THE ADVOCATE

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Judge broadens rights of convict

Court says attorney was too cautious

BY BEN L. KAUFMAN
The Cincinnati Enquirer

A federal court in Cincinnati Wednesday expanded the rights of indigent convicts who rely on court-appointed attorneys to handle their appeals.

The ruling was written by the new chief judge of the U.S. Court of Appeals for the 6th Circuit, Albert J. Engel.

It said lawyer Albert J. "Tim" Rodenberg Jr. was too cautious when he filed an unsuccessful appellate brief for Albert Huston Freels.

That amounted to inadequate assistance and violated Freels' right to due process, Engel said.

And the judge did not leave it at that.

Noting this was 6th Circuit's first look at indigents' appellate rights under recent Supreme Court decisions, Engel admonished court-appointed attorneys to err on the side of creative lawyering and aggressiveness:

"Very often what may seem frivolous or unsupportable to counsel may seem otherwise in the eyes of the client or the appellate court."

Because lawyers risk sanctions for filing frivolous claims, Engel asked state appellate judges to recognize the attorneys' dilemma while assuring indigents of adequate representation.

The decision affects cases in Ohio, Kentucky, Tennessee, and Michigan.

The case began in mid-1983 when Freels, then 29, pulled a knife on a rival pushcart operator during an argument over a spot at Fifth and Vine streets.

He pleaded guilty to felonious assault but later rethought his position and appealed. The court appointed Rodenberg who filed a brief saying Hamilton County Common Pleas Judge Robert Gorman committed no prejudicial errors.

Freels lost that appeal and Ohio Supreme Court refused to review his case.

Freels turned to federal courts and enlisted Gregory L. Ayers, chief counsel for the Ohio Public Defender Commission, as his attorney.

Tuesday, Freels and Ayers won.

Engel said Rodenberg failed to meet standards expected of a court-appointed appellate attorney.

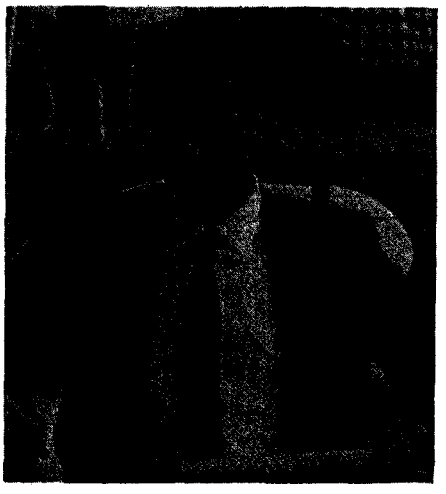
Then the 6th Circuit told Ohio to appoint a new attorney for Freels and give him a new appeal or let him go.

"Great," Ayers said. "This is a substantial problem all over the state."

Rodenberg repeated his conviction that there was merit in none of Freels' complaints and said he had tried to avoid burdening the court with frivolous assertions of error.

The Cincinnati Enquirer April 8, 1988. Reprinted with Permission.

The Advocate Features



RUSS BALDANI

Russ Baldani is a name that's probably familiar to you, because he clerked for the DPA Frankfort post-conviction branch from 1982 until he graduated from UK law school in May, 1984, and joined Fayette Legal Aide. Perhaps you have read or heard of his impressive advocacy for Fay Foster. Russ obtained "not guilty" verdicts in six of his last seven felony trials.

As of this publishing date, Russ has left his position with Fayette Legal Aide and joined the Lexington branch office of the Cleveland based firm of Summers, Fox, Dixon, McGinty and Davidson. He intends to continue practicing criminal law and to maintain his ties with the public defender system by doing conflict cases and pro bono work.

Criminal defense is very close to his heart. "Criminal defense work is never boring - often frustrating, depressing and stressful - but never boring" and an education - "In the year I spent preparing for and participating in Fay Foster's trial, I learned more than in all my years of education combined." More comments from Russ:

What aspect of criminal defense do you like best, and why?

Public defenders represent people who often have no resources, hope or support from family/friends. The most satisfying aspect of criminal defense work is when one of these people realizes that you really do care about what happens to them. No matter how the public perceives my client, I can always find something good to say about each one.

Problems you've experienced with the criminal justice system?

The gross inequity in resources available to the Commonwealth and public defender. The Commonwealth's resources are limitless, while a public defender has to fight and scrap for everything.

I spent my first year at Fayette Legal Aide in juvenile court, and went from there to adult felony court. It's incredible how many juveniles I represented that I've now seen going through the adult system. The system seems content to warehouse offenders, rather than to vigorously attempt to deal with the sources of the offender's problems - alcoholism, drug abuse and mental illness.

What was your most embarrassing moment as an attorney?

Before a judge put my client on probation, he asked the client if I had explained what a "stickler" the judge was on probation violators. The client answered "Yes - but that's not the word Russ used."

What's a secret or insight of your job that you've learned that you could share with new attorneys?

Don't feel that simply because you are an attorney you're better than bailiffs, clerks, jailers, probation and parole officers, secretaries and others integral to the criminal justice system. If you adopt that attitude, you won't go far.

* * *

Kevin McNally said, "I've worked with many local counsel in some tough cases and I've never learned as much as I did working with Russ on Fay Foster. He taught me a lot about direct examination in particular. Russ is a natural." Neal Walker added, "Russ throws the best Halloween parties in Lexington."

Russ was born in Pawtucket, Rhode Island, lived in Big Flats, New York until 7th grade and graduated from high school in Harrodsburg, Kentucky. His hobbies are skiing, guitar and handicapping horses.

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The Advocate welcomes correspondence on subjects treated in its pages.

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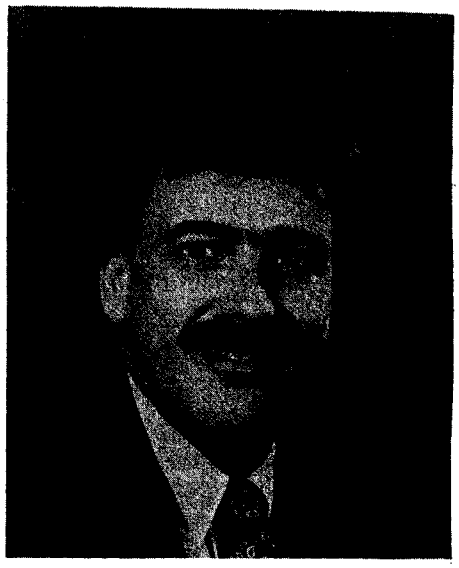
Public Advocate, Paul F. Isaacs On The Department of Public Advocacy: A Written Interview



Paul F. Isaacs

You have been reappointed to a second 4-year term as Public Advocate, what are your focus and agenda in your second 4 years?

My focus for the next 4 years is to improve the delivery of services to every client of DPA. The 3 areas of major concerns which I would like to address are: 1) the need for increased resources for the contract counties coupled with a system of quality assurance which rewards those contract programs providing good services; 2) maintaining a full complement of attorneys in our field offices; and 3) insuring that the Department has adequate resources to meet its statutory responsibilities in the area of capital litigation so that our attorneys, full-time and private, do not have to suffer emotional and professional burnout.

How did DPA do in the Legislature with appropriations for the next biennium?

The Department received a continuation budget for the next biennium with an increase in funds to meet specific new responsibilities in the areas of involuntary commitment procedures and to staff the new Morgan County Prison in the second year of the biennium. In a year of extremely tight state revenues, it was clear that the Legislature recognized the continued needs of the Department for more resources.

DPA has never had adequate funding. What will DPA not be able to do adequately in the next 2 years?

The major problem of the Department is that it does not adequately compensate its staff, both full-time and private contract attorneys, for their dedicated service to the Department and to the criminal justice system, which cannot operate without their services. With a continuation budget, there is no possibility of increased compensation during the next 2 years and the Department will continue to depend on this dedication in order to maintain its level of services to its clients.

How did criminal defense advocates do in the Legislature with substantive criminal law legislation?

This legislative session was so absorbed in budget issues that there were no major criminal justice issues considered. Maintaining the Unified Juvenile Code without gutting the progressive aspects of the code was one major accomplishment in this session, and, although the two bills prohibiting the execution of the mentally retarded and juveniles did not pass, both bills had overwhelming support in both chambers and have excellent chances in the next session.

How can DPA receive more adequate appropriations and do better with criminal law legislation in the future?

The Department will be more effective in the legislature both in substantive criminal law legislation and appropriations when the criminal defense bar speaks with one voice on these issues. Every attorney doing public advocacy work is providing a valuable service to the Commonwealth and they should be adequately compensated for their work. When public advocates, private part-time and full-time, are not adequately compensated, it devalues the work of all criminal defense lawyers because it is a reflection of a view that protecting the rights of citizens is not important. We, as criminal defense lawyers, know better and we must make that position known and accepted.

County contract public defenders have been and still are underfunded. One county public defender system is paying $7.50 per hour on cases. It is ridiculous to think that indigent defendants accused of crimes can be minimally represented

for that pittance. How can this situation be permitted to continue to exist?

KRS Chapter 31 very clearly sets forth that in those areas where the local government has elected to establish a contract system for delivery of public advocacy services, the local unit of government has the responsibility to adequately fund the program over and above the state share. Some counties do this and others do not. The state share to the contract counties has risen the last 2 years but county contributions have not increased. I know that the local units of government cannot meet all of the shortfall in this area but I think that we do have to be more aggressive in reminding the counties of their responsibilities to the public advocacy program.

Death penalty cases continue to drain DPA dry. Death cases demand resources that DPA does not have. They cause inhuman conditions on DPA attorneys and staff. How can DPA survive capital litigation?

DPA can only survive the demand of Death Penalty cases if there are more resources to meet the demand of capital litigation. This means we need more attorneys involved in these cases. The Department is currently using several approaches to address this lack of resources. We currently have a proposal submitted to the IOLTA Board of Trustees for an IOLTA Grant to establish a part-time position to recruit attorneys from the private bar who would be willing to do some pro bono work in capital litigation and to provide a paralegal to assist capital litigation attorneys in their cases. We also have a proposal before the United States Administrative Offices of the Courts Defender Committee for funds to establish a community Resource Center in Kentucky which would involve providing direct representation and backup services in federal habeas and state court actions. Recently, the United States Administrative Offices of the Courts has approved the $75.00 an hour fee for attorneys doing federal habeas corpus capital representation for both Eastern and Western Districts of Kentucky so the Department, if it receives this Resource Center Grant, will be recruiting private bar members to get involved in these cases. We must have more lawyers involved in this process, and the Department is aggressively seeking ways to make capital litigation more than just the responsibility of the Department of Public Advocacy.

DPA has a horrendous turnover of attorneys in many of its field offices. Why do you think that is? What can be done to reverse this damaging turnover?

Turnover has been a traditional problem in all public defender offices because of a variety of problems. One problem that the Department has is that many of our field offices are located in the more geographically remote areas of the state and younger attorneys will go there for a few years to develop their trial skills but their ultimate desire is to get to the central part of the state or closer to their home area. Also, there is the problem of high caseloads coupled with capital litigation which results in a high level of stress for these attorneys and they cannot do it for a very long period of time.

However, these are my perceptions of why people leave based on individual situations, but we have never conducted a thorough survey to determine if my perceptions are correct. We are now in the process of doing that and that should give us some ideas of the areas that we need to address. My belief at this point is that we need to understand that there will be a certain amount of turnover in our field offices and that that necessarily is not a bad thing. Attorneys who have done public defender work continue doing criminal defense work in the private bar, become legislators, judges and other community leaders and become important advocates for the Department in the future. Secondly, we need to find out if there are other reasons that they are leaving and try to address those issues. We have tried to address the caseload area by increased staff when possible and I think our training component is a very important part of retaining our people because for those individuals who have chosen this as their life's work, they must be given the opportunity to grow professionally. We need to provide an atmosphere that allows our staff to continue to grow professionally so that they can feel good about the work that they are doing.

Why has DPA been able to do so well over the years with so many serious problems and such a significant lack of resources?

The strength of DPA has been and will always be the fact that there is a hard core of very dedicated individuals, both full-time and part-time contract attorneys, who are committed to doing this work. The success of the Department is the combination of the success of many individuals in aggressively representing the citizens whose interest they have been appointed to protect.

Have you been successful at exciting people to want to be public defenders in this state?

I do not believe that individuals will choose to be public defenders in Kentucky because of anything that I as an individual do.

The attraction to doing public defense work comes from a person's commitment to protecting the interests of citizens who are entangled in the criminal justice system. It has to do with the perception of DPA as an exciting and intellectually challenging place to work. That message must be carried by all of the people who work for the Department.

I hope that people know of my commitment to providing this service and my commitment to making this a good place to fulfill those goals. Realistically, however, the real ambassadors of excitement are those attorneys in the trenches doing this on a day-to-day basis and not whomever happens to be the Public Advocate at any given time. The best way to excite people about being public defenders is by aggressively representing our clients because the people we want to attract will be attracted to us because of that.

Commonwealth of Kentucky
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The courts continue to go after DPA attorneys for contempt and sanctions, often callously and unfairly without any sensitivity to the unique difficulties of criminal defense work, especially capital defense work. What are you doing about this as Public Advocate?

The criticisms of the courts of DPA and their contempt proceedings has been that the Department lawyers do not get their briefs filed in a timely manner. In my view, this is a resource problem and this is an area in which we are working very desperately to try to get increased resources for our staff, especially in the area of capital litigation. The other method that I have used as Public Advocate is to try to open lines of communications with the courts so that we can discuss these problems prior to their becoming adversarial, if at all possible. Although more work needs to be done in this area, I do think that the number of contempt citations and show cause orders has dropped and I hope it will continue to drop until it is no longer a problem.

Are indigent citizens accused of crimes in Kentucky's district courts receiving adequate representation?

While I cannot speak for every case in every area, I can say that our statistics show that consistently we obtain some relief for our clients in 35 to 40 percent of the cases in district court. That seems to me to be a high percentage of service to our clients. On the other hand, because my office handles all the complaints received by the Department concerning their attorneys, I do know that in some areas there have been problems with representation at the district court level in individual cases. We are currently reviewing those cases to see if there is a pattern and what method we might use to improve the delivery of services in those particular areas.

What is DPA doing to expand the protections and representation for the mentally ill and the retarded in the courts?

In the last year DPA's Protection and Advocacy Division received a new federal grant to represent individuals who are labeled as mentally ill and are currently or have been in a mental institution in the last 6 months. This program, which is staffed by lawyers, social workers, and psychologists, insures that these individuals' rights are protected both in courts and in the institutions. Also, in the last General Assembly the Department received funding to provide representation to adult individuals labeled as mentally retarded who are in danger of being placed in institutions for the mentally retarded. This representation was required under a federal court decision, Doe v. Austin, in the Western District of Kentucky. Also, House Bill 48 which passed this session of the Legislature made some changes in the involuntary commitment law in Kentucky and we will be having a training session on that subject in the next year. In the last year, the Department received a grant from the Developmental Disability Council to represent individuals who are labeled as developmentally disabled at sentencing and to provide alternative sentencing proposals to the court in order to divert these individuals from prison. This program is now operating statewide and has 4 alternative placement workers in 4 different offices who are working with attorneys in their areas to provide this resource to the developmentally disabled clients.

Is DPA fighting to insure that no one is involuntarily committed without the benefit of a jury determination? Why?

As I said earlier, the Department will be providing a training session concerning the new proposals in House Bill 48, one of which requires attorneys to request a jury trial in involuntary commitment proceedings. The statute provides that if a jury trial is requested, one must be provided. However, it is not DPA's role to determine whether every individual involved in an involuntary commitment should have a jury trial. That decision is reserved for the client and to his attorney. In some cases, as a matter of strategy, the client and his attorney may want to have a judge trial as opposed to a jury trial and it is their role to make that determination. The Department's role is to educate the attorney about his options, not to make that decision for him and his client.

The full-time contract systems in both Louisville and Lexington continue to be burdened with incredibly high caseloads and inadequate resources to cope with those caseloads. The most recent statistics show that, in Lexington, the Public Defender's Office handled 4,383 cases in the last fiscal year with an average caseload of 398 per attorney. Even worse, in Louisville, the Public Defender's Office handled an overwhelming 37,656 cases in fiscal year '87. That is over 1,300 cases per attorney! With anticipated increases in workload during the coming year and bleak prospects for additional funding, how do you intend to address this continuing problem? National standards recommend far fewer cases per attorney in order to ensure effective assistance of counsel. In other jurisdictions, such as New York, job actions have been taken to resolve similar problems. In such states as Arizona and California, lawsuits have been filed to impose a cap on the number of court appointments which can be directed to defender officers. Are you considering either of these strategies as a means to rectify conditions in Kentucky's system? Also, how do you go about equitably distributing available funds to the various offices throughout the state since there seems to be such a wide disparity in the caseload levels between contract systems and branch offices?

The Lexington and Louisville offices do need more resources, but as discussed earlier, the funding for both of these counties who have elected to establish their own system is a joint responsibility of the state and local unit of government. The state resources have increased for both of these offices every year since I have been Public Advocate. My responsibility is to try to distribute the resources throughout the system as equitably as possible. In order to do that, we have tried to use a population formula based on a figure currently at 80 cents per capita for all of the counties. However, considering the huge caseloads in Jefferson and Fayette Counties, we have not used that formula for those two counties but have given them a greater proportion of the resources. As I said earlier, I do not think that it is solely the county's responsibility to meet this shortfall and in fact, every session of the legislature we have asked for more funding for the contract counties and will continue to do so. However, I do think that the local units of government are going to have to contribute more to addressing this problem.

What is your vision for DPA? How are you going to implement that vision?

My vision of the Department of Public Advocacy is that of an agency committed to fulfilling its statutory duties in such a way that no person in Kentucky is denied his right to adequate representation because of his financial situation. I believe that the Department will achieve its goal when, in every case, whether it involves a contract attorney or a full-time attorney, that person had as good a representation as is available in this state. That vision can only come true when there are adequate resources to compensate those persons working in the system so that we have individuals willing to do this work over a long period of time and in an atmosphere of professional growth. The only way to implement this is to aggressively seek new resources for the Department and that is my goal.

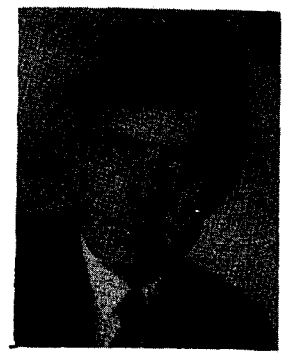
Any other thoughts?

The question I was asked most often after I was first appointed Public Advocate 5 years ago was, "Why do you want that job?" and I have to admit that there have been times in the last 5 years that I have asked myself that question. However, those times have been few and far between. I have enjoyed being the Public Advocate and look forward to the next 4 years. The main reason that I have enjoyed it and think I will continue to enjoy it is the opportunity to be associated with the most dedicated individuals I have ever had the pleasure of working with. Being a Public Advocate is the highest level of public service. There can be no higher duty than protecting the rights of citizens and each day I feel honored to be a part of that work.

Paul Isaacs was appointed to a 4-year term as Public Advocate by Governor Brown and was reappointed by Governor Collins on October 1, 1987.

Kentucky IOLTA fund

Written interview with William T. Robinston III, Chairman



William T. Robinson III

How many lawyers are participating in the Kentucky IOLTA Fund? What percent is that of attorneys in private practice in Kentucky?

1,562 attorneys - 26% of the 6,000 attorneys in private practice.

How much money has been collected?

$150,000.

What interest rate are the financial institutions paying?

The financial institutions pay the fund the same rate paid to their non-attorney customers. The rate fluctuates but usually is not too far from 5%.

How much money has been expended in start up costs and administration of the Fund?

The Fund started with a $60,000 line of credit from the Bar Association. That line of credit was retired after the first year with a $25,000 grant from the Ford Foundation and interest earned from Fund accounts.

What are the on-going total costs to administer the Fund that have to be met each year before there is any grant money available?

The Fund has a limited experience on its budgetary costs and has run under budget so far. It is anticipated that annual costs will level off at $70,000 - $80,000 per year.

What are those yearly costs allocated to?

The Fund functions on the same format as the Bar Association - paid staff, volunteer Board. The largest single cost is personnel, including our staff support for the Clients' Security Fund in addition to administration of the Fund. The Trustees have also allocated 10% of revenues to an endowment.

How much money is now available for grants?

$75,000 - $80,000

What is the process for obtaining grant money?

By applications to the Trustees and their recommendation to the Supreme Court.

How many grant applications have you received, of what type, and from whom?

The grant deadline was not until May 2 but we have already received one application for a project to promote the administration of justice from a law school.

When will future grants be made and under what criteria?

At least annually beginning with the 1988-1989 fiscal year.

In December of 1986 you informed The Advocate that North Carolina's IOLTA is receiving $80,000 per month with 8,000 lawyers, and you believed with 6,000 Kentucky lawyers that Kentucky should be collecting $60,000 per month. Is Kentucky faring well in this regard?

The Kentucky program has not yet met with the monetary success achieved by North Carolina in large part due to differences in practice (mainly real estate) between the states. Participation, though, is comparable.

Where does Kentucky rank with other IOLTA states in terms of participating lawyers and amount of money collected? What state ranks lowest and highest in this regard?

For a voluntary state, Kentucky ranks well with 26% participation in less than 2 years. New Hampshire ranks highest with over 50% (and one of the smaller Bars) and New York is probably low with 13-15% (and one of the largest Bars). Our income is comparable to Tennessee, Oklahoma and Mississippi.

Is assisting the delivery of legal services to indigents accused of misdemeanors, felonies and capital crimes a priority with the Fund's Trustees in deciding on grants?

The Trustees have not allocated any percentage of funds to one category or prioritized between categories. They are looking for well managed programs which will maximize the benefits to the public from funds

NOTICE TO THE BOARD OF TRUSTEES OF THE KENTUCKY IOLTA FUND

TO: Board of Trustees
Kentucky IOLTA Fund
West Main at Kentucky River
Frankfort, Kentucky 40601

_____ (Date)

_____ (Signature)

The undersigned elect(s) to enroll in the Interest on Lawyers' Trust Accounts program established by the Kentucky Supreme Court in SCR 3.830.

_____ (Name)

The undersigned's trust account (Acct. No. _____

_____ (Firm Name)

Acct. Name _____) is with

_____ (Address)

the (Financial Institution) _____,

(Mailing Address) _____,

_____ (City) _____ (State)

(City) _____, (Zip Code) _____

(Telephone) (___) _____.

_____ (___) _____
(Zip Code) (Telephone)

Enclosed is a list of Kentucky Bar members in this firm who are participating in the Interest on Lawyers' Trust Accounts program.

received. Pro Bono programs multiplying the grant dollars with volunteer labor are a good example.

Should participation in the Kentucky IOLTA Fund be mandatory for Kentucky attorneys? Why/Why not?

Kentucky's experience with a voluntary program has been favorable. Support for the program has been easily garnered from both attorneys and banks because the program is voluntary. It is not likely that support for a mandatory program would be as enthusiastic. Further, voluntary programs foster a spirit of voluntarism among the Bar membership which will result in a virtually incalculable return.

How can an attorney sign up to participate?

Call the Kentucky Bar Center at (502) 564-3795 or write to the address below.

Why are more attorneys not participating?

The main reason attorneys give for not yet participating is that there is not a large enough balance in their account to earn interest. This is largely a misconception because, while an attorney may view the account balance for a single day, the Fund earns interest on the average monthly balance and the Fund can receive a profit from an account 1 month out of 12 which more than offsets the past service charges (which we gladly pay).

Any other thoughts?

The IOLTA Fund would receive many more returns if each person reading this newsletter volunteered to sign up another colleague and returned that sign up to the Fund at the Bar Center.

William T. Robinson III
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Lawyers group rejects ABA resolution

Associated Press

LOUISVILLE — The Kentucky Bar Association has voted not to go along with an American Bar Association resolution urging mandatory participation by lawyers in a money-raising program to finance legal services for the poor and other projects.

In February, the ABA's policy-making body overwhelmingly approved the resolution involving participation in Interest on Lawyers' Trust Accounts.

The plan calls for small sums of clients' money, often held for brief periods by lawyers, to be put to public use. With interest on the money pooled statewide, enough money would be raised to finance public-interest projects.

The plan calls for small sums of clients' money, often held for brief periods by lawyers, to be put to public use. HERALD-LEADER, LEXINGTON, KY., MONDAY, APRIL 18, 1988

Such money was placed in bank accounts that earned no interest before the plan because lawyers are barred from earning interest on clients' money.

The Kentucky Supreme Court in 1986 approved an Interest on Lawyers' Trust Accounts program, but participation was voluntary.

The program has been adopted in 46 states and the District of Columbia and has generated $121 million nationwide. Sixty-five percent of the money, has been generated in states where the program is mandatory, an ABA spokesman said.

In California, which has a mandatory program, $53.8 million was collected over five years, the ABA said. But in New York, which has a voluntary program and a similar number of lawyers, $3.2 million was raised over a four-year period.

Wisconsin's mandatory program has generated 1,200 percent more revenue than Kentucky's voluntary program in one year, according to ABA statistics. Wisconsin listed only 20 percent more lawyers with escrow accounts.

Wisconsin's program had raised $1.2 million as of January, compared with Kentucky's $96,562.

William T. Robinson III, chairman of Kentucky's program, said Kentucky lawyers would resent mandatory participation and might decline to voluntarily represent the poor if pressed.

"There's a strong feeling that volunteerism makes you feel good," said Greg Fuchs, the program's administrator. "It's a nicer way to do it. We think if we get the chance to ask every attorney, no one will turn us down."

The ABA said most states with voluntary programs had been unable to enroll more than 30 percent of their lawyers and none had recruited more than half

West's Review

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

Linda K. West

Kentucky Court of Appeals

PROMOTING CONTRABAND-
"DETENTION FACILITY"
Commonwealth v. Simmons
35 K.L.S. 4 at 7
(March 11, 1988)

Simmons was sent as a member of an inmate work detail from the Roederer Farm Center to the Kentucky State Fair Grounds. While there, Simmons was found to be in possession of a knife and marijuana cigarettes. As a result, Simmons was indicted for promoting contraband. The trial court, however, dismissed the indictment because possession of the contraband did not occur within a "detention facility" as required by KRS 520.050(1)(b). The Commonwealth appealed.

KRS 520.010(4) defines "detention facility" as a "place used for the confinement of a person." The Court of Appeals held that this definition encompassed only the actual physical structure of a detention facility and not temporary work sites. "Had the legislature intended to encompass temporary work detail or simply custody for purposes of promoting contraband, it would have included language to that effect."

VOLUNTARINESS OF GUILTY PLEA
Coker v. Commonwealth
35 K.L.S. 4 at 10
(March 25, 1988)

In this case, the Court of Appeals held that Coker's guilty plea to first degree wanton endangerment was involuntary. While he was intoxicated, Coker fired a shotgun into a closed and empty store. In the Court's view, this evidence did not support the "substantial danger of death or serious injury" element of first degree wanton endangerment. Additionally, Coker was never advised that his intoxication might serve as a defense under KRS 501.080. Under these circumstances, Coker's plea was not voluntary. Judge Lester dissented.

CONSTITUTIONALITY OF KRS 525.080
Yates v. Commonwealth
35 K.L.S. 5 at 6
(April 1, 1988)

In this case, the Court held that KRS 525.080, which prohibits "harassing communications" by means of telephone, telegraph, or a writing is not unconstitutionally overbroad. The Kentucky Supreme Court has previously held that KRS 525.010(1)(b), which prohibits verbal harassment in a public place, is unconstitutional. Musselman v. Commonwealth, Ky., 705 S.W.2d 476 (1986). The Court of Appeals reasoned that Musselman does not apply to KRS 525.080, since the communication prohibited by the statute does not occur in a public place. Instead, the communication prohibited is directed privately at an unwilling recipient upon whose privacy it intrudes.

PFO
White v. Commonwealth
35 K.L.S. 5 at 11
(April 8, 1988)

In this case, the Court held that where both crimes used to enhance the defendant's third conviction were committed before he had any exposure to rehabilitative efforts, the two prior convictions must be considered one crime for purposes of the PFO statute. See KRS 532.080(4); Combs v. Commonwealth, Ky., 652 S.W.2d 859 (1983). Judge Wilhoit dissented.

JURY SELECTION/AUTHENTICITY
OF TAPE RECORDING/CHOICE
OF EVILS
Greer v. Commonwealth
35 K.L.S. 6 at ___
(April 29, 1988)

The Court rejected several assignments of error to uphold Greer's conviction of facilitation of cultivating marijuana.

The Court held that no error occurred when a prosecuting witness, who also happened to be a member of the jury panel for the then term of court, assisted the prosecution in jury selection. The court noted that the assistance rendered by the witness was not based on information obtained through jury service.

The Court also found no error in the admission of a tape recording although the tape was apparently

shortened by thirteen minutes. The Court held that the seven rules for establishing a foundation for admissibility of a tape recording set out in Commonwealth v. Brinkley, Ky., 362 S.W.2d 494 (1962) are not mandatory.

Lastly, the Court held that Greer's contention that his desperate financial condition compelled him to permit cultivation of marijuana on his land did not entitle him to a choice of evils defense.

Judge Dyche dissented on the grounds that the authenticity of the tape recording was not established.

See was excluded from a hearing to determine the competency of a minor victim to testify. The court held that Kentucky v. Stincer, 482 U.S. ___, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987), in which the United States Supreme Court held on identical facts that the defendant's confrontation rights were not violated, was dispositive of See's Sixth Amendment claim. The Court also refused to find a denial of confrontation under the Kentucky Constitution.

The Court did find error in See's sentence to consecutive sentences of life and a term of years in violation of KRS 532.110(1)(c).

Kentucky Supreme Court

CONFRONTATION/SENTENCING
See v. Commonwealth
35 K.L.S. 3 at 26
(March 3, 1988)

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Child admits lying, but educator out of work

Associated Press

FRAMINGHAM, Mass. — Nearly three years after accusations of sexual misconduct threw Joseph Escobedo's life into turmoil, the former elementary school principal is trying to pick up the pieces of his career.

He said yesterday he was overjoyed that a 12-year-old girl who accused him of fondling her had recanted her story. But his battle is not over.

Escobedo, 52, is petitioning the Denver school board to be reinstated as an elementary school principal. He spent 20 years with the district before his suspension in 1985.

The board said Wednesday that he would not be rehired. However, he has retained an attorney to press the case. Escobedo lost his Massachusetts teaching job in June after the allegations caught up with him, and he said he had no firm prospects of a new position soon.

Escobedo said he decided to tell what happened only after the girl's parents went public with the truth last week.

"It was a horrendous ordeal and very trying on myself and my family," he said.

Escobedo said his ordeal started innocuously in early 1985, after he helped the girl off a piece of playground equipment.

"She alleged that I had touched her on the playground," he said. "The allegation is just there and without substance, but it provides that cloud that just hangs over you, and you can't do anything about it."

Two other children subsequently complained that they also had been touched by Escobedo. He was suspended.

Escobedo suggested the children could have been influenced by a lecture on child abuse held just before the accusations were leveled.

Although investigations found no basis for legal action, Escobedo said he decided to quit under pressure.

Lexington Herald-Leader, December 4, 1987.

The Death Penalty

The Call Was Late: The Prisoner Died

By Gara LaMarche

AUSTIN, Tex. — At 3:19 A.M., Central Standard Time, on Jan. 7, Texas began to execute Robert Streetman, who was strapped down at the state prison in Huntsville, by pumping lethal drugs into his veins. Before he was pronounced dead seven minutes later, the telephone rang in the death chamber. The Governor's office had word that the United States Supreme Court was prepared to consider a new motion for appeal, and, in the words of a prison spokesman, wanted to know "where we were in the process." By then it was too late.

Mr. Streetman, 27, was the first inmate executed in the United States this year and the 27th in Texas since executions resumed here in 1982.

He was one of life's losers. He dropped out of school in ninth grade and worked when he could as an oilfield roughneck. In 1982, he and two companions broke into a farm house in Kountze, Tex., and shot Christine Baker after taking the dollar she had in her purse. Although he maintained his innocence, Mr. Streetman was convicted of capital murder after the other two men cooperated with the prosecution in exchange for lenience.

A serious head injury in fifth grade triggered a lifelong procession of mental problems for Mr. Streetman, including persistent delusions and hallucinations. Yet his court-appointed attorney failed to raise the issue of mental impairment at his brief trial in 1983.

When his conviction was upheld upon automatic appeal in 1985, his lawyer dropped the case, because under Texas law he would no longer be paid for further work on Mr. Streetman's behalf, even though a broad range of state and Federal legal appeals remained available. Eventually a volunteer lawyer was found, but the overworked lawyer failed to communicate with his client, and by the time of a Federal court hearing in May 1987 a despondent Mr. Streetman had decided to end his appeals.

The judge took six months to decide whether Mr. Streetman would be permitted to do so; meanwhile, his family worked to find another volunteer lawyer. On New Year's Eve, a week before his scheduled execution, they found one, and Mr. Streetman changed his mind and agreed to go back into court and fight for his life.

The new lawyer, Robert McGlasson, knew the Supreme Court was reviewing the constitutionality of the Texas capital murder statute in the case of another Texas death row inmate, Donald Gene Franklin.

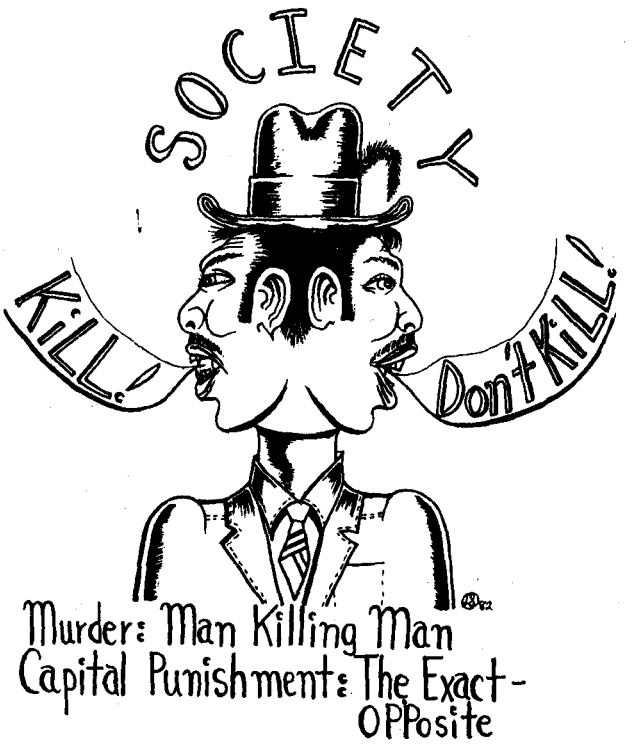
The issue, applicable to Mr. Streetman, was whether Texas sentencing juries are properly instructed to consider mitigating evidence about the prisoner's possible future dangerousness. On the Monday after New Year's, with three days to go, Mr. McGlasson went to court to seek a stay of execution. Although it had halted another execution on the same grounds months earlier, the Texas Court of Criminal Appeals inexplicably denied Mr. Streetman's motion.

Finally, at 1:45 A.M. on Jan. 7, with Mr. Streetman waiting in the death chamber, a bitterly divided Supreme Court deadlocked 4-4, one vote short of enough for a stay. The Court's clerk called Mr. McGlasson and began to read the order and Justice William J. Brennan Jr.'s unusual seven-page dissent, which noted that there were enough votes on the Court to take a different action with the same effect and simply hold the case until the Franklin case was decided.

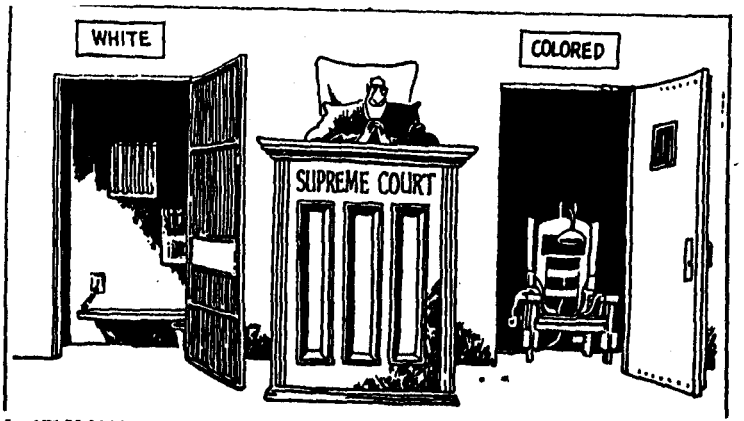
Mr. McGlasson interrupted the clerk's reading and tried to make the motion orally. Informed that the necessary papers would have to be filed, Mr. McGlasson then spent the next hour and a half on the telephone, much of the time on hold, in an unsuccessful effort to persuade the state Attorney General and the Governor to stop the execution so he could file the new motion, which would almost certainly be successful. He was still on hold when his client died.

If Donald Gene Franklin's challenge to the Texas capital murder statute is successful, some death row inmates will get new trials. Like Mr. Streetman, virtually all death row inmates are poor and uneducated. Many have mental disorders. Many are convicted because of incompetent trial counsel, and most must rely on overworked volunteer lawyers to pursue their final appeals. All are the victims of an arbitrary and inconsistent justice system.

As Justice Brennan noted early on Jan. 7, if Mr. Streetman had been convicted of bank robbery, this would matter much less. But the finality of death makes unfairness irrevocable. It's time for the majority of Americans who say they support the death penalty on philosophical grounds to begin paying attention to how it works in practice. Because whatever is taking place in predawn hours in our nation's death chambers, it certainly isn't justice.



Streetman v. Lynaugh, 108 S.Ct. 588 (1988).



Copies of a 17" X 22" black and white poster of the above McCleskey cartoon copy righted by Atlanta Journal Constitution cartoonist Doug Marlette are available for $4 by contacting Pat Delahanty, 2704 West Chestnut, Louisville, Kentucky 40211, (502) 772-2348. All proceeds will be used by the Kentucky Coalition Against the Death Penalty to provide public information on the death penalty in Kentucky. Please make your checks payable to the Kentucky Coalition Against the Death Penalty.

Justice Dept. Memo: 'Polarize the Debate'

Aides Urged to Eschew 'Consensus' on Issues

By Ruth Marcus
Washington Post Staff Writer

An internal Justice Department memo distributed this week to top departmental officials urges them to "polarize the debate" on issues such as drugs, AIDS and capital punishment in the closing months of the Reagan administration.

"We must not seek 'consensus,' we must confront," the five-page memo said. "Of course, we must confront sensibly, in ways designed to win the debate and further our agenda," it added, offering an "issue-by-issue analysis that where possible proposes means of polarization."

Assistant Attorney General William Bradford Reynolds, who also serves as counselor to Attorney General Edwin Meese III, distributed the memo Monday to top department officials, asking them to "give consideration to ways in which your activities can highlight and reinforce these themes." Its existence was first reported yesterday in The Baltimore Sun.

Terry H. Eastland, director of public affairs at the Justice Department, said he wrote the memo several months ago as "a first rough draft of some thoughts for a breakfast discussion" on criminal justice issues. "It was suggestive in character," Eastland said. "It was not the sort of a finished work product as such."

The memo recommended that the department "attack" a Supreme Court decision last year on the use of victim impact statements in death penalty cases. The rationale for capital punishment, it said, is "deterrence, retribution, and incapacitation (i.e. decapitation.)."

Noting that prison overcrowding is expected to worsen, the memo said that the situation would prompt some to urge "alternatives" to incarceration.

"We must take the side of more prisons, and to polarize the issue we must attack those by name (such as Sen. Paul Simon [D-Ill.]) who take the other approach," it said.

The memo, entitled "A Strategy for the Remaining Months," emphasizes that issues such as drugs, obscenity and acquired immune deficiency syndrome are matters of public health and safety. "We must define them as such, and insist on the definition, in order to keep the debate on our terms," it said.

The paper said the department's drug policy "should send the message that there are two ways to approach drugs: the soft, easy way that emphasizes drug treatment and rehabilitation versus the hard, tough approach that emphasizes strong law enforcement measures and drug testing. Naturally we favor the latter."

As part of this "tough approach," the memo recommends prosecuting drug users and pressing local governments to spend more money on drug enforcement, perhaps through a "pledge campaign" in which Meese would ask local law enforcement agencies "to increase their drug spending by a certain (reasonably attainable) percentage."

President Reagan's budget request released last week recommends slashing $69.5 million in grants to state and local governments for drug enforcement efforts.

In one section labeled "Truth in the Courtroom," the memo describes the importance of associating "the search for truth with protecting public safety . . . .

"If you're against exclusionary rule reform, or Miranda reform, you're against truth in the courtroom and you're against public safety," it said. "The issues should be defined in these broad public terms, leaving the technical debates for brief writers and legislators. The purpose is to put the other side on the defensive."

On the AIDS issue, it said, the department should stress that the disease "is not a civil rights or privacy issue, but one of public health and safety.

"While care must be taken to protect civil rights, we must take appropriately designed measures to protect communities against the threats posed by AIDS. We should make periodic reports . . . on any defensive litigation that holds off the privacy advocates who challenge AIDS testing."

In the Trenches

District Court Practice

Larry Webster

This is the last of a two part article. The first part appeared in the Vol. 10, No. 3 (April, 1988) issue of The Advocate.

TRIAL TACTICS

Now comes the time when the fat lady sings. It will soon be over. This whole strategy is a trial strategy, so pay attention. First think what the whole thing is about. You must first get your client, yourself and then maybe the jury talking not about levels of alcohol content, but get them talking about driving impairment. You will win if you can show that notwithstanding this honest policeman's observations and the arbitrariness of the law, still your guy was not really under the influence of that stuff.

If the jury likes your client and if he doesn't make a fool out of himself, and they can appreciate how much he needs to drive and how he really doesn't get blasted all that much, then at some point they will start looking for an excuse to let him go. If they find one, they will try to figure out next who will get mad at them if they turn him loose and if you can lighten up the mood and keep the cop smiling, you may have a pretty good shot at them. The rest of this merely gives them a philosophical underpinning for their pardon.

There are some constants in defense of DUIs and knowing them can help. First of all, not many police officers can do any more than pretend to remember all their drunks apart. Therefore they always list exactly the same symptoms in each case: red eyes, slurred speech, the smell of alcohol, unsteady gait, loss of coordination. That is so predictable that you can muster up all sorts of possible answers to these complaints before the officer takes the stand. The officer will prove the apprehension, the field sobriety tests, the B.A. and the defendant's maneuvering or speaking ability from road to jail. Unless he has eye witnesses to the defendant's actions, that will be about it.

VOIR DIRE

Make some favorable impressions. Ask if anyone believes it is against the law to drink and drive and ask those who respond if they would be surprised to learn that it is not unless you were under the influence of what you were drinking. Ask if anyone takes prescription drugs. Ask if they think a B.A. is infallible and if they could ignore it if it has flaws which make it untrustworthy as evidence.

Get a mix of men and women on the jury, and some drivers. Lay off people who have had no accidents. Get some drinkers if they will admit it.

OPENING STATEMENT

The most important part of a trial. Lay it out and don't understate the other side's case. Tell the jury all those things you hope to prove through the policeman. Explain the basic flaws in breath testing. Push the nonimpairment theory and relate your client to them in positive terms, without being artificial. If there is a prior conviction, explain to the jury that they are the finders of fact; whether or not this is to be treated like a second conviction is entirely up to the jury. Don't, then or later, jump on the cop unless he starts to act like the kind of person that the jury would want you to fuss at.

WHAT THE COMMONWEALTH MUST PROVE

1. Operation of a motor vehicle. It seems clear that the term "operating" is broader than the term "driving." As defined in nearly all cases, operating does not necessarily require that the vehicle be in motion. Kentucky and other states have a long history of wrestling with this one. In DeHart v. Gray, Ky., 245 S.W.2d 434 (1952) it got so bad that the court held that one who had left his motor vehicle parked on the street with the motor running and had gone into his house was nevertheless operating the auto so as to sustain a drunk driving arrest when he staggered out of the house and announced that he was going to move the auto. In Newman v. Stinson, Ky., 489 S.W.2d 826 (1972) a wry court observed that it was a question of whether the motor vehicle was subjected to his control or lack of it. More specific guidance

on the issue can be found in Wells v. Commonwealth, Ky.App., 709 S.W.2d 847 91986) and Harris v. Commonwealth, Ky.App., 709 S.W.2d 846 (1986). These cases ask whether the alleged driver was conscious, the engine was operating, where the vehicle was located, how it got there, and the alleged driver's intent.

2. **Anywhere in this state.** Simple enough. Not just on a road is what is important. This can mean in a yard or a farm.

3. **While under the influence of alcohol.** You can get convicted for other things besides booze if they impair you. Cruse v. Commonwealth, Ky.App., 712 S.W.2d 346 (1986).

To prove that a person is under the influence of something without scientific proof requires special help. That help comes from KRS 189.520(4) which contains the presumptions (under .05, not under the influence; .05 to .10 goes either way; over .10, under the influence). In Marcum v. Commonwealth, Ky., 483 S.W.2d 122 (1972), the Court said that these presumptions may be read to the jury as expert testimony.

BUILDING A DEFENSE

The tactics herein employed largely involve trying to point up the inherent reasonable doubt in a DUI arrest. There is nothing contrived about this inherent reasonable doubt, and it is much more effective if not overstated. You may very well not get the cooperation of the police officer. If you have supplied him with technical data about the Breathalyzer or with copies of scientific studies showing the unreliability of police characterizations of drunkenness based on symptoms, you can at least feel safe in predicting for the jury that your proof will show certain things. Be specific in your opening statement and tell the jury that Officer Smiley will admit such and such. Smiley may feel too uncomfortable not to. If he doesn't come around, the judge can always admonish the jury not to remember what you have said.

Successful defense of criminal cases depends upon the creation and maintenance of a mood in court. You are not in a debate and scoring points won't win it. Any single point you make could win it for you. Remember, it is better to deflect unfavorable evidence to your side than to confront it head on.

A great deal of the defense mood will come from your cross-examination of the police officer. That will primarily deal with two subjects.

COUNTERING COMMON SENSE EVIDENCE OF DRUNKENNESS

A key to the defense of a DUI is to demonstrate to the jury through the officer that his observations are merely fallible human opinions. As to most of the possible lay symptoms of being drunk, here are suggested explanations for them, which you can point up either on cross-examination of the officer or on final argument:

Bloodshot eyes - Contacts; hay fever; officer didn't know his eyes before; lack of sleep

Odor of alcohol - Alcohol per se has virtually no odor; what you smell is the oils and flavoring substance of the stuff from which

False-arrest suit settled in Boone County DUI case

Boone County officials have settled out of court with a Hebron man who sued for false arrest and false imprisonment after he was charged with drunken driving.

Neither side would reveal details of the agreement, but Thomas Willenborg, attorney for Gaines David Dotson, said his client received a monetary settlement from Boone County.

"In my mind, the settlement indicates clearly that the county considers their conduct wrong on that night," Willenborg said.

Boone County Attorney Larry Crigler said the county settled because "the expense of litigation was going to be more costly than the settlement. The county did not admit any liability."

Dotson sued Officer Brian Davies, Police Chief Thomas Schwartz and Boone County for $125,000 in U.S. District Court in Covington.

Dotson said in his suit that he was stopped in September 1985 after he bought a quart of orange juice at a Hebron liquor store. He said he twice registered zero on a Breathalyzer test. Under Kentucky law, a person is presumed intoxicated at 0.10 percent.

Despite the Breathalyzer results, Dotson said, Davies told another police officer that because Dotson was already present (at police headquarters), (police) would have to charge him with something." Boone County District Judge Jay Bamberger dismissed the criminal charge in October 1985.

In his arrest report, Davies said he observed Dotson driving eastbound on Ky. 20 for about 1½ miles before pulling him over. The report said Dotson's vehicle crossed the center line twice.

Dotson failed field sobriety tests, according to the report. The report says Dotson was unable to perform a heel-to-toe walk, kept stumbling backwards as he attempted to touch his nose with his finger, and that he could not keep his balance during a one-leg stand.

Kentucky Post, April 29, 1986 - Reprinted with Permission.

the alcohol was made. Odor and alcohol concentration are not related. Alcohol is metabolized (removed from the bloodstream) faster than the odor-producing chemicals. Drinks with lower alcohol content smell stronger than higher ones. NOTE: The strong smell of fresh liquor will indicate that your client had just had a drink and that his B.A. test later will be higher than at the time of the arrest.

Staggering - People who get up suddenly from a theater seat are unsteady; argue there was no stumble at jail. If the staggering was said to have occurred during the field sobriety tests, recreate for the jury the scene, and point out that it was dark, your client was both upset and scared.

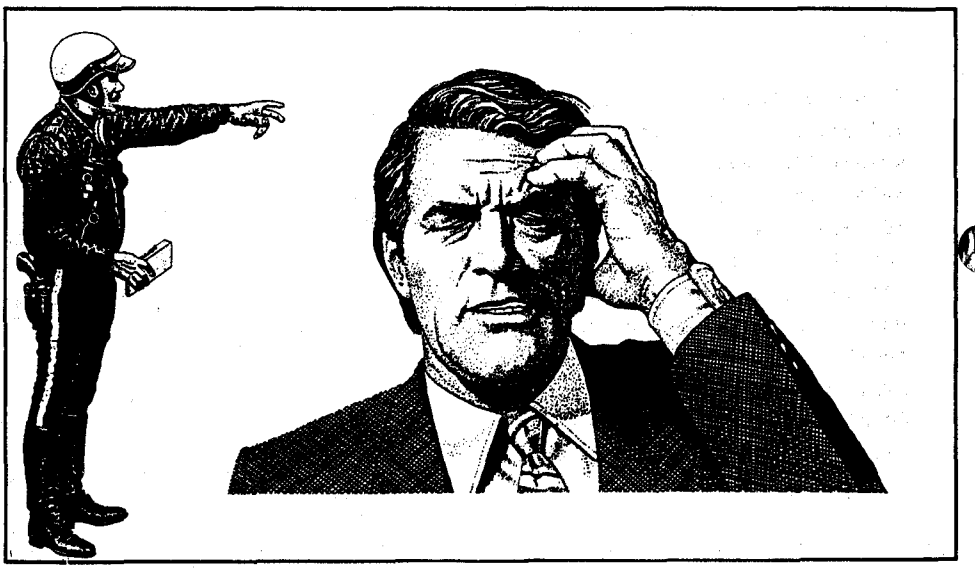
To explain any sort of motion problems, point up the "strobe" effect. Establish that there was a flashing blue light and get the officer to admit that people appear to move in a jerky fashion in flashing light.

Finger to nose failure - Do not ask the cop to demonstrate the finger to nose trick. Suggest that the jury try it in the jury room. Have them tilt head way back, wait a few minutes (this is a key) and touch their nose.

Bad driving - If the officer testifies to weaving, point out that everybody weaves. Suggest the 1964 Ford pickup defense, a natural weaver.

Wallet fumbling - Is that unnatural in such a situation?

The key is to get the officer to say when he first decided that the defendant was under the influence. Obviously that would precede the time of arrest. If the officer says that his decision was rather early in the apprehension, then you can ask why he did further tests, and whether or not it would have embarrassed him to change his decision if the defendant passed those tests and isn't it true that the defendant's performance on those tests was merely the opinion of a police officer who had already made up his mind that a defendant was drunk. If the officer had to perform all those tests to decide your client was impaired, that might suggest reasonable doubt in and of itself. Argue that the officer who had pulled the defendant over, talked to him, decided that he was intoxicated, and then judged the tests himself.



COUNTERING GADGET EVIDENCE
ON DRUNKENNESS

A police officer need not be an expert on Breathalyzers to testify as to the test results. He must merely show that he is skilled in administering the tests. The basic requirements for valid tests are: 1) that the machine was properly checked and in proper working order at the time of conducting the test; 2) that the chemicals employed were of a correct kind and compounded in the proper proportions; 3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test; 4) that the test be given by a qualified operator in the proper manner. See Marcum v. Commonwealth, Ky., 483 S.W.2d 122 (1972).

To effectively prove that breath tests are invalid as a measure of impairment, you need an expert. Without one you must get the police officer to admit certain things. A brief explanation of the problems inherent in Breathalyzers follows:

A Breathalyzer is a non-specific test which measures the wave length of ethanol. Other compounds have similar wave lengths and are non-toxic. The Breathalyzer Model 2000, commonly used in Kentucky, can be thrown off by humidity, which can be trapped in the ampule glass, and which traps the "early breath" alcohol. One-third to one-half of breath compounds have similar wave lengths.

The Model 2000 is subject to radio frequency interference, which is most common in a jail, police-type situation. The machine can be manipulated to the extent that the date and time can be changed. It

should be calibrated every 60 days. A National Technical Information Service study shows that Model 2000 fails one out of six times. It is difficult on one of these machines to tell gasoline from ethanol, and almost impossible to tell the difference between ethanol and methanol.

The statute speaks exclusively of blood alcohol. Get the officer to admit that he did not measure blood, but that he only measured breath. Then he will have to admit at least some of the following assumptions, all of which are necessary for the validity of any relationship between breath alcohol and impairment. Get the officer to admit that all of this must be true or his machine is of no help:

1. The Breathalyzer accurately reflects the actual alcohol content in the breath.

2. Breath alcohol accurately reflects blood and alcohol.

3. Blood alcohol concentration at the time of the test accurately reflects the blood alcohol concentration at the time of the incident.

4. Blood alcohol concentration at the time of the incident accurately reflects the brain alcohol concentration at the time of the incident.

5. Brain alcohol concentration at the time of the incident accurately reflects the impairment of driving or other skills at the time of the incident.

6. The impairment at the time of the incident fits the legal definition of "under the influence of alcohol or any other substance which may impair one's driving ability."

If you can break the above chain at any level, you can make a good argument to the jury for not guilty. Here are some suggested ways to do so. With regard to item (1), remember that the machine can be fooled by compounds which mock ethanol. With regard to item (2), the whole principal of a B.A. test is that you can measure breath and call it blood. Breath alcohol is arterial and not veinous. In the arteries a lot of alcohol is absorbed, and during the falling phase of absorption the arterial blood overstates the blood alcohol content.

The Breathalyzer measures the alcohol content of a breath sample and derives the blood alcohol content by use of the factor of 2100, based on the premise that there is a conversion ration of 2100 to one. This assumption is not valid or scientifically acceptable because such things as body temperature, mouth temperature, whether the sample is from the deep lung or not, whether it is alveolar air all will throw off the assumption. The assumption is that it takes 2100 units of breath to contain the same weight of alcohol in one unit. This has to do with the rate of diffusion of alcohol from the blood, which is temperature dependent. If a client had a mild fever, the factor would result in a falsely high blood alcohol concentration. The presence of black lung, emphysema, chronic bronchitis or such means that those individuals do not reach an alveolar air plateau.

Tests have shown that the mean ratio between blood/breath ranges from 1307 up to 3478, so it is quite apparent that no contents are valid beyond a reasonable doubt.

A little alcohol in the mouth can wreck the measurement. False teeth, with their suction devices, trap alcohol, as do dental cavities, belching, and even untimely flatulence. Mouth sprays with alcohol will disturb the readings.

With regard to item (3), it is clear that a breath test only measures alcohol concentration at the time of the test. Because the alcohol concentration may be increasing due to its absorption into the blood, or decreasing due to its elimination from the blood, the result is valid only for a limited time, and it has been suggested that 10 or 15 minutes is the maximum allowable interval. Absorption itself varies with the presence of food in the stomach, ulcers, nervous tension, or the type of alcohol being absorbed. High alcohol spirits are absorbed faster than beer.

VALUABLE NOTE: The stronger the smell the officer notices, the more likely your client is in the absorption phase and thus the more likely that the test, which is later than the driving, shows higher contents than a test at the time of apprehension would. There is more impairment on the rising phase than on the falling phase.

ANOTHER NOTE: A B.A. reading of .20 is not double .10.

BOTTOM LINE ON BREATHALYZER: **The chemical test for blood alcohol content does not measure at all the effect of that blood alcohol level on the ability of the individual to drive an automobile.**

MOTIONS DURING TRIAL OR AT END OF EVIDENCE

When you move for a directed verdict, you may want to throw in some new stuff.

Argue here the failure of the prosecution to give pre-trial

notice of any attempt to enhance penalty. Renew any pre-trial arguments you have lost about setting aside earlier convictions.

A big constitutional argument, based on the due process clause, made applicable to the states by the Fourteenth Amendment is the "void for vagueness" theory. An Alaska court has declared unconstitutional Kentucky's definition of DUI. Argue that KRS 189.520 does not focus upon conduct or require recognizably impaired driving ability. Argue that a defendant has not reasonably certain means of knowing when to quit drinking, that a defendant is entitled by due process to know the precise moment when he reaches the physiological point of being a perfect .10. Add your scientific arguments to your legal ones.

In addition, there is some authority for the proposition that the government cannot destroy evidence (fail to keep samples). Argue under United States v. Buffalino on this. 576 F.2d 446 (2nd Cir. 1978).

Attack an evidence of a statement of your client before Miranda warnings. Under Berkemer v. McCarty, 468 U.S. ___, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), applies to misdemeanors and prevents an officer from using the defendant's statements or admissions prior to being "read his rights."

Argue your inability to cross-examine the Breathalyzer both to the jury and to the judge, and tell the latter that it violates your Sixth Amendment rights to confront witnesses.

FINAL ARGUMENT

Explain why such a good cop could be wrong. Focus on the machine and not the man. Argue that the machine is an engineering compromise. Stress the time variation between testing and offense. Subtly emphasize your client's need to drive to support his orphans and don't forget his mother's tumor.

If you win, do not celebrate right there in the courtroom by opening a champagne bottle.

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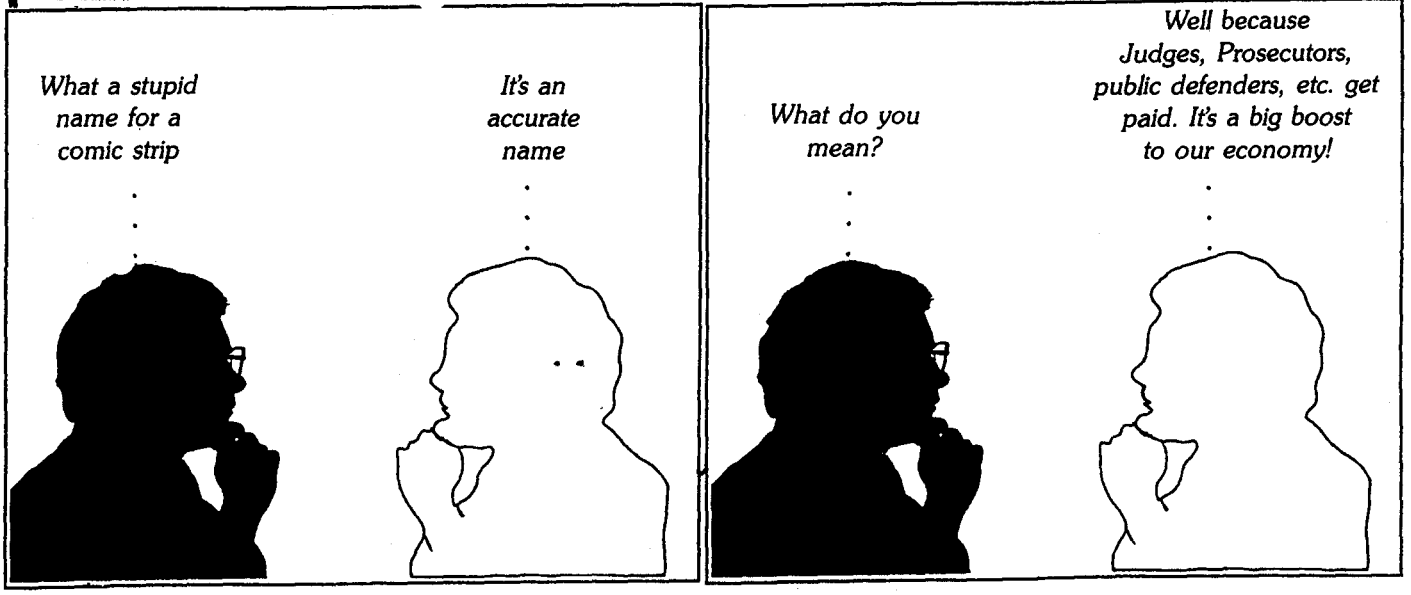
EDITOR'S NOTE -

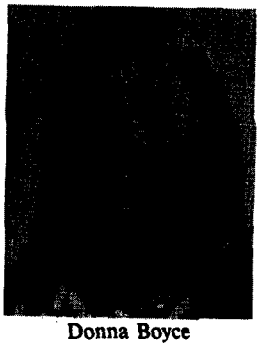
In conversations with Larry, he said he had gathered information for this article from a variety of sources, not the least from DUI Wizard, Dr. Jonathan Cowan.

Crime Pays

by Edward C. Monahan



6th Circuit Highlights



Donna Boyce

ANDERS BRIEFS

In Freels v. Hills, ___ F.2d ___, 17 SCR 8, 13 (April 6, 1988), the Sixth Circuit held that the failure by defendant's appellate counsel to strictly conform to the requirements for filing an Anders brief was presumptively prejudicial and was not to be measured by the standards of Strickland.

In Anders v. California, 386 U.S. 738 (1967), the U.S. Supreme Court set forth guidelines for appellate counsel to follow when s/he believes there is no merit to the defendant's appeal. In Freels, appellate counsel represented to the court that he had reviewed the transcript and found no error but it was unclear from the record whether he consulted with or sought the advice of the defendant or even whether he gave any notice of his intention to file such a brief. Apparently, counsel had merely filed a "no merit" letter with no request to withdraw from the case.

The Court stated in Freels that the obligation of advocacy required of counsel by Anders is of such a quality that it is not subject to waiver or excuse. Anders requires 1) a specific determination by appellate counsel that the record is devoid of error and that the issues suggested by the client are frivolous, 2) that appellate counsel file a brief referring to anything in the record arguably supporting the clients appeal, 3) that this brief be furnished to the client, and 4) that counsel seek to withdraw from the case.

The Sixth Circuit concluded that in this case there had been substantial non-compliance with Anders in nearly all respects and that the deficient counsel standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), could not be applied to excuse this failure of counsel to comply with the more specific commands of Anders.

The Sixth Circuit was careful to recognize the dilemma that a defense attorney faces with the struggle to represent her client and not be subject to ineffective assistance or malpractice claims and cautioned understanding from appellate courts: "Where this occurs, it is altogether likely that counsel, weighing the unpleasant alternatives, would rather risk judicial rebuke for raising issues which are not honestly debatable than risk the alternative and more costly danger that in failing to do so, he or she may become liable to a suit for malpractice or for obloquy resulting from a charge of incompetence. The choice is both difficult and real, we recognize, but it is also true that very often what may seem frivolous or unsupportable to counsel may seem otherwise in the eyes of the client or the appellate court. Thus, we commend a continued compliance with the requirements of Anders where appellate counsel concludes that he cannot fairly serve as advocate for his client. Similarly, we believe that appellate courts have a duty to recognize not only the dilemma faced by counsel, but also their own responsibility to insure that indigents are adequately represented, a right which is guaranteed by Anders...."

CONFESSIONS

In Cooper and Calloway v. Scroggy, ___ F.2d ___, 17 SCR 10, 8 (April 26, 1988), the Sixth Circuit Court of Appeals reversed the convictions of two men due to the admission of involuntary confessions in a case it described as "a throwback to an earlier era."

During questioning, defendant Calloway was struck in the face by at least one, and possibly two, detective(s), and was threatened by a third detective. The detective who struck Calloway continued to serve as one of his captors in the car on a lengthy ride from Tennessee to Kentucky and by remaining at the Owensboro police station during subsequent interrogations. The Court concluded that the blow delivered by the first detective created a coercive environment, that the police failed to change that environment on the night of the incident and that the state failed to meet its evidentiary burden to rebut the evidence that there was more than one blow and that another detective made a threat. The Court stated that the

Judge panel rejects sentencing rules

LOS ANGELES — Strict sentencing guidelines imposed in November for federal crimes have been ruled unconstitutional by a panel of U.S. district judges in California's Central District.

The judges voted 14-10 Thursday to reject the guidelines imposed by the U.S. Sentencing Commission, a seven-member group formed by Congress. Federal judges in Maryland also have declared the guidelines unconstitutional, and individual judges elsewhere have disagreed on whether to implement them.

The guidelines set up a prescribed range of penalties based on the severity of the crime and the defendant's background. Although designed to make federal sentencing more uniform, some jurists say they unfairly restrict a judge's ability to select the best sentence in individual cases.

Courier Journal, May 5, 1988

clear evidence of brutality and injury plus these additional factors led it to the conclusion that Calloway's confession was involuntary and should have been suppressed.

The confession of co-defendant Cooper presented a closer question for the Court. Cooper's claim that one detective struck and threatened him was not corroborated, nor was it squarely contradicted. Giving heavy weight to the uncorroborated fact that Calloway was physically abused, the Court held that that abuse of Calloway created a coercive environment in which co-defendant Cooper reasonably feared that he too was threatened with physical abuse. The Court stated that the police took no steps to change the environment and probably added to it by later threats.

In finding both defendant's confessions involuntary, the Court found that it was clear that the police created a coercive environment through brutality, extracted the confessions while the environment continued, and did not give assurance of fair treatment, provide a lawyer, let time go by or do any other acts to change the environment.

The Court further held that even if co-defendant Cooper's confession were voluntary, he should receive a new trial because the admission of Calloway's confession, which incriminated Cooper, violated Cooper's rights under the Confrontation Clause. Calloway's coerced confession was hearsay evidence against Cooper. There was no limiting admonition given to confine the use of Calloway's confession and it was used to convict Cooper. The Court found no particularized guarantees of trustworthiness to overcome the presumption that such evidence is unreliable and inadmissible, nor did the Court consider this error to be harmless beyond a reasonable doubt.

HABEAS CORPUS

In **Green v. Arn**, ___ F.2d. ___, 17 SCR 5, 19 (Feb. 22, 1988), the Sixth Circuit Court of Appeals held that a habeas corpus action is not mooted by the petitioner's release from parole. The Court stated that most criminal convictions do entail adverse collateral legal consequences and that the mere possibility that such consequences may exist is sufficient to preserve a live controversy.

HABEAS CORPUS

The Court addressed the issue of the proper standard for review by the United States district court of the magistrate's findings in **Flourney v. Marshall**, ___ F.2d ___, 17 SCR 7, 13 (March 22, 1988). The Sixth Circuit rejected the district court's review of the magistrate's findings under the weaker "clearly erroneous" standard. The Sixth Circuit emphasized that the district court must use the "de novo" standard in reviewing findings and recommendations by the magistrate to insure that they are legally and factually correct.

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61% of teen mothers in study abused

Associated Press

CHICAGO — About 61 percent of the teenage mothers surveyed in Illinois said they had been sexually abused as children or had been involved with forced, unwanted sex as early as age 2, officials said yesterday.

The average age for the first incidence of abuse was 11½ years. Fifty percent of the 445 teen agers questioned reported that the same abuser had harassed them between six and 10 times, according to the survey. It was sponsored by the Illinois Department of Children and Family Services.

"Experiences were often coercive and sometimes aggressive, including rapes at knifepoint and boyfriends inviting their buddies to share the frightened and confused victim," said Judith Musick, executive director of the agency's Ounce of Prevention Fund.

Department Director Gordon Johnson said: "These survey results tell us that the risks of second generation child sexual abuse are even greater than we knew."

Ms. Musick said at a news conference that the survey might help officials develop better ways to prevent sexual abuse of children.

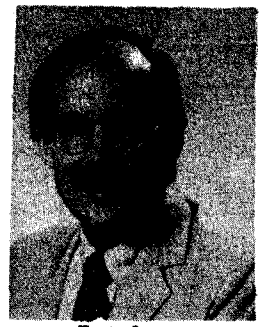
The survey found that:

- Of the teen age mothers who reported the unwanted sex, 65 percent said they were abused on multiple occasions.
- 94 percent of the abusers were known to the young women and 25 percent were family members.

Lexington Herald-Leader, September 15, 1987

Plain View

Search and Seizure Law and Comment



Ernie Lewis

On September 14, 1985, police answered a complaint of a man beating on a door of a motel. They found Charles Johnson, a man they knew to be a drug user, standing in the halfway outside his darkened room. When they shone a flashlight into the room, they saw white powder and drug paraphenalia, which they later seized pursuant to a warrant.

Three days later, in another motel room, the police took a warrant based upon a canine search of Johnson's car. There the police forced their way into his room as he tried to close the door so he could get dressed and accompany them to his car. Once inside, the police again saw drug paraphenalia and white powder, which was seized pursuant to a warrant.

In a unanimous opinion, the Court of Appeals held that both searches violated the Fourth Amendment and Section Ten. **Johnson v. Commonwealth**, Ky. App., 746 S.W.2d 80, (1988). The first search was unconstitutional when the police illuminated a darkened motel room without probable cause. The later seizure executed pursuant to a warrant was a "fruit of the poisonous tree."

The second search was likewise unconstitutional, since the police forced their way into Johnson's room without probable cause.

As to both searches, the Court rejected the Attorney General's appeal that the evidence should be admitted under the good faith exception of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). While not acknowledging the applicability of the good faith exception to Section 10, the Court held that the first search was "patently illegal," and because the affidavit in support of the warrant was "clearly and materially misleading," the second search warrant was likewise illegal. Accordingly, neither piece of evidence could be entered into evidence.

Johnson is an important case for two reasons. First, it is the closest an appellate court has come to establishing the good faith exception in Kentucky. Secondly, it reveals a Court truly presuming the illegality of warrantless searches, that a Court does not seem overanxious to find a relevant exception to the warrant requirement.

The citizen accused won another search and seizure issue in the Court of Appeals, this time in **Commonwealth v. Young**, (4/1/88- not to be published). The Court affirmed a trial court's suppression of evidence where the affidavit failed to inform the magistrate of the informer's reliability. The Court, while acknowledging that Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984) had adopted the "totality of the circumstances" test of Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 912, 76 L.Ed.2d 527 (1983), held that in Kentucky the reliability of the informer remained an important factor. Where the affidavit fails to sufficiently advise the magistrate of the informer's reliability, and where his basis of knowledge is not strong enough to compensate, then the trial court's suppression of evidence is to be upheld.

Together, both Johnson and Young provide hope that Leon and Gates will not produce a knee-jerk response in the Court of Appeals, and that privacy rights remain alive there.

The defendants did not fare as well in **United States v. Knox**, 17 SCR 5 (2/12/88). There, the defendants were stopped upon their meeting several parts of the standard DEA drug courier profile. They were detained for thirty minutes and cocaine was later seized from a bag they disavowed. The Sixth Circuit held that the investigatory stop based upon the reasonable and articulable suspicion found in meeting the drug courier profile was constitutional. Further, a thirty minute detention did not offend the mandates of United States v. Sharpe, 470 U.S. 675 (1985). Finally, the Court held that because neither displayed a reasonable expectation of privacy in the bag, they lacked standing to complain of any Fourth Amendment violation.

In a second Sixth Circuit case not applicable to defense counsel

practicing in the state courts, the Court reversed the trial court's suppression of evidence seized following a wiretap conducted under a warrant. The case consists largely of analysis of the totality of the circumstances under Illinois v. Gates, 462 U.S. 213 (1983). In essence, the Court holds that where there are numerous phone calls within a short period of time among members of a conspiracy, there is probable cause to issue a wiretap. The Court was obviously troubled however, despite their reversal. They acknowledge that their role is one of appellate review, not of deciding whether they would have issued the wiretap warrant. And they go out of their way to minimize the probable cause test, referring to it as more than a "mere suspicion," a "fair probability," but short of "even a prima facie showing."

The Short View

Lee v. State, 537 A.2d 235 (Md. 1988). In what has to be one of the worst search and seizure cases of the year, the Court affirmed a search of a gym bag taken "incident to a lawful arrest," where a Terry stop of a number of basketball players was conducted by armed officers pointing shotguns on the "detained" players lying face down on the court. The Court justified the "hard take down" of the players by stating the officers had grounds to believe they were "armed and dangerous." One should never underestimate the utility of the Terry stop to aggressive law enforcement officers and creative prosecutors, not to mention cynical appellate judges.

United States v. Parr, 43 Cr.L. 2063 (9th Cir. 4/7/88). Parr was stopped on suspicion of driving with a suspended driver's license. Parr was placed in the squad car, and his passenger was also asked to leave. The police took a gym bag and leather bag out of the car and searched them, finding drug paraphenalia, a sawed-off shotgun, and stolen mail. The trial court erred, according to the Ninth Circuit, in failing to suppress the evidence. Because Parr was not yet under arrest, the search of the car was not done incident to a lawful arrest, under New York v. Belton, 453 U.S. 454 (1981). Nor was this a probable cause search of the car under United States v. Ross, 456 U.S. 798 (1982). Thus, for once the Court's tardy notion of when an arrest occurred (from stop to finish this one lasted forty five minutes) benefits an accused.

Brown v. State, Md., 43 Cr.L. 2066 (4/14/88). The police received information that Brown was dealing PCP from his house. Three officers went to the house. When Brown did not answer, one officer went to the back of the house, and saw 19 small aluminum packets flying out the window. The Court held that the drugs should have been suppressed by the trial court, because the officer's going into the backyard without a warrant constituted a search of the curtilage.

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Juvenile Decoy Case Set For Trial

United States District Judge Scott Reed has set a May 1988 jury trial date for an ACLU case challenging police use of "juvenile decoys."

The lawsuit, which is being handled by cooperating attorney Phillip J. Shepherd, was filed in 1985 against officials of the Lexington-Fayette Urban County Government. ACLU represents a juvenile and his mother.

The lawsuit claims that police used juvenile males in a sting operation along "The Wall," a Lexington area notorious for male prostitution and juvenile sex. The plaintiff in this case was allegedly used as a decoy by police even though neither he nor his mother gave prior consent.

According to documents in the case, the ACLU client's cousin had consented to act as a police decoy. He was wired for sound by use of a hidden microphone and made himself available for solicitations from men to engage in illicit sex.

The two boys were picked up at "The Wall" by a male attorney who police had previously identified as a suspect. All three went to the man's apartment, where he allegedly supplied both boys with alcohol and began performing oral sex upon ACLU's client. Although police had followed the boys to the apartment and listened to all proceedings through the cousin's microphone, they failed to intervene until after the commission of these acts. The attorney was later convicted for his conduct.

Shepherd said that he is seeking more than $1,000,000 in damages on behalf of his client.

ACLU Newsletter, January, 1988

Trial Tips

For the Criminal Defense Attorney

Legislative Update

Ernesto Scorsone

After the conclusion of the 1986 General Assembly, I observed that the criminal defense bar had not been an active participant in the legislative process. The 1988 General Assembly was different. With lobbying efforts of the Kentucky Association of Criminal Defense Lawyers (KACDL) and the Kentucky Coalition Against the Death Penalty (KCADP), we witnessed a new and more balanced approach to criminal law enactment. The final outcome of legislation passed was not dramatically different than past sessions. However, significant first steps were taken by the defense bar, and as a result, the "prosecution-only" perspective to law-making in Frankfort is slowly being altered.

The following is a brief description of some of the major pieces of legislation that have become law. Their effective date is July 15th unless the word Emergency appears with their description.

SB96 CONSPIRACY

Amends KRS 218A.990 and 506.040 to provide that a person committing a criminal conspiracy to traffic in a controlled substance be subject to the same penalties as are specified for trafficking in the controlled substance.

SB97 MARIJUANA

Amends KRS 218A.990 to set penalty for second and subsequent offenses of manufacturing, selling or possession with interest to sell, not less than 8 ounces of marijuana as confinement in the penitentiary for 1 to 5 years, or a fine of $3,000 to $5,000, or both.

SB353 MARIJUANA

Amends KRS 218A.990 to remove requirement that planting, cultivating or harvesting marijuana be for purposes of sale to impose penalty of 1 to 5 years in the penitentiary or a fine of $3,000 to $5,000, or both; moves the presumption of growing for sale of marijuana plants from 25 plants to 5 plants.

SB352 HASHISH

Amends KRS 218A.990 to provide that manufacturing, selling or possessing with intent to sell hashish is a Class D felony.

1988 SESSION STATISTICS

	House	Senate	Total
Bills introduced:	1,030	399	1,429
Bills passed:	299	110	409
Bills vetoed:	7	4	11
Bills enacted into law:	292	106	398

The 1988 General Assembly enacted 28% of all legislation introduced for consideration.

SB99 LSD

Amends KRS 218A.990 to set penalty for possession of lysergic acid diethylamide (LSD) or phencyclidine (PCP), for the first offense, as confinement in the penitentiary for 1 to 5 years, a fine of from $3,000 to $5,000, or both, and for each subsequent offense, is 5 to 10 years, a fine from $5,000 to $10,000, or both; excludes possession of LSD or PCP from provision permitting drug abuse treatment program to substitute for penalty.

SB351 TRAFFICKING NEAR SCHOOLS

Amends KRS 218A.990 to make trafficking in controlled substances in or within 1,000 yards of a school classroom building a felony punishable by 1 to 5 years imprisonment, a fine of $3,000 to $5,000, or both; requires that violators receive the highest penalty permitted by law for the class of controlled substance sold.

SB118 TINTED WINDSHIELDS

Creates standards by which motorists may apply window tinting to windshield, side windows and rear windows: sets penalty for violations as a Class B misdemeanor for person who installs substandard material; establishes that tinted windshields provisions apply only to vehicles registered in the Commonwealth; permits any window of a motor vehicle tinted in a manner approved by federal statute or regulation by the manufacturer.

SB275 CHILD RESTRAINTS

Amends KRS 189.125 to enable a penalty to be placed on violations of child restraint law; amends KRS 189.990 to create a $50 fine for failure to use a child restraint seat; exempts pickup trucks if all seats are occupied by person other than child.

SB360 VEHICULAR HOMICIDE

Amends KRS 186.560 to provide for suspension of an operator's license for not less than five years in the event of vehicular homicide.

SB627 DRIVER LICENSES AND MINORS

Amends KRS 189.990 to establish a pre-trial diversionary program for minors who commit motor vehicle traffic offenses pursuant to KRS Chapter 189; permits the court to retain a person's driver's license for a period not to exceed 45 days rather than a license suspension; requires the attendance in the driver improvement clinic pursuant to KRS 186.574; requires dismissal of violation if program is satisfactorily completed.

SB147 USE OF LEFT LANES

Amends KRS 189.340 to prohibit use of left lane on any limited access highway except when passing, yielding or when traffic conditions necessitate such use; limits provision to highways posted at 65 mph.

HB452 JUVENILE CODE

Creates and amends over 100 sections of KRS Chapter 600, the Kentucky Unified Juvenile Code; amends

Judge faults law requiring juvenile trial for ax slayer

Associated Press

ROCHESTER, Minn. — A judge said he did not agree with trying a 16-year-old as a juvenile in the ax slayings of his parents and two siblings but insisted the law gave him no choice.

District Judge Gerard Ring said Friday that he hoped the case would prompt the legislature to review the law on juvenile crime.

"Under the present law, I can give the same disposition to a juvenile for stealing a Baby Ruth candy bar as for murdering baby Ruth," he said. "I have never agreed with that."

Ring denied a motion to have David Brom tried as an adult on charges of murdering his parents, Bernard and Paulette Brom, his brother Ricky, 11, and sister Diane, 14, at the family's home Feb. 18.

If David is convicted as a juvenile, he will be released at age 19 or when he has been deemed rehabilitated, whichever comes first. If tried as an adult and convicted, he would face a life sentence with parole eligibility after about 17½ years.

To try a juvenile as an adult, state law requires the prosecutor to show that the child is not suited to rehabilitative treatment and is a danger to the community.

Ring wrote in a ruling released Friday that neither standard applied to David, who was described by a court-appointed psychiatrist as "deferential, polite and compliant" and had no prior record.

Olmsted County Attorney Ray Schmitz said he would appeal the ruling.

The psychiatrist, Dr. Carl Malmquist, testified earlier this month that David described the killings to him and that depression made David suicidal and eventually homicidal.

An older brother, Joseph, 19, lived away from the Brom home and is the only other survivor of the immediate family.

Lexington Herald-Leader, April 25, 1988

definition of "juvenile holding facility" to require total separation between juvenile and adult facility spatial areas; allows child accused of committing a status or public offense or of being in contempt to be detained in a secure juvenile detention/holding facility, for a period of time not to exceed 24 hours, provides procedures for 24-hour detention hearing; provides that if the court orders the child detained further, such detention occur in either a secure juvenile detention/holding facility; amends KRS 635.020 to provide that a child 14 at time of offense, charged with a capital offense, Class A or B felony, be proceeded against as a youthful offender and that a child 16, with 2 prior adjudications as a public offender be proceeded against as a youthful offender if charged with a Class C or D felony; amends KRS 635.090 to provide that the cabinet may petition for continued commitment of public offender and delete 12-month maximum sentence; removes requirement that a child be guilty of prior felony within 1 year of the commission of the new offense before being proceeded against as a youthful offender; authorizes the peace officer to retain the child for an additional 12 hours or transport the child to proper facility; amends to provide that if a child commits a new offense before reaching eighteen, the court of the county where the new offense was committed have jurisdiction for purposes of adjudication but may transfer the case for disposition to the court having jurisdiction of the prior offense; amends to allow an officer to take a child into protective custody and/or allow a court to issue an ex parte emergency custody order if there is reasonable grounds to believe that the child may be in danger of imminent death or serious physical injury or is being sexually abused and the parent or person exercising custodial control is unwilling or unable to protect the child; allows the court to consider the religious belief and practices of the child regarding medical treatment; amends and repeals various provisions to conform.

Georgia bans execution of retarded: Georgia will prohibit the execution of people found "guilty but mentally retarded" when a newly signed bill prompted by a 1986 execution takes effect this summer.

The 1988 General Assembly passed the measure despite opposition by prosecutors to early drafts.

HB841 CONSENT TO TREATMENT

Amends KRS 222.440, relating to the capacity of juveniles to consent to treatment, to permit parents or guardians to commit minors to substance abuse treatment programs; permits minors to petition the district court to determine if treatment is necessary.

HB766 ABANDONED REFRIGERATORS

Creates a new section of KRS Chapter 438 to prohibit abandoning refrigerators with lids on them; permits refrigerators to be used for other purposes if locked to prevent unauthorized entry.

HB48 MENTAL HEALTH REFORM ACT

Creates and amends various sections of KRS Chapter 202A, relating to policies and procedures for voluntary and involuntary hospitalization of the mentally ill; sets forth policies and procedures for transfer of mentally ill or mentally retarded patients between hospitals; sets forth policies and procedures for the transfer of a mentally ill inmate of a penal and correctional institution to a hospital or forensic psychiatric facility; amends KRS 202B.010 to redefine the term "qualified mental retardation professional"; amends KRS 202A.041 relating to the detention of person believed to be mentally ill, to require the judge, unless either the court or a party to the proceedings objects, to implement emergency 72-hour hospitalization; amends newly created section of KRS Chapter 202A, relating to the transfer of mentally ill or mentally retarded patients between specified mental health facilities and treatment centers, to allow the patient, guardian or designated family member to challenge the transfer; amends KRS 504.080 to allow the court to commit a criminal defendant to a forensic psychiatric facility for examination, treatment and evaluation except under certain conditions; amends KRS 504.110 to allow an incompetent criminal defendant to be court ordered to submit to treatment in a forensic psychiatric facility except under certain conditions; amends KRS 504.140 to allow rather than mandate the court to appoint a psychologist or psychiatrist to examine, treat and report on a guilty but mentally ill defendant's mental condition at the time of sentencing; amends KRS 504.150 to mandate court sentencing of a guilty but mentally ill defendant to the local jail or corrections cabinet in addition to sentencing such person in the same manner as a defendant found guilty; requires treatment to continue for such defendant until the treating professional determines treatment is no longer necessary instead of until the person is no longer mentally ill; requires treatment of a guilty but mentally ill person which is a condition of probation, shock probation, conditional discharge, parole or release to continue so long as the treating professional determines the treatment for mental illness is required instead of so long as the defendant is mentally ill.

SB178 GRAVE DESECRATION

Creates a new section of KRS Chapter 525 to create the crime of desecration of venerated objects in 1st degree, for unlawfully excavating human remains for purposes of commercial sale or exploitation, as a Class D felony; amends present desecration of venerated objects statute, KRS 525.110, to offense in the 2nd degree; EMERGENCY.

HB594 PAROLE BOARD

Amends KRS 439.320, relating to the parole board, to specify a quorum for parole board hearings as 3 members; retains the 4-member quorum for all other business; deems a three-member panel's decision final unless any member of the full board requests that the full parole board hear the case, whereupon a parole hearing by at least four parole board members must be held.

HB87 DEFENDANT AND ABUSED CHILDREN

Defines "reasonable efforts" according to Public Law 96-272 to enable a child to live safely at home; amends KRS 620.030 to add the requirement that any supervisor who receives from an employee a report of suspected dependency, neglect or abuse promptly make a report to the proper authorities; amends KRS 620.040 to require CHR to investigate reports of non-custodial abuse to law enforcement agency for additional investigation; provides that school personnel or other persons listed in KRS 620.030(2) have no authority to conduct internal investigation in lieu of official investigation; amends KRS 403.720 to redefine family member to include a former spouse for purposes of warrantless arrest; amends KRS 431.005 to provide that unmarried couples with a child in common are entitled to protection under warrantless arrest, domestic violence and abuse and adult protection statutes; permits university police to make arrests for spouse and family abuse cases; amends KRS 403.765 to clarify the reference to "orders of the circuit court"; amends KRS 403.210 to require the court, when establishing child support obligations, to consider the education needs of a child over the age of 18 who is enrolled in high school on a full-time basis.

HB559 GED OR JAIL

Creates new sections of KRS Chapter 533 to provide that persons convicted of misdemeanors or violations who have not graduated from high school or received a GED may be sentenced to complete an education program in addition to or in lieu of any other penalty; provides that such person convicted of a felony may be sentenced to complete an education program in addition to any other penalty; provides for program administration by the state department of education.

HB288 FORCIBLE COMPULSION

Amends KRS 510.010 relating to sexual offense to change the definition of forcible compulsion to delete the requirement for earnest resistance by the victim and to add an element of implied or expressed threat of force.

HB346 UNIVERSITY KEYS

Creates a new section of KRS Chapter 164 to prohibit unauthorized possession or duplication of university keys which bear the legend "unlawful to duplicate this key"; amends KRS 164.990 to make offense a Class A misdemeanor.

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HB987 BOUNTY ON PROBATIONERS

Creates a new section of KRS Chapter 196 to provide a salary incentive program for probation and parole officers; amends KRS 439.310 to require persons released on probation or parole to pay $10 per month while on active supervision unless unable to work; incentive program effective July 1, 1990.

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As of July 1, 1988,
STARTING SALARY for:

Public Defenders -
7 surrounding states

Ohio - $25,896
Indiana - $25,000
Tennessee - $24,300
Missouri - $23,220
Virginia - $23,000
Illinois - $22,500
West Virginia - $18,000 - $21,000
Average Salary- $23,131

Public Defenders in Kentucky

State - $16,608
Louisville - $15,000
Lexington - $14,000

Prosecutors in Kentucky

State - $16,608
Louisville - $16,000 - $18,000
Lexington - $16,000 - $18,000

Police in Kentucky

State - $18,072
Louisville - $16,120
Lexington - $14,500

The committee voted to freeze the number of state troopers at 950. The starting salary for troopers was raised from $15,000 to $18,000. Veteran troopers were given a $1,200 salary boost, and sergeants will get $800 more a year.

FOR THE RECORD

COURT REPORTERS AND COMPUTERS

Group critical of videotaped appeals

LOUISVILLE — The Kentucky Shorthand Reporters Association has criticized the use of videotaped appeals and says its survey shows public defenders also are against them.

Reasons given for the defenders' dissatisfaction included vast increases of time needed to review the tapes, poor sound quality and non-acceptance of video by higher courts, the association said in a news release. The association said almost 94 percent of the public defenders were critical of videotapes.

Seventy defenders participated in the census, which included all public defenders who handle appeals in Louisville, Lexington and Frankfort, the association said.

"While the rest of the nation's courts are moving into the computer age, we're playing around with video," said association President Laura Knight.

She said the association is calling for a study to see if the sacrifice of computers for video is really cost-efficient.

The association said two-thirds of the nation's court reporters used computers to produce a written transcript.

By Ben Rogner

Most court reporters have already switched to computerized shorthand machines.

Perry Mason stood up in court and won case after case, week after week, for nine years on television. No matter how quickly the revelations mounted, every word of the high drama was taken down by the court reporter—unobtrusive and unfailingly accurate. How do they do it? On such a tiny typewriter?

The court reporter is neither a stenographer nor a super-fast typist. The shorthand machine, invented more than 80 years ago, doesn't use the phonetic squiggles of pen-and-paper shorthand, but the letters of the alphabet. And yet, with only 22 closely spaced keys, it doesn't work much like a conventional typewriter, either. Rather than writing out words letter by letter, the court reporter's machine transcribes speech syllable by syllable. Combinations of two or three keys are pressed at once to represent particular syllables.

The machine's early 20th-century inventor, Ward Stone Ireland, devised a system called "stenotypy" for replacing absent letters and punctuation with combinations of keys. To speed up writing even further, court reporters abbreviate common words and phrases. A skilled reporter can keep pace with speech bursts of 140 to 225 words per minute—a match even for Perry Mason's rapid-fire, rapier-witted defense.

There is one hitch: lack of standardization. Most court reporters are independent contractors, hired by particular courts, who may sell their transcripts to the parties in a legal proceeding. Relatively few work for the state or federal government. This means that codes and abbreviations are not universal among all court reporters. Eventually, each reporter develops unique abbreviations and habits, and this can sometimes make deciphering a transcript difficult. The reporter, or a trained assistant, is therefore also responsible for decoding the shorthand tape into full, legal transcripts.

Shorthand machines have been common in courtrooms since the mid-1930s. Over the last decade and

a half, computerized shorthand machines have transformed the work of court reporting, and recent innovations are dramatically changing the very procedures of the courtroom itself. Roughly two-thirds of court reporters have already switched to machines that contain special internal electronics to record which keys are pressed, and in what order. This information is later fed into a personal computer equipped with computer-aided transcription (CAT) programming, which translates the shorthand code to English in a matter of about ten seconds.

CAT produces remarkably clean transcripts: about 98 percent complete and accurate. A few editorial corrections later, and the final legal text is ready for printing—or, in real-time transcription systems, for display on computer monitors within the courtroom (see sidebar).

Order in the Court

Computerized shorthand makes the reporter's idiosyncratic coding system less of a problem, allowing notes to be accurately transcribed even if the reporter is unavailable. It also affects courtroom processes in several other, more important ways. Trial participants can consult testimony given minutes or months before. Attorneys can confront witnesses with conflicting testimony, and judges can base rulings on more accurate information. As Judge Roger G. Strand of Phoenix, Arizona, recently commented, "Perhaps the most magical part of this whole system is that the entire 8,000 pages of transcript [from one case] is on the database. You can pull from that 8,000 pages anything you want."

At the time, Judge Strand was presiding over a complicated case that involved both conspiracy and interstate cocaine distribution. "One of the defense lawyers in particular," he noted, "had quite a flair for the system. While the other lead counsel examined a witness, he would be looking for inconsistencies in the man's testimony. He and his colleagues were constantly passing each other notes about things they had discovered in the transcript database."

Attorneys and judges involved in the huge and complex cases called "mega-trials" are delighted to see court reporters' computerized transcripts because they yield vital data—data that can be analyzed and manipulated. Since court reporters can now provide testimony and proceedings on floppy diskettes, judges and lawyers can more effectively automate their own preparations and management of these difficult trials.

Computers in the courtroom have other important uses as well. Modems enable lawyers to instantly reach out beyond the courtroom, to consult on-line legal databases or computerized transcripts for quick research, or to consult other distant computerized records—financial databases or correspondence files. Innovative court reporters, attorneys, and judges are regularly discovering useful applications for these new, computer-based judicial tools.

Reporters vs. Recorders

The most common question asked about court reporting is, "Why don't courts just use tape recorders instead of court reporters?" It is actually more expensive and less efficient to use tape recorders and typists to produce transcripts than it is to use court reporters and their computers. One reason is that the court reporters generally supply all of the equipment themselves. Only in a few isolated instances have court systems installed computers for them.

What about eliminating the transcripts altogether and simply using audio or video tapes as a court record? Such a system was tried in New Mexico, and that state has since returned to using court reporters. Justice Mary C. Walters of New Mexico's Supreme Court headed up the committee that made the decision. "We have learned," she wrote, "that taping of the record indeed gets the record to the appellate court much more expeditiously than was possible when typed transcripts (without CAT) were prepared. But we have also learned that the time saved in transmitting the record was either completely lost or expanded three-to four-fold because of having to listen to, rather than read, the record." ❑

Ben Rogner, of Chicago, worked for several years as a court reporter, and is now editor of a magazine for court reporters called National Shorthand Reporter.

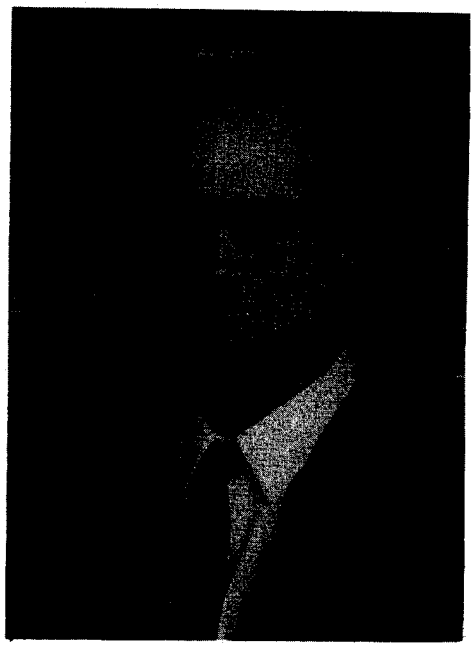
Simultaneous Transcription

"Hear ye, hear ye!" the bailiff cries. "The court is in session!" But what about the hearing impaired? The latest technological advances in CAT, or computer-aided transcription, are proving of great value to deaf lawyers, judges, and other trial participants with hearing disabilities.

Generally, court reporters process their shorthand transcripts—manually or using CAT—into full texts while the court is in mid-day or overnight recess. A new hybrid of CAT, known as computer-aided real-time transcription, or CART, provides near-instantaneous full transcripts on computer monitors. This allows deaf litigants to participate directly in the proceedings. CART also enabled a judge who lost his hearing to remain on the bench, and a deaf attorney was able to argue a case before the US Supreme Court.

To further explore and demonstrate CART's abilities, the court reporters' professional association (the National Shorthand Reporters Association) installed CART systems in several courtrooms. One setup is in Judge Roger Strand's Phoenix courtroom; US Supreme Court Justice Sandra Day O'Connor and Chief Justice William H. Rehnquist have viewed the installation and commented favorably. ❑

Innocent lies, tragic consequences: the manipulation of child testimony



PAUL R. LEES-HALEY, PH.D.

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PAUL R. LEES-HALEY, Ph.D.*

"Let's give him a fair trial this evening, and hang him in the morning."

Anonymous

Surely everyone agrees on the desperate need for help for child abuse victims, and on the need for vigorous child advocates. But in court, child advocates should not be confused with unbiased independent experts. Child advocates are fighting for the child, and some of them may fight with a philosophy of "Damn the defendant, full speed ahead."

Zealous advocacy is for lawyers, not for objective interviewers and researchers. Preconceptions and interviewing styles that shape children's perceptions and reports are reckless and potentially vicious in their impact on persons entitled to due process and to the children themselves.

Preconceptions and interviewing styles that shape children's perceptions and reports are reckless and potentially vicious in their impact on persons entitled to due process and to the children themselves.

This article will describe certain preconceptions about child abuse that are assumed by some helping professionals. It will argue that these assumptions are erroneous, and that they can cause innocent victims to suffer from false accusations as child abusers. It will then describe a procedure by which any experienced interviewer can demonstrate the risk of such assumptions when they are held by a therapist who is testifying in a child abuse case.

In 1986 an alleged child abuser was sentenced to 99 years in prison based on the testimony of a 5-year-old child. Children who were as young as three years of age have been found to be competent to testify,[1] and as Berliner and Barbieri observed, "Prosecution of child sexual assault often rests largely on the child victim's testi-

**The author would like to thank Theodore Blau, Ph.D. and William McIver, Ph.D. for the original inspiration for this article. Neither is responsible for its contents or shortcomings.*

mony."[2] At least 20 states have abolished special competency requirements for children, and they have created a presumption that they are competent witnesses.[3] Let us examine a few of these preconceptions . . .

ASSUMPTION: The current methods that are being used by therapists to interview children are appropriate and sufficient for gathering evidence about alleged child abuse. For example, according to a report by the Child Sexual Abuse Clinical Consultation Group, in conjunction with the Sexual Assault Center,[4] "An informed professional opinion about sexual abuse can be made by evaluation of the child. It is not necessary to interview the accused offender."

ASSUMPTIONS: Children need to be "helped" in special ways to talk about the crime. As James K. Stewart, Director of the National Institute of Justice, put it, "innocent children are often reluctant to speak out against those upon whom they depend both emotionally and physically."[5]

> "All child victims of sexual abuse can be expected to be fearful of the consequences of . . . disclosure."[6]
>
> Some children give "clues" through play or oblique references . . . but are unwilling to share this information directly with you."[7]

ASSUMPTION: Children don't lie. Consider these quotes:

> It is "a maxim among child sexual abuse intervention counselors and investigators that children never fabricate the kinds of explicit sexual manipulations they divulge in complaints or interogations"[8]
>
> "the child is the best and usually the only reliable reporter of the event(s). The accused individual has a strong motivation to lie . . ."[9]
>
> "Very few children . . . have ever been found to exaggerate or to invent claims of sexual molestation."[10]
>
> "In other words, there is no reason to doubt a child's report of sexual assault . . ."[11]

These advocates actually go so far as to say that, unlike adults whose eyewitness testimony is notoriously unreliable,[12] children probably don't even make errors in their abuse reports:" It is unlikely that a child would lie *or be mistaken*" (emphasis added).[13]

ASSUMPTION: A "special" adult is needed to elicit the child's "true" views—not just any adult can do it. This special adult must be supportive and encouraging of the child and suspicious of adults, believing that the latter are good suspects even if they appear to be normal people.

One physician, for example, says that it is "countertherapeutic and unjust" to use therapists who will not *suspect* "apparently normal adults" or who are not *believers* in the possibility of "unilateral sexual victimization" of children by such "apparently normal" adults.[14]

"Each child should have a victim advocate or other supportive adult for assistance and accompaniment throughout the investigation and adjudication processes."[15]

ASSUMPTION: Although the children need to be protected during these interviews, no one needs to worry about the needs and rights of the defendants who are alleged to be child abusers.

Some of the above-mentioned authors begin by reminding us that "when an offender is acquitted . . . it does not mean that the child was not abused."[16] Then these authors have the excruciating callousness to claim that "no binding consequence accrues to the adults who are involved as a result of a mental health opinion that a child is the victim of abuse."

If responsible professionals act on false assumptions, are the results any better than the work of irresponsible parties?

Has their zeal to prosecute blinded them to the consequences of false accusations of child abuse? Have they never noticed that, as *Women's Day*[17] so aptly put it, "On the mere suspicion of mistreatment, social workers have the power to take your child away" with all of the concomitant emotional and social and financial consequences? Is it "no binding consequence" to have one's career wrecked by false allegations of child abuse?

The problem

These assumptions and the interviews that are inspired by them are dangerous weapons. If responsible professionals act on false assumptions, are the results any better than the work of irresponsible parties? This question must be addressed to the social workers, psychiatrists, psychologists, and police investigators who are conducting these interviews. These groups are not lacking in confidence in their own importance and abilities. Even the least academically trained of the three licensed professional groups (social workers) tell us that "the values and generic skills of social work make it an obvious and competent profession to address the societal and individual problems of child sexual abuse."[18]

Unqualified "authorities" sometimes jump to breathtaking conclusions: an Abt Associates consultant, *writing in a publication of the U.S. Department of Justice*, made the remarkable statement that, "when a 7-year-old girl spontaneously asks her father . . . about details of erection and ejaculation, there can be little doubt that this child was sexually abused. . . ."[19] If that 7 year old has been alone with only one male in the recent past, are we then to conclude that there is little doubt that he is guilty of child abuse? Are we also to assume without doubt that a little girl, in the United States, in 1987, has never seen or inadvertently overheard a conversation about an X-rated movie, book, or magazine, or an animal mating in a children's zoo, or the topic of sex, and that she would not ask about such things if she had not been sexually abused?

In the same article the Abt Associates consultant cited, as evidence of the alarming frequency of child abuse, The National Center on Child Abuse and Neglect estimate that approximately 72,000 children were reported as sexually maltreated by a parent or household member in 1983.[20] What the same agency also found—and the consultant did not bother to mention—is that "over 65 percent of all reports of suspected child maltreatment proved to be unfounded."[21]

Procedure: Is Big Bird a criminal?

In a staged demonstration, interviews were conducted with two girls, ages 5 and 7, and one boy age 6. The interviewer used assumptions and practices that therapists are using throughout the country, but used these assumptions and practices deliberately to manipulate the children into testifying to patent nonsense. This investigator played the part of a therapist who:

1. has a "gut feeling" (clinical intuition) that the alleged perpetrator is guilty,
2. senses that the child wants to tell but is afraid, or has been told to keep it secret, or finds it difficult to express because it was painful, or for other reasons is reluctant to tell, and therefore,
3. feels that the child needs support and

encouragement to "open up" about this painful topic and to express these hard-to-express truths, and finally,

4. knows that children do not lie or make mistakes.

In these interviews, answers in the desired direction met with smiles and warmth and remarks like "good for you." When a child answered in the undesired direction, she was met with facial expressions of scepticism and disappointment, questioning looks, and frowns, along with a parallel tone of voice and remarks such as, "It's o.k. to tell me," "Are you sure?" and "You're safe here." An effective way to induce alarm in a perfectly calm child is to say, "Don't worry, this won't hurt. You are safe here." They've heard it before.

Readers who imagine that such practices are not occurring in real settings are referred to McIver's[22] videotaped interview between a child social service worker and a 4½ year old child whose testimony led to the conviction of a 38 year old man for molesting her. In this interview the child was led to say that the defendant had touched her genital area with his hands and mouth, by smiling and hugging her when she made such allegations and by being cold and nondemonstrative when she did not. McIvery cites cases in which interviewers congratulated children for making desired allegations and became perturbed when the child did not.

The point is not that therapists are trying to frame anyone. The point is scientific knowledge versus sloppiness: the actions of well-meaning, concerned therapists can lead a child to testify falsely. As McIver[23] pointed out, these interviews are highly stressful experiences for a child, especially a very young one.

Prosecutors are well aware of the fact that the nonverbal behavior of adults influences what the child says. Prosecutors deliberately manipulate nonverbal behavior toward obtaining convictions. In the courtroom some prosecutors, during direct examination, stand between the defendant and the child so that the child cannot see the defendant. Others instruct children to look at a victim advocate or supportive family member and not to look at the defendant while testifying. According to Whitcomb, "one victim advocate encourages children to tell the judge if the defendant is making faces."[24] How is a falsely accused child abuse defendant expected to look? Impartial? Unconcerned? Enthusiastic and supportive?

In the experiment with these three children, no attempt whatsoever was made to ask sensible, reasonable questions or to use concepts and words the child understood. The point of this experiment was to demonstrate that a child's answers are often the result of the interviewer's behavior, not the child's experience. The interviewer paid rapt attention to the answers that he wanted, and he was inattentive to the wrong answers, which he suspected were innocent fibs inspired by the perpetrators' threats against the child. The findings below are flagrant examples of events that are happening in more subtle ways wherever children are being interviewed.

The point is scientific knowledge versus sloppiness: the actions of well-meaning, concerned therapists can lead a child to testify falsely.

Testimony by manipulated children: How Big Bird was framed

Each child was sworn in with the following oath, "Do you swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?" After a few minutes of rapport-building chit chat, each child was presented with an anatomically incorrect paper doll—one with three heads, six arms, and four legs. Only a few smiles and expectant looks were required to obtain the agreement of both the seven year old and the six year old that their fathers had touched all six of their hands, all four of their feet, and all three of their heads. The five year old, a more independent thinker, flatly denied that her father had ever touched her anywhere at all, in her entire life.

All three children gleefully agreed that Big Bird has repeatedly "behaved in a lewd and lascivious manner" in their presence. Big Bird "presented his genitalia in a lascivious manner" to the five year old and the six year old on Saturn, Mars and Venus. The seven year old maintained that even though Big Bird did this on earth, he never did it on another planet. Sensing the interviewers disappointment, however, she volunteered that her dog may have done so.

The five and six year old agreed that psychotic psychosexual hermaphroditism was probably the basis for Big Bird's behavior, but when the seven year old was offered this explanation, she ventured, "I don't think so." She found more plausible the theory that it might be fractured yellow feathers or bird measles that caused this outburst of pathological exhibitionism. She also agreed that it could be related to the North Alabama intergalactic religious wars of 1986.

Commentary:

A typical example of one factor that controlled answers in these interviews is the responses the children made to questions about the running speed of "diddle-dees" versus "kubunga kubungas." They consistently agreed that a "diddle-dee" (spoken quickly in a higher pitcher with a smile) can run faster than a "kubunga kubunga" (spoken in a low pitch with a slow, ponderous tone and a frown). Perhaps many adults would have also agreed that a "diddle-dee" can run faster too, but the reason for our decision would be found in the sounds and style of asking, not in an accurate definition of the terms.

It is extremely significant *and typical* that the children answered "yes" or "no" or some synonym of "I think so," and *not* "I don't know," when asked completely incomprehensible questions. From kindergarten forward children are taught that questions have answers, and that you are supposed to know the answers.[25] In other words, when asked ludicrous questions in terms that they had never heard, the children *guessed*. Children aren't trying to be accurate scientists when they answer questions; they are trying to please the adults.

Children's answers cannot only be influenced and slanted, they can be turned around 180 degrees. When the answer wasn't the desired one, a simple but powerful technique reversed the child's original answers (follow these six steps):

1. Frown and look hurt when the child answers.
2. Tilt your head and assume a stern, somewhat accusing look, while staring at the child's eyes.
3. Ask, "Are you *sure*?"
4. Continue staring in complete silence until the child responds.
5. As the child begins to reverse the answer, begin to look relieved.
6. Upon reversal, breathe a sigh of relief and smile warmly.

This technique is extremely effective in reversing answers. A typical example of the result is the reply of one of the little girls in this study, who had firmly and clearly

said, "No" to a question, and then, after a moment of the reversal technique, said, "Ah, I mean . . . yes."

Conclusion

What does a demonstration like this prove? That Big Bird must be stopped? A scientific survey would have had adequate samples, controlled procedures, and peer review. This study involved merely three times the number of child witnesses most defendants get, with only as much peer review and control of procedures as you usually get in a psychotherapist's office, i.e., none. No claim is made that this study has any scientific merits, but is it any less valid than what we are doing to alleged child abusers?

The average 5 year old cannot tell you his phone number, does not know what day of the week it is, and cannot accurately answer the question, "What is your address?"[26] The average six year old doesn't know how many units make a dozen, doesn't know in which direction the sun sets, and can't name the four seasons.[27] Yet young children are considered to be sufficiently knowledgeable to take an oath and to testify on complex matters that can lead to imprisonment of an innocent defendant.

While this article was being written, it was discovered that a 15-year old girl had been deceiving authorities for six months with fantasies of an international white slavery ring. These authorities included local, state, federal and international (INTERPOL) experts with many years of experience. In a neighboring state, an 8-year old testified as an eye-witness in a capital offense trial, and after the trial the child admitted that she had fabricated her entire testimony. In another case, it was discovered that a nine year old child had persuaded a four year old to frame her stepfather.

Memories are creations made by people, not videotapes of events.[28] Once told, and then repeated—especially with adult encouragement—a child's fictitious memory becomes more believable to that child.[29] The child can come to believe a new "memory." Children make human errors, they tell fibs, they are overwhelmed by adults, and they act out unconscious motivations. And then if their testimony is accepted in adult court, it becomes a powerful event in the life of the alleged offender.

Excepting George Washington, all of us, having been children, should know that only an expert could believe that children don't fib. And as Mark Twain observed, "George Washington evidently was a backward boy. He lacked skills common to every American child—he couldn't even tell a lie."

Recommended action:

The attorney whose client is falsely accused of child abuse can find experienced interviewers in every city who can demonstrate how easily children can be led to testify inaccurately as a consequence of behaviors irrelevant to the legal matters at hand. This author recommends using a carefully selected, well-trained interviewer from a background such as psychology, medicine, or early education for their relevant experience and witness value. However, a bright attorney will not feel limited to these professions. For example, an absolutely spectacular person for demonstration purposes would be a magician with a lot of experience performing before children. Try it, and you'll see for yourself—and for your client.

Children aren't trying to be accurate scientists when they answer questions; they are trying to please the adults.

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Alternative Sentencing

IN THE PUBLIC defender's office in West Palm Beach, Fla., Mildred M. George carefully crafts alternative sentencing plans for felons who — unless the judge accepts her plans — are headed for prison.

One case involves a 28-year-old man facing up to 17 years in prison under seven felony charges for armed robberies of convenience stores. He had led a fairly stable personal and business life until a recent cocaine addiction. Once hooked, he lost everything and turned to crime.

The trial judge ultimately approved a sentencing plan that required the man to complete a live-in drug treatment program, follow-up treatment and 10 years of probation. He also was to submit to random drug tests, perform 100 hours of community service and be involved in a self-improvement program during each year, and pay restitution to all of his victims.

Is such a sentence punishment, or escape from punishment? The answer will determine whether there will be widespread acceptance of alternative sentencing programs.

Ms. George's program is one of a small but growing number of "defense-based" alternative sentencing programs, so called because they encourage defense attorneys to become sentencing advocates. The focus of these programs is the serious offender, and their goal is to reduce prison overcrowding.

DEFENSE-BASED sentencing services and other alternative programs developed in the mid- to late 1970s as prison overcrowding was emerging a national problem. But few specifically sought to reduce prison capacity, focusing instead on rehabilitation and treatment.

Minnesota pioneered sentencing guidelines intended primarily to keep down the number of prison-bound offenders. In other states, public money went into community corrections programs, such as halfway houses and public works projects.

Other alternatives include victim-offender reconciliation programs, in which an independent organization with the court's approval tries to arrange a sentencing "settlement" with the victim. House arrest, electronic surveillance and intensive probation supervision are among the range of alternatives available in some jurisdictions.

Most of these alternative programs have done little to reduce increasing prison populations. But in 1979, Jerome Miller, executive director of the National Center on Institutions and Alternatives in Alexandria, Va., began a somewhat revolutionary approach to sentencing. Moving away from the program response, he offered individually tailored planning to defense attorneys whose clients were bound for prison. Since 1981, Malcolm Young, executive director of The Sentencing Project, based in Washington, D.C., has been offering that type of service to public defenders.

Mr. Young says 85 individuals and programs — non-profit groups as well as staffs within public defender offices — now provide defense-based sentencing services around the country. In 1985-'86, he says, they handled more than 7,400 cases. In approximately 65 percent of the cases, the trial judge accepted the sentencing plan in lieu of incarceration, he adds.

THESE PLANS can save the government a considerable amount of money. The average cost of preparing one alternative sentencing proposal is $700-$1,500, while the average annual cost of locking up someone in a prison is $15,000-$20,000, according to Mr. Young. "This is justification for these programs," he says.

Mr. Young, Mr. Miller and others involved in defense-based alternative sentencing contend they are trying to reawaken the defense bar to its responsibility as sentencing advocates and to persuade key actors in the criminal justice system to re-examine the bases of sentencing in America.

Both are formidable tasks. Defense lawyers tend to limit their involvement after a guilty verdict is returned, offering a judge no alternatives to incarceration, says Randall Berg Jr., executive director of the Florida Justice Institute in Miami. And when alternatives are presented, many prosecutors, public officials and judges draw the line at the serious or violent offender when applying sentencing alternatives, says Mary Ann Tally, public defender for the 12th Judicial District in Fayetteville, N.C.

Ms. Tally, whose office has a defense-based services program, says she lost the battle to include violent offenders when the legislature approved the program with substantial limitations on who could be eligible.

"Since judges deal with cases on an individual basis, the violent offenders should be considered in the same way," she says. "Once a state commits itself to excluding certain people from the program, it's very difficult to open that process up. In our current prison situation, it's important to expand these categories rather than narrow them."

While acknowledging the natural prosecutorial instinct to "put the bad guys in jail," Indianapolis Prosecuting Attorney Stephen Goldsmith says there is a legitimate philosophical difference of opinion about alternatives for serious offenders. Serious offenders should continue to be sent to prison, he says, but alternatives can "provide services to people truly neglected by our system."

Ultimately, no one program or approach will reduce the number of people going to prison, says Mr. Young.

"You're not going to change the numbers in the system until you get the actors in the system — judges, prosecutors, legislators and others — to change sentencing, to change the goals," he says. "One way we know how to do that is to educate these actors on a case-by-case basis that there are other ways to punish."

— *Marcia Coyle*

Ask Corrections

Betty Lou Vaughn

TO CORRECTIONS:

Based upon a recent unpublished decision out of the United States Sixth Circuit Court of Appeals, it is my understanding that it is no longer an automatic violation of parole to be convicted of and reincarcerated for a new felony or felonies committed while on parole (KRS 439.352); is this correct?

TO READER:

Yes, now those parolees returned to the Kentucky State Reformatory, Kentucky State Penitentiary and Kentucky Correctional Institution for Women (admitting institutions) with new sentences (for crimes committed while on parole) must be given a final parole revocation hearing within thirty (30) days from the date of return to the institution, the same as those parolees returned with parole violation warrants.

TO CORRECTIONS:

My client was returned to the Kentucky State Reformatory in January, 1988 with a new felony sentence committed while on parole; is the decision referred to above retroactive?

TO READER:

No, the decision is not retroactive and, therefore, applies only to those persons reincarcerated on or after March 7, 1988.

TO CORRECTIONS:

My client just returned to the Kentucky State Reformatory with a new short sentence for a crime committed while on parole and, with jail credit, is immediately eligible for parole consideration on his new sentence; how will his hearings be conducted?

TO READER:

He will be afforded two hearings. The first hearing will be his parole revocation hearing, followed immediately by his regular hearing on the new sentence.

All questions for this column should be sent to David E. Norat, Director, Defense Services Division, Department of Public Advocacy, 1264 Louisville Road, Frankfort, Kentucky 40601. If you have questions not yet addressed in this column, feel free to call either Betty Lou Vaughn at (502) 564-2433 or David E. Norat at (502) 564-8006.

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State's 28,000 homeless lack jobs, education, study finds

Associated Press

OWENSBORO — Most of the more than 28,000 people in Kentucky who have no place to call home are male, white, uneducated and unemployed, a state survey found.

The study done for the Legislative Research Commission said the number of homeless people was at least 28,570. Some of the agencies that work with the homeless did not respond to the survey.

"We'd like to have agencies try to agree on a core of data so services most needed can be developed," said Dianna Mobure, who worked on the study.

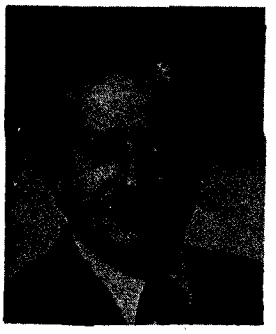
The survey also found that a large number of the homeless were teen-age girls. The second largest group of homeless women — 19 percent — are between the ages of 13 and 18. The only larger group of women is the 19- to 30-year-olds, who constitute 29 percent.

Homeless men are relatively older: 25 percent are between the ages of 31 and 40; 16 percent are 41 to 50; and 12 percent are 19 to 30.

The study found that 84 percent of the homeless are white and only 53 percent have education beyond high school. They also have very few job skills and are almost always unemployed.

Lexington Herald-Leader, November 29, 1987

Cases of Note...In Brief



Ed Monahan

IMPROPER CLOSING

James Coffey and Carolyn Coffey v. Commonwealth,
(Ky. App., March 4, 1988)
(unpublished)

The Court of Appeals held that the prosecutor's improper closing argument remarks violated the defendant's due process rights. The Court noted the Commonwealth Attorney's remarks:

"(1) the prosecution detailed thoughts concerning the nature of sex offenders; (2) the prosecution commented on the 'mildness' of the penalty; (3) in closing, the prosecutor stated a medical opinion untestified to during trial; (4) the prosecution attempted to convince the jury to return a guilty verdict by implying that he would no longer prosecute sex offense cases if they did not convict; (5) during trial, the prosecution attempted to comment on the character of the appellant/husband by reference to a photograph and comments about beer drinking; (6) and during closing, the prosecution created an issue concerning which party brought the medical evidence involved into evidence and refused to end discussion of the issue after the court insisted that he do so."

DIRECTED VERDICT ON FORCIBLE COMPULSION AND AGE

Charles Maggard v. Commonwealth,
(Ky., March 5, 1988)
(unpublished)

The Court held that the Commonwealth did not prove forcible compulsion for 4 counts - attempted 1st-degree sodomy, 2 counts of 1st-degree sexual abuse, and attempted first-degree rape. The Court stated:

"'Forcible compulsion' is defined as physical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury. KRS 510.010(2). A subjective standard is applied to determine if an implied threat placed a person in fear of immediate death or physical injury. Salsman v. Commonwealth, Ky. App., 565 S.W.2d 638, 641 (1978).

One victim testified that she was scared because appellant told her that she would get in trouble if she told anyone.

Another stated that on one occasion appellant squeezed her arm making a bruise and that she was scared that he was going to hurt her. Pam Locke (a social worker) testified that when she interviewed the girls, they were scared, tearful, and frightened.

The evidence relates a fear of getting in trouble if the incidents were reported and a general fear of appellant. A finding of 'forcible compulsion' would require an implied threat of immediate physical harm that causes the submission. The evidence does not support a finding of death or physical injury which overcame earnest resistance."

The Court also reversed since there was insufficient proof of age of the victim on a first 1st-degree sexual abuse charge:

"Appellant was convicted of first-degree sexual abuse in Count 8 which alleged a touching of the vagina when the victim was under twelve. She was born on January 29, 1973, and was over twelve between January 29, 1985, and the cut-off date of July 10, 1985. The actual date of the commission of the offense was not established with sufficient precision to permit a jury to conclude beyond a reasonable doubt that the victim was less than twelve years old at the time of the offense."

COSTS OF TRANSPORTING WITNESS

Kathi Kerr v. Commonwealth,
(Ky.App., February 5, 1988)
(unpublished)

The Court held it error for the circuit judge to refuse to order the county to pay the transportation expenses to the trial at Louisville of a non-resident federal prisoner who was a material defense witness.

The Court recognized that an accused in a criminal prosecution has a constitutional right to have compulsory process issued to obtain testimony, even of an out-of-state

federal prisoner, if the testimony is material to the defense, as it was in this case.

The Court rejected the argument of the Commonwealth that the defendant had to depose the witness prior to trial when the witness was in Louisville in order to preserve her right to have him appear as a witness.

The Court readily noted that, "It is clearly established that a state 'must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense' when those tools are available for a price to other defendants. Britt v. North Carolina, 404 U.S. 226, 231, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). See also Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The stated policy in Kentucky is that '[t]he financial condition of the defendant should not be a determining factor in his relationship to the criminal process.' Stephens v. Bonding Association of Kentucky, Ky., 538 S.W.2d 580, 582 (1976). In furtherance of this policy, KRS 31.110(1)(b) provides that a needy person shall be 'provided with the necessary services and facilities of representation including investigation and other preparation.' We conclude that this statutory mandate must be deemed to include an indigent defendant's right to issuance of compulsory process for material defense witnesses to the same extent that such services are available to nonindigent defendants, since the right to compel witnesses to testify on one's behalf is clearly a 'basic tool' of an adequate defense as contemplated by the statute."

ORGANIC BRAIN SYNDROME/ CRIMINAL RESPONSIBILITY

Commonwealth v. Brennan, 504 N.E.2d 612 (Mass. 1987)

The trial court refused to admit the testimony of a psychiatrist that the defendant's alcoholism triggered organic brain syndrome and absent drinking the defendant could have conformed his conduct to the requirements of the law.

The psychiatrist saw the defendant on 2 occasions for 5 hours, and would have testified:

> "the defendant was an alcoholic who probably had a genetic predisposition for alcoholism, but also that he had a mental disease or defect apart from the alcoholism. He diagnosed this condition, often seen in alcoholics, as organic brain syndrome, which he described as damage to the limbic system. He stated that the limbic system is the more primitive part of the brain which is related to emotions and reactions and which can become irreversibly affected by the consumption of alcohol. He characterized organic brain syndrome as an irreversible condition which cannot recover unless the individual stops drinking. Drinking will trigger off these reactions characteristic of a chronic brain syndrome. And it is my opinion that when Mr. Brennan was drinking, he showed all these reaction characteristics of this organic, physiological brain syndrome."
> Id. at 613-14.

The appellate court reversed the trial court's exclusion of this evidence, holding it relevant to the issue of criminal responsibility:

> "The expert's testimony would have warranted a finding that the defendant's mental disease or defect, organic brain syndrome, was the cause of his lack of criminal responsibility. Although Dr. Weisman was of the opinion that the defendant had the capacity to understand the nature of his conduct when he did not consume alcohol, and that his conduct when alcohol-free is unaffected by the mental condition or defect, he was nevertheless of the opinion that the defendant suffered from an underlying disease or defect, apart from the alcoholism, which was the cause of his lack of criminal responsibility. The jury should have been permitted to hear this testimony."
> Id. at 615.

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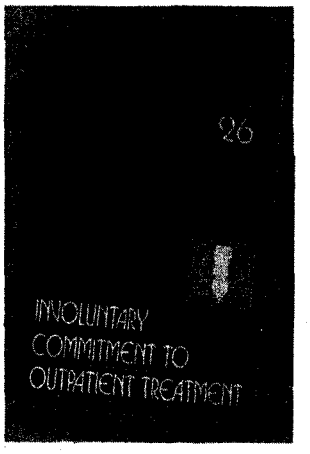
The National Clearinghouse on Battered Women's Self-Defense (Article in Vol. 10, No. 2, February, 1988 issue of The Advocate) has moved. Their new address is:

125 S. Ninth Street
Suite 302
Philadelphia, PA 19107
(215) 351-0010

Book Review



New Outpatient Commitment Guidelines Stress Clinician's Role in Assuring Appropriate Care

The American Psychiatric Association has approved guidelines on outpatient commitment that emphasize the importance of strong involvement by clinicians in court decisions to commit mentally ill persons to outpatient treatment.

The APA task force that drafted the guidelines said that such involvement is needed to prevent courts from making inappropriate outpatient commitments because they are considered less restrictive or more convenient than involuntary hospitalization. Clinical involvement will also prevent outpatient commitment from becoming "simply another method . . . to control socially undesirable persons without regard to their treatment needs."

The guidelines are contained in a report entitled *Involuntary Commitment to Outpatient Treatment,* approved by the APA board of trustees in June and scheduled for publication this month. The report was prepared by a four-member task force on outpatient commitment chaired by David Starrett, M.D., of Denver. Members were Robert D. Miller, M.D., of Milwaukee, the principal author; Joseph Bloom, M.D., of Portland, Oregon; and William D. Weitzel, M.D., of Lexington, Kentucky. Robert D. Luskin, Esq., of Washington, D.C., was a consultant to the committee.

The report cites a 1985 study showing that only 26 states and the District of Columbia explicitly provide for outpatient commitment. New York prohibits outpatient commitment, and the remaining states have taken no position on the issue. However, currently a number of legislatures are actively considering outpatient commitment statutes, and the task force hopes the guidelines will help shape the new laws. The guidelines supplement the APA's Guidelines for the Psychiatric Hospitalization of Adults, published in the *American Journal of Psychiatry* in May 1983. The earlier guidelines had been criticized for ignoring the option of outpatient commitment.

The task force said outpatient commitment can be expected to be most effective for those with psychotic illnesses that respond well to medication but who have a demonstrated pattern of drug noncompliance after hospital discharge, and for patients who need an externally imposed structure to function as outpatients.

The guidelines define outpatient commitment as "a court order directing a person to comply with specified treatment requirements, not involving the continuous supervision of the person in a residential setting, that are reasonably designed to alleviate or reduce the person's illness or disability, or to maintain or prevent deterioration of the person's mental or emotional functioning." A person who is ordered to outpatient commitment may be required to take prescribed medication, to report to a facility charged with monitoring his condition, or to participate in individual or group therapy or in educational or vocational programs.

A patient may be committed to outpatient treatment for a period of up to 180 days if the following criteria are met:

- The patient is suffering from a severe mental disorder.
- Without treatment, the patient is likely to cause harm to himself or to suffer substantial mental or emotional deterioration, or is likely to cause harm to others.
- The patient lacks the capacity to make an informed decision concerning his need for treatment.
- The patient has been hospitalized for treatment of severe mental disorders within the previous two years and has failed to comply on one or more occasions with the prescribed course of treatment outside the hospital.
- An acceptable treatment plan has been prepared for the patient, including specific conditions with which he is expected to comply. There should also be a detailed plan for reviewing the patient's medical status and for monitoring his compliance with the conditions of treatment.
- There is a reasonable prospect that the patient's disorder will respond to the treatment proposed in the treatment plan if he complies with treatment.
- The physician or treatment facility responsible for the patient's treatment under the commitment order has agreed to accept the patient and has endorsed the treatment plan.

The guidelines broaden the criteria for outpatient commitment beyond evidence of dangerousness to self or others, which in some jurisdictions is the only criterion for inpatient commitment. But the task force said some of these juris-

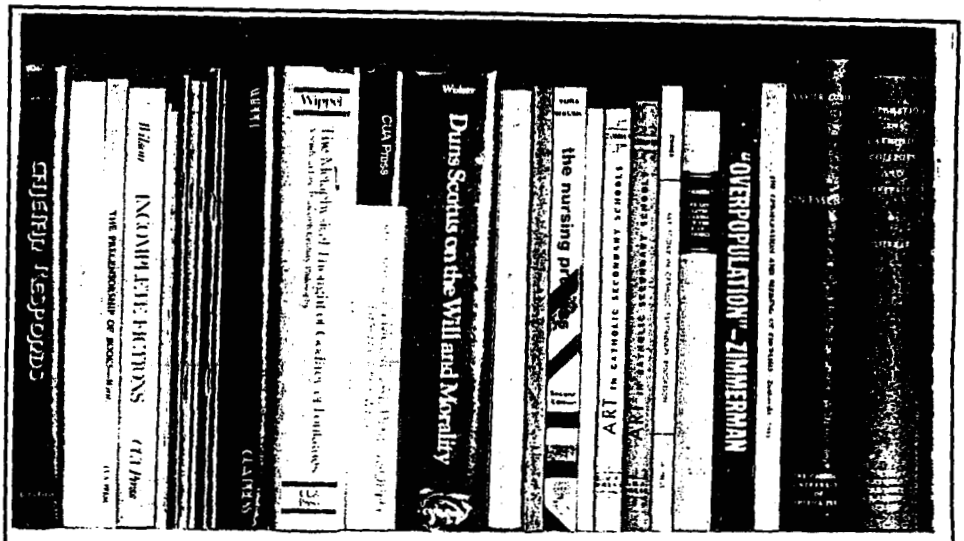
dictions may be willing to consider involuntary outpatient treatment with less evidence of dangerousness than is required for commitment to inpatient treatment. Recently several states, including North Carolina and Hawaii, have established less stringent criteria for outpatient commitment than for involuntary hospitalization.

The task force acknowledged that the concept of psychological or emotional deterioration, when not linked directly to dangerousness, may be difficult to define and thus may encounter resistance from some patient advocates. This problem may be somewhat alleviated by requiring predictions of future deterioration to be based on past treatment histories. However, that would have the effect of excluding first-time patients from the outpatient commitment option.

If a patient fails to comply with requirements of the outpatient commitment order, the guidelines require the physician or staff of the treatment facility to make reasonable efforts to obtain his voluntary compliance. If the patient repeatedly fails to report and is believed to be at significant risk of deterioration, the police should be asked to transport him to the treatment facility in an effort to obtain his voluntary compliance. If the patient persists in noncompliance, the physician or the director of the treatment facility should notify the court in writing and recommend an appropriate disposition. The court should hold a supplemental hearing within five days after receiving the notification.

Although outpatient commitment works more effectively with patients who stop taking their medications after discharge from a hospital, the guidelines recommend that noncompliant patients not be physically forced to take their medication. Individual physicians or small clinics generally lack sufficient personnel to give medications to noncompliant patients. In addition, many outpatient clinicians are strongly opposed to coercing patients to take medication, and forcible medication could be expected to generate strong opposition from some patient advocates.

Involuntary Commitment to Outpatient Treatment (APA Task Force Report No. 26) is available free of charge from Linda Hughes, Government Relations, American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005.



There are over half a million prisoners in the United States. The criminal "justice" business, from cops through judges to prison bureaucrats, being as racist and money/ property oriented as it is, has little interest in providing legal, educational and other reading material to those they keep in their cages. Often the most "spirited" (resistant!) are isolated (for their "protection"): jailhouse lawyers who are filing suits on prison conditions, organizers inside who are blunting the divide-and-rule racist/homophobic techniques of the administrations. Access to law or general libraries is sometimes limited especially for those in isolation who need them most. More and more what passed for prison libraries (westerns and romances) are being converted into dormitories as overcrowding increases at the rate of a double in prison population every 10 years.

Prisoners need educational (GED etc.), legal (rights, process, etc.) and stimulating political/cultural reading material desperately. What little is available to them is largely religious (Christian).

Regional programs (your state, for example; or even just one prison) would be especially effective. Prisoners show their gratitude generously and teach you something about how your criminal justice system works.

Prison Book Program has 15 years of experience in sending reading material to prisoners. We're writing a brochure on the "tricks" of getting books in, and getting started. Please send for a FREE copy of "Books for Prisoners" to: Prison Book Program, 92 Green Street, Jamaica Plain, MA 02130.

The People at the Prison Book Store

SEARCH WARRANT LAW DESKBOOK

SEARCH WARRANT LAW DESKBOOK
John M. Burkhoff
Clark Boardman Company, Ltd.
$55.00

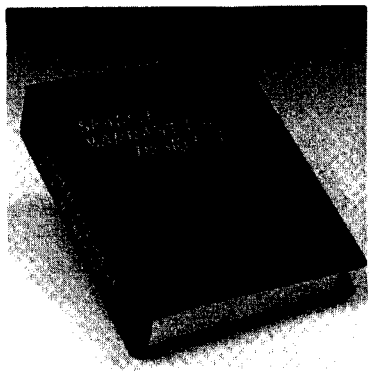
A new reference work is now available that should be added to the libraries of everyone who works with search and seizure issues on a daily basis. Search Warrant Law Deskbook by John M. Burkhoff was published in 1987 by Clark Boardman Company, Ltd., the same company that makes available Search and Seizure Checklists and Searches and Seizures, Arrests and Confessions.

The major strength of the book is its organization. It consists of 20 short chapters, each of which begins with a black letter rule of law regarding search warrants. After that rule is fleshed out, the author ends each chapter with a "checklist" for both prosecution and defense. Throughout the work, Burkhoff offers what he calls "tactical tips" which offer valuable suggestions to the lawyers litigating these issues.

This work should be part of every district judge's library. As the judge who issues the great majority of search and arrest warrants in Kentucky, this book offers to him or her a practical guide through the minefield of search and seizure law. Because it is well organized, particular questions should be readily answered. That is the value of the book - it is practical and useful.

It is not a highly theoretical work, such as Professor LaFave's, Search and Seizure. It does not spin out the different hypotheticals as does Professor LaFave, nor does it editorialize about how particular case law should be changed.

One area I hoped would be covered more thoroughly was in what occurs behind closed doors when a magistrate is presented with a petition for a search warrant. Is there give-and-take between the magistrate and the police? Is the oath taken seriously? Are substantial warrant requests rejected? There is little feel in this book for the **answers to those questions.**



Also lacking here is a chapter on the practical guide to suppression hearings. What happens at such hearings? Who has the burden of proof when there is a warrant? When there is no warrant? What happens at a Franks hearing?

Much of the book, perhaps the last third is devoted to the specific search and seizure rules applicable in each of the states. This had to be a monumental job, and makes this book all the more valuable as a ready resource tool. For example, one finds that there are no provisions in Kentucky for many matters covered in the laws of other jurisdictions, such as a provision for abuses of the search warrant process, or a provision for nighttime searches. This section could assist researchers, legislators, and courts who are trying not only to determine what the law is but even perhaps what it should be.

Ernie Lewis
Director, DPA
Madison/Jackson Co. Offices
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(606) 623-8413

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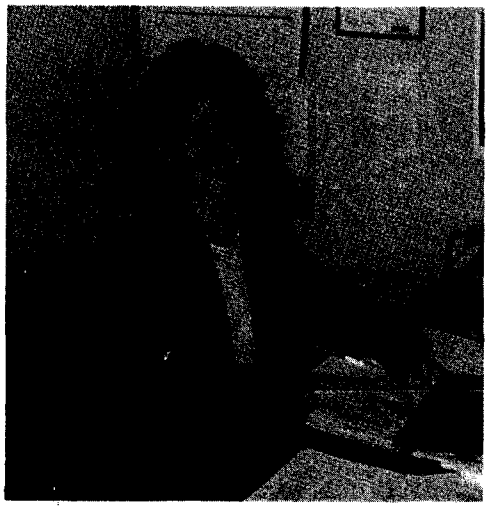
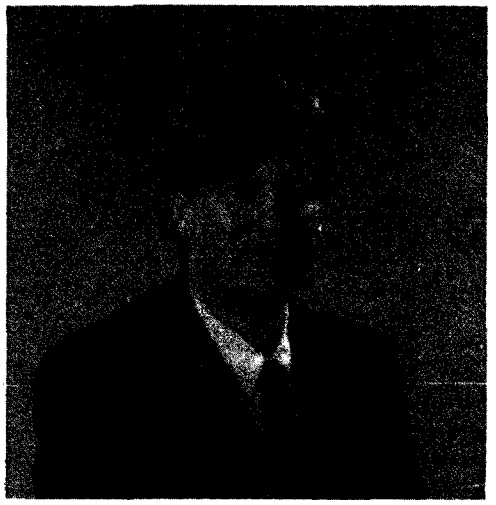


BARBARA HOLTHAUS

A DPA Law Clerk from October, 1984 to September, 1985 and an Assistant Jefferson County Public Defender from October, 1985 to July 1, 1987 joined the Northpoint Training Center DPA as an Assistant Public Advocate on July 1, 1987.



ROY COLLINS

Roy Collins, Personnel Administrator, joined the Frankfort Office, Administrative Division on May 16, 1988. Roy is a MBA 1985 graduate from Murray State University. He worked with the Department of Agriculture as Chief Inspector prior to joining DPA.

Bob Bishop, formerly director of DPA's Pikeville Office, is now Assistant County Attorney in Pike County, Kentucky.

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