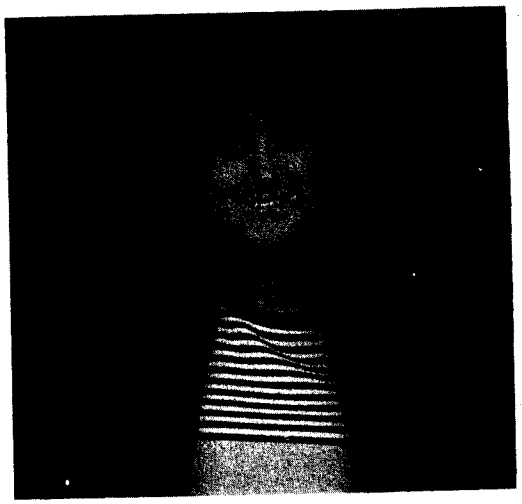
THE ADVOCATE

Vol. 7 No. 4 A Bi-Monthly Publication of the DPA June, 1985

THE ADVOCATE FEATURES



Angela Patrick

Early in her career a judge informed Angela Patrick, our Bath County Public Defender Administrator, that he didn't allow paralegals to practice in his courtroom. Angela expected some resistance when she returned to her community to set up a law practice. "It took time for them to get used to a female attorney. I guess what people here think is that men just look more the part." She felt it was especially hard for the community to accept that she wanted to do criminal defense work. "Face it, a female attorney here just isn't going to get criminal cases off the bat. I decided to take contract work because that was the best way I could find to become initiated into criminal litigation."

Angela has found her niche. A colleague said of Angela, "She is an excellent trial attorney and is a fighter, who really works to prepare a case. She won't hesitate to try a case at all. She has a very good reputation in her county."

Public defender work is only a part of her practice, but she prefers it, as it's the "most interesting." Her favorite work is with juvenile clients because they are neophytes to the criminal justice system and can be turned around. It follows that her favorite case was a juvenile murder case. The defendant was a 14 year old alcoholic, who had been physically abused since he was two. It was particularly interesting for her to present the case to the judge. She is extremely proud of that victory.

The small town vantage has benefits as well as hindrances. She has an edge in juror selection as she knows or knows of most of the prospective jurors. They, in turn, know of her and her family. But, she smiles, "they never forget who you were."

Angela is the oldest child of a farming family. She'd witnessed a dichotomy of justice in that small town for the prominent and the poor, and she made a promise to herself at age 15 to choose law as a profession. She affirmed, "If I ever get the chance, I'm going to take the side of the poor." Graduating from the University of Kentucky School of Law in 1982 answered that prayer.

Her interests and hobbies include camping, cycling, lifting weights, and she's a member of a nature conservancy group.

Thanks Angela for your excellence in advocacy and dedication to the protection of indigent rights in Bath County. - CRIS PURDOM

THE ADVOCATE

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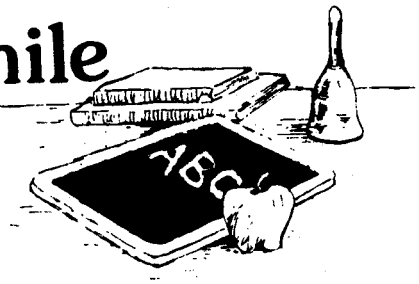
Inside

The dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes.

JOHN STUART MILL

Juvenile Law

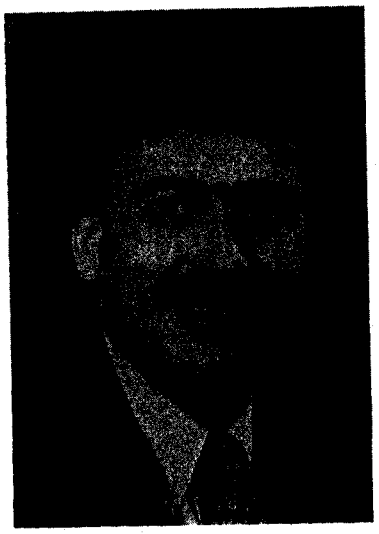


THE ROLE OF PUBLIC ADVOCATES IN JUVENILE CASES

The role of public advocates in Juvenile Court raises several perplexing issues in Kentucky. It is clear under KRS 31.100(4) that a "serious crime" includes all juvenile petitions involving violations of public offenses because under 208.110, 208.180, and 208.194 a child can be confined upon a determination that the allegations in a petition are true and constitute a public offense. However, problems arise concerning those children before the court or petitions alleging facts which establish juvenile court jurisdiction because of "the age of the person involved." KRS 31.100(4) indicates that these petitions are outside the jurisdiction of public advocates.

The juvenile court statute, Chapter 208, complicates the issue in KRS 208.065 which provides that a child is entitled to counsel when the child "could receive a sentence resulting in detention." KRS 31.100 defines "detain" as "to have in custody or otherwise deprive of freedom of action" and the words "detain" and "detention" are synonymous in this connection.

A further complication is that Kentucky's Court of Appeals has made it clear in two cases, Department of Human Resources v. Nester, Ky., App., 585 S.W. 2d 437 (1979) and Cabinet for Human Resources v. Lexington-Fayette County Urban County Government, Ky.App., 679 S.W.2d 244 (1984), that a guardian ad litem is required in cases involving status offenses



PAUL F. ISAACS

under KRS 208.020(1)(b), (c) and (d). However, neither of these cases decide who is to pay the guardian ad litem fee. Since there is no statutory authority for the Department of Public Advocacy to pay for these services, the Department cannot pay those fees unless the case comes within the purview of KRS Chapter 31.

Putting all of these statutes and cases together, the Department of Public Advocacy has the duty to represent children in the following juvenile cases:

1) petitions involving public offenses;
2) petitions in nonpublic offense cases where the child is in jeopardy of detention or commitment to an institution, public or private; and,
3) any juvenile case where the child is detained in violation of the law.

This represents a change in the Department's current policy only in that public advocates are not limited by the type of case but must now consider the impact of the case on the child.

PAUL F. ISAACS
PUBLIC ADVOCATE

Multiple-Impairment Rules Issued

Rules for determining disability on the basis of multiple impairments (required by section 4 of P.L. 98-460) were issued on an interim final basis on March 5, 1985 (50 CFR 8726). The regulations continue SSA's policy of denying claims on a finding that the combined impairments are not severe. The nonseverity finding "may be based solely on medical considerations." Although the rules are effective upon publication, written comments will be accepted until May 6, 1985. The same issue is under litigation in several jurisdictions, notably in Illinois (Johnson v. Heckler) and New York (Dixon v. Heckler). Both federal courts have rejected SSA's policy of using only medical factors without considering vocational factors as the basis for a nonseverity finding.

Reprinted from Mental Health Law Project's UPDATE (March/April 1985) with permission from Norman Rosenberg, Director.

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AMA ISSUES WARNING ON HYPNOSIS

Law enforcement officials should use hypnosis only in investigations because the technique can result in recall of false details, an American Medical Association panel reported today. Although at least 12 states prohibit testimony by witnesses who have been hypnotized to improve their memory of a crime and other states have special safeguards about the use of this technique, hypnosis is still considered a valid memory tool by many law enforcement personnel, said Dr. Martin T. Orne. Based on a review of scientific literature on hypnosis, the panel concluded in the Journal of the American Medical Association, published recently, that recall of past events, even ones that are traumatic, does not improve with hypnosis.

MEMO

THE COLUMNS SIXTH CIRCUIT REVIEW AUTHORED BY DONNA BOYCE AND PLAIN VIEW WRITTEN BY ERNIE LEWIS WILL RETURN IN THE NEXT ISSUE OF THE ADVOCATE.

TWO ASSISTANT PUBLIC ADVOCATES TO BE ON NCCD FACULTY FOR NATIONAL TRIAL PRACTICE INSTITUTE

Erwin W. Lewis, Directing Attorney of our Richmond Office, and J. Vincent Aprile II, General Counsel, of the Frankfort Office, have been asked to be on the faculty of the National College of Criminal Defense Lawyers, formerly out of Houston, Texas now centered at Mercer Law School in Macon, Georgia. Lectures and demonstrations by the faculty throughout the program supplement the critiqued performance instruction method.

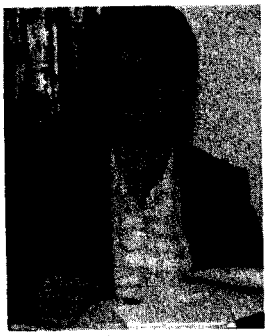
$4,200 AWARDED IN A 1983 SUIT

On March 9, 1985 a United States District Court jury awarded former Kentucky State Penitentiary inmate, Greg Ivey, more than $4,200 in compensatory and punitive damages. Nancy Curtis, attorney for the Plaintiff, law office at 109 North Mill Street, Lexington, Kentucky 40507, said, "I think what it shows is that juries, even in Western Kentucky, can be shown there is a seriousness to these claims. I know this has made a difference in other attorneys' willingness to take these suits as several have approached me for advice. This case showed that they are in fact winnable."

CONGRATULATIONS NANCY.

West's Review

A Review of the Published Opinions of the Kentucky Supreme Court and Court of Appeals and United States Supreme Court.



Linda K. West

In **Haight v. Commonwealth**, Ky.App., 32 K.L.S. 4 at 11 (March 15, 1985) the Court of Appeals held that Haight was denied the effective assistance of counsel when no steps were taken to perfect his appeal. The Department of Public Advocacy was appointed to represent Haight on appeal. At a hearing on Haight's RCr 11.42 motion alleging ineffective assistance, a witness for DPA testified that "for some reason unknown" the appeal was not perfected. The circuit court nevertheless denied the motion to vacate. In reversing, the Court of Appeals noted that Section 115 of Kentucky's Constitution creates a right to an appeal. The Court then observed that "As an appellate court, if this Court fails to see that the appellant is afforded the right to an appeal, the federal courts undoubtedly will. [Citations omitted]. Yet, to require the appellant to seek relief through a federal habeas corpus proceeding would be simply to deny him immediate relief, as well as to pass on the cost of such proceeding to the taxpayers of the commonwealth." The court remanded with directions to vacate the judgment and enter a new judgment from which an appeal could be taken.

In an interesting case, the Court of Appeals has affirmed the first degree manslaughter conviction of Charles Williams. **Williams v. Commonwealth**, Ky.App., 32 K.L.S. 4 at 12 (March 15, 1985). The undisputed evidence showed that the defendant shot the victim while the victim was attempting to assault him. In support of his defense of self-protection, the defendant testified concerning the violent actions of the victim on the day of the offense, and to prior instances of verbal abuse by the victim to third persons in the defendant's presence. However, the trial court excluded testimony by the defendant that on a prior occasion he had witnessed the victim intentionally run over a boy on a bicycle. In some intriguing dictum, the Court of Appeals hypothesized that although specific acts are inadmissible under Parish v. Commonwealth, Ky., 581 S.W.2d 560 (1979) to establish a victim's character, they may be admissible under Wooten v. Commonwealth, Ky., 478 S.W.2d 701 (1972) to show the defendant's "state of mind" in explanation of why he acted as he did. "[T]he law in this jurisdiction is settled that if a state of mind or mental attitude is formed by the victim's reputation, specific acts, which go to comprise such reputation, are inadmissible. See Parrish, supra. However Wooten extends the rule in Parrish and opens the door conditionally by the saving clause, 'unless the defendant knew of those acts.'" Under Wooten as interpreted by the Court of Appeals, evidence of specific acts which are known to the defendant would be admissible to prove the defendant's state of mind. The Court stopped short of adopting such a rule however, by finding that any error was harmless, in that the excluded testimony would have been cumulative. Judge McDonald, dissenting, would have found the error prejudicial since "[t]he evidence admitted clearly showed the decedent's propensity toward violence; the excluded testimony, however,

showed the decedent's actual resort to violent acts."

In **McClure v. Commonwealth**, Ky.App., 32 K.L.S. 4 at 14 (March 15, 1985) the Court held that hearsay statements of an infant victim of sexual abuse, who does not testify, may be admissible under the res gestae exception to the hearsay rule. The five-year-old victim in McClure responded to questions by her mother several hours after the alleged abuse with statements incriminating the defendant. The Court held that this evidence was admissible and that "the determination of what evidence falls within the res gestae exception to the hearsay rule must be based on the facts and circumstances of the particular case." Thus, the Court's holding is not that any statement by an infant sexual abuse victim is admissible as res gestae, but rather that such statements may be admissible depending upon their spontaneity, the lapse of time between the offense and the statements, and whether the statements were made while "under the stress of nervous excitement and shock produced by the act in issue..."

The Court granted a writ of prohibition in **Taylor v. Leibson**, Ky.App., 32 K.L.S. 5 at 2 (March 22, 1985), prohibiting the defendants' retrial. Earl Oliver and his brother Victor were both indicted for murder. Based on a belief that Victor would testify against Earl, the commonwealth obtained a dismissal of the indictment against Victor "with prejudice." However, at trial Victor invoked the Fifth Amendment, thereby depriving the commonwealth of critical evidence. The trial court then set aside the order dismissing the indictment against Oliver, declared a mistrial as to Earl, and set a new trial date as to both defendants. Both defendants then sought to prohibit their trial. As to Victor, the Court of Appeals held that the circuit court abused its discretion when it set aside its previous order dismissing the indictment. "The trial judge's action was purely punitive for Victor's assertion of his constitutional right." However, the Court of Appeals stated that nothing in its decision prevented the commonwealth from seeking to reindict Victor. As to Earl, the Court of Appeals held that his retrial would be violative of the prohibition against double jeopardy. Specifically, retrial was barred because the declaration of a mistrial over defense objection was not "manifestly necessary." KRS 505.030(4)(6). The trial court stated as the basis for the mistrial its factually unsupported conclusion that Earl had improperly influenced Victor to refuse to testify. The Court of Appeals expressed as its holding that "the requirement of manifest necessity is not satisfied where a codefendant whose indictment has been previously dismissed is called to testify against the defendant and refuses to testify on advice of counsel absent a direct showing of coercion, intimidation, or fraud." Finally, the Court of Appeals also held, citing King v. Venters, Ky., 596 S.W.2d 721 (1980), that the circuit court had no authority to require the defense to furnish it a list of defense witnesses. The circuit court lacked such authority even though it sought such a list not for discovery by the commonwealth, but in order to assist the court in voir dire of prospective jurors as to whether they knew defense witnesses.

In **Boyle v. Commonwealth**, Ky.App., 32 K.L.S. 5 at 6 (March 29, 1985), the Court reiterated the fundamental rule that "neither the court nor the prosecutor should mention to a jury that a defendant could be paroled." The trial court in Boyle advised the jury panel that whether the defendant went to prison depended upon whether he was denied probation and that even if he did go to prison "it didn't

mean he would stay the maximum term." After thus injecting issues of probation and parole into the case, the trial court cautioned the jury to "look at the facts in the case and make their determination on that basis only." The commonwealth argued that this second statement cured the error. The Court of Appeals disagreed inasmuch as the jury imposed the maximum sentence. Addressing another issue, the Court held that "sexual intercourse" as used in KRS 503.050 includes "deviate sexual intercourse" as defined in KRS 510.010. KRS 503.050(2) authorizes the use of deadly physical force to resist "sexual intercourse compelled by force of threat." The Court of Appeals interpreted this language as including deviate sexual intercourse because it found it "beyond reason to think that the Legislature did not intend for a male to have the right to use deadly physical force to resist being sodomized." The Court also held that evidence as to the victim's reputation for peace and quietude was admissible, without regard to whether the defendant knew of the reputation, so long as the victim's reputation was offered to show who was the aggressor rather than the reasonableness of the defendant's actions.

The Court of Appeals held in **Baumgardner v. Commonwealth**, Ky.App., 32 K.L.S. 5 at 9 (April 5, 1985) that the defendant's probation revocation hearing denied the defendant due process of law. While on probation, the defendant was charged with receiving stolen property. Although a jury acquitted the defendant, the trial judge stated his disagreement with the jury's verdict and found that the defendant had violated the terms of his probation by "being convicted in the Fayette Circuit Court." The Court of Appeals found that there were insufficient facts in the record to support the revocation. The defendant was also denied due process of law as particularized in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973), when the defendant did not receive notice of the claimed probation violation, when the trial court did not prepare a written statement of the reasons for the revocation, and because the revocation was not by a "neutral and detached hearing body" as shown by the fact that the trial judge ordered the revocation proceedings in response to the acquittal.

In **Phillips v. Commonwealth**, Ky.App., 32 K.L.S. 6 at 3 (April 12, 1985),

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the Court held that statements by the defendant's non-testifying codefendant that the defendant had shaken the infant victim were admissible under the "interlocking confessions" exception to Bruton v. United States, 391 U.S. 123 (1968). The exception, as set out in Parker v. Randolph, 422 U.S. 62 (1979), permits a non-testifying codefendant's admissions to be introduced when the admissions are not materially inconsistent with the defendant's own admissions. In Phillips, the codefendant's statements were "consistent with those of the [defendant] to police officers and at trial that he had indeed shaken his daughter." The Court held that this circumstance rendered the admission of the codefendant's statements harmless. The Court also held that the trial court did not commit error when it struck for cause a prospective juror who equivocated as to whether she could impose the maximum penalty.

In another appeal of a probation revocation, the Court again held that the defendant's probation was unlawfully revoked. **Keith v. Commonwealth**, Ky.App., 32 K.L.S. 6 at 4 (April 12, 1985). As conditions of his probation, the defendant was directed to voluntarily commit himself to Eastern State Hospital, and at the conclusion of his treatment to report to his probation officer. However, a hospital psychiatrist determined that hospitalization was not appropriate for the defendant and instead recommended out-patient therapy. The defendant told his attorney that he had been refused admission. The attorney then advised him to wait until the matter was "straightened out" before reporting to his probation officer. The trial court subsequently revoked the defendant's probation because of the defendant's failure to obtain admittance to the hospital and to report to his probation officer. The Court of Appeals reversed based on its finding that "there is no evidence that the appellant violated any of the conditions of the probation..." The defendant attempted to comply with the condition that he commit himself, and the Court considered it "fundamentally unfair to deprive him of his liberty for reasons beyond [his] control, that is, because the hospital's admitting physician did not believe he needed the treatment anticipated by the court." "Likewise, the record is devoid of any evidence that the appellant failed to report to the probation officer for any reason except his good faith reliance on his attorney's advice that such was not required until the hospitalization issue was resolved." The Court rejected argument by the commonwealth that the trial court's decision to revoke the probation was discretionary. Such a decision is discretionary only after there has been "an appropriate determination that the individual has in fact breached the condition of probation."

In **Baker v. Commonwealth**, Ky.App., 32 K.L.S. 6 at 9 (April 19, 1985) the Court held that the defendant's convictions with respect to a single vehicle of obscuring the identity of a machine contrary to KRS 514.120, and of altering or removing a motor vehicle identification number or selling or receiving a vehicle with the identification number removed or altered in violation of KRS 186A.305 and 186A.310, constituted double jeopardy. Since the offenses defined by these statutes did not each include an element not included in the others, the defendant's convictions under them failed to meet the test of Blockburger v. United States, 284 U.S. 299 (1932).

Lastly, the Court held in **Harris v. Commonwealth**, Ky.App., 32 K.L.S. 6 at 14 (April 4, 1985) that "when ineffective assistance of counsel is raised via an 11.42, the statutory attorney-client privilege is lost."

This rather broad holding appears to reach beyond the fact situation with which the Court was confronted in Harris. Harris called his former attorney as a witness at his 11.42 hearing but sought to limit the attorney's testimony as to confidential matters by asserting the attorney-client privilege. The Court of Appeals held that this strategy was precluded by CR 43.06, which provides for wide open cross-examination in Kentucky as follows: "[A]ny witness called by a party and examined as to any matter material to any issue may be examined by the adverse party upon all matters material to every issue..." It is noteworthy that the Court did not have before it a scenario in which the attorney whose effectiveness is challenged was called as a witness for the commonwealth. In that fact situation, CR 43.06 would have no bearing, and it may be argued that the attorney-client privilege is not waived in its entirety, but only to the extent necessary for the attorney to controvert the former client's specific allegations. Yet another apparent limitation on the waiver rule adopted by the Court appears in the language of CR 43.06 itself. The rule provides that a witness "may be examined by the adverse party upon all matters material to every issue..." (Emphasis added). Defense attorney's faced with an issue like that in Harris may argue that this materiality requirement must be strictly interpreted if it is to act as the basis for the breaching the attorney-client privilege. It can also be argued that broad application of Harris will chill the assertion of any claim of ineffective assistance and operate to deny a full and fair hearing.

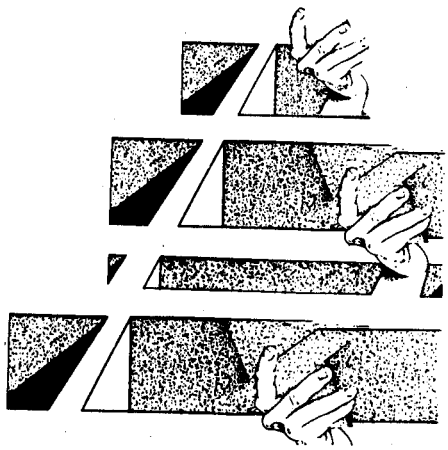
Kentucky Supreme Court

In **Commonwealth v. Vanover**, Ky., 32 K.L.S. 4 at 18 (March 21, 1985), the Court reversed a decision of the Court of Appeals which had held that the defendant's confession was obtained in violation of Miranda v. Arizona, 304 U.S. 346 (1966). Miranda, of course, held that once an individual in custody indicates that he wishes to remain silent all interrogation must cease. Subsequently, in Michigan v. Mosley, 423 U.S. 96 (1975), the Supreme Court approved a resumption of questioning after the defendant had exercised his Fifth Amendment right where questioning was resumed by another officer after a two hour time lapse and where the questioning went to another, unrelated offense. The Court emphasized in Mosley that the police "resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." By contrast, the interrogating officers in Vanover resumed questioning after the lapse of an "undetermined period of time" and, after again giving Vanover his Miranda rights, obtained admissions from him regarding the offense which he had been previously questioned about. Despite this distinction, the Kentucky Supreme Court held that Vanover's statements were admissible under the rationale of Mosley. Justice Leibson, in a dissenting opinion in which Chief Justice Stephens and Justice Aker join, would have held that "[t]he circumstances distinguishing Mosley from Miranda do not exist here."

The Court again reversed a decision of the Court of Appeals in **Commonwealth v. Varney**, 32 K.L.S. 4 at 19 (March 21, 1985). The defendant in Varney was indicted for robbery and first degree assault. At this first trial the trial court ruled pursuant to Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977) that the charges of assault and robbery merged. The commonwealth proceeded on the robbery

charge. However, the jury was unable to reach a verdict and a mistrial was declared. Prior to the second trial the commonwealth moved for dismissal of the robbery charge and to proceed to trial on the assault charge. The defense did not object, but moved to dismiss at trial on the ground that a trial for assault was precluded by double jeopardy since the trial court had ruled at the first trial that the assault merged with the robbery and since the commonwealth had dismissed the robbery charge. The Court of Appeals agreed. The Supreme Court, however, reasoned that while the jury at the first trial could not have convicted the defendant of both assault and robbery, the jury could still have been instructed on assault as a lesser included offense to robbery. Moreover, although the trial court ruled at the first trial that the robbery and assault merged, the trial court did not dismiss the assault charge. In practical effect, the trial court's ruling merely amounted to a decision not to instruct on the lesser included offense of assault. Likewise, the commonwealth's decision at the second trial not to proceed on the robbery charge amounted to a decision to try only the lesser offense of assault. "Since Varney could have been retried on the greater crime of robbery in the first degree, no aspect of the double jeopardy doctrine precluded his retrial on the lesser included offense of assault."

The Court held in **Penn v. Commonwealth**, Ky., 32 K.L.S. 4 at 21 (March 21, 1985) that proof of an "official proceeding" in progress is not required to sustain a conviction of bribing a witness. A person is guilty of bribing a witness in violation of KRS 524.020 when he "offers, confers, or agrees to confer any pecuniary benefit upon a witness or a person he believes may be called as a witness in any official proceeding with intent to... influence the testimony of that person...." Penn argued that he could not be convicted under the statute because, when he offered his neighbor $10,000 not to tell anyone about the marijuana patch on Penn's property, no "official proceeding" was underway. The Court disagreed and held that Penn's conduct was encompassed within the statute by the language "or a person he believes may be called as a witness." "The jury must only be convinced that the accused had an intent to influence the testimony of a potential witness." Justice Leibson dissented.



In **Damron v. Commonwealth**, Ky., 32 K.L.S. 4 at 21 (March 15, 1985), the Court held that the defendant's testimony that he escaped from jail because his life was "in jeopardy" from illness and he had been denied medical attention was not such as to require an instruction to the jury on "choice of evils" under KRS 503.030. Damron also argued that this first degree PFO conviction was invalid because under KRS 532.080(4) Damron had only one prior felony. That portion of the statute provides that:

> For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of

the convictions was for an offense committed while that person was imprisoned. (Emphasis added).

Damron contended that a prior jail escape conviction was not an offense committed while he was "imprisoned." Damron urged the Court to interpret imprisonment as limited to custody by the Department of Corrections since only after a term of such custody could it be said that Damron had been exposed to rehabilitative efforts. The Court rejected this argument based on its conclusion that "[i]t is apparent that the legislature intended to deal more harshly with persons who commit crimes while incarcerated." Justice Leibson dissented from this portion of the Court's decision.

The Court was also called upon in Damron to decide whether the defendant's kidnapping conviction should have been foreclosed under KRS 509.050 - the kidnapping exemption statute. The day following his escape from jail, Damron overpowered a woman, tied her up, and fled with her car. The Supreme Court held that a jury might find that Damron's restraint of the woman had as its purpose the accomplishment of either the theft or the previous day's escape. Justice Leibson, again dissenting, would have held that if the restraint was in furtherance of the theft it could not constitute kidnapping since the exemption statute excludes restraint which is an "ordinary incident to commission of the offense which is the objective...." Justice Leibson would also have held that the restraint could not be in furtherance of the escape which was accomplished a day earlier.

In **Blanton v. Commonwealth**, Ky., 32 K.L.S. 5 at 19 (April 11, 1985) the Court held that RCr 12.76(2) does not require that a defendant who elects not to commence service of his sentence must be released from custody. The rule provides that "[t]he execution of a sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail." Blanton asserted that inasmuch as KRS 532.120(3) provides for credit for jail time on any sentence of imprisonment that the language "elects not to commence service of the sentence" must mean not that the defendant elects to remain in jail, but rather that he elects not to remain incarcerated at all. The Court found that such an interpretation would lead to "absurd results" and that the rule instead means that a defendant who has appealed "is granted the right to remain in jail rather than be transported to prison."

United States Supreme Court

The U.S. Supreme Court continued to rewrite Fifth Amendment law. In **Oregon v. Elstad**, 36 CrL 3167 (March 4, 1985), the Court held that a voluntary confession obtained following proper Miranda warnings need not be suppressed because it was preceded by an earlier, voluntary confession obtained in violation of Miranda. The Court advanced two reasons for its refusal to require suppression of the second confession as "tainted fruit" of the prior unlawfully obtained confession. First, the Court cited its opinion in New York v. Quarles, 467 U.S. ____, 104 S.Ct. 2626 (1984) which stated that "[t]he prophylactic Miranda warnings are not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination [is] protected." Based on this lesser stature of the Miranda warnings, the Court held that the fruit of the poisonous tree doctrine need not extend to procedural Miranda violations, unlike Fourth Amendment violations, "which have

traditionally mandated a broad application of the "fruits doctrine." The reasoning of the Court thus leaves undisturbed its holdings in Wong Sun v. United States, 371 U.S. 471 (1963), Dunaway v. New York, 442 U.S. 200 (1979), and intervening cases which held that confessions obtained in the wake of a Fourth Amendment violation are "fruit of the poisonous tree." The second basis for the Court's holding lay in its rejection of argument that the defendant's unlawfully obtained first confession, by "letting the cat out of the bag," vitiated the voluntariness of his second confession. "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of subsequent informed waiver." (Emphasis added). Justices Brennan, Marshall, and Stevens dissent and would have held that the fruit of the poisonous tree doctrine is applicable to Miranda violations.

In **Francis v. Franklin**, 37 CrL 3019 (April 19, 1985) the Court held that a Georgia trial court's instruction to the jury that "the acts of a person of sound mind and discretion are presumed to be the products of a person's will, but the presumption may be rebutted" shifted the burden of persuasion as to intent to the defendant in violation of the Fourteenth Amendment. The Court has previously held in Sandstrom v. Montana, 442 U.S. 510 (1979), that mandatory presumptions, which instruct the jury that they must infer the presumed fact if the state proves certain predicate facts, unconstitutionally shift the burden of persuasion. See also Patterson v. New York, 432 U.S. 197 (1977) and Mullaney v. Wilbur, 421 U.S. 684 (1975). The Court found that the presumption instructed on in Francis shifted the burden of persuasion even though the jury was also instructed on the presumption of innocence and that the state was required to prove every element of the offense beyond a reasonable doubt. Justices Powell, O'Connor, Rehnquist, and Chief Justice Burger, dissenting, would have found that the giving of these additional instructions cured any error.

LINDA WEST

JURORS GUILTY OF PRESUMING GUILT

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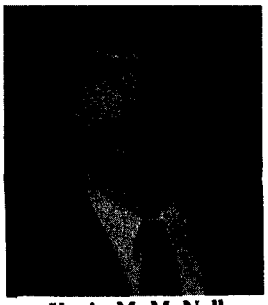
According to a recent national survey done for the Hearst Corporation by Research and Forecasters, Inc., nearly half of all former jurors believe defendants must bare [sic] the burden of proving their innocence. The surveyors conducted telephone interviews with 983 randomly selected citizens across the country. One question asked was: "True or False: In a criminal trial it is up to the person who is accused of the crime to prove his innocence." Fifty percent of the respondents incorrectly answered "true." When the same question was put to 983 former jurors, 49.9 percent answered incorrectly. In response to this survey, the New Hampshire Supreme Court has ordered the State's criminal trial judges to question all potential jurors closely on this subject. The court cited indications of "shockingly widespread ignorance of those precepts most central to our American system of criminal justice - a defendant's presumption of innocence and the government's burden of proving guilt beyond a reasonable doubt." Said Charles G. Douglass, III, New Hampshire's Supreme Court Senior Justice: "You can start with one of two basic assumptions in a legal system. You presume an accused person is guilty of a crime or he is not. Which assumption you pick tells everything about your society." (The Hartford Courant, 9/2/84, p. A4.)

The Death Penalty



Kevin M. McNally

KENTUCKY'S DEATH ROW POPULATION - 24
PENDING CAPITAL INDICTMENTS KNOWN TO DPA - 92

POTENTIAL CAPITAL CASES: STATISTICAL INFORMATION

In various capital appeals, DPA attorneys have provided to the Kentucky Supreme Court statistical information regarding potential capital cases since the effective date of the death penalty statute on December 22, 1976. We thought it might be useful to publish this preliminary statistical information and solicit corrections, additions and deletions. It would greatly help us (and, presumably, the courts) if you would review these lists of cases and bring any errors to our attention. Have we left out any potential capital cases that you have handled? Or, have we mislabeled any noncapital cases? Is the biographical data correct? Have we miscategorized any cases? Let us know. Call the toll free number, 800-372-2988, and leave a message for Kevin McNally. Thanks.

Capital Cases Since Effective Date of Statute with Original Sentences of Death

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX,NO. &[4] RACE OF VICTIM(S)
	1978					
1. Gall, Eugene	78	008	Death	2(d)-T	WM	1WF
2. Ice, Todd	78	099	Death/Rv Hew/Tr.	2(c)-T	WM	1WF
	1979					
3. Moore, Brian	79	013	Death/Rv Death*	2(b)-T	WM	1WM
4. O'Bryan,Laverne	79	056	Death/Rv 25 yrs.*	4-T	WF	1WM
5. Smith, Johnny	79	089	Death/Rv Life*	4-T	WM	1WM
6. White, Gene	79	013	Death	2(b)(c) 6-T	WM	2WM-1WF
	1980					
7. Bowling, Alxdr	80	103	Death Suicide	2(d)-T	WM	1WF
8. Holland, Jack	80	093	Death	2(b)-?	WM	1WF
9. James Larry	80	093	Death	1(b),2(b)-?	WM	1WF
10. McQueen, Harold	80	076	Death	2(b)-T	WM	1WF
11. Smith, David	80	098	Death	6-T	WM	4WF
	1981					
12. Kordenbrock, Paul	81	008	Death	2(b)-T	WM	1WM
13. McClellan, Ray	81	056	Death	2(c)-T	WM	1WM
14. Marlow, Huge	81	048	Death	2(b)-T	WM	1WM
15. Matthews, David	81	066	Death	2(c), 6-T	WM	2WF
16. Skaggs, David	81	805	Death	2(b)(c), 6-T	WM	1WM-1WF
17. Stanford, Kev.	81	056	Death	2(b)(c)-T	BM	1WF
	1982					
18. Bevins, W. Ohio	82	036	Death	6-T	WM	5WM
19. Harper, Eddie	82	056	Death	4, 6-T	WM	1WM-1WF
20. Ward, Douglas	82	066	Death	2(b) -T	WM	1WF
	1983					
21. Halverson, Leif	83	034	Death	6-T	WM	1WM-2WM
22. Sanborn, Per.	83	052	Death	2(d)(e)-T	WM	1WF
23. Slawter, James	83	056	Death	2(b)-T	BM	1WF
24. Willoughby, M.	83	034	Death	6-T	WM	1WF-2WM
25. Ashew, Robert L	83	056	Death	2(b)-T	BM	1WF
26. Simmons, Deoris	83	056	Death	6, 2(d)-T	BM	3WF
27. White, Larry	83	056	Death	2(b), 6-T	BM	2BF
	1984					
28. Grooms, Fred	84	072	Death	5-T	BM	1WF

1. See County Code, infra.

2. See Aggravating Circumstance Code, infra.

3. & 4. Male-M
Female-F
White-W
Non-White-B
Numerals Denote Number of Victims

Capital Cases Since Effective Date of Statute Tried to Jury or Judge Death Penalty Not Imposed After a Penalty Phase

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, # &[4] RACE OF VICTIM(S)
	1977					
1. Bibbs, Henry	77	056	Life+18+30	2(c)-T	BM	1BF
2. Coleman, James	77	056	20 Years	2(b)-?	?M	?
3. Lewis, Marvin	77	056	20,20,20	2(b)-?	BM	1WF
4. Nolan, Robert	77	056	20,20,20	2(b)-T	BM	1WF
5. Sullivan, Dan	77	056	20,20,20	2(b)(d)-NT	BM	1WF
	1978					
6. Couch, Kermit	78	105	Life W/out/Par	6-T	WM	2WF-1WM
7. Green, Carl	78	056	Life, 20	2(c)(d)-T	BM	1WF
8. Hall, Henry	78	114	Life	2(b)-T	BM	1WF
9. Johnson, Lyle	78	056	?	2(d)(e)-T	WM	1WF
10. Johnson, Ron	78	024	99, 20	2(d)-T	WM	1WF
11. Martin, Robert	78	054	30, 20	2(c)-?	BM	1BF
12. Plummer, Claude	78	010	99 x 3	6-T	WM	2WF-1WM
13. Smith, Charles	78	056	Life	1(b)-?	?M	?
14. Warner, James	78	033	99, 20	1, 6-T	WM	1WM-1WF
	1979					
15. Crick, Billy	79	089	Life	2(b)-T	WM	1WF
16. Harston,Sherill	79	114	99, 20, 5	1(b), 4, 6-T	WM	1WF-1WM
17. Houze, Thomas	79	019	Life	2(b)-T	WM	1WM
18. Hume, Allen	79	076	Life,Life 20, 10	2(c), 6-T	WM	1WF-1WM
19. Poynter, David	79	056	Life, 20	1(b), 2(b)-T	WM	1?M
	1980					
20. Burnell, Wm.	80	076	25	2(b)-NT	WM	1WF
21. Jones, Tommy	80	056	99, 20	1(b), 2(b)	BM	?
22. Floyd, Wayne	80	056	Life(GBMI)	2(b)(d)	?M	?
23. Martin, Victor	80	056	20, 10	2(b)-T	BM	?1BM
24. Paris, William	80	056	55	1(b) 2(b)-?	BM	1WM
25. Thacker,Steeley	80	007	Life	6-T	M	2WF-1WM
26. Turner, Robert	80	056	40,20,15	2(b)(c)-T	WM	1WM
	1981					
27. Blue, Howard	81	017	Life, 20	2(b)-NT	BM	1BM
28. Crews, David W.	81	056	Life,Life	2(b) - ?	WM	1WM
29. Crews, Paul D.	81	056	Life,Life	2(b) - ?	WM	1WM
30. Ford, Louis	81	105	Life	2(b)(d)-T	BM	1WF
31. Gilbert, Edna	81	013	Life	4-C	WF	1WM

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, # &[4] RACE OF VICTIM(S)
32. Kruse, Michael	81	008	50,20,10	2(b)-NT	WM	1WM
33. Miracle, Char.	81	058	20	2(b)-T	WM	1WM
34. Mullins, David	81	059	22	2(b)-?	?M	?
35. Odom, Gary	81	056	Life, 15 Rev-Dis.	1(b),2(e),7 -NT	WM	1WM
36. Partee, Larry	81	017	50, 20	2(b)-T	BM	1BM
37. Partee, Larry	81	017	Life, 20	2(b)	BM	1BM
38. Ralph, John	81	092	Life,Life	2(b)(c), 6-T	WM	1WM-1WF
39. Shelor, Harry	81	016	50,20,5	7	WM	1WM
40. Sydnor, Lewis	81	056	68	2(b)-T	BM	1M?
41. Wallen, Stephen	81	116	25, 15	6-T	WM	1WM-1WF
	1982					
42. Archer, Walter	82	097	60, 20	1(b)-T	WM	1WM
43. Brock, Wendell	82	066	60	2(b)-NT	WM	1WF
44. Crawford, Robt.	82	026	60	2(b)-?	WM	1WF
45. Horton, James	82	056	Life	2(b)(d)-T	BM	1BF
46. Rackley, John	82	092	Life, 20	2(b)(c)-T	WM	1WF
47. Smith, Melvin	82	056	40, 20	2(c), 6-T	BM	2BM
	1983					
48. Adcock, Lewis	83	056	Life	2(d)-T	?M	1?F
49. Barnes, Edsel	83	090	Life	4, 6-NT	WM	1WF-1Fetus
50. Crowder, James	83	097	Life-25, 20	2(b)-T	WM	1WM
51. Gwinn, Harlow	83	048	99	6-T	WM	2WM
52. Leach, James	83	063	Life, 50	2(b)(c) 6-T	WM	1WM-1WF
	1984					
53. Coggins, James	84	024	Life-25, 20	2(b)-T	WM	1WM
54. Jagoe, John	84	056	Life, 20	2(b)-T	BM	B
55. Medeiros, Gary	84	034	99	2(b)-T	WM	1WF
56. Morton, Elzie	84	034	Life	2(d)-T	WM	BF

Potential Capital Cases Disposed of by Plea to Less than Death Penalty

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, # &[4] RACE OF VICTIM(S)
	1977					
1. Dozier, Tommy	77	056	?	1(b)-T	BM	1BF
2. Forrest, Alvin	77	056	20, 5	2(b)-NT	BM	1WM
3. Green, Robert	77	056	20, 15	2(b)-T	BM	1WM
4. McElvain, Ben	77	054	20	2(c)-T	WM	1WM
5. Morgan, William	77	024	Life, 10,10	2(b)(c)-NT	WM	1WM
6. Naylor, Michael	77	024	Life, 10, 10	2(b)(c)-T	WM	1WM

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND RACE OF DEFENDANT[3]	SEX, # & RACE OF VICTIM(S)[4]
7. Smith, Ronnie	77	013	Life	1(b)-?	WM	1WM
8. Young, Vance	77	015	Life,Life	6-T	WM	2WF
	1978					
9. Annis, Ralph	78	049	20	2(d)-T	WM	1WF
10. Bradshaw, Thur.	78	047	20	2(a), 6-T	WM	1WM-1WF
11. Cramer, Lenox	78	087	20	4-T	WM	1WM
12. Gerald, Michael	78	076	20	2(c), 6-NT	WM	1WM-1WF
13. Goff, Robert	78	024	30	1(b), 2(b)-T	WM	1WM
14. Hillyard,Donnie	78	113	Life,Life 20	2(d)-T	WM	1WF
15. Livesay, Bobby	78	056	20, 20	2(b)(c)-?	WM	1WM
16. Livesay, Rich.	78	056	Life	1(b), 2(c)-?	WM	1WM
17. Moore, Reyben	78	093	Life,Life 20	1(b), 2(a)-T	WM	1WM
18. Payne,Terrence	78	010	99, 20	6, 2(b)-T	WM	2WM
19. Pearson, Oliver	78	056	25	2(b)-?	BM	1BM
20. Rose, John	78	098	Life, 20	2(b)-T	WM	1WM
21. Stepp, Pearl	78	048	Life(DHR)	2(b)-T	WM	1WM
22. Wagers, Billy	78	026	Life, 10	6-T	WM	1WM
23. Wagonner, Bobby	78	113	Life,Life 20	2(d)-NT	WM	W
24. White, Dan	78	013	80	6-?	WM	1WM-1WF
25. Whitmore, Ron	78	013	80	6-?	WM	1WM-1WF
26. Wilson, Sheila	78	024	20	2(b)-NT	WF	1WM
27. Wyatt, James	78	087	20	4-T	WM	1WF
	1979					
28. Brooks, Gary	79	117	Life,Life 20	2(b)-T	WM	1WF
29. Caldwell, David	79	065	Life, 20, 10	2(b)(c)-NT	WM	1WM
30. Combs, Gary	79	056	Life	2(b)-?	?M	1?M
31. Cummins, Floyd	79	037	Life	7-T	WM	1BM
32. Devlin, John	79	082	Life,Life 20	2(b), 6-T	WM	2WM
33. Devlin,Michael	79	082	20, 20,20,20	2(b), 6-NT	WM	2WM
34. Fisher, Dennis	79	102	21	2(b)-?	WM	?
35. Foreman, Steve	79	073	Life	2(b)-T	BM	1WM
36. Gillenwater, N.	79	022	Life	2(b)-T	WM	1WF
37. Harris, Eddie	79	069	20	1(b)-T	WM	?
38. Hert, Janice	79	073	25, 25	6-T	WF	1WM-1WF
39. Jarvis, Carolyn	79	089	20	4-C	WF	1WM
40. King, David	79	098	Life	1(b), 2(b)-T	WM	1WM
41. King, James	79	098	21 x 3	2(b)-NT	WM	1WM
42. Raley, John	79	056	Life	2(b)-?	WM	1?M

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, # & [4] RACE OF VICTIM(S)
43. Simms, Ricky	79	089	21	4-NT	WM	1WM
44. Slone, Melvin	79	065	Life, 20, 20	2(b)(c)-T	WM	W
45. Sutherland, R.	79	056	Life, 40	2(d)-T	?M	1?F
46. Wilson, Raymond	79	056	30	3-T	BM	1?M
	1980					
47. Couch, Mark	80	059	Life	2(b)-T	WM	1WM
48. Despain, Michael	80	056	20	2(c)-T	WM	1WM
49. Floyd, Wayne	80	056	Life	2(c)(d)-T	BM	1BF
50. Hager, Ken	80	076	Life, Life	2(c), 6-T	WM	1WM-1WF
51. Harris, Anthony	80	056	30	2(b)(c)-T	BM	1BM
52. Jennings, Otis	80	056	Life	1(b), 2(b)	BM	1WF
53. Napier, Ernest	80	058	20, 5-T	2(b)-T	WM	1WM
54. Polk, Marshall	80	056	20, 20-T	2(b)-NT	BM	1??
55. Smith, William	80	056	30-NT	1(b), 2(b)-NT	BM	1WM
56. Taylor, Samuel	80	056	25, 15-T	2(b)-T	BM	1WM
57. Tucker, Stacy	80	056	Life-T	2(b)(c)(d)	BM	1?F
	1981					
58. Branhan, Elisha	81	097	Life, Life	2(b)-T	WM	1WM
59. Crews, David	81	056	Life, Life	2(b)-?	WM	1WM
60. Patrick, Denver	81	011	Life, 20	1(b), 4-NT	WM	1WM
61. Dixon, James	81	058	20	4-NT	WM	1WM
62. Gammons, John	81	056	Life	1(b), 4-T	WM	1WM
63. Hancock, Eddie	81	011	Life	2(c)(d)-T	?M	1?F
64. Beasley, Willie	81	073	30	4-?	WM	1WM

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, # & [4] RACE OF VICTIM(S)
65. Holbrook, Lynn	81	058	20	4, 7-T	WF	1WM
66. Jones, Chester	81	048	Life	2(b)-T	WM	1WM
67. King, Kelly	81	058	Life	4-T	WM	1WM
68. Milburn, Paul	81	102	40	1(b), 2(b)(d)-T	WM	1WM
69. Noel, James	81	011	Life, 20	4, 2(a)-T	WM	1WM
70. Smith, Jackie	81	056	22	2(c)-T	W?	1WM
71. Swiney, Sheila	81	056	Life	7-T	WF	1WM
72. Townsend, C.	81	034	35	2(b)-?	?M	1?M
73. Townsend. Wm.	81	034	35	2(b)-?	?M	1?M
74. Williams, Geo.	81	056	20	1 (b), 2(b)-T	WM	1WM
	1982					
75. Amburgey, Velda	82	037	50	4-NT	WF	1WM
76. Bingham, Ben	82	034	?	1(b)-?	WM	1?M

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, # &[4] RACE OF VICTIM(S)
77. Boggs, Ronnie	82	026	20	1(b), 2(?)	WM	W
78. Bush, Donnie	82	097	20	6-T	WM	2WM
79. Davis, James	82	057	40	2-T	BM	?
80. Fahlbush, Chris	82	059	Life	2(b)-T	?	?
81. Hart, Randall	82	118	30	2(b)-T	WM	1?M
82. Henderson, Gary	82	014	Life	1(b)-T	WM	1WM
83. Henry, William	82	034	Life	2(b)(c)(d)-T	BM	1?F
84. Hurst, John	82	037	Life	4-T	WM	1WM
85. Jenkins, Ray	82	013	30	4-?	WM	1WM
86. Knuckles, Larry	82	026	Life	2(b)-NT	?M	1WF
87. McDaniel, Michael	82	073	Life	1(b)-T	WM	?
88. McGlone, Timmy	82	068	Life	2(b)(c)-T	WM	1WF
89. McKinley, Wm.	82	034	Life	2(b)(c)(d)-?	WM	?
90. Owens, George	82	048	Life, 20	2(b)-NT	WM	1WM
91. Slone, Eddie	82	036	20, 20	6-T	WM	2WM
92. Taylor, Steve	82	059	Life	2(b)-?	WM	1WM
93. Terry, William	82	056	20	2(a)(c)-T	WM	1WF
94. Vogelsberg, M.	82	056	Life	1(b), 2(b)-T	WM	1WM
95. Whittinghill,D.	82	089	Life	6-T	WM	2WM
96. Wright, Charles	82	014	Life	2(c)-T	?M	1?M
	1983					
97. Bailey, Brenda	83	056	25	2(b), 7-?	BF	1?M
98. Baines, Raymond	83	102	Life,Life 20	2(b)-T	BM	1WM
99. Bolin, Tamela	83	106	15	5-NT	WF	1WM
100. Bowling, Leisa	83	106	15	5-NT	WF	1WM
101. Brooker, R.	83	105	5	2(d)-NT	BF	1BF
102. Bryon, Sammy	83	054	25	2(c)(d)-T	BM	1BF
103. Clark, Craig	83	054	Life, 21	2(b)-T	BM	1WF
104. Combs, Robert	83	013	21	2(b)-T	WM	1WM
105. Couch, Sandra	83	058	30	2(b) - NT	WF	1?M
106. Craig, Steven	83	013	21	1(b),2(b)-NT	WM	1WM
107. Davis, Natalie	83	069	30	2(b)(c)-?	BF	1BM
108. Decker, Eddie	83	100	25	1(b), 2(b)-T	WM	1WM
109. Denault, Rick	83	059	Life	2(b)-?	WM	1BM

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING FACTORS	RACE OF DEFENDANT	RACE OF VICTIM(S)
110. Flynn, John	83	059	Life	2(b)-?	WM	1BM
111. Foster, Angela	83	054	20	2(b)-NT	BF	1WF
112. Gividen, Wm.	83	034	Life	2(b)-T	WM	1WM
113. Hall, Marvin	83	034	30	6-T	BM	1BF-1Fetus
114. Hamby, Felix	83	056	25, 20	2(c)-NT	BM	1BF
115. Hawks, Alfred	83	106	Life, 10	7-T	WM	1WM
116. Herrington, R.	83	008	20	?-T	?M	1?M
117. Jackson, J.	83	081	?	2(c)-NT	BM	1BM
118. Jackson, M.	83	081	25/W/out/ Parole	2(c)-T	BM	1BM
119. Johnson, Steven	83	056	Life	2(b)-T	BM	1?M
120. Jones, Wildean	83	034	5	2(b)-NT	WF	1WM
121. Long, Robert	83	056	Life	2(c)-T	?M	1?F
122. Martin, Charles	83	036	20, 10	1(b),-T	WM	2WM
123. McGuffey, Bob	83	036	Life	2(a), 4-NT	WM	1WF
124. McKinney, O.	83	087	Life but Men. Ill	2(b)-T	WM	1WF
125. Montgomery, O.	83	087	?	2(c)-?	WM	W
126. Oller, Cletus	83	015	Life	2(b)-?	?M	1?M
127. Phillips, L.	83	107	30	2(b)-T	WM	1??
128. Rhodes, A.	83	069	40, 10	2(b)(c)-?	BM	1BM
129. Rummage, James	83	015	Life	2(b)-?	WM	1?M
130. Salyers, Ralph	83	064	Life	2(d)(e)-T	WM	1BF
131. Simmons, Danny	83	114	Life	2(c),6-T	WM	1WF-1WM
132. Slone, Melvin	83	065	Life, 20, 20	2(b)(c)-?	WM	1WM
133. Thompson, Wm.	83	059	Life	2(c)-T	WM	1WM
134. Vickers, Doug	83	019	Life	2(b)-?	WM	1?M
135. Weir, George	83	090	Life,Life	2(c), 6-?	WM	1WF-1Fetus
	1984					
136. Bandy, Thomas	84	014	Life, 20	4-T	WM	1WM
137. Bess, Genphrey	84	056	15, 10	2(b)-T	BM	1BM
138. Bush, Rodney	84	056	(5)	2(b)-NT	?M	1BM
139. Cleaver, Geo.	84	093	?	1(b)-T	WM	1BM
140. Darby, Robin	84	056	?	2(b)-NT	BF	1BM
141. Detalente, M.	84	034	(8)	2(b)-NT	WM	1WM
142. Estepp, Mathew	84	034	Life, 20, 20	1(b),2(c)-NT	WM	1WF
143. Gabbard, Randy	84	059	Life	2(b)-T	?M	1?M
144. Hall, Russel	84	034	(12)	2(b)-T	WM	1WM
145. Martin, Frank	84	087	Life	1(b)-T	WM	1WF

146. McGaugh(y),M.	84	056	(5)	2(b)-NT	BM	1BM
146. Napier, Flet.	84	013	20	1(b)-T	WM	1WM
147. Sexton, Hassel	84	045	20	2(b)-T	WM	1WM
148. Scott, Barry	84	073	Life, 20, 20	2(b)(d)-T	WM	1WF
149. Taylor, C.	84	073	5	2(b)(d)-NT	BM	1WF
150. Taylor, John	84	056	?	2(b)-T	?M	1BM
151. Williams, R.	84	034	10, 5	2(b)(c)-NT	WF	1WF
152. Williams, S.	84	034	10, 10	2(b)(c)-NT	WF	1WF
153. Woods, Roy	84	056	(5)	2(b)-NT	?M	1BM

Potential Capital Cases Which Went
To Trial in Which The Prosecution Did Not Seek
Or was Prevented from Seeking The Death Penalty

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, # &[4] RACE OF VICTIM(S)
1. Jackson, Barbara	77	056	20,20	1(b)-T	BF	1BF
2. Ross, Larry M.	77	076	Life	4-T	WM	1WM
3. Stahl, Richard	77	027	Life	1(b)-T	WM	1?M
4. Branham, David	78	098	Life,15	1(b),2(b)-T	WM	1?M
5. Long, Michael	78	071	Life x 2, 5,10	2(b)(c)(d)-T	BM	1WF
6. Smith, Charles R	78	056	Life, 5,5,3	1(b)-T	?M	1?M
7. Abbott, Elmer	80	034	Life, 5	2(b)-T	WM	1WM
8. Champion, Chaney	80	098	20x3,5x4	7-T	WM	1WM
9. Gibson, Delaney	80	066	20	1(b)-T	WM	1WM
10. Hall, Terry	80	015	Life, 1	2(b)-T	WM	1WM
11. Lewis, Jeffrey	80	070	35	7-T	WM	1WM
12. Marcus, Paul	80	034	99,20	2(b)-T	WM	1WM
13.Spurlock Ronnie	80	055	20, 10	2(b)-NT	WM	1WF
14.Terry, Allen A.	80	056	Life, 20--Rev.	1(b)-T	BM	1WF
15.Buchanan,DavidC.	81	056	LIFE	2(b)(e)-NT	BM	1WF
16. Craft, Willie	81	068	20	2(b)-?	?M	1??
17. Frasure, Walter	81	068	20	2(b)-?	?M	1??
18. Hicks, Glen	81	058	Life x 2	2(c), 6-T	WM	2WM
19. Rogers, Tony C.	81	025	Life	2(d)(e)-T	?M	1?F
20. Saylor, Lloyd V	81	048	30- Rev.	-?	?M	1?M
21. Woolum, William	81	072	Life,5	4-T	WM	1WM

Potential Capital Cases Which Went To Trial in Which The Prosecution Did Not Seek The Death Penalty

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, # &[4] RACE OF VICTIM
22. Cort, Steven	82	034	20, 5,1	2(b)(c)-T	WM	1?M
23. Plummer, Claude	82	072	Life	1(b)(a)-T	WM	1WM
24. Thacker, Dennis	82	098	Life	1(b)-T	WM	1WF
25. Adams, Zendall	83	066	20,10	2(b)-T	WM	1WM
26. Cooper, Joe	83	034	Life	2(b)-T	BM	1WM
27. Jones, Harold	83	073	Life,20	2(c(-T	WM	1WF
28. Todd, Charles	83	065/033	Life	2(c)-T	WM	1WF
29. Wellman, Jimmy	83	096	Life, Life	1(b)-T	WM	1WF
30. Lovely, Sam	84	077	20	1(a)(b)-T	WM	1WM
31. Miller, Charles	84	063/118	Life	2(b)-T	WM	1WF
32. Jude, Odias	85	080/058	Life	4-T	?M	1?F

Potential Capital Case in Which Defendant was Convicted of a Lesser, Included Offense, Acquitted or Dismissed

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, RACE AND[4] # OF VICTIM(S)
1. Bell, Robert	77	059	MISTR.	2,4,6 -T	?/M	2/W/F
2. Blake, Darrell	77	110	5	1(b) -T	W/M	1/W/M
3. Brown, Roger	77	056	20	2(b) -T	B/M	1/W/M
4. Cable, James	77	072	10	-T	W/M	1/B/M
5. David, James	77	056	Dis.	2(a), 6 -T	W/M	1/W/M 1/W/F
6. Faulkner, Ronald L.	77	045	Dis.	2(d) - ?(VH)	W/M	1/W/F
7. Gary, Robert	77	056	15, 8	2(b) -T	W/M	1/W/F
8. Hendley, Terrell	77	107	10,10,5, 20 total	2(a), 6-T	?/M	2/?/?
9. Holmes, Rodney	77	056	5,10	2(c) - ?	?/M	1/?/?
10. Major, Gregory	77	056	IMM	2(c) - ?	?/M	1/?/?
11. Perkins, Maurice	77	059	10,10	2(b) -T	W/M	1/W/M
12. Allen, Tommy	78	056	17,10	2(c) -T	W/M	1/W/M
13. Arthur,Loraine	78	076	20	2(a) -T	W/F	?
14. Baril, Tony	78	036	10,10	1(b), 2(b) - T	W/M	1/W/M
15. Canada,Charles	78	017	10	-T	W/M	1/W/M
16. Crouch,Berthyl	78	035	5	2(b)-T	W/M	1/?/M
17. Day, Danny	78	054	ACQ	2(b)(c) -?	B/M	1/B/F
18. Decker, James	78	056	15	2(b)(c) - T	W/M	1/W/M
19. Grace, Martin	78	010	20,10	2(d) - T	W/M	
20. Lear, Robert	78	017	15,2	-T	W/M	1/W/F

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, RACE[4] AND # OF VICTIM(S)
21. Lightsby, Steve	78	056	17	2(b) - ?	B/M	1/B/M
22. Moore, Samuel	78	056	15	2(b) - T	B/M	1/B/M
23. Morris, Wm. Walker	78	067	20,5	2(b) - T	W/M	1/W/M
24. Anderson, Norris	79	034	9,18	1(b) - T	?/M	?
25. Baynum, James	79	059	Dir.V.	2 - T	W/M	1/W/M
26. Becker, David H.	79	056	ACQ.	6, 2(d) - ?	W/M	3-W/M&W/F& - B-W/F
27. Bowling, Tommy	79	099	20x3, 20x3,20	6, 2(b)(c) - NT	W/M	2/W/M 1/W/F
28. Clem, Frank	79	059	1	2(b) - NT	W/M	1/W/M
29. Devlin, Michael	79	082	20x10, 9	6, 2(b) - NT	W/M	2/W/M
30. Fischer, Charles	79	099	IMM	2(d), 6- NT	W/M	3-W/M&W/ - B-W/F
31. Jordon, Ruba	79	058/098	IMM	2(b) - NT	W/F	1/W/M
32. Linville, Samuel	79	101	ACQ.	2(a) - T	?/M	1/?/M
33. Moore, Claude	79	017	5	-T	W/M	1/W/M
34. Pullen, Wesley	79	056	20,5,5	2(b) - NT	W/M	1/W/?
35. Todd, Fred	79	056	20,20	6,2(b), 1(b) - T	B/M	2/B/M
36. Wilson, Gary	79	081	20,20	2(c),7 - T	W/M	1/?/M
37. Adams, Steven	80	106	10,20	2(b) - ?	?/M	1/?/M
38. Ashcraft, Mary	80	034	DIS(IMM?)	2(b) - NT	W/F	1/W/M
39. Brown, Larry	80	078	DIS	- T	B/M	1/W/F
40. Burnbridge, Robert	80	034	15	2(c) - T	?/M	?
41. Cunningham, Michael	80	111	ACQ.	2(b) - T	W/M	1/B/M
42. Elliott, Gregory	80	056	15,15	2(b) - ?	?/M	?
43. Elliott, Keneth	80	056	DIS,10	2(b) - ?	?/M	?
44. Ham, Kenneth	80	070	ACQ.	6,2(d) - T	W/M	1/?/M 1/?/F
45. Honeycutt, Doyle	80	007	DIS	6, -T	?/M	1/?/M 1/?/M
46. Hammonds, Francis	80	017	5	2(c),(7) - T	W/M	1/W/M
47. Inabnitt, Robert	80	008	ACQ.	2(b) - ?	W/M	1/?/M
48. Kinman, Ronald	80	106	20,20	2(b) - ?	?/M	1/?/M
49. Koenig, Brian	80	106	10,5	2(b) - ?	W/M	1/?/M
50. McGeorge, Colmar	80	007	DIS	2(c) - ?	?/M	1/?/M
51. Miller, Earl	80	008	ACQ.	2(b) - ?	?/M	1/?/M
52. Pridemore, P.	80	007	DIS	2(c) - ?	W/M	1/?/M
53. Ridner, Graylon	80	074	DIS	2(b) - ?	W/M	?
54. Shifflett, Thomas	80	011	20,10 10,5	2(b)(c) - T	?/M	1/?/M
55. Simms, Robert	80	056	10,5	2(b)(c) - ?	B/M	1/?/F
56. Smock, Kerry	80	011	10	2(b)(c) - NT	?/M	1/?/M
57. Stevens, John C.	80	008	ACQ.	2(b) - ?	W/M	1/?/M

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, RACE[4] AND # OF VICTIM(S)
58. Adams, Donald	81	056	15,10,5	2(c) - T	?/M	1/?/F
59. Britt, Belinda	81	056	5	2(c) - T	?/F	1/?/M
60. Brown, James	81	102	20,15, ACQ,10,5	2(b)(d) - NT	W/M	1/W/M
61. Bush, DonnieR.	81	097	DIS.	?, 6 - NT	?/M	2/?/M
62. Coles,Benjamin	81	034	10	2(d) - T	B/M	1/B/F
63. Daniel, L.C.	81	097/013	15	7 - NT	?/M	1/?/M
64. Gibson, Duke	81	102	ACQ.,10	2(b) - T	W/M	?
65. Graham, Norman	81	110	DIS	2(d) - T	?/M	1/?/F
66. Hensley, Arvil	81	097	10x3	6 - T	W/M	3/W/M
67. Johnson, Jonathan	81	034	20	- T	?/M	1/?/F
68. Johnson, Larry	81	037	HUNG JURY	2(a) - T	?/M	1/?/F
69. Leado,RodneyD.	81	048	20	2(b) - T	W/M	1/?/M
70. Little,Raymond	81	025	2,2	6	W/M	2/W/M
71. Miller, Betty	81	058	7	4 - NT	W/F	1/?/M
72. Michell, David	81	111	DIS	2(b) - ?	?/M	1/?/M
73. Newcombe, Donald	81	102	5	2(b)(d) - NT	W/M	1/W/M
74. Pace, Garland	81	048	15	-T	?/M	?
75. Parrett, Douglas	81	059	20	2(d)(e) - T	W/M	1/W/F
76. Rendor, Marilyn	81	056	27(tot.)	2(b) - ?	B/F	1/?/M
77. Roberts, Wm.E.	81	059	18	(1(b)) - T	W/M	1/?/M
78. Shearer, Larry	81	011	DIS	1(c)(d)(e)-T	W/M	1/W/F
79. Springer, Marcie	81	073	20	2(b) - ?	W/F	1/W/M
80. Sydnor, Joyce	81	056	32(tot.)	2(b) - ?	B/F	1/?/M
81. Weatherford, J. L.	81	056	DIS	2(d) - T	?/M	1/?/F
82. Wiley, Jackie	81	073	50(tot.)	2(b) - ?	W/M	1/?/M
83. Worthington, James	81	007	DIS	2(b) - T	W/M	1/?/M
84. Anderson, Paul	82	077	DIS	6,2(b) - ?	W/M	2/W/M
85. Caudill, Troy	82	095	20,10	6 - T	W/M	2/?/?
86. Jennings, Edward	82	005	20	1(b) - T	?/M	?
87. Kidd, Stewart	82	003	20	2(c) - T	W/M	1/W/F
88. Lambert, Gary	82	034	15	1(b) - ?	?/M	1/?/M
89. McCormick, Sammy	82	068	(Life)	2 - NT	W/M	1/W/F
90. Powell, James	82	077	DIS	1(b), 6 2(b) - ?	W/M	2/W/M
91. Powell, Leona	82	077	DIS	1(b),2(b), 6 - ?	W/F	2/W/M
92. Sizemore, James	82	058	3,2,3	2(a)(b)(c)-?	W/M	1/W/M
93. Sizemore Stevie	82	026/065	20/20	6-T	W/M	2/W/M
94. Sublett, Arbie	82	077	18	1(b) 2(b),6 - ?	W/M	2/W/M
95. Thomas, Riddle	82	061	DIS-INCOM	6 - T	?/M	1/?/M 1/?/F

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, RACE AND # OF[4] VICTIM(S)
96. Tuggle, James	82	024	ACQ.,5	2(a)(b),6-T	W/M	1/W/M 1/W/F
97. White, Ernest	82	056	10, DIS-IMM	2(c) - NT	B/M	1/W/M
98. Wright,Sherman	82	037	14	4 - NT	W/M	1/W/M
99. Davis, Natalie	83	069	20,10	2(b)(c)-?	?/F	1/B/M
100. Ells, Larry C.	83	056	3	2(b) - ?	W/M	1/W/F
101. English, Darrell	83	056	18,10	2(b) - T	B/M	1/W/M
102. Ferrell, Billy	83	056	5,10	1(b) - T	W/M	1/W/M
103. Flippin, Donnell	83	107	20	2(c) - T	B/M	1/?/?
104. Franklin, Cleveland	83	056	DIS	2(b) - NT	?/M	1/?/F
105. Gibson,Dewie W	83	067	DIS	?	W/M	1/W/M
106. Gooslin, Joseph	83	098	2	2(a)-T	W/M	1/W/?
107. Holly, Denver	83	102	(31)	6(VH) - T	W/M	2/W/F 1/W/M
108. Hutchens, Susan	83	034	5,5	6 - NT	W/F	2/W/M 1/W/F
109. Jackson, Joseph	83	081	5,20	2(c) - NT	B/M	1/B/M
110. Leach, Johnny	83	063/011	20,20,15	2(b)(c),6-T	W/M	1/W/M 1/W/F
111. Lewis, Doctor	83	034	35	6-T	B/M	2/?/M
112. McFarland, Karl	83	036	IMM	4-NT-C	W/M	1/W/F
113. Marshall Clyde	83	036	ACQ.	4-NT-C	W/M	1/W/F
114. Milton, Garry	83	056	5	2(b) - NT	B/M	1/W/M
115. Moore, Donald	83	056	DIS	1(b) - NT	W/M	1/W/M
116. Newsome, Forrester	83	098	ACQ.	1(b),2(c)-T	W/M	1/W/M
117. Quintero, Derrick	83	072	ACQ.	2(b)-NT	W/M	1/W/M
118. Pruitt, Debora	83	056	?(MST)	4 - ?	?/F	1/?/M
119. Settles, Roy	83	076	20,20 20,5	2(c),6 - T	W/M	1/W/M 1/W/F
120. Smith, JamesH.	83	056	DIS	2(b) - ?	W/M	1/W/F
121. Terrell, Jack	83	021	ACQ.	2(c) - ?	?/M	1/?/M
122. Williams, Frances	83	102	2	2(b) - NT	?/F	1/?/M
123. Crouch, Vernon	84	059	10	2(b) - NT	?/M	1/?/M
124. Dale, Gary	84	072	15	1(b) - T	W/M	1/B/M
125. Danner, Randy	84	097	ACQ.	2(c) - T	W/M	1/W/F
126. Fleming, Patty	84	024	30	2(b) - T	W/F	1/W/F
127. Ford, Margaret	84	034	10	4 - T	B/F	1/B/M
128. Gray, Betty	84	054	ACQ.	2(d)(b)- ?	W/F	1/B/F
129. Hall, Harlos	84	036	20	1(b) - T	W/M	1/W/M
130. Jacobs, Malcolm	84	069	20	?-T	?/M	1/?/F
131. King, Anthony	84	100	DIS	2(b) - ?	W/M	1/W/M

DEFENDANT	YEAR OF INDICTMENT	COUNTY[1]	SENTENCE	AGGRAVATING[2] FACTORS	SEX AND[3] RACE OF DEFENDANT	SEX, RACE[4] AND # OF VICTIM(S)
132. Reffitt, Jackie	84	072	DIS	1(b) - NT	W/M	1/B/M
133. Thomas, Jerry D.	84	107	10,10	2(b) - ?	W/M	1/W/M
134. Thomas, Rocky D.	84	107	10,10	2(b) - NT	W/M	1/W/M
135. Hopewell, Darnell	85	072	IMM	5 - NT	B/M	1/W/F

1. See County Code infra.

2. See Aggravating Factors Code infra.

3. & 4. M - Male
F - Female
W - White
B - Non-White
Numerals Denote Number of Victims

[1]COUNTY CODE

COUNTY	CODE	COUNTY	CODE	COUNTY	CODE
Adair	001	Hickman	053	Scott	105
Allen	002	Hopkins	054	Shelby	106
Anderson	003	Jackson	055	Simpson	107
Ballard	004	Jefferson	056	Spencer	108
Barren	005	Jessamine	057	Taylor	109
Bath	006	Johnson	058	Todd	110
Bell	007	Kenton	059	Trigg	111
Boone	008	Knott	060	Trimble	112
Bourbon	009	Knox	061	Union	113
Boyd	010	Larue	062	Warren	114
Boyle	011	Laurel	063	Washington	115
Bracken	012	Lawrence	064	Wayne	116
Breathitt	013	Lee	065	Webster	117
Breckinridge	014	Leslie	066	Whitley	118
Bullitt	015	Letcher	067	Wolfe	119
Butler	016	Lewis	068	Woodford	120
Caldwell	017	Lincoln	069		
Calloway	018	Livingston	070		
Campbell	019	Logan	071		
Carlisle	020	Lyon	072		
Carroll	021	McCracken	073		
Carter	022	McCreary	074		
Casey	023	McLean	075		
Christian	024	Madison	076		
Clark	025	Magoffin	077		
Clay	026	Marion	078		
Clinton	027	Marshall	079		
Crittenden	028	Martin	080		
Cumberland	029	Mason	081		
Daviess	030	Meade	082		
Edmonson	031	Menifee	083		
Elliott	032	Mercer	084		
Estill	033	Metcalfe	085		
Fayette	034	Monroe	086		
Fleming	035	Montgomery	087		
Floyd	036	Morgan	088		
Franklin	037	Muhlenberg	089		
Fulton	038	Nelson	090		
Gallatin	039	Nicholas	091		
Garrard	040	Ohio	092		
Grant	041	Oldham	093		
Graves	042	Owen	094		
Grayson	043	Owsley	095		
Green	044	Pendleton	096		
Greenup	045	Perry	097		
Hancock	046	Pike	098		
Hardin	047	Powell	099		
Harlan	048	Pulaski	100		
Harrison	049	Robertson	101		
Hart	050	Rockcastle	102		
Henderson	051	Rowan	103		
Henry	052	Russell	104		

[2]Aggravating Circumstances Code

1(a)	-- prior conviction of capitol offense
1(b)	-- substantial history
2(a)	-- arson
2(b)	-- robbery
2(c)	-- burglary
2(d)	-- rape
2(e)	-- sodomy
3	-- destructive device
4	-- profit
5	-- prison employee
6	-- multiple deaths
7	-- law enforcement officer
T	-- participated in killing
?	-- participation in killing unclear
NT	-- did not participate in killing
C	-- paid or arranged to have someone else killed

Trial Tips

For the Criminal Defense Attorney

EXPERT TESTIMONY AND THE ULTIMATE ISSUE RULE

Prior to about 1940 expert witnesses were forbidden to express an opinion on an ultimate fact in issue, on the theory that such testimony would "usurp the function" or "invade the province" of the jury. (McCormick on Evidence, p. 30 (3d edition)). These notions were criticized by Wigmore as "empty rhetoric", "impracticable and misconceived utterances which lack any justification in principle" (7 Wigmore pp. 18, 22) and a trend began about forty-five years ago to reject the "ultimate fact" rule. Today a majority of states permit an expert to state an opinion on an ultimate fact if the opinion will be of assistance to the jury (McCormick, p. 30).

Kentucky seemingly rejected the ultimate fact rule in Department of Highways v. Widner, Ky., 388 S.W.2d 583 (1965), in which the Court upheld the decision of the trial court admitting testimony that enlargement of a drainage ditch caused a landslide on plaintiff's property. Writing for the Court Commissioner Davis held,

"If it may be said that there still exists a general rule to the effect that a witness may not express an opinion upon an ultimate issue of fact, it is obvious that the extensive relaxation of the rule turns it into what amounts to an expression by the courts of reluctance or reserve in the receipt of even expert opinion which would seem to substitute the witness for the jury or the judge in the final decision. On this basis what would seem to be confusion and conflict may be looked upon as reflecting a trend toward a common sense and not an arbitrary view. This common sense view is to receive the opinion testimony where it appears that the trier of fact would be assisted rather than impeded in the solution of the ultimate problem." 388 S.W.2d at 586-7, quoting Jones on Evidence, section 418 (5th Ed.).

Pronounced dead in 1965, the ultimate fact rule has demonstrated the tenacity of a hardy weed. In Claycomb v. Howard, Ky., 493 S.W.2d 714, 717 (1973) the Court refused to let a police officer testify to the reasonableness of speed because "such testimony (would) invade the province of the jury," and in Koester v. Commonwealth, Ky., 449 S.W.2d 213, 216 (1970) the Court cited with approval an earlier case in which "we expressly declined to follow Wigmore (to) permit an expert witness to invade the province of the jury."

What is the status of the "ultimate issue" rule in Kentucky? In three

recent cases the Supreme Court accepted the proposition that an expert's opinion may be excluded under some circumstances when it touches on a "ultimate fact in issue." The meaning of these cases, however, is far from clear.

In Ford v. Commonwealth, Ky., 665 S.W.2d 304, 309 (1984) the Court affirmed a murder conviction in which a serologist testified for the state that "there was little chance that the skin pieces found at the scene could have come from anyone but the (defendant)." Writing for the Court, Justice Gant held that it was not an abuse of discretion for the trial judge to hold the serologist qualified to render such an opinion, though Justice Gant noted the serologist's opinion was "virtually destroyed" by testimony that "skin tissue, once removed, would shrink and the wound would enlarge". Justice Liebson dissented. Although the objection at trial had been to the qualifications of the serologist, the issue for Justice Liebson was whether the serologist should have been permitted to say that the skin tissue at the scene probably came from the defendant. In Justice Liebson's view the testimony of the serologist should have been restricted to a description of the tissue and wound and his measurements of same. 665 S.W.2d at 310-11.

Several months later Justice Liebson wrote for a unanimous Court in Hampton v. Commonwealth, Ky., 666 S.W.2d 737, 742 (1984), upholding the exclusion of the testimony of a "clinical social worker' that the defendant would not have become involved with the twelve year old victim because, based on (the defendant's) psychological development, ...the victim was too young to attract (the defendant)." In affirming the conviction Justice Liebson wrote that "the testimony as proferred went to the ultimate question of the guilt or innocence of the appellant, rather than being limited to a professional opinion regarding mental condition. As such it invades the province of the jury and is thereby improper." 666 S.W.2d at 742.

A year after Hampton the Court decided the case of Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985). As in Hampton, the offered testimony in Pendleton was that of a mental health specialist (a psychologist) that the defendant's psychological profile was inconsistent with the offense charged (sex offenses with his young daughter). As in Hampton the trial court excluded the testimony, the defendant was convicted, and the Supreme Court upheld the decision of the trial court affirming the conviction. Writing for the Court, Justice Wintersheimer said that

> "an opinion as to whether the accused had the ability or propensity to commit such an act is improper because it is an opinion on the ultimate fact, that is innocence or guilt. Consequently it invades the proper province of the jury. Such an opinion is not evidence of mental condition but is a factual conclusion of the witness on the ultimate issue before the jury which can be reached only consideration of all the facts." 685 S.W.2d at 553.

Justice Liebson, the author of the Hampton opinion, dissented on the ground that the psychologist's testimony did not run to the ultimate issue of guilt or innocence. As Justice Liebson viewed it, there is a material difference between testimony that the defendant "would not have become involved with the victim" (Hampton), and the testimony that the defendant's "psychological profile is inconsistent with the nature of the offense" (Pendleton). He characterized the testimony in Hampton (and

the testimony in the earlier case of Koester v. Commonwealth, Ky., 449 S.W.2d 213 (1969)) as running to guilt or innocence and therefore subjective, and the testimony in Pendleton as running to mental condition and (though the opinion does not so state) presumably objective.

Thus, in the three "ultimate issue" cases in the last year Justice Liebson wrote for the majority in Hampton and dissented in Ford (on the ground that the state expert improperly testified to an ultimate issue) and Pendleton (on the grounds that the defense expert's offered testimony would not have run to an ultimate issue). While it is difficult to generalize from Ford, Hampton and Pendleton (and the Liebson dissents), these apparently pro-prosecution cases hold a number of plusses for defense attorneys:

1) There is nothing in Pendleton indicating that a defense expert, if qualified, should not be allowed to testify that the defendant was insane or mentally ill at the time of the offense, as those terms or defined in

KRS 504.060. The Court did not overrule Buckler v. Commonwealth, Ky., 541 S.W.2d 935 (1976). Justice Wintersheimer wrote in Pendleton that the "case would have been an entirely different animal had the defense of insanity been relied on." 685 S.W.2d at 553. It is worth noting, however, that the Federal Rules of Evidence were amended in 1984 to preclude expert testimony "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." FRE 704(b). This rule change may influence the Kentucky Supreme Court to extend Pendleton to insanity cases.

2) Pendleton and Hampton accept the proposition that expert testimony may be helpful in ascertaining whether the defendant committed the offense or had the required mental state. The Court did not hold (as it did in Pankey v. Commonwealth, Ky., 485 S.W.2d 513 (1972) involving expert testimony on eyewitness identification) that expert testimony could not be of assistance to the jury. In Pendleton the Court cited with approval (685 S.W.2d at 553) Robinson v. Commonwealth, Ky.App., 569 S.W.2d 183 (1978) in which a conviction was reversed for refusal to allow a clinical psychologist to testify to the defendant's mental retardation, which affected the way she perceived the danger resulting from her conduct. The key, apparently, is to focus the expert testimony on a description of the defendant's mental state or psychological profile and avoid any assertion that a court might characterize as the equivalent of an opinion that a defendant "didn't do it" or "didn't have the mental state required." The psychologist in Robinson stayed on the right side of the line by restricting his testimony to a description of the defendant's mental retardation, which was "sufficient to permit a jury to conclude, but would not require it to conclude, that appellant was not mentally able to perceive the danger in her conduct." 569 S.W.2d at 185. Defense attorneys intending to introduce evidence of this sort should caution their witnesses against di-

rectly relating the defendant's mental state to the fact in issue. The testimony should be such as to invite the jury to reach the desired conclusion.

3) Defense attorneys can use the Court's language in Pendleton and Justice Liebson's dissent in Ford to argue that state experts should not be permitted to testify to ultimate issues. For example, in Pevlor v. Commonwealth, Ky., 682 S.W.2d 272 (1982) the Court held there was no error in permitting a doctor to testify that his findings were compatible with an incident of forcible intercourse or rape. A defense attorney can now resist such testimony by pointing out that in Pendleton the Court held that the re-vitalized ultimate issue rule would have been violated by testimony that the defendant's psychological profile was not consistent with the commission of sex offenses. On its face Pendleton stands for the proposition that experts must stop short of an opinion on an ultimate issue; such a rule, if enforced even-handedly, will restrict prosecution, as well as defense, witnesses. While the admission of expert testimony rests largely in the discretion of the trial court there are instances in which trial courts have been reversed for what an appellate court deemed to be the erroneous admission of expert testimony. Cf. Alexander v. Swearer, Ky., 642 S.W.2d 896 (1982), and Southwood v. Hanison, Ky.App., 638 S.W.2d 706 (1982), both auto accident point-of-impact cases. In Southwood, by the way, the Court of Appeals characterized the point of impact as the ultimate issue, 638 S.W.2d at 706.

BILL FORTUNE

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Trial Tip

TRADE SECRETS OF A TRIAL LAWYER - CROSS EXAMINATION

This is the 3rd of a series of 5 articles on trial skills. They originally appeared in NLADA's Cornerstone and are reprinted with permission.

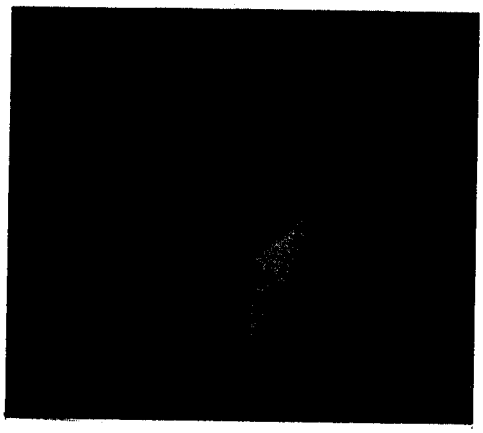
Too often cross-examination consists of unplanned (and/or purposeless) questions, unnecessary repetitions of direct testimony, and arguments with the witness. Such proceedings can cause far more harm than good to a case.

Our purpose here is to alert the attorney to considerations which should be part of the very being of a cross-examiner. (Time for analysis during cross-examination does not exist.) These are not rules (sometimes their violation will be precisely the right course), but rather are presumptions or 'red flags' which will help the attorney avoid mistakes.

Most bad cross-examinations result from failing to adhere to the following key points:

CROSS-EXAMINE BY OBJECTIVE - ADVANCE THE TRIAL PLAN

The general objective is to help the defense case and to hurt the prosecution's; the specific objective is to advance the position which will be argued in the closing argument. Starting from this objective will



STEVE RENCH

bring about purposeful, conservative cross-examinations which have impact and will build momentum.

GET FAVORABLE FACTS

Pleasure in destroying witnesses can make us forget to get from prosecution witnesses those facts which will bolster our positive position.

BE CONSERVATIVE

1. Consider using no cross-examination at all.

2. Ask no question with a purpose.

3. Permit no repetition of direct testimony; it will only emphasize the prosecution evidence.

4. Don't gamble on the hope of something good by asking questions without knowing the answers.

5. Don't as the one-question-too-many once the facts you need for closing are obtained. Experience teaches that the examiner will be hurt far more often than helped.

DON'T ARGUE WITH THE WITNESS

Arguing with a witness occurs when you have a conclusion with which you are trying to force with witness to agree. Deal only with the facts during the cross-examination. Reach the conclusion in your closing argument.

CONTROL THE WITNESS

The basic technique is asking short, plain, unambiguous, leading questions to which the answers will be "yes" or "no".

DON'T FIGHT LOSING BATTLES

Do not push beyond the areas in which the witness will agree with you. It is better left unsaid.

MAXIMIZE IMPACT

Plan how to maximize the impact and sustain the momentum; always end on a high note.

Here we have dealt with avoiding mistakes. We will next take up some of the positive techniques to advance in this very important art.

STEPHEN RENCH

Stephen Rench is a NCCD faculty member and former Deputy Colorado public defender. He is the author of many books including The Rench Book. He is now in private practice in Denver.

Trial Tip

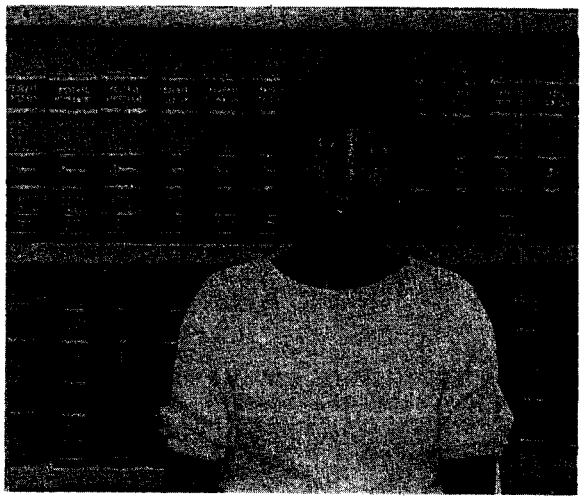
MAKE THE COMMONWEALTH PROVE VALUE - THE DEFENDANT IS WORTH IT

The offenses of theft by unlawful taking (KRS 514.030) and receiving stolen property (KRS 514.110) are Class A misdemeanors unless the value of the property is $100.00 or more in which case the offenses are Class D felonies. KRS 514.030(2); KRS 514.110 (3). The Kentucky Penal Code retains the common law use of the value of the property as determining the severity of the punishment. The Commentary (1974) to KRS 514.030 explains:

> In general, the greater the value of the property, the greater the harm to the victim. A standard based on value also has the advantage of simplicity and familarity [sic] of application over the alternative of a list of factors which would aggravate the penalty for theft. The $100 figure was chosen because it was the prior dividing line between petty and grand larceny.

A FAILURE OF PROOF THAT THE PROPERTY HAS A VALUE OF $100.00 OR MORE CAN MEAN THE DIFFERENCE BETWEEN CLASS D FELONY VERSUS CLASS A MISDEMEANOR.

A failure by the prosecution to prove that the property in question has a value of $100.00 or more can mean the difference between a conviction for a Class D felony versus a Class A misdemeanor. Therefore, it is important for trial counsel to be aware



JULIE NAMKIN

as to what constitutes sufficient proof of value.

The established rule is that the prosecution must prove the fair market value of the property at the time and place of the the theft in order to make its case. Perkins v. Commonwealth, Ky., 409 S.W.2d 294 (1966); See also Beasley v. Commonwealth, Ky., 339 S.W.2d 179 (1960); Braden v. Commonwealth, Ky.App., 600 S.W.2d 466 (1978). The fair market value is not the original cost of the property, nor its replacement cost, nor its sale price for junk. However, evidence of such cost or price is admissible as tending to establish the value or in the absence of an established market value. Beasley, supra.

In Perkins, supra, the stolen property was a chain saw. Although there was no direct evidence of the fair market value of the saw, the owner of the saw testified that he purchased the saw about one year ago for $169.00 and used it only occasionally. The saw was also introduced into evidence and shown to the jury so they could see its actual condition. Based on the condition of the saw and the uncontradicted purchase price, there was no error when the trial court refused to give the defendant's requested instruction on theft under $100.00.

Another way to establish value is by descriptive testimony of the property in question. In Lee v. Commonwealth, Ky.App., 547 S.W.2d 792 (1977) there was no direct proof as to the market value of the stolen televisions. Pictures were introduced but they revealed little about the condition of the television sets or even the exact size of their screens. Nor was the jury ever informed whether the televisions worked. The Court of Appeals concluded that the prosecution failed to provide sufficient descriptive testimony to enable the jury to make an informed conclusion as to value and reversed Lee's conviction for receiving stolen property over $100.00.

The Courts have repeatedly held that the testimony of property's owner is sufficient to prove value. In Brewer v. Commonwealth, Ky.App., 632 S.W.2d 456 (1982), the owner of the stolen motorcycle gave his opinion as to the value of his property. In addition, there was testimony that the motorcycle was only two months old when it was stolen, had only 3000 miles on it and was unwrecked. Likewise, in Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984), the owner of the stolen television gave her opinion that her television was worth over $100.00. In addition to her opinion, the owner described the television and told the jury how much she had paid for it eight months prior to the theft.

Where the property is not taken from an individual owner, but is taken from a store, different criteria are used to establish the value of the property. In such a situation it is possible that the retail value of the property can have a value of $100.00 or more and a wholesale value of less than $100.00. Although the retail price may represent a merchant's expert opinion of value, such an appraisal is not conclusive on the issue of value. In such a situation it is necessary to instruct on theft (or receiving stolen property) of $100.00 or more and on theft (or receiving stolen property) under $100.00. Irvin v. Commonwealth, Ky., 446 S.W.2d 570 (1969).

In a prosecution for knowingly receiving stolen property, the value of the property on the date the offender receives it is the proper date for determining the severity of the violation. In Tussey v. Commonwealth, Ky., 589 S.W.2d 215 (1979), a spool of insulated copper wire worth $1500.00 disappeared from a steel corporation. When the wire was discovered, it had been badly burned with most of the insulation destroyed. The accused did not receive the wire until after it had been burned. The evidence established that the wire had value only as scrap and was worth approximately $50.00 or $60.00. Accordingly, the accused could only be convicted for receiving stolen property under $100.00.

Where the Commonwealth's proof that the property has a value of $100.00 or more is questionable, or where the value is just slightly over $100.00 (See Smith v. Commonwealth, 284 Ky. 169, 144 S.W.2d 215 (1939), it behooves defense counsel to put on evidence that the property is worth less than $100.00. Depending upon the type of property, testimony of a pawnbroker should be considered. Moreover, in order to preserve the issue of failure of proof for appellate review, defense counsel must not only move for a directed verdict but specifically request an instruction on theft (or receiving stolen property) under $100.00.

In conclusion, the existing case law in this Commonwealth outlines what the prosecution must do to establish the value of the property in question. Therefore, it is up to defense counsel to hold the prosecution to

its proof or to come up with a creative way to refute said proof.

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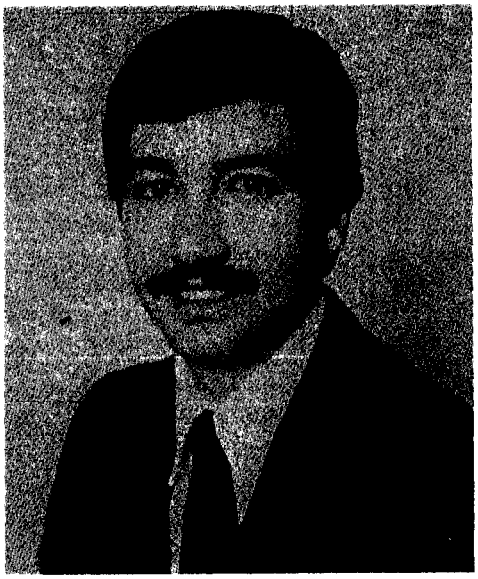
Trial Tip



JOHN A. TARANTINO

THE .10 PERCENT SOLUTION

This column examines recent court decisions which will have an impact on DWI trials. The cases cited here demonstrate the developing sophistication necessary for a successful DWI practice. The cases also demonstrate that a DWI trial is no longer a "small case." See 10 Litigation 3 (Spring 1984). This article appeared in the September/October 1984 issue of The Champion, and is reprinted here by permission.

I. California v. Trombetta, ___ U.S. ___, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

Trombetta is literally a "breath-taking" decision.

In Trombetta, the United States Supreme Court decided whether the due process clause of the fourteenth amendment requires the State to preserve potentially exculpatory evidence on behalf of Defendants. The particular question addressed was whether the due process clause required law enforcement officials to preserve breath samples of suspected drunk drivers before the results of the breath tests would be admissible in criminal prosecutions. Mr. Justice Marshall, writing for the majority, held that the due process clause does not require law enforcement agencies to preserve breath samples before test results may be introduced in evidence at trial. The Court based its holding on the following analysis.

The respondents all submitted to breath tests on an Omicron Intoxilyzer (Intoxilyzer), a breath analysis device approved for use in the State of California as well as many other states. The Intoxilyzer measures the concentration of alcohol in the blood of motorists suspected of driving under the influence of intoxicating liquors. Prior to conducting the tests the operator must follow these procedures:

> [T]he device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air; to assure that such a sample is obtained, the subject is required to blow air into the Intoxilyzer at a constant pressure for a period of seven seconds. A breath sample is captured in the Intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is in-

> dicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading for zero alcohol. The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.
> People v. Trombetta, 142 Cal. App. 3d 138 (1983).

The Court acknowledged that the preservation of a sample of breath was technologically feasible by noting that the California Department of Health had approved a device known as an Intoximeter Field Crimper-Indium Tube Incapsulation Kit which officers can use to preserve breath samples. The Court reviewed the holding of the California Court of Appeals which had concluded: "Due process demands simply that where evidence is collected by the State, as it is with the Intoxilyzer, or any other breath testing device, law enforcement officials must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the Defendant." Id., at 144. While acknowledging that it "never squarely addressed the Government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants," The Court found itself facing "a treacherous task of divining the import of materials whose contents is unknown and, very often, disputed." Id., at 3129; Cf. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). The Court analogized Trombetta to Killian v. United States, 368 U.S. 231 (1961). In Killian, the petitioner had been convicted of giving false testimony in violation of 18 U.S.C. Sec. 1001. A key element of the Government's case was an investigatory report prepared by the FBI. It was conceded that prior to the petitioner's trial, the agents who prepared the investigatory report destroyed the preliminary notes they had made while interviewing witnesses. The petitioner argued that the notes would have been helpful to his defense and that the agents had violated the due process clause by destroying the exculpatory evidence. The Court ruled that the destruction did not rise to the level of constitutional violation:

> If the agents' notes...were made only for the purpose of transferring the data thereon..., and if, having served that purpose, they were destroyed by the agents in good faith and in accord with normal practices, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right.
> Id. at 242.

The Court reasoned that to the extent that respondents' breath samples came into the possession of California authorities, it was for the limited purpose of providing raw data to the Intoxilyzer. The evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples. "As the petitioner in Killian wanted the agents' notes in order to impeach their final reports, respondents here seek the breath samples in order to challenge incriminating test results produced with the Intoxilyzer." The Court concluded by stating "given our precedents in this area, we cannot agree with the California Court of Appeals that the State's failure to retain breath samples for respondents constitutes a violation of the Federal Constitution." The Court reasoned that the California authorities did not destroy respondents' breath samples in a "calculated effort to circumvent the disclosure require-

ments established by Brady v. Maryland and its progeny." The Court found that in failing to preserve breath samples, the officers were acting "in good faith and in accord with their normal practices." Killian v. United States, supra at 242.

The Court held that "whatever duty the Constitution imposes on the states to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense."

In conclusion, the Court reasoned that in order to meet this standard of constitutional materiality, evidence must possess an exculpatory value that was apparent before the evidence was destroyed, and must also be of such a nature that the Defendant would be unable to obtain comparable evidence by other reasonably available means. The Court stated that neither of these conditions was met on the facts of this case. The Court seemed to base its reasoning on the limited number of ways in which an Intoxilyzer might malfunction: faulty calibration, extraneous interference with machine measurements, and operator error. The Court reasoned that respondents would be capable of raising these issues without resort to preservation of breath samples.

Justice O'Connor concurring stated that "rules concerning preservation of evidence are generally matters of state, not federal constitutional law." See United States v. Augenblick, 393 U.S. 348, 352-353 (1969). Justice O'Connor reasoned that the failure to preserve breath samples does not render a prosecution fundamentally unfair and "thus cannot render breath analysis tests inadmissible as evidence against the accused."

Trombetta strikes a devastating blow to those defendants challenging the state's failure to preserve samples. There is a federal due process violation where the state fails to preserve a sample of breath absent facts showing that the breath sample would possess exculpatory value apparent before its destruction, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Many states allow the defendant to have additional chemical tests performed at his own expense. If it can be shown on the facts of the case that the right is illusory, or if it can be shown that another breath testing device is not as "in-

THE WIZARD OF ID *by Brant Parker*

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herently reliable" as the Intoxilyzer, and is subject to a greater possibility of error in its analysis, Trombetta might be distinguished on its facts. See Trombetta, supra at note 10.

Finally, some states have held that the failure to preserve a breath sample violates state constitutional law. See Municipality of Anchorage v. Serrano, 649 P.2d 256 (Alas. Ct. App. 1982); see e.g., City of Lodi v. Hine, 107 Wis.2d 118, 318 N.W. 2d 383 (1982); Trombetta supra at note 12.

In the opinion of this writer where the technology exists for the preservation of breath samples, where the machines are designed to preserve a sample of breath for later retesting, and where the blood alcohol content becomes the crime itself, the failure of law enforcement officials to preserve a sample of breath for later retesting is tantamount to suppression of that evidence. Although there may be only a one in ten chance that the retesting of the sample will show a flaw in the breath testing device, each and every criminal defendant should be entitled to that opportunity. The fact that 90 percent, 95 percent or even 99 percent of the results are accurate should not substitute for proof beyond a reasonable doubt, where the blood alcohol content is the crime itself. See e.g. Jackson v. Virginia, 443 U.S. 307 (1979). The battle for preservation, however, must be fought and won in the state courts.

II. State v. Bristor, 691 P.2d 1 (Kan. Ct. App. 1984)

In Bristor the Kansas Court of Appeals held that a drunk driving suspect had a sixth amendment right to contact counsel before making a decision whether to submit to a blood alcohol test. The lower court suppressed results of a test administered to the defendant who was refused the right to telephone an attorney until after the tests had been completed. The majority limited the right to a reasonable opportunity where the request to speak to an attorney would not unduly interfere with the breath test result. The majority's ruling centered on its reasoning that the request to submit to the test constituted a "critical stage" of the prosecution. The majority stressed that under the implied consent law and its related statutes, a drunk driving suspect had important rights surrounding the decision to take the test. Since Kansas law imposed no duty upon the arresting officer to inform the suspect of these rights, it was only with counsel's help that the suspect could be protected. The court held as follows:

> We hold that the point at which an accused is asked to consent to a (blood alcohol test) is a critical stage in the prosecution of a DUI case at which the right to counsel attaches. First, prior to requesting the defendant's consent, Trooper Brooks had arrested the defendant and prepared a complaint and charging him with DUI. Thus, adversarial judicial proceedings had commenced, the defendant was faced with the "prosecutorial forces of organized society," and he found himself "immersed in the intricacies of the law." Second, a person in the defendant's position is possessed of certain rights. However, since the exercise of one of them may operate as a relinquishment of another, the accused needs the hands of counsel to avoid an irretrievable loss of important rights...
>
> We recognize that the human body assimilates alcohol in the blood at a fairly rapid rate. Accord-

ingly, the right we recognize today is something of a limited right. The accused must be given a reasonable opportunity to contact and to consult with an attorney before being required to elect whether to consent to the (blood alcohol test). In exercising this right, the accused too must act with reasonableness. Furthermore, vindication of this right does not necessarily mean face to face consultation with an attorney. Sometimes the accused will have to settle for telephonic communication when the delay inherent in arranging a face to face meeting would unduly interfere with the administration of the blood alcohol test.

THE BRISTOR DECISION HAS IMPORTANT APPLICABILITY TO IMPLIED CONSENT HEARINGS AS WELL.

The Bristor decision has important applicability to implied consent hearings as well. Using the Bristor rationale, it can be argued that if the defendant refuses to submit to the test, after having requested and having been refused the right to counsel, the refusal should also be dismissed. See Heles v. South Dakota, 530 F.Supp. 646 (D.S.D. 1982) vacated as moot, 682 F.2d 201 (8th Cir. 1982), see e.g. Moore v. State Motor Vehicle Division, 638 P.2d 1171 (Or. 1982). This right to counsel, as stated in Bristor may not, however, unduly postpone the administration of the test. See Zahtila v. Motor Vehicle Division, 560 P.2d 847 (Colo. 1977); Lund v. Hjelle, 224 N.W.2d 522 (N.D. 1974).

III. People v. Carlson, 677 P.2d 310 (Colo. 1984)

In Carlson the Colorado Supreme Court ruled that police may not require a driver to submit to a field sobriety test, where the driver is asked to perform a series of physical tests and maneuvers designed to determine whether he is intoxicated, without probable cause to believe he has been driving under the influence of alcohol. Although the court concluded that a reasonable suspicion is sufficient to permit the officer to stop the motorist and order him to get out and walk to the rear of his vehicle, Pennsylvania v. Mimms, 434 U.S. 106 (1977), where the test "involved an examination and evaluation of a person's ability to perform a series of coordinative physical maneuvers, not normally performed in public or knowingly exposed to public viewing..." and where the maneuvers "are those which the ordinary person seeks to preserve as private, there is a constitutionally protected privacy interest in the coordinative characteristics sought by the testing process."

The court distinguished the field sobriety test from the "patdown" search in Terry v. Ohio, 392 U.S. 1 (1968). The court reasoned that patdown searches are so limited in scope as to be proper upon less than probable cause. The court reasoned that a roadside sobriety test cannot be so categorized since it must be deemed a full "search" for purposes of the fourth amendment, thereby requiring probable cause.

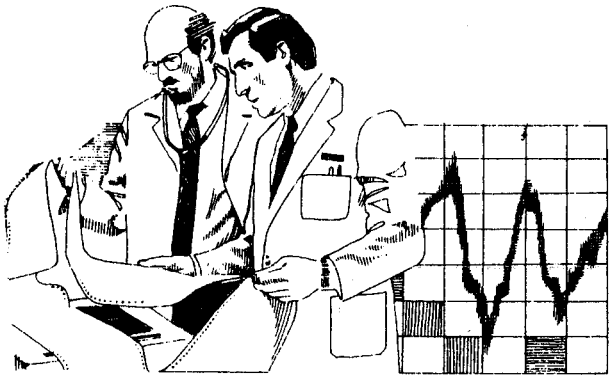
Justices Rovira and Chief Justice Ericson, concurred and dissented. They agreed that an officer may order a motorist to walk away from his vehicle upon reasonable suspicion, but held that probable cause is not a prerequisite to a valid roadside sobriety test.

Based on Carlson, if there is no probable cause to ask the driver to step from his vehicle and to take the

field test, all results of the test and flowing from the tests will be suppressed. Id.

IV. Commonwealth v. Neal, 464 N.E.2d 1356 (Mass. 1984)

In Neal, the Supreme Judicial Court of Massachusetts held that the admissibility of test results obtained from a Smith and Wesson model 900 A Breathalyzer to determine the blood alcohol content of a suspected drunk driver is "contingent on presentation by the state that an adequate foundation has been laid establishing that the machine was not so susceptible to RFI (Radio Frequency Interference) as to create a significant risk that the result was inaccurate and unreliable." The Massachusetts Supreme Judicial Court rejected the defendant's contention that the results could only be admitted if the machine had been "hardened" against RFI. The court



reasoned that less drastic alternatives could sufficiently demonstrate the accuracy of the machine. The court recommended that a second corroborative test of the driver's breath after a correct simulator reading would establish an adequate foundation, although a second test is not required. See Fitzgerald and Hume, "The Single Chemical Test for Intoxication: A Challenge to Admissibility," the Champion (June, 1984).

The court stated that "at a minimum the prosecution should be prepared to demonstrate the RFI testing procedures recommended by Smith and Wesson and the customer advisory had been followed. See Tarantino and Kelly, "How to Get the State to Dismiss Your Case and Pay Your Attorneys' Fees," the Champion (September/October, 1983). The testing procedures should consist of two testing programs. The first is designed to measure susceptibility to RFI. The second is to check the effects of radio frequencies transmitted by sources associated with police stations. See also Romano v. Kimmelman, 35 Cr.L. 2120 (N.J. 1984).

V. State v. Werkheiser, 474 A.2d 898 (Maryland Ct. App. May 1984)

In Werkheiser the court refused to order the dismissal of drunk driving charges as a sanction for the police officer's failure to order the taking of a blood sample from an unconscious suspect. A Maryland statute provided that where an officer has reasonable grounds to believe that an individual had been driving while intoxicated, and that individual is unconscious or otherwise incapable of refusing to take a test, "the officer shall... direct a qualified medical person to withdraw blood for a chemical test..." See Md. Code Sec. 16-205.1(d)(1)(iii).

Although the court agreed that the word "shall" imposed a mandatory duty on the officers, it decided that dismissal was an inappropriate sanction. The court reasoned that although the legislature showed a strong interest in providing prosecutors with scientific evidence of intoxication, there was nothing to

indicate that a chemical test is a prerequisite to prosecution. The court stated: "To hold otherwise would be to transform the accused's right to due process into a power to compel the State to gather in the accused's behalf what might be exculpatory evidence." Rather, the court concluded that the appropriate remedy would be to allow an inference that had the test been administered, the result would have been favorable to the defendant. The court stated that this inference must be weighed along with all other evidence, including the officer's reasons for not complying with the statute.

CONCLUSION

To protect your client's rights in a DWI case, all aspects of the case from the initial stop to the arrest, booking and breath test must be analyzed thoroughly. As these cases indicate, significant constitutional issues can and do arise in the DWI context. Be alert. Be creative, and be ready to recognize, appreciate and take advantage of any constitutional deficiencies applicable to your client's case.

JOHN TARANTINO

* * * * * *

JAILED DRUNK DRIVERS PRONE TO SUICIDE, CONSULTANT SAYS

By Jacqueline Duke

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The national campaign against drunken driving has inadvertently pushed up the jail suicide rate among a group that already posed a high suicide risk when incarcerated, a jail consultant said yesterday.

At a workshop in Lexington, Dave Kalinich, a suicide-prevention expert and consultant with the National Institute of Corrections (NIC), discussed the problem of jailing drunken drivers and the local government's liability in suicide cases.

"If someone dies in your jail, you're going to get sued even if it's not your fault. It's a lucrative thing," Kalinich told a small group of Fayette County Detention Center officials and government lawyers. Kalinich noted that awards handed down in jail death cases in other jurisdictions had reached $800,000.

Members of the Urban County Council, who have voiced concern about various jail problems, including deaths there, were invited to attend the workshop. Only Councilman Joby Gastineau showed up, although Vice Mayor Pam Miller attended a workshop for the jail staff earlier in the day.

The workshop was conducted as part of jail officials' efforts to improve the suicide-prevention program and to reduce the risk of lawsuits. Ray Sabbatine, assistant jail director, said some staff members would receive further training from the NIC and then would develop a training program on suicide prevention.

Twenty-two inmates have died at the jail on Clark Street since it opened in 1976. Of that number, eight have committed suicide. None of the inmates who committed suicide was arrested for drunken driving, although one was charged with public intoxication, Sabbatine said.

In some cases, guards failed to make regular cell checks or to take action to provide inmates with prompt medical attention to prevent the deaths, according to a Herald-Leader article in 1984 that detailed the jail deaths. In the majority of cases, no autopsies were performed, the article said.

The article prompted jail officials to seek a consultant's study on jail conditions and problems. The consultant, Thomas Reid, who also spoke at the workshop yesterday, concluded that the jail had too many inmates, too little staff and a design that made it difficult to observe and supervise prisoners. He also said the jail had a "rather high" death and suicide rate.

A government cannot use its ignorance of jail problems as a defense, and its failure to correct acknowledged problems leaves it vulnerable to lawsuits, Reid said. And jails constantly lose, he said.

"If they're made aware of it (and) don't act on it, that's deliberate indifference," Reid said.

The Urban County County Government, which has authority over much of the jail's operations, has been made aware of staff shortages, overcrowding and other problems as a result of Reid's report.

"It's going to be real easy to prove there was not enough staff" if a lawsuit is filed, Reid said. "The staff themselves are not safe."

Reid called deficiencies at the jail a "time bomb waiting to go off."

"Something's going to happen eventually."

In response to the consultant's report, the council has appropriated $94,000 to hire six additional jail guards, to provide round-the-clock medical care and to hire specialists to help identify suicide risks. Reid said the jail should hire 18 more guards.

His recommendations would cost $400.000 to put in place.

With the six new guards, the number has increased to 42. The jail has a staff of about 100. Its current budget is 3.5 million. By comparison, the county jail in Albuquerque, N.M. - a city of similar size - has a staff of 300 and an annual budget of $9 million, Reid said.

Despite the local government's steps to correct problems, "They still have been put on notice that this is not enough," Sabbatine said. "Given the level of scrutiny and the recommendations made by the national consultants, who now have officially informed government of the liability we face, the Urban County Government's liability is greater now than it was."

Both Kalinich and Reid said drunken drivers should be housed in a separate facility to reduce the chances for suicide. Several factors make drunken drivers susceptible to suicide, Kalinich said. Many will experience an alcohol-induced depression, which, coupled with the guilt of having been arrested and placed among criminals, could increase the risk of suicide.

First-time offenders and people of good standing in the community who are arrested also are likely candidates for suicide, Kalinich said.

"Short-term (inmates) are the problem," Kalinich said.

The local government received a $1 million state grant last year to build a minimum-security jail annex to house drunken drivers, people charged with public intoxication and low-risk prisoners.

In no country perhaps in the world is law so general a study [as in America].... This study renders men acute, inquisitive, dextrous, prompt in attack, ready in defense, full of resources. - *EDMUND BURKE*

Trial Tip

SPOUSE ABUSE SYNDROME

The defense of a woman who suffers from the battered spouse syndrome must be set up very carefully, given the nature of the defense. In a sense the defense is risky, in that it usually serves to justify, what are on its face some very unjustifiable facts. Hence, a failure to explain why, setting your sleeping husband's bed on fire is an act of self defense, will cause your client to go the penitentiary.

After years of debating how to present this evidence, and some actual trial experimentation, I think I've learned some valuable lessons.

The first lesson is: Do not expect a jury to understand the syndrome without being especially careful that it is explained to them in as understandable terms as possible. This is not easy, because on its face, the burning bed case, does not sound like self defense. In fact it is self defense, in that because of the constant batterings, the woman feels like she is always under attack.

ON ITS FACE, THE BURNING BED CASE, DOES NOT SOUND LIKE SELF DEFENSE. IN FACT IT IS SELF DEFENSE.

These are difficult concepts for a juror to digest. If the evidence is presented carefully and coherently, the jury will come to understand, and hopefully justify, some typically unjustifiable facts.

NED PILLERSDORF

Typically, battered spouse syndrome cases involve facts that are hard to justify. If the syndrome is not properly presented, your defense becomes... "that because he beat her previously, she had a right to kill him." If a jury perceives that as your defense, you have just lost your case.

The way to overcome this problem is the proper use of expert witnesses. I generally prefer a social worker who deals with battered spouses on a daily basis. A psychologist or psychiatrist can be used as a compliment to her/his testimony, to the extent they will assure the jury the syndrome exists.

1) In opening statement, take considerable time to explain the syndrome in as understandable terms as possible, and relate it to your client.

2) Have your expert describe some of the symptoms of the syndrome. I would suggest limiting the number of symptoms to about five or six, which are factually relevant in your case. This limitation will tend to condense your case in a way as to hopefully make it more understandable. Some symptoms that might be discussed are:

a) That beatings generally begin around the time of the first child's birth.

b) The beatings occur in predictable cycles, and may become more random and violent.

c) The woman's low self-esteem results in her actually feeling she deserves the sporadic beatings.

d) Why women who were abused as children, often marry abusers. That is what they can best relate to.

Following the discussion of the symptoms, the point should then be made that women who experience this syndrome tell remarkably the same stories. This point tends to bolster the credibility of the syndrome itself.

Following this discussion, your expert should then be asked how your client's particular case fits into each of the symptoms, with a related emphasis on the fact that your client's experiences are similar to others who have the syndrome.

Hopefully, once this is established your client's actions have become more understandable and justifiable to the jury.

In your closing argument remind the jury that in Kentucky we have a subjective self defense standard, and that the existence of the syndrome makes your client's actions predictable and justifiable.

NED PILLERSDORF

Ned Pillersdorf is a former Assistant Public Advocate out of our Pikeville office. He is a 1980 graduate from the University of the Pacific Law School and has been on the faculty at numerous DPA training seminars.

Trial Tip

CURRENT DEFENSE STRATEGIES TO SHORT CIRCUIT ELECTRONIC TESTIMONY BY YOUNG VICTIMS IN SEX TRIALS

This the final of a two part series on testimony of children in sex cases.

As discussed in the last issue, the 1984 Kentucky General Assembly enacted legislation which created three separate evidentiary innovations in the trial of sexual offenses where the alleged victim at the time of the crime was a child twelve years of age or younger. KRS 421.350 (eff. 7-13-84). These three evidentiary changes apply only to the statements or testimony of the alleged child victim. KRS 421.350(1).

First, the statute creates an electronic exception to the hearsay rule by allowing in evidence at trial a filmed or videotaped pre-trial, extra-judicial oral statement of the alleged child victim under certain specific circumstances. KRS 421.350 (2). That portion of the statute was analyzed in detail in the last issue of The Advocate.

The second major section of this law provides the trial judge with the discretion to order, on motion of the attorney for any party, that the testimony of the alleged child victim be taken outside the courtroom, but televised simultaneously by closed circuit equipment to the judge and the finder of fact in the proceeding. KRS 421.350(3).

This statute contains a third provision which similarly gives the trial court the discretion, upon the motion of any party's counsel, to order that the testimony of the alleged child victim be recorded, both visually and orally, for a later showing in the courtroom before the judge and the jury. KRS 421.350(4).

If the court directs the testimony of the child victim to be taken under either subsection (3) or (4) of KRS 421.350, the child may not be compelled to testify in court at the proceeding for which the testimony was taken. KRS 421.350(5).

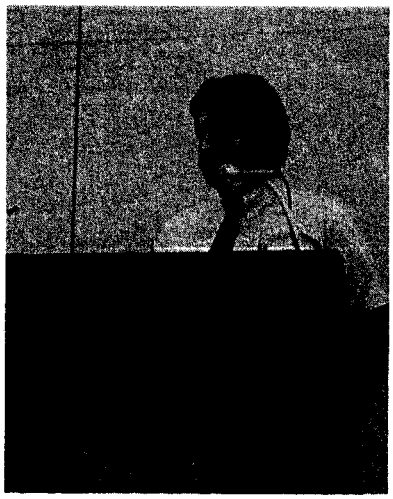
For lack of better nomenclature, these two statutory provisions will be designated in this article as either "closed circuit television testimony" (KRS 421.350(3)) or "previously recorded testimony" (KRS 421.350(4)).

In both instances, the statute specifically enumerates the persons who may be be present in the room with the child during his or her testimony. "Only the attorneys for the defendant and for the state, persons necessary to operate the [closed circuit or recording] equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony." KRS 421.350(3) & (4). Of those present, "[o]nly the attorneys may question the child." KRS 421.350 (3).

The persons "operating the [closed circuit or recording] equipment" must "be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them." KRS 421.350(3) & (4).

Under the statute, the court must "permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child [witness] cannot hear or see the defendant." KRS 421.350(3) & (4).

When "previously recorded testimony" is used, the court must "ensure" that:



VINCE APRILE

(1) the recording is both visual and oral;

(2) the statement is recorded on film, videotape or other electronic means;

(3) the recording equipment was capable of making an accurate recording;

(4) the operator of the equipment was competent;

(5) the recording is accurate and unaltered;

(6) every voice on the recording is identified; and

(7) each party is afforded an opportunity to view the recording before it is shown in the courtroom. KRS 421.350(4)(a)-(d).

Initially, KRS 421.350 should be challenged on the grounds that it is an unconstitutional infringement by the legislature on the inherent powers of the judiciary to prescribe rules of practice and procedure for the courts of Kentucky.

"'Rules of practice and procedure are, fundamentally, matters within the judicial power and subject to the control of the courts...'" Trent v. Commonwealth, Ky.App., 606 S.W.2d

386, 387 (1980), quoting Arnett v. Meade, Ky., 462 S.W.2d 940, 946 (1971).

The Kentucky Constitution divides the three powers of government-legislative, executive, and judicial - into three separate and distinct departments. Ky. Const., §27. Each department is prohibited from exercising any governmental power properly belonging to another. Ky. Const., §28. The judicial power of the Commonwealth is "vested exclusively" in the Court of Justice, which has for its executive head the chief justice of the Kentucky Supreme Court. Ky. Const., §§109, 110. The Kentucky Supreme Court has "the power to prescribe... rules of practice and procedure for the Court of Justice." Ky. Const., §116. The Kentucky Rules of Criminal Procedure, enacted by the Kentucky Supreme Court, "govern procedure and practice in all criminal proceedings in the Court of Justice." RCr 1.02(2).

The Kentucky Rules of Criminal Procedure prescribe in criminal cases the grounds for taking depositions (RCr 7.10), the method of taking depositions (RCr 7.12 & 7.18), and the use of depositions (RCr 7.20). These procedural rules have preempted the field of depositions in criminal trials. Additionally, the Rules recognize that "[t]he order authorizing the taking of a deposition shall contain such specifications as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant." RCr 7.12(1). In this context, the provisions of KRS 421.350 permitting the substitution of prior recorded testimony or closed circuit television testimony for the child victim's live in-court testimony are unconstitutional intrusions by the legislature into the province of the judiciary. See Trent v. Commonwealth, supra.

The statute in question makes no provision for instantaneous private communication between defense counsel and the defendant. Although the defendant must be able to observe and hear the testimony of the child "in person," he will be placed in a setting where "the child cannot hear or see" him. KRS 421.350(3) & (4).

The United States Supreme Court "has uniformly found constitutional error without any showing of prejudice when [defense] counsel was either totally absent, or prevented from assisting the accused during a critical state of the proceeding." United States v. Cronic, 104 S.Ct. 2039, 2047 n. 25 (1984). The "[g]overnment violates the right to effective assistance [of counsel] when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984), citing, inter alia, Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess).

Absent provisions that guarantee the defendant and his attorney instantaneous private communications during the taking of either the child victim's deposition or his closed circuit testimony, this procedure deprives the defendant of his right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the federal constitution. See also Ky. Const., §11.

Obviously, any defendant in a state criminal case has the federal constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). As a result, a State may not "constitutionally hale a person into its criminal courts and there force a

lawyer upon him, even when he insists that he wants to conduct his own defense." Id., 95 S.Ct. at 2527.

KRS 421.350 attempts to guarantee the federal constitutional rights of the defendant by the use of an agent, his defense lawyer. But that formulation is totally unworkable where a defendant elects to proceed pro se - without the assistance of appointed or retained counsel. In that situation, the defendant, acting as his own attorney, would have to be entitled to confront and cross-examine personally the child victim/witness.

In this scenario, the defendant who elects to exercise one federal constitutional right - his right to effective assistance of counsel - suffers the significant reduction in another federal constitutional guarantee - the right of confrontation and cross-examination. In comparable circumstances, the United States Supreme Court has held "it intolerable that one constitutional right should have to be surrendered in order to assert another." See Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968).

In any event, the limitations on the defendant's presence at the testimony of the child victim under the provisions of KRS 421.350 (3) and (4) may not be applied against a defendant who is representing himself. This type of uneven application of a rule of procedure is patently discriminatory and in violation of federal constitutional due process guarantees.

Both the "closed circuit televised" testimony and the "prior recorded" testimony provisions of KRS 421.350 violate a defendant's right under the state constitution "to meet the witnesses face to face." Ky. Const., §11. The actual language of the pertinent portion of section eleven of the Kentucky Constitution is that "[i]n all criminal prosecutions the accused has the right... to meet the witnesses face to face" (emphasis added). It would require judicial legerdemain to reconcile a statutory provision which commands the court to "ensure that the child [witness] cannot hear or see the defendant" with the constitutional proviso that the defendant be allowed "to meet" each witness "face to face." "The right of confrontation is limited to witnesses and one who would be a witness must confront the accused." Flatt v. Commonwealth, Ky., 468 S.W.2d 793, 794 (1971).

Both of the statute's proposed alternatives to the live, in-court testimony of a child victim/witness violate the defendant's federal constitutional rights to confrontation and cross-examination of a witness.

"The Confrontation Clause [of the Sixth Amendment] reflects a preference for face-to-face confrontation at trial." Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980). "In short, the Clause envisions 'a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'" Id., 100 S.Ct. at 2537-2538, quoting Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895); (emphasis added).

By its very nature the camera, whether for simulcast or delayed showing, will disrupt the ability of the jurors to evaluate the demeanor

and manner of the child witness. First, the projected image of the witness on either a television or movie screen is one-dimensional and less than lifelike. Second, the camera operator, rather than each individual juror, will determine the focal point of each juror's attention. If the camera operator selects a close-up of the witness' face, then the jurors will be deprived of a view of the witness' entire body, including hand and leg movements. Conversely, if the cameraperson chooses a shot of the witness' entire person, then the jurors will lack the ability to watch closely specific aspects of the witness' face, such as eyes, lips, and mouth. Third, by filming or televising only the witness, the camera operator will preclude the jurors from observing any of the external stimuli present in the other room, such as the prosecutor or other persons "whose presence would contribute to the welfare and well-being of the child." Consequently, while the child on the screen may appear to the jurors to be gazing off into space, an observer in the same room with the witness would be aware that the witness is actually looking to his or her parent or psychiatrist for cues, approval, or other nonverbal assistance.

The jurors will also be confused about the circumstances of the child's testimony whether it is presented via closed circuit television or prior recorded testimony. Under either method the prosecutor and defense attorney as well as the child witness will be heard and/or seen by the jury on either the television monitor or movie screen, but the defendant will not be shown. The jurors will naturally assume the defendant was present and in full view of the witness during the child's testimony since they will be unaware of the elaborate safeguards taken to shield the witness from the physical presence of the defendant. During a simultaneous closed circuit television view of the child victim's testimony, the jurors will know that the defendant is not present in the courtroom and will undoubtedly assume that the defendant is with his attorney in the presence of the testifying witness. If the child victim becomes emotionally distressed while testifying on camera, the jurors may erroneously attribute this reaction to the visible presence of the defendant. This would be a patently incorrect assumption, but an understandable one under these confusing circumstances. Yet judicial

endeavors to correct this misperception, such as an admonition to the jury explaining that the defendant is not within the sight or hearing of the testifying child, would be equally prejudicial to the defendant since it would create the impression that the mere physical presence of the defendant could or would have an adverse effect on the child's ability to testify. Such an admonition would be in derogation of the defendant's federal constitutional right to a presumption of innocence. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

Face-to-face confrontation also envisions a courtroom situation where in view of the jury the defendant and the prosecution witness can see each

other during the testimony. "Confrontation at trial ... operates to ensure reliability in other ways." Ohio v. Roberts, supra, 100 S.Ct. at 2538 n. 6. For example, "'the requirement of personal presence ... undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial.'" Id.

The Confrontation Clause was "intendded to secure the right of the accused to meet witnesses face to face ..." Dowdell v. United States, 221 U.S. 325, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911).

"The right of cross-examination reinforces the importance of physical confrontation." United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979). "Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." Id. "This feature is a part of the sixth amendment right of cold, logical cross-examination by one's counsel." Id. "A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm." Id.; (emphasis added). In the Benfield case "the defendant was not allowed to confront the witness face to face and the witness was apparently unaware that her testimony was being monitored by the defendant." Id. at 821-822. "The partial confrontation allowed was inadequate to test ... her testimony." Id. at 822.

"Basically the confrontation clause comtemplates the active participation of the accused at all stages of the trial, including the face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel." United States v. Benfield, supra at 821.

Physical confrontation between the witness and the accused gives "the fact-finder the opportunity of weighing the demeanor of the [witness] when forced to make his or her accusation before the one person who knows if the witness is truthful." Herbert v. Superior Court of Sacramento County, 117 Cal.App. 3rd 661, 671, 172 Cal.Rptr. 850 (1981). "A witness' reluctance to face the accused may be the product of fabrication rather than fear or embarrassment." Id.

In Herbert, the five-year-old child victim of sexual offenses was "reluctant or unable to testify" and "disturbed ... in particular with the presence of the defendant." Id., 117 Cal.App. 3rd. at 664. At the preliminary hearing the magistrate devised a seating arrangement that precluded the witness and defendant from seeing each other during the child's testimony. "By allowing the child to testify against [the] defendant without having to look at him or be looked at by him, the trial court not only denied [the] defendant the right of confrontation but also foreclosed an effective method for determining veracity." Id., 117 Cal.App. 3rd at 668.

KRS 421.350 grants the trial court the discretion to employ testimony by either closed circuit television or prior recording simply on the basis of a "motion" by any party's counsel. The statute in question does not even require that the moving party show "good cause" for the ruling. In fact, KRS 421.350 contains no requirement that the court, before granting the motion, must find that testifying outside both the actual presence of the jury and the apparent presence of the defendant is necessary for the particular child witness. Instead

where the victim/witness was twelve years of age or younger at the time of the offense and the alleged crime was a sexual offense against the child, the statute presumes in every case that the child cannot testify in view of either the jury or the defendant. Clearly the statute does not provide a "necessity" exception to the federal constitutional guarantee of confrontation.

Similarly, the statute is not premised upon a defendant's waiver or forfeiture of his confrontation rights. A defendant cannot be automatically deprived of his personal right of confrontation on the basis that he is charged with a sexual offense against a child who is twelve years old or younger. "To find a waiver or forfeiture" under such circumstances "would destroy the right of confrontation in nearly all cases of alleged [sex] crimes against persons" twelve and younger. United States v. Benfield, supra at 821. Such a statutory formulation also violates the presumption of innocence mandated by the federal constitution since the nature of the charge triggers the loss of the confrontation right without reference to the witness' individual problems.

"In the usual case (including cases where prior cross-examination has occurred), the prosecutor must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." Ohio v. Roberts, supra, 100 S.Ct. at 2538; (emphasis added).

The "unavailability" of a witness must be demonstrated on a case-by-case individual basis, not on a statutory generalization about a particular class of witnesses. Interestingly, the statute does not require that the witness be twelve years of age or less at the time of the testimony, but only at the time of the alleged sexual crime. Apparently a nineteen year old victim/witness who was twelve at the time of the charged offense would qualify for the protection of this statute.

Defense attorneys should be alert to possible ex post facto and retroactive applications of this statute. Since KRS 421.350 did not become effective until July 13, 1984, this statute may not be applied to the trial of offenses which allegedly occurred prior to that date.

Article 1, Section 10 of the United States Constitution prohibits a State from passing any "ex post facto Law." This constitutional prohibition is a limitation upon the powers of state legislatures. Section 19 of the Kentucky Constitution states that "[n]o ex post facto law ... shall be enacted." See Commonwealth v. Brown, Ky., 619 S.W.2d 699, 703 (1981).

KRS 421.350 substantially reduces the amount and degree of proof necessary for conviction and its application to crimes allegedly perpetrated before July 13, 1984 is prohibited by the ex post facto provisions of both the state and federal constitutions.

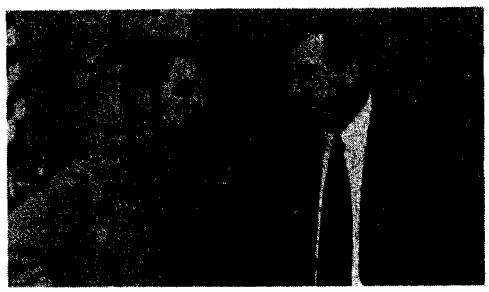
In Kentucky, "[n]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080 (3). Nothing in the act of the legislature enacting KRS 421.350 "even hints at retroactive application, much less expressly declares other than prospective application." Hudson v. Commonwealth, Ky., 597 S.W.2d 610, 611 (1980); (emphasis in original).

Since there is no statute of limitations on felony offenses in Kentucky, a high probability exists that a number of cases will arise in which prosecutors erroneously attempt to apply the provisions of KRS 421.350 to defendants whose crimes allegedly took place before July 13, 1984. KRS 500.050(1).

1985 DEATH PENALTY SEMINAR

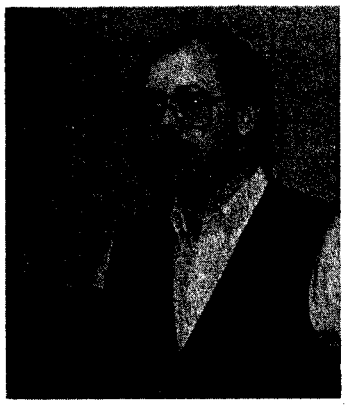
March 22-24, 1985 marked the fourth time we have met in the eight years since our "guided discretion" death penalty law was passed in 1976. 90 participants met to talk about what works and doesn't in the scenic state park at Natural Bridge, Kentucky. Dr. William Olsen of U. of L. spoke to us about possible uses of neurological defenses in mitigation. Psychologists Ron Dillehay and Craig Haney spoke on jury selection and persuasion. They also facilitated the most fascinating aspect of the seminar -- a wide ranging question and answer session with columnist Bob Hill of the Louisville Courier Journal who served on a jury who sentenced a man to death. David Bruck's moving key note speech helped put it all in perspective.

CRAIG HANEY, CAL. & DAVID BRUCK, S.C.

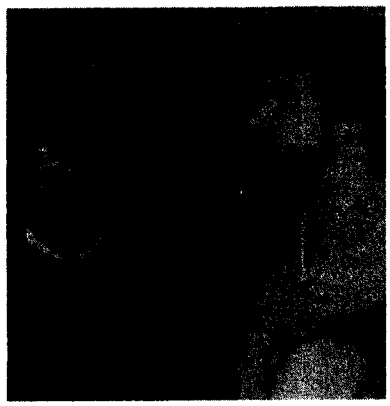


PSYCHOLOGIST/LAWYER CRAIG HANEY TALKS WITH CAPITAL TRIAL JURY FOREMAN, BOB HILL

RICHMOND CONTINGENT: CHARLIE COY AND ERNIE LEWIS

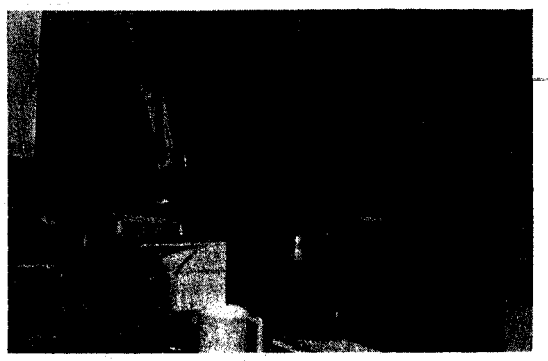


BILL RADIGAN



KEVIN MCNALLY AND JURY EXPERT RON DILLHAY

BETTE NIEMI ADDRESSES PARTICIPANTS



DR. BILL OLSEN, CHAIRMAN, DEPT. OF NEUROLOGY, UNIVERSITY OF LOUISVILLE

OVERTURNING GRAVITY

* * * * *

A lawyer without history or literature is a mechanic, a mere working mason; if he possess some knowledge of these, he may venture to call himself an architect.

- Sir Walter Scott

* * * * *

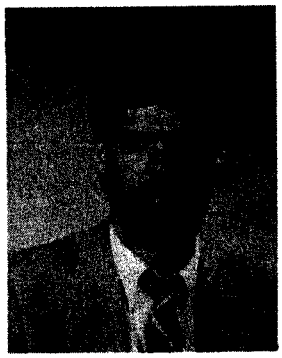
This column is about the architecture of advocacy.

It is hoped that the literature and poetry selected for presentation in this and future installments will be of interest to public defenders and criminal defense attorneys.

Two works are reprinted below. The first is a prose piece by Franz Kafka, author of The Trial, entitled "Advocates." Hauntingly beautiful, this parable is a powerful commentary on the universal inaccessibility of Justice. The ending is surprisingly inspirational.

ADVOCATES

I was not at all certain whether I had any advocates, I could not find out anything definite about it, every face was unfriendly, most people who came toward me and whom I kept meeting in the corridors looked like fat old women; they had huge blue-and-white striped aprons covering their entire bodies, kept stroking their stomachs and swaying awkwardly to and fro. I could not even find out whether we were in a law court. Some facts spoke for it, others against. What reminded me of a law court more than all the details was a droning noise which could be heard incessantly in the distance; one could not tell from which direction it came, it filled every room to such an extent that one had to assume it came from everywhere, or, what seemed more likely, that just the place where one happened to be standing was the very place where the droning originated, but this was probably an illusion, for it came from a distance. These corridors, narrow and austerely vaulted, turning in gradual curves with high, sparsely decorated doors, seemed to have been created specially for profound silence; they were in the corridors of a museum or a library. Yet if it were not a law court, why was I searching for an advocate here? Because I was searching for an advocate everywhere; he is needed everywhere, if anything less in court than elsewhere, for a court, one assumes, passes judgment according to the law. If one were to assume that this was being done unfairly or frivolously, then life would not be possible; one must have confidence that the court allows the majesty of the law its full scope, for this is its sole duty. Within the law all is accusation, advocacy, and verdict; any interference by an individual here would be a crime. It is different, however, in the case of the verdict itself; this is based on



NEAL WALKER

THEY WERE IN THE CORRIDORS OF A MUSEUM OR A LIBRARY. YET IF IT WERE NOT A LAW COURT, WHY WAS I SEARCHING FOR AN ADVOCATE HERE?

inquiries being made here and there, from relatives and strangers, from friends and enemies, in the family and public life, in town and village - in short, everywhere. Here it is most necessary to have advocates, advocates galore, the best possible advocates, one next to the other, a living wall, for advocates are by nature hard to set in motion; the plaintiffs, however, those sly foxes, those slinking weasels, those little mice, they slip through the tiniest gaps, scuttle through the legs of the advocates. So look out! That's why I am here, I'm collecting advocates. But I have not found any as yet, only those old women keep on coming and going; if I were not on my search it would put me to sleep. I'm not in the right place - alas, I cannot rid myself of the feeling that I'm not in the right place. I ought to be in a place where all kinds of people meet, from various parts of the country, from every class, every profession, of all ages; I ought to have an opportunity of choosing carefully out of a crowd those who are kind, those who are able, and those who have an eye for me. Perhaps the most suitable place for this would be a huge fairground; instead of which I am hanging about in these corridors where only these old women are to be seen, and not even many of them, and always the same ones, and even those few will not let themselves be cornered, despite their slowness; they slip away from me, float about like rain clouds, and are completely absorbed by unknown activities. Why is it then that I run headlong into a house without reading the sign over the door, promptly find myself in these corridors, and settle here with such obstinancy that I cannot even remember ever having been in front of the house, ever having run up the stairs! But back I cannot go, this waste of time, this admission of having been on the wrong track would be unbearable for me. What? Run downstairs in this brief, hurried life accompanied as it is by that impatient droning? Impossible. The time allotted to you is so short that if you lose one second you have already lost your whole life, for it is no longer, it is always just as long as the time you lose. So if you have started out on a walk, continue it whatever happens; you can only gain, you run no risk, in the end you may fall over a precipice perhaps, but had you turned back after the first steps and run downstairs you would have fallen at once - and not perhaps, but for certain. So if you find nothing in the corridors open the doors, if you find nothing behind these doors there are more floors, and if you find nothing up there, don't worry, just leap up another flight of stairs. As long as you don't stop climbing, the stairs won't end, under your climbing feet they will go on growing upwards.

THE TIME ALLOTTED TO YOU IS SO SHORT THAT IF YOU LOSE ONE SECOND YOU HAVE ALREADY LOST YOUR WHOLE LIFE.

- Translated by Tania and James Stern

Next, a song lyric by Bruce Springsteen, the rock and roll populist. "Johnny 99" is the story of a desperate man, of crime and punishment. Springsteen's emotional narrative style, rich with cultural and geographic detail, differs from Kafka's spiritual abstract approach. However, the themes of the two works are similar.

"JOHNNY 99"

Well they closed down the auto plant in Mahwah late that month
Ralph went out lookin' for a job but he couldn't find none
He came home too drunk from mixin' Tanqueray and wine

He got a gun shot a night clerk now they call 'm Johnny 99.

Down in the part of town where you hit a red light you don't stop
Johnny's waivin' his gun around and threatenin' to blow his top
When an off duty cop snuck up on him from behind
Out in front of the Club Tip Top they slapped the cuffs on Johnny 99.

Well the city supplied a public defender but the judge was Mean John Brown
He came into the courtroom and stared poor Johnny down
Well the evidence is clear gonna let the sentence son fit the crime
Prison for 98 and a year and we'll call it even Johnny 99.

A fistfight broke out in the courtroom they had to drag Johnny's girl away
His momma stood up and shouted "judge don't you take my boy this way"
Well son you got a statement you'd like to make
Before the bailiff comes forever to take you away.

NOW JUDGE I GOT DEBTS NO HONEST MAN COULD PAY

Now judge I got debts no honest man could pay
The bank was holdin' my mortgage and they was takin' my house away
Now I ain't saying that makes me an innocent man
But it was more 'n all this that put that gun in my hand.

Well your honor I do believe I'd be better off dead
And if you could take a mans life for the thoughts that's in his head
Then won't you sit back in that chair and think it over judge one more time
And let 'em shave off my hair and put me on that execution line.

(From the L.P. "Nebraska", CBS Records, 1982)

NEAL WALKER

THE ADVOCATE

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