Looking Forward

2016 has been a significant and productive year for the Kentucky Association of Criminal Defense Lawyers. KACDL celebrated its 30th anniversary, welcomed a new Executive Director and hosted DUI and video seminars throughout the Commonwealth. Our members proved instrumental in the passage and implementation of the Felony Expungement Bill. Last but not least, KACDL is currently in the process of developing a new and improved website.

As criminal defense lawyers, we know all too well how broken our current system is. Our prisons and jails are full of non-violent offenders. 2017 provides an opportunity for our members to play a vital role in pushing for overdue and necessary reforms in the criminal justice system in Kentucky. Some of the pressing matters facing us include the need for bail reform, comprehensive Penal Code reform and Marsy’s Law.

I look forward to working with our members to follow in the great tradition of those that have gone before us to fight for fairness and justice for all citizens accused of crimes in the Commonwealth of Kentucky. We will continue to focus on increasing our membership; we know that our strength is in our numbers. With a bit of luck and hard work, by the end of 2017 we will reach our goal of 400 paid members. As the members of the Kentucky Association of Criminal Defense Lawyers look forward to the challenges that lie ahead, I find the words of Clarence Darrow to be encouraging and inspiring:

“To be an effective criminal defense counsel, an attorney must be prepared to be demanding, outrageous, irreverent, blasphemous, a rogue, a renegade, and a hated, isolated, and lonely person - few love a spokesman for the despised and the damned.”

November 2016

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Cicely Lambert, Editor  cj lambert@metrodefender.org
MARK YOUR CALENDARS! FUTURE KACDL EDUCATION
Leading criminal defense litigators, teaching on the latest thinking

30th Annual Conference and Criminal Defense Seminar
November 4, 2016
Galt House West
Louisville, KY

KACDL
Advocating Key Liberty Issues
Educating Criminal Defense Practitioners
Advancing Justice for Kentuckians

www.kacdl.net  Tel: 502.594.1375
Program Schedule

9:00 - 9:00 Welcome/Opening Remarks - Emu Lewis, KACDL, President
9:00 - 10:15 "Case Decisions and Recent Developments in the Appellate Courts"
   Chief Justice John D. Minton, J., Kentucky Supreme Court
10:15 - 10:30 Break
10:30 - 12:45 "The Law: A Call to Conscience in the Pursuit of Justice"
   Rick Jones, Executive Director
   National Defender Service of Harlan (NDSH), New York, NY
   President-Elect of the National Association of Criminal Defense Lawyers (KACDL)
12:45 - 1:45 Lunch and Awards Presentation
1:45 - 3:15 "Handling Physical Evidence: How Does the Defense Advocate Respond to the Challenges?"
   Rodney J. Upshall, Professor Emeritus of Law
   University of Missouri School of Law
3:15 - 3:30 Break
3:30 - 5:00 "Why Do I Do This Work?" - Judge Williams
   "Bobby" Murphy, Jr.
   Judge, Baltimore County Court
5:00 - Closing Remarks/Adjustment - Emu Lewis
   [???]

John D. Minton, J., Chief Justice of Kentucky

[Image of John D. Minton, J., Chief Justice of Kentucky]

Cicely Lambert, Editor  cjlambert@metrodefender.org

Please note: Online discount closed on October 13th.
The Awards Committee of the Kentucky Association of Criminal Defense Lawyers voted unanimously to present six of KACDL’s awards at the Annual Conference on Friday, November 4, 2016. Below you will find the listing. Please extend your congratulations to these worthy recipients and help us honor them later this month for their outstanding work and exceptional contributions to our justice system.

KACDL Fair Administration of Justice Award
Presented to a member of the judiciary who has served and advanced the interests and cause of justice by fairly applying constitutional principles and impartially presiding in criminal proceedings.

2016 Recipient: Justice Daniel J. Venters, Supreme Court of Kentucky (3rd Supreme Court District)

KACDL Distinguished Service Award
Presented to a member of KACDL whose service to the organization and contributions to its mission have resulted in significant improvement of the criminal justice system.

2016 Recipient: Julie M. Kaelin, Faulkner Kaelin Law Office, Louisville, KY

KACDL W. Robert Lotz Public Policy Award
Presented to a member of the legislative or executive branches of government who has established and/or implemented public policy that protects individual liberties, ensures a fair process, and guarantees reliable results in criminal cases.

2016 Recipient: Darryl T. Owens (D-43rd District), Kentucky House of Representatives (Chairman of the House Judiciary Committee)

KACDL Gail Robinson Juvenile Justice Award
Presented to a member of the bar in recognition of outstanding contributions to and exceptional achievement in the development of juvenile law and the representation of children in delinquency and transfer proceedings, as well as in matters involving status offenses and detention.

2016 Recipient: Sen. Whitney H. Westerfield (R-3rd District), Kentucky State Senate (Chairman of the Senate Judiciary Committee)

KACDL Bill of Rights Enforcer Award
Presented to a citizen of the Commonwealth of Kentucky who, while not a practicing criminal defense lawyer, has effectively supported and vigilantly protected the Bill of Rights for all citizens accused of crime and subjected to prosecution by the government.

2016 Recipient: Kate Miller, Advocacy Director, ACLU of Kentucky

KACDL Clarence Darrow Prodigy Award
Presented to a member of KACDL who has been practicing law for less than 5 years and has demonstrated precocious legal knowledge and trial skills as a criminal defense advocate, as well as an uncompromising commitment to aggressively defending clients in the spirit and best tradition of Mr. Darrow.

2016 Recipient: Molly Rose Green, 2015-16 Expungement Fellow for DPA from the Yale Initiative for Public Interest Law (currently Law Clerk for Judge Jane Branstetter Stranch of the Sixth Circuit).

30th Annual KACDL Conference & Criminal Defense Seminar
The Galt House, Louisville, KY
Friday, November 4, 2016
12:15 – 1:30 p.m. / Lunch and Awards Presentation (Rivue Tower)
Dear Members of the Criminal Justice Policy Advisory Council (CJPAC):

Kentucky Smart on Crime (KYSOC) is a broad-based coalition working for common-sense justice reforms that enhance public safety, strengthen communities and promote cost-effective sentencing alternatives. We are made up of well-established Kentucky business, economic, faith–based, advocacy and civil rights organizations.

We boast membership bases from across the political spectrum and across the commonwealth. Though our member organizations often find themselves on opposing sides of many issues, we have come together around the need to update an increasingly burdensome criminal justice system.

KYSOC is comprised of the Kentucky Chamber of Commerce, Catholic Conference of Kentucky, Kentucky Center for Economic Policy, Kentucky Council of Churches, Kentucky Association of Criminal Defense Lawyers, Bluegrass Institute for Public Policy Solutions, Kentucky Youth Advocates and the ACLU of Kentucky. At a time when partisan politics are dividing our country and commonwealth, one glaring exception has emerged: consensus around the need to reform our criminal justice system.

There is support for justice reform in every corner of Kentucky. According to a 2016 survey by the Tarrance Group, a large majority of Kentuckians in every age group and both political parties agreed that the government spends too much money imprisoning non-violent offenders, that the main goal of the criminal justice system should be rehabilitating offenders, and that barriers that make it difficult for former criminal offenders to find jobs should be removed.

The founding members of Kentucky Smart on Crime determined that a consolidated effort was needed to work toward reform in areas where consensus already exists. The coalition established its first major goal at the beginning of the 2016 General Assembly and worked in a concerted way to pass an expungement bill that provides a second chance to tens of thousands of deserving Kentuckians, enhancing their ability to get educated, employed and more meaningfully engaged in their communities. A proposal to allow individuals to seek to expunge certain Class D felonies had been discussed by the legislature throughout much of the last decade but had failed to gain sufficient bipartisan support. We believe the focus placed on the measure in 2016 by KYSOC played a significant role in garnering votes from Republicans and Democrats to finally pass the measure. We also applaud the sitting members of CJPAC who demonstrated leadership in achieving this positive outcome.

Consensus around modernizing our criminal justice system doesn’t end with expungement. KYSOC is grateful to have a representative serving on the CJPAC. Our members plan to be a resource to the Council as its work moves into the nuts and bolts phase of developing a reform agenda. We look forward to working with the CJPAC on policies that promote cost effective sentencing alternatives, allow offenders to return to the workforce after they’ve completed their sentences, and achieve better results for public safety.

The opportunity to move forward with major reforms is now. Our jails are overcrowded, Kentucky’s recidivism rate is too high, families are being torn apart, and employers are struggling to fill the jobs that will move our Commonwealth’s economy forward. We applaud Governor Bevin’s commitment to make Kentucky a national, shining example of criminal justice reform. We thank you for your support on the CJPAC, and look forward to offering feedback and rallying critical support behind your proposals.

Regards,

ACLU of Kentucky
Bluegrass Institute for Public Policy Solutions
Catholic Conference of Kentucky
Kentucky Association of Criminal Defense Lawyers
Kentucky Center for Economic Policy
Kentucky Chamber of Commerce
Kentucky Council of Churches
Kentucky Youth Advocates
Chairman Westerfield, Chairman Owens, Members of the Committee, good morning/afternoon. My name is Russell Coleman and I represent the KY Smart on Crime Coalition, an organization in this political climate that is unfortunately somewhat of an outlier; a bi-partisan coalition dedicated to joining with members of this committee, Kentucky law enforcement, and our Governor to address one of our Commonwealth’s most pressing public policy challenges: public safety.

Modeled after successful efforts in Texas, the Kentucky Smart on Crime Coalition was formed about a year ago, and it includes such diverse groups as the Kentucky Chamber of Commerce, ACLU, KY Council of Churches, Catholic Conference of KY, KY Association of Criminal Defense Lawyers, KY Center for Economic Policy, and the Bluegrass Institute.

Since we were last afforded the opportunity to address you, the coalition has added yet another member, the longstanding voice for policies benefiting Kentucky’s youngest and most vulnerable population, Kentucky Youth Advocates. This is an organization that strives to answer the question, "What would it mean for Kentucky to be the best place in the nation to be young?" and advocates accordingly.

Earlier this year, KYA released a devastating study indicating that our Commonwealth has the highest percent by population in the nation of kids whose parents have been incarcerated, approximately 135,000 kids. And just as those members of the committee from law enforcement and corrections backgounds know all too well, these young people are at an enhanced risk for continuing the cycles of criminality, addiction, and poverty with which their parents have been immersed. KY Smart on Crime is pleased to welcome KYA into the expanding coalition.

While each of these coalition members approach the challenge of improving Kentucky’s criminal justice system from a different perspective, some commonalities do emerge, namely that KY spends far too much of our limited resources to achieve an outcome that is inadequate, a recidivism – or re-offense – rate that hovers around the 44% mark within three years of release.

While these coalition members are realistic that our system cannot rehabilitate every offender, they agree that failing to re-form four out of every 10 Kentuckians incarcerated, is not acceptable. The safety of our communities demands better outcomes.

While "recidivism" is a term that fits well in the confines of legislative proceedings such as this or within academic treatises on criminology, members of the Smart on Crime coalition know that each point on that 44% statistic represents yet another victim in our communities and an officer safety threat to the men and women of law enforcement, some of which can be prevented through better re-entry efforts and more targeted use of resources.

Last session and ably led by your two chairman, members of this committee took steps to safely address a towering obstacle to many Kentuckians seeking to successfully recover from their criminal mistakes: earning a job. Through passage of HB40, ex-offenders who have paid their debts to our commonwealth, can, after a crime free period, seek judicial expungement of a certain category of the lowest level felony offenses. KY Smart on Crime applauds your leadership, that of Governor Bevin, and Senate and House leadership in taking this step.

During last session’s debate on HB40, members of this committee made the observation that we should also – or in some cases, in lieu of expungement – take a hard look at what we call felonies in the first place. There are a number of ideas for how we address this challenge that warrant the committee’s examination.

The instant legislation being discussed today from Representative Yonts, carves out a new category of what will be deemed “gross misdemeanor” level offenses for serious though non-violent crimes that will be criminalized with up to 24 months imprisonment but brand them with all the collateral consequences of felony offenses. The Smart on Crime Coalition supports this creative approach by Representative Yonts, thanks him for his leadership, and urges the committee to use HB412 as the impetus to begin a conversation on common sense felony-misdemeanor distinctions within the KY Penal Code.

There are also other approaches that bear the committee’s thoughtful consideration. Our commonwealth’s attorneys have supported examining the loss threshold as a way of right-sizing how we prioritize resources. For example, perhaps a $500 felony loss threshold, a single iPhone, is too low to tie up the limited resources of commonwealth’s attorneys and circuit courts, and potentially brand an offender with the felony scarlet letter.

Our prosocial community has also put forward a concept that involves the creation of a new class E felony that carries a potential term of incarceration of 1-3 years but provides for automatic restoration of voting rights and ineligibility for PFO enhancements.

KY Smart on Crime commends all those that are demonstrating leadership in improving the commonwealth’s criminal justice system in taking up these hard issues such as Rep. Yonts, the commonwealth’s attorneys; the governor’s Criminal Justice Policy Assessment Council, and members of this committee, and urges them to work with all corners in achieving the dual goals of shepherding our state’s limited precious resources to have the most profound impact on keeping our communities safe. Thank you for this opportunity.
On October 5, 2016 KACDL made the following press release:

Up until April 9, 2016, calculating whether a DUI charge should be treated as a first or second offense was relatively simple. The question was: Is the date of the previous DUI charge older than five years from the date of the new charge? It was easy for defendants, prosecutors, and others in the justice system to make a determination of whether or not a new DUI charge was subject to greater penalties because of a past one.

The Kentucky Legislature changed all that by increasing the ‘look-back’ window for DUI offenses from five years to 10 years. This changed the question to: Is the date of the previous DUI charge older than ten years? This may sound simple on paper, but there is a fundamental element that the legislation did not address—Defendants in previous DUI cases signed guilty plea agreements that stated explicitly that their DUIs could be used against them for only five years going forward, and in fact allowed for complete expungement of the charges after the five-year lookback period had ended.

So now we have courts trying to determine whether or not the government should be allowed to change the terms of their agreements with thousands upon thousands of people. The Kentucky Association of Criminal Defense Lawyers (KACDL) believes this is a simple matter of contract law and fair dealing. In order for there to be a contract, you must have at least two parties, and there must be an offer, an acceptance of that offer, and some sort of consideration that either party gives up in order to make the contract legally binding. In the case of DUI guilty pleas we have all three.

When one party does not follow through with the terms of the contract, it is considered a breach, and the other party can rightfully request that the contract be enforced or voided. As Warren Circuit Judge John R. Grise put it when recently reviewing this issue, “The principle of contract law, as well as our ‘historical ideals of fair play and substantial justice,’ bind the government to the agreement it made with [the defendant], and the Commonwealth cannot rely on the General Assembly’s subsequent change of law to escape its terms.” In other words, the government must maintain their end of the bargain. We hope higher courts will agree with him.

The government has made promises. People have relied on those promises. The state should not be in the business of breaching contracts with its own citizens. The new law should not be used against those who never agreed to its terms. KACDL is hopeful that our Courts will take the fair and just approach and rule in favor of defendants who have kept their end of the bargain.

Signed,

Attorney Larry Forman, on behalf of KACDL

Note: The Kentucky Association of Criminal Defense Lawyers is the only organized, statewide, all-inclusive group of criminal defense lawyers in Kentucky. We remain committed to penal code reform, to fairness and justice for all citizens accused of crimes in the Commonwealth of Kentucky, and to unswerving service to the criminal defense community through effective and supportive networking, advocacy and education.
Amicus Curiae Committee

The KACDL Board of Directors have voted in favor of supporting an anticipated Petition for Certiorari to the SCOTUS regarding an issue involving a significant search and seizure issue:

Whether a police officer may force entry into a third party's home to execute an arrest warrant based on mere suspicion that the arrestee is within; or whether the officer must instead have probable cause to believe the arrestee is within. The question is how to interpret the Supreme Court's decision in Payton v.New York, 445 U.S. 573 (1980), which held that an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives in order to execute the warrant, but only when there is reason to believe the suspect is within. The federal circuit courts are deeply divided over whether "reason to believe" requires probable cause or something less.

The invitation to participate came from Michael B. Kimberly, a partner in the firm of Mayer Brown in Washington, D.C. As stated by Mr. Kimberly in his request for our support,

"This is an issue of enormous practical importance—in jurisdictions where officers need only suspicion to enter a home to execute arrest warrants, those arrest warrants effectively become writs of assistance, allowing officers to enter private homes in search of suspects and evidence against those suspects based on little more than a hunch. Our research unsurprisingly shows that the issue arises frequently."

Furthermore, Mr. Kimberly wrote that the Kentucky Supreme court is on the adverse side of the circuit conflict, and has ruled that "mere suspicion" will suffice for entry. This position is an open invitation for abuse. For its part, there is conflicting precedents within the Sixth Circuit.

The Amicus Committee will keep the membership informed about this important issue.

Larry D. Simon

After receiving a Juris Doctorate (J.D.) from the University of Louisville School of Law in 1980, Simon served as an Assistant Commonwealth’s Attorney in Jefferson County through 1985. Since entering private practice he has defended people charged with criminal offenses in state and federal courts at trial, appellate and post-conviction levels, and litigated cases under 42 U.S.C. Section 1983, as well as other federal and state personal injury claims resulting from governmental misconduct or negligence. In addition to his private practice, Simon has continuously served as appointed conflict counsel under the Criminal Justice Act in the U.S. District Courts for the Western District of Kentucky and the Southern District of Indiana, as well as conflict counsel for the Louisville-Jefferson County Public Defender Corporation and the Kentucky Department of Public Advocacy. Simon served as President of the Kentucky Association of Criminal Defense Lawyers and is a member of the National Police Accountability Project. Previously Simon served as Chair of the Louisville Bar Association’s Criminal Practice Section and as a member of the LBA’s Committee on Professional Responsibility. He was recognized as the LBA’s Pro Bono lawyer of the year in 1992.

HB 40 Felony Expungement, Members still working hard

In partnership with the DPA and the local county attorney’s office, Kentucky Legal Aid hosted a free one hour CLE session on expungement remedies at the Warren County Justice Center on Thursday, October 27 at noon.

The presenter was Damon Preston, KACDL board member and the DPA’s Deputy Public Advocate. Following the lunchtime CLE session, at 2:30 PM they also hosted a free information session on expungement for members of the community at the Old County Courthouse. The community session was a great opportunity for attorneys to attend and network with potential clients.
Facts v. feelings
What people think is clear. “Seven in 10 Americans say there is more crime in the U.S. now than there was a year ago -- up slightly from the 63% who said so in 2014,” according to an October 22, 2015 Gallup Poll Report. “Meanwhile, 18% say there is less crime, and 8% say the level of crime has stayed the same.”

While most people feel crime is increasing, crime is decreasing.

The 2015 FBI data is out. While the 2015 US violent crime rate, a subset of the crime rate, and the Kentucky violent crime rate each increased by 3% over the last year, the Kentucky violent crime rate remains the third lowest since 1985. The overall crime rate nationally and in Kentucky continues to decline. Meanwhile, the Kentucky prison rate climbs.

Since 1985, the Crime rate in the United States has declined by 45%
Violent crime rate in United States has declined by 33%
Violent crime rate in Kentucky has declined by 28%

From 1985-2014 the United States imprisonment has increased by 133%, more than doubling. The Kentucky imprisonment rate is 371% of what it was in 1985, nearly quadrupling.

While Kentucky’s crime rate and violent crime rate are well below the national levels, Kentucky’s prison rate exceeds the prison rate of the United States.

Here is the data:

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In reviewing the recent crime rate data, Ken Cuccinelli, former attorney general for Virginia, observed, “Communities across the country still have far safer streets than twenty years ago, as homicide and overall violent crime rates are roughly half of their early-1990’s peaks.”
Why this significant drop in the crime rate? Many believe that the drop in crime is primarily caused by the increase in incarceration and length of sentences and the decrease in release. “The reality is far more complex… [A]bout 25% of the decline in violent crime can be attributed to increased incarceration. While one-quarter of the crime drop is not insubstantial, we then know that most of the decline in crime — three quarters — was due to factors other than incarceration.” Ryan S. King, Marc Mauer, Incarceration and Crime: A Complex Relationship (2005) at 3.4.

A 2015 report by Dr. Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, What Caused the Crime Decline?, The Brennan Center for Justice (2015), comprehensively answers the question of why the crime rate is declining with three findings:

1. Increased incarceration at today’s levels has a negligible crime control benefit: Incarceration has been declining in effectiveness as a crime control tactic since before 1980. Since 2000, the effect on the crime rate of increasing incarceration, in other words, adding individuals to the prison population, has been essentially zero. Increased incarceration accounted for approximately 6 percent of the reduction in property crime in the 1990s (this could vary statistically from 0 to 12 percent), and accounted for less than 1 percent of the decline in property crime this century. Increased incarceration has had little effect on the drop in violent crime in the past 24 years. In fact, large states such as California, Michigan, New Jersey, New York, and Texas have all reduced their prison populations while crime has continued to fall.

2. One policing approach that helps police gather data used to identify crime patterns and target resources, a technique called CompStat, played a role in bringing down crime in cities: Based on an analysis of the 50 most populous cities, this report finds that CompStat-style programs were responsible for a 5 to 15 percent decrease in crime in those cities that introduced it. Increased numbers of police officers also played a role in reducing crime.

3. Certain social, economic, and environmental factors also played a role in the crime drop: According to this report’s empirical analysis, the aging population, changes in income, and decreased alcohol consumption also affected crime. A review of past research indicates that consumer confidence and inflation also seem to have contributed to crime reduction.

This report concluded that “increasing incarceration had a minimal effect on reducing property crime in the 1990s and no effect on violent crime. In the 2000s, increased incarceration had no effect on violent crime and accounted for less than one-hundredth of the decade’s property crime drop.” Id. at 79.

Why is there a disconnect between feelings and reality? People, often well informed people, feel crime is on the rise when it is actually dropping. Why the dramatic disconnect? One reason is that each of us has a Ph.D. in media criminology.

Craig Haney, a Professor of Psychology, University of California, Santa Cruz, has identified why the incorrect viewpoint exits. By the time they are old enough to vote or serve as jurors, most citizens in the United States have earned the equivalent of a Ph.D. in “media criminology.” The average eighteen-year-old has watched some twenty thousand hours of television programming, much of which has been devoted to crime-related news and drama. Moreover, adults are afforded seemingly limitless opportunities to obtain continuing, post-doctoral education. Indeed, the typical American household now holds more television sets than people, and the sets are on over eight hours per day. By most estimates, crime continues to be the industry’s mainstay, with approximately one-third of television programming devoted to crime and law enforcement shows. News media are also dominated by crime-oriented content. For example, an estimated one-fifth of local television and newspaper reporting is devoted to crime.
I have argued elsewhere that the media play a critically important and potentially deleterious role in helping to shape criminal justice policy. Media myths and misinformation substitute for real knowledge for many members of the public who—as citizens, voters, and jurors—participate in setting policy agendas, advancing political initiatives, and making legal decisions. Media messages about the causes of crime, the nature of violent criminality, and the most effective strategies for addressing crime-related problems are especially influential because they address topics with which most citizens have little or no direct experience.

Craig Haney, Media Criminology and the Death Penalty, 58 DePaul L. Rev. 689 (2009)

What are we criminal defense lawyers to do?
Perception is too often reality for people. Myths matter as they influence how people, jurors, judges, legislators, the public, make decisions about our clients and the criminal justice policies that apply to our clients. However, Albert Einstein addressed the complexity of the contradiction between facts and myths this way, "Reality is merely an illusion, albeit a very persistent one."

Recognizing these myths, our opportunity is to proactively communicate the facts to people who make decisions about our clients and laws and provide the rest of story, the full context.

When representing clients, Craig Haney advises criminal defense attorneys to provide a counter narrative for our clients that "contextualizes behavior and explains the forces and factors that have helped to shape a defendant's life course." Id. at 740.

That’s our opportunity. It is why good public policy advocacy and good lawyering make a difference for clients.

Ed Monahan
KY Public Advocate

Educating Criminal Defense Practitioners

New Bail Appeal Rules

How the New RCr 4.43 for Bail Appeals from Circuit Court Works:

Bail Hearing is conducted pursuant to:

- Setting of Bail After a Preliminary Hearing (RCr 3.07);
- Adversarial / Evidentiary Review of Conditions of Release (RCr 4.40); or
- Change of Conditions of Release (RCr 4.42)

And Judge has decided the bail issue, or changed a condition of release, and entered an ORDER, …

Within 10 Days of the Actual Day the Order is Entered, Defendant SHALL:

- File a Notice of Appeal with the Circuit Clerk. No Motion In Forma Pauperis is necessary.

Within 14 Days of the Actual Day when Notice of Appeal is Filed, the Clerk SHALL:

- Prepare and certify a COPY of that portion of the record or proceedings as relates to the question of bail, including Order, Motion, any Responses, and any video recordings. (The Defense Attorney should communicate with the Clerk to make sure everything that needs to go into the record is in there.)

Brian Scott West, KACDL Education Chair, can be reached at brianscott.west@ky.gov
Within 10 Days of the **Actual Day** the Record is Filed, Defendant SHALL:

File a Brief in the Court of Appeals. No more than 5 double-spaced typewritten pages which complies with briefing requirements of CR 76.12. If you want oral argument, you must move for it in the Brief (see below).

The Commonwealth Attorney / Attorney General Need Not File a Brief; But Should They Decide To Do So, They Have 10 Days of the **Actual Day** the Defendant’s Brief is Filed to:

File a Brief in the Court of Appeals. No more than 5 double-spaced typewritten pages which complies with briefing requirements of CR 76.12.

Following the **Lesser Of** 10 Days or the Actual Day the Commonwealth’s Brief is Filed, the Appeal SHALL Stand Submitted for Decision by the Court of Appeals:

Oral argument will not be held unless ordered by the Court *sua sponte* or on the grant of a motion by the party. There is no rehearing or hearing on request for modification or reconsideration.

Within 30 days of the **Actual Date** of the Entry of the Decision by the Court of Appeals, Either Party May:

Move for discretionary review by the Kentucky Supreme Court, which shall be entertained only for extraordinary cause shown in the Motion for Discretionary Review. There must be 10 copies filed with the Supreme Court Clerk.

Within 30 days of the **Actual Date** of the Filing of a Motion for Discretionary Review, the Other Party May:

File a Response to the Motion for Discretionary Review by filing 10 copies of the response with the Kentucky Supreme Court Clerk.

**IMPORTANT:** Depending Upon How Quickly the Defense Attorney, the Commonwealth’s Attorney / Attorney General, and Clerk Act, the Appeal May Be Handled Quite Expeditiously.

**EXAMPLE:** If an Order on a Bail Hearing is Entered on Day 1, the Notice of Appeal is Filed 5 Days Later (Instead of 10), the Clerk Prepares the Record in 10 Days (Instead of 14), the Brief is filed within 5 Days, and the Attorney General Files a Response In 5 Days, the Case Will Stand Submitted to the Court of Appeals in a Mere 20 Days of the Bail Hearing. If Everyone Uses the Maximum Deadlines, the Case Will Be Submitted Within 34 Days of the Bail Hearing. There is No Timetable by Which the Court of Appeals Must Decide the Case.
Miranda v. Arizona as Applied in Kentucky

The United States Supreme Court’s decision in Miranda v. Arizona, 384 U.S. 436 (1966) turns fifty years old this year. In celebration of this monumental case, throughout 2016 KACDL will publish articles in each newsletter about how the Miranda decision has been interpreted in Kentucky.

In order for the constitutional Miranda warnings to be triggered, a person must be “in custody” (discussed in the last newsletter) and must also be questioned by a “state actor.” What is a “state actor”? The most obvious example is the police or other law enforcement agency. But what about persons who are employed by the state, but not in a prosecutorial capacity?

In Welch v. Commonwealth, 149 S.W.3d 407, 410-411 (Ky. 2004), the Supreme Court held that counselors who questioned Appellant were employees of the treatment facility, not law enforcement officers. Generally, questioning by law enforcement is required to trigger the necessity for Miranda warnings. On the other hand, the Supreme Court of the United States has recognized the applicability of Miranda in situations not involving law enforcement.…..

In Estelle v. Smith, 163 F.3d 499 (8th Cir 1998), the Court held that a psychiatrist, who performed an involuntary evaluation of the defendant, could not testify regarding information that had been gathered by questioning during the evaluation, because the defendant had not been apprised of his Fifth Amendment rights. The examining physician was not a law enforcement officer, but the Court held that the doctor went beyond a routine examination and gathered information during the evaluation to testify concerning the defendant’s future dangerousness and to assist the prosecution in seeking the death penalty. The dancers gathered information previously undisclosed sexual misconduct and delivered that information to law enforcement officers.

The title and employer of the questioner are not the sole basis for determining state action; rather courts must determine whether the interrogation was such as to likely result in disclosure of information which would lead to facts that would form the basis for prosecution. In this case, the likelihood of such a disclosure was virtually overwhelming. Accordingly, the counselors who interrogated Appellant were state actors for the purpose of the Fifth Amendment, and Appellant should have been informed of his Miranda rights regarding his privilege against self-incrimination.

In another case, however, a state employee was not considered a state actor where the employee was not acting in cooperation with the prosecution. In Jackson v. Commonwealth, 468 S.W.3d 874, 875, 877 (Ky. 2014), the Supreme Court held that a psychiatric nurse employed by Western State Hospital was not a state actor, for Miranda purposes, when treating defendant, and thus nurse could testify during prosecution:

Prior to trial, Chris gave notice of his intent to present an insanity defense. At trial, Chris presented evidence regarding his history of mental health issues and his treatment, including testimony from Dr. Cooley, the head of forensics at KCPC. He opined that Chris was not able to appreciate the nature of his acts at the time of the incident on February 10, 2010.

In rebuttal, the Commonwealth argued that Appellant was not a state actor, for Miranda purposes, when treating defendant, and thus nurse could testify during prosecution:...

Stewart was not present for the purpose of aiding the prosecution and not acting in concert with law enforcement. Moreover, there is nothing in the record to suggest that the circumstances were likely to result in “disclosure of information which would lead to facts that would form the basis for prosecution.” Welch, 149 S.W.3d at 411. Rather, just as the EMT in Fields was present for the purpose of treating Fields’s physical needs, Stewart was acting in response to Chris’s immediate psychiatric needs. We conclude Miranda does not apply and there was no error.

Cicely Lambert, Editor cjlambert@metrodefender.org
Kentucky traffic stop/dog sniff issues

Prior to March 17, 2016, Kentucky traffic stop/dog sniff issues were governed by two cases: Johnson v. Commonwealth, 179 S.W.3d 882 (Ky. App. 2005), and Epps v. Commonwealth, 295 S.W.3d 807 (Ky. 2009). In the Johnson case, a Henderson police officer was patrolling near an apartment building known as a high drug trafficking area when he saw an automobile parked in front of the building. The officer followed the vehicle when it pulled away. As he followed, he saw the driver make a turn without signaling and then noticed the license plate was not properly lit. He made a routine stop and as he approached the driver’s side, the vehicle’s registration appeared to be expired. He radioed dispatch for more information and a canine unit. Id., at 883. The Kentucky Supreme Court found that because “[t]he purpose of the initial stop had not been completed before the canine unit arrived at the scene,” the stop and dog sniff were valid Id., at 885-886.

In the Epps case, a Mount Sterling police officer saw a white Oldsmobile make an improper turn and then noticed the license plate was not illuminated. He initiated a traffic stop. A search of the license plate number revealed that the car was registered to a used car lot. The driver could not produce registration or proof of insurance and refused a search of the car. Epps, supra, 295 S.W.3d at 808. On appeal, the Supreme Court found traffic stop and dog sniff in this case was too extended and the stop invalid. Id. at 810.

The legal landscape changed in Davis v. Commonwealth, 484 S.W.3d 288 (Ky. 2016), when the Kentucky Supreme Court adopted the holding in Rodriguez v. United States, —– U.S. ———, 135 S.Ct. 1609 (2015).

In Rodriguez, a majority of the United States Supreme Court found that a dog sniff “is not an ordinary incident of a traffic stop,” such as deciding whether to write a ticket, checking a driver’s license and inspecting registration and proof of insurance. Rodriguez, supra, 135 S.Ct. at 1615; citations omitted. Rather, a sniff search is “a measure aimed at detect[ing] evidence of ordinary criminal wrongdoing.” Id., quoting Indianapolis v. Edmond, 531 U.S. 32, 40–41 (2000). “The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket. . . . but whether conducting the sniff ‘prolongs’—i.e., adds time to—-the stop [.]” Id, 135 S.Ct. at 1616.

In the Davis case, a McLean County Deputy Sheriff initiated a traffic stop after he saw the Davis vehicle cross the center line two or three times. As he approached the driver’s side window, he noticed the odor of an alcoholic beverage coming from the vehicle and saw an open beer can in the center console. Davis admitted that he had ingested about half of it. The Deputy got Davis out of his vehicle, patted him down and performed two field sobriety tests, both of which Davis passed. A PBT also registered no alcohol.
The Deputy asked permission to search the vehicle, which Davis refused. The Deputy then had his drug dog perform a sniff search. Davis, supra, 484 S.W.3d at 290-291. The question presented on appeal was whether in light of Davis passing the field sobriety tests and the Deputy’s personal observations, extending the stop in order to perform the sniff search was valid.

The Kentucky Supreme Court agreed that the purpose of the traffic stop was for the Deputy to determine whether Davis was driving under the influence or was sober. The Court then considered whether under the Rodriguez analysis, extension of the stop beyond that necessary to verify Davis’s sobriety was “accompanied by additional grounds to believe other criminal activity was afoot.” Davis, 484 S.W.3d at 293. Thus, the question became whether the sniff search was related to determining whether Davis was sober or driving under the influence. Id., at 294.

The Deputy’s testimony regarding whether the stop was complete at the time he had the sniff search performed was inconsistent. First, he testified that when he administered the two field sobriety tests and Davis passed both, he determined that Davis was not under the influence of alcohol. In the Court’s estimation, because the Deputy had accomplished the purpose of the stop—he determined that Davis was not intoxicated—the stop itself was complete. Then, the Deputy testified that even after Davis passed the field sobriety tests, because there was an open beer can in the car, he continued the stop in order to determine whether Davis was under the influence of narcotics. It was because he wanted to make this second determination he decided he needed the dog to perform a sniff search.

As the Court stated, Davis had passed two sobriety tests. There was no evidence suggesting that Davis’s “speech, demeanor, or behavior otherwise exhibited any characteristics associated with drug or alcohol intoxication from which an officer might reasonably believe further investigation was necessary.” Id. Further, the Court said, a sniff search “could not possibly serve the purpose of the traffic stop by showing whether [Davis] was driving under the influence of any substance.” Id. Rather, it was conducted in order “to discover [whether] illegal drugs [were] in” the Davis automobile, an action “clearly beyond the purpose of the original DUI stop.” Id.

The Kentucky Supreme Court found the stop invalid and ordered the trial court to suppress the evidence obtained from it. The Court also held that to the extent the Johnson and Epps cases held otherwise, both cases were overruled by Rodriguez.
Practice Tips:

● In Davis, the purpose was a DUI stop. What is the original purpose in your case? Go through the citation, ask for dispatch records and go through them. Does the police department/sheriff’s department have any written procedures about what to do in traffic stops? If they do, get those procedures as you prepare to cross the officer. Ask the officer about the original purpose of the traffic stop.

● There are some actions an officer performs at all traffic stops. What makes a DUI stop, for example, different? Ask the officer about the “ordinary incidents” of a traffic stop. Follow that with a question about the “ordinary incidents” of a DUI stop, for example. Rodriguez, supra, 135 S.Ct. at 1615. What cues does the officer look for in your particular stop that he may not in an ordinary traffic stop?

● Extension of the stop beyond determining the original reason for the stop must be “accompanied by additional grounds to believe other criminal activity was afoot.” Davis, 484 S.W.3d at 293. Read the citation, read the transcript of/listen to the dispatch records. Read the written procedures, if any. Ask the officer what facts in this stop gave him those additional grounds.

● The “inevitable discovery” rule allows admission of evidence which is unlawfully obtained when it is proven by a preponderance of the evidence that the evidence would have been inevitably discovered by lawful means. Nix v. Williams, 467 U.S. 431 (1984); Hughes v. Commonwealth, 87 S.W.3d 850 (Ky. 2002). The government bears the burden of proof. Nix, supra, 467 U.S. at 444.

Do some thinking about 1) whether the government can argue inevitable discovery in your case; 2) how, based upon your facts, you can combat the argument; and 3) how to argue that the government did not meet its burden of proof, which is the preponderance standard.

Julia K. Pearson, Senior Attorney, Appeals Branch, Department of Public Advocacy can be reached at Julia.pearson@ky.gov or by phone at (502) 564-8006.
Greeting Members!

We are gearing up to close out the year here at KACDL and it has been an active one. It is amazing what our President Ernie Lewis has accomplished! Thank you Ernie for serving KACDL so well.

Please remember these important dates approaching soon!

November 3, 2016: Annual Board and Member meeting, Galt House West, 4pm.

November 4, 2016: Annual Conference and Criminal Defense Seminar, Galt House West, 8:30-5:30 pm

November 4, 2016: Awards Luncheon, Galt House West, 12:00pm

Late November: Launch of the New Website. If all continues to go well, we will be sending emails to members with log in instructions to our new website. We are confident that you will love the new features.

Warm Regards, Donna

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EXECUTIVE DIRECTOR’S COLUMN

We Have Updated Our Logo!

Thank you Brad Clark for completing the design work for us!
### Active Members

Vince Aprile, who practices with Lynch, Cox, Gilman and Goodman P.S.C., in Louisville, has been reappointed to the editorial board of *Criminal Justice* magazine, the quarterly publication of the American Bar Association’s Criminal Justice Section. Vince has been a member of the magazine’s editorial board (1989-2012, 2014-present) and twice has served as its chair (2005-09, 1991-93). He continues as the author of his column, *Criminal Justice Matters*, a regular feature of the magazine (1992 to present).

In partnership with the DPA and the local county attorney's office, Kentucky Legal Aid hosted a free one hour CLE session on expungement remedies at the Warren County Justice Center on Thursday, October 27 at noon. KACDL’s Board member and the DPA’s Deputy Public Advocate, Damon Preston, presented.

### New Members

Please welcome the following new members:

- **Nicholas Caprino**, Department of Public Advocacy, Covington, KY
- **Cole Adams Maier**, Department of Public Advocacy, Winchester, KY
- **Corey Nichols**, Michael Hawkins & Associates, Lexington, KY
- **Nicholas Wilson**, Law Offices of Nick Wilson, Florence, KY
- **Jacob Johnson**, Department of Public Advocacy, Burlington, KY
- **E Seth Combs**, Jerry W Wicker Law Office, Hindman, KY
- **Robert Dziech**, The Farrish Law Firm, Cincinnati, OH
- **Ryan Maxwell**, Institute for Compassion in Justice, Lexington, KY
President’s Message

Final Thoughts

It has been an honor to serve in 2016 as the KACDL President. I was there when KACDL formed in 1986 following the passage of KRS 532.055, also known as “truth-in-sentencing.” I have been on the board since that time as we have grown as an organization. I have seen us struggle in the early days trying to stay afloat, only to see us grow into the primary criminal defense organization in Kentucky. The year is coming to a close, and I consider it a great honor to have been your president over the past year.

I cannot believe it is happening all over again. I recall vividly when Ernesto Scorsone and Ernie Fletcher ran against one another in the 1998 election for the open 6th Congressional District of Kentucky. Both were state representatives from Lexington. The one thing I recall from the election is that Fletcher, a physician, ran ugly and distorted ads against Scorsone that contributed to his victory. He ran ads condemning Scorsone for being a defense attorney. Specifically, he featured a video of a rape victim attacking Scorsone for having represented the man charged with raping her. Scorsone had been a public defender in Lexington, and was then in private practice representing persons charged with a crime. At one time, he had been a KACDL board member. While the Kentucky Trial Lawyers Association and the Sierra Club both condemned the ads, they were not pulled and Fletcher went on to win by 7 percentage points. Fletcher condemned nothing about Scorsone’s representation specifically. Rather, the condemnation came from the mere representation by a defense lawyer of his client. It was an attack on Scorsone’s upholding his client’s Sixth Amendment rights.

I had been a public defender for 21 years and Public Advocate for two years at the time. I recall feeling both anger and frustration. One of the things the Republican Party has traditionally done is to condemn their opponents for not being true to the Constitution. Republicans have long attacked nominations to the US Supreme Court by Democratic Presidents as being something other than “strict constructionists.” The so-called “Tea Party” made adherence to the Constitution one of its fundamental tenets. Yet, here was the future Governor condemning his opponent for having defended a person charged with a crime.

A figure no less towering than John Adams had long ago demonstrated the courage it takes to represent persons charged with crimes when he represented British Captain Preston in 1770 for having murdered American citizens in Boston during a time of great civil unrest. The American Revolution was about to begin. Emotions were high. Yet Adams, a revolutionary himself, answered to a higher calling and represented Preston. Preston was acquitted. Criminal defense lawyers have followed Adams’ example ever since, and have not been dissuaded by the cheap attacks on them by politicians more interested in scoring points than in defending the Constitution.

So now here we go again, in the campaign of 2016. Donald Trump is attacking Hillary Clinton for her defense of a person charged with a crime. Trump used Kathy Shelton at a news conference on October 9, 2016 condemning Hillary Clinton for her defending the man accused of raping Shelton when she was 12 years of age. See generally https://www.washingtonpost.com/news/fact-checker/wp/2016/10/11/the-facts-about-hillary-clinton-and-the-kathy-shelton-rape-case/wpisrc=nl_headlines&wpmm=1. Trump has also condemned Clinton’s defense in his stump speeches.

Clinton was at the time a young Arkansas lawyer running a legal clinic at the University of Arkansas. As part of her defense, she made a motion for a psychiatric examination of Shelton claiming the exam violated her. The record shows, on the other hand, that the motion was denied and no exam even occurred. Yet Trump continues his attacks.

So here we are again, with a candidate for the presidency attacking another candidate for defending their client. I am proud of Ernesto Scorsone who never apologized for representing a person charged with rape. I am proud of Bill Johnson and Frank Hadad and the hundreds more Kentucky criminal defense lawyers who make up KACDL for defending their client one person at a time and in so doing upholding the Constitution. Let us reject these attempts at undermining the sacred right to counsel.
We have accomplished a lot this year, but we can accomplish so very much more. We have accomplished much together this year. At the beginning of the year, we set four goals as an organization. We achieved the first—the passage of a felony expungement bill for the first time in Kentucky. That was followed up by collaborating with Legal Aid and Clean Slate Kentucky to assist eligible persons in seeking an expungement. A second goal, unachieved this year, was to double our attendance at our excellent DUI seminars. The quality of those seminars, however, continues to be excellent, and KACDL will continue to be the primary educator of Kentucky lawyers on this important area of the law. A third goal was to have 400 paid members by the end of 2016. This goal has been extended to the end of 2017, so it is too early to gauge the success of this goal. Finally, we have achieved our fourth goal, which is to create a ready response to articles in newspapers. We responded to the efforts by some to pass the unwise “Marsy’s Law” which would radically change our state constitution in unknown ways when it comes to victims’ rights. We have at the time of this writing submitted an op-ed on the unfairness of the look-back provision when applied to those who were found guilty of DUI prior to the passage of the law. In addition, we had a successful 2016 General Assembly under the able leadership of our legislative agent, Rebecca DiLoreto. We hired an excellent new Executive Director in Donna Brown, who has jumped in with competence and enthusiasm as she is guiding us toward a new website, better record keeping, and other efforts. Our spring video series was first-rate and well attended. Larry Simon and his Amicus Committee have guided us through several efforts to advocate for pro-defense positions. Larry also led the effort to have KACDL predominantly featured at the state fair. Dan Goyette has been working tirelessly on planning our 2016 Annual Conference. It has been a terrific year.

Yet I believe KACDL is a sleeping giant. We should have every criminal defense lawyer in Kentucky as part of our organization. We need to advance into the 21st Century with our website and our listserv. We need to be the go-to organization for comments and advocacy on criminal justice issues. We must make our voice louder in the sphere of public opinion on important criminal defense issues. And we need to bring younger lawyers, including minority lawyers, into membership and leadership of this organization. These are just some of the areas of growth for us to explore as we move forward as an organization.

See you at the convention. This is my last column. Again, it has been an honor to serve you this year. I hope to see each of you on November 4th at our 30th Annual Conference.

Ernie Lewis
KACDL President