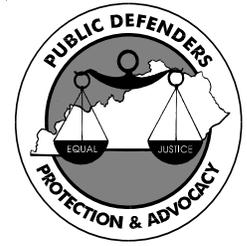


The Advocate



Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 31, Issue No. 3 August 2009

Stopping the Improper Incarceration of Debtors for Contempt

Bringing Baghdad into the Courtroom: Should Combat Trauma in Veterans Be Part of the Criminal Justice Equation?

Kentucky Public Defense Service Recognitions

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Table of Contents

- Remarks by Steve Bright at DPA's Service Recognition** 4
- Public Advocacy Recruitment** 7
- Kentucky Public Defense Service Recognitions** 8
- Stopping the Improper Incarceration of Debtors for Contempt — James Jameson** 10
- Bringing Baghdad into the Courtroom —Christopher Hawthorne** 13
- Kentucky Case Review — Roy Durham** 21
- Sixth Circuit Case Review — Meggan Smith & Aaron Dyke** 30
- Capital Case Review — David M. Barron** 35
- Practice Tips** 60
- Convicting the Innocent in Georgia** 61



Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status.

— Lewis Powell, Jr., U.S. Supreme Court Justice



The Advocate:
**Ky DPA's Journal of Criminal
 Justice Education and Research**

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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Paid for by State Funds. KRS 57.375

**FROM
 THE
 EDITOR...**



Jeff Sherr

Due to the current budget, the DPA is not able to print and mail **The Advocate** at the present time. This edition of the Advocate is posted online at <http://apps.dpa.ky.gov/library/advocate.php>. There you can also browse and search all past editions of **The Advocate** and **Legislative Update**.

The Advocate plays an important role in the DPA meeting its statutory duty under KRS 31.030 to provide technical aid to local counsel, to conduct research into, and develop and implement methods of, improving the operation of the criminal justice system, and to do such other things and institute such other programs as are reasonably necessary to carry out the provisions of KRS Chapter 31.

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On August 21, 2009, the Department of Public Advocacy presented Service Recognitions. **Stephen Bright**, University of Kentucky Law School graduate and president and senior counsel of the Southern Center for Human Rights spoke for the audience at the recognition lunch. His eloquent speech and information about those recognized appear on pages 4-8.

It is not uncommon for public defenders to be appointed to represent clients for failure to pay a court ordered monetary amount. James Jameson, a staff attorney in the DPA Covington office, offers guidance for these cases in **Stopping the Improper Incarceration of Debtor for Contempt**.

Hundreds of thousands of veterans are returning to the states from Iraq and Afghanistan. Each day we are seeing more of these veterans in the criminal justice system. In this issue we reprint the ABA's Criminal Justice article, **Bringing Baghdad into the Courtroom Should Combat Trauma in Veterans Be Part of the Criminal Justice Equation?** by Christopher Hawthorne. ■

REMARKS BY STEVE BRIGHT AT DPA'S SERVICE RECOGNITION

I am just honored and delighted to be back home again. As you know, or probably as no one knows, I left this great state not long after getting a law degree at the University of Kentucky; which was the greatest bargain in legal education which is what the land grant universities were all about. The fact that you could get a legal education back in those days for a tuition of \$250 a semester. I thought that meant that I was supposed to go out and do things in the public interest because I didn't have any debts unlike those graduating from college today.

I am indebted to the University of Kentucky, and to the state, for making it possible for me learn under great professors like Bob Lawson, Bill Fortune, and Al Goldman, and so many other people who were at the university at that time. And, I relied upon that throughout the thirty some odd years that I have practiced law.

I remember during that time that I was in law school, which was in the early 70s, was the time when the Kentucky Department of Public Advocacy was a fledgling organization just had been created, was just starting, you could probably put the whole organization in a room about this size; and it wouldn't come anywhere as near as many people as we have here today.

As a law student, I would go to the training programs because one of the geniuses of the program right from the very start was the recognition of the value of training. If you are going to have a first rate public defender office, you have to have training, and you have to provide for the young lawyers that are coming there, and they are usually going to be young lawyers. Because the lawyers who are out making a fortune practicing law are not going to come work at the public defender office for the modest salaries that were being offered, and believe me, in those days, they were very modest. But that you could find young, idealistic people like Ed Monahan and like Ernie Lewis. You could bring in the best lawyers from around the country, not just the people from around the state, although Frank Hadaad and those people, the great lawyers in Kentucky at that time. They certainly contributed. You could bring people in and you could teach young lawyers how to master their craft. How to be the best that they can be on behalf of their clients. You can develop those lawyers, and as we have seen over the last 30 years. They would make a career of it.

I remember Ed Monahan would call me over the last 30 years and ask would I come to Faubush? Faubush? I grew up here

but I didn't know where Faubush was. Would I go to the 4-H camp at Faubush and spend a week with lawyers? What are we doing to do for a week there? We are going to learn how handle capital cases. We're going to learn how to do the best we can. We're going to have lawyers from all over the country.

Then, there will be other training programs We're going to learn how to give client centered representation. How to provide representation where were not just going along to get along, which is what representation had often been. Not only in Kentucky but throughout the country.

Because after the Gideon case had been decided in so many places, and this was one of them. The way in which the so called Promise of Gideon, and I've always said, "What a promise." It was a constitutional requirement: that people accused of crimes be provided with lawyers. But, for a very long time, particularly in the southern states the way in which "Gideon was satisfied," was by conscripting lawyers: just appointing lawyers, they may be tax lawyers, they might be general practitioners, they may be lawyers that didn't want criminal cases, didn't like criminal clients and they would be appointed to represent people and they resented it.

Anthony Lewis said after Gideon was decided, "It will be an incredible challenge to bring to life the promise of Gideon. In a diverse country, that people accused of crimes will be capably represented by a competent lawyer with the resources necessary to do the job and without the resentment of an unfair burden.

Even today, in many parts of this country, we don't have that, and we don't realize that. But, we've come closer here because of the development of the Kentucky Department of Public Advocacy. Because of the training that was provided, I can still remember going in my second year of law school, and Albert Krieger, a great lawyer from Miami, he was talking, and I can remember it like it was yesterday, talking about cross-examination, and talking about *Davis v. Alaska*. And, he said if the judge won't let you do that then it is "constitutional error of the first magnitude." I thought not only is that a good lesson in terms of the law, but that is a hell of a way to stage your objection. "Constitutional error of the first magnitude!" I thought that is not only a little law to know but how to practice law a way that is fairly dynamic.

I'm glad to see here today we're honoring people for the work they have done in maintaining this commitment to excellence that has been growing just as the office has grown

over the years. I remember Ernie called me a few years ago and said we're finally getting to where we're opening the offices. so we're now serving the fulltime offices, all 120 counties. It's a long process of building this office out.

I think when we come to programs like this, it is time that we can ask ourselves, the lawyers, the public defenders, ask themselves: where are we? Where are we in terms of providing client-centered representation? Are we *processing* people or are we representing people? That is always the question I urge public defenders to ask themselves, because so many places we're just processing people through the system. Are we giving people what the constitution requires; which is individual representation. Or, we give them representation that deals with their particular case and their particular problem and not just what they are accused of but most importantly sentencing. Because most of them will be sentenced. Are providing individual sentencing and advocacy for them? Are we raising race issues, because we know that race influences everything that happens in the criminal justice system. From who is stopped, how they are treated when they are stopped, whether they are arrested after they are stopped, what kind of bail is set for them, and all of those kinds of things. In many places, that issue is still very much a problem today.

One thing I urge people is that persistence pays. I was involved a few years ago in a case in Louisiana, in Jefferson Parish, which is a white flight suburban community right outside of New Orleans. There was a practice that had gone on there, it had been going on as long as anyone could remember that when you picked a jury in Jefferson Parish that the prosecutor set a practice of striking all the African-Americans. There weren't that many African-Americans, only 20% of the population. It was fairly easy, there would only be four or five that would qualify in a panel where the jury would strike. And, they would strike them every time. The defense lawyers had pretty much given up on trying to do anything about it. They also knew that psychologically that the prosecutors and the judges; same prosecutors before the same judge almost all the time, they are assigned court rooms, and psychologically you are asking that judge to make a finding that the prosecutor has discriminated on the based of race, intentionally. And, then is given a reason that is not true. That, is a pretext. In other words, is lied about. And, as a practical matter, with two elected officials, one that has to run every four years, that is not going to happen. It is practically not going to happen.

In the case of Allen Snyder, the defense lawyers didn't get around to objecting until the third strike. There had only been one case since *Batson* had been decided. *Batson* is a case out of Louisville, I believe. *Batson v. Kentucky*, 1986. And, in all the time since then, the Louisiana Supreme Court had only sustained one *Batson* challenge. It only reversed one time because of *Batson*. And, that was when the prosecutor gave as his reason for the strike. "I struck that

person because he was an African-American male." Even Louisiana Supreme Court found that was not a race neutral reason for the strike. So, it sort of sent a message for people practicing in Louisiana, that unless you were really dumb, you could come up with a race neutral reason.

But, in this particular case, *Allen Snyder v. Louisiana*, we had a district attorney who in his office had a little electric chair on his desk that he had pasted the faces of the five black men that he had sent to death row. On his wall behind him was a big hypodermic needle that said underneath it that he had won the "Big Prick" award for sentencing people to death. Jefferson Parish was the Parish that had three times that had been carried in state-wide elections by David Duke, the grand wizard of the Klu Klux Klan in Louisiana.

Maybe some of you remember this, that when Katrina hit, the Jefferson Parrish was the jurisdiction that put its police officers at the bridges so that people fleeing Katrina could not come into that jurisdiction. Not a hospitable jurisdiction when it comes to race.

As it turned out, the Supreme Court granted *certiorari* in that case, *Allen Snyder v. Louisiana*. It looked at the five strikes, compared them with the acceptance of white people who were accepted. In a 7-2 opinion, with Justice Alito writing, reversed. I think the most important thing in that case, though, was not just the facts as they played out, as they were reported in the record of the case. But, a brief written by eleven African-American ministers, an amicus brief. Which basically said, "[w]e are being disenfranchised here. We never participate in the criminal justice system in this jurisdiction. We are struck every single time." And, in the conclusion of our brief, I said, you know, the African-American people in Jefferson Parish know that they are not a part of the criminal justice system. And, you know what, the white people know it too. And, if this system is to have any legitimacy then there has to be participation by all people in the community in the system. And, I think it shows two things, that persistence pays, but also getting the atmospherics, getting the larger picture of the community and its history is an important part of what we do as lawyers in representing our clients.

There are many challenges that face us, and I don't have time to talk about very many because we have very many people to recognize today and hear what they have say. But, I want to say one thing about the right to counsel and the challenges for the right to counsel that I see all across the country today.

In Kentucky, I think you are extremely fortunate, we are extremely fortunate in the leadership that we've had at the Kentucky Department of Public Advocacy. What we're seeing in jurisdiction after jurisdiction in bad economic times is that public defenders are being cut. Robert Kennedy said, when he was the Attorney General of the United States, the

Continued on page 6

Continued from page 5

poor person accused of a crime has no lobby. And, yet, if ever there is a time when there are tough economic times, when there is more crime, when there is more pressure on our criminal justice system to deal with people who in desperation are stealing things or dependant upon drugs or whatever it may be, that's when we need to have public defenders to deal not only with what they are accused of but as I said this great sorting out that this criminal justice system does. Is this person going to go into a drug program, are they going to be on probation, are they going to spend weekends in jail, are they going to spend months in jail, years in prison, life without parole, the death penalty.

How are we going to sort that out and all the implications that's going to have. And, there does not seem to be the recognition, that the right to counsel, as I've said earlier, is not a promise it is a constitutional requirement. It is not optional. There is no constitutional requirement to pave the highway to anywhere. There is no constitutional requirement that we have symphonies. No one loves the arts more than I do, but it is not a constitutionally required. When they started having these bail out programs and economic stimulus programs, I called the people I knew in the justice department and said if anything needs stimulating in this country is the defense of criminal cases. That's where we should be putting money try to bring up our system. We love to say that this is the greatest system in the world. But, it's not. It is not nearly as good as the British system or the Canadian system.

If you are accused of a serious crime in Great Britain, you'll be represented by somebody who is the Queen's counsel. Somebody who is one of the best lawyers there whether you are private person who hires them or the poorest person in the country. The most destitute person is assigned that person. You don't get this sort of representation that many people get with court appointed lawyers throughout the United States of America.

What I have been troubled by, and just want to raise, is the fact that there are those that will justify this sort of representation. Judge Richard Posner, United States Court of Appeals, for the 7th Circuit, highly regarded jurist and highly regarded academic at the University of Chicago has written this: "I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But, if we are to be hardheaded about it, we must recognize that this might not be an entirely bad thing. The lawyers who represent criminal indigent defendants seem to be good enough to at least reduce the probability of convicting an innocent person to a fairly low level. If they were much better, either many guilty people would be acquitted or society would have to devote much more resources to the prosecution of criminal cases. A barebones system for the defense of indigent criminal defendants may be optimal."

Now notice this barebones system is only for poor people, not for anyone else. It's not for the General Motors bankruptcy. And, notice too, he says, "[i]f the public defenders were much better, more guilty people would be acquitted." Judge Posner missed the main point. If the public defenders were better, more *innocent* people would be acquitted.

I think this is very disturbing. I go around the country working on these indigent defense systems in Georgia and Alabama, and I keep hearing this one thing. Someone will always pipe up and say, "You know we don't need a Cadillac here, we just want a Chevy." That's what the Georgia Legislature kept saying. They go down to Louisiana, "We don't want a Cadillac, we just want a Chevy." They never say we don't want Lexis, we'll be happy to have a Ford. I think, this is life and liberty. Even in this materialistic society of which we live, what is more precious than life, and liberty, even a little bit of liberty, because you can lose your liberty for a short period of time, lose your job, lose your home, have your whole life destroyed by losing a little bit of liberty. I think that maybe we ought to have a Cadillac.

Our chief justice in Georgia, at one time, the Honorable Harold Clarke said, "We set our sites on the embarrassing targets of mediocrity, and that is about halfway there. And, half justice is half injustice, and that is no justice at all."

We suffer so many people: in our legislatures, and I'm sorry to say in our judiciaries, and in our executive branches, a poverty of vision when it comes to indigent defense; and, when it comes to settling for a barebones system of indigent defense and representation.

I will tell the lawyers that are here, the public defenders, the reason you are here is because of your aspiration of always improving and of always doing a better job. Asking yourself if we are processing or representing people. Seeing the injustices. I send my students to court and I say "count the injustices." Going to first appearance hearings, going and seeing people processed, handled in orange jumpsuits, with no dignity whatsoever as they are paraded through the courts. And, I urge all of you that are public defenders to stand back and just reassess how this looked to you when you very first saw it.

When I was growing up in Danville, about 10 or 12 years old, I remember being told that in this modern society of ours we still had a primitive punishment that we used called capital punishment. I found it unbelievable, and I was somewhat prejudice about it, but I was also outraged about it.

I remember in 1979, when somebody asked me to take a capital case, and I found out that people facing the death penalty did not have lawyers for certain stages of the process. I was outraged about it. When I hear about people, as I did just the other day, being arrested and thrown in jail because they can't pay their fines and they're basically in debtors prison

because of their poverty. I still find that I am as outraged about it as I was the first time I heard about it. I think that one thing that sustains us in doing this work, one person at a time, is outrage at the injustices that we see. My advice for public defenders is don't ever let a bad experience with one client affect the way you see the next client, or any other client. Always see each client, and convince others to see each client as more than the worst thing that they are accused of. Just because someone stole it doesn't mean they are a thief. All of us have some good and some bad in everything we do and in everything we are.

I would say this, in closing, that Robert Louis Stevenson once said, "It's acts of kindness that make the world tolerable. If it were not for kind words, kind looks, and kind letters, kind jests, I would think that our life was a practical jest in the worst possible spirit."

I think the kindness that we bestow on our clients and coworkers, the people we work with and the people we are adversaries with. I was dealing with one of these lawyers, a jerk. That's one thing you learn in law school today, just be a jerk. Yell at people. Don't agree to anything. They've needed to continue a deposition and I've agreed to, and they were so surprised and they said, thank you so much for doing this. I said, I treat people nice no matter how big a jerk they are to me. It's just the way I am.

The other day I had my class and we talked about *Gideon vs. Wainwright*. The students read the handwritten petition that Gideon had written, and Judge Black's opinion through the court, and then Anthony Lewis' article about Gideon's

acquittal when he was retried with a lawyer. Lawyers do make a difference. Abe Fortas, who was one of the lawyers that represented Gideon in 1963. When Abe Fortas was still alive, I had him come and talk to my class. And, it seems to me that Gideon is the law at its very best. A nameless man accused of a crime, takes out his #3 pencil and petitions the court, and the court responds, and now his name echoes through history, and millions benefit.

As Anthony Lewis said, "It is an enormous task to bring to life this constitutional requirement in which people will be represented no matter what their circumstances." And, we're not there yet. I will tell the lawyers here that every time you explain to a client, every time you sit down with their mother, every time you investigate a case: the promise of Gideon is realized. The courts may fail to protect the rights to counsel, the legislatures may fail, the executive branch may fail, but not you. It may be that they are ignoring Gideon in Texas, and in Alabama, and maybe even in other cases here. But, in your case, that case that you resolved with a plea bargain, with a trial, sentencing, dismissal.

When that client is capably defended by you, his or her lawyer, who represent your client proudly just because 45 years ago a little man convicted of breaking into a poolroom put a pencil to paper and he and all your clients would not stand alone. We've come a long way. We have a long way to go, and it is a journey that is bigger than any of us. But, we're all a part of something that's bigger than us. You, more than any one else, are making it a reality. I wish you good luck and Godspeed. ■

PUBLIC ADVOCACY RECRUITMENT

The Kentucky Department of Public Advocacy seeks compassionate, dedicated lawyers with excellent litigation and counseling skills who are committed to clients, their communities, and social justice. If you are interested in applying for a position please contact:

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For further information about Kentucky public defenders and current available positions:
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Information about the Louisville-Jefferson County Public Defender's Office is found at:
<http://www.louisvillemetropublicdefender.com/> ■



Patti Heying

2009 KENTUCKY PUBLIC DEFENSE SERVICE RECOGNITIONS

On August 21, 2009, the Department of Public Advocacy presented the 2009 Kentucky Public Defense Service Recognitions.

The *United States Supreme Court Quill Pen Award* was introduced this year. The award was presented to **Tim Arnold and Richard E. Neal** for their grant of certiorari in *Jose Padilla v. Kentucky*. Tim Arnold is the Post Trial Division Director. Richard Neal is currently in private practice, but worked with DPA when the grant was received. The award was also presented **Karen Maurer**, an attorney for the Appeals Branch. It was presented to her for her writ of certiorari in *Keith A. Owens v. Kentucky*.

The *Rosa Parks Award* was presented to **Shane Beaubien**, an Investigator with the Murray office. It was presented for his courageous investigation on behalf of his clients. The *Rosa Parks Award* was established in 1995 to honor a non-attorney who has galvanized other people into action through their dedication, service, sacrifice, and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice . . . And we are not wrong . . . If we are wrong justice is a lie. And we are determined . . . to work and fight until justice runs down like water and righteousness like a mighty stream."



Shane Beaubien receiving the Rosa Parks Award from Public Advocate Ed Monahan



Emily Farrar-Crockett receiving the In Re Gault Award from Public Advocate Ed Monahan

Emily Farrar-Crockett received the *In Re Gault* Award. This award honors a person who has advanced the quality of representation for juvenile defenders in Kentucky. Emily is an attorney with the Louisville-Jefferson Metro Public Defenders Office in the Juvenile Trial Division.



Mike Lemke receiving the Furman Award from Public Advocate Ed Monahan

The *Furman Award* was created in 2000 to honor the person who has exhibited outstanding achievements on behalf of capital clients either through litigation or advocacy in the spirit of *Furman v. Georgia*, which abolished the death penalty in 1972 for 4 years. This year's recipient was **Mike Lemke**, an attorney with the Capital Trial Division, Louisville-Jefferson Metro Defender's Office.



Ronnie Ellis receiving the Anthony Lewis Media Award from Public Advocate Ed Monahan

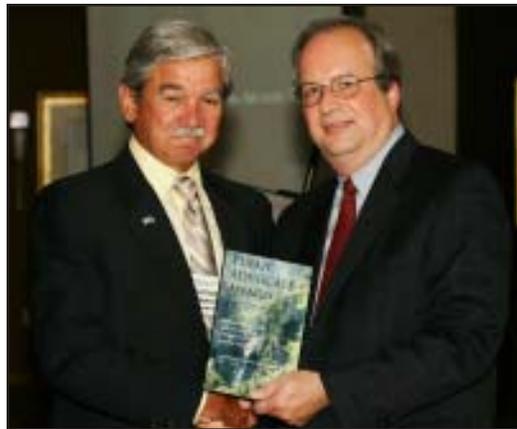
Ronnie Ellis, CNHI News Service, received the *Anthony Lewis Media Award*. Established in 1999, this Award recognizes in the name of the *New York Times* Pulitzer Prize columnist and author of *Gideon's Trumpet* (1964), the media's informing or editorializing on the crucial role public defenders play in providing counsel to insure there is fair process which provides reliable results that the public can have confidence in.

Kathleen Schmidt, DPA's Appeals Branch Manager, received the *Professionalism & Excellence Award*. The award was established in 1999. Each year, the President-Elect of the Kentucky Bar Association receives nominations and selects the individual among them who best emulates Professionalism and Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism and Excellence: "Prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to insure high quality representation of clients, and takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence." Buzz English, President of the Kentucky Bar Association presented Kathleen with her award.



Jason Nemes receiving the Public Advocate Award from Public Advocate Ed Monahan

Public Advocate's Award is given to honor those in Kentucky who have worked to improve significantly Kentucky's indigent defense delivery system. This year's two honorees were **Jason M. Nemes**, former Director of the Administrative Office of the Courts, currently with *Dinsmore & Shohl*, and to, **Justice Martin E. Johnstone**, Retired, Supreme Court of Kentucky.



Hon. Justice Martin E. Johnstone receiving the Public Advocate Award from Ed Monahan

John Delaney, DPA's Directing Attorney for the Covington office was the recipient of the *Gideon Award*. In celebration of the 30th anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, DPA established the *Gideon Award* in 1993. It is presented to a person who has demonstrated commitment to equal justice and who has courageously advanced the right to counsel for poor people in Kentucky.

Finally, the *Nelson Mandela Lifetime Achievement Award* was given to **Ernie Lewis**, former Public Advocate. This award was established in 1997 to honor an attorney for a lifetime of dedicated services and outstanding achievements in indigent criminal defense. "It always seems impossible until it's done." – Nelson Mandela. ■



Ernie Lewis receiving the Nelson Mandela Lifetime Achievement Award from Ed Monahan

STOPPING THE IMPROPER INCARCERATION OF DEBTORS FOR CONTEMPT

By James Jameson, Covington Trial Office

Something that gets little or no attention in law school that many attorneys have to deal with on a regular basis is contempt of court. Certainly those who practice in the courtroom have likely represented many a client charged with contempt. These charges typically arise because the defendant or respondent has committed some act prohibited by a Judge's order, or because they failed to do something a court has ordered them to do. These two different results (committing a prohibited act and failing to act as ordered) essentially define the two different types of contempt of court: criminal and civil. The most common way in which civil contempt is used is in collection of a debt that has occurred due to a citizen being ordered to pay some amount of money, *e.g.*, child support, restitution, or fines. The purpose of this article is to clarify the difference between civil and criminal contempt and make attorneys aware of some tools available when defending a client against contempt; specifically, civil contempt.

By now, no one can legitimately question the state of our economy. People are truly struggling to survive. With our slumbering economy logically comes increased failure of citizens to pay their court-ordered debts. Efforts to enforce these orders often include the jailing of the debtors. Fortunately, the Kentucky Constitution specifically forbids our penal system from creating "debtors prisons."¹ However, if the failure to pay is intentional or willful, the debtor may be incarcerated.² But, there is good news. For example, in a criminal case, the prosecution has the burden to prove beyond a reasonable doubt that the defendant had the ability to pay his court-ordered support. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Similarly, before a court may find a person in civil contempt for failure to pay a court-ordered debt, there must be a finding as to intent.

The Kentucky Supreme Court has defined contempt as, "the willful disobedience toward *or* open disrespect for, the rules or orders of a court." *Burge, supra*. Notice that contempt requires "willful" action. No person can properly be held in contempt for doing something accidentally or for failing to do an impossible act. *Commonwealth Ex rel. Bailey v. Bailey*, 970 S.W.2d 818, 820 (Ky. App. 1998) *citing* *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993).

An attorney needs to know which type of contempt they're dealing with in order to launch the correct defense. Criminal contempt is conduct, "which amounts to an obstruction of

justice, and which tends to bring the court into disrepute." *Burge, supra*. By contrast, civil contempt is the, "failure to do something under order of court." *Burge, supra*. If it is the court's purpose to "punish," then the contempt is criminal. *Burge, supra*. If the purpose is to compel one to action, then the contempt is civil.³ However, it is not the fact of punishment, but rather the character and purpose of the sentence or other actions taken by the court that determines whether contempt is criminal or civil. *Burge, supra*. Most case law on point uses "purpose of the court" language to distinguish between civil and criminal contempt. *See Burge, supra. See also Bailey, supra*. However, this "test" can seem to do more to confuse than clarify.

It seems that the "purpose of the court" analysis commonly used by Kentucky appeals courts may better be exchanged for a different one. This is particularly true given the cases using the test give little guidance on how to apply it. After reviewing the case law on point, the actual analysis used by Kentucky appeals courts appears to focus on what led to the contempt: was it a prohibited *act*, or a *failure to act*?⁴ In other words, did the person *do* something that he shouldn't have,⁵ or did he simply *fail to do* what the court ordered him to do? If the former, the contempt is criminal; if the latter, the contempt is civil. Thus, if I fail to pay my child support, I have committed civil contempt. *See Burge, supra. Bailey, supra. Blakeman, supra*. However, if an attorney continues to disrupt the courtroom after being instructed not to,⁶ or if a citizen ignores a domestic violence order,⁷ he or she has committed criminal contempt. The thought behind civil contempt is the coercion of the person into *future* compliance with the court's order. On the contrary, the purpose of criminal contempt is to punish someone for an *act already committed*. The distinction is one of "action" vs. "inaction."

The difference between civil and criminal contempt is much more than semantics. If you've made it this far, don't stop reading now. This is where you may learn something that can significantly help you in your practice of law. First, it's worth briefly mentioning that there are two types of criminal contempt: direct and indirect. Direct criminal contempt is committed in the presence of the court and often requires no notice or opportunity to be heard. *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001). Indirect criminal contempt, however, involves an act that occurred outside the presence of the court and thus always requires notice and an opportunity for hearing. Both may require

notice and some form of hearing or even a jury trial if the contempt is “serious.”⁸

However, for civil contempt, a new set of rules comes into play. Because the purpose of civil contempt is to coerce, *not* to punish, one *cannot* be incarcerated for civil contempt without some reasonable way of purging the contempt.⁹ We have all heard of courts holding someone in jail for refusing to testify or for refusing to do some act.¹⁰ You may have even witnessed this. This is absolutely permissible in certain circumstances because the person can “purge” herself/himself of the contempt simply by complying with the court’s order to act or perform in some way. In the words of the Kentucky Supreme Court, “the contemptuous one carries the keys to the jail in his pocket, because he is entitled to immediate release upon his obedience to the court’s order.” *Burge, supra*. See also *Bailey, supra*. Thus, if a court orders an attorney to produce a report and the attorney fails to do so, he could potentially be incarcerated until the report is produced, depending on the circumstances, of course. The production of the report “purges” him of the contempt.

Where this analysis becomes particularly pertinent is in civil child support enforcement actions, *i.e.*, where the court is looking to hold a respondent in contempt for failure to pay his court-ordered child support. These actions are quintessentially civil contempt actions. Respondent has failed to pay the support as ordered and thus the “purpose” of the action is to coerce the respondent into future compliance with the court’s order.¹¹ Simply put, the court wants the respondent to pay his child support.

However, as was stated previously, a person cannot be held in contempt for failing to do an impossible act.¹² Thus, if a person delinquent in child support (or any other court-ordered debt)¹³ is unable to pay, such is a valid defense to contempt. *Lewis, supra* at 864, citing *Clay v. Winn*, 434 S.W.2d 650 (Ky. 1968). However, it should be noted that the inability to pay (or otherwise comply with any court order) must be shown clearly and categorically by the person charged, and the accused must show that all reasonable steps to comply with the court’s order were taken. *Bailey, supra*, citing *Lewis, supra*. The burden lies solely on his shoulders. Otherwise it is assumed he could have complied with the order of the court but failed to do so, and therefore is in contempt.

In accordance with the maxim that the court cannot compel the doing of an impossible act, a trial Judge seeking to hold a child support obligor in contempt should make a finding on the question of ability to pay. Then, any further contempt proceedings should be limited to that amount. *Lewis, supra*. The debt is not extinguished and the state can still compel payment on the balance, but the defendant must be given some reasonable alternative to satisfy the debt other than incarceration for failure to pay an amount he cannot summon.¹⁴

For those who find themselves defending clients against the collection of court-ordered debt, whether it’s as a result of restitution, child-support, or any other debt caused by a court’s order, the above information provides some hope of preventing the unnecessary incarceration of those clients. If, for example, your client is brought before a court on a show cause or similar motion for failure to pay child support, the court must follow the mandates of case law set out above in deciding whether or not your client is in contempt, and then, if he is, in fashioning his sentence.

Most importantly, always remember that your client *cannot* be sentenced to any term of incarceration without the ability to purge himself of the contempt. In fact, the “purge amount” also cannot be set at the client’s total balance owed without evidence he has the *present* ability to actually pay that amount. See *Reed, supra*, citing *Lewis, supra*. This does not mean the debt is discharged. Nor does it mean that the Commonwealth cannot pursue various methods of collection.¹⁵ It simply means that Kentucky Constitution Chapter 18 truly still has life.

In summary, if you’re representing a client charged with contempt for failure to pay a court-ordered debt, here are the things to remember: the failure to pay must have been “willful” before your client can be in contempt¹⁶ (inability to pay is specifically a defense),¹⁷ and if the court seeks to incarcerate your client for contempt, it *must* establish an appropriate “purge amount” based on your client’s *present* ability to pay.¹⁸ Failure to do any of these things is a clear violation of case law and quite possibly a violation of Chapter 18 of the Kentucky Constitution.

Endnotes:

1. “The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law.” Ky. Const. Chapter 18.
2. KRS 530.050, Kentucky’s nonsupport statute has been held to be constitutional because it does not seek to impose punishment for debt, but rather, to redress the “intentional” financial abandonment of legal responsibilities. *Waddell v. Com.*, 893 S.W.2d 376 (Ky. App. 1995). Further, willful noncompliance with a court’s order to pay is sufficient to find the debtor in contempt and incarcerate him until he reasonably complies with the court’s order to pay. *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996).
3. *Kentucky River Community Care v. Stallard*, No. 2007-CA-002013-MR, 2008 WL 5264331 (Ky. App. 2008) (to be published in S.W.3d), See also *Bailey, supra*.
4. *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993). Recent case law confirms the emphasis on “action” vs. “failure to act.” See *Stallard, supra*.
5. Either by committing an act prohibited by a court, or by committing an act that constitutes “open disrespect” of the court.

Continued on page 12

Continued from page 11

6. See *Delahanty v. Commonwealth Ex rel. Maze*, No. 2008-CA-000580-MR, 2009 WL 2341518 (Ky. App. 2009) (to be published in S.W.3d).

7. See *Taylor v. Taylor*, No. 2008-CA-001844-ME, 2009 WL 2192797 (Ky. App. 2009).

8. See *Payne v. Commonwealth*, 724 S.W.2d 230 (Ky. App. 1987) (man held in direct contempt for failure to appear to testify who was sentenced to 90 days and \$250 fine must have notice and a public trial). See also *Bloom v. Illinois*, 391 U.S. 194 (1968).

9. The United States Supreme Court has unequivocally held that a civil contemnor cannot be incarcerated beyond the opportunity to purge himself of his contempt. *Blakeman, supra, citing Shillitani v. United States*, 384 U.S. 364, 371 (1966).

10. A not too recent familiar example is that of Times reporter Judith Miller being jailed for failing to reveal her source in connection with the Valerie Plame scandal. See Susan Schmidt & Carol Leonnig, *Reporter Held in Contempt in CIA Leak Case*, WASHINGTON POST, Page A01, ¶ 1 (Aug. 10, 2004) < <http://www.washingtonpost.com/wp-dyn/articles/A52895-2004Aug9.html>>

11. All non-criminal child support collection actions are viewed as civil contempt actions. See *Bailey, supra, Blakeman, supra, Burge, supra, Reed v. Commonwealth*, No. 2008-CA-000220-MR, 2009 WL 1974475 (Ky. App. 2009) (unpublished opinion).

12. See *Commonwealth Ex rel. Bailey v. Bailey*, 970 S.W.2d 818, 820 (Ky. App. 1998) citing *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993).

13. See *Spurlock v. Noe*, 467 S.W.2d 320 (1971) (holding that a defendant in custody only because he was unable to pay a fine because of his indigence must be released).

14. *Lewis, supra, citing Clay v. Winn*, 434 S.W.2d 650, 652-653 (Ky. 1968) which states, "If [defendant] is unable to pay the entire amount then the trial court may properly determine if he is able to pay any portion thereof at the present time. After a proper determination of his ability to pay is made it should be clearly set forth in a finding of fact. Thereafter all contempt orders should be limited in their coverage to those amounts which the court has previously found are within the ability of the Petitioner to satisfy. The court may properly, in its discretion, if it finds Petitioner unable to satisfy the entire judgment at this time, order payments made on same over a period of time, which are within the ability of the Petitioner to satisfy."

15. "This Court is not unmindful of the fact that the trial court has the capacity to enforce its orders even if it is unable to effectively incarcerate indigent debtors. The trial judge may order the debtor to report periodically regarding job search efforts so that appropriate wage assignments can be made. Legally proper actions can be taken to impound any Federal or State Income Tax refund to which the debtor may be entitled as a result of whatever employment has been obtained. The trial court can include provisions in its support collection orders requiring the debtor to report child support obligations when applying for unemployment benefits. By no means do we wish to limit the opportunity for innovative counsel and courts to enforce the collection of proper child support payments and arrearage." *Lewis, supra* at 864-865.

16. *Burge, supra, Bailey, supra* at 820, citing *Lewis, supra*.

17. *Lewis, supra* at 864, citing *Clay supra*, at 652.

18. *Reed, supra*. See also *Lewis* at 865 (requiring present ability to pay). ■

A new report released by The Sentencing Project finds a record 140,610 individuals are now serving life sentences in state and federal prisons, 6,807 of whom were juveniles at the time of the crime. In addition, 29% of persons serving a life sentence (41,095) have no possibility of parole, and 1,755 were juveniles at the time of the crime.

No Exit: The Expanding Use of Life Sentences in America represents the first nationwide collection of life sentence data documenting race, ethnicity and gender. The report's findings reveal overwhelming racial and ethnic disparities in the allocation of life sentences: 66% of all persons sentenced to life are non-white, and 77% of juveniles serving life sentences are non-white.

The authors of the report, Ashley Nellis, Ph.D., research analyst and Ryan S. King, policy analyst of The Sentencing Project, state that persons serving life sentences "include those who present a serious threat to public safety, but also include those for whom the length of sentence is questionable." One such case documented is that of Ali Foroutan, currently serving a sentence of 25 years to life for possession of 0.03 grams of methamphetamine under California's "three strikes" law.

The Sentencing Project calls for the elimination of sentences of life without parole, and restoring discretion to parole boards to determine suitability for release. The report also recommends that individuals serving parole-eligible life sentences be properly prepared for reentry back into the community.

http://www.sentencingproject.org/doc/publications/inc_noexit.pdf

BRINGING BAGHDAD INTO THE COURTROOM SHOULD COMBAT TRAUMA IN VETERANS BE PART OF THE CRIMINAL JUSTICE EQUATION?

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On a Saturday night in August 2005, Matthew Sepi set out from his Las Vegas apartment, dressed in a black trench coat and carrying an unlicensed AK-47 rifle. Sepi lived in “Naked City,” a run-down area inside the territory of a Las Vegas street gang. He expected trouble, and he wanted to be ready.

As Sepi took a shortcut through an alley, two people emerged at the other end and yelled at him to “get out of the alley.” Later insisting that he saw the butt of a gun and “a flash,” Sepi pulled his AK-47 and sprayed the two figures with bullets. He killed one of them—Sharon Jackson, a 47-year-old woman—and wounded the other, Kevin Ratcliff, a 26-year-old man. Both victims were gang members, and Ratcliff returned fire with a 9-millimeter pistol, though Sepi was not hit. Sepi claimed he acted in self-defense, but aside from his own testimony, there was no evidence that the victims had fired first. On the surface, there was nothing to distinguish Sepi from any other citizen who had ill-advisedly taken the law into his own hands.

Matthew Sepi, however, had served two years in Iraq with the U.S. Army. He had been trained as a marksman, and in the service of his country, had engaged in acts that would have been illegal and immoral in civilian life. More importantly, Sepi’s combat experience in Iraq had left him an exceedingly damaged young man. He had been diagnosed with post-traumatic stress disorder (PTSD), but because of an overburdened and understaffed veteran’s health system, he had never been treated for it.

Calling the incident “a clear case of self-defense,” Clark County prosecutor Christopher Owens recommended that Sepi be diverted to a veteran’s mental health program to treat the psychic wounds he had sustained in Iraq. He was given probation for felony possession of a concealed dangerous weapon. He was never even charged with murder or assault. (Deborah Sontag & Lisette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, at A1; Frank Curreri & Keith Rogers, *Iraq Veteran Arrested in Killing*, LAS VEGAS REVIEW-JOURNAL, Aug. 2, 2005, at 1A; Glenn Puitt, *Matthew Sepi Case: Murder Charge Dropped*, LAS VEGAS REVIEW-JOURNAL, Sept. 24, 2005, at 1B.)

Sepi’s experience could not have been more different than that of James Allen Gregg. On July 3, 2004, Gregg, a former National Guardsman who served with a combat engineering

team in Iraq, spent a long night drinking with his friends on the Crow Creek Reservation in South Dakota. At one point, Gregg got into an argument with a friend, James Fallis, over a woman. Fallis punched Gregg several times, leaving his face swollen and bloody. Later, fueled by more alcohol, Gregg drove to where Fallis was drinking. When Fallis challenged him to fight again, Gregg drew a pistol and told Fallis to back away. As Fallis retreated to his car, with his back turned, Gregg got scared that Fallis was going to reach for his own gun, and fired nine times. Five shots hit the victim in the back.

Like Sepi, Gregg had spent a long year in Iraq, most of the time serving “checkpoint duty”—watching Iraqi civilians approach his roadblock, some friendly, some lethal, many carrying dead or wounded victims of the American occupation. Soon, Gregg was volunteering for dangerous missions, hoping he would be killed. Defense psychiatric experts agreed that Gregg suffered from PTSD, and that it was “the driving force” behind Gregg’s actions. The jury was partly convinced—they convicted Gregg only of second-degree, not first-degree murder.

But District Judge Charles B. Kornmann felt that Gregg had received enough compassion from the jury, and he was not inclined to join in. Noting that Gregg was a “casualty” of the Iraq conflict, he nonetheless denied all of Gregg’s four motions for downward departures from the Federal Sentencing Guidelines, including requests based on Gregg’s military record, “aberrant behavior,” and diminished mental capacity resulting from PTSD. He sentenced Gregg to nearly 21 years: 135 months for the murder charge, and 120 months for discharge of a firearm during the crime. (*United States v. Gregg*, 451 F.3d 930, 937-38 (8th Cir. 2006).)

Hundreds of thousands of veterans will return from Iraq and Afghanistan during the next three years; hundreds of thousands already have. By some estimates, nearly 40 percent will seek treatment for mental health problems related to their military service. (*Hearing on Invisible Casualties: The Incidence and Treatment of Mental Health Problems by the U.S. Military Before the Committee on Oversight & Government Reform*, 111th Cong: 4 (2007) (statement of Congressman Henry Waxman, Committee Chair).) Although not all of those mental health problems involve combat-related PTSD, with nearly 1,000,000 veterans returning from Operation Enduring Free-

Continued on page 14

Continued from page 13

dom and Operation Iraqi Freedom (OEF/OIF), the problem is widespread, with more than 100,000 veterans applying for mental health services since the beginning of operations. (*Id.* at 4; *id.* at 102-03 (statement of Dr. Antonette Zeiss, Deputy Chief Consultant, Office of Mental Health Services, Department of Veterans Affairs).) A RAND Corporation study is even more sobering: it estimates that approximately 300,000 veterans suffer from PTSD or major depression, and 320,000 experienced a probable traumatic brain injury (TBI) during deployment. The fact that these figures probably overlap offers little comfort: given that the presence of TBI aggravates PTSD stress reactions, veterans who experience both are very likely to have more severe psychological problems.

In addition, several other factors make OEF/OIF combat trauma particularly grim. First, troops are subject to longer and longer deployments to the war zone, which means that more veterans will be exposed to intense combat situations, and consequently, experience more acute stress reactions. Second, because of recent medical advances in the treatment of traumatic injury, veterans can now be expected to survive TBI and other wounds. Therefore, more of them come home, badly damaged in body and spirit. Finally, nearly a third of Iraqi and Afghanistan veterans came from National Guard and Reserve units, which means that they arrived on the battlefield with less training, and less appetite for battle, than their compatriots. (RAND CORP., *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* 7, 69, 104 (Terri Tanielien & Lisa H. Jaycox eds., 2008).)

The federal government has begun to recognize the magnitude of the problem, beginning with the July 2007 hearings before the House Oversight Committee. The American Psychiatric Association (APA) has called for increased funding for veterans' mental health services, (Jane Salodof MacNeil, 35 (No. 4) *CLINICAL PSYCHIATRY NEWS* 1 (2007).) The Norfolk County District Attorney's Office in Clinton, Massachusetts, has even recorded a 10-minute informational video called "Beyond the Yellow Ribbon: PTSD and Veterans," which explains to law enforcement the "natural reactions to unnatural events" that cause post-combat trauma in veterans (*available at* http://www.mass.gov/da/norfolk/Media_Library.html). But these are prospective solutions, and for many veterans, they are too late. What about these veterans who are already accused of crimes, and are now in the criminal justice system? PTSD is not confined to combat veterans, and courts are reluctant to recognize it in the trial phase, although it is fairly common to see it mentioned in the sentencing phase. Does it matter that an offender suffers from PTSD because of service to his or her country, instead of membership in a street gang? This article attempts to provide some guidance to attorneys who—if the statistics hold—will see many more veterans in the criminal court system during the coming years. It examines combat trauma in the context of existing insanity defenses, as well as self-defense, and as a mitigating factor at sentencing.

PTSD and Combat Trauma

Combat trauma is as old as combat itself—or at least organized combat. Incidences of strange behavior were recorded in ancient Greece, and military surgeons recognized a form of PTSD during the Civil War, when the end of the conflict brought home millions of soldiers, only a few weeks removed from horrific combat operations. Physicians in 1865 still referred to the syndrome as "nostalgia" and believed that it arose from a longing for home and family, but the behavior of Civil War veterans was anything but nostalgic. Returning Union soldiers often experienced terrifying delusions and nightmares, and some returning Confederate veterans, who came home to the humiliation of poverty and defeat, took out their aggressions by going on violent crime sprees. (*See generally* ERIC T. DEAN, JR., *SHOOK OVER HELL: POST-TRAUMATIC STRESS, VIETNAM, AND THE CIVIL WAR* 99-109 (1997).)

During the 20th century, incidences of combat trauma spiked in World War I— notably among British and American troops—leading slowly to an acceptance of the disorder, culminating in the 1918 publication of *War Neuroses* by Dr. John T. MacCurdy, who worked with traumatized soldiers at the Ward's Island facility in New York City, with a preface by Dr. W.H.R. Rivers, his counterpart in Great Britain. (*See also* PAT BARKER, *THE GHOST ROAD* (1995), the third volume in a trilogy of novels dealing with Dr. Rivers and his work with shell-shocked British soldiers.) Nonetheless, it wasn't easy for the country to accept combat trauma—veterans didn't want to talk about it, and the public didn't want to accept that war could result in so many lasting and horrible consequences for its heroes. It took another 60 years for PTSD to be recognized as a disorder in the APA's *Diagnostic & Statistical Manual of Mental Disorders*. One event, more than any other, brought about that recognition: Vietnam.

Until the war in Iraq, Vietnam was unique: it was the longest and the most unpopular military conflict in American history. Veterans returned home to a hostile public and an inadequate post-combat medical system. By some estimates, 70 percent of Vietnam veterans suffered from post-traumatic stress disorder. It was in the wake of the Vietnam conflict that the use of PTSD as a defense first appeared in American courts. (*See* Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 415-16 (1988).) The acceptance of PTSD in a legal context, however, was helped along by another, unrelated case: Buffalo Creek.

What would later be known as the Buffalo Creek Disaster occurred on February 26, 1972, when a coal-sludge dam, saturated with rainwater, collapsed at the top of a West Virginia hollow and sent a 30-foot wave of black water rocking through the narrow hollow, not stopping until it reached the Man River 16 miles away. The wave scoured the hollow, washing away more than a dozen towns, killing 125 people, and leaving 80 percent of the survivors homeless. A year later, a

citizen's group, led by Dennis Prince and Charlie Cowan, sued the Pittston Coal Company, hiring Gerald Stern of Arnold & Porter as their lawyer.

At first, Stern sought the usual damages for lost life and property. But while interviewing survivors, he noticed that even people who had survived the flood were exhibiting strange symptoms. For instance, the sound of rain, like the rain that had fallen for days before the flood, could afflict his clients with extreme anxiety, causing them to take cover under tables and chairs. Stern called Robert Jay Lifton, the renowned psychiatrist who was about to publish *Home from the War: Learning from Vietnam Veterans* (1973). Lifton in turn called Kai Erikson, a well-known sociologist at Yale. Erikson traveled to Buffalo Creek and interviewed the survivors.

One of the unusual circumstances Erikson discovered was that the entire *community* was traumatized—even people who had been away from home on the day of the flood. One of the injuries the Buffalo Creek survivors suffered from was what Erikson later called “loss of community.” The fabric of their daily lives had been shredded, and there was no way to repair it. (KAI ERIKSON, *EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD* 186-244 (1978).) More recently, Erikson has posited that soldiers may experience a similar loss when members of their company or platoon are killed, even if they don't witness the killing. Therefore, even veterans who did not see a lot of action may come home badly traumatized if their platoon sustained heavy losses in the conflict.

Armed with Erikson's research, and depositions from 600 survivors, Stern demanded that the court award damages to the survivors for what he called “psychic impairment”—the forerunner of what would later be called PTSD. (GERALD R. STERN, *THE BUFFALO CREEK DISASTER* 66 (1976).) Pittston ended up settling for \$13.5 million—the largest settlement in West Virginia history, and an award that put “psychic impairment” into the legal lexicon. The award electrified the legal profession, opening up new avenues of tort liability, much to the ongoing dismay of the defense bar. (See, e.g., James T. Brown, *Compensation Neurosis Rides Again: A Practitioner's Guide to Defending PTSD Claims*, 63 DEF. COUNS. J. 467 (Oct. 1996).)

But the Buffalo Creek settlement also occurred at a crucial time in the history of the nation—in June 1974, when the Watergate scandal had deepened distrust of government and its ability to protect the less fortunate. Certainly, no one could ignore that Buffalo Creek had certain similarities to another national disaster that disproportionately affected the working class: namely, Vietnam.

Beginning around 1980, roughly the time at which PTSD was recognized as a disorder in the *DSM-III*, criminal defense lawyers started to bring their clients' Vietnam combat experiences into the courtroom, often in the context of an insanity defense. (See Davidson, *supra*, at 422-28.) Despite the general

unpopularity of the insanity defense with juries, several veterans were found not guilty by reason of insanity for various crimes. (See, e.g., *State v. Heads*, No. 106-26 (1st Jud. Dist. Ct. Caddo Parish La. Oct. 10, 1981); *United States v. Tindall*, No. 79-376 (D. Mass. Sept. 1980).) A 1985 *New York Times* article estimated that, because of “defenses” involving Vietnam combat trauma, “at least 250 Vietnam veterans receive shorter sentences, get treatment instead of incarceration, or win acquittals.” (David Margolick, *New Vietnam Debate: Trauma as Legal Defense*, N.Y. TIMES, May 11, 1985, at A11.) However, despite the expansive language of the *New York Times* article, PTSD as a mitigating factor for Vietnam veterans was used primarily in the sentencing phase of trials.

Moreover, the success of the PTSD defense for Vietnam veterans was short-lived, for a number of reasons. Nearly all the successful insanity defenses based on combat trauma occurred from 1980 through 1983. The aforementioned *New York Times* article noted that the defense was already on the wane in 1985, and that “juries [were] reject[ing] an increasing percentage of stress-related defenses.” (Margolick, *supra*, at A11-12.) Possibly, this was a function of the backlash against the insanity defense that followed the acquittal of John Hinckley, Jr., by reason of insanity in the shooting of President Ronald Reagan.

More likely, by the late 1980s, anger against the Vietnam conflict—and what it had done to the soldiers who fought in it—was fading away. Although juries focused on *individual* criminal culpability, they were also aware that the United States bore a share of *collective* guilt for its inadequate treatment of veterans' medical problems. In 1984, Congress passed the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984 (Pub. L. No. 98-542, 98 Stat. 2725 (1984)), publicly addressing what had been privately acknowledged for some time—that the Veterans Administration had failed to properly deal with Agent Orange (dioxin) poisoning and its health effects. “Agent Orange” and “PTSD” were the terms that symbolized the failure of the government to properly deal with veterans' medical and psychic wounds. When the government began to address veterans' medical problems in the late 1980s, juries became less sympathetic to veterans who said that their crimes arose from untreated PTSD. People wanted to put Vietnam behind them, and expected veterans to do the same.

And some veterans agreed. While most veteran advocacy groups continued to point out that combat-related PTSD still went undiagnosed and untreated, other Vietnam veterans, like Michael Ryan, deputy prosecutor for Maricopa County, Arizona, claimed that “[s]ome bad apples are trying to use the disorder to escape criminal responsibility This stigmatizes all Vietnam veterans, because it convinces people that we're all crazy.” (Margolick, *supra*, at A12.) Nonetheless, while Vietnam faded from the public consciousness, PTSD itself was here to stay.

Continued on page 16

Continued from page 15

PTSD in the Courts Today

Despite the gradual coldness of juries to combat trauma PTSD as a criminal defense, PTSD has recently gained acceptance as a defense in other guises: “battered spouse syndrome,” “battered child syndrome,” “policeman’s syndrome,” “rape trauma syndrome,” and certain dissociative disorders all have their roots in PTSD. (Ralph Slovenko, *The Watering Down of PTSD in Criminal Law*, 32 J. L. & PSYCH. 411, 422-26 (2004).) These different syndromes—all subsets or cognates of PTSD—are introduced as mental diseases or defects in an insanity defense, as part of a diminished capacity defense, as evidence bearing on the defendant’s subjective point of view in self-defense cases, and, most commonly, during the sentencing phase as a mitigating factor. Nor are these “syndromes” used exclusively by the defense: prosecutors introduce them as evidence on behalf of victims—sometimes to show why a victim may not remember the details of a crime, or sometimes at the sentencing phase, to show the psychic damage caused by the defendant. (See Landy F. Sparr, *Mental Defenses and Posttraumatic Stress Disorder: Assessment of Criminal Intent*, 9 J. TRAUMATIC STRESS 405, 406 (1996).)

For lawyers, the advantage of PTSD’s generalized acceptance is that nearly every jury member now knows what “PTSD” means, and will recognize it as a disorder. On the other hand, “acceptance” sometimes sours into notoriety, with the result that some juries regard PTSD as “trendy” or a “designer defense.” While the persuasive value of PTSD evidence will of course depend on the facts of the specific case, the practitioner should be aware of some cultural pitfalls created by PTSD’s recent popularity in the courts.

The “Stressor” Event

PTSD evidence enjoys a built-in advantage over other mental illnesses, in that it points backward to an easily identifiable event that *caused* the trauma: the “stressor.” Slovenko notes that PTSD is “almost unique among *DSM* categories in that an etiological component, exposure to a certain event, is clearly specified.” The presence of an identifiable *trauma* is very persuasive to juries, who have difficulty picturing mental illness based solely on a collection of symptoms. The attorney seeking to introduce PTSD evidence can usually present evidence of a relatively happy and healthy client *before* the event; and a damaged client *after* the event. The evidence of the event itself is usually vivid, and tends to evoke tremendous sympathy for the person who experienced it.

Recently, however, both the psychiatric establishment and the media have expressed concern that the definition of PTSD is overbroad, and may be used in courts to describe syndromes that have no clear “stressor.” The *DSM-IV* mentions exposure to a traumatic event as a component of PTSD, but then goes on to describe three other diagnostic criteria that are common to other disorders that have no “stressor” event:

(1) the “reexperiencing” of the event (including nightmares, “flashbacks,” and reactivity); (2) avoidance of stimuli associated with the trauma, as well as general “numbing” (including a feeling of detachment, diminished interest, and restricted affect); and (3) “increased arousal” (including irritability, insomnia, and an exaggerated startle response). (AMERICAN PSYCHIATRIC ASSOCIATION (APA), *DIAGNOSTIC & STATISTICAL MANUAL* 463, 467 (4th ed. Text Revision 2000).) The mental health professional is not required to independently verify that a “stressor” actually occurred, or occurred in the manner described by the patient; the intent is therapeutic, not judicial. And in terms of treatment, determining whether the patient is telling the truth is far less important than dealing with the symptoms, which are real, even if the “stressor” is not.

In a court (and in the court of public opinion), however, the nature of the traumatic event, or “stressor” is very important: Was the defendant morally culpable in bringing about the traumatic event? Was it objectively traumatic? Was the defendant a child when it occurred? The vagueness of PTSD in the courtroom is exacerbated by the fact that a psychiatric expert cannot testify as to whether a “stressor” actually occurred, only that the subject’s behavior is “consistent with” a person who experienced such a trauma. (Slovenko, *supra*, at n.9.) Therefore, unless a defendant can provide fairly vivid evidence of the trauma that gave rise to his or her symptoms, juries that have been regaled with media accounts of the “abuse excuse” are likely to reject symptomatic evidence of PTSD.

And they may be right in doing so: The author of a recent scientific study found that, in a sample group of patients seeking treatment, the patients who had experienced *no* trauma displayed symptoms of PTSD at the *same rate* as patients who had experienced an identifiable stressor. (J. Alexander Bodkin et al., *Is PTSD Caused by Traumatic Stress?* 21 J. ANXIETY DISORDERS 176 (2007).) Bodkin also recommended that the *DSM-IV* definition of PTSD be reassessed and tightened, warning that PTSD may have been dramatically overdiagnosed since its acceptance in 1980.

Consequences of the “Drawdown”

Between March 2009 and August 2010, the United States is expected to bring home nearly 100,000 troops from Iraq. (Greg Miller & Usama Redha, *U.S. to Pull 12,000 Troops from Iraq as Withdrawal Begins*, L.A. TIMES, March 9, 2009, at A1.) If past statistics are any indication, 40,000 of these troops will be dealing with mental health concerns. And if past events are any predictor, a number of these returning veterans will commit crimes, some of them violent. The lawyers who defend these veterans will often have to choose from a menu of not very appetizing choices. Should they try to fit their client’s mental health history into the demanding and unpopular insanity defense, the disfavored diminished capacity defense, the subjective component of self-defense, or just to relegate

their client's war record to the sentencing phase? Prosecutors will sometimes have to make difficult charging decisions when faced with sympathetic defendants such as the young, slight Matthew Sepi, accused of gunning down two gang members in Las Vegas. And, as with Vietnam, the public will have to make a decision on how much collective guilt we feel for sending young, untried men and women overseas to fight in an increasingly unpopular counterinsurgency campaign.

Vietnam-era Resources

For the practitioner trying to get a handle on defending the OEF/OIF veteran with combat trauma, America's national tragedy is the lawyer's gain because, in a very real sense, we have been here before. The Iraq and Vietnam conflicts share several similarities: both are, and continue to be, very unpopular; both involve counterinsurgency campaigns, with the enemy embedded in a civilian population, armed with improvised explosive devices and a powerful animus towards the occupying forces; and finally, troops in both conflicts have their unique vulnerabilities. Vietnam was a *young* war: the average age of a combat soldier was 19. Iraq is an *un-trained* war: as much as 40 percent of troops deployed to Iraq came from reserve and National Guard units with little combat experience. Furthermore, deployments in OIF and OEF were longer and more repetitive than in earlier conflicts. (*Testimony Before the Senate Committee on Veterans Affairs* (April 17, 2007) (statement of Ralph Ibson, Pres., Mental Health America).)

Therefore, aside from the scattered case law on the subject, two sources stand out, both by the late well-known defense attorney (and Vietnam veteran) Barry L. Levin: *Defending the Vietnam Combat Veteran* (1989), and "Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder" (46 AM. JUR. TRIALS 441 (updated 2008).) Levin defended several Vietnam veterans accused of crimes, including Albert Dobbs, who was released from serving a seven-and-a-half-year sentence for robbery because of evidence Levin introduced concerning Dobbs's PTSD.

As with the Vietnam conflict, the prevalence of PTSD in the courts may only now be surging, even though veterans have been returning from Iraq and Afghanistan for nearly eight years. Consequently, although the *New York Times* series identified 121 veterans "in trouble with the law" (a list that included such offenses as DUI), considering the pending troop drawdown and the bleak economy, it is likely that the numbers of veterans in the criminal justice system will rise significantly over the next few years, and they will probably have something in common with the defendants discussed below.

Insanity

When considering how PTSD fits into the insanity defense, one fact overwhelms all others: the insanity defense is almost never used, and when it is used, it is rarely successful.

A recent survey found that defendants plead insanity in only .87 percent of cases, and in those cases, they were successful only 23 percent of the time. These figures include cases that were disposed of by plea bargain, but do not include cases in which the defense was available but not employed ("bypassed"), or cases in which the case resulted in nonprosecution. This is significant because, according to the survey, the insanity defense was the *most* bypassed affirmative defense, as well as the defense that provides one of the best chances for a nonprosecution.

This is consistent with a defense attorney truism—don't let an insanity defense go before a jury. Although, clinically, mental illness can be subtle, and the mentally ill can conceal their symptoms, juries usually need more than expert opinion and the evidence of the crime itself to find a defendant not guilty by reason of insanity. Furthermore, the current tests for criminal insanity in the United States are not defendant-friendly. The M'Naghten or "right-wrong" test, which requires that the accused be suffering from a mental disease or defect that either (1) made him or her unable to understand the nature and quality of the criminal act, or (2) if the accused did know, he or she did not know that it was wrong, is used in about half of the jurisdictions in the United States, and is famously restrictive. The ALI test, which is used in about a third of states, replaces the first "understanding" prong of M'Naghten with a volitional prong: thus, under the ALI test, the defendant can also be found not guilty, "if he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law." This last, volitional standard is itself a reform of the now-discredited "irresistible impulse" test, which held that a defendant could be found not guilty if his conduct was the product of an "irresistible" (and presumably delusional) impulse. (*See United States v. Frazier*, 458 F.2d 911, 916 (criticizing the "irresistible impulse" test and adopting the ALI test).)

Federal courts have adopted the ALI test, but 18 U.S.C. § 17 includes only the first, or cognitive prong of the ALI test, and requires that the defendant's conduct be the product of a "severe" mental disease or defect—essentially reenacting the M'Naghten test. Four states have abolished the insanity defense altogether. The picture for a veteran pleading not guilty by reason of insanity due to combat trauma is about as bleak as it is for all other defendants.

One factor, however, provides a glimmer of hope in this landscape—the inherent sympathy for the person who has sustained mental damage in the service of country. Interestingly, while attempted political assassinations have generally resulted in reflexive tightening of insanity laws—Hinckley tried to assassinate President Reagan, while M'Naghten tried to assassinate British Prime Minister Robert Peel—the two defendants whose cases liberalized insanity laws were both veterans. The first, James Hadfield, was the subject of *Rex v.*

Continued on page 18

Continued from page 17

Hadfield, in which the British courts finally departed from the “wild beast” test for insanity (which insisted that the accused be “totally deprived of his reason,” such that “[he] did not know what he was doing any more than a wild beast”) and adopted a test that allowed the accused to plead insanity if, as did *Hadfield*, he or she alternated between spells of delusion and lucidity. *Hadfield* was a very sympathetic defendant—he had been almost decapitated at the Battle of Flanders. More importantly, his head injury, rather than being one of the “invisible wounds of war,” was dramatically visible—his brain membrane was permanently exposed.

Monte Durham, whose last name is still the shorthand for the “New Hampshire” or “product” test for insanity, was a World War II veteran who had been discharged from the Navy for mental illness. (*Durham v. United States*, 214 F.2d 862, 864 (D.C. Cir. 1954).) A series of minor criminal acts, suicide attempts, and commitments to St. Elizabeth’s Hospital led to him being convicted of housebreaking. On appeal, the court of appeals rejected the M’Naghten test, and adopted the “Durham” test, which requires only that the defendant’s criminal act be the “product” of a mental disease or defect. The court probably thought it had a sympathetic defendant on whom to hang the new doctrine. Apparently the court was wrong—on retrial, Durham was convicted again. The Durham test’s acceptance was also short-lived; in 1972, the D.C. Circuit adopted the ALI test instead.

Ultimately, however, the test doesn’t matter as much as the concreteness of the defendant’s illness and the inherent sympathy of the defendant’s story—and in that, veterans do have a distinct advantage over other defendants. They also face two unique obstacles when arguing that their military service is the “stressor” that produced a mental disease or defect. The first is the social backlash against the idea that military service “causes” mental illness. The other is the more difficult question of what *weight* to give to military service as a cause of mental illness, including PTSD, especially when a veteran displayed signs of mental illness or criminal behavior *before* entering military service. Both of these issues came up in the trial of Louis Bressler, Bruce Bastien, and Kenneth Eastridge for the murder of their former army buddy, Kevin Shields.

Shields, Bressler, Bastien, and Eastridge all served in the same platoon in Iraq. All of them were under 25 years of age. Significantly, all of them had trained at Fort Carson and were part of a combat team dispatched to Ramadi that had seen some of the bloodiest fighting of the conflict. Their deployments were also unusually long: they were transferred from South Korea to Iraq in the middle of their first deployment, then sent back for a second, 15-month deployment.

The history of the accused killers was a confusing mix of brutality and heroism. Bressler had been honorably discharged from the army when he was diagnosed with PTSD, and was taking antidepressants. Bastien, an army medic, had received

a commendation for administering aid in combat. Eastridge was the strangest amalgam of heroism and sociopathic behavior. He had received numerous decorations for bravery in battle, including a Purple Heart, but he had also been court-martialed for threatening an officer and getting caught with 463 Valium tablets, and had served time in a hard labor camp in Kuwait before being discharged. Most troublingly, as a child, Eastridge had been arrested for killing a fellow 12-year-old with a shotgun in his home state of Kentucky. Although the shooting was ruled an accident, it made observers of the case question whether the army was doing its job screening potential recruits for mental health concerns.

The most striking thing about the victim, Kevin Shields, was how much like his killers he was. Like them, he had served in Iraq, and had been sent home with traumatic brain injury, which he sustained from a roadside bomb. He was celebrating his 24th birthday with his three army buddies when an argument broke out, and ended with Shields dead in a Colorado Springs parking lot, shot four times with Bressler’s wife’s revolver. (See, e.g., Sara Burnett, *From Combat to Crime*, ROCKY MOUNTAIN NEWS, Feb. 23, 2008, at 6.)

The investigation was swift, partly because the trio accused of killing Shields was also implicated in several other crimes, including two murders. Bastien and Eastridge pleaded guilty to lesser charges, and pointed the finger at Bressler as the shooter. It might have been natural for Bressler’s defense attorney, Ed Farry, to point to his client’s proven PTSD as an excuse, but Farry took precisely the opposite tack: he sought to have Bressler’s PTSD *excluded* from evidence during the trial.

The “Wacko Vet” Myth

Farry had strategic reasons for wanting to downplay Bressler’s PTSD—he planned to prove that Eastridge or Bastien was the shooter, and he wanted to argue that Bastien and Eastridge were laying the blame on Bressler because his PTSD would make him an easy target because of possible PTSD-induced fugue states and loss of memory. But Farry also seemed to have an inherent problem with the admission of PTSD in a criminal trial. “Everyone thinks if someone carries that diagnosis, PTSD, they are a crazy killer,” Farry said. “We’re not going to talk about it at all,” he insisted, despite the evidence that everybody on that fateful night in Colorado Springs was probably suffering from PTSD. (Dennis Huspeni, *Soldier’s Murder Trial Opens Monday*, COLO. SPRINGS GAZETTE, Nov. 2, 2008, at 1.)

Farry’s reluctance may have also arisen from the side of this argument that no one wants to discuss: that soldiers in Iraq are rewarded, encouraged, and given medals for conduct that would be criminal behavior in Colorado Springs. This, of course, is a politically charged issue, and conservative commentators in particular decry the “Wacko Vet” myth, saying that it dishonors the over-whelming majority of veterans who

came home from Iraq, reintegrated into society, and never broke the law. (See, e.g., John J. Dilulio, Jr., *The Wacko-Vet Myth: Now Echoed by the New York Times*, Jan. 14, 2008, THE WEEKLY STANDARD, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/592buqao.asp>.) On the other side are advocates like Paul Sullivan, executive director of Veterans for Common Sense, who sees the alarming spike in crimes committed by OIF/OEF veterans as “a social catastrophe caused by President Bush’s [and others] failure to plan for hundreds of thousands of physical and psychological casualties.”

The two stances are not inconsistent, in any case: most combat veterans experience difficulties readjusting to civilian life and shedding their combat instincts. A simple drive on a freeway, with cars changing lanes nearby, can cause a combat veteran tremendous anxiety because it so closely resembles a typical combat duty in Iraq: going on patrol, when any approaching vehicle represented a potential ambush or explosive device. Despite these difficulties, however, most combat veterans *do* eventually readjust to society.

Nonetheless, Bressler and Eastridge, in particular, displayed behavior that was unusual in its violence and lack of regard for human life. Their MySpace pages, which soldiers often use to communicate with family and friends, both during and after military service, are post-adolescent shrines to killing. Bressler’s headline reads: “Chillin’ and Killin’.” Eastridge’s reads “Killin’ Is Just What I Do,” and contains pictures of him in uniform, posing with an M-16 and AK-47, and in another picture, posing with a dead cat, with the caption, “Killed another Iraqi pussy.” (Andrew Wolfson, *Ex-soldier from Louisville Faces Murder Charge in Colleague’s Death*, LOUISVILLE COURIER-JOURNAL, April 21, 2008, at A1 & A12.) The MySpace pages stayed up until the two soldiers’ defense attorneys took them down, shortly before trial— suggesting that, far from reintegrating into civilian life, Eastridge and Bressler were keeping their combat identities alive long after they were discharged.

Another telling statistic: the records from the El Paso County jail in Colorado showed that bookings of service members— most of them from Fort Carson—have more than tripled, going from 162 in 2004 to nearly 550 in 2008. Acknowledging that veterans have a hard time dealing with the violence and death inherent in combat duty does not dishonor veterans as a group, or war as a sometime political necessity, but it does shine an unpleasant light on military culture and what young men and women are asked to do in the service of their country.

Ed Farry’s strategy proved successful in the Bressler trial. After a contentious proceeding, in which experts advanced several different theories as to how Kevin Shields was murdered—and after Bruce Bastien repudiated his plea agreement and refused to testify against Bressler—the jury voted to acquit Bressler of first-degree murder, convicting him in-

stead of the lesser charge of conspiracy to commit murder. (Dennis Huspeni, *Anguish Continues for Slaying Victim’s Sister*, COLO. SPRINGS GAZETTE, Dec. 19, 2008, at 1-2.) The insistence on denying Bressler’s PTSD, however, may have handcuffed Farry in future cases: in Bressler’s trial for the murder of Pfc. Robert James, another of Bressler’s fellow soldiers, Bressler pled guilty. At the sentencing hearing, when Bressler’s PTSD could have been a mitigating factor, Farry barely mentioned the condition. Bressler was sentenced to 60 years. (Pam Zubeck, *Iraq Vet Gets 60 Years in Prison*, COLO. SPRINGS GAZETTE, Mar. 2, 2009, at 1 & 4.)

Self-defense

A more culturally acceptable defense for the defendant accused of committing a violent crime is self-defense, though it also plays into the “Wacko Vet” myth, unless the defendant veteran was confronted with an actual deadly threat, and PTSD or combat trauma goes primarily to the question of the defendant’s subjective reaction to that threat. Most self-defense statutes have an implied subjective component: Nevada’s, for instance, states that, if a person kills in self-defense, “it must *appear* that” the defendant had to kill to save his own life. (NEV. REV. STAT. § 200.200.) Nonetheless, as in the case of Matthew Sepi, prosecutors will consider a number of nonlegal factors in determining whether to take the combat veteran to trial. Sepi had shot two gang members, in gang territory, and one of the victims was armed. Had the victim been one of Sepi’s friends, the result might have been far more like the result in *Gregg*, where Gregg’s defense attorney argued that, as a result of PTSD, Gregg had an exaggerated “startle reaction,” which caused him to switch to “military mode” when he was confronted by a man who had beaten him up earlier that night. (See *Sontag & Alvarez, supra*, at A1.) The jury found Gregg guilty of a lesser crime, but Gregg, unlike Sepi, is now serving 21 years in prison.

A significant exchange during the trial came when Gregg insisted on the stand that military trainers had sought to “break down his mind.” Seizing on that metaphor, the prosecutor asked him to explain. “They break down your mind and then try to build you back up,” answered Gregg. “Into a killer?” prompted the prosecutor. “Yes,” said Gregg. Juries and judges are not likely to be sympathetic to defendants and defense attorneys who condemn the military itself for the veteran’s PTSD. A more effective strategy would be to focus on the veteran’s actual combat experiences.

Mitigating Factors at Sentencing

Given the unpopularity of the insanity defense, PTSD and the defendant’s combat experience generally show up in the sentencing phase of a criminal trial. In fact, most of the Vietnam-era cases dealing with PTSD involved reductions in sentences, usually in state courts. (See, e.g., Davidson, Note, *supra* notes 60-63; Margolick, *supra*, at A1.) The Federal Sentencing Guidelines, in section 5H1.3, discouraged downward departures based on “mental and emotional conditions,” and

Continued on page 20

section 5K2.13 limited the use of PTSD or any other mental defect as a consideration in awarding a downward departure in violent crimes, but the advisory nature of the guidelines under the post-*Booker* “reasonableness” standard will probably allow veterans to seek reductions in sentence for a broader variety of crimes. Given that PTSD is now widely recognized as a disorder in a number of contexts—including the situation in which a defendant’s own illegal conduct results in diminished capacity from PTSD—courts and juries should have a high comfort level in evaluating symptoms of PTSD based on its first, most acceptable cause: combat trauma. (See, e.g., J. Vincent Aprile II, *PTSD: When Crime Punishes the Perpetrator*, 23:4 CRIM. JUST. 39 (Winter 2009).)

State legislatures have also begun to recognize the relevance of PTSD to criminal sentencing. Recently, spurred on by veterans groups, legislatures have created or updated sentencing-mitigation laws for veterans in California and Minnesota. The California law, which was updated in 2007 to recognize the problems of OIF/OEF veterans, provides that criminal defendants who are veterans, and who suffer from PTSD or substance abuse problems, can avoid state prison and be sent to a federal facility or a treatment facility. (CAL. PEN. CODE § 1170.9.) A similar law in Minnesota, passed in 2008, requires a sentencing judge to inquire as to the status of a convicted defendant. If the defendant is a veteran, the court may consider contacting the Department of Veterans Affairs or another agency to participate in sentencing and treatment recommendations. (MINN. STAT. § 609.115.) Similar laws are under consideration in other states.

Resources

The attorney—whether prosecutor or defender—confronted with a criminal defendant suffering from combat trauma, must deal with any number of difficult problems. But thanks in part to the recent prevalence of PTSD in combat veterans, the attorney will not have to deal with it alone. There is a wealth of information, both legal and psychiatric, concerning the effect of PTSD on the returning veteran.

The first thing an attorney may want to do is to approach local veterans’ groups that are often eager to help a fellow veteran and have extensive knowledge of local resources. While the Veterans Administration’s reaction to combat trauma has been slow and often inadequate, the reaction of veterans’ groups has been decisive, if conflicted. However, given that veterans’ groups have been a driving force behind many of the recent legal reforms concerning veterans with combat trauma, an attorney would be well-advised to employ his or her knowledge and commitment.

The attorney may also be fortunate enough to live in a state that has one of the recently formed “veterans courts”—specialized courts that deal solely with veterans who have broken the law. Starting with the first veterans court in Buffalo, New York, these courts deal with the characteristic (mostly

nonviolent) crimes that afflict veterans of Vietnam, Desert Storm, and now, increasingly, Iraq and Afghanistan. Veterans under the jurisdiction of the court are required to plead guilty to their crimes. In return, the court recognizes the special problems veterans have in returning to society and offers treatment and supervised release instead of jail time. Nearly as important is the atmosphere: the defendant is surrounded by other veterans who are in similar situations. Other veterans’ courts have sprung up in Orange and Santa Clara Counties in California, in Tulsa, Oklahoma, and in Anchorage, Alaska, with a dozen other courts likely to open during the next year. (Nicholas Riccardi, *Where Justice Isn’t Blind to the Needs of Veterans*, L.A. TIMES, March 10, 2009, at A1.)

Online resources can also help the attorney searching for ways to help a jury understand the details of combat trauma. One comprehensive Web site, “Healing Combat Trauma,” provides a clearinghouse for therapeutic and legal information on combat-related psychological disorders, at <http://healingcombattrauma.com>. Another excellent blog, “PTSD, A Soldier’s Perspective,” represents veteran and social work student Scott Lee’s attempt to understand his own and other veterans’ PTSD experiences, at <http://ptsdasoldiersperspective.blogspot.com>.

Ideally, combat trauma and PTSD should be dealt with early—before or immediately after a veteran is discharged from military service—and in a therapeutic context. By the time a veteran stands in court, accused of a crime, it is too late to prevent the worst effects of combat trauma—they have already occurred. Furthermore, it is unreasonable to expect the criminal courts to deal with the military’s failure to treat its returning veterans, or commit sufficient resources to integrating them back into everyday life. Nonetheless, attorneys can make sure that, where a veteran has committed a crime, even a violent one, that crime is put into the context of the trauma the defendant experienced as a warrior in an unpopular and terrifying conflict. While not every attorney should be expected to “bring Baghdad into the courtroom,” the veteran accused of a crime should not be the only one to hear the war’s distant echoes.

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KENTUCKY CASE REVIEW

by Roy Durham, Appeals Branch

Commonwealth v. David Nichols

Rendered 03/19/09

208 S.W. 3d 39

Affirming in part and vacating and remanding in part

Opinion by J. Cunningham

David Nichols was previously convicted in the McCracken Circuit Court of one count of criminal abuse in the second degree and sentenced to serve five years in prison. On appeal, however, that conviction was vacated, and the case was remanded to the McCracken Circuit Court for a new trial.

Prior to trial, Nichols filed a motion requesting the trial court to clarify whether his defense counsel was obligated, pursuant to RCr 7.24, to disclose to the Commonwealth the identity of his expert witness and to provide to the Commonwealth a written report regarding the expert's anticipated testimony at trial. Nichols's expert had not prepared a report. It was Nichols's position, therefore, that no report could be produced and that the Commonwealth was not entitled to the expert's identity.

In an order, the trial court held that RCr 7.24 does not require an expert witness to generate a report just to satisfy the rules of reciprocal discovery. As long as there is no report, there is no obligation to provide one to opposing counsel. However, the trial court ruled Nichols was required to provide the full name and address of any expert witness he planned to call at trial.

The Commonwealth filed an interlocutory appeal, objecting to the trial court's ruling that Nichols's expert witness was not required to generate a report for reciprocal discovery. Nichols filed a cross-appeal, objecting to the requirement that he provide the full name and address of the expert witness to the Commonwealth.

The Court of Appeals issued an opinion affirming in part and reversing in part, stating that the trial court did not abuse its discretion by failing to require Nichols's expert witness to generate a report for the Commonwealth. However, the Court of Appeals also stated that the trial court did abuse its discretion by ordering Nichols to provide to the Commonwealth the name and address of the expert witness. The Commonwealth petitioned for discretionary review.

Court of Appeals lacked jurisdiction to review defendant's interlocutory cross-appeal.

Nichols cannot file an interlocutory cross-appeal. Rather, KRS 22A.020(4) is uniquely for the benefit of the Commonwealth. Therefore, the Court of Appeals did not have jurisdiction over the issue of the trial court's order requiring disclosure of the name and address of the defense expert. *Evans v. Commonwealth*, 645 S.W.2d 346-47 (Ky. 1982). Accordingly, that portion of the Court of Appeals' opinion must be vacated and the order of the trial court reinstated.

Criminal discovery rule does not require defendant's proposed expert to generate a report for Commonwealth.

The trial court was correct in interpreting the plain meaning of RCr 7.24 and denying the Commonwealth's request for Nichols's expert witness to generate a report. RCr 7.24 is unequivocal in requiring a defendant to permit the Commonwealth to have "any results or reports ... of scientific tests or experiments *made* in connection with the particular case ... which the defendant intends to introduce as evidence or which *were prepared* by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony." See RCr 7.24(3)(A)(i) (emphasis added).

The Supreme Court stated that "the rule says what it says. It requires a defendant to produce reports that are in existence, but does not require a defendant to generate such reports for production to the Commonwealth."

Case law strongly supports the trial court's discretion in interpreting the meaning of RCr 7.24, as well as in making rulings outside the strict confines of the criminal rule in order to enforce the "spirit" it is intended to advance. "The common thread which runs through these cases, culminating in *Jones v. Commonwealth*, 237 S.W.3d 153 (Ky. 2007), is that reciprocal discovery in criminal cases is important to the fair and orderly administration of these types of cases. But, 'reciprocal' does not – indeed cannot – mean 'equal.' For the criminal defendant is cloaked with the due process protections afforded by both our state and Federal constitutions, and discovery orders by the trial court which



Roy Durham

Continued on page 22

Continued from page 21

trample upon these rights cannot be upheld. In short, the defendant is protected from overreaching discovery orders by the Fifth, Sixth, and Fourteenth Amendments to our U.S. Constitution and Section Eleven of our state constitution.”

“To require Nichols’s expert to manufacture a report for production to the Commonwealth would clearly have forced Nichols to provide evidence which potentially-and even likely-would have been used against him at the prosecution of the case. Such a directive would, in effect, have caused Nichols to become a witness against himself.”

Allen David Jones v. Commonwealth

Rendered 03/19/09

279 S.W.3d 522

Reversing and Remanding

Opinion by J. Minton; dissenting Opinion by J. Cunningham.

A grand jury indicted Jones on one count of fourth-offense DUI; third-offense operating a vehicle with a suspended license (which had been suspended for DUI); second-degree wanton endangerment; driving without insurance; and for being a PFO I. Jones filed a motion to dismiss the PFO charge because the qualifier for the fourth-offense DUI charge and the PFO charge were the same, which he argued is an impermissible double enhancement.

In an effort to avoid any impermissible double enhancements, the Commonwealth moved to amend the fourth-offense DUI to second-offense DUI and the third-offense driving on a DUI-suspended license to a second-offense driving on a DUI-suspended license. The effect of those amendments was to save the PFO I charge by applying one of Jones’s prior DUI convictions as the qualifier for the PFO I charge instead of applying his current DUI charge as the qualifier.

Jones argued that KRS 189A.010 (5)(d) and 189A.120 (1) prohibited the Commonwealth from recommending amending down the fourth-offense DUI charge. The trial court rejected Jones’s argument and permitted the Commonwealth to amend the charges. The Court of Appeals affirmed. The Supreme Court granted discretionary review and reversed the Court of Appeals.

A prosecutor is statutorily prohibited from moving to amend fourth-offense DUI charge to second-offense DUI charge given that defendant had refused an alcohol concentration test. The Supreme Court stated “for purposes of this case, KRS 189A.120 (1) provides, in relevant part, that ‘a prosecuting attorney shall not agree to the amendment of the charge to a lesser offense ...’ in DUI cases in which the defendant has refused an alcohol concentration test.”

“KRS 446.080 (4) requires that we construe the words of all statutes ‘according to the common and approved usage of

language,’ unless the words ‘have acquired a peculiar and appropriate meaning in the law....’” “According to Webster’s Dictionary, the word *agree* means ‘to concur in’ or ‘to consent to as a course of action....’” The Supreme Court held that “clearly, the Commonwealth concurred in, or consented to, the amendment of Jones’s DUI fourth charge to DUI second charge. After all, it was the Commonwealth that sought the amendment.”

The Supreme Court concluded “we see no indication in the plain language of KRS 189A. 120(1) that would cause us to conclude that the Commonwealth is only prohibited from concurring in a defendant’s motion to amend a DUI charge while remaining free to seek such an amendment on its own. Such a conclusion would be illogical....the proper construction we have given KRS 189A.120(1) causes that statute to stand for the clear and logical proposition that the Commonwealth may not join a defendant’s motion to amend DUI-related charges, nor may the Commonwealth seek such an amendment on its own.”

Commonwealth v. Kevin T. McCombs

Rendered 03/19/09

___ S.W.3d ___; 2009 WL 735794

**Reversing in Part and affirming in Part
Opinion by J. Cunningham.**

A Bullitt County jury found McCombs guilty of first-degree burglary, fourth-degree assault, and violation of a protective order. The Court of Appeals affirmed the conviction of violation of a protective order, but reversed the burglary and assault convictions, determining that they constituted double jeopardy. The Court of Appeals further held that the trial court erred when it determined, as a matter of law, that a crowbar was both a deadly weapon and a dangerous instrument. The Commonwealth appealed the decision to this Court and discretionary review was granted.

Convictions for first-degree burglary and fourth-degree assault did not violate double jeopardy; overruling *Butts v. Commonwealth*, 953 S.W.2d 943. Applying the *Blockburger* test, when a defendant is convicted of first-degree burglary under the “armed with explosives” theory or the “dangerous instrument” theory, and is convicted of fourth-degree assault, there is clearly no double jeopardy violation. The physical injury required for assault is not required for the burglary conviction, while the unlawful entry requirement for burglary distinguishes it from assault. The issue becomes more complicated when the first-degree burglary conviction rests on a finding that physical injury was inflicted on a non-participant in the crime.

This Court concluded “(u)pon careful reconsideration, we believe *Butts* was incorrectly decided. The physical injury element of fourth-degree assault and the physical injury element of first-degree burglary are not one and the same. The assault statute requires a finding that the injury was

inflicted with an intentional, wanton, or reckless mental state. The burglary statute requires no such finding; it merely states that the offender ‘causes physical injury’ to a non-participant. Under the burglary statute, the injury could be accidental.”

Earl Vincent, JR. v. Commonwealth

Rendered 04/23/09

___ S.W.3d ___; 2009 WL 1107799

Affirming

Opinion by C.J. Minton

In 2005, police began investigating allegations that Vincent had sexually abused his granddaughter, C.V. During the course of this investigation, Vincent’s daughters, J.H. and A.M., reported that Vincent had also subjected them to sexual abuse, rape, sodomy, and incest during their childhoods in the 1970s and 1980s. The grand jury indicted Vincent for 294 counts of various sexual offenses against J.H., A.M., and C.V. Vincent was found guilty of one of two counts of first-degree rape, nine counts of first-degree sodomy, fifteen counts of first-degree sexual abuse, and three counts of incest. Vincent was sentenced to fifty years imprisonment.

Original indictment of defendant for 294 counts, which indictment was amended to 29 counts at close of Commonwealth’s case, did not constitute intentional and baseless overcharging of criminal counts in order to prejudice the defendant. The Supreme Court found that it did not appear that the prosecutor intentionally obtained an indictment with many times the number of counts eventually submitted to the jury in order to prejudice Vincent. The victims testified to numerous instances of offenses occurring, and two victims each testified to estimates of 25 to 30 instances of certain offenses. The Supreme Court noted that the prosecutor and the trial court made an effort to ascertain that each count that was eventually submitted to the jury was identified with specificity; and, apparently, only 29 counts could be identified from the trial testimony with enough specificity.

The Supreme Court concluded “Although we would not condone an intentional, baseless tenfold overcharging of criminal counts, the fact that Vincent was initially charged with 294 counts but that only 29 counts were eventually submitted to the jury does not entitle him to relief under the facts of this case.”

The trial court did not commit reversible error by denying Vincent’s mistrial motion following a testifying officer’s reference to his exercising his right to remain silent.

The reference to Vincent’s exercising his right to remain silent was isolated and brief and, apparently, not intentionally elicited by the prosecution. Since Vincent did not show that this reference compromised his right to a fair trial, the Supreme

Court concluded that the trial court did not abuse its discretion in denying the mistrial motion.

No palpable error resulted from alleged admission of investigative hearsay. In questioning the investigating officer about his investigation, the prosecutor asked him what kind of allegations the alleged victims made. The officer responded that they “disclosed years of rape, sodomy, and incest” by Vincent. Vincent concedes he failed to object to this testimony.

While perhaps the officer’s description of the victims’ allegations was hearsay, the Supreme Court failed to see how it affected Vincent’s substantial rights. The Supreme Court concluded that “the admission of the police officer’s very brief summary of what the alleged victims told him certainly did not amount to palpable error given the victims’ graphic testimony that followed, detailing several specific instances of sexual misconduct and their belief that it occurred on numerous occasions over long periods of time. So any erroneous admission of ‘investigative hearsay’ did not constitute a palpable error”.

Commonwealth v. Kenneth McBride

Rendered 04/23/09; Modified 04/27, 2009

___ S.W.3d ___; 2009 WL 1108101

Reversing

Opinion by Special Justice Mark C. Whitlow

On November 12, 1999, McBride was convicted in a Tennessee court of the felony offense of sexual battery and was sentenced to two years in confinement and had to register as a sex offender in Tennessee. In late January 2001, McBride moved from Tennessee to Mount Sterling, Kentucky. McBride did not register as a sex offender in Kentucky.

On May 11, 2001, McBride was indicted, pursuant to KRS 17.510(7), for failure to register as a sex offender in Kentucky on March 13, 2001. McBride was found guilty and sentenced to four years’ imprisonment.

Former version of Kentucky Sexual Offender Registration Act did not provide defendant with a right to receive notice that he was required to register as sex offender upon changing his residence to Kentucky. The Court of Appeals stated that due process requires that an individual receive notice of a duty to register as a sex offender in Kentucky before he has a duty to so register in Kentucky and found that McBride received no notice from the Commonwealth regarding his duty to register as a sex offender. Therefore, because the Commonwealth failed to inform McBride of his duty to register, it was improper to convict him.

Continued on page 24

Continued from page 23

The Supreme Court, relying in part on *North Carolina v. Bryant*, 614 S.E.2d 479 (N.C. 2005), which stated that “by 1996 every state, the District of Columbia and the Federal Government had enacted some variation of [a sex offender registration and community notification program]...” held that convicted sex offenders had been subject to registration throughout the fifty states for approximately six years when, in 2001, McBride was arrested for failing to register as a convicted sex offender. The evidence established that McBride was required to register as a sex offender in Tennessee before he changed his residence to Kentucky. The Supreme Court concluded that McBride had an absolute duty to register as a sex offender once he became a resident of Kentucky as required by KRS 17.510(7). The statute which was the basis of McBride’s conviction, KRS 17.510(7), does not require that the Commonwealth provide him notice of his duty to register. In addition, KRS 17.510(6) was not enacted to give a right of notice to a sex offender, but for the sole purpose of facilitating the effective administration of the statute.

Former version of Kentucky Sexual Offender Registration Act was not void for vagueness under due process principles.

McBride claimed that KRS 17.510(7) was unconstitutionally vague because it does not define “residence.” “Residence” is defined as “the act or fact of dwelling in a place for some time.” *Merriam-Webster’s Collegiate Dictionary* 993 (10th Ed. 2001). The Supreme Court held that the language of KRS 17.510(7) was sufficiently definite to put McBride on notice that if he failed to register as a sex offender when he changed his place of dwelling from Tennessee, where he was registered as a sex offender, to Kentucky, he would be guilty of the offense therein.

The trial court had jurisdiction for felony prosecution. In *Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003), it was held that KRS 17.510(11), as amended in 2000, is inapplicable to anyone who had acquired the status of registrant before its effective date of April 11, 2000. The court further held that those violating registrant requirements after April 11, 2000, but who had acquired registrant status before that date, can only be prosecuted for a Class A misdemeanor. The Circuit Court would have no jurisdiction unless such a charge is joined with a felony.

The Supreme Court stated that although McBride was convicted in Tennessee in 1999, he would not have acquired registrant status under KRS 17.510 until he changed his residency from Tennessee to Kentucky. McBride moved to Kentucky in January 2001, nine months after the effective date of the amended KRS 17.510(11). Therefore, McBride was properly charged and convicted under the amended statute, as that is the version applicable at the time he should have registered in Kentucky.

Jerry Bernard Winstead, JR. v. Commonwealth

Rendered 05/21/09

___ S.W.3d __; 2009 WL 1438712

Affirming

Opinion by J. Abramson

Jerry Winstead appealed from a judgment of the Daviess Circuit Court convicting him of murder and of first-degree robbery and sentencing him to concurrent prison terms, respectively, of life without the benefit of parole and of twenty years.

Winstead did not invoke his right to proceed *pro se* and therefore was not denied his right to represent himself.

Winstead filed three *pro se* motions seeking discovery from the Commonwealth. On his fourth *pro se* motion, Winstead complained that the discovery provided to him had excluded several items he believed he was entitled to. The trial court forwarded the motions to counsel for both sides and held a hearing.

During that hearing, Winstead stated that he had asked counsel to file the motions on his behalf, and that when counsel had refused, he had decided to take the matter into his own hands. The court informed Winstead that as long as he had counsel of record the court would not entertain *pro se* motions. Motions Winstead filed himself would be forwarded to counsel to be handled as counsel saw fit. Winstead complained that he found it difficult to work with counsel. The court informed him that although he was entitled to an attorney, he was not entitled to the attorney of his choice. In the court’s estimation, the team representing Winstead was highly competent.

Two months later, Winstead filed another *pro se* motion, seeking dismissal of the indictment for lack of evidence and monetary compensation for what Winstead characterized as his unlawful incarceration. Winstead accompanied the motion with a letter to the court in which he again complained of counsel’s unavailability and his failure to share with Winstead several items of discovery.

The Supreme Court states “a defendant must clearly and unequivocally seek to represent himself.” Citing *Deno v. Commonwealth*, 177 S.W.3d (Ky. 2005). The motions and the letter appeared to be an attempt to enlist the trial court’s aid in compelling counsel to provide discovery, or even perhaps a request to replace counsel with someone less insistent on the realities of Winstead’s serious predicament. Those documents stop short, however, of seeking to dispense with counsel, in whole or in part, and to proceed *pro se*. That Winstead did not, in fact, seek to represent himself is clear from his statements that he was not schooled in the law and that with an attorney “who would work with me,” he could mount a defense. This conclusion is confirmed

by the fact that Winstead lodged no further complaints about his representation after his first attorney was replaced. Because the trial court did not disregard an unequivocal request for self-representation and had no duty otherwise to advise Winstead of his right to proceed *pro se*, Winstead is not entitled to relief on this ground.

Winstead was not denied a fundamentally fair trial by trial court's limitations on jury voir dire on the issue of racial bias. At the beginning of individual *voir dire*, Winstead asked one of the panel members whether she agreed that in this state's history, racial prejudice had been and that it continued to be, a serious social problem. He also asked how she would react to an interracial romantic relationship in her own family. The Commonwealth objected to these questions as straying from the issues in the case and the court agreed. The court limited *voir dire* on race to the following questions:

1. Does the fact that the defendant is an African-American have any bearing on your judgment in this case?
2. Would the fact that individuals in this case were involved in interracial relationships have any bearing on your judgment?
3. Would the fact that the defendant is African-American and the victim Caucasian have any bearing on your judgment?

The Supreme Court concluded that even if Winstead's counsel deemed the additional questions helpful, the trial was not rendered fundamentally unfair and the trial court did not abuse its discretion when it focused *voir dire* on the particular racial facts confronting the jurors in this case.

Trial court in death penalty case was not required to exclude for cause potential juror who stated that a defendant's poverty and difficult family background would not affect his sentencing decision. During individual *voir dire*, a potential juror stated that he would consider the death penalty but would not automatically impose it, that he could imagine circumstances in which imprisonment for twenty years would be an appropriate punishment for murder and robbery, and that he would consider evidence offered in mitigation of the offense. The potential juror was asked if the defendant's poverty and family history would bear on his decision, and the juror replied that it would not. Defense counsel moved to strike the juror for cause.

The court took the motion under advisement and ultimately denied it. The Supreme Court stated that a defendant is entitled to have removed for cause any potential juror so biased in favor of the death penalty that he would automatically vote for that penalty regardless of any mitigating evidence. A potential juror should be disqualified, therefore, who would automatically impose the death penalty and give not consideration to mitigating circumstances.

Winstead would expand this rule to disqualify a potential juror who would give no weight to a particular mitigating factor.

The Supreme Court concluded that because the juror indicated that he would not automatically impose the death penalty but could conceive of mitigating circumstances that would justify the minimum penalty and that he would consider mitigating evidence, the trial court did not abuse its discretion in ruling that he was not disqualified under *Morgan* and related Supreme Court precedent. The fact that the juror was disinclined to see poverty and a difficult family life as factors mitigating murder and robbery did not betray an attitude so closed to all mitigation as to suggest a prejudgment on the merits and so does not undermine the trial court's decision. The juror's unwillingness to say that he would find mitigating the defendant's poverty and family background did not indicate that he was incapable of rendering a fair verdict on the evidence. He was not obliged to weigh that particular evidence in Winstead's favor, and otherwise he indicated that he would consider the full range of penalties and would consider as well the facts of Winstead's life.

Witness's prior consistent statement to police was not admissible to corroborate her in-court testimony, however, the witness's improper testimony was harmless error.

A witness testified during direct examination that she gave a statement to the police, that it was essentially the same as her testimony, and that it had been truthful. Before defense counsel commenced her cross-examination, she moved to have the witness's testimony struck on the ground that the witness's police statement had not been provided in discovery. The Commonwealth explained that the witness's statement had not been recorded, apparently because she was a minor at the time, but that otherwise the discovery materials had duly noted her interview. Winstead then renewed his motion to strike on the ground that as there was no way to explore the alleged prior statement, reference to it was improper and also on the ground that the witness should not have been permitted to characterize the prior statement as truthful.

On appeal, Winstead contended that the witness's testimony amounted to improper self-bolstering and entitled him to a new trial. The court stated that under KRE 801A(a)(2) and 802 (the rule against hearsay), a witness's out-of-court prior consistent statement is not admissible merely to corroborate the witness's in-court testimony. The witness's testimony about her prior statement to the police was improper under these rules, and the impropriety was compounded in this case when the witness was asked to characterize her prior statement as truthful.

Continued on page 26

Continued from page 25

However, Winstead is not entitled to relief because counsel did not properly preserve this matter for review. Here, Winstead's objection to the witness's testimony about her prior statement was neither timely nor specific. Counsel did not object until after the witness had been asked several additional questions. By that point, it was certainly within the trial court's discretion to deem the objection untimely. Counsel's objection, moreover, was primarily based on the alleged discovery violation, not on the rules limiting the admissibility of prior consistent statements. Even counsel's "bolstering" argument did not focus on the prior statement itself as inadmissible, but, rather, on the witness's characterization of that statement as truthful. The objection, in other words, did not direct the trial court's attention to the ground of objection advanced on appeal. The Supreme Court also held that even if the matter was deemed preserved, Winstead would not be entitled to relief because the purported error was harmless. There was overwhelming evidence that Winstead robbed as well as shot the victim. There is simply no substantial possibility in this case that the verdict was swayed by the improper bolstering of the witness's testimony.

Terry Tobar v. Commonwealth

Rendered 05/21/09

___ S.W.3d ___; 2009 WL 1439833

Affirming

Opinion by J. Venters

Having been convicted of a sexual offense in the state of Ohio, Appellant duly registered as a sex offender under Kentucky's Sexual Offender Registration Act, KRS 17.500, when he moved to his mother's house in Fayette County. He subsequently vacated those premises under the terms of a domestic violence order, and moved to the Hope Center, also located in Fayette County. In conformance with KRS 17.510 (10)(a), he promptly notified his probation and parole officer of his address change. Unfortunately, Appellant was expelled from the Hope Center because it has a policy against housing registered sex offenders. Evidence then indicates Appellant became homeless. He failed to report to the proper authorities that he was no longer living at the Hope Center, and did not otherwise inform his probation officer of his relocation. He was subsequently indicted for violating KRS 17.510 (10)(a).

Appellant moved to dismiss the indictment, arguing that the statute was unconstitutionally vague as applied to him because he was homeless and therefore unable to register a change in address. Finding KRS 17.510 (10)(a) constitutional, the trial court denied Appellant's motion, and allowed him to enter a conditional guilty plea, reserving the constitutional question for appeal.

Statute requiring a registered sex offender to report a change of residence was not unconstitutionally vague. A review of KRS 17.510 (10)(a) indicates that it is not void for vagueness as applied to Appellant. KRS 17.510 is designed to fulfill a public purpose by tracking where sex offenders live. The key to this purpose is to make sure that registered sex offenders report to the proper authorities whenever they change their residence address. The Supreme Court agreed with the Court of Appeals that the focus of KRS 17.510 (10)(a) is not that the sex offender have an address, but that any *change* in address be reported to the proper authorities.

KRS 17.510(10)(a) clearly provides "[i]f the residence address of any registrant *changes*, but the registrant remains in the same county, the person *shall* register...." Nowhere in the plain language of the statute does it require that the registrant must have an actual place he is moving to. The Supreme Court found that there was no reason why appellant could not have reported to the proper authorities that he no longer lived at the Hope Center. The Supreme Court concluded that KRS 17.510(10)(a) does not criminalize being homeless. It simply criminalizes a failure to register by a registered sex offender upon a change in their residence address. Even if a sex offender becomes homeless, there is a clear requirement and expectation that the change in their living situation be reported to the proper authorities.

Kenneth Wayne Parker v. Commonwealth

Rendered 05/21/09

___ S.W.3d ___; 2009 WL 1439206

**Affirming, in part, and Reversing and Remanding, in part
Opinion by C.J. Minton**

Kenneth Parker was sentenced to, along with lesser sentences, two terms of imprisonment for life without the possibility of parole for twenty-five years. Parker, the alleged leader of the Victory Park Crips gang in Louisville, also known as the Rat Pacc.

The criminal syndication count of the indictment did sufficiently state an offense. According to Kentucky Revised Statutes (KRS) 506.120(1), there are seven actions a person may take to commit criminal syndication. In addition, KRS 506.120(3) sets out six forbidden activities that define what a criminal syndication entails. Appellant contends that a criminal syndication indictment must allege at least one of the seven methods of committing the crime set forth in KRS 506.120(1) and one of the six forbidden activities set forth in KRS 506.120(3).

An indictment properly states an offense merely by naming the offense charged. In other words, a criminal syndication indictment is not infirm and subject to dismissal solely because it lacks a detailed recitation of the underlying facts. The protocol for a defendant who desires more information is to serve a motion for a bill of particulars.

Parker was not entitled to severance of charges. The very nature of the offense of criminal syndication requires proof of underlying crimes. So severing the underlying crimes from the syndication charge would seem to defeat the entire purpose of the charge of criminal syndication and would not promote justice or efficiency. In other words, the criminal syndication charge serves to link the other charges together. Even the charges that do not specifically underlie the syndication charge helped present the jury with a more complete picture of the alleged activities of Parker and the Victory Park Crips. And aside from his speculation that a jury was more likely to convict him due to the multitude of charges, Parker has pointed to no concrete prejudice.

Parker was not entitled to mistrial based upon State's witness's improper testimony about fearing that he would be harmed for testifying against defendant. The Court agreed that the statement was improper as jury verdicts must be based upon admissible evidence, not juror's fear of the allegedly vengeful nature of a defendant. However, the improper testimony was relatively brief in nature given the lengthy trial. And defense counsel did not object when the witness first mentioned fearing retribution and, in fact, raised that issue himself during cross-examination. The trial court's admonition was a sufficient curative measure, rendering a mistrial unnecessary.

Prosecutor's improper reference to recording of rap lyrics that was never admitted into evidence was not reversible error. The trial court erred by permitting the Commonwealth to refer repeatedly to damning material that was not admitted into trial. However, the Court found that the references to the CD in the case at hand were not so far beyond the bounds of ethical propriety as to undermine the basic fairness and integrity of the trial.

Recording of alleged conversation between defendant and murdered witness was admissible under forfeiture-by-wrongdoing exception to the confrontation clause. It is no longer sufficient under KRE 804(b)(5) simply to show that a defendant caused the declarant's absence; rather, the forfeiture-by-wrongdoing exception to the confrontation clause is applicable "only when the defendant engaged in conduct *designed* to prevent the witness from testifying." The proper procedure was for the proponent of the hearsay evidence in question to show "good reason to believe that the defendant has intentionally procured the absence of the witness," after which "the burden then shifts to the opposing party to offer credible evidence to the contrary." The proponent of the evidence need only prove by a preponderance of the evidence that the defendant engaged or acquiesced in wrongdoing that made the declarant unavailable.

Evidence must be admissible before it can be admitted. Stated differently, a trial court – as gatekeeper of evidence – may decline to permit a party's presenting evidence, including

evidence of forfeiture by wrongdoing, if the trial court finds that evidence to be inadmissible. From a purely procedural standpoint, a trial court promotes justice and judicial economy by engaging any forfeiture-by-wrongdoing issues before the trial begins so that the parties and the court can be fully cognizant of the evidence that likely will be presented to the jury. A trial court must hold an evidentiary hearing before ruling on the admissibility of the proposed hearsay. In this evidentiary hearing, the proponent of the hearsay must first introduce evidence establishing good reason to believe that the defendant intentionally procured the absence of the declarant, then the burden of going forward shifts to the party opposing introduction of the hearsay to offer credible evidence to the contrary.

Turning to the case at hand, the Commonwealth met its burden of establishing by a preponderance of the evidence that Parker either engaged in – or at least acquiesced in – wrongdoing designed to prevent the witness from testifying. The trial court – and later the jury – could certainly have reasonably inferred from all of the unique facts and circumstances of this case that Parker was motivated to kill the witness in order to prevent him from testifying that Parker shot Baker. Parker has not offered credible evidence to the contrary and therefore the taped conversations did not violate the Confrontation Clause, meaning that the trial court's decision to admit those taped conversations was neither clearly erroneous nor an abuse of discretion.

Admission of irrelevant hearsay evidence regarding history of the feud between rival street gangs was harmless error.

During the trial, the Commonwealth played for the jury an approximately thirty-minute audio tape of one of a witness's (Shameka) statements to the police. Much of that taped statement contained statements by Shameka regarding the violent history of the feud between the Crips and the Bloods. But, on the tape, Shameka repeatedly referred to what she had heard; and Shameka testified that she had no personal knowledge of the feud's history.

The Commonwealth, in its brief, did not refute Parker's contention that many of the statements on the taped statement were hearsay. The Commonwealth contended that Shameka's testimony was admissible because it "only documented the running feud that existed between the Bloods and the Crips and did not implicate the appellant's involvement in any way." The Commonwealth's argument is actually an acknowledgement that the challenged portions of Shameka's taped statement are irrelevant and irrelevant evidence is inadmissible. The fact that much of Shameka's taped statement did not directly implicate Parker is an additional reason to exclude the evidence, not a reason to admit it. The trial court abused its discretion by permitting the Commonwealth to play to the jury the hearsay portions of Shameka's taped statement. However, the inadmissible statements did not appear to implicate Parker and therefore their admission was harmless.

Continued on page 28

Continued from page 27

Evidence did not support criminal syndication conviction.

Although KRS 506.120 contains many methods for committing criminal syndication, according to the essential parts of the instruction the trial court issued to the jury, the jury could convict Parker only if it found beyond a reasonable doubt that Parker “committed, conspired or attempted to commit or act as an accomplice in the commission of any offense of violence” and that when he did so, Parker had the “intent to establish, maintain, or facilitate any of the activities of an organization consisting of five or more persons collaborating to promote or engage in Trafficking in a Controlled Substance on a continuing basis.

The Commonwealth does not name the four or more additional persons who allegedly assisted Parker in the Crips’ drug trafficking efforts, nor does the Commonwealth point to anything specific in the record to show that Parker and the Crips collaboratively trafficked in drugs on a continuing basis. There was no doubt that there were at least five members of the Crips but there was no testimony that would show that at least five Crips collaborated on a continuing basis to traffic in drugs. Additionally, the charge involved only a one-time drug deal or robbery, not a continuing collaboration to sell narcotics. It is simply beyond question that one incident involving only three individuals is not sufficient to prove existence of an ongoing collaboration involving at least five individuals. The trial court erred by failing to grant Parker’s motion for a directed verdict on the criminal syndication charge.

Frederick Miller v. Commonwealth

Rendered 05/21/09

___ S.W.3d ___; 2009 WL 1438781

Reversing

Opinion by J. Scott

Miller was charged with one count of first-degree rape, seven counts of third-degree rape, two counts of third-degree sodomy, and of being a Persistent Felony Offender (PFO), first-degree. The charges were the result of a sexual relationship between Miller and a young girl, C.O., who was under the legal age of consent. C.O. was fifteen years of age and Miller was over twenty-one. Miller was convicted of four counts of third-degree rape and one count of third-degree sodomy enhanced by one count of PFO, first-degree. Miller was sentenced to twenty years imprisonment.

Jury instructions failed to factually differentiate between the separate offenses.

A trial court errs in a case involving multiple charges if its instructions to a jury fail to factually differentiate between the separate offenses according to the evidence. *Combs v. Commonwealth*, 198 S.W.3d 574, 580 (Ky. 2006). Here, because the trial court used identical jury instructions on multiple counts of third-degree rape and sodomy, none of which could be distinguished from the

others as to what factually distinct crime each applied to, Miller was presumptively prejudiced.

The instructional error was palpable, reversible error. The error was not preserved and Miller requested palpable error review pursuant to RCr 10.26. The Supreme Court cited *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008), which held an Appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error. In the case at bar, the Supreme Court held that the Commonwealth did not meet its burden to show affirmatively that “no prejudice resulted from the error and therefore the identical jury instructions, here, can not be considered harmless.”

It is obvious that the identical jury instructions used in this case patently failed to adequately differentiate the alleged instances of multiple third-degree rape and sodomy. Therefore, the error was palpable. Further, as the trial court’s error “prejudiced the substantial rights of the defendant,” the use of identical jury instructions resulted in manifest injustice, potentially depriving Appellant of his right to a unanimous verdict and to challenge the sufficiency of the evidence of appeal. Thus, Appellant’s convictions for third-degree rape and sodomy, as well as, their enhancement by virtue of the finding of Persistent Felony Offender (PFO) first-degree is reversed and remanded for a new trial.

David Paul Sanderson v. Commonwealth

Rendered 05/21/09

___ S.W.3d ___; 2009 WL 1438474

Reversing and Remanding

Opinion by J. Noble

Sanderson was convicted of two counts of Second-Degree Sodomy and three counts of First-Degree Sexual Abuse, and was sentenced to thirty-five years in prison and five years of conditional discharge.

Admission of child sexual abuse accommodation syndrome (CSAAS) testimony constituted reversible error.

Lori Brown, a clinical psychologist, gave testimony about Child Sexual Abuse Accommodation Syndrome (CSAAS) that victim’s addition of new allegations of sexual abuse is normal. The court acknowledged that this type of child sexual abuse testimony is inadmissible; however, the court still allowed Brown to give propensity testimony.

Brown testified that it is normal for child victims of sexual abuse to add details about their abuse after they have been in counseling for an extended period of time, and to appear happy in their outward life and to be able to excel in their extracurricular activities and make good grades. The testimony in the Commonwealth’s case-in-chief that sexually abused children commonly add details over time through counseling is analogous to the situation in *Miller v.*

Commonwealth, 77 S.W.3d 566 (Ky. 2002), where the Court held testimony that sexually abused victims commonly delay reporting of their abuse to be reversible error.

In addition, in the Commonwealth's rebuttal, Brown was recalled and gave testimony identifying generic characteristics of child sex abuse victims by describing them as outwardly appearing happy. Finally, the Commonwealth even went so far as to ask whether these "symptoms" are what caused sexually abused children to become prostitutes. The Supreme Court held "Brown's 'expert' testimony in this case, coupled with the Commonwealth's speculation about the creation of prostitutes, are the exact type of generic and unreliable evidence this Court has repeatedly held to be reversible error. Therefore, this case must be reversed for a new trial because of the admission of CSAAS testimony against Appellant."

Defendant's maximum sentence was 20 years imprisonment. Pursuant to KRS 532.110(1)(c) and KRS 532.080(6)(b), Sanderson could only receive a maximum sentence of twenty years, not the thirty-five years to which he was sentenced. In addition, Sanderson was sentenced to five years of conditional discharge, although the version of KRS 532.043 in effect at the time these offenses were allegedly committed (prior to July 2006) only allowed for a conditional discharge of three years. The Supreme Court held that the case in bar was on point with *Purvis v. Commonwealth*, 14

S.W.3d 21 (Ky. 2000), which held the amendment disadvantaged the Appellant and its retroactive application was an *ex post facto* law and thus unconstitutional. Therefore, Sanderson's sentence to conditional discharge could not exceed three years, the statutory maximum at the time the alleged offenses took place.

The Commonwealth conceded the maximum possible sentence was twenty years' imprisonment and three years conditional discharge, however, it argued that Sanderson did not make the sentencing hearing part of the record. The Supreme Court held that regardless of whether the sentencing hearing was made part of the record, the court still had a list of Sanderson's convictions before it and can apply the statutory maximum sentence as a matter of law.

Social worker's testimony was inadmissible hearsay. Carla Hyde, a social worker, testified primarily about the alleged victim's statements made to her. Additionally, Hyde testified about the alleged victim's credibility when she stated that the victim "seemed believable" and she was "appropriately nervous and scared." The Supreme Court held that Hyde improperly testified as to the alleged victim's hearsay statements to her, and she improperly testified about her ultimate opinion of the alleged victim's credibility. On retrial, a social worker cannot testify about the alleged victim's statements made to her and her conclusions on the ultimate issue of the alleged victim's credibility. ■

"Double Tragedies": Mental Illness and the Death Penalty

A new report, "Double Tragedies," addresses the question of whether people with severe mental illness should face the death penalty. The report was authored by the **National Alliance on Mental Illness (NAMI)** and **Murder Victims' Families for Human Rights (MVFHR)** and called for treatment and prevention instead of execution for such offenders. The report, based on extensive interviews with 21 family members in 10 different states, calls the death penalty "inappropriate and unwarranted" for people with severe mental disorders. Families of murder victims joined with families of persons with mental illness to speak out against the death penalty at NAMI's annual convention on July 6 in San Francisco. "Family opposition to the death penalty is grounded in personal tragedy," said MVFHR executive director Renny Cushing. "In the public debate about the death penalty and how to respond in the aftermath of violent crime, these are the voices that need to be heard." "Most people with mental illness are not violent," added NAMI executive director Mike Fitzpatrick. "When violent tragedies occur they are exceptional—because something has gone terribly wrong, usually in the mental health care system. Tragedies are compounded and all our families suffer."

SIXTH CIRCUIT CASE REVIEW

By Meggan Smith, Capital Post-Conviction, and Aaron Dyke, Law Clerk

Braxton v. Gansheimer,

561 F.3d 453 (2009), before Boggs, Chief Justice, Gibbons and Griffin, Circuit Judges

Sixth Circuit reversed district court's grant of habeas relief based on *Batson* claim because state court performed required analysis and did not unreasonably credit prosecutor's race-neutral reasons for striking juror.

Anthony Braxton was convicted of felonious assault of a police officer, failure to comply with an order of a police officer, and receiving stolen property. At trial, defense counsel objected to the prosecutor's use of two of its four peremptory challenges to remove African-Americans. The first struck juror (#8) had worked for the public defender's office for fifteen years. The prosecutor struck the second juror (#14) because of inattentiveness and demeanor.

During *voir dire*, the prosecutor had the following exchange with juror #14:

[PROSECUTOR]: Are you off this week? Are you able to take the week off? Is that a hardship for you especially?

JUROR NO. 14: No, it's not.

[PROSECUTOR]: When you got your subpoena for jury service, what was going through your mind?

JUROR NO. 14: Why me?

[PROSECUTOR]: Why me? Did anybody in this room when they got their jury service think all right? You were excited?

[PROSECUTOR]: And one of the reasons I ask you, [Juror No. 14], because you are a very laid back person or you are kind of exuding the fact you might not want to be here. Just to be honest. By body language. Now, I don't know. It could be you're laid back and you are kind of paying attention. And so I just have to ask, would you rather not be here on this case?

JUROR NO. 14: You know, I have no problem. I served before.

[PROSECUTOR]: And believe me, nobody wants to be here. I'm not trying to pick on you.

JUROR NO. 14: I understand.

[PROSECUTOR]: We have to pick a jury that's fair for the State and fair for the defendant and so, if I see someone I think – I'm not just picking on you, hey, maybe he doesn't want to be here. You know I want to ask, okay? So you are saying you will be all right?

JUROR NO. 14: No problem.

[PROSECUTOR]: Okay. Do you have anything else for me, sir?

JUROR NO. 14: No.

The trial court asked the prosecutor to elaborate on his reasons for excusing the two African-American jurors. In regards to Juror #8, the prosecutor stated that her employment at the PD's office "worried" him. The prosecutor regarded Juror #14 as disinterested in serving on the jury:

With regards to [Juror No. 14], he sat there the entire time with his arms crossed and his head bent over, and his hand – he showed no interest in being in here. I specifically questioned him about his body language, and he even said he didn't want to be here. So, I am not going to have someone sit on a jury that for the last two hours didn't listen to anything, had no intention of actually paying attention and then even when I asked him, he said he didn't want to be here. It's got nothing to do with race. With regards to [the third African-American prospective juror], who is juror number 20, there is a potential if she gets on this panel and I can tell you right now we have no problem with her as well, the lone black juror. We also want to note our objection for the record because we know that's why we objected before. We knew he [defense counsel] was planning on getting rid of four white people as well. There is a reverse *Batson*. There's case law on that,



Meggan Smith

and that's why we noted our continuing objection as well. And I suspect that's why he actually put it on initially because he knew both African-American jurors were not suitable for this jury regardless of the race. One was a public defender. One hadn't paid attention at all. He knew we were kicking them off, and I specifically asked the guy about it.

Finding that the prosecutor's reasons were sufficient, the trial court overruled the defense's *Batson* objection. On direct appeal, the court held that "Braxton failed to make a prima facie case of purposeful discrimination, the prosecutor provided a bona fide race-neutral explanation for the challenge, and the court's determination was not clearly erroneous."

Reviewing the state court's decision under AEDPA, the federal district court noted:

The prosecutor relied on Juror No. 14's body language and, more importantly, on what he described as Juror No. 14's statements that "he didn't want to be here." Both the state trial and appellate courts ignored the fact that Juror No. 14 never made these statements. A review of the prosecution's voir dire examination of Juror No. 14 reveals that the prosecutor went to great length to entice this juror into conceding that he had no interest in serving on this jury. Yet, despite this prodding, Juror No. 14 stood firm in his responses that he had no problems with jury service. The prosecutor tried, unsuccessfully, to put words in Juror No. 14's mouth. Given this blatant inconsistency between the prosecutor's stated "justification" and Juror No. 14's actual statements as recorded, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

* * *

[T]he prosecutor did not justify his peremptory challenges solely on Juror No. 14's body language, which he could have, but instead emphasized to the court incorrectly that Juror No. 14 voiced opposition to jury service. The Court finds as the tipping point in this close analysis the fact that the prosecutor misquoted Juror No. 14 twice as having said he did not want to be there when in fact Juror No. 14 said exactly the opposite. This blatant inconsistency between what the prosecutor argued and what the record demonstrates undermines the prosecutor's stated reasons for excusing Juror No. 14 and therefore exposes his pretext for racial discrimination.

The district court then held:

[T]he evidence is clear and convincing that the prosecutor's stated justifications for excusing Juror No. 14 were a pretext for discrimination. The trial court failed to address the blatant inconsistency between the juror's actual response and the prosecutor's claims in *Batson* inquiry, and the appellate court unreasonably determined that the trial court did not err. Additionally, the appellate court made an unreasonable application of *Batson* in finding that Mr. Braxton did not satisfy his prima facie case when such matter had become moot.

The Sixth Circuit, however, reversed the district court's grant of habeas relief. *Batson* claims present mixed questions of law and fact and are reviewed under the unreasonable application prong of AEDPA. However, the question of whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is a question of fact which is presumed correct unless rebutted by clear and convincing evidence. The Sixth Circuit held that Braxton had not shown by clear and convincing evidence that the state court's finding that the prosecutor's race-neutral justifications were not pretext for discrimination was erroneous.

The Court held that the district court had usurped the fact-finding functions of the trial court and failed to defer to the trial court on questions of credibility and demeanor of the juror and the prosecutor. "[W]here 'reasonable minds reviewing the record might disagree about the prosecutor's credibility . . . habeas review . . . does not suffice to supersede the trial court's credibility determination.'" The Court stated that the district court improperly relied upon "debatable inferences" to reverse the state courts' decision "by presuming subjectively that 'the prosecution's justification for excusing Juror No. 14 is based primarily on statements Juror No. 14 never utters,' and by focusing an inordinate amount of attention on the misstatement while ignoring the prosecutor's other race-neutral reason for the strike – the disinterest demonstrated by Juror No. 14's body language and demeanor – that was accepted by the trial court."

"Thus, while the prosecutor's misstatement regarding Juror No. 14's responses may furnish a reason to question whether the prosecutor's motivation for the peremptory strike was pretextual, it does not compel such a conclusion. Under these circumstances, the district court erred in failing to defer to the trial court as the best judge of the prosecutor's and the juror's credibility."

Continued on page 32

Continued from page 31

U.S. v. Carson, et. al.,

560 F.3d 566 (2009), before Guy, Suhrheinrich, and Gibbons, Circuit Judges.

Prosecutor’s comments in closing argument, referring to a co-defendant’s plea agreement by rhetorically asking the jury why he would have pleaded guilty to conspiracy if there had not in fact been a conspiracy, did not constitute prosecutorial misconduct, and even if they did they did not affect defendant’s substantial rights.

Six Mount Clemens, Michigan police officers were charged with multiple crimes including, deprivation of rights under color of law, conspiracy to obstruct justice, obstruction of justice, and perjury, after they stopped a motor vehicle, dragged the driver out of the vehicle, and struck and kicked him multiple times and then falsified police reports pertaining to the traffic stop and lied to a grand jury investigating the incident.

Robert Hey, a Mount Clemons police officer, was driving his off duty police car when he noticed the car behind him, driven by Robert Paxton, was tailgating him. Hey became upset and he and Paxton started cutting each other off and braking suddenly. Hey radioed to the police station to inform them of the situation and officers left the police station in pursuit of Paxton. Paxton pulled over in a residential neighborhood and officers pulled him out of his truck and threw him to the ground where they hit and kicked him while shouting obscenities.

Originally, Paxton was charged with felonious assault with a motor vehicle, resisting arrest, and fleeing and eluding. After Paxton filed a civil lawsuit, an investigation ensued. The charges against Paxton were dropped and charges were brought against the officers.

At trial there were multiple eye-witnesses that testified to the events, one of which, Duane Poucher, was a fellow officer who had entered into a plea agreement. Poucher testified that after the traffic incident, a fellow officer informed all of the officers involved to claim that Paxton had gotten out of his vehicle and lunged at an officer. Poucher also claimed that the testimony given to the grand jury by his fellow officers was false.

During the closing argument of the officers’ trial the prosecutor stated:

And you’ll hear a lot about this deal, this deal that Mr. Poucher got. Well, ask yourselves, as you’re hearing about this deal, why is Mr. Poucher, a veteran police officer, going to step up and admit that he committed three felonies if they didn’t actually happen? If they didn’t happen, what kind of deal is that? What kind of deal is that?

And why is Poucher going to admit to committing three felonies when the best, the best he can receive from the United States government is a recommendation of at least a year in prison? If these felonies didn’t happen, why would he take that medicine? Ask yourselves that when you’re hearing about Mr. Poucher.

In order to establish that the prosecutor’s comments constituted misconduct the defense must show that that the statements were improper and that they affected the defendant’s substantial rights.

The defendants did not object to the comments during the trial so the Sixth Circuit reviewed the alleged misconduct for plain error. To show plain error the defendant must show:

1. an error occurred in the district court;
2. the error was obvious or clear;
3. the error affected defendant’s substantial rights; and
4. this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Applying these factors, the Sixth Circuit ruled that the prosecutor’s comments regarding whether the felonies had actually happened were improper, but they did not constitute plain error because “the error was not clear and obvious, given the overall tenor and import of the remarks about Poucher’s plea.” The plea agreement was mentioned several times throughout the trial including in both the prosecutor’s and defense’s opening argument, as well as on direct examination and cross examination.

The court determined that the prosecutor’s comments were meant to comment on the witness’ credibility, not as substantive evidence of the defendants’ guilt. The court stated, “we can infer that the prosecutor’s closing argument remarks were intended to address Poucher’s credibility, in anticipation of the attacks on his credibility that would follow in the subsequent closing arguments made by the defense.” Therefore, the defendants were unable to establish that the prosecutor’s comments, while improper, constituted plain error.

The court goes on to state that even if the remarks constituted plain error, they did not affect the defendants’ substantial rights. When determining whether a defendant’s substantial rights were affected the court relied upon four factors:

1. Whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant,
2. Whether the conduct or remarks were isolated or extensive,
3. Whether the remarks were deliberately or accidentally made; and
4. Whether the evidence against the defendant was strong.

Applying these factors, the court determined that the comments were not meant to mislead the jury, but were presented to the jury for them to determine the witness' credibility; that the comments were isolated and that the defense had a chance to rebut the remarks in their closing argument; that the comments were made intentionally, but they were not intended to "inflame the jury"; and that the total strength of the evidence against the defendants was "sufficiently strong." Weighing these factors the court determined that the defendants' substantial rights had not been violated.

Hall v. Vasbinder,
563 F.3d 222 (2009), before Siler, Cook, and McKeague,
Circuit Judges.

Testimony and prosecutor's comments regarding defendant's silence at a probate hearing, during defendant's sexual assault trial do not violate defendant's constitutional rights to due process and against self incrimination. Also, defense counsel's failure to object to testimony and prosecutor's remarks regarding defendant's silence do not constitute ineffective assistance of trial counsel.

Christopher Hall was charged with criminal sexual conduct, obstruction of justice, and conspiracy to obstruct justice. Hall's 12 year-old daughter accused him of fondling her breast while giving her a back rub after she had been involved in a minor all-terrain vehicle accident. The incident went unreported for several months until Hall's daughter reported the incident to her mother, who lived out-of-state. Her mother encouraged her to report the incident to a teacher.

Hall's daughter reported the incident and was interviewed by a Michigan State police officer and a representative from the Family Independence Agency. Hall and his wife (Hall's daughter's step-mother) found out that Hall's daughter had reported the incident. The three of them went to visit an attorney to discuss the possible ramifications. Hall's daughter was told by the attorney to write a letter to the detective stating that she had made the whole thing up (this attorney was later charged with conspiracy to obstruct justice). Hall's daughter wrote the letter but never delivered a copy to the detective.

The following day a hearing was held in probate court to determine whether Hall's daughter, as well as the other children living with Hall and his wife, would be removed from the home and placed in foster care. Hall did not testify at that hearing, and his daughter, as well as all of the other children in he and his wife's care, were removed from the home.

Hall was later charged and proceeded to trial. At trial, the prosecutor and defense attorney both elicited testimony from several witnesses regarding Hall's silence at the probate

court hearing. On direct examination the prosecutor asked the lead detective whether Hall had testified at the probate court hearing and the prosecutor asked Hall on cross-examination why he had not testified during the probate hearing. The prosecutor also commented on Hall's silence during closing argument:

[T]he Defendant was there with his attorney, who sat there silent and made no objection and made no statement and offered no testimony at all, who stood there and what did he do? Hid from the proceedings, he hid from the proceedings, he did not say a word while this was going on. He cowered in fear of discovery for what he had done and what he did that week to try to thwart this investigation. That's what happened that Friday; it was the guilty man in Court being whispered to by his lawyer saying don't get involved in this, they might find something out. That's what you can conclude from that process.

I'd ask you this, how long does it take to prepare if all you're gonna do is go in there and tell the truth? How big of a deal is it to go somewhere and answer a few questions if it's the truth? It's not a big deal. What's a big deal is if it's a lie and you've gotta cover all the bases and get to everybody and put something together. That's why the Defendant didn't testify at that hearing that Friday.... He had to stay out of it because everybody didn't have their stories straight. That was guilt working there and guilty knowledge. The truth is always the truth, it's the truth the minute you're asked; you don't have to get it straight, it is straight.

The defense attorney did not object to any of the prosecutor's questions and while cross examining Hall's daughter asked her if Hall had testified at the probate hearing.

Hall was convicted and appealed his conviction to the Michigan Court of Appeals. The Court of Appeals found the prosecutor's remarks during closing argument to be improper, but ruled that they did not rise to the level of plain error due to, "the overwhelming evidence that was properly admitted from which the jury could find and defendant guilty beyond a reasonable doubt." The Court of Appeals also determined that the defense "ha[d] not demonstrated that he was prejudiced by his trial counsel's performance and ha[d] not overcome the presumption that his trial counsel rendered effective assistance."

The Michigan Supreme Court denied leave to appeal and Hall filed a petition for Habeas relief. The District Court, acting on the Magistrate Judge's recommendation, granted relief, concluding "that the prosecutor had violated Hall's Fifth Amendment right against self-incrimination and his due process right to a fair trial." The district court also found

Continued on page 34

Continued from page 33

that Hall's counsel's ineffectiveness "served as cause for Hall's procedural default of his Fifth Amendment and due process claims." The court excused the procedural default due to these errors.

The Sixth Circuit reversed the district court's decision, finding that Hall's Fifth Amendment right against self-incrimination and his due process right to a fair trial had not been violated, that he had not received ineffective assistance of counsel and that his claims were procedurally defaulted.

First, the Sixth Circuit found that since Hall's silence was pre-*Miranda* and the prosecutor's comments were not meant as substantive evidence of guilt, but rather as evidence used to "reply to a defense theory of governmental persecution," it was not improper for the prosecutor to comment on Hall's silence. The defense, in its opening statement, had tried to paint a picture that the probate court hearing had come about so quickly that Hall did not have an opportunity to testify. The defense was also first to question a witness as to who had testified during the probate court hearing, when they asked Hall's daughter on cross-examination if her father had testified at the probate court hearing.

The court reasons that by pursuing this line of defense, that the government had rushed to judgment and they had not allowed Hall a chance to testify at the probate court hearing, the defense had "left the door open" to allow the prosecutor to inquire whether Hall did in fact have a chance to testify, and to explain possible reasons why Hall might not have testified. The court states, "when the prosecutor goes no

further than to take defense counsel up on an invitation, that conduct will not be regarded as impermissibly calculated to incite the passions of the jury."

The court acknowledges that even though the prosecutor may examine whether Hall did in fact have a chance to testify and provide possible reasons why he did not, the statements made by the prosecutor in this case may have gone too far. "[T]he prosecutor arguably went beyond even that fairly wide opening by explicitly characterizing Hall's refusal to testify as evidence of 'guilt.'" Instead of determining whether the prosecutor's comments constituted harmless error, the court instead determined that Hall had procedurally defaulted his Fifth Amendment claim, thus making the determination of whether the prosecutor's error was harmless, moot. "Hall has procedurally defaulted his Fifth Amendment claim. In order to excuse the default, Hall relies solely on the ineffective assistance of his trial counsel. The prejudice prong of the ineffective assistance analysis subsumes the *Brecht* harmless-error review."

Hall claimed that his default was caused by ineffective assistance of counsel. In order to prevail on this claim a defendant must show a) cause for the default and b) actual prejudice from it. The court found that Hall's counsel's performance was not ineffective, "because Hall's silence was first raised by defense counsel, and because his silence fit within the defense's sound trial strategy, defense counsel was not ineffective for failing to object to the prosecutor's questions about Hall's silence." Therefore, Hall was not able to show cause for the default and the court determined that he had defaulted his Fifth Amendment claim. ■

The Justice Project's Recommendations for Georgia's Criminal Justice System

- **Require law enforcement agencies to adopt written policies and procedures for the conduct of photo and live lineups**
- **Require the electronic recording of full custodial interrogations in serious crimes.**
- **Implement safeguards designed to subject informant and accomplice testimony to higher scrutiny and increased transparency.**
- **Institute an improved, proactive forensic oversight system in order to set quality standards for evidence.**
- **Improve its existing discovery laws to make sure that judges and juries have access to all relevant evidence at trial.**
- **Enhance access to post-conviction DNA testing to accommodate technological advances and newly discovered evidence.**
- **Develop better accountability and oversight mechanisms to prevent against prosecutorial misconduct.**
- **Take steps to ensure that indigent defendants have access to adequate legal representation**

CAPITAL CASE REVIEW

By David M. Barron, Capital Post Conviction Branch

Supreme Court of the United States

District Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S.Ct. 2308 (2009) (non-capital)

(Roberts, C.J., for the Court, joined by, Scalia, Kennedy, Thomas, and Alito, JJ.; Stevens, J., dissenting, joined by, Ginsburg, Breyer, and Souter, JJ.)

Osborne filed a federal civil rights action seeking to obtain evidence in the State's possession so he could have DNA testing conducted that he believed would exonerate him. The federal court of appeals held that he was entitled to the evidence for that purpose. The Supreme Court granted certiorari and reversed, despite recognizing that "DNA testing can provide powerful new evidence unlike anything known before" and that it has "an unparalleled ability both to exonerate the innocent and convict the guilty." In doing so, the Court held: 1) the prosecution's duty, under *Brady v. Maryland*, to disclose material and exculpatory evidence does not extend to post conviction proceedings; 2) there is no substantive due process right to the release of evidence for DNA testing; and, 3) Alaska's procedures for DNA testing do not violate due process by "offend[ing] some principle of justice so rooted in the traditions and conscience of our people as to be fundamental" or "transgresses any recognized principle of fundamental fairness in operation" because: a) discovery is available; b) there is no time limitations or statute of limitations for seeking DNA testing; and, c) inmates shall be released upon a sufficient showing of new evidence that establishes innocence.

Note: By ruling that Alaska's procedures for obtaining DNA testing does not violate the federal procedural due process clause, the Court implicitly acknowledged that procedural due process rights apply to the constitutionality of State procedures for obtaining DNA testing, regardless of whether a right to the testing would otherwise exist.

Bobby v Bies, 129 S.Ct 2145 (2009) (Ginsburg, J., for a unanimous Court)

Bies was sentenced to death before the Supreme Court prohibited the execution of the mentally retarded. On direct appeal, the Ohio Supreme Court observed that Bies' "mild to borderline mental retardation merit[ed] some weight in mitigation," but ultimately concluded "the aggravating circumstances outweigh[ed] the mitigating factors beyond a reasonable doubt." After the Supreme Court outlawed executing the mentally retarded, the Ohio trial court ordered a full hearing on the question of Bies' mental retardation. Prior to the hearing, Bies filed a federal habeas petition seeking to prohibit the mental retardation hearing on double jeopardy

grounds. The federal district court agreed, vacating Bies' death sentence. The Sixth Circuit affirmed, reasoning that the Ohio Supreme Court had definitively determined as a matter of fact Bies' mental retardation, which, according to the Sixth Circuit, established Bies' "legal entitlement to a life sentence." Thus, the Sixth Circuit held that issue preclusion barred any renewed litigation of Bies' mental



David M. Barron

state. The Supreme Court reversed because: 1) "mental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues"; 2) this case involves "serial efforts by the defendant to vacate his capital sentence" instead of serial prosecutions, thereby meaning there was no acquittal and Bies was not "twice put in jeopardy"; 3) issue preclusion is available only to a final judgment prevailing party, which Bies was not because the Ohio Supreme Court's recognition of Bies' mental state as a mitigating factor was not essential to the death sentence he received.

Note: Although denying Bies' claim, the Court held that "even where the core requirements of issue preclusion are met, an exception to the general rule may apply when a change in the applicable legal context intervenes." In other words, issue preclusion may not apply once the law changes.

Note: The Court also held that it "would not advance the equitable administration of the law" to apply preclusion law when the change in law substantially altered a party's incentive to litigate an issue. Thus, where a change in law gives a party a newfound reason to litigate a particular issue, it would, arguably, be inappropriate to apply preclusion to bar the litigation.

Montejo v. Louisiana, 129 S.Ct 2079 (2009)

(Scalia, J. for the Court; joined by, Roberts, C.J., Kennedy, Thomas, and Alito, JJ; Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, J.)

The Court overruled *Michigan v. Jackson*, which held that a criminal defendant's waiver of the right to counsel, following a critical stage, is presumptively invalid. From now on, the Sixth Amendment right to counsel should instead be protected by the procedures the Court has established to secure the Fifth Amendment right to counsel, namely *Miranda* and its progeny.

Continued on page 36

Continued from page 35

Cone v. Bell, 129 S.Ct. 1769 (2009)

(Stevens, J., for the Court, joined by, Kennedy, Souter, Ginsburg, and Breyer, JJ.; Roberts, C.J., concurring in judgment; Alito, J., concurring in part and dissenting in part; Thomas, J., dissenting, joined by Scalia, J.)

Cone contended that the State violated his right to due process by suppressing witness statements and police reports that would have corroborated his trial defense and bolstered his case in mitigation of the death penalty. At trial, Cone asserted an insanity defense, contending that he killed two people while suffering from acute amphetamine psychosis, a disorder caused by drug addiction. The State discredited that defense, alleging that Cone's drug addiction was "baloney." Ten years later, Cone learned that the State had suppressed evidence supporting his claim of drug addiction. Cone presented his new evidence to the state courts in a petition for post conviction relief, but the state courts denied him a hearing on the ground that his withheld evidence claim had been "previously determined" either on direct appeal from his conviction or in earlier collateral proceedings. In federal habeas proceedings, the district court concluded that the state courts' disposition rested on an adequate and independent state ground that barred further review in federal court. The Sixth Circuit affirmed, acknowledging that Cone raised his withheld evidence claim in state court but nevertheless considering itself barred from reaching the merits of the claim because the state courts had concluded the claim was previously determined or waived under Tennessee law. "Doubt concerning the correctness of that holding, coupled with conflicting decisions from other Courts of appeals, prompted [the] grant of certiorari" to determine "whether a federal habeas claim is procedurally defaulted when it is twice presented to the state courts." The Court answered this question in the negative. The Court also held that the withheld documents were not material to the question whether Cone committed murder with the requisite mental state, the lower courts failed to adequately consider whether the same evidence was material to Cone's sentence. Thus, the Supreme Court vacated the Sixth Circuit's decision and remanded to the district court to determine in the first instance whether there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment of the appropriate penalty for Cone's crimes.

The law governing procedural default: "It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that "is independent of the federal questions and adequate to support the judgment. In the context of federal habeas proceedings, the independent and adequate state ground doctrine is designed to ensure that the States' interest in correcting their own mistakes is respected in federal habeas. When a petitioner fails to properly raise his federal claims in state court, he deprives

the State an opportunity to address those claims in the first instance and frustrates the State's ability to honor his constitutional rights. Therefore, consistent with the longstanding requirement that habeas petitioners must exhaust available state remedies before seeking relief in federal court, [the Court] has held that when a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review. That does not mean, however, that federal habeas review is barred every time a state court invokes a procedural rule to limit its review of a state prisoner's claims. [The Court has] recognized that the adequacy of state procedural bars to the assertion of federal questions is not within the State's prerogative finally to decide; rather, adequacy is itself a federal question." Thus, federal courts have "no concomitant duty to apply state procedural bars when state courts have themselves declined to do so."

A claim does not become procedurally defaulted because it is twice presented in state court: The Court held that "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. As the Court noted in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), "when a state court declines to revisit a claim it has already adjudicated, the effect of the later decision upon the availability of federal habeas is nil because a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing procedural default. When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for federal adjudication." Thus, the Court held that "[a] claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once." The Sixth Circuit's decision to the contrary was erroneous.

The law governing claims that the prosecution withheld evidence: "Although the State is obligated to prosecute with earnestness and vigor, it is as much its duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Accordingly, [the Court has] held that when the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment." Evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally

mandated disclosure when it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”

2254(d)’s limitation on relief does not apply to Cone’s withheld evidence claim: Because the state courts did not reach the merits of Cone’s withheld evidence claim, deciding it instead on procedural default grounds, 2254(d)’s limitation on relief standard to “any claim that was adjudicated on the merits in State court proceedings” does not apply. Instead, the claim is reviewed *de novo*.

The suppressed evidence was not material to determining guilt but may be material to determining the appropriate sentence:

Despite “tak[ing] exception to the Court of Appeals’ failure to assess the effect of the suppressed evidence collectively rather than item by item,” and although recognizing the suppressed evidence would have strengthened Cone’s defense that he was impaired by his drug use around the time of the crimes, the Court held that the suppressed evidence falls short of being sufficient to sustain Cone’s insanity defense in light of the fact that Cone’s behavior before, during, and after the crimes was inconsistent with the contention that he was insane at the time of the crime. The Court, however, held that the same cannot be said with regard to the jury’s sentencing phase decision. “There is a critical difference between the high standard Cone was required to satisfy to establish insanity as a matter of Tennessee law and the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case.” Noting that the jury was required to consider whether Cone’s capacity to appreciate the wrongfulness of his conduct or to conform it to the requirements of law was substantially impaired as a result of intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment, the Court held “[i]t is possible that the suppressed evidence, viewed cumulatively, may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge, and that Cone’s drug use played a mitigating, though not exculpating, role in the crimes he committed. The evidence might also have rebutted the State’s suggestion that Cone had manipulated his expert witnesses into falsely believing he was a drug addict when in fact he did not struggle with substance abuse.” Because the suppressed evidence may have been material to the jury’s assessment of the proper punishment, and because “[n]either the Court of Appeals nor the District Court fully considered whether the suppressed evidence might have persuaded one or more jurors that Cone’s drug addiction -- especially if attributable to honorable service of his country in Vietnam -- was sufficiently serious to justify a decision to imprison him for life rather than sentence him to death,” the Court remanded the case to the district court to determine whether the evidence may have been material to determining the appropriate sentence.

Harbison v. Bell, 129 S.Ct. 1481 (2009)

(*Stevens, J., for the Court; joined by, Kennedy, Souter, Ginsburg, and Breyer, JJ.*); *Roberts, C.J., concurring in judgment; Thomas, J., concurring in judgment; Scalia, J., joined by, Alito, J., concurring in part and dissenting in part*) After exhausting his appeals, Harbison requested that the federal defender’s office be appointed to represent him in state clemency proceedings. The Sixth Circuit held that the governing federal law, 18 U.S.C. 3599, did not authorize appointing counsel to handle clemency proceedings. Certiorari was granted to determine if a certificate of appealability is necessary to appeal an order denying a request for appointed counsel under 18 U.S.C. 3599 and whether 3599’s reference to “proceedings for executive or other clemency as may be available to the defendant encompasses state clemency proceedings.” The Court held that a COA is not necessary and that 18 U.S.C. 3599 authorizes appointing counsel to represent condemned inmates in state clemency proceedings. In so ruling, the Court reiterated that “clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted,” and that “[f]ar from regarding clemency as a matter of mercy alone, we have called it the ‘fail safe’ in our criminal justice system.”

A COA is not required to appeal the denial of appointment of counsel:

28 U.S.C. 2253 requires a COA to appeal from the “final order in a habeas proceeding in which the detention complained of arises out of process issued by a State court.” This provision “governs final orders that dispose of the merits of a habeas corpus proceeding – a proceeding challenging the lawfulness of the petitioner’s detention.” Because “[a]n order that merely denies a motion to enlarge the authority of appointed counsel (or denies a motion for appointment of counsel) is not such an order,” the Court held that a COA is not required to appeal.

Note: By saying COA’s govern final orders that dispose of the merits of habeas proceedings, the Court made clear that a COA is not necessary to appeal rulings that neither dispose of the ultimate merits of a claim nor operate as an impediment to reaching the merits of a claim. Thus, a COA should not be necessary to appeal the denial of discovery, the denial of an evidentiary hearing, the denial of a motion to expand the record, or how AEDPA does or does not apply to a particular claim.

The plain language of 18 U.S.C. 3599 authorizes counsel appointed to represent a state petitioner in 28 U.S.C. 2254 habeas proceedings to represent the petitioner in subsequent proceedings in state court, including clemency:

18 U.S.C. 3599 is titled “Counsel for financially unable defendants” and provides for appointment of counsel in habeas proceedings challenging a state imposed death sentence. Subsection (e) provides: “Unless replaced by similarly qualified counsel upon the attorney’s own motion or upon motion of the defendant,

Continued on page 38

Continued from page 37

each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for a new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.” Interpreting the plain language of subsection (e), the Court held that “[b]ecause state clemency proceedings are ‘available’ to state petitioners who obtain representation pursuant to [3599], the statutory language indicates that appointed counsel’s authorized representation includes [clemency] proceedings.” In so ruling, the Court rejected the Government’s argument that the statute refers to only federal clemency proceedings – a contention that is refuted by the fact that the statute refers to executive or other clemency and the only form of clemency in the federal system is executive clemency – and the Government’s argument that the word “available” limits the scope of representation. Instead, when an attorney is appointed at the habeas stage, the “subsequent stage” portion of the statute means the attorney is obligated to represent the petitioner in all proceedings “subsequent to her appointment.”

18 U.S.C. 3599 does not apply to state court proceedings that follow the issuance of a federal writ of habeas corpus:

Because a retrial is properly understood as the commencement of new proceedings, not a subsequent stage of judicial proceedings,” the “subsequent proceeding” portion of 3599(e) does not require counsel appointed under 18 U.S.C. 3599 to handle the retrial in the event appointed counsel is successful in overturning the conviction or death sentence.

Note: The Court noted that information from a claim rejected by the courts “could be marshaled together with information about Harbison’s background in a clemency application to the Tennessee Board of Probation and Parole and the Governor.” By so noting, the Court recognized that claims rejected by the courts can be an appropriate basis for granting clemency.

Thompson v. McNeil, 129 S.Ct. 1299 (2009) (regarding denial of certiorari)

McNeil was sentenced to death in 1976, after relying on his attorney’s erroneous advice that he would not be sentenced to death if he pled guilty. Since then, two state court judgments have set aside McNeil’s death sentence. At the third trial, five jurors voted for less than death but the court once again imposed a death sentence.

Stevens, J., respecting the denial of certiorari: Stevens focused on the conditions of confinement and length of

time on death row, concluding that combination violates the Eighth Amendment. Stevens described the conditions of confinement as “especially severe” whereby McNeil spends up to 23 hours per day in isolation in a 6-by 9-foot cell, and had two death warrants signed against him and stayed only shortly before he was scheduled to be put to death. “The dehumanizing effects of such treatment are undeniable.” Further, Stevens concluded that “delaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner’s death. It would therefore be appropriate to conclude that a punishment of death after significant delay is so totally without penological justification that it results in the gratuitous infliction of suffering.” Noting the percentage of capital cases reversed, the number of innocent people executed, and that delays in carrying out executions are caused, in part, by the State’s failure to apply constitutionally sufficient procedures at the time of the initial conviction or sentencing, Stevens ultimately concluded that “our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decisions to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process.”

Thomas, J., concurring in denial of certiorari: Thomas saw the issue as “whether the death-row inmate’s litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right.” Thomas believes it does not because such a claim is a mockery to justice because it allows a death row inmate to take advantage of the panoply of appellate and post conviction proceedings only to then complain that it took too long.

Breyer, J., dissenting from the denial of certiorari: Breyer believes the issue of whether executing a person after a lengthy stay on death row violates the Eighth Amendment is an important issue that merits the Court’s attention. Breyer also rejected Justice Thomas’ argument that McNeil’s “decision to exercise his right to seek appellate review of his death sentence automatically waives a claim that the Eighth Amendment proscribes a delay of more than 30 years.” To Breyer, that argument is particularly untenable when the delay “resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible.”

Certiorari Grants

Wood v. Allen, No. 08-9156, decision below, 542 F.3d 1281 (11th Cir.), cert. granted, 5/18/09

1. Whether a state court’s decision on post-conviction review is based on an unreasonable determination of the

facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it demonstrates otherwise?

2. Whether the rule followed by some circuit courts, including the majority in this case, abdicates the court's judicial function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut subsidiary factual findings?

Beard v. Kindler, No. 08-992, decision below, 542 F.3d 70 (3d Cir.), cert. granted, 5/18/09

After murdering a witness against him and receiving a sentence of death, Respondent broke out of prison, twice. Prior to his recapture in Canada years later, the trial court exercised its discretion under state forfeiture law to dismiss respondent's post-verdict motions, resulting in default of most appellate claims. On federal habeas corpus review, the court of appeals refused to honor the state court's procedural bar, ruling that, because "the state court ... had discretion" in applying the rule, it was not "firmly established" and was therefore "inadequate." Is a state rule automatically "inadequate" under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus review – because the state rule is discretionary rather than mandatory?

United States Court of Appeals for the Sixth Circuit

Fautenberry v. Mitchell, 2009 WL 1975853 (6th Cir.)

(Batchelder, J., for the Court; joined by, Gilman, J.; Moore, J., concurring in judgment)

After exhausting all available appeals, Fautenberry filed an ex parte motion for funds under 18 U.S.C. §3599 to retain a neuropsychologist to develop evidence to use in a clemency petition. In support of his motion, Fautenberry submitted the affidavit and report of the neuropsychologist who evaluated Fautenberry during his state post-conviction proceedings and who had concluded that Fautenberry suffers from a "mild-although by no means insignificant" degree of brain impairment, which can "cause serious problems in such areas of day-to-day functioning as impulse control; modulation of affect; planning; problem-solving; and the capacity to tolerate frustration." Fautenberry also presented affidavits providing anecdotal evidence of head injuries Fautenberry suffered as a child and medical records documenting Fautenberry's head injuries. The district court found that Fautenberry's motion was "long on the head injuries that Fautenberry suffered and the manner in which those injuries likely affected his day-to-day behavior . . . but short on an explanation for why another neuropsychological assessment is reasonably necessary in this case." Thus, the district court held that funds for a

neuropsychological evaluation were not reasonably necessary and accordingly denied Fautenberry's motion. Fautenberry appealed and the Sixth Circuit affirmed.

The district court did not abuse its discretion in denying funds:

18 U.S.C. 3599(f) provides "upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of the fees and expenses therefore under subsection (g)." Due to the discretionary language in 3599(f), the Sixth Circuit reviews a district court's decision on funding for an abuse of discretion. "A district court abuses its discretion where it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." To find that one of these errors took place, the court must have "a definite and firm conviction that the trial court committed a clear error of judgment." On appeal, Fautenberry argued only that the district court relied upon clearly erroneous findings of fact, namely that the district court improperly relied on the previous neuropsychological evaluation as a basis to find funding for a current evaluation not reasonably necessary. Fautenberry further argued that his mental condition could have changed since the last evaluation and that the prior evaluation was incomplete, outdated, and unreliable. The Sixth Circuit held, however, that whether the prior evaluation was incomplete, outdated, and unreliable is not something that can be reviewed in determining whether funds for a current evaluation should have been granted in preparation for a clemency petition. Instead, the issue remains "whether the district court, acting on the information before it at the time, committed a clear error of judgment." The Sixth Circuit held that it did not, because Fautenberry: 1) did not argue to the district court, or present evidence or authority that might have supported the argument, that the results of the prior evaluation are outdated due to advancements in the field of neuropsychology or changes in Fautenberry's condition, or that a new evaluation might show that Fautenberry now suffers brain impairment more severe than was diagnosed 13 years ago; 2) did not attempt to show that the expertise of Fautenberry's proposed current expert or his methods would lead to a more accurate diagnosis; and, 3) did not point to any facts suggesting his brain impairment has worsened. Simply, according to the Sixth Circuit, Fautenberry presented nothing to the district court from which it could have concluded that Fautenberry wanted to present an "updated evaluation" in support of clemency. Thus, the district court did not abuse its discretion in holding that the evaluation Fautenberry sought would be duplicative of information already available and thus not reasonably necessary.

Continued on page 40

Continued from page 39

Fautenberry presented no authority for staying an execution so evidence can be presented in support of clemency: The Sixth Circuit also noted that Fautenberry has not cited any legal authority upon which the court could base a stay of the State's right to execute its judgment so Fautenberry could obtain a neuropsychological examination and then present the results to the governor.

Moore, J., concurring in judgment: "Because an accurate understanding of John Fautenberry's current mental state is essential to a determination of whether he is entitled to clemency, [Moore] believe[d] that retention of a neuropsychologist is reasonably necessary for Fautenberry's representation during his clemency proceedings. Fautenberry has a history of head trauma and suffers from significant brain impairment, part of which was identified by a neuropsychological evaluation performed in 1996. Now thirteen years later, it is important that a Parole Board and the Governor have a complete picture of Fautenberry's current mental state, including whether he still suffers from brain impairment. A stale evaluation performed in 1996 does not serve this purpose. Even without specific changes, which, in any event, could be discovered only through a current evaluation, it is obvious that Fautenberry's mental state would have changed in the past thirteen years he has spent on death row." But, because Fautenberry did not argue in the district court that "an updated neuropsychological evaluation is reasonably necessary for his representation in clemency proceedings . . . because a current picture of Fautenberry's mental state is clearly important to determining whether he should be executed," Moore concurred with the majority that the court cannot conclude the district court abused its discretion based on the record before it. Thus, she would uphold the district court's ruling, finding that funds for an evaluation are not reasonably necessary. Moore, however, "would not foreclose Fautenberry from presenting new arguments to the district court."

***Harbison v Little*, 2009 WL 1884378 (6th Cir.)**

(Siler, J. for the Court, joined by, Cook, J.; Clay, J., dissenting)

In 2006, Harbison filed a 42 U.S.C. 1983 suit challenging the chemicals and procedures Tennessee uses to carry out lethal injections. In that suit, Harbison argued that Tennessee's lethal injection protocol violates the Eighth Amendment because the State knowingly disregarded the protocol's substantial risk of inflicting unnecessary pain and because the protocol involves the unnecessary and wanton infliction of pain. In 2007, the Governor issued an executive order directing the Department of Corrections to review the lethal injection protocol. A commission was formed that ultimately recommended changing to a one-drug barbiturate protocol. The Commissioner of Corrections rejected that recommendation because it had not been done by any other State and could cause negative political ramifications. Shortly before certiorari was granted in *Baze*, the district

court held that Tennessee protocol created an inherent risk of sodium thiopental (the barbiturate) being improperly administered and therefore leaving the inmate conscious when the second and third drugs are administered. The district court cited the following reasons for reaching that conclusion: 1) the protocol did not provide a test for determining whether the inmate was conscious before administering the second drug, pancuronium bromide; 2) the State did not carefully select and adequately train the individuals performing the execution; 3) the protocol did not provide for tactile monitoring of the IV lines during the administration of the drugs; and, 4) the State protocol review committee had recommended several safeguards as part of its review process, including the adoption of a "one-drug" protocol, but Corrections did not adopt these recommendations in issuing the amended protocol. In light of these four findings, the district court held that the State knowingly disregarded an excessive risk of causing pain to the inmate when it issued the amended protocol, and thus Tennessee's execution protocol violates the Eighth Amendment cruel and unusual punishment clause. Tennessee appealed. While the case was pending on appeal, the Supreme Court of the United States decided *Baze*. Without explaining why and despite Supreme Court law holding that the narrowest concurring opinion controls when there is no majority opinion, the Sixth Circuit ruled that the plurality opinion is controlling. Under the *Baze* plurality, as characterized by the Sixth Circuit, "[a] prisoner cannot successfully challenge a method of execution merely by showing that the method may result in pain, either by accident or as an inescapable consequence of death, or that a slightly safer alternative is available. In order, for a lethal injection protocol to violate the Eighth Amendment, the inmate must show it "creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. With respect to the disposition of future challenges to state protocols, the plurality opinion stated: 'A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.'" As in *Baze*, Harbison conceded that if the protocol were followed perfectly, it would not pose an unconstitutional risk of pain, and argued instead that maladministration of the sodium thiopental would result in a severe risk of pain from the subsequent drugs that could go undetected. Against this backdrop, the Sixth Circuit analyzed Tennessee's protocol. To the Sixth Circuit, in *Baze*, the Supreme Court considered each of the risks that caused the district court to find Tennessee's lethal injection protocol unconstitutional and held that they did not constitute a substantial risk of serious harm. *Baze* also rejected the failure to adopt a one-drug protocol as a basis for finding the current protocol unconstitutional. "Given the direction in *Baze* that a protocol substantially similar to Kentucky's would not create a risk that violates the constitutional standard set forth in the Court's opinion, [the Sixth Circuit held that] Tennessee's

protocol must be upheld because *Baze* addressed the same risks identified by the trial court, but reached the conclusion that they did not rise to the level of a constitutional violation.”

Standard of review: The Sixth Circuit held that whether an execution protocol exposes an inmate to a substantial risk of serious harm is a question of law, and thus is reviewed *de novo*.

Tennessee’s lethal injection protocol: Two paramedic technicians insert catheters into each of the inmate’s arms. These catheters run from the inmate’s arms to the execution room, where the executioner administers the drugs into one of the lines. The executioner injects each drug intravenously, with saline flushes in between the different drugs. The drugs and saline flushes are administered in 50 cubic centimeter syringes. The following amounts of each drug are used: 5 grams of sodium thiopental, administered in four syringes; 100 milligrams (1 mg/mL) of pancuronium bromide, administered in two syringes, and 100 milliliters (of a 2 mEq/mL) of potassium chloride, administered in two syringes. The protocol also describes the role of each drug: the sodium thiopental depresses the central nervous system, causing “sedation or sleep, depending on the dose,” the pancuronium bromide is a muscle paralytic that “will assist in the suppression of breathing and ensure death,” and finally the potassium chloride “causes cardiac arrest and rapid death.” After all of the injections are administered, the executioner closes the IV line and opens up the drip chamber, and signals the warden that all of the syringes have been administered. After a five-minute waiting period, a physician is brought in to pronounce the inmate’s death.

Failure to check for consciousness does not violate the Eighth Amendment: *Baze* held that “because a proper dose of sodium thiopental would render any check for consciousness unnecessary, the risks of failing to adopt additional monitoring procedures are thus even more remote and attenuated than the risks posed by the inadequacies of Kentucky’s procedures designed to ensure the delivery of thiopental.” Although the *Baze* plaintiffs argued that “the State needed to adopt certain steps to ensure the prisoner’s unconsciousness, including some of the tests suggested by Harbison, the *Baze* Court concluded that a visual inspection of the inmate by the warden was sufficient to protect the inmate’s Eighth Amendment rights.” Thus, the Sixth Circuit held that *Baze* required it to reject Harbison’s failure to check for consciousness claim and to reverse the district court’s ruling on that aspect of Tennessee’s lethal injection protocol.

The training and selection of the execution personnel does not give rise to an Eighth Amendment violation: In *Baze*, the Supreme Court rejected an argument that the execution team was inadequately trained, noting that the Kentucky protocol required: 1) team members to be certified medical professionals who engage in regular practice sessions; 2) the team to run primary and backup IV lines for the lethal injection process

and to prepare two sets of the drugs before the execution begins; and, 3) the warden and deputy warden to monitor the IV lines during the execution for any signs of difficulties. According to the Sixth Circuit, Tennessee’s protocol contains similar requirements: 1) two certified paramedics insert the catheters into the inmate’s arms; 2) the execution team conducts monthly practice sessions where they inject saline solution into volunteers; and, 3) the warden monitors the execution to safeguard against potential problems. Thus, the Sixth Circuit held that the training and selection of Tennessee’s execution team does not violate the Eighth Amendment even though a member of the execution team had a history of drug and alcohol addiction and psychological disorders; the executions received only approximately forty hours of training on inserting I.V. catheters, but not on setting up the I.V. lines, administering drugs through the I.V. lines, or monitoring the I.V. lines during the injections; the Warden testified that his only training was watching executions in Texas, visiting an execution site in Indiana, and talking with other states about the process; and, the members of the execution team could not identify any of the numerous potential problems medical experts testified could occur with the I.V. catheters and lines during their use, including slippage of the catheter, stopcocks used to set the directional flow of the I.V. turned in the wrong direction, and injection of the wrong drug.

Failure to provide for tactile monitoring of the I.V. lines does not violate the Eighth Amendment: In *Baze*, the Supreme Court held that a warden and deputy warden, who have no medical training, visually monitoring the condemned inmate for signs of any problems was sufficient to satisfy the Eighth Amendment. Tennessee’s protocol requires the warden to be in the execution room in order to guard against any problems. Thus, the Sixth Circuit held that Tennessee’s protocol satisfies the level of monitoring required under *Baze* and that the failure to touch or palpate the insertion site does not give rise to an Eighth Amendment violation.

The failure to adopt a one-drug protocol does not violate the Eighth Amendment: In light of *Baze*’s statement that the continued use of the three-drug protocol cannot be seen as an “objectively intolerable risk” in light of the fact that no other state adopted it, the Sixth Circuit held that Tennessee’s failure to adopt a one-drug protocol does not violate the Eighth Amendment.

The district court’s finding that the failure to adopt other safeguards must be reversed in light of *Baze*: Because, according to the Sixth Circuit, *Baze* held that the Eighth Amendment requires the condemned inmate to first establish a substantial risk of serious harm before offering an alternative that is feasible, readily implemented, and that significantly reduces a substantial risk of severe pain, Harbison’s failure to make that showing requires reversing the district court’s ruling that the failure to adopt alternative safeguards violates the Eighth Amendment.

Continued on page 42

Continued from page 41

Clay, J., dissenting: Because the district court rendered its decision before *Baze*, it never rendered a judgment as to whether Tennessee's protocol complied with *Baze*. Judge Clay thus concluded that "[b]y failing to provide the district court with an opportunity to consider Tennessee's protocol in light of *Baze*, the majority effectively usurps the district court's role as a fact finder and decides an issue never presented to the district court: whether there are material differences between Kentucky's and Tennessee's lethal injection protocols." Because appellate courts are obligated to provide district courts with the first opportunity to receive evidence and rule on an issue, Judge Clay would remand this case for an evidentiary hearing in light of *Baze*. Judge Clay also noted that "[i]t is not unforeseeable that a three-drug protocol that is, at first glance, similar to Kentucky's protocol, could fail to meet the standard set forth in *Baze*. That determination would turn in large part, not on the state's written protocol, but rather on the way the protocol is implemented."

***Palmer v. Bagley*, 2009 WL 1528503 (6th Cir.)**

(*Griffin, J., for the Court, joined by Daughtrey and Cole, JJ.*)

This case involved the following issues: 1) whether the trial court erred by refusing to instruct the jury on involuntary manslaughter, a lesser included offense of aggravated murder; 2) whether the trial court erroneously instructed the jury that it could convict Palmer of aggravated murder without specifically finding that he intended to kill; 3) whether Palmer was denied a fair trial by the prosecutor's misleading argument to the jury that the "prior calculation and design" necessary to convict him of aggravated murder could occur in ten to fifteen seconds and by introducing evidence at the penalty phase that Palmer failed to pay child support and sexually abused his children.

Palmer's Eighth Amendment and due process rights were not violated by the trial court's refusal to instruct the jury on involuntary manslaughter, a lesser included offense of aggravated murder: In *Beck v. Alabama*, 447 U.S. 625 (1980), the United States Supreme Court held that "the jury must be permitted to consider a verdict of guilt of a noncapital offense in every case in which the evidence would have supported such a verdict." The reasoning for that, as the Supreme Court explained in *Hopper v. Evans*, 456 U.S. 605 (1982), is that "a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious crime. Or a jury might acquit because it does not think the crime warrants death, even if it concludes that the defendant is guilty of a lesser offense. While in some cases a defendant might profit from the preclusion clause, we concluded that in every case it introduces a level of uncertainty and unreliability into the fact finding process that cannot be tolerated in a capital case." The Supreme Court later clarified, in *Schad v. Arizona*, 486 U.S. 447 (1984), that the central concern remedied by *Beck* was forcing the jury into the

conundrum of an "all-or-nothing choice between the offense of conviction (capital murder) and innocence" - - a concern that the *Schad* Court held was not present where the jury was given a third option, second degree murder. Palmer asserted that a jury could rationally have found that he did not intend to kill the victims, thereby entitling him to an involuntary manslaughter instruction, because at the time of the shootings, or immediately prior, he was under the influence of alcohol or LSD; the victims were strangers; Palmer's companion and one of the victims were involved in an altercation over which he had no control; he thought he had shot his companion not the victim; the second victim threw his arms up, possibly to grab Palmer, and "in his state of confusion and with no time to think, his gun fired again"; he denied any intent to kill or rob the victims; there were no other witnesses with personal knowledge who testified about the shootings; and the evidence regarding his intent was circumstantial. Palmer's jury, however, was instructed on aggravated murder, a lesser included offense of aggravated murder distinguishable by the absence of "prior calculation and design," and aggravated robbery. Thus, Palmer's jury was instructed on lesser offenses, preventing the jury from having to choose between a death-eligible offense and acquittal, and thus taking the case out of the context of *Beck*. Accordingly, the Sixth Circuit held that Palmer was not entitled to an involuntary manslaughter instruction under the *Beck* line of cases. The Sixth Circuit also held that the state court's determination that the evidence - - Palmer shot both victims multiple times in the head, with one of the shots having been fired from point-blank range - - would not permit the jury to rationally find Palmer guilty of involuntary manslaughter was not contrary to *Beck* or any other clearly established Supreme Court precedent.

Palmer's claim that the trial court erroneously instructed the jury that it could convict him of aggravated murder without finding that he intended to kill is procedurally defaulted: Although the Warden conceded that she failed to raise procedural default in the district court, the Sixth Circuit decided to exercise its discretion, after the Warden requested that it do so, to find this claim defaulted by Palmer's failure to abide by Ohio's contemporaneous objection rule.

Palmer's argument that the prosecutor misled the jury by telling it that the "prior calculation and design" necessary to convict him of aggravated murder could occur in ten to fifteen seconds is procedurally defaulted: During closing argument, the prosecutor told the jury: "Although it's true that we have to show the defendant had a specific intent to kill this man, and it's true we have to show that he had some degree of forethought that he thought about it for some period of time, there is no legally required period of time. The defendant testified that the whole thing happened in 10 to 15 seconds. If in those 10 to 15 seconds, if that's true - and we submit the evidence will show that the length of time is virtually impossible - but even if that were true, it is legally possible for the defendant to have in his mind sufficient

prior calculation and design in that period of time.” The Ohio courts held that Palmer forfeited his claim regarding this statement by not objecting and thus reviewed the claim only for plain error. Palmer attempted to get around the default by arguing actual innocence of the specific intent to kill. The Sixth Circuit rejected this argument because: 1) Palmer forfeited it by not raising it in his objections to the magistrate judge’s recommendation that the claim be deemed procedurally defaulted; and, 2) the miscarriage of justice exception to procedural default is concerned with actual as compared to legal innocence.

The Constitution permits the states to admit all other acts evidence in the penalty phase of a death penalty case: Relying on the United States Supreme Court’s statement in *Tuilaepa v. California*, 512 U.S. 967 (1994), that “[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. Indeed the jury may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty,” the Sixth Circuit held that the “Constitution permits the states to admit *all* other-acts evidence in the penalty phase of a capital case.” Thus, the court held that no error took place when the prosecutor introduced evidence in the penalty phase that Palmer failed to pay child support and sexually abused his children.

***Wilson v. Strickland*, 2009 WL 1477248 (6th Cir.) (per curiam)**
(*Before Cole, Clay, and Rogers, JJ.*)

Wilson intervened in the *Cooley* lethal injection litigation, but was dismissed as a party when the federal district court held that Wilson’s complaint was barred by the applicable statute of limitations. After an evidentiary hearing on the lethal injection issue was held on behalf of *Biros* (another plaintiff in *Cooley*), Wilson filed a new lethal injection suit claiming information learned from the *Biros* hearing proved that the personnel charged with implementing Ohio’s execution protocol lack the necessary knowledge and training to carry out the execution “without exposing [Wilson] to a substantial risk of pain.” The district court dismissed Wilson’s complaint as time-barred, expressly refusing to consider whether the claim is also barred by *res judicata*. Wilson appealed to the Sixth Circuit, which affirmed the dismissal on the alternative ground that Wilson’s suit was barred by the doctrine of *res judicata* without addressing whether it was also barred by the applicable statute of limitations.

Standard of review of dismissal of complaint for failing to state a claim on which relief can be granted: The Sixth Circuit reviews such a dismissal *de novo* and “must accept all well-pleaded factual allegations of the complaint as true and construe the complaint in the light most favorable to the plaintiff. Dismissal is appropriate only if it is clear that no

relief could be granted under any set of facts that could be proved consistent with the allegations.”

The doctrine of *res judicata*: Under *res judicata*, a “final judgment on the merits bars further claims by parties or their privies based on the same cause of action” as long as the following four elements are satisfied: 1) a final decision on the merits by a court of competent jurisdiction; 2) a subsequent action between the same parties or their privies; 3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and, 4) an identity of the causes of action. For the third and fourth requirement to be satisfied, “there must be an identity of the causes of action, that is, an identity of the facts creating the right of action of the evidence necessary to sustain each action.”

Wilson’s lethal injection action is barred by *res judicata*: Wilson argued that his lethal injection lawsuit differed from his previous lethal injection lawsuit because this one challenged the administration of the protocol rather than the protocol itself and because it is based upon a different set of facts that came about in light of testimony at the *Biros* evidentiary hearing. Wilson’s complaint, however, said he was challenging “any other procedures, practices, policies, protocols and means for accomplishing his execution that are or might be adopted, and alleged the department of corrections has created, maintained, and implemented a method of execution and procedures that if utilized on Wilson, will deprive him of his constitutional rights. Relying on this and other language in Wilson’s complaint, the Sixth Circuit held that this suit raised the same basic challenge as his previous one - - “that the Defendants’ personnel are not adequately qualified or prepared to execute him within the parameters permitted by the Constitution.” The Sixth Circuit also held that Wilson’s suit is based on the same assertion as the previous one - - “the manner in which the Defendants intend to execute him could result in a painful death in violation of his constitutional rights.” Thus, the Sixth Circuit held that Wilson’s suit is barred by *res judicata* and must be dismissed without reaching the issue of whether the statute of limitations expired before the suit was filed.

***Hartman v. Bobby*, 2009 WL 899917 (6th Cir.)**
(*unpublished order before panel of Clay, Gilman, and Rogers, JJ.*)

Hartman sought authorization to file a successive habeas petition and for a stay of execution on the basis of previously undiscoverable evidence, which Hartman argued demonstrates his actual innocence when viewed in the context of all the evidence in the case. The undiscovered evidence would purportedly show that Hartman’s prison jailmate, who testified at trial that Hartman confessed to the crime, may have perjured himself. Hartman also sought access to crime scene evidence, including hairs found on the victim’s body, that has never been tested. Because the Supreme Court of the United States recently heard oral argument, in *District Attorney’s Office v. [redacted]*
Continued on page 44

Continued from page 43

Osborne, on whether the State is obligated to produce evidence of DNA testing that could be material to a showing of actual innocence, the Sixth Circuit reserved ruling on whether Hartman is entitled to access to the evidence. A stay of execution is an equitable remedy that shall be granted when a balance of the following factors favors a stay: 1) likelihood of success on the merits; 2) likelihood of irreparable harm absent a stay; 3) whether the stay will cause substantial harm to others; and, 4) whether the stay would serve the public interest. The Sixth Circuit held that the harm in executing Hartman would be irreversible and that temporarily staying the execution would not cause substantial harm to others. Without deciding at this point whether authorization to file a successive petition should be granted, the court granted a stay of execution “to permit a determination regarding whether further evidentiary development will support his claim of actual innocence,” and decided that it would revisit the issue of whether authorization to file a successive habeas petition should be granted once the Supreme Court decides *Osborne*.

***Smith v. Mitchell*, 567 F.3d 246 (6th Cir. 2009)**

(*Moore, J., for the Court; joined by, Daughtrey and Clay, JJ.*) Smith’s case raised five issues: 1) whether the prosecutor committed misconduct at trial by arguing that Smith lacked remorse and by improperly questioning Smith on cross-examination; 2) whether trial counsel provided ineffective assistance of counsel in challenging Smith’s confession to police; 3) whether Smith was sentenced to death for a murder he did not commit; 4) whether the Ohio death penalty statute is unconstitutional as applied to Smith; and, 5) whether Ohio’s adoption of a one-tier system of appellate review for capital cases denied Smith due process.

The state court’s ruling that the prosecutor’s comments during the guilt phase were not improper was not unreasonable: Smith argued that the prosecutor’s comments during closing argument that Smith lacked remorse and the prosecutor’s inflammatory comments about the victim during cross-examination were improper. To obtain relief on an improper comment/argument claim, the prosecutor’s comments must “so infect the trial with unfairness as to make the resulting conviction a denial of due process.” In determining this, the Sixth Circuit considers four factors: 1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; 2) whether the remarks were isolated or extensive; 3) whether the remarks were deliberately or accidentally made; and, 4) the total strength of the evidence against the defendant. At trial, Smith testified that he cried when he told his friend of the murders – testimony that contradicted the friend’s testimony that Smith laughed when he told him about killing the victim. Thus, the Sixth Circuit held that the prosecutor’s reference to the friend’s testimony that Smith lacked remorse was proper to discredit Smith’s contradictory testimony. With regard to the prosecutor’s questions on cross-examination of Smith, the Sixth Circuit held that asking Smith about “the kind of sounds

[the victim] made when you ripped his throat from ear to ear” was improper, but that the prosecutor’s questions were not “flagrant such that it so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Notably, the comments were “isolated, do not seem to have been purposeful, and any prejudice was slight, as the jury already had graphic photographs of the crime scene,” and the evidence against Smith was strong.

Smith was not prejudiced by his counsel’s failure to develop and introduce at the suppression hearing evidence of Smith’s intoxication at the time of his arrest and interrogation and of his low mental capacity: In post conviction, Smith submitted evidence that he ingested various prescription medications, smoked marijuana, and consumed large amounts of alcohol during the hours leading up to his arrest. He also presented affidavits of three experts detailing his limited mental capability and long history of polysubstance abuse. Despite this evidence, the Sixth Circuit held that Smith “would not have been able to show that his waiver was not knowing and intelligent under the totality of the circumstances. The testimony of the officers at the suppression hearing showed that Smith was given his *Miranda* warnings at least three times and that he affirmatively stated that he did not need a lawyer and that he would talk about the killings. After completing a typed statement, the detective had Smith read the statement back to him to show that Smith could read, and Smith then signed the statement and initialed various edits. It is highly unlikely that this testimony would have been controverted by Smith had he testified at the suppression hearing. During his trial testimony, Smith stated that he recalled being advised of his rights and agreed that he was willing to talk to the detectives, willing and ready to confess at that time to actually killing [the victim], and had no intention of denying it at all. Smith’s age and previous experience with the criminal justice system would have weighed further toward finding the waiver knowing and intelligent. Moreover, Smith has submitted no evidence that his conduct during the interrogation gave the police any indication of his alleged intoxication or failure to understand his repeated waivers. Overall, we conclude that Smith has not shown a likelihood that the presentation of this evidence at the suppression hearing would have changed the outcome of the proceeding.”

Smith’s rights were not violated when he was allegedly sentenced to death for a murder where the capital specification did not require him to have the specific intent to kill: Smith argued that his Eighth Amendment rights were violated when he was sentenced to death for a murder, committed by his brother, despite the capital specifications not requiring that Smith had the specific intent to kill the victim. The Sixth Circuit rejected this argument because “the Ohio Supreme Court reasonably concluded that the jury found that Smith and his brother had planned to kill [both victims] to avoid leaving any witness, providing the requisite intent.”

The jury instruction adding the language “aider and abettor” did not mean the instructions failed to genuinely narrow the class of death eligible offenders: Smith argued that adding this language removed the requirement that Smith “acted with prior calculation and design in the murder” – a requirement of the capital specification under which he was charged. The Sixth Circuit also rejected this argument because any confusion caused by the “aider and abettor” language in the statute was cleared by the next paragraph of the jury instructions, which explained that “prior calculation and design means that the purpose to cause the death was reached by a definite process of reasoning in advance of the homicide, which process of reasoning must have included a mental plan involving studied consideration of the method and the means or instrument with which to cause the death of another.”

Ohio’s death penalty statute’s failure to require the sentencing body to identify the mitigating circumstances does not undercut adequate appellate review or render Ohio’s proportionality review unconstitutional, and the prosecutor’s virtually uncontrolled indictment discretion does not allow arbitrary and discriminatory imposition of the death penalty: Because the Ohio Supreme Court did not directly address these claims on direct appeal, although they were raised, but instead merely addressed the appropriateness and proportionality of Smith’s death sentence, the Sixth Circuit reviewed Smith’s claims *de novo*. But, the court held that Smith’s claims were foreclosed by prior Sixth Circuit precedent rejecting the same arguments.

Ohio’s death penalty scheme does not result in arbitrary and unequal punishment as applied to Smith merely because he was sentenced to death while his codefendant received a lesser sentence: Because the court is bound by the precedent it established in *Getsy v. Mitchell*, 495 F.3d 295 (6th Cir. 2007), in which the Sixth Circuit held that no Eighth Amendment violation takes place when one defendant is sentenced to death while the more culpable codefendant receives a lesser sentence, the court held that the “Ohio Supreme Court’s refusal to consider [the codefendant’s] life sentence in upholding Smith’s death sentence was neither contrary to nor an unreasonable application of clearly established federal law.”

Due process and equal protection are not violated where state law provides non-death sentenced inmates intermediate levels of appeal but requires death-sentenced inmates to appeal directly to the Ohio Supreme Court: The Sixth Circuit held that the state court’s ruling that death-sentenced inmates, as opposed to other inmates, have an interest in prolonging the appeal process satisfies the rational basis review for treating them differently than non-capital inmates is not contrary to or an unreasonable application of clearly established federal law.

***Bedford v. Collins*, 567 F.3d 225 (6th Cir. 2009)**

(*Sutton, J., for the Court; joined by, Boggs, C.J. and McKeague, J.*) (pre-AEDPA case)

The trial judge did not dismiss four prospective jurors for cause without allowing Bedford adequate opportunity to rehabilitate them: “A prospective death-penalty juror may be struck for cause if he is substantially impaired in his . . . ability to impose the death penalty under the state-law framework. That includes jurors who express an unwillingness to recommend the death penalty, no matter what the weighing of aggravating and mitigating factors suggests.” The four prospective jurors at issues held one or more of the following beliefs: 1) “definitely” did not think could sign a death-penalty recommendation; 2) did not think “could be a part of convincing someone to impose the death sentence”; 3) would not recommend a death sentence under any circumstance; and, 4) could not follow the law requiring considering imposing death. The Sixth Circuit concluded that these statements provided ample cause to excuse a juror for cause. Bedford, however, argued that he might have been able to rehabilitate the jurors had the trial court not cut short each colloquy. The Sixth Circuit disagreed, noting that the trial court allowed Bedford’s lawyers to follow up with questions after initial inquires elicited disqualifying responses, and each time the additional questions confirmed the juror’s unwillingness to sign a death verdict. The Sixth Circuit further noted that even showing the juror’s were “simply confused” would not help him because “voir dire responses that signal serious confusion about the jury’s role in the process suffice to excuse a juror.” Finally, the Sixth Circuit held that even if Bedford could show the trial court erred in excusing the jurors, he still could not obtain relief because he also must show that the trial court’s decision resulted in an actually biased jury - - something Bedford does not even allege.

Note: The latter portion of the Sixth Circuit’s ruling appears legally erroneous. Under United States Supreme Court law, the failure to excuse a juror who should have been excused for cause or the improper excusal of a juror for cause requires automatic reversal without a showing of bias or prejudice. Gray v. Mississippi. The only way to reconcile the need to show actual bias portion of the Sixth Circuit’s opinion with Supreme Court law is to interpret it to mean that actual bias must be shown when a petitioner argues his or her rights were denied by the refusal to allow additional questions of a juror, as opposed to the actual excusal of the juror.

The trial court did not improperly preclude trial counsel from asking certain questions of jurors: The trial court “drew the line at questions that sought to elicit the jurors’ views on Bedford’s case.” Specifically, the trial court: 1) allowed trial counsel to ask whether a juror would consider a specific fact at all during the sentencing phase, but barred Bedford’s lawyers from asking whether a juror would find

Continued on page 46

Continued from page 45

that fact mitigating; 2) allowed trial counsel to “explore each juror’s general attitudes about the death penalty, but it did not permit them to ask for what crimes the juror thought it appropriate or whether death always would be warranted for intentional homicide”; and, 3) allowed counsel to ask whether a juror thought various alternatives to the death penalty such as prison time were ‘serious’ punishments, but it did not let them ask whether such sentences would be ‘serious’ for defendants who committed murder. The Sixth Circuit held that Bedford’s inability to ask these question did not render voir dire “fundamentally unfair,” because the trial court “gave each side ample opportunities to explore the venire members’ views – devoting fives days (spanning nearly 900 pages of transcript) to the task,” because the trial court did not “restrict either side to abstract questions about whether a juror would follow instructions or perform his duties impartially,” and because the trial court’s limitations only “prevent[ed] counsel from extracting commitments from individual jurors as to the way they would vote.”

The prosecutor’s guilt phase closing argument did not deprive Bedford of a fair trial: Bedford argued that the following actions by the prosecutor during closing argument deprived him of a fair trial: 1) referring to Bedford’s defenses as “Mickey Mouse defenses”; 2) characterizing some of Bedford’s arguments at trial as attempts to “confuse” the jury by “filling the courtroom with as much smoke as you possibly can,” as attempts to cast aspersions “all around the courtroom,” and, attempts to put “everyone on trial in the case except our little boy over here” – all in the hope the jury would “lose sight of the real issues in the case”; 3) telling the jury that it predicted Bedford would “drag [a witness] through the mud by the defense” 4) referring to Bedford as a “demon”; and, 5) telling the jury that its duty required finding Bedford guilty and that, if they did so, each could say to himself, “I did Gwen justice and I did Johnny justice.” The Sixth Circuit noted that a prosecutor “may not simply belittle the defense’s witnesses or deride legitimate defenses, nor may he offer his own opinion about a witness’s credibility.” The Sixth Circuit also noted that a prosecutor “may not urge jurors to identify individually with the victims with comments like ‘it could have been you’ the defendant killed or ‘it could have been your children,’ nor may it fan the flames of the jurors’ fears’ by predicting that if they do not convict, a crime wave or some other calamity will consume their community.” But, although noting that the “demon” comment was unnecessary and unprofessional, the Sixth Circuit held that the prosecutor’s comments in Bedford’s case, “all made in the course of the fast-moving thrust and parry of a criminal trial – did not rise to that level and did nothing more than respond to Bedford’s actual and reasonably likely contentions and tactics.” Thus, the court held that the prosecutor’s comments did not deprive Bedford of a fair trial.

The prosecutor’s sentencing phase closing argument did not deprive Bedford of a fair trial: Bedford argued that the following actions by the prosecutor during his sentencing phase closing argument were unfairly prejudicial: 1) reminding the jury that they make only a recommendation, not a final decision, on the sentence; 2) reading the jury a passage from *Gregg v. Georgia* concerning the death penalty’s role in society; 3) suggesting it was “unpleasant” for Bedford’s counsel to represent him; 4) redisplaying photographs of both victims and arguing that the photos established an aggravating circumstance; 5) speculating that despite the minimum imprisonment under current law, Bedford might be paroled sooner; and, 6) commenting on Bedford’s unsworn in-court statement. Specifically, the prosecutor told the jury that because Bedford’s statement to the jury was unsworn, “you can judge his credibility and the things that he had to say to you with a jaundiced eye because even if a person is under oath, you don’t have to believe what they say . . . And the mere fact that this man elected to avoid being scrutinized by the prosecutor in this case should be scrutinized by you.” The Sixth Circuit quickly dispatched with the first four allegedly improper arguments, holding: 1) “[t]here was nothing improper about accurately explaining to the jury that, under Ohio’s death penalty scheme, they recommend – but do not definitively determine - - the defendant’s sentence”; 2) it was not improper to “quote from the Supreme Court’s opinion in *Gregg* to support the State’s argument that the death penalty is consistent with, and in some instances necessary to, an ordered society”; 3) viewed in context, the prosecutor’s comment that it was unpleasant to represent Bedford “did no more than urge the jurors not to shrink from their difficult duty even though the process was ‘unpleasant’ for all involved – prosecutors, defense counsel and jury included”; and, 4) because the capital specification was that the murder was part of a course of conduct involving the purposeful killing of two or more persons, the photos depicting two victims did not invite the jury to consider a non-statutory aggravating factor. The remaining two allegedly improper comments were of more concern. The prosecutor suggested that, even though under then-existing state law a life sentence would keep Bedford behind bars for 20 to 30 years before he could obtain parole, the law could change, enabling Bedford to obtain parole sooner. The Sixth Circuit held “that statement is similar to informing the jury that if it selects a life sentence, state officials might commute the sentence to a shorter term. So long as the jury receives accurate information, it may consider the possibility, speculative though it may be, that future decisions of state executive officials could lead to the defendant’s early release.” The court also noted that even if the comment was improper, it was unlikely to mislead the jury since the prosecutor said nothing untruthful, the comment was isolated, the evidence against Bedford at the sentencing phase was strong, and both the trial court and the defense made the current law clear to the jury. Finally, the Sixth Circuit ruled that the last part of the prosecutor’s

comment on Bedford's unsworn testimony "may have gone too far, arguably inviting the jury to draw an adverse inference from the fact that Bedford never testified under oath at all." The court concluded, however, that even if the comment was improper, it would not require reversal because the isolated comment was not flagrant and it likely did not mislead the jury, who was told Bedford was entitled to make an unsworn statement.

The trial court did not give an unduly coercive *Allen* charge:

A day into its deliberations, the jury sent a note to the court asking "what would happen" if the jury could not reach a unanimous sentencing recommendation and whether there was "an approximate time frame" for reaching a decision. "After consulting with the parties, the court gave a supplemental instruction informing the jury that there was no fixed time limit but urging the jurors to 'make every reasonable effort to agree on a recommendation,' given the time and energy already invested in the trial and the jurors' superior position (having already participated in the guilt phase) to make a fair decision." The trial court also "suggested" that the jury first determine whether they were in fact deadlocked and, if so, to return a life sentence recommendation. Bedford argued this instruction was coercive because it: 1) omitted language directing all jurors to reconsider their views; 2) failed to caution them not to abandon their conscientiously held views; and, 3) misled the jurors by suggesting that if they could not reach a decision, another jury would take up their task, when in reality a deadlock would force the judge to impose a life sentence. Rejecting Bedford's arguments, the Sixth Circuit ruled that a "general instruction, addressed to all jurors, suffices so long as it does not imply that only those in the minority should rethink their position" and that the trial court's instruction was sufficient because it implicitly encouraged all of the jurors to reconsider their positions. The Sixth Circuit also ruled that there is no iron-clad rule requiring what Bedford claims was omitted from the instruction and that the trial judge's incorrect statement that a mistrial would be declared if the jury could not reach a verdict was quickly corrected by the trial judge's instruction that the jury should return a life sentence if they remained deadlocked. Thus, the Sixth Circuit held that the trial court's deadlock instruction was not unduly coercive.

***Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009)**

(Batchelder, J., for the Court, joined by Siler, J.; Giolman, J., concurring in part and dissenting in part)

No *Brady* violation took place when the prosecution failed to disclose a statement concerning Irick's behavior the night before the murder, in which the witness discussed Irick's intoxication and that he was a trusted family friend of the victim: The Sixth Circuit first held that evidence of Irick's intoxication could not have negated his attempt to commit rape, because whether he was drunk or not, "the fact that he sexually penetrated [the victim] is itself sufficient to prove the requisite *mens rea*." The court then held that the

jury had heard evidence about Irick's positive past treatment of the victim and about his drinking large amounts of alcohol the day before the murder, and about his strange behavior the night before, so the undisclosed statement that Irick was "drunk and talking crazy" the night before the murder "would have been, at best, cumulative of this other evidence, and [thus] we cannot say that the fairness of the penalty phase was undermined by its absence." The court also rejected the argument that the statement would have allowed him to impeach the witness' trial testimony that she could not tell if Irick was intoxicated the night before the murder, holding that it cannot say a reasonable probability exists that Irick would have been acquitted if he had used the statement, particularly since the statement said Irick was "well on his way" to being drunk rather than admitting that he was drunk.

The prosecutor's general deterrence argument was not improper:

In his rebuttal closing argument at the penalty phase, the prosecutor told the jury: "with your verdict, you make a statement about things whether you realize it or not. You will make a statement about the value of Paula's life. You will make a statement about what this man did and your willingness to tolerate it. You will make a statement to everybody else out there what is going to happen to people who do this sort of thing. Some of you may believe that punishment is a deterrence. Some of you may not. I don't know. I personally believe that it is. . . . There comes a time in society when we have a right to defend ourselves. I suggest to you that it is more than a right to defend ourselves in this kind of a situation where there is a child involved. We have a duty to defend . . . our families, and our homes and our children. That is what this case is about." The Sixth Circuit stated it was "not convinced" that general deterrence arguments are improper, but recognized that "it is well established that the personal opinion of counsel has no place at trial." The prosecutor's statement that he "personally believed" could thus be considered improper, but as noted by the Sixth Circuit, the prosecutor "did not vouch for a witness, personally comment on the credibility or weight of the evidence, or suggest that he had personal knowledge of facts not before the jury. He simply acknowledged that there were differences of opinion on the efficacy of capital punishment as a deterrent and shared where he stood in the debate. Without conclusively resolving whether the comment was improper, the court held that the prosecutor's argument was not flagrant and thus did not require reversal. That is because the proof of the aggravating circumstances was strong, the prosecutor's comments did not tend to mislead or prejudice the jury (the court did not explain why that is so), the comment were limited to the rebuttal portion of the prosecutor's closing argument and did not make up an extensive part of the argument, and "although the remarks were deliberate rather than accidental, the balance of these factors" mean "any impropriety here was moderate at best."

Continued on page 48

Continued from page 47

The prosecutor did not improperly suggest Irick had committed acts similar to the offense for which he was on trial: Also during his penalty phase rebuttal, the prosecutor told the jury: “Should we be surprised to hear these people get up here today and say, ‘When Billy Irick is angry or moody, he wants to hurt something. He wants to hurt somebody.’ We knew that, didn’t we? We knew that, on April 15, 1985, he was upset. It doesn’t appear to us to be anything significant does it? But it just doesn’t suit Billy Ray Irick, so he is moody, and he is grumbling. He is talking under his breath. Things aren’t going his way. And he takes it out on a seven-year-old child. We knew that about Billy Irick before Ms. Lunn or Dr. Tennison ever hit that witness stand. What we didn’t know is he has been doing it for a long time.” The Sixth Circuit held that this statement could be interpreted, as the state court did, to mean Irick had a tendency to behave violently towards others, which rebutted Irick’s sentencing phase defense that he deviated from his nonviolent character when he committed the murder. Under this interpretation of the prosecutor’s statement, according to the Sixth Circuit, the prosecutor did nothing wrong.

Gilman, J. concurring in part and dissenting on the application of AEDPA to the *Brady* claim and whether the prosecutor’s closing argument requires granting the writ:

Gilman believes the “modified AEDPA deference line of cases [from the Sixth Circuit and the standard applied to Irick’s *Brady* claim] treads a precarious path in light of the Supreme Court’s decisions in *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Wiggins v. Smith*, 539 U.S. 510 (2003). In these two cases, the Supreme Court applied de novo review to the prejudice prong of ineffective-assistance-of-counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court did so because the state courts in both *Rompilla* and *Wiggins* had held that counsel’s assistance was not ineffective, and therefore had not reached the prejudice prong of the *Strickland* test. This circuit thus applies *more* deference to state courts in modified-deference cases . . . where the state court denied the constitutional claim without providing any indication that it had even considered the claim, than did the Supreme Court in *Rompilla* and *Wiggins*, where the state courts provided a thorough analysis of at least the first prong of the relevant claim. The inconsistency in this approach strikes me as troublesome at best, and I conclude that applying de novo review to perfunctory state-court conclusions . . . would align more closely with the Supreme Court’s decisions.” Moreover, even if the “modified-AEDPA-deference standard could be appropriate in some cases, Gilman concluded it would not be here where the state court did not even mention the “drunk and talking crazy” statement that is the subject of Irick’s *Brady* claim.

Gilman also believed that the prosecutor’s general deterrence closing argument was improper because it misled the jury since general deterrence has nothing to do with the proper weighing of aggravating and mitigating circumstances and

because the prosecutor expressed his personal belief in the effectiveness of general deterrence - - something that is improper in general but more egregious when done by the prosecutor whom jurors are automatically apt to afford undue respect to. Gilman also believed the majority overstepped its role by second-guessing the Tennessee Supreme Court’s conclusion that the general deterrence argument was improper. As for the harm caused by the comments, Gilman believed the comments “were an extended emotional appeal for the jurors to protect themselves and the community at large from persons of Irick’s ilk” that is prejudicial in itself but more prejudicial because it came at the “end of the state’s argument, with no chance for rebuttal by the defense.” Finally, Gilman noted that “the fact that Irick did not challenge the overwhelming evidence of his guilt for the underlying crime has no bearing on the jury’s proper role in weighing the mitigating factors presented at the sentencing phase of his trial.” Quoting the United States Supreme Court’s holding in *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985), that if the court “cannot say that the [prosecutor’s comments] had no effect on the sentencing decision,” then the jury’s decision “does not meet the standard of reliability that the Eighth Amendment requires,” Gilman believed the writ of habeas corpus should have issued on Irick’s improper prosecution closing argument claim.

***Wiles v. Bagley*, 561 F.3d 636 (6th Cir. 2009)**

(*Sutton, for the Court; joined by, Siler, J.; Martin, J., concurring*)

Wiles was not prejudiced by his attorney’s failure to adequately investigate mitigation: Wiles claimed that his attorneys failed: 1) to uncover abuse in his childhood; 2) to uncover that he had taken barbiturates before entering the victim’s home on the day of the murder; and, 3) to investigate a head injury he received twelve days before the murder. Assuming, without deciding, that trial counsel’s performance was deficient, the Sixth Circuit held that the unrepresented mitigating evidence does not “differ markedly from the testimony and evidence the three-judge panel in fact considered,” and thus Wiles has not shown a reasonable probability that he would have received a lesser sentence if not for trial counsel’s performance.

First, at trial, Wiles introduced evidence that his father was “stern,” “less tolerant with Wiles than he was with the other children, and that he viewed Wiles as an interference in the family’s life because Wiles was not a planned child.” At trial, a counselor’s report also noted that Wiles’ father pushed him down some steps and then had him arrested for intoxication. In post conviction, Wiles presented evidence that his father: 1) was “emotionally distant”; 2) washed his hands of Wiles when Wiles went to prison for burglary; 3) said he “never wanted that bastard anyway”; 4) told him that he “would never amount to anything and that he did not want him”; and, 5) emotionally and physically abused him, although the affidavit on it offers no details about any incidents of physical violence. The Sixth Circuit held that

this evidence “adds little to the picture that counsel already had painted of Wiles’ father: a man who did not like Wiles, who resented him as an unwanted addition to the family and who, on occasion ‘got rough’ with him.” Instead, this evidence is “precisely the kind of cumulative evidence that does not show prejudice because it does not differ in a substantial way – in strength or in subject matter – from the evidence actually presented at sentencing.” The court, however, acknowledged that Wiles presented one new piece of evidence not covered at trial – Wiles’ statements that his father was “sexually inappropriate with his sisters.” That evidence, to the Sixth Circuit, would not have made a difference because it was not corroborated and was “exceedingly weak mitigation evidence, because nothing shows that Wiles was aware of this abuse at the time of the murder, and there is no evidence that it caused him any psychological harm beyond what he had already experienced at the hands of a distant and sometimes abusive father.”

Second, without mentioning what evidence was presented on it at trial, the Sixth Circuit held that the “new” evidence of Wiles’ drug abuse, which escalated after an industrial accident which caused the tragic death of his brother, “largely duplicates” evidence presented at the sentencing phase of Wiles’ trial. The court, however, noted that no evidence was presented at trial that Wiles ingested three or four barbiturates shortly before entering the victim’s home. Yet, it found this evidence unpersuasive because it “directly contradicts his confession to the crime, in which he denied consuming drugs on the day of the murder or within the previous twelve days - - making the claim readily impeachable and thus unlikely to have changed the outcome - - because Wiles’ mitigation strategy emphasized that he had confessed truthfully in all respects to the crime, and because “it is hardly self-evident that getting high on barbiturates before stabbing someone to death is the kind of evidence that makes a capital defendant look better in the eyes of a court as opposed to making him look even worse.” In other words, “Wiles had little to gain from this new evidence and much to lose by introducing it. He thus cannot show prejudice by its omission.”

Third, the court rejected Wiles’ argument that he was prejudiced by trial counsels’ failure to investigate a head injury in which Wiles was hit on the head with a tire harm and treated at a hospital for multiple facial fractures only to return to the hospital five days later complaining of dizziness, somnolence and difficulty walking. Although the head injury occurred only twelve days before the murder, the Sixth Circuit held that no prejudice occurred from failing to uncover this evidence because “[n]otably absent from the record is any evidence that Wiles was still experiencing symptoms from his head on the day [of the murder],” thereby making his claim pure speculation.

Wiles was not prejudiced by his attorney’s failure to adequately prepare his expert: Wiles argued that his attorneys

gave his psychologist, who testified at the sentencing phase, too little time to prepare by hiring him a week before the sentencing phase began - - something that resulted in the psychologist interviewing Wiles for just two hours and that prevented him from speaking to any member of Wiles’ family, friends, or coworkers, and that also prevented him from reviewing Wiles’ educational records. Wiles argued that this inadequate preparation led the expert to testify in a way that failed to convey a useful mitigation theory. Specifically, Wiles complained that his expert admitted on cross-examination that “one of the many factors” that motivated Wiles to kill was that the victim was “the only witness” to the burglary. Because, by the time of this testimony, the sentencing body had already found that Wiles killed the victim “for the purpose of escaping detection, apprehension, trial or punishment for another crime,” the Sixth Circuit held that the expert’s admission on cross-examination could not have affected the sentencing decision. The Sixth Circuit also rejected Wiles’ argument, supported by an affidavit from a clinical psychologist, that a more prepared expert would have opined that “antisocial behaviors reported by Mr. Wiles are directly related to his substance dependence” and that the murders were a “direct result” of Wiles’ ingestion of barbiturates. According to the court, evidence linking Wiles’ conduct to drug abuse was already before the sentencing body and linking the recent consumption of barbiturates was inconsistent with Wiles’ confession and the theme for leniency presented at trial. Thus, the Sixth Circuit held that Wiles’ failed to establish the prejudice prong of his ineffective assistance of counsel claim.

Martin’s concurrence on the problems with the death penalty: “Now in my thirtieth year as a judge on this Court, I have had an inside view of our system of capital punishment almost since the death penalty was reintroduced in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972). During that time, judges, lawyers, and elected officials have expended great time and resources attempting to ensure the fairness, proportionality, and accuracy that the Constitution demands of our system. But those efforts have utterly failed. Capital punishment in this country remains ‘arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.’ *Moore v. Parker*, 425 F.3d 250, 268 (6th Cir. 2005) (Martin, J., dissenting). At the same time, the system’s necessary emphasis on competent representation, sound trial procedure, and searching post-conviction review has made it exceedingly expensive to maintain.

The system’s deep flaws and high costs raise a simple but important question: is the death penalty worth what it costs us? In my view, this broken system would not justify its costs even if it saved money, but those who do not agree may want to consider just how expensive the death penalty really is. Accordingly, I join Justice Stevens in calling for “a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the

Continued on page 50

Continued from page 49

benefits that it produces.” *Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520, 148-49 (Stevens, J., concurring). Such an evaluation, I believe, is particularly appropriate at a time when public funds are scarce and our state and federal governments are having to re-evaluate their fiscal priorities. Make no mistake: the choice to pay for the death penalty is a choice *not* to pay for other public goods like roads, schools, parks, public works, emergency services, public transportation, and law enforcement. So we need to ask whether the death penalty is worth what we are sacrificing to maintain it.

And, while this is a matter that would benefit from further study, the evidence indicates that, on average, every phase of a capital case is more expensive than in a non-capital case, and that the lifetime cost of a capital case is substantially more than the cost of incarcerating an inmate for life without parole. Surprising as that may seem, the reason for it is simple: ‘lawyers are more expensive than prison guards.’

To begin, capital cases involve more pre-trial and trial costs than non-capital cases. Capital cases are far less likely to be resolved through plea bargain, and they generally require far greater time, support services, and expertise to prepare. And capital trials are generally longer and more complex than non-capital trials. Beyond more attorneys and attorney time, capital cases tend to involve more experts and related expenses from experts and support staff. They also require a “death-qualified” jury, and bring the added costs of the “second trial” conducted during the penalty phase. And because both sides of a capital case are usually funded at public expense, these additional costs must be counted twice in calculating the added costs of a capital prosecution.

Capital cases also involve a significantly longer post-conviction appeal process than non-capital cases. Unlike non-capital cases, capital cases almost invariably proceed through all avenues of post-conviction relief, including direct appeal, state post-conviction proceedings, at least one federal habeas petition, and multiple petitions for certiorari. Naturally, this is because capital defendants (and advocacy groups) have a much stronger motive to pursue post-conviction remedies. But that is their right. Plus, experience has shown that every stage of review is needed to guard against wrongful convictions and correct the unusually high rate of error that plagues capital cases. However, the upshot of higher rates of collateral attack and reversal is that state and federal courts are packed with capital cases, and these cases themselves take decades to wind their way through the system. More appeals means more costs, regardless of why the appeals arise. And reversal means repeating all or part of the process and thus duplicating its time and expense.

So, in almost every way, capital cases are more expensive than non-capital cases. And given the death penalty’s exorbitant costs and many basic flaws, it is clear to me that our scarce public resources can be put to better use. This is

especially so given what the public is getting for its money – little more than the time of lawyers and judges and the ‘illusion’ of capital punishment. Moral objections aside, the death penalty simply does not justify its expense.

Recent news reports indicate that the cost of the death penalty is becoming part of the public debate on capital punishment and has begun to influence policymaking. That strikes me as a very positive development. I hope it continues.”

***Zagorski v. Bell*, 2009 WL 996307 (6th Cir.)**

(Cook, J, for the Court, joined by Cole and Griffin, JJ.)

Zagorski’s case raised five issues: 1) whether the prosecution improperly withheld evidence that someone else may have killed the victims; 2) whether the prosecution improperly withheld evidence that it did not reinstate a prosecution witness’ suspended sentence; 3) whether the trial court improperly admitted statements Zagorski made to police; 4) whether the trial court gave an erroneous instruction concerning malice; and, 5) whether trial counsel provided ineffective assistance by failing to investigate and present mitigating evidence.

Any evidence withheld by the prosecution did not prejudice Zagorski and could not give rise to a *Brady* violation because trial counsel should have known of the evidence:

The Sixth Circuit held that trial counsel had reason to know the essential facts underlying the claim that someone else had a motive to kill the victim and thus no *Brady* violation took place because *Brady* does not assist a defendant who is aware of essential facts that would allow him to take advantage of the exculpatory evidence. The Sixth Circuit also rejected Zagorski’s *Brady* claim that the prosecution failed to disclose that a witness was involved in a drug deal following the murders. The Sixth Circuit found that the evidence was not material since Zagorski failed to show any agreement between the witness and the prosecution or that they exchanged any consideration for his testimony.

The trial court did not err in admitting Zagorski’s statements to police made after Zagorski invoked his right to silence and to counsel:

An accused “having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” According to the Sixth Circuit, Zagorski insisted on giving a detective specific details, thereby meaning the state court’s ruling that his statements were admissible was neither contrary to, nor involved an unreasonable application of clearly established Federal law.

Zagorski’s malice instruction claim is procedurally defaulted: Zagorski presented two reasons why he did not default this claim by failing to raise it before the state courts:

1) the Tennessee Supreme Court expressly stated that it exhaustively reviewed the record for all possible claims; and, 2) the procedural default violates the Fifth Amendment equal protection clause. The Sixth Circuit rejected these arguments, noting that the state courts reviewed the record pertaining only to issues Zagorski raised and that the state procedural rules implicated by procedural default are firmly established and regularly enforced.

Trial counsel's investigation of mitigation was reasonable:

Noting that Zagorski told his attorneys he did not want mitigation presented, trial counsel contacted Zagorski's mother but obtained little useful information from her, and trial counsel retained a mental health expert but decided to not present his testimony after learning what he would say, the Sixth Circuit held that state court's decision that trial counsel conducted an objectively reasonable investigation was neither contrary to nor an unreasonable application of Supreme Court precedent.

Van Hook v. Anderson, 560 F.3d 523 (6th Cir. 2009)

(Merritt, J., for the Court; joined by, Martin and Moore, JJ.) "At the request of the majority of the *en banc* court and in order to avoid the need for an *en banc* rehearing, the original panel amends its opinion of August 4, 2008, by deleting its discussion of counsel's failure to seek an independent mental health expert and the failure of counsel to object to the Presentence Report. Therefore, the sole basis for the issuance of the writ of habeas corpus [in this pre-AEDPA case] is counsel's failure to investigate mitigating factors."

General standard for determining ineffective assistance of counsel: "Since 1984, the standard for whether counsel's ineffectiveness fell below the minimum requirements of the Sixth Amendment contain two components: (1) the deficient performance of counsel and (2) the resulting prejudice of the defendant. To prevail on an ineffective assistance of counsel claim, Van Hook must satisfy both the deficient performance and prejudice prongs of *Strickland*. For Van Hook to prove that his counsel's performance was constitutionally deficient, the performance must have fallen below an objective standard of reasonableness under prevailing professional norms. While the Court in *Strickland* did not lay out a detailed, bright-line set of rules for determining whether counsel's performance is adequate, as it did later in *Wiggins* and *Rompilla*, the Court did require that in normal cases such as this one counsel must investigate fully all aspects of a case. It explained that this duty is of utmost importance in capital murder cases, especially at the mitigation phase where the lawyer's work may be the difference between life and death. Thus, the typical focus of analysis in an ineffective assistance of counsel during mitigation case is whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable. After *Strickland*, this Court and the Supreme Court made clear in a number of cases that counsel in death cases should follow closely the ABA standards referred to above. We have explained clearly

that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provide the guiding rules and standards to be used in defining the prevailing professional norms in ineffective assistance of counsel cases."

Minimum requirements for investigation to be reasonable:

"Our Court's precedents make clear that a partial but ultimately incomplete mitigation investigation is inadequate. This is particularly true when counsel's investigation failed to reveal any of the significant, potentially mitigating details of the defendant's personal and family history.... The ABA Guidelines explain that this investigation ought to include interviews with family members and all other people who knew the client: 'It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case works, doctors, correctional, probation or parole officers, and others.' Such thorough interviews are necessary to reveal all potential arguments to support a case for mitigation. Both this Court and the Supreme Court have also held counsel's performance deficient when counsel's last-minute investigation resulted in overlooking potentially powerful mitigating evidence. The requirement for counsel to perform thorough, not last-minute, investigations before a mitigation hearing is further reinforced by the ABA Guidelines: 'The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase offenses, decisions about the need for expert evaluations, motions practice, and plea negotiations.' The ABA Guidelines also explain that preparing for the mitigation phase of trial 'requires extensive and generally unparalleled investigation into personal and family history.'"

Trial counsel's failure to investigate mitigating circumstances was deficient performance:

Trial counsel did not begin investigating mitigating evidence until after Van Hook was convicted, thereby spending less time preparing for mitigation than the Supreme Court found deficient in *Williams* (counsel began preparing for mitigation a week before the guilt phase began). "By not performing the sort of extensive, thorough investigation that is a minimum requirement of trial counsel in these cases," trial counsel learned little mitigation. The omitted evidence "goes far beyond the brief details of his parents' alcohol abuse and dysfunctional relationship that were presented at mitigation." Specifically, trial counsel's investigation failed to reveal the following information that would have been available if counsel interviewed or even contacted Van Hook's stepsister, paternal uncle, two paternal aunts, maternal uncle, and the psychiatrist who treated his mother when she was committed to a mental institution: 1) Van Hook's parents repeatedly beat him; 2) Van Hook witnessed his father attempt to kill his mother several times; and, 3) Van Hook's

Continued on page 52

Continued from page 51

mother was committed to a psychiatric hospital when he was between four and five years old. The court held that counsel's decision to terminate the mitigation investigation before learning of this information cannot be considered a reasonable, strategic decision because the information they had already learned about Van Hook's abusive family background would have given objectively reasonable counsel reason to suspect much worse details existed, because "[f]ailing to complete a mitigation investigation when additional family witnesses are available is not sound trial strategy," and because waiting until four days before the mitigation hearing to being the investigation is not sound trial strategy. The court also held that trial counsel's decision not to introduce additional family background witnesses cannot be justified under the strategy of attempting to prevent the sentencer from learning about prior criminal convictions because the sentencer was already aware of Van Hook's prior conviction and any additional witnesses that might have been called would have only further developed his case for mitigation.

Trial counsel's deficient performance prejudiced Van Hook:

"While it is possible that the panel could have heard the evidence described above, and still have decided on the death penalty . . . that is not the appropriate test. Instead, we must ask whether the available mitigating evidence, taken as a whole, might well have influenced the panel's appraisal of Van Hook's culpability." In ruling that trial counsel's deficient performance prejudiced Van Hook, the court cited the following: 1) there was only one aggravating factor, thereby making the threshold for finding prejudice less than cases where multiple aggravators had been found; 2) the trial court concluded there was "absolutely no evidence that would suggest that Van Hook suffered from a mental disease or defect"; 3) the sentencer never learned "fully about the two statutory mitigating factors that were the strongest in his case – his traumatic family background and his mental illness"; 4) the sentencer never heard "first-hand accounts from those who knew [Van Hook] best" about how "Van Hook was often beaten by his parents, how he saw his father try to kill his mother, and how his mother was committed to a psychiatric hospital when he was a young child;" and, 5) the sentencer expressly stated that it considered the presentence report, which contained inadmissible victim impact evidence.

***Awkal v. Mitchell*, 559 F.3d 456 (6th Cir. 2009)**

(Moore, J., for the Court; joined by, Cole, J.; Gilman, J., dissenting)

Trial counsel was ineffective for presenting testimony from an expert who contradicted the only defense presented at trial: Awkal's only defense at trial was not guilty by reason of insanity. At trial, Awkal's attorney presented testimony from two mental health experts. One said Awkal was insane. But, the other expert testified on cross-examination that Awkal was sane at the time of the murders, directly contradicting the only defense. Although Awkal's attorney possessed

that expert's report before calling him to testify and referenced the sanity report during the expert's testimony, the Sixth Circuit held that the decision to put on the stand an expert who would contradict the only defense was objectively unreasonable regardless of whether defense counsel knew or should have known the contents of that expert's opinion. The Sixth Circuit also held that trial counsel's deficient performance prejudiced Awkal, even though the State presented evidence that Awkal was legally sane at the time of the murders. It did so because defense counsel's decision to present testimony from an expert who believed Awkal was sane "destroyed any hope of a successful insanity defense" and "was completely devastating to the defense." It was so obviously damaging that, prior to the expert's testimony, the prosecutor prompted the judge to ask defense counsel if he had a strategic reason for calling the expert. The prosecutor then highlighted the damaging decision during closing argument, telling the jury he is still trying to figure out why defense counsel had a witness beneficial to the prosecution testify, and defense counsel then responded by saying the expert "didn't quite agree" with defense counsel. Rejecting the State's argument that prejudice did not exist because the prosecution would have called the expert to testify if defense counsel did not, the Sixth Circuit ruled that "[t]he error here is not that the testimony countering Awkal's not-guilty-by-reason-of-insanity defense was presented at some point during trial, but rather the fact that Awkal's *own counsel* called an expert witness whose testimony completely destroyed this defense. . . . it is devastating for a defendant to present voluntarily evidence that completely contradicts his entire defense." Rejecting the argument that Awkal has not shown prejudice because one of his witnesses testified that he was insane at the time of the crime, the Sixth Circuit noted that the two defense experts "presented diametrically opposed views on the critical guilt-phase issue. The jury could not seriously consider or accept Awkal's assertion that he was not guilty by reason of insanity after Awkal's own attorneys had given them a witness who unequivocally stated that this defense was not applicable to Awkal." Thus, the Sixth Circuit held that Awkal was denied the right to effective assistance of counsel when his own attorney presented testimony contradicting the sole defense presented at trial. The Sixth Circuit then held that the state court's "analysis and conclusion are objectively unreasonable applications of *Strickland* [ineffective assistance of counsel standard] because they fail to recognize the extent of the obvious harm caused by trial counsel's decision to call [the expert]. The analysis also mischaracterizes [the expert's] testimony as helpful to Awkal. Though [the expert] did testify regarding Awkal's family and psychiatric history, these facts were irrelevant at the guilt phase. As discussed above, the only relevant question at the guilt phase was whether Awkal was sane at the time of the crime. Accordingly, anything else that [the expert] said at the guilt phase was irrelevant and did not 'assist' Awkal's defense. Nor did it matter that [the expert] had previously

found Awkal incompetent to stand trial, because that incompetency was unrelated to Awkal's mental state at the time of the crime. [The expert's] relevant guilt-phase testimony obviously eviscerated Awkal's sole defense, a fact that the Ohio Supreme Court ignored when it assumed that [the expert's] testimony was simply one part of an overall strategy. Once the jury heard one of Awkal's own witnesses state that Awkal was sane at the time of the crime, no strategy could have saved his sole defense." Thus, the court held that the AEDPA does not limit relief and accordingly granted a writ of habeas corpus. Because the court granted Awkal a new trial, it did not reach the merits of any of his other claims, but the court noted that the prosecutor's statements during guilt-phase closing argument that one of Awkal's experts "comes in here and says for a brief moment that this guy hallucinated on January 7th and as a result of that he was legally insane, but he is now sane, so let him walk out that door," which is a misstatement of the law, and that expert's decision to testify that Awkal was insane at the time of the crime was "one of the most irresponsible acts he had ever seen" was a "serious error which should not be repeated in this case or in others," as was defense counsel's failure to object to these comments.

Note: Awkal had attempted to withdraw his appeal and volunteer for execution. He was found incompetent to do so, causing his appeal to go forward and eventually resulting in this grant of habeas relief.

Cornwell v. Bradshaw, 559 F.3d 398 (6th Cir. 2009)

(Gibbons, J., for the Court, joined by, Rogers, J.; Moore, J., dissenting)

This case involved the following issues: 1) whether there is a reasonable probability the result of the penalty phase would have been different had trial counsel discovered and corrected the misunderstanding of Dr. James Eisenberg regarding Cornwell's childhood mastectomy in time for him to determine whether the information affected his evaluation; 2) whether the district court erred in denying Cornwell's request for an expert on genetic disorders and an evidentiary hearing on the ineffective assistance of counsel claim involving the mastectomy; 3) racial bias tainted the prosecution; 4) the trial court erred in admitting the testimony of a witness; and, 5) appellate counsel was ineffective in failing to challenge the admission of an eyewitness' testimony.

Trial counsel's failure to discover and correct the misunderstanding held by his expert concerning Cornwell's childhood mastectomy did not prejudice Cornwell: Medical records trial counsel failed to uncover show that, at age thirteen, Cornwell underwent "bilateral double mastectomies" with nipple transplants and that before surgery he had size DD breast. The records further reveal that Cornwell had a hormonal imbalance and that he had underdeveloped genitalia. The discharge summary attached to the records gave Cornwell a final diagnosis of "testosterone deficiency syndrome with manifestations of

macromastia," which is "abnormal largeness of the breasts." Based on this, Cornwell argued that his mitigation phase expert, if given these medical records, might have suggested that Cornwell suffered from Klinefelter's Syndrome, which is characterized by having an extra sex chromosome - - symptoms of which include, "enlarged breasts, sparse facial and body hair, small testes, and an inability to produce sperm." Men who suffer from this syndrome also tend to be overweight and to have some degree of language impairment. Although Cornwell's trial expert was aware of the surgery, despite having not seen the medical records, his explanation of the surgery at trial began with an account of how people made fun of Cornwell for being overweight and that he literally asked his mother if he could get a "chest reduction" - - which the Sixth Circuit recognized arguably made the surgery seem like an elective cosmetic procedure and as a result, the jury may have viewed Cornwell less favorably than if they had known that a medical condition caused the enlarged breasts that were removed by double mastectomy. Noting that a reasonable attorney would locate medical records for a known, unusual, and likely traumatic procedure performed on the defendant as a child; that Cornwell himself could not be expected to provide a full account of his medical history as he was only thirteen years old at the time; and his family did not understand the nature of the procedure, having described it as "cosmetic surgery," the Sixth Circuit assumed, without deciding, that trial counsel's performance was deficient despite the level of investigation that trial counsel actually conducted. The Sixth Circuit, however, held that Cornwell suffered no prejudice from trial counsel's failure to uncover and present the medical records and his failure to provide them to his mitigation expert, because the unrepresented mitigating evidence was similar to that presented at the penalty phase. According to the court, the jury heard testimony about Cornwell's weight problems, his large breasts, his learning difficulties, the teasing by other children, his poor performance at sports, and his low self-esteem, and that all these activities drove him to gang activity. The end effect of the information contained in the medical records discovered after trial is, according to the court, that "the jury would have understood that the surgery was related to a medical condition"; that Cornwell had surgery for a medical condition, not cosmetic surgery; and, that he was overweight because of a medical condition, not because he was lazy. Concluding that juries do not hold a child's weight against the child, nor that a child had cosmetic surgery, and also noting that the evidence of the aggravating factor was strong, the Sixth Circuit held that the state courts did not unreasonably conclude that there was no reasonable probability that the outcome of the sentencing phase would have been different if the jury knew the medical reason for Cornwell's obesity and surgery or that he suffered from Klinefelter's Syndrome.

Continued on page 54

Continued from page 53

The district court did not err in denying Cornwell's motion for funds for a genetic disorders expert and an evidentiary hearing: Both the denial of an evidentiary hearing and the denial of discovery in a habeas proceeding is reviewed for an abuse of discretion. Further, because a request for experts is a form of discovery, the good cause standard for obtaining discovery in habeas proceedings also applies to motions for funds for experts in habeas proceedings. To obtain discovery, a habeas petitioner must present "specific allegations showing reason to believe that the facts, if fully developed, may lead the district court to believe that federal habeas relief is appropriate." The Sixth Circuit held that the district court did not abuse its discretion because "the facts, if fully developed, would not have led the district court to believe that federal habeas relief was appropriate" since, even if Cornwell could establish through an expert that he suffers from Klinefelter's Syndrome, he has not established prejudice from trial counsel's failure to uncover and present that information.

The state court's decision that racial bias did not taint Cornwell's prosecution was not an unreasonable application of Supreme Court precedent, nor was it an unreasonable determination of the facts: To prevail on a selective prosecution claim, the defendant must show that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. Discriminatory effect is established by showing that similarly situated individuals of a different race were not prosecuted. Although Cornwell may have shown that the prosecutor made a statement of racial animus with regard to prosecuting Cornwell, he presented no evidence that similarly situated individuals of a different race were not prosecuted. Thus, the court held that Cornwell cannot prevail on this claim.

The state court and district court did not improperly deny Cornwell an evidentiary hearing on his racial bias claim: Because this issue is closely related to the underlying claim for which a certificate of appealability had been granted, the Sixth Circuit held that it was not unreasonable for Cornwell to conclude that the certificate of appealability included this claim. But, the Sixth Circuit held that the claim that the state court improperly denied him an evidentiary hearing is not cognizable in habeas proceedings, "which cannot be used to challenge errors or deficiencies in state court post-conviction proceedings." As for the denial of an evidentiary hearing in federal court, the Sixth Circuit held that because Cornwell did not attempt to present evidence in state court that similarly situated individuals were not prosecuted, he is prohibited from doing so in federal court, and thus was not entitled to an evidentiary hearing on his racial bias claim.

Note: The Supreme Court of the United States recent decision in Harbison held that a certificate of appealability is necessary only to appeal the denial of a decision disposing of the merits of a claim or a decision that the

court cannot reach the merits of a claim. Because the denial of an evidentiary hearing on a claim is not a decision on the merits, a certificate of appealability should no longer be necessary to appeal the denial of an evidentiary hearing.

Direct appeal counsel were not ineffective for failing to raise the claim that the trial court erred in denying Cornwell's motion to suppress an eyewitness' testimony: "Cornwell had the right to the effective assistance of appellate counsel on his direct appeal to the Ohio Supreme Court because it was his first appeal of right." "Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . . In determining whether an identification is admissible, this court follows a two part analysis. The court first considers whether the procedure was unduly suggestive. . . . If the procedure was suggestive, the court then determines whether, under the totality of the circumstances, the identification was nonetheless reliable and therefore admissible." In support of his argument that the eyewitness' testimony should have been suppressed, Cornwell cites the witness: 1) initially failing to identify anyone; 2) being under the influence of morphine when he first made the identification; 3) failing to identify Cornwell as the shooter until the preliminary hearing; and, 4) becoming more certain in his identification as time went by but changing his mind about where in the car Cornwell was sitting when the shooting took place. The Sixth Circuit held that all of these arguments go to the reliability of the identification, not the suggestiveness of it. Thus, without more, which Cornwell does not provide, the initial element that the identification procedure was unduly suggestive has not been shown, therefore meaning Cornwell could not have prevailed on the underlying claim if appellate counsel had presented it. As a result, appellate counsel was not ineffective for failing to raise the issue.

Moore, J., dissenting: Moore dissented both on whether the district court abused its discretion by denying Cornwell funds for a genetic expert and on whether trial counsel was ineffective for failing to learn that Cornwell suffered from a genetic disorder and failing to provide that information to his expert.

"The majority has determined that portraying a male teenager as fat, lazy, and choosing liposuction to avoid working out has the same effect on a jury as portraying a male teenager as the sufferer of a genetic disorder that causes underdeveloped testes, gender identity disturbance, and size-DD breasts that required a double mastectomy at age thirteen. . . . unlike the majority, I do not believe that we need only assume that counsel in this case was deficient; applying Supreme Court and Sixth Circuit precedent, I believe that it is clear that Cornwell's attorney's representation at the penalty phase was deficient. As the Supreme Court has stated

numerous times, if ‘counsel have not fulfilled their obligation to conduct a thorough investigation of the defendant’s background,’ then counsel’s representation is deficient. Moreover, as we have explained, ‘a partial, but ultimately incomplete, mitigation investigation does not satisfy *Strickland*’s requirements’ for effective counsel. As the majority begrudgingly admits, in a death penalty case, a thorough mitigation investigation requires counsel to investigate, at the very least, the known medical history of the defendant, including hospitalizations.

At the penalty phase, Cornwell was portrayed by his family as a fat, lazy person who took the easy way out of situations, evidenced by his choice to undergo ‘cosmetic’ surgery instead of working out to lose weight. No one utilized and emphasized this image more than the prosecutor. At closing argument, the prosecutor stated: ‘Did Cornwell work out weights, run, watch what you eat, what all the rest of us have to try and do? No, he went for liposuction. He had a fat reduction. For God’s sake, Cornwell’s lazy.’

Had Cornwell’s medical records been given to Dr. Eisenberg, the expert hired to aid Cornwell’s mitigation case, he likely would have realized that Cornwell may be suffering from Klinefelter Syndrome, a genetic disorder that causes weight gain, enlarged breasts, language issues, and underdeveloped genitals. The fact that the post-conviction expert, Dr. Haskins, a forensic psychologist just like Dr. Eisenberg, realized this possibility after reviewing the medical records indicates a strong likelihood that Dr. Eisenberg would have reached this realization. With this knowledge, Dr. Eisenberg could have corrected the image of Cornwell being portrayed by informing the jury that Klinefelter Syndrome was the likely cause of Cornwell’s various problems, not laziness. This information would have allowed the jury to view Cornwell in a much more sympathetic light—not as a teenager who had been lazy and taken the easy road in his life, but as a teenager who suffered the burdens of a genetic disease that he could not control and for which he never received a diagnosis, let alone treatment. Furthermore, evidence of Klinefelter Syndrome would reduce Cornwell’s blameworthiness in a way that the weight-related evidence alone did not. Because this genetic-disorder image creates ‘a mitigation case that bears no relation to’ the case of laziness presented, I believe that Cornwell has met his burden of showing prejudice.

The majority contends that ‘the state courts could reasonably reject an assumption that jurors blame teenagers for their own weight problems and somehow consider those who are overweight or lazy or have cosmetic surgery more deserving of the death penalty than those who are thin or energetic or have surgery related to medical conditions.’ I find this reasoning odd, given the fact that the prosecutor in this case—a person who likely has significant experience and expertise in regard to what persuades juries -- appeared to assume that the jury would be heavily swayed by this fact.

Why else would the prosecutor emphasize the issue so conspicuously in his closing argument?

Because I believe that the jury, as the prosecution hoped, likely viewed Cornwell less sympathetically and placed more culpability on Cornwell than it would have had he not been portrayed as overweight and lazy, I cannot accept the majority’s rationale on the issue. Looking at the case as a whole, although I suppose it is possible that a jury could have heard all the evidence and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of Cornwell’s culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at the sentencing.”

Judge Moore also believed that the district court abused its discretion in denying Cornwell funds for a genetic expert: “I believe that a diagnosis of Klinefelter Syndrome would have a reasonable probability of affecting the outcome of the penalty phase and rendering the state-court finding of no prejudice objectively unreasonable because (1) having a genetic disorder is itself a strong mitigator and was a subject not addressed at the penalty phase, (2) a mitigation case centered on a genetic disorder, as opposed to an overweight individual who is lazy by nature, would induce much more sympathy from the jury, and (3) Klinefelter Syndrome could indeed reduce Cornwell’s blameworthiness, something that the weight-based evidence did not accomplish. Thus, Cornwell has met his burden of showing that ‘the facts if fully developed, may lead the district court to believe that federal habeas relief is appropriate.’ Therefore, I would hold, at the very least, that Cornwell is entitled to a genetic expert to determine whether he has Klinefelter Syndrome and that the district court abused its discretion by holding to the contrary.”

***Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009) (en banc)** (Rogers, J., for the Court, joined by, Boggs, C.J., Batchelder, Gilman, Gibbons, Sutton, McKeague, and Griffin, JJ.; Daughtrey, J., concurring in result only; Cole, J., concurring in part and dissenting in part; Moore, J., dissenting, joined by, Martin and Clay, JJ.)

En banc review was granted to determine whether Garner validly waived his *Miranda* rights, notwithstanding expert testimony-based in part on a test administered six years later -- to the effect that Garner could not have sufficiently understood the scope of what *Miranda* protects. *Miranda* waivers have two components: voluntariness and comprehension. In determining whether *Miranda* rights were validly waived, courts must examine “the particular facts and circumstances surrounding the case, including the background experience, and conduct of the accused. The relevant question is not whether the criminal suspect knew and understood every possible consequence of a waiver of

Continued on page 56

Continued from page 55

the Fifth Amendment privilege but rather whether the suspect knew that he could choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time.” The majority held that “Garner’s conduct before and during the interrogation demonstrates that he understood his *Miranda* rights and the consequences of waiving those rights.” Specifically, “contemporaneous evidence in the record indicates that Garner appeared ‘perfectly normal’ and ‘very coherent’ at the time that he waived his rights and confessed to the crimes. Officers read Garner the *Miranda* warnings at least two times before he confessed, and Garner signed and dated a form expressly waiving his rights.” Further, an officer testified that “after reading each provision of the *Miranda* warnings to Garner, he asked Garner if he understood the meaning of that provision. Each time that he was asked, Garner responded that he understood his rights, including the waiver provision. Further, nothing in the record indicates that Garner verbally expressed a misunderstanding to police officers or otherwise engaged in conduct indicative of a misunderstanding.” The majority also held that Garner’s explanation of his conduct during the commission of his crimes served to confirm his capacity to understand the *Miranda* warnings. According to the court, “[i]t follows from the above that, at the time of the interrogation, police officers had no indication that Garner’s age, experience, education, background, and intelligence may have prevented him from understanding the *Miranda* warnings.” Given the “original purpose underlying the *Miranda* decision, which was to reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation,” the majority held that the fact the interrogating officers had no way to discern any misunderstanding in Garner’s mind is “of primary significance.” Nonetheless, the majority ruled that it can consider “later-developed evidence of a defendant’s actual mental ability to understand the warnings at the time of the interrogation.” In that regard, at the time of the waiver, Garner was a nineteen-year-old who had poor education and an I.Q. of 76. In post conviction proceedings, Garner was administered the Grisso test, which is designed to determine a person’s capacity to understand *Miranda* warnings. Based on the results of the test, an expert opined that Garner did not have the capacity to understand the *Miranda* rights. In a detailed analysis in which it criticized the Grisso test as a whole and analyzed Garner’s performance on each prong of the test, the majority rejected the results of the Grisso test and held that the conclusions from that test and the expert testimony presented at trial (not based on that test) “do not provide sufficient evidence that Garner’s waiver was not knowing and intelligent.”

Cole, J., concurring in part and dissenting in part: Judge Cole concurs in the outcome but disagrees with the majority that the “primary focus in determining whether a waiver was

knowing and intelligent is the conduct of the interrogating officers.”

Moore, J., dissenting: Judge Moore believes that the “proper inquiry is whether the defendant has the maturity, intelligence, and mental capacity to make a knowing and intelligent waiver.” Applying this standard to the facts of Garner’s case, Judge Moore believes that Garner did not knowingly and intelligently waive his *Miranda* rights before his interrogation. Thus, she would reverse the district court and grant a writ of habeas corpus.

United States District Courts for Kentucky

***United States v. Green*, 2009 WL 928424 (W.D. Ky.) (Russell, C.J.)**

Green requested an order requiring the United States to provide transportation, security, escort, and translation services in Mahmudiyah, Iraq so Green’s attorneys could interview various unidentified family members and neighbors of the victims, along with any Iraqi and United States military personnel familiar with the conditions of the area between the Fall of 2005 and March 2006. Although the court recognized that trial counsel has a duty to “investigate all witnesses who may have information concerning a client’s guilt or innocence,” the court denied Green’s motion. In doing so, the court noted that the Government has provided Green’s attorneys with approximately 200 photographs as well as video recordings of the crime scene and the results of all forensic testing performed on materials recovered from the crime scene, the severity of the present security situation in Mahmudiyah, Iraq – “The Triangle of Death,” neither the prosecutors nor the FBI have traveled to the crime scene, Green’s attorneys did not identify any specific witnesses they would like to interview or the evidence he seeks to obtain, the prosecution agreed to make available to the defense for interviews any victim family members whom it wishes to present testimony from, and the delay that would take place from granting Green’s motion.

***Matthews v. Simpson*, 603 F.Supp.960 (W.D. 2009)**

(Heyburn, J.)

AEDPA does not violate the Ex Post Facto Clause: Because the AEDPA, “neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided a greater punishment, nor changed the proof necessary to convict,” the court held that its application does not violate the Ex Post Facto Clause.

AEDPA does not Suspend the writ of habeas corpus: Habeas legislation violates the Suspension Clause only when it unreasonably renders the habeas remedy “inadequate or ineffective to test the legality of detention. While the AEDPA certainly established new guidelines for habeas cases, it did not suspend the right of a prisoner to seek habeas relief contrary to [the Suspension Clause of the United States Constitution],” but instead left habeas petitioners with “a reasonable opportunity to have their claims heard on the

merits.” Thus, the court held that AEDPA does not unconstitutionally suspend the writ of habeas corpus.

AEDPA when the state court does address a claim: Quoting *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003), the district court held that “[i]n the absence of a state court decision explicitly addressing the federal constitutional issue in question, this court exercises its independent judgment and undertakes a de novo review of the claim.”

The trial court’s failure to define extreme emotional disturbance (EED) did not violate Due Process or the Eighth Amendment: Because the Warden failed to raise procedural default as a defense to this claim, the court refused to address procedural default and held that the “apparent” default does not bar consideration of the merits of this claim. Turning to the merits, the court differentiated between cases where an incorrect reasonable doubt instruction was given and ones where no instruction was given, holding that only the former gives rise to an issue involving proof of every element of the crime. Because Kentucky’s EED instruction told the jury that EED was to be determined from the defendant’s viewpoint, the court held that Kentucky’s EED statute was not overly vague in violation of the Eighth Amendment.

Kentucky law on EED: According to the district court, from 1978 to 1985, the absence of EED was an element of the offense of the crime of murder. In 1985, the Kentucky Supreme Court completely reversed course on the issue. Thus, in 1982, when Matthews was tried for murder, “the burden of persuasion as to the absence of EED lies with the Commonwealth,” while “the burden of production as to the absence of EED lies on the defendant. These two propositions are entirely consistent with the absence of EED as an element of murder in Kentucky.” Thus, “[w]hen all the proof is complete, the Commonwealth must have evidence in the record from which a jury could conclude beyond reasonable doubt as to the absence of EED.” With regard to being entitled to a directed verdict of not guilty or for the Commonwealth to avoid one, “the Commonwealth should make its case in chief, introducing evidence regarding the elements of the crime. At this time, the Commonwealth may, but is not required to, introduce evidence regarding the absence of EED. After the close of the Commonwealth’s case, a defendant may put forth a defense if he chooses. In doing so, a defendant may present evidence that at the time of the crime he acted under EED. If a defendant first presents evidence suggesting the presence of EED, the Commonwealth must be able to point to evidence suggesting an absence of EED in order to survive a defendant’s motion for a directed verdict on the charge of murder. To do this, the Commonwealth may point either to inferences from evidence elicited from the defendant’s witnesses or from its own.”

No burden shifting took place with regard to EED and Matthews was not entitled to a directed verdict of not guilty because the Commonwealth failed to prove the lack of EED:

According to the district court, relief could be granted on this claim “only if a reasonable jury could not have found from the evidence the absence of EED. If that were true, then the trial court would have impermissibly shifted the burden onto the defendant to prove the presence of EED when it denied his motion [for a directed verdict]. If, however, a reasonable jury could have concluded from the evidence that the defendant acted in the absence of EED, the trial court properly denied defendant’s motion. The question then is whether the evidence as a whole permits the necessary inferences that Matthews acted in the absence of EED.” Noting that Matthews went to great lengths to procure the murder weapon, that the method of committing the crime suggested contemplation and thought by Matthews, and that Matthews’ efforts to conceal the crime, are all facts from which the jury could have inferred the absence of EED, the district court held that a reasonable jury could find beyond a reasonable doubt the absence of EED -- meaning Matthews’ rights were not violated when the trial court failed to grant a directed verdict and also meaning that the burden of proof was not shifted to Matthews.

Matthews’ claim that appellate counsel was ineffective for failing to raise various issues is not procedurally defaulted: Because the Kentucky Supreme Court has held that “RCr 11.42 cannot be used as a vehicle for relief from ineffective assistance of appellate counsel,” the district court held that Matthews’ failure to raise ineffective assistance of appellate counsel in state court did not operate as a procedural default barring federal courts from reviewing the claim on its merits.

Appellate counsel was not ineffective for failing to argue that the failure of Kentucky’s statutes to define EED rendered it unconstitutional: The district court found “no support for the idea that counsel must foresee changes in the law and argue settled issues or open themselves to a claim of ineffective assistance.” The district court also “does not believe that appellate counsel can be said to have fallen below an objective standard of reasonableness because he decided against arguing an issue upon which Kentucky law had been settled or at least stable for seven years.” Thus, the court held that Matthews failed to establish that trial counsel was deficient in failing to argue that Kentucky’s EED law was unconstitutional because it did not define EED.

Trial counsel was not ineffective for failing to strike a juror who believed that people who abuse alcohol and drugs are worthless: Because the juror indicated by his silence to the trial court’s instructions that he would follow the law as instructed by the court and because the juror indicated he believed psychiatrists can bring more understanding to why people act in certain ways, the district court held that trial counsel was not ineffective for failing to move to excuse the juror for cause.

Continued on page 58

Continued from page 57

Trial counsel was not ineffective for failing to request an instruction that differed from the intoxication instruction the Kentucky Supreme Court required at the time:

The court also denied multiple claims alleging trial counsel was ineffective for failing to conduct an objectively reasonable investigation at the guilt phase and sentencing phase, much of which revolved around mental illness.

The prosecutor denigrating Matthews' insanity defense was improper but did not require reversal: The district court held that the prosecutor's statements that Matthews "can work with his attorneys, and enhance[d] his story to Dr. Chutkow" and that EED was a "defense of last resort" were improper. Yet, the district court held that the comments did not require reversal because: 1) the prosecutor immediately followed up the comments by saying he was not trying to imply defense counsel or Matthews' expert were unethical or fabricated testimony; 2) the remarks were fairly isolated; and, 3) the evidence against Matthews was strong.

Kentucky Supreme Court

***Foley v. Commonwealth*, 2009 WL 1110333 (Ky.) (unpublished)**

Foley appealed the denial of a CR 60.02 motion in which he argued that he should receive the benefit of a change in Kentucky law that allows claims that could have been or were raised on direct appeal as palpable error to be raised as ineffective assistance of counsel claims in an RCr 11.42 motion. Relying on its holding, in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), that this change in law does not apply retroactively to cases where the denial of 11.42 relief has been affirmed on appeal, the Kentucky Supreme Court ruled that Foley does not receive benefit of the change in law and thus the circuit court properly denied Foley's 60.02 motion.

***Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)**
(*Noble, J., for a unanimous court*)

DISCLAIMER – Author was counsel of record for Leonard

Once the Kentucky Supreme Court reversed years of precedent by holding that claims that were or could have been raised as palpable error on direct appeal can be raised as ineffective assistance of counsel claims in an 11.42 motion, Leonard filed a CR 60.02 seeking to reopen 11.42 proceedings so ineffective assistance of counsel claims that were summarily denied because the related non-ineffective assistance claims were or could have been raised on direct appeal could be reviewed on the merits. The circuit court found Leonard's motion timely but denied relief because the change in law did not constitute an extraordinary circumstance justifying relief. The Kentucky Supreme Court affirmed, holding that the change in law applied to capital cases but that the change in law does not apply retroactively to individuals who have completed RCr 11.42 proceedings.

Commuting a death sentence while an appeal is pending does not deprive the Kentucky Supreme Court of exclusive jurisdiction to hear the appeal: Because maintaining jurisdiction furthers judicial economy, the Kentucky Supreme Court held that regardless of subsequent actions, it will retain jurisdiction over a case where jurisdiction was proper in the first place.

Claims that were or could have been raised as unpreserved error in a death penalty case can be raised as ineffective assistance of counsel claims in an RCr 11.42 motion: Under long-standing law, a petitioner cannot raise in 11.42 proceedings claims that were raised on direct appeal or that could and should have been raised on direct appeal. The former, commonly referred to as the "law of the case" doctrine, is akin to collateral estoppel or issue preclusion. The latter procedural bar aims to have issues raised in only the proper forum. These procedural rules, however, were extended to bar review of an ineffective assistance of counsel claims related to claims raised on direct appeal. In 2006, in *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), the Kentucky Supreme Court recognized that the standards for evaluating unpreserved errors and claims of ineffective assistance of counsel are substantially different, with the palpable error standard being more stringent. "When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process. However, on collateral attack, when claims of ineffective assistance of counsel are before the court, the inquiry is broader. In that circumstance, the inquiry is not only upon what happened, but why it happened, and whether it was a result of trial strategy, the negligence or indifference of counsel, or any other factor that would shed light upon the severity of the defect and why there was no objection at trial." Because of these differences, in *Martin*, the Kentucky Supreme Court held that an ineffective assistance of counsel claim, which is one step removed from claims raised on direct appeal, can be presented in an RCr 11.42 motion even though the underlying claim of error had been denied on direct appeal. In other words, "the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel." *Martin*, however, did not directly deal with capital cases or address the contrary line of authority in death penalty cases. In *Leonard*, the Kentucky Supreme Court made it clear that *Martin* applies to death penalty cases and overruled the line of pre-*Martin* cases holding otherwise.

The Commonwealth must appeal an adverse ruling even though it ultimately prevails in order to preserve the issue for appellate review: Because the Commonwealth failed to appeal the circuit court's express ruling that Leonard timely filed his CR 60.02 motion, the Kentucky Supreme Court held that it could not review whether Leonard's 60.02 motion was timely.

The triggering date for automatically receiving the benefit of *Martin*: The Kentucky Supreme Court held that the triggering date for retroactivity of a new rule relating to post conviction proceedings is when the order resolving the collateral attack becomes final. In other words, all petitioners whose post conviction proceedings had not become final by the time the new post conviction rule is adopted automatically receive the benefit of the rule. Because *Martin* is a rule of state procedure governing 11.42 proceedings, the Kentucky Supreme Court held that the relevant judgment for determining retroactivity is when the order resolving 11.42 proceedings becomes final. Thus, anyone who had not concluded 11.42 proceedings when *Martin* became final automatically receives the benefit of *Martin* regardless of whether *Martin* applies retroactively.

***Martin* is a new rule:** A case announces a new rule when it breaks new ground or imposes a new obligation on the State or the Federal Government. In other words, “a case announces a new rule if the result was not dictated by precedent existing at the time of the defendant’s conviction became final.” Because the language of *Martin* was contradicted by pre-*Martin* cases, the Kentucky Supreme Court held that *Martin* did not “clarify the law,” but instead “broke new ground by allowing claims that were procedurally barred under the prior case law.” Thus, it is a new rule.

***Martin* does not apply retroactively:** Although the Kentucky Supreme Court recognized that it is not required to apply the *Teague* Retroactivity Doctrine, it decided to adopt the doctrine. Under the *Teague* Doctrine, new rules do not apply retroactively to cases that are final unless the rule makes a category of conduct not criminal, places a category of offenders beyond the reach of a punishment, or is a watershed rule of criminal procedure. Finding that *Martin* satisfies none of these requirements, the Kentucky Supreme Court held that *Martin* does not apply retroactively.

The change in law is not grounds for 60.02 relief under the circumstances: “A change in law is not grounds for CR 60.02 relief except in aggravated cases where there are strong equities.” The Kentucky Supreme Court held that this is not one of those cases, because: 1) Leonard received significant direct and collateral review at the state and federal levels since his conviction some 25 years ago; and, 2) Leonard’s death sentence was commuted by the Governor.

***Baze v. Commonwealth*, 276 S.W.3d 761 (Ky. 2009)**
(Cunningham, J., for a unanimous court; Scott, J., not sitting) **DISCLAIMER** – Author was counsel of record for Baze.

Venue for Baze’s trial was changed to Franklin County. The judge appointed to try the case in Franklin County then transferred venue to his home county. Baze argued that the judge had no territorial jurisdiction to act outside of Franklin County and thus Baze’s convictions and death sentences, rendered in Rowan County, are void. Likening territorial

jurisdiction to subject matter jurisdiction, Baze argued his CR 60.02 motion was timely because jurisdictional defects cannot be raised at any time and cannot be waived.

Purpose of CR 60.02: Coram nobis was a procedure by which a party could raise issues that had not been heard or litigated, were not known or could not have been known by the party through the exercise of due diligence, or could not have been raised earlier because of duress, fear, or some other cause. CR 60.02 has preserved the writ of coram nobis but limits relief to the exact language of the rule. In its current form, CR 60.02 allows relief only when relief is not available through other proceedings and the 60.02 claims were not presented and could not have been presented on direct appeal or in an RCr 11.42 proceeding. Because RCr 13.04 makes the civil rules of procedure applicable to criminal cases, criminal defendants can invoke CR 60.02 to present issues not available through direct appeal or RCr 11.42 proceedings.

The difference between venue and jurisdiction: Subject matter jurisdiction deals with the power of a court to hear a case and to issue a binding decision. Territorial jurisdiction places boundaries on a court’s power to hear a case by limiting a circuit court judge’s jurisdiction to his own circuit and any area outside that circuit in a proceeding where the judge has been appointed as Special Judge. A ruling or judgment entered by a judge who lacks subject matter or territorial jurisdiction is void. Venue, on the other hand, deals with the place for a claim to be heard and can be waived expressly or by failing to raise it in the proper manner within the proper time.

Baze’s trial judge had jurisdiction to transfer the case to his home circuit after being appointed to preside over the case as a Special Judge in a non-adjointing circuit: The Kentucky Supreme Court held that a circuit court judge has simultaneous jurisdiction to preside over a case in the county in which he was appointed Special Judge for the case and in his home county, but not in any other county. Baze’s trial judge validly obtained jurisdiction over Baze’s case by being appointed Special Judge to try the case. He simultaneously maintained jurisdiction in his home county. Thus, the court held that Baze’s trial judge did not exceed his territorial jurisdiction when he sua sponte changed venue to his home county.

Any issue that a court cannot change venue more than once in a case is waived: Because any issue concerning an improper change of venue was not raised on direct appeal or in the initial RCr 11.42 motion, the Kentucky Supreme Court held that Baze waived any claim that a circuit court cannot change venue more than once in a case or that a sua sponte change of venue to the county in which Baze was tried was improper. ■

PRACTICE TIPS

By DPA Appeals Branch

You've been assigned to represent a client charged with offending a new sex offender restriction statute and you think that the statute is unconstitutional. You do a ton of research, draft a brilliant memorandum in support of your motion and are not the least surprised when the trial court overrules your motion—you expected as much and were really just preserving everything for an appellate court's review. However, the appellate court refuses to consider the argument on appeal because you failed to read KRS 418.075.

KRS 418.075 (1) requires something extra to preserve constitutional challenges for appellate review—notice to the Attorney General of the challenge. The statute reads:

- (1) In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

CR 24.03 mirrors this statutory requirement, and adds the requirement that the notice be served at the inception of the challenge: “[W]hen the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney-General.”

Whether the constitutional challenge contemplated in KRS 418.075(1) is a facial one or a challenge to the application of the statute to the defendant appears not to matter to the current incarnation of the Kentucky Supreme Court. In *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002), the Kentucky Court of Appeals determined that a challenge to the constitutionality of a statute pertaining to child custody determination was not constitutional, as applied, despite the Sherfey's failure to notify the Attorney General of the challenge. In a footnote, the Court stated, “[W]e can only address the “as-applied” constitutional challenge because the Attorney General was not given notice of the facial challenge pursuant to KRS 418.075 and Kentucky Rules of Civil Procedure (CR) 24.03.”

The Kentucky Supreme Court denied the Sherfey's Motion for Discretionary Review of this published decision in 2002, therefore offhandedly intimating that the 2002 incarnation of the Court agreed with the Court of Appeals' conclusion that KRS 418.075(1) required notice to the Attorney General in facial challenges, but did not in “as applied” challenges.

However, in 2008, the Kentucky Supreme Court emphatically stated in *Benet v. Commonwealth*, 253 S.W.3d 528, 532 - 533 (Ky. 2008), that the new Court saw things differently:

Likewise, we reject the Court of Appeals' undoubtedly well-intentioned conclusion that an appellate court may rule on an “as applied” challenge to a statute's constitutionality... the Court of Appeals' statement in *Sherfey* that a reviewing court has the power to review improperly preserved “as applied” constitutional challenges must be overruled...

Thus, it is of supreme importance that trial counsel making any challenge to the constitutionality to a statute, whether facial or in application, send a copy of the Motion or other document containing the challenge to the Attorney General's Office contemporaneous with its filing with the local clerk. Some examples of such Motions include: challenges to the composition of the jury pool when including an indictment of the statutory method of selection, challenges of vagueness to any statute, arguments that statutes violate the right to privacy or any other recognized right of constitutional origin.

The same Supreme Court that rendered *Benet* also rendered *Owens v. Commonwealth*, an unpublished decision. 2008 WL 466132 (Ky. 2008). In *Owens*, a narrow majority of the Court indicated that in limited circumstances, it might consider a constitutional challenge that was not presented to the trial court, so that the serving of the appellate brief upon the Attorney General as the prosecutor of appeals for the Commonwealth was compliant with KRS 418.075:

In criminal appeals where the Commonwealth is a party represented by the Attorney General, and the constitutional validity of a statute is raised for the first time on direct appeal, the notice requirement of KRS 418.075(2) is satisfied by the filing of the appellate brief.

It must be remembered that in a circumstance where a constitutional challenge was not raised in the trial court, the palpable error standard articulated in RCr 10.26 would be applied and that standard is not one that often results in relief for criminal appellants, so trial counsel should be cautioned not to rely upon the grace of the Kentucky Supreme Court in deigning to consider an unpreserved constitutional challenge; Owens' conviction was affirmed as he could not satisfy the palpable error standard.

Anytime you think you even come close to challenging the constitutionality of a statute in a motion, send a copy to the Attorney General. It should go without saying that oral challenges are not contemplated, but if the occasion should arise, prompt reduction of the challenge to writing would be required to affect the notice required.

Address of the Attorney General for service:
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601. ■

CONVICTING THE INNOCENT IN GEORGIA

For most Americans, spending one day behind bars for somebody else's crime would be difficult. Twenty innocent individuals in Georgia, however, spent nearly 170 years in prison for crimes they did not commit. In *Convicting the Innocent in Georgia: Stories of Injustice and the Reforms that Can Prevent Them*, The Justice Project highlights the cases of these twenty individuals and presents Georgia with common sense solutions that must be implemented in order to improve the quality of evidence used in criminal cases and reduce the risk of wrongful convictions.

Georgia's criminal justice system is in serious need of reform. Mistaken eyewitness testimony is largely recognized as the leading cause of wrongful convictions in the United States, and Georgia is no exception. Of the twenty men highlight in this report, half were convicted on the basis of mistaken eyewitness identifications. Prosecutorial misconduct also plays a significant role in Georgia's wrongful convictions. Half of the individuals in this report were prosecuted by attorneys who either deliberately or inadvertently failed to meet their legal, ethical, or constitutional obligations. Wrongful convictions are also caused by false jailhouse informant testimony, faulty forensic testimony or methods, and inadequate defense counsel.

Convicting the Innocent in Georgia outlines the common causes that lead to wrongful convictions and provides Georgia with a clear path towards a more fair and accurate criminal justice system.

The Justice Project's Recommendations for Georgia's Criminal Justice System

- Require law enforcement agencies to adopt written policies and procedures for the conduct of photo and live lineups
- Require the electronic recording of full custodial interrogations in serious crimes.
- Implement safeguards designed to subject informant and accomplice testimony to higher scrutiny and increased transparency.
- Institute an improved, proactive forensic oversight system in order to set quality standards for evidence.
- Improve its existing discovery laws to make sure that judges and juries have access to all relevant evidence at trial.
- Enhance access to post-conviction DNA testing to accommodate technological advances and newly discovered evidence.
- Develop better accountability and oversight mechanisms to prevent against prosecutorial misconduct.
- Take steps to ensure that indigent defendants have access to adequate legal representation

Profiles of Injustice

Robert Clark: In 1982, Robert Clark was convicted of kidnapping, rape, and armed robbery after the victim misidentified him as her attacker during a suggestive lineup. In 2005, DNA testing exonerated Clark and identified another individual as the true perpetrator. Robert Clark spent nearly twenty-four years in prison for a crime he did not commit.

Jerry Banks: In the late 1970s, Jerry Banks was tried and convicted twice for the murder of two people in Henry County, Georgia. In both cases, inadequate legal representation and the suppression of exculpatory evidence contributed to Bank's wrongful convictions. Jerry Banks spent six years on death row before new volunteer lawyers got his conviction overturned on the basis of newly discovered evidence. Prosecutors dropped all charges against him when the chief detective in the case was implicated in evidence tampering.

Calvin Johnson: In 1983, mistaken eyewitnesses and inaccurate forensic testimony led to Calvin Johnson's conviction of the rape of a young woman in College Park, Georgia. After two rapes and several attempted assaults, police put together a photo line up to show the victims. Because the victim said the attacker was clean shaven, police included a picture of a clean-shaven Johnson in the photo lineup – at the time Johnson had a full beard and mustache. Three of the four victims chose Johnson as their attacker, though later in a live line up, they each identified another suspect. At trial, misleading testimony by a forensic expert convinced the jury of Johnson's guilt despite Johnson's alibi and corroborating witnesses. In 1999, DNA testing proved that Calvin Johnson was innocent, after sixteen years behind bars.

Full report link

<http://www.thejusticeproject.org/wp-content/uploads/convicting-the-innocent-in-georgia.pdf> ■

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