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A lot of people are waiting for Martin Luther King or Gandhi to come back - but they are gone. We are it. It is up to us. It is up to you.

— Marian Wright Edelman

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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FROM THE EDITOR...

Jeff Sherr

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

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

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This edition brings us up to date with our regular columns – **Kentucky Case Review** by Steven Buck and Brandon Jewell, **The Sixth Circuit Case Review** by Dennis J. Burke, the **Fourth Amendment Case Review** by Jamesa J. Drake and **Practice Tips** by Gene Lewter and Shannon Dupree Smith

Due to the length of **The Capital Case Review** by David M. Barron, it is located at a separate web link. You can find it at: http://drop.io/BarronCaseReview

The cover of this edition features a "word cloud," from the article titles of this edition of The Advocate. The clouds give greater prominence to words that appear more frequently in the source text. This image was created using the tools at http://www.tagxedo.com ■

KENTUCKY CASE REVIEW

By Brandon Jewell and Steven Buck, Appeals Branch

Keith A. Owens v. Commonwealth,
291 S.W.3d 704, Ky., August 27, 2009
(NO. 2006-SC-000037-MR)
Opinion by Chief Justice Minton. All sitting, all concur.
(primary issue, *Gant v. Arizona*)

The Supreme Court's original opinion affirming the trial court's conviction of Owens was rendered January 24, 2008. 244 S.W.3d 83 (Ky. 2008). The United States Supreme Court granted petition for certiorari and remanded for reconsideration in light of *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710 (2009).

Prior to trial, Owens filed a motion to suppress evidence of drugs seized after a police pat-down. A police officer stopped a vehicle driven by Thornton because he believed his license was suspended. Thornton's license was suspended, and Thornton was arrested. The officer found drug paraphernalia on Thornton and decided to search the vehicle. Owens, who was in the front seat, was instructed to exit the vehicle and the officer asked if he had weapons on him. The officer testified that Owens said no and began removing money from his pockets. The officer further testified that a baggie fell out of Owens' pocket and that he suspected it contained contraband, which it did, and then he conducted a pat-down of Owens. No further contraband was found. Owens testified that the officer reached into his pockets and that he did not possess the baggie containing contraband. The motion to suppress was denied and Owens was eventually found guilty of all charges.

The Supreme Court found that the officer had authority to stop and arrest Thornton for driving on a suspended license and to search him incident to that arrest. After finding contraband on Thornton, the Court found that it was reasonable for the officer to believe the vehicle contained evidence of possession or trafficking in drugs and to search the vehicle.

The issue is whether a police officer may conduct a pat-down search for weapons of a passenger of a vehicle when the driver has been arrested even if the officer has no independent suspicion that the passenger is guilty of criminal conduct. The Court stated that this was an issue of first impression and decided to adopt the automatic companion rule in the narrow realm of cases involving facts similar to the case at hand.

Steven Buck

Brandon Jewell

The Court held that this is a limited and narrow exception to the exclusionary rule, designed to apply only in situations in which the driver of a vehicle has been lawfully arrested and the passengers of the vehicle have been lawfully expelled in preparation for a lawful search of the vehicle. Only in those limited circumstances, which the Court stated are dangerous for officers and bystanders alike, may an officer conduct a brief pat-down for weapons (not a full-blown search) of the vehicle's passengers, regardless of whether those passengers' actions or appearance evidenced any independent indicia of dangerousness or suspicion. The Court stated that in applying its holding, the trial court did not err by denying Owens' suppression motion.

Commonwealth v. Michael Stone,
291 S.W.3d 696, Ky., August 27, 2009
(NO. 2007-SC-000107-DG, 2007-SC-000576-DG)
Opinion by Justice Venters. All sitting, all concur.
(primary issue, redacted statements and the Confrontation Clause)

Stone and four co-defendants were charged with murder. Stone was convicted of first degree manslaughter and the co-defendants were acquitted of their homicide charges. The Court of Appeals reversed Stone's conviction on the grounds that the trial court improperly admitted evidence of out-of-court statements from a non-testifying con-defendant in violation of the Sixth Amendment under *Bruton v. United States*, 391 U.S. 123 (1968) and *Richardson v. Marsh*, 481 U.S. 200 (1987). Discretionary review was granted and the Supreme Court affirmed on different grounds.

The charges resulted from a fight in which Stone, the co-defendants, and the victim were present. Stone had a knife and the victim had a broken beer bottle. Stone killed the victim with the knife. All co-defendants were jointly tried.

An issue at trial was whether the victim came after Stone with the bottle or whether Stone came after the victim with the knife. Stone and all but one co-defendant had given voluntary statements to the police. The Commonwealth redacted the statements to eliminate any references to the other defendants as required by *Burton* and *Richardson*.

Over objection, the Commonwealth introduced a co-defendant's statement that the victim was "backing away" after he broke the beer bottle. The Court of Appeals found that the statement was, on its face, incriminating to Stone and nullified the effect of the redaction and violated Stone's Sixth Amendment right to confront the co-defendant declarant under *Bruton* and *Richardson*. The Supreme Court agreed but based its decision on *Crawford v. Washington*, 541 U.S. 36 (2004).

In a joint trial, the use of prior statements of a co-defendant against another defendant violates the hearsay rule, KRE 802, and, if the co-defendant declarant is not subject to cross-examination, the Sixth Amendment right to confront. *Burton*, 391 U.S. at 129; *Terry v. Commonwealth*, 153 S.W.3d 794, 799 (Ky. 2005). *Burton*/*Richardson* cases allow such statements into evidence if they are redacted so as to remove any direct or implied reference to another defendant that is, on its face, incriminating to the other defendant.

Crawford holds that a defendant is denied the right to confront his accusers by the introduction into evidence of an out-of-court "testimonial statement" made by a declarant who is unavailable for cross-examination. 541 U.S. at 69. Both Kentucky Appellate Courts agreed that the statement at issue was introduced solely to incriminate Stone by refuting his claim that the victim was "coming after me with a bottle."

Bruton/*Richardson* redactions are made to prevent such statements from incriminating non-declarant defendants and require an admonition that the jury can consider such statements as evidence against the declarant but not against the non-declarant co-defendant. When the purpose of the statement is to incriminate the non-declarant co-defendant a *Burton* redaction makes no sense.

The declarant co-defendant's statement that the victim was "backing away" was testimonial because it was a statement taken by a police officer in the course of interrogation, made out-of-court, offered into evidence to prove the truth of the matter asserted, to establish the guilt of the accused. The declarant co-defendant was unavailable for cross-examination and Stone had had no previous opportunity to confront him. Consequently, Stone's confrontation right was violated.

Stone did not open the door to the statements. Opening the door to inadmissible evidence is a form of waiver that happens when one party's use of inadmissible evidence justifies the opposing party's rebuttal of that evidence with equally inadmissible proof. Stone's pretrial statement that the victim "came at" him created no new issue of fact. The Commonwealth could offer countervailing proof that the victim was "backing away" but not in violation of the hearsay rule and confrontation clause.

The redaction of Stone's own statement did not infringe upon his right to present a complete defense. As *Schrimsher v. Commonwealth* explains, KRE 106 allows a defendant to offer into evidence portions of his own inadmissible hearsay statement only to the extent that the portion admitted into evidence by the opposing party created a misleading or incomplete impression of the statement. 90 S.W.3d 330-331 (Ky. 2006). The redacted version of Stone's statement introduced by the Commonwealth fairly and completely presented to the jury Stone's statement that he stabbed the victim in self-defense.

Stone was not entitled to a "no duty to retreat" instruction. When the trial court adequately instructs the jury on self-defense, a "no duty to retreat" instruction is unnecessary. *Hilbert v. Commonwealth*, 162 S.W.3d 921, 926 (Ky. 2005). The "no duty to retreat" codification created by the 2006 amendment of KRS 503.050(4) was a change to substantive law, and therefore has no retroactive application.

Commonwealth v. Richard Wayne Terry,
295 S.W.3d 819, Ky., August 27, 2009
(NO. 2007-SC-000-796-DG)
Opinion by Chief Justice Minton. All sitting, all concur.
(primary issues, *Faretta* hearing requirements)

Terry insisted on the day of trial that his appointed attorney was not prepared. The trial court permitted Terry to waive representation. Terry was thereafter convicted. The Court of Appeals reversed the judgment, holding that the trial court failed to follow *Faretta*. The Supreme Court affirmed the Court of Appeals because the record did not reflect that the trial court held a meaningful *Faretta* hearing nor did it reflect that Terry's waiver of counsel was voluntary, knowing, and intelligent.

Faretta requires that a defendant seeking self-representation be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." 422 U.S. 805, 835 (1975). The colloquy between the trial court and defendant to determine if the defendant's eyes are sufficiently opened is to be made on a case-by-case basis. At minimum, an accused must be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forego the aid of counsel. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004); *Depp v. Commonwealth*, 278 S.W.3d 615, 618 (Ky. 2009).

In this case, Terry complained that his appointed counsel was too busy to meet with him prior to trial, had failed to communicate, was not prepared, and that he had disagreements over trial strategy. The trial court told him to "shine" and "cooperate" and to "sit up" and to "put your game face on" and allowed him to proceed *pro se*. Such was insufficient to ensure that Terry knowingly, intelligently, and voluntarily sought to waive counsel and nothing in the record indicates that Terry knowingly, intelligently, and voluntarily waived his right to counsel.

While no script is required or always sufficient for a *Faretta* hearing, the Court offered the following model questions for guidance:

> When a defendant states that he wishes to represent himself, you should… ask questions similar to the following:
>
> (a) Have you ever studied law?
> (b) Have you ever represented yourself or any other defendant in a criminal action?
> (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
> (d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court… could sentence you to as much as __ years in prison and fine you as much as $_____?
> (e) You realize, do you not, that if you are found guilty of more than one of those crimes[,] this court can order that the sentences be served consecutively, that is, one after another?
> (f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
> (g) Are you familiar with the [Kentucky] Rules of Evidence?
> (h) You realize, do you not, that the [Kentucky] Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?
> (i) Are you familiar with the [Kentucky] Rules of Criminal Procedure?
> (j) You realize, do you not, that those rules govern the way in which a criminal action is tried…?
> (k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.
> (l) (Then say to the defendant something to this effect): I must advise you that in my opinion[,] you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.
> (m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?
> (n) Is your decision entirely voluntary on your part?
> (o) If the answers to the two preceding questions are in the affirmative, [and in your opinion, the waiver of counsel is knowing, intelligent, and voluntary,] you should then say something to the following effect: "I find that the defendant has knowingly, [intelligently,] and voluntarily waive his right to counsel. I will therefore permit him to represent himself.
>
> *United States v. McDowell*, 814 F.2d 245, 251-252 (6th Cir. 1987).

Charles Lamar Johnson, v. Commonwealth,
292 S.W.3d 889, Ky., August 27, 2009
(NO. 2007-SC-000952-MR)
Opinion by Justice Scott. All sitting, all concur.
(primary issue, biased jury pool)

Johnson was convicted of multiple sex crimes. Five females alleged that Johnson had sexual contact with them many times for a decade. Two were Johnson's daughters, two were friends of the daughters, and one was a babysitter.

A.Johnson did not establish a *prima facia* violation of the fair cross-section requirement of *Taylor v. Louisiana*, 419 U.S. 522 (1975) or of purposeful discrimination under *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) in the jury selection process set forth by KRS 29A.060 and RCr 9.30 because he failed to supplement the record with evidence supporting his claim.

1. In this case, prior to trial, Johnson requested the court to permit testimony from a Circuit Court Clerk regarding the jury selection process and introduced statistical information compiled by the AOC concerning jury selection procedures in the County. The trial court disallowed testimony by the Clerk but stated the subpoenaed records would be sealed in the record or made available for appellate review.

The panel from which a petit jury is selected must be drawn from a representative cross-section of the community under the Sixth Amendment's right to a fair and impartial jury. *Taylor*, 419 U.S. at 528-530. The burden is on the Appellant to establish a *prima facie* violation. *Duren v. Missouri*, 439 U.S. 357 (1979).

> In order to establish a *prima facie* violation of the fair-cross section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren*, 439 U.S. at 364.

Johnson met requirement (1). To meet (2), he had to "demonstrate the percentage of the community made up of the group alleged to be underrepresented" and compare that percentage to the number of African Americans in venires. *Duren*, 439 U.S. at 364. However, Johnson merely estimated the numbers of African Americans which made up his venire and failed to supplement the record with statistical information. Since requirement (2) was not met, (3) could not be either.

2. Johnson fails to make a prima facie case for purposeful discrimination. To do so, an appellant must show he is a member of a racial group capable of being singled out for differential treatment and that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time." *Batson* 476 U.S. at 94. A bare argument that the venire had only three to ten African-Americans does not meet this standard.

B. Johnson failed to preserve his claim that African-Americans were systematically excluded from the grand jury because he did not object prior to trial.

C. There was no Double Jeopardy violation because the incest and rape charges did not arise from a single continuing offense. Engaging in multiple acts of sexual intercourse with his daughters did not constitute a single continuing offense. Also, rape and incest each require proof of a fact that the other does not. Specifically, rape requires proof of age, whereas incest does not; incest requires proof of relationship, whereas rape does not. *Blockburger*, 284 U.S. at 304; see KRS 530.020; KRS 510.040.

D. Johnson failed to establish a case of prosecutorial misconduct because he failed to demonstrate that any testimony the prosecutor elicited was perjurious. "In order to establish [this form of] prosecutorial misconduct…, the defendant must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecutor knew it was false." *Commonwealth v. Spaulding*, 991 S.W.2d 651, 654 (Ky. 1999) (*quoting United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). In this case, there was no evidence that any of the statements identified by Johnson as perjury were either actually false or known to be so by the Commonwealth. Johnson cited inconsistencies in the testimony of various witnesses and then concluded that they must be perjurious. If a statement was false, Johnson failed to show it was made intentionally or that the prosecutor knew of the falsity.

E. The trial court did not abuse its discretion when it denied Johnson's motion for a directed verdict because it was not unreasonable for the jury to find him guilty. The Court notes that this issue is not properly preserved. In pertinent part, CR 50.01 reads, "[a] motion for a directed verdict shall state the specific grounds therefore." The Court has consistently held that the failure to state a specific ground for directed verdict "will foreclose appellate review of the trial court's denial of the directed verdict motion." *Pate v. Commonwealth*, 134 S.W.3d 593, 597-598 (Ky. 2004) (*citing Daniel v. Commonwealth*, 905 S.W.2d 76, 79 (Ky. 1995). In this case, Johnson only made a general motion for directed verdict based upon insufficiency of the evidence as to all charges.

"On appellate review, the test for a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appeal Johnson claimed the Commonwealth failed to prove an essential element of two of the crimes: that he was eighteen years of age or more with respect to second degree rape and twenty-one years of age or more with respect to third degree rape when he engaged in sexual intercourse with a victim. A defendant's age may be proven by both direct and indirect evidence "so long as the indirect evidence is sufficient to create a reasonable inference" of age. *Moody v. Commonwealth*, 170 S.W.3d 393, 397 (2005). From the evidence, the jury could reasonably infer that in order to have biological children that were the ages of his daughters, Johnson must have been over twenty-one so as to satisfy both the age requirements, and the jury had the opportunity to actually see Johnson at trial and deduce his approximate age.

Timothy Shemwell v. Commonwealth,
294 S.W.3d 430, Ky., August 27, 2009
(NO. 2008-SC-000102-TG)
Opinion by Justice Venters. All sitting, all concur.
(primary issues, methamphetamine laws and double jeopardy)

Appellant was convicted of manufacturing methamphetamine under KRS 218A.1432(1)(a) (actual manufacturing), possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, possession of a methamphetamine precursor, possession of marijuana (less than eight ounces), and possession of drug paraphernalia. Five arguments were raised on appeal.

1. Convictions for manufacturing methamphetamine and possession of a methamphetamine precursor did not violate double jeopardy. Appellant argued that the two crimes constitute "a continuing course of conduct" and was "uninterrupted by legal process," violating KRS 505.020(1) and questions whether each crime "requires proof of an additional fact which the other does not" in violation of *Blockburger v. United States*, 284 U.S. 299, 304 (1932). To be guilty under KRS 218A1432(1)(a), one must have actually **manufactured** some quantity of methamphetamine. To be guilty under KRS 218A1437(1), one must have the precursor necessary to produce methamphetamine and the intent to use it to do so **in the future**. Double jeopardy is not violated.

2. Likewise, convictions for manufacturing methamphetamine and possession of anhydrous ammonia do not violate double jeopardy. Manufacturing requires that the methamphetamine was manufactured **in the past**. Possession of anhydrous ammonia in an unapproved container requires that the person possess anhydrous ammonia, in an unapproved container, with the intent of manufacturing methamphetamine **in the future**.

3. Introduction of evidence regarding a sawed-off shotgun found in Appellant's house was error, but harmless. A detective first talked about finding the sawed-off shotgun and later the prosecutor asked Appellant about it and showed a picture of it. Counsel objected, the prosecutor said it was to impeach Appellant because he said he did not know if his house was entirely searched. The prosecutor then asked Appellant several questions about the sawed-off shotgun.

This violated KRE 404(b) because it was irrelevant and prejudicial to Appellant and because "weapons which have no relationship to the crime are inadmissible." *Major v. Commonwealth*, 177 S.W.3d 700 (Ky. 2005). Also, it was inadmissible as impeachment because whether Appellant knew his entire house was searched was irrelevant and a collateral matter not subject to impeachment. *See Commonwealth v. Jackson*, 281 S.W.2d 891, 894 (Ky. 1955). However, because the testimony lasted only a few minutes in a four day trial and because guilt regarding the charges was sufficient and convincing, the error was harmless.

4. An officer's testimony that Appellant had been suspected of drug activity for years was not objected to and waived because defense counsel afterwards asked the officer why he believed Appellant when he said others were law-abiding citizens and if Betty had ever called and told him that there was a meth lab on his property.

5 No mistrial or severance was warranted. The co-defendant was questioned as to whether she had ever been around meth and said "no." The prosecutor, over defense counsel's objections, was allowed to ask if a detective had come to her house and found drugs before. She denied such. Defense counsel asked for a severance and a mistrial stating that the line of questions prejudiced Appellant. "The decision to grant a mistrial is within the sound discretion of the trial court and such a ruling will not be disturbed absent an abuse of discretion." *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005). In this case, the questioning was not out of line and the evidence against Appellant was substantial. Also, under RCr 9.16 a severance must be requested before the jury is sworn.

Commonwealth v. Lennie G. House,
295 S.W.3d 825, Ky., August 27, 2009
(NO. 2008-SC-000114-DG)
Opinion by Justice Abramson. All sitting, all concur.
(primary issues, grounds for subpoena *duces tecum*)

House was arrested for DUI. He registered a 0.160 blood alcohol level on a preliminary breath test and then a 0.201 on a breath test with the Intoxilyzer 5000 EN at the jail. House served the Commonwealth with a discovery motion requesting the Intoxilyzer's "source code," the computer commands that control the Intoxilyzer as it isolates and tests the sample for alcohol and then calculates the blood alcohol level. The Commonwealth denied the request because it did not have possession of such. House served CMI (manufacturer) with a subpoena *duces tecum* requesting the "source code." The Commonwealth and CMI moved to quash and the trial court agreed with them that House had failed to establish relevancy. House entered a conditional guilty plea reserving the right to appeal that order. The Circuit Court affirmed. The Court of Appeals reversed because under RCr 7.02(3) a subpoena *duces tecum* may be quashed only if "unreasonable or oppressive" and in its view it was neither. The Supreme Court reversed the Court of Appeals and held that the subpoena was unreasonable and should be quashed.

Using the federal rule and federal courts for guidance, the Kentucky Supreme Court explained that under RCr 7.02(3), a subpoena *duces tecum* is not intended to serve as a discovery device for criminal cases, but was meant "to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." *United States v. Nixon*, 418 U.S. 683, 698-699 (1974) (*citing Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951)). To be entitled to production of subpoenaed materials prior to trial:

> The moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Motions to quash subpoenas are subject to the trial court's sound discretion and will be reversed on appeal only for abuse of that discretion. *Cf. Transit Authority of River City v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992). In the hearing on this matter, a defense expert testified that he could examine the codes for errors but that he knew of no reason to suspect that the code was in any way flawed. It is unreasonable if, as in this case, the party demanding production can point to nothing more than hope or conjecture that the subpoenaed material will provide admissible evidence.

Commonwealth v. Tommy Lopez,
292 S.W.3d 878, Ky., August 27, 2009
(NO. 2008-SC-000308-DG)
Opinion by Chief Justice Minton. All sitting, all concur.
(primary issue, can a UCMJ violation warrant probation revocation?)

While serving in the U.S. army in Iraq, Lopez was charged with violating the Uniform Code of Military Justice (UCMJ) by viewing child pornography on a computer. In lieu of a trial, Lopez requested and received a discharge and admitted he was "guilty of one of the charges against him or of a lesser included offense therein contained…." At the time he was on probation in Kentucky. A probation revocation hearing was held.

At the hearing, Lopez testified he did not view child pornography but admitted to viewing adult pornography in violation of UCMJ. The Circuit Court believed this violation was a sufficient ground for revocation. The Court of Appeals reversed holding that an admission to the violation of a general order under USCA by itself is insufficient to justify revocation of probation. The Supreme Court reversed the Court of Appeals.

In a probation revocation hearing, the Commonwealth need only prove by a preponderance of the evidence that a probationer has violated the terms of probation. *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky. App. 1986). The issue is whether a person serving in the armed services who violates Article 92 of the UCMJ has committed an offense that may give rise to revocation. The Kentucky Penal Code defines offense as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or… by any law, order, rule, or regulation of any governmental instrumentality authorized by law to adopt the same…." Congress and the armed forces are authorized to adopt laws and a term of imprisonment or a fine are possible punishments for the violation of UCMJ Article 92. Consequently, revocation was permissible.

Since members of the armed forces are subject to many more orders and regulations than civilians, one can hypothesize instances in which some violations of military law might not justify revocation of probation; *e.g.*, members of the U.S.A.F. were at one time prohibited from wearing wigs. This holding should not be construed to mean a trial court must revoke probation each time a person on probation serving in the armed forces violates a military law. Rather, it may, and any abuse of discretion may be corrected on appeal.

Mark Lee Crossland v. Commonwealth,
291 S.W.3d 223, Ky., August 27, 2009
(NO. 2007-SC-000689-MR)
Opinion by Chief Justice Minton. All sitting, all concur.
(primary issue, post-submission substitution of an alternate juror)

Shortly after submitting this case to the jury, a juror who had previously been excused from jury duty because he said he could not sit in judgment of another was dismissed. (According to the opinion, it seems as though the record did not reveal the complete facts of this situation.) The court ordered an alternate juror who had already been excused be located to join the already deliberating jury. Later the proceedings came back on record and the jury informed the court it had reached a verdict. Defense counsel objected to the post-submission substitution of the alternate juror. The Commonwealth said the objection was belated and defense counsel responded that he had planned to object when the alternate arrived and was re-sworn but that no such proceedings were made on record. The court overruled the objection citing an unnamed federal case.

1. The Kentucky Supreme Court found nothing in its case law, procedural rules, or statutes to authorize a post-submission substitution of a juror and concluded that the trial court simply lacks the authority under Kentucky law to order a juror substitution after the jury had begun deliberations. However, this type of error should be subjected to a harmless error analysis if it is properly preserved because it is not an error of constitutional dimension. Also, if not properly preserved, it should be analyzed for palpable error under RCr 10.26.

Crossland was not penalized in this case because the objection was not made contemporaneously since the trial court did not afford him a proper forum in which to lodge a contemporaneous objection. So, under the harmless error analysis, the determination to be made was whether the erroneous post-submission juror substitution had a "substantial influence" on the outcome, or whether it created a "grave doubt" as to whether the error substantially influenced the jury's guilty verdicts.

The Supreme Court had a grave doubt because the trial court failed to ensure that the alternate juror had not been subjected to outside influences that would compromise his ability to function as an impartial juror. Also, the trial court failed to instruct the newly reconstituted jury to begin its deliberations afresh once the alternate juror joined them.

2. Crossland was not entitled to a directed verdict on the arson charge. A defendant is entitled to a directed verdict, drawing all reasonable inferences in favor of the Commonwealth, only "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt…." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Crossland was accused of setting his estranged wife's house of fire. He had told her he was not going to let someone else "lay up in that house…." A camcorder and handgun, missing from the house, were found in Crossland's residence, and when interviewed after the fire, he smelled of gasoline and had what appeared to be burn marks on his hands. A reasonable juror could have concluded he intentionally set fire to the house.

3. Alleged prosecutorial misconduct either was not properly preserved or not erroneous. Crossland alleged four instances of prosecutorial misconduct. Three were not preserved and palpable error review was not requested. The preserved claim regarded the prosecutor saying "all that needs to happen for evil to prevail is for good people to do nothing," and then asked the jury to "do something." A prosecutor is afforded "wide latitude" in closing argument. Also, when reviewing claims of prosecutorial misconduct, the overall fairness of the trial is the focus, and reversal is called for only if the misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). The Court construed the comment to "do something" as only a request for the jury to find Crossland guilty and was within the wide latitude afforded in closing argument.

Frankie Covington v. Commonwealth,
295 S.W.3d 814, Ky., August 27, 2009
(NO. 2007-SC-000773-MR)
Opinion by Justice Venters. Minton, C.J., and Noble, J., concur. Abramson, J., concurs with the majority's opinion but joins Justice Cunningham's observation that this Court should require all felony plea agreements to be in writing and signed by the prosecutor, defendant, and defense attorney. Cunningham, J., dissents by separate opinion in which Schroder and Scott, JJ., join. (primary issue, withdrawing a guilty plea when the trial court does not follow Commonwealth's recommendations).

Covington was indicted on one count of kidnapping, one count of first degree sexual abuse, one count of resisting arrest, and being a first degree persistent felony offender. On the day set for trial, Covington entered into a plea agreement in which he would plea guilty and the prosecution would recommend a twenty year sentence. Covington tendered a written and signed motion to enter a guilty plea to all charges. The judge advised that under local rules, a plea entered on the day of trial would be an "open plea" or "blind plea." The judge then conducted the proper colloquy and accepted the plea. Prior to sentencing, Covington moved to withdraw his guilty plea, stating that the medications he took at the time of the plea rendered him incompetent and that he did not remember pleading guilty. He also claimed his attorney did not act in his best interests when she advised him to plead guilty. Sentencing was deferred pending a mental health evaluation. Covington was found competent and the trial court concluded that he was not mentally impaired when he entered his plea and that it was voluntary. The trial court fixed his sentence at life imprisonment. Two issues were raised on appeal.

On appeal Covington argued that the trial court's findings regarding his competence to enter a guilty plea and that his attorney did not render ineffective service were clearly erroneous. The Supreme Court found no fault in the trial court's findings.

Regarding Covington's other argument, the Supreme Court concluded that when the trial court declined to impose the twenty-year sentence offered as part of the plea agreement, RCr 8.10 required that he be given an opportunity to withdraw the plea. RCr 8.10 requires that "upon the determination of a trial court that it will not follow the plea agreement made between the prosecutor and the defendant, the defendant has a right to withdraw the guilty plea without prejudice to the right of either party to go forward from that point." *Haight v. Commonwealth*, 938 S.W.2d 243, 251 (Ky. 1996) (citing *Commonwealth v. Corey*, 826 S.W.2d 319 (Ky. 1992). The fact that the judge said it was a "blind plea" made no difference because all plea agreements are "blind pleas" because the decision to accept or reject a plea agreement is always within the province of the trial court. *See Kennedy v. Commonwealth*, 962 S.W.2d 880, 882 (Ky. App. 1997). Accordingly, the case was reversed and remanded to the trial court for further proceedings.

The dissent argues that there was no plea agreement because the trial court said it was a "blind plea" and because the Commonwealth only made a recommendation. It also argues that all plea agreements should be in writing, which was not done in this case.

Jimmy L. Epps v. Commonwealth,
295 S.W.3d 807, Ky., August 27, 2009
(NO. 2007-SC-000312-DG)
Opinion by Justice Noble. All sitting, all concur.
(primary issue, duration of traffic stop)

A police officer stopped a vehicle for an improper turn and not having an illuminated license plate. There were four occupants and Epps was seated behind the driver. The officer thought he recognized another passenger as someone his partner had previously arrested for drug activity and he thought he was impaired. He requested a narcotics-detection dog that arrived fifteen minutes later. The officer made the

occupants get out of the vehicle and patted each down for weapons, finding none. The dog sniffed the vehicle and "alerted" that drugs were present. A crack-cocaine pipe was recovered. The officer patted down Epps a second time and indicated he found something and Appellant admitted he was in possession of cocaine. He was arrested and entered a conditional guilty plea reserving the right to appeal the trial court's denial of his suppression motion.

Epps "was seized from the moment [the driver's] car came to a halt on the side of the road," *Brendlin v. California*, 127 S.Ct. 2400, 2410 (2007), and he therefore has standing to challenge the stop as an alleged violation of the Fourth Amendment. *See also Commonwealth v. Morgan*, 248 S.W.3d 538, 540 (Ky. 2008). The stop was lawful as was subjecting the vehicle to a dog sniff. However, because Epps was detained, his claim can still succeed if he can show that the detention itself was otherwise unreasonable. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

In this case, fifteen minutes elapsed from the stop until the drug dog arrived. It took thirty to forty minutes to complete the dog sniff. The officer was working on the citation while waiting for the dog to arrive but it was not given to Kelly until after the dog arrived and searched the vehicle, nearly an hour after the stop. The second pat down did not take place until after the completed dog sniff. The entire incident from stop until arrest took 90 minutes. The stop was unreasonable and "so prolonged as to be unjustified."

Melissa Helton v. Commonwealth,
299 S.W.3d 555, Ky., August 27, 2009
(NO. 2008-SC-000141-MR)
Opinion by Justice Noble. Minton, C.J.; Abramson, Cunningham, Schroder and Venters, JJ, concur. Scott, J., dissents by separate opinion. (primary issues, admissibility of "implied consent" blood sample in DUI homicide case)

Helton was convicted of multiple counts of wanton murder and several other charges stemming from a car accident in which she was driving under the influence of alcohol. She challenged a blood sample taken by police while she was at the hospital unconscious or nearly so after the accident. She claimed taking the sample violated KRS 189A.105(2)(b), which requires a warrant to test blood in a fatality accident, and which she argues controls over the "implied consent" statute, KRS 189A.103. She also claimed that even if the statutes are not in conflict, then the consent statute and the practice of taking blood samples from unconscious DUI suspects in general are unconstitutional.

The Court concluded that the statutes are not in conflict and that under Kentucky statutes one consents to such test by operating an automobile.

Helton argued that the implied consent sample taking violates the Fourth and Fourteenth Amendments to the U.S. Constitution because she did not consent (or rather because she did not have the opportunity to refuse); there were no exigent circumstances; and no warrant was obtained. Appellee simply did not respond to this argument.

KRS 189A.030(1) requires "reasonable grounds" to believe that a violation of the DUI statute has occurred. To pass constitutional muster, "reasonable grounds" must equate at least to probable cause. At a suppression hearing, no testimony was taken. Instead, the Commonwealth summarized what occurred at the hospital in the course of responding orally to Helton's suppression motion; that Helton did not consent or refuse, that the test was done "kind of on the heels of the blood test the hospital was doing anyways" and that it did not involve any additional intrusion. Based on this, the trial court ruled that Helton had not withdrawn her consent or refused testing and that she had consented.

The record in this case, however, simply does not reveal whether the officer had probable cause to believe that alcohol was involved in the wreck.

The dissent concurs on all grounds other than the one that a retroactive hearing is required to show that the officer had reasonable grounds to justify testing Ms. Helton's blood alcohol level.

Commonwealth v. Michael Baker,
295 S.W.3d 437, Ky., October 01, 2009
(NO. 2007-SC-000347-CL)
Cunningham, Noble, Schroder, Scott, and Venters, JJ., concur. Abramson, J., dissents by separate opinion in which Minton, C.J., joins. (primary issue, sex offender registration)

KRS 17.545, which restricts where registered sex offenders may live, may not be applied to those who committed offenses prior to July 12, 2006, the effective date of the statute. The residency restrictions are so punitive in effect as to negate any intention to deem them civil. Retroactive application of KRS 17.545 is an ex post facto punishment, which violates Article I, Section 10 of the United States Constitution, and Section 19(1) of the Kentucky Constitution.

Both constitutions prohibit the enactment of any law that imposes or increases the punishment for criminal acts committed prior to the law's enactment. For a law to be ex post facto, "it must be retrospective, that is apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Hyatt v. Commonwealth*, 72 S.W.3d 566, 571 (2002). KRS 17.545 applies to conduct by Baker that occurred before enacted and disadvantages him by restricting where he may live. To violate the ex post facto clause, the statute must also be punitive. *Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003).

The Court concluded that the legislature did not intend the law to be punitive, but had to also determine "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.'" *Smith v. Doe*, 538 U.S. 84, 92 (2003).

As in *Smith*, the five factors to consider are whether the scheme 1) has been regarded in our history and traditions as punishment, 2) promotes the traditional aims of punishment, 3) imposes an affirmative disability or restraint, 4) has a rationale connected to nonpunitive purpose, or 5) is excessive with respect to the nonpunitive purpose. The restrictions in this case are similar to banishment and are regarded as punishment. By imposing restraints based solely upon prior offences, the law promotes the traditional aims of punishment, retribution and deterrence. Prohibition from residing within certain areas is a disability or restraint. There is not a rationale connected to a nonpunitive purpose. Finally, a sex offender may be permitted one day to live in a particular home, while the next day prohibited by the opening of a school, daycare, or playground. Also there is no guidance as to what exactly qualifies as a playground and the burden on whether or not one is in compliance is placed solely on the registrant. Such is excessive with respect to the purpose of public safety.

All five factors weigh in favor of concluding that KRS 17.545 is punitive in effect. Therefore, the statute may not constitutionally be applied to individuals who committed their crimes prior to July 12, 2006.

The dissent feels the majority has arrogated to itself the role of legislator and has substituted its public policy judgment for that of the General Assembly.

Samuel Ray Prather v. Commonwealth
301 S.W.3d 20, Ky., November 25, 2009
(NO. 2007-SC-000903-DG)
Reversing and Remanding
Opinion by Schroder, J.

The concurrent sentencing provision applied to Prather when he pled guilty to misdemeanors and a felony at the same time and received diversion on the felony conviction. Prather did not waive concurrent sentencing when he entered into pretrial diversion.

On September 4, 2001, Prather was indicted on charges of possession of marijuana, resisting arrest, carrying a concealed weapon, assault in the third degree (class D felony), and possession of a firearm while committing a violation of KRS Chapter 218 (class D felony). The indictment stated that all five violations occurred on August 26, 2001. On November 16, 2001, Prather pled guilty to the charges as follows. Pursuant to a plea agreement, the third-degree assault charge was amended to fourth-degree assault (misdemeanor) and he received a total sentence of six months in jail on the misdemeanors. As to the felony charge of possession of a firearm while committing a violation of KRS Chapter 218, the motion to enter the guilty plea and the order on the guilty plea both stated that said conviction was covered by a separate pre-trial diversion agreement. On the same date the order on the guilty plea was entered, January 22, 2002, the court entered its order granting pretrial diversion on the felony, fixing the period of diversion at five years, with two years to serve if Prather violated the terms of his diversion.

Prather served his six-month sentence from January 18, 2002, through July 4, 2002. On June 26, 2003, the court entered an order revoking Prather's diversion for numerous violations of the terms of his diversion and imposed the two-year sentence set out in the pre-trial diversion agreement. On that same date, the court entered a "Judgment and Sentence on Plea Of Guilty," which referenced the 2002 guilty plea to possession of a firearm while committing a violation of KRS Chapter 218, the pre-trial diversion agreement, and the revocation of the pre-trial diversion. In the judgment, the court sentenced Prather to two years, probated for a period of five years.

On September 21, 2005, the court entered an order setting aside Prather's probation for multiple probation violations. In that order, Prather was sentenced to two years' imprisonment and was not credited for the time spent in custody on the misdemeanor convictions. Prather subsequently moved the court to order that he be credited for the time served on the misdemeanor convictions. The trial court denied the motion, reasoning that the concurrent sentencing statute, KRS 532.110(1)(a), was not applicable because Prather had not been formally sentenced on the felony until after he completed serving his sentence on the misdemeanors. The Court of Appeals affirmed, agreeing with the trial court that "the sentencing provisions afforded by KRS 532.110(1)(a) do not apply to Prather" because "[w]hen Prather was serving his six-month jail term for the misdemeanor convictions, he had not yet been convicted of the felony possession of a handgun charge."

Prather argued that pursuant to *Thomas v. Commonwealth*, he was convicted of the felony at the same time he was convicted of the misdemeanors, when the judgment was entered on his guilty plea on January 22, 2002, and not at the time he was ordered to serve the two-year sentence after his diversion and probation were revoked. Thus Prather maintained that the Court of Appeals erred in ignoring the holding in *Thomas*. And because he was convicted of the felony (indeterminate term) and the misdemeanors (definite term) at the same time, Prather contended that the mandatory concurrent sentencing provision in KRS 532.110(1)(a) would be applicable.

KRS 532.110(1)(a) provides:

> (1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:
>
> (a) A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term[.]

The question before the Court was whether the above statute applies to a felony and misdemeanor sentence, when the defendant has served out his misdemeanor sentence before beginning to serve his time on the felony sentence as a result of his diversion being revoked.

As a condition of pretrial diversion, the defendant is required to enter an *Alford* plea or a plea of guilty. (KRS 533.250(1)(f).) "If the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant shall be listed as 'dismissed-diverted' and shall not constitute a criminal conviction." (KRS 533.258(1).) If the defendant fails to complete the diversion agreement, the diversion agreement can be voided by the trial court, and the court is to "proceed on the defendant's plea of guilty in accordance with the law." (KRS 533.256(1).) At that point, "[t]he defendant has the same right to a sentencing hearing as if he or she had pled guilty without the diversion agreement."

In *Thomas*, the appellant pled guilty to a felony and requested diversion. Before the trial court could rule on the diversion request, the appellant was arrested for possession of a firearm by a convicted felon. The felony element was based on the offense for which he had just pled guilty and requested diversion. The appellant argued that he could not be charged with possession of a firearm by a convicted felon because he was not a convicted felon at the time of that charge, as he was under consideration for diversion on the underlying felony. The Supreme Court held that once the trial court accepted his guilty plea to the underlying felony, the appellant was a convicted felon until such time as he completed the diversion program. Thus, the Court affirmed the conviction for possession of a firearm by a convicted felon.

In holding that the Commonwealth must first approve of pretrial diversion for a defendant, the Court in *Flynt v. Commonwealth* characterized pretrial diversion not as "simply a sentencing alternative," but as an "interruption of prosecution prior to final disposition" of the case. Citing *Thomas*, the Court noted, however, that "some disqualifications associated with a felony conviction are triggered by the guilty plea that KRS 533.250(1)(e) requires as a condition of pretrial diversion."

The holding in Thomas, which was not addressed by the Court of Appeals, refutes the basis of the Court of Appeals ruling in the instant case - that Prather was not considered convicted of the felony charge while he was in the diversion program. The Commonwealth even conceded in its brief that "once a defendant enters a guilty plea and is a participant in a diversion program, he is considered a convicted felon until completion of the diversion program [,]" and that the Court of Appeals' conclusion to the contrary was erroneous. It follows that if the defendant is considered convicted of the offense once he enters the guilty plea and has the same right to sentencing if the diversion is revoked as if he had not been granted diversion, then the final sentencing on the felony should be, for concurrent sentencing purposes, as if he had been sentenced at the same time as the misdemeanor(s) to which he pled guilty. Therefore, it would be immaterial that the defendant had already served out his time on the misdemeanor(s) at the time of final sentencing on the felony. Hence, the Court adjudged that the concurrent sentencing provision in KRS 532.110(1)(a) would be applicable in the instant case.

The Commonwealth argued that when Prather agreed to enter into pretrial diversion, he waived the concurrent sentencing provisions in KRS 532.110(1)(a). Assuming that the concurrent sentencing provision of KRS 532.110(1)(a) could be waived by a defendant, any such waiver would have to be knowing and voluntary. Here, there was no mention of waiver of concurrent sentencing in the plea agreement, guilty plea, plea colloquy, or pretrial diversion agreement. Accordingly, the Commonwealth's claim of waiver was without merit.

The Commonwealth also argued that even if Prather's misdemeanors and felony sentences should have run concurrently under KRS 532.110(1)(a), Prather was not entitled to credit for time served on the misdemeanors pursuant to KRS 532.120(3), which provides:

> Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court; imposing sentence toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of the sentence shall be considered for all purposes as time served in prison.

The above statute was clearly not at issue in the present case because Prather was not seeking credit for time served on the same offense. And, contrary to the Commonwealth's position, the statute does not preclude giving credit for time served for purposes of remedying a sentencing error such as in the case at hand.

The Court reversed the judgment of the Court of Appeals and remanded the case to circuit court for entry of an order granting Prather credit on the felony sentence for the time served on the misdemeanors.

David Weaver v. Commonwealth
298 S.W.3d 851, Ky., November 25, 2009
(NO. 2008-SC-000492-MR)
Reversing and Remanding
Opinion by Minton, C.J.

The trial court's refusal to let Weaver present expert testimony as to a possible defense during the guilt phase of trial was reversible error.

KRS 501.080 sets forth when intoxication constitutes a valid defense to a crime:

> Intoxication is a defense to a criminal charge only if such condition either:
>
> (1) Negatives the existence of an element of the offense; or
>
> (2) Is not voluntarily produced and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Weaver was charged and convicted of first-degree burglary, a crime that consists of the following elements under KRS 511.020(1):

> A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight there from, he or another participant in the crime:
>
> (a) Is armed with explosives or a deadly weapon; or
>
> (b) Causes physical injury to any person who is not a participant in the crime; or
>
> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

Because first-degree burglary requires the specific intent "to commit a crime[,]" voluntary intoxication is a valid defense to this crime when it results in the defendant's not having that specific intent to commit a crime because that would "negative the existence of an element of the offense...."

The trial court abused its discretion in not allowing Weaver to present Dr. Fabian's testimony during the guilt phase. Voluntary intoxication is a possible defense to a crime, as recognized by statute in KRS 501.080. If the jury accepts this defense by finding that because of voluntary intoxication, the defendant did not form the intent required as an element of the offense, then the jury acquits the defendant of the offense, rather than merely reducing the punishment.

The trial court seemed to recognize this to a degree because it instructed the jury on voluntary intoxication. But the trial court erred by relegating Weaver's expert testimony on this statutory defense to the penalty phase of the proceedings. The expert's opinion about Weaver's intoxication was clearly relevant to a determination of guilt and not simply to setting a penalty.

The trial court's error in not allowing Weaver to present expert testimony was not harmless.

Whether or not the error is deemed to be of constitutional magnitude, the Supreme Court stated that it cannot conclude the error was harmless because to find that the expert testimony would have little or no effect would be sheer speculation.

Darryl Gordon Grigsby v. Commonwealth
302 S.W.3d 52, Ky., January 21, 2010
(NO. 2009-SC-000171-MR)
Affirming
Opinion by Noble, J.

Grigsby's claim that he was not informed of his right to enter a blind plea and demand jury sentencing was not a sentencing issue that fell outside of the scope of his appeal waiver.

Prior to trial, Grigsby pleaded guilty, pursuant to *North Carolina v. Alford*, to murder, two counts of tampering with physical evidence, and third-degree arson. In exchange for this guilty plea, the Commonwealth dismissed first-degree robbery and abuse of corpse charges and recommended a total sentence of life in prison without the possibility of parole for twenty years. The trial court accepted Grigsby's plea and sentenced him in accordance with the recommendation.

In the plea agreement, Grigsby waived several rights, including his right to appeal. Nevertheless, he appealed to the Supreme Court, arguing that his plea must be vacated because he was not informed of his right to enter a blind plea and demand jury sentencing, in lieu of having the court fix his sentence in accordance with his signed plea agreement. This, Grigsby argued, was a "sentencing issue," which survives his waiver of the right to appeal under *Windsor v. Commonwealth*.

The Supreme Court found that the substance of Grigsby's argument was that his plea did not comply with *Boykin v.*

Alabama. Given that *Boykin* challenges survive a waiver of the right to appeal, the Court found that it could reach the merits of this challenge.

Appellant's argument failed because *Boykin* does not require separate enumeration of each right waived. Rather, as long as a defendant has a full understanding of what the plea connotes and its consequences, it is valid.

For this reason, guilty pleas are upheld even where specific rights are not enumerated by the trial court during the plea hearing. Here, Grigsby did not offer any authority requiring the trial court to inform him of his right to enter a blind guilty plea and demand jury sentencing in lieu of being sentenced according to his signed plea agreement. Instead, Appellant cited only Section 11 of the Kentucky Constitution and cases interpreting that section for the proposition that he had the right to do so.

Although Grigsby may have had that right, the fact that it was not separately enumerated to him does not render the plea invalid, because *Boykin* does not require separate enumeration of each right waived. And here, given the rights listed in the plea agreement, the rights listed orally in the plea hearing, and the consequences of his plea as explicitly stated in both, there is no doubt that Grigsby had a "full understanding of what the plea connoted and its consequences. Grigsby knew that he was waiving his constitutional rights associated with proceeding to trial and that he would be sentenced to twenty years in prison without the possibility of parole. In exchange, he knew that the Commonwealth would recommend that sentence and take the death penalty off the table. This satisfies *Boykin*.

Charles Brent Beard v. Commonwealth
302 S.W.3d 643, Ky., January 21, 2010
(NO. 2008-SC-000079-DG)
Affirming
Opinion by Noble, J.

Beard's arrest and conviction resulted from series of controlled buys performed by Jackie Davis for the police. Davis, who was on probation at the time, had approached the police and offered to assist them as a confidential informant. Though it was against Probation and Parole policy for Davis to participate in a police operation without prior approval by his probation officer, the police did not know he was on probation and Davis did not volunteer that fact. Over the course of three buys, Davis purchased marijuana and methamphetamine, allegedly from Beard.

Prior to trial, Beard filed a *pro se* motion to dismiss his attorney and to have new counsel appointed due to a conflict of interests. He claimed that his attorney had a conflict because he represented two other clients, Jackie Davis and Ron Damron, whose interests were adverse to him. At a hearing on the matter, the trial court asked Beard how he felt that the representation of Davis was a conflict of interests, to which he replied, "How could it not be a conflict of interest when he's sitting here and he's going to defend me at trial but here he's going to defend this man for a P.B. revocation hearing or whatever it's called? He represented Jackie Davis to get him probation." The judge then stated, "But that was unrelated to your case." Beard replied by noting that it was the same person who "brung these charges against" him. The trial court then asked Beard how he had been prejudiced by his attorney's representation of the other clients. Beard had no good answer, stating only that it may have put "bad thoughts" in his attorney's mind and made him think that Beard was guilty. The judge then gave the attorney an opportunity to address the claims.

The attorney admitted that he had previously represented Jackie Davis in a criminal case that resulted in probation. Also, Davis was in danger of having his probation revoked for failure to report, and the attorney had been appointed to again represent him. The attorney indicated that upon being reappointed to represent Davis, one of the things he wanted to explore was the extent to which Davis had cooperated in any other investigation with the Commonwealth "because that might have some bearing on whether or not he gets revoked again." He also stated that before the revocation motion could be heard, the Commonwealth moved to have it held in abeyance, presumably to see how Davis performed in the cases in which he was to be a witness. He stated that the motion was still pending and that he would represent Davis in the future if the motion was pursued, at which time he would address any cooperation between Davis and the Commonwealth "because that has some bearing on this court's decision."

The attorney admitted he had also questioned Beard in the course of representing Ron Damron in another criminal case. The attorney had obtained a recess during Damron's trial to talk to Beard at the local jail about Damron's case (specifically about his relationship with Damron and the victim in Damron's case). The attorney stated that Beard told him he knew nothing about the other case.

Thus, the attorney effectively admitted Beard's factual claims about his representation of Davis and Damron, but he went even further in noting that the matter against Davis was still pending and that Davis's performance could affect the outcome of this matter. Nevertheless, the attorney indicated that he saw no conflict and stated, "I defend everyone that I am appointed to represent equally."

The judge stated that a conflict would arise as to Davis only if the attorney had learned anything during that representation that might be beneficial to Beard's case that he then did not disclose. The attorney stated that he had not learned any such information.

After hearing this discussion, the trial court denied Beard's motion, noting on the docket sheet that the "Court finds no evidence to support Def [endant]'s claim of conflict of interest."

Beard's defense at trial consisted of an attack on Davis's credibility and the police's compliance with the rules concerning use of informants. His attorney specifically asked Davis why he had not told the police he was on probation, to which Davis responded that he did not know he was on probation. He also asked Davis about the probation violation, to which Davis replied that he did not report because he had not known he was on probation.

The Court of Appeals affirmed Beard's conviction, holding that Beard failed to show prejudice because his attorney actually represented him vigorously. The Supreme Court granted discretionary review to address the proper standard to apply to claims of a conflict of interests between a criminal defendant and defense counsel.

Whether Beard was or would have been prejudiced by his appointed trial counsel's apparent conflict in representing the confidential informant (CI) was irrelevant for purposes of ruling on a pro se motion to dismiss counsel. Counsel had a conflict of interest in his joint representation of Beard and CI such that the trial court's denial of Beard's pro se motion to dismiss counsel was reversible error.

Holloway v. Arkansas provides the analytical framework for a claimed conflict of interests that is actually raised at trial. In that case, the Court held that the harmless error rule (*i.e.*, a showing of prejudice) was inapplicable where a conflict of interests is shown and raised at trial, noting that "a rule requiring a defendant to show that a conflict of interests - which he and his counsel tried to avoid by timely objections to the joint representation - prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application." The Court went so far as to state that "whenever a trial court improperly requires joint representation over timely objection *reversal is automatic*." This is because such a conflict of interests has the effect of denying the defendant the Sixth Amendment right to counsel because the attorney has an incentive not to act in one of the defendants' best interest. "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing...The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters...[I]n a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." Also, "[T]he 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

Though *Holloway* specifically addressed joint representation of codefendants in the same trial, ultimately, a conflict is a conflict. Thus, the *Holloway* rule is equally applicable where an attorney represents defendants with conflicting interests in separate matters, at least where those conflicting interests converge at the trial of one of the defendants, as was the case here. Because Beard raised the conflict issue at trial, *Holloway* provides the controlling standard.

Because Beard raised the issue at trial, the proper inquiry then is whether Beard raised an actual conflict at trial, not whether he was prejudiced by his attorney's representation of other defendants. A conflict arises from competing duties or interests that create the *potential* for prejudice. The conflict does not come into being only when the potential turns into actual prejudice; it exists from the instant that inconsistent duties or interests arise. Thus, a conflict of interests is generally thought of as both "[a] real or *seeming* incompatibility between the interests of two of a lawyer's clients...."

The attorney had a duty of confidentiality that required him not to disclose information learned from Davis in the course of representing him in the revocation process. But the attorney also had a duty to disclose to Beard any information that might have been helpful to his defense, including what he learned from Davis. These duties are in direct conflict with each other and cannot be reconciled. Under *Holloway*, such a conflict violates the Sixth Amendment and requires reversal. Because Beard's Sixth Amendment right to counsel was denied by the existence of a conflict of interests, and such an error cannot be harmless error, the Court reversed and remanded his case.

Hollis Deshaun King v. Commonwealth
302 S.W.3d 649, Ky., January 21, 2010
(NO. 2008-SC-000274-DG)
Reversing and Remanding
Opinion by Schroder, J.

On the evening of October 13, 2005, Lexington-Fayette County police were conducting a "buy bust" operation at an apartment complex on Centre Parkway in Lexington. Police arranged for a confidential informant to purchase crack cocaine from a "street level" dealer. Officer Steven Cobb and several narcotics detectives were nearby in marked police cars waiting to make an arrest after a sale was complete.

After a suspected dealer sold crack cocaine to the confidential informant, undercover officer Gibbons gave a prearranged signal, informing officers to move in and make an arrest. As Cobb drove toward the location of the sale to make the arrest, Gibbons radioed a description of the suspect, and stated that he had entered a specific breezeway at the apartment complex. Cobb testified that Gibbons told officers to hurry, in order to keep the suspect from entering an apartment.

Cobb exited his vehicle, and continued toward the breezeway on foot with two narcotics detectives. After Cobb had exited his vehicle, Gibbons informed officers via radio that the suspect had entered the back *right* apartment. Because they were no longer near a radio, Cobb and the narcotics detectives did not hear this final piece of information. The officers heard a door slam shut, but did not see which apartment the suspect had entered.

When the officers reached the breezeway, they detected the "very strong odor of burnt marijuana." It soon became clear that the smell of marijuana was emanating from the back *left* apartment. Officer Cobb testified at the suppression hearing that this strong odor led him to believe that the left apartment door had been recently opened. However, Cobb stated that he did not know which door he had heard close.

Detective Maynard, one of the narcotics detectives, knocked loudly on the back left apartment door and announced "police." The three officers then heard movement inside the apartment, which lead the officers to believe that evidence was about to be destroyed.

At this point, the officers made a forced entry into the left apartment. As the circuit court noted in its findings of fact, when asked to articulate the reasons which he thought justified the forced entry, Cobb testified that the officers thought 1) that a crime was occurring based on the strong odor of marijuana, and 2) that evidence was possibly being destroyed based on the sound of movement inside the apartment.

Cobb kicked the back left apartment door open, and officers performed an initial protective sweep looking for the original suspect. Though police did not find the suspected drug dealer, they found three people sitting on couches in the apartment: Jamela Washington, Clarence Johnson, and Hollis King. Johnson was smoking marijuana, while Washington and King sat nearby. Police found approximately 25 grams of marijuana and 4.6 ounces of powder cocaine in plain view. Upon further search, police found crack cocaine, scales with cocaine residue, $2500 in cash, three cell phones, and other drug paraphernalia. Police eventually entered the back right apartment, and found the suspected drug dealer who had been the original target.

King and his co-defendants argued that the police's entry into the apartment was unlawful, and filed motions to suppress all evidence obtained as a result of that entry. Following a suppression hearing, the circuit court issued extensive findings of fact, conclusions of law, and an opinion and order. As a preliminary matter, the circuit court concluded that King had standing to challenge the search. Next, the court concluded that the smell of marijuana gave the officers probable cause to continue with their investigation. And finally, the court concluded that the lack of response to the knock on the door - coupled with the sound of movement, which the officers believed to be the destruction of evidence - created the requisite exigent circumstances to justify a warrantless entry. Therefore, the circuit court denied King's motion to suppress evidence.

King entered a conditional guilty plea, reserving the right to appeal the circuit court's denial of his motion to suppress. The circuit court found King guilty of trafficking in a controlled substance; possession of marijuana; and persistent felony offender, second degree (PFO II). For the trafficking charge, the court imposed a sentence of five years' imprisonment, enhanced to ten years by King's PFO status. For the possession charge, the court imposed a sentence of twelve months in jail.

On appeal, the Court of Appeals found fault with the circuit court's conclusions of law. The Court concluded that smelling burning marijuana, knocking on the door, and hearing movement within the residence cannot justify a warrantless entry. Rather, the Court of Appeals noted, such a search is invalid if the police created their own exigent circumstances. Nevertheless, the Court of Appeals concluded that, "under the circumstances of this case," police did not create their own exigency because they did not engage in deliberate and intentional conduct to evade the warrant requirement, citing *United States v. Chambers*. The Court of Appeals also noted a "good faith" exception, and affirmed the circuit court's judgment. The Supreme Court granted discretionary review.

On appeal, both parties agreed that the smell of burning marijuana created probable cause, which would have been sufficient for the police to obtain a warrant to search the back left apartment. Because the police chose not to seek a warrant, the Court had to address whether there existed exigent circumstances to justify the warrantless entry. The Commonwealth argued that two types of exigent circumstances justified the warrantless entry: 1) "hot pursuit," and 2) imminent destruction of evidence.

Police were not in hot pursuit of suspect as grounds for warrantless entry into apartment.

An important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued. In this case, uniformed officers were in pursuit of the suspected

drug dealer, but there was no evidence that he was aware of this. According to testimony at the suppression hearing, the suspect sold drugs to a confidential informant, and then returned to his apartment.

Exigent circumstances based on fear of destruction of evidence did not justify warrantless entry into apartment.

The odor of marijuana alone can justify the warrantless search of an *automobile*. However, there is a strong distinction in Fourth Amendment jurisprudence between an automobile and a home. The mobility of an automobile creates an exigent circumstance *per se*. By contrast, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."

The odor of marijuana emanating from the left apartment did not create an exigency based on destruction of evidence. Therefore, the sounds police heard after knocking on the door provide the only possible justification for entry based on imminent destruction of evidence. There is certainly some question as to whether the sound of persons moving was sufficient to establish that evidence was being destroyed. However, the Court assumed for the purpose of argument that exigent circumstances existed, and proceed to the more important question of whether police created their own exigency.

To address this, the Court adopted a two-part test for Kentucky: First, courts must determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement." If so, then police cannot rely on the resulting exigency. Second, where police have not acted in bad faith, courts must determine "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." If so, then the exigent circumstances cannot justify the warrantless entry.

The Court found that while the police passed the first part of the test, they did not pass the second part. The odor of marijuana did not create an exigency based on imminent destruction of evidence. In addition, any exigency that did arise when police knocked and announced their presence was police-created and could not be relied upon as a justification for a warrantless entry.

Gregory Woodlee v. Commonwealth
306 S.W.3d 461, Ky., January 21, 2010
(NO. 2008-SC-000351-MR)
Reversing
Opinion by Noble, J.

Prior sexual abuse of his daughter when she was four or five years old was not sufficiently similar to the charged offense as to be admissible to establish Woodlee's identity as the perpetrator of abuse.

Woodlee's girlfriend Alice became fearful that Woodlee may have abused their daughter, A.L., so she took her to the Child Advocacy Center's TLC House for an examination. The examination revealed several healed and healing tears in A.L.'s vagina. TLC House staff then contacted police, and Woodlee was subsequently arrested and charged with two counts of first-degree sexual abuse.

Prior to trial, the Commonwealth filed a notice of its intent to introduce evidence of Woodlee's prior sexual abuse of another daughter, B.W. (Woodlee was convicted of sexually abusing B.W. when she was four or five years old. Alice was not B.W.'s mother.) Woodlee objected and filed a motion *in limine* to exclude this evidence. Ultimately, the trial court overruled Woodlee's motion.

Subsequently, B.W. testified at trial that Woodlee began sexually abusing her when she was four or five years old. In particular, she testified that Woodlee had placed his tongue, fingers, and penis in her vagina. In her reports at the time, B.W. also stated that Woodlee placed toothpaste on his penis and had her perform oral sex on him. She eventually told her grandmother, and Woodlee was convicted in 2001 of first-degree sexual abuse. The Commonwealth referred to this conviction in its opening statement and closing argument, as did Alice and a neighbor during their testimony.

Dr. Crawford, of the Child Advocacy Center's TLC House, also testified. He performed an examination on A.L. in March 2007. He testified that A.L. had scars and a partially healed tear on the vestibule of her vagina, as well as multiple tears on her hymen. He testified that, in his opinion, these injuries must have been caused by something penetrating A.L.'s vagina.

"[W]hether prior sexual misconduct by a defendant is admissible [is] a difficult, fact-specific inquiry." To indicate modus operandi, the two acts must show "striking similarity" in factual details such that "if the act occurred, then the defendant almost certainly was the perpetrator." That is, the facts underlying the prior bad act and the current offense must be "simultaneously similar *and so peculiar or distinct*, that they almost assuredly were committed by the same person.

As the proponent of the prior bad act evidence, the Commonwealth "bore a heavy burden" to show the striking similarity of the acts. The similarities offered here are that both acts included touching or penetration of the vagina, both girls were very young, Woodlee was sometimes alone with them, he was the father of both, and the acts were close in time. These common facts are not so peculiar or distinct to show modus operandi.

First, sexual contact is, by itself, not distinctive for sexual abuse. In fact, sexual contact is an element of the crime, and

thus would be present in any such charge. Woodlee's present charge and his prior bad act necessarily have "some basic similarities" because they are for the same crime, and thus share statutory elements. For that reason, "conduct that serves to satisfy the statutory elements of an offense will not suffice to meet the modus operandi exception."

Moreover, the particular manner of sexual contact here is not so peculiar or distinct as to show modus operandi. The bad act evidence showed that Woodlee placed his tongue, fingers, and penis in B.W.'s vagina. The evidence in this case, from Dr. Crawford's testimony, shows only that something penetrated A.L.'s vagina. There is no evidence as to what was used, or how it was used. Facts cannot be presumed in the absence of evidence, and the only commonality shown here is that something penetrated both victims' vaginas. This cannot be said to be peculiar or distinct for this sort of crime. Penetration is present in all rape charges, as is sexually touching in all sexual abuse charges. And "it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates modus operandi."

Second, although it is true that both victims were very young, the *difference* in their age actually cuts against establishing modus operandi. Woodlee's prior bad act involved a victim who was four or five years old at the time of the sexual abuse. Here, the victim was no more than six months old. The four-or five-year-old child could and did engage in participatory sexual behavior with Woodlee, whereas the infant could not and did not.

The prior bad act evidence showed that, among other things, Woodlee placed toothpaste on his penis and had the victim perform oral sex on him. Clearly, an infant could not perform oral sex, or otherwise participate in the sexual activity. This lack of participatory or reciprocal ability of the infant is a strong point of dissimilarity, as the basic nature of the abuse is so different-participatory versus passive. The prior conviction suggests that Woodlee's modus operandi, if he had one, was to demand participatory behavior from his victims in a like manner, something which he plainly could not do here.

Third, it is not peculiar or distinct that Woodlee was alone with both victims when he allegedly abused them. In fact, it would seem very peculiar or distinct indeed for a perpetrator to commit sexual abuse *without* being alone with the victim. Virtually all sexual offenses occur when the perpetrator and victim are alone.

Fourth, the strongest factor supporting modus operandi is that Woodlee is the father of both victims, but this is insufficient without more. This is the only common fact that is arguably so peculiar or distinct that it identifies Woodlee as the perpetrator. However, merely being the victims' father does not so identify him. And in light of the key difference in the basic nature of the abuse-participatory versus passive - this commonality cannot be said to carry the Commonwealth's "heavy burden" to meet the modus operandi exception.

Last, the closeness in time between the two crimes is not relevant in this analysis. As the Supreme Court has previously stated, "[t]emporal remoteness goes to the weight, *not the admissibility*, of the prior bad acts evidence." In other words, this is a factor to be considered "when balancing the probative value of [the bad act evidence] and the undue prejudice it caused" under KRE 403, but not when determining the threshold modus operandi question under KRE 404(b).

The only way to identify Woodlee as the perpetrator in this case is to conclude that because he did it before, he must have done it this time. This is the very type of propensity presumption that is forbidden by our rules of evidence because it is obviously prejudicial without being truly probative.

In short, the prior bad act and the current charge were not simultaneously similar and so peculiar or distinct as to be admissible under the modus operandi exception to KRE 404(b). The "fundamental demands of justice and fair play" require that Woodlee "be tried for only the crimes for which he was charged." For that reason, the trial court abused its discretion by allowing evidence of Woodlee's prior offense. Given the "universal agreement that evidence of this sort is inherently and highly prejudicial," this error was not harmless.

Frederick Rennel Hanna v. Commonwealth,
2007-SC-000267
Rendered March 18, 2010. To be published
Opinion by Justice Scott, Reversing.
(Primary issue(s)): **No duty to retreat**.

Appellant and two friends went to a bar where Grady and two of his friends happened to be. Grady approached one of Appellant's friends with a gun. A fight broke out, Grady dropped the gun, and Appellant picked it up. Grady continued fighting and Appellant shot him. Appellant testified that he heard somebody else try to shoot a gun first and saw something shinny in Grady's hand. One of Grady's friends testified that he had tried to shoot his gun and it misfired but that this was after Appellant shot Grady.

At trial, Appellant's counsel was denied the right to question the jury regarding the "no duty to retreat" rule during *voir dire*, denied the right in closing argument to argue that he had "no duty to retreat," and denied his request for an instruction informing the jury that Appellant had "no duty to retreat." Appellant was convicted of murder and sentenced to life imprisonment without the possibility of parole.

KRS 503.055(1), as amended, established a presumption, with some exceptions, that a person has "a reasonable fear of imminent peril of death or great bodily harm" to himself or others when using defensive force against someone under certain circumstances. KRS 503.055(3) also codified the pre-existing "no duty to retreat":

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

KRS 503.050(4) was also amended to state that "[a] person does not have a duty to retreat prior to the use of deadly physical force." And KRS 503.070 was amended to address the justification of protecting another and now recognizes that a person "does not have a duty to retreat if the person is in a place where he or she has a right to be." However, since the 2006 self-defense amendments do not apply retroactively *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009), the trial court did not err by failing to include a "no duty to retreat" instruction.

However, the right to present a defense includes the right to be heard in summation. *Herring v. New York*, 422 U.S. 853, 863 (1975). In closing argument, the Commonwealth argued that Appellant could have withdrawn but Appellant was not allowed to comment as to whether or not he had a duty to retreat. Yet, "whether the assailed should stand his ground or give back is a question for the jury, and that he may properly follow that course which is apparently necessary to save himself from death or great bodily harm. *Hilbert v. Commonwealth*, 162 S.W.3d 921, 926 (Ky 2005). Thus, the trial court erred in not permitting Appellant to argue to the jury that he was privileged to defend himself and others without first attempting to retreat and this error could not be found harmless.

Also, Appellant should have been allowed to ask the jurors properly formulated questions in *voir dire* to ascertain any bias they may have had on a duty to retreat. Thus, the trial court abused its discretion in disallowing such questioning because answers would have afforded a basis for a peremptory challenge or a challenge for cause.

Kelly Marquette Stewart v. Commonwealth,
306 S.W.3d 502, Ky., March 18, 2010
(NO. 2007-SC-000278-MR, 2007-SC-000853-MR)
Opinion by Justice Cunningham, affirming in part and vacating in part.
(Primary issue(s)): **Prior misdemeanor must be proven to meet an element of felony possession of drug paraphernalia. Double jeopardy relating to possession of controlled substance and promoting contraband.**

After a traffic stop, Appellant was arrested and later convicted of possession of a controlled substance first degree, promoting contraband first degree, possession of drug paraphernalia second or subsequent offense, possession of marijuana, giving a police officer a false name, representing as one's own another's operator's license, improper signal, failure to illuminate a license plate, and persistent felony offender in the first degree.

Appellant argued that because the jury was never instructed to make a finding of guilt regarding Appellant's previous conviction for possession of drug paraphernalia the conviction for possession of drug paraphernalia second offense should be vacated. When a prior misdemeanor conviction is used to enhance a subsequent offense to a felony the jury must make the finding with respect to the prior conviction during the penalty phase. *See Commonwealth v. Ramsey*, 920 S.W.2d 526, 528-529 (Ky. 1996). The penalty phase instructions in this case simply required the jury to fix punishment at confinement for not less than one year nor more than five. The element of the misdemeanor conviction was missing from the instruction. Jury instruction errors are presumptively prejudicial. *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008). (Such errors are subject to harmless error analysis, however, since this error was unpreserved, the proper inquiry is was it a palpable error under RCr 10.26). The Court concluded that with the element of the prior misdemeanor missing from the penalty phase instructions, Appellant could have only been found guilty of possession of drug paraphernalia first offense- a misdemeanor. The conviction for possession of drug paraphernalia second offense was vacated.

Appellant also argued that convictions for both possession of a controlled substance and promoting contraband violated double jeopardy. "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test is to be applied to determine whether there are two offense or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); KRS 505.020(2)(a). While possession of a controlled substance does not require proof of an additional fact that promoting contraband does, the convictions in this case were based on two separate quantities of cocaine- the cocaine found and confiscated upon arrest and the cocaine found when taken into the jail.

Terry Glenn Hobson v. Commonwealth,
306 S.W.3d 478, Ky., March 18, 2010
(NO. 2007-SC-000645-DG)
Opinion by Justice Venters, reversing and remanding.
(Primary issue(s)): **Use of force element of first degree robbery not met when force used after attempted theft had been abandoned**.

Appellant was convicted of first degree robbery, receiving stolen property, and giving a police officer a false name.

Appellant had broken into a truck and taken a driver's license and credit cards. Appellant attempted to use a stolen credit card at a store. After being confronted by a police officer, Appellant was escorted to the back of the store and then ran out of the store, the officer followed and a scuffle ensued. The officer's ankle was broken in the scuffle.

First degree robbery under KRS 515.020 provides:

1. A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

    a. Causes physical injury to any person who is not a participant in the crime;
    b. Is armed with a deadly weapon; or
    c. Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

First degree robbery requires that one use, or threatens to use, force upon another person with intent to accomplish a theft. Appellant's conviction of first degree robbery did not satisfy all the elements of first degree robbery because, although the act of theft extends through the getaway attempt, the attempted theft in this case had been abandoned and ended by the time force against the officer was used. Thus, the use of force was not "with intent to accomplish the theft." Accordingly, the first degree robbery conviction was reversed.

Brandon Leon Watkins v. Commonwealth,
307 S.W.3d 628, Ky., March 18, 2010
(NO. 2008-SC-000567-DG)
Opinion by Justice Cunningham, affirming.
(Primary issue(s)): **Loss of privacy expectation in property abandoned when fleeing from police**.

A police officer observed Appellant speeding and attempted to pull the vehicle over. Appellant stopped the vehicle, exited, and ran away. He was subsequently caught and arrested. The police towed the vehicle and prior to doing so, searched the vehicle. They found marijuana and cocaine inside. Appellant entered a conditional guilty plea to speeding in excess of 26 miles per hour over the speed limit, failure to comply with instructional permit, fleeing or evading police in the second degree, possession of marijuana under 8 ounces, and possession of controlled substance (cocaine) in the first degree, second offense.

Prior to entering the plea, Appellant moved to suppress. The trial court denied the motion by finding that Appellant lacked standing to challenge the search since he had abandoned the vehicle and the search was properly conducted pursuant to an inventory exception to the warrant requirement. The Court of Appeals affirmed the conviction and the Supreme Court granted discretionary review.

In order to have standing to make challenge a search a person must have a "reasonable expectation of privacy" in the place to be searched. *Katz v. United States*, 389 U.S. 347 (1967). An individual does not have any reasonable expectation of privacy to abandoned property. *California v. Greenwood*, 486 U.S. 35 (1988). What constitutes abandoned property has to be determined on a case by case basis. Leaving property behind, when in flight from apprehension by law enforcement, must be considered in and of itself an abandonment of that property. This holding should be narrowly applied to the facts of fleeing fugitives.

Robert Eugene Dennis v. Commonwealth,
306 S.W.3d 466, Ky., March 18, 2010
(NO. 2008-SC-000049-MR)
Opinion by Justice Abramson, vacating and remanding.
(Primary issue(s)): **Introducing alleged victim's prior false allegations of sexual abuse against another**.

Appellant was convicted of sodomizing and sexually abusing his stepdaughter. He claimed the trial court erred in excluding evidence that she had made a false accusation of sexual abuse against another on a prior occasion.

KRE 608(b) permits an attack on a witness's credibility and it may take the form of cross-examination about specific instances of conduct if, in the court's judgment, the specific instances are "probative of truthfulness or untruthfulness." There must be a factual basis for the subject matter of the inquiry. However, KRE 412 prohibits, except in carefully delineated circumstances, the admission of evidence (1) "offered to prove that any alleged victim engaged in other sexual behavior" or (2) "offered to prove any alleged victim's sexual predisposition." These rules are subject to the KRE 403 balancing test, which permits the exclusion of otherwise admissible evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

False allegations of abuse do not involve "other sexual behavior," and thus evidence of such false allegations is not barred by the rape shield rule and may be admitted in accord with the other rules of evidence. Such allegations must be "demonstrably false." Meaning, the proponent must show that there is a distinct and substantial probability that the prior accusation was false. Even then, the allegation may still be limited or excluded under KRE 608 and KRE 403.

Based on the records in this case, there was no evidence that the prior allegations were "demonstrably false." However, the trial court erred by not conducting an in camera review of Cabinet for Health and Family Service documents to determine if the prior allegations within were "demonstrably false." While court reviewed 2006 records relating to allegations against Appellant, it did not review 2001 records relating to allegations against another individual. The judgment was vacated and remanded for an inspection of records, and for a new trial if those records contained evidentiary material such that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Fred Lee Colvard v. Commonwealth,
309 S.W.3d 239, Ky., March 18, 2010
(NO. 2007-SC-000477-MR)
Opinion by Justice Venters, reversing and remanding.
(Primary issue(s)): **Identity of perpetrator through hearsay no longer allowed in any sexual abuse cases**.

Appellant was convicted by a jury of one count of first degree sodomy, two counts of first degree rape, one count of first degree burglary, and of being a second degree persistent felony offender, and sentenced to life imprisonment.

D.J. and D.Y. told their mother that they had just been sexually assaulted by Appellant and the mother immediately reported it. The girls were medically examined and interviewed. The examinations turned up no DNA or other physical evidence connecting Appellant to the alleged acts.

At trial, an EMT testified that one child said that Appellant "stuck his dick in her" and that the other child said Appellant "hurt" her anus. Dr. Condra testified that one child told a nurse that Appellant had sexually abused her and that "Fred had been fucking her, putting his weenie in her private parts." Dr. Pfitzer testified that she saw the children as a result of allegations that Appellant had sexually abused them involving vaginal and anal penetration and that the mother reported that one child told her "Fred was fucking us."

KRE 803(4) provides that "[s]tatements made for purpose of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis" are not excluded by the hearsay rule even though the declarant is available as a witness. However, the general rule is that the identity of the perpetrator is not relevant to treatment or diagnosis. *Souder v. Commonwealth*, 719 S.W.2d 730, 735 (Ky. 1986) (overruled on other grounds by B.B., 226 S.W.3d 47 (Ky. 2007). In *Edwards v. Commonwealth*, 833 S.W.2d 842 (Ky. 1992), the Court recognized an exception to the identification rule in cases where a family or household member is the perpetrator of sexual abuse against a minor of that household. In this case, the Court found that the *Edwards* exception was based upon an ill-advised and unsound extension of a traditional exception to the hearsay rule and accordingly overruled *Edwards*. A child's identification of the perpetrator of the abuse to a medical professional contains the same tangible risks of unreliability generally inherent in all hearsay testimony.

Consequently, it was error for the trial court to have permitted the EMT, Dr. Condra, and Dr. Pfitzer to testify as to the statements identifying the alleged perpetrator. Moreover, because the testimony served to bolster the children's testimony and the Commonwealth's theory of the case, the testimony was highly prejudicial. Furthermore, the children's uncle, mother and Valleri Mason, a children's forensic interviewer, were permitted to testify and repeat statements made by the children's identifying Appellant as the perpetrator, and this testimony was not subject to any hearsay exception. Reversible error occurred.

The Court also held that at retrial, evidence regarding the accused's prior conviction for attempted rape would be admissible under the *modus operandi* exception to KRE 404(b) since there was a "striking similarity" between the crimes. In his dissent, Justice Scott, joined by Justice Abramson, contended that there was no evidence that the victims' motives in making the statements were other than as a patient responding to a physician's questioning for prospective treatment—and thus a valid exception under KRE 803(4). The Chief Justice concurred in part and dissented in part, arguing that the prior conviction was not sufficiently similar to satisfy the *modus operandi* exception to KRE 404(b).

David Thomas Cohron v. Commonwealth,
306 S.W.3d 489, Ky., March 18, 2010
(NO. 2007-SC-000483-MR)
Opinion by Chief Justice Minton, affirming in part, and reversing and remanding in part.
(Primary issue(s)): **Joinder of offenses.**

Appellant was convicted of first degree fleeing and evading, first degree wanton endangerment, receiving stolen property over $300, two counts of second degree escape, fourth degree assault, reckless driving, and being a first degree persistent felony offender.

Appellant left a work release detail, drove a stolen car at a high rate of speed in the wrong direction, and wrecked it. He was taken to the hospital. He repeatedly struck an emergency room technician. Three days later, having been charged as a result of the events, he escaped from the hospital and was recaptured.

The trial court consolidated both escape cases against Appellant but agreed to bifurcate the guilt phase so the charges related to the latter escape would be heard separately than those related to first, but in front of the same jury.

RCr 6.18 permits joinder of offenses in a single indictment if the offenses are (1) of the same or similar character or (2) based on the same acts or transactions connected together or constituting parts of a common scheme or plan. But RCr 9.16 permits a court to order separate trials of the counts of an indictment upon motion and a showing of prejudice. A trial court has broad discretion with respect to joinder and will not be overturned in the absence of a showing of prejudice and a clear abuse of discretion.

The Court rejected Appellant's argument that he was prejudiced by the joinder, holding instead that the trial court's bifurcation was improper procedurally but harmless error because the offenses could have been joined. However, the Court reversed a conviction for second degree escape, holding that no evidence was presented at trial to show that, at the time of his second escape, Appellant was facing felony charges—an element of the offense—instead, the officer only testified that he was facing charges in general. Since there was insufficient evidence on that charge, double jeopardy bars retrial on second-degree escape charges. However, Appellant could still be tried for third-degree escape.

Commonwealth v. Lawrence Everett Alleman,
306 S.W.3d 484, Ky., March 18, 2010
(NO. 2007-SC-000570-DG)
Opinion by Justice Venters, reversing.
(Primary issue(s)): **Written findings not always required after revocation proceeding**.

Discretionary review granted to decide if a trial court's findings of fact and reasons for revocation entered orally on the record from the bench are sufficient to satisfy due process as set forth in *Morrissey v. Brewer*, 408 U.S. 471 (1972), which requires a trial court to produce "a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole." *Id*, at 489.

Appellee was on probation and the trial court revoked Appellee's probation without written findings of fact. The Court of Appeals reversed the conviction. The Supreme Court reversed the Court of Appeals and reinstated the order of revocation, holding that where oral findings are preserved by a reliable means and sufficiently complete to allow the parties and reviewing courts to determine the facts relied on and reasons for revocation, due process is met. The Court stated that requiring the trial court turn its oral findings and reasons for revocation into a written order seems unduly formalistic and noted that its decision was consistent with the trend among federal circuits. Justice Schroder, joined by the Chief Justice, dissented, contending that *Morrissey* explicitly requires a "written" statement.

Essamond Wilburn v. Commonwealth,
— S.W.3d ——, 2010 WL 997164, Ky., March 18, 2010
(NO. 2008-SC-000787-MR)
Opinion by Justice Venters, affirming in part and reversing and remanding in part.
(Primary issue(s)): **First degree burglary, entering or remaining unlawfully element**.

Appellant was convicted of first degree burglary, two (2) counts of first degree robbery, and being a second degree persistent felony offender. Appellant and Terrance went into a liquor store to rob it. Appellant was alleged to have pulled the trigger of a pistol which did not fire while pointing it at an employee. The employee then fired three shots himself and the two robbers immediately fled the store. Subsequently, police found Terrance, who confessed to attempted robbery and identified Appellant as the gunman. Terrance testified to the same at Appellant's trial.

On appeal, Appellant argued he was entitled to a directed verdict on the burglary charge since the prosecution failed to prove he did not unlawfully enter or remain upon store premises. On a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, he is entitled to a directed verdict of acquittal. *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). KRS 511.020(1) provides:

(1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, *he knowingly enters or remains unlawfully in a building*, and when in effecting entry or while in the building or in the immediate flight there from, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or
(b) Causes physical injury to any person who is not a participant in the crime; or
(c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.
(emphasis added in opinion)

KRS 511.090 provides:

(1) A person "enters or remains unlawfully" in or upon premises when he is not privileged or licensed to do so.

(2) A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license or privilege unless he defies a lawful order not to enter or remain personally communicated to him by the owner of such premises or other authorized person.

Appellant was licensed or privileged to be in the store upon his initial entry. Also, the employee's firing of the gun was the functional equivalent of a personally communicated lawful order by an authorized person not to remain in the store, and that at that point Appellant's license to remain in the store was revoked. However, Appellant then fled immediately. Based upon that fact, the Court concluded that Appellant did not "remain unlawfully" either. The Commonwealth failed to prove either that Appellant unlawfully entered or unlawfully remained on the premises of the liquor store with the intent to commit a crime. He was entitled to a directed verdict on the first degree burglary charge. The case was remanded for an entry of a judgment of acquittal.

Appellant also contended he was entitled to a directed verdict on the first-degree robbery charge since the prosecution failed to prove his pistol was operational at the time of the robbery. KRS 515.020 provides:

(1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Is armed with a deadly weapon; or

(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

KRS 500.080(4)(b) defines a deadly weapon, as relevant here, as "[a]ny weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."

The Court affirmed the robbery conviction, holding that the legislature intended for the statutory definition of a deadly weapon to refer to a "class" of weapons in general, in this case being a gun, which encompasses individual, non-operational weapons like Appellant's— overruling *Merritt*, *Kennedy* and *Helpenstine*.

The Court also rejected Appellant's Batson claims. Under Batson, according to McPherson v. Commonwealth, 171 S.W.3d 1, 3 (Ky. 2005):

> [a] three-prong inquiry aids in determining whether a prosecutor's use of peremptory strikes violated the equal protection clause. Initially, discrimination may be inferred from the totality of the relevant facts associated with a prosecutor's conduct during a defendant's trial. The second prong requires a prosecutor to offer a neutral explanation for challenging those jurors in the protected class. Finally, the trial court must assess the plausibility of the prosecutor's explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class.

The prosecutor's reason for striking the juror was that she had stated that her friend had been wrongly arrested, wrongly convicted, and received an unfair sentence. The Court was not persuaded that this was a race-based reason.

Justice Schroder concurred in result only, noting that the decision would preclude first-degree robbery convictions where the accused uses an exact toy replica of a handgun— a result presumably not intended by the legislature. Justice Noble, joined by the Chief Justice, dissented, asserting that the majority overlooked the plain meaning of the statutory definition to reach its conclusion that the phrase "any weapon" means a "class" of weapons.

Cassandra Smith v. Commonwealth,
— S.W.3d ——, 2010 WL 997394, Ky., March 18, 2010
(NO. 2008-SC-000060-DG)
Opinion by Justice Venters, affirming in part and reversing and remanding in part.
(Primary issue(s)): **Custodial interrogation occurred when handcuffed in home and police ask "do you have any weapons or drugs" prior to Miranda warnings**.

Police executed as search warrant on Appellant's home. Upon entry, Appellant was immediately handcuffed and, without advising her of her Miranda rights, asked if she had any drugs or weapons on her. Appellant replied that "she had something in her pocket. Crack cocaine was removed from her pocket by officers. Police later found baggies which appeared to contain cocaine residue and after being Mirandized, Appellant said "well, I knew this was going to happen one day so that's why I've told my kids this may happen one of these days", and that she "was not a big drug dealer but just did it to get by." The trial court initially suppressed the evidence, but ultimately ruled that Appellant was not in custody at the time she made the statements concerning drugs in her pocket. She was convicted of first degree possession of a controlled substance and possession of drug paraphernalia.

Custodial questioning is inherently coercive. *Micigan v. Mosley*, 423 U.S. 96, 112 (1975). Thus, "Miranda warnings are only required when the suspect being questioned 'in custody.'" *Commonwealth v. Lucas*, 195 S.W.3d 403, 405. "Custodial interrogation has been defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." *Id.*

Custody does not occur until police, by some form of physical force or show of authority, have restained the liberty of an individual. *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999). The test is whether, considering the surrounding circumstances, a reasonable person whould have believed he or she was free to leave. Id. (Citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). In this case, several police officers busted down the door, handcuffed, and physically touched Appellant. She was not free to leave and did not possess unrestrained freedom of movement.

Interrogation has been defined to include "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect… focus[ing] primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *Wells v. Commonwealth*, 892 S.W.2d 299, 302 (Ky. 1995). The unambiguous question "do you have any weapons or drugs" amounted to police interrogation.

The Supreme Court reversed the possession conviction, holding that the motion to suppress should have been granted since the incriminating statement was the product of an un-Mirandized custodial interrogation that was not subject to the public safety exception. The error was not harmless because Appellant's defense was that she did not know the drugs were in her pocket. The Court affirmed the conviction for possession of drug paraphernalia, holding later statements by Appellant were admissible. The Court also affirmed the trial court's refusal under KRE 404(b) to allow evidence concerning Appellant's ex-husband's prior felony drug conviction which Appellant wished to use as evidence that her husband had slipped the drugs into her pocket which she claimed she thought was money.

Robert Carl Foley v. Commonwealth,
306 S.W.3d 28, Ky., March 18, 2010
(NO. 2009-SC-000428-TG)
Opinion by Justice Venters, affirming.

Death row inmate filed a petition for declaratory judgment in Franklin Circuit Court seeking to have Kentucky's self-defense statutes as they existed at the time of his 1991 trial declared unconstitutional as violative of Section 1 of the Kentucky Constitution which provides: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties." The Court stated that the gist of his argument is that our Constitution identifies self-defense as a right, but was treated by the self-defense statues in effect at the time of his trial as a privilege. He contended that the "castle doctrine" as now codified in KRS 503.055 represents a proper implementation of the Constitutional right and illustrates the unconstitutionality of the self-defense provisions in effect at the time of his trial. The circuit court denied the petition.

The declaratory judgment statue, KRS 418.040 provides:

> In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

The Court stated that an "actual controversy" is of fundamental importance and "requires a controversy over present rights, duties, and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion." *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991).

The Court concluded that the petition fails to plead an actual controversy because the present self-protection statues contained in Chapter 503 have no foreseeable application to him since he is incarcerated subject to six death sentences. While petitioner intended to use a favorable ruling as the basis for a federal habeas corpus challenge to the jury instructions used during his criminal trial, the Supreme Court affirmed dismissal of the petition, holding there was no actual controversy. The Court characterized the petition as an attempt to incorporate declaratory judgment actions into the existing framework of post-conviction remedies and noted the federal rule against same.

Alan Hummel v. Commonwealth,
306 S.W.3d 48, Ky., March 18, 2010
(NO. 2008-SC-000801-MR)
Opinion by Justice Noble, affirming.
(Primary issue(s)): **request for self representation can be denied if a tactic to delay**

Appellant was convicted of first degree rape, third degree rape, and being a second degree persistent felony offender. Appellant contended the trial court improperly denied his right to represent himself or proceed with "hybrid counsel." After a *Faretta* hearing, the trial court denied Hummel's request on the grounds 1) self-representation was not in the accused's best interests; 2) Hummel was not skilled enough to represent himself; and 3) Hummel could not control himself.

While acknowledging that the first two reasons were improper, the Supreme Court held, in a case of first impression, that a request for self-representation may be denied if the defendant is unable or unwilling to abide by courtroom protocol as he conducts his defense or if the request is made purely as a tactic to disrupt or delay proceedings. The Court noted that the record showed Hummel's behavior during trial was "substantially and repeatedly disruptive" and that the timing of Hummel's requests "strongly suggests he was using them as a tactic to delay proceedings."

Mark Padgett v. Commonwealth,
— S.W.3d ——, 2010 WL 997272, Ky., March 18, 2010
(NO. 2008-SC-000632-MR)
Opinion by Justice Noble, affirming.
(Primary issue(s)): **Precluding an expert from testifying as to defendant's out of court statement to establish EED, thus requiring the defendant to testify, is not compelled testimony.**

Appellant was convicted for attempted first-degree manslaughter, second-degree assault and violation of an EPO.

Appellant argued that the trial court impermissibly compelled his testimony by refusing to allow an expert to testify on extreme emotional disturbance based only on his out-of-court statements, thus, forcing Appellant to testify. Appellant subsequently took the stand and testified about the triggering event that gave rise to his extreme emotional disturbance. The Court held that the trial court did not force Appellant to testify; rather it followed the prohibition in *Talbott v Commonwealth*, 968 S.W.2d 76 (Ky. 1998) against bootstrapping an extreme emotional disturbance defense into evidence through expert opinion premised primarily on out-of-court information provided by the accused.

The Court also held that the trial court was not required to hold a hearing after Appellant announced he wanted to fire his counsel. A trial court has a duty to inquire about allegations of dissatisfaction with counsel. However, a searching inquiry is not required unless the defendant raises some "substantial basis for dissatisfaction." Further, the Court held that the trial court was not required to advise Appellant of his right to "hybrid counsel." Appellant also argued that the trial court erred by adopting findings he was competent to stand trial without first holding a competency hearing. The Supreme Court held there was no need to remand for a retrospective competency hearing since there was no substantial evidence of Padgett's incompetency in the record—overruling its earlier decision in
Gibbs v. Commonwealth, 208 S.W.3d 848 (Ky. 2006).

Danny Montgomery v. Commonwealth,
— S.W.3d ——, 2010 WL 997398, Ky., March 18, 2010
(NO. 2007-SC-000852-MR)
Opinion by Justice Abramson, affirming.
(Primary issue(s)): **modus operandi exception to KRE 404(b), and precluding evidence under the rape shield law.**

Appellant was charged with five counts of rape and one count of sexual abuse against his stepdaughter, K.B. He was acquitted of the rape charges and convicted of the sexual abuse charge.

In 2002, K.B. told a friend and school counselor that Appellant raped her. She was examined and her hymen was intact and her genitals were completely normal. Thereafter, she said she had made up the rape allegation. In 2004, the mother of one of K.B.'s classmates reported to authorities a rumor that Appellant had molested some of K.B.'s friends and subjected K.B. to intercourse. Police investigated and three of K.B.'s friends said that they had spent the night at K.B.'s home and been awakened by Appellant reaching into their pants and touching their vaginas. K.B. testified at trial that one night Appellant subjected her to intercourse, however, she also admitted that when she was interviewed by police that she had recanted her allegations. She had also accused him of other rapes but had later told investigators that she had fabricated the allegations because she was on probation and wanted to divert attention from herself. After Appellant and K.B.'s mother were divorced, another friend of K.B. accused K.B. of molesting her. The same officer who investigated K.B.'s prior allegations investigated this one and K.B. renewed the allegations against Appellant.

Appellant challenged the admission of evidence under the modus operandi exception to KRE 404(b), that he had similarly abused K.B.'s three friends. Each testified to being asleep in the room and awakened to find Appellant reaching into their pants. The similarities in the girl's ages was not sufficient to meet that exception to KRE 404(b). However, Appellant had access to each alleged victim, assaulted them in the same manner while they were asleep with another girl or girls sleeping nearby, and in each case silently withdrew when the girl awoke. The court deemed this conduct distinctive enough to be deemed a modus operandi.

Appellant also challenged the joinder of the rape and sexual abuse charges. Under RCr 9.12, two indictments may be tried jointly if the offenses could have been joined in a single indictment, and under RCr 6.18 joinder in a single indictment is appropriate if the offenses "are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." The Court found that these charges were "connected" or "parts of a common scheme or plan."

Appellant also contended that the Commonwealth sought the sex abuse charge "vindictively" in retaliation for Appellant's motion to exclude the collateral sex abuse evidence regarding the three other girls. In post-conviction settings, vindictiveness can be presumed when a defendant exercised the right to appeal a misdemeanor conviction and the prosecutor then obtained a new felony indictment based on the same conduct while the appeal was pending. However, bootstrapping the collateral sex abuse evidence through a sex abuse indictment is not vindictive.

Appellant also contended that evidence was improperly excluded. The examining physician from the 2002 allegation was precluded from testifying that in his opinion K.B. was still a virgin when she was examined in 2002. The Court did not address this contention, stating that K.B. admitted that she was not raped by Appellant in 2002 and the error, if any, would be harmless. Appellant also wanted to introduce evidence of K.B.'s sexual knowledge to show she could fabricate the charges against him. Under KRE 412, evidence is generally not allowed which is offered to prove that an alleged victim engaged in other sexual behavior or to prove an alleged victim's sexual predisposition. Appellant contended KRE 412 does not apply to minors, the Court rejected that contention. Also, there are only three exceptions to KRE 412; (1) a victim's past sexual experience is admissible to prove that a person other than the accused was the source of semen, injury or other physical evidence, (2) to prove consent, and (3) if it directly pertains to the offense charged. The first two are not applicable here. The third exception, the residual exception, is applicable when exclusion of the evidence would be arbitrary or disproportionate with respect to KRE 412's purposes of protecting the victim's privacy and eliminating unduly prejudicial character evidence from the trial. The evidence sought to be introduced was marginally relevant to a defense.

Appellant also challenged the certified copies of prior convictions in the PFO stage claiming that somebody should have testified to their accuracy. The Court concluded that certified copies of the convictions are admissible without further authentication. Also, the trial court's failure to instruct the jury to impose a sentence for the underlying offense before enhancing the PFO sentence is not palpable error.

Raymond McClanahan v. Commonwealth,
308 S.W.3d 694, Ky., April 22, 2010
(NO. 2008-SC-000033-MR)
Opinion by Justice Venters. Reversing and Remanding.
(Primary issue(s)): **Hammer clause with an unlawful sentence.**

Appellant entered a plea agreement to multiple offenses for a sentence of ten years with a hammer clause requiring him to serve forty if he did not appear for sentencing. He did not appear for sentencing and picked up new misdemeanor charges. When he did appear, he moved to withdraw his guilty plea or for a continuance so he could explain his failure to appear.

Because the highest class of crime Appellant was convicted of was a Class C felony, under KRS 515.030, the aggregate of the sentences to be imposed upon Appellant could not lawfully exceed twenty years. A sentence that lies outside the statutory limits is an illegal sentence, and the imposition of an illegal sentence is inherently an abuse of discretion. Parties can agree to an unlawful sentence, but a judge cannot impose one. Any decisions stating otherwise are overruled.

The court also failed to follow the requirements of applicable sentencing statutes, and failed to exercise independent judicial discretion at sentencing. The trial court may impose a sentence of imprisonment (with exceptions not applicable here) only "after due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant." KRS 533.010(2). At the entry of the plea the trial court told Appellant "If you don't follow through [with the conditions of release], it's forty [years]… and, I'm telling you, it'll be forty [years] and I guess I'm still in shock over that!" At sentencing, the trial court only made a superficial reference to reviewing the case and there was no meaningful hearing." This violated KRS 533.010(2) and RCr 11.02.

The case was reversed for further proceedings consistent with the opinion.

John Tim Jenkins v. Commonwealth,
308 S.W.3d 704, Ky., April 22, 2010 (NO. 2007-SC-000248-DG)
Opinion by Justice Schroder. Reversing and Remanding.
(Primary issue(s)): **Experts can testify as to interviewing methods of children to challenge the reliability of the children's answers.**

Appellant was a volunteer with the Big Brothers program. He took two children to a pool. Two lifeguards on duty were suspicious of Appellant because he was playing with the two children in the pool. They said he was swimming up under them and lifting them up out of the water and thought it looked like he was nibbling on their thighs. They asked their supervisor to watch them and he saw nothing of concern. There was another family in the pool and a swim team and dive team and no one else expressed any concern. The two lifeguards expressed their concern to another supervisor and he said it looked like they were playing a game of "shark" (where one person pretends to be a shark and the others try to swim across the pool without getting "eaten").

After swimming, Appellant and the two children went to a shower stall and showered. The two lifeguards observed them. They did not see any physical contact. Yet they

called the police. The police arrived and took one child home and the other, J.S. to the police station. Officer Qualls began interviewing eight year old J.S. around midnight. J.S. stated that Appellant had not done anything sexually inappropriate. Qualls would not accept this and would not let J.S. go home. After unrelenting and suggestive questioning, J.S., who was very tired, finally agreed with a leading question that he had been touched once. The next day, J.S. was interviewed again and agreed with another suggestive question that there was a second touching.

At trial, Appellant proposed to call Dr. Terence Campbell, a forensic psychologist, to provide expert testimony concerning improper interviewing techniques that can result in unreliable reporting by child witnesses. He was not allowed to testify.

KRE 702 allows a qualified expert to testify in the form of an opinion or otherwise with respect to scientific, technical, or other specialized knowledge, provided that the testimony is scientifically reliable and will assist the trier of fact to understand the evidence or to determine a fact in issue. The evidence must be both relevant and reliable. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), factors to consider in assessing an expert's reliability are (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.

Dr. Campbell had extensive qualifications. He testified that it is absolutely accepted in the psychological community that young children are highly susceptible to suggestion, that improper interviewing methods create a serious risk of unreliable responses and inaccurate recall, including false allegations of sexual abuse. Improper interviewing techniques include interviewer bias, leading or suggestive questions, coercive or "forced-choice" questions, repeated questions, and repeated interviews. A child's memory can be distorted and once distorted later rehabilitation is nearly impossible. These principles are based on accepted science and supported by longstanding and unanimous scientific research that has been empirically tested. They have been subjected to peer review and publication and are emphatically accepted in the psychological community. Also, the testimony was not going to be used to challenge the credibility of the witness but rather the reliability and accuracy of the witnesses beliefs or recollection. Dr. Campbell should have been permitted to testify.

The trial court also erred in not allowing the tape recordings of the interviews with J.S. to be introduced. They were not being offered for the truth of the matter asserted, nor to impeach, but rather as proof that the investigation was flawed from the beginning, by showing the coercive and suggestive manner in which the interviews were conducted and the allegations obtained. It is a proper, non-hearsay use. On retrial , they should be admitted.

Appellant should have also been granted a directed verdict on indecent exposure which reads as "A person is guilty of indecent exposure when he intentionally exposes his genitals under circumstances in which he knows or should know his conduct is likely to cause affront or alarm." KRS 510.150. There was no evidence that Appellant removed his swimming trunks for any purpose other than to shower. The children provided no evidence that it had any effect on either of them. Also, male nudity in a men's locker room with showers is certainly not unusual, and standing alone, it is not likely to cause affront or alarm, and is not a crime.

William Buck v. Commonwealth,
308 S.W.3d 661, Ky., April 22, 2010 (NO. 2008-SC-000896-DG)
Opinion by Justice Schroder. Affirming.
(Primary issue(s)): **Kentucky Sex Offender Registration Act and amendments.**

In 1994, the Kentucky Sex Offender Registration Act (SORA) was enacted and required those convicted of sex offenses who were not incarcerated to register with probation and parole and to continue to register for ten years after their final discharge from confinement, probation, parole, or supervised release. Failure to comply was a Class A misdemeanor and applied only "to persons convicted after the effective date" of the Act.

In 1998, SORA was amended to require those designated high risk to register for life and others to register for ten years after their final discharge. The amendments were applicable to "persons individually sentenced or incarcerated after the effective date of this Act."

In 2000, SORA was amended to base the length of registration on the offense committed. Also, the penalty for failure to register, providing false, misleading, or incomplete information, from a Class A misdemeanor to a Class D felony. It applied "to all persons who, after the effective date of this Act, are required… to become registrants…."

In 2006, SORA was amended to increase the registration period for non-lifetime registrants from ten to twenty years. It also enhanced the penalty for a second or subsequent offense to a Class C felony, and criminalized the violation of "prior law."

In 1985, Appellant was convicted of first degree sexual abuse and his sentence was probated for three years. In 1987, Appellant was convicted of second degree assault and

second degree burglary. In 1997, Appellant was granted parole. In 2000, Appellant violated the conditions of his parole and returned to prison. In 2001, Appellant was again paroled and violated and returned to prison in 2002. He was granted parole again in 2005.

After the effective date of SORA's 2006 amendments, police checked Appellant's registered address and found he was not living there. He was subsequently indicted for failure to register as a sexual offender, second or subsequent offense, a Class C felony, and entered a conditional guilty plea to a Class D felony. He contended prosecution was barred by the ex post facto clause.

An ex post facto law is any law, which criminalizes an act that was innocent when done, aggravates or increases the punishment for a crime as compared to the punishment when the crime was committed, or alters the rules of evidence to require less or different proof in order to convict than what was necessary when the crime was committed. The key is whether a retrospective law is punitive. It is punitive if the legislature intended to impose punishment. Where the "legislature intended to enact a civil, nonpunitive, regulatory scheme, then we must determine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." In determining whether a civil regulatory scheme is punitive in purpose or effect, five factors can be considered: whether, in its necessary operation, the regulatory scheme (1) has been regarded in our history and traditions as punishment, (2) promotes the traditional aims of punishment, (3) imposes an affirmative disability or restraint, (4) has a rational connection to a nonpunitive purpose, or (5) is excessive with respect to the nonpunitive purpose.

When Appellant was first paroled in 1997, he was not required to register because the 1998 version was only applicable to those sentenced or incarcerated for a sex crime after the effective date. The 2000 amendments applied to persons who "after the effective date of this Act, are required… to become registrants…" This applied to Appellant because Appellant was again incarcerated and released after the 2000 amendments became effective. So, he was subject to the Class D felony penalty for failure to register. The failure to register occurred after the effective date. An increase in the degree of the offense for failing to register only presents an ex post facto issue if the act of failing to register occurred prior to the effective date of the amendment.

Larry Thomas Jones and Gerald Henley v. Commonwealth,
—S.W.3d ——, 2010 WL 1636852, Ky., April 22, 2010
(NO. 2007-SC-000922-DG)
Opinion by Justice Schroder. Reversing.
(Primary issue(s)): **The executive branch, not judicial, has power to revoke conditional discharge imposed after a period of incarceration.**

KRS 532.043(5) violates the separation of powers doctrine of Sections 27 and 28 of the Kentucky Constitution by giving the judicial branch, rather than the executive branch, the power to revoke conditional discharge imposed after a period of incarceration.

KRA 532.043(5) states in pertinent part "The Commonwealth's attorney may petition the court to revoke the defendant's conditional discharge and re-incarcerate the defendant as set forth in KRS 532.060(2)."

In these cases, the Appellants served out their initial sentences and were placed on conditional discharge for three years after release. While they were on "conditional discharge" the situation was more akin to parole or an extension of parole. The Parole Board (executive branch) sets the conditions of release on parole. The statute, thus, imposes upon the judiciary the duty to enforce conditions set by the executive branch. The statutory mixture of the role of the judiciary within the role of the executive branch is fatal to the legislative scheme because it gives the court jurisdiction over revocation after a sentence of incarceration has been imposed, the sentence has become final, and the defendant has been transferred to the custody of the Department of Corrections (the executive branch), the defendant has served out the period of incarceration or has been paroled, and the defendant has been released subject to the conditions of the Department of Corrections and supervision by the Division of Probation and Parole. Revocation is in such a situation is not a function of the judicial branch, only an appeal of an administrative action should involve the judicial branch.

Russell Winstead v. Commonwealth,
— S.W.3d ——, 2010 WL 1636863, Ky., April 22, 2010
(NO. 2007-SC-000829-MR, 2008-SC-000446-TG)
Opinion by Chief Justice Minton.

Appellant was convicted of murder and robbery and sentenced to LWOP/25 for murder and 20 years on robbery to run consecutively.

Appellant contends the trial court erred by permitting his ex-wife to testify in contravention of the spousal privilege in KRE 504. They were married at the time of the murder but divorced by the time of trial. At trial, she testified that she had lied to police regarding what time Appellant arrived home on the night of the murder because Appellant asked her to.

KRE 504 contains two privileges, first, is the testimonial privilege "by which a spouse may refuse to testify, or may prevent the other spouse from testifying against him or her, as to events occurring after the date of their marriage…" Since they were no longer married at trial, this privilege was inapplicable. Second, is that "[a]n individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage." It is considered confidential when "it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person." The Court concluded that because the time of Appellant's arrival at home could have also been observed by others outside the marriage, his wife's observation of her husband's arrival time was not a confidential communication. However, the Court also concluded that the act of requesting one's spouse to give false information to police is prohibited from being testified to at trial if such request was not intended for disclosure to others. The Court found this error harmless though because the jury would have still been presented with testimony that Appellant's wife had first stated Appellant had arrived home at one time and then later told them he arrived home at a different time.

Appellant also contended that his Sixth Amendment rights were violated by the Commonwealth's presentation of testimony of jailhouse informant whom the Commonwealth allegedly used to gather incriminating evidence against him. Three things must be show to demonstrate use of a jailhouse informant deliberately eliciting incriminating statements from an accused following invocation of the right to counsel in violation of the Sixth Amendment: "(1) the right to counsel has attached, (2) the informant was acting as a government agent, and (3) the informant deliberately elicited incriminating statements." There was no evidence of the second or third requirement and the Court concluded no violation.

Appellant also requested a mistrial because of a security officer said some jurors were observed using cell phones during penalty phase deliberations. The Court found that there was nothing to suggest jurors discussed the case with outsiders. Some juror's admitted to the trial court that they had used cell phones for personal calls such as checking to make sure children arrived home and checking in with work.

The Court did hold that Appellant was entitled to a new sentencing hearing since the consecutive terms violated KRS 532.110(1)(c) which provides that a term for a sentence of years cannot run consecutive to a life sentence. ■

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Sixth Circuit Case Review

By Dennis J. Burke, Post-Conviction Branch

Johnson v. Sherry,
586 F.3d 439 (6th Cir. 2009)
Before Cole, Clay and Kethledge, Circuit Judges

On appeal from denial of writ of habeas corpus, Johnson argued that the state violated his Sixth Amendment right to a public trial when it excluded the public from the courtroom during portions of his jury trial and that his Sixth Amendment right to effective assistance of counsel was violated when his trial attorney agreed to the closure. Clay, J. delivered the opinion of the Court. It vacated the judgment of the lower court and remanded for an evidentiary hearing. Kethledge, J., dissented.

At the start of Johnson's murder and assault trial, the prosecutor moved to close the courtroom to spectators during the testimony of three prosecution witnesses, who were apparently afraid to testify publicly. The basis for the apparent fear was that two other prosecution witnesses had been killed under suspicious circumstances. Defense counsel acquiesced to the prosecution's motion asking only that the trial court not order the courtroom closed in the jury's presence. The court instructed defendant's relatives not to arrive before 11:00 a.m. on the day that the three witnesses testified and to remain outside the courtroom until permitted to enter.

Following his conviction, Johnson filed a motion for a new trial in state court alleging a denial to his right to a public trial and ineffective assistance of counsel due to trial counsel's failure to assert that right. The court denied the motion noting that Johnson's counsel agreed to the closure. Johnson then filed a federal habeas petition raising the two claims. The district court ruled that Johnson had waived his public trial claim by acquiescing to the prosecution's motion and that his claim failed on the merits.

"The Sixth Amendment guarantees the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right to a public trial benefits the accused because it permits "the public to see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia,* 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (internal quotation marks and citations omitted). "Denial of a public trial is a structural error thus prejudice is presumed." *Id*. at 50 n. 9. Nevertheless, the right to a public trial can be waived.

Johnson's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, Johnson may obtain relief only if he can show that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or that the state court relied on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

Judge Clay wrote for the majority:

> Johnson concedes that his attorney acquiesced to the closure, but argues that because the right to a public trial is a fundamental constitutional right and a structural guarantee, his attorney's statements were insufficient to constitute waiver. While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom, assuming the justification for closure is sufficient to overcome the public and media's First Amendment right to an open and public trial proceeding. *See Freytag v. Commissioner,* 501 U.S. 868, 896, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) ("[T]he Sixth Amendment right to a trial that is 'public,' provide[s] benefits to the entire society more important than many structural guarantees; but if the litigant does not assert [it] in a timely fashion, he is foreclosed.")….Because Johnson failed to object to the closure, his claim is procedurally defaulted unless he can show cause and prejudice for the default. *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)…. Johnson argues that he has demonstrated cause for the default because his counsel was ineffective in failing to object to the closure of the trial. Consequently, both of Johnson's claims on appeal turn on whether his counsel was constitutionally ineffective.
>
> In order to establish ineffective assistance of counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," and that "the deficient performance prejudiced [his] defense." *Strickland,* 466 U.S. at 687-88, 104 S.Ct. 2052. In the instant case, we agree that defense counsel's failure to object to the closure of Johnson's trial may have

> fallen below an "objective standard of reasonableness" as required in *Strickland.* Courts have been clear that while the closure of a trial may be justified in certain cases, "[s]uch circumstances will be rare ... and the balance of interests must be struck with special care." *Waller,* 467 U.S. at 45, 104 S.Ct. 2210….To be sure, counsel's decision would be owed deference if it could be viewed as strategic, and counsel may have been privy to information of which we are unaware. *See Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 (explaining that a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy). However, if counsel had additional relevant information, it is not evident from the record….No court below conducted an evidentiary hearing to explore these matters, and, on the record before us, it is difficult to see how the failure to object to the closure could have been strategic. [Citation omitted]. Consequently, an evidentiary hearing is warranted to determine if trial counsel's failure to object to the closure constitutes deficient performance.

Johnson must also demonstrate prejudice to excuse the procedural default. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). However, the majority determined that because a public trial is a structural constitutional right, if the evidentiary hearing reveals that the courtroom closure was unjustified then prejudice is presumed.

Kethledge, J. in dissent, suggests a potential strategic reason for trial counsel acquiescing to the prosecution's request to close the court room. But mostly he takes issue with the majority's conclusion that if Johnson can establish deficient performance by his trial counsel, that prejudice is presumed. Judge Kethledge acknowledges "reasonable jurists can disagree as to whether, when a defendant asserts an ineffective-assistance claim based on an underlying violation of his right to a public trial, the *Waller* definition of prejudice should trump the *Strickland* one, or vice versa." However, he "simply [does] not see how, when Johnson presents a *Strickland* claim and *Strickland* by its terms imposes an *actual*-prejudice standard, we can hold that clearly established Supreme Court precedent required the Michigan state courts to apply a presumed-prejudice standard instead."

Robinson v. Mills, 592 F.3d 730 (6th Cir. 2010)
Before Ryan, Cole and Clay, Circuit Judges

District Court's granting of a conditional writ of habeas corpus pursuant to 28 U.S.C. § 2254, relying upon *Brady v. Maryland,* 373 U.S. 83 (1963), is affirmed unanimously where the prosecution (yet again) withheld evidence – this time evidence that a critical witness was a government informant.

Robinson was convicted of first degree murder in Tennessee state court and was sentenced to mandatory life in prison. After state post conviction efforts failed, he filed a federal writ of habeas corpus alleging among other claims that the state violated his rights under *Brady* by withholding evidence that the state's star witness was also a paid state informant.

In the state court trial, Robinson testified that he shot the deceased in self-defense. Robinson said that the victim had threatened him and his family over the course of the night and he shot the victim because the victim pointed a gun at him. No physical evidence or testimony contradicted Robinson's testimony except that of the state's star witness. At trial, she stated that the time of the shooting the deceased had a pork chop sandwich in his right hand, thus making it unlikely that he grabbed for his gun with his right hand. She also testified that after shooting him, Robinson was "smiling," which paints Robinson as cold and calculating and contradicts his assertion that shooting Irwin was self-defense rather than premeditation. The star witness's testimony at the preliminary hearing, held a year earlier, was significantly different. There, she testified that she did not witness the shooting and she had no idea whether the deceased reached for his gun. She also testified that rather than Robinson smiling after the shooting, he just "stared at her." Robinson's trial counsel attempted to impeach the informant with the disparities between her preliminary hearing testimony and the trial testimony.

Prior to Robinson's trial, the government's star witness worked for the Sparta, TN police department as a paid confidential informant (CI). About a month after the shooting, she served as a CI against the deceased's sister and was paid $70. The deceased's sister later testified against Robinson at his trial. The state's star witness had worked as a CI for the Sparta police at least seven times. She also worked as a CI for the Putnam County Sheriff's Department and the Tennessee Bureau of Investigation (TBI). Both agencies headed up the investigation resulting in Robinson's prosecution. Furthermore, just eighteen days before Robinson's trial began, the star witness/CI made a controlled buy on behalf of the TBI against another person who then just happened to testify against Robinson at his trial. As noted above, Robinson was not informed that the star witness against him was a CI, nor was Robinson told that she had informed against two of the other persons who testified against him at trial.

Under the AEDPA, Robinson may obtain relief only if he can demonstrate that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or that the state court relied on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

Under *Brady v. Maryland*, 373 U.S. at 87, the government has a constitutional obligation to turn over any exculpatory evidence related to the defendant's guilt or possible punishment. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Strickler v. Greene*, 527 U.S. 263, 281(1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)) (internal quotation marks omitted). The prosecutor's duty to disclose under *Brady* encompasses impeachment evidence. *Id.* at 280 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

"A successful *Brady* claim requires a three-part showing: 1) that the evidence in question be favorable; 2) that the state suppressed the relevant evidence, either purposefully or inadvertently; and, 3) that the state's actions resulted in prejudice." *Bell v. Bell*, 512 F.3d 223, 231 (6th Cir.2008).

Applying *Brady* to the facts in Robinson's case, Judge Clay wrote:

> Respondent does not dispute that Robinson's claim satisfies the first two prongs of the test. Therefore, the key issue for us to resolve under *Brady* is the third prong-whether Petitioner was prejudiced by the State's actions, *i.e.*, whether the withheld impeachment evidence is "material" to Robinson's jury conviction when viewed in light of the other evidence presented at trial….We conclude that withholding the impeachment evidence regarding Sims was material under *Brady* because there is a reasonable probability that disclosure of the evidence would have resulted in a different outcome for the proceeding.
>
> The State argues that the undisclosed impeachment information would have been merely cumulative because Sims had already been impeached by the jury's attention to the discrepancies between Sims' testimony at the preliminary hearing and her testimony at trial. "[W]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *Byrd v. Collins*, 209 F.3d 486, 518 (6th Cir.2000) (quoting *United States v. Avellino*, 136 F.3d 249, 257 (2d Cir.1998)). We are not swayed by the prosecution's argument. Although Robinson attempted to demonstrate that Sims' trial testimony differed from her testimony at the preliminary hearing, the undisclosed information was different in kind because the suppressed materials would have offered insight into why Sims' testimony at trial differed from her testimony at the preliminary hearing. Moreover, Robinson could have used the information to demonstrate that Sims had a pro-prosecution bias at the time of trial. As the Ninth Circuit has noted:
>
> > It makes little sense to argue that because [the defendant] tried to impeach [the key witness] and failed, any further impeachment evidence would be useless. It is more likely that [the defendant] may have failed to impeach [the key witness] because the most damning impeachment evidence in fact was withheld by the government.
> >
> > *United States v. Serv. Deli Inc.*, 151 F.3d 938, 944 (9th Cir.1998).

The Court explained at some length why the government's hiding of evidence that it used a confidential informant as its star witness to convict Robinson was prejudicial:

> "The use of informers ... may raise serious questions of credibility." On *Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). Indeed, jurors often have a negative predisposition toward informants. "Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable...." Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1385 (1996); *see also Banks v. Dretke*, 540 U.S. 668, 701-02, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (favorably citing Trott, *Words of Warning, supra).*

Finally, even though the prosecutor's actual knowledge of the withheld evidence is irrelevant because "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf ..., including the police." *Strickler*, 527 U.S. at 281, (quoting *Kyles*, 514 U.S. at 437) (internal quotation marks omitted), the Court pointedly rejected as "unconvincing" the government's argument that because the CI had informed for the government on "unrelated cases" the prosecutor and lead TBI investigator had no knowledge of the star witness' activities.

Gagne v. Booker,
—- F.3d—- 2010 WL 616436
Before Batchelder, Chief Judge, Norris and Kethledge, Circuit Judges

Norris, J. delivered the opinion of the court affirming the grant of habeas relief. Batchelder, C.J. delivered a separate dissent.

Lewis Gagne and his co-defendant, Donald Swathwood, were each charged with three counts of criminal sexual misconduct for forcibly and simultaneously engaging in sexual activities with Gagne's ex-girlfriend. All of the charges arose out of events occurring over the course of one night. The defense at trial was consent. The jury convicted Gagne of two counts, and his co-defendant of three. Gagne filed a petition for a writ of habeas corpus, 28 U.S.C. § 2254, and the district court granted him relief on the basis that the state trial court's decision to exclude certain evidence under the state rape shield law had violated Gagne's due process right to present a meaningful defense. The Court of Appeals affirmed.

The parties do not dispute the background circumstances leading to the events of July 3, 2000. Gagne and his girlfriend had been dating for about six months until early June and lived together for most of that time until the relationship ended. Throughout, Gagne did not work but his girlfriend did. Gagne would frequently use his girlfriend's ATM card, sometimes without her knowledge.

Many of the facts on the night of July 3 are also undisputed. Earlier in the day, Gagne's now ex-girlfriend consumed nearly a pint of vodka. Around 10:45 p.m. she was watching television when Gagne arrived uninvited. He informed her he was moving to California with Swathwood. Shortly thereafter, Swathwood and a third man arrived at the house. The group began drinking beer. By Gagne's exgirlfriend's own estimate, she consumed nine or ten beers during that time.

From this point on, the facts are disputed at least on the issue of consent. According to the prosecution's version, Gagne and his ex-girlfriend took a shower together shortly after midnight. The shower led to oral sex in the living room. Gagne's ex-girlfriend thought she and Gagne were alone but Swathwood entered the living room and began having sexual intercourse with her as Gagne held her down. A few minutes later Gagne and his ex-girlfriend left the living room and entered the bedroom. There she told Gagne she did not want to have sex with Swathwood. She and Gagne again engaged in oral sex and again Swathwood entered the room and began having sexual intercourse with her. The men proceeded to alternate holding her down and having non-consensual sexual intercourse with her until they tired of it at approximately 5:00 a.m. The woman took a shower, and after vomiting returned to bed where she slept until approximately noon. At that time she discovered $300.00 had been withdrawn from her bank account at 5:28 a.m. and that someone had tried to withdraw more money two more times in the next fifteen minutes.

The defense version of the sexual activity differed only in that Gagne and Swathwood claim that the woman consented to the sexual activity. At around 5:00 a.m., Gagne and Swathwood left the house with the woman's ATM card and purchased crack. Both men testified they returned to the woman's house later in the day and Gagne returned the ATM card but she was angry and told him to leave, so he did. Two days later Gagne's ex-girlfriend told her adult son she had been raped. She then told the police and was seen by doctors who did not find any physical evidence of sexual assault.

At pre-trial, Gagne gave notice of his intent to introduce evidence regarding the woman's prior sexual experience and tastes. Specifically he wanted to introduce evidence of a prior incident of group sexual activity involving the woman, Gagne and another man (not Swathwood). He also wanted to introduce evidence that the woman had urged Gagne's father to join her and Gagne in group sex. The trial court excluded this evidence at trial. The court did however admit evidence of an incident of group sex involving Gagne's ex-girlfriend and two other women. In closing argument of the trial, the prosecutor stressed the unlikeliness of the defendant's version of events finding it too far fetched to be true. The defense pointed to the group sex between the three women, which was introduced at trial. But, in rebuttal, the prosecutor argued that the situation was different because she had sexual intercourse with two woman not two men.

On appeal the state appellate court found the excluded evidence to be irrelevant because it involved third parties – not Swathwood. It also determined Gagne was not denied his constitutional right to present a defense because the jury was allowed to hear evidence of Gagne's group sexual activity with the two other women.

The Court of Appeals explained that it reviews the last reasoned state court decision on the issue to determine whether that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). A state court's determination is contrary to clearly established federal law if its conclusion was "opposite to that reached by [the Supreme Court] on a question of law," and it is an unreasonable application of clearly established federal law "if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000).

In affirming the district court's grant of habeas relief the majority explained its decision as follows:

> The Supreme Court has repeatedly recognized that the right to present a complete defense in a criminal proceeding is one of the foundational principles of our adversarial truth-finding process: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)) (internal quotation marks omitted). But a "meaningful opportunity" is not "every opportunity," and relevant evidence is frequently excluded from trial. Trial judges must make "dozens, sometimes hundreds" of evidentiary decisions throughout the course of a typical case, and rarely are these of constitutional significance: "the Constitution leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane,* 476 U.S. at 689-90 (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) (alterations and omissions in original). But while the Constitution leaves much in the hands of the trial judge, "an essential component of procedural fairness is an opportunity to be heard." *Id.* at 690…. In *Crane,* the Court's inquiry did not end with consideration of the defendant's interests. Rather, the Court sought to balance those interests against the state's interests in the evidentiary exclusion at issue. *Crane,* 476 U.S. at 691…. In our view, the court of appeals underestimated the vital nature of the disputed material, which we believe to be highly relevant, primarily as substantive evidence on the issue of whether Clark consented to the sexual activity the night of July 3, 2000. The State argues otherwise in its brief to this court; inferring Clark's consent from these past incidents is the very inference that rape-shield laws are meant to avoid; that somehow consent to unrelated sexual activity is relevant to whether the victim consented to the charged offense. Like evidence of a defendant's prior criminal acts, governed by MRE and FRE 404(b), propensity evidence carries a significant danger of unfair inference and prejudice.
>
> The State is correct that evidentiary rules generally disfavor showing a person's propensity for certain actions by introducing evidence of past similar acts, and it is further correct that in rape cases evidence regarding "unrelated sexual activity" is generally accepted as only minimally relevant to the question of consent. But rape shield laws, including Michigan's, almost universally except from this rule evidence regarding prior sexual activity *between the complainant and the defendant,* precisely because that evidence carries heightened relevancy due to its increased similarity to the instance of the alleged rape. *See* Mich. Comp. Laws § 750.520j(1)(a); *see also* Fed.R.Evid. 412(b)(1)(B). In this case, these prior incidents have significant relevance…because they are both remarkably similar to the events that occurred the night of July 3.…We cannot accurately portray the extent of Gagne's interest in presenting this evidence without reference to the lack of other evidence in this case. Other than the two defendants and the complainant, there were no eyewitnesses at all. Nor did the physical evidence tend to weigh in favor of one side or the other. In short, the excluded evidence was not just *relevant* to this case, it was in all likelihood the most relevant evidence regarding the sole contested issue at trial -- an issue about which there was not much evidence in the first place. We believe it was indispensable to the defense's theory….
>
> With this in mind, we turn to the Michigan Supreme Court for an indication of the State's interests in enforcing the rape shield statute. As the court of appeals recognized, the Michigan Supreme Court has explained that those interests are two-fold: to encourage victims to report criminal activity and testify at trial; and to further the truth-finding process by preventing the admission of minimally relevant evidence that creates a significant risk of prejudice or confusion. *See Adair,* 550 N.W.2d at 509. We have acknowledged that there is always a real risk that allowing evidence concerning a complainant's sexual history will turn the case into a trial of the victim instead of the defendant. *Lewis v. Wilkinson,* 307 F.3d 413, 422 (6th Cir.2002).
>
> Nonetheless, we do not believe that admitting the evidence at issue in this case would overly frustrate the legitimate purposes of the rape shield statute. After all, the statute itself contains exceptions that demonstrate that the interests it usually serves must also accommodate the defendant's interest in the admission of evidence that is highly relevant, such as prior sexual conduct between the complainant and the defendant.…Moreover, in this case, the excluded evidence would not have been unfairly

> prejudicial given the sexually graphic testimony that had already been admitted as well as the testimony involving the use of crack cocaine and other narcotics. And as we pointed out in *Lewis*, "the court could minimize any danger of undue prejudice by admitting the evidence with a cautionary instruction and strictly limiting the scope of cross-examination." *Id*

Chief Judge Batchelder dissented sharply. In her view the majority reads *Crane v. Kentucky* too broadly. She believes the majority has interpreted *Crane* to mean "that if a defendant accused of rape can show that evidence of the rape victim's promiscuity or prior willingness to perform sex acts is 'highly relevant, non-cumulative, and indispensable to the central dispute in a criminal trial,' then that defendant has a *constitutional right* to 'put [that evidence] before the jury.'" Maj. Op. at 15. (emphasis in original) Judge Batchelder also believes that the majority opinion "in effect, invalidates all rape shield laws as violative of the Sixth Amendment."

McElrath v. Simpson,
—F3rd— 2010 WL 517412 (6th Cir. 2010)
before Guy, Clay and Kethledge, Circuit Judges.

Unanimous panel reverses the denial of McElrath's habeas petition after concluding that counsel's joint representation of McElrath and a codefendant resulted in an actual conflict of interest that affected petitioner's representation in violation of the Sixth Amendment.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), governs the petition in this case. Therefore, a writ of habeas corpus may not be granted for any claim that was adjudicated on the merits in state court unless the adjudication resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2).

Following a joint trial in Paducah, Kentucky, Treon McElrath, Terrance Boykin, and another co-defendant were convicted of several charges including complicity to murder, stemming from a shooting. All three men were sentenced to a total of 52 years in prison. McElrath was represented at trial and on appeal by the same attorney as Boykin. As a result, McElrath claims he received ineffective assistance of counsel. The federal district court denied habeas relief but granted a certificate of appealability with respect to McElrath's claim that his "counsel labored under an impermissible conflict of interest" that manifested itself in counsel's decision to pursue a joint defense and counsel's failures in the pursuit of and advice regarding a possible guilty plea. The Court of Appeals expanded the COA to include the claim that he was denied effective assistance of counsel because his attorney failed to properly advise him concerning the Commonwealth's five-year plea offer.

After the Kentucky Supreme Court affirmed McElrath's conviction, he unsuccessfully sought post-conviction relief in state court. On appeal, the Kentucky Court of Appeals found that although McElrath had executed a waiver, the record contained no indication that the trial judge had advised either McElrath or Boykin concerning the possible conflict of interest as required by Kentucky Rule of Criminal Procedure (RCr) 8.30. Nevertheless, the appellate court denied relief, finding trial counsel did not actively represent conflicting interests and that there was no evidence that McElrath was prejudiced by the dual representation.

Judge Guy writing for the court described the relevant law:

> The Sixth Amendment guarantees a criminal defendant's right to "have the Assistance of Counsel for his defense." U.S. Const. amend. VI. "This right has been accorded, ... 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (quoting *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Derivative of the right to counsel under the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Generally, a defendant alleging ineffective assistance of counsel must demonstrate prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
>
> However, "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Id.* at 692. One such circumstance arises "when the defendant's attorney actively represented conflicting interests." *Mickens*, 535 U.S. at 166; *see also Moss v. United States*, 323 F.3d 445, 455-56 (6th Cir.2003); *Smith v. Hofbauer*, 312 F.3d 809, 814 (6th Cir.2002). A presumption of prejudice is warranted because "joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants 'effectively sea[l] his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors." *Mickens*, 535 U.S. at 168 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 1173, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)). Where, as here, there was no timely objection to the dual or joint representation,

the Supreme Court has held that prejudice is presumed only if the defendant demonstrates that "a conflict of interest actually affected the adequacy of his representation." *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

To find an actual conflict, we require petitioner to "point to specific instances in the record to suggest an actual conflict or impairment of [his] interests" and "demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *United States v. Hall*, 200 F.3d 962, 965-66 (6th Cir.2000) (internal quotation marks omitted) (quoting *Thomas v. Foltz*, 818 F.2d 476, 481 (6th Cir.1987)). A conflict may also prevent an attorney "from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution." *Holloway*, 435 U.S. at 490.

Counsel's choices between alternative courses is evidence of adverse effect only if it is not part of a legitimate strategy, "judged under the deferential review of counsel's performance prescribed in *Strickland*." *McFarland v. Yukins*, 356 F.3d 688, 706 (6th Cir.2004).

The Court concluded that in this case an actual conflict existed because the joint representation forced trial counsel to pursue a joint defense that neither McElrath nor Boykin was the shooter, and to argue the third defendant was the actual shooter. However, this joint defense was contradicted by the evidence including by testimony of the ballistics expert as elicited by McElrath's counsel in cross-examination. Most of the evidence in the case pointed to Boykin as expressed by the trial judge after presentation of all the evidence: " [the only] real case that I can see in this whole thing is [against] Boykin," and "I have a reasonable doubt [as to the other two] but I'm not the jury."

Thus, the Court of Appeals concluded that while there may have been sufficient evidence introduced to convict McElrath, "counsel's decision to forgo McElrath's best defense and pursue a doomed mutual defense to the detriment of McElrath (and Boykin) is evidence of disloyalty and demonstrates an actual conflict that affected the adequacy of counsel's representation. Prejudice is therefore presumed, and petitioner is entitled to habeas relief." ■

FAQs CONCERNING JUVENILE "RECORDS"

1. Q: If a juvenile offender[1] is asked on a job application if he has ever been arrested or convicted, does he have to answer yes?

   A: No. KRS 635.040 specifically provides that a juvenile adjudication is not a conviction. And KRS 610.190(1) states that the taking of a child into custody does not constitute an arrest unless a decision has been made to try the child as an adult.

2. Q: Is a juvenile offender's juvenile record erased when he turns eighteen (18)?

   A: No. KRS 610.0330 does permit expungement (erasure) of juvenile court records but only for misdemeanors or violations, not felonies. Generally the offender has to wait two years from the date of termination of the court's jurisdiction to request expungement but the two year period may be waived if the court finds "extraordinary circumstances".

3. Q: Are juvenile records open to the public?

   A: That depends. KRS 610.320(3) provides that juvenile records are not generally open to the public with the exception that the petition, order of adjudication and disposition in a public offender proceeding concerning a child fourteen (14) or older at the time of the offense who is adjudicated guilty of a Class A, B or C felony or any offense involving a deadly weapon or where a deadly weapon is used or displayed are open to the public.

Footnotes:

1. A "juvenile offender" is an individual who committed an offense when he was under eighteen (18) years of age.

4TH AMENDMENT CASE REVIEW
THE GOOD FAITH EXCEPTION IS GOOD FOR US

By Jamesa J. Drake, Frankfort Post Conviction

On February 19, 2010, the Kentucky Court of Appeals decided *Valesquez v. Commonwealth*. In that case, the Commonwealth conceded that, "under the new constitutional precedent set forth in *Gant*," the warrantless search of the defendant's car violated the Fourth Amendment. The Commonwealth then went on to argue that, the illegal search notwithstanding, "the equities of these circumstances justify the application of the 'good faith' exception to the exclusionary rule…." In response, the Court of Appeals remarked: "Whether the good faith exception to the exclusionary rule may be utilized, as a matter of law, to preserve the admissibility of evidence discovered from searches *conducted pursuant to settled law at the time of the search* is an open question." (Emphasis added).[1]

Notice how the court framed the question. The Court of Appeals believes that *Gant* overturned "settled law." The more accurate reading of *Gant*, however, is that it simply clarified *Belton* and corrected many of the *lower court* decisions which held (erroneously) that *Belton* searches were reasonable regardless of the possibility of the defendant's access to the interior compartment of the vehicle.

That *Gant* clarified, rather than overturned, any existing *Supreme Court* case law is confirmed by *Thornton*, which was decided five years before *Gant*. Justice Scalia's opinion concurring in the judgment in *Thornton* (which became the majority opinion in *Gant*) and Justice O'Connor's separately concurring opinion both made abundantly clear that those *lower court* decisions were on very shaky ground. *See* O'Connor, J., concurring in part ("I write separately to express my dissatisfaction with the state of the law in this area."); Scalia, J., concurring in the judgment ("When petitioner's car was searched in this case, he was neither in, nor anywhere near, the passenger compartment of his vehicle. Rather, he was handcuffed and secured in the back of the officer's squad car. … The Court's efforts to apply our current doctrine to this search stretches it beyond its breaking point, and for that reason I cannot join the Court's opinion."). Justices Stevens and Souter dissented altogether.

Prosecutors and police officers who failed to heed the warnings of four Supreme Court Justices in *Thornton* now seek to rely on the "good faith" exception to the exclusionary rule to excuse their oversight in *Gant* cases. That strategy is not new. Prosecutors often argue that, in general, an officer's reliance on *any* legal precedent – settled or not – is covered by the "good faith" exception.[2]

Kentucky Courts should not be fooled. And, neither should you. The "good faith" exception to the exclusionary rule is a narrow one. Prosecutors love to cite the "good faith exception," but it applies in only the most unusual circumstances. Thus, for all practical purposes, the "good faith" exception is good for us, not them.

The United States Supreme Court has decided only four "good faith" cases. In *United States v. Leon*, the Court held that the "good faith" exception applied when the police relied on a search warrant later found to be constitutionally invalid.[3] In *Illinois v. Krull*, the Court held that the "good faith" exception applied when the police relied on a statute later found to be invalid. In *Arizona v. Evans* and *Herring v. United States*, the Court held that the "good faith" exception applied when, due to third-party record keeping errors, the police mistakenly believed that outstanding warrants (which, it turned out had been quashed or recalled) authorized the suspects' arrest.

That's it. Unless and until the Court holds otherwise, the "good faith" exception is limited to three situations: 1) a search or seizure pursuant to a warrant later found to be constitutionally invalid; 2) a search or seizure pursuant to a statute later found to be invalid; and 3) a search or seizure pursuant to a warrant later found to have been quashed or recalled. Notably absent from that list is any indication that the police (acting either on their own or at the direction of a prosecutor) may be excused for relying on *their own* misunderstanding of law. The crucial fact in both *Evans* and *Herring* was that a third-party, rather than the police themselves, erred.

The Court has long *rejected* the argument that the exclusionary rule applies when police reasonably rely on overturned case law. In *Katz v. United States*, which was decided in 1967, the police planted a listening device on a telephone in a public telephone booth without a warrant. At the time the device was planted, such warrantless monitoring was lawful under *Olmstead v. United States* and *Goldman v. United States*. The Court overruled both those cases in *Katz*. It then rejected the government's argument that the evidence in question should be admitted because the officers reasonably relied on then-existing case law: "The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did not do more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do."

Even assuming, *arguendo*, that the "good faith" exception *does* apply when the police act in reliance on case law, the *Gant* Court itself rejected the notion that the "good faith" exception applied to searches believed (erroneously) to be valid under the extension of *Belton* applied in some, but not all, *lower* courts. Justice Alito, in his dissenting opinion (which was joined by Chief Justice Roberts and Justices Kennedy and Breyer) lamented that, "the Court's decision will cause the suppression of evidence gathered in many searches carried out in good faith reliance on well-settled case law."

The *Gant* majority did not correct or deny Justice Alito's assertion. Instead, it agreed with Justice Alito that the "good faith" exception was inapt: "Although it appears that the State's reading of *Belton* has been widely taught in police academies and law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the *Chimel* exception. … The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence."

Finally, the Court's retroactivity decisions foreclose any argument that the "good faith" exception applies to *any* search undertaken before some change in the case law. The Court has long held that "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *United States v. Johnson; see also Griffith v. Kentucky*.

The "good faith" exception is good for defendants because each time the Commonwealth claims that it applies, it necessarily concedes that the search or seizure in question was unlawful. The "good faith" exception is also good for defendants because it almost never applies. When the County Attorney or Attorney General in your next case argues that the "good faith" exception to the exclusionary rule applies in your case, you can rest easy in the knowledge that, in all but the most unusual cases, you will win.

Endnotes:

1. The Court of Appeals erroneously believes that, as to the question of whether the "good faith" exception applies to searches conducted prior to a change in the case law, "[t]he law is currently emerging and unsettled." As explained herein, the Court of Appeals is mistaken in that regard, also. Thankfully, the Court of Appeals rejected the Commonwealth's argument by simply noting that until it receives additional guidance, it would "elect to follow the dicta set forth by the Kentucky Supreme Court in *King v. Commonwealth*, declaring that 'the *Leon* good faith exception is 'clearly limited to warrants invalidated for lack of probable cause' and does not create a broad good faith exception for any illegal search.'" (Internal citation omitted).
2. On March 1, 2010, the United States Supreme Court denied petitioner Markice McCane's petition for certiorari. The question presented was: "Whether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional." The police searched Mr. McCane's automobile, believing that *Belton* authorized them to do so. The search was subsequently found to be invalid under *Gant*.
3. Of course, suppression remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, or if the issuing magistrate wholly abandoned his detached and neutral judicial role. Nor would an officer's manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient, *i.e.*, in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid. ■

Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects.

— *Jones v. United States*, 362 U.S. 257, 273 (1959)

PRACTICE TIPS

By Gene Lewter and Shannon Dupree Smith, Appeals Branch

Appellate attorneys have a certain advantage over those who are exclusively trial attorneys, in that we have the opportunity to watch dozens of trials every year, from all over the state. We observe many different attorneys, private and otherwise, and many different judges.

We only see the losing trials, however, because there are generally no appeals from the wins. We also see areas where trial counsel can greatly improve the chances of success on appeal.

In this article we want to point out some issues we have seen in recent trials. We will not look at them in depth, but just show some simple errors that some attorneys may learn to avoid in the future in their own cases.

1) The first thing we should mention is RCr 10.26, a rule cited by the appellate attorneys more than we would like. That is the palpable error rule, which we must cite in every argument that was not preserved at the trial level. It is a much higher standard for us to prove, in order to win. We urge trial attorneys to object to everything they possibly can. Many times, if you can't immediately think of the appropriate objection, but it seems wrong, just object and ask to approach the bench. Think about how to argue it as you casually stroll to the bench. Your objection may be that it denies the defendant her due process right to a fair trial. The essence of the preservation issue is that the trial court must have an opportunity to rule on the matter. Give the court a chance.

2) One issue that we see constantly relates to the instructions. The rule is that a verdict must be unanimous. Therefore, case law has developed that each possible option in a given instruction must have sufficient evidence to support a verdict on each portion of the instruction. The simple example is in a trafficking case. Many instructions say something like you can convict: "If you believe from the evidence that Mr. Bad Guy sold, transferred, distributed, manufactured, or intended to sell, transfer, distribute, or manufacture..." That has eight different clauses for the jury to consider. Each one must be supported by sufficient evidence. Make an objection to any that aren't. (Note that it is not a crime to "intend to transfer." This would be a built in error if you make the objection, and you're overruled). This error is always present in the Persistent Felony Offender instructions, but few objections are ever made. The Persistent Felony Offender instructions always list every possible statutory manner in which the five year limit may apply, but there is usually only one way that it does apply. Object. (And hope you're overruled, because you then have a built in error for reversal)

3) In the penalty/PFO phase, the instructions must tell the jury to fix the penalty on the underlying charge, before it deliberates on the PFO. Many jurisdictions don't do that, and never even get a penalty for the underlying charge. Object, and you have error if you're overruled.

4) Make sure the record is complete. Many times judges want to do things in chambers, without a record. Object, but if you can't prevent that, take notes on each argument, then put everything on the record as soon as you are back in court. Courts generally hold that it is the defense obligation to make sure the record is complete for appeal.

5) Make certain that everyone, the Commonwealth, the judge, and you, are picked up by the microphone. Many prosecutors stand far away from the microphone at the bench, then whisper. When the record doesn't pick it up, it can be held against the defendant. Many prosecutors wander around the courtroom while asking questions of a witness, and there are many dead areas where they aren't picked up. Interrupt the Commonwealth and approach the bench and object to that.

6) When you make an objection, make sure the judge rules on it. It is considered waived if you don't require the judge to make a ruling. Sometimes, the judge might say, "Let me think about that for a minute." Revisit it later. Sometimes, they just get distracted and forget. It's your responsibility.

7) In order to be admissible as a prior conviction for a Persistent Felony Offender charge, each prior conviction must have had a sentence of at least one year, whether probated or imposed. Occasionally, a prior felony conviction from other states have had only a fine imposed. Object. That can't be used. (It's alright if the sentence was, as some Ohio cases are, 6 months to five years. Our courts have held that he could have spent five years in prison, so it meets the requirement.)

8) Don't let the police officer merely read from his report. Stop him. He is allowed to refresh his memory with it, then put it aside. If he can't remember anything and the court lets him read it, you can have fun on cross examination, and remind the jury in your closing argument.

9) Approach the bench for every objection, and don't let the Commonwealth argue from his table. The jury should not hear these matters. They will hold it against the defense if you're trying to keep things out of evidence.

10) Don't let the Commonwealth lead their witnesses. If you have to object twenty times, do it. Some prosecutors can't ask a question without leading. That's not your fault. Sometimes, they really help their case, and hurt you, by rephrasing what a witness says, especially one with a heavy accent that the jury may not understand. "So what you're saying is..." The Commonwealth is not the witness. Think of yourself as the director of a play, and you have to get it right.

11) Don't let the Commonwealth ask a witness, usually a police officer, "What did you do next?" Make them earn their conviction. Sometimes you won't like the answer that comes, which was once, "I arranged for the defendant to take a lie detector test." Just object as soon as the question is asked, approach the bench, and require that they be specific. Witnesses are not supposed to testify by narrative.

12) Don't let the Commonwealth ask the officer if he testified before the grand jury, and if the defendant was indicted. That's irrelevant. Remind the judge (at the bench) that the instructions are going to say that the fact that the defendant was indicted is not evidence and cannot be used against him. The Commonwealth wants the jury to understand that the grand jury believed this officer and indicted your client based on what the officer said. Therefore, they are using the fact of the indictment against your client. Don't let them. In addition, of course, they're bolstering the credibility of the officer.

13) Don't let the Commonwealth tell the jury that a defendant has a built in motive to lie, and/or the Commonwealth's witnesses don't, based on the fact that the defendant is facing a prison sentence. He is, in fact, presumed innocent, which means he has no reason to lie at all, and the "truth will set him free."

14) The essence of hearsay testimony is that one is trying to prove the truth of something by the use of something stated by someone else. "John told me that the light was red. I didn't actually see it." It is not hearsay if your client is explaining why he killed someone, and tries to tell the jury what the victim said. In a recent murder case, the Commonwealth objected each time the defendant said that as the victim came at him with a knife, "she said she was going to..." Each objection was sustained, and his own attorney kept telling him not to say what the victim said. Needless to say, his defense was hamstrung. No matter what she said when she came at him, the defense was not trying to prove the truth of it. If she actually said, with a knife in her hand, "I'm going to slice a piece of pie for you," the defense is not trying to prove the truth of that. The Commonwealth generally objects every time a defense witness begins, "Then she said..." Approach the bench, and if you're not trying to prove the truth of "what she said," it is not hearsay.

15) Don't let an officer give his opinion. If he begins a sentence with, "It is my belief that..." Object unless he has been qualified as an expert under KRE 702 and is giving an expert opinion or it qualifies under KRE 701.

16) If the Commonwealth is attempting to qualify a witness as an expert, don't let the Commonwealth ask the court in front of the jury to rule that he is an expert. That's a discussion to be had at the bench, and the jury is not to be told. Approach the bench as soon as the Commonwealth begins the qualification questions, and make sure they all understand that the judge will rule at the bench, with no discussion in front of the jury.

17) Be specific when you ask for a directed verdict. Say what is lacking. A general statement that, "The Commonwealth has failed to prove its case" may well not be sufficient. In a recent case, the defense merely said, "Move for directed verdict based on the record." That does not preserve the issue. Be familiar with all the elements in the statute and object if they have failed to prove one of the elements.

18) When the court sustains an objection that you have made, ask for a mistrial if the jury heard too much. If you don't ask for a mistrial, the appellate court will assume you were satisfied with everything. If the court denies that request, you can then accept an admonition if you think it will help.

Together we can win these cases for our clients!

* * * *

Identify the additional jurors you would have struck had your for-cause motion been granted.

In *Gabbard v. Commonwealth*, __S.W.3d __, 2009 WL 3517705, the Kentucky Supreme Court held that in order to appeal the denial of a peremptory challenge due to the trial court's failure to grant a for-cause strike, the defendant must identify on his strike sheet the other jurors he would have struck if his for-cause strikes were granted in order to bring a claim under *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007).

Quick Tip: Name those jurors! Identify all those jurors you would have struck if the trial court would have granted your for-cause motion.

Conditional Guilty Pleas—The Issues reserved for appeal must be put in writing. In the recent unpublished case of *Brown v. Commonwealth*, 2009 WL 3786445. Brown entered a conditional guilty plea. Defense counsel verbally stated on the record the specific issue being reserved for appeal. The Court of Appeals specifically cited RCr 8.09, which specifies in pertinent part:

> [w]ith the approval of the court a defendant may enter a conditional plea of guilty, **reserving in writing** the right, on appeal from the judgment, to review of the adverse determination of any **specified trial or pretrial motion**.

The Court stated that the grounds for appeal were not reserved *in writing* as required by RCr 8.09. Ultimately, the Court addressed the issue due to the Commonwealth's lack of objection and the defense attorney's "inartful" oral reservation.

Compare with the recent case of *Fore v. Commonwealth*,2009 WL 3319987, an unpublished Court of Appeals case that cited *Dickerson v. Commonwealth*, 278 S.W.3d 145 (Ky. 2009) for the proposition that an appellate court can consider issues on appeal from a conditional guilty plea if, among other things, (i) the issues upon which appellate review are sought were expressly set forth in the conditional guilty plea documents or in a colloquy with the trial court; or (ii) the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy. *Id.* at 149.

Quick tip: Be safe rather than sorry! Be sure to put any and all issues in writing when entering conditional guilty pleas!

Remember www.census.gov for Venire and *Batson* challenges!

Prior to voir dire, go to www.census.gov. On the right hand side of the screen, click "Quick Facts." Enter state and county name. The website will give you the total county population and a break down of the percentages of White, Black, Hispanic, Asian, etc, populations. Print this information out to use in your *Batson* challenges or other venire challenges. Keep this information with you so you will have it when needed!

Quick tip: Remember www.census.gov. Print. Carry. Cite.

Some Friendly Reminders

- If anyone has a felony case of Theft of Identity based on giving a false name to a police officer, you should file a motion to hold it in abeyance until the Supreme Court rules on a pending Discretionary Review case dealing with several issues that may very well stop such prosecutions.
- Remember to object to questions from prosecutors to a defense witness such as, "Is Officer Smith lying when he said that you…".
- Remember the definition of hearsay. To constitute hearsay, you must be trying to prove the truth or falsity of an event. It is not hearsay to ask your defendant in a homicide case, "What did she say to you when she came at you with the knife?" Yet in a recent case the prosecutor objected to that question, and a dozen other similar ones and the trial judge sustained the objections. The defense attorney mistakenly agreed with the prosecutor and trial court.
- Object to instructions which give more than one option for the jury in only one instruction. To avoid a lack of unanimity in the verdict, case law is clear that if there are multiple options in one instruction, there must be sufficient evidence to justify each aspect of it. The best practice is to object to any multi-faceted instruction on a lack of unanimity argument, thus giving the client a chance on appeal.
- Be specific in your motion for directed verdict. State why the evidence is insufficient. ■

Rights Protected	Federal Constitutional Amendment	KY Constitutional Section	KY Cases Recognizing State Constitutional Right
Search & Seizure	4th	1, 10	*Commonwealth v. Robey*, Ky., 337 S.W. 2d 34 (1960) *Holbrook v. Knopf*, Ky., 847 S.W. 2d 52 (1993) *Colbert v. Commonwealth*, Ky., 43 S.W. 3d 777(2001)
Self-Incrimination	5th	11	*Jones v. Commonwealth*, 303 Ky. 666, 198 S.W. 2d 969 (1947) *Mace v. Morris*, Ky., 851 S.W. 2d 457 (1993)
Grand Jury Indictment	5th	12	*King v. City of Pineville*, 222 Ky. 73, 299 S.W. 1082 (1927) *Commonwealth v. Baker*, Ky., 11 S.W. 3d 585 (2000)

The complete version of this chart including Kentucky cases recognizing the state constitutional right is available on page 45 of the Trial Law Notebook at http://apps.dpa.ky.gov/library/advocate/pdf/2010/Mar10%20Advo.pdf

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Web: KACDL.net
E-mail: kacdl2000@yahoo.com

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For more information regarding NLADA programs:

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A comprehensive listing of criminal defense related training events can be found at the NLADA Trainers Section online calendar at: http://www.airset.com/Public/Calendars.jsp?id=_akEPTXAsBaUR

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