THE ADVOCATE

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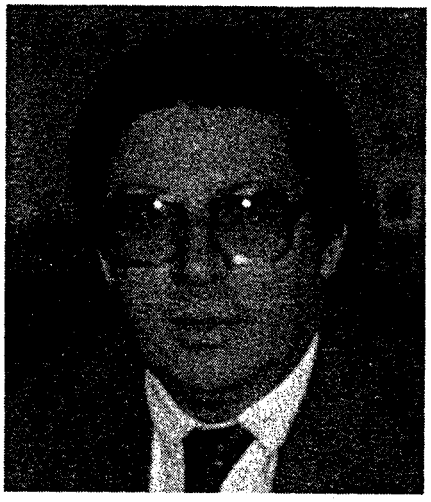
Victims

vic·tim \'vik-təm\ *n* [L *victima;* akin to OHG *wīh* holy, Skt *vinakti* he sets apart] (15c) **1 :** a living being sacrificed to a deity or in the performance of a religious rite **2 :** one that is acted on and usu. adversely affected by a force or agent ⟨the schools are ~*s* of the social system⟩: as **a** (1) **:** one that is injured, destroyed, or sacrificed under any of various conditions ⟨a ~ of cancer⟩ ⟨a ~ of the auto crash⟩ (2) **:** one that is subjected to oppression, hardship, or mistreatment ⟨a frequent ~ of severe political attacks⟩ **b :** one that is tricked or duped ⟨a con man's ~⟩

The Advocate Features



Bob Bathalter

Pendleton County contract counsel Robert Bathalter has been a public defender for 18 years; several of those were before the Department of Public Advocacy was established to provide statewide assistance to indigents accused of crimes. He "accepted whatever criminal defense work came through the door" because he recognized the great need. Attorney David Melcher of Cynthiana said of him, "Bob took cases in various Kentucky Counties wherever needed, without complaint, and he was more than fair to the system because he didn't charge a great deal for his services and he represented the defendants well."

Being an attorney is a way for Bob to help people "without being a social worker." He is very sympathetic to his client's circumstances and tries to understand their point of view and give them the benefit of the doubt. He stressed that it's important to look at the big picture and not get emotionally involved with the parties of the case. His belief is that "every person is worth a great deal and we all suffer if even one individual isn't protected." He brings the principle to his practice that "everyone is entitled to a good defense and to be presumed innocent."

It's not a perfect system. He fumes at the inadequate pay for defense attorneys and the amount of time spent in court waiting for motions to be heard. He is frustrated that he doesn't have the time or resources to do an in-depth investigation or to hire needed expert witnesses. He says the worst aspect of the criminal justice system is that there's no "real effort to rehabilitate people who are repeat offenders."

Bob enjoys matching wits with prosecutors. He's found working with experts "very fascinating" and credits the system with "providing every person an opportunity to defend themselves from charges and obtaining expert help to challenge the state's case" as the best aspect of the criminal justice system.

Bob is a 1970 graduate of the University of Kentucky School of Law. He and his partner, Richard A. Woeste, practice at 16 E. Main St., Alexandria, KY 41001. Bob hopes to build his practice and yet continue to render services to people in need at a reasonable price. Bob has held positions as the Falmouth City Attorney and Pendleton County Trial Commissioner.

Pendleton County Attorney Donald Wells said of Bob:

> As a brother attorney, Bob is very diligent, efficient and very adept at sizing up the merits of a case and proceeding accordingly. He sees the wisdom of compromise and settlement. As a criminal defense attorney he is reliable and straight forward; very ethical and fair. He's a straight-up fellow. When Bob characterizes a defense case, you can bank on it.

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An eye for an eye leaves everyone blind - Gandhi.

From The Editor-

Criminal defense lawyers are often viewed as not caring about victims. Our important roles in the criminal justice system are often misunderstood as being against the victim. It is critical that we better understand what victims endure.

To this end, the Advocate presents a special issue focused on victims. We attempted to have many viewpoints expressed, and we have been fortunate that so many have been willing to share their understandably deep feelings. Unfortunately for us, some chose not to respond to our request for an article.

Victims are the most neglected persons in the criminal justice system - whether they be those who are the object of the criminal act and their families; the defendant who is in many respects a victim of himself and those that have formed him; the defendant's family, which is often the victim of societal actions that do little or nothing to break the cycle of violence and the real causes of crime.

It is appropriate that this issue is presented during this season since it is a time of birth, life and new hope. Our hope is that we better understand the many real victims in our work.

-ECM

IF YOU FORGIVE PEOPLE ENOUGH, YOU BELONG TO THEM AND THEY TO YOU, WHETHER THE PERSON LIKES IT OR NOT—SQUATTER'S RIGHTS OF THE HEART.

James Hilton

IN THIS ISSUE

The Kentucky Crime Victims Compensation Board

Written interview with its Chairperson, Anne P. McBee

What is the purpose of the Kentucky Crime Victims Compensation Board?

The general assembly declared that it served a public purpose and is of benefit to the state to indemnify those needy persons who are innocent victims of criminal acts and who suffer bodily or psychological injury or death as a consequence thereof. Such persons or their dependents may thereby suffer disability, incur financial hardships and become dependent upon public assistance. To that end, it is the general assembly's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

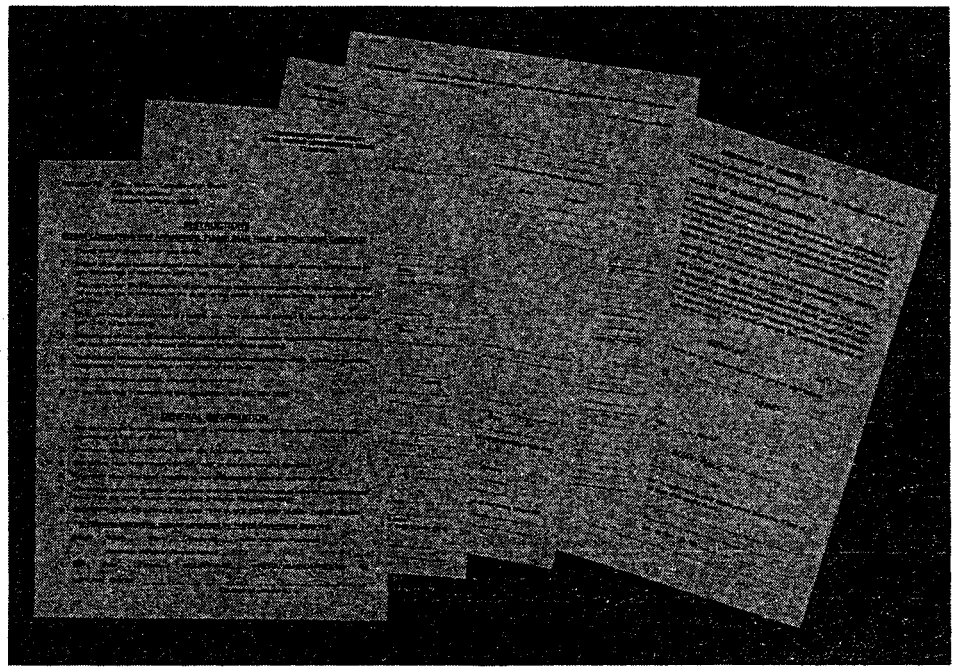
When and how did the Board come into existence?

The Board was established in 1976 by a bill introduced to the General Assembly by David Karem.

Who are the present Board members, and what are their professions, backgrounds?

1. **Anne P. McBee,** Chair of the Board, Attorney at Law
2. **Jack D. Razor,** dentist
3. **Edward M. Coleman,** former Democratic Party Chairman
4. **Gordon C. Duke,** former Secretary of Finance and Administration

Who appointed them and when were they appointed?



All members were appointed by former Governor Martha Layne Collins, except Anne P. McBee who was appointed by former Governor John Y. Brown, and reappointed during the Collins administration. Edward M. Coleman and Gordon C. Duke were appointed December 7, 1987. Jack D. Razor was appointed August 8, 1986 and Anne P. McBee was appointed July 18, 1980.

What is the compensation of Board Members?

The Chair starts at $19,000 per year while the members start at $18,000 per year plus full benefits.

How many staff does the Board have, and what is the yearly operating budget of the Board?

The Board has 1 full-time legal secretary, 1 full-time clerk, and 1 full-time investigator. It also has 1 part-time investigator and 1 contract investigator for a total of 5 employees. It must also be responsible for 1/2 of the executive director, executive secretary, and Board members salaries. The yearly operating budget based on the above information is $248,550. The Executive Director is Joe Billy Jones. The Director's starting salary is $31,900.

Who is eligible for benefits? Must there be a criminal complaint, indictment, or conviction for a victim to receive compensation?

The Crime Victims Compensation Board was established to hel needy, innocent victims who suffer-

ed physical or psychological injury as a result of a violent crime committed against them. KRS 346.130(1)(c) states that police records show that such crime was promptly reported to the proper authorities; and in no case may an award be made where the police records show that such report was made more than 48 hours after the occurrence of such crime unless the board for good cause shown, finds that the delay may have been justified. KRS 346.130(2) states that the Board upon finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies shall deny, reconsider, or reduce an award.

How much money has been distributed yearly for each of the last 5 years to crime victims?

1983-84	$648,100
1984-85	$634,500
1985-86	$657,400
1986-87	$874,000
1987-88	$773,700

What is the range of awards over the last 5 years?

$3,400.00 average per award.

Where does the money available to be distributed come from? What amount of money is presently available to be awarded?

The money used to pay awards comes from court cost collections and a federal grant. This fiscal year the Board will be allowed to spend $947,700 from these funds.

How many people have applied for compensation and how many people have received it in each year of the last 5 years?

	Applications	Awards
1983-84	400	209
1984-85	360	199
1985-86	422	252
1986-87	528	281
1987-88	508	287

What are the reasons why persons are denied compensation?

Some of the reasons people are denied compensation are: failure to supply the necessary information to the Board in order to process their claim; application withdrawn; unable to locate the claimant; failure to cooperate with law enforcement; failure to meet financial hardship criteria; assailant and victim were related within the third degree of consanguinity; assailant member of victim's household; the injury was caused by an unknown hit and run driver; no physical injury; contributory misconduct; no police report filed; claimant received payment for injuries from other sources; failure to file claim on time; property loss only; crime not reported to police within 48 hours; the victim was confined in a state, county, urban county, or city jail, prison or other correctional facility, or any state maintained institution. The victim cannot be involved in any illegal activities at the time of his injury for which his claim is based.

What are important regulations, rules, and policies of the Board?

The Board tries to adhere to KRS 346 and 107 KAR.

If a member of a criminal defendant's family is harmed by the community or someone in it, can they receive compensation from the Board?

The Board reviews each claim on an individual basis and awards or denies a claim based upon it merits in relation to KRS 346.

What does a person have to do in order to apply for compensation and within what time frame?

A person must file a claim form with the Crime Victims Compensation Board, 115 Myrtle Avenue, Frankfort, Kentucky, 40601 within 12 months from the date of the crime or the death of the victim.

How long does it take for a claim to be processed by the Board?

Due to several budget cuts over the last 2 years, it has been impossible to add additional staff to cover the increase in paper work and claims that the Board has been experiencing, unfortunately, it takes approximately 8 months from the date a claim has been received in the Board's office to reach a final decision. The Board meets one day per month.

Is the decision of the Board appealable; to whom?

When a claim is assigned for decision, it is assigned to 1 individual Board member on a rotating basis. When that Board member makes a decision, the claimant has a right to file a written appeal to the full board within 30 days from the date of the original decision. If the claimant files an appeal to the full Board, it will be put on the agenda for the next Board meeting. If the full Board upholds the original decision, the claimant has a right to file an appeal with the Franklin Circuit Court within 30 days of the Board's decision.

Does the Board compensate for both state and federal crimes within Kentucky?

Yes.

Is the victim subject to any kind of examination, if so, what kind and by whom?

There is no set exam that the victim must have in order to be eligible for crime victims compensation, however, the victim must have suffered physical or psychological injury.

If the defendant makes full or partial restitution to the victim does that affect your award?

KRS 346.140 states that any award made must be reduced by the amount of any payments received or to be received by the claimant as a result of the injury by the following sources: from or on behalf of the person who committed the crime, under insurance programs mandated by law, from public funds, under any contract of insurance wherein the claimant is the insured or beneficiary, and as an emergency award pursuant to KRS 346.120.

What kinds of things are victims compensated for and what are the minimum and maximum amounts that can be received?

There is no minimum amount a claimant can receive, however, the maximum amount that can be paid on 1 injury or claim is $25,000. The Board can only compensate for medical expenses incurred as a result of the injury for which the claim is based, $150 per week for loss of support or wages as a result of the injury, $2,500 funeral expenses, and fees for psychological counseling.

Are awards 1 time only or continuing?

If the claimant states at the time of investigation that additional medical expenses are forthcoming, the Board member to whom the claim is assigned may elect to leave the claim open for additional bills providing proper documentation is submitted by the claimant and his physician. The majority of our claims are 1-time awards. The amount awarded to victims is public record.

Is representation of the victim by an attorney necessary and/or preferred by the Board?

No.

Who pays the attorney and what amount?

107 KAR 1:025 states that if the claimant is represented by an attorney and the attorney so requests, the Board may, as part of any award or by separate order subsequent to the award, allow a reasonable attorney's fee for the filing of a claim and any subsequent proceedings. Such fee shall not exceed 15% of the amount of the award, and shall be paid out of the award and not in addition to the award. No attorney representing a claimant shall contract for or receive as a fee any sum larger than 15% of the amount of the award. Any fee contract in violation of this provision shall be void.

Any other thoughts you have.

The crime victims compensation board relies totally upon court cost collections to pay awards to victims. Unfortunately, collections are not increasing even though the cases being tried in court are on the rise. Some counties have never collected 1 penny for our Board even though they are mandated by law. Any help you could give us in increasing our collections would be greatly appreciated.

ANNE MCBEE
Chair
Crime Victims Compensation Board
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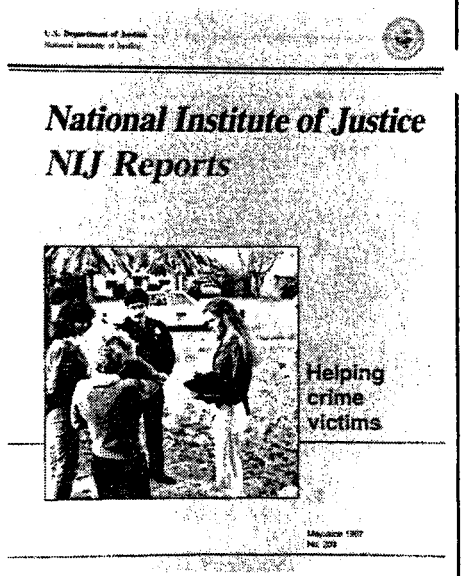
Anne McBee was appointed to the Board in 1980 by Governor Brown. She was reappointed in 1984 by Governor Collins. Ms. McBee is an attorney with McBee and Ruttle, P.O. Box 17, Burlington, Kentucky. She is a 1984 graduate of Chase Law School. She was employed with the Administrative Offices of the Courts 1976-1980.

HELPING CRIME VICTIMS



The National Institute of Justice published an issue on **Helping Crime Victims** in May/June, 1987. Copies of the article can be obtained directly from NIJ, Box 6000, Rockville, MD 20850, (800) 851-3420 or by contacting Cris Brown, Department of Public Advocacy, 1264 Louisville Road, Frankfort, Kentucky 40601, (502) 564-8006.

Compensation For Crime Victims

Legal Authority

Ed Monahan

LEGAL AUTHORITY AND CRIME COMPENSATION

Some law has developed in Kentucky and elsewhere concerning compensation for crime victims. We briefly summarize it.

KENTUCKY CASE LAW

In Com, Crime Victims/Compensation v. Miller, Ky., 607 S.W.2d 424 (1980) Adams collided with a parked pickup truck on the street in Berea while driving intoxicated. Adams then proceeded to strike a minibike ridden by John Miller (age 12) and William Miller (age 6), and kill both riders. Adams pled to 2 counts of second degree manslaughter.

In 1978 the Crime Victim's Compensation Board denied a claim by the fathers of the kids since the claim arose out of the operation of a motor vehicle and were thus excluded from the KRS 346.020(3) definition of "criminally injurious conduct." The Franklin Circuit Court reversed the Board. The Court of Appeals affirmed the Board's appeal. The Supreme Court of Kentucky granted discretionary review at the Board's request, and looked at the definition of criminally injurious conduct which reads, in part:

> The operation of a motor vehicle, motorcycle, train, boat, aircraft or other vehicle in violation of law does not constitute a criminally injurious conduct unless the injury or death was intentionally inflicted or the operation thereof was part of the commission of another criminal act.

The Court held no recovery in this case was possible "...where there is a single injury-producing impact and the only 'criminal act' performed by an automobile driven prior to such impact is the operation of a motor vehicle in violation of law...." Id. at 426.

The definition of "criminally injurious conduct" has since been amended to now read:

> (4) "Criminally injurious conduct" means conduct that occurs or is attempted in this jurisdiction, poses a substantial threat of personal, physical, or in the case of a child, psychological injury, or death, and is punishable by fine, imprisonment or death. Acts which, but for the insanity or mental irresponsibility or lack of capacity of the perpetrator, would constitute criminal conduct shall be deemed to be criminally injurious conduct. The operation of a motor vehicle, motorcycle, train, boat, aircraft or other vehicle in violation of law does not constitute a criminally injurious conduct unless the injury or death was intentionally inflicted or involved a violation of KRS 189A.010;

In Hulsey v. Commonwealth Crime Victim's Compensation Board, Ky.App., 628 S.W.2d 890 (1982) Hulsey was the innocent victim of a crime in 1976 involving a serious gunshot wound to his left leg. In 1978 he was awarded $5,313.00 by the Crime Victim's Compensation Board for medical expenses and lost wages. In 1979 the Worker's Compensation Board awarded Hulsey a $15,000.00 lump sum settlement.

Under KRS 346.170(2), the Court held that the "Crime Victim's Compensation Board is subrogated to the right of a crime victim to receive worker's compensation benefits when its award to the victim is based on the same injury which gives rise to a worker's compensation claim." Id. at 892.

The Court reasoned that the Worker's Compensation award is for economic loss, not for the physical injury. The crime victim's compensation act awards also includes awards for economic loss. The Court indicated that the crime victim's compensation act had a clearly enunciated policy that a crime victim could not recover twice for the same damage, and that the Act was for "needy" victims.

In Lynch v. Crime Victim's Compensation Board, Ky.App., 748 S.W.2d 160 (1988) Michelle Lynch was killed during a robbery of a Lexington

motel. She was 20 and unmarried, and was survived by a 3 year old son, Joshua. The grandparents, who were the guardians of Joshua, requested $2,500.00 from the Crime Victim's Compensation Board for funeral expenses. It was awarded. The grandparents also sought an additional award of support because of serious financial hardships due to the loss of Joshua's sole benefactor. The Board denied the request since it found no financial hardship suffered since there was $264.00 per month available to him from Social Security and investment returns on $22,000.00 life insurance proceeds. The Board found these monies were greater than those monies available to Joshua prior to his mother's death. The child and the mother had been living on $3,289.50 per year. The Board also denied the claim for the failure of the grandparents to provide info on their financial resources.

The Court looked to the purpose of the Crime Victim's Compensation Act, and determined it was to compensate victims or their dependents who have financial hardships and who may become dependent on public welfare, and that this support was provided as a matter of grace by the state. In other words, it was a favor by the state, not a right of the victim.

The Court held that Joshua suffered hardship but not financial hardship since he was financially better off after the death of his mother, and that the grandparents, even though they have suffered, are not eligible claimants.

Judge Gudgel dissented saying it was unfair to penalize the child since the grandparents volunteered to assume the burden of raising im, and that the child's present income was totally inadequate to pay the cost of his ordinary day-to-day expenses.

ATTORNEY GENERAL'S OPINIONS

IN **OAG 79-471** the Attorney General stated his belief that credit for earnings such as insurance payments shall be reduced from the maximum award rather than from total loss of earnings under KRS 346.130 and KRS 346.140.

In **OAG 82-332** the Attorney General stated that the $10.00 cost was due on all felonies and misdemeanors but only applies to traffic offenses for which a term of imprisonment may be imposed.

In **OAG 82-570** the Attorney General opined that Ohio residents injured by criminal acts in Kentucky must be compensated in the same manner as a Kentucky resident since Ohio is effectively a reciprocal state with Kentucky.

In **OAG 82-469** the Attorney General stated that in his opinion under KRS 346.185(1) the $10.00 fine that funds the Crime Victim's Compensation Board is only applicable to those crimes where the Defendant was ordered imprisoned or was put on probation or conditional release. It is not applicable where the Defendant is only fined even though the Defendant could have received a jail sentence.

In **OAG 84-312** the Attorney General withdrew OAG 82-469 and opined that since KRS 346.185 had been amended that now the $10.00 fine that funds the Crime Victim's Compensation Board is a cost to be paid by a person convicted of a crime where the Defendant could be sentenced to a term of imprisonment.

KBA ETHICAL OPINIONS

In May, 1983, the KBA Ethics Committee was presented with the following question: May a lawyer who represented a criminal defendant later represent the victim of that criminal's acts in an action before the Crime Victim's Compensation Board? The Committee answered No, in KBA E-271 saying this involved a "classic conflict of interest."

OTHER AUTHORITY

A) Annotation, Statutes Providing for Governmental Compensation for Victims of Crime, 20 ALR 4th (1983).

B) Title 107 Kentucky Administrative Regulations.

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ANNOTATED BIBLIOGRAPHY ON SENTENCING

The Sentencing Project announces the publication of Annotated Bibliography: Recent Articles on Sentencing Issues, a 58-page bibliography listing over 150 articles from law reviews, bar journals, and other publications that have appeared since 1978. Issues covered include alternative sentencing, capital punishment, sentencing guidelines, mandatory sentencing, and sentencing advocacy. The Bibliography is available for $10 from The Sentencing Project, 1156 15th St. NW, Suite 520, Washington, D.C. 20005.

Judicial Sentencing

Probation-the judge's quandary

Judge Johnstone

There may be no concept in criminal law more difficult to explain to the public than probation. Many Judges shudder at the prospect of going into an open courtroom and granting probation over the objections of dissenting victims or under the glare of the various victims; rights groups. While editorial writers have recently begun to suggest that the Courts should utilize probation or alternatives to sentencing more often, their courthouse reporters are more likely to pen headlines that read, "Judge Lets Convicted Felon Go Free on Probation." In short, I have yet to see a judicial campaign in which an incumbent Judge has run on a platform of releasing more defendants on probation than his or her colleagues on the bench.

A couple of months ago, I probated a defendant who had defrauded various businesses by claiming employee truck drivers had run her off the road, thereby ruining a wedding cake she was delivering. After the sentencing hearing, the headline in the Courier-Journal was typical, "Wedding Cake Caper Gets Final Layer - Probation." Incredibly, the case made the national wire with headlines similar (or worse) to that used by The Philadelphia Inquirer - "A Not Even Half-Baked Idea."

What follows is a brief overview of the current status of the law as it relates to probation in Kentucky. We begin with the proposition that the legislature created a presumption that probation should be employed. KRS 533.010(2) mandates that the "court shall consider the possibility of probation...," and that "probation or conditional discharge should be granted..." unless the Court finds that at least 1 of 3 conditions exist.

The first is whether there is a substantial risk that the defendant will commit another offense while on probation. This is generally determined by the party's past criminal record. The second, is whether the defendant is in need of correctional treatment that can most effectively be rendered in an institutional setting. Such problems as alcoholism, drug addiction, and severe mental or emotional problems are the most common faced. The Judge must look to the available resources at his or her disposal which may vary greatly throughout the state. The third and final question the Court must ask is whether granting probation in the case at bar would unduly depreciate the seriousness of the offense. Most any victim would say yes. Most any defendant would say he's learned his lesson. Judicial discretion becomes a most important factor as this is the most difficult criteria to consider.

There any many factors which influence the trial Judge when considering the statutory criteria. Judges are reluctant to disturb a jury verdict. Juries are made up of fellow citizens (many who vote) and are presumed to reflect public sentiment. Nevertheless, every trial Judge is sure to face an absurd jury recommendation at some point during his/her career. Considering probation becomes rather tricky when a jury has decided that a maximum sentence should be imposed.

The Commonwealth Attorney's recommendation is of particular importance, especially in cases which have culminated with a guilty plea. The positions that the prosecutor takes and the effect that it has on the sentencing Judge obviously varies from circuit to circuit. In Jefferson Co. the recommendation as to years is generally followed and the trend appears to be that less positions are taken as to the issue of probation. This leaves the discretion, and the pressure, with the Judge.

Arguments of counsel are often persuasive on the issue. The attorneys will sometimes bring to light factors which the Judge may not have otherwise considered. At times, argument coupled with an articulate defendant may make a difference in a borderline case for probation. Statements from a defendant other than routine "foxhole religion" (I just got a job, got married, found Jesus, etc.) have raised more than one judicial eyebrow.

With fairly recent legislation regarding victims' impact statements, Judges are becoming more sensitive to the feelings and circumstances of victims and their families. Written statements from young victims of sexual abuse can be gut-wrenching for the sentencing Judge. I had a victim impact statement submitted from a young lady who had been shot by her husband with a large caliber handgun. Her description of her feelings before, during and after the shooting, as well as her description of the physical

pain as the bullet ripped through her flesh, would put Stephen King to shame. It certainly caught my attention.

The nature of the crime itself may have a bearing on the outcome of the case. A sex offense or drug case might not only be viewed differently by the sentencing Judge, but the current feelings of the community about the particular type of crime may be taken into account by the trial Judge. Members of the bench have been criticized in some areas of the state for probating defendants involved in marijuana cases regardless of the amount involved or the lack of a criminal record. One can imagine the dilemma a sentencing Judge is in today when dealing with a drunk driving related offense in Carrollton or Hardin County after the tragedy those communities suffered. Circuit and District Judges alike are acutely aware of public sentiment.

The presentence investigation report is the most effective tool during sentencing in most instances. The Division of Probation and Parole prepares a thorough and extensive report that contains the personal information on the particular defendant before the bench. Everything from a description of the offense to remarks or recommendations from the interviewer are there for review. The detailed history of the defendant's past criminal record, school and work history, family information, physical and mental status, drug or alcohol abuse and other pertinent information are of special import.

Many an argument has taken place over whether jail and prison overcrowding should be considered in granting or denying probation. Numerous Judges feel that the overcrowding issue is purely an executive problem and should not be a factor when deciding the propriety of incarceration. While this argument may have technical merit, it is doubtful that the judicial branch can escape any blame or responsibility for the problem of too many inmates for the space available. The criminal justice system is multi-faceted and all branches of government must cooperate to ensure a speedy resolution to the serious problem of overcrowding.

There is little doubt that Judges feel pressure from special interest groups and press coverage when handling those cases that have aroused public attention. The Courts are experiencing a major influx of cases involving alcohol related offenses. From the drunk driving case in District Court to the murder case in Circuit Court evolving from a fatal accident, the movement to catch and punish those who drink and drive has had significant impact on the criminal justice system. Moreover, the groups that are pursuing the cause of a specific type of offense are aided by the accompanying press coverage that dominates the morning paper and the evening news. While there is little doubt that victims' rights groups are making good faith efforts to right what they perceive as wrongs, one can only wonder what effect their presence, along with the ever-present press coverage has on the sentencing Judge trying to give all factors consideration.

Finally, it should be noted that judicial discretion in sentencing and granting probation has been eroded by legislative enactments despite the mandate in KRS 533.010 to utilize probation. Consider KRS 533.060 which prohibits probation, shock probation or conditional discharge after conviction of certain felonies if a weapon has been used, KRS 532.045 which relates to defendants convicted of certain crimes involving a minor, KRS 532.080 dealing with persistent felony offender sentencing and KRS 533.060 dealing with people convicted while awaiting trial on another charge, or convicted while on parole, probation or conditional discharge. These are a few examples of what many Judges consider an unwarranted encroachment by the legislature upon the judiciary's responsibility to consider sentencing alternatives, lengths of sentences and whether to run sentences concurrently or consecutively.

What does the future hold for Kentucky? One project to watch is the Public Advocacy Alternative Sentencing Project. This pilot program is funded by the Department of Public Advocacy, the Corrections Cabinet, and other agencies. It offers meaningful alternatives to incarceration for the Court to consider. From current reports, the first several months of the project have been encouraging and offer needed alternatives and resources for the sentencing Judge, The criminal justice system continues to need the cooperation of all involved to fulfill its function of providing justice and equity. Necessary elements for success are prosecutors who will make reasonable recommendations, defense counsel to help provide reasonable alternatives at sentencing and Judges who will make informed and intelligent decisions.

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Judge Johnstone was elected to the Circuit Judge bench on January 1984 and became Chief Judge on January 1988. He served as a District Judge from 1978-1984.

MADD

MOTHERS AGAINST DRUNK DRIVERS

Mothers Against Drunk Driving is a tax-exempt benefit corporation which works to aid victims of drunk driving crashes, discourage drug and alcohol impaired driving, which is unacceptable and criminal, and deal more effectively with those who do drink and drive.

MADD was founded in Fair Oaks, California in 1981 by Candy Lightner, whose 13 year old daughter, Cari, was killed by a drunk driver out on bail from a previous hit and run drunk driving crash. Until then, nothing effective had ever been done to keep impaired drivers off the road, even those who had killed somebody. We now have more than 400 members in 8 chapters in Kentucky, with 2 more counties in the process of getting charters.

In the years since MADD was established in Kentucky we have been encouraged by signs of progress. The General Assembly passed the "Slammer Bill" in 1984. We felt this was a beginning for Kentucky to get tough on people who chose to drive under the influence. After monitoring the law for the past 4 years we have found the need to go back to our legislature and ask for changes. The law is not being applied consistently throughout Kentucky. One of the changes we will be seeking is enacting of the "illegal per se" concept. This will make it illegal to drive or to be in control of a motor vehicle with illegal alcohol concentration as prescribed by state law. There are now 45 states including D.C. that have established "illegal per se" laws. We will continue to monitor the law and seek changes where we feel it is appropriate.

MADD helps victims through the criminal justice system in a number of ways, starting from the time we are contacted. In some cases this means getting the proper charges filed. We go to any pre-trial conferences, court appearances and sentence hearings. Often we are contacted when a defendant comes up for a probation or parole hearing, as well. For more information or help, contact the chapter nearest you.

LOIS WINDHORST

Lois Windhorst is married with 4 children. In 1980 her in-laws were killed in a car crash involving a unlicensed, uninsured drunk driver. Through her efforts and the efforts of others the Louisville-Metro Chapter of MADD was established on November 17, 1981. She served as President of the Louisville Chapter and is now Vice-President and the Legislative Liaison for the State Coordinating Committee.

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KVCV

KENTUCKIANS' VOICE for CRIME VICTIMS

P.O. Box 14123 , Louisville, Ky 40214

Purpose: The organization of Kentuckians' Voice for Crime Victims is basically what the name stands for. We are to serve as a group of interested citizens and victims of violent crime that speak out for Justice for ALL.

The original organization was formed in Sept. 1984 under a different name, then on Sept. 13, 1988 there was a division and the new organization was formed under the new name K.V.C.V. with most of the original members joining K.V.C.V.

The original organization came into being after I found the injustice that was rendered to the victims and the protection that was given to the persons convicted of the crime. This was the results of my son, Bradley N. Pruitt, being murdered while asleep in his own bed, in his own home, by his wife and a hired killer.

Officers: Earl Pruitt, Executive Director; Darwin Settles, Associate Director; Kelly Wurth, Treasurer; and Sue Egan, Secretary.

Board of Directors: include all officers, plus 7 members at large, Chapter Presidents are all Board Members during their tenure.

Presently we have approximately 125 active members with chapters in Louisville, Owensboro, Paducah and Covington, KY, as well as in counties where no chapter is available.

Our legislative goals are to continue the work to get laws passed or defeated that do not tend to aid the victims, such as we did with the Truth in Sentencing law in 1986.

Our service to victims is service as advocates during their court proceedings, work with them through their grief period, help them in any matters, as well as appearing with them in court. We also assist them in preparing their forms for victims compensation and their victims impact statements.

My personal view on the cause of the crime is the lack of punishment for the crime convicted of and the misapplication of the justice system. It should not be allowed to try to get someone off or found NOT GUILTY on the basis of technicality when the violation of the law is committed. Also the fact that a person can be found guilty, sentenced and then 7 people on the parole board have the right to grant them a parole. This is not what the jury or the judge wanted after having heard the full testimony in the case.

How can the causes of crime be lessened and dealt with? More emphasis on family control, education, religious factor toward crime, mandatory sentencing, determinant sentencing based on the crime convicted of, making the corrections facilities a place of punishment and not a place to get a rest while planning on future crimes.

We have been successful in getting HB 76 (Truth in Sentencing) bill passed, supported the victims bill of rights and supporting bills whereby victims can appear before the parole board. We have also been successful in helping some bills that would lessen the hardship on victims.

We helped defeat some bills that would give criminals more rights.

We have appeared in the courtrooms and observed judges, prosecutors and others. This has (in our opinion) had some effect on the outcome of certain cases.

We also have been able to lecture to groups and give them the insight as to what they should expect if serving on a jury. This we feel has had an effect on the jury knowing more about the law and about their duties as a juror.

The worst aspect of our system is the plea bargain and shock probation. Also the lack of prosecutors understanding and considering the feelings of the victims. (This has changed some what in the past couple of years). Other aspects are listed in some of the above items.

We are in hopes that we can have a Victim Advocate in every county where there is a Commonwealth Attorney to aid the victims through the trial procedure. This will be done by volunteer workers and will assist in the area where the victims will not feel they are all alone.

We have regular monthly meetings throughout the state and hold seminars to educate potential jurors or witnesses as well as having speakers from the system to speak.

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YWCA

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Louisville, Ky. 40202
502-581-7200

West End Branch
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R.A.P.E. Relief Center

604 S. 3rd Street
Louisville, Ky. 40202

502/581-RAPE

THE RAPE VICTIM - A THORN IN THE SIDE OF THE SYSTEM?

Rape and violent sexual assault are heinous crimes. Few would dispute that. Yet, somehow when these incidents evolve into the Commonwealth vs. John Doe for his sexual assault against Jane X, it is no longer quite so simple. The complexity of the issue starts with the victim, impacts the prosecution and defense, affects the decisions of the judge and jury members and confounds society as a whole.

During the 13 and a half years of its existence, the YMCA R.A.P.E. Relief Center has provided services to thousands of victims of rape and sexual assault. During those years, we have seen laws change, increased willingness of victims to report and prosecute, improved investigation and prosecution. The victim, however, still presents the same profile and the incidents of sexual violence continue to fit similar patterns. Perhaps, if we take a look at the victim's response to the incident and the aftermath, we can better understand why she presents such a challenge.

VICTIM/PERPETRATOR RELATIONSHIP

In 80 to 85% of the cases reported, the assailant is known to the victim. The implications of this influence the reaction of the victim. She may anticipate continued routine contact with this individual or family and friends of the perpetrator may place excessive pressure on the victim to not report or follow through. How often have we heard of situations in which a courtroom breaks out cheering when a case is dismissed because the prosecuting witness is reluctant to testify? We cannot assume that this response is secondary to a false report being withdrawn.

VICTIM RESPONSE TO FORCE

The main affect experienced by victims during rape is fear. The perpetrator may or may not have a weapon, but the threat of death or serious mutilation is almost always stated by the rapist. The rape often happens with no forewarning and the victim's shock and fear limits her response to a choice between being raped or mutilated and/or killed. Later, as people say "why didn't you do this" or "why did you stay there", she may ask herself the same thing, forgetting her mental and emotional state during the actual assault. Being "forced" to participate, in this context, is more than a simple definition of "force."

NATURE OF THE ASSAULT

Sexual intercourse is often only one aspect of the rape. She may have been "forced" to participate in degrading behaviors. The assault can assume sadomasochistic or ritualistic overtones. Breast, rectum, mouth and other body parts can become the sexual focus. All of the above are humiliating and difficult to report, never mind testifying in open court.

VICTIM RECALL OF THE INCIDENT

Frequently there are apparent contradictions in the victim's memory of the assault. On the one hand, she can remember details such as furniture placement, color of clothing or other extraneous items, sequence of events leading up to and following the rape, who was around the scene before and after the incident, and, often, a good basic description of the assailant. On the other hand, through a healthy and natural process of denial, she may block out memory of the level of violence of the assault or some of the details of the actual rape.

In a small percentage of these cases, the victim chooses to prosecute, the perpetrator is identified and arraigned, and she effectively resolves for herself all of the conflicts inherent in the judicial process. The prosecutor, wanting to have a "good" case, tests her veracity and stability through what appears to be a brutal interrogation. The defense, on behalf of the alleged rapist, manipulates the presented facts to support whatever defense suitable, whether that be mistaken identity, consensual behavior on the part of the victim or false, retaliatory reporting. People, including the judge and jury, are reluctant to see the clean cut,

well dressed father/husband/son defendant as a someone capable of the violent and primitive behaviors alleged by the victim. This brief outline of the judicial involvement does not include the revictimization felt through medical and police investigation, the fear involved if the rapist is not apprehended or is acquitted, nor the frustration of dealing with an intimidating correctional system.

To understand why the rape victim is different from any other victim we must understand how rape as a crime differs from burglary, assault, or other crimes against person or property. It appears that somehow our culture was imposed upon the women the responsibility of monitoring the man's sexual control.

Imagine reading a headline "19 YEAR OLD HITCHHIKER PICKED UP ON I-64 AND DRIVEN OFF THE HIGHWAY; WHILE THE DRIVER HOLDS THE 19 Y.O. AT KNIFE POINT, COMPANION STRIPS AND SEXUALLY ASSAULTS THE HITCHHIKER." Take a moment to assimilate your reaction. Now, add to the headline the information that the 19 year old is a girl. Does that alter your reaction? Do you wonder why she was hitchhiking? Think it through again. This time, add to the information received that the two assailants were women. What is your instinctive reaction to two women sexually assaulting a 19 year old hitchhiker, regardless of whether the victim was male or female?

The majority of you will be almost immune to an emotional reaction to the headline itself. You will probably think that the 19 year old girl had no business on the highway but would have been indifferent if it had been a boy. You would think two women sexually assaulting a teen would have been pathological but if it had been two men, you would simply assume they had a "problem."

This brief scenario suggests another complication of prosecuting or defending rape cases. It is difficult enough under "ideal" circumstances, for example a woman is alone in her own home during daylight hours when a man forcibly enters the home. He assaults and rapes her but during the rape, after ejaculation, a witness, preferably a police officer, comes on the scene. This might constitute a "good" case but consider how this case would be effected with variables such as a juvenile victim, a juvenile perpetrator, either of the two parties being under the influence of alcohol, the rape occurring at night, racial or ethnic differences or any of the other circumstances that touch on our own fears and biases. The barriers appear almost insurmountable.

To complete a discussion of the rape victim, it is necessary to address the issue of false reporting. A close examination of the characteristics of a falsely reported rape can be found in Practical Aspects of Rape Investigation edited by Robert Hazelwood and Ann Burgess, published in 1987. We can also conclude that the majority of women who have subjected themselves to the multiple levels of scrutiny preceding a trial are motivated to prosecute for reasons other than their own personal gain. The long term damage resulting from this type of false allegation is of great concern to everyone but a greater wrong can be done if a valid complaint is assumed to be false.

There are indications that some of the above concerns are being rectified. People, including those of us in rape crisis work, are having to examine our biases. Men are beginning to acknowledge that at times they feel embarrassment or guilt when dealing with a victim. Women are having to separate themselves from the fear that they could be similarly victimized. Prosecutors are learning that they can successfully prepare a witness for trial by supporting her attempts to articulate the sequence of events. Defense attorneys are discovering ways to completely defend their clients without further exploiting the rape victim.

For the most part, these women are essentially healthy, productive people. With good information and support, they can handle the trauma of trial. Through being accepted the way any other crime victim would be accepted, they can overcome the shame and learn to state the simple facts of the case with candor and complete honesty. As we continue to work together in relating to rape as a crime, our hope would be that the rape victim is no longer the "thorn in the side of the system."

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Joanne Weis is the Program Director for the YMCA R.A.P.E. Relief Center, Louisville, Kentucky. She received her B.A. at Salve Regina College, Newport, Rhode Island and her Masters in Social Work from Washington University, St. Louis, Missouri. Between 1980 and 1984, she was employed by the AOC in the Warrant and Mediation Division of Jefferson District Court. In December, 1984, she went with the YMCA Spouse Abuse Program as Adult Services Supervisor and therapist. She has been at her present position since December, 1987.

Protecting Children from Abuse and Neglect

Designed for both policymakers and practitioners, *Protecting Children from Abuse and Neglect*, edited by Douglas J. Besharov, provides a comprehensive review of child protective programs. It describes how protecting children from abuse and neglect is a complicated, value laden endeavor that sometimes does more harm than good. Professionals contribute discussions of child abuse reporting laws, the rapid expansion of child protective efforts, the absence of protection for the unborn child, the dilemma of allegations of sexual abuse in custody and visitation disputes, the misuse of foster care in cases of emotional neglect, abuse in out-of-home care, and other topics of concern. Specific policy guidelines covering the role of protective agencies, parental rights, reporting procedures, and case disposition are presented to aid state and local officials, professionals, and advocates seeking to improve services for abused and neglected children. An up-to-date, comparative study of state laws regarding reporting, investigation, court procedures, and criminal sanctions appears in the appendix. This 490-page book is available from Charles C Thomas, Publisher, 2600 S. First St., Springfield, IL 62794-9265. Price: $62.50.

CHILD ABUSE AND SUBSEQUENT CRIMINALITY

A United States Senate Sub-Committee Hearing on juvenile justice was held on October 19, 1983 to examine the relationship between child abuse and neglect, juvenile delinquency, and subsequent adult criminal behavior.

Statements from **Charles Huggins**, a child in the Juvenile Resource Center, **James Garbarino**, Professor of Human Development at Penn State University, **Nicholas A. Groth**, Director of Connecticut's Department of Corrections Sexual Offender Program, and **Henry A. Musk**, Maryland's Director of Mental Health Services unanimously spoke of the correlation of these childhood experiences to adult criminality as it became apparent to them from the work they did as counselors and correctional personnel to adult offenders who were troubled youths.

A sampling of an "at-risk" child's life was presented in a publication authored by children of the Camden, New Jersey Youth Center. Titles of poems are various but examples include "Mr. Nobody," "I'm Incorrigible," "Speak Up and Suffer." Their pain is palpable. How prevalent these atypical homelife experiences are nationwide was not addressed.

If you'd like a copy of the transcript, please write to me.

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Just before his death, Socrates, the father of philosophy, speaking the Crito, said, "We ought not to retaliate or render evil for evil to anyone, whatever evil we may have suffered from him."

VOLUNTEER PROGRAM CHECKS ON ABUSED CHILDREN

R. Neal Lewis, Campbell County District Judge heads up an innovative group called CASA. The program, which has been in effect for 3 years, relies on volunteers to check on children who have been declared abused or neglected and have been committed to the supervision of the state.

The Victim's Family

The emotions raised by the debate over the use of the death penalty reach their peak when mention of the victim's family is made. Proponents of the death penalty, many of whom believe that capital punishment is something all victims' families desire, feel that opposition to the death penalty is tantamount to opposition to the interests of the survivors of murder victims. Opponents of the death penalty are continually having to defend themselves against such accusations. "What about the victim's family?" is a question that speakers against capital punishment can expect from almost any audience. Most often it is stated as an angry accusation rather than a question.

While it could generally be conceded that the majority of victims' families, like the majority of people in this country, are proponents of the death penalty, there is certainly no unanimity on the matter. Large numbers of families of murder victims are opposed to the use of capital punishment, even in the case of the murderer of their loved one. Their views, which don't fit the image of a vindictive, vengeful murder victim's family, often are not reported in the media and are certainly not considered by proponents of capital punishment.

Despite the existence of victims' families opposed to the death penalty, there is a commonly-held view that opponents of capital punishment and victims' families are in two different camps. In some measure this is true. Unless victims' families come forward to publicly state their opposition to the death penalty, a rare event for which they have little desire or motivation, they are assumed to be in favor of the death penalty and upset with anyone who works against executions and the death penalty in general. Opponents of the death penalty rightly feel that it is not their place to make contact with victims' families and to try to persuade them to make pronouncements against capital punishment, even those families they know to hold private opposition to the death penalty.

In many ways, though, the "two camp" mentality regarding victims' families is not an accurate one and is harmful both to opponents of capital punishment and to the families themselves.

In the aftermath of murder, victims' families experience a range of problems that have little or nothing to do with the use of the death penalty and none of which are cured or healed or satisfied by an execution. Those problems are often psychological ones arising from grief, loss, anger, guilt, and fear. In addition, families are treated indifferently by courts, prosecutors, and the police, are often shunned by members of their community, friends and family, and are frequently put in the public spotlight by the media in ways that only deepen their pain. The ways in which society treats the families of murder victims has been referred to as a "second victimization," one that is clearly not ameliorated by executions. The extreme anguish caused by the murder of a loved one and compounded by society's attitude toward them is for most victims' families much more of an immediate concern than whether or not we should be executing convicted murderers.

The irony of the "two camp" mentality that exists with many proponents of the death penalty is that though they claim to be speaking on behalf of the victims' families, they, like all of us, know little about what those families go through. While these people are most likely sincere in their belief that what they are doing will in some way aid the victims' families, they are in fact, like most of us, avoiding the real issues involving victims' families.

Opponents of the death penalty who feel that their active work against capital punishment somehow sets them apart from victims' families need to look more closely at the problems faced by the families, to understand the variety of attitudes toward the death penalty in particular and the criminal justice system in general held by those families, and the ways in which alternatives to capital punishment might include increased awareness of and

aid for the survivors of murder victims.

Over the past few years there have been a number of groups formed to deal with the problems of victims' families. Many of these groups have been short-lived, existing in many cases to pass certain specific pieces of victims' rights legislation. One of the oldest and most enduring of these groups, and an excellent source of information on victims' families, is a self-help group known as Parents of Murdered Children (1739 Bella Vista, Cincinnati, Ohio, 45237). Following is a reading list prepared by Charlotte Hullinger, a founder of Parents of Murdered Children.

READING LIST OF BOOKS ON VICTIMS

1. Bard, Morton & Sangrey, Dawn, **The Crime Victim's Book**, Basic Books, Inc., 1979.

2. Barkas, J.L., **Victims**, Charles Scribner's Sons, 1978 (out-of-print, but your library may have it).

3. Biddy, Don, **The Principles of Criminal Victimology**, 1978 (available from the author: Don Biddy, Criminal Justice Consultant, 6922 Turnbridge Way, San Diego, CA 92119).

4. Carrington, Frank G., **The Victims**, Arlington House, 1975.

5. **The Crime Victims Handbook** (order from Crime Prevention Center, Office of the Attorney General, 555 Capitol Mall, Sacramento, CA 95814).

6. Forer, Lois G., **Criminals and Victims: A Trial Judge Reflects on Crime and Punishment**, W.W. Norton & Co., 1980.

7. Magee, Doug, **What Murder Leaves Behind: The Victim's Family**, Dodd, Mead, Inc., 1983.

8. McDonald, William F., **Criminal Justice and the Victim**, Sage Publications, Inc., 1976.

9. Nicholson, George, Condit, Thomas W., and Greenbaum, Stuart, **Forgotten Victims: An Advocate's Anthology**, California District Attorneys Association (order from Crime Prevention Center, Office of the Attorney General, 555 Capitol Mall, Sacramento, CA 95814).

10. Reiff, Robert, **The Invisible Victim: The Criminal Justice System's Forgotten Responsibility**, Basic Books, Inc., 1980.

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What Murder Leaves Behind: The Victim's Family by Doug Magee explores the tragic social, psychological, and legal consequences of violent crime on victims' families. $14.95. Order from: Dodd, Mead & Co., 79 Madison Avenue, New York, NY 10016.

Slow Coming Dark: Interviews On Death Row by Doug Magee contains in-depth interviews with prisoners on death row. $10.95. Order from: National Coalition to Abolish the Death Penalty, 1419 V Street, Washington, DC 20009.

Forgiveness doesn't mean putting a false label on an evil act. It means, rather that the evil act no longer remains as a barrier to the relationship.
-Marin Luther King

Woman who shot spouse is granted new trial

Associated Press

FRANKFORT — The 1987 manslaughter conviction of a Lexington woman who shot her estranged husband after suffering years of physical abuse at his hands has been overturned by the Kentucky Court of Appeals.

The court ruled Friday that Fayette Circuit Judge George E. Barker erred when he excluded expert testimony that described Ramona Craig as suffering from "battered woman syndrome."

The decision means Ms. Craig will receive a new trial.

Her attorney, Ken Taylor, said the syndrome, though not recognized as a disorder by the American Psychiatric Association, had been used in several court cases across the country to show why battered wives commit violent crimes.

According to testimony at the trial, Ms. Craig was repeatedly abused by her husband, George Craig.

"At various times over a period of years, George beat Ramona severely, cut her with butcher knives, shot her and burned her with hot metal," said the appeals court's opinion, written by Judge Boyce G. Clayton.

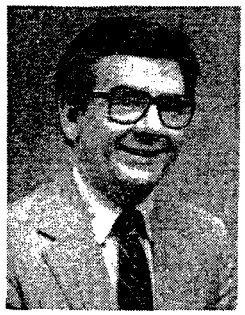
George Craig was twice convicted of crimes related to the physical abuse and ordered to stay away from his wife.

But on Nov. 19, 1986, he showed up at her home, and Ms. Craig shot him.

The jury that convicted Ms. Craig asked Barker to be lenient in sentencing. But Barker said he had no choice but to sentence her to 10 years, the minimum for first-degree manslaughter.

Herald-Leader
8-21-88

KENTUCKY COUNCIL OF CHURCHES



John C. Bush

In October, 1987, the 40th Annual Assembly of Kentucky Council of Churches approved a comprehensive policy statement on crime and criminal justice. That policy statement and its accompanying commentary has been published as a study document for use by churches and others interested in these issues. One of the specific areas of concern around which the council encourages the building of alliances for action is that of rights of victims.

The statement reads:

"Victims of crime and the criminal justice system suffer from the after-shock of violent acts."

"The Kentucky Council of Churches calls on all sectors of the community, including legal, legislative and religious groups and agencies, to help victims of crime and the criminal justice system in order to assure them full restoration of their social, civil and economic rights."

The council of churches is implementing action on the wide range of crime and criminal justice issues over a 3-year period. To date, action on victims issues has been limited to support for legislation to expand the use of restitution as part of the sentencing process, and encouraging clergy to receive training in dealing with victims of abuse.

Kentucky Council of Churches is open to suggestions for action and collaboration on these issues. We are interested in awakening awareness and understanding among our member churches and the general public to promote an equitable and stable system of justice for all people. We approach the entire criminal justice system with the awareness that the human beings involved often are members of our churches, whether they are criminals, victims, professionals or public officials.

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Ky. bishops concerned about victims

The five bishops of Kentucky, through the Catholic Conference of Kentucky, have issued a statement concerning crime victims. In a statement dated Sept. 23, the bishops said the Church's consistent life ethic demands that an organized effort be established to aid victims of crimes. The bishops' statement reads as follows:

Dear brothers and sisters in Christ:

In our letter "Choose Life — Reflections On the Death Penalty," the bishops of Kentucky affirm the value and dignity of all life and the obligation that value places upon us to support and nuture life at all stages.

While "Choose Life" focuses on the death penalty, the bishops state early in the letter that "We affirm from the outset that we are concerned for all persons affected by crime, especially victims and their families.

Our opposition to the death penalty, we do not want to be insensitive to the sufferings of these victims and we urge a compassionate response to meet their needs."

What has become clear in working and talking with victims of crime, is that the recovery involves far more than the restitution/punishment from the court system. Victims of crime go through many of the same stages as those who suffered loss — denial, anger, fear, depression.

The sense of loss may revolve around such issues as loss of privacy, loss of the sense of being able to protect oneself, loss of thinking of oneself as a valued member of society, the loss of perceiving oneself as a participant in society, the loss of control over one's life.

In the case of physical violence, some victims blame themselves, focusing on what they did to cause the attack.

Relatives of victims sometimes unwittingly contribute to this blame when they ask such questions as "Was the door locked?" "Why were you alone?" "Didn't you see him/her/them?"

It seems clear that the Church's mission demands an organized, deliberate communal effort to aid victims of crime, to be a mediating force to promote healing of the varied forms of injury sustained.

The concern for victims of crime is further stressed by our insistence on a consistent life ethic.

The Catholic teaching on the dignity of the human person represents a unified 'Respect Life' stance, a consistent life ethic encompassing all human life from conception through natural death, from the innocent to the guilty.

Cardinal Bernardin of Chicago has developed this approach as one which does not separate life issues but rather seeks to show their essential unity.

We gratefully support the Kentucky Council of Churches' statements on victims of crime and urge implementation of a response.

One of the first steps toward implementing a response to victims of crime needs to center around education and training of those who are in pastoral positions: pastoral workers and clergy.

The dynamics of direct victimization are complex and require specific knowledge. We urge workshops be conducted by those with the specialized knowledge of the dynamics of victimization.

These workshops should sensitize and educate in order to guide the services to victims and properly prepare those who are ministering to victims. These workshops will be conducted by appropriate diocesan agencies.

Yours in Christ,

Most Rev. Thomas C. Kelly, O.P.
Archbishop of Louisville

Most Rev. William A. Hughes
Bishop of Covington

Most Rev. John J. McRaith
Bishop of Owensboro

Most Rev. J. Kendrick Williams
Bishop of Lexington

Most Rev. Charles G. Maloney
Auxiliary Bishop Emeritus of Louisville

The Compassionate Friends

A self-help organization offering friendship and understanding to bereaved parents and siblings.

By Ronnie Peterson

The Compassionate Friends is a self-help group for parents who have experienced the death of a child. The primary method of support for bereaved parents is by providing sharing groups, but newsletters, lending libraries, guest speakers, and telephone friends are part of most chapter programs. Present at every meeting are parents who have survived and can model that it is possible to do so. There is no elaborate structure, nor affiliation with any religion, and any contributions are entirely voluntary.

Members are at all stages of recovery and are fluctuating among them. Some have a deep religious faith; some have lost theirs; many are adrift. Even a small chapter is apt to include some who are currently receiving professional help or who have had such help in the past, in addition to participating in TCF.

We recommend that all chapters have advisory boards of professionals from various disciplines and that the leaders turn to them for guidance whenever necessary. It is essential, of course, that those the chapter selects to serve on its advisory board believe in self-help and recognize that the process, like grieving itself, is slow and sometimes stumbling, but can usually be trusted to work itself out with a minimum of intervention.

The Compassionate Friends was founded in 1969 by Rev. Simon Stephens, an Anglican chaplain at the Coventry-Warwickshire Hospital in England, after he noticed that two sets of bereaved parents were of more comfort to each other than he or any other professional could be. Arnold and Paula Shamres brought him and TCF to the United States in 1972 after the death of their daughter, and there are now over 400 chapters in this country alone.

Our own son was killed in 1970 and we knew nothing of TCF until 1978 when we joined the new Buffalo, N.Y., chapter with the stated purpose of helping others. We had survived quite well but remembered clearly how very difficult it had been even in our relatively simple situation: an exemplary child with whom we had an excellent relationship, a really "accidental" death with no one seriously at fault, continuing support from family and friends, and a marriage with loving communication.

We discovered that we had had one great advantage: prior experience of tragedy. For many parents their child's death is the first really bad thing that has happened to them. We had already known the death of my parents in a flood and the suicide of Art's sister. These were hard lessons in real life. They made the headlines, and they had happened not to someone else, but to us.

In the self-help group, one of the first great learnings is this: I have not been singled out for this unspeakable affliction. There are all these others, and, as one gets to know them, they are fine people with beautiful children also. The absolute isolation that bereaved parents feel starts to break down into identification with the group. At some point, "Why me?" and "Why my child?" can begin to give way to "Why us?" and "Why all our children?"

Meetings always start with the members introducing themselves by telling briefly of their children and the circumstances of their deaths. Those who cannot yet say the words need not speak. (Frequently they will say later the same evening, "I'm ready now," and tell their story.) Immediately the new member knows that these people *know*, unlike family and friends who seem to trivialize the death by likening it to the death of some other family member. These people know that losing a part of one's self, of one's future, is different from other losses. The inappropriate remarks, the "comforting" cliches of the uninformed, are repeated ruefully and then often with rising humor about the ignorance betrayed. In the midst of the "How could they's" someone, blessedly, may say, "I remember when *I* said things like that." The door to understanding a neighbor's "uncaring" attitude begins to open.

Someone may have, without asking, dismantled our child's room, "to spare us," and the impotence and guilty rage this arouses is remembered. Another has felt this way, too, and is still angry and hurt and feels no gratitude for the work involved. Don't bother me with the good motives behind it—they had no *right!* So I would have cried all the way through it. What's wrong with that? I often feel better after crying. Me too.

It is of course the "me too's" that are the magic. Someone in the group will have felt "that way" too. And another part of the magic is that someone else won't have felt that way at all. We learn that there is no right way and no wrong way. Each has to find a way that works. We give no answer. We give lots of answers. Pick one.

Sometimes drugs or alcohol are mentioned and there is real unanimity about the dangers involved—but no righteousness and no condemnation (except of the doctor who prescribes liberally and then disappears). The need for oblivion, for an even temporary sense of well-being, is too well understood and accepted.

The most important things that TCF offers are the endless capacity to listen with true empathy and the reassurance that one is not "going crazy." People come together with nothing else in common but their bereavement, and nothing else matters. We listen to each other's stories told over and over as each tries to convey the specialness of the lost child, to deal with the events surrounding the death itself,

the bitterness and alienation that remain, the disappointment over ticipated support that does not materialize. We do not live up to ..e expectations of society; we are uncomfortable for friends and fellow-workers; we think that perhaps they are right and that we should be "putting it all behind us" and "getting on with our lives." We pretend, but we are frightened.

Some doctors prescribe for our "nerves" and some clergy tell us that it's God's will. Even our parents, our brothers and sisters think that we should be over it, and our other children appear to be going on with their lives as though nothing had happened, or else they are in deep trouble and we have no idea what to do for them or the strength to do it.

Attendance at TCF meetings bring us together with many other parents who feel the same way and with parents who have succeeded in resolving many of the problems. Each meeting includes a short portion giving cognitive knowledge about some aspect of grief and healing (speaker, film, book review) and most chapters also have a lending library of books and tapes, but it is the sharing that brings parents back time after time. This is often the first group that they have felt comfortable with and may even be the first social contact.

A wife may say that her husband won't talk to her about their child. (He may be sitting next to her when she says it!) Other wives present know all about that. But a husband in the group will counter that his wife would talk about nothing else, so that he didn't even want to come home at night. And yet another couple may tell that they had not been able to resolve this, were growing further and ..rther apart, and had gone to a counselor. Together they'd learned reach compromises that worked for them. A woman will say that that is why she comes to TCF. She can talk about the child, and someone will listen. It takes the pressure off her husband. All the women present have learned a little more about men and marriage.

We read terrible statistics about the marriages that break up after the death of a child and we are disturbed. TCF's constant counsel of patience, with one's self and then with others, as well as insights into other marriages that seem to be holding, works to reinforce the idea that a relationship may be basically okay in spite of the discovery that partners are not able to support each other while each is struggling to adapt to a crushing new reality.

All of us worry about our surviving children. We have trouble understanding their different styles of grieving. We ask for and receive a lot of advice about this. TCF family get-togethers have helped by putting our children in touch with each other. Some chapters have regular sibling programs.

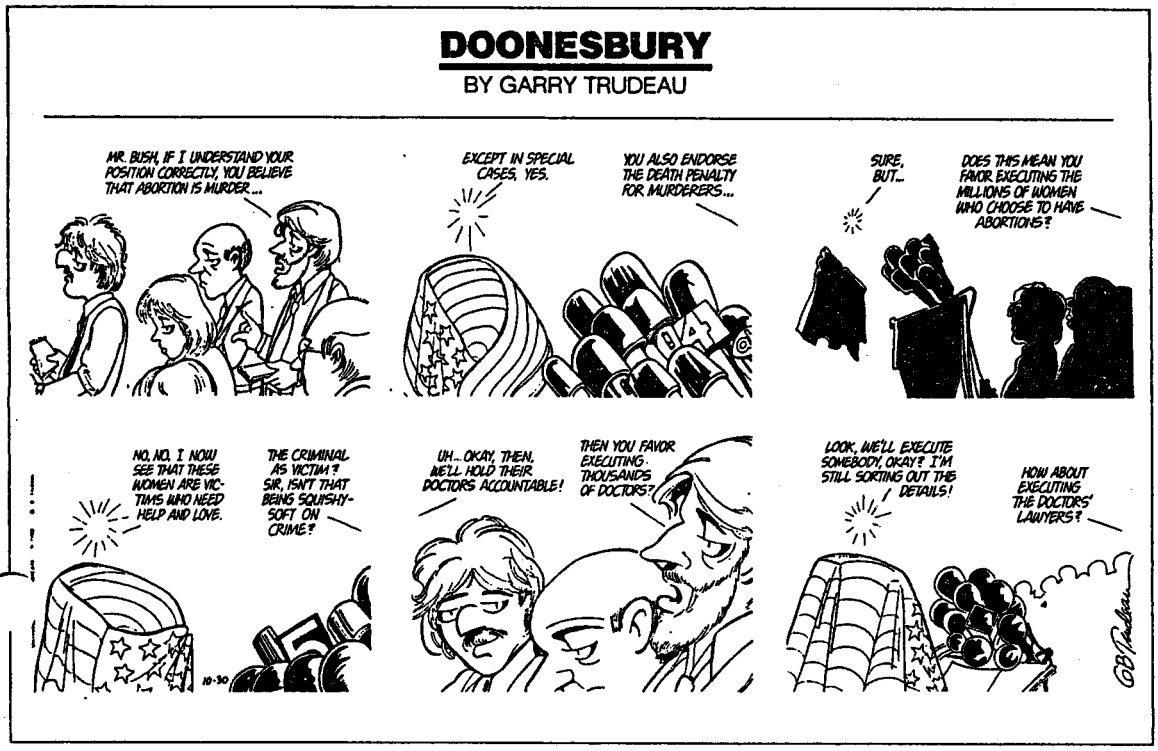
In TCF we hear each other talk about how much it hurts, and all agree, and no one suggests any need to hurry it along or pretend that the pain is gone. There will be someone there to say that it isn't quite as bad as it was, that it does get a little better after a while. Another nods.

There are difficulties on the job (or at home) in being disorganized, unable to concentrate or reach decisions. Lots of company there. It feels safe to discuss fears, dreams, anything. Through it all, we listen and respond. We take each other very seriously. We recognize each other's needs as our own, and those a little further along reach out to those coming on behind. It feels very good to be able to help someone else, and we recognize it as a sign of our own progress.

Some of us stay on, listening, reading, listening, attending conferences, listening—and learning. We have seen a lot of pain and a lot of healing. We have received much more than we have given. The Compassionate Friends works.

For further information and a complimentary copy of the National Newsletter, write The Compassionate Friends National Office, P.O. Box 3696, Oak Brook, IL 60521-3696.

Mrs. Peterson is the Professional Relations Liaison at TCF.



Forgiveness Benefits Pardoner Most Of All, Says Theologian

BY BRUCE BUURSMA
The Chicago Tribune

CHICAGO—Forgiveness can be a grand and dramatic gesture, as it was last year inside a stark Roman prison cell when Pope John Paul II took the hand of Mehmet Ali Agca, the man accused of attempting to assassinate the pontiff in St. Peter's Square, and forgave him.

But usually it is a far more ordinary miracle whose chief value may rest less in the sense of relief that washes over the one who is forgiven than in the purging of the pain that has seared the soul of the one who proffers the pardon.

"When you release the wrongdoer from the wrong, you cut a malignant tumor out of your inner life," said theologian and ethicist Lewis B. Smedes. "You set a prisoner free, and you discover the prisoner almost always was you."

SMEDES, A professor at Fuller Theological Seminary in Pasadena, Calif., has become a nationally recognized authority on the balm of forgiveness since the publication last year of his best-selling *Forgive and Forget: Healing the Hurts We Don't Deserve.*

The book, published by Harper & Row, has sold about 250,000 copies and has made Smedes nearly as torrid an item on the country's television and radio talk-show circuit as the scorchingly candid sex counseling crowd.

The overwhelming response to the book, Smedes said after a speech this week to a clergy seminar in Oakbrook, Ill., a Chicago suburb, has provided him with a resounding "reassurance of how right I was" in tackling the topic

> ***"When you release the wrongdoer from the wrong, you cut a malignant tumor out of your inner life."***
>
> **Lewis B. Smedes**

"It has increased my awareness of how epidemic the sense of being screwed is," he said. "On the other hand, I wish to God I could have said something in the book that would have made forgiving easier. It isn't a how-to book. There isn't a road map to forgiveness."

But Smedes, an ordained minister in the Christian Reformed Church, a conservative Dutch Calvinist denomination, has provided four markers, or "stages," for a pathway to forgiveness and reconciliation.

"FORGIVING IS love's toughest work, and love's biggest risk," he said. "Our sense of fairness tells us that people should pay for the wrong they do. But forgiving is love's power to break nature's rule."

And retribution, said Smedes, has its limitations. "If it were really a matter of an eye-for-an-eye, the whole world would be blind," he said. "Vengeance is a passion to get even. The problem with revenge is that it never evens the score. It ties both the injured and the injurer to an escalator of pain. Both are stuck on the escalator as long as parity is demanded, and the escalator never stops."

On the other hand, the alternative of forgiveness creates the "possibility that the violence of love can invade the irreversibility of history," Smedes added. "It may break all the normal moral equations of fairness, but it is the only way to break the cycle of the violence of pain in an unfair world."

HIS "STAGES of forgiving" include a tough-minded acknowledgement of the hurt felt by the person who has been wounded, a recognition of the hate that often boils up, a decision to heal the broken relationship and, finally, a resolve to invite the wrongdoer back as a partner in a new relationship.

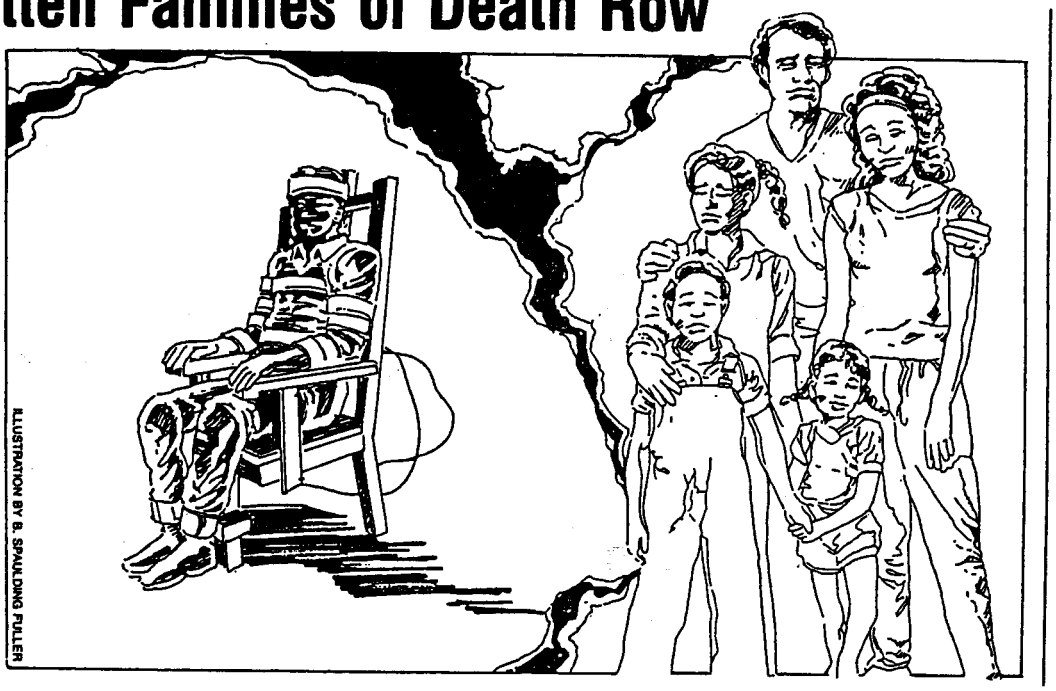
But there is, he acknowledged, ambivalence shot through the whole process.

"Forgiving is a risk," he said. "God is not a doormat, nor should anyone else be a doormat. We must face up to the skeptic's suspicion that forgiving is really a religious trick to seduce hurting people into putting up with wrongs they do not deserve."

In addition, Smedes said, forgiveness ought not to be regarded as a moral obligation. "You can ruin a really nice miracle by making forgiving a moral duty," he said. "Forgiving is an outrage against straight-line, dues-paying morality. And anyone who preaches the beauty of forgiveness should get it through his head that what he urges us to do goes against the grain of any decent person's yen for a fair deal."

The Death Penalty

Forgotten Families of Death Row



by Karen Kane

Karen Kane is a research associate with the New York State Defenders Association and has received her master's degree in criminal justice from the State University of New York at Albany.

Introduction

The consequences of capital punishment are not confined to the individual who has been sentenced to die, but tear at the entire social fabric of those who stand on the periphery of an act of violence. However, with all the debate concerning capital punishment, little, if any, attention has focused on the impact of capital punishment on the families of both death row inmates and murder victims. These consequences, for many families, can be profound; yet, society traditionally reacts to these families with indifference and avoidance. For example, the families of death row inmates have often been referred to as the "forgotten victims."[1] This article is an attempt to alert the reader to some of the consequences that many of these "forgotten families" have endured; it will hopefully become an issue that enlarges the debate surrounding the overall wisdom of maintaining capital punishment in a civilized society.

We focus first on the families of murder victims.

The Families of Victims

Society's clear message to the families of murder victims is that the cry for vengeance is expected, acceptable and, indeed, redeemable. An angry but removed populace frequently assumes that the grief of the victim's family will be lessened once the death penalty accounts for the life of the convicted. Society intuits that these families not only support the death penalty for their loved one's killer, but also for others who are convicted of similar offenses. Often, however, the cry for vengeance is a reflection only of society's collective frustration, not that of an aggrieved family whose wounds need closure. As Colin Turnbull writes:

"There is no shortage of testimony to the effect whereas their (the victim's family) initial reaction is to demand vengeance, they ultimately suffer from the knowledge that they are responsible for an ever-widening circle of tragedy."[2]

There is no doubt that many families who have suffered the tragedy of having a loved one murdered advocate for the use of capital punishment. However, it cannot be cavalierly assumed that all families in like situations want the same. It is one purpose of this article to introduce the reader to the feelings of some victims' relatives who have actively sought to overcome the anger, hate and vengeance associated with their loved one's death, and have in the process worked to prevent additional murder at the hands of the State. The following quotes, most of which have been provided by the Institute for Southern Studies, are from the members of some of these very special families.[3]

ROY PERSONS, in a letter to the *St. Petersburg Times* regarding the sentencing of Willie Rivers for the murder of his wife:

"My wife, Carol Persons, was murdered by Willie Rivers. She was a good and beautiful person, and I loved her very

1. *See*, P.W. Perry, "The Forgotten Victim," *Mental Hygiene* 57: 11-14 (1973). Similarly, Bakker, et al. (1978) have labeled the families of prisoners the "hidden victims of crime". *See*, L. Bakker, et al., "Hidden Victims of Crime," *Social Work* 23: 143-148.

2. C. Turnbull, "Death by Decree," *Natural History* 87: 51-56 (1978) p. 54.

3. The Institute for Southern Studies, located in Durham, N.C., is a research and publication center which focuses on combating capital punishment. We thank the Institute for allowing us to reproduce these quotes.

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much. That heinous act robbed her of her chance to have a full and productive life, and robbed us of the opportunity to continue the meaningful relationship we had developed over the past four years.

"Her life was precious, as is all life. Despite my feelings of anger, disgust, pity and nausea toward Rivers, I do not believe that his life should be taken. I would have been willing to testify in court that I or Carol would not have wanted him to be sent to his death, but this testimony would not have been legal.

"Do not misunderstand. I am not criticizing the jurors, nor do I think they made a mistake. All of the evidence unmistakably proved that Willie Rivers murdered Carol. The jury is not mistaken, but the law is. Nobody has the right to take a human life, and this includes the State of Florida....

"Carol's death was a real tragedy to all of those who loved her so dearly. Her life as a person and as a psychologist represented an attempt to create better interpersonal relations among people and to promote understanding. Therefore, it is even more tragic that her death will, by sentencing Willie Rivers to his death, reinforce and perpetuate feelings of vengeance, hate and further human evil. The laws should be changed."

MARIE DEANS, in a 1986 speech to an Illinois church group concerning the murder of her mother-in-law, Penny:

"I was carrying Penny's grandchild, and we could not imagine how we would teach this child that life is sacred if we allowed a human being to be killed in his grandmother's name or in ours."

The following is a quote from a letter written by Ms. Deans in July 1986 to the New York State Defenders Association:

"The hundreds of murder victims' families across the country who, to no avail, have pleaded for mercy for those who murdered their loved ones clearly demonstrate that the death penalty has nothing to do with the victims' families ... Victims' families simply serve as a cover-up for the fact that our leaders choose to gain votes by reacting to people's fears rather than honestly responding to society's needs."

WILLIAM RILEY of Orlando, Florida, in a letter to Governor Robert Graham requesting clemency for his father's murderer:

"If my father taught me anything about life, it is that God gives life and only He has the right to take it away. The God that I came to know, through my father, was one of love and mercy and giving another a chance to do better—not one of vengeance.... We questioned and wondered the reason for my father's death. We suffered as a family when he died. And we ask you not to add to our suffering by killing James Dupree Henry. We have found it in ourselves to feel compassion for this young man and we ask you to do the same."

VIRGINIA FOSTER of Knoxville, Tennessee, in a 1978 interview regarding the murder of her son:

"There is an old saying: 'You would feel different if it happened to you.' Well, it did to me. And I have thought so much about this person and how I have hated him for taking my loved one away from me.

"But after much thought and many tears I knew that my feelings on capital punishment had not changed. For I knew in my heart that killing is still wrong. And I believe that there are other ways for punishment. And I surely want this person to be punished.

"He must pay for what he did. But I don't wish him to be punished by death.

"For taking his life would make two killings, two murders and two guilty people.

"I truly believe in God's commandment, 'Thou shalt not kill.' And I believe the person or persons who kill by capital punishment are as guilty as the person who is being punished."

ILLUSTRATION BY B. SPAULDING FULLER

GOLDEN BRISTOL of Dearborn, Michigan, in a 1978 speech to a group of California inmates:

"The devastating news that our daughter Diane had been raped and brutally murdered cut like a knife into the depths of our souls. We had the normal human reaction of grief and anguish.

"Didn't I have the right to be filled with red-hot hate? But where would it have gotten me? It wouldn't have brought my daughter back.

"We view this person (Michael Keeynes, convicted of Diane Bristol's murder) as one of value and worth. We are interested in him as a total person. Not for what he did, but for what he can become."

The Families of Death Row Inmates

Several studies have examined the stresses experienced by the families of "general population" inmates, but studies which specifically focus on the families of death row inmates are relatively sparse.[4] The literature that does exist suggests that one of the most common effects for these families is a feeling of stigmatization and embarrassment surrounding the tragedy.[5] As observed by Radelet, et al.:

"Like the victims' families, the families of death row inmates see themselves as innocents deprived of a loved one because of an event over which they have no control. They bear no direct responsibility for the crime, but they suffer it's stigma."[6]

This feeling is aptly illustrated in a statement by the wife of a death row inmate:

"I've found that people can be very cruel when they learn you have an immediate family member on death row. Generally they leave you with the impression they think you

4. For a review of such studies, *see*, S.L. Brodsky, *Families and Friends of Men in Prison*, Lexington, MA: Lexington Books (1975); S.H. Fishman and A.S. Alissi, "Strengthening Families as Natural Support Systems for Offenders," *Federal Probation* 43: 16-22 (1979); P. Morris, *Prisoners and their Families*, New York: Hart (1965); D.P. Schneller, *The Prisoner's Family: A Study of the Effects of Imprisonment on the Family of Prisoners*, San Francisco: A and E Research Associates (1978).

5. *See, generally*, M. Radelet, et al., "Families, Prisons, and Men with Death Sentences," *Journal of Family Issues* 4: 593-612 (December, 1983); L. Bakker, et al., "Hidden Victims of Crime," *Social Work* 23: 143-148 (1978).

6. *See*, M. Radelet, et al., *supra*, note 5, at 600.

are tainted because you are related to a convicted killer...."[7]

Studies of families of incarcerated men reveal that frequently family members will lie about or hide the whereabouts of the incarcerated family member.[8] Keeping such a "secret" is almost impossible for the families of death row inmates because the pending execution is brought to the attention of the public through the glare of national media. Very little, they report, can be more hurtful or humiliating than knowing a relative's death is actively desired by others. "The families of the condemned," states Radelet, et al., "are acutely aware of the hostility society has for their loved ones, perhaps seeing it and feeling it more than the incarcerated persons themselves."[9]

The situation becomes more painful for those families with children. Research has found that the absence of the father from the home has a considerable effect on the children left behind.[10] It destroys the paternal image and makes adjustment to home and school extremely difficult, an effect multiplied many times over for children with fathers on death row. Not only does the child experience the effects of having an incarcerated parent, but suffers the added confusion of knowing that society—without remorse, and with anger and vengefulness—would opt to see their parent die. There are a myriad of instances of children with parents on death row having to cope with community members who respond and react to them as if they themselves had committed an act of violence.

One of the leading causes of stress among families of death row inmates is the uncertainty that accompanies their loved ones' sentence of death—uncertainty inescapable in the commendable litigation process of a constitutional democracy like that of the United States. After the guilt and penalty phase of a capital trial, the inmate sentenced to death in the United States has a constitutional right to a review of his sentence on both the state and federal levels. It has been stated that:

"A permanent and indispensible feature of capital litigation involves the review of constitutional, statutory and discretionary questions at a minimum of 10 state and federal judicial levels."[11]

In a democratic society that prides itself on holding life sacred, it is normal for the litigation process to last 8 to 10 years.[12] Given the gravity of the sanction, it is routine for stays to be granted at each level or stage of litigation,[13] and each new proceeding brings new highs and lows for the families. The hopes and expectations of reprieves or commutations are quickly dashed when the court conducting the review affirms the sentence. Families are thus forced again to relive the experience of the original trial when the sentence of death was imposed. It has been stated that this constant uncertainty may cause the families of death row inmates to experience a "prolonged period of anticipatory grief in rehearsal for the forthcoming demise of a loved one."[14]

It is not surprising that the experience of families of death row inmates is often analogized to the experiences of families of the terminally ill. In cases of chronically or terminally ill persons, the families experience a lingering death and sense of injustice, uncertainty and financial hardship.[15] The great distinction between families of terminally ill patients and death row inmates is that the inmates' families are involved in a slow-dying process that *they know can be stopped.* This knowledge adds to the stress and frustration felt by the families. Frequently, the results of this uncertainty for death row families is the severance of ties with the inmate to permit some emotional release.[16] Often, visits and letters to death row inmates decline in the first few months of incarceration as the families' economic and psychological resources become drained.[17] And it is clear that even if the family is able to overcome the psychological barriers mentioned above, they still must hurdle the economic ones.

Financial hardship is common among the families of death row inmates. Far from being freed to simply grieve for the impending death of a loved one, these families must grapple with the harsh reality of fiscally "making it" on a day-to-day basis. Frequently, the removal of the inmate from the family unit means the loss of a breadwinner. While the majority of families of death row inmates are poor prior to the inmate's sentence, removal of the inmate often ensures that the family will need to seek public assistance. If the inmate's family is not impoverished prior to the sentence, economic hardship is certain to ensue given the cost of the inmate's legal expenses.

Given the economic status of the families with loved ones on death row, little, if any, money is left for visits to prison. Very often the prisons are far away from the major population centers, and public transportation to the prison is either inadequate or non-existent.[18] The financial burden of making the trip can be great for an impoverished family, and is exacerbated when children are involved. Even when money can be scraped together for visits to the prison, the procedures and facilities for visiting often induce stress and anxiety. The visiting facilities themselves are inadequate and overly restrictive. Once the families arrive at the prison they must often endure the humiliation of a body search and the depression associated with visiting under deplorably impersonal conditions. These types of barriers function to emphasize the isolation and separation the inmate and family members feel, and often—yet predictably—lead to the further severance of critically important family ties.[19]

To date, no formal national or statewide organization has been formed for the families of death row inmates.[20] There are, however, numerous organizations for families of victims.[21] Like these other families, families who have a loved one on death row need the support and understanding of others who are experiencing similar tragedies. However, finding people who are sympathetic to their situation is often difficult, given society's prevailing support for capital punishment and its belief that persons sentenced to die, as well as their families, are worthy of sub-human treatment.[22] It is a tragic consequence of an already tragic affair that most families of death row inmates must face the struggle alone. ■

7. This statement was made by Zell Morris in a letter dated 12/21/84 to various governmental organizations in an attempt to obtain grant money for a statewide support program for prisoners and their families.

8. *See,* P.W. Perry, *supra,* note 1, at 11; P. Morris, *Prisoners and Their Families,* New York: Hart (1965) p. 116.

9. *See,* M. Radelet, et al., *supra,* note 5, at 599.

10. S. Friedman and T.C. Esselsty, "The Adjustment of Children of Jailed Inmates, *Federal Probation,* 29 (December 1965), pp. 55-59; S. Brodsky, *Families and Friends of Men in Prison,* Lexington: Mass: D.C. Heath and Co., (1975).

11. New York State Defenders Association, *Capital Losses: The Price of the Death Penalty in New York State,* (1982), p. 7.

12. Id.

13. Id.

14. *See,* M. Radelet, et al., supra, note 5, at 609.

15. Id.

16. *See, generally,* M. Radelet, et al., *supra,* note 5.

17. *See,* L. Bakker, et al., *supra,* note 1, at 143.

18. *See,* P.W. Perry, *supra,* note 1, at 12.

19. *See,* L.Bakker, et al., *supra,* note 1, at 144.

20. Although there are no national organizations for families of inmates in the general prison population, there are a number of statewide organizations. Two such organizations are Reconciliation and Separate Prisons. No such statewide programs currently exist for families of death row inmates.

21. Some of these organizations include National Organization for Victim Assistance (NOVA), Parents of Murdered Children, and Mothers Against Drunk Drivers (M.A.D.D.).

22. *See,* M. Radelet, et al., *supra,* note 5, at 599.

Victims

VICTIMS

In past issues of Network Newsletter (e.g. July-August, 1983) I have drawn parallels between the experiences of victims and of offenders using the concept of personal power. In short, crime may be a way for offenders to assert power, thus to gain a sense of personal worth. In doing so, however, they rob victims of their sense of personal power. For victims to regain wholeness, this sense of autonomy must be regained. The criminal justice process, unfortunately, robs both victim and offender of a sense of power, compounding the problem.

Now I would like to explore parallels between the experiences of victims and offenders in somewhat different terms. Judge Challeen ("Turning Society's Losers into Winners" in a past issue of The Judges' Journal) has noted that one characteristic of most offenders who appear in his courts is that, by society's standards, they are losers. People who see themselves as losers are more likely to assert their identities through crime; they are also least likely to be deterred by the fear of consequences. Deterrence, according to Challeen, works least for those who need it the most: those who are used to losing, who are least likely to learn from past mistakes and are least likely to be concerned about the effects of apprehension and punishment.

Turning to victims, Nils Christie ("The Ideal Victim," presented to the 33rd International Course in Criminology in Vancover, B.C.) has pointed out that victimization is not in itself "a thing." Rather, it has to do with participants' interpretations of situations. Given the same experience, some people might define themselves as victims. Others, however, might define themselves as losers. Still others might interpret their experience as victories.

Just how a "victim" interprets the situation depends upon a number of factors. If such people can identify that they have been wronged and can identify how they were wronged and by whom, they may identify themselves as victims. If, on the other hand, they are used to losing, to being a victim, and if they cannot clearly identify how they have been wronged and who has wronged them - if they are "ignorant victims" - they may interpret the same experience as another loss, more evidence that they are losers.

Christie as well as Richard Sennett (The Hidden Injury of Class) point out that our society tends to encourage people at the bottom to see themselves as losers rather than victims. Working class children tend to see their defeats not as evidence of the social constraints upon them but as personal failures. Poor folks especially, therefore, are often "ignorant victims," developing self-definitions of themselves as losers.

People who identify themselves as losers may commit crimes as a way of asserting themselves, as a means of empowerment. However, because they are used to believing that they do not have the power to determine their futures, they are unlikely to be deterred by punishment or the example of others' punishment. The result is the creation of another class of victims - crime victims. Some of this new class of victims will identify themselves as crime victims, but some will not; persons who are used to misfortune, who daily experience crime, are likely to see themselves as losers, and see the crimes as one more misfortune. The victimization simply confirms that they are losers. From this group may come more offenders. The cycle is repeated. --Howard Zehr

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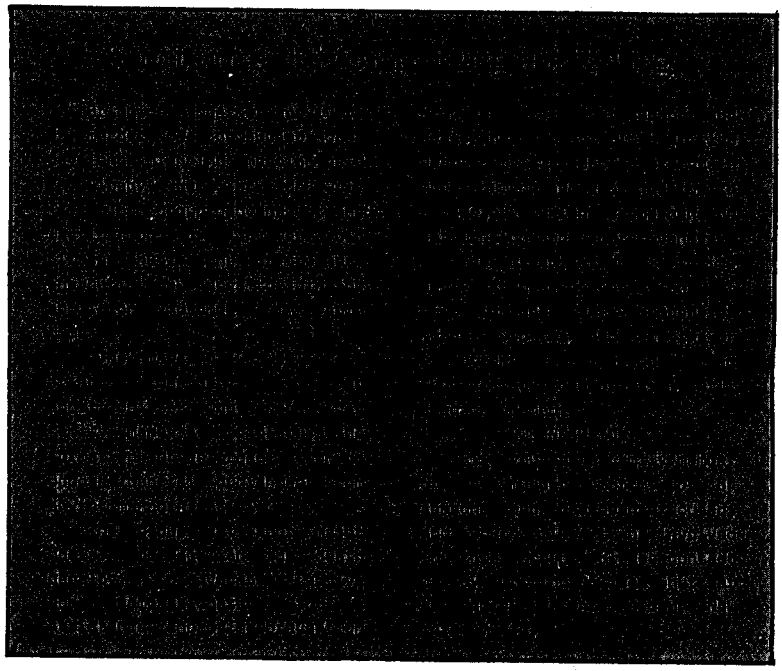

Families of Death Row Prisoners

FAMILIES OF DEATH ROW PRISONERS

I have often been impressed by the similarity of the experiences of victims/survivor victims and the families of convicted offenders in prison. The lives of both groups have been affected in fundamental ways by forces from without. They both experience pain and loss that will probably be with them for the rest of their lives. That does not mean that they are all entirely without hope: victims of crime may, in time, find healing and empowerment; families of prisoners can usually look forward to the release of the prisoner and a hopeful new beginning. For families of murder victims and families of death row inmates, however, there is no hope of reunion.

I have just read a study that focuses on one of these groups of secondary victims of crime and justice, a group that lives without the hope of healing and reunion. The study, by John Ortiz Smykla of the Uni. of Ala., looks at death row inmate families and the impact of capital punishment on them. Smykla calls them "the neglected victims of the system of criminal punishment." He says that "the most disturbing effect of capital punishment on their lives ...is the morbid grief reaction to the threat of civil execution. I call it morbid because it is excessively prolonged and it distorts their conduct. To date, no one has considered the impact of morbid grief as diffuse punishment on the innocent families of persons on death row as a consequence of the state's effort to control crime."

In the course of this study, Smykla interviewed 40 family members of death row inmates in Alabama. The time lapse since the death sentences were handed down ranged from 6 months to 7 years. However, he found that "families who had been facing the death sentence the longest...experienced no practical reductions in their grief reactions compared to families that were facing the sentence for shorter periods of time. This is prolonged grief and it appeared in all the families interviewed." Grief reactions identified by Smykla included: (1) Overactivity without a sense of loss; (2) Acquisition of medical illnesses; (3) Alteration in social relationships and loss of patterns of social interactions; (4) Furious hostility toward specific persons; (5) Conduct that resembles schizophrenia; (6) Behavior detrimental to their social and economic well-being; (7) Depression, including tension, agitation, insomnia and self-accusation.

Smykla argues that in evaluating the death penalty the state must consider not only effectiveness, already soundly challenged, but also moral acceptability. His conclusion is that the extended and intense diffuse punishment experienced by innocent family members of death row inmates renders the death penalty morally unacceptable. "... death row families have as much right to be free from the impact of morbid grief reactions in their lives as the rest of us. The implication of such an evaluation is to abolish the death penalty."

("Study of the Impact of Capital Punishment on Death Row Inmate Families" by John Ortiz Smykla, Associate Professor, Department of Criminal Justice, Uni. of Ala., University, Alabama 35486.)

RUBY FRIESEN ZEHR

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Staff Changes

TRANSFERS

Gary Johnson, Assistant Public Advocate, formerly director of the Morehead office, transferred on 11/16/88, to the Frankfort office, Appellate Branch.

RESIGNATIONS

Gail Robinson, formerly an Assistant Public Advocate with MLS, resigned on 11/1/88, to join Kevin McNally in private practice at 308 Wilkinson (P.O. Box 1243) Frankfort, KY 40602 (502) 227-2142.

Lana Combs, an APW with the Stanton office since February 1988, resigned on 11/1/88.

Since August, 1988, 9 attorneys have left the Department, with a combined total of 54.5 years of service and experience.

National Coalition to Abolish the Death Penalty

FOR THE GOOD OF EVERYONE: ABOLITION AND THE VICTIMS ASSISTANCE MOVEMENT

We are a nation rooted in the belief that human life is uniquely valuable. We continually strive to create a judicial system which holds that each person is as important as every other. Yet the tragedy of murder, whether at the hands of a criminal or at the hands of the state, test this judicial system and our ideals of equity and compassion. The National Coalition to Abolish the Death Penalty (NCADP) is an organization dedicated to the task of halting state-sanctioned murder in the U.S. in favor of more morally consistent and pragmatic responses to crime.

The NCADP is a resource, coordination and support center for efforts to end capital punishment across the country. NCADP was founded in 1976 in response to the resumption of executions in the U.S. after the 4 year moratorium imposed by the U.S. Supreme Court in it's 1972 Furman v. Georgia decision.

The Coalition is a nonprofit organization based in Washington, D.C., with a Field Office in Indiana. It is made up of affiliate groups with a common goal of ending capital punishment in the U.S. Our over 120 affiliates include the U.S. Catholic Conference, the American Baptist Church and the ACLU, as well as state and local organizations such as Pilgrimage for Life in New Orleans and the Missouri Coalition Against the Death Penalty.

Each Affiliate organization holds 1 seat on the NCADP's Board of Direc-tors, which meets annually to ap-prove the Coalition's budget and general program areas. The Board also elects officers and members of the Executive Committee, which meets quarterly to oversee the day-to-day activities of the coalition and to strategize for future work.

The Coalition has a broad range of activities. Perhaps most importantly, the NCADP is a resource clearinghouse, providing up to date information about capital punishment to individuals and to activists across the country. NCADP produces 4 regular publications: LIFELINES, our membership newsletter; "The Death Penalty Exchange," an organizer's worksheet; The Abolitionist Directory, a state-by-state listing of groups working to end the death penalty; and the "National Execution Alert," which notifies activists of approaching executions and provides suggestions for response.

NCADP also serves as a training facilitator. Each spring, 4 regional conferences help provide abolitionist organizers with up-to-date information and training workshops in some of the critical areas of the issue. A national conference, held in November of each year provides a chance for activists around the country to gather and exchange skills and information. The conferences also serve as an important time for defense attorneys and activists to gather and share skills and strategies.

The Coalition monitors both state and federal legislation, and provides informational materials to those working to influence legislative efforts. In particular, the Coalition has been active in providing information for those states seeking to repeal the death penalty, or to prohibit capital punishment from applying to juvenile offenders or the mentally retarded. During the 100th Congress, the Coalition worked closely with the Federal Anti-Death Penalty Coalition to monitor and fight efforts to restore a federal death penalty.

ABOLITION AND THE VICTIM'S MOVEMENT

For too long, victim's rights advocates and abolitionists have failed to recognize the common ground between our goals, our frustrations with the criminal justice system, and our desire to see a more productive, reasoned, and sensitive approach to the tragedy of murder.

The experience of losing a loved one to a brutal murder shatters the lives of those who remain. Families of murder victims wake from that nightmare and face a new world, a world without that special person, a world insensitive to the devastation which murder leaves behind. Yet survivors must find ways to move forward with their lives. Society shares an undeniable responsibility to help this process of healing and recovery.

Ironically, the victim's assistance movement now sweeping the country was born, not out of government concern, but out of the determination and commitment of crime victims themselves and their families. While the electric chairs of southern states were being warmed up in the late seventies, victim's families were forced to form their own grassroots movement to answer their special demands. The system focused on retribution while ignoring the need for healing.

Some argue that capital punishment fulfills our responsibility to vic-

tim's families by paying back the fe taken. In reality, however, ecutions are a smokescreen, an easy rationalization that we've "done something for the sake of the survivors." We have not. By using the death penalty as our helping hand, we spread the violence, condone retribution, and prolong the agony of the victim's family and friends. By killing again, we create yet another family of victims who must repair their shattered lives amid a society which, this time under the auspices of the law, has taken a life from them.

Executions spread violence by legitimizing aggression and force as a means of resolving conflicts. Capital punishment justifies retribution by suggesting that our duty to the survivors of murder is finished when another life is taken. The death penalty prolongs the agony of the victim's family by quiring them to struggle through rs of legal battles over a celebrated crime.

Perhaps the most ironic result of the death penalty is its memorializing of the criminal rather than the victim. In the years of appeals and the ceremony of execution, criminals are given a platform, a name, and notoriety. We all remember Gary Gilmore. Yet can any of us name his victims?

RE-EVALUATING OUR RESPONSE TO CRIME

Instead of the death penalty, society needs productive and progressive responses to crime. We need counseling and financial programs to aid victim's families. While victims assistance programs have been established in many states, several have no state funded assistance programs, and others do not target murder vics families under the existing ograms. Too often, prosecutors spend precious funds on securing a death sentence rather than providing more lasting support to the families of the victim. With their focus on the grisly details of the crime, capital trials strip the victim's family of need for a public expression of the dignity of the victim and an acknowledgment of the life that he or she led. Instead, the trial links the defendant with the victim in a way that is offensive to many victim's families. And they create new victims. A "successful" capital trial results in yet another family destined to wait out nearly a decade of uncertainty about the fate of their loved one, now condemned to death. Families of prisoners on the nation's death rows suffer self-accusation, social isolation and feelings of powerlessness very similar to those of murder victim's families.

The emotional side of the debate shadows the pragmatic one: the death penalty is one of the most expensive, if not the most expensive criminal justice program in the nation. Figures which have surfaced over the last several years show without exception that the death penalty costs taxpayers an average of $1.8 million per case from the point of arrest to the point of execution. Those states with an active death machine, particularly Florida and Texas have now estimated that the state has spent tens of millions of state dollars on a handful of executions. In Texas, the figure since 1977 has been estimated at $182 million. There have been 27 executions in that time.

Conversely, Texas spent just over $8 million in 1988 on their entire victim's assistance program. While more detailed research is underway on the correlation between victims assistance funding and the death penalty, it seems clear that executions rob valuable resources from other criminal justice programs, including victim's assistance. Those programs contribute more to the healing of society than does capital punishment.

Through continued outreach to victims organizations and to the general public, the NCADP is working to close the imagined gap between those who work for victim's assistance and those who work for victim's assistance and those who work against executions. Abolitionist organizations have begun direct work with victim's groups in several states, to cooperate in legislative efforts and link state spending on executions with other criminal justice programs.

Society needs to direct the tremendous financial resources now focused on executions towards crime prevention. If the millions spent on the death penalty went to social programs, education, research and innovation, we could surely achieve our most common goal: we could make murder obsolete.

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Leigh Dingerson is a 1978 graduate of Brown University, and spent 5 years as a community organizer in Texas, Arkansas and South Carolina before being hired in 1984 to reactivate the South Carolina Coalition Against the Death Penalty. She was hired as SCCADP's full-time Director in January of 1985. In 1987, Dingerson was hired as Director of the NCADP. Her work in Washington began in June of 1987.

The Improper Influence of Victims In The Criminal Process

Victims have a voice in the criminal justice system in many areas where their views should be known and considered before decisions are made. But courts recognize that victims can have improper influence in the criminal justice system - influence that unfairly focuses the decisionmakers. We share caselaw on inappropriate victim influence.

UNITED STATES SUPREME COURT

In **Booth v. Maryland**, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) the court held in a capital case the consideration by the sentencer of a description of "the personal characteristics of the victims and the emotional impact of the crimes on the family," and "the family members' opinions and characterizations of the crimes and the defendant" violated the 8th amendment since it is "irrelevant to a capital sentencing decision," Id. at 2533, and since it is an improper appeal to influence the sentencer:

> One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. As we have noted, any decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, supra, at 358 (opinion of Stevens, J.). The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision-making we require in capital cases. Id. at 256.

KENTUCKY LAW

In **McQueen v. Commonwealth**, 669 S.W.2d 519 (Ky. 1984) the court recognized that certain background information about the victim is relevant to understanding the nature of the crime and that victims are not mere "statistics." Id. at 523.

In **Benge v. Commonwealth**, 97 S.W.2d 54 (Ky. 1936) the court held that the prosecutor had improperly introduced evidence "to show the deceased was a member of the church, did not drink at the time he was killed, but attended church regularly and sang in meeting":

> It is just as great a crime to kill the most hardened criminal as it is to kill the most upright and illustrious citizen in the land; hence evidence of the good or bad morals of the one slain has no proper place in a trial for murder. Id. at 56.

In **Nickell v. Commonwealth**, 56 S.W.2d 145 (Ky. 1978) the dec eased's wife, who was not a witnes to the killing, testified as t when she last saw her husband aliv and to the number of ages of he children. The court held this "wa immaterial and solely designed t play upon the emotions of th jury." Id. at 147.

In **Ice v. Commonwealth**, 667 S.W.2 671 (Ky. 1984) the court condemne the introduction of evidence tha had the obvious purpose "to engen der sympathy for the victim and he family." Id. at 676. A photo wa introduced through the mother o the victim, "interspersed wit questions regarding her great lov for the child and the terrible los she had sustained." Id.

In **Sanborn v. Commonwealth**, 75 S.W.2d 534 (Ky. 1988) the victim' husband, son, mother and 2 daugh ters testified that the victim wa "a former Miss Henry County," " beautiful, attractive, energeti woman," "a mother, and a wife, an a homemaker, and helped run th farm." Articles of the victim' clothing were introduced bit by bi from these different witnesses oc casionally accompanied by cryin and sniffling, and a photograph o the victim decorating a wedding o anniversary cake. All this wa followed by an impassioned closin argument calling attention to th devastating impact on the family The court held that the inflamma tory effect of this clearly out weighed its probative value. Id

at 542-43. The court stated:

> The principle that conviction and punishment are not contingent upon who was the victim is a difficult concept to explain to the public in the present climate of victim's advocacy. Nevertheless, it is fundamental to our American system of justice and cannot be ignored in individual cases. Id. at 543.

OTHER JURISDICTIONS

In **Walker v. State**, 208 S.E.2d 350 (Ga.App. 1974) the accused was on trial for murder. The victim's mother was seated at counsel table with the prosecutor, over the objection of the defense. Although the defendant was convicted of voluntary manslaughter, the Court reversed his conviction:

> The presence of the bereaved mother at the prosecutor's table during the trial of one accused of murdering her son surely must have had an impact on the jury and we cannot say it was not harmful and prejudicial to the defendant's right to a fair trial. Id.

In **Price v. State**, 254 S.E.2d 512 (Ga.App. 1979) the victim's mother was seated in the courtroom so that she was directly facing the jury. Id. at 513. Several times she interrupted the trial with emotional outbursts. Id. at 513-514. Eventually she had to be excluded from the courtroom. Id. at 514. The court reversed the defendant's voluntary manslaughter conviction on this and another ground.

In **State v. Henry**, 198 So. 910 (La. 1940) the court reversed the murder conviction and death sentence, holding that permitting the widow and young daughter of the murder victim to sit with the special prosecutor was an "extraneous...influence...prejudicial to the substantial rights of the accused." Id. at 921. The error was prejudicial even though the victim's family "made no demonstration before the jury" since the prosecutor discussed their grief in his summation. Id.

In **People v. Ramirez**, 457 N.E.2d 31 (Ill. 1983) the court reversed a death sentence because the deceased's widow testified in the sentencing hearing with little or no purpose other than to inflame the factfinder. Id. at 37-38.

It is improper for the jury to base its decision on guilt or innocence, or on the appropriate punishment, on who the victim is. **Moore v. Zant**, 722 F.2d 640, 651 (11th Cir. 1984), Kravitch, J., concurring.

In **Fuselier v. State**, 468 So.2d 45 (Miss. 1985) the defendant was sentenced to die for murder. After the daughter of the victim, the first witness for the state, testified, she took a seat within the rail of the courtroom near the prosecutor's table, facing the jury. She exhibited emotion and conferred with the prosecutor.

The court reversed since her presence "presented the jury with the image of a prosecution acting on behalf of" the victim. This "erroneous view can all too easily lead to a verdict based on vengeance and sympathy as opposed to reasoned application of rules of law to the facts...." Id. at 53.

In **Patterson v. State**, 513 So.2d 1257 (Fla. 1987) the victim's niece testified at the sentencing hearing before the judge about the effect on the children of the death of their mother. The court held that Booth v. Maryland prohibited this use of this kind of evidence to aggravate the sentence. Id. at 1263.

In **People v. Hope**, 508 N.E.2d 202 (Ill. 1986) the defendant was sentenced to death. In his opening at the guilt phase, through the victim's widow and other witnesses at trial, and during his closing, the prosecutor referred to the victim's family, introduced a family photo, and noted that the decedent's widow was left alone with children of tender years. The court held these matters had no relevance to guilt or innocence and were an improper consideration for the jury which only should consider the circumstances of the crime. Id. at 207-08.

In **State v. Gathers**, 369 S.E.2d 140 (S.C. 1988) the prosecutor in the penalty phase closing argument of the capital case conveyed to the jury the suggestion that the defendant deserved death because the victim was a religious man and registered voter. The extensive focusing on the personal characteristics of the victim violated the 8th amendment. Id. at 143-44.

CONCLUSION

Courts have confronted this difficult area head on, and insured, in spite of understandable criticism, that defendants have their freedom or life taken only through reasoned and focused decisions.

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If you want something really important to be done you must not merely satisfy the reason, you must move the heart also. The appeal to reason is more to the head but the penetration of the heart comes from suffering. It opens the inner understanding... -Gandhi

EXODUS

A JAIL MINISTRY

JAIL REFORM — WHAT ABOUT IT!

Prisons have been a part of our civilization for thousands of years. In the 18th century Quakers introduced the idea of imprisonment as a liberal reform movement against public floggings, society's punishment for persons who broke the law. The idea was to preserve personal dignity and allow the criminal to become penitent (hence "penitentiaries") thus being spiritually and socially rehabilitated.

The concern of the religious community for the incarcerated must be aroused in our society. Record increases in prison and jail populations, high rates of recidivism and rising costs of incarceration reveal an acute situation in the American penal system. Judith Johnson, executive director of the National Coalition for Jail Reform, described the situation well when she said, "With limited resources and unlimited demands, America's 3,493 jails stand on the verge of total collapse." Having revised minimum standards for jails, Kentucky, along with other states, now faces severe strain on state and county budgets. Over and above the economic problem, concern for the humane and religious dimension of persons held or convicted is a serious responsibility of the community.

. . . AND WHY CARE?

What does this mean to a person of Jewish or Christian heritage professing belief in a saving God who forgives and calls all to repentence, reconciliation and wholeness? In the bible the prophets even now urge the people of God to "proclaim liberty to captives, freedom to those in prison," (Is. 61,1) and "to do justly, to love tenderly and to walk humbly with your God." (Mic. 6, 8) Christians are directed to visit those in prison, (Matt. 25, 36) to express Jesus' passion for the downtrodden and lonely. In short, the religious community is called by God to bring compassion and healing to brothers and sisters who are prisoners. Believing that people are mutable, "in process" and precious sons and daughters of the saving God, we must translate these beliefs into ongoing commitment and service.

JAIL MINISTRY HERE?

In northern Kentucky there are three county jails. A few clergy and lay visitors bring a message of hope to inmates held in these institutions. Some local agencies provide human services for inmates and their families. Yet here in northern Kentucky there is no coordinated volunteer ministry of the interreligious community to meet the spiritual and physical needs of these people. There is no organized support for chaplains and jail personnel, no facilitators for local congregations to become aware and involved; neither is there a local religious group to work for a just and effective criminal justice system.

Responding to an acute need for a volunteer jail ministry, the Northern Kentucky Interfaith Commission is initiating EXODUS, a program to help people whose lives have been marred, hurt and nearly broken by various kinds of bondage and incarceration. EXODUS will enable volunteers to be friends who assist inmates, ex-offenders and their families to reclaim the will, recover the soul and revive the spirit in their passage to a life of dignity and deliverance. Volunteers will be screened and trained to participate in various aspects of the jail ministry program.

WHAT CAN YOU DO?

Volunteers may:

- Counsel adult or juvenile inmates
- Visit inmates; listen and care
- Conduct bible study, worship
- Help chaplain to phone, follow-up
- Minister to the ex-offender
- Help families; transportation
- Find work, housing, church
- Share academic and social skills
- Work for criminal justice reform
- Organize a prayer chain
- Educate the community
- Bring others into the program

I was in prison and you visited me.

MATT. 25:36

CONTACT US

INTERFAITH COMMISSION
601 Greenup Street
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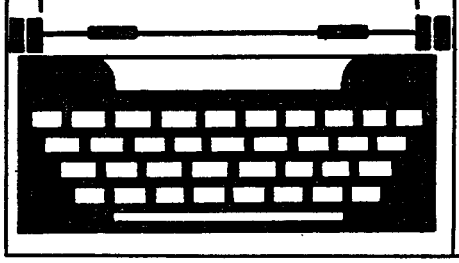

Prison Book Program

92 Green Street, Jamaica Plain, MA 02130

Prison Book Program at the Red Bookstore sends free reading material to prisoners all over the country. We are a small (!) group of people, so very often we are a couple or three months behind in filling your orders. Also, since all the books are donated, we don't always have exactly the book you might want, so please ask for certain kinds of reading, and we'll come as close as we can with what we've got.

Since we are so few and always behind in sending out books, we can NOT also be pen pals (or we'd get even further behind!) So don't expect letters from us. We're doing our best to keep up with books. Hopefully when you get out you'll get involved in starting a books for prisoners or a penpal program. It's needed, no?!

Also, if you like to draw or write poems we would like to have some, so that when we do a "benefit" to raise some money for the postage to send out the books, we can "show" your drawings and poems from prison to people so that they can be educated more about what prisons are all about.

Usually we have some dictionaries and sometimes we have a summary of prisoners' rights taken from a very good book called Prisoners Self-Help Litigation Manual, which costs $15 to prisoners. (Write to Oceana Press, 75 Main Street, Dobbs Ferry, NY 10522.) We cannot afford to buy copies to send out, but we will try to have summaries available. Take care,

The Prison Book folks

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

JUROR MISCONDUCT
Doyle v. Marymount Hospital, Inc.
35 K.L.S. 11 at 12
(September 1, 1988)

In this case of general interest the Court held that a motion for new trial based on juror misconduct should have been granted. The juror in question violated the trial court's admonition when he discussed the case several times and apparently expressed an opinion as to its merits. The Court cited Dalby v. Cook, Ky., 434 S.W.2d 35 (1968) for the principle that "Violations of the admonition by jurors may not be tolerated nor may verdicts be permitted to stand when rendered by juries which have violated the admonition."

PRIVATE PROSECUTOR/
JUDGE SENTENCING
Hubbard v. Commonwealth
35 K.L.S. 12 at 2
(September 9, 1988)

This case rejects Kentucky's acceptance of private prosecutors as an "untenable relic of the past." The Court specifically held that the participation of a private prosecutor in a criminal trial offends 14th Amendment due process. Although the federal courts have not so held, the Court found persuasive Justice Blackmun's concurring opinion in Young v. U.S. ex rel. Vuitton et Fils S.A., ___ U.S. ___, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). In Young the U.S. Supreme Court exercising its supervisory power, condemned the use of a private prosecutor. Justice Blackmun would have reached the same result under the due process clause. The Court of Appeals' decision challenges a longstanding Kentucky practice.

The Court of Appeals additionally held that the trial court violated due process when it sentenced Hubbard to a sentence greater than the minimum when the jury could not agree on a sentence. The Court relied on Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980).

PRO SE PLEADINGS - SANCTIONS
Stidham v. Commonwealth
35 K.L.S. 12 at 4
(September 9, 1988)

Following his entry of a guilty plea, Stidham moved the trial court, pro se, for a bill of particulars. The trial court imposed a sanction of $65.50 for filing this plainly frivolous motion. Stidham appealed from the imposition of sanctions.

The Court of Appeals held that the imposition of sanctions under CR 11 based solely on the frivolity of a pro se pleading was inappropriate. The Court noted that "pro se pleadings are not required to meet the standard of those applied to legal counsel." However, "sanctions would have been appropriate had the appellant been a lawyer, or had he blatantly misrepresented material facts of record...."

SEARCH AND SEIZURE -
PROBABLE CAUSE FOR ARREST
Paul v. Commonwealth
35 K.L.S. 12 at 13
(September 30, 1988)

Paul was one of 3 passengers in a car that was stopped for speeding. Upon smelling marijuana and observing marijuana at the drivers feet and in the dashboard ashtray, the stopping officer placed all the occupants of the car under arrest and transported them to the Franklin County Jail. Under threat of a strip search, Paul than handed over a small amount of cocaine.

The Court of Appeals held that the cocaine should have been suppressed since it was the fruit of Paul's illegal arrest. "The probable cause requirement is not satisfied by one's mere propinquity to others independently suspected of criminal activity." Citing Ybarra v. Illinois, 444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 (1979).

PROCEDURE TO CONTEST DENIAL
OF CREDIT FOR TIME SERVED
Maynard v. Commonwealth
35 K.L.S. 13 at 5
(October 14, 1988)

This opinion replaces a published opinion issued July 19, 1988, but subsequently withdrawn by the Court

upon granting Maynard's petition for rehearing. See Maynard v. Commonwealth, 35 K.L.S. 9 at 17 (July 29, 1988). As in its previous opinion, the Court held that the proper method to contest the denial of jail credit is direct appeal, not the filing of a CR 60.02 motion and appeal from the denial of that motion. However, unlike its previous opinion the Court chose, "in the interest of judicial economy," to remand with directions to give Maynard proper credit. Judge Wilhoit dissented.

USE OF SHACKLES
Branham v. Commonwealth
35 K.L.S. 13 at 5
(October 14, 1988)

Branham was charged with first degree escape. Based on an anonymous tip that an escape attempt might be made during his trial, the trial court required Branham to wear leg irons and handcuffs throughout his trial. The Court of Appeals held that the trial court abused its discretion. The Court noted that the informant's tip was uncorroborated and the basis for his belief was not shown. Significantly, the defendant's previous escape attempts had been from jail, not from a courtroom. The trial court did not consider less prejudicial alternatives to shackling such as the use of extra bailiffs. Finally, the use of shackles was especially prejudicial since the defendant was on trial for escape.

DUI - "VEHICLE"
Heath v. Commonwealth
35 K.L.S. 14 at
(October 28, 1988)

The issue in this case was whether a farm tractor is a motor vehicle for purposes of KRS 189A.010, which denounces driving under the influence. KRS 189.010(18) of the statute defines "vehicle" as "all agencies for the transportation of persons or property over or upon the public highways of this commonwealth and all vehicles passing over or upon said highways, excepting...farm tractors...." Heath argued that this exemption applied to the offense of drunk driving. The Court disagreed, holding that the exemption applied only to vehicle equipment requirements. Health's operation of a tractor was not exempt from the drunk driving statute. Judge Miller dissented.

MOTOR VEHICLE INSURANCE
EQUAL PROTECTION
Commonwealth v. Fulkerson
35 K.L.S. 14 at
(October 28, 1988)

Fulkerson was convicted of driving without the liability insurance required by KRS 304.39-110. Fulkerson, a first-time registrant of his vehicle, was not required by law to show proof of insurance at the time of registration. Had he been a reregistrant, proof of insurance would have been required. Fulkerson contended that this statutory scheme provided reregistrants, but not first-time registrants, with notice of the insurance requirement in violation of equal protection. However, in the Court's view, since the "notice" thus provided was no more than an indirect, unintended consequence of the statute's proof requirement, it could not be the basis for an equal protection claim.

Kentucky Supreme Court

DOUBLE JEOPARDY
Alexander v. Commonwealth
Hyde v. Commonwealth
35 K.L.S. 11 at 17
(September 8, 1988)

Alexander and Hyde were convicted of both wanton murder and first degree wanton endangerment based on a single course of conduct. The 2 men fired a shotgun through a night club window, killing an employee.

On appeal the defendants argued that their convictions of both offenses constituted double jeopardy since the wanton endangerment charge was a lesser included offense of the murder. The Court agreed that the men could not have been convicted of both offenses had there been only a single victim. However, there were a dozen people in the area into which the shotgun was fired. One was killed and the others were wantonly endangered. The defendant's "single course of conduct thus gave rise to more than one offense." Justice Leibson dissented.

TRAFFICKING AND POSSESSION - SUFFICIENCY OF EVIDENCE/ SENTENCING
Dawson v. Commonwealth
35 K.L.S. 11 at 24
(September 8, 1988)

Dawson contended that there was insufficient proof that he trafficked in Talwin. Eighteen Talwin tablets were found concealed behind aluminum foil taped to the ceiling of Dawson's apartment. A variety of other drugs were found in unconcealed locations about the apartment. The Court reasoned that "The fact that some of the controlled substances were in night stands and other easily discernible places but one substance was secreted and hidden in a cache in the ceiling is so incongruous as to justify a jury to believe that that particular substance was possessed, not for personal use, but for the purpose of sale."

The Court held that the trial court erred in sentencing Dawson to consecutive terms totalling 30 years when the highest class of crime of

which he was convicted was a Class C felony. The 30 year aggregate term violated the KRS 532.110(1)(c) limitation of an aggregate term to the longest term which would be authorized pursuant to PFO enhancement of the highest class of crime for which a defendant is convicted - in Dawson's case a 20 year sentence. Chief Justice Stephens dissented.

DOUBLE JEOPARDY - LESSER INCLUDED OFFENSES
Jones v. Commonwealth
35 K.L.S. 11 at 29
(September 8, 1988)

Jones asserted a double jeopardy violation based on his convictions of both robbery and possession of stolen property taken in the robbery. The Court agreed and reversed Jones' conviction of possession of stolen property. The Court reasoned that since Jones' acts formed a single course of conduct, motivated by a single impulse, the commonwealth could not carve the single course of conduct into multiple offenses. Moreover, "[i]n these circumstances, the fact that theoretically there are elements in each offense different from the other offense is not sufficient to justify conviction for both." The Court cited its decision in Jordan v. Commonwealth, Ky., 703 S.W.2d 870 (1986) reversing a conviction of theft committed during a robbery on the same grounds. Justice Wintersheimer dissented.

SUFFICIENCY OF EVIDENCE OF MANSLAUGHTER/REASONABLE DOUBT/ ENFORCEMENT OF PLEA AGREEMENT/ NARRATIVE STATEMENT
Simpson v. Commonwealth
35 K.L.S. 11 at 29
(September 8, 1988)

In this case, the Court rejected Simpson's claim that the evidence was insufficient to support his conviction of first degree manslaughter. After an argument between Simpson and his stepdaughter's boyfriend, whom Simpson disliked, Simpson ordered the boyfriend to leave Simpson's home. The boyfriend did so, but Simpson nevertheless obtained his pistol and fired 2 shots from the doorway after the departing boyfriend. As the second shot was fired, the open screen door swung shut striking Simpson's gun hand. The second shot struck and killed the boyfriend. Simpson told police that the shots were warning shots and not meant to injure the victim. However, based on evidence that Simpson disliked and argued with the victim, in conjunction with Simpson's act of firing after the victim, the Court held that an instruction on first degree manslaughter was justified.

The Court held that Simpson was not entitled to enforcement of a plea bargain. Pursuant to the commonwealth's recommendation, the trial court accepted Simpson's plea of guilty to second degree manslaughter and entered an order stating that the court "finds the defendant guilty in accordance with the plea(s) entered herein and fixes punishment as follows: Five (5) years in the penitentiary." However, the trial court delayed final sentencing until it had obtained a presentence report. Following consideration of that report and a victim impact statement, the trial court announced its intention to sentence Simpson to 10 years. The trial court subsequently granted Simpson's motion to withdraw his guilty plea. The Kentucky Supreme Court held that the trial court acted within its discretion in deciding to impose the 10 year sentence. It was not bound by the commonwealth's recommendation and was not precluded from changing its sentence prior to final sentencing. In fact, the trial court was without authority to impose a final sentence prior to consideration of a presentence report.

The Court also held that the prosecutor did not "define" reasonable doubt when he asked prospective jurors whether they would hold him to a higher standard than proof beyond a reasonable doubt. Finally, the Court held that use of a narrative statement in lieu of a missing portion of the trial videotape was proper even though certain trial objections were not reflected in the narrative statement where the objections were not directed at prejudicial errors.

POSSESSION OF STOLEN MAIL
Commonwealth v. Griffin
35 K.L.S. 13 at 19
(October 27, 1988)

KRS 514.150 provides that a person is guilty of possessing stolen mail if he possesses it "knowingly" or while "having reason to believe that it has been the subject of theft." The Court held that an instruction that Griffin could be convicted under the statute if he "knew or had reason to believe" that mail was stolen was proper.

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"As long as there is one upright man, as long as there is one compassionate woman, the contagion may spread and the scene is not desolate," E. B. White wrote to one of his many correspondents in 1973.

Plain View

Search and Seizure Law and Comment

Ernie Lewis

In the February, 1988 issue of The Advocate, I reviewed Gross v. Commonwealth, in which the Court of Appeals announced a bright-line rule disallowing the execution of search warrants at night. This much publicized case featured a Fayette County SWAT team crashing through a closed door with a sledgehammer while occupants inside slept and watched T.V. in the middle of the night. Gross, who had been asleep, was prosecuted for assault after he responded to the assault on his house by shooting through the front door, injuring one of the officers. The Court of Appeals, understandably, used these egregious facts to establish a bright-line rule against search warrant executions at night. At that time, I predicted that the Kentucky Supreme Court would have something to say on this topic.

The other shoe has dropped. On Oct. 6, 1988, the Court unanimously reversed the Court of Appeals. **Commonwealth v. Gross**, ___ S.W.2d ___ (Ky. Oct. 6, 1988). In an opinion by Justice Gant, the Court emphasized the dangerous situation the police found themselves in. "A search of the house after the bullet was fired revealed two 9mm automatic pistols, a shotgun and a shell casing which matched the bullet lodged in the bulletproof vest." (Master Slip Opinion, p. 2). This emphasis led the Court to state that the issue before them as "not whether the method of serving the search warrant was in violation of the law but whether, once the police officers had been shot by someone within the house, probable cause existed that a felony had thereby been committed and that there were exigent circumstances justifying their immediate entry to effect an arrest for that felony." Id. The Court, of course, found the requisite exigencies existed, and no 4th Amendment violation.

The Court further addressed the bright-line rule espoused by the Court of Appeals. In short, the Court tersely rejected it. The Court of Appeals had mandated "that under all circumstances the police are to go to the premises in the daytime, knock on the door and announce who they are and the purpose of their presence. This is not the law in Kentucky, and never should be ... [w]hen exigent circumstances exist, a search warrant may be executed at any time." Id. at p.3.

The decision is both predictable and disappointing. It is predictable in the sense that few truly expected the Court to protect the citizens of this Commonwealth from night time searches in a manner not absolutely required by the U.S. Supreme Court. Our Court simply has not of late enforced Section 10 beyond that required by the 4th Amendment. cf. Gooding v. United States, 616 U.S. 430, 94 S.Ct. 1780, 40 L.Ed.2d 250 (1974). It is disappointing in the sense that the Court brushed aside the citizens' privacy rights in such a casual fashion, and affirmed the right of the police to break down our doors in the middle of the night. It is even more disappointing that the reasoning supplied ("this is not the law in Kentucky, and never should be?") neither rebutted the substantial arguments on the other side, nor displayed the slightest sympathy to the citizen's very real complaint here. After all, Gross awoke, likely terrified, to a sledgehammer through his door. He obviously did not hear the police identifying themselves prior to his waking up. He reacted, tragically, by shooting through the closed door at his unknown assailants. Most of the risk of this could have been avoided had the warrant been executed during the day without utilizing swat-team tactics. The Court of Appeals recognized this, and took steps in its opinion to keep this from occurring again. Unfortunately, the Supreme Court has come down strongly on behalf of the law enforcement community, and affirmed the night time search as a tool in police arsenal.

The Court of Appeals wrote 1 published opinion and 2 unpublished opinions during the last 2 months on search and seizure. The published opinion provides important ammunition for attorneys representing automobile passengers accused of possessory offenses.

Cheryl Paul was riding in the back seat of a car in Franklin County on

May 3, 1986 when the car was pulled over for speeding. The officer saw marijuana in the car; asked the 4 occupants about it and when no one claimed ownership, he arrested them all. A threat of a strip search at the jail produced a small amount of marijuana and cocaine. When her suppression motion was denied, she entered a conditional guilty plea, whereupon she received a probated three year sentence.

The Court of Appeals reversed the conviction, holding that Paul was arrested illegally. **Paul v. Commonwealth**, __S.W.2d (Ky. App. 9/30/88). The Court noted that under Leavell v. Commonwealth, 737 S.W. 2d 695 (Ky. 1987), "the person who owns or exercises dominion or control over a motor vehicle is deemed to be the possessor of any contraband discovered inside it." Ms. Paul, as a back seat passenger, merely present in a car with marijuana present, could not be assumed to be in possession of the marijuana. Accordingly, the drugs seized from her at the jail had to be suppressed as a fruit of the illegal arrest. The police cannot, in the future, arrest a passenger for merely being in a car where contraband is present.

This case also demonstrates the utility of the conditional plea under RCr 8.09. Such pleas allow for the avoidance of trials where the only issue in dispute concerns evidence allegedly illegally seized. Further, conditional pleas result in a healthy development of 4th Amendment and Section 10 jurisprudence, demonstrating a commitment to the rule of law. (Significantly, all 3 of the Court of Appeals cases reviewed here resulted from conditional pleas). Unfortunately, conditional pleas are receiving the cold shoulder from many prosecutors and some judges. Hopefully, this progressive development will spread and be utilized even in the state's most conservative districts.

In another conditional plea case, and a startling one at that, one Court of Appeals panel clearly adopts the good faith exception to the exclusionary rule, citing United States v. Leon, 468 U.S. 897 (1982). **Patterson v. Commonwealth**, (9/9/88) (Not to be published). It is startling partly because it is not to be published. Such major shifts in the law should not be rendered through the vehicle of the unpublished opinion.

It is further startling because the case involves the preparation of the affidavit and search warrant by the issuing magistrate, Ballard District Judge Jimmy Robinson. The Court acknowledges that the affidavit did not contain sufficient information to establish probable cause. Leon is based upon a belief that a police officer acting in good faith reliance upon a search issued by a judge will not be deterred by excluding evidence where a reviewing court later finds that no probable cause exists. Leon further is based upon a faith statement that the exclusionary rule does not deter judges. Be that as it may, this case is altogether different, featuring a judge who himself writes out the affidavit. This seems to be an example of the kind of thing condemned in Lo-Ji Sales v. New York, 442 U.S. 319 (1979), where a judge abandoned his neutral judicial role and became virtually a prosecutor. It is alarming that the Court of Appeals would use these circumstances in which to adopt the Leon good faith exception.

The 3rd case from the Court of Appeals also came up as a conditional plea. In **Suddeth v. Commonwealth** (9/30/88) (not to be published), the Court held that there were sufficient facts on the face of the affidavit to establish probable cause to issue a warrant. The Court also rejected the appellant's Franks v. Delaware argument. Both arguments were fact-bound, and not remarkable. What was significant was their declining to rely upon the good faith exception to the exclusionary rule. Judge Dyche in a concurring opinion stated that he would have adopted Leon's good faith exception. He did so, however, without stating any reason for doing so, and without stating why Kentucky's Section 10 exclusionary rule, established long before Leon and Mapp v. Ohio, should now be abandoned.

Thus, we have 1 panel of the Court of Appeals adopting the exception, and another panel declining to do so. What is becoming clearer is that the question will be resolved in the not too distant future, either in the Patterson or Suddeth cases, or in some as of yet unresolved case.

The 6th Circuit has also been quite busy over the past 2 months. In **Walker and Turner v. Schaeffer**, 17 SCR 16 (Aug. 12, 1988), the Court examined the effect of a guilty plea on a later attempt to sue under 42 USC § 1983 for a violation of constitutional rights. A racial incident occurred at a football game, 2 black men sued the white police officers who arrested them alleging the arrests were accomplished without probable cause, despite having entered guilty pleas in state court to disorderly conduct and reckless driving. The Court held that "the pleas in state court made by defendants and the finding of guilt and imposition of fines by that court estop plaintiffs from now asserting in federal court that the defendant police

officers acted without probable cause." Id. at 16.

The Court revisited Tennessee v. Garner, 471 U.S. 1 (1985) under tragic circumstances in Robinette v. Barnes, 17 SCR 17 (8/22/88). Garner had held that deadly physical force used to apprehend a suspect could only be done within the 4th Amendment where there was probable cause to believe the suspect was dangerous to himself or others.

In this Tennessee case, the police released a police dog in an automobile dealership to apprehend a suspect. The dog found the accused, bit him in the neck, and killed him. Remarkably, the Court held that the district court had properly granted summary judgment because no deadly force had been used within the meaning of Garner, relying upon the intent of the police officers and fact that no other persons have been killed under similar circumstances.

How do you prove that an informant lied to the police officer who used the information to secure a search warrant or wiretape if you don't know who the informant is? How do you make a "substantial preliminary showing" in order to get a Franks v. Delaware, 438 U.S. 154 (1979) hearing where the police are trying to protect the identity of their informants? The 6th Circuit addressed these issues in **United States v. Giacalone**, 17 SCR 11 (Aug. 5, 1988). There, the defendants asserted that either the informants or agent Rossi were lying, but that they could not prove which without having a Franks hearing. The district court questioned Rossi in camera; the district court, however, denied the defendant's request to also examine the informants in camera. The 6th Circuit approved this procedure, holding that the district court "did not abuse its discretion by declining to examine the informants in camera in addition to the government's affiant. Under Franks, suppression is required only when the affiant deliberately lied or testified in reckless disregard of the truth. The procedure followed by the district court in this case struck a fair balance between defendant's interests in excluding evidence secured by means of a false affidavit and the government's interest in preserving the confidentiality of its informants."

The 4th case under review will be familiar to every experienced defense attorney. **United States v. Pino**, 855 F.2d 357 (6th Cir. 1988). Here, Pino was stopped by an officer for a traffic violation. The officer required him to move from the side of the interstate to an underpass. There, the officer talked to Pino, and determined that he met the drug courier profile. Under a Tennessee statute giving the officer discretion to take into custody a traffic offender the officer suspects will fail to show up in court, Pino was arrested. The officer then searched a pillow in the rear section of Pino's station wagon, where 12 kilograms of cocaine were recovered. With domino-like reasoning, each subsequent search and seizure was approved. The stopping was approved as a not clearly erroneous finding. The move to the underpass was viewed as permissible under Terry. The arrest was approved as authorized under state law. And the final search of the pillow was approved as a search incident to a lawful arrest under New York v. Belton, 453 U.S. 454 (1981). This case demonstrates how the 4th Amendment has become virtually irrelevant in the presence of an automobile stop.

At the time of this writing, the presidential election remains 25 days away. When this issue of The Advocate is received, we will know who will be deciding the replacements for some of our more liberal justices on the United States Supreme Court. That makes this Court's cert grants all the more significant. Watch for these cases over the next few months:

Florida v. Riley. Here, the Court reviews the Florida Supreme Court's ruling that a helicopter's hovering 400 feet over residential curtilage violates the Fourth Amendment. California v. Ciraolo, 476 U.S. 207 (1986) will be extended or restricted;

Brower v. County of Inyo. The Court has an opportunity to address Tennessee v. Garner in the context of a tractor-trailer roadblock which resulted in the death of the fleeing suspect;

United States v. Sokolow. The use of the drug courier profile to establish reasonable suspicion for detention will be explored in this case from the 11th Circuit. The Court below held that the drug courier profile standing alone, was not sufficient to justify a stop;

Burnely v. Railway Labor Executives' Association. Here, the Court will have the opportunity, in tandem with National Treasury Employees Union v. Von Raab, to pass on the constitutionality of mandatory blood and urine tests for certain governmental employees.

The Short View

United States v. Gorski, 43 Cr.L. 2364 (2nd Cir. 7/26/88). A bag seized during an arrest of a defendant could not be opened and field tested for the presence of cocaine. The Court remanded to the district

court for consideration of the question of whether the FBI office where the defendant was taken has a routine inventory search procedure. If such a procedure exists, the Court will allow the admissibility of the contents of the bag under the inventory search exception;

United States v. Hill, 855 F.2d 664 (6th Cir. 1988). The Court held that a houseboat traveling on a lake is more boat than house and therefore may be searched without a warrant, citing California v. Carney, 471 U.S. 38 6 (1985) in support;

State v. Boyce, Wash. Ct. App., 43 Cr.L. 2420 (8/22/88). The search incident to a lawful arrest exception applicable to passenger compartments of cars does not apply once the arrestee has been removed from the scene, according to the Washington Supreme Court, as a matter of state law. Thus, in Washington, the Court will truly enforce New York v. Belton's rationale, that of allowing such warrantless searches for the protection of the arresting officer. This refreshing analysis should be used by counsel in similar situations under Section 10 of the Kentucky Constitution;

United States v. Koenig, 43 Cr.L. 2440 (7th Cir. 8/31/88). In a case that should be of interest to a certain assistant basketball coach, the 7th Circuit held that Federal Express' policy of searching packages for drugs and later turning any drugs found over to the government, did not constitute a search and thus was not a violation of the 4th Amendment;

People v. Perlos, 428 N.W.2d 685 (Mich. App. 1988). A state law which allowed prosecutors to obtain blood tests of hospitalized drivers involved in an accident without a warrant has been declared unconstitutional by the Michigan Court of Appeals. The Court held that the statute allowed for a warrantless search where neither exigencies nor consent could justify the search;

State v. Bravo, Ariz., 44 Cr.L. 2022 (9/20/88). Under certain circumstances the exclusionary rule will require the exclusion of a witness' testimony where the witness has been discovered as a result of illegally seized evidence. Here, the police violated Bravo's Miranda rights and discovered the identity of a witness thereafter. Under the factors of United States v. Ceccolini, 435 U.S. 268 (1978), the Court held that the witness' testimony had to be suppressed;

State v. Isom, Oregon, 44 Cr.L. 2023 (9/21/88). As a matter of state constitutional law, the prosecution may not impeach a defendant with a statement given in violation of his Miranda rights. The Court held that the Oregon v. Hass, 420 U.S. 714 (1975) rule allowing for impeachment had the effect of encouraging such illegal interrogation, and that a stricter rule was required under the state constitution;

Hawkins v. State, Tex. Ct.App., 44 Cr.L. 2024 (9/21/88). Hawkins was approached by the Fort Worth police as he stood in front of a tavern. When he tried to walk away another officer confronted him. As the police closed in, Hawkins threw a paper bag containing cocaine and heroin. The Court held this police action to be illegal investigative detention, and thus ordered suppression of the bags and drugs. The recent case of Michigan v. Chesternut was distinguished by the fact that Hawkins was clearly seized, thereby involving the 4th Amendment;

Sitz v. Michigan Department of Police, 429 N.W.2d 180 (Mich. App. 1988). The Michigan Court of Appeals has upheld a trial court's decision to permanently enjoin the conducting of sobriety checkpoints by the Michigan State Police. The Court stressed that such checkpoints are not an effective means of catching drunk drivers, that any deterrence value is shortlived, and that the intrusion into the driver's privacy is unreasonable.

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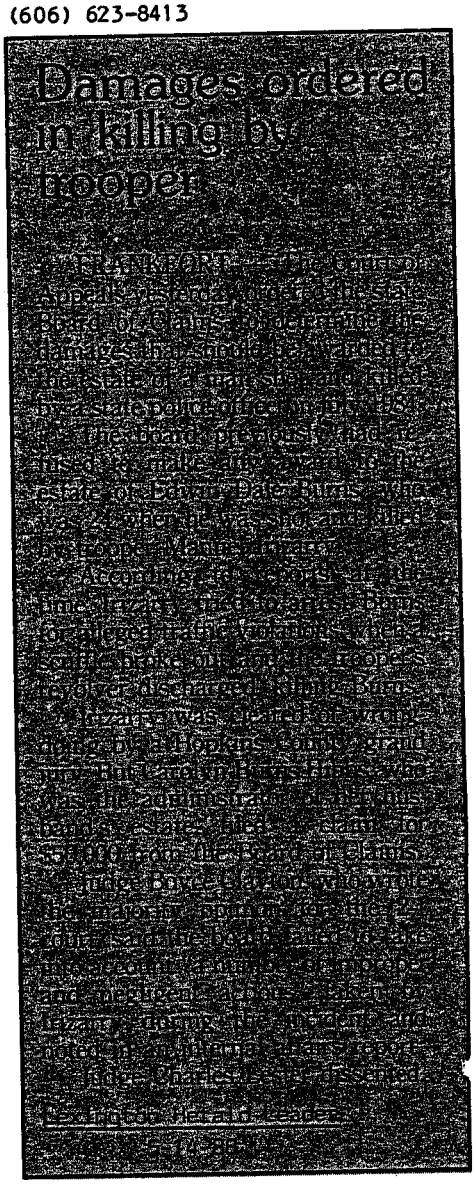
Damages ordered in killing by trooper

Civil Legal Services in Kentucky

Dennis Bricking

Legal Services programs are the primary vehicle for the provision of civil legal representation for low-income clients. The passage of the Legal Services Corporation (LSC) Act in 1974 (42 USC 2996) provided a structure for the expansion of a patchwork of local efforts to provide civil legal services to the poor. Seven LSC funded programs, with 23 local offices, now constitute the basic framework for delivery of civil legal services to the poor in Kentucky. A list of our programs and the addresses and telephone numbers of their local offices is at the end of this article.

GOALS

The goals of the Legal Services Corporation Act are to provide equal access to justice and high quality legal representation to those who are unable to afford private civil representation. Eligibility for legal services through LSC programs is determined by income and resource guidelines adopted by each program, in accordance with overall income guidelines adopted by the federal LSC.

LOCAL CONTROL

A primary characteristic of each LSC program is local control. While programs operate under guidelines and restrictions contained in the LSC Act and LSC regulations, each program is a separate 501(c)(3) corporation, with its own board of directors as its governing unit. Private attorneys from each program's service area constitute at least 60% of each program's board, and eligible clients constitute another 30% of these boards, thus assuring that programs are responsible to both the legal and client communities. To the extent permitted by federal law, the local program boards determine the policies and procedures to be followed by each program. Thus, while each program has basically a similar delivery model, relying on full-time staff attorneys and paralegals for delivery of legal services, local control of boards assures sensitivity to the particular needs of each local service area.

REDUCTION OF FUNDING

The LSC Act goals of equal access to justice and high quality representation for all low-income citizens of Ky. have been severely restricted since 1981. For instance, in 1982, Pres. Reagan recommended the elimination of Legal Services altogether and Congress cut our national funding base by 25%. In real 1987 dollars, federal funding for legal services programs in Kentucky has declined 50% since 1978.

This decline in federal funding is clearly reflected in the dramatic decrease in the number of Legal Services staff attorneys. In 1980, when the minimum access goal of 2

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lawyers for every 10,000 poor people was nearly achieved, there were .6 Legal Services attorneys in Kentucky (including managing attorneys and litigation directors). Currently, there are 70 attorneys in Legal Services programs. Even maintaining this level with funding cutbacks has required very low and uncompetitive salary levels for attorneys, both for entry level and experienced positions.

Programs have responded to declining resources in several ways. One is through increased productivity and efficiency in resource management. The 7 programs provide quality legal representation to approximately 20,000 low-income clients per year. While this represents only a small percentage of the legal problems faced by low-income Kentuckians, it nevertheless also represents a very large workload for understaffed programs.

SERVICES PROVIDED

Our programs provide a full range of civil legal services to clients, including advice and referral, individual representation before courts and administrative agencies, impact litigation, legislative and administrative advocacy where appropriate, community education, and economic development. While program delivery mechanisms vary by service area, the common commitment is to high quality representation.

Our programs have had to prioritize their case acceptance policies to maximize the efficiency of use of scarce resources. Prioritization is conducted by each program for its service area, so the priorities of each program differ from other service areas.

Certain broad substantive areas are commonly prioritized by each program:

At the Bar | David Margolick

Lawyers and compulsory public service: Resisting the inevitable

One lawyer, describing the plan, conjured up Orwellian images of Big Brother. Another lawyer said it smacked of the Soviet Union. Many said it violated numerous clauses of the Constitution, including the ban on slavery.

The speakers were not professional civil libertarians but rank-and-file lawyers from places like Bismarck, Fargo, and Mandan, N.D. Their target was not some draconian measure to curb crime, but a far more modest proposal requiring them to devote 20 hours a year to the noncriminal legal problems of the needy.

Traditionally, the mere mention of making public service work a condition for licensing has generated hostility of Pavlovian predictability. Eight years ago the American Bar Association's House of Delegates crushed such a proposal, as have many other organizations. The North Dakota plan was proposed by a panel created by the state's Supreme Court. It is now stalled and may just be the latest victim.

Still, there are numerous signs that such compulsory programs are inevitable if not exactly imminent. Courts and bar associations in Texas, Florida, and Arkansas have already put mandatory public service requirements into effect. The issue has been debated in Oregon and Washington. It is on the table in Maryland, and it will soon be addressed in New York by a panel created by Chief Judge Sol Wachtler and led by Victor Marrero of Brown & Wood and including the most impressive convert to the cause, former Secretary of State Cyrus R. Vance.

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Throughout the country, the talk is no longer so much whether and if lawyers will be required to contribute their services as it is how much, when, and where.

"Mandatory pro bono is coming for two reasons," said Representative Benjamin L. Cardin of Baltimore, condensing the Latin for for the public good. He has spearheaded the effort in Maryland. "There's a rising social consciousness among attorneys, as well as a more pragmatic concern that if they don't do something themselves, something more severe will be imposed on them."

The different climate reflects a desire to compensate for the Reagan Administration's cutback in the Federal Legal Services program, the largest provider of assistance to poor people in civil cases. And it stems from the obvious inadequacy of current voluntary efforts by bar groups to meet the huge call for help.

Bismarck, N.D., is a place better known as the home of the Raccoon National Cemetery on "The Honeymooners" than a hotbed of legal innovation. Indeed, there are only 1,000 practicing lawyers in the entire state. But North Dakota's proposed pro bono program is clearly the most far-reaching and imaginative anywhere. Until recently, its backers thought, it was also the most palatable.

All licensed lawyers — private practitioners, corporate attorneys, government lawyers including Attorney General Nicholas Spaeth and, even, arguably, judges — would be required to devote 20 hours each year to the legal needs of the poor. A lawyer could buy his way out (for $50 an hour, with the money going to other work for the needy), pass along his obligation to colleagues, or educate his way out, by taking or teaching courses in poverty law.

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The program, backed by Chief Justice Ralph J. Erickstad of the North Dakota Supreme Court, rests not on the idea, unpopular among lawyers, that lawyers have a perpetual ethical obligation to serve the poor, but that the bar should take the lead in serving society's unmet needs. It would be dropped after six years. By that time state-financed legal aid programs would presumably be in place. Sponsors of the proposal insist that it is not only public-spirited but also self-interested, helping to clean up the bar's image of avariciousness and perhaps even to find new business.

The proposal generated the predictable prairie storm of criticism. In their antipathy to mandatory pro bono, lawyers have one clear advantage over other equally resistant cartels: they know all the ground rules. In North Dakota as elsewhere, they say it violates the Fifth Amendment, which bars taking property without just compensation.

They say further that it abridges equal protection guarantees: only when doctors must perform free appendectomies, when restaurateurs must donate meals, when landlords furnish free apartments and when gas stations pump gratis gas, they say, can lawyers be so coerced. And they say it violates the 13th Amendment's ban on "involuntary servitude."

The North Dakota state bar recently voted not to act on the measure before June 1989. But the association rejected a move to kill the plan outright. In the meantime, the proposal has attracted national attention. Robert D. Raven of San Francisco called it "impressive and provocative," and so in a way, it is. Its proponent, he is the incoming president of a group that is not known for its fondness for change, the American Bar Association.

PUBLIC BENEFITS - includes cases involving Medicare, Medicaid, AFDC, food stamps, and general assistance;

CONSUMER LAW - includes bankruptcy cases and cases involving public utilities;

FAMILY LAW - includes cases involving spouse abuse/domestic violence, juvenile court dependency cases, and divorce and custody cases; and

HOUSING LAW - includes cases involving public, subsidized, and Section 8 housing, as well as landlord and tenant responsibilities and remedies in the private housing market.

Other common priority areas are **UNEMPLOYMENT INSURANCE, HEALTH CARE ACCESS,** and **UTILITY TERMINATIONS.** Our programs typically do not handle fee-generating cases, automobile accident cases, paternity actions, and matters in small claims court. More detailed information about program case acceptance policies can be discovered by calling the program office closest to you. Each program does maintain, and periodically updates, a priority list and case handling procedures to guide our intake and acceptance of cases. We endeavor to develop systems that are as fair as we insist that the welfare department and public housing authorities be to our clients, while operating in a situation where we can handle at best only 1 out of every 10 clients who need our help.

PRIVATE BAR INVOLVEMENT

Each program also operates a significant private bar involvement component to supplement our own intake capacity. In those service areas where the concentration of private attorneys is sufficient to make such efforts practical, programs have been actively involved in setting up and maintaining pro bono referral panels, to refer eligible clients to private attorneys. The programs have been active in expanding the pro bono approach wherever possible. Currently, 751 private attorneys serve on such pro bono panels. Other programs maintain contract and judicare models for the referral of eligible clients to private attorneys, although the clear trend and preference is towards the pro bono model.

TRAINING AND SUPPORT

The programs have supported a highly successful training program on poverty law issues to increase staff productivity and efficiency. Trainings are prepared and coordinated by the programs' state support office, the Office of Kentucky Legal Services Programs (OKLSP). OKLSP, an approved KBA CLE sponsoring agency, conducts 10-15 training events per year, and in 1987, provided training on substantive issues and practice skills to 290 legal services participants and 60 private attorneys. In addition, OKLSP maintains an extensive brief bank of legal services cases and coordinates task forces in substantive areas such as family law, public benefits, medical care issues and housing, to serve as an information sharing device to improve the quality of legal representation provided to clients. OKLSP also conducts legislative and administrative advocacy for clients of all Kentucky programs through its Lexington office.

CONCLUSION

Our Kentucky Legal Services programs remain committed to the goals of high quality legal representation and equal access to the justice system for low-income Kentuckians. Despite inadequate resources to deal with the high demand for our services, we continue to strive to make a difference in the lives of the clients within our service areas. We also look to other public interest advocates across Kentucky to help us become more effective representatives for our clients by making timely referrals and by keeping us in touch with systemic problems which adversely impact low-income senior citizens, families, and children within the Commonwealth of Kentucky.

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Defendant: Judge, I want you to appoint me another lawyer.
The Court: And why is that?
Defendant: Because the P.D. isn't interested in my case.
The Court (to the Public Defender): Do you have any comments on the defendant's motion?
Public Defender: I'm sorry, your honor, I wasn't listening.

—from *Disorderly Conduct* by R.R. Jones, C.M. Sevilla, G.F. Uelman, $12.95.

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Truth-In-Sentencing

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"STRIPPING THE VENEER FROM RENEER"
(Part 2)

EVIDENTIARY ISSUES

A number of challenges can be made to the quality and type of proof the Commonwealth is allowed to introduce under KRS 532.055. Practitioners should keep in mind that analogies can be made to both PFO proceedings and the penalty phase of a death penalty case in support of their arguments. In essence, KRS 532.055 is geared toward enhancement. Why else would it focus on allowing the prosecutor more latitude in what is relevant to sentencing? At the least, it is akin to the individualized consideration of a capital penalty. Obviously, the advocate's goal is to restrict as much as possible the evidence which the prosecutor can introduce and expand as much as possible the mitigating evidence available to the defendant to convince the jury to lessen his sentence.

PRIOR CONVICTIONS

First, KRS 532.055(2)(a)(1) allows the prosecutor to introduce both felony and misdemeanor prior convictions of the defendant. An objection can be made that it violates due process to introduce misdemeanor convictions. Misdemeanor convictions have never been allowed as impeachment or to enhance under PFO law. Commonwealth v. Richardson, Ky., 674 S.W.2d 515 (1984), KRS 532.080. Dissenting in Reneer, Justice Leibson pointed out:

> Many misdemeanors are not only mala prohibita and not malum in se. Occasionally misdemeanors are pled to as a matter of convenience rather than an admission of guilt. Often safeguards applicable to a felony conviction are not utilized. In short, admitting evidence of this type, as with parole eligibility, has a great potential for producing 'half truths.'

Prior juvenile convictions should also be challenged. KRS 532.080 (2)(b); (3)(b), prohibits the use of prior convictions occurring while the defendant was under 18 for PFO purposes. The Commentary to that statute indicates that the rationale for this is the inherent lack of maturity of juveniles and that a juvenile offender even if convicted as an adult should be allowed to place his juvenile conviction behind him. For TIS purposes, "the truth" is that a child's activities and mistakes should bear no relation on how he or she is treated as an adult.

Any prior conviction that occurred after the date of the commission of the present offense should also be challenged. See Dillingham v. Commonwealth, Ky. App., 684 S.W.2d 307 (1985). The rationale is that prior convictions are relevant to how stiff a sentence should be for a present offense because they show the inability of the defendant to benefit from punishment for prior wrongdoing. However, there is no way for the defendant to have been punished for wrongdoing if he was not actually convicted of that wrongdoing before he committed the present offense. Challenges should also be made to convictions that are not yet final because they are pending appeal. Cornett v. Judicial Retirement Removal Commission, Ky., 625 S.W.2d 564 (1982); Ross v. Commonwealth, Ky. App., 577 S.W.2d 6 (1979); Commonwealth v. Duvall, Ky., 548 S.W.2d 832 (1977). If we are interested in telling the jury the truth about a defendant, then the Commonwealth should not present a conviction that has not withstood the test of a defendant's appeal of right to the jury verdict. This is especially unworkable because if a prosecutor can use a conviction presently on appeal, the defendant would have the right to introduce evidence concerning meritorious issues which should mandate reversal of that conviction in rebuttal.

In order to challenge the admissibility of prior convictions before the trial, it is essential to move for discovery concerning any evidence that the Commonwealth intends to introduce at the TIS hearing. It is intimated in Commonwealth v. Gadd, Ky., 665 S.W.2d 915, 918 (1984) that notice of prior convictions through the indictment, and discovery of the documents which will be used to establish the prior

convictions, is mandated by federal due process. Although Gadd deals with the procedure for challenging the validity of prior convictions used to enhance under the PFO statutes, a similar system may be applied to challenge prior convictions used by the prosecutor to stiffen sentences under TIS. Once the practitioner has received discovery of the prior offenses, he or she should be able to make the same challenges to the validity of those priors as one would be able to make in the PFO setting. If the truth of the matter is that a prior conviction was obtained when the defendant did not have an attorney or under an involuntary guilty plea, then this prior conviction has no relevancy for a jury.

An objection can be made to prior convictions that occurred many years ago. KRS 532.080 limits how far back the state can go in using prior conviction to enhance a sentence. Additionally, although there is no specific time limit in Kentucky, the age of a prior conviction is a relevant factor for a trial court to consider when deciding whether a prior conviction can be used to impeach a testifying defendant's credibility at trial. See Scruggs v. Commonwealth, Ky., 566 S.W.2d 405 (1978); Brewer v. Commonwealth, Ky. App., 632 S.W.2d 456 (1982).

An objection can also be made if the Commonwealth picks and chooses which prior convictions to relate to the jury and thereby only showing them half the truth. For instance, a defendant who has been convicted of an offense which he attempted to explain due to intoxication will be harmed if the Commonwealth chooses to show the jury his two prior felony burglaries while withholding public intoxication and disorderly conduct misdemeanors which naturally show that he may well be an alcoholic.

Objections may also be appropriate if the Commonwealth's method of proving the prior conviction is inadequate. The fact of the prior convictions must be proven with the same evidence that is required in proving prior convictions in PFO case, i.e., either the testimony of the clerk of the circuit court or district court or properly authenticated copies of the judgment of conviction. Any other proffered evidence such as the testimony of the defendant's parole and probation officer is out and out hearsay. See Gardner v. Commonwealth, Ky., 695 S.W.2d 705 (1983); Commonwealth v. Willis, Ky., 719 S.W.2d 440 (1986).

PAROLE ELIGIBILITY

The prosecutor is allowed to introduce evidence of minimum parole eligibility. In one case, the prosecutor introduced the testimony of a parole and probation officer that in general people are released when they first meet the parole board about 50 per cent of the time. First, there was no foundation laid to show that this was anything other than pure speculation and the evidence was irrelevant since what happens to people in general does not fall into the strict category of the actual minimal parole eligibility for the offense the defendant is convicted of. This kind of speculative, irrelevant evidence amounts to misinformation which due process prohibits a sentence from resting on. See United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) (in which United States Supreme Court held that due process was violated when the sentencing judge explicitly considered 3 previous felony convictions, 2 of which were constitutionally invalid).

NATURE OF PRIOR OFFENSES

KRS 432.055(2)(a)(2) allows the prosecutor to introduce evidence of the nature of the defendant's prior offenses. A challenge can be made that the term "nature of the offense" is vague. In Reneer, the majority complain that sentencing was in a vacuum without any knowledge of the defendant's past record or "other matters that might be pertinent to consider in the assessment of an appropriate penalty", but as Justice Leibson points out in dissent in that case and Judge McDonald points out in his concurrence in Lemon, exactly what other matters will the prosecutor be allowed to introduce? As many specific objections limiting what the prosecutor can introduce should be made. For instance, the Supreme Court in Waller indicated that an indictment is not evident and thus should not be used to prove the nature of the prior offenses. In that same case, the Court obviously lent support for the idea that the prosecutor will be limited in what evidence he or she introduces to the extent that it may prejudice jurors who may be familiar with prior charge. Additionally, it is prejudicial and untrue for a prosecutor to tell the jury what the defendant was actually indicted for when those charges may have been reduced by a jury verdict or a plea. Unless the prosecutor can affirmatively show before introducing the original charges that the defendant was guilty of them, the only truth is that the defendant's ultimate guilt was only assessed at a lesser culpability.

RESTRICTING AGGRAVATING EVIDENCE

A defense attorney should operate from the mindset that the evidence that the statute allows the prosecutor to introduce should be restricted to only the specific items

listed in the statute and if there is any ambiguity about the admissibility of evidence, then the statute should be interpreted in favor of the defendant under the rule of lenity. See Roney v. Commonwealth, Ky., 695 S.W.2d 863 (1985); Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1981). For example, the trial court should not allow the prosecutor to call a social worker to give a diagnosis of the defendant's mental state and offer an opinion on his poor chance for rehabilitation and recidivism. The statute governing sentencing must be strictly applied. See Edmondson v. Commonwealth, Ky., 725 S.W.2d 595 (1987); Brown v. Commonwealth, Ky., 639 S.W.2d 758 (1982).

MITIGATING EVIDENCE

KRS 532.055(2)(b) allows the defendant to introduce evidence in mitigation. This section reads as follows:

> The defendant may introduce evidence in mitigation. For purposes of this section, mitigating evidence means evidence that the accused has no significant history of criminal activity which may qualify him for leniency. This section shall not preclude the introduction on evidence which negates any evidence introduced by the Commonwealth.

The problem is deciding what is meant by this statute and what the defendant may introduce. Your position as defense attorney should be that you ought to be allowed to introduce any evidence which is mitigating in nature.

> "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986).

If the prosecutor attempts to argue that the defense is limited to evidence which specifically negates evidence introduced by the Commonwealth, then the defense should counter by arguing that it has a due process right to offer evidence at a sentencing hearing and the court cannot constitutionally limit the defense to simply counter the Commonwealth's evidence. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

SPECIFIC EXAMPLES

Counsel should be creative in his or her thinking and should not limit the possible mitigating evidence to only evidence which specifically negates that evidence the Commonwealth is allowed to introduce. Any type of evidence which reflects well on the defendant or on the defendant's chances for rehabilitation should be seriously considered. Examples of such evidence are as follows:

Evidence relating to the frequency of actual release on parole. Statistics are available from the Frankfort office in regard to how often offenders receive parole the first time they are eligible and how often specific types of offenders receive parole. Juries have a natural tendency to fear and despise the very concept of parole. Unfortunately, they believe that offenders will inevitably receive parole and that quite often said parole will be given at the very earliest opportunity. Any evidence which can be provided to alleviate the fears, particularly in the case of violent offenders, is beneficial to the defense. The defense should attempt to show that the Parole Board is a responsible and sensible body which is concerned with the welfare of the public at large and is not prone to release violent offenders early. If the prosecutor objects to this type of evidence, an argument can be made that this evidence in fact rebuts the evidence which the Commonwealth is specifically allowed to introduce showing the minimum parole eligibility dates.

If the defendant has been on parole previously, attempt to show that any conditions imposed by the Parole Board at that time were met. If the defendant was required to receive alcohol or drug counseling, for instance, attempt to show that such counseling was provided and was received by the defendant. Again, this is clearly evidence in mitigation and is relevant to the whole issue of parole and whether a defendant ought to be released on parole. This evidence also serves to alleviate some of the negative feelings which exist in regard to parole.

If the defendant has already served time in jail prior to trial, attempt to inform the jury of this fact so that they can take it into account when they fix sentence in the case. It would seem that such evidence is certainly relevant to an informed and intelligent decision by the jury in regard to sentence. The whole purpose of the concept of "truth in sentencing" is to provide the jury with a total picture. If a defendant has already been punished, for this offense, the jury should certainly have the right to know. Since the law specifically requires that the court credit a defendant with time served prior to trial, it would seem that the jury should know of this fact. The prosecution, of course, would have the right to inform the jury that the defendant is going to get credit for this time served, but the defendant should have the op-

portunity to inform the jury that ie defendant has already been incarcerated and served time on the charge.

Evidence concerning the cost to the Commonwealth of incarcerating a person should also be considered. See "Corrections: Populations and Trends" by Bill Clark (The Advocate, Vol. 10, No. 6, pp. 34-37). While the relevancy of this evidence could be questioned, an argument could certainly be made that it is relevant to the whole question of parole. There is no doubt that the new "truth in sentencing" laws are going to create additional weight on an already overburdened penal system. The overcrowding in our prisons is going to directly affect parole considerations. The cost to the Commonwealth of incarcerating an individual is a factor which will affect parole and the ability of the prisons to confine ndividuals. If counsel can pro- uce evidence which would show some link between the overcrowding in prisons and the likelihood of release on parole, then the relevancy of this type of evidence would be established.

Evidence relating to the sentence received by a codefendant should also be considered. At the present time, there is pending a case before the Kentucky Supreme Court, Commonwealth v. David Bass, in regard to a ruling by the circuit court allowing the defendant, at the sentencing hearing, to introduce evidence about the sentence received by a codefendant. The court allowed the evidence, but the Kentucky Supreme Court has now certified the question and is going to grant review. Steve Durham represented Bass at trial and now on appeal. Again, the argument is hat under "truth in sentencing," he jury should have the total picture. If a codefendant has received favorable treatment and was involved in the same offense, the jury should be so informed.

The defense should request that any and all mitigating evidence be embodied in the instructions. The more mitigating circumstances which can specifically be listed in the instructions, the better. If the defendant has introduced evidence tending to show that he has no significant history of criminal activity, this should most definitely be embodied in the instructions. In death penalty cases, it has consistently been held that both statutory and nonstatutory mitigating evidence must be contained in the instructions. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed.2d 973 (1978). It should be argued that this same principle holds true in sentencing hearings pursuant to KRS 532.055. The Commonwealth will argue that there is a distinction in that in death penalty cases the jury must find a specific statutory aggravating factor before a sentence of death or life without parole for 25 years can be imposed. The jury is thus required to make a finding of fact. But the defense should argue that the same principle applies in hearings pursuant to KRS 532.055. The statute specifically mentions "evidence that the accused has no significant history of criminal activity." The jury should therefore be instructed to take this into consideration if such evidence is presented to them. The fact that the defense attorney is permitted to argue this fact during closing argument is certainly not an adequate substitution for instructions. This has been consistently held by the courts. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); Commonwealth v. Callahan, Ky., 675 S.W.2d 391 (1984).

PRETRIAL MOTION PRACTICE

If the defense wishes to limit what the prosecution can introduce at the sentencing phase, counsel should seriously consider filing pretrial motions asking for such relief. There are various types of things under the statute which can be challenged. The defendant can challenge the right to introduce parole eligibility regulations. Although the constitutionality of the statute was upheld in Reneer, the specific portion permitting parole eligibility regulations to be introduced was not addressed. That issue is presently before the Kentucky Supreme Court in numerous cases and until it has definitively been decided, counsel can still challenge this evidence. Furthermore, counsel can request that the Commonwealth be precluded from going into great detail in regard to the nature of prior offenses. The Commonwealth should not be allowed to, in effect, retry past felony and misdemeanor cases. It is good strategy to challenge these sorts of things prior to trial and request hearings. For instance, if the prosecution is going to be allowed to go into great detail in regard to prior offenses, the defense needs to know ahead of time what to expect and be able to counter it.

VOIR DIRE

While it is a tactical decision whether to inform the jurors in voir dire of the sentencing range, parole eligibility and prior convictions of the defendant, a defense attorney should have the right to raise these issues if he or she so chooses. The defendant has a due process right to a jury who will be able to consider all of the evidence and all the sentencing alternatives available and to voir dire the panel accordingly. See

lles v. Commonwealth, Ky., 455 S.W.2d 433 (1970). Bifurcation alone should not defeat this due process right since prospective jurors in death penalty cases are questioned during voir dire about their ability to consider the entire range of sentences. Additionally, a juror has the right to nullify a charge on guilt/innocence and a highly relevant factor would certainly be the range of sentences for the charged offense. This is especially relevant if the offense falls within the parole eligibility guidelines of KRS 439.3401. The right to counsel and right to an impartial jury are also impaired if the attorney cannot obtain any information about jurors feeling about the sentences and sentencing information they may hear.

VERDICT FORMS

Counsel should also take care to assure that the jury recommend whether the sentences are to run consecutively or concurrently in the verdict forms. The undersigned has already seen verdict forms under truth in sentencing where this has been omitted. This is such a radical departure from existing procedure that apparently trial courts are apt to overlook this new feature of the truth in sentencing law. Even though the judge is not obligated to follow the jury's recommendation, such recommendation should be made. It remains to be seen how the appellate courts will handle those situations where counsel requests this instruction and it is refused, but it would seem that, under such circumstances, a new sentencing would have to be held if the judge ran multiple sentences consecutively.

PROCEDURE

KRS 532.055(4) states that if the jury is unable to agree on the sentence, the trial judge shall impose the sentence within the range provided by law. In Hubbard v. Commonwealth, Ky.App., ___ S.W.2d ___ (decided 9/9/88), petition for rehearing pending, the Court of Appeals held this provision conflicts with RCr 9.89(1) which provides for mandatory jury sentencing. Consequently, under Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980), it is a violation of the due process clause of the 14th Amendment for a trial judge to fix a sentence at more than the minimum prescribed for that crime when a jury hangs on penalty. The Court finesses the Supreme Court's language in Reneer approving this section by rightly pointing out that Reneer was a separation of powers, not a due process, case and this specific fact situation was not involved in Reneer. Judge Miller wrote the opinion, with Judge Clayton concurring. Judge McDonald dissented without writing a separate opinion.

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ABA House of Delegates approves 50 hour Pro Bono minimum standard

The ABA House of Delegates approved a 50-hour per year minimum pro bono service standard at the August Annual Meeting in Toronto. The resolution reads that the ABA:

"(1)Urges all attorneys to devote a reasonable amount of time, but in no event less than 50 hours per year, to "pro bono" and other public service activities that serve those in need or improve the law, the legal system, or the legal profession;

(2)Urges all law firms and corporate employers to promote and support the involvement of associates and partners in "pro bono" and other public service activities by counting all or a reasonable portion of their time spent on these activities, but in no event less than 50 hours, towards their billable hour requirements, or by otherwise giving actual work credit for these activities; and

(3)Urges all law schools to adopt a policy under which the law schools would request any law firm wishing to recruit on campus to provide a written statement of its policy concerning the involvement of its attorneys in public service and "pro bono" activities."

The language of item (1) "public service activities that serve those in need or improve the law, the legal system, or the legal profession" closely tracks the language of Model Rule 6.1 with the addition of the 50 hour per year service standard. The above resolution is now the official policy of the ABA.

Communicating with Disabled Clients

The Canons of Professional Responsibility require that each lawyer "represent a client zealously within the bounds of the law." ABA Canon #7. Although ordinarily the parameters of this obligation are determined through discussions with the client to ascertain the client's desires, and application of the attorney's legal knowledge and skills, that formula is not necessarily easily followed by attorneys representing clients with mental disabilities. In such cases, determining the client's desires can be a seemingly insurmountable bar-rier to compliance with the Canons.

The Ethical Considerations recognize this dilemma, noting that a mental condition that renders the client "incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer." EC 7-12. The Ethical Consideration goes on to recommend that, in representing a client with a mental disability who does not have a guardian, "the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client." Ibid.

Thus the Canons themselves anticipate that a lawyer will pursue the client's desires, the client's disability notwithstanding. The Canons do not, however, indicate how one is to determine those desires.

The Canons do provide one possible alternative for lawyers with mentally disabled clients: resort to a guardian, whose decisions control the actions of the lawyer. Ibid. Even if the client does not have a full-time guardian, a guardian-ad-litem can be appointed by the Court once any Court proceedings are begun. See e.g., Rule 17(c), Federal Rule of Civil Procedure. See also, Michenberg, "The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals," 31 Stanford Law Review 625 (April 1979).

There are circumstances, however, when a guardian-ad-litem is not possible; for example, when decisions in the course of representation must be made before the case goes to court. In other situations, no guardian may be available; or the court may be reluctant to appoint one. In such cases, the attorney must "consider all circumstances" and then act in accordance with the client's interests. The remainder of this article will offer some specific suggestions in determining exactly what those interests are.

Take time to meet the client. Everyone has high caseloads, but the client with mental disabilities will probably take some extra time, to warm up to you, to get to know you, and to understand who you are and what you're saying. This is not a client who can be taken care of competently by a three-minut encounter in a noisy hall before entering court. Visit the client, more than once if possible, and as close to any scheduled court appearance as feasible without interfering with your ability to prepare the case.

Take time to talk, but don't overextend the client. Obviously, clients with mental disabilities need concepts broken down for them as simply as possible. This may mean that you need to skip over the technical points of the case, and concentrate on the essence of what is happening; it definitely means that "lawyer words" like "jurisdiction," "motion" and "judgment" should be avoided. Some clients may not know what a lawyer or judge is: check, don't assume.

The other side to explaining things simply to a client is to avoid overextending a client. Many clients have short attention spans:

be aware of this, and be conscious of the various signals (such as looking around, fidgeting, showing signs of anxiety) that the client may give to tell you she can't pay attention any longer or isn't following you.

Be careful about leading the client. Your goal is to discern the client's desires, but the client could easily have "pleasing the lawyer" as the primary desire. If you ask a leading question, then you'll very likely get the response called for by the question, not the client's true belief. Even a question like "Do you want to stay in the institution or go to a group home"?, while not technically leading, can lead the client into giving you the answer the client thinks you want to hear. Ask instead for specifics from the client ("Tell me what you do here; what do you like? what not"?).

Be aware of the client's limitations. A client can't choose among options he's never experienced. Thus, asking a client if she wants to live in a group home, or would consent to probation, is meaningless unless the client can describe how that would affect her life. Comparisons to things the client has experienced can be helpful. One client, for example, refused to consent to have his leg amputated (due to complications from diabetes) until he was introduced to another man who'd had the experience, and the client could see that the man could still walk, and how the prosthesis worked.

Use an expansive concept of communication. We all know that body language and changes in behavior can often communicate sentiments that the client cannot express verbally. This is all the more true with clients who, because of disabilities, have an impaired ability to talk.

Get information from other sources. Clients who have been institutionalized often have volumes written about them. Non-institutionalized clients with a long history of mental disability may have undergone evaluations in the past and may have mental health clinic or school records that can shed some light on the client's background and ability to communicate. Of course, such records should be read with a skeptical eye: the author was not necessarily accurate, despite the best intentions. In reading any such records, it pays to demand specifics about any conclusions, such as "client is aggressive" or "client has a history of acting out." One client, for example, was described as unfit for group home life because the client was "sexually aggressive." Interviews of direct care staff disclosed that the client attempted to hug everyone who came onto her ward. While inappropriate, the behavior can also be easily monitored and certainly presents no danger to others.

These suggestions will not always succeed in helping the attorney discern a client's desires. Particularly in cases where a client is under a severe mental impairment and is non-verbal, the attorney may have no choice but to postpone any decisions until he can request the appointment of a guardian ad litem. In many situations, however, these concepts have proven useful and underlie the essence of what the attorney needs to do: listen, be aware and be sensitive. That way, the attorney can best fulfill his ethical obligations to the client and the client can be assured of having his desires truly represented.

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CRIME-VICTIM GROUP PICKS LEXINGTON

LEXINGTON, Ky. - The National Organization for Victim Assistance, a group upholding the rights of crime victims, will hold its 1990 national convention in Lexington.

About 2,000 members are expected to attend the gathering, to begin September 23, said Marlene Young, the group's executive director.

Lexington was chosen because of the state and local programs for crime victims, said Dan Rosenblatt, president of the group.

Forensic Science News

Jack Benton

This is the 2d of a 4 part series.

BLOOD ALCOHOL CONCENTRATION ANALYSIS IN TEXAS

Of the direct blood alcohol test methods available, 2 are predominantly utilized by law enforcement in Texas. The first method is commonly known as the Dubowski method, named after the man who developed the procedure, Dr. Kurt Dubowski. This procedure appeared in the "Proceedings of the American Academy of Forensic Sciences" in 1952 and is widely known in the field of forensic chemistry. A modification to the original procedure was made by Dr. Dubowski and J.R. Withrow which eliminated, by use of a catalyst, the necessity of heating the distillate-oxidizing reagent mixture. The catalyst, magnesium sulfate, which is added to the potassium dichromate/suluric acid solution, does not enter into the reaction, but simply causes the reacting to take place without heat. The article is called, "A Photometric Microdetermination Method for Ethyl Alcohol in Biological Material."[1]

The second procedure (to be discussed in the next Advocate) is that of gas chromatography. This method utilized an instrument that separates the components of a mixture and allows for their identification and quantitation.

DUBOWSKI METHOD

Principle: Specimens of any body fluid (or steam distillates of tissue homogenates) are distilled directly from tungstic acid to precipitate the proteins and separate the ethyl alcohol from the matrix. An aliquot of the aqueous distillate is mixed with a measured volume of standard potassium dichromate in sulfuric acid (in a closed container at 100 degrees Centigrade). Any alcohol present is oxidized to acetic acid with concomitant partial reduction of the yellow dichromate ($Cr_2O_7^=$) ions to blue-green chromic (Cr^{+++}) ions as follows:

$$2K_2Cr_2O_7 + 8H_2SO_4 + 3CH_3CH_2OH \rightarrow 2Cr_2(SO_4)_3 + 3K_2SO_4 + 3CH_3COOH + 11H_2O$$

The residual potassium dichromate is measured spectrophotometrically at 450 nm or 350 nm, and the corresponding alcohol concentration of the original specimen is obtained directly from a calibration curve or table prepared by analysis of solutions of known alcohol content.

REAGENTS

OXIDIZING REAGENTS
0.0214 N POTASSIUM DICHROMATE

Exactly 1.0500g anhydrous reagent grade potassium dichromate ($K_2Cr_2O_7$) are dissolved with mechanical stirring in 1 liter of 50 volume percent sulfuric acid (H_2SO_4) which is free of reducing substances. One milliliter of this reagent is equivalent to 0.247 mg of ethyl alcohol. The reagent is stable for 1 year or more at room temperature, and should be stored in a borosilicate bottle (low-acidic glass), protected from light and absorption of atmospheric water vapor.

SODIUM TUNGSTATE, 1 PERCENT W/V

112g of reagent grade sodium tungstate ($Na_2WO_4 \cdot 2H_2O$) are dissolved in distilled-demineralized water and the volume adjusted to one liter. Stable indefinitely.

SULFURIC ACID, 1N

28 ml of 36N (concentrated) reagent grade sulfuric acid (H_2SO_4) are added stepwise, with caution, to the three or four volume of distilled-demineralized water and the volume adjusted, after cooling, to one liter. Stable indefinitely.

TARTARIC ACID, 10 PERCENT W/V

100g of reagent grade tartaric acid ($H_2C_4H_4O_6$) are dissolved in distilled-demineralized water and the volume adjusted to one liter. Stable indefinitely.

APPARATUS

DISTILLING APPARATUS

Direct and steam distillation apparatus of Dubowski and Shupe (Catalog No. JD-1390 & JD-1410, Scientific Glass Apparatus Company, Inc., Bloomfield, New Jersey 07003) or comparable all-glass distillation apparatus.

HEATING BATH

A modular electric heating block (Catalog No. 6124-C05 & 6124-C55, Temp-Block Module Heater, Arthur H. Thomas Co., Philadelphia, PA 19105) is convenient. However, any electric water bath at 100 degrees Centigrade, or electric constant temperature bath with permanent water soluble bath fluid (UCON fluid 50-HB-280X), Union Carbide Chemicals Co., New York, NY 10017) at 100 degrees Centigrade can be used.

PHOTOMETER

Beckman Models DU II, B, DB or DB-spectrophotometer, Bausch & Lomb Spectronic-20 spectrophotometer,

Coleman Model b1/20 Junior II Spectrophotometer, Gilford Model 2000 or 300; or comparable spectrophotometer or photronic filter photometer with blue filter transmitting at 450 nm.

PROCEDURE

ANALYSIS OF BLOOD, URINE, SALIVA, CEREBROSPINAL FLUID, TISSUE DISTILLATES

1. Into a 125 ml distilling flask (250 ml for blood) are placed the following:

a.) 20 ml of distilled-demineralized water;
b.) 2.00 ml of the specimen (1.00 ml specimens can be analyzed by collecting the distillate in a 5 ml volumetric flask, proceeding with steps three through five as usual);
c.) 5 ml of 1 N sulfuric acid;
d.) 5 ml of 10 percent sodium tungstate;
e.) The flask contents are mixed by swirling and the flask is attached to the distillation apparatus. Heating is begun when the blood has coagulated completely and has changed to a dark brown color.

2. Slightly less than 10 ml of distillate are distilled directly into a 10 ml glass stoppered volumetric flask in about eight minutes, heating with a microburner with a 2.50 to 4.00 cm flame. The distillate is adjusted to the 10 ml mark with distilled-demineralized water, the flask stoppered, and the contents mixed thoroughly by repeated inversion.

3. Into a 13 X 100 mm borosilicate glass culture tube with Teflon lined screw cap are placed 1.00 ml of distillate and 3.00 ml of oxidizing reagent. (When many analyses are performed, an automatic diluting-dispensing apparatus is very convenient; e.g., Model LD-a Automatic Diluter, York Instrument Corporation, Berkeley, California 94710; otherwise manual syringe-dispensers are best employed to dispense all reagents; e.g., Catalog No. 3005-A Repipet, 5 ml, Labindustries, Berkeley, California 94710).

A reagent blank is prepared with 1.00 ml of distilled-demineralized water and 3.00 ml of oxidizing reagent. The tubes are closed, for contents mixed by vigorous rotation and the tubes heated for eight minutes at 100 degrees Centigrade, immersed above the liquid line.

4. The tubes are cooled to room temperature (25 degrees Centigrade or less) under running tap water or in an ice bath. A portion of each solution is transferred to a suitable cuvette (1.00 cm pathlength Corex or borosilicate glass cuvettes are used with the Beckman spectrophotometers) and the absorbance or transmittance of each specimen is determined at 450 nm, against a reference cuvette containing the reagent blank.

5. The alcohol concentration of the unknown specimen, in percent weight/volume or mg/dl, is obtained directly from a calibration table or curve prepared by subjecting a series of biological specimen standards of known alcohol content to the entire analysis.

ANALYSIS OF TISSUES

1. Approximately 10g of frozen or ice cold tissue are rapidly liquefied in an ice cold Waring blender. Exactly 2.00g of the liquefied sample are rapidly weighed out and transferred quantitatively to a 250 ml distilling flask with 30 ml of 10 percent tartaric acid solution. Two of three drops of silicone antifoam fluid (Dow Corning Antifoam AF emulsion 30 percent w/v used as a 10 percent w/v emulsion, Dow Corning Corporation, Midland, Michigan 48640; Antifoam 60 emulsion, General Electric Company, Silicone Products Department, Waterford, New York 12188) or 0.10 g of low melting paraffin compound are added, or silicone antifoam spray (Dow Corning Antifoam A spray) is used sparingly. The flask contents are mixed by swirling and the flask attached to the steam distillation apparatus.

2. Distilling in a rapid current of steam from a steam generator containing distilled-demineralized water, about 20 to 30 ml of distillate are collected into a 125 ml distilling flask within eight to ten minutes.

3. To the 125 ml distilling flask containing the steam distillate are added 4 ml 1N sulfuric acid and 5 ml 10 percent sodium tungstate. The flask contents are mixed by swirling, the flask is attached to the direct distillation apparatus and the remainder of the procedure is carried out as for biological liquids (steps two through four of Procedure A).

4. The alcohol concentration of the tissue, expressed in percent w/v or mg/100 g, is obtained directly as in step five of Procedure A from the same calibration table.

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FOOTNOTE

[1]Dubowski and Withrow, **A Photometric Microdetermination for Ethyl Alcohol in Biological Materials,** 63 Proceedings of Iowa Academy of Science 364 (1956).

The Criminal Rules Process in Kentucky

Justice Donald C. Wintersheimer

Justice Donald C. Wintersheimer of Covington has been appointed as Chairman of the Criminal Rules Committee, succeeding Justice Roy Vance.

All proposed amendments to the criminal rules will be discussed at the next annual meeting of the Kentucky Bar Association which will be held in Louisville June 6-9, 1989. In order to have the opportunity for members of the profession to consider any suggested rule changes, the Supreme Court has indicated that all suggestions must be printed in the Bench & Bar (KBA) publication prior to the June annual meeting. Practically, that means that the suggested rule changes must be presented to the Supreme Court before mid-January in order to meet the printing deadline of the KBA magazine which is in early February. Accordingly, all suggested rule changes must be submitted to the committee before January 9, 1989. The criminal rules committee will consider the rule changes immediately thereafter and make a report to the Supreme Court before January 30, 1989.

Suggestions for amendments are circulated to all members of the committee for comment. The members express their opinions in writing with copies to other members of the committee and a discussion is held at least one annual meeting as to which amendments will be reported to the Supreme Court. Amendments to the criminal rules are generally initiated as a result of a recommendation by some member of the practicing bar. Occasionally, members of the Clerk's office or court staff attorneys or members of the Court will make recommendations for changes. Suggestions are also welcome from members of the judiciary at all levels.

Justice Wintersheimer has indicated that the present membership of the committee will remain the same.

The members of the Committee are:

Hon. William L. Graham
Franklin Circuit Judge
Frankfort

Hon. Penny R. Warren
Lexington

Hon. Mark P. Bryant
Commonwealth Attorney
Paducah

Hon. Frank E. Haddad, Jr.
Louisville

Hon. William E. Johnson
Frankfort

Hon. Frank W. Heft, Jr.
Public Defender
Louisville

Justice Wintersheimer indicated that all rule changes are now considered on an annual basis. The entire purpose of the civil and criminal rules committee is to provide members of the legal profession with an opportunity to make suggestions and comments on any proposed rules before they are enacted by the Supreme Court. Naturally, the final rule making authority resides in the Supreme Court.

Dr. Jim Bresnahan

On May 7, 1987, Colorado Governor Romer granted an unconditional pardon to Jim Bresnahan. Bresnahan stabbed his parents to death when he was 16, pleaded guilty, and received concurrent life sentences. A poor student before his conviction, he began studying while in prison, and after he was paroled in 1977, finished college and then medical school. As a doctor he now treats migrant workers at the Earlimart Public Health Unit. United States District Court Judge John Kane, his former attorney, said of him, "It's clear that the intellectual capacity for bad is not the same as the capacity for good. My concern was that society would never let him." That's why I say it's inspiring to think that a 16-year-old convict with no life sentence could end up as a physician practicing internal medicine is a severe blow to anyone's cynicism." Article from the May 8, 1987, Los Angeles Daily Journal.

Kentucky Supreme Court Rule Changes

The following is a summary of the important changes in the rules announced by the Kentucky Supreme Court in 1988 which relate to the practice of criminal cases. The rules have been amended 5 times in 1988. The changes are effective January 1, 1989, unless otherwise indicated.

Rules of Criminal Procedure

RCr 9.38
EXAMINATION OF JURORS

Adds the following to the rule: "When the court seeks the death penalty, individual voir dire out of the presence of other prospective jurors is required as to questions regarding capital punishment and pretrial publicity."

In Ferguson v. Commonwealth, Ky., 512 S.W.2d 501, 503 (1974), the Court stated that "separate examination of jurors or perspective jurors and circumstances of potential prejudice is a matter of procedural policy...." The court went on to "suggest to the trial courts that they give thought to the use of separate examination of jurors in appropriate circumstances." Id. at 503 n.1; see also Hovey v. Superior Court, 616 P.2d 1301 (Cal. 1980), requiring individual voir dire in capital cases.

The amendment brings RCr 9.38 into conformity with the nearly uniform practice of Ky. circuit judges. It is extremely rare that a Kentucky trial judge does not employ individual, sequestered voir dire in a death penalty trial.

THE NEW RCr 9.84: THE LOSS OF A FRIEND

Kentucky defense attorneys have suffered a grievous loss, one which has received virtually no publicity. It has occurred in the change in RCr 9.84. RCr 9.84 presently reads as follows:

> 1) When the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty, except where the penalty is fixed by law, in which case it shall be fixed by the Court;
>
> 2) When the defendant enters a plea of guilty the Court may fix the penalty, except in cases involving offenses punishable by death.

As of January 1, 1989, RCr 9.84 will read as follows:

> 1) When the jury returns a verdict of guilty, it shall fix the degree of the offense and the penalty except that the Court may fix the penalty a) in cases where the penalty is fixed by law and b) in cases where the court is otherwise authorized by law to fix the penalty;
>
> 2) When the defendant enters a plea of guilty, the Court may fix the penalty, except that in cases involving offenses pun-ishable by death the defendant may demand that his punishment be fixed by the jury."

RCr 9.84 has had a long history in Kentucky criminal jurisprudence. It originated in Criminal Code #257 (2), Criminal Code #258, and KRS 431.130. As they originally read, a jury was assembled even when a guilty plea was entered. While courts received those guilty pleas, sentencing was done totally by the jury.

In 1952, KRS 431.130 was amended to allow the Court "within its discretion, and without the intervention of the jury fix the degree of punishment within the periods or amounts prescribed by law, except in cases involving an offense punishable by death." By this change, the Kentucky legislature recognized the clumsy procedure then existing whereby a person would plead guilty and thereafter a jury was assembled to fix the penalty. This change further recognized the common practice of a guilty plea being entered followed by the judge sentencing to the minimum. In such cases, "the defendant cannot be heard to say that his rights are prejudiced when the judge fixed his punishment no higher than the minimum the jury could have inflicted." Strunk v. Commonwealth, 302 Ky. 284, 194 S.W.2d 504, 505 (1946).

As of January 1, 1963, this statutory scheme was replaced by RCr 9.84. This rule was part of the rules of criminal procedure which superseded the old criminal code. RCr 9.84 (1) continued the practice of allowing the juries in Kentucky to fix the penalties in criminal cases. RCr 9.84 in essence maintained jury sentencing. RCr 9.84 (2) further continued the existing practice which had been established in KRS 431.130 allowing the trial court to fix the penalty where defendants pled guilty. Most significantly, RCr 9.84(2) further continued the practice which absolutely prohibited a trial court from fixing the death penalty pursuant to a plea of guilty. Cinnamon v. Commonwealth, Ky., 455 S.W. 2d. 583 (Ky. 1970). Thereafter, once a person had entered a plea of guilty, a jury had to be assembled to fix the penalty, or the judge had to fix the penalty at a sentence below the death penalty since "there is no provision under Kentucky law for a judge to impose the death penalty." Lyons v. Howard, 434 Fed.2d. 632, 634 (6th Cir. 1970).

RCr 9.84 continued to be used in the 1970's and 1980's in all cases, including death penalty cases. While the Attorney General on occasion has argued that KRS 532.025 superseded RCr 9.84, it has been clear that the Kentucky Supreme Court continued to abide by RCr 9.84. "By Chapter 234, acts of 1962, the Rules of Criminal Procedure (RCr) were recognized as superseding the old criminal code and, among other things, KRS 431.130 was amended to delete reference to the fixing of punishment. Since that time the jury requirement has been preserved in RCr 9.84." Ex Parte Farley, Ky., 570 S.W.2d. 617, 619 (1978); Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985) (J. Leibson, concurring).

Unfortunately, in the mid to late 80's RCr 9.84 came under attack. Specifically, Assistant Attorney Generals began to advance the odd theory that once the defendant entered a plea of guilty to a recommendation of life imprisonment that the trial court then had the authority to sentence an individual to the death penalty. The case of Commonwealth v. Randy Haight, out of the Garrard Circuit Court, established the vehicle for the Commonwealth to make this argument. In that particular case, Randy Haight pled guilty to a recommendation of life without parole for 25 years. The trial judge recognized that KRS 532.025 was in conflict with RCr 9.84. However, he sentenced Randy Haight to die. On September 8, 1988, the Ky. Supreme Court reversed Randy Haight's death sentence and sent the case back for a new trial. Petition for rehearing is presently pending. The Court did not address RCr 9.84 in the opinion, however.

As Haight was winding its way through the courts, RCr 9.84 was under attack by prosecutorial forces. They successfully secured the abolition of RCr 9.84 before the Bar in the spring of 1988. The abolition of the rule was addressed at the KBA convention in June of 1988. At that convention, impressive arguments against the abolition of RCr 9.84 were made by Louisville Public Defender's Office, DPA, and representatives of the Kentucky Association of Criminal Defense Lawyers. Thereafter, the rule was not abolished, but rather changed in the form as indicated above.

The new RCr 9.84 accomplishes a couple of things. First of all, it maintains jury sentencing. However, the new rule adjusts to the new reality of truth in sentencing. RCr 9.84(1) allows for the Court to fix the penalty when "otherwise authorized by law to fix the penalty." That no doubt refers to KRS 532.055(4) which reads that "in the event the jury is unable to agree as to the sentence or any portion thereof and so reports to the judge, the judge shall impose the sentence within the range provided elsewhere by law." RCr 9.84(1) makes the Court's procedure consistent with truth in sentencing.

More significantly, the new RCr 9.84(2) absolutely abolishes the protections provided by the present RCr 9.84(2) in cases involving the death penalty. Previously, a defendant could plead to a recommendation of life knowing that RCr 9.84(2) prohibited the judge from sentencing to death. Further, case law looking at KRS 431.130 and RCr 9.84 had interpreted these provisions to allow for the judge to sentence to something other than death, reasoning that in such cas a defendant could not complain where the death penalty was not given. See Hobbs v. Stivers, Ky., 385 S.W.2d. 77 (1964); Thomas v. Maggard, Ky., 313 S.W.2d. 271 (1958); Houston v. Commonwealth, 270 Ky. 125, 109 S.W.2d. 45 (1937). It was under the umbrella of these rules, statutes and case law that literally hundreds of individuals, since the new death penalty statute was enacted in 1976, entered pleas of guilty with aggravating factors present and were sentenced to penalties less than death.

There is a serious question now as to whether plea bargaining has come to an end in death penalty cases with the new RCr 9.84. Prosecutors who so clamored for RCr 9.84 to be abolished in death cases have won the day. However, it is in fact the case that in many death penalty cases prosecutors want a negotiat plea rather than trying a case. the one hand, a defendant would be

foolish to enter a plea under the new 9.84(2) without any assurances from the Court that the Court will be bound to the recommended sentence. Defense attorneys would be remiss if they enter such pleas without the protections of the old RCr 9.84 and further without an absolute assurance, most likely on the record, that the Court will be bound by the recommendation of the Commonwealth.

Yet, will those hundreds of murders with aggravating factors present over the next decade all go to trial where formerly they were negotiated and pled? I think it is hardly likely. I think the reality is that in the past few decades, good sense of the bar and the judiciary at the trial level has led to an informal procedure whereby death penalty cases were negotiated in such a way that all the interests of the parties were protected. I cannot imagine that that informal practice has now come to an end with this unwise amendment to the rule. Rather, I suspect that the informal mechanism of disposing of death penalty cases short of the risk of the ultimate penalty will be continued by wise bar and judiciary. Unfortunately, what the new RCr 9.84(2) does is require that procedure to stay underground. It further invites the occasional aberration, such as the Randy Haight case, where a judge for whatever reason goes outside the informal practice and sentences someone to death. After the new RCr 9.84(2), the unfortunate defendant and his defense attorney may be without remedy in such a case.

We have indeed lost a friend. Time will only tell whether the very real risk posed by the new RCr 9.84 will be dealt with successfully by the members of the bar and judiciary who are now forced to live within the confines of the new rule.

RCr 12.76(1)
STAY OF EXECUTION

Formerly required stay of death sentence only if appeal taken. Now that an appeal is mandatory, it was changed to say the stay occurs pending review by an appellate court.

Civil Rules

CR 5.05(4)
FILING

Adds a sentence to make clear the controlling date for certification of the record: "The time for certifying the record on appeal under CR 73.08 shall run from the date the Motion to Proceed In Forma Pauperis is granted." This prevents filing and certification problems that arise when a motion to proceed in forma pauperis is not ruled on quickly.

This rule was effective July 14, 1988.

CR 7.02(4)
TYPE SIZE

On October 24, 1988, the Supreme Court made its 5th set of rules changes this year. It amended CR 7.02 by requiring the type on everything except exhibits and printed briefs to be "no smaller than 12 point."

CR 73.08
APPELLATE TIME

Changes two matters. First, it reduces from 60 to 30 days the amount of time a clerk of court has to prepare and certify the record on appeal for cases with video records. Second, it makes clear that the time for certifying the record on appeal runs from the date any motion to proceed in forma pauperis is granted.

This rule was effective July 14, 1988.

75.01(1)
DESIGNATION OF EVIDENCE

Makes clear that any party other than appellant can file a designation of additional portions of the transcribed proceedings not only 10 days after the service and filing of appellant's designation but also 10 days after the time for appellant's filing of a designation has expired. This covers the situation where the appellant does not file a designation.

CR 76.12(4)(b)
LENGTH OF BRIEFS

Makes several changes. If the appellant is responding to more than one appellee's brief, then appellant is permitted in both the Supreme Court and Court of Appeals 5 additional pages for each additional appellee brief.

There is also a change in the page limits of briefs for death penalty cases: "In cases where the death penalty has been imposed, upon motion made at least 20 days prior to the filing deadline, and upon good cause shown, the appellant's brief and the appellee's brief may be extended to no more than 150 pages, excluding the introduction, statement of points and authorities, exhibits and appendices. Upon similar motion, for good cause shown, made at least 5 days prior to the filing deadline, a reply brief may be extended to no more than 25 pages."

CR 76.16(1)
ORAL ARGUMENT

Adds additional protection in instances where the Court waives oral argument on its own motion: "In any case where the court orders on its own motion that oral argument shall be dispensed with, an attorney shall have ten (10) days from the date of the order in which to object and ask for reconsideration. No opinion shall be rendered until the time has expired for making such objection and motion for reconsideration, or is such objection and motion is made, until it can be decided."

CR 76.18(2)
TRANSFER OF DEATH PENALTY APPEALS

Drastically changes the appellate process to automatically transfer to the Supreme Court an appeal in any case in which the death penalty has been imposed.

Administrative Procedures of the Court

APVI, §7(3)
RECORDING COURT PROCEEDINGS

A new section is added:

"(3) In all actions reported by recording equipment any party shall have the right to employ a reporter to take down the proceedings. Any transcript so produced shall not be received as an official record in the case except upon good cause shown. Any reporter so employed shall be afforded accommodations in the courtroom sufficient to allow the transcription of the proceedings."

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National Center on Institutions and Alternatives

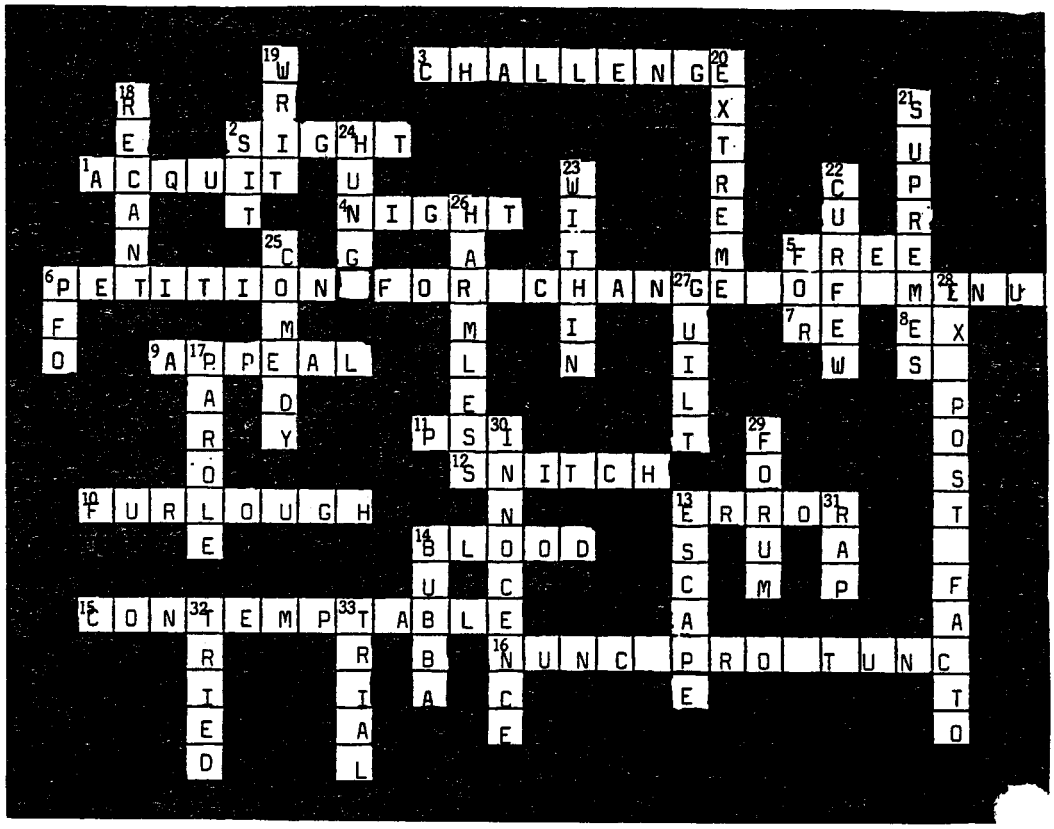
Help for Death Penalty Cases

The National Center on Institutions and Alternatives (NCIA) has led the way in developing sentencing plans (Client Specific Planning) as a way of reducing prison use. Now it has received a small grant to assist in the sentencing phase of capital cases.

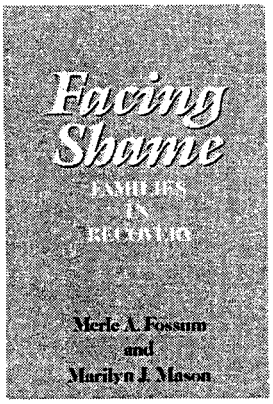
Attorneys in death penalty cases often focus their preparation on the guilt phase of the trial. When a guilty verdict is returned, they are often poorly prepared to present evidence for mitigation. The NCIA project is designed to prepare background reports for such cases.

To do that, they need to know of upcoming capital cases long before the trial begins. If you know of cases where they may be helpful, contact Hans H. Selvog, Director, Southeast Regional Office, NCIA, Grant Bldg., 44 Broad St. NW, Suite 0, Atlanta, GA 30303 (404/659-8).

ANSWERS TO LAST ISSUES'S PUZZLE BY BETTE NIEMI



Book Review



FACING SHAME: FAMILIES IN RECOVERY
Merle A. Fossum & Marilyn J. Mason
W.W. Norton & Company
New York, 1986

"Thou shall not only obey thy parent, thou shall live up to the image that he has painted for the neighbors." This commandment is the essence of the writers' theoretical and therapeutic model of the "shame bound family." Departing from the traditional notions of family therapy, these two family therapists explore the connection and inner-dependence between the social structure and its effect on the family and individual family members. The authors postulate that while the individual is molded by the family, the family is molded by and responds to the demands of the community. The organizing principal in this hierarchical model, is shame. The roots of shame are found in addictions, abuse, personal violations and seductions, and assaults where one's sense of self has been shattered. The shame bound cycle is set in perpetual motion by the individual's unconscious shame feeling and the dependency found in families caught up and entangled by a rigid, controlling "perfectionist rule system." This rule system is designed to create a false image of social conformity. As these families and individual members attempt to live up to the impossible image of what the community suggests or directs them to be, they fail. Having failed, and swallowed up in feelings of unworthiness and inadequacy, the family and its members try harder to live within the perfectionist system. This new attempt to regain control merely creates an ongoing process, a vicious circle, where the coping responses intensify the problem, and the problem intensifies the coping responses until the system is ritualized and self-sustaining.

The authors define and distinguish shame from guilt. While guilt is "a feeling of regret one has about behavior that has violated a personal value," shame is " an inner sense of being completely diminished or insufficient as a person. It is self-judging the self." Thus, the authors maintain that since guilt doesn't diminish oneself as a person, there is the possibility of healthy repair. However, they claim repair is impossible with shame because it involves one's identity. The distinction is unconvincing. The authors ignore the productive aspects of shame, and fail to acknowledge that shame can create guilt and guilt, shame.

The interesting concept behind this book is not only that shame can consciously exist as the central character in the compulsive and/or addictive individual, but that it is the organizing principal in the family dynamic. In speaking of the "shame bound family" the authors refer to a family with a "self-sustaining, multi-generational system of interaction with a cast loyal to a set of rules demanding control, perfectionism, blame and denial." In other words, the shaming process is a self-perpetuating ongoing cycle that inhibits the development of a self, fosters family secrets and brings chaos and shame to all family members now and in the future. Luckily, the shame pattern is easily recognized, according to these family therapists, by those behaviors which are identified as addictive and compulsive. By identifying the addictive and/or compulsive nature of a person's behavior, the therapist can force the patient to face shame directly and thus, break the shame bound cycle.

The theory is interesting, if simplistic, but has limited use for the criminal practitioner. First, you must treat the entire family in order to completely obliterate the shame cycle, and second, short-term therapy will fail. The nature of the theory requires long-term therapy sessions with a therapist advocating a personal involvement with clients. Using a broad-based no fault problem solving approach, the therapist attempts to unmask shame. This is done in the first instance by identifying the compulsive or addictive behavior that causes the problem which maintains the shame system. By unveiling the family history, and searching out the particular shaming events, family secrets are brought forth and shame is directly faced. This begins the movement from the shame bound family system to a respectful family system.

All in all, the book is interesting, its theory viable and approach novel. The authors therapeutic model provides insights into a defendant's deeper problems and in the long run, insights into our own behavior.

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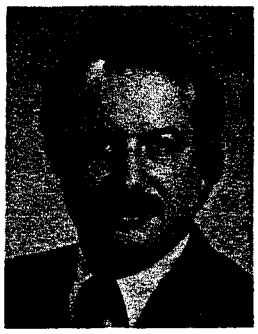
The Advocate Celebrates Its 10th Anniversary

Ernie Lewis
Editor
)ec., 1978 - Dec., 1983



Ed Monahan
Editor
April, 1984 - Present

With the publication of this issue, The Advocate celebrates 10 years of publishing the Department's bi-monthly newsletter. In December, 1978 the first issue of the then unnamed newsletter was issued. It was the brainchild of the Public Advocate, Jack Farley, and was the product of DPA's public information committee. Ernie Lewis began in December, 1978 as its editor and continued until December, 1983 when he became the Director of the Madison County public defender office.

The first issue was 8 pages with an article on post-conviction services, the newly formed protection and advocacy division, the death penalty, and the $452,260 federal grant to start public defender offices in London, Stanton, Hazard and Prestonsburg to cover 26 Southeastern Kentucky counties. Ten years later those Southeastern Kentucky offices are a foundation of our statewide system. The Advocate had modest goals in the beginning. Our first goal was to get a name, which was achieved by the second issue. Our next goal, more demanding in scope, was to publish the newsletter regularly and predictably. After a decade of bi-monthly publications, that goal too has been achieved.

During Ernie's 5-year tenure as editor, he saw 30 issues go to press. His last issue in December, 1983 was 40 pages in length. It contained an interview with the newly appointed Public Advocate, Paul Isaacs, a column, West's Review, on published case holdings, a death penalty column, and articles on opening statements, reinterrogation and the right to counsel, and the rape trauma syndrome.

In April, 1984 Paul Isaacs appointed Ed Monahan to the editor's post. Since then over 341 articles have been distributed in 22 issues. Ed's tenure as editor has featured regular growth, both in quantity and quality of the newsletter. The look of the newsletter has improved considerably over the past 5 years rivaling publications with desk-top publishing capabilities in appearance and readability. More importantly, the quality of the publication has also seen steady growth where now The Advocate regularly has the best criminal justice information published anywhere.

Over the years The Advocate has grown in its coverage, its substantive content, and its size. Ernie

introduced the concept of regular columns. The first two were West's Review and the Death Penalty. He initiated the concept of featuring a public defender from across the state in each issue. There are now regular columns on Search and Seizure, Cases of Note...In Brief, District Court Practice, Post-Conviction, Book Reviews, 6th Circuit Case Law, Ask Corrections, and occasional articles on Ethics and Protection and Advocacy. We have also continued to expand our Trial Tips articles from attorneys within the Department and from attorneys across the state in private practice. We have tried to provide a regular series of interviews with important people in the Kentucky Criminal Justice System. We are starting a regular Evidence Column with Frank Jewell, Chief of the trial attorneys in the Louisville public defenders office, as the contributing editor.

Throughout the existence of The Advocate, its good content has primarily been the product of the efforts of Department attorneys who have been good enough to take the time to share information with others. Also, through the years other criminal defense attorneys and judges have been increasingly willing to write articles for The Advocate.

It is our belief that we are serving the real needs of the practicing public defender, as well as needs of Kentucky judges and criminal defense attorneys, in a way that contributes to improving Kentucky's criminal justice system.

Thank you for your support over this past decade. All of us here at The Advocate hope we can continue to serve you.

Program helps inmates break emotional chains

By John C. K. Fisher
Kentucky Post staff reporter

Christopher Goerke had a bad attitude when he arrived at Transitions Inc. in Newport two months ago.

Goerke, 21, of Bellevue, had been convicted of two counts of drunken driving.

"What got me here was my outlook on life. I didn't care anymore. I got drunk and did what I wanted to," he said.

But the counselors in the Misdemeanor Program have made him examine himself. They encouraged him to continue his education and to stop drinking. He learned to talk to people — learned that he drank because he was lonely and angry.

"I don't have the anger that I had before. I deal with my problems instead of drinking and running," Goerke said. "I can talk to people now. I can understand better since I'm not drinking."

Goerke plans to pursue a high school degree.

"It may take me a long time, but I plan on getting it," he said.

And he's thankful that the Campbell County program exists.

"It's a privilege being here, it really is," Goerke said.

Goerke is among the success stories in the work-release and counseling program operated by Transitions Inc. for Campbell County.

"We know we have been successful when they shoulder responsibility and life conditions themselves," said Steve Gadberry, coordinator for both the misdemeanor program and a program designed to prepare felons for returning to society.

The program is for felons nine months short of parole. They are encouraged to work in community service jobs and visit family in order to re-adjust to society.

Jim McKinney, 51, former owner of the Sly Fox Lounge in Covington, has been in the felon program since August. He hopes to receive parole next month from a 10-year sentence for cocaine possession.

"It's a good feeling to sit down with people who are willing to listen," said McKinney, of Covington.

"It's entirely different from prison. It's clean. Inside (prison), you don't have to think. It's done for you. There is a lot more opportunity here to get back to yourself. In there, your only responsibility is to breathe," he said.

"I guess you learn how to get along with people. You feel a sense of comraderie here. It's only 26 people."

McKinney, who went to prison last year, took a paralegal class during his incarceration and hopes to land a job as a legal aid. Although he already has served his time, he is hoping his name will be cleared on appeal.

"I might win the war, but I lost the battle," McKinney said.

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11-9-37

THE ADVOCATE

The Advocate is a bi-monthly publication of the Department of Public Advocacy. Opinions expressed in articles are those of the authors and do not necessarily represent the views of the Department.

The Advocate welcomes correspondence on subjects treated in its pages.

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National Victims Resource Center Established

To encourage progress in victims' issues, the U.S. Department of Justice, through its Office for Victims of Crime within the Office of Justice Programs, has established the National Victims Resource Center (NVRC).

As a national clearinghouse for victim information, the NVRC data base contains the following:

- More than 7,000 victimization-related books, articles, and audiovisual materials covering child sexual abuse treatment programs, child abuse programs and curriculums, victim services, domestic violence, the establishment or expansion of victim-witness programs, and violent crime.
- Federal victimization statistics.
- Federally sponsored victimization-related research studies.
- Names, addresses, and telephone numbers of people to contact for information and assistance.
- Federal victim assistance programs data base.
- Federal victims compensation programs data base.

From the clearinghouse you can get free publications, borrow hard-to-find publications, and buy selected videotapes. The NVRC information specialists can also conduct data base searches designed especially for your needs.

In addition, NVRC can help you learn about victim assistance and compensation programs, victim advocacy groups, and special programs. The NVRC can refer victims to programs that help soften the blow, ease their recovery from trauma, and educate them about the aftermath of crime.

If we can be of assistance, call us at (301) 251-5525, or write National Victims Resource Center, Office for Victims of Crime, Box 6000-AHG, Rockville, Maryland 20850.

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