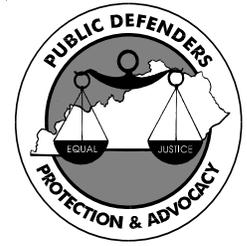


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Let us realize the arc of the moral universe is long but it bends toward justice.

— Martin Luther King Jr.

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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Department of Public Advocacy

Education & Development
 100 Fair Oaks Lane, Suite 302
 Frankfort, Kentucky 40601
 Tel: (502) 564-8006, ext. 236
 Fax: (502) 564-7890
 E-mail: Lisa.Blevins@ky.gov

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**FROM
 THE
 EDITOR...**



Jeff Sherr

If information is presented orally, people remember about 10%, tested 72 hours after exposure. That figure goes up to 65% if you add a picture. Najjar, LJ (1998) *Principles of educational multimedia user interface design*, Human Factors 40(2): 311 – 323. In **A Picture's Worth a Thousand Words: Persuasion Through the use of Visual Effects at Trial**, Jon Rapping takes us through the nuts and bolts of utilizing “visual effects” in trial.

The ABA Standing Committee on Ethics and Professional Responsibility recently issued **Formal Opinion 09-454 Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense (2009)**. This opinion addresses the ethical obligations of a prosecutor to disclose evidence and other information favorable to a defendant in a criminal proceeding under Rule 3.8(d) Special Responsibilities of a Prosecutor of the ABA Model Rules of Professional Conduct.

The National Juvenile Defender Center has released the publication “**Role of Juvenile Defense Counsel in Delinquency Court.**” This publication, reprinted in this edition, describes the unique and crucial role played by defense attorneys in juvenile court proceedings in providing comprehensive legal representation to children charged with offenses.

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**.

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A PICTURE'S WORTH A THOUSAND WORDS: PERSUASION THROUGH THE USE OF VISUAL EFFECTS AT TRIAL

By Jonathan Rapping, Southern Public Defender Training Center

Why should we use visual¹ evidence at trial?

There are two reasons why we should consider using visual effects at trial. The first is that a visual presentation, when accompanying testimony, will help to reinforce the recollection of the fact-finder. The second is that visual effects can help us to paint a picture in the fact-finder's mind that is consistent with the image we are trying to create (or, conversely, there is a real danger that without visual effects jurors may develop a different picture in their mind from testimony than we intend).

It helps the fact-finder recall the testimony. With respect to the first, studies have shown that people are far more likely to retain information presented orally when the oral presentation is accompanied by visual effects. During the course of a trial, jurors hear from many witnesses. A trial is a battle of competing narratives. Every witness should be important to the narrative of that witness' proponent. The problem for the defense attorney is that people have short attention spans. No juror will retain every word she hears. Often, at the end of a trial, jurors will remember testimony differently. However, a creative demonstration will be much less likely forgotten. There will be times when visual evidence can accompany the jury into deliberations. Even when a visual aid is not permitted to be included in deliberations, it will surely leave more of an impression than mere testimony alone.

It helps you convey your interpretation of the testimony to the fact-finder. With respect to the second reason, studies have also shown that the vast majority of people are visual learners. This means that a presentation will be far more likely to successfully convey a concept to a person if it includes visual aids. This presents a particular challenge to us as lawyers because we are hardwired to present our case orally. If we are to maximize our effectiveness at persuasion, we have to better cater to the learning styles of our audience. We must keep in mind that we win and lose cases based on how the jury interprets the facts presented at trial. We must keep in mind that we are shaped by our experiences as defense attorneys. Your jury will not be made up of defense attorneys. We must keep in mind that we come into the trial having already dissected, digested, processed, and analyzed the facts. Your jury is just learning about the case for the first time. Don't lose sight of the fact that every person is different.

We all bring with us our own set of biases and prejudices. We all come with myriad life experiences. We each have varying cultural and historical perspectives that impact how we see things. All of these factors, and many others, create for each of us our own prism through which we process information. The more vague the information presented, the greater the likelihood that multiple listeners will draw vastly different conclusions. The more detailed the description, the less room there is for wide divergence in the way the information is processed.

Because we live with our cases, it is easy to become wed to a particular version of events. There is the danger that we assume everyone will share this interpretation. But our jurors come to us without prior knowledge of the case and with their own perspectives and biases. It is our job to get them to see things our way. Visual effects can provide a very effective way to get jurors to share a common mental image and, therefore, more likely reach the conclusion we want them to reach.

What do we mean by "visual effects?" When we talk about visual effects we are talking about anything that we use at trial, intended for the jury to perceive through its sense of sight, to help them frame testimony in a manner helpful to our defense theory. When we talk about visual effects we are talking about a universe of evidence that encompasses several sub-categories. A common distinction drawn between types of visual effects is "real" evidence versus "demonstrative" evidence.² The former refers to evidence that has a historical connection to the case at hand. Examples are the actual drugs found at a scene or the actual shell casings related to a shooting. The latter refers to evidence that is not historically connected to the case but will aid the jury in understanding testimony presented. Examples of this include a map or diagram of the crime scene or a replica of the knife described by witnesses to a stabbing.

Another useful distinction is that between visual evidence and visual aids. Visual evidence refers to evidence, whether "real" or "demonstrative," that is available to the jury during its deliberations. Visual aids are physical objects used during trial that are not intended to be part of the evidence that the jury can take back to the jury room, in their physical form, during deliberations.

For the most part, you will need to lay a proper foundation before you can use visual effects with your jury. However, there will be times that you will get away with not laying a foundation before using a visual aid. In fact, it would be awkward to do so. An example of this might be if you ask a witness to use a chair in the courtroom to demonstrate how a beating victim was slumped in his chair following a fight or if you ask a witness to use a pencil to demonstrate how it saw a mugger holding a knife.

Therefore, I find it helpful to think of visual effects in four categories:

1. Real or actual evidence (this is a form of visual evidence)

– This is evidence that is historically connected to the case and will usually accompany the jury to the jury room once admitted.

2. Demonstrative or illustrative evidence admitted as evidence (this is a form of visual evidence) – This is evidence such as a map or diagram that is helpful to illustrate testimony and that will accompany the jury to the jury room if admitted.

3. Visual aid admitted for demonstrative or illustrative purposes only – This is demonstrative or illustrative evidence that is admitted only to be used in the courtroom to help explain testimony. It does not accompany the jury to the jury room.

4. Visual aid not admitted – This refers to any appeal to a jury’s sense of sight that is not first admitted into evidence.

How do we use visual effects at trial?

The last category is the easiest, so we will start there. Any time you want a witness to step off the witness stand (or remain on the witness stand) and demonstrate something, you are using a visual aid. Any time you get animated or act out a scene from a narrative during a closing argument, you are using a visual aid. Any time you use a prop in the courtroom that has not been admitted into evidence; you are using a visual aid. There are times that you will naturally do these things during a trial without seeking to move anything into evidence. In fact, it would be awkward to try to do so. No one in the courtroom would expect you to do so. These are examples of visual aids that are not technically “evidence.” [Note: your description of a witness’ demonstration, if not objected to, will become part of the record.]

For the other three categories of visual effects, you must lay a foundation before you can make use of them in the courtroom. Getting visual effects into evidence is a three-step process. The first step is eliciting testimony that makes the visual effect relevant. The second step is getting the object to the witness. The third step is laying the foundation required to get the object admitted into evidence,

Step 1: Eliciting testimony to demonstrate relevance: Visual effects are meant to be adjunct to relevant testimony.

Therefore, before a visual effect will be admitted, there must be accompanying testimony that demonstrates the relevance of the visual effect. So, step one is to call a witness who will provide (or elicit through cross examination) testimony that can be better illustrated through the use of visual effects.

Step 2: Get the object to the witness: Some lawyers refer to the step as “the document dance,” although it is not limited to documents. Any time a lawyer wants to get an object to a witness in order to lay a foundation, the lawyer must follow some basic steps. It is helpful to remember the acronym MOPS (mark, opposing, permission, show). The four steps in getting an object to a witness are:

a. Mark the object for identification. Some courts require that all exhibits be pre-marked. Others allow the lawyer to mark the object as it becomes needed.

b. Show Opposing counsel. The lawyer must make sure opposing counsel has had an opportunity to inspect the item marked for identification.

c. Permission to approach the witness. Unless and until a judge tells a lawyer that she need not seek permission to approach a witness, the lawyer should always ask.

d. Show the object to the witness.

Now you are ready for step 3.

Step 3: Laying the foundation: Once the lawyer has shown the object to the witness the witness must both identify and authenticate the object.

a. Identifying the object – The witness must be asked if they recognize the object, diagram, map, chart, etc. and be given the opportunity to explain what it is. [Note: you are leading the witness if doing this on cross-examination.]

b. Authentication the object – The witness must be able to explain one of two things, **either:**

a. If the object is “real” or “actual” evidence the witness must be able to explain how she knows the object is what it purports to be. This can be done in one of two ways:

i. Establishing that the object is “readily identifiable.” This can be done because the object has distinctive features, through a serial number, or through markings or initials placed on the object at the time of its collection.

ii. Establishing a chain of custody. The witness must be able to account for the items whereabouts from the time of collection until its presentation in court. This could require multiple witnesses.

b. **Or**, if the object is “demonstrative” or “illustrative” the witness must be able to testify that the object/chart/map/etc. fairly and accurately depicts/

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represents/shows the scale, dimensions, and contours of the underlying object. The witness need not be the person who created the exhibit or took the photograph. It is important to note that the judge has wide discretion in determining whether to admit demonstrative evidence. Especially when the evidence is being introduced for illustrative purposes only, the judge need not require that scale, dimensions, or contour be exact. As long as the jury is made aware that an object is not to scale, the judge can ensure that the jury is not misled.³

Practice Tip: As defense attorneys we will often have to deal with the State attempting to use visual effects to prove its case against our client. Therefore, it is equally important that we be able to think defensively about keeping visual effects out of the trial. A prosecutor's inability to lay a proper foundation will often result in visual effects being deemed inadmissible if the defense attorney is on her toes with objections. Keep in mind that all visual evidence and effects must be: a. relevant – it has something to do with an issue at

trial b. material – that it actually helps to illustrate the relevant point c. competent – that is not misleading or unreliable d. more probative than prejudicial – as with all evidence it must pass this additional balancing test for relevancy

Endnotes:

1. This article primarily deals with visual evidence since that is the primary form demonstrative evidence will take at trial. However, the creative attorney should consider taking advantage of all of the jury's senses if possible for demonstrative purposes. Consider using a fragrance if it helps illustrate a point of testimony or asking the jury to feel a surface if relevant to an issue at trial.
2. Some scholars categorize all visual evidence as "demonstrative" and instead draw a distinction between "actual" evidence and "illustrative" evidence. It matters less what you call it and more that you understand the distinction and how the evidence can be used at trial.
3. An accompanying instruction to this effect can also be given.

Jonathan Rapping is the founder and CEO of the Southern Public Defender Training Center. ■

**National Leader in Juvenile Justice Releases New Report
Addressing Racial and Ethnic Disparities in Youth Detention**

SAN FRANCISCO, CA | Dec. 1, 2009 – Today, the national nonprofit W. Haywood Burns Institute (BI) is releasing its second report about systemic problems in juvenile justice systems, *The Keeper and the Kept*.

On any given day, more than 90,000 youth are in custody of the juvenile justice system. A majority of these detained children are youth of color who are held for minor and nonviolent offenses undeserving of the deprivation of liberty. For this, our society pays a high moral and financial price, argues BI Executive Director James Bell.

"Youth of color and poor youth coming into contact with the law find themselves pulled deep into an ever growing industry of confinement," Mr. Bell says. "These juvenile justice systems are upheld by 'keepers,' who believe that secure confinement is an appropriate response to nonviolent and first offenses, and to provide youth with services. We promote a shift in thinking – to using secure confinement as the exception, or the rare instance for all youth."

Most nonviolent youth offenders are incarcerated because alternative services including mental health or counseling are no longer available in communities. When it comes to youth of color in particular, decisions to incarcerate are often driven by "zero tolerance" policies, and fear. In *The Keeper and the Kept*, Mr. Bell and his colleagues challenge this overreliance on detention.

Among the arguments:

- Local juvenile justice systems must account for the expense and outcomes of their operations. States spend about \$5.7 billion each year imprisoning youth, even though the majority are held for nonviolent offenses. Instead, most youth could be supervised safely with alternatives to detention that cost substantially less and lower recidivism, particularly for youth of color.
- A key first step to transforming a local juvenile justice system is the creation of a governing committee that includes decision-makers and the community, for the purpose of analyzing at what decision-making points White youth are released whereas youth of color are detained.
- The second step to successful reform efforts is using data to ensure that policy and practice change is based on neutral and accurate information. By doing so the BI has successfully helped reduce by nearly half the incarceration of Black boys for school fights in Peoria, Illinois, for example, and have helped establish alternatives to detention for Latinos who were incarcerated to protect them from domestic violence situations in Pima County, Arizona.

Our executive director, James Bell is available for interviews about this report and other juvenile justice issues. He is a national leader in reducing disparities in the juvenile justice system. **DOWNLOAD THE REPORT HERE.**

<http://www.burnsinstitute.org/article.php?id=159>

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

FORMAL OPINION 09-454

July 8, 2009

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution.¹ Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility

by a protective order of the tribunal." This obligation may overlap with a prosecutor's other legal obligations.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*,² which held that criminal defendants have a due process right to receive favorable information from the prosecution.³ This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule.⁴ Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.⁵ Finally, although courts sometimes sanction prosecutors for violating disclosure obligations,⁶ disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance. The Committee undertakes its exploration by examining the following hypothetical.

A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant

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and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant's consent to the prosecutor's noncompliance with the ethical duty eliminate the prosecutor's disclosure obligation?

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal.⁷ In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law.⁸ The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."⁹ Similarly, Comment [1] to Model Rule 3.8 states that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland*,¹⁰ the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused.¹¹ This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.¹²

Over the course of more than 45 years following *Brady*, the Supreme Court and lower courts issued many decisions regarding the scope of prosecutors' disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,"¹³ and most importantly, "that special precautions are taken to prevent . . . the conviction of innocent persons."¹⁴ A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d)¹⁵ establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation.¹⁶ The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.¹⁷

In particular, Rule 3.8(d) is more demanding than the constitutional case law,¹⁸ in that it requires the disclosure of evidence or information favorable to the defense¹⁹ without regard to the anticipated impact of the evidence or information on a trial's outcome.²⁰ The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.²¹

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof.²² Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible “evidence,” such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable “information.” Though possibly inadmissible itself, favorable information may lead a defendant’s lawyer to admissible testimony or other evidence²³ or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a *de minimis* exception to the prosecutor’s disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant’s guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, *supra*, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant’s guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses’ testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant’s favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information “known to the prosecutor.” Knowledge means “actual knowledge,” which “may be inferred from [the] circumstances.”²⁴ Although “a lawyer cannot ignore the obvious,”²⁵ Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors’ legal obligations under other law. Although the rule requires prosecutors to disclose known evidence and information that is favorable to the accused,²⁶ it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known

evidence and information that would be relevant or useful to establishing a defense or negating the prosecution’s proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.²⁷

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.²⁸ Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty.²⁹ Because the defendant’s decision may be strongly influenced by defense counsel’s evaluation of the strength of the prosecution’s case,³⁰ timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant’s arraignment.³¹ Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant’s identity would be revealed, the prosecutor may seek a protective order.³²

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Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply.³³ For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client³⁴ or another.³⁵ Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,³⁶ with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.³⁷

The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, *e.g.*, information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather

than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, "in connection with sentencing," *i.e.*, after a guilty plea or verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.³⁸

The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.³⁹ Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,⁴⁰ and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.⁴¹ To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.⁴²

Endnotes:

1. This opinion is based on the **Model Rules of Professional Conduct** as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. 373 U.S. 83 (1963). See *State v. York*, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), “merely codifies” *Brady*).

3. *Brady*, 373 U.S. at 87 (“the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”); see also *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (“The prosecution’s affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court’s decision in *Brady v. Maryland*.”)

4. See Arizona State Bar, Comm. on Rules of Prof’l Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof’l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof’l Ethics, Op. E-86-7 (1986).

5. See, e.g., *Mastracchio v. Vose*, 2000 WL 303307 *13 (D.R.I. 2000), aff’d, 274 F.3d 590 (1st Cir.2001) (prosecution’s failure to disclose nonmaterial information about witness did not violate defendant’s Fourteenth Amendment rights, but came “exceedingly close to violating [Rule 3.8]”).

6. See, e.g., *In re Jordan*, 913 So. 2d 775, 782 (La. 2005) (prosecutor’s failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); *N.C. State Bar v. Michael B. Nifong*, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm’n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); *Office of Disciplinary Counsel v. Wrenn*, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re Grant*, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state’s key witness in murder prosecution). Cf. Rule 3.8, cmt. [9] (“A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.”)

7. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35; *United States v. Bagley*, 473 U.S. 667, 674-75 (1985).

8. “[Petitioner] must convince us that ‘there is a reasonable probability’ that the result of the trial would have been different if the suppressed documents had been disclosed

to the defense. . . . [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury’s conclusions. Rather, the question is whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” *Strickler*, 527 U.S. at 290 (citations omitted); see also *United States v. Copp*, 267 F.3d 132, 142 (2d Cir. 2001) (“The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor’s constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.”)

9. *Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor’s obligation to seek justice date back more than 150 years. See, e.g., *Rush v. Cavanaugh*, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor “is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.”)

10. Prior to *Brady*, prosecutors’ disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. See, e.g., *Jencks v. United States*, 353 U.S. 657, 668, n. 13 (1957), citing Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution “is not that it shall win a case, but that justice shall be done;” *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) (“While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.”)

11. ABA Canons of Professional Ethics, Canon 5 (1908) (“The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.”)

12. See, e.g., *OLAVI MARU*, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) (“a disparity exists between the prosecutor’s disclosure duty as a matter of law and the prosecutor’s duty as a matter of ethics”). For example, *Brady* required disclosure only upon request from the defense – a limitation that was not incorporated into the language of DR 7-103(B), see

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MARU, *Id.* at 330—and that was eventually eliminated by the Supreme Court itself. Moreover, in *United States v. Agurs*, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. *MARU*, *Id.*

13. Rule 3.8, cmt. [1].

14. *Id.*

15. For example, Rule 3.4(a) makes it unethical for a lawyer to “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value” (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to “offer an inducement to a witness that is prohibited by law” (emphasis added), and Rule 3.4(c) forbids knowingly disobeying “an obligation under the rules of a tribunal . . .” These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

16. This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative “materiality” test. *See Cone v. Bell*, 129 S. Ct. 1769, 1783 n. 15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”), citing inter alia, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* “requires less of the prosecution than” Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) (“The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny”); PETERA. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

17. The current version provides: “A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.” ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a)

(ABA 3d ed. 1993), available at <http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf>. The accompanying Commentary observes: “This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law.” *Id.* at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: “It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity.”

18. *See, e.g., United States v. Jones*, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the *Brady* line of cases. *See In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof’l Conduct 3.8, cmt. 1 (“[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.”)

19. Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that “mitigates the offense.” Evidence or information mitigates the offense if it tends to show that the defendant’s level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

20. Consequently, a court’s determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). *See, e.g., U.S. v. Barraza Cazares*, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer’s statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

21. Cf. *Cone v. Bell*, 129 S. Ct. at 1783 n. 15 (“As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”); *Kyles*, 514 U.S. at 439 (prosecutors should avoid “tacking too close to the wind”). In some jurisdictions, court rules and court orders serve a similar purpose. *See, e.g., Local Rules of the U.S. Dist. Court for the Dist. of Mass.*, Rule 116.2(A)(2) (defining “exculpatory information,” for purposes of the prosecutor’s pretrial disclosure obligations under the Local Rules, to include (among other things) “all

information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

22. Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

23. For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

24. Rule 1.0(f).

25. Rule 1.13, cmt. [3], cf. ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); see also ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

26. If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. Cf. Rule 3.8, cmt. [9].

27. Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass

complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

28. Compare D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, supra note 17 (calling for disclosure "at the earliest feasible opportunity").

29. See ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

30. In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel – that is, they provide access to all the documents in their case file including incriminating information – to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. See N.C. GEN. STAT. § 15A-903 (2007); see generally Robert P. Mosteller, Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery, 15 GEO. MASON L. REV. 257 (2008).

31. See *JOY & MCMUNIGAL*, supra note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

32. Rule 3.8, Comment [3].

33. It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In *United States v. Ruiz*, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in *Giglio v. United States*, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

34. See, e.g., Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. See, e.g., Rule 1.7(b)(1).

35. See, e.g., Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial

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protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

36. See Rules 1.2(a) and 1.4(b).

37. The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

38. The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

39. Rules 5.1(a) and (b).

40. Rule 5.1(b).

41. Rule 5.1(c). See, *e.g.*, *In re Myers*, 584 S.E.2d 357, 360 (S.C. 2003).

42. In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). See, *e.g.*, Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).

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Patti Heying

ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT

By Robin Walker Sterling
In collaboration with
Cathryn Crawford, Stephanie Harrison, and Kristin Henning
National Juvenile Defender Center, Spring 2009

Preamble and Scope

A. The Origin of the Role of the Juvenile Defender

In a series of cases starting in 1966, the United States Supreme Court extended bedrock elements of due process to youth charged in delinquency proceedings. Arguably the most important of these cases, *In re Gault*¹ held that juveniles facing delinquency proceedings have the right to counsel under the Due Process Clause of the United States Constitution, applied to the states through the Fourteenth Amendment. The Court added juvenile defense counsel to rectify the dilemma ensnaring juveniles across the country, in which juveniles received “the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”² The Court clearly observed that juvenile defense counsel’s role in delinquency proceedings is unique and critical: “[t]he probation officer cannot act as counsel for the child. His role . . . is as arresting officer and witness against the child. Nor can the judge represent the child.”³ The Court concluded that no matter how many court personnel were charged with looking after the accused child’s interests, any child facing “the awesome prospect of incarceration” needed “the guiding hand of counsel at every step in the proceedings against him” for the same reasons that adults facing criminal charges need counsel.⁴

The introduction of advocates to the juvenile court system was meant to change delinquency proceedings in several key ways. First, it was meant to infuse the informal juvenile court process with more of the jealously-guarded constitutional protections of adult criminal court and their attendant adversarial tenor. Perhaps more importantly, with attorneys explicitly assigned to advocate on their behalf, juveniles accused of delinquent acts were to become participants, rather than spectators, in their court proceedings. The Court observed specifically that juvenile respondents needed defenders to enable them “to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the client] has a defense and to prepare and submit it.”⁵

With its decisions in *Gault* and other cases,⁶ the Court moved the treatment of youth in juvenile justice systems into the national spotlight. In 1974, with a goal of protecting the rights

of children, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA).⁷ The JJDPA created the National Advisory Committee for Juvenile Justice and Delinquency Prevention, which was charged with developing national juvenile justice standards and guidelines. The National Advisory Committee standards, published in 1980, require that children be represented by counsel in delinquency matters from the earliest stage of the process.⁸

At the same time, several non-governmental organizations also recognized the necessity of protections for youth in delinquency courts. Beginning in 1971, and continuing over a ten year period, the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) researched, developed and produced 23 volumes of comprehensive juvenile justice standards, annotated with explicit policies and guidelines.⁹ The IJA/ABA Joint Commission on Juvenile Standards relied upon the work of approximately 300 dedicated professionals across the country with expertise in the many disciplines relevant to juvenile justice practice, including the judiciary, social work, corrections, law enforcement, and education. The Commission circulated draft standards to individuals and organizations throughout the country for comments. The final standards, which were adopted by the ABA in 1982, were crafted to establish a model juvenile justice system, one that would not fluctuate in response to transitory headlines or controversies.

By the early 1980s, there was professional consensus that defense attorneys owe their juvenile clients the same duty of loyalty as adult clients.¹⁰ That coextensive duty of loyalty requires defenders to represent the legitimate “expressed interests” of their juvenile clients, and not the “best interests” as determined by the attorney.¹¹

B. Present State of Juvenile Defense: A Call for Justice

Recognizing the need for more information about the functioning of delinquency courts across the country, as part of the reauthorization of the JJDPA in 1992, Congress asked the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) to address this issue. One year later, in 1993, OJJDP responded to Congress’ request by funding the Due Process Advocacy Project, led by the ABA Juvenile Justice Center, together with the Youth Law Center and the

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Juvenile Law Center. The purpose of the project was to build the capacity and effectiveness of the juvenile defense bar to ensure that children have meaningful access to qualified counsel in delinquency proceedings. One result of this collaboration was the 1995 release of *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national review of the legal representation of children in delinquency proceedings.¹² The first systemic national assessment of its kind, the report laid the foundation for a closer examination of access to counsel, the training and resource needs of juvenile defenders, and the quality of legal representation provided by each state's juvenile indigent defense system. The report highlighted the gaps in the quality of legal representation for indigent children across the country.

The findings of *A Call for Justice* prompted an outpouring of concern from judges and lawyers across the country, and pointed to the need for state-specific assessments to guide and inform legislative reforms. In response, a methodology was developed to conduct comprehensive assessments of access to counsel and quality of representation in individual states. Since 1995, first the ABA Juvenile Justice Center, and then the National Juvenile Defender Center, have conducted state-specific juvenile defense assessments in 16 states: Florida, Georgia, Indiana, Illinois, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington. Re-assessments have been conducted in Kentucky and Louisiana. County-based assessments were conducted in Cook County, Illinois, Marion County, Indiana and Caddo Parish, Louisiana. The National Juvenile Defender Center is continuously working with leaders in states who are interested in conducting juvenile indigent defense assessments.

Although each state has its own idiosyncrasies, hundreds of interviews in assessment after assessment reaffirm the findings first uncovered in *A Call for Justice*. Since the *Gault* decision, the role of the juvenile defender has evolved to require a complex and challenging skill set. Juvenile defense attorneys must have all the legal knowledge and courtroom skills of a criminal defense attorney representing adult defendants. In addition, juvenile defenders must be aware of the strengths and needs of their juvenile clients and of their clients' families, communities, and other social structures. Juvenile defenders must: understand child and adolescent development to be able to communicate effectively with their clients, and to evaluate the client's level of maturity and competency and its relevancy to the delinquency case; have knowledge of and contacts at community-based programs to compose an individualized disposition plan; be able to enlist the client's parent or guardian as an ally without compromising the attorney-client relationship; know the intricacies of mental health and special education law, as well as the network of schools that may or may not be appropriate placements for the client; and communicate the long- and short-term collateral

consequences of a juvenile adjudication, including the possible impact on public housing, school and job applications, eligibility for financial aid, and participation in the armed forces.

There are many juvenile defense attorneys who, in the face of daunting systemic and other obstacles, offer their clients zealous, holistic, client-centered advocacy. Unfortunately, as *A Call for Justice* first revealed, these attorneys are the exception and not the norm: in jurisdiction after jurisdiction, systemic and other barriers prevent juvenile defenders from realizing the constitutionally-mandated vision of their role. For example, on average, juvenile defenders' caseloads are staggeringly high, and these crushing caseloads have redounding repercussions: plea agreements function as a case management tool and are entered into without previous, independent investigation; pre-trial advocacy to test the strengths and weaknesses of the government's case is often set aside; and already scarce resources, stretched thin to provide basic services, like office space, computers, desks, and files, are not available for investigators, social workers, and expert witnesses. Also, across the country, juvenile court suffers from a "kiddie court" mentality where stakeholders do not believe that juvenile court is important. Finally, in some jurisdictions, because they view juvenile court first and foremost as an opportunity to "help a child," judges and other system participants undermine attorneys' efforts to challenge the government's evidence and provide zealous, client-centered representation, considering such advocacy an impediment to the smooth function of the court. As a result, many juvenile courts still operate in a pre*Gault* mode in which the defense attorney is lawyering cannot occur, and the fair administration of justice is impeded.

C. Goals of These Principles

The Principles that follow are developed to describe the unique and critical role juvenile defense attorneys play in juvenile proceedings. Hundreds of interviews with juvenile justice system stakeholders reveal that the juvenile defense attorney's role is perceived differently by different courtroom actors. While there are of course exceptions, across the country, prosecutors and probation officers often view zealous juvenile defense attorneys as obstructionists who overlook the compelling needs of their clients in service to the single and monolithic goal of "getting the client off, and communicate, in direct and indirect ways, that the defender should be less adversarial. Similarly, judges rely on juvenile defense attorneys to advocate on the child's behalf, but only as a necessary cog in the machinery of the appearance of fairness and of judicial economy, and not as a zealous, client-centered advocate. Juvenile defenders themselves are unsure of their role. Most understand that, in theory, they are bound to zealously represent their clients' expressed interests. Nonetheless, in practice, many yield to the unified pressure from other stakeholders and from the seemingly irresistible momentum of the proceedings, and advocate for their clients'

best interests. The reasons for this capitulation vary. Some set aside their ethical obligation because of a genuinely misguided understanding of their role; others sacrifice zealous advocacy because they have to triage staggering caseloads supported by scant resources; still others bow to systemic barriers that interfere with their advocacy. The defenders' role seems all the more ambiguous in specialty boutique courts, like drug court and mental health court.

In the vision of the *Gault* Court, the juvenile defense attorney is a critical check on the power of the state as it imperils the client's liberty interests. Defenders are not obstructionists; they protect the child's constitutional rights. They do this through their practical, everyday duties - from interviewing the child outside of the presence of the child's parents, to objecting to inadmissible but informative evidence at adjudicatory hearings, to advocating for the least restrictive alternative at disposition, to pressing, at every stage, for the client's expressed interests. Each of these day-to-day duties has its grounding in defense counsel's mandatory ethical obligations. These Principles serve to inform indigent defense providers and the leadership of indigent defense organizations, judges, prosecutors, probation officers, and other juvenile justice stakeholders the specifics of the role of defense counsel in the delivery of zealous, comprehensive and quality legal representation to which children charged with crimes are constitutionally entitled.

The Role of Juvenile Defense Counsel

1. Duty to Represent the Client's Expressed Interests

ABA Model Rules of Professional Conduct (Model Rules): Preamble; 1.14(a) Client with Diminished Capacity; 1.2(a) Scope of Representation and Allocation of Authority between Client and Lawyer

At each stage of the case, juvenile defense counsel acts as the client's voice in the proceedings, advocating for the client's expressed interests, not the client's "best interest" as determined by counsel, the client's parents or guardian, the probation officer, the prosecutor, or the judge. With respect to the duty of loyalty owed to the client, the juvenile delinquency attorney-client relationship mirrors the adult criminal attorney-client relationship. In the juvenile defender's day-to-day activities, the establishment of the attorney-client relationship is animated by allocating the case decision-making, and practicing the special training required to represent clients with diminished capacity.

A. Establishment of the Attorney-Client Relationship:

Juvenile defense counsel do not assume they know what is best for the client, but instead employ a client centered model of advocacy that actively seeks the client's input, conveys genuine respect for the client's perspective, and works to understand the client in his/her own socioeconomic, familial, and ethnic context.

1. At every stage,¹⁵ juvenile defense counsel works to provide the client with complete information concerning all aspects of the case, including honest predictions concerning both the short-term (e.g., whether the client will be detained pending trial or whether the client will win the probable cause hearing) and longterm (e.g., whether the child will be acquitted or whether, if found involved, the child will be committed and/or face additional collateral consequences) goals of the case. Juvenile defense counsel's abiding purpose is to empower the client to make informed decisions. Counsel's advice to the client about the likely advantages and disadvantages of different case scenarios is legally comprehensive, candid, and objectively relayed using age-appropriate language.

2. Operating under a client-centered model of advocacy allows juvenile defense counsel to enhance immeasurably the fundamental fairness of the system. Because no other courtroom actor serves the juvenile's expressed interests, without juvenile defense counsel, the juvenile would be subjected to a pre-*Gault* proceeding in which protecting the juvenile's due process rights are relegated to a mere technicality.

B. Allocation of Decision-Making: Unlike the other courtroom actors, who have no obligation to consider a juvenile's expressed interests in their recommendations and orders, juvenile defense counsel allows clients, to the greatest extent possible, to be the primary decision-makers in their cases.

1. Juvenile defense counsel enables the client, with frank information and advice, to direct the course of the proceedings in at least the following areas:

- a. whether to cooperate in a consent judgment, diversion, or other early disposition plans;
- b. whether to accept a plea offer;
- c. if the client can choose, whether to be tried as a juvenile or an adult;
- d. if the client can choose, whether to have a jury trial or a bench trial;
- e. whether to testify in his own defense; and
- f. whether to make or agree to a specific dispositional recommendation.

2. Other decisions concerning case strategy and tactics to pursue the client's goals, like the determination of the theory of the case, what witnesses to call, or what motions to file, are left to juvenile defense counsel, with the critical limitations that counsel's decisions 1) shall not conflict with the client's expressed interests concerning the areas listed in c, and 2) shall not conflict with the client's expressed interests in any other case-related area.

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C. Diminished Capacity: Minority does not automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client's expressed interests. Nor does a juvenile's making what juvenile defense counsel considers to be a rash or ill-considered decision constitute grounds for finding that the client suffers from diminished capacity. In fact, because of the unique vulnerabilities of youth, it is all the more important that juvenile defense attorneys firmly adhere to their ethical obligations to articulate and advocate for the child's expressed interest, and to safeguard the child's due process rights. In other words, in direct contrast to the pervasive informality that characterizes juvenile court practice in so many jurisdictions, minority sharpens defense counsel's ethical responsibilities, instead of relaxing them.

1. In light of current brain development research, it is clear that minority critically affects the scope of the juvenile attorney- juvenile client relationship. Current brain development research posits that youth are categorically less culpable than the average adult offender. This research has gained wide acceptance, as indicated most recently by the United States Supreme Court's opinion in *Roper v. Simmons*, 543 U.S. 551(2005), which struck down the juvenile death penalty as unconstitutional. The *Roper* Court concluded that youths are less culpable than the average adult offender because they: (1) lack maturity and responsibility, (2) are more vulnerable and susceptible to outside influences, particularly negative peer influences, and (3) are not as well formed in character and personality as, and have a much greater potential for rehabilitation than, adults. *Id.* at 569-570. This research requires juvenile defense counsel to be adept at using age-appropriate language, motivational interviewing, visual aids, and other techniques effective in communicating with, and more specifically, effective in translating legal concepts to, children.

2. It is crucial to recognize that this research does not provide an argument for counsel to disregard a child's expressed interests merely because of the child's minority. To the contrary, the unique vulnerabilities of youth, make it all the more important for the child's lawyers to help the child identify and articulate his or her views to key players in the juvenile justice system. Any juvenile client capable of considered judgment is entitled to a normal attorney client relationship. And, even youth of diminished capacity and other vulnerabilities have views, concerns and opinions that are entitled to weight in legal proceedings.

Additional sources:

- IJA/ABA Juvenile Justice Standards, Standards Relating to Counsel for Private Parties (Juvenile Justice Standards): 3.1 The Nature of the Lawyer-Client Relationship; 5.2 Control and Direction of the Case; 9.3(a) Counseling Prior to Disposition

- ABA Standards for Criminal Justice, Standards Relating to the Defense Function (Criminal Justice Standards): 4-3.1 Establishment of Relationship

2. Duty of Confidentiality and Privilege

Model Rules: 1.6 Confidentiality of Information

Juvenile defense counsel is bound by attorney-client confidentiality and privilege. The duty of confidentiality that juvenile defense counsels owe their juvenile clients is coextensive with the duty of confidentiality that criminal defense counsels owe their adult clients. This duty includes:

A. No Exception for Parents or Guardians: There is no exception to attorney-client confidentiality in juvenile cases for parents or guardians. Practically, this fact means that juvenile defense counsel has an affirmative obligation to safeguard a client's information or secrets from parents or guardians; that interviews with the client must take place outside of the presence of the parents or guardians; and that parents or guardians do not have any right to inspect juvenile defense counsel's file, notes, discovery, or any other case-related documents without the client's expressed consent. While it may often be a helpful or even necessary strategy to enlist the parents or guardians as allies in the case, juvenile defense counsel's primary obligation is to keep the client's secrets. Information relating to the representation of the client includes all information relating to the representation, whatever its source.

B. No Exception for Client's Best Interests: There is no exception to attorney-client confidentiality in juvenile cases allowing disclosure of information in service to what counsel, parents or guardians, or any other stakeholders deem to be the client's best interests. Even if revealing the information might allow the client to receive sorely-needed services, defense counsel is bound to protect the client's confidences, unless the client gives the attorney express permission to reveal the information to get the particular services, or disclosure is impliedly authorized to carry out the client's case objectives.

C. Private Meeting Space: To observe the attorney's ethical duty to safeguard the client's confidentiality, attorney-client interviews must take place in a private environment. This limitation requires that, at the courthouse, juvenile defense counsel should arrange for access to private interview rooms, instead of discussing case specifics with the client in the hallways; in detention facilities, juvenile defense counsel should have a means to talk with the client out of the earshot of other inmates and guards; and in the courtroom, juvenile defense counsel should ask for a private space in which to consult with the client, and speak with the client out of range of any microphones or recording devices.

Additional sources:

- *Juvenile Justice Standards: 3.3 Confidentiality*

3. Duties of Competence and Diligence

Model Rules: 1.1 Competence, 1.3 Diligence

A juvenile defense attorney provides competent, prompt, and diligent representation based in legal knowledge, skill, thorough preparation, and ongoing training.¹⁴ With respect to the juvenile defender's day-to-day activities, the Duties of Competence and Diligence are expansive, encompassing the obligations to investigate, to zealously protect the child's due process rights from arrest through the close of the case, to engage in dispositional advocacy, and to access ancillary services.

A. Comprehensive Skill Set: Juvenile defense counsel possesses a comprehensive skill set that meets the client's legal, educational, and social needs.

1. Competent representation in juvenile delinquency matters requires legal training that encompasses rules of evidence, constitutional law, juvenile law and procedure, and criminal law and procedure, as well as trial skills, such as examining witnesses, admitting documents into evidence, and making legal arguments before the court, and appellate procedure.

2. Competent Juvenile defense counsel is also well-versed in the areas of child and adolescent development. Child and adolescent development research intersects with counsel's representation in many ways. For example, counsel might rely on recent development research in detention and disposition arguments. Counsel also might use the research to help counsel convey complex legal concepts in age-appropriate language.

3. Competent juvenile defense counsel has a working knowledge of and maintains contacts with experts in ancillary areas of law that often intersect juvenile delinquency matters, including but not limited to the collateral consequences of adjudication and conviction, expungement, special education, abuse and neglect, mental health, cultural competency, child welfare and entitlements, and immigration

4. Competent defense counsel engages in continuing study and education of juvenile-specific subject areas and complies with all relevant continuing legal education requirements.

B. Investigation: Juvenile defense attorneys promptly investigate cases to find witnesses, examine forensic evidence, locate and inspect tangible objects and other evidence that might tend to exculpate the client, that might lead to the exclusion of inculpatory evidence at adjudication or disposition, or that might buttress the client's potential defenses. This duty exists even when the lawyer believes the client is guilty, and when the client has confessed in interrogation, in interviews with counsel, or to anyone else.

1. Juvenile defense attorneys promptly take the Counsel in necessary steps to obtain discovery, including filing discovery requests, motions pursuant to *Brady v. Maryland*, and motions to compel if the prosecutor does not comply with counsel's request.

2. Based on leads from the client and from discovery received from the prosecutor, juvenile defense attorneys conduct independent investigation of, inter alia, the allegations against the client, of police conduct, of witnesses' backgrounds, and of any and all possible defenses and mitigating factors for disposition.

3. Juvenile defense attorneys do not allow clients to plead guilty without first reviewing the government's file, including police reports, results of forensic examinations and tests, photographs, and other evidence, discussing and pursuing possible exculpatory investigation leads, and providing a fair and informed assessment of the strengths and weaknesses of the government's case.

C. Protecting Pretrial Due Process Rights: Juvenile defense attorneys have a duty to protect the client's pretrial due process rights by obtaining discovery, filing motions, and making arguments to protect the client's rights while serving the client's expressed interests.¹⁵

1. To ensure that the court system is not being used for societal functions it was not meant to assume - for example, as the disciplinary arm of the school system, or as a reflection of the racial, ethnic and class biases that often mark police arrest rates - juvenile defense attorneys file pretrial motions that seek pretrial release, that advocate for individualized plans that offer the least restrictive set of release conditions necessary to ensure the client's return to court and community safety, and that guard against infringement of the client's federal or state constitutional rights before and during the arrest, including motions to suppress tangible evidence, identifications, and statements.

2. Juvenile defense attorneys also file pretrial motions that clarify points of law, block the admission into evidence of inadmissible or prejudicial information, and otherwise ensure that the client will receive a fair trial.

D. Protecting Due Process Rights at Adjudicatory Hearings: Juvenile defense counsel has a duty to protect the client's due process rights and to pursue vigorously the client's expressed interests at adjudication.

1. Juvenile defense counsel ensures that, as *In re Gault* and its progeny clearly intended, juvenile adjudicatory hearings are adversarial proceedings in which the state bears the burden to prove its case beyond a reasonable doubt with credible, admissible evidence.

2. In accord with this constitutional imperative, juvenile defense counsel ensures fairness in the courtroom by

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litigating the case vigorously consistent with the presumption of innocence, regardless of counsel's opinion concerning either guilt or innocence or the client's need for social, educational, and other services.

3. Juvenile defense counsel litigate adjudicatory hearings aware of the elements of each charged allegation, the lesser-includes for each charge, all the clients' possible defenses and relevant case law.

4. Juvenile defense counsel fulfill their role under *Gault* by adhering to and enforcing application of the rules of evidence, lodging objections, examining witnesses, filing written and oral motions, and challenging the credibility and admissibility of the state's evidence. This duty exists regardless of counsel's opinion of the client's guilt.

5. Juvenile defense counsel explains the right to testify, helps the client identify and weigh the advantages and disadvantages of testifying, and helps the client prepare if he decides to testify.

E. Preparing for and Engaging in Dispositional Advocacy: As part of the duty of competence and diligence, juvenile defense counsel has an affirmative duty to prepare for and engage in dispositional advocacy. Accordingly, at disposition, juvenile defense counsel offers the court strengths-based disposition alternatives that look beyond the options considered by the probation officer to address the child's expressed interests while being responsive to the court's concerns.

1. Dispositional investigation and advocacy begin at the initiation of the attorney-client relationship. Regardless of counsel's prognosis of the case outcome, counsel begins disposition planning and investigation at the earliest opportunity to maximize the chance that the appropriate investigation, evaluations and interviews are completed, and the necessary documents are located and submitted, with the end result that, should the client be found guilty, the client receives the most appropriate, least restrictive disposition with as little delay as possible.

2. Juvenile defense counsel investigates disposition alternatives beyond those available to and considered by probation officers and juvenile court counselors, drawing on community-based resources, according to the client's wishes.

3. Counsel thoroughly engages the child in disposition planning by helping the child identify and understand and weigh the available options. Counsel informs the client about the nature of the presentence investigation process and the importance of statements the client and the client's family might make to probation officers and youth court counselors. Counsel also advises the client about the right of allocution at disposition, and helps the client prepare if the client chooses to allocute.

4. As part of disposition preparation, juvenile defense counsel consults with mitigation specialists, social workers, and mental health, special education, and other experts to develop a plan consistent with the client's expressed interests.

5. At the disposition hearing, juvenile defense counsel prepares and presents the court with a creative, comprehensive, strengths-based, individualized disposition alternative consistent with the client's expressed interests.

6. As at the adjudicatory hearing, at the disposition hearing, juvenile defense counsel protects the client's due process rights by challenging the state's evidence, including any hearsay and other inadmissible evidence that may be included in the presentence report, by cross-examining the state's witnesses, including the probation officer, and by proffering witnesses in support of the client's own disposition plan, according to the client's expressed interests.

F. Conducting Post-Disposition Representation: Juvenile defense counsel has a duty to research and understand the legal rights to which the client is entitled and the legal options the client can access at the post-disposition stage of the case and, after consultation with the client, to pursue available options.

1. Juvenile defense counsel files timely notices of appeals, writs of habeas corpus, and other motions that challenge orders or outcomes that counsel believes are illegal or otherwise offend principles of fundamental fairness.

2. At periodic intervals after disposition, juvenile defense counsel checks in with the client, with an eye towards averting any potential problems with the client's successful completion of disposition conditions, to maximize the client's chance at closing the case as quickly as possible.

3. In jurisdictions that hold regular post-disposition review hearings, juvenile defense counsel participates in these proceedings. In jurisdictions that do not hold regular post-disposition review hearings, juvenile defense counsel encourages periodic post-disposition reviews by filing motions to review that request hearings or other forms of relief, unless counsel's contract prohibits filing such a motion.

4. In preparation for probation and parole revocation hearings, juvenile defense counsel locates witnesses, investigates the allegations, challenges the government's evidence, prepares a defense and offers relevant mitigating factors for the court's consideration.

5. Defense counsel also keeps a record of any difficulties with, or failings by probation officers, programs or other entities charged with providing service to the client in order to militate against violations of probations. If the client is detained, juvenile defense counsel helps the client to

maintain contact with the client's family and/or other positive community-ties, in accordance with the client's wishes.

6. Because juvenile defense counsel's obligation is to the client, counsel can challenge conditions of confinement, either individually or as part of a larger strategy with other juvenile defense counsel.

7. Juvenile defense counsel helps the client expunge juvenile adjudications from the client's record, so that the client is better able to live as a productive, law-abiding citizen without the stigma of adjudication.

G. Accessing Ancillary Services: Juvenile defense counsel provides to the client, either directly or indirectly through referrals, assistance in ancillary areas of law that intersect juvenile indigent defense, with the goal of affording the client holistic representation. Juvenile defense counsel does whatever counsel can reasonably undertake to facilitate the relationship with the client and the provider, and ensure the attainment of the client's ultimate goal.

1. Juvenile defense counsel is familiar with special education law and works to ensure that the client is in an appropriate educational setting.

2. Juvenile defense counsel ensures that the client's rights are protected at school discipline or expulsion hearings.

3. Juvenile defense counsel is available to assist the client with intersecting, ancillary proceedings that may impact the client's case, including housing and immigration matters, as well as procedures for obtaining Medicaid or other public benefits.

4. Juvenile defense counsel who are prohibited from or face limitations in providing these services directly develop a network of providers to whom these cases can be referred so that ancillary representation is holistic and responsive to the client's legal needs.

Additional sources:

- *Juvenile Justice Standards: 4.3 Investigation and Preparation; 4.1 Prompt Action to Protect the Client; 7.2 Formality, In General; 7.3 Discovery and Motion Practice; 7.8 Examination of Witnesses; 7.9(a) Testimony by the Respondent; 9.1 Disposition, In General; 9.2 Disposition Investigation and Preparation; 9.3 Counseling Prior to Disposition; 9.4 Disposition Hearing; 9.5 Counseling after Disposition; 10.1 Relations with the Client after Disposition; 10.2 Post dispositional Hearings before the Juvenile Court; 10.3 Counsel on Appeal; 10.4 Conduct of the Appeal; 10.6 Probation Revocation; Parole Revocation; 10.7 Challenges to the Effectiveness of Counsel*
- *Criminal Justice Standards: 4-4.1 Duty to Investigate; 4-3.6 Prompt Action to Protect the Accused; 4-1.2(a) The Function of Defense Counsel, Commentary; 4-7.4 Opening Statement; 4-7.5 Presentation of Evidence; 4-7.6 Examination of Witnesses; 4-7.7 Argument to the Jury; 4-8.1*

Sentencing; 4-7.9 Posttrial Motions; 4-8.2 Appeal, 4-8.3 Counsel on Appeal

4. Duty to Advise and Counsel

Model Rules: 2.1 Advisor

To better enable the client to make a fully informed decision about the direction of the case, juvenile defense attorneys offer clients honest and comprehensive advice that considers the client's educational, familial, social, developmental, and other realities, in addition to the client's legal situation.

A. Pursuing Diversion Options: Consistent with the client's expressed interests, juvenile defense counsel negotiates, at every possible opportunity, for diversion and other means of case dismissal, regardless of counsel's own opinion of guilt or innocence or the client's need for services. Counsel advises the client on the advantages and disadvantages of each of these alternatives to adjudication, including the consequences of non-compliance with conditions of diversion.

B. Ensuring Ethical Plea Agreements: Juvenile defense counsel negotiates reasonable plea offers and ensures that clients make well-considered decisions concerning whether to plead or go to trial.

1. In negotiations with prosecutors, juvenile defense counsel represents and advocates for the client's expressed interests.

2. Juvenile defense counsel promptly relays plea offers, taking time to review the offer with the client in detail and using age-appropriate language, advises the client on the full panoply of rights relinquished by pleading, as well as the range of disposition options.

3. Juvenile defense counsel seeks to ensure the client has sufficient time to understand and weigh the offer.

4. Juvenile defense counsel's advice as to whether to accept the plea offer includes discussion of the long-term collateral consequences of a juvenile adjudication or transfer to and conviction in adult criminal court (e.g., in some jurisdictions, deportation if the client is undocumented, ineligibility for public housing, federal student loans, and military service). This discussion should also include: the possible dispositions and their impact on the client's life; if the client is likely to get probation; and the consequences of a probation violation.

Additional sources:

- *Juvenile Justice Standards: 6.3 Early Disposition; 7.1 Adjudication without Trial*
- *Criminal Justice Standards: 4-6.1 Duty to Explore Disposition Without Trial; 4-6.2 Plea Discussions; 4-5.2 Control and Direction of the Case*

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5. Duty of Communication

Model Rules: 1.4 Communications

At every stage of the case, a juvenile defense attorney keeps the client informed of the case's legal progression in frequent discussions using age-appropriate language, so that the client is a fully informed and proactive participant at all stages of the proceedings.

A. Communication in Court: For in-court proceedings, juvenile defense counsel previews for the client each hearing before it happens, and reviews each hearing after it happens, providing an opinion as to how the specific hearing has affected the course of the overall case, and allowing the client ample opportunity to ask questions and raise concerns.

B. Communication outside of Court: Juvenile defense counsel keeps the client similarly informed about the case's progression outside of the courtroom by: soliciting and following up on the client's investigatory leads, sharing copies of and discussing motions filed, monitoring the client's compliance with release conditions, or, if the client is detained, making sure that the client is receiving adequate services, and being available to assuage the client's concerns as the case proceeds.

C. Communication and Confidentiality: Counsel creates a safe, comfortable, and, to the extent possible, private environment, and allocates adequate time for counseling; engages the youth with age-appropriate language; earns the child's trust over time; and offers balanced and objective advice when appropriate.

D. Communication with Detained Clients: If the client is detained pending trial, juvenile defense counsel visits the client at the detention facility, and informs the client's family how and when they can visit the client. If the detention facility is too remote, counsel keeps in regular phone contact with the client.

Additional sources:

- *Juvenile Justice Standards: 3.5 Duty to Keep Client Informed; 4.2 Interviewing the Client; 5.1 Advising the Client Concerning the Case*
- *Criminal Justice Standards: 4-3.1 Establishment of Relationship; 4-3.8 Duty to Keep Client Informed; 4-5.1 Advising the Accused*

Endnotes:

1. 387 U.S. 1 (1967).
2. *Gault*, 387 U.S. at 19 n. 23 (internal quotations and citation omitted).
3. *Gault*, 387 U.S. at 36.
4. *In re Gault*, 387 U.S. 1, 36 (1967).
5. *In re Gault*, 387 U.S. 1, 36 (1967).
6. *See Kent v. U.S.*, 383 U.S. 541 (1966) (holding that due process requirements apply to transfer proceedings); *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles have right to

notice of charges, right to counsel, privilege against self incrimination, and right to confrontation and cross-examination); *In re Winship*, 397 U.S. 358 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications); *Breed v. Jones*, 421 U.S. 519 (1975) (rejecting the rigid categorization of juvenile proceedings as civil, and extending the protection offered by the Double Jeopardy Clause, which had traditionally been applied to criminal proceedings, to juvenile proceedings). 7. Pub. L. 93-415 (1974).

8. National Advisory Committee for Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice §3.132 Representation by Counsel - For the Juvenile (1980).

9. For a description of the project, see IJA/ABA Juvenile Justice Standards Annotated: A Balanced Approach xvi-xviii (Robert E. Shepherd, ed., 1996).

10. Kristin Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, 81 Notre Dame L. Rev. 245, 255-56 (2005). 11. Id.

12. ABA Juvenile Justice Center, Juvenile Law Center & Youth Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995), available at <http://www.njdc.info/pdf/cfjfull/pdf>.

13. For purposes of this document, "stage" is broadly defined to include each step at which the state's power intersects the child's life, including, but not limited to, arrest, interrogation at the police station, at school, or at home, initial detention hearings, the probable cause hearing, and post-disposition hearings.

14. Under Model Rule 1.16(a)(1), Declining or Terminating Representation, if a lawyer cannot provide competent, prompt and diligent representation, and continued representation will result in violation of the rules of professional conduct, a lawyer can decline new cases or terminate representation. This rule gives important support to juvenile defense attorneys whose unmanageable caseloads prohibit the individualized, zealous advocacy to which juveniles are constitutionally entitled.

15. It should be noted that juvenile defense counsel is not the only stakeholder ethically charged with safeguarding the client's pretrial due process rights. Model Rule 3.8, Special Responsibilities of a Prosecutor, requires prosecutors to: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; not seek to obtain from an unrepresented defendant a waiver of important pretrial rights, such as the right to a preliminary hearing; and make timely disclosure to the defense of all mitigating or exculpatory evidence.

The complete text can be found at:

http://www.njdc.info/pdfrole_of_juvenile_defense_counsel.pdf ■

KENTUCKY CASE REVIEW

By Steven Buck, Appeals Branch

Frank Rodgers v. Commonwealth,

285 S.W.3d 740 (Ky. 2009)

Rendered June 25, 2009

Affirming

Opinion by Abramson, J.

Noble, J., concurs in part, concurs in result in part, and dissents in part by separate opinion

Scott, J., concurs in part and dissents in part by separate opinion

First-degree manslaughter and second-degree persistent felony offender - 20 year sentence.

The Court found that while the substantive provisions of the 2006 Self-Defense Law apply prospectively, the immunity provision is procedural and applies retroactively. Effective July 12, 2006, after Rodgers's alleged 2004 crime but before his September 2006 trial, the Kentucky General Assembly joined a trend urged by the National Rifle Association and, through Senate Bill 38, extensively amended the self-defense provisions of KRS Chapter 503. Among other changes, Senate Bill 38 created presumptions that one "unlawfully and by force" entering a dwelling, residence, or occupied vehicle does so with the intent to commit an unlawful act involving force or violence, and that a person encountering such an intruder reasonably fears death or great bodily injury. It expanded the circumstances in which the use of deadly force is justified to include those instances when one reasonably believes that such force is necessary to prevent the commission of a felony involving the use of force. The bill expressly provided that the right to use force, including deadly force, in defense of self or others is not contingent upon a duty to retreat. Moreover, the bill declared that one who justifiably used defensive force "is immune from criminal prosecution," including arrest, detention, charge, or prosecution in the ordinary sense.

Pursuant to this latter provision, Rodgers claimed immunity from prosecution, moved to have the charges against him dismissed, and sought an evidentiary pre-trial hearing to address the immunity question. Denying Rodgers' motion to dismiss, the trial court ruled that the new immunity statute did not apply retroactively to Rodgers' case but that even if it did a review of the discovery record was sufficient to determine that Rodgers' assertion of self-defense was significantly controverted, precluding his immunity. Rodgers argued that these rulings were incorrect: that the new self-defense legislation does apply retroactively and that he was entitled to an evidentiary hearing to address his assertion of immunity. Although the Supreme Court agreed with Rodgers

that the immunity statute (KRS 503.085) applied to his trial, the trial court appropriately addressed the immunity question and otherwise correctly determined that the new self-defense laws do not apply retroactively.

Brent Cantrell v. Commonwealth,

288 S.W.3d 291 (Ky. 2009)

Rendered June 25, 2009

Affirming

Opinion by Cunningham, J.

Complicity to manufacture methamphetamine; complicity to possession of a controlled substance in the first degree; complicity to use/possession of drug paraphernalia; and second-degree persistent felony offender - 50 year sentence.

Sufficient evidence was presented to connect defendant to the trailer from which methamphetamine was seized and to prove his age at the time of a prior felony. The Commonwealth introduced evidence that Cantrell was climbing out a window of the trailer and attempting to flee when officers arrived on the scene. In *Rodriguez v. Commonwealth*, 107 S.W.3d 215 (Ky. 2003), the Supreme Court recognized that "proof of flight to elude capture or to prevent discovery is admissible because 'flight is always some evidence of a sense of guilt.'" Officers also noted how Cantrell and his associate were unseasonably dressed when they were apprehended. In addition, officers testified that there was the presence of a strong odor of ammonia on the clothes of both Cantrell and his associate. Cantrell led the officers to believe the trailer was his home. The written consent form Cantrell signed allowing officers to search the trailer clearly indicated Cantrell was giving them consent to search "the home of Brent Cantrell." Cantrell's black truck was parked in front of the residence. After the charges were brought, Cantrell presented the trial court with a motion to suppress evidence seized from "his home" in violation of his constitutional rights. The Court also noted that Cantrell was indicted on each of these three offenses as having acted in complicity with two associates. As the Supreme Court has held: "Complicity liability requires (1) proof of commission of an offense by another person and (2) proof of the defendant's participation in commission of that offense." *Parks v. Commonwealth*,



Steven Buck

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192 S.W.3d 318 (Ky. 2006). With the evidence presented taken as true, and viewed in a light most favorable to the Commonwealth, the Court found that it was not clearly unreasonable for the jury to find guilt.

Cantrell also argued that the Commonwealth failed to establish all the elements of the count charging him with being a persistent felony offender in the second degree. In particular, Cantrell pointed out that the Commonwealth failed to introduce any evidence as to his age at the time the prior felony was committed. In order to establish the count for being a persistent felony offender in the second degree, the Commonwealth must show Cantrell was over the age of 18 years at the time the first offense was committed, and that he was more than 21 years of age when he was convicted of the current offenses. *See* KRS 532.080(2).

The Commonwealth relied on the testimony of Cantrell's father in order to establish his date of birth. During the father's testimony, he indicated Cantrell was born in 1976. Since Cantrell was convicted of the present charges in 2007, the evidence was clear that he was at least 29 years of age at the time of the conviction. The Court found no error in the evidence relied on by the Commonwealth for allowing the jury to infer Cantrell was over 18 when he committed the first offense. During the penalty phase, the Commonwealth introduced Cantrell's prior conviction. No further evidence was introduced during the PFO phase of the trial. Based on the prior conviction and the testimony of Cantrell's father, the jury had evidence that: 1) Cantrell was born in 1976; 2) his prior offense was for possession of a controlled substance; 3) the indictment was returned in 2003 (when Cantrell was 26 or 27 years old); and, 4) at the time Cantrell received a one year sentence after pleading guilty in 2004 (when he was 27 or 28 years old), he had been in custody for 124 days. The Court found that this was enough evidence for the jury to reasonably infer Cantrell's age.

Denial of continuance was harmless error. Cantrell argued that the trial court abused its discretion and committed reversible error when it denied his motion for a continuance. At the start of the second day of trial, Cantrell's attorney informed the court that Cantrell was experiencing problems with his vehicle and would be late arriving at the courthouse. The court, after Cantrell's counsel was unable to provide further details, denied the motion for a continuance and allowed the Commonwealth to continue with its case. The Commonwealth then called one of the three officers who initially arrived on the scene. A couple of minutes after the officer's testimony began, Cantrell entered the courtroom.

The Kentucky Rules of Criminal Procedure state that a defendant shall be present at every critical stage of the trial. *See* RCr 8.28. In determining whether a stage is critical, "[t]he appropriate question is whether there has been any interference with the defendant's opportunity for effective

cross-examination." *See Kentucky v. Stincer*, 482 U.S. 730 (1987). The U.S. Supreme Court has indicated that not all constitutional errors automatically call for a reversal. The Court recognized that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *See Chapman v. California*, 386 U.S. 18 (1967).

Cantrell's absence occurred at the commencement of the second day of trial. He arrived within a couple of minutes of the start of the officer's testimony. Cantrell did not contest the Commonwealth's assertion that during that time the officer testified as to his current and past employment, the fact that he was involved in the investigation, and a description of what he encountered when he initially arrived at the trailer. Nor did Cantrell make any attempt to demonstrate how he was prejudiced by his absence of only a couple of minutes. In light of these circumstances, the Court concluded that the error was harmless beyond a reasonable doubt.

Commonwealth's "send a message" argument during closing arguments of the penalty phase was proper. Cantrell noted that the Commonwealth, over his objection, was allowed to make a "send a message" argument during closing. Cantrell contended that this argument was improper and highly prejudicial in the penalty phase. The Commonwealth stated:

"This is the first case on manufacturing methamphetamine ever heard in Johnson County. You have seen commercials, you have seen the advertisements, you know ... [interrupted by Cantrell's objection] ... you know what meth does to communities. You have seen those that are dead, those that are dying. Now is the time for you to speak with one voice and tell people like Mr. Cantrell, who is bringing poison into our community, we don't want you. We don't want you near us. I am going to ask that you go out and bring back a maximum sentence in this matter..."

In *Young v. Commonwealth*, 25 S.W.3d 66 (Ky. 2000), a post "truth in sentencing law" case very similar to this one, the Court held defendant suffered no "manifest injustice" as the result of prosecution's sentencing phase closing argument during which he asked the jury to send a message to the methamphetamine dealers in Muhlenberg County. The Court noted that the prosecutor's statements were "responsive to defense counsel's contention that the jury should recommend the minimum sentence," and that the "full text of the Commonwealth's sentencing phase closing argument clarified the 'send a message to drug dealers' rhetoric and made it clear that the Commonwealth wanted the jury to know that [defendant's] methamphetamine manufacturing placed him in the drug trafficking stream of commerce." The Court stated that while *Young* dealt with palpable error, rather than preserved error, it is essentially illogical, at the sentencing

phase, to say that the prosecutor cannot encourage the jury to impose a sentence that speaks to deterrence, as well as punishes the specific crime before it. Deterrence is clearly not intended for that defendant alone, but rather his sentence sends the message to all others so inclined that their crimes will be punished, and that a jury made up of local citizens will not tolerate such offenses. This is a significant part of the benefit of public trials. The Court noted, however, that it continues to disapprove of this argument at the guilt stage. And even at the penalty phase, the “send a message” argument shall be channeled down the narrow avenue of deterrence. Any effort by the prosecutor in his closing argument to shame jurors or attempt to put community pressure on jurors’ decisions is strictly prohibited. Prosecutors may not argue that a lighter sentence will “send a message” to the community which will hold the jurors accountable or in a bad light. The penalty argument in this case directed at the potential meth pushers in Johnson County was not error.

Shannon Gibson v. Commonwealth,

291 S.W.3d 686 (Ky. 2009)

Rendered June 25, 2009

Affirming

Opinion by Venters, J.

Cunningham, J., concurs by separate opinion

Scott, J., concurs by separate opinion

The Supreme Court took this case on discretionary review from the Court of Appeals and affirmed its ruling. The Court found that the Rule of Civil Procedure authorizing the court to decide whether to render voluntary pretrial dismissal “without prejudice” or “with prejudice” (CR 41.01) does not apply to criminal cases and that the trial court lacked authority to designate pretrial dismissal of Gibson’s indictment “with prejudice.”

Charles Allen v. Commonwealth,

286 S.W.3d 221 (Ky. 2009)

Rendered June 25, 2009

Affirming

Opinion by Minton, C.J.

Wanton murder - 20 year sentence.

Display of message-bearing clothing was properly determined to be non-prejudicial. The parties agreed that at least once during jury selection, the victim’s father and brother appeared in the courtroom wearing t-shirts containing the words, “In loving memory,” and displaying the victim’s image. And, for at least a short period of time, one of the victim’s relatives wearing the t-shirt was spotted during a recess inside the bar in the area reserved for counsel and the defendant. The trial court denied Allen’s motion to discharge the entire venire and permitted Allen’s attorney to question venire members during voir dire about the effect, if any, the t-shirts would have on them. During that questioning, none

of the jurors stated that these t-shirts would have any bearing on how they viewed the case. On appeal, Allen argued the trial court’s denial of his motion to discharge the entire venire had the effect of denying his right to a fair trial.

The Court recently held in *Coulthard* that a defendant’s right to a fair trial was not denied when a trial court refused to bar similar so-called “propaganda” from a courtroom. But, unlike this case, the Court emphasized in *Coulthard* that the t-shirts in that case had not been worn in the courtroom or viewed by the jury. The Court noted that *Coulthard*’s “argument could possibly have merit if he were able to cite to any ‘propaganda’ displayed in the courtroom during the trial or which was viewed by the trial jury at any time.” Since the “propaganda” was seen inside the courtroom in the present case, the Court stated that it could not resolve this issue solely by reliance upon *Coulthard*.

The Court quoted Justice Souter: “[O]ne could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim’s photo can raise a risk of improper considerations.” Because such displays are “no part of the evidence going to guilt or innocence, and ... are ... an appeal for sympathy for the victim ... and a call for some response from those who see them[,]” the Court agreed that the wearing of such buttons or clothing by spectators “is not a good idea....” The Court declined, however, to conclude that the wearing of such clothing or buttons in the courtroom is so inherently unfair as always to constitute reversible error. Instead, it concluded that the best course in these situations is for the trial court to determine if the spectators’ display caused the defendant to suffer any tangible prejudice.

The trial court appropriately permitted Allen’s counsel in this case to inquire during voir dire as to the effect, if any, the t-shirts would have on the venire members. Since no venire member stated that the t-shirts would affect service as a juror, Allen did not suffer any demonstrable prejudice.

Larry McCloud v. Commonwealth,

286 S.W.3d 780 (Ky. 2009)

Rendered June 25, 2009

Affirming

Opinion by Minton, C.J.

Trafficking while in possession of a firearm; possession of drug paraphernalia while in possession of a firearm; and carrying a concealed deadly weapon - 25 year sentence.

Police officer’s testimony and trial court’s comment were not error. A detective testified about the drug trade, including things like baggies being used to package drugs, the amount of cocaine in a typical “hit,” and his opinion regarding whether the amount of drugs seized from McCloud indicated an intent to traffic or for personal usage. McCloud argued that the detective’s testimony “included nothing that was beyond the ken of a lay person[,]” meaning that “[t]he

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trial court abused its discretion when it allowed the Commonwealth to present [the detective's] opinion testimony."

The Court stated that its precedent was contrary to McCloud's argument. The detective was unquestionably an experienced, qualified law enforcement officer. The Court has approved the introduction of similar testimony both before and after the United States Supreme Court's landmark 1993 decision regarding expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* And, the Court has held that the type of testimony offered by Bowling was "representative of the type of expert opinion based on 'specialized knowledge' for which a formal Daubert hearing on reliability may be unnecessary...." The Court believed that its precedent remains a correct exposition of the law and, thus, held that the trial court did not abuse its discretion when it permitted the detective to render his opinions without first holding a formal Daubert hearing.

The trial court's written instruction to the jury on the trafficking in a controlled substance while in possession of a firearm charge provided that "[i]f you find the Defendant guilty under this Instruction, you will say so by your verdict and no more." Unfortunately, however, when the trial court read this instruction aloud to the jury it instead stated: "You will find the defendant guilty under this instruction. You will say so by your verdict and no more." McCloud argued on appeal that the trial court's misstatement constituted a de facto directed verdict in favor of the Commonwealth.

No contemporaneous objection was lodged to the trial court's unfortunate slip-of-the-tongue. A trial court is obligated to prepare written instructions (which the jury may take into their deliberations) and also to read the instructions aloud to the jury. The Court's precedents hold that written orders of a court take precedence over any arguably contradictory oral statements. The written jury instructions permitted the jury to find McCloud guilty or not guilty of all offenses. More specifically, the written instruction regarding the trafficking in a controlled substance while in possession of a firearm charge required the jury to find McCloud guilty "if, and only if" the jury members "believe[d] from the evidence beyond a reasonable doubt" that the Commonwealth had presented sufficient evidence for all the elements of that offense (as detailed in that instruction). Additionally, the Court found that the evidence against McCloud was strong. Because the written instructions were a correct exposition of the law and adequately explained the jury's obligation to find McCloud guilty only if the jury members believed beyond a reasonable doubt that the evidence showed him to be guilty, the Court determined that the trial court's verbal slip in this case was not so egregious as to rise to the level of a palpable error.

Dayron Castellanos Hidalgo, a/k/a Dayron Castellanos, real party in interest v. Commonwealth, et al. and Hon. A.C. McCay Chauvin, Judge Jefferson Circuit Court v. Commonwealth, et al.,

290 S.W.3d 56 (Ky. 2009)

Rendered June 25, 2009

Affirming

Opinion by Cunningham, J.

Circuit court is without authority to sua sponte conduct a hearing on shock probation. The Commonwealth sought writ of prohibition to bar the trial court from conducting, *sua sponte*, a hearing on shock probation for Hidalgo, who accepted a negotiated plea offer conditioned on his refraining from seeking probation or shock probation. The Court of Appeals granted writ. Hidalgo appealed and the trial judge cross-appealed.

Hidalgo and a co-defendant robbed a business using a BB gun. Hidalgo was subsequently indicted on one count of robbery in the first degree. During plea negotiations, the Commonwealth offered to amend the charge to robbery in the second degree if Appellant would refrain from seeking probation or shock probation. At sentencing, Hidalgo supplemented the pre-sentence investigative report with statements regarding his good character, even though he was not technically asking for probation. The Commonwealth objected and the Jefferson Circuit Court denied probation. However, the court stated that it would consider shock probation if it had authority to do so *sua sponte*. The court set a status/scheduling hearing in sixty days, at which time it would let the parties know if shock probation would be considered and, if so, the date of the shock probation hearing. The Commonwealth objected and moved to set aside the plea and take the case to trial.

At the status hearing, the circuit court, on its own motion, scheduled a shock probation hearing. The Commonwealth objected and sought a writ of prohibition from the Court of Appeals. The Court of Appeals granted the writ on the basis that the trial court was acting outside its jurisdiction. Hidalgo then appealed that decision to this Court, and the Hon. A.C. McCay Chauvin filed a cross-appeal. The Supreme Court affirmed the ruling of the Court of Appeals.

The Court has consistently held that a writ of prohibition is appropriate in two circumstances: 1) when the lower court is acting without or beyond its jurisdiction and there is no adequate remedy through an application to an intermediate court; or 2) when the lower court is acting erroneously within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. The Court found that this case is an example of the lower court acting beyond its jurisdiction.

The trial court had the option of accepting the plea agreement or rejecting it. RCr 8.10. By accepting the agreement, the

court could not then circumvent its terms by its own actions. The Court recognized in this decision that “shock probation” is procedurally much different than outright probation. The latter requires no overt act by the defendant, but must be considered by the court in all eligible cases, regardless of what the Commonwealth agrees to recommend. KRS 533.010(2). The court may grant outright probation against the recommendation of the Commonwealth’s Attorney in the plea agreement. In such a case, it neither violates the plea agreement nor is acting outside its jurisdiction.

James Darnell Graves v. Commonwealth,

285 S.W.3d 734 (Ky. 2009)

Rendered June 25, 2009

Affirming

Opinion by Noble, J.

Third-degree burglary; possession of burglary tools; and first-degree persistent felony offender - 20 year sentence.

Trial court did not err in failing to grant a mistrial after a prosecutor improperly bolstered a witness during voir dire, where defendant sought no further relief and the prosecutor “clarified.” Graves claimed that the trial court erred when it failed to grant a mistrial during *voir dire* when the Commonwealth described its witness as having no motive and being neutral. The Commonwealth first told the jury that the co-defendant had already had his day in court, but that they may or may not find out what happened in his case. The Commonwealth then told the jury that it was their job to determine credibility. In reference to the co-defendant’s testimony, the Commonwealth asked the jury if it could “think of a reason someone might lie for someone else, take the blame for someone else, cover up for someone else.” The Commonwealth then said, “Well, there’s such an individual today, and then there is an individual who is neutral. And that neutral individual is [an eyewitness to the burglary].” The defense objected and moved for a mistrial. At a bench conference, the Commonwealth agreed to correct any error. The court sustained the objection, but overruled the motion for a mistrial. No admonition or further relief was requested. However, the Commonwealth then offered to “clarify” by instructing the jury that it was their job to determine credibility and who had the motivation to lie. The defense responded, “Okay, as long as he clarifies,” and the Commonwealth informed the jury accordingly.

“The standard for reviewing the denial of a mistrial is abuse of discretion.” *Bray v. Commonwealth*, 68 S.W.3d 375 (Ky. 2002). Here, defense counsel agreed that the Commonwealth could “clarify” any potential bolstering issue by telling the jury that they would determine credibility and motivation. Additionally, the Commonwealth’s bolstering was not during its case in chief while the eyewitness was on the stand; it was during *voir dire*. No admonition was requested. Even though it was improper bolstering, it was not an “error ‘of such character and magnitude that a litigant will be denied a

fair and impartial trial and the prejudicial effect can be removed in no other way [except by grant of a mistrial].” *Id.* Therefore, the Court found that the trial court did not abuse its discretion in failing to declare a mistrial.

Christian Omar Walker v. Commonwealth,

288 S.W.3d 729 (Ky. 2009)

Rendered June 25, 2009

Affirming in part and reversing and remanding in part

Opinion by Scott, J.

Complicity to murder; complicity to robbery; complicity to second-degree assault; and complicity to tampering with physical evidence - 50 year sentence.

Reinstatement of tampering with evidence charge was a violation of double jeopardy.

At the close of the Commonwealth’s case, Walker moved the trial court for a directed verdict as to the tampering with physical evidence charge, arguing that it had not been supported by sufficient evidence. The Commonwealth, in response, explained that the charge related to “throwing the guns away.” Unable to recall evidence as to this fact, the trial court stated that the defense motion “was sustained as it relates to the tampering with physical evidence.” Walker then proceeded with his defense.

At the close of the evidence, however, the Commonwealth moved the trial court “to reconsider” its prior directed verdict, arguing that the tampering indictment was “open-ended” and that they had, in fact, presented evidence that certain items - such as clothing and ski masks - had been intentionally disposed of by Walker and his co-defendant with the knowledge that they had shot someone. Upon hearing the Commonwealth’s motion, the trial court stated that it had not previously considered these items and that its prior ruling related only to handgun evidence. On that basis, and over Walker’s objection, the trial court reinstated the tampering charge and allowed the Commonwealth a tampering instruction as it related to the clothing and ski masks. Thereafter, both Walker and his co-defendant closed their cases.

On appeal, the Commonwealth did not contest that jeopardy attached in Walker’s trial. The issue before the Court concerned whether jeopardy was subsequently terminated. Specifically, Walker argued that he was acquitted of the tampering charge when the trial court orally granted his motion for a directed verdict and, thus, its later reinstatement represented a violation of double jeopardy under the holding in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986).

Because an acquittal functions to terminate jeopardy, “subjecting [a] defendant to post-acquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.” *Smalis*; KRS 505.030(1)(a). The established test for determining whether a trial court’s ruling

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constitutes an acquittal depends on “whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). The United States Supreme Court has held that a trial court’s determination of the sufficiency of the evidence is tantamount to such a resolution.

In the present case, the Court found that Walker had no reason to doubt the finality of the trial court’s oral grant of his motion for a directed verdict on the tampering charge. After considering the Commonwealth’s response that the charge related to gun evidence, the record reveals that the trial court stated that Walker’s motion was “sustained as it relates to the tampering with physical evidence” and the Commonwealth did not indicate in any way that it would make or reserve a motion for reconsideration or that it would seek a continuance on the basis of the trial court’s ruling. For the trial court to then reinstate the Walker’s charge after he had presented his defense would be an affront to his reasonable confidence in the finality of the trial court’s initial ruling and to hold otherwise would be an invitation for the prejudice of an accused.

The Court held that the trial court’s subsequent reinstatement of the tampering charge and its instruction to the jury was a violation of the Double Jeopardy Clause of the Fifth Amendment as it represented “postacquittal factfinding proceedings going to” Walker’s “guilt or innocence.”

William Sanders v. Commonwealth,

2009 WL 1819481 (Ky. 2009)

Rendered June 25, 2009

Affirming in part and reversing and remanding in part

Opinion by Venters, J.

Scott, J., concurs in part and dissents in part by separate opinion

First-degree robbery and first-degree persistent felony offender - 22 year sentence.

PFO sentence reversed because it was based on a violation of KRS 218A.500. Sanders first argued that the trial court’s jury instruction for first-degree persistent felony offender was incorrect because it allowed the jury to convict him based on his prior conviction for possession of drug paraphernalia, second offense. KRS 532.080(8) states that “[n]o conviction, plea of guilty, or Alford plea to a violation of KRS 218A.500 shall bring a defendant within the purview of or be used as a conviction eligible for making a person a persistent felony offender.” KRS 218A.500 deals with the crime of possession of drug paraphernalia. Sanders did not object to the jury instruction at trial.

In its brief, the Commonwealth conceded that the inclusion of Sanders’s prior conviction for possession of drug paraphernalia, second offense was error. However, the Commonwealth argued that the error was harmless because evidence was presented at trial that Appellant was convicted of four other felonies, any of which would have qualified him for persistent felony offender status.

Despite the apparent credibility of the evidence of prior convictions, the Court noted in *Medley v. Commonwealth*, 704 S.W.2d 190 (Ky. 1985), that in a persistent felony offender case, “A jury is entitled to disbelieve evidence of prior convictions put on by the Commonwealth.” The Court stated that it could not therefore presume that the specific prior offenses enumerated in the instruction made no difference to the jury. Ordinarily, the Court reviews error in jury instructions under harmless error or palpable error standards to determine whether the use of different prior offenses in the instruction had a substantial impact on the proceedings or would have produced a different verdict. Here, the Court decided that it need not engage in that analysis because KRS 532.080, the statute that defines the offense of persistent felony offender, expressly forbids a conviction for persistent felony offender to be based on a violation of KRS 218A.500. The conviction obtained in this case directly violated the statute which defines the crime itself, so the Court reversed the Sander’s conviction for being a first-degree persistent felony offender, and remand the matter to Jessamine Circuit Court for a new penalty phase trial.

Penalty phase verdict form must conform to decision in

Reneer. The Court noted, upon review of the jury instructions in this case, that the verdict form for the penalty/persistent felony offender phase of the trial did not conform to the procedure established by the Court in *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987), in that it did not require the jury, having found Sanders guilty of persistent felony offender, to fix a sentence on the underlying felony. Although the parties did not raise the issue, the Court addressed the matter *sua sponte* because it has observed the same deviation from *Reneer* recurring frequently throughout the Commonwealth and found it appropriate to use this occasion to provide clarification and guidance. In *Reneer*, the Court directed that at the conclusion of the combined penalty/persistent felony offender phase hearing, the jury should first be instructed to fix a penalty on the underlying charge in the indictment, then to determine if the defendant is guilty of being a persistent felony offender, and if so, to fix the enhanced penalty to be served as a persistent felony offender in lieu of the sentence on the underlying charge. Too often, the Court finds trial courts submitting to the jury a verdict form which directs the jury to fix the sentence on the underlying charge only if it acquits on the persistent felony offender charge. The Court stated its disapproval of that departure from *Reneer*. The jury should always fix a sentence for the underlying charge, and if it finds guilt on the persistent felony offender charge, fix an enhanced

sentence accordingly, with knowledge that the persistent felony offender sentence will be served in lieu of the other sentence.

The model verdict forms provided in 1 Cooper, *Kentucky Instructions To Juries, Criminal* §§ 12.41-12.43 (5th ed.2008) require the jury to fix both sentences after determining guilt on the persistent felony offender charge. They are adequate only if it is made clear to the jury that a sentence for the underlying offense must be fixed in every case. Some trial judges may prefer to place the verdict form for the sentence on the underlying offense ahead of the persistent felony offender instruction, and follow that with the verdict form for sentencing on the persistent felony offender charge. Either method is appropriate and consistent with *Reneer*, so long as a sentence is fixed for the underlying charge, as well as a sentence is fixed for the persistent felony offender charge (assuming the accused is found guilty of same), and the jury is clearly informed that the persistent felony offender sentence will be served instead of the sentence fixed on the underlying charge.

David Morrow v. Commonwealth,

286 S.W.3d 206 (Ky. 2009)

Rendered June 25, 2009

Reversing

Opinion by Scott, J.

At issue is whether the defendant must admit to criminal conduct in order to receive an entrapment instruction. This appeal came to the Court by way of discretionary review from a decision of the Court of Appeals, wherein it was determined that a criminal defendant may not deny commission of a criminal offense and alternatively seek the affirmative defense of entrapment, breaking with the United States Supreme Court's ruling in *Mathews v. United States*, 485 U.S. 58 (1988).

Morrow appealed from the Court of Appeals' decision affirming the judgment of the McCreary Circuit Court convicting him of complicity to commit first-degree trafficking in a controlled substance whereby Morrow was sentenced to 6 years imprisonment. Morrow claimed that the trial court improperly refused to instruct the jury on entrapment. Having been sufficiently persuaded that *Mathews* should be followed in Kentucky, the Court reversed the ruling of the Court of Appeals and remanded the matter back to the trial court for further proceedings.

The United States Supreme Court specifically addressed the issue of alternative inconsistent defenses in the entrapment setting, *i.e.*, denial of the offense and reliance upon entrapment, in *Mathews*, a case substantially on point. In *Mathews*, the United States government argued that a criminal defendant should not be allowed to both deny an offense and alternatively rely on an entrapment defense "[b]ecause entrapment presupposes commission of a crime." Rejecting

that argument, the Supreme Court recognized "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Extrapolating that logic, the Court noted that both federal and state courts permit alternative inconsistent affirmative defenses in various settings and that inconsistent pleading is explicitly allowed under the federal rules of civil procedure and impliedly allowed under the federal criminal rules. Accordingly, the Court held that, in the case of entrapment, a defendant could deny the acts and elements constituting the underlying crime, yet still maintain an entrapment defense.

Because "[t]he question of entrapment is generally one for the jury, rather than for the court," the Court adopted *Mathews* and reversed Morrow's case.

Raymond Kreps v. Commonwealth,

286 S.W.3d 213 (Ky. 2009)

Rendered June 25, 2009

Reversing

Opinion by Abramson, J.

Two counts of second-degree rape and two counts of third-degree rape - 25years.

Admission at trial of defendant's statement, made in the course of plea discussions, was reversible error. Prior to trial, Kreps moved to suppress his taped police statement, arguing that it was inadmissible because it was not given voluntarily and because it was made during the course of a plea discussion with the prosecutor and prohibited by KRE 410. In its order denying the motion, the trial court acknowledged that the interrogating officers told Kreps that "they couldn't promise anything, but they could relate the fact of his cooperation, and they could make recommendations to the prosecutor's office." With no further discussion of KRE 410 and its prohibition on statements made in the course of plea discussions, the trial court concluded that because Kreps's statements were made voluntarily, his taped confession was admissible.

During Kreps's interview, the police officer initially informed Kreps that he could not promise him anything specific because he was not the prosecutor in this case. Kreps countered that he was willing to work with the officers and asked if they could "talk to the County Attorney and see what kind of deal we can make." An officer eventually informed Kreps that in Graves County, Kreps was facing four Class C felonies, which could result in five to ten years imprisonment on each count. In pleading with the officers to reduce his felonies to misdemeanors, Kreps stated:

"If you guys talk [the prosecutor] into a felony - I'm gonna run it all the way up to the court and hope for the best ... I ain't got no choice ... You want me to cop to a misdemeanor

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and talk probation ... I'll give you that. But that's as far as I can go.... Help me out, help a dying man out."

Subsequently, after the officer tried to contact the prosecutor on the phone but was unable to reach him, he told Kreps that he knew the prosecutor would reduce his charges to at least Class D felonies and would possibly run his sentences concurrently or allow him to do "county time." However, the officer also informed Kreps that "those are things that are beyond our control right now because [the prosecutors] are not here and they're ultimately gonna be the ones that make the decision."

The officer then spoke with the Commonwealth's Attorney on the phone and informed him that Kreps was "willing to write out a statement or give a confession" in exchange for a deal. The officer reviewed Kreps's criminal history with the prosecutor. Following the phone conversation, which occurred in Kreps's presence, the officer told Kreps that the prosecutor "was offering a little bit" but had "refused to reduce any of [the charges] to a misdemeanor ... primarily just because of the nature of these particular offenses." Kreps expressed concern that because of his prior convictions, another felony would be his third offense, resulting in an automatic five years. The officer then informed Kreps that the Commonwealth's Attorney "did not have a problem with reducing the Class C felonies to Class D and running them concurrently." In response, Kreps said he was looking for the "best deal" he could get. He inquired if Class D was the lowest level of felony. The officer replied, "Yes. It's just above a Class A misdemeanor." Kreps then asked, "OK, say I give you what you want. When do I see a judge?" The officer replied that Kreps could see a judge that afternoon and that he could post bond.

Kreps then informed the officers that he had incriminating information about the alleged victim's mother and asked whether he should reveal it now or save it for later. Kreps stated, "I'll tell you the deal I'm looking for: one year or less in the county - I'll take the rest on paper. I'll go five years on paper if that's what you want." The officer replied that Kreps's attorney would have to work that out for him later based on the information he could provide about the alleged victim's mother. Kreps then went to smoke a cigarette. When he returned, he told the officer, "I think you're gonna go to bat for me and try to work this out for me ... All right, let's get this over with ... I will confess to having consensual sex with [the alleged victim], age fourteen, and will admit to the four counts I'm being charged with." Despite the officer's statement that the Commonwealth's Attorney was willing to reduce the Class C felonies to Class D, Kreps was indicted for two Class C felonies and two Class D felonies.

KRE 410(4) prohibits the admission at trial of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of

guilty or which result in a plea of guilty later withdrawn." Thus, a statement must be suppressed pursuant to KRE 410 when it is made "in the course of plea discussions" and those discussions are "with an attorney for the prosecuting authority." First and foremost, the Court found that Kreps met the second requirement under KRE 410 because his statement was made in discussions with an attorney for the prosecuting authority. The Court has held that even when the prosecuting authority is not physically present, this requirement is met when "law enforcement agents state they are acting with the express authority ... from a government agent." *Roberts v. Commonwealth*, 896 S.W.2d 4 (Ky. 1995). Here, the officer telephoned the prosecutor in the presence of Kreps, and after ending their phone call, represented to Kreps that the prosecutor had no problem with charging him with Class D felonies and running them concurrently. In making this statement to Kreps, the officer communicated that he was acting with the prosecutor's authority. The Court found that the more difficult question was whether Kreps made his statement in the course of a plea discussion.

The Court has adopted a two-prong test in order to determine whether a defendant's statements have been made in the course of plea discussions: "[w]hether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and whether the accused's expectation was reasonable given the totality of the objective circumstances." *Roberts*. The Court found that, at the very least, it was clear that when Kreps began his interview with the officer, he intended to negotiate his charges down to misdemeanors in exchange for cooperating with the police and providing a statement. Kreps voluntarily went to the Graves County Sheriff's office in order to discuss his relationship with the alleged victim and specifically asked to speak with the prosecuting attorney several times in order to make a deal. Thus, Kreps had an actual subjective expectation to negotiate a plea and satisfies the first prong of the analysis. However, it was less clear whether Kreps's expectation was reasonable given the totality of the objective circumstances.

The officer informed Kreps that the prosecutor had explicitly rejected his initial proposal to reduce his felony charges to misdemeanors. However, after speaking with the prosecutor on the phone, the officer told Kreps that the prosecutor did not "have a problem reducing those [Class C felonies] to Class D felonies and running them concurrent." In response to Kreps asking whether that was the lowest level of felony, the officer also informed Kreps that a Class D felony was just above a Class A misdemeanor. Although Kreps did not ask any additional questions about the specific deal, such as requesting confirmation that those would be his charges in exchange for a confession or discussing any additional terms or conditions, the fact remains that soon after the officer represented what the prosecutor was willing to do, Kreps confessed.

After carefully reviewing the taped statement, the Court believed that it was reasonable for Kreps to expect that he and the Commonwealth were negotiating a plea based on the totality of circumstances. Even though the officer originally stated that he could not promise Kreps anything and that the prosecutor would have to make the ultimate decision, later in the interview, the officer informed Kreps that the prosecutor had made a decision about what felonies he would be charged with. The officer unequivocally represented to Kreps that the prosecutor had no problem reducing Kreps's charges to Class D felonies and running them concurrently. Further, the officer made this assurance immediately after speaking with the prosecutor on the phone in Kreps's presence. Thus, this was not the common scenario where the police simply encourage the defendant to give a statement with assurances that the defendant's cooperation will be viewed favorably by the prosecutor. Here, Kreps did not confess until the officer spoke with the prosecutor on the phone and obtained his assurance that Kreps would be charged only with Class D felonies that would run concurrently. Based on "the totality of the objective circumstances," it was reasonable for Kreps to expect that he was participating in a plea negotiation and that he would be charged with Class D felonies that would run concurrently if he confessed. Consequently, the Court found that Kreps's statement was taken in the course of a plea discussion with a prosecuting authority and should have been excluded at trial pursuant to KRE 410. Due to the fact that this statement was an important element of the Commonwealth's case and especially damaging to Kreps, this error could not be deemed harmless, so the Court reversed Kreps's convictions and remanded the matter for a new trial.

Prior allegation of abuse made by the victim against a person other than the defendant was properly deemed inadmissible.

Because this issue may arise on retrial, the Court noted that the trial court did not err in prohibiting Kreps from asking the alleged victim about a prior allegation of abuse and did not err in refusing to hold a hearing to determine the admissibility of such evidence. Prior to trial, Kreps requested that the Commonwealth disclose any record of the alleged victim having made prior allegations of sexual abuse. The Commonwealth provided these confidential reports to Kreps and the court during an unrecorded, *in camera* meeting. During trial, Kreps attempted to ask the alleged victim on cross-examination about these prior allegations. The prosecutor objected to this line of questioning and requested a bench conference. The Commonwealth informed the court

that although there was some evidence of a prior allegation, it occurred over ten years prior, when the alleged victim was approximately six years old. Further, the prosecutor claimed that the affidavit, which apparently stated that the alleged victim had alleged that another child had abused her, "did not make much sense" and was not particularly reliable. Kreps responded that because a prior allegation is not sexual behavior, this evidence should not be excluded due to KRE 412. Although the trial court noted that KRE 412 might apply, it ultimately ruled that the alleged victim's age at the time of the prior allegation justified excluding this evidence.

The Kentucky Court of Appeals has addressed the admissibility of prior allegations of abuse made by the victim against persons other than the defendant. In *Hall v. Commonwealth*, 956 S.W.2d 224 (Ky.App. 1997), the Court of Appeals warned that "evidence of this nature is without a doubt prejudicial. Its admission would undermine the purpose of KRE 412, shifting the focus from the real issues, and effectively put the victim on trial." However, the court sanctioned an approach taken by other jurisdictions that permits prior accusations of abuse to be admitted in certain instances:

"If the unrelated accusations are true, or reasonably true, then evidence of such is clearly inadmissible primarily because of its irrelevance to the instant proceeding. Additionally, unrelated allegations which have neither been proven nor admitted to be false are properly excluded. If demonstrably false, the evidence still must survive a balancing test, *i.e.*, the probative value must outweigh the prejudicial effect."

Here, it was not clear whether the alleged victim's prior allegation of abuse was proven or admitted to be false. Regardless, however, the fact remained that the trial court did not err in concluding that the alleged victim's age at the time of the prior allegation weighed against admissibility. The alleged victim's allegation made when she was six years old that she had been abused by another child has little or no probative value to a case regarding the alleged victim, as a teenager, having sexual relationship with a 38 year old man. The prejudicial effect of this evidence would certainly outweigh its probative value, causing this evidence to fail the balancing test necessary for its admission. Therefore, the Court found that the trial court did not abuse its discretion in excluding this evidence and Kreps would not be entitled to a new trial on this basis. ■

SIXTH CIRCUIT CASE REVIEW

By David Harshaw, Post-Conviction Branch

*The first case reviewed is a grant of the writ on a claim of ineffective assistance for failure to procure alibi witnesses. The second is a denial of the writ in which the voluntariness of a guilty plea is analyzed for **Brecht** harmlessness instead of as a structural error. The third is a denial of the writ in which the knowing introduction of false testimony by the prosecution is also analyzed under **Brecht** rather than the traditional reasonable likelihood of a different verdict standard.*

***Bigelow v. Haviland*, 576 F.3d 284, before Merritt, Cole, and Sutton, Circuit Judges.**

Judge Sutton wrote for a unanimous court. The case originates from the northern District of Ohio.

This was Michael Bigelow's second trip to the Sixth Circuit. Bigelow's first trip resulted in a remand for an ineffective assistance of counsel hearing. *Bigelow v. Williams*, 367 F.3d 562 (6th Cir.2004). Bigelow's allegation was that his counsel, Peter Rost, did not adequately investigate his alibi defense. On remand, the district court granted relief. The Sixth Circuit affirmed.

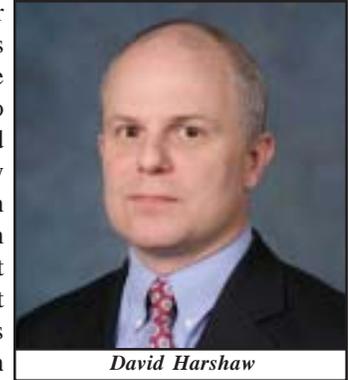
Bigelow was convicted of kidnapping a woman in her own car, forcing her to drive to a remote location, and then cutting her with a knife. The woman got away by kicking her assailant in the groin. Bigelow was also convicted of burning her car. Bigelow became a suspect when a composite of the kidnapper resembled him.

The evidence against Bigelow was the testimony of the victim and of one witness to the abduction. There was no physical evidence. At trial Bigelow put on one alibi witness who testified that he was 150 miles away on the day of the crime. This witness, Vernon Greenlee, said that on the day in question that Bigelow was helping prepare a residence for a large wedding.

Bigelow did not tell his attorney that others had seen him working on the day of the crime. Bigelow, in fact, only told his attorney that three people were at the house that day, himself, Greenlee, and Chasen, the home-owner. Nevertheless, the Court found deficient performance:

Surveying the new evidence, we see no reasonable explanation for Rost's unwillingness to do more after learning that Greenlee could testify in support of Bigelow's alibi defense. At the evidentiary hearing, Rost testified that he knew of one additional witness-Chasen-

who could not verify (or refute) that Bigelow was working at his home on the day of the crime, and who might have prejudiced Bigelow by telling the jury that Bigelow had been involved in a crime in Columbus. But the fact that one witness could not corroborate Greenlee's testimony does not mean that others could not have



David Harshaw

corroborated it. Rost added that Greenlee told him that "there were a total of three people there"-- Greenlee, Chasen, Bigelow -- which is why he did not think that additional witnesses would be available. JA 276-77. But, as we explained before, had Rost taken even "minimal additional investigative steps" after Greenlee contacted him -- such as "confronting [Chasen] with the new information [and] asking [him] for records of the companies that helped with wedding preparations on the 17th" or "talking to Chasen's neighbors" -- he would have learned that there were many others at the house that day, most of them working for Moonlighting Landscape. *Bigelow*, 367 F.3d at 573-74. Once evidence emerged supporting Bigelow's alibi defense, Rost's failure to take even these minimal steps to corroborate it was objectively unreasonable. See *Ramonez v. Berghuis*, 490 F.3d 482, 488-89 (6th Cir.2007); *Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir.1992).

Resisting this conclusion, the State argues that, after Greenlee told Rost that there were only three people at Chasen's home on June 17 and after Bigelow failed to give him any contrary information, Rost had no reason to inquire further. But if "the duty of the lawyer to conduct a prompt investigation" exists regardless of "the accused's admissions or statements to the lawyer of facts constituting guilt," *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)), surely the silence of a defendant about still more mitigating evidence -- remember that Bigelow, not Rost, had identified the only useful witness (Greenlee) up to that point -- does not vitiate that duty. An attorney's duty of investigation requires more than simply checking out the witnesses that the client himself identifies. And that is especially true here since Rost knew that Bigelow

suffered from an “untreated mental illness,” *Bigelow*, 367 F.3d at 568, and that his “recollection [was] not fully with him” regarding the June 1993 period because he was not “taking his medication at the time.” JA 108. Rost had no reasonable basis for assuming that Bigelow’s lack of information about still more witnesses meant that there were none to be found.

The state argued that the additional witnesses were merely cumulative. However, the Court found that they tipped the balance in the case. The Court relied on a prior case, *Ramonez v. Berghuis*, 490 F.3d 482 (6th Cir.2007), that held that even *interested* witnesses could make a difference in a case. Here, Bigelow’s additional witnesses were all *disinterested*.

In assessing prejudice, the Court then said:

In considering the likelihood that new evidence would have affected the jury verdict, we place considerable weight on the strength of the evidence that led to the conviction. *See Strickland*, 466 U.S. at 696, 104 S.Ct. 2052; *Clinkscale v. Carter*, 375 F.3d 430, 445 (6th Cir.2004). That evidence, as we noted before, was far from overwhelming: two witnesses, each with obscured views, placed Bigelow at the scene of the crime, and there was no forensic or other evidence supporting their testimony. *Bigelow*, 367 F.3d at 575. Schrier, for example, identified Bigelow in court, but her recollection rested on a shallow foundation: She had only two fleeting opportunities to view her assailant, and she gave varying descriptions of him at different times. *Id.* The perspective of the other eyewitness, Thomas Mermer, a bystander, “was even weaker,” as he saw the assailant “only from the back and side” and linked Bigelow to the crime only after the highly suggestive event of seeing his face on television in connection with a story about the crime. *Id.* at 575-76.

***Ruelas v. Wolfenbarger*,
— F.3d —, 2009 WL 2851374, before Martin and
Kethledge, Circuit Judges, and Watson, District Judge.**

Judge Martin wrote for a unanimous Court. The case is from the Eastern District of Michigan.

John Ruelas pled guilty to the murder of his mother. His mother called Ruelas’ ex-wife a “bitch,” and Ruelas gave her a “couple of strikings,” resulting in her death. The plea was an “open murder,” which allowed a judge to determine what level of homicide was appropriate. Here, the Judge rejected first degree murder and instead found second degree murder.

In post-conviction, Ruelas argued that the trial Judge never mentioned manslaughter as a possibility and that manslaughter could not have even been considered as a matter of law. Ruelas maintained that his plea of guilt was involuntary because he believed that manslaughter was a possibility.

The state courts found that Ruelas’ plea was voluntary and in the alternative they found that even if it was not that the error was harmless. The federal district court, however, granted the writ because the improper guilty plea had a “substantial and injurious effect” on the proceedings. The district court found that Ruelas would have gone to trial if he had known he was ineligible for a manslaughter verdict.

The Sixth Circuit reversed.

The Court first delved into whether the trial Judge was precluded from considering manslaughter as well as whether the trial judge actually considered it. The state of Michigan law was somewhat in flux. In the end, the Court assumed that the law and the facts of the case were as Ruelas pled them.

Ruelas’ position was that an involuntary guilty plea is a structural error that required automatic reversal. However, the Court disagreed:

Ruelas argues that a finding that his guilty plea was involuntary ought to end his case because all such errors are “structural.” “Structural errors” are those that “defy” analysis by normal harmless error standards, *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), because their consequences “are necessarily unquantifiable and indeterminate,” so reversal is “automatic.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Ruelas’s case, however, neither “defies” harmless error standards nor is the harm “unquantifiable and indeterminate.” His argument otherwise relies on a faulty premise: that the remedy for all involuntary guilty pleas is the right to go back, plead innocent, and have a trial. That is sometimes the remedy, but not always, and not here. Habeas courts have “broad discretion” in crafting remedies for constitutional errors. *See Pickens*, 549 F.3d at 382. And, because guilty pleas are in the nature of contracts, *Puckett*, 129 Sects. at 1430, the remedy for Ruelas is specific performance of what he bargained for: a degree hearing where first-degree murder, second-degree murder, and manslaughter could all be considered. *E.g.*, *Pickens*, 549 F.3d at 382 (“[W]e hold that it is unnecessary to permit a person to withdraw an illegal plea or require the state to retry a case when the defendant’s sentence has been modified to make the sentence legal and to give the defendant every benefit of his bargain.”). Here, the “benefit of the bargain” is the opportunity to be considered for manslaughter, and that is the sort of analysis judges can perform during a harmless-error inquiry. So in this case, where Ruelas pleaded to “open murder” under Michigan law, we can apply harmless error standards to determine whether the Michigan courts properly concluded that he was guilty of second-degree murder. The assumed error was not “structural.”

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The Court found that *Brecht v. Abrahamson*, 507 U.S. 619 (1993) controlled. The test from *Brecht* is whether the error “had [a] substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* at 623. The Court found that all non-structural errors should be analyzed under *Brecht*.

Thus, unlike the district court, which considered whether Ruelas’ misapprehension of his eligibility for a manslaughter verdict had a “substantial and injurious effect” on Ruelas’ initiation of a plea of guilt, the Circuit Court considered whether the misapprehension had a “substantial and injurious effect” on the result Ruelas’ plea of guilt.

The Court found that the calling Ruelas’ ex-wife a “bitch” was little evidence of the provocation necessary to establish manslaughter under Michigan law. The Court concluded that the trial judge would never have found manslaughter under the facts.

***Rosencrantz v. Lafler*, 568 F.3d 577, before Boggs, Chief Judge, Cole and Cook, Circuit Judges.**

Judge Cook wrote for the majority. Cole dissented. The case is from the Eastern District of Michigan.

Timothy Rosencrantz challenged his conviction for the rape of Elaine Lasky. He alleged that the prosecution suborned the perjury of Lasky at his trial.

In a case that has echoes of the first case reviewed in this column, the crime involved an alleged abduction in Rosencrantz’ vehicle in which he used a knife to assault Lasky. Rosencrantz’ defense, like Bigelow’s, was an alibi one. His landlord, two restaurant owners, and Rosencrantz’ girlfriend, all testified that he was 822 miles away on the day of the alleged rape.

Lasky was the key witness for the state. She identified Rosencrantz from a photo line-up. In a fact found key to the majority, she also related to police, soon after the rape, that her assailant had a car tattoo on his chest. Rosencrantz had such a tattoo.

During cross-examination, Lasky was impeached on many inconsistencies between (i) her initial interview with the detective, (ii) her preliminary hearing testimony, and (iii) her trial testimony. Rosencrantz was variously shirtless or bearded. Lasky was drunk or sober prior to the crime. The offense happened before or after midnight.

Lasky was also asked if she had prepared her testimony beforehand with the prosecutor. She denied doing so. The prosecutor did nothing to inform the trial court that Lasky was incorrect in this testimony.

After exhausting his state remedies, Rosencrantz filed a habeas petition. In it he alleged that the prosecution had suborned Lasky’s perjury on four points: (i) the timing of the assault, (ii) the certainty of the identification, (iii) her sobriety, and (iv) her pre-trial meetings with the prosecution. The district court had a hearing at which testimony was taken from Lasky and another witness. Lasky testified, among other things, that she had told the police that she was unsure of her identification of Rosencrantz (an ID she testified she was still unsure about) and that she had met with the prosecution before trial. The other witness corroborated the pre-trial meetings.

Of the four points of error, the district court found that the prosecution had only failed to correct Lasky’s testimony regarding pre-trial meetings. The district court, however, found that this error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The district court cited *Carter v. Mitchell*, 443 F.3d 517, 537 (6th Cir.2006) (applying harmless error to a knowing-presentation-of-false-testimony case), and the First Circuit’s decision in *Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir.1995) (same).

On appeal, the Sixth Circuit found that the *Carter* holding was dicta. Thus, the Court considered, here, as a matter of first impression, whether the knowing use of false testimony is subject to *Brecht* harmless error review.

The Circuit Court began its analysis by laying out the difference between the prosecution’s knowing use of false testimony as contrasted with the prosecution’s failure to turn over exculpatory evidence:

The difference between *Brady/Giglio* false-testimony claims and traditional *Brady* withholding claims drives the analysis here. *See Agurs*, 427 U.S. at 104, 96 S.Ct. 2392. To prove that the prosecutor’s failure to correct false testimony violated due process rights, a petitioner must demonstrate that: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir.1998); *Abdus-Samad v. Bell*, 420 F.3d 614, 625-26 (6th Cir.2005); *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir.2000) (placing the burden on the habeas petitioner). But in these *Brady/Giglio* claims, the materiality assessment is less stringent than that for more general *Brady* withholding of evidence claims. We weigh the materiality of *Brady* withholding claims by asking whether “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). By contrast, for *Brady/Giglio* claims, we ask only “if there is any reasonable likelihood that the false testimony could have affected the judgment of the

jury.” *Agurs*, 427 U.S. at 104, 96 S.Ct. 2392 (citing *Giglio*, 405 U.S. at 154, 92 S.Ct. 763); *see also Carter*, 443 F.3d at 535. The distinction matters here, because while a traditional *Brady* materiality analysis obviates a later harmless-error review under *Brecht v. Abrahamson*, courts may excuse *Brady/Giglio* violations involving known and materially false statements as harmless error. *See Carter*, 443 F.3d at 537; *Gilday*, 59 F.3d at 268

The Court noted that in a traditional *Brady* case *Brecht* review is unnecessary because the Supreme Court in *Kyles v. Whitley* found that a finding of *Brady* materiality automatically means that *Brecht* also is satisfied. By contrast, the Court noted that in a *Brady/Giglio* case the materiality standard of a “reasonable likelihood” is the equivalent of *Chapman v. California*’s harmless error standard.

The Court then engaged in a two-part analysis. First, the Court assumed that under the *Brady/Giglio* test there was a “reasonable likelihood” that the error affected the jury. The Court noted that Lasky was the key witness and that her credibility was the linchpin of the case for the state. Also, if the prosecution had corrected her falsehood as to the meetings, that would have demonstrated her willingness to lie on the stand. Second, the Court then looked to harmless error under *Brecht*’s “substantial and injurious” standard. Rosencrantz could not get over this hurdle.

The Court explained why it used *Brecht* as second test past the usual *Brady/Giglio* analysis:

Reviewing for harmless error under *Brecht*-instead of reviewing only for materiality and instead of reviewing under *Chapman*’s harmless-beyond-a-reasonable-doubt standard-is especially appropriate on collateral review, and doing so here honors *Brecht*’s weighty concerns:

Overtaking final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States’ interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a ‘reasonable possibility’ that trial error contributed to the verdict, *see Chapman v. California*, 386 U.S. at 24, 87 S.Ct. 824, is at odds with the historic meaning of habeas corpus -- to afford relief to those whom society has ‘grievously wronged.’ Retrying defendants whose convictions are set aside also imposes significant ‘social costs,’ including the expenditure of additional time and resources for all the parties involved, the ‘erosion of memory’ and ‘dispersion of witnesses’ that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of ‘society’s interest in the prompt administration of justice.’

507 U.S. at 637, 113 S.Ct. 1710 (internal citations and quotation marks omitted). Testing Rosencrantz’s claim only for *Brady/Giglio* materiality would be tantamount to applying only *Chapman*’s harmless error (the standards are equivalent) and would therefore brush aside *Brecht*’s policy concerns.

The Court also noted that Rosencrantz conceded that harmless error review was appropriate.

In dissent, Judge Cole makes several criticisms of the majority’s opinion. He first finds that the majority ignored a line of Sixth Circuit precedent. This line does not impose a second hurdle on knowing use of false testimony claims. From a policy point of view he then writes:

Brady/Giglio harm by its nature goes to the substantive fairness of trial. The genius of *Brady* -- and perhaps the reason that it has lent its name to a whole category of constitutional claims-lies in its recognition that certain material prosecutorial misconduct renders a trial ipso facto substantively unfair. *See Brady*, 373 U.S. at 87-88, 83 S.Ct. 1194. Where this misconduct is present, post-conviction relief is mandatory. *Id.* An individual may not be imprisoned when the fairness of his trial is in question. *See id.* 86-87, 83 S.Ct. 1194 (describing prosecutorial-abuse cases leading up to *Brady*). And *Brecht* does not alter this fundamental rule. *See Brecht*, 507 U.S. at 627-39, 113 S.Ct. 1710. As the Supreme Court stated in the post-*Brecht* case of *Kyles*: “a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” 514 U.S. at 433, 115 S.Ct. 1555 (internal quotations omitted).

Given the conceptual framework of *Brady* and *Brecht*, we should not shoehorn *Brady* into *Brecht*’s harmless-error analysis. Rather, *Brady* and *Brecht* remain consistent only so long as they stand apart. The Court’s only task in the present case, then, is to apply the *Giglio* test. If the test is satisfied, “a new trial is required.” *Giglio*, 405 U.S. at 154, 92 S.Ct. 763.

Judge Cole lastly finds that Rosencrantz would have even satisfied *Brecht*.

*Author’s Note: The thing to take from the second and the third cases is that a disturbing trend towards the **Brecht**-ization of habeas may be occurring. Of the two, the **Rosencrantz** case is the most unsettling because it treats subornation of perjury like any garden variety trial error. It tells the prosecution that if you can get your misconduct through state court without being caught that it is far less likely the conviction will be overturned in habeas. There is less incentive to play by the rules. ■*

FOURTH AMENDMENT CASE REVIEW

IT'S THE END OF THE WORLD AS WE KNOW IT...AND I FEEL FINE: HUDSON, HERRING, AND THE FUTURE OF THE EXCLUSIONARY RULE

By Jamesa J. Drake, Frankfort Post Conviction

In the March issue of *The Advocate*, I discuss the evolution of the exclusionary rule. I remark that in his concurring opinion in *Hudson v. Michigan*, 47 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), “Justice Kennedy wrote to clarify that ‘the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.’ But the dissenters and many legal commentators remain skeptical.” Since I wrote that article, the Court decided *Herring v. United States*, ___ U.S. ___, 129 S.Ct. 695, 127 L.Ed.2d 77 (2009). After *Herring*, that skepticism has, in certain circles, been replaced by full-blown panic. Are we witnessing the beginning of the end of the exclusionary rule? Should you be worried? I’m not – at least not yet.

Recall that in *Hudson*, the police obtained a warrant to search the defendant’s home. Officers went to the home to execute the warrant and announced their presence. After waiting “three to five” seconds, the police entered the home and seized drugs and a firearm. The defendant moved to suppress the evidence, claiming a violation of the “knock-and-announce” rule.

Hudson was first argued in January 2006. At that time, observers predicted that five members of the Court would apply the exclusionary rule to a knock-and-announce violation. Shortly after oral argument, however, Justice Alito replaced Justice O’Connor and, two months after that, the Court ordered re-argument, which is often viewed as a sign of deadlock. The case was re-argued in May 2006, and this time observers noted a realignment of judges. A few weeks after re-argument, the Court issued its decision.

The *Hudson* Court began by cutting to the chase: “Michigan has conceded that the entry was a knock-and-announce violation. The issue here is remedy.” Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito, all held that suppression was *not* the remedy. From the outset, the opinion takes an ominous tone: “Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial costs.” And, the Court flatly declared that “deterrence of knock-and-announce violations is not worth a lot.”

As previously noted, Justice Kennedy wrote a concurring opinion to reassure concerned readers that “the continued operation of the exclusionary rule...is not in doubt.” Justice Kennedy’s decision to join the majority opinion in *Herring*, however, suggests that he has since changed his mind. Many scholars worried that the continued operation of the exclusionary rule was very much in doubt.

Three years after *Hudson*, the Court decided *Herring*. In that case, a police officer observed the defendant walking on the street and radioed dispatch to determine whether there were any outstanding warrants for the defendant’s arrest. After he was told that there was an active bench warrant in a neighboring county for the defendant’s failure to appear in court, the officer arrested the defendant and found drugs on his person and a gun in his vehicle. After the defendant’s arrest, police later discovered that the arrest warrant had been vacated five months earlier. The defendant moved to suppress the contraband.

Relying on *Leon*, the *Herring* Court reiterated that “[t]he extent to which the exclusionary rule is justified by...deterrence principles varies with the culpability of the law enforcement conduct.” The Court remarked that “[a]n error that arises from nonrecurring and attenuated negligence is...far removed from the core concerns that led us to adopt that rule in the first place.” The Court then held that: “To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price to be paid by the system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.”

Before *Hudson* and *Herring*, the exclusionary rule had teeth. In *Mapp v. Ohio*, the Court held that, “[n]o man is to be convicted on unconstitutional evidence,” and that “*all* evidence obtained by searches and seizures in violation of the Constitution is...inadmissible in...court.” (Emphasis added). After *Hudson* and *Herring*, the applicability of the exclusionary rule appears to depend on a case-by-case consideration of police misconduct, with suppression turning on whether the police acted egregiously enough.

Judges are now expected to ask themselves: Is the constitutional violation bad or *really, really* bad? The question itself is ridiculous. According to *Herring*, only evidence obtained as the result of “deliberate, reckless, or gross conduct, or in some circumstances recurring or systemic negligence” on the part of the police is worthy of suppression.

What should we make of *Hudson* and *Herring*? If those cases mark the beginning of the end of the exclusionary rule (and they very well might), then why haven’t you heard more about them? Why has *Gant*, a relatively narrow decision about the applicability of the search incident to arrest exception to the warrant requirement in the context of automobile searches, completely overshadowed *Herring*, a powder keg of a case about the continued viability of the exclusionary rule in general? Why hasn’t the Commonwealth raised *Hudson* and *Herring* at every suppression hearing and in every search and seizure brief? Because the rationale articulated by the *Hudson* and *Herring* majorities for abandoning the exclusionary rule is – on its face – absurd.

The *Hudson* and *Herring* Courts offer three reasons why the exclusionary rule is, under the circumstances, inapt. First, the Court notes that the “social costs” of applying the exclusionary rule are “substantial.” By “social costs,” the Court means the risk of “setting the guilty free and the dangerous at large.” But, that “social cost” is at the foundation of Anglo-American criminal jurisprudence. Every first year law student learns Blackstone’s 10:1 ratio: “better that ten guilty persons escape than that one innocent suffer.” Benjamin Franklin famously wrote that “it is better one hundred guilty Persons should escape than one innocent Person should suffer.” The sentiment is so ubiquitous that *The Simpsons* has parodied it; Chief Wiggum has said: “I’d rather let a thousand guilty men free than chase after them.” This social contract is Biblical in nature. See Genesis 18:23-32. If the risk of “setting the guilty free” makes the Court queasy about enforcing constitutional protections, then criminal law and procedure as we know it today rests on very shaky ground. For an excellent exposition on the Blackstone ratio, see Alexander Volokh, *n Guilty Men*, 146 U. Pa. L. Rev. 173 (1997).

The Court’s second justification for narrowing the applicability of the exclusionary rule is breathtakingly naïve. The *Hudson* majority cites to, and relies on, “the increasing professionalism of police forces, including a new emphasis on internal police discipline. . . . [W]e now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. Modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect.” In other words, the suppression of evidence is no longer necessary to deter the police because internal “professional” police discipline is a sufficient deterrent. Anyone with even a passing

acquaintance of criminal procedure knows that the police are primarily concerned with catching criminals, not with protecting citizens’ constitutional rights.

Lastly, the Court’s third rationale would make any police officer, police chief, or mayor blanch. The future envisioned by the Court, without the exclusionary rule, is worse for the police and local governments than it is for criminal defendants. According to the *Hudson* majority, the final justification for narrowing the exclusionary rule is the availability of civil remedies for those aggrieved by Fourth Amendment violations. Referring to *Mapp v. Ohio*, the Court reasoned: “Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief. . . . It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities. . . . Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney’s fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, very few lawyers would even consider representation of persons who had civil rights claims against the police, but now much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct. The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.” (Internal citations omitted).

That particular justification comes as no surprise. The alternative to the exclusionary rule has always been civil litigation. Before *Mapp*, persons aggrieved by Fourth Amendment violations sued the offending police officer personally for trespass, malicious prosecution, or a variety of other torts. If the officer acted pursuant to a warrant, the aggrieved person sued the judge who approved the warrant. The *Hudson* majority would, apparently, welcome a return to that approach. And that – more than anything – explains why you probably should not worry about *Hudson* or *Herring*.

It is *highly* unlikely that prosecutors, municipalities, and already over-burdened trial judges would also welcome the flood of new civil cases *in addition to the corresponding criminal case* that *Hudson* and *Herring* invites. It is *highly* unlikely that municipalities or even individual police officers would view the payment of compensatory *and* punitive damages as a remedy for a Fourth Amendment violation as an improvement over simply excluding the unlawfully obtained evidence. One can imagine that, in some aggrieved communities, jurors would jump at the chance to financially punish a police officer or police department for an unlawful search or seizure. The bottom-line impracticality of that rationale will be, I suspect, *Hudson’s* and *Herring’s* undoing. The Court’s willingness to ignore the ramifications of *tens of thousands* of civil suits against individual police officers or police departments is itself troubling.

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At any rate, in the event that you are confronted with *Hudson* and *Herring*, you should begin by identifying the open questions. The first open question concerns the scope of those opinions. Neither *Hudson* nor *Herring* overruled *Mapp*. Thus, it is entirely unclear whether the new “test” articulated in *Herring* – *i.e.*, that the exclusionary rule applies only to “deliberate, reckless, or gross conduct, or in some circumstances recurring or systemic negligence” on the part of the police – applies to every Fourth Amendment violation. Argue that *Hudson* and *Herring* are narrow rulings, limited to two specific types of Fourth Amendment violations: violations brought about by bookkeeping errors and violations of the knock-and-announce rule. Cite to Justice Kennedy’s concurring opinion in *Hudson*, which reaffirms that “the exclusionary rule...is not in doubt.”

Assuming you *are* confronted with the “deliberate, reckless, or gross conduct, or in some circumstances recurring or systemic negligence” standard, the second open question is: Which party bears the burden of establishing deliberate, et al., conduct? In cases involving warrantless searches, argue that the Commonwealth bears the burden of proving that the police did *not* act deliberately or recklessly. Reiterate that when considering the constitutionality of a warrantless search or seizure, a reviewing court must presume that the police

acted unlawfully, and the Commonwealth bears the “heavy burden” of proving otherwise. *See e.g. Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (so stating); *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (same).

Furthermore, explain precisely how the suppression of evidence in your case would further the deterrence rationale which underpins the exclusionary rule. Justice Ginsburg’s concurring opinion in *Herring* is instructive: the suppression of evidence *necessarily* should motivate police to learn from past mistakes, correct internal procedures, and prevent future error. Make the Commonwealth explain why internal police discipline against the individual officer will be a sufficient deterrent to future violations. Emphasize that the alternative to suppression is a civil suit against the individual officers involved. Cite to the majority opinion in *Hudson*. And, above all, argue that Section 10 of the Kentucky Constitution does not track with *Hudson* or *Herring*.

Please contact me if you find yourself confronted by *Hudson* or *Herring*. I am trying to track those cases. We may be entering a new phase of criminal procedure. But, until you start hearing more about *Hudson* and *Herring*, it is safe to assume that they are limited to their facts. Good luck to you and your clients. ■

CSG Justice Center Releases Essential Elements of Specialized Probation Initiatives

New York—The Council of State Governments (CSG) Justice Center announced today the release of *Improving Responses to People with Mental Illnesses: The Essential Elements of Specialized Probation Initiatives*. The publication, developed with the support of the National Institute of Corrections, U.S. Department of Justice, identifies 10 key components found in successful initiatives to improve outcomes for people with mental illnesses under probation supervision.

Barbara Broderick, president of the American Probation and Parole Association and chief adult probation officer in Maricopa County, Arizona, said, “We in probation, together with judges, prosecutors and the defense bar, have struggled for many years to reduce particularly high rates of reincarceration among probationers with mental illnesses. Until now, there hasn’t been a document that focuses specifically on how to improve outcomes for these individuals. The *Essential Elements* report addresses that gap by providing clear guidance to state and local officials who oversee probation agencies and their partners in the mental health system.”

According to the Bureau of Justice Statistics and recent prevalence estimates, there are more than four million people under probation supervision in this country and as many as one in six have serious mental illnesses. The Justice Center’s March 2009 *Community Corrections Guide to Research-Informed Policy and Practice* found that people with mental illnesses who are sentenced to traditional forms of supervision often return to jail or prison.

Morris Thigpen, director of the National Institute of Corrections, said, “Probationers with mental illnesses have complex treatment and supervision needs. The *Essential Elements* provides specific recommendations for responding to these challenges without touting a ‘one-size-fits-all’ approach. It is relevant for both urban and rural jurisdictions, whether or not they employ specialized caseloads for probationers with mental illness.”

New York State Assemblyman Jeffrion Aubry, chair of the Council of State Governments Justice Center Board of Directors, added, “To improve success rates among people with mental illness on probation, leaders in the criminal justice system and the mental health community must work in partnership. The *Essential Elements* should be required reading for policymakers seeking to increase public safety, reduce expenditures on the criminal justice system and help people with mental illnesses.”

Download the report for free at http://consensusproject.org/jc_publications/probation-essential-elements or www.nicic.gov. It was produced under cooperative agreements (07HI03GJP4 and 08HI06GJVO) for the National Institute of Corrections. Additional resources can be found at www.consensusproject.org. A limited number of hard copies will be available after October 15 and can be pre-ordered at asknicic@nicic.gov or by calling 1.800.995.6429, option #4 (Publication accession number 024023).

CAPITAL CASE REVIEW

By David M. Barron, Capital Post Conviction Branch

Supreme Court of the United States

In Re Davis, 2009 WL 2486475 (Aug. 17) (unsigned order) (Sotomayor, J., not participating)

Troy Davis filed an original writ of habeas corpus in the Supreme Court of the United States arguing that he was innocent of the murder for which he was sentenced to death. In support of his innocence claim, Davis relied on recantations by seven State witnesses to make the same argument he made at trial - he was present when the murder occurred but his companion committed the murder. The Supreme Court transferred the original writ of habeas corpus to the United States District Court for the Southern District of Georgia for an evidentiary hearing and specifically directed the district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."

Stevens, J., concurring; joined by, Ginsburg and Breyer, JJ.:

Stevens wrote to explain that Justice Scalia's dissent is wrong for two reasons: 1) Scalia assumes as a matter of fact that Davis is guilty of the murder even though seven of the State's key witnesses have recanted their trial testimony, several individuals have implicated the State's principal witness as the shooter, and no court (state or federal) has ever conducted a hearing to "assess the reliability of the score of post-conviction affidavits that, if reliable, would satisfy the threshold showing of a truly persuasive demonstration of actual innocence; and, 2) Scalia assumes as a matter of law that even if the district court were to be persuaded by the affidavits, 28 U.S.C. 2254(d)(1) would prohibit the court from granting relief. As to the first argument, Justice Stevens concluded that "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently 'exceptional' to warrant utilization of this Court's Rule 20.4(a), 28 U.S.C. §2241(b), and our original habeas jurisdiction." As to the second argument, Justice Stevens concluded that 2254(d)(1) may not apply at all or does not apply with the same rigidity to an original writ of habeas corpus, 2254(d)(1) may not apply to actual innocence claims, that 2254(d)(1) may be unconstitutional to the extent it bars relief for a death row inmate who has established his innocence, or that an actual innocence claim satisfies the requirements of AEDPA because it "would be an atrocious violation of our Constitution and the principles upon which it is based to execute an innocent person." Stevens concluded by saying, "imagine a petitioner in Davis's situation who possesses new evidence conclusively and

definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning."

Note: Davis appears to recognize the federal constitutional right to not be executed if you are innocent.

This would be a new constitutional right that should fall within the class of rights that applies retroactively. When such a right is created, the date the right is recognized is the triggering event for the one-year statute of limitations to file a federal habeas action. Thus, death-sentenced inmates would have one year from August 17, 2009 to file an action raising an actual innocence claim that argues it would be unconstitutional to carry out the execution because of the petitioner's factual innocence of the murder.

Scalia, J. dissenting; joined by, Thomas, J.:

Scalia believes that even if Davis was innocent, he would not be entitled to relief because the Court "has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent," and thus, Davis would not be able to establish that the state court's adjudication of his actual innocence claim was contrary to or an unreasonable application of clearly established Federal law, as required by 28 U.S. C. 2254(d)(1). Scalia further concluded that "[t]here is no sound basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction" and doing so would be inconsistent with the Court's cases reversing lower court decisions for their failure to apply 2254(d)(1). Scalia, however, did note that if the Court has "new-found doubts regarding the constitutionality of §2254(d)(1), we should hear Davis's application and resolve that question (if necessary) ourselves."



David M. Barron

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United States Court of Appeals for the Sixth Circuit

Thompson v. Bell, 2009 WL 2901193 (6th Cir., Sept. 11)
(Clay, J., for the Court, joined by, Moore, J.; Suhrheinrich, J., concurring in part and dissenting in part)

Four of the claims raised in Thompson's original habeas petition had been found to be procedurally defaulted because Thompson failed to seek discretionary review of them before the Tennessee Supreme Court. Thompson did not specifically challenge this procedural ruling when he appealed to the Sixth Circuit. While Thompson's appeal of the district court's denial of his other habeas claims was pending in the Sixth Circuit, the Tennessee Supreme Court adopted a rule clarifying that litigants need not seek discretionary review to the Tennessee Supreme Court to exhaust their appeals. When that happened, Thompson did not seek to expand the certificate of appealability in the Sixth Circuit, which subsequently denied habeas relief. Shortly after the Supreme Court of the United States denied certiorari from the denial of federal habeas relief, Tennessee set Thompson's execution. Thompson then argued that he was incompetent to be executed. The trial court denied the motion and the Tennessee Supreme Court affirmed, finding that "Thompson [was] aware of his impending execution and the reason for it," and that his documented history of mental illness was "not relevant to the issue of present competency." Thompson then filed a federal habeas petition challenging the state court's competency ruling. That habeas proceeding was stayed when the Sixth Circuit sua sponte reversed its decision denying habeas relief. Tennessee sought certiorari and the Supreme Court reversed, holding that the Sixth Circuit abused its discretion by withholding the mandate of its original judgment for more than five months after the Supreme Court denied rehearing on Thompson's petition for a writ of certiorari. The Sixth Circuit then issued its mandate, on December 1, 2005. On January 20, 2006, Thompson filed a Fed.R.Civ.P. 60(b)(6) in the district court, alleging that the promulgation of the Tennessee rule was an extraordinary circumstance warranting the re-opening of his original habeas petition. About the same time, the district court resumed Thompson's habeas petition, which had, by then, been stayed for more than one year. Thompson then requested that he be allowed to update the state courts on his present mental state. The federal district court agreed. Thompson went back to state court, arguing that his delusions expanded, that his medications no longer worked, and, for the first time, that "if [he] is rendered competent for execution only because of the medication he takes involuntarily, then the execution is barred by the Eighth Amendment." The Tennessee Supreme Court once again denied Thompson's petition, finding no substantial change had occurred since it last ruled on Thompson's competency to be executed. Thompson then resumed habeas proceedings on his competency and amended his petition to include the arguments made in state court when the federal court allowed him to go back there.

The district court dismissed the petition, but issued a certificate of appealability on Thompson's competency to be executed claim. The district court also denied Thompson's Fed.R.Civ. P. 60(b) motion and denied a certificate of appealability. The Sixth Circuit then expanded the certificate of appealability to include Thompson's second competency to be executed claim and granted a certificate of appealability on his Rule 60(b) motion.

Evidence of Thompson's incompetency to be executed:

Thompson submitted medical records along with the reports of three mental health experts. The medical records show "Thompson has engaged in self-destructive acts from the time his incarceration began, including swallowing poison, cutting his wrist and arms, and burning his hand and face. Prison doctors began prescribing medication, including Lithium, to control Thompson's 'mood swings' as early as 1988 [three years after he was sentenced to death]. A medical report from 1988 indicated that Thompson heard 'voices' and believed he had gotten a 'snake bite' on his finger and chest. In 1989, prison doctors diagnosed Thompson on two different occasions as 'schizophrenic, paranoid type,' and as having 'bipolar affective disorder.' Thompson was given prescriptions for Klonopin and Trilafon when he refused to take his Lithium prescription. The psychiatrist who diagnosed him at that time reported that Thompson had been 'displaying active evidence of psychosis and mania with marked grandiosity and delusional thought content.' Thompson was continuously diagnosed as bipolar or schizophrenic throughout his incarceration. In 1995, a prison doctor deemed Thompson a 'mental health emergency' because his mental illness was causing 'an immediate threat of serious physical harm to the inmate/patient or to others as a result of his violent behavior.' The doctor's report noted that voluntary . . . medication had been ineffective. According to a physician who evaluated Thompson in 2001, Thompson had been 'violent at times' and had 'assaulted staff in the recent past which appears to be related to his mental illness.'"

In 2003, Thompson told a non-prison doctor that he wrote "most of the songs you hear on the radio; that he has millions of dollars, gold bars and a Grammy award buried near a church in Thomaston, Georgia; and that the United States Navy owes him back pay dating back to 1979." Thompson also told the doctor that he killed the victim, that he had been convicted of first-degree murder, and that he had been sentenced to death in connection with the killing. Finally, Thompson told the doctor that "once everyone sees I am a lieutenant [in the Navy], the Secretary of the Navy will take control, and the case will be thrown out." The doctor concluded that Thompson "lacks the mental capacity to understand the fact of the impending execution and the reason for it." Another non-prison doctor reported that "Thompson believes that he can not die and there will be a two-year period in which he will stay alive, even if he were executed," and that Thompson "denied that electrocution would, in fact, eliminate his life"; instead, claiming that "after

death . . . he was going to be in Hawaii.” This doctor also concluded Thompson is not competent to be executed. A third non-prison doctor concluded that Thompson “lacks the capacity to understand the fact of his scheduled execution or the reason for it.” In addition to all of this, in 2001, Tennessee had petitioned a court to appoint a conservator to make medical treatment and mental health decisions on Thompson’s behalf. The conservatorship was terminated once Thompson began voluntarily taking his medication, which was only months before the state court denied his incompetency to be executed petition.

The law governing competency to be executed: In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court held that “the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.” Justice Powell’s concurring opinion in *Ford* became the controlling opinion, because there was no majority opinion and Powell’s concurrence was the narrowest concurrence, and thus constitutes clearly established Supreme Court law. Powell opined that inmate’s are incompetent to be executed if “they are unaware of the punishment they are about to suffer and why they are to suffer it.” In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court clarified that an inmate’s delusional beliefs are relevant to whether he or she knows the State has identified his crimes as the reason for his or her execution and to whether the inmate can reach a “rational understanding of the reason for the execution.” *Panetti* also rejected the “proposition that a prisoner is automatically foreclosed from demonstrating incompetency on the state once a court has found he can identify the stated reason for his execution. A prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.” Thus, it is error to apply a “strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.” *Panetti* also held that expert reports and a documented history of mental illness are sufficient to entitle an inmate to an evidentiary hearing on whether he or she is competent to be executed.

The Tennessee Supreme Court unreasonably applied the law governing competency to be executed claims: The Sixth Circuit held as follows: “First, the Tennessee Supreme Court unreasonably applied *Ford* when it determined that Thompson’s ‘severe delusions’ are ‘irrelevant’ to a *Ford* competency analysis. Thompson’s delusions relate to precisely to the two concepts that Justice Powell required a prisoner to understand to be competent: his impending execution and the reason for it. With respect to Thompson’s understanding of his execution, he believes that only the lieutenant of the Navy can execute him; that electrocution will not ‘eliminate his life,’ but that he will live for at least two more years after being electrocuted; and that he will be retried for the crime once a ‘professional’ jury is constituted. With respect to Thompson’s understanding of the reason

for his execution, although he seems to know on some level that it is for ‘killing Brenda Lane,’ his understanding of the connection between his act of murder and the execution appears to be cursory at best, since he seems to believe that when his buried riches are discovered, he will be exonerated.

Second, the Tennessee Supreme Court’s determination that Thompson’s documented history of mental illness is equally ‘irrelevant’ to the question of his present incompetency was also unreasonable. Although the court was correct that only Thompson’s present competency was at issue, his medical records are relevant to that question, particularly to the extent that they demonstrate a chronic mental condition, or a condition that has only worsened over time. Thompson’s medical history demonstrates his ‘long history of bipolar disorder and psychotic symptoms,’ and that he has been psychotic and delusional since at least 1989. While this history is not definitive proof of Thompson’s current incompetency for execution, it is at least probative of the seriousness of his illness and whether it is chronic.

Regardless of whether Thompson’s incompetency petition should be granted, his evidence has at least created a genuine issue about his competency, and therefore warrants an evidentiary hearing. Thompson included extensive evidence of his incompetency in his petition, including (1) the reports of three medical experts, two of whom had recently examined Thompson on multiple occasions; (2) a long documented history of delusions and psychosis; and (3) the state’s previous effort to appoint a conservator to make medical decisions on his behalf -- essentially an acknowledgment by the state that Thompson was mentally ill. The conservatorship was terminated less than five months prior to Thompson’s competency petition filing, and only because a court found Thompson had become voluntarily compliant with his drug program. The evidence Thompson submitted was undoubtedly a ‘substantial threshold showing,’ and therefore an evidentiary hearing should have been held.” Because it was not, the Sixth Circuit remanded Thompson’s case to the federal district court for an evidentiary hearing on whether Thompson is competent to be executed.

The law governing procedural default: “In determining whether a procedural default has occurred and, if so, what effect the default will have on federal review of a state conviction, the district court must consider whether (1) a state procedural rule exists that applies to the petitioner’s claim, (2) the petitioner failed to comply with the rule, (3) the state court actually applied the state rule in rejecting the petitioner’s claim, and (4) the state procedural rule is an adequate and independent ground upon which the state can rely to deny relief. A procedural default does not bar consideration of a federal claim on habeas corpus review unless the last state court rendering a reasoned opinion in the case clearly and expressly states that its judgment rests on a state procedural rule.” Further, “where a petitioner

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raised a claim in the state court but in violation of a state's procedural rule, a state court must expressly reject the claim on that procedural ground for a federal court to deem the claim defaulted."

Thompson's claim that the Eighth Amendment prohibits involuntarily medicating a person to make the person competent to be executed is not procedurally defaulted:

Putting aside the debatable issue of whether Tennessee has a procedural rule that Thompson failed to follow, the Sixth Circuit held that the Tennessee Supreme Court's failure to expressly say that it was relying on a procedural rule to avoid reaching the merits of Thompson's claim means the procedural default doctrine cannot bar federal habeas review of his claim. In so ruling, the Sixth Circuit distinguished *Castille v. Peoples*, 489 U.S. 346 (1989), on the basis that *Castille* dealt with a claim raised for the first time on discretionary review.

AEDPA does not apply to Thompson's claim that the Eighth Amendment prohibits involuntarily medicating a person to make him or her competent to be executed:

"Where the state court has not addressed or resolved claims based on federal law . . . the decision is not an 'adjudication on the merits.' Thus, a federal habeas court reviews such unaddressed claims *de novo*." Because the state courts did not adjudicate this claim on the merits, the Sixth Circuit held that "there is no state court decision to which" 28 U.S.C. 2254(d)'s limitation on relief could apply. Thus, the Sixth Circuit reviewed Thompson's claim *de novo*.

When does a forced medication to be competent for execution claim become ripe?: The majority held that this type of claim "arises only when the defendant is subject to a forced medication order and execution is imminent."

Whether involuntarily medicating a person to be competent to be executed violates the Eighth Amendment is not properly before the court because Thompson was not currently being involuntarily medicated, but was touched upon by the Sixth Circuit since it had not yet done so: Because Thompson was not being involuntarily medicated at the time of the appeal, the Sixth Circuit held that the issue was not ripe and thus need not be resolved. But, noting that neither the Supreme Court nor the Sixth Circuit has squarely addressed the issue, the Sixth Circuit touched upon it. In doing so, the court noted that the Supreme Court has recognized that mentally ill state prisoners have a "significant liberty interest" in avoiding unwanted antipsychotic drugs. "Considering whether a state may forcibly medicate a defendant to render him competent to stand trial, the Supreme Court has held that a state may do so only if the treatment is (1) medically appropriate, *i.e.*, in the patient's best medical interest in light of his condition; (2) substantially unlikely to have side effects that may undermine the fairness of the trial; and (3) necessary significantly to further important government trial-related

interests, given less intrusive alternatives." The Supreme Court, however, added "special circumstances may lessen the importance of the [governmental interests]. The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill -- and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." The Sixth Circuit interpreted this to mean that it "may be unconstitutional to medicate a prisoner already destined for lengthy confinement just to render the prisoner competent for legal proceedings." The "logical inference from these holdings," according to the Sixth Circuit, is that "subjecting a prisoner to involuntary medication when it is not absolutely necessary or medically appropriate is contrary to the 'evolving standards of decency' that underpin the Eighth Amendment." The Sixth Circuit also noted that the purpose why executing the insane (incompetent) violates the Eighth Amendment -- their inability to understand the reason for their punishment robs them of the "opportunity to prepare, mentally and spiritually, for their death" -- "applies with equal force to those who have been rendered chemically competent involuntarily. If forced medication reduces a prisoner's delusions and controls his outward behavior, but does not improve his understanding of his impending death or his ability to prepare for it, it is quite possible that the prisoner cannot be executed under the principles [governing competency to be executed]." Yet, because Thompson is not being forcibly medicated right now, the Sixth Circuit ruled that it is not necessary to resolve this difficult issue.

Standard of review for the denial of a Fed.R.Civ.P. 60(b) motion: It is reviewed for an abuse of discretion, which is defined as a definite and firm conviction that the trial court committed a clear error of judgment." But, "Rule 60(b) proceedings are subject to only limited and deferential appellate review."

The law governing Rule 60(b) motions: Under Rule 60(b), "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. Relief under Rule 60(b)(6) . . . requires a showing of extraordinary circumstances, and must be made within a reasonable time. The decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court intensively balance numerous facts, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts."

State law clarifying that seeking discretionary review is not necessary to exhaust a claim in state court is an extraordinary circumstance: In *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004), the Sixth Circuit held that the Tennessee rule clarifying that discretionary review need not be sought to exhaust a claim in state court was an

extraordinary circumstance. That was because the new rule indicated that the district court had failed to recognize a state's own procedural rule -- thereby undermining the principle of comity on which AEDPA is based." In other words, an "extraordinary circumstance" automatically exists when failing to recognize something as an extraordinary circumstance "would disserve the comity interests enshrined in AEDPA by ignoring the state court's view of its own law." That decision was subsequently vacated by the Supreme Court of the United States. But, because the rationale behind the Sixth Circuit's decision in *Abdur'Rahman* remains valid, the Sixth Circuit reiterated that the Tennessee rule satisfies the extraordinary circumstance requirement for relief under Rule 60(b)(6).

Thompson's Rule 60(b) motion was also filed within a reasonable time: A Rule 60(b)(6) motion must also be filed within a reasonable time. "Whether the time of the motion is reasonable ordinarily depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief." Although Thompson did not file his Rule 60(b) motion until four years after the Tennessee rule went into effect, for the following reasons, the Sixth Circuit held that the motion was timely: 1) "when the Tennessee Supreme Court enacted [the rule] in June 2001, it would have been pointless for Thompson to file a Rule 60(b) motion because at that time, Rule 60(b) motions were deemed equivalent to successive habeas petitions"; 2) the appeal of Thompson's habeas petition was still pending when the Sixth Circuit first held that not all Rule 60(b) motions must be construed as a successive habeas petition, thereby meaning the district court would not have had jurisdiction to hear Thompson's Rule 60(b) motion until the Sixth Circuit issued its mandate denying habeas relief on December 1, 2005; and, 3) Thompson filed his Rule 60(b) motion less than two months after the Sixth Circuit issued the mandate in his case, thereby preventing a finding of a "lack of diligence that would detract from the extraordinary circumstance reflected in the promulgation of [the Tennessee rule]." In so ruling, the Sixth Circuit also noted that the Supreme Court has held that "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Thus, to the Sixth Circuit, "[c]ourts addressing Rule 60(b) motions must consider the equities, and the incessant command of the court's conscience that justice be done in light of all the facts." Applying those principles to Thompson's case, the Sixth Circuit held that "the finality of the judgment against Thompson must be balanced against the more irreversible finality of his execution, as well as the serious concerns about ineffective assistance that caused this Court so much angst upon its prior consideration of Thompson's petition." Thus, the Sixth Circuit reversed the district court's denial of Thompson's Rule 60(b) motion and remanded the case to the district court for a merits review of the ineffective

assistance of counsel claims that were the subject of Thompson's Rule 60(b) motion.

Suhrheinrich concurring and dissenting: Suhrheinrich concurred that the Tennessee courts erred in denying Thompson's competency to be executed claim without first holding an evidentiary hearing, in light of "Thompson's well-documented history of delusions and psychosis-evidence by, *inter alia*, three medical experts' opinions, prison records spanning two decades, and conservatorship proceedings." He also concurred that the Tennessee Supreme Court's ruling that seeking discretionary review is not necessary to exhaust a claim in the state court is an "extraordinary circumstance," but concluded that the number of years that elapsed between the state court's ruling on whether discretionary review was necessary to exhaust and when Thompson sought relief on that basis under Fed.R.Civ.P. 60(b) motion rendered his 60(b) motion untimely. Finally, Suhrheinrich concluded that the Eighth Amendment does not prohibit involuntarily medicating a person to make that person competent to be executed and that an involuntary medication claim must be raised when the inmate was first involuntarily medicated or when he reasonably should have known that he would be involuntarily medicated. Suhrheinrich noted that the "state has the following rights and obligations vis-à-vis prisoners: The state is obligated under the Eighth Amendment and the Due Process Clause to attend to a prisoner's serious medical needs. The state is also not restricted by the Due Process Clause from involuntarily medicating a prisoner if he is a danger to himself or others. The state is further permitted under the Constitution to medicate a defendant to render him competent to stand trial. And the state may carry out the death penalty, so long as the prisoner is competent on the eve of his execution." From that, Suhrheinrich concluded that "if all of the predicate acts of carrying out a valid death sentence on a mentally ill inmate are either constitutionally required or permitted, and the death penalty itself is constitutional, the state's imposition of the death penalty to an inmate rendered competent via involuntary medication must also be constitutional. In other words, it is illogical to conclude that while the state has a duty to provide an inmate with medical care and can also render the prisoner competent to stand trial and possibly receive the death penalty, the state is barred from carrying out the death penalty if that medical care successfully reduces the symptoms of a mental illness and, as a result, the inmate regains competency."

Hodge v. Haeberlin, 2009 WL 2836542 (6th Cir., Sept. 4) (Rogers, J., for the Court, joined by, Cook, J.; Martin, J., dissenting)

Hodge's claim that trial counsel was ineffective for preventing Hodge from testifying despite his desire to do so is procedurally defaulted: Failure to comply with a well-established and generally enforced state rule constitutes a procedural default and is an adequate and independent state

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ground for denying relief when the state court relied upon the procedural rule to avoid reaching the merits of a claim. RCr 11.42 requires a movant to “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds.” It also says the “failure to comply with this [requirement] shall warrant a summary dismissal of the motion.” The Sixth Circuit has previously held that RCr 11.42 is a regularly followed procedural rule that constitutes an adequate and independent ground for denying a claim. The Kentucky Supreme Court rejected Hodge’s claim on the basis that Hodge failed to say what facts he would have testified to that were not already before the jury or how those facts would have influenced the jury’s decision. Because that ruling means Hodge failed to properly present his claim in state court in accordance with state procedures, the Sixth Circuit held it could not review the claim unless Hodge could show cause and prejudice for his default. In an attempt to do so, Hodge contended that his verified state post conviction motion stating that he wanted to testify supplied the necessary basis for an evidentiary hearing, which would have established the facts necessary to prove his claim. Rejecting this argument, the Sixth Circuit noted that “[a] defendant is presumed to have waived his right to testify unless the record contains evidence indicating otherwise” and that “[a] contrary rule would require courts to hold an evidentiary hearing any time a defendant who did not testify at trial filed an after-the-fact statement saying that he wanted to testify but was prevented from doing so. Therefore the state court’s refusal to hold an evidentiary hearing cannot supply cause for Hodge’s failure to plead the claim properly.”

Trial counsel was not ineffective with regard to Hodge’s right to testify: The Sixth Circuit also held that even if Hodge’s claim was not procedurally defaulted, it would fail on the merits. The court “entertains a strong presumption that trial counsel adhered to the requirements of professional conduct and left the final decision about whether to testify to the client. To overcome this presumption, [a petitioner] would need to present record evidence that he somehow alerted the trial court to his desire to testify. Hodge never stated he was unaware of his right to testify or that he was somehow prevented from seeking the court’s assistance in overcoming counsel’s unilateral decision that he would not testify. And, nothing in the record shows he wanted to testify or that trial counsel prevented him from doing so. Thus, the Sixth Circuit held that Hodge did not overcome the presumption that he was aware of his right to testify and that the decision to not do so was a tactical choice.

Trial counsel did not render ineffective assistance in cross-examining Hodge’s ex-wife: During defense counsel’s cross-examination, Hodge’s ex-wife: 1) expressed her belief that Hodge would kill again; 2) described Hodge as being “on the run” from police; and, 3) noted Hodge’s use of cocaine and marijuana. Trial counsel did not object to these

references, but moved for a mistrial at the end of the testimony. When that was denied, counsel explained that he did not request an admonition during the testimony because he feared drawing the jury’s attention to the damaging evidence. On appeal, the Kentucky Supreme Court ruled that “counsel’s continued cross-examination of an obviously hostile witness was a tactical decision. Trial strategy will not be second guessed in an 11.42 proceeding.” Before the Sixth Circuit, Hodge argued that trial counsel was ineffective for eliciting damaging, inadmissible evidence, and counsel was ineffective in failing to move contemporaneously to strike the evidence. Given the importance of Hodge’s ex-wife’s credibility as a witness for the prosecution, the Sixth Circuit held that it was objectively reasonable to pursue lines of inquiry that occurred during her relationship with Hodge even though doing so was likely to implicate past crimes Hodge committed. The Sixth Circuit also ruled that many of Hodge’s ex-wife’s damaging statements were nonresponsive answers to legitimate questions. Because the questions were legitimate, regardless of the unresponsive answers, the Sixth Circuit also held that trial counsel was not ineffective for asking the questions.

Trial counsel adequately investigated Hodge’s ex-wife before examining her: The Sixth Circuit rejected this claim merely by ruling that, “[w]hile it is clear from the record that the attorney who cross-examined [the ex-wife] had not spoken to her previously, it is also clear from the questions asked of [her] and from other motions presented to the trial court that Hodge’s counsel investigated [her] personal, medical, and criminal histories extensively in preparation for trial.” The Sixth Circuit did not specify what questions or motions it relied upon in reaching this conclusion.

Hodge’s other ineffective assistance of counsel claims are not procedurally defaulted even though the Kentucky Supreme Court invoked a procedural rule to avoid reaching the merits: When Hodge’s state post conviction appeal was decided, Kentucky law was that “an issue raised and rejected on direct appeal may not be re-litigated in collateral proceedings by claiming that it amounts to ineffective assistance of counsel.” The Kentucky Supreme Court used this law to avoid reaching the merits of many of Hodge’s claims. However, the Sixth Circuit ruled that “[i]neffective assistance of counsel claims in Kentucky are appropriately raised for the first time on collateral review, rather than on direct review.” The result of this practice, according to the Sixth Circuit, “is that several ineffective assistance claims that Hodge preserved by properly raising them on collateral review appear never to have been treated on the merits. Where a state bars collateral review of a claim actually preserved by the petitioner, such bar will not constitute procedural default on federal review.”

The Sixth Circuit also rejected the following claims: 1) trial counsel was ineffective for failing to get the trial court to allow testimony from a witness who claimed Hodge’s ex-

wife told her that one of Hodge's codefendants confessed that Hodge had nothing to do with the murder (the trial court found the testimony inadmissible over trial counsel's objection); 2) trial counsel was ineffective for failing to obtain admission of Hodge's ex-wife's psychiatric records after the trial court reviewed the records in camera and determined there was nothing sufficiently relevant to determine her "true" reasons for testifying that would be sufficient to breach the psychotherapist-patient privilege; 3) trial counsel was ineffective for failing to gain admission of a document in which a testifying codefendant said the Commonwealth reneged on a deal it made with him to secure his testimony against Hodge (court held that counsel is not deficient merely because he was unable to persuade a trial court to rule in his favor on the admissibility of particular evidence); 4) trial counsel was ineffective for failing to secure the testimony of a witness who was out of the country during the trial and for whom trial counsel had obtained permission to take a deposition (the Sixth Circuit distinguished that from cases where trial counsel completely failed to investigate or contact a witness); and, 5) trial counsel was ineffective for failing to secure the testimony of the mitigation specialist who had done work on Hodge's case, but was undergoing a high risk pregnancy at the time of the trial (the Sixth Circuit held that, in addition to extending considerable efforts to secure Charvat's participation, counsel was neither deficient nor that prejudice ensued since trial counsel presented thirteen mitigation witnesses who testified about Hodge's troubled past, including the way family members and the penal system unjustly harmed him). The Sixth Circuit also refused to hold Hodge's appeal in abeyance pending the results of DNA testing the state court ordered on behalf of one of Hodge's codefendants.

A state court ruling that a trial court did not abuse its discretion in keeping evidence out is distinct from an ineffective assistance of counsel claim that the evidence was inadmissible and that trial counsel was ineffective for failing to gain its admission. Thus, a ruling that a trial court did not abuse its discretion in keeping evidence out is neither a ruling on nor relevant to an ineffective assistance of counsel claim.

Martin, J., dissenting:

Judge Martin dissented because he believes the state courts unreasonably rejected Hodge's ineffective assistance of counsel claim with regard to trial counsel's cross examination of the state's key witness, Hodge's ex-wife. According to Martin, trial counsel's cross examination of this witness was a "disaster, and his lawyer also failed to object to any of the incriminating -- and inadmissible -- answers that he had elicited from her. Altogether, Hodge's counsel's performance fell below the minimum constitutional standards of professional competence."

The Commonwealth "presented no direct physical evidence linking Hodge to the murders. Its case consisted of the

testimony of two witnesses, Bartley, Hodge's co-defendant, and Sherry Hamilton, his ex-wife. Bartley did not testify in person at Hodge's second trial, however, because he asserted his Fifth Amendment right against self-incrimination. Instead, the jury was read a redacted transcript of his testimony from Hodge's 1987 trial, with all references to the previous trial omitted. Hamilton was thus the government's lone primary witness who testified in person. Hamilton and Bartley both identified Hodge as one of the killers, though they differed on other details, including who had accompanied Hodge in the Morrises' home to kill them (Hamilton said Bartley went in; Bartley said it was Epperson). Hamilton's testimony was based on her having allegedly witnessed Hodge's and Bartley's reactions to seeing reports of the murders on television. During deliberations, several jurors requested to hear certain testimony again; they reheard portions of the testimony of Bartley and Hamilton, as well as one of Hodge's witnesses, Tammy Gentry. At one point, the jury indicated that it was deadlocked, but later returned a verdict finding Hodge guilty on all counts." With that background of the evidence against Hodge, Judge Martin concluded that trial counsel's performance during the cross-examination of Hamilton was so deficient that Hodge should be entitled to a new trial.

First, relying on ABA Guideline 10.7, Martin concluded that trial counsel was ineffective for failing to interview Hamilton, because "[n]o competent lawyer would fail to interview the key -- indeed the only in -- person-witness against his client." Second, he concluded that trial counsel was ineffective because his questioning of Hamilton "veered off into the irrelevant but harmful before disintegrating into the totally devastating." Specifically, although none of it was addressed during Hamilton's direct examination, Hodge's attorney: 1) brought up an irrelevant "immigration scam" of which Hodge was the chief architect; 2) then, asked Hamilton if Hodge ever dyed his hair, which elicited the reply, "Yes When he was on the run"; 3) followed that up by detailing the specifics of Hodge's drug abuse; 4) asked Hamilton if she remembered in 1985 when Hodge wore a beard frequently, which elicited the "predictable reply" that he wore a beard "unless he was fixing to do a job, and he would shave it off." Later during her cross-examination, Hamilton testified, "I must tell the truth. The Morris family and others have to know the truth. This man is guilty of murder. He does not deserve to be free, because he will do it again. And I may be the next person he kills, because he has threatened me several times to take my life." Trial counsel, however, never objected; instead, merely requesting a mistrial after the jury had been discharged for the weekend. According to Martin, "[t]his was worse than foolish, it was inept. Indeed, most of the testimony elicited by Hodge's own lawyer (a) was otherwise inadmissible, and (b) was later belabored during the prosecution's closing argument." It was, to Martin and even the majority, "extremely damaging." Yet, the Kentucky Supreme Court denied relief on the basis that a tactical

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decision will not be second-guessed. Judge Martin called that “hogwash,” and referred to the majority’s ruling as “fall[ing] under the seductive notion that the word ‘strategy’ somehow deflects all meaningful review.” It does not. As Martin said, “[t]he label ‘strategy’ is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel. The entire point of an ineffective assistance of counsel claim is to ‘second-guess’ trial strategy, though with deference for legitimate-and reasonable-strategic choices. The only reason Hodge’s counsel proffered for his disastrous cross-examination performance -- that he didn’t want to draw attention to Hamilton’s answers -- is inadequate given how predictably harmful Hamilton’s testimony was. Nor does it explain the insanity of his questioning, full as it was with discussions of Hodge’s past crimes and drug abuses. Indeed, very little of what went on approaches the term ‘strategy.’ There was nothing ‘strategic’ about a failure to prepare, and there was nothing strategic about a bumbling, meandering cross-examination that let in a flood of otherwise inadmissible evidence. And, even if counsel’s failure to object or request an admonishment regarding Hamilton’s errant statements could in some fashion be labeled a ‘strategic choice’ or a ‘tactic’ in some absurd, Pollyannish sense, it was so unreasonable that it cannot pass constitutional muster. Thus, because there were not even minimally intelligent reasons given to explain this inadequate lawyering, [Martin thought] the state courts [acted] unreasonabl[y] in determining that Hodge’s counsel was not constitutionally deficient.”

Martin also had “no doubt Hodge was prejudiced by the error. The state had no direct evidence linking Hodge to the murders, and both the Kentucky Supreme Court and the majority agree that Hodge was convicted on the basis of Hamilton’s and Bartley’s (at-times contradictory) testimony. Further, Bartley did not even testify in person at the second-trial -- his testimony was merely read to the jury. Sherry Hamilton was the state’s key witness linking Hodge to the murders, and she was the only such major witness to testify in person. Unsurprisingly, the jury’s decision was apparently quite close: the jurors at one point announced that they were deadlocked and they requested a review of the testimony before delivering their verdict. Hodge’s counsel’s disastrous cross-examination cost Hodge a reasonable shot at acquittal.”

***In Re Hartman*, No. 09-3299 (6th Cir., Sept. 4) (unpublished order)**

Hartman sought leave to file a successive habeas petition, arguing that DNA testing of hair fibers and other evidence found at the scene of the crime would demonstrate his innocence. Specifically, Hartman argued that after the police revised the time of death, which destroyed the victim’s boyfriend’s alibi, the police never subjected hairs, cigarette butts, or a condom to DNA testing to see if they matched the boyfriend or possible other suspects. Hartmann thus asked

that these items be provided to him so he can conduct his own tests, which he believes will exonerate him. The Sixth Circuit previously stayed Hartman’s execution, and held is application for leave to file a successive habeas petition in abeyance pending the Supreme Court’s decision in *District Attorney’s Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308 (2009). Once *Osborne* was decided, the Sixth Circuit ordered the parties to file supplemental briefs. Then, the Sixth Circuit, in the instant order, denied leave to file a successive habeas petition.

Before a successive habeas petition can be filed in a federal district court, authorization must be received from a federal court of appeals. To obtain authorization, the petitioner must make a prima facie showing that: 1) a new rule of constitutional law applies to his case that the Supreme Court made retroactive to cases on collateral review; or, 2) a newly discovered factual predicate exists which, if proven, sufficiently establishes that no reasonable fact-finder would have found the petitioner guilty of the underlying offense but for constitutional error. “In this context, a prima facie showing means sufficient allegations of fact combined with some documentation that would warrant fuller exploration in the district court.” The Sixth Circuit held that Hartman did not establish a prima facie case because: 1) although Hartman learned additional information about these items during his clemency hearing, as Hartman admits, he was aware of the items at the time of his conviction; and, 2) scientific test results on the items showing they do not match Hartman would “merely demonstrate that someone else had been in the victim’s apartment and likely engaged in intercourse with [the victim] at some point,” which would insufficiently conclude that “no reasonable fact-finder would have convicted Hartman of murder.” Finally, the Sixth Circuit held that *Osborne* did not create a new rule of constitutional law that applies retroactively. Instead, *Osborne* held that a petitioner “may have a state-created liberty interest in pursuing state post-conviction relief” -- something the Sixth Circuit characterized as not being a “new rule” because “[t]he Supreme Court has repeatedly held in the past that the states may create a liberty interest which would then receive due process protections.” Thus, the court denied Hartman’s application for leave to file a successive habeas petition and vacated the stay of execution.

***Broom v. Strickland*, 2009 WL 2739603 (6th Cir., Sept. 1, 2009)**

(Moore, J., for the Court; joined by, Batchelder, C.J. and Gibbons, J.)

Broom filed a 42 U.S.C. §1983 suit challenging the constitutionality of the chemicals and procedures Ohio uses to carry out lethal injections. The federal district court dismissed the suit as time barred under *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007). On appeal, Broom argued that his suit is not time barred for the following reasons: 1) *Cooley I* was wrongly decided; 2) the continuing-violations doctrine governs method-of-execution challenges; 3) *Cooley*

II is a new rule of law with prospective force only; 4) *Cooley II* adopted the statute-of-limitations provisions set forth in the AEDPA and his claim is timely under the AEDPA; and, 5) he is entitled to equitable tolling. Relying on its recent decision, in *Getsy v. Strickland*, 2009 WL 2475165 (6th Cir., Aug. 13, 2009), rejecting the same arguments, the Sixth Circuit once again rejected these arguments. Reiterating *Cooley II*, the Sixth Circuit held that the statute of limitation for challenging Ohio's lethal injection protocol begins to accrue on the latest of the following dates: 1) upon conclusion of direct review in the state court or the expiration of time for seeking such review; or, 2) in 2001, when Ohio adopted lethal injection as the sole method of execution. Because Ohio applies a two-year statute of limitations, the latest Broom could have filed suit was December 2003. He filed suit after that. Thus, the Sixth Circuit affirmed the district court's ruling that Broom's suit was time barred.

The continuing-violation doctrine does not toll the statute of limitations: Broom argued that the continuing-violation doctrine tolls the statute of limitations because "the legal violation continues anew every single day that . . . the same deficient lethal injection protocol . . . remains in place." A continuing violation exists if: "1) the defendants engage in continuing wrongful conduct; 2) injury to the plaintiffs accrues continuously; and, 3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided. A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." According to the Sixth Circuit, Broom, however, "has not alleged continual unlawful acts, but rather challenges the effects from the adoption of the lethal injection protocol. In essence, he has presented no continued wrongful conduct, only the continued risk of future harm." Thus, the court rejected Broom's continuing-violation doctrine argument.

Cooley does not set a new rule regarding the applicability of the statute of limitations: The Sixth Circuit interpreted United States Supreme Court law about retroactivity of a new rule in civil cases to be a "strict rule requiring retroactive application of new decisions to all cases still subject to direct review." Because nothing in *Cooley II* suggests that the court intended to not follow the general rule of retroactivity and instead make *Cooley II*'s ruling on the statute limitations apply only prospectively, assuming *Cooley II* established a new rule, the Sixth Circuit applied the general rule governing retroactivity and thus held that *Cooley* applied to Broom's lethal injection claim. The Sixth Circuit also noted that Broom was a party to *Cooley II*, by virtue of intervening in *Cooley II*, and thus would be bound by *Cooley II* regardless of retroactivity law.

Ohio's refusal to fully disclose details concerning its execution protocol does not constitute a state impediment to filing suit that would toll the statute of limitations: The Sixth Circuit ruled that *Cooley II* found that despite Ohio's

refusal to disclose details concerning its execution protocols, Ohio death-sentenced inmates "had the information required to file their claims no later than December 2001, when lethal injection became the sole method of execution in Ohio," and thus Ohio's failure to disclose details concerning its execution protocol cannot constitute a state impediment that would provide a different statute of limitations for Broom.

The state court's ruling that Ohio law mandates a painless death has no impact on when the statute of limitations begins to run: Because the Ohio state court ruling is not a right newly recognized by the United States Supreme Court, the Sixth Circuit held that the state court ruling had no bearing on when the statute of limitations begins to run.

Broom is not entitled to equitable tolling of the statute of limitations, if it is applicable: To the extent equitable tolling principles could apply, the Sixth Circuit held that the following reasons Broom presented for equitable tolling are insufficient to toll the statute of limitations: 1) "uncertainty of the law" on when the statute of limitations begins to run and when a challenge to chemicals and procedures used in lethal injections would become ripe; 2) a timely motion under *Cooley II* would have been dismissed by the district court as unripe; 3) the department of corrections' delay in providing the relevant information; 4) counsel's negligence in failing to timely file; and, 5) this is a capital case.

***Getsy v. Strickland*, 2009 WL 2496573 (6th Cir., Aug. 17, 2009) (denying rehearing en banc)**

Moore, J., dissenting from the denial of en banc review; joined by, Martin, Cole, and White, JJ.:

Judge Moore dissented from the denial of rehearing en banc for the reasons expressed in her concurring opinion in *Getsy v. Strickland*, 2009 WL 2475165 (discussed *infra*) and for the reasons expressed in Judge Gilman's dissent in *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007) and *Cooley v. Strickland*, 489 F.3d 7765 (6th Cir. 2007). Here, she wrote, "[a]s I have previously emphasized, a suggestion for rehearing en banc is an *extraordinary procedure* which is intended to bring to the attention of the entire Court to a precedent-setting error of *exceptional public importance* or an opinion which *directly conflicts* with prior Supreme Court or Sixth Circuit precedent. This is precisely that case. Determining when the statute of limitations begins to run for a death-sentenced prisoner who wishes to challenge a state's method of execution under 42 U.S.C. §1983 is tantamount to determining whether the prisoner will be able to challenge the method of execution at all. Certainly, the determination of when a person becomes time barred from challenging a procedure that may violate his or her constitutional rights is of 'exceptional public importance.' Because the panel majority in *Cooley II* fundamentally erred in determining the moment at which the statute of limitations begins to run in a §1983 method-of-execution challenge-and we are thus improperly constrained in *Getsy*-en banc review is required.

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Furthermore, as stated in my concurring opinion in *Getsy*, applying *Cooley II*'s 'precedent-setting error' in Getsy's case is unconscionable. Due to the majority's refusal to review *Cooley II* by way of its application in *Getsy*, Getsy will be executed on August 18, 2009, without ever having the opportunity to have a court consider the merits of his Eighth Amendment challenge to his method of execution, a method that a court may well find unconstitutional just a few short months following his death by lethal injection."

Merritt, J., dissenting from the denial of en banc review; joined by, Martin, J.: Judge Merritt dissented from the "failure to grant Jason Getsy a stay of execution until the case can be fully heard by the court in a deliberative and careful way, or, failing that, until the Supreme Court of the United States has an opportunity to consider the case. The decision not to stay Getsy's imminent execution adds one final, absurd injustice to this court's complete mishandling of his case." Merritt then explained what he considers to be the court's mishandling of Getsy's case:

"1. Last week, a divided panel of this Court concluded that *Cooley II* required us to find that Getsy's challenge to Ohio's 2009 alterations to its lethal-injection protocol somehow became time barred in 2003, six years before the alterations took place and five years before the new Supreme Court decision setting out a new Eighth Amendment standard in such cases. As I explained in dissent, this holding unnecessarily and unconscionably expanded *Cooley II*, turning it into an insuperable bar to any §1983 challenge to the state's lethal injection protocol. The court's deceptive attempt to say that some unknown undescribed future case might not be time barred, if the challenged alterations are sufficiently egregious, improperly conflates the merits of the case with the statute of limitations, and is not even consistent with the *Cooley II* case or any other case in the legal cannon.

Given this situation, it is incomprehensible to me that we would refuse to stay Getsy's execution until the decision is final. It should be noted that all three members of the panel agreed that if *Cooley II* in fact required us to dismiss Getsy's case as time barred, that rule would be utterly illogical and would require immediate revisitation, either by the *en banc* court or the Supreme Court. Staying Getsy's execution for the few extra days that those two courts would require to act is the least we can do. This is particularly true when the recency of the panel decision, combined with a *sua sponte* call for *en banc* review, have made it difficult for Getsy's lawyers to seek Supreme Court review. If, after reasoned deliberation, both courts decide to leave this holding undisturbed, then the execution could go forward. Refusing to wait until such reasoned deliberation takes place is not just procedurally inappropriate, but patently unjust.

2. The Supreme Court of Ohio has said that Getsy's death sentence was grossly disproportionate to the lesser sentence imposed on the most culpable of the conspirators -- the man who conceived, planned, paid for and participated in the crime. I have previously pointed out this unprecedented injustice in the *en banc* dissent joined by five other judges.

3. The parole board of the State of Ohio has issued a strong, reasoned recommendation that the Governor commute Getsy's sentence to life. The Governor, facing an impending election, refused after the local District Attorney publicly protested."

***Getsy v. Strickland*, 2009 WL 2475165 (6th Cir., Aug. 13, 2009)**

(Gilman, J. for the court; Moore, J., concurring; Merritt, J., dissenting)

In 2007, Getsy intervened in a lawsuit brought under 42 U.S.C. 1983 by Richard Cooley that challenged Ohio's lethal injection protocol. After the Sixth Circuit concluded, in *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007), that Cooley's suit was time barred, the district court dismissed Getsy's complaint also as time barred. According to the majority, *Cooley II*'s "central holding is that the two-year statute of limitations for a §1983 lawsuit challenging Ohio's lethal-injection protocol begins to accrue on the latest of the following possible dates: 1) upon conclusion of direct review in the state court or the expiration of time for seeking such review, or 2) in 2001, when Ohio adopted lethal injection as the sole method of execution. With reference to the first of the alternative dates, the 'conclusion of direct review' occurs when, after the state supreme court has affirmed the defendant's conviction and sentence on direct appeal, the United States Supreme Court denies the inmate's petition for a writ of certiorari." Getsy's case became final in 1999. Thus, his statute of limitations began to accrue in 2001, when Ohio adopted lethal injection as its exclusive method of execution. Getsy, however, did not file suit until 2007. Thus, under *Cooley II*, Getsy's lethal injection suit was time barred. On appeal, Getsy argued that *Cooley II* is distinguishable because: 1) *Baze v. Rees*, 128 S.Ct. 1520 (2008), created a new constitutional right that Getsy was previously unable to invoke; 2) Ohio modified its lethal injection protocol on May 14, 2009; and, 3) a panel of the Sixth Circuit vacated Getsy's death sentence, which should reset his statute of limitations even though the *en banc* court later reinstated his death sentence. Getsy also argued that *Cooley II* was wrongly decided. The Sixth Circuit rejected each of these arguments and affirmed the district court's dismissal of Getsy's suit.

Baze did not create a previously unrecognized right: Getsy argued that *Baze* reset the statute of limitations because it was the first time the Supreme Court explicitly recognized the right to challenge lethal injection protocols under the Eighth Amendment, and thus Getsy could not possibly have been on notice to vindicate that right before *Baze* was decided. The Sixth Circuit disagreed. Citing a Supreme Court

case from 1890 involving electrocution and a federal court of appeals case that noted that constitutional challenges to specific lethal injection protocols was not unprecedented before *Baze*, the Sixth Circuit held that the “Supreme Court has long recognized the right to challenge execution methods under the Eighth Amendment.” Thus, to the Sixth Circuit, *Baze* merely “clarified the standards that should apply to the merits of Eighth Amendment protocol challenges.” Because Getsy’s claim focused on Ohio’s particular application of its lethal injection method of execution, which could have been asserted long before *Baze*, the Sixth Circuit held that *Baze* does not trigger a new accrual date for challenges to the chemicals and procedures used in lethal injections.

2009 modifications to Ohio’s lethal injection protocol did not create a new accrual date for a challenge to chemicals and procedures used in lethal injections: Relying on *Cooley II*’s ruling that previous changes to Ohio’s lethal injection protocol did not change the accrual date for challenging specific aspects of Ohio’s lethal injection protocol, the Sixth Circuit held that the 2009 modifications also did not change the accrual date. Specifically, the court held that Getsy failed to make a prima facie showing that the changes, mainly that a noninvasive device could be used to locate a vein and that the changes provide officials with too much discretion in carrying out lethal injections, are not likely to increase suffering or to cause extreme pain.

The Sixth Circuit vacating Getsy’s death sentence, which was later reinstated by the en banc court, did not reset the accrual date for the statute of limitations: *Cooley II* held that the accrual date for a lethal injection challenge begins upon the conclusion of direct appeal or when lethal injection became the sole method of execution (1999 and 2001, respectively). The Sixth Circuit did not originally reverse Getsy’s death sentence until 2006, approximately three years after Getsy’s statute of limitations expired. By that time, Getsy’s lethal injection suit would have already been untimely. Thus, the Sixth Circuit held that its original decision vacating Getsy’s death sentence had no impact on the statute of limitations.

Note: Under the Sixth Circuit’s reasoning, reversal of a death sentence before the statute of limitations expires should toll the clock for filing a suit challenging the chemicals and procedures used in lethal injections.

***Cooley II* was wrongly decided but the court is bound by that decision:** The panel of the Sixth Circuit expressly agreed that *Cooley II* was wrongly decided, but felt powerless to do anything about it. A panel cannot overrule a holding of another panel unless the prior case is superseded by: 1) an en banc decision of the same court; or, 2) a subsequent decision of the Supreme Court. Because neither has taken place, the panel had no authority to reverse *Cooley II* and thus was bound to apply it.

Moore, J., concurring: Judge Moore wrote separately to “highlight [her] conviction that *Cooley II* was wrongly decided and to urge immediate en banc review of the application of that rule in the present case to ensure that Getsy’s potentially valid 42 U.S.C. §1983 claim is not improperly and unjustly time barred. In *Cooley II*, the panel’s majority held that the statute-of-limitations period for a §1983 method-of-execution challenge begins to run upon conclusion of direct review in the state court or the expiration of time for seeking such review, or when Ohio adopted lethal injection as the sole method of execution. The panel’s majority also acknowledged that the statute-of-limitations period can be reset when the lethal injection protocol changes in a manner that relates to the death-sentenced prisoner’s core complaints regarding the lethal injection process. The panel’s majority provided little illustration of this core complaints exception, other than to conclude that the prisoner in *Cooley II* had failed to meet the threshold. For the compelling reasons set forth in Judge Gilman’s dissent in *Cooley II*, I believe the *Cooley II* panel majority clearly erred in establishing the statute-of-limitations period as outlined above. Undertaking a proper legal analysis, I find convincing Judge Gilman’s conclusion that the statute of limitations for bringing a §1983 method-of-execution challenge starts to run when the prisoner knows or has reason to know of the facts that give rise to the claim and when the prisoner’s execution becomes imminent. A prisoner’s execution can become imminent only when he or she has exhausted both state and federal legal challenges to the death sentence, which is a moment that occurs, at the earliest, upon the Supreme Court’s denial of the prisoner’s first writ of habeas corpus. Indeed, a prisoner’s execution may not be imminent until the state sets an execution date following the rejection of the prisoner’s first habeas petition. It is only upon the conclusion of habeas review and when the prisoner knows or has reason to know of the facts that give rise to the method-of-execution challenge that a court may properly establish the accrual date. *Cooley II*’s ill-advised rule unduly entangles a prisoner’s challenges to the validity of his or her sentence with the wholly distinct question of whether the method by which he or she will be executed—assuming the Court ultimately denies habeas relief—can withstand constitutional scrutiny. These are distinct legal and factual questions, and, as Judge Gilman articulately stated, requiring simultaneous litigation of such divergent issues will only decrease judicial efficiency and increase injustice.

Furthermore, in addition to setting the accrual date upon the conclusion of habeas review or the subsequent imposition of an execution date, we must be mindful that in many states the lethal-injection protocol is neither a creature of statute nor of administrative rule. As a result, there is very little, if anything, to constrain the protocol’s amendment or to require that the administering body provide notice to concerned parties when it changes execution procedures. Given the

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protocol's potential state of flux, then, it is imperative that the law provide an opportunity for a prisoner to challenge his or her method of execution following any modification in the protocol that may lead to the potential for increased suffering. Numerous changes — for example, a change in the type of drugs that Ohio administers in the current three-drug protocol -- would clearly merit resetting the statute of limitations. But I also believe that a less obvious change to the protocol could require a new accrual date as well if the amended protocol poses a substantial risk of serious harm.

Instead of attempt to draw a not-so-bright-line rule related to core complaints, I believe that a more practical rule can be found in an analogy to pleading standards. If the prisoner is able to make a prima facie showing that a modification to the protocol would cause increased likelihood of suffering, then the claim will accrue on the date the protocol was changed or when the prisoner could reasonably be expected to have notice of such changes. A mere unadorned claim that the change would cause an increased likelihood of harm would be insufficient; rather, the prisoner would be required to present sufficient factual matter to support the claim of increased harm. Such a rule would also extend to cases in which the prisoner was able to show a history of problems with the current protocol, regardless of whether there was a recent modification to the protocol at issue.

Applying this test to Getsy's case, I would find that the statute of limitations did not begin to run on his method-of-execution claim until the date that his execution became imminent; that is, on March 3, 2008, the date that the Supreme Court of the United States denied certiorari in his habeas appeal, or, April 8, 2009, the date the Ohio Supreme Court set his execution date. Although the 2009 changes to Ohio's lethal-injection protocol had the potential to rest the statute of limitations and provide a later accrual date, as the majority points out, Getsy 'has failed to make even a prima facie showing . . . of increased likelihood of suffering' with regard to those changes. Such a deficiency, however, is of little import given the fact that Getsy filed his method-of-execution challenge in May 2007, well before his claim began to accrue for statute-of-limitations purposes. Consequently, under this rule, I would find that Getsy's challenge to his method-of-execution was timely.

I am compelled to point out that the present case is particularly troubling given the lack of clarity regarding the constitutionality of Ohio's method of execution. Importantly, the district court in this case has scheduled an evidentiary hearing on whether Ohio's lethal-injection protocol violates the Eighth Amendment to the Constitution under the standard the Supreme Court recently set forth in *Baze*. That hearing is set for October 2009, only two months after Getsy's imminent August 18, 2009 execution date. Given the Supreme Court's recent guidance as to the type of scrutiny that courts should afford execution protocols to ensure their compliance

with the Eighth Amendment's prohibition against cruel and unusual punishment, I find it unconscionable that by invoking a statute-of-limitations defense, the State should be able to execute a person by a procedure that a court may ultimately find cannot withstand constitutional scrutiny. Thus, it is with huge reservation and only because I am bound to apply the law of the Circuit that I am constrained to conclude that Getsy's claim is time barred under this Court's view of the law in *Cooley II*.

Given the numerous concerns outlined above and contained within Judge Gilman's dissent in *Cooley II*, I believe that we should sua sponte grant en banc review of *Cooley II* by way of its application in Getsy's case."

Merritt, J., dissenting: In Judge Merritt's words, "[w]hatever defect my colleagues see in *Cooley II*, they are a minor-a mere speck in the eye of justice-compared to their opinions that create a mote that cannot be removed without drastic surgery by the en banc court. Rather than create such an intractable mess, it would have been much more reasonable and judicious to write an opinion along the following lines that does not use *Cooley II* to bar actions prematurely that deserve to be considered on the merits."

Addressing the nature of the doctrine of binding precedent, Judge Merritt concluded that courts must first extract from the precedents the underlying principle of the case, and it is in failing to do so that the majority erred. To Merritt, the underlying principle of *Cooley II* is that the requirements set out in 28 U.S.C. §2244(d)(1) for determining the statute of limitations for habeas petitions also determine the date on which a §1983 method-of-execution challenge accrues. 2244(d)(1) says the limitations period shall run from the latest of: A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or, D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. Because *Baze* had yet to be decided and the 2009 amendments to Ohio's lethal injection protocol had yet to take place, Merritt concluded that the *Cooley II* Court only applied subsection A. Thus, according to Merritt, *Cooley II* does not stand for the rule that in all lethal-injection cases the statute of limitations expired two years after Ohio adopted lethal injection as the exclusive method of execution in 2001. "It stands rather for the creation of a process that imports from the federal habeas corpus statute the accrual dates set out for the statute of limitations. Under those rules, when the whole process set out in *Cooley II* is properly used, Getsy's case is viable and well within the statute of limitations if it fits within the criteria laid out in subsections C or D."

Merritt then concluded that *Baze* created a new constitutional right made retroactively applicable to cases on collateral review. In so concluding, Merritt noted that the *Baze* plurality made clear that the question before it was one of first impression, that the Court had never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment, and that the plurality "recognized that execution by lethal injection could violate the Eighth Amendment if it involves a 'demonstrated risk of severe pain' that is 'substantial when compared to the known and available alternatives.'" Merritt further noted that Justice Thomas and Scalia "observed that this 'formulation of the governing legal standard' found 'no support in the original understanding of the cruel and unusual punishment clause or in any of our previous method-of-execution cases' because no case had previously suggested that capital punishment would be unconstitutional if 'it involved a risk of pain-whether substantial, unnecessary, or untoward-that could be reduced by adopting alternative procedures.'" Merritt then noted that Justice Thomas went on to note that the new formulation of the legal standard was more lenient than the Sixth Circuit's previous formulation in *Workman*, which required intent to create pain. Relying on the plurality and concurring opinion's discussion of how *Baze* should be implemented with regard to stays of execution, Merritt also concluded that the Supreme Court "contemplate[d] the *Baze* formulation applying to all challenges to lethal-injection protocols, whether those challenges are brought on direct appeal or far more likely by prisoners whose direct appeals have become final." From that, Merritt concluded that "the Supreme Court has not created a 'newly recognized' constitutional right 'made retroactive to cases on collateral review.'" Thus, to him,

unless a change is made to the protocol that would impact the accrual date, "the accrual date for challenges of this sort would be the date of the Supreme Court opinion in *Baze*, April 16, 2008," and thus Getsy's claim is not barred by the applicable statute of limitations.

Judge Merritt also concluded that the May 2009 changes to Ohio's lethal injection protocol provide a new factual predicate that could not have been discovered through the exercise of due diligence prior to its passage, thereby making Getsy's suit timely. "To state the problem more clearly, imagine that a defendant is sentenced to death in 1996. In 2001, the State adopts lethal injection as its sole method of execution. In 2009, it decides to cut costs by halving the dosage of each drug that it uses in its three-drug protocol, and further decides that the drugs will be administered by first-year medical students who perform the procedure for free. Imagine further that several people who are executed under this new protocol suffer a prolonged and excruciating death. If our defendant then seeks to challenge this newly amended protocol, it would seem absurd to read *Cooley II* to require a court to find that the challenge became time-barred in 2003, despite the fact that the challenge specifically attacks changes that were made in 2009. The merits of Getsy's challenge may be weaker than those laid out in this hypothetical. But the statute-of-limitations question is the same. When a prisoner challenges a change in a State's method of execution, that change provides a new 'factual predicate' that resets the two-year statute of limitations. As all of the opinions in *Baze* make clear, the constitutionality of a particular method of execution will depend on the specific factual details of its administration. Thus, a change to those details resets the accrual date for a constitutional challenge." ■

Report Addresses Disparities in Juvenile Justice

The W. Haywood Burns Institute has published "The Keeper and the Kept."

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PRACTICE TIPS

By Kathleen Schmidt, Appeals Branch Manager

Object to *Moss* Violations to Secure a Win on Appeal - We're not Lying!

In a recent case, the Court of Appeals was confronted with an issue raised by an industrious appeals attorney (Julia Pearson) regarding improper cross-examination by a prosecutor when he asked witnesses if another witness was lying when he gave testimony that was contradictory to the witnesses being questioned. *Hines v. Commonwealth*, 2009 WL 1884392 (Ky. App. 2009) (unpublished). The Court acknowledged:

As a general rule, courts have strongly cautioned against asking a witness to comment on the truth of another witness. *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky.1997).

A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.

Id. at 583. See also *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324, 329 (1928).

The Court went on to note that Mr. Moss did not get relief from the Court because the error was not objected to and the Court did not find palpable error. The Court went on to make this caustic but blunt statement in a footnote:

Despite repeated decisions by our Appellate Courts that such unpreserved allegations of error will not be reviewed under RCr 10.26, trial counsel continue to fail to object, leaving appellate counsel with the difficult task of "crying foul." While a simultaneous objection would not guarantee a reversal, it would at least ensure a fair and reasoned review.

Ouch. And Mr. Hines did not win a new trial because his *Moss* error was not preserved for appellate review.

More than almost any issue, the appeals courts have made it clear that they will rarely find palpable error if a *Moss* violation.¹ Yet if the issue is objected to at trial, and the error is prejudicial, courts will likewise reverse and grant a new trial.

And this line of questioning can be extremely prejudicial. Pity the poor defendant who is asked if two police officers are lying when they say they saw him hand drugs to their informant but the defendant denies it. In cases where credibility is key, and little forensic evidence exists, forcing a witness to explain why the jury should believe she is telling the truth and the other witnesses are lying is a losing proposition for the defense.

So please object to *Moss* violations! Together we can win for our clients!

Endnote:

1. One case, *Frye v. Commonwealth*, included a finding of error on an unpreserved *Moss* issue but the case was reversed on other grounds and MDR is pending in the Kentucky Supreme Court. ■

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