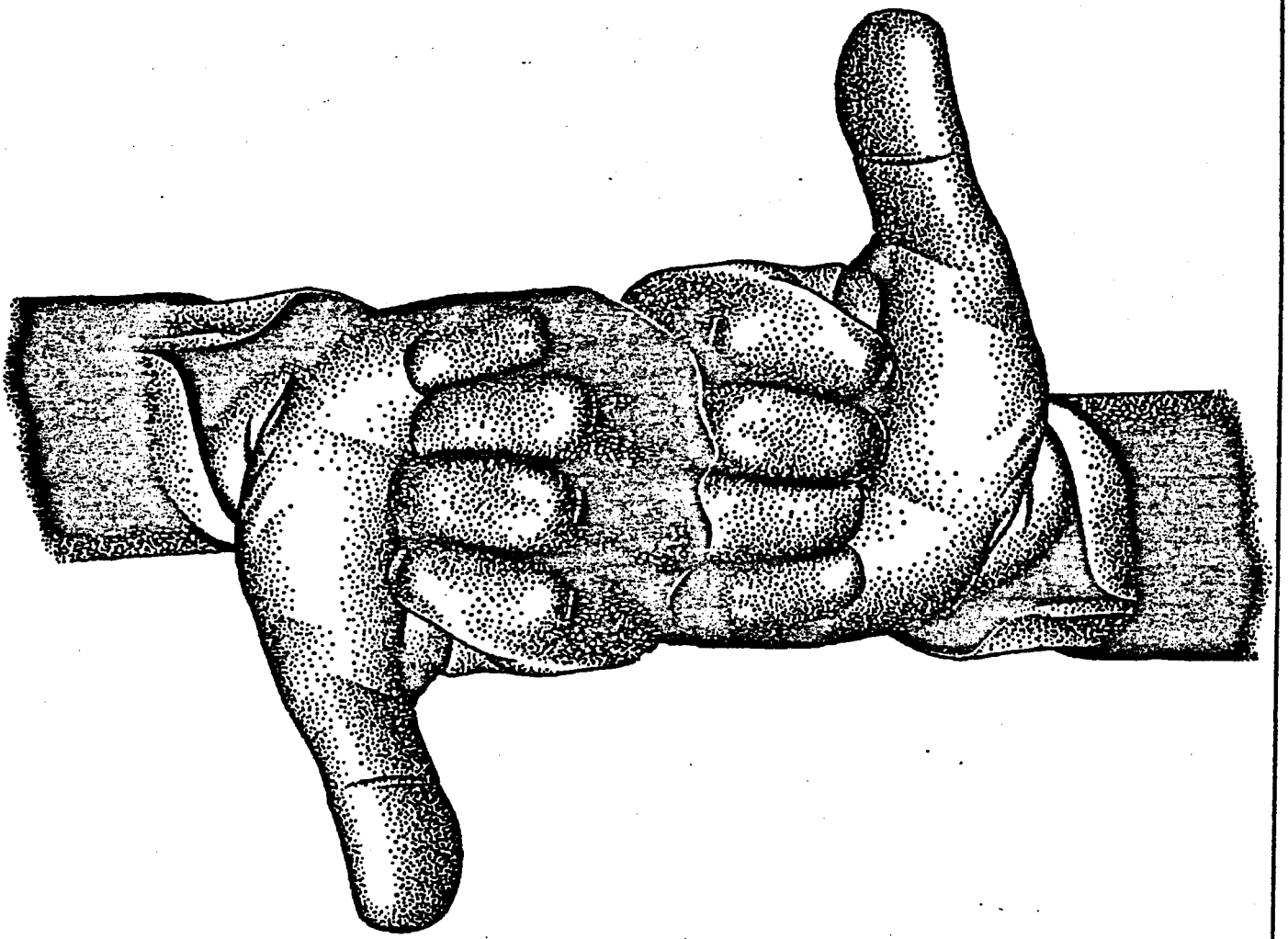
A BI-MONTHLY PUBLICATION OF THE DEPARTMENT OF PUBLIC ADVOCACY VOLUME 1, NUMBER 2

# THE ADVOCATE

ADVOCACY ROOTED IN JUSTICE FEBRUARY, 1989



## THE CHIEF JUSTICE ON JUDICIAL RECUSALS

National Standards For Capital Attorneys

John Delgado On Criminal Defense Work

Aprile Appointed To Federal Courts Committee

New Parole Regulations

Sixth Circuit Practice

# THE ADVOCATE FEATURES

## Lynda Campbell

LYNDA CAMPBELL

I was in London doing some research on a case and had, as always, another assignment -- to get a photo of our new public defender, Lynda Campbell. I arrived at the courthouse early and sat in on a case Lynda was handling. I liked her presence in the courtroom, the way she went to her client to explain a ruling and how she didn't back down even with the "pounding" she was receiving. In the corridor before I took her photo, a male client from another case came up to her smirking., "Honey," he said carressingly, "When is my case going to trial?" Lynda paused a moment, collected herself and told him she didn't like to be addressed as "honey." She looks a little harrassed in the photo I took. She said it was just a typical day. One of many.

She's been a public defender for eight years. She worked with the Daytona, Fla. public defender office from November 1980 to July 1983 after graduating from the Florida State University School of Law in June, 1980. Lynda joined our London office on April 1, 1984 and then transferred to our Richmond office on October 19, 1987. She's working closer to home now.

Lynda and her husband, Robert William Hoag, live in Berea where Bob teaches philosophy at Berea College. Their son, Bryan Campbell Hoag, was born on September 10, 1987.

Lynda worked as a counselor for juvenile delinquents while an undergraduate at the University of Florida studying criminal justice. That led her to law school so she could, as an attorney, have an immediate effect on the system.

"Our fundamental principle of the criminal justice system requires that good, free legal representation be provided for indigent defendants," she said. She, like many of us, sees the very real problem of justice dealt out based on socioeconomic class -- a disparity of treatment in the justice system, because of disparity in wealth or standing. She observed that society "fails to understand the importance of criminal defense attorneys in protecting those rights, and thereby the rights of all citizens. In Eastern Kentucky a fine line exists between vigilantism and the criminal justice system." In one of her murder cases, the defendant's home was burned to the ground and banners were hung in the community urging the defendant to "be sentenced to death." Lynda believes that vigilant litigation and aggressive advocacy "counter balance vigilante justice."

Lynda hopes the trend toward alternatives to imprisonment will grow. "A majority of our clients are chronically dependent on drugs and alcohol and desperately need treatment instead of incarceration." Even as a juvenile counselor, she realized how difficult it is to change a person's behavior in a period of months, and "even if you're successful in an institutional setting, the person is often returned to the very same environment that led to the problems to begin with."

Bill Spicer, formerly the Director of the DPA London office, now in Stanton, said of Lynda, "When we contacted the Daytona Beach Public Defenders' Office about Lynda, one statement they made was that she was 'always there.' That was our experience in London. She did her work, continually looked for ways to help the other attorneys, and indeed was 'always there' when needed. I would not have survived our two capital trials without Lynda. She did more than her share of the work and continually was the voice of reason. Not only is Lynda a great attorney to work with, she is an outstanding athlete, with tennis and swimming h specialities. She is one of my favorite people. We are all lucky to have her in the Department."

CRIS BROWN
Paralegal
Major Litigation Section/Training
Frankfort, Kentucky 40601

Do not disagree, or for that matter, do not agree, with anyone unless you understand the position the other is taking... to disagree before you understand is impertinent; and to agree before you understand is inane.
- Mortimer Adler from *How To Speak; How To Listen.*

**FROM THE EDITOR:** We are delighted to inaugurate with this issue an *Advocate* that is equivalent to being typeset. This increases its readability and digestibility. It allows us to produce more copy in less space, saving us significant printing costs. We hope you enjoy our cost-saving advance.

This issue includes an article by the Chief Justice on Recusals. He presents important thoughts and information on disqualification of judges, an area that has been mysterious to many of us. The causes of crime confront the criminal advocate daily. This issue contains a series of articles exploring why people commit crime; why southern states have very high homicide rates; a book review of Judge Bazelon's book on criminal acts; a review of Kentucky statistics on the hungry and homeless; how anger feeds criminal behavior; and the related area of how much money we spend on defending the poor who are accused of crimes. We also present an article that addresses 6th circuit practice, a foreign land to most attorneys. ECM


## The Advocate

The *Advocate* is a bi-monthly publication of the Department of Public Advocacy, an agency within the Public Protection and Regulation Cabinet. 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 it.

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# IN THIS ISSUE

# REFLECTIONS ON CRIMINAL DEFENSE WORK

*John Delgado spoke at the 1988 DPA Trial Practice Institute on the work we do as criminal defense attorneys.*

I had a law partner once 8 or 9 years ago that left South Carolina to go to Europe to practice law and it was really traumatic for the 3 of us partners to have to split up because we really loved each other. We fed off each other. I missed her personally and professionally. The day after the night she left, I came to the office and on my desk was a big manila envelope. On the inside was the dog-eared beaten up old copy of the Bill of Rights that I had seen my partner keep with her in her briefcase over the time we had worked together. She had enclosed a nice little note -- "I'm giving you this, I want you keep it." And she signed the farewell note, "Protecting the Constitution I remain...your loyal law partner."

I think sometimes when we do criminal defense work that the Constitution is our foundation for our work, our efforts. Those constitutional guarantees that we seek to preserve and protect and defend on behalf of the people we represent.

But the way I see this or my interpretation of the system, I guess it's the reason I'm not on the Supreme Court, is that I don't recall the 6th Amendment giving the government anything. The 6th Amendment gives those rights, those guarantees, those privileges to the defendants -- those individuals charged with criminal offenses.

It is my very subjective opinion that the Constitution and the government and state of South Carolina, my personal jurisdiction, are always served and protected when an individual is afforded a fair trial. It is not, in my very humble subjective opinion, their criminal justice system. Those are our guarantees, our rights, our protections, not George Bush's. I think we are the conservators of the 1st, 4th, 5th, 6th, 8th and 14th Amendments of the Constitution. We are the law court officers, not necessarily just those colleagues of ours that wear badges and service revolvers. We are law enforcement officers and those are the rights and guarantees we protect.

In my continuing love affair with constitutional guarantees, I am reminded that because this is where I come from, sometimes I think, the Constitution has its basis, in some small part, in Judeo-Christian theology. "For lo, ye who have done it unto the least of my brethen, ye have done it unto me." "Go to the hospitals; visit the prisoners." For that's what the Constitution does, it gives us guarantees for the very least of these, our fellow citizens, and requires the State to prove beyond every reasonable doubt, that exists in the minds of 12 people, their guilt. And when the Constitution gives these rights to the poor, the powerless, the least of these...it gives them to the rest of our citizens.

Ever since *Gideon v. Wainwright*, it is our criminal justice system. We must begin to look at it in the sense: it is ours, not just theirs. They simply carry out enforcing the law. But in a superior way we enforce the law. We are the true conservators and protectors of the Constitution.

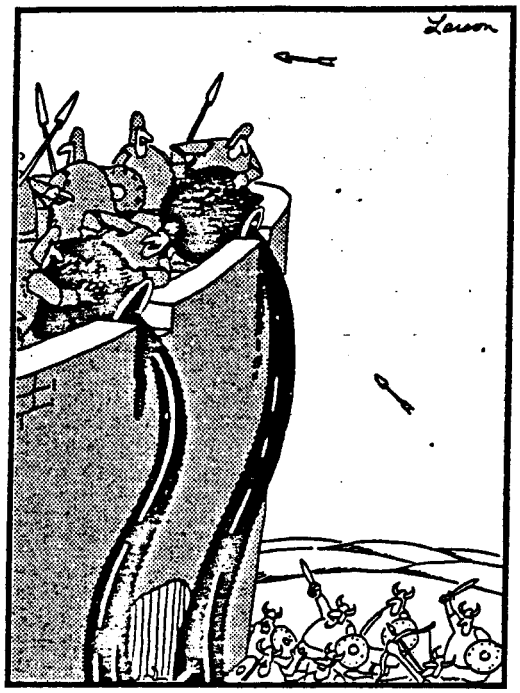
But beyond these constitutional guarantees, why do we do this? We do this because we love it, as silly as that may seem, to somebody who doesn't understand what we have to do on a daily basis. We love a fight, we don't go out of the way to have them, but we love a fight. More importantly, we love a fair fight. That's what we've been doing together for the past few days at this Institute: learning to maximize our skills so we can fight on behalf of our client.

I am reminded of our national motto, "In God we trust." That was a compromise motto. In 1776 Thomas Jefferson proposed the motto, "Rebellion to tyrants is obedience to God." I think that has more of a fighting spirit to it and that epitomizes to me the spirit of our work.

Jefferson and I agree. What we do in our work is we do rebel against the tyrants that parade in judicial robes and, against mob mentality that convicts our clients simply because they are accused. "If they're not guilty what are they doing here?" That is who we fight, and we love that.

But more importantly, we love those poor individuals that come to us and to whom we go, who are frightened, scared and paralyzed. Mommas scared of what's going to happen to their children, family members afraid of an unknown system. But we love them because we know that with them we still have a bond.

This country has taken a definite turn within the past 20 years. The bond we try to create in our relationships with our clients is more difficult now because of the tide of anti-intellectualism -- the flame is flickering. Still we must nurture the bond of commonality that exists in each individual that comes to us frightened, scared, maybe wrong, maybe having done some horrendous thing, but we love them. We continue to love them no matter what because that is our professional and constitution-




"You know, I have a confession to make. Win or lose, I love doing this."



al obligation, and, for this South Carolina lawyer, it is his personal significance. The way he continues to help define his life.

It is hard to talk about love and criminal defense work isn't it? But maybe that is what we do; what we are. You know it's damned lonely to love some of these poor folks that we have to love -- that nobody in hell loves. They've done everything in the world and nobody loves them. They're looking at us. They're scared, and want to know what's going to happen to them. That's our role because of the Constitution and because they personally look to us for help and guidance. We find that higher calling, the noble essence that continues to keep that flame burning. But it is so lonely, isn't it?

I don't know how many times it happened when I was a public defender and I would come in and meet one of these folks. After awhile they'd say, "Well I don't want a public defender. I want a real lawyer" and I'd think "Oh God. I've worked 3 years in that hell hole of law school for this and you want a real lawyer? I am a real lawyer." Isn't it lonely?

The "powers that be" don't love us. It is lonely. Sometimes our clients don't love us; our spouses don't understand us. There's a participant here from Florida whose father in North Carolina is a police officer. This participant told me, "He doesn't tell anybody I'm a public defender." We're all cut off, aren't we?

Because they're inarticulate, because they're fearful, because they don't have those skills, our clients sometimes can't tell us "Thanks I really appreciate what you did," so they leave us and we think "Why did I pour out all this blood? They didn't thank us, we didn't get anything."

Nobody really loves us. Except at times like this when it comes down to just us that's why I love doing these seminars. I get the energy to continue that fight. Monday at 11:30 a.m. in the South Carolina Supreme Courtroom I argue for a client. I'll be able to do it now because of the energy, love and respect we have shared among ourselves here. That is what has to enable us to carry on our fight.

It is lonely. We got everybody pointing fingers at us. So we may in fact have only ourselves to call on for support. The comraderie between us in this common struggle can sustain us, give us the strength to endure because Monday morning 5 or more of us will start a jury trial. From this lawyer to you all, by God, I'll be thinking about you. I hope you're thinking about me at 11:30 because I'm going to be lonely up there.

So we may only have ourselves for ourselves. That is why, as we split up going back to wherever we're from, we'll retain that comraderie. That trust and love is going to sustain us. And hopefully, continue to show us that what we do is noble; it has a purpose, and it is the highest calling of our profession. I'll remember you. Thank you.

*John has been practicing criminal law in South Carolina since 1975. From 1975 - 1978 he was a Richland County public defender; 1978 - 1980 he was Executive Director of the local Legal Aid office, and since 1980 he has practiced criminal law in the firm of Furr & Delgado, 1913 Marion Street, Columbus, South Carolina 29201, (803) 771-8774*

## 6TH DPA TRIAL PRACTICE INSTITUTE COMPLETED

DPA's 6th Trial Practice Institute was held November 29 - December 3, 1988 in Louisville. Over 50 part-time public defenders, private criminal defense lawyers and full-time public advocates from our regional offices, from the Louisville and Lexington Offices, and from around the state, were trained in trial skills. Also, 20 attorneys from Ohio, Massachusetts, Florida, West Virginia, New Hampshire and Tennessee were trained.

A faculty of 13 included **Bob Carran**, public defender administrator for Kenton County, **Frank Jewell**, chief trial attorney with Louisville Public Defender Office, **Linda Miller**, a Wyoming criminal defense attorney, **Mike Stout**, a New Mexico criminal defense attorney, **John Delgado**, a South Carolina criminal defense lawyer, **Mario Conte**, a San Diego Federal Public Defender, **Joe Guastaferro**, a Chicago actor and director, and public advocates from across the state. The out-of-state faculty are all National Criminal Defense College Faculty as are our own **Vince Aprile** and **Ernie Lewis.**

During the 4 days of training, the participants practiced each aspect of a criminal trial. Each exercise was preceded by a lecture on the topic and followed with a demonstration by a faculty member. Through the help of **Chris Weinman of Actors Theatre**, theatre apprentices played the role of witnesses.

Criminal defense lawyers are indeed liberty's last champion. Hopefully, armed with the best skills, knowledge and spirit, we will be up to our immense challenge. Thanks to those who made this training effort a success.
Ed Monahan, Director of Training

# NEED A DEFENSE LAWYER?

Jim Rogers with Northern Ky. Legal Aid and DPA have developed the following 1 page of information on public defender services. In the left hand column, we list our trial field offices and the Frankfort office addresses and phone numbers. Your local public defender system is welcome to copy this page and insert your information in the left hand column. If you'd like copies from DPA, contact us.


**Ky. Department of Public Advocacy**
1264 Louisville Road
Perimeter Park West
Frankfort, KY 40601
(502) 564-8006


## TRIAL OFFICES

**Hazard**
233 Birch St., Suite 3
Hazard, 41701
(606) 439-4509

**Hopkinsville**
P.O.Box 991
Hopkinsville, 42240
(502) 887-2527

**LaGrange**
300 North 1st St.
LaGrange, 40031
(502) 222-7712

**London**
P.O. Box 277
London, 40741
(606) 878-8042

**Madisonville**
8 Court St.
Madisonville, 42431
(502) 825-6559

**Morehead**
P.O. Box 1038
Rt. 32 South
Morehead, 40351
(606) 784-6418

**Northpoint Training Center**
P.O. Box 479
Burgin, 40310
(606) 236-9012
ext. 219

**Paducah**
400 Park Ave.
Paducah, 42001
(502) 444-8285

**Pikeville**
335 Second St
Pikeville, 41501
(606) 432-3176

**Richmond**
201 Water St.
Richmond, 40475
(606) 623-8413

**Somerset**
P.O. Box 672
Somerset, 42501
(606) 679-8323

**Stanton**
108 Marshall St.
P.O. Box 725
Stanton, 40380
(606) 663-2844

**NEED A DEFENSE LAWYER BUT CAN'T AFFORD ONE? MAYBE YOU HAVE THE RIGHT TO A PUBLIC DEFENDER.**

Under federal and state law, the court must give you a lawyer ("public defender") *if* you can't afford one and *if* you may be sentenced to jail.

**Who can have a public defender?**
There is no clear guideline. The general rule is that if you cannot pay for a lawyer in your case, the court will give you one. The court makes a separate decision with each person using an "Affidavit of Indigency." This is a written statement you give to the court describing your income, property, dependents and debts. The court clerk or pre-trial services should help you fill it out.

**Do I talk to the judge about needing a lawyer?**
Yes! Ask the judge the first time you are in court. Be ready to talk about your money problems in detail. If you can, take bills and income records and make a list of income and expenses showing why you can't afford a lawyer.

**Can I have a public defender if I own property? Posted bail? Own more than one car? Don't get state aid?**
Maybe. Those are factors against you, but if you can prove you can't afford a lawyer, the court should give you a public defender.

**Do I pay for my public defender?**
No, but you may have to pay for some of the court costs if you can afford it. A decision about payment should be made at each stage of the case by your judge. Your public defender may not charge you personally for his/her services. If you can't pay a fee you should not lose your lawyer.

**Does the court give you a lawyer only in criminal cases?**
No. When the state tries to take your children you may be entitled to a court appointed lawyer. When someone tries to put you in a mental institution the court should give you a lawyer if you are too poor to hire your own. Also, if you are under 18 and said to be truant, beyond your parents' control, or are before the juvenile court facing any kind of punishment, the court must give you a lawyer if you are too poor to hire one. There are other times too, so always ask!

**Can I go to jail for not paying a fine or court costs?**
Maybe, but you should always be given a fair chance to pay a fine. You shouldn't be jailed for not paying a fine or court costs unless you do not make a serious effort to pay. Costs should be waived, or not charged, if you are too poor to pay them and you tell the court.

**TIPS!**
Never miss a scheduled court appearance. If you are not at court, you can be tried anyway or you can be jailed for contempt of court. DO NOT talk about your case with anyone or agree to any search, test, or line-up without talking to your lawyer first. *You may choose not to have a lawyer. However, it is very risky to represent yourself at trial or enter a guilty plea without legal advice.*

# Drug rulings spawn debate

By ANGELA STRUCK
Staff Writer

A recent Oldham Circuit Court ruling has sparked a debate about whether state inmates can be convicted of a felony for possessing very small amounts of marijuana and, in some cases, whether they should be prosecuted at all.

Oldham Circuit Judge Dennis Fritz in May dismissed five cases in which inmates of the Kentucky State Reformatory near La Grange were accused of promoting dangerous contraband, saying that the amount of marijuana involved didn't constitute a usable quantity. Commonwealth's attorney Bruce Hamilton has appealed the five cases to the Kentucky Court of Appeals.

If Fritz's ruling is upheld, proponents say, the decision would lighten court caseloads and reduce prison overcrowding. They say prisoners caught with small amounts of contraband can be adequately punished within the prison system.

However, some corrections officials say the ruling threatens prison security and gives license to inmates to carry small amounts of the illegal drug.

The cases in question involve five inmates caught with less than one-10th of a gram of marijuana. That, the judge ruled, is not a usable amount, which he defined as enough to roll into a cigarette, light and inhale.

Fritz based his ruling on a decision he rendered last November in two similar cases involving reformatory inmates. After days of testimony — including that of prison officials, drug chemists and reformatory inmates — Fritz ruled that an amount of marijuana weighing less than one-10th of a gram is not a usable amount.

His ruling was in part based on the fact that state crime labs don't provide weights for under one-10th of a gram when they test the drug.

Assistant public advocate Bette Niemi has argued that if the amount of marijuana is not enough to be used in a normal way, it can't constitute possession and is not enough to endanger the safety or security of the institution.

Promoting dangerous contraband in a prison is a felony punishable by a sentence of one to five years.

If the defendants had been on the street, Niemi said, they would have been charged with possession of marijuana, a misdemeanor carrying a maximum sentence of 90 days or a fine of up to $250 or both.

But in his arguments against dismissing the cases, Hamilton said the Kentucky General Assembly has designated possession of marijuana in prison in any amount as dangerous contraband. It's not up to the courts to determine what amount qualifies for prosecution, he said; that's up to the legislature.

Al Parke, warden of the reformatory, said he supports the commonwealth's position.

"The No. 1 cause of problems between inmates is drugs," Parke said. And ruling that a certain amount could not be prosecuted as a felony offense would give inmates an open market for that amount, he said.

An inmate wouldn't have a certain amount of marijuana unless it was usable, he said, and if it's usable, it can be sold, and therefore causes debt between inmates. Debt, he said, causes violence.

If the Court of Appeals upholds Fritz's ruling, the prison would continue to punish inmates internally for possession of marijuana, Parke said.

However, he said, the threat of an outside sentence, which adds years to an inmate's prison time and is likely to result in parole deferment, is a greater deterrent, Parke said. Regardless of prison crowding, Parke said, inmates committing crimes in prison should be kept longer.

Vertner Taylor, commissioner of adult institutions for the state Corrections Cabinet, also agreed that any amount of marijuana is a threat.

If the ruling is upheld, "that would definitely cripple our abilities to control the security of an institution," Taylor said. "The only thing [prisoners] respect is when you increase the time" they have to serve.

But Niemi said that 150 to 200 indictments a year dealing with marijuana usually involve small amounts. Inmates are already punished within the prison system, she said, and bringing them to court for such small amounts often adds years to sentences and increases prison overcrowding.

Because the majority of prisoners can be convicted of being persistent felony offenders when convicted of promoting dangerous contraband, they can get 10 to 20 more years.

"The punishment ought to fit the crime," Niemi said.

Other prisons in the state don't prosecute contraband cases as rigorously, she said.

G. L. Ovey, commonwealth's attorney in Lyon County, where the Kentucky State Penitentiary near Eddyville is located, said his office only prosecutes cases referred by prison officials, and those cases have always involved a clearly usable amount of marijuana. He said a ruling by the Kentucky Court of Appeals would have no effect on practices in his district.

Barry Banister, penitentiary spokesman, said that while the institution considers any amount of marijuana dangerous, cases are evaluated individually. Officials haven't designated a certain amount for which they'll seek prosecution, he said, but they believe some cases can be dealt with effectively by the administration.

Steve Durham, a private defense attorney who contracts with the state as public advocate for Shelby County, agrees with Niemi. Durham said that in cases involving small amounts of marijuana the state could prosecute inmates for promoting simple contraband — an item defined as not threatening the security of the institution. The offense is a misdemeanor punishable by a maximum of 12 months in jail, $500 fine or both.

However, Taylor said a misdemeanor conviction does not have the force a felony does because it usually doesn't increase an inmate's time. Misdemeanors are usually served concurrently with any sentence, he said.

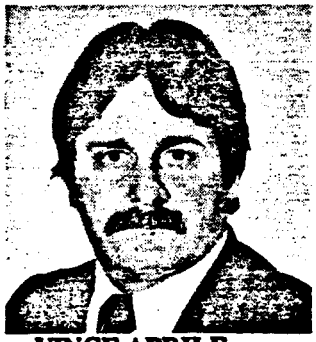
"We definitely want it kept a felony," he said.

Durham said small cases could be handled within the institution with punishments that offer enough deterrent to the offenders. He said that pursuing cases involving small amounts ties up lawyers and judges and takes time away from more important issues.

Niemi said she welcomed the appeal, saying the issue needs to be resolved by a higher court.

No court date has been set by the Court of Appeals.

*Courier Journal*, July 6, 1988



VINCE APRILE

# Federal Courts Study Committee

A Kentuckian has been selected by U.S. Supreme Court Chief Justice William H. Rehnquist to serve on the Federal Courts Study Committee. J. Vincent Aprile, II, general counsel for the Kentucky Department of Public Advocacy (DPA) in Frankfort, is part of the 15-member committee made up of a nationwide representation of the executive, legislative and judicial branches of government.

The Committee, during the next 15 months, will examine problems facing the Federal courts and develop a long-range plan for the future of the Federal Judiciary.

Vince Aprile, who has law degrees from both the University of Louisville Law School(1968) and George Washington University's National Law Center (1973), joined DPA in June, 1973. During his 15 year tenure with DPA, he has served as the director of the state appeals division, as director of professional development for the state-wide public defender program, and, for the last 7 years, as general counsel. Throughout that same period, Mr. Aprile has represented indigent persons charged with serious crimes at trial, on appeal, and in post-conviction actions in state and federal courts. In recent years, much of his representation of individual clients has been in the context of death penalty trials and appeals. He has argued 4 cases before the U. S. Supreme Court.

Mr. Aprile has served on the board of directors of both the National Legal Aid and Defender Association (1982-88) and the National Association of Criminal Defense Attorneys (1983-85). Since 1982, Mr. Aprile has been a member of the faculty of the National Criminal Defense College, which is now housed at Mercer Law School in Macon, Georgia. Mr. Aprile is an often requested speaker at continuing legal education programs, primarily for criminal defense lawyers, across the country. From 1975 to 1983, he was a lecturer at the U of L School of Law.

"All of us in the Department of Public Advocacy have long been aware of Vince's high professional standards and his dedication to improving the entire judicial system. It is very gratifying to see him recognized on a national level. We are very proud of this recognition. The Committee is very fortunate to have Vince as a member," said Paul F. Isaacs, Public Advocate of DPA.

"This is well-deserved recognition for Mr. Aprile's abilities and expertise in the area of judicial reform. This selection speaks highly of Mr. Aprile and the Department of Public Advocacy," said Public Protection and Regulation Cabinet Secretary Theodore T. Colley. DPA is one of the agencies of that Cabinet.

Among the issues to be studied by the Committee are alternative methods of dispute resolution, the structure and administration of the Federal court system, methods of resolving intracircuit and intercircuit conflicts in the court of appeals and the types of disputes resolved by the Federal courts.

Its findings will be submitted to the Judicial Conference of the U. S., the President, the U.S. Congress, the Conference of Chief Justices and the State Justice Institute.

## BARRETT RESIGNS

As of January 3rd, 1989, Jay Barrett began his duties with the New Hampshire Public Defender's office 1 Elm Street, Suite 203, Keene, N. H. 03431 (603) 357-4891. Jay's departure is a significant loss for DPA. Jay is the quintessential trial lawyer: a man of compassion, intelligence, and vigor. Not only is Jay a tremendous advocate, but he is also a good husband , a good father and a good friend.

Jay joined DPA on August 23, 1982, and, before the Stanton Office opened, he worked with us in the Somerset Office and touched the lives of all of us.

Jay Barrett represents what we all as Public Advocates should strive for -- excellence.

GEORGE SORNBERGER
Assistant Public Advocate
Somerset Office
(606) 679-8323

## HALSTEAD NEW NORTHPOINT DIRECTOR

John Halstead, Assistant Public Advocate, was appointed Director of the Northpoint office onDecember 14,1988 replacing Allison Connelly, who became chief of the post-conviction section.

# The retarded

## The criminal-justice system must consider this condition

The 61-year-old Newport, Ky., grandfather who raped his granddaughter when she was 8 years old deserves the life sentences he received. Every moment of his prison term should be hard time. No parole. No mercy.

But the mother who videotaped the horrifying sequences of rape for the grandfather's sick pleasure? That is another matter. She is mentally retarded, and as her abused child testified, "My grandpa made my mom do things we didn't want to do."

The mother, who must be nameless to protect the identity of her children, received two consecutive life sentences in a Clermont County Common Pleas Court the other day on charges of complicity to rape. The judge had no choice under Ohio law, once the jury decided that a threat of force was involved.

The child, now 11, testified in court that she feared her mother would spank her if she didn't do "what grandpa said." The child was brutally violated by her grandfather in both her mother's apartment near Amelia and her grandfather's home in Newport.

In the mother's defense, Dr. David Chiappone, a clinical psychologist, testified that the mother had the mental age of perhaps a 9- or 10-year-old. She had told him, he said, that she herself had been raped several times.

When her defense attorneys argued that she, too, is a victim, they were not wrong. But she is more than a victim of her father's perversion, she is also the victim of a criminal-justice system that fails to understand the meaning of "mentally retarded."

Trying such people as adults is a mockery. They are not adults who happen to be slow, a bit below the "average" intelligence level. They are people who lack the ability to make adult judgments about the nature and consequences of their acts.

Those mentally retarded citizens who have had the good fortune to have a caring family and friends can be guided into happy, productive lives. Those who have been treated bestially, like this mother, know no other way.

Tristate legislators must recognize this problem with legislation that will protect both the mentally retarded and the society they may threaten. Confinement will be necessary for some. Others, perhaps, could still be rescued. There must be a way to help these eternal children.

*Cincinnati Post*, **Editorial**

# WEST'S REVIEW

LINDA WEST

## KENTUCKY COURT OF APPEALS

### DIRECTED VERDICT MOTION JUDGMENT *N.O.V*

*Commonwealth v. Pevely*
35K.L.S. 14 at 3
(November 4, 1988)

At the close of the commonwealth's case the defense moved for a directed verdict. The motion was denied and the defense immediately announced closed without presenting any evidence. Following his conviction, the defendant requested a judgment *n.o.v.*, which was granted. The commonwealth appealed on the grounds that the defendant's right to a judgment *n.o.v.* was procedurally defaulted by the defense's failure to renew its motion for directed verdict at "the close of all the evidence" as required by RCr 10.24. The Court of Appeals rejected the commonwealth's argument as "absurd." The Court additionally held that the judgment *n.o.v.* was correctly granted since the proof did not support the charge of theft by failure to make required disposition.

### RCr 11.42 - MOTION TO VACATE DURING PENDENCY OF DIRECT APPEAL HEARSAY/OTHER CRIMES PRIOR INCONSISTENT STATEMENT

*Wilson v. Commonwealth*
35 K.L.S. 15 at 4
(November 18, 1983)

In this case the Court held that a trial court may consider the merits of a motion to vacate under RCr 11.42 during the pendency of a direct appeal of the movant's conviction. The Court noted that RCr 10.06(2) provides that "[a]fter a motion for a new trial is filed and if there is an appeal pending, either party may move the appellate court for a stay of the proceedings in the appellate court."

The Court also reviewed Wilson's direct appeal. It held that testimony by a fearful witness that he had heard on the streets that Wilson had set the fire was harmless hearsay since the witness also testified that he had heard Wilson state that he set the fire. Testimony that Wilson stated he set the fire to earn money for "dope deals" was admissible to show motive. Finally, it was permissible to augment a witness' testimony with his prior written statement where the witness at trial professed not to remember.

### RACIALLY DISCRIMINATORY USE OF PEREMPTORIES

*Hardy v. Commonwealth*
35 K.L.S. 15 at 6
(November 18, 1988)

Three black veniremen were called at Hardy's trial. One was struck by lot and one of the remaining two was struck by a prosecution peremptory. Hardy asked that the commonwealth be required to come forward with a racially neutral reason for striking half of the blacks remaining on the jury panel. This request was denied.

The Court of Appeals agreed with Hardy that under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) his request should have been granted. The Court found that the commonwealth's striking of half the blacks on the panel gave rise to a *prima facie* case of discrimination. Judge Howerton dissented.

### PROCEDURE - RETROACTIVITY OF STATUTES

*Dennison v. Commonwealth*
35 K.L.S. 15 at 12
(December 9, 1988)

Dennison contended that he should have received the benefit of retroactive application of KRS 640.010, governing the proof required to try a child as a youthful offender in circuit court. The Court however held that since the Act was procedural in nature, pursuant to KRS 446.110 the proceedings were to be governed by the law in effect at the time of the proceedings. Because Dennison had already been waived to circuit court to be tried as an adult as of the effective date of KRS 640.010, the former juvenile waiver law was controlling. In addition, KRS 640.010 does not provide for its retroactive application and, under KRS 446.080(3) "no statute shall be construed to be retroactive, unless expressly so declared."

### CRIMINAL CONTEMPT

*Hall v. Commonwealth*
35 K.L.S. 16 at __
(December 29, 1988)

In this case the Court reaffirmed its holding in *Payne v. Commonwealth*, Ky.App., 724 S.W.2d 231 (1987) that "a defendant in a criminal contempt proceeding be accorded the right to refuse to testify against himself, be advised of the charges, have a reasonable opportunity to respond to them, and be permitted to have assistance of counsel and the right to call witnesses.

### DUI - SECOND OFFENSE

*Asher v. Commonwealth*
35 K.L.S. 16 at __
(December 29, 1988)

Asher attempted to foreclose the prosecution from introducing evidence of his previous DUI conviction by stipulating that the jury instructions would encompass only the penalty for DUI second offense. The commonwealth rejected this arrangement and the trial court refused to require it. The Court of Appeals affirmed. The Court noted its holding in *Ratliff v. Commonwealth*, Ky.App., 719 S.W.2d 445 (1986) that it was not error to deny a defense motion for bifurcation of a DUI second offense trial since bifurcation is not required by statute. The Court of Appeals however "encouraged trial courts to attempt to negate the possible harm by admonishing the jury that the prior conviction be given no weight in their deliberations as to the defendant's guilt."

### ARSON - DEFINITION OF "BUILDINGS"

*Commonwealth v. Cross*
35 K.L.S. 16 at __
(December 29, 1988)

Cross contended that he could not be convicted of second degree arson for burning his own car in order to collect insurance proceeds because his car was not a "building." However, KRS 513.010 provides that "'building,' in addition to its ordinary meaning, specifically includes any...automobile...." The statute explicitly defeated Cross' argument.

### CR 11 SANCTION

*Clark Equipment Co. Inc. v. Bowman*
35 K.L.S. 15 at 10
(December 9, 1988)

In this case the defendants to a civil suit, after having obtained a jury verdict in their favor, sought the imposition of attorneys fees and sanctions against the plaintiffs pursuant to CR 11. Sanctions were sought on the grounds that the plaintiff's lawsuit had been meritless and would not have been filed had plaintiff's attorney conscientiously investigated it. The Court of Appeals affirmed the trial court's denial of the motion for sanctions. The Court held that Rule 11 does not authorize sanctions for simple negligence in filing a suit and that it would in any event be anomalous to grant Rule 11 sanctions where the plaintiff's suit had survived a motion for directed verdict. "To punish a litigant merely because a jury has found against him is to stifle the practice of law the same as denying him access to the court's." The Court additionally noted that "poorly conceived Rule 11 motions" might themselves become the subject of sanctions in the future.

## KENTUCKY SUPREME COURT

### VIOLENT OFFENDER PAROLE ELIGIBILITY

*Huff v. Commonwealth*
35 K.L.S. 14 at 12
(November 17, 1988)

In this case the Court upheld KRS 439.3401. The statute provides that a "violent offender," as defined in the statute, is eligible for parole after twelve years if he is sentenced to life, and is eligible for parole upon serving fifty percent of his sentence if he is sentenced to a term of years. This statutory scheme results in the anomaly that an offender sentenced to a thirty year term is eligible for parole only after fifteen years while an offender sentenced to life is eligible for parole in twelve years. The Court rejected Huff's argument that the statute denied due process and equal protection. Justices Leibson and Lambert dissented and would have held the statute unconstitutional.

### DISCOVERY CHARACTER EVIDENCE HEARSAY

*Barnett v. Commonwealth*
35 K.L.S. 15 at 14
(December 17, 1988)

The Court reversed Barnett's conviction of the murder of his wife on several grounds. Error first occurred when the commonwealth failed to notify the defense of the existence of a critical witness or to provide the defense with her recorded statement prior to trial. Although RCr 7.24 and 7.26 leave it to the trial judges' discretion whether such discovery is to be provided, the Supreme Court held that the discovery was required in Barnett's case under the commonwealth's agreement to allow "open file" discovery. The Court emphasized the weakness of the commonwealth's case in reaching this holding. Barnett's discovery rights under RCr 7.24 were also violated when a serologist testified that minute amounts of blood found on Barnett's hands were left after Barnett washed his hands to remove a larger quantity of blood. The serologist's reports which were provided the defense prior to trial omitted this "finding."

Error also occurred when a witness was permitted to testify that Barnett had an extramarital affair with her. "There is no question but that such evidence tends to 'smear' the defendant's character when character is not an issue." Finally, it was error to admit the victim's hearsay statements made out of the defendant's presence. Justices Stephenson, Vance, and Wintersheimer dissented.

### WANTON HOMICIDE AND SELF-PROTECTION DEFENSE

*Shannon v. Commonwealth*
35 K.L.S. 15 at 8
(December 15, 1988)

In this case, the Court reevaluated the line of cases including *Blake v. Commonwealth*, Ky., 607 S.W.2d 422 (1980), *Baker v. Commonwealth*, Ky., 677 S.W.2d 876 (1984), and *Gray v. Commonwealth*, Ky., 695 S.W.2d 860 (1985), which deal with the question of whether self-protection may be a defense to a wanton or reckless homicide. The difficulty arises from KRS 503.120 which provides that if "...the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary ...[the defense of self-protection ]is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be suffices to establish culpability." This statute seems to contemplate that self-protection (an intentional act) may serve to reduce a charge of intentional murder to reckless homicide. The *Shannon* Court held that indeed this is so, and that no self-contradiction is presented since, although the act of self-protection is intentional, the belief on which the act is based may have been wantonly or recklessly arrived at. Consequently, "an intentional killing precipitated by a wanton or reckless belief in the need to kill is less culpable than murder, and shall be clas-

sified for punishment as either Manslaughter II or Reckless Homicide..." The defendant's wanton belief that self-protection is necessary does not justify an instruction on wanton murder in the absence of proof of the additional element of "extreme indifference to human life." The Court's decision overrules *Baker* and *Gray, supra*, and reinstates the Court's earlier holding in *Blake, supra*. Justices Vance and Lambert dissented.

### DOUBLE JEOPARDY INDEPENDENT PHYSICAL EXAMINATION OF VICTIM

*Turner III v. Commonwealth*
35 K.L.S. 15 at 20
(December 15, 1988)

Turner was convicted of rape and first degree sexual abuse. The Court reversed the sexual abuse conviction as violative of double jeopardy: "[P]hysical contact was only incidental to the accomplishment of the rape, and therefore, the charge of sexual abuse merged into the charge of rape."

The Court also reversed Turner's rape conviction on the grounds that he was entitled to an independent physical examination of the child victim. A gynecologist called by the commonwealth testified to injuries to the four year old victim's vagina and opined that the injuries resulted from penile penetration. The Court held that the defense was entitled to an independent physical examination of the victim since this "might have disclosed evidence to completely refute the charge, and at the very least, would have been of enormous benefit to the appellant in the conduct of the trial." Chief Justice Stephens and Justice Leibson concurred and dissented in part inasmuch as they would have additionally reversed on the grounds that Turner was improperly excluded from a hearing into the victim's competency to testify. Justice Wintersheimer dissented.


### DOUBLE JEOPARDY

*Lockhart v. Nelson*
44 CrL 3031
(November 14, 1988)

Nelson was convicted as a persistent felon under Arkansas law and sentenced to an enhanced term. He subsequently obtained habeas corpus relief on the grounds that one of the prior convictions used to obtain his enhanced sentence had been pardoned at the time. Without this conviction the remaining prior convictions were insufficient to uphold the persistent felony adjudication. The state however, sought to retry Nelson as a persistent felon and to offer as evidence another prior conviction not relied on at the initial proceeding.

The majority held that Nelson's retrial did not amount to double jeopardy. The Court reasoned that a reversal based on the erroneous admission of evidence does not bar a retrial, even though without the evidence the prosecution's case is insufficient, so long as with the evidence the proof was sufficient. Such an error is mere trial error and *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) which bars retrial following a reversal for insufficient evidence is inapplicable. Justices Marshall, Brennan, and Blackmun dissented on the grounds that Arkansas had in fact failed to prove that Nelson was a persistent felon, and that to give the state a second opportunity to muster the necessary evidence would violate *Burks, supra*.

### PRESERVATION OF EVIDENCE FOR DEFENSE TESTING

*Arizona v. Youngblood*
44 CrL 3037
(November 29, 1988)

In this case, the police failed to properly preserve evidence consisting of semen samples. A prosecution expert's testing of the samples was inconclusive. The defense argued that police failure to preserve the evidence for defense testing, which might have exonerated the defendant, was a denial of due process. The Court disagreed, emphasizing that the exculpatory value of the lost evidence was speculative: "The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the prosecution irrelevant when the state fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the state to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." In the Court's view, unless bad faith is shown, the destruction of merely potentially exculpatory evidence does not violate due process. Justices Blackmun, Marshall, and Brennan dissented. Kentucky's appellate courts have held that the defense is entitled to the preservation of material evidence for defense testing pursuant to RCr 7.24. See *Smith v. Commonwealth*, Ky., 722 S.W.2d 892, 895 (1987) citing *Green v. Commonwealth*, Ky.App., 684 S.W.2d 13 (1984).

### RIGHT TO COUNSEL

*Penson v. Ohio*
44 CrL 3044
(November 19, 1988)

Penson's appointed appellate counsel filed a motion to withdraw with the Ohio Court of Appeals on the ground that he had reviewed the record and determined the appeal to be meritless. However, he did not file a brief outlining those points that might arguably support an appeal. Such a brief is required by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Ohio Court of Appeals erred when it granted the motion to withdraw in the absence of such a brief. The state appellate court again erred when, upon independently examining the record, it found "several arguable claims" but chose not to appoint other counsel for Penson. The state appellate court reasoned that Penson was not prejudiced by the lack of counsel since it had itself thoroughly examined the record and had the benefit of arguments advanced by a codefendant's counsel. The Supreme Court held that these facts presented a straightforward denial of counsel on appeal. As soon as the state appellate court determined that the appeal was not frivolous it was required to appoint counsel for Penson. Harmless error analysis had no application. Chief Justice Rehnquist dissented.

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# POST-CONVICTION

## WHEN WOMEN DO TIME

By Jim Bencivenga
Staff writer of The Christian Science Monitor

Bedford Hills, N.Y.

AN inmate at New York's Bedford Hills prison, a maximum-security facility for women, laughs when she thinks of how little people really know about women in prison. B. J. Close recalls a phone call from a couple who are friends of hers.

"He's a university professor," she says, "and he and his wife wanted to come and visit, take me out for dinner. They wanted me to just tell them where a nearby restaurant was and they'd be sure to get me back in on time." The visit took place inside the prison in the visitors' room.

The steel-bar doors in women's prisons clang just as loud as in men's. Concertina wire (a ribbon of looped, razor-blade steel) scrapes the tops of walls and fences and snakes along the ground at the outer perimeter of the facility. Electronic searches of visitors for weapons and contraband are just as thorough, just as impersonal. All movement is confined and controlled.

But differences are quickly apparent. Some are grounds for sex discrimination lawsuits, criminal-justice experts say. Others offer possibilities for change in the premises for which people are imprisoned.

• Overcrowding is not the problem for women that it is for men. Fewer than 28,000 women are doing hard time in a state or federal prison, compared with 542,500 men in similar institutions.

But fewer women behind bars means the cost of rehabilitation per inmate is greater for women than men. "You just don't have the economy of scale for women that you do for men," says Kay Monaco, a lawyer in Santa Fe, N.M., who is a former state deputy secretary for corrections. The result is fewer education programs and pre-release work opportunities for women, she says.

"Women get the short end of the stick when it comes to prison industries," Ms. Monaco says. "Lots of resources go into men's programs. There's an inequality for women." The qualities that should be rewarded with more opportunities result in fewer, because in the competition for scarce resources men win out each time, she says.

"They didn't come in with high job skills," says Christine J. Herlinger, executive director of the Guilford County Women's Residential/Day Center, an alternative setting for incarceration of women. If they spend 10 years in prison, where education programs are limited, where being a hairdresser is the model offered, what can they do when they leave? she asks.

The rate of increase in incarceration for women last year was 12.3 percent, more than double that for men. If this rate continues, a crisis in overcrowding will occur very quickly for women, and it will be difficult to manage, because state systems have far fewer options for shifting female populations among prisons.

• Incarceration plays itself out differently for women in terms of self-respect, says Michael A. Millemann, a professor of law at the University of Maryland. Men inmates preserve an element of dignity that does not exist in women's prisons. The guards know how potentially violent men are, and there are sections (especially in the residential cellblocks) where "treaties" are reached between inmate and guard. Not so in women's facilities, he says.

"The biggest problem by far," says Mr. Millemann, "is that our perception of women inmates is distorted in that we do not, and cannot, relate to the idea of a woman as inmate." Women's records suggest that more women offenders could be given alternative sentences or paroled, he says. But because society confuses them with male inmates, it is not willing to take what it considers risks in releasing them, he says.

This problem is endemic to modern corrections, says Anthony Travisono, executive director of the American Correction Association. "We equate punishment with putting someone someplace," he says. This mentality limits alternative forms of sentencing better suited to the offense and the offender.

Few women in prison ever dreamed they would be incarcerated. Many men, especially the 60 percent who are repeat offenders, knew they faced such a possibility. And although the majority of women do their crime with a man, they do their time without one. Rarely, if ever, are there any men in the visiting room. Sisters, mothers, daughters, aunts – but seldom men.

In most cases, locking up a woman means locking up a family. "When a woman does time, her entire family does time," says Bedford Hills inmate Karen Ely. Child custody reverts to the state except in the rare instance when a father is present.

This increases the potential ripple effect for children entering the criminal-justice cycle as offenders themselves, says Jo Ann Potter, an advocate for women's correctional issues at the Edna McConnell Clark Foundation in New York City.

It would take five to 10 years to verify, says Ms. Monaco, but she is convinced fewer kids would turn up in juvenile-justice court if fewer mothers were locked up.

• Violence is less likely in women's prisons.

"The violence isn't there, so you don't have the same atmosphere in women's prisons," Mr. Travisono says. Although there's always a hard-core element intimidating other women, the smaller number of women prisoners allows prison officials to isolate these predators and maintain a (physically) violence-free facility, he says.

"Idle men often lead to trouble in prisons. Women bring less attention to themselves, in that they do not deal with idleness in a violent way," says John Dilulio of Princeton University's Wilson School of Government.

"Women are not going to riot," says Susan Hallett, an inmate at Bedford Hills. "We'll just nest." It is common to see curtains in a cell, or find one inmate surprising another with a hot meal or a handcrafted gift.

In a perverse way this works against the best interests of women inmates, Ms. Potter says. Riots and court intervention have resulted in better rehabilitation programs for men. In contrast, the absence of violence in facilities for women has let state corrections departments be more responsive to male than to female inmates, she says.

Ironically, a little-known fact in the history of corrections is that many humanizing innovations originated in women's prisons at the turn of the century: These include education classes, libraries, art and music programs, work release, recreation, vocational training, and placement by age, offense, and length of sentence.

The high price tag on corrections (average annual cost of keeping an inmate in a state medium- or maximum-security prison is $17,500; in some industrialized states costs reach $30,000) is forcing many states to consider alternative modes of punishment and incarceration, Travisono says, adding they are much more likely to be adopted for women than for men, because women present less of a threat to others.

"One of the current catches of the criminal-justice system is that murderers of a spouse or lover are not a risk to you or me," says Monaco. "We are talking about a serious crime, certainly," she says, "but how many years is enough?" "Ten. 15. 25?" If the risk is near zero that a 45- to 55-year-old inmate would injure anyone else or commit another crime, punishment becomes the only reason, not safety at all, she says.

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# THE DEATH PENALTY

MARDI CRAWFORD

## NATIONAL STANDARDS FOR CAPITAL REPRESENTATION

With the paucity of resources available for the promotion of quality legal representation for poor people accused of crime, one may wonder why the National Legal Aid and Defender Association (NLADA) chose to use scarce resources to produce Standards for the Appointment and Performance of Counsel in Death Penalty Cases. A substantial document of over 100 pages, the Standards took 2 years to complete in their initial form, and were amended slightly at the recent NLADA Annual Conference.

The following history of the Standards explains why and how NLADA embarked on this project (with support from the Bar Information Program [BIP] of the American Bar Association [ABA] Standing Committee on Legal Aid and Indigent Defendants [SCLAID]). It also summarizes the Standards in their current form.

### NLADA

NLADA is a national association, whose membership includes programs (defender offices and assigned counsel programs as well as civil legal services offices) and individual attorneys (including capital defense counsel) who provide legal representation to poor people.

### CRISIS IN CAPITAL REPRESENTATION

NLADA has long been aware of problems with the quality of representation being provided to poor people accused of capital crimes. These problems were documented in the early 1980's, notably in Goodpaster, "The Trial for Life: Effective Representation of Counsel in Death Penalty Cases," 58 *N.Y.U. L. Rev.* 299 (1983). Among the most consistent and serious deficiencies in the performance of capital counsel has been the failure to properly prepare and present a defense case at the sentencing phase. Goodpaster, in 1983, gave detailed examples of cases in which attorneys failed to recognize that the sentencing phase is actually a separate trial, a trial at which a central issue is the meaning and value of the defendant's life. He pointed out that many courts, too, failed to acknowledge "the special nature of advocacy required at the penalty phase." *Id.* at 338.

Such thinking is incomprehensible in light of modern developments in the law and practice of death penalty defense. Two years after Goodpaster's article appeared, the 11th Circuit said "It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonable effective assistance of counsel by any objective standard of reasonableness." *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985).

### CRISIS REQUIRES STANDARDS

Goodpaster not only highlighted the crisis in representation, but also heightened the dialogue about the need for standards by listing several performance guidelines and standards for capital counsel and calling for judicial enforcement of them. He was not alone in observing that capital defendants were being sentenced to die because counsel did not conduct an adequate defense. Others began to call for articulation of enforceable standards.

### NLADA DEVELOPS STANDARDS

When members of the ABA Criminal Justice Section's Defense Services Committee met in conjunction with NLADA's 1985 Annual Conference, they described case after case in which capital defendants had been represented by lawyers who did no investigation for the guilt or sentencing phase, failed to file pretrial motions, referred to their own clients in demeaning terms (includ-

**Table 1**
**EXAMPLES**
**OF APPOINTED COUNSEL FEES**
**IN INDIGENT CAPITAL CASES**

| STATE | AVERAGE FEE | MAXIMUM FEE KNOWN |
|---|---|---|
| ALABAMA | $10-14,000 | |
| CALIFORNIA | $60,000 | $150,000 |
| CONNECTICUT | $39,850 | $39,850 |
| GEORGIA | ------ | $150,000 |
| MARYLAND | $20,000 | $ 44,000 |
| NEBRASKA | $10-20,000 | $20,000 |
| NEW JERSEY | $43,000 | $100,000 |
| OHIO | $25,000 | $25,000 |
| WASHINGTON | $40,000 | $60,000 |
| KENTUCKY | $2,000 | $2,5000 |

Several members volunteered to begin writing death penalty standards.

However, the need for a full-time commitment to this project soon became apparent, and NLADA committed itself to seeing the Standards through. In 1986, NLADA sought and obtained a grant from BIP to hire a summer intern to work on death penalty standards.

The intern collected examples of state and local standards for appointed counsel in death penalty and murder cases from across the country, researched statutes and caselaw, and drafted an outline and rough Standards.

Following the summer of 1986, the NLADA Standards were redrafted by staff and distributed for comment to the NLADA Defender Committee, BIP and SCLAID staff and other interested persons. The Standards then underwent an exhaustive review and redrafting process. Further comments were solicited and received from members of the Defender Committee and death penalty lawyers nationwide, and led to a number of changes. The most dramatic change was the expansion of the draft to include detailed performance standards, which comments from the field has deemed essential to any credible death penalty standards.

## POOR REPRESENTATION CONTINUES

While work proceeded in the NLADA Standards, concern about the poor quality of counsel in death penalty cases grew. Ronald Tabak, a lawyer with the New York firm of Skadden, Arps, Slate, Meagher & Flom, who through *pro bono* post conviction work had developed expertise in death penalty defense, helped publicize the problem. In late 1986 his article," The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty," appeared, XIV *N.Y.U. Rev. L. & Soc. Change* 797 (1986).

Like Goodpaster, Tabak gave many examples of poor representation afforded in capital cases. The thesis of the article was that capital punishment cannot be administered fairly and should be abolished, but Tabak noted that "The ineffectiveness of court-appointed attorneys in capital cases need not be inevitable, and its frequency may be diminished by taking a variety of measures." *Id.* at 801. Among the measures described were requirements that 2 attorneys be appointed in every capital case and that lead counsel have substantial experience.

## OHIO ADOPTS STANDARDS

At about the same time, Ohio was in the process of considering capital appointment standards. Some of the same people working on the Ohio standards were also active in the NLADA process. The Ohio standards, adopted in October, 1987 as state Supreme Court Rule 65, share many similarities with the NLADA Standards, but are much less extensive. Randall Dana, head of the Ohio Public Defender Commission, said recently that the Ohio standards are being enforced--appointments to represent poor persons on trial for their lives are going to attorneys who have criminal trial experience and get continuing legal education specifically on death penalty law. A commission created by the state Supreme Court is working to develop criteria to remove attorneys (for poor performance) from the appointment list. Dana spoke highly of the performance section of the NLADA Standards, and said that if he were rewriting the Ohio standards, he would add some element of evaluation of attorney performance to their experiential requirements for initial placement on the list, similar to that in NLADA's Standards.

## NLADA STANDARDS APPROVED IN 1987

At the 1987 NLADA Annual Conference, the NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases were approved by the Defender Committee and the Board of Directors. Copies were sent to public defenders and private counsel who had provided comments during the drafting process, and other interested persons. Copies were also sent to the chief justices of the 37 death penalty states with a letter from NLADA President James Neuhard urging adoption of the Standards as enforceable rules.

## KENTUCKY'S RESPONSE

Only one direct reply was received. Robert F. Stephens, Chief Justice of the Supreme Court of Kentucky, said that the Court "has, at this time, no interest in adopting the standards because the representation in capital cases at both the trial and appellate levels has been excellent."

## KENTUCKY'S REALITY

Despite the Chief Justice's confidence, public reports in the latter part of 1988 indicated that provision of quality representation to poor persons accused of capital crimes in Kentucky is a current problem. The Kenton County Circuit Court capital trial of Gregory Wilson has focused public attention on the low fees provided for capital representation in Kentucky when no Department of Public Advocacy office can handle the case. The DPA pays a maximum of $2500, one of the lowest fees in the nation for capital cases. (See Table 1)

When Wilson's initial lawyers withdrew, no other defense lawyers agreed to take the case (the low fees being a primary factor). The DPA, already overloaded with capital cases, refused to represent Wilson. Judge Raymond E. Lape, Jr. took the unusual step of posting a notice in the courthouse begging lawyers to "PLEASE HELP. DESPERATE." Two lawyers did respond -- one who had never tried a felony case and one who, in the words of a September 20, 1988 *Courier-Journal* (Louisville) editorial, "is a semi-retired and works without benefit of support staff, file cabinets or other resources commonly found in law offices." Wilson repeatedly complained about the lack of qualifications of his 2 attorneys. No evidence was presented at the mitigation phase, and he was sentenced to death on October 28,1988.

The questions of lawyer qualifications raised by the *Wilson* case are not unique to that case. The *Courier-Journal* reported on December 20, 1988 that "of the 30 people now on Kentucky's Death Row, 7 were represented by lawyers who have since been disbarred, left the profession before they could be disbarred or were suspended from the bar. One lawyer is now in a federal penitentiary." Yet the Chief Justice apparently sees no need to adopt the NLADA Standards, which require that counsel

have specific experiential qualifications and "have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases." Even though the Department provides superb representation to many capital clients, there are obviously many capital cases in Kentucky that lack adequate counsel.

## NEBRASKA EXPERIENCE

In Nebraska, standards relating to the appointment (but not performance) of death penalty counsel, based on NLADA's Standards, also got a cool reception from the state Supreme Court. After being reviewed by the Legal Services Committee of the State Bar Association, those standards were sent to the State Bar House of Delegates, which passed a resolution sending them to the state Supreme Court with a recommendation that they become Rules of the Court. In a one paragraph order in July, the Court declined to implement them, according to Lancaster County Public Defender (and then-chair of the NLADA Defender Committee) Dennis Keefe.

## ABA MOVING TO ADOPT STANDARDS

But there has been encouraging progress at the national level. The most significant response to the Standards has been from the ABA. In February, 1988, the Standards were submitted to SCLAID, and a working group within the ABA was established to review the Standards for possible approval by the House of Delegates.

The working group produced a document called Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which varied from the 1987 NLADA Standards only slightly. (At the 1988 NLADA Annual Conference, those changes were adopted by the NLADA Defender Committee and Board, although NLADA will continue to call its product Standards rather than Guidelines).

In February, 1989, SCLAID, in cosponsorship with the Litigation and Criminal Justice Sections, will be asking the ABA House of Delegates to adopt a resolution calling on state and local jurisdictions to implement the ABA Guidelines.

## NACDL ENDORSES STANDARDS

Also on the national level, the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL) unanimously endorsed the NLADA Standards at its mid-February, 1988 meeting.

## PHILADELPHIA ADOPTS STANDARDS

And at least one local jurisdiction outside Ohio has recognized the need for death penalty standards. The Board of Judges of the Philadelphia Court of Common Pleas adopted Standards for Appointment of Counsel on May 18, 1988, effective February 1, 1989, that include specific standards relating to capital counsel. The experiential requirements contained in those standards are very similar to NLADA's Standards, upon which the initial draft of the Philadelphia death penalty standards was based.

## CONTENT OF NLADA STANDARDS

What do the NLADA Standards cover? Briefly, they (specific Standards in parentheses) include the following requirements: that 2 qualified attorneys be appointed at every level (2.1); that a formal appointment plan be adopted in every death penalty jurisdiction and that an independent appointing authority make appointments (3.1) by rotating an established roster of qualified attorneys [with exceptions to rotation being allowed in the best interest of the client] (4.1); that specified experiential criteria for lead and co-counsel be required except where it is clearly demonstrated that an attorney with other types of extensive legal experience can provide competent representation (5.1 as amended 1988); that excessive workloads should preclude acceptance of a capital case (6.1); that attorneys who have inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case, should not receive additional appointments (7.1); that counsel should be provided with expert services necessary to prepare an adequate defense (8.1), training (9.1) and reasonable compensation (10.1); and that performance standards should be adopted (11.1).

The performance standards are detailed, including standards for: early investigation and preparation of a capital or potentially capital case (11.3, 11.4 as amended 1988); consideration of relevant pretrial motions (11.5.1); consideration and conduct of plea negotiations (11.6.1-11.6.4); familiarity with jury selection procedures including death qualification of jurors (11.7.2) and with capital sentencing procedures (11.8.1-11.8.6); and standards for post sentencing representation (11.9.1), including appeal (11.9.2), post conviction (11.9.3), clemency (11.9.4) and seeking stays of execution (11.9.5).

## PRACTICAL USE OF STANDARDS

It is NLADA's hope that the Standards are not only adopted by state and local courts, but can be used by attorneys during their representation of capital clients. Suggested uses for the Standards include: citation in motions for provision of expert witnesses, investigators, and other necessary support for preparation and presentation of the defense case; citation in motions for reasonable fees; citation in civil pleadings seeking reform of inadequate systems for the appointment of counsel in capital cases; and of course use as a model for proposed court rules, assigned counsel regulations, legislation, or other formal means of assuring quality representation by assigned capital counsel.

## STANDARDS AVAILABLE FROM NLADA

Copies of the Standards are available at a cost of $6.00 for members of NLADA, $12 for nonmembers. To order, or for further information about the Standards, contact me.

**MARDI CRAWFORD**
1625 K Street NW 8th Floor
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# IN THE TRENCHES

## DISTRICT COURT PRACTICE

GARY JOHNSON

### MUNDANE INHUMANITIES

About a month ago, I was at a seminar for criminal defense lawyers, and heard the latest war story from the crowd that practices in that exalted field of our profession, *anything that's not in District Court*. Seems this major criminal litigator had recently resigned from 10-years-plus as a public defender, and had become a private practitioner. He had taken a case for a defendant in District Court and, because he hadn't actually defended any misdemeanor cases, went to a session on an earlier date, without his client, to get the feel of the territory. The Bailiff called court to order, and the Judge immediately "*Boykinized*" the entire room. 30 or 40 people were sitting in the audience, witnesses, defendants, by-standers, attorneys, men, women and children, and all were told of their right to counsel, their right to a trial and to call witnesses on their behalf, and told how all these rights could be intelligently and knowingly waived. As the Judge called the docket, each defendant came forward, and was asked for their plea. If the response was "Guilty," the Judge asked "Did you hear the speech I just made to the rest of the audience, and do you understand it?" and if the answer was "Yes," the defendant signed a form acknowledging the waiver. Sentence was then imposed.

Word around the drinks at the seminar was that the major litigator was shocked and outraged. He was sure that most of those who pled guilty did so without any real and substantial understanding of the freedoms they had surrendered. He couldn't believe that this five-minute liturgy between a speaker and an audience was the practical result of *Boykin* and all that it stands for.

I was shocked that he was shocked. How can you work as a criminal defense lawyer for all those years and not be aware of the routinization and denigration of constitutional rights in District Court? 10-years-plus in District Courts had taught me that the only constitutional rights you or your client had there were those the Judge had the constitution to stomach that day. All to which the other big-timers at the seminar replied, "It's a damn shame you've become so insensitive to these petty injustices, Gary." And that shocked me again, because there was a truth in that, too.

Wholesale "*Boykinizing*" of the entire crowd in a District courtroom does happen, and when used alone, the information doesn't really counsel and advise the people who most need to understand.

Judge Michael Roney, Chief District Judge of Fayette County and trainer of incoming District Judges for AOC uses this wholesale *Boykinizing*, but also employs a screening procedure to find a need for additional, individualized inquiry. He generally considers the nature of the charge, the information on the arrest sheet, and his personal impression of whether the defendant appears to have any mental, physical, or other impediment to a full understanding, before deciding whether to conduct a more extensive colloquy. He uses follow-up questions in all but the "petty misdemeanors," and in all cases where jail or a probated sentence is a possibility. He does the follow-up questioning on the court recording device, and doesn't use the AOC Waiver of Rights form, although he designed it for them- specifically for the use of the judges and clerks in District Court.

Unfortunately, my experience in District Courts across the state leads me to think that Judge Roney's approach is the exception, and that the experience of my friend at the seminar is the rule. For defendants in many District Courts, due process has come to mean an image of fairness (the record of their conviction is "clean"), and the real guarantees of the right to an intelligent choice among knowing alternatives is denied. They have criminal convictions that appear constitutionally valid, and those convictions can be used against them, but surely they have been obtained without the defendant's knowing consent.

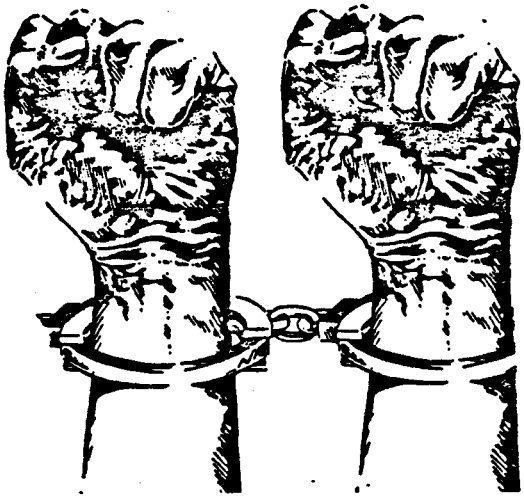
Even Judge Roney's court allows some depreciation of fundamental constitutional rights in District Court. When I asked him what contribution Public Advocates could make to assist him in the selection of those defendants that might warrant a more thorough examination before waiver, he replied that he wasn't sure if they could help at all, since the Public Advocates in his District Court didn't meet the defendants until they had been screened through the arraignment process. So much for early entry.

I know of a full-time public defender's office that practiced in one county where arraignments were routinely held only once each week. Those lawyers didn't make jail-runs and didn't insist on earlier arraignments because they reasoned that, by waiting a week, most defendants who were going to have to serve time would either get released or get a lesser sentence when the arraignment finally did happen. The lawyers said they always argued, "The defendant's already done a week in jail, Judge."

We tolerate these conditions in lower-court proceedings because of our self-serving attitudes. We belittle the importance of the work. Every young lawyer

I ever met dreamed of moving out of District Court as the first career move. You get more money as your practice moves away from District Court, either as a Public Advocate, a private practitioner, prosecutor or judge. It feeds our insatiable egos to work on the "important cases." Who among the District Court Judges would ever turn down, or has turned down, an appointment to the Circuit bench? These attitudes don't further the interests of our profession, or our clients.

District Court practice is not trivial stuff, in spite of our indifference. The Legislature has decided that the worst crimes you can commit are the ones that follow earlier convictions, and the law is after these folks with a passion. There's a myriad of offenses with progressively harsher sentences upon subsequent convictions. Consider the defendant in eastern Kentucky who was



charged with knowingly receiving some stolen property he'd purchased at a flea-market, and who had become a first-degree PFO defendant because, in addition to having pled guilty to a minor felony some years earlier, he had at a later time pled to a third-time No Operator's License following DUI conviction. Three of the underlying convictions against him had occurred in District Courts, and none of them had been obtained with an individualized *Boykin* waiver. Remember, under Half-Truth-In-Sentencing, all the misdemeanor guilty pleas we are routinely allowing are going to come to haunt us in the years to come when some of these defendants meet us in circuit courts. Any conviction record, even in District Court, is admissible, and it won't be particularly helpful in later parole and probation considerations, either.

These "small-time" inequities we allow in the District Courts are important because they affect not only long-time sojourners in the system, but because they affect so many one-timers. AOC reports that over 650,000 filings were made in District Courts in Kentucky in Fiscal Year 1987, while there were slightly more than 80,000 in all other courts combined. No matter how you read these stats, it's clear that most of our citizens gain their personal experience with our court system through the low end, in District Court. Nearly 180,000 non-traffic, criminal cases passed through those courts, and we are allowing the procedure to be less than it should be for a whole lot of people.

DPA statistics tell the same story, only stronger. Of the nearly 65,000 cases opened by DPA lawyers for poor people in FY 1987, only 9,600 were circuit court cases, and almost all of those began in a District Court.

It's mass production, at best. And because it's mass production, we lawyers and judges tend to denigrate it's importance to our citizens accused. The fact is that working in District Court requires a unique commitment, a commitment to advocate in the face of mundane inhumanity, a commitment to systems analysis for the benefit of the faceless and often nameless, a deep and abiding concern for those who are the least among us, and a commitment to breathe new life into a system of constitutional guarantees dead as platitudes, about to be overcome by numbers, neglect, and numbness.

My major-litigator friend from the seminar should be congratulated for his fresh perspective on District Court practices, but he ought to be asking, like the rest of us, how he missed it in the first place.

**GARY JOHNSON**
Assistant Public Advocate
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## MOTIONS COLLECTED, CATEGORIZED, LISTED

The Department of Public Advocacy has collected many motions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various motions, and a listing of each motion. Each motion is a copy of a defense motion filed in an actual Kentucky criminal case. They were updated in February, 1989.

### COPIES AVAILABLE

A copy of the categories and listing of motions is free to any pub lic defender or criminal defense lawyer in Kentucky. Copies of any of the motions are free to public defenders in Kentucky, whether full-time, part-time, contract, or conflict. Criminal defense advocates can obtain copies of any of the motions for the cost of copying and postage. Each DPA field office has an entire set of the motions.

### HOW TO OBTAIN COPIES

If you are interested in receiving an index of the categories of motions, a listing of the available motions, or copies of particular motions, contact:

**TEZETA LYNES**
DPA Librarian
1264 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
(502) 564-8006 Extension 119

***I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.***

***-James Madison, Speech at Virginia Convention, June 16, 1788.***

# 6TH CIRCUIT HIGHLIGHTS

DONNA BOYCE

## PLEA OFFERS AND EFFECTIVE ASSISTANCE OF COUNSEL

In *Turner v. Tennessee*, ___ F.2d ___; 17 S.C.R. 20, 18 (6th Cir. 1988), the Sixth Circuit Court of Appeals ruled that a new trial would not adequately remedy Turner's constitutional deprivation of his right to effective assistance of counsel which prevented him from considering the state's plea offer.

Turner and his two co-defendants were charged with kidnapping a married couple and murdering the husband. One co-defendant agreed to plead to a two year sentence for a reduced charge. The second co-defendant was tried and convicted of aggravated assault and was sentenced to 70 years in prison. Concerned about the trauma the surviving victim would suffer by testifying at another trial, the state offered Turner the same 2 year plea arrangement that the first co-defendant had accepted. Turner's counsel advised against the offer and the court's deadline for settlement expired. Turner was tried before a jury, convicted of felony murder and two counts of aggravated kidnapping, and sentenced to life imprisonment plus two 40 year terms.

The State agreed that the right to effective assistance of counsel extends to the decision to reject a plea offer and did not contend that Turner's counsel was competent. Instead, the State argued that Turner failed to show there was a reasonable probability that the outcome would have been different but for counsel's unprofessional errors. The Sixth Circuit disagreed. The Court found that Turner established a reasonable probability that, absent counsel's incompetence, he would have accepted the State's two year plea offer. The Court rejected as unusual and unfair the State's contention that Turner should be required to demonstrate a reasonable probability that the trial court would have accepted the plea arrangement.

The Court recognized that a new trial would not remedy the specific deprivation suffered by Turner. The Court stated that the only way to neutralize the constitutional deprivation suffered by Turner would seem to be to provide him with an opportunity to consider the State's two year plea offer with the effective assistance of counsel. However, the Court also recognized that requiring specific performance of the original plea offer might unnecessarily infringe on the competing interests of the State. To strike the proper balance, the Court held that the State could withdraw the two year plea offer only upon a showing that such a withdrawal was not the product of prosecutorial vindictiveness.

## *BIVENS* CLAIM

The Sixth Circuit Court of Appeals held that federal courts have jurisdictional authority to entertain a Bivens action brought by a federal prisoner, alleging violations of his right to substantive due process in *Cole v. Johnson*, ___ F.2d ___; 17 S.C.R. 23, 9; 44 CrL. 2183 (6th Cir. 1988). The Supreme Court, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), ruled that a victim of a 4th Amendment violation by federal officers acting under color of their authority may bring a federal suit for money damages against the officers even though no such remedy was specifically provided either by Congress or the 4th Amendment. Bivens actions have also been permitted against federal prison officials for a violation of a prisoner's 8th Amendment rights. *Carlson v. Green*, 446 U.S. 14 (1980).

Cole argued that his substantive due process rights were violated when in retaliation for his complaint about the food a federal prison official framed him by instructing another inmate to plant narcotics on him and by then filing false disciplinary charges. The Court found that there was evidence to support Cole's claim and that the alleged conduct constituted an egregious abuse of authority. Cole was subject to the possibility of disciplinary sanctions and a resulting loss of liberty as a result of the alleged actions. The Court concluded by noting that an inmate need not show a court the scars of torture in order to make out a 1983 claim.

## *GRIFFIN* VIOLATION

In *Lent v. Wells*, ___ F.2d ___, 17 S.C.R. 23, 17 (6th Cir. 1988), the Sixth Circuit found that Lent's privilege against self-incrimination was violated by the state's indirect reference to his failure to testify. The Court concluded that the prosecutor's closing argument remarks were manifestly intended to call attention to Lent's failure to testify or at least the remarks would have been so construed by the jury.

The Court rejected the State's contention that the remarks were intended to address defense counsel's unfulfilled promise in opening statement that contradictory evidence would be forthcoming, so that the jury would be able to distinguish properly between mere comments and actual evidence. The Court also rejected the State's claim that the remarks were not offensive because witnesses other than Lent could have provided contradictory evidence. The Court noted that only the complainant and Lent were present when the alleged rape occurred so only Lent could have rebutted the prosecutor's evidence.

The Court found that the prosecutor's five remarks were extensive, not iso-

lated, and that the evidence of guilt was not otherwise overwhelming. No curative instructions were given at the time of the defense's objections. While the trial judge instructed the jury at the end of the trial that a defendant need not testify or produce any evidence, and that Lent's silence was not to influence their decision, the judge failed to mention the prosecutor's improper comments. The Court further found that the State had not demonstrated that the error in this case was harmless beyond a reasonable doubt.

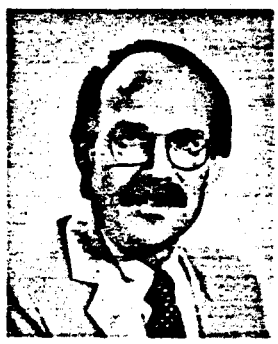
**DONNA L. BOYCE**
Assistant Public Advocate
Major Litigation Section
Frankfort, Kentucky 40601

***Prosecutor misconduct ...is rampant. Even if one looks only at the reported cases, the quantity and variety of alleged misconduct is staggering. And the reported cases constitute only a very small percentage of the actual instances of misconduct., since many defense lawyers are apt to shut their eyes to the misconduct of their brothers and sisters at bar.***

***- Alan M. Dershowitz***

# PLAIN VIEW

## SEARCH AND SEIZURE LAW



ERNIE LEWIS

The Kentucky Supreme Court is apparently still waiting to decide whether to adopt the good faith exception to the exclusionary rule established in the federal system in *United States v. Leon*, 468 U.S. 897 (1984). For a number of years, that case was virtually ignored by our appellate courts. Recently, several panels of the Court of Appeals have reached different results on the question, from outright adoption of the exception, to declining to consider its existence. One can expect 1989, five years after *Leon*, to find an answer to the question of whether Section 10 of the Kentucky Constitution can be violated so long as it is done by the police acting in good faith reliance upon a warrant issued by a neutral magistrate.

Prior to making that decision, the Court could do worse than to spend its time reading Abraham Goldstein's recent article entitled, "The Search Warrant, the Magistrate, and Judicial Review" at 62 *NY Law Review* 6 (December 1987). There Professor Goldstein reviews the results of a recent study on the warrant process by the National Center for State Courts. That study concluded that magistrates are not doing the kind of job that is called for by *Leon*. One must realize that only if the magistrate does a competent job of scrutinizing affidavits and issuing warrants can our privacy rights be protected in the context of the good faith exception. Unfortunately, "[t]oo many warrant applications were filled with "boilerplate" language and were not fitted in detail to the situation at hand. The 'oath or affirmation' requirement rarely played a significant role because of the large amount of hearsay or double hearsay in the affidavits. Proceedings before the magistrate generally lasted only two or three minutes and the magistrate rarely asked any questions to penetrate the boilerplated language or the hearsay in the warrant. Witnesses other than the police applicant were never called. And the police often engaged in magistrate shopping' for judges who would give only minimal scrutiny to the application." *Id.* at 1182-1183.

The present nature of the warrant process should cause the Court to reject the good faith exception in Kentucky. "[T]he proceeding, as we now know it, is so speedy and so accommodating that it is difficult to see why police are constrained by it or why judges should defer to it." *Id.* at 1215. It is questionable whether any Kentucky practitioner would disagree.

If the Court decides to begin the experiment with the good faith exception, Professor Goldstein wisely calls for changes in the warrant process. First, he calls for an expansion of the role of the magistrates who issue search and arrest warrants. Magistrates under his view are to be careful in making the probable cause determination, and aggressive in gathering and examining the facts. "[T]he role they must play under the fourth amendment requires that they probe the questions of fact and issues of law that are necessary to a finding of probable cause. If either the written affidavit or the oral examination of the affiant leaves the issue of probable cause in doubt, the logic of that role may sometime require them to call witnesses -- those mentioned in the affidavit, and others, including confidential informants. It may also require on occasion that they summon experts or that the police produce their files." *Id.* at 1194

Where the magistrate plays such an aggressive role in the probable cause determination, deference by the reviewing court is warranted, according to Professor Goldstein. Where, however, the magistrate is not a lawyer, or does little to examine the facts, the "reasons for deference do not exist," and the reviewing court then becomes the "principal supervisor of the warrant process." *Id.* at 1208.

Under both kinds of magistrates, "it would be essential to require that the proceedings before the magistrate be recorded or transcribed . . It could, and should, be made a precondition of invoking the good faith exception." *Id.* 1208-1209. Since 1972, FRCP 41(c) has required the recording of testimony at the hearing to obtain a warrant. No such requirement presently exists in Kentucky. Defense counsel is left, then, to probe unrecorded memories of police officers at the suppression hearing who often genuinely do not remember what occurred at the hearing and who frankly have a distinct incentive not to remember.

We need a new rule of criminal procedure requiring all *ex parte* warrant proceedings to be on the record. And certainly unless such a requirement is established, a good faith exception should not be seriously considered. If deference is to be given to magistrates, that deference must be reviewable.

One interesting facet of all this is whether the good faith exception, as proposed by Professor Goldstein, would actually constrict or expand our privacy rights. It all depends, of course, on the quality of the players. "If the police understand that the courts will defer more readily to warrants that emerge from a credible process, they will presumably present fuller affidavits to the magistrate and will probably seek informed review from prosecutors. The *ex parte* hearing will then prove to be a credible 'judicial' screen and there should be little occasion to use the exclusionary rule. *Leon* will have

provided a model for expanded use of the *ex parte* proceeding, not only for search warrants but for other pre-charge investigative measures as well. But if reviewing courts take the existence of a warrant alone as decisive, the police will surely adapt to the new facts and consider themselves liberated from the obligation to take the warrant requirement seriously. The Supreme Court's assumption that magistrates, and the judges who supervise them, can be relied on to play a major role in compelling compliance with constitutional requirements will have been proved wrong and *Leon* will be an experiment that failed."*Id* at 1217.

This is all complicated stuff. It is far more complex than accepting the good faith exception and thereupon putting on judicial blinders to all Fourth Amendment/Section 10 violations. The choice the Court makes hopefully will be one which takes into account this complexity and further fully preserves our precious privacy rights.

## Short View

***State of Washington v. Leach,*** Wash. 761 P.2d. 83 ( Wash. Ct. App., 1988). The police received a consent to search of a business office from the defendant's girlfriend, who worked some at the office. The defendant was present during the warrantless search. The Court held the search to be invalid due to the police officer's avoidance of the defendant and obtaining consent from one with lesser privacy rights in the premises.

***United States v. Luk***, 859 F.2d. 667 (9th Cir. 1988). A hotel maid erroneously believed the defendant had checked out of his room, and began to clean it. She discovered a suitcase, opened it, and found cocaine. A police officer visited the room, after which the defendant arrived and was arrested. The trial court's overruling of the motion to suppress was itself overruled by the 9th Circuit, holding that the search was warrantless, the defendant had a reasonable expectation of privacy in the room, and that the police should have known they could not rely upon private action to avoid the warrant requirement. *United States v. Jacobsen*, 466 U.S. 109 (1984) was distinguished based upon the fact that there the defendant's property was outside of his privacy interest, and that in this case a hotel room, the equivalent of a home, was entered without a warrant.

***People of New York v. Harris***, NY Ct.App. 44 Cr.L. 2124 (10/20/88). The New York Court of Appeals found a confession given after the defendant was arrested in his home without a warrant to have been illegally admitted in his trial. The Court rejected the argument that an arrest in violation of *Payton v. New York*, 444 U.S. 573 (1980) is different in its illegal nature from an arrest without probable cause, thereby requiring a similar disposition.

***State v. Shamblin***, Utah Ct. App. 44 Cr. L. 2139 (10/24/88). The Utah State Police have a written order requiring vehicles impounded to be inventoried in writing. Those policies did not address what to do about closed procedures.

In this case, that omission proved to be fatal to an inventory conducted by a Utah State trooper of a moving van seized following a DUI arrest. Because there were no such policies, the warrantless search of a shaving kit, and the marijuana found therein, had to be suppressed.

***Commonwealth v. Reese***, Pa. 549 A.2d. 909 ( Pa. Sup. Ct.. 1988). A warrant authorized the search of an apartment and a person there for cocaine and paraphenalia. While executing the warrant, the police searched a jacket belonging to Reese, an associate of the person named in the warrant who did not live at the apartment. Relying upon the car search case, *United States v. Ross*, 456 U.S. 798 (1982), the Pennsylvania Supreme Court held the search to be valid, saying "the police were justified in searching the defendant's jacket pursuant to the lawful search warrant since that property was part of the general content of the room and was a plausible repository for the object of the search."

***Coffman v. State***, Ark. 759 S.W. 2d. 573 (Ark. Ct. App.,1988). The utility of the roadblock as a law enforcement tool is demonstrated in this case, where the Court upholds the stopping of a motorist who turned his caR around at the sight of a roadblock. The motorist's action constituted a reasonable suspicion allowing for an investigative detention, after which probable cause to arrest developed.

***Buie v. State***, Md. 550 A.2d. 79 Md.Ct. App.1988). The police obtained arrest warrants for Buie and Allen for armed robbery. After placing Buie's home under surveillance, they received information that Buie was at home. While executing the search warrant, Buie was found and arrested emerging from the basement. The police then searched the basement briefly, finding a running suit that linked Buie to the armed robbery. The Maryland Court of Appeals held the trial judge erroneously overruled the motion to suppress the jumpsuit. The Court noted that when executing a search warrant, the police may only search the area within the immediate control of the arrestee, citing *Chimel v. California*, 395 U.S. 752 (1969). No exigencies were apparent which allowed for the kind of warrantless, protective sweep of Buie's house which occurred here.

***People v. Leichty***, Calif. Ct. App. 44 Cr.L. 2191 (11/1/88). A package was suspected by a private freight carrier to contain methamphetamine or PCP. He took the package to the police who field tested it; those tests were inconclusive. The next day the contents of the bottles (found in the package) were tested in a laboratory revealing methamphetamine. A warrant for the defendant's room was issued, revealing additional contraband. The trial court refused to suppress. The California Court of Appeals used *United States v. Jacobsen*, 466 U.S. 109 (1984) to hold the search by the air freight carrier to be private and thus not involving the Fourth amendment; further, the initial field test under *Jacobsen* violated no reasonable privacy expectation. However, the Court held that under *United States v. Mulder*, 808 F.2d 1346 (9th Cir. 1987) holding the bottles, submitting them to a lab, and testing their contents violated the defendant's Fourth Amendment privacy rights.

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# TRIAL TIPS

## The Practice of Recusals in Kentucky

### Recusal Affidavits Filed Pursuant to KRS 26A.020

### *A. GENERAL CONSIDERATIONS*

**1. KRS 26A.020**

KRS 26A.020 reads:

*(1) When, from any cause, a judge of any circuit or district court fails to attend, or being in attendance cannot pro perly preside in an action pending in the court, or if a vacancy occurs or exists in the office of circuit or district judge, the circuit clerk shall at once certify the facts to the chief justice who shall immediately designate a regular or retired justice or judge of the Court of Justice as special judge. If either party files with the circuit clerk his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the circuit clerk shall at once certify the facts to the chief justice who shall immediately review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge. Any special judge so selected shall have all the powers and responsibilities of a regular judge of the court.*
*(2) A retired justice or judge serving as a special judge shall be compensated as provided by KRS 21A.110.*

KRS 26A.020 is a legislative enactment which directs the Commonwealth's chief judicial officer to determine whether another judicial officer should be disqualified from presiding at a trial. The question of whether this statute is unconstitutional as being in violation of the separation of powers sections of our Constitution has never been judicially determined. However, I, and former Chief Justices since the statute's enactment in 1976, have tried to comply with the statute as a matter of comity.

KRS 26A.020 allows a party to file with the circuit clerk an affidavit that the presiding judge will not afford that party a fair and impartial trial, or will not impartially decide an application for a change of venue.

The statute requires that once the affidavit is filed with the circuit clerk, the clerk is required to certify the facts and send the affidavit to the Chief Justice.

Upon receipt of the affidavit, the Chief Justice must immediately review the facts sworn to in the affidavit, and determine whether the facts as set forth in the affidavit are sufficient, or are insufficient, to require the recusal of the sitting judge and the assignment of a special judge.

**2. KRS 26A.015**

It is important to note that a separate statute, KRS 26A.015, sets forth the grounds for the disqualification of a judge. The grounds stated in this statute are substantially the same as those set forth in our Rule, SCR 4.300 (3) (C). It is appropriate, when filing a motion with a judge which asks that judge to recuse himself or herself, to state grounds relied upon for seeking disqualification as set out in KRS 26A.015. If you believe, in good faith, that a judge should recuse himself or herself because of one or more of the grounds listed under KRS 26A.015, and you file a motion with the judge for the judge to disqualify based upon those grounds, and the judge overrules your motion, then you may also have your client, as a party, file an affidavit with the circuit clerk, who will send it to the Chief Justice pursuant to 26A.020.

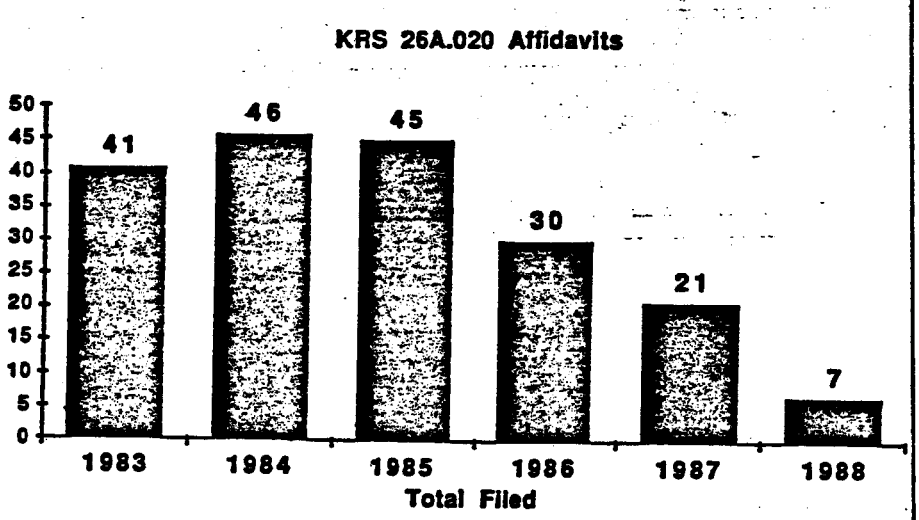
**Chief Justice Stephens**

Filing an affidavit under KRS 26A.020 is not an appeal to the Chief Justice of a trial judge's adverse ruling on a motion to disqualify. It is a separate and distinct avenue available to a party who does not think he or she will get a fair and impartial trial.

Under the predecessor statute to KRS 26A.020, which was KRS 23.230, the trial judge who was the subject of the motion to disqualify was the one who had to judge the sufficiency of the party's affidavit, and his decision as to the affidavit's sufficiency was reviewable on an appeal of the whole case. But if an affidavit is filed pursuant to KRS 26A.020, the Chief Justice rules on its sufficiency, and there is no appeal from, or reconsideration of, the Chief Justice's ruling on the affidavit provided for in the statute.

**3. DIFFERENCE IN STATUTES**

Please keep in mind that it is one thing when an attorney, moving under KRS 26A.015, files a motion with a judge




asking that judge to recuse himself or herself from a case. In such a case, the judge will rule on the motion of recusal, or disqualification.

But it is a completely separate matter, in my view, when a party files an affidavit with the circuit clerk under SCR 26A.020 swearing to facts which support the contention that the party will not receive a fair and impartial trial.

Under .015, the judge rules on a motion, usually signed by an attorney, to disqualify himself or herself; while under .020, the Chief Justice determines the sufficiency of an affidavit, signed by a party, to support the recusal of a judge. When you seek to disqualify, or recuse, a judge from proceeding further in a matter, you can either file a motion with the judge under .015, or your client can file an affidavit with the Chief Justice via the circuit clerk under .020, or you can do both. One does not have any direct connection with the other, except that they both involve a request to have another judge preside over the matter.

A motion, filed under KRS 26A.015 and ruled upon by the trial judge you are seeking to recuse, becomes a ruling in the case which, if designated and raised, can become an issue on appeal later on.

The question of whether a ruling by the Chief Justice on a KRS 26A.020 affidavit, which is adverse to a party who later appeals, can be raised as an error on appeal by the appellant--or whether the appellee can use such an adverse ruling to claim success on a disqualification issue that is raised by the appellant on appeal--these questions have, to my knowledge, never been judicially determined. In order not to have to recuse myself someday when these questions may arise, I will express no opinion on this matter!

## *B. PROCEDURE IN RULING ON KRS 26A.020 AFFIDAVITS*

### 1. REQUIREMENTS FOR A RULING

In order for the Chief Justice to rule on the sufficiency of an affidavit filed pursuant to KRS 26A.020, the statute must be strictly complied with, and the following requirements must be met:

a. there must be an affidavit with specific facts,
b. signed by a party (and not signed just by the party's attorney),
c. which is filed with the circuit clerk,
d. timely with the discovery of the facts,
e. the clerk must certify it, and
f. send it directly to the Chief Justice.

The failure of the party to sign the affidavit is fatal.

Once an affidavit, properly signed and certified, is received in my office, I read it, and decide whether the facts set forth in the affidavit are sufficient to recuse the judge and to assign a special judge.

One thing to remember about the statute is that it provides a means for seeking the recusal of a trial judge, not an appellate judge. I have never ruled on an affidavit seeking to recuse an appellate judge, simply because the wording of the statute makes it clear that it applies only to a "judge who will not afford [a party] a fair and impartial trial."

It is also important to remember that, under KRS 26A.020, the filing of an affidavit only is required; the filing of a motion with the affidavit is not necessary, but neither is it prohibited. An extensive record, however, should not be sent along with the affidavit.

In reaching a decision as to an affidavit's sufficiency, I rely upon two sources: (1) the grounds set forth for mandatory disqualification under KRS 26A.015, and (2) prior case law dealing with the subject of disqualification of judges. Of course, it is often necessary, even after researching the statute and prior case law, to exercise discretion in order to determine whether the facts stated in the affidavit are sufficient to recuse a judge.

### 2. SERVICE

The statute itself does not require that a copy of the affidavit be served either upon other parties to the action or upon the judge who is subject of the affidavit, nor does it require that notice of the affidavit's filing even be given to the judge. However, I read our Rule, CR 5, broadly enough to require service of copies of the affidavit upon all other parties to the action, and upon the judge.

Whether or not the affidavit has been served upon the judge by the party filing it, after I read the affidavit, I will often direct someone on my staff to call the judge for the purpose of informing the judge that an affidavit seeking his or her recusal has been filed, and to ask the judge not to proceed with the case until a ruling has been made on the sufficiency of the affidavit.

There have been instances in which the judge, after seeing a copy of a recusal affidavit which has been sent to me, wishes to formally respond to the affidavit. If a judge insists upon making such a formal response, I do not prohibit him from doing so, but I do not encourage a judge to make a response. I am aware that the cases decided prior to the enactment of the present statute say that a recusal affidavit must stand or fall

upon its own facts, and that nothing outside the affidavit can be considered in ruling on its sufficiency. Suffice it to say that in those cases, the trial judge himself was ruling on its sufficiency, and not the Chief Justice. Hopefully, now that there is an impartial third party looking at the affidavit, I find that a formal response from a judge who wishes to make one is appropriate.

Responses to the affidavit filed by other parties to the case, however, are not accepted, and if they are tendered, they are not considered.

### 3. AUTHORITY FOR PROCEDURE

The only published procedures that I follow in ruling on recusal affidavits filed pursuant to KRS 26A.020 are found in the statute itself. Other procedures not spelled out in the statute that are followed, such as calling the judge once an affidavit is received to inform him or her of its having been filed, or using the grounds set forth in KRS 26A.015 as a yardstick to determine an affidavit's sufficiency, have been developed by the Chief Justice since the enactment of the statute in 1976. The procedures followed have been found to work best for the prompt and just resolution of an affidavit's sufficiency, but the procedures are not published--they are not even written down--and exist only to expedite the process of promptly ruling on the sufficiency of the affidavits fairly.

Occasionally, a recusal affidavit will be filed with me, and before I have a chance to rule on its sufficiency, the trial judge will disqualify himself or herself from the case. In such instances, which do not occur very often, a ruling on the affidavit is passed as moot, and an order is entered so ruling.

## *C. NUMBER OF AFFIDAVITS FILED WITHIN LAST 5 YEARS*

### 1. TOTAL

From 1983 through 1987, our research shows that a total of 183 affidavits were ruled on by the Chief Justice, pursuant to KRS 26A.020, and there have been 10 affidavits ruled on so far in 1988, for a total to date of 193 affidavits over the past 5 1/2 years.

### 2. BY YEAR

a. 41 affidavits were ruled on in 1983;
b. 46 in 1984;
c. 45 in 1985;
d. 30 in 1986;
e. 21 in 1987; and
f. 10 so far in 1988.

### 3. BY CATEGORY

| Yr. | Civil | Criminal |
|---|---|---|
| 1983 | 24 | 17 |
| 1984 | 24 | 22 |
| 1985 | 28 | 17 |
| 1986 | 12 | 18 |
| 1987 | 14 | 7 |
| 1988 | 6 | 1 |

### 4. BREAKDOWN OF RULINGS

a) Civil

| Yr. | Suf. | Insuf. | Moot |
|---|---|---|---|
| 1983 | 3 | 21 | 0 |
| 1984 | 7 | 17 | 0 |
| 1985 | 4 | 24 | 0 |
| 1986 | 1 | 11 | 0 |
| 1987 | 1 | 13 | 0 |

b) Criminal

| Yr | Suf. | Insuf. | Moot |
|---|---|---|---|
| 1983 | 2 | 14 | 1 |
| 1984 | 3 | 17 | 2 |
| 1985 | 0 | 16 | 1 |
| 1986 | 0 | 18 | 0 |
| 1987 | 0 | 7 | 0 |

## *D. REASONS RECUSAL AFFIDAVITS WERE FOUND TO BE SUFFICIENT*

Recusal affidavits were found to be sufficient to assign a special judge in the following illustrative cases. It is by no means an exhaustive list, and is intended only to provide you with some examples. Remember that specific facts must be alleged in order for a recusal affidavit to have a chance of being found sufficient to recuse a judge:

### 1. CIVIL CASES

**a. Personal Bias.** A trial judge in a Termination of Parental Rights case was recused when the affidavit filed by the Cabinet for Human Resources set forth facts which showed that the trial judge, who was delaying trial on terminating the parental rights of the mother until a future grand jury considered charges of child sexual abuse against the father, made specific statements which showed a personal bias toward the Cabinet and the best interests of the child.

**b. Expressing an Opinion Concerning the Merits of the Proceedings.** A trial judge in a negligence case was recused when the affidavit filed by the defendants set forth facts which showed that the counsel for the plaintiffs in the negligence case had filed on behalf of the trial judge a brief in a mandamus action which arose during the pendency of the negligence case. This affidavit was filed and ruled upon before our Rule, CR 76.36, was amended to specifically allow the real party in interest to participate directly in an original action filed in an appellate court. Therefore, an affidavit based only upon this ground today would be insufficient to recuse the judge.

**c. Prejudice.** A trial judge in a divorce and custody matter was recused when the affidavit filed by the husband set forth concrete facts which showed that the judge had made specific *ex parte* statements to the wife telling her not to worry, that he would see to it that she would get the property and the children.

### 2. CRIMINAL CASES

**a. Expressing an Opinion.** A trial judge in a case in which the defendant was charged with the distribution of obscene matter was recused when the affidavit filed by the defendant set forth facts which showed that the judge had made public comments to the press about his views on obscenity during the pendency of the action. Because this may have been a possible violation of the Code of Judicial Conduct, it was thought that the judge should be recused.

**b. Expressing an Opinion.** A trial judge, who presided at an initial murder trial in which the defendant was convicted of murder and sentenced to death, was recused from presiding at the retrial of the defendant when the affidavit set forth facts which showed that the judge had filed a trial judge's report, mandated by KRS 532.075, in which he necessarily expressed his views con-

cerning the weight of the evidence, the merits of the proceedings, and the appropriateness of the death sentence in the first trial. After considering what the judge had written in the trial judge's report, it was felt that, in this particular death penalty case, a different trial judge should preside at the retrial.

**c. Questioned Impartiality.** A trial judge in a case in which the defendant was charged with being a persistent felony offender was recused when the defendant's affidavit showed that the judge, in a prior "life" as a public defender, had represented the defendant on the very charges and convictions being used to enhance the defendant's status to PFO. The affidavit also showed that the defendant had filed a civil suit against the judge during the trial the judge was a public defender. These facts were sufficient to recuse the judge in this case.

## *E. REASONS 26A.020 AFFIDAVITS HAVE BEEN FOUND INSUFFICIENT*

As you can tell from the statistics on recusal affidavits, many more are found to be of affidavits which have been found to be insufficient. Again, these are only examples, for illustrative purposes only:

### 1. CIVIL CASES

**a. Belief of Affiant.** A defendant's affidavit in a breach of contract case, in which the affiant was "led to believe" that the trial judge would not afford a fair hearing on the retrial which had been reversed on appeal, was found to be insufficient to recuse the judge. The phrase "led to believe" did not state facts upon which a sufficiency ruling could be grounded. This case illustrates a common failing of recusal affidavits, and that is, that merely stating that one believes one cannot get a fair trial is not nearly enough; there must be specific, definite facts detailed in the affidavit for sufficiency to be considered.

**b. Judge's Former Law Firm Representing Party.** A plaintiff's affidavit, in a class action in which negligence was alleged to have contributed to the flooding of a state capital, was found to be insufficient to recuse the judge when it set forth facts which showed that the trial judge had previously been a member of a law firm which had, as a client, the class action's defendant utility company. The affidavit was insufficient because the law firm was not representing this defendant utility company in this particular controversy involving the flood.

**c. Demeanor and Tone of Voice.** A plaintiff's affidavit, in a case involving a dispute over real estate, was found to be insufficient to recuse the judge when the affidavit alleged that the trial judge's "unwelcome demeanor, tone of voice, and unfriendly expression" made the litigant feel unwelcome in the courtroom. In the usual case, an unfriendly look or stern tone of voice will not sustain an affidavit to recuse a judge.

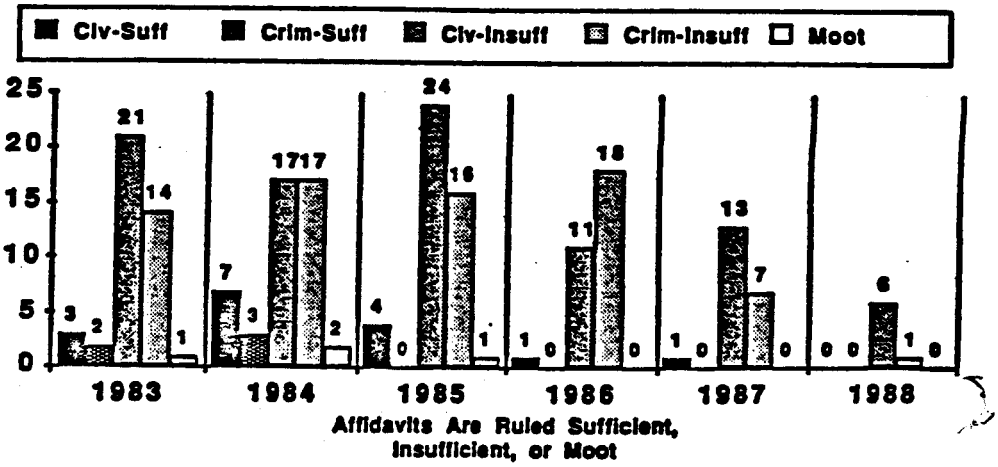
### 2. CRIMINAL CASES

**a. Political Affiliation.** A defendant's affidavit was found to be insufficient to recuse the trial judge when the facts showed that the trial judge and the father of defense counsel were currently involved in a hotly contested election for judge. Generally, political affiliation, or being in an election contest, is not a sufficient enough ground, in and of itself, upon which to adjudge a recusal affidavit sufficient to warrant assigning a special judge. By the way, it is also insufficient to recuse a judge if the affidavit states that the judge is a hunting or fishing buddy, or is in the Garden Club, with the lawyer for the other side!

**b. Possible Trial Error.** A defendant's affidavit was found to be insufficient to recuse the trial judge when the facts showed that the trial judge raised his bond without first holding a hearing. Even though this may (or may not) have been an error on the part of the trial judge, it is not a sufficient ground to recuse a judge under KRS 26A.020. Generally, trial error will not be sufficient to recuse a judge.

**c. Timeliness of Affidavit.** A defendant charged with murder, kidnapping, robbery, burglary, and theft filed a recusal affidavit 5 days before trial was scheduled to begin. The affidavit alleged, first, that the trial judge, as a former prosecutor, prosecuted the defendant for an unrelated crime some 4 years previously, and second, that the judge's secretary was the sister-in-law of the victim of the crimes. This is a close case. The affidavit was found to be insufficient because the defendant knew both of these facts at his arraignment before the same trial judge, which occurred several months prior to the affidavit being filed. The defendant should have filed his affidavit as soon as he knew of the facts supporting his affidavit, and because he did not, he waived his right to raise those grounds in a KRS 26A.020 affidavit. See, *Salisbury v. Commonwealth*, Ky.App., 556 S.W.2d 922 (1977).

**Rulings on KRS 26A.020 Affidavits**



It is important to file a recusal affidavit as soon as you discover the facts used to ground the affidavit. It is also important to state in an affidavit that is being filed near to the time of trial because you have just learned of the facts that the facts used to ground the affidavit have just been discovered. You have a duty to file a recusal affidavit under KRS 26A.020 timely.

## *F. CRITERIA USED TO DETERMINE AN AFFIDAVIT'S SUFFICIENCY*

### 1. KRS 26A.015

Even though KRS 26A.015 sets out when a judge should disqualify himself or herself, and is separate and apart from the requirements of a recusal affidavit filed pursuant to KRS 26A.020, I find that it serves as an ideal guide in determining the sufficiency of recusal affidavits. If facts in a recusal affidavit specifically show any of the following, the affidavit will generally be sufficient to recuse the trial judge:

a.personal bias or prejudice concerning a party;
b.personal knowledge of disputed evidentiary facts concerning the proceedings;
c.expressing an opinion concerning the merits of the proceedings;
d.serving as a lawyer in the matter in controversy;
e.rendering a legal opinion as a lawyer in the matter in controversy;
f.practicing law with a lawyer who served as a lawyer in the matter in controversy;
g.serving as a material witness concerning the matter in controversy;
h.practicing law with a lawyer, or the judge's commissioner, either of whom served as a material witness concerning the matter in controversy;
i.where the judge, or the judge's spouse or minor child, has a pecuniary or proprietary interest in the subject matter in controversy;
j.where the judge, or judge's spouse or minor child, has a pecuniary or proprietary interest in a party to the proceeding;
k.where the judge, the judge's spouse, or a relative within the third degree relationship (first cousins) to either of them, or the relative's spouse: (1)is a party, or an officer, director, or trustee of a party; or (2)is acting as a lawyer in the proceeding and the disqualification is not waived by stipulation of counsel in the proceeding; or (3)is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (4)is to the knowledge of the judge likely to be a material witness in the proceedings; and finally,
l.where the judge has knowledge of any other circumstances in which his impartiality might reasonable be questioned.

Any of these facts that can be shown in the affidavit to exist will be sufficient grounds for recusal of the trial judge. I cannot overemphasize, however, how important it is to, first, be specific in setting forth the facts, and be timely in having your party file the affidavit. Remember, the judge must be shown to be partial to a party, and not to the party's attorney.

### 2. PRIOR CASE LAW

Because there have been no cases that I have been able to find which deal with rulings under KRS 26A.020 as enacted in 1976, it is necessary to use the cases decided under the prior statute.

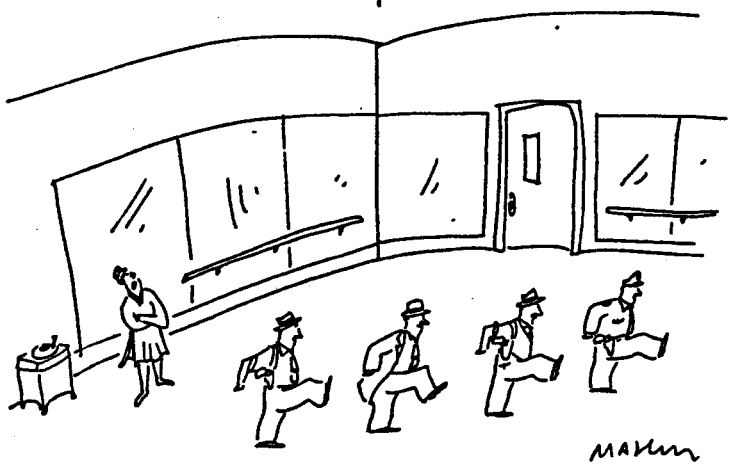
The annotations which follow the statute are a guide to what will, and what will not, be sufficient to recuse a trial judge. Though I do not feel bound by all of these cases--because most of them were decided on the basis of the trial judge himself or herself ruling on an affidavit's sufficiency, and not the Chief Justice ruling on an affidavit's sufficiency--I do use the cases to determine general rules of thumb. And you should, too.

## *G. Conclusion*

Not all of the issues connected with recusal affidavits filed under 26A.020 have even been raised, much less addressed. It is a special statutory procedure to prevent injustice from occurring because of a biased trial judge, or because of one who could profit by his own decision. However, a party's mere belief in bias is not enough; the belief must be supported with facts which show the bias.

**CHIEF JUSTICE ROBERT F. STEPHENS**

*Chief Justice Stephens was an Assistant Fayette County Attorney, Fayette County Judge Executive. He was the Kentucky Attorney General from 1975 until 1979. Justice Stephens was appointed by Governor Carroll to the Kentucky Supreme Court in December, 1979, and has been its Chief Justice since 1982.*




"ONE, TWO, THREE - KICK. ONE, TWO, THREE - KICK."

**DRAWING BY MICHAEL MASLIN**

# CRIMINAL APPELLATE PRACTICE BEFORE THE 6TH CIRCUIT

*In preparation of this Article, the authors have contacted all of the offices of the Court and all of its active and senior judges for information about the Court and common problems that arise during criminal appeals. The generous responses of the judges and the employees are the basis for this Article.*

## I. STRUCTURE OF THE COURT

### A. Office of the Clerk

One of the most important units of the Court is the Office of the Clerk, now headed by Leonard Green. The Clerk's Office now processes nearly 4,000 newly-filed cases each year. It employs 49 employees, divided into two sections, an Administrative Section and a Case-Processing Section.

Once you have filed your Notice of Appeal in district court and your case has been docketed in the Sixth Circuit Clerk's Office, you will receive from the Clerk a packet of very important documents. Included in this packet will be a very well-prepared *Sixth Circuit Practice Guide*. Before you do anything else, you should read this document at least once and maybe more. This will give you the greatest education that you could possibly receive on appellate practice in the Sixth Circuit. This is an absolute must.

If a Kentucky defense attorney has occasion to contact the Office of the Clerk, it will most likely be the Case-Processing Section that he or she will contact. The Case-Processing Section is organized into three, separated "teams." Each team handles appeals from a particular state or states within the Circuit. Each team also has its own supervisor. At present, Team Three handles appeals from Tennessee and Kentucky[1] Yvonne Henderson is the Supervisor of Team Three. Yvonne has been extremely friendly and very helpful in her responses to inquiries by the authors of this Article. Her comments and insights on Sixth Circuit practice by Kentucky attorneys are summarized below.

On the whole, Kentucky's criminal and civil attorneys should be very pleased with the impression they have left at the Clerk's Office. Kentucky attorneys appear to create few problems for the clerks. To paraphrase Ms. Henderson, Kentucky attorneys are genuinely friendly and seem to earnestly attempt to comply with the Rules, federal and local. The problem, however, is that Kentucky attorneys, like their brethren in Michigan, Ohio and Tennessee, do not sufficiently read the case letters and informational material sent to them by the Office of the Clerk. Nor do they sufficiently consult the *Sixth Circuit Practice Guide* in preparing their appeals. This leads to problems, particularly with the index to the joint appendix, which Yvonne observes is frequently over-complicated by attorneys. It appears that the solution in this instance is to carefully read the case materials sent from the Office of the Clerk and consult the Guide before acting.

Another problem is motions for extension of time in which to file briefs on appeal. These motions have apparently become a growing problem for the Court. Indeed, so many have been filed that the Administrative Section of the Clerk's Office is sometimes having difficulty accumulating enough perfected appeals to set for oral argument. The result of this growing problem appears to be a new, stricter policy regarding

FRANK E. HADDAD, JR.

extension of time. No more will routine extensions be repeatedly granted. Under the new policy, as discussed by Ms. Henderson, the Court will routinely grant only one extension of time for 14 days in which to file a brief. After this extension is granted, no more extensions of time will be granted, absent unusual circumstances. Failure to file a timely brief after receiving an extension of time may result in dismissal!

Finally, Ms. Henderson urges any attorney that is confused about the proper way to comply with the local rules to call the Office of the Clerk. These calls are welcomes, and they save all parties concerned a substantial amount of time. The clerks are glad to answer any questions you might have about a brief or joint appendix.[2]

### B. Office of the Staff Attorneys

In 1972, the Court created a central legal staff, known as the Office of the Staff Attorneys. Fifteen attorneys are presently employed in the Office, including a Senior Staff Attorney, Kenneth A. Howe, Jr., and a Supervising Staff Attorney, Michael Cassady. These attorneys routinely screen all cases filed with the Court, to determine those cases suitable for summary disposition pursuant to Rule 9 of the Rules of the 6th Circuit. Included among

these cases are prisoners' civil rights suits, habeas corpus petitions filed by state prisoners and federal prisoners occasionally, administrative appeals from various federal agencies. After the cases have been selected, they are assigned to individual staff attorneys, who will review the record, research the applicable law and recommend a suggested disposition for the Court.

In the 16 years that the Office of the Staff Attorneys has been inexistence, the Court has come to increasingly rely upon the efforts of these attorneys. In the year that the Office was created, 1972, the 10 attorneys then employed by the Office disposed of some 130 cases. Sixteen years later, in 1988, the Office of the staff Attorneys disposed of 840[3] such cases. In addition to this workload, the staff attorneys also routinely scan cases for jurisdictional defects and handle motions for appointment of counsel. The Office of the Staff attorneys now has a permanent task force on the new federal sentencing reforms, as well.

### C. Office of the Circuit Executive

Another recent position in the Circuit is the Office of the Circuit Executive (OCE). Created in 1976, the OCE serves as an administrative-support staff for the Court. The duties of the Circuit Executive, Jim Higgins, and his assistants, Tom D'Alessandro and Kay Lockett, are to advise and assist the Chief Judge on legislation and judicial conference matters affecting the courts, and to process criminal justice vouchers seeking payment in excess of statutory limits under the Criminal Justice Act (CJA), 18 U.S.C. Sec. 3006A(3).[4]

Ordinarily, a Ky. defense attorney would have little contact with the OCE , except in the area of excess compensation vouchers. When vouchers are submitted in excess of the guidelines of the CJA, the OCE will screen the vouchers for mathematical accuracy and compliance. If there are math errors, or items are claimed in violation of the guidelines, a recommendation for an appropriate adjustment will be made to the Chief Judge of the Circuit by the Circuit Executive. The most common problems that Jim Higgins encounters in this area involve a misunderstanding of the application of the guidelines. Service of the process fees, witness fees and travel costs of fact witnesses for the defense are not payable out of CJA funds, but are governed by Rule 17 of the FRCP and 28 U.S.C. SEC. 1825.

Law student research and computer-assisted legal research are occasionally a problem area. The amounts paid to law students and for computer-assisted legal research may be claimed as expense items by appointed counsel. These costs, however, may not exceed the amount that would have been approved as attorney compensation for time spent doing the research manually.

A final and very important problem is the failure of attorneys to submit a supporting statement to the district court, concerning the nature of the case and services rendered. As Jim Higgins explains, it is in the attorney's best interest to submit such a statement, whether or not the district judge requires it. The Chief Judge of the Circuit will not be nearly so familiar with the case as the trial judge. It would be very helpful to the Circuit Executive's Office if attorneys submitting excess vouchers would include a statement, containing a description of the offense charged, the number and variety of counts, the number of defendants, whether the case went to trial and a description of any special circumstances or factors involved relating to the various categories of out-of-court services.

### D. Library

On the 3rd floor of the Courthouse is the Law Library of the 6th Circuit. Headed by Law Librarian, Kathy Welker, and Deputy Librarian, Pam Schaffner, the Library is an important source of research information for the judges, their staffs and attorneys admitted to practice in the 6th Circuit. At present, the Library contains approximately 60,000 volumes, maintained by a support staff of 3 technicians. The Library is open daily from 8:00 a.m. to 5:00 p.m. for attorneys needing to do legal research. As of this year, Lexis and Westlaw computer-assisted legal research are available to attorneys who have their own password number. The Library also now has available a computerized index of all recent published and unpublished 6th Circuit opinions. This index is presently organized by plaintiff or defendant name, docket # or date of decision. Intercom paging for attorneys is also available in the Library by calling 1-513-684-6138.

## II. APPELLATE ADVOCACY BEFORE THE 6TH CIRCUIT

"What are the judges thinking?" -- Every criminal defense attorney at one time or another has asked himself this question. Unfortunately, there is no easy answer. Judicial demeanor demands a level of Stoicism that even the most polished poker player would be proud of. Fortunately for the Kentucky defense bar, the judges of the 6th Circuit have graciously and generously consented to set aside a portion of this Stoicism and favor us with their views of criminal appellate practice in their Court. This section of the Article discusses those common concerns.

In the view of Judge Albert J. Engel, the criminal appellate advocate has 3 main goals: to get the attention of the judges, to hold the attention of the judges and to persuade them that your view is the correct view. This is by no means an easy task. The average Sixth Circuit judge will work between 2,600 and 2,800 hours per year.[5] He or she will read approximately 7,000 pages in preparation for a week of oral argument, during which time he will hear 32 cases. Understandably, 6th Circuit judges are extremely jealous of their time, any unnecessary argument, written or oral, which wastes that precious time, will be resented. The criminal defense attorney's goal in this regard is to interest the judges enough to get past summary disposition without irritating the judges with unnecessary arguments.

A major concern voiced by every responding judge was the record. The most common complaint of the judges was that attorneys do not adequately know the record on appeal when they appear before the Court. A thorough knowledge of the record is, therefore, an absolute essential for success on appeal. Furthermore, it is no excuse that you did not try the case below. According to Judge Engel:

*You will receive little sympathy and, in fact, probably a great deal of scorn if you open your remarks with the apologetic comment that after all, you did not try the case. I can think of no quicker way to turn off a judge on appeal.*[6]

In this regard, the lesson is clear; a thorough knowledge of the record, with ample citation in the statement of facts, is absolutely indispensable! Every responding judge agreed on this point.

Another common problem mentioned by the judges was the inadequacy of the joint appendix.[7] Many times the joint appendix provided by counsel is both poorly organized and inadequately copied. It should be remembered that the joint appendix is the main document that the Court relies on to understand the facts of your case. A joint appendix that is incomprehensible can and has resulted in dismissal.[8] When you designate and compile the joint appendix, try and take the perspective of the appellate judge and ask yourself what you would need to review in the appendix to decide the outcome of the appeal. Too often, attorneys will include only isolated portions of a key witness' testimony, omitting the rest from the appendix. This makes the appendix disjointed and is frustrating for judges who will be reading the testimony of one witness, only to turn the page and be confronted with the testimony of another, often unidentified, witness.[9] Also, if you are faced with an illegible document in the appendix, you have two alternatives. First, according to Chief Judge Engel, you can simply mark the document "Best Obtainable Copy," so that the judges know that you are aware of the deficiency, but were unable to correct it. The better alternative, if possible, is to have opposing counsel review the document with you and enter an agreed statement of its contents under Fed.R.App.P. 10(d) or (e).

### A. The Brief on Appeal

The most critical element of any appeal, criminal or civil, is the brief on appeal. This is the document in which the criminal defense attorney makes his first impression. As with all first impressions, this initial impression will have a lasting influence on the Court and the way that it treats the appellant's appeal. Before discussing each section of the brief in detail, there are several general points that should be kept in mind about the appellate brief. First, and most important, a brief should be brief. Make your point and stop.[10] Disorganized or lengthy briefs inevitably raise the ire of the bench.[11] It is also important to avoid being overly emotional in the description of the facts or the argument. Never demean an opposing counsel or the district court. The goal of the brief is to use reasoning and logic in an organized fashion to persuade the Court to adopt your view. Anything that gets in the way of this goal is an impediment.

Under Federal Rule of Appellate Procedure 28, the brief on appeal is required to include a statement of the issues.[12] Do not attempt to slant the statement of the issues or to overburden it with extended reference to the facts. The statement of the issues should be a neutral and short portion of the brief. If it is too slanted or too verbose, the Judge may not understand the issue until after he has read the arguments. At this point, much of the impact of the argument has been lost.[13]

The key requirement for a successful statement of the facts is accuracy. Never, never, mislead the Court. Attorneys who misrepresent the facts will find themselves facing a very angry Court.[14] It is equally as important to acknowledge the "bad" facts that bear against your position. Unstated adverse facts will not simply go away. Usually, they turn up at oral argument when they are least desired. When stating the facts, also be certain that there are amply citations to the record. Nothing is more frustrating for a Judge, or his or her clerks, than to have to search through an extensive record to locate the origin of an undocumented statement of fact. If the statement of facts is accurate and thoroughly document, it may be the most persuasive portion of your brief on appeal. Finally, you can rest assured that in the Sixth Circuit, all of the judges have read your brief before oral argument and are familiar with the facts.[15]

The argument section of the brief is an area that drew extended commentary by the judges. In their view, one of the most reoccurring problems is that defense attorneys will all too often "shotgun" a criminal appeal.[16] This approach to appellate advocacy angers the already overburdened Court, and will do little to win an appeal that is not otherwise winable. To quote Judge Pierce Lively:

*The most common mistake I observe on the part of criminal practitioners is that they attempt to throw everything, including the kitchen sink, at us. As you well know, the most effective appellate strategy is to find the strongest single point in your favor and hammer away on it, knowing that the judges will also consider other issues having merit, but of less clear potential for reversal.*[17]

If you do have the fortune to have such a strong issue, make sure that you include it at the very outset of your brief. The judges, like all readers, are the most receptive at the outset. Hiding an important issue in the middle of a lengthy brief is the surest way to guarantee that its impact will be greatly diminished.[18] In sum, the moral of the story on brief work in the Sixth Circuit is lead with your strongest shot; say what you have to say and stop; do not appeal to emotionalism; and, never attempt to hide the "bad" facts from the Court.

Another problem area for the Court appears to be the misuse of citations.[19] Attorneys, both criminal and civil, simply do not make the best use of cited authority. For example, too many attorneys string-cite cases. This practice only diminishes the impact of the few, truly critical cases that are usually found.[20] It also wastes valuable space that could have been used for text. Another problem is that attorneys fail to cite Sixth Circuit case law in favor of decisions from other Circuits.[21] The Sixth Circuit will not abandon its case law simply because you have failed to cite it. It is much better for the criminal defense attorney to attempt to distinguish unfavorable Sixth Circuit cases than to ignore them. Also, simply because there is a Sixth Circuit case on point in your favor is not reason to rely on the precedent without explanation of its reasoning. On this point, Judge Cornelia G. Kennedy comments:

*Don't limit your reliance on prior precedent to the mere fact that it exists. Your opponent may distinguish it. Focus on the reasoning of that case, as well, and point out why it should be applied in your case for the same reason it was in the prior case. That is especially important if the case is from another Circuit and not binding in our Circuit.*[22]

Some successful criminal defense attorneys often transcend the facts of their particular case and attempt to show how reversal will favorably impact the criminal justice system as a whole. This is often difficult to do, and you may wish to stick with the argument that persuades the Court that the error prevented your client from obtaining a fair trial.

"Moral Rightness,"[23] as described by Judge Engel, is sometimes important to establish in your argument. By showing the moral rightness of your position, you will lend a special importance to your appeal that will distinguish it from the other 400 criminal appeals filed that year. Indeed, respected criminal practice authors, Purver and Taylor, suggest that the criminal defense attorney has an ethical obligation to demonstrate this "moral rightness" of his case.[24]

### B. Oral Argument

Oral advocacy is another area in which the judges have been most generous with their comments. Unfortunately, some defense attorneys all too often do not make the most efficient use of the limited time that is available to them. Kentucky defense attorneys will be pleased to know that the judges appreciate the difficulties that advocates face when arguing their cases before the Court. As Judge Edwards notes, the appellate courts simply do not provide time for great examples of oral advocacy.[25] Too many times, this precious resource is wasted with unnecessary recitation of the facts. In this regard, Judge Kennedy's comments are telling:

*The greatest mistake lawyers make in oral argument is the failure to use the limited time given them to deal with the critical issues. Often, appellant uses valuable time to state the facts. The judges have all read the briefs. Some reference to the facts is appropriate when the appellant issues relate to the factual issues, but confine the argument to those critical facts.*[26]

Judge Kennedy also notes that attorneys should welcome questions form the bench. In her words, "The Judge is looking for an answer and you, as counsel for the party, can supply and answer favorable to your client."[27] Chief Judge Engel adds that when responding to these questions, you should not waffle or act surprised by a difficult or unanticipated question. If you do not understand the question, admit your incomprehension. When you answer, speak up and do not read from your brief. If a Judge seems to be badgering you, be polite, but be firm. Do not immediately abandon your position simply because a member of the panel appears to disagree with it.[28]

Oral argument can make a big difference in the outcome of your appeal. Most judges in the Sixth Circuit will agree with this view. Judge Engel notes that from his discussions with other judges and their law clerks, it appears that the outcome of approximately ten percent of all appeals are affected by oral argument.[29] As the Chief Judge notes, "Many medical patients have traveled to the Mayo Clinic in Minnesota with less hope."[30]

Oral argument at the Sixth Circuit is important not only to defense attorneys and their clients, but to the judges as well. To quote the Chief Judge:

*It is an event of importance in the lives of judges. To be blunt, it is almost the only time when we appeals judges can actually put on our black robes and look like judges. The oral argument is our chance to show that we, in fact, exist beyond our published opinions, and we look forward to it, no matter how we may grouse about it from time to time. It crystalizes our thinking. It brings us together. It lets us see the lawyers and seen their issues alive and with the immediacy that only physical confrontation can achieve. The oral argument is an equalizing force. There, the most modest attorney can compete with the most prestigious, if she but prepares and is confident in the rightness of her cause.*[31]

## CONCLUSION

This Sixth Circuit has a dedicated staff and a judicial membership that is genuinely interested in improving the quality of criminal appellate advocacy. Kentucky defense attorneys who argue before the Court need to be aware of the structure of the Court and the views of its members. Such knowledge can only result in increased confidence, a heightened sense of purpose and an improved quality of appellate criminal advocacy. In short, the entire criminal justice system benefits when lawyers know the courts before which they practice.

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Frank is the President of KACDL 1987-89.. He is the past president of the Ky. Bar Assn. 1977-78 and NACDL 1973. He is a 1952 graduate of the University of Louisville School of law.

FOOTNOTES

[1]Internal Operating Procedure 2.2.1.

[2]Internal Operating Procedure 2.2.1.

[3]Statistics concerning the amount of cases disposed of in 1972 were taken from, Hehman, *Judicial Administration in the United States Court of Appeals for the Sixth Circuit: Organization and Procedures to Address the Volume Crisis*, 10 Toledo L.Rev. 645, 652 (Spring 1979).

[4]Letter from James A. Higgins on October 28, 1988.

[5]Albert J. Engel, *Advocacy at the Appellate's Level*, p. 4 (unpublished speaker's outline) [hereinafter referred to as "Outline"].

[6] *Id.* at 5. On this point, Judge Ralph B. Guy, Jr. adds that,

> Unfortunately, all too often the appellate advocate is not sufficiently familiar with the record. It is imperative that the attorney arguing the appeal know the record, particularly with regard to the points being raised on appeal.

Letter of Judge Guy on October 17, 1988. Judge Nelson further adds that,

> Most criminal cases -- and habeas cases -- probably turn pretty much on their individual facts, and the importance of a lawyer's having complete mastery of the record can hardly be emphasized too much.

Letter of Judge David A. Nelson, October 11, 1988.

[7] Engel, Outline, *supra*, note 5 at p. 10-12.

[8] *Id.*

[9] *Id.*

[10] Letter of Judge Pierce Lively of October 19, 1988.

[11] Engel, Outline, *supra*, note 5 at p. 13.

[12] Fed.R.App.P. 28(a)(2).

[13] Dane & Risley, *Briefing Techniques in the Sixth Circuit*, 13 Toledo L.Rev. 697, 701 (Spring 1982).

[14] See, *Cunningham v. Sears, Roebuck & Company*, 854 Fed.2d 914, 916 (Sixth Circuit, 1988).

[15] Dane & Risley, *Briefing Techniques in the Sixth Circuit*, *supra*, note 13 at 702.

[16] On this point, Judge Guy explains that,

> The second observation I would make is that frequently, in criminal appeals, too many frivolous and inconsequential issues are raised. The harm in this is that the weak arguments detract from the arguments relative to the issues that do have merit. It is far better to pick out the one or two points on which you stand some real chance of success and concentrate on those.

Letter of Judge Guy of October 17, 1988.

[17] Letter of Judge Pierce Lively of October 19, 1988.

[18] Letter of Judge Edwards of October 13, 1988. In this regard, Judge George Edwards tells a delightful story of a young lawyer, who at oral argument gave an insightful answer to a key question in the case. Judge Edwards asked him form the bench, "Why didn't you brief that point?" The young attorney responded, "Why, I did. It is right here on Page 37 of my brief!"

[19] Engel, Outline, *supra*, note 5 at p. 15.

[20] *Id.*

[21] *Id.*

[22] Letter of Judge Kennedy of December 15, 1988.

[23] Engel, Outline, *supra*, note 5 at p. 19.

[24] Purver & Taylor, *The Criminal Appeal: Writing to Win!*, 87 Case & Comment No. 5 (Sept.-Oct. 1982).

[25] Letter of Judge Edwards of October 13, 1988.

[26] Letter of Judge Kennedy of December 15, 1988.

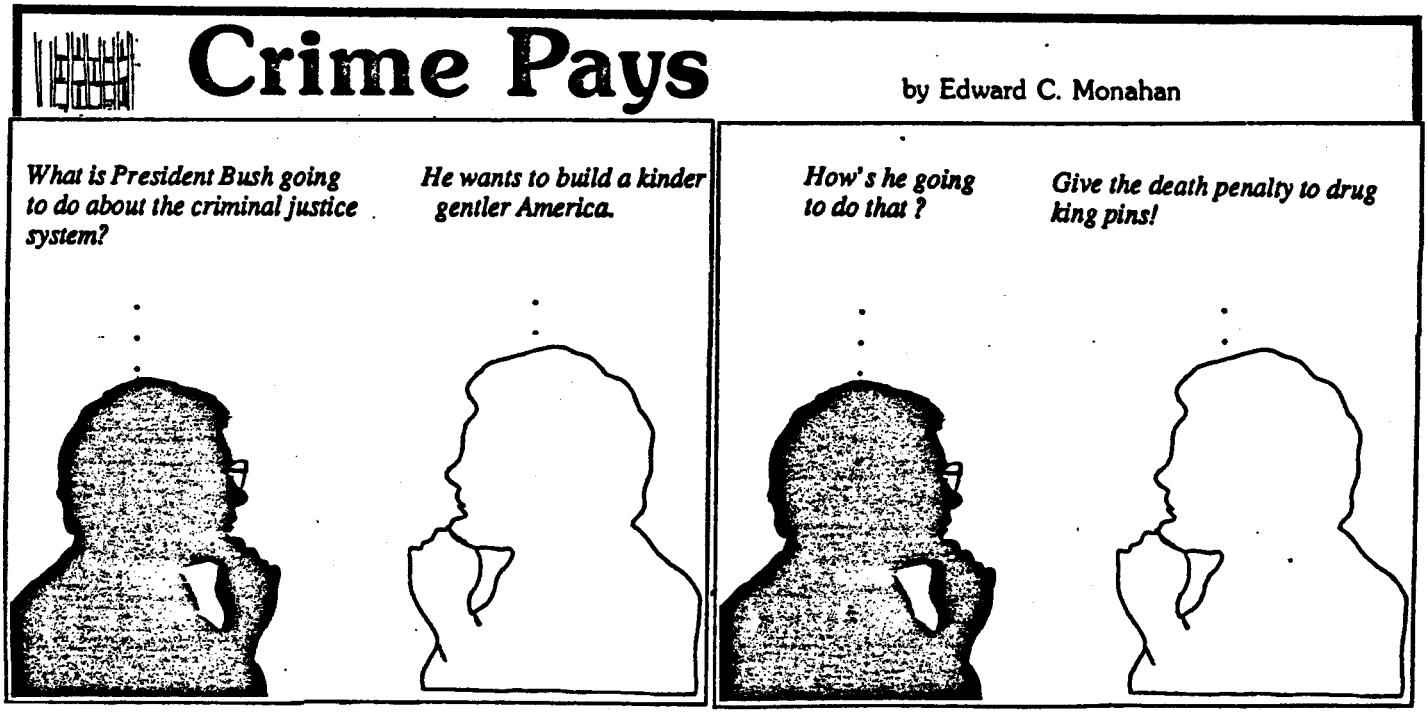
[27] *Id.*

[28] Engel, Outline, *supra*, note 5 at p. 33-37.

[29] *Id.* at p. 38.

[30] *Id.*

[31] *Id.* at p. 40



# NEW PAROLE BOARD REGULATIONS

JOHN C. RHUNDA

On December 3, 1988 three new regulations governing the Kentucky Parole Board became effective. 501 KAR 1:030, "Determining Parole Eligibility" replaced 501 KAR 1:011; 501 KAR 1:040, "Conducting Parole Revocation Hearings" replaced 501 KAR 1:020 and, 501 KAR 1:050, "Granting Final Discharge from Parole" replaced 501 KAR 1:015.

The purpose of writing the new regulations was threefold: 1) to assure that the Board's regulations were consistent with legislation enacted and Court judgments rendered since the last writing of the regulations in 1980; 2) to assure that the Board's regulations were consistent with its practices; and, 3) to reflect accurately the philosophy of the Kentucky Parole Board.

The following comments primarily focus on the differences between the current and the previous regulations. Key elements of the regulations which have remained the same however are also highlighted.

### 501 KAR 1:030 DETERMINING PAROLE ELIGIBILITY

In establishing the initial parole eligibility hearing date, the regulations have remained unchanged. An individual is eligible after serving 20% of his sentence, minus jail credit. For those serving less than 2 years, 4 months must be served; again, minus any jail credit. The most significant change is that not all parole eligibility dates are now determined by regulation. KRS 439.3401, the violent offender statute, establishes that an individual must serve at least 50% of his sentence, if sentenced to a term of years, before being eligible to be released on parole, if convicted under the provisions of this statute. Those sentenced to Life must serve 12 years. KRS 439.340(10) also affects parole eligibility. This statute prohibits an eligible sexual offender, within the meaning of KRS 197.400 to 197.440, from being paroled unless he successfully completes the sexual offender treatment program. Thus while the regulations have remained constant in establishing parole eligibility dates, the 2 statutes enacted in 1986 are having a significant impact on the parole eligibility dates for many inmates.

In the regulations in effect prior to December 3, 1988, the maximum deferment given by the Board was 8 years or 96 months. The basis for this maximum deferment was that 96 months was the minimum amount of time a person on a Life sentence had to serve before being eligible for a parole hearing. Now, however, under KRS 439.3401 a person must serve 12 years or 144 months, if sentenced to Life before being eligible for parole. Consequently, the new regulations in Section 4 subsection (1) paragraph (d) state that the maximum deferment given at any 1 time shall not exceed the minimum parole eligibility for a Life sentence as established by statute. Therefore the current maximum deferment is now 144 months. In addition, the Parole Board explicitly states that it reserves the right to order a Serve-Out on any sentence.

Another significant change in this regulation is found in Section 4(2). This subsection severely restricts the conditions under which an early parole hearing may be established. Any early parole hearing is one which occurs prior to the regular parole eligibility hearing as described in Section 4(1). Under this new subsection, the Board may establish an early parole hearing only if 1) the inmate qualifies for the Intensive Supervision Program under the criteria established in conjunction with the Corrections Cabinet, or 2) the Corrections Cabinet requests an early parole hearing due to medical problems as documented by the Cabinet's medical doctors, or 3) if requested in writing by the prosecuting attorney of record, or 4) if requested in writing by the sentencing judge of record. All requests under this subsection must be submitted in writing, indicating the reason for the request and providing all appropriate documentation. All of this information is then submitted to each Board Member who indicates in writing his/her desire to establish such a hearing. If a majority votes to schedule an early parole hearing it is done and the hearing is conducted as any other hearing. Simply because the Board agrees to schedule the early hearing is no indication or guarantee that the inmate will receive a parole recommendation. The provisions of this subsection are not applicable to those who are statutorily ineligible for an early parole hearing.

Prior to the effective date of this regulation, any inmate or anyone on their behalf could request an early parole and the Board would make a decision on each request. The Board felt this was too permissive, especially given the fact that the initial parole hearing date occurs earlier in Kentucky than in most states. While seeking to limit the circumstances under which a request could be considered, the Board, nonetheless, wants to remain flexible enough to respond to the few cases which deserve special consideration. By permitting the sentencing judge or the prosecuting attorney of record to request an early parole hearing in writing, the Board is recognizing the special knowledge and interest the Court and the Commonwealth may have in a particular case. If

the Court or the Commonwealth is willing to express their support for an inmate in writing and request an early hearing, the Board will circulate the case for a vote. As in all cases of parole decision-making, the final action is taken by the Board. The request simply initiates the process, with no promise or guarantees of the outcome.

In no way does this subsection imply that the Courts or the offices of the Commonwealth Attorney should be deluged with requests for early parole recommendations. Nor does this imply that a recommendation from the Court or the Commonwealth is necessary for a favorable parole recommendation, at the regular parole eligibility hearing. This subsection merely indicates that the Parole Board will consider no case for early parole unless 1 of the 4 conditions is present.

Other changes in this regulation include a subsection that states that the Board may rescind a parole recommendation before an inmate is released on parole and may reconsider a decision denying parole. As in all cases, the reasons for these actions are put in writing and placed in the inmate's file, with a copy being given to the inmate.

This regulation also includes the addition of a separate section relating to Youthful Offenders, as described in KRS 640.080. In short, this section indicates that Youthful Offenders are subject to all sections of the Kentucky Parole Board Regulations. To date, all Youthful Offender parole hearings have been conducted at the Parole Board Office in Frankfort. This section also indicates that preliminary parole revocation hearings for Youthful Offenders shall be conducted at facilities out of sight and sound of adult inmates. Final revocation hearings and special hearings are held at the Parole Board Office in Frankfort.

Finally, this regulation includes the general conditions of parole to which every parolee is subject, including the mandatory payment of a supervision fee as required by legislation passed in the 1988 General Assembly. These conditions are the same as those found on the back of each parole certificate. The Parole Board continues to reserve the right to add any special condition of parole which it considers important for the protection of society and the successful adjustment of the inmate while on parole.

## 501 KAR 1:040 CONDUCTING PAROLE REVOCATION HEARINGS

The provisions of this regulation clearly delineate the procedures which are to be followed in the process of parole revocation. There are a few significant changes and additions but the primary function filled by the revisions is that the regulations and procedures now coincide. The procedures involved in parole revocation have been revised over the past 8 years as required by various Court rulings.

Among the revisions of this regulation is the establishment of good cause hearings which are required when it is alleged that a parolee has failed to pay the required supervision fee. It is the parolee's responsibility to demonstrate that good cause exists for not paying the fee. If the parolee is found to have no good cause then a preliminary parole revocation hearing may be conducted to determine if probable cause exists that the parolee has violated his parole for failure to abide by the condition of parole requiring the payment of the supervision fee. It is possible for the parole office to request leniency at the good cause hearing through a motion to continue the hearing sine die with the condition that the parolee pay the arrears and agree to pay the supervision fee as required on a monthly basis. This, however, is at the discretion of the parole officer.

In order to assist the Parole Board in making a decision whether or not to issue a parole violation warrant, this regulation includes a provision for the Administrative Law Judge to make a recommendation, at his discretion, to the Board concerning the issuing of a warrant, despite the finding of probable cause. This recommendation is advisory only and the Board makes the final decision on the issuing of a parole violation warrant.

Perhaps one of the most significant additions to this regulation is the ability of the parolee to waive his preliminary parole revocation hearing. In order to waive the hearing the parolee must admit to the charges against him and sign a waiver form. The Administrative Law Judge determines if the waiver is accepted. Despite waiving this hearing, the parolee may submit written mitigation. This mitigation, along with the waiver form and the finding of probable cause is then forwarded to the Parole Board for consideration of issuing a warrant.

The new regulations also permit a parolee to waive his final revocation hearing. This waiver is based upon admission of guilt. Acceptance of such waiver is totally within the discretion of the Board. If the Board accepts the waiver, the final decision on the revocation of the parolee's parole and subsequent action is based upon a majority vote of the Board without any further proceedings.

The Board included these 2 waivers in an attempt to expedite the parole revocation process for those cases where the allegations are uncontested.

## 501 KAR 1:050 GRANTING FINAL DISCHARGE FROM PAROLE

A substantial revision in the regulation governing the granting of a final discharge from parole has been effected. A parolee, paroled on a sentence other than a Life sentence, may request a final discharge from parole after the expiration of 24 months clear conduct on parole. The parolee's request must come through this parole office and accompanied by a report and recommendation from his parole officer. The Board will review each request and make a determination. This regulation simply states that the parolee may request a final discharge. In no way does it imply that the request will automatically be granted. The final decision on granting the final discharge rests with the Parole Board.

Individuals paroled on a Life sentence must successfully complete 5 years on parole before making a request for a final discharge. The request is treated in the same manner as described above.

The Parole Board will review any parolee for a possible final discharge

after service of 10 years on parole. The Offender Records section of the Corrections Cabinet will notify the Parole Board of all parolees who have been on parole for a least 10 years and who have not received a final discharge. The Board will make a decision in each case after a records' check with the F.B.I. has been completed. Under the provisions of this regulation the Board may grant an early final discharge. When a parolee reaches the maximum expiration date of his sentence, a final discharge from parole shall be issued by the Board, if there is no outstanding parole violation warrant against the parolee.

The Parole Board instituted these changes in the regulation in order to provide an incentive for each parolee to fulfill the responsibilities of his parole with the possibility of a final discharge at the end of the specified period. In addition, this regulation provides each parole officer with the opportunity to assist the Board in its decision-making. It also establishes a closer link between the parolee and his parole officer.

The revisions in the Kentucky Parole Board regulations signify a change in emphasis. These regulations make it possible to reward a parolee for good performance while on parole by permitting the granting of a final discharge sooner than before. These regulations also permit additional input into the Board's decision-making by requesting the parole officer's recommendation in the granting of a final discharge and by permitting the Administrative Law Judges the opportunity to make recommendations concerning the issuing of a parole violation warrant.

The changes in the regulations also permit the Parole Board the latitude to deal more effectively with inmates by increasing the maximum deferment to 144 months and establishing the possibility of a serve-out on any sentence, including a Life sentence. Finally, by significantly restricting the conditions under which an early parole can be granted, the Board is clearly stating that few exceptions to the regular parole eligibility date are recognized and those that exist must be well-documented.

It is the belief of the Kentucky Parole Board that the new regulations are more in tune with the values of most Kentuckians. These regulations allow the Board to respond to positive behavior more equitably and appropriately.

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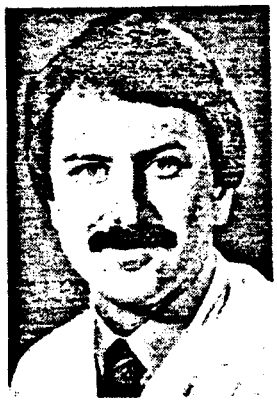
***John was appointed to the Board by Governor Collins in 1986 and became Chairman in 1987. He received his Ph.D. from Ohio State University in 1980.***



**RANDY WHEELER**

## *DPA DEATH PENALTY RESOURCE CENTER*

At its September, 1988 proceeding, the Judicial Conference of the U. S. Courts approved a Grant to the Ky. Dept. of Public Advocacy DPA to establish a Ky. Capital Litigation Resource Center (KCLRC)for 1989. This Grant was a result of a proposal prepared by the Capital Representation Task Force of the 6th Circuit Court of Appeals for Ky., chaired by **Judge Edward H. Johnstone**, Chief Judge, U. S. District Court for the Western District of Ky.. The Grant will assist the DPA in guaranteeing that competent representation is available to clients in post-conviction capital litigation. The Grant proposal was supported by the Task Force, **Judge Eugene E. Siler, Jr.**, Chief Judge, U. S. District Court for the Eastern District of Ky. DPA is very fortunate to be one of 13 states in the nation to have a capital litigation resource center

### The Responsibilities of the Resource Center are to:

1. Establish and maintain a panel of attorneys competent to represent persons , assistance to newly appointed counsel and other lawyers involved in capital litigation;
2. Coordinate resources with other state and national organizations in death penalty cases;
3. Develop training resources and coordinate continuing legal education activities concerning capital litigation;
4. Represent clients in state and federal post-conviction cases;
5. Develop and expand existing expert witness list for capital litigations in state and federal courts;
6. Assist private attorneys doing capital litigation in organizing investigative efforts;
7. Provide a report in each edition of The Advocate concerning its activities.

### Wheeler Appointed Director

The Resource Center will be established as a separate branch within the DPAand designated as a federal community defender organization. **Randy Wheeler** has been selected to head this new project. Randy, who has been an employee with DPA for 11 years, has had extensive experience in death penalty cases and concentrated on post-conviction issues for 6 years and directed the Department's post-conviction section for 4 years. He recently won a case [*James Olden V. Ky.*(No. 88-5223 Dec. 12, 1988) ] in the U. S. Supreme Court which summarily reversed the decision of the Ky. Court of Appeals based solely on his brief. Although the Grant primarily is to ensure representation at the post-conviction stage of capital cases and is not a complete solution to all the problems generated by the death penalty, Randy expects that the Resource Center will allow other branches of DPA to concentrate their efforts more effectively. An article about the Resource Center in more detail will be presented in the next issue of the *Advocate*-**Paul F. Isaacs, Public Advocate**

# SOUTHERN HOMICIDE RATES

BILL CURTIS

## Southern Homicide Rates and the Subculture of Violence Thesis

A historical review of homicide data clearly indicates that excessive violence has been reflective of crime in the American South from the time that comparative homicide data became available. These consistently high homicide rates led one writer in 1935 to describe the South as "that part of the United States lying below the Smith and Wesson line."[1]

### HIGH HOMICIDE RATES IN SOUTH

The most recent data compiled by the Bureau of Justice Statistics (1986) show exceedingly high homicide rates in Southern states compared with the New England and other Northern states. (See tables 1, 2, 3, and 4.) Although Kentucky has the lowest homicide rate (6.8) in the Southeast, it is nearly 6 times higher than North Dakota (1.0) and nearly 2 and 1/2 times higher than the rates in Maine (2.0) and Vermont (2.0). Furthermore, not one Southern state appears on the list of 10 states with the lowest homicide rates. These wide disparities in homicide rates are rather stunning. The obvious question is why?

**TABLE 1**
**1986 HOMICIDE RATES FOR SOUTHEASTERN STATES PER 100,000 POPULATION**

| State | Homicide Rate |
|---|---|
| 1.Louisiana | 12.8 |
| 2.Florida | 11.7 |
| 3.Georgia | 11.2 |
| 4.Mississippi | 11.2 |
| 5.Tennessee | 10.4 |
| 6.Alabama | 10.1 |
| 7.S. Carolina | 8.6 |
| 8.N.Carolina | 8.1 |
| 9.Virginia | 7.1 |
| 10.Kentucky | 6.8 |

**TABLE 2**
**1986 HOMICIDE RATES FOR NEW ENGLAND STATES PER 100,00 POPULATION**

| State | Homicide Rate |
|---|---|
| 1. Maine | 2.0 |
| 2. Vermont | 2.0 |
| 3. New Hampshire | 2.2 |
| 4. Rhode Island | 3.5 |
| 5. Massachusetts | 3.6 |
| 6. Connecticut | 4.6 |

**TABLE 3**
**TEN STATES WITH LOWEST HOMICIDE RATES PER 100,000 POPULATION 1986**

| State | Homicide Rate |
|---|---|
| 1. North Dakota | 1.0 |
| 2. Iowa | 1.8 |
| 3. Maine | 2.0 |
| 4. Vermont | 2.0 |
| 5. New Hampshire | 2.2 |
| 6. Minnesota | 2.5 |
| 7. Montana | 2.9 |
| 8. Wisconsin | 3.1 |
| 9. Nebraska | 3.1 |
| 10.Utah | 3.2 |
| 11. Idaho | 3.2 |

**TABLE 4**
**TEN STATES WITH HIGHEST HOMICIDE RATES PER 100,000 POPULATION 1986**

| State | Homicide Rates |
|---|---|
| 1. Texas | 13.5 |
| 2. Louisiana | 12.8 |
| 3. Nevada | 12.6 |
| 4. Florida | 11.7 |
| 5. New Mexico | 11.5 |
| 6. California | 11.3 |
| 7. Michigan | 11.3 |
| 8. Georgia | 11.2 |
| 9. Mississippi | 11.2 |
| 10. New York | 10.7 |

### HOMICIDES DUE TO CULTURAL VALUES

To date, most studies which have attempted to explain these shockingly high rates of homicide in the South have been grounded in a "subculture of violence" theory. According to the theory, in many areas of the South frontier conditions continue to exist. For many South-erners there is an enduring tradition of honor. It is thought that among Southerners a strong sense of grievance persists as a result of the region's long history of defeat, occupation, and national ostracism. Violence is attributed to subcultural traditions which reinforce and perpetuate violent patterns of behavior.[2]

Some of the early studies using the subculture of violence thesis to explain the high homicide rates in Southern states found support for this idea. However, more recent researchers disagree with regard to methodologies used, *i.e.* sampling techniques, indicators selected, and appropriate statistical tests. Not surprisingly, the most recent research in this area seriously questions whether any scientific support for the Southern violence syndrome has been established.

Two researchers, Hackney (1969)[3] and Gastil (1971)[4], using very similar research designs, reach very similar conclusions. Both authors used a regression analysis to examine aggregate characteristics of states which were thought to measure "backwardness" or "under development." Also entered into the analysis were standard economic and demographic variables and a variable representing the regional location of the states. These independent variables (thought to be causal variables) were all correlated with each state's homicide rate. Both analyses clearly indicated that the regional variable is significantly correlated with homicide rates independent of situational variables. The conclusion was

that Southern violence can be attributed mainly to a unique cultural pattern which developed in the South and still exists.

## HOMICIDE DUE TO POVERTY

In 1974 Loftin and Hill critiqued the work of Hackney and Gastil and conducted their own research on the notion of a Southern culture of violence.[5] In this article it is pointed out that the only measure of Southern culture used by Hackney and Gastil is the regional variable, proximity to former confederate states. Loftin and Hill argued that this index is primarily a measure of region and not a measure of culture. These authors further argued that Hackney and Gastil used invalid measures of socioeconomics variables.

Loftin and Hill developed a "structure of poverty index," which they entered into a regression analysis along with the regional variable, to explain the variance in a state's homicide rate. This structure of poverty index turned out to be the most powerful predictor of a state's homicide rate. The conclusion was that poverty, not cultural values, account for high rates of homicide in Southern states.

## HOMICIDE DUE TO VALUES & ATTITUDES OR SITUATIONS

Another important study on the subculture of violence was conducted by Ball-Rokeach in 1973. In her study Ball-Rokeach attempted to measure values and attitudes associated with violence in a national area probability sample of 1,429 adult males and also with a sample of 363 men incarcerated in a Michigan prison for violent and non-violent offenses.[6]

To explain why members of a subculture behave violently, Ball-Rokeach looked at the values and attitudes of the subculture. Prior studies claim that subculture members conform to a "machismo" lifestyle which includes such things as leading an exciting life, achieving status, and protecting one's honor. Ball-Rokeach predicted that positive attitudes toward violence would be positively related to frequent participation in violent behavior.

To test this hypothesis the author obtained responses on the Rokeach Value Survey from 1,429 adult males. Analysis of the data did not support the prediction, nor was there support for the idea that males who conform to the "machismo" lifestyle are more likely to participate in violent behavior. The only significant finding was in the opposite direction. That is, males scoring high on participation in violence place less, not more, importance on social recognition, than do males scoring low on participation in violence.

As a further test of her hypothesis, Ball-Rokeach administered the Rokeach Value Survey to four groups of males in a Michigan prison. One group consisted of 57 men convicted of murder and the other group was made up of 302 men convicted of all other crimes. The second comparison was made between a group of prisoners convicted of violent crimes and non-violent crimes. Analysis of the data showed that there is no evidence that the value systems of murderers differ from those of other inmates, or that the value systems of violent prison inmates differ from those of non-violent inmates.

Ball-Rokeach concluded that the subculture of violence thesis cannot be explained by values and attitudes. She speculates that values and attitudes may have very little impact on violent behavior. A more likely explanation may be that violence results from situational factors such as access to weapons, exposure to drugs and alcohol, the rate of crime in the immediate environment, population density, or level of intergroup conflict.

## HOMICIDES DUE TO POVERTY AND RACE

In a study conducted in 1984 using 1970 aggregated census data, Williams examined the effects of poverty and race on homicide rates in 125 Standard Metropolitan Statistical Areas with a population of 250,000 or more. Williams found that an index of family income concentration, racial inequality, percent divorced or separated, and the percent black had significant positive effects on the homicide rate. In addition, population size and the South/Non-South dichotomy were positively related to the homicide rate. But as previously discussed, this dichotomy may be a measure of region and not culture. A highly significant finding was that a relatively large black population was associated with high homicide rates. While this finding may be a valid indicator of a violent subculture orientation, Williams points out that this association could be the result of unmeasured economic variables, for example, the percent of the black population in poverty.[7]

## CONCLUSION

This cursory review of literature on regional subculture and homicide clearly shows that, to date, research has not successfully demonstrated that a subculture of violence accounts for comparatively high homicide rates in Southern states. One of the primary difficulties in researching this thesis is developing valid measures or indicators of subculture. It is very likely that participation in violent behavior is some interacting function of the values, attitudes, economic, and demographic characteristics of all parties involved.

**BILL CURTIS**
RESEARCH ANALYST
FRANKFORT, Ky 40601

Bill Curtis has been employed with the Department's administrative division for 8.5 years. Bill has brought the Department's death penalty tracking project into the computer age.

1 H.C. Brearly. "The Pattern of Violence," *Culture in the South.*, Edited by W.T. Couch (Chapel Hill, 1935), 678.

2 Albert C. Smith. "Southern Violence Reconsidered: Arson as Protest in Black-Belt Georgia, 1865-1910," *The Journal of Southern History, November, 1985.*

3 Sheldon Hackney. "Southern Violence" in Hugh Davis Graham and Ted Robert Gurr, ed.s, *The History of Violence in America*, (New York, 1969), 505-27.

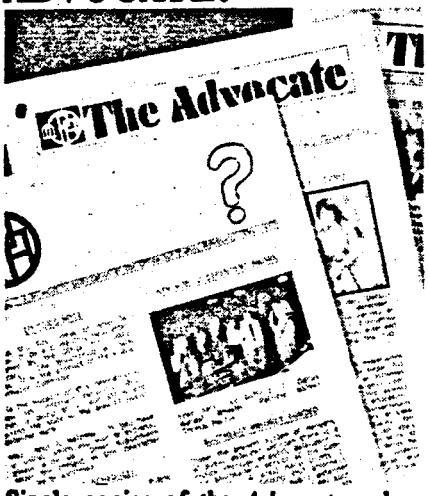
4 Raymond D. Gastil, "Homicide and the Regional Culture of Violence," *American Sociological Review*, October, 1974.

5 Colin Loftin and Robert H. Hill, "Regional Subculture and Homicide: An Examination of the Gastil-Hackney Thesis," *American Sociological Review*, December, 1973.

6. Sandra J. Ball-Rokeach, "Values and Violence: A Test of the Subculture of Violence Thesis," American Sociological Review, December, 1973.

7 Kirk R. Williams, "Economic Sources of Homicide: Re-estimating the Effects of Poverty and Inequality," *American Sociological Review*, April, 1984.

## BACK ISSUES OF THE *ADVOCATE.*

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***PEACE cannot be kept by force. It can only be achieved by understanding.***

## *THE CAUSES OF CRIME: FACTS ON THE HUNGRY AND THE HOMELESS*

19% of KY's population is living in poverty. This figure includes: 25% of our elderly, 33% of our black population , 22% of our children, 40% of all 1-parent families and 56% of all families headed by women with preschool age children

Approximately **165,000 households in Ky. depend on food stamps to extend their food purchasing ability in order to have enough to eat each day.** Of these households:- 57% have children under age 15, 69% are households headed by women,- 90% have incomes below the poverty line,- 48% have incomes of less than $3600 ,-Statewide, 1 or every 7 persons receives food stamps each month In 1981, Congress cut the Food Stamp Program by several billion dollars. In Ky. that meant a loss of $15,019,000 in federal funds. 27,000 Kentuckians lost their food stamp benefits, thousands more had their food stamp benefits reduced.

Children living in low-income and unemployed families who were participating in the school lunch and breakfast programs were hard hit by policies in 1981 lowering eligibility for free and reduced price meals and increasing the price of reduced price meals. Because of these policies, **17,000 low-income children are no longer able to eat breakfast and lunch at school.**

There are some 600 emergency food programs (including food pantries and soup kitchens) operating in Ky. All the agencies have seen at least a 75% increase in requests for assistance, with some recording an increase of more than 400%.

**In Louisville, shelters for the homeless estimate they have to turn away 2 families for every family they have space for:**Families turned away are forced to double up with relatives or friends in overcrowded housing or live in their cars when shelters are full and families cannot afford housing. --2-parent families made up 37% of homeless families served with the remaining being single-parent families. **-75% of homeless families have only 1 or 2 children.**

Poverty among families with children has risen in the last few years to the levels of 20 years ago when 1 in 5 families with children lived in poverty.

We are moving toward a service based economy with a loss of 1/3 of our manufacturing jobs since 1974. Many of the new jobs being created are part-time, minimum wage ($3.35 an hour) and without benefits.A single parent with 2 preschool children who works full-time must earn $7.00 an hour to be self-sufficient. If paid less, some form of assistance would be required.

Aid to Families with Dependent Children (AFDC) is a program aimed solely at providing income support to families (single-parent households) who have needy or dependent children -- it is aimed at helping poor children survive. In Kentucky: **66% of those who receive AFDC are children.** Of these children, approximately 50% are 8 years old or younger. Only 2.4% of children in Kentucky who receive welfare remain on the program for the duration of their childhood. -Kentucky families on welfare average about the same number of children as the general population -- 1.8.--Most conditions requiring assistance are experienced for a period of 1 or 2 years and are brought on by divorce, unemployment, or some other temporary adversity that suddenly jeopardizes the family income. --Almost 3/4 of the families receiving assistance do so for no more than 5 years; 28.5% receive assistance for fewer than 13 months.

# ASK CORRECTIONS

BETTY LOU VAUGHN

**TO CORRECTIONS:**

My client has been convicted of a sexual offense. Due to controlled intake he has not been transferred to Corrections and does not know when he will.

If he must complete a sexual offender treatment program before parole, KRS 439.340(10), how does this affect his parole eligibility date?

**TO READER:**

KRS 439.340(10) does not address nor pertain to eligibility for parole consideration dates but, rather, pertains to the GRANTING OF PAROLE by the PAROLE BOARD. His parole eligibility date would be calculated per the provisions of the applicable parole board regulations or statute.

**TO CORRECTIONS:**

My client has been convicted of receiving stolen property over $100 and received a one-year sentence. He will be parole eligible next month having served four months on his sentence. If paroled will he have eight months to serve under parole supervision or will he have twelve months under parole supervision as set out in KRS 439.342?

**TO READER:**

No, the conditional release date is the date upon which your client would have been released from prison had the parole board not granted khim parole but gave him a serve out. When one is granted parole and accepts same, he is working toward his adjusted maximum expiration date.

**TO CORRECTIONS:**

My client is on parole and will soon reach his conditional release date as reflected on is Resident Record Card. Will he be issued a Final Discharge from Parole on that date?

**TO READER:**

Your client will be issued a Final Discharge from Parole when his adjusted maximum expiration date is reached, provided a parole violation warrant has not been issued by the parole board or he has not absconded from parole supervision, per KRS 439.354.

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

**BETTY LOU VAUGHN**
Offender Records Administrator
Corrections Cabinet
Frankfort, Kentucky 40601
(502) 564-2433

## Instructions Collected, Categorized, Listed

The Department of Public Advocacy has collected many instructions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various instructions in a 7 volume manual. Each instruction is a copy of a defense instruction filed in an actual Kentucky criminal case. They are categorized by offense and statute number. They were updated in February, 1989.

**COPIES AVAILABLE**

A copy of the index of available instructions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the actual instructions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Criminal defense advocates can obtain copies of any of the instructions for the cost of copying and postage. Each DPA field office has an entire set of the manuals.

**HOW TO OBTAIN COPIES**

If you are interested in receiving an index of instructions, or copies of particular instructions, contact:

**TEZETA LYNES**
DPA Librarian
1264 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
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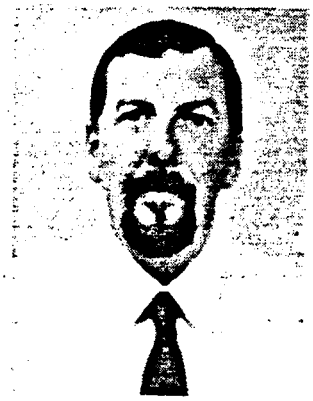
Extension 119

# FORENSIC SCIENCE NEWS



JACK BENTON

*This is the third of a 4 part series by Jack L. Benton.*

## SPECIAL PROBLEMS

1. Partially decomposed specimens are first distilled from the acid tungstate solution into another 125 ml distilling flask, to which are ten added to 10 ml of saturated aqueous mercuric chloride and 10 ml of 110 percent w/v calcium hydroxide suspension. This mixture is mixed by swirling, allowing to stand for a few minutes, and then re-distilled and the analysis is completed as in Procedure A.

## CALIBRATION

1. Blood or other specimens demonstrably free of volatile reducing substances are used to prepare calibration standards containing 0 to 0.35 percent w/v ethanol in steps of 0.05 percent w/v.

2. The prepared calibration samples are analyzed in duplicate according to the procedure outlined and absorbance or transmittance measurement made against the reagent blank reference.

3. The absorbance values obtained are plotted on a rectangular coordinate plot of absorbance units as the ordinate versus alcohol concentration of the original sample in percent w/v or mg/dl at the abscissa, and a best fit straight line is drawn through these points and the origin. Alternatively, transmittance values may be plotted as the ordinate on semi-logarithmic paper versus alcohol concentration as the abscissa.

## SOURCES OF ERROR IN DUBOWSKI METHOD

Although the method described above is generally highly regarded as a method for blood alcohol determination, the possibility of erroneous results exists. The greatest source of error exists in the quality control or lack of it in the testing laboratory and the analytical technique of the examining technician/chemist conducting the procedure. The blood alcohol calibration curve prepared in this procedure is absolutely critical to the proper determination of the alcohol concentration present in the unknown blood specimen. [1] The blood distillate derived from this procedure and the potassium dichromate reagent solution are both compared to this calibration curve, therefore, any constructional or procedural error has a direct impact upon the final analysis results.

During the course of the calibration curve preparation, any value deviations should be noted and the calibration process continued until all deviations have been rectified. If these deviations are allowed to remain in the calibration curve and are translated into the resulting chart used to report analysis results, these errors are difficult to identify. By whom, when and how this calibration curve was prepared should be of primary concern and attention. This calibration curve can and should be checked periodically by the testing facility, by the analysis of known alcohol standards and comparing the resultant values to the calibration curve.

All glassware used in measuring and transferring specimens and distillates should be in good condition and of proper quality. Analytical grade volumetric glassware is required in this and all analytical procedures to insure that accurate quantities are transferred and collected. Prior to beginning this analysis procedure, all glassware should, therefore, be inspected as to quality, cleanliness and dryness.

Precision in delivering volumes of material should be employed to insure correct amounts. Of particular importance, is the measurement of the one milliliter portion of alcohol distillate to be reacted with the oxidizing reagent. It should be noted here that volumetric glassware is calibrated in two manners; both to contain a certain volume at a certain temperature and to deliver a certain volume at a given temperature. Deviations in this prescribed temperature affect the amount of liquid measured.

The usage of repipetting devices is common practice for dispensing procedural reagents in high volume blood alcohol laboratories. These devices are utilized to deliver specific volumes of reagents in the blood alcohol analysis procedure, including the oxidizing reagent. Their advantage over single reagent measurements is rapidity. These repipetting devices should be checked at each test, however, to insure accurate and consistent delivery of specific amounts.

A reduction in the amount of oxidizing reagent delivered would have a direct impact on the blood alcohol results, producing an erroneously high reading. Likewise, any fluctuation in reagent volumeteric measurements have a direct effect on the accuracy and integrity of the blood alcohol calibration curve and the resultant analysis chart.

Interfering contaminants contained in the water used in this procedure should be considered. Although the examining laboratory probably distills its own water, the possibility of this water con-

taining foreign materials exists and should, therefore, be checked at each analysis run. Any foreign material present in this, as a result of improper distillation procedures, could be oxidized by the dichromate solution giving rise to a high or false positive alcohol reading. Due to many factors, including time considerations and low caseload priority, blood alcohol specimens are typically collected at an individual laboratory until many specimens can be analyzed at once.

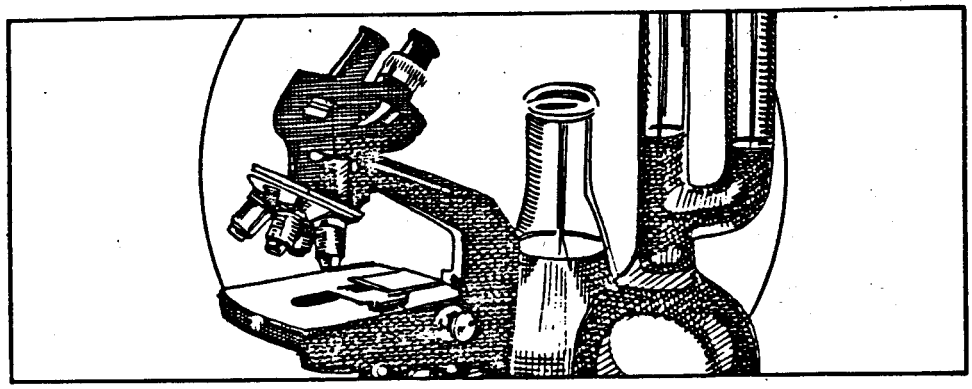
This procedure can lead to prolonged storage of these samples in variable environmental conditions (which may produce putrification volatiles in some samples), long delays in reporting results and opportunity for increased error while manipulating several specimens at once. Caution should be exercised by the analyst to protect against specimen contamination and switching. Ideally, only one specimen of evidentiary blood should be opened at one time. This would obviously retard the analysis time, but would in fact preserve the integrity of each sample. Considering the legal implications which may result from this procedure, such a safeguard is imperative.

Spectrophotometers used in this procedure are readily available from a number of sources. Whatever spectrophotometer is utilized by the examining laboratory, it should be inspected on a regular basis to insure proper functioning and proper results. This inspection should be performed and documented by an authorized/recognized instrument specialist willing to certify its instrumental accuracy. Any necessary repairs should be documented, and should also be available for inspection.[2] The results from these properly maintained photometers can generally be considered accurate, providing the results of a distilled water blank and a known alcohol solution fall within acceptable ranges.[3]

Although not commonly encountered, the possibility of interfering substances present in the blood of living subjects does exist. These possible contaminants can produce erroneous false positives, and should, therefore, be screened for their presence. Additionally, contaminants may be introduced by virtue of the collection of these blood specimens in both living and deceased subjects and should likewise be screened. Five common contaminants are acetaldehyde, acetone, isopropyl alcohol and methyl alcohol.

## GAS CHROMATOGRAPHY

Some of the possible errors mentioned above may be eliminated by employing other analysis procedures. Once such procedure is gas chromatography, which offers a reduction of many of the problems inherent in the above procedure. It, however, like most procedures, has both strengths and weaknesses, which we will attempt to explore.



Gas chromatography is not new in its theory or its research applications. However, only within recent memory has the design of the instrumentation and practical procedural applications thrust the gas chromatograph into the mainstream of accepted and required crime laboratory instrumentation. The advance in usage has resulted largely in design advances, which have produced reliable and rugged instruments capable of handling the rigors of a high volume laboratory setting. Previous to this advance, gas chromatographs presented the chromatographer with an alternate method of analysis, with questionable instrumental reliability. With new advances in design came advances and discoveries as to its wide range of practical laboratory applications.

As laboratory instrumentation goes, the gas chromatograph is relatively simple both in operation and design. Basically, the gas chromatograph is a temperature controllable over, containing either glass or metal coiled columns ranging in length from one meter to 30 meters. Samples of either vapors or liquid samples are injected into these columns, which may cause the individual components to separate and exit the columns at different times. The degree of separation varies according to many factors such as the packing material contained in the columns, the rate of flow of gases which push to samples through the columns, the nature of the sample composition and the temperature parameters used in each individual analysis.

Upon exiting these columns, the various components of each sample are passed throughra detector which causes a signal to be relayed to a strip chart recorder. The resultant chart is referred to as a chromatogram. This chromatogram may contain few or many peaks or spikes, depending on all of the separation parameters listed above, which by location represent the time required to pass through the column (retention time) and by the height of each peak represent the strength of the signal produced. This peak height is translatable into other respective amount of each component present.

Samples presented to the gas chromatograph may either be introduced as vapors or liquids, as mixtures or single component samples.

In the specific application of blood alcohol analysis by gas chromatography, direct analysis of the blood presents possible damage to the column material and precise measurement problems. As a result, the common procedural technique involves the precise measurement of 1 ml of blood to be placed in a septum capped container with a known quantity of an internal standard (usually N-propanol) and a small amount of NaCl

(common table salt) to reduce surface tension. This septum capped container is either heated or allowed to equilibrate to room temperature. Vapors of the volatile N-propanol and alcohol (ethyl) form a layer of vapor above the liquid sample (headspace) in the same proportions that exist in the liquid itself. Therefore, by withdrawing a sample of this headspace and injecting it into the gas chroma-tograph, we will produce a chromatogram containing a peak representing N-propanol and a peak representing ethyl alcohol. By measuring the relative ratio of the two peaks and correlating their value to a know .10% N-propanol and a known .10% ethyl alcohol, the alcohol content of the unknown blood specimen may be determined.

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[1] The calibration curve and laboratory notes ought to be discoverable as per Art. 39,14, Tex. C.Cr. Pro. and Art. 67011-5, Sec. 3(e). The latter provides:
Upon the request of a person who has given a specimen at the request of a peace officer, full information concerning the analytical results of the test(s) of the specimen shall be made available to him or his attorney.

[2] It should again be noted that alcohol breath testing equipment, to be valid for evidentiary purposes, as per Texas Department of Safety Regulations, must be not only certified for testing, but also periodically inspected. No such certification or periodic inspection of blood alcohol testing equipment is required for admissibility of blood analysis results. In the author's opinion, blood analysis ought to be treated the same as breath alcohol analysis and have required certification and periodic inspection.

3 See also generally, Harper, "A Simple Micromethod for the Determination of Alcohol in Biological Material," *J. Laboratory & Clinical Medicine*,746 (1934). See also, Friedman and Brook, "The Identification and Determination of Volatile Alcohols and Acid. *J. Biological Chem.* 161 (1938)

# DPA MAJOR LITIGATION CHIEF NAMED

Effective January 17, 1989, Neal Walker was appointed the chief of the Major Litigation Section (MLS), by Paul F. Isaacs, Public Advocate. He replaces Kevin McNally who resigned July 31, 1988. The position had been vacant since Kevin resigned.

MLS is responsible for coordinating the Department's death penalty trial efforts across the state. With Neal's appointment, the section will have a renewed emphasis on assisting local attorneys in capital trials across the state,as it will be a capital trial section.

NEAL WALKER

Neal Walker is a 1976 graduate of Pikeville College and a 1979 graduate of Chase Law School. He worked as a trial public advocate in the Prestonsburg public defender's office from 1979-80, and as an appellate public defender in the Frankfort office from 1981-82. In 1983, he became a full-time federal public defender in the Eastern District of Kentucky. He rejoined DPA in Frankfort as a MLS member in late 1985. Neal has extensive capital litigation experience at trial, appeal and post-conviction levels. He has represented capital defendant's since 1985, and is currently representing 5 capital clients and is preparing for retrials in 2 capital cases.

Upon being appointed by the Public Advocate, Neal said,"We hope to contribute to the death penalty effort by intervening in cases at the most meaningful time- the pretrial stage. However, 4 lawyers can't solve Ky.'s death penalty problem."

As to why it has been 6 months since no one has been willing to replace Kevin, Neal commented," Understandably there is a reluctance in assuming the responsibility for coordinating capital defense work without having adequate resources. The system is hemmorhaging and all we have are bandaids. The only solution is increased funding through the Courts or legislature."

Kevin McNally expressed his delight with Neal's willingness to take on the responsibility of that problem,"The concept of a death penalty trial unit was always an unattainable goal of mine. The idea that Neal Walker will head up Ky.'s capital trial defense team means that the DPA will continue to set the pace for the rest of the country, because Neal is one of the best trial lawyers anywhere. I'm thrilled about his appointment."

***AND EARTHLY POWER DOTH THEN SHOW LIKEST GOD'S WHEN MERCY SEASONS JUSTICE.***

--WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE

# CASES OF NOTE

ED MONAHAN

### MITIGATION OF SENTENCE
*State v. Legendre*
522 So.2d 1249 (La.App. 1988)

Convicted by a jury of 2d degree battery, the defendant was sentenced by the trial judge to 5 years, the maximum. In sentencing the defendant, the judge did not consider the defendant's mental illness as in mitigating factor. He challenged his sentence as excessive.

The appellate court noted that a "sentence may be found to be unconstitutionally excessive when considered in light of the particular defendant and the circumstances of the particular crime even if it falls within the statutory limit. This principle is especially relevant when the maximum penalty has been imposed. Maximum sentences are considered particularly suspect because they are reserved for the most serious violation of the charged offense and the worst kind of offender." *Id.*, at 1251.

While the Louisiana statute on sentencing and probation does not list mental illness as a mitigating factor, Louisiana caselaw requires it to be considered as such. In fact, the court determined that the mitigating circumstances listed in the Louisiana capital statute had to be considered by a sentencing judge in a non capital case, even though the capital mitigating factors by statute, expressly apply only to capital cases.

The Court held, "When persons with recognized, diagnosed mental illnesses are convicted of crimes, that condition should be considered to mitigate the type and length of sentence imposed on the offender, even if he has been ruled legally sane. Incarceration of a mental patient in a penal institution for the maximum period of time applicable to the crime is not in keeping with the standards established by courts of this state, or with the theory of punishment and retribution. The defendant in this case should have had the benefit of consideration of his mental illness as a mitigating circumstance." *Id.* at 1253.

*Legendre* opens up new possibilities when applied to Kentucky practice. Its rationale requires a Kentucky judge who reviews a jury sentence determination to listen to mitigation, whether in a statute or not, and decide if the jury sentence is excessive. Secondly, when the case's rational is applied to the half truth in sentencing hearing, it means that the defense is entitled to present mitigation of whatever sort to the sentencers.

### SEX CASE/BILL OF PARTICULARS
*Letcher Roe v. Commonwealth*
Ky., Sept. 8, 1988 (Unpublished)

The defendant was convicted of 1st degree rape, 1st degree sexual abuse, and 2d degree sodomy and sentenced to 26 years.

The defense attorney requested a bill of particulars. The prosecutor's response to it was: "Count One - 1979-1980, Count Two - 1979-1980, Count Three - 1982, Count Four - 1983."

Defense counsel informed the court that he was satisfied with the discovery. In a 5-2 opinion of the Court, the Supreme Court of Kentucky was not however. The Court stated, "It is not conceivable to us how an adequate defense could have been prepared after reviewing the bill of particulars filed in this case.... In fact, an adequate defense was not presented at this trial."

The Court expressed its outrage, "This case is alarming in its demonstration of the simplicity with which a man can be sentenced to 26 years in prison on sheer unsupported allegations of an ultimate crime itself. No one at trial seemed interested in any way as to the circumstances, details, or events that occurred and for which appellant was ultimately sentenced to 26 years in prison."

Justices Wintersheimer and Vance dissented.

### STATE MUST PRESERVE SEMEN SAMPLES FOR RETESTING
*State v. Escalante*
734 P.2d 597 (Ariz. App. 1987)

The defendant was convicted of 5 counts of sexual assault of two victims.

Before trial the defendant requested dismissal because the state permitted semen stains to deteriorate to the point that they could not be scientifically tested. Since the state failed to freeze the underwear of the victims, a defense expert could not do PGM testing on them. PGM testing is capable of excluding an accused in a sex case as the semen donor, or the perpetrator.

The appellate court found that it was "clear that the state had a duty to preserve the semen stains properly." *Id.* at 602. "When such evidence can be collected and preserved by the performance of routine procedures by state

agents, failure to preserve the evidence is tantamount to prosecutorial suppression of the evidence, even though the loss of the evidence is inadvertent and not the result of bad faith." *Id.*

The Court held "that when identity is an issue at trial, and the police permit the destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process. Dismissal is the appropriate remedy unless the evidence against the defendant is so strong that a court can say, beyond a reasonable doubt, that the destroyed evidence would not have proved exonerating." *Id.* at 603.

## HGN TESTING
*State v. Barker*
366 S.E.2d 642 (W.Va. 1988)

The policeman administered the Horizontal Gaze Nystagmus (HGN) Test, and estimated the defendant's blood alcohol level at .20%. The HGN test is based on the principle that consumption of alcohol cause nystagmus. According to *The Merck Manual of Diagnosis and Therapy* (1980) (4th Ed. 1982), Nystagmus is the rhythmic oscillation of the eyes in a horizontal, vertical or rotary direction. Nystagmus can be congenital or can be caused by a variety of conditions affecting the brain, including ingestion of drugs such as alcohol or barbiturates. *Id.*

The appellate Court held it error to admit the HGN results since the state did not introduce evidence of the test's scientific reliability. Additionally, the Court determined: "Even if the HGN test were found to be reliable, and its results admissible, we would be left with the question of whether estimates of blood alcohol content based on a driver's performance of the HGN test are admissible. The HGN test is a field sobriety test. A police officer's testimony as to a driver's performance on other field sobriety tests like finger-to-nose or walking the line, is admissible at trial as evidence that the driver was under the influence of alcohol. From the evidence presented, we are not convinced that the HGN test should be entitled to any more evidentiary value than other field sobriety tests." 366 S.E.2d at 646.

## PROSECUTOR CANNOT COMMUNICATE WITH PARTY WHO HAS ATTORNEY
*United States v. Hammad*
846 F.2d 854 (2d Cir. 1988)

DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility prohibits a lawyer or his representative from communicating or causing to communicate with a party to the action who is known to be represented by a lawyer

The Second Circuit found this ethical rule applicable to criminal prosecutions and to certain criminal investigations before the attachment of a person's 6th amendment rights. It is noted with approval that the rule prohibiting a prosecutor from communicating with a party who had a lawyer through a prosecutorial informant was limited to "instances in which a suspect has retained counsel specifically for representation in conjunction with the criminal rather in which he is held suspect, and the government has knowledge of that fact." *Id.* at 859

## FACTUAL BASIS FOR OPINION ALLOWED
*Hemmingway v. State*
543 A.2d 879 (Md. App. 1988)

Eric Hemmingway was convicted of manslaughter. The defendant did not know the victim. His defense was self-defense with the victim being the initial aggressor. The trial court allowed the defendant to call a retired West Virginia state policeman to testify as to the reputation for violence of the victim. The policeman's opinion was that the victim was a very violent person based on his investigation of the crimes that the victim was charged with, a 1979 voluntary manslaughter and a 1981 malicious wounding. However, the trial court refused to allow the policeman to mention the basis for his opinion, the specific acts of violence committed by the victim.

The appellate Court held it error for the trial court to limit the policeman's testimony to the length of time he knew the victim and a bold conclusion as to the victim's reputation for violence. "In so ruling, the court deprived appellant of an ability to urge the jury to credit [the policeman's] opinion because of the substantial basis for it." *Id.* at 883.

## LACK OF REMORSE
*Dockery v. State*
504 N.E.2d 291 (Ind. App. 1987)

The 76 year old defendant was convicted of 12 counts of child molesting, and sentenced to 25 years. In arriving at this sentence, the trial judge listed 4 aggravating circumstances, one of which was: "The defendant has displayed a total lack of remorse or contrition for his disgusting acts." *Id.* at 297.

The appellate court reversed since the trial judge improperly considered lack of remorse in sentencing: "The defendant has the right to protest his innocence at all stages of the criminal proceeding including sentencing. This is particularly true in instances where the evidence of criminal acts comes solely from the victims without any corroborating evidence, physical or otherwise."

In the present case, the finding of lack of remorse was based solely on Dockery's persistent denial of his guilt. He had never made any statements that were inconsistent with this claim of innocence. The evidence against him was comprised solely of the victims' testimony and was not corroborated by physical evidence, such as medical reports. Under these circumstances, the defendant's continued assertion of his innocence should not be used as an aggravating factor under the guise of lack of remorse. See *Mahla v. State* (1986), Ind., 496 N.E.2d 568, 575 (where additional evidence of guilt was present to substantiate finding of lack of remorse)." *Id*

## ROADSIDE SOBRIETY TEST

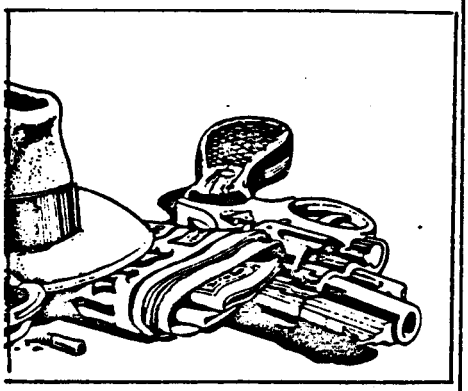
*Patrick v. State*
750 S.W.2d 391 (Ark. 1988)

The court held that the results of a portable breath test, which is not admissible by the prosecution to prove a person in guilty of DUI, are admissible by the defense when they indicate a person is not guilty of DUI since the evidence is exculpatory, crucial to the defense and sufficiently reliable. See *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

## *MIRANDA* VIOLATION NOT HARMLESS

*Smith v. Zant*
855 F.2d. 712 (11th. Cir., 1988)

The defendant, Smith, was convicted of murder and robbery and sentenced to death. Smith confessed to a friend that he killed the victim, and later to the police. Smith took the stand at trial and admitted stabbing and beating the victim, but said that he did not mean to kill him and he was sorry that he had done it



The Court found that a waiver of *Miranda* rights was an issue distinct from the voluntariness of a confession. The constitutional waiver of *Miranda* rights required a finding that in the totality of the circumstances there was 1) an "uncoerced choice" to waive them, and 2) there was a "requisite level of comprehension of the rights by the defendant." *Id.* at 716. Since the defendant in this case had an IQ of 65 and a mental age of 10 or 11 and since experts testified at the habeas hearing that it was unlikely that Smith understood his rights, the Court held that Smith did not intelligently waive his *Miranda* rights. Also, the Court held that the error was not harmless either to the conviction or sentence because confessions carry "extremely probative weight." While there was overwhelming evidence that Smith killed the victim, there was a dispute as to whether this was with or without malice. Additionally, there was "considerable difference between the tenor of Smith's confession and that of his trial testimony...." *Id.* at 722.

## INADMISSIBILITY OF VICTIM'S MEDICAL RECORDS

*Ronald Stewart v. Commonwealth*
Ky. App., 12/16/88 (Unpublished)

Stewart was convicted of 1st degree rape and sentenced to 10 years. The prosecutor introduced 5 pages of certified medical records of the victim without any witness, medical or otherwise, testifying to them. They included a notation by a nurse: "Rape relief (unintelligible mark) pt's bedside...." The record on the gynecological exam stated, "Description: ext gent- nl x some swelling clitoral... Impression: NL physical and pelvic exam x for slight clitoral edema..."

The Court held the records inadmissible since in the absence of expert testimony the jury was "invited to speculate what constituted 'clitoral edema'," and allowed to have an opinion that the victim received "rape relief" without an expert laying the foundation for the conclusion, and since the opinion was an ultimate fact which is solely in the province of the jury. Also, the defendant was denied the right to cross-examine and confront the doctor. The Court noted that the defendant had no duty to call the doctor; rather the prosecutor had the duty to introduce the evidence properly.

## POLICE CAN NOT WELCH ON PROMISE

*Jerry Johns v. Commonwealth*
Ky.App., 12/16/88 (unpublished)

In gaining a confession from Johns that he committed a burglary, the police struck a deal with him. If Johns agreed to be wired to get a confession from a co-defendant, then Johns was promised by the police that he would not be charged with any crime. Johns performed his part of the bargain. The promise was ignored, however, and Johns was arrested. He entered a conditional guilty plea, and received twice the sentence of the co-defendant.

The Court of Appeals reversed, holding that *Workman v. Commonwealth*, Ky., 580 S.W.2d 206 (1979) applies to a police officer's breaking an agreement with an accused, and is not just limited to a prosecutor's welching on a bargain. This is so, even if the prosecutor is unaware of and does not authorize the police promise. The indictment was ordered dismissed.

ED MONAHAN
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## Trooper cleared in rapes says colleagues still wary

Associated Press

TRAVERSE CITY, Mich. — When he retired from the State Police last December, Lt. Robert L. Beadle was a 23-year veteran with expertise in child abuse cases.

Four months later, he found himself on the other side of the fence, charged with raping two girls, one 11 years old, the other 13.

Two juries acquitted Beadle in August and September, but the verdicts haven't ended his personal trial.

Beadle, 52, says being accused of the very crime he dedicated part of his life to solving will always haunt him.

"The only way I'm going to clear my name is to go out and catch the guy who committed these crimes, and I've already started my investigation," he said.

State police investigators say that they still have serious questions about Beadle, who also has faced two indecent exposure charges in the past year.

Beadle's wife, Shirley, 54, and three daughters have stuck by him throughout the ordeal. Some 80 friends have written letters of support, but others have turned their backs on the family.

*Cincinnati Post*, October 4, 1988

# CRIMINAL DEFENSE FOR THE POOR, 1988

The United States Department of Justice's Bureau of Justice Statistics in September, 1988 issued a report on indigent criminal defense services in the United States. The report covered the year 1986, and compared it to the information obtained in the previous survey for 1982. A summary of the report follows.

## I. Number of Cases

There were 4.4 million indigent criminal cases in 1986, a 40% increase in cases from 1982.

## II. Caseload Increases

Three states and the District of Columbia more than doubled their indigent criminal caseloads between 1982 and 1986. Another 4 states had caseload increases between 80 and 100%. Kentucky's increase was 111%, the 4th largest increase in the country. (See Table 9).

## III. *Per capita* Costs

Table 9. States with the largest percentage increases in indigent defense caseload, 1982-86

| State | Percent increase in caseload, 1982-86 |
|---|---|
| Hawaii | 261% |
| Oregon | 214 |
| District of Columbia | 184 |
| Kentucky | 111 |
| Massachusetts | 96 |
| Montana | 95 |
| Iowa | 87 |
| Arkansas | 82 |

Note: Sampling error may affect the precision of the order of States in this table.

The nationwide per capita cost of indigent criminal defense in 1986 ranged from a low of $.69 in Arkansas to a high of $28.90 in the District of Columbia. (See Table 6). Of the 10 states with the lowest *per capita* costs in 1986, 7 were in the South. Kentucky ranked 36th with a $2.06 *per capita* expenditure.

Table 8. Ten States with the lowest average cost per indigent defense case, 1982 and 1986

| 1982 State | 1982 Cost per case | 1986 State | 1986 Cost per case |
|---|---|---|---|
| Oklahoma | $ 85 | Arkansas | $ 63 |
| Connecticut | 105 | Oklahoma | 102 |
| Louisiana | 111 | Mississippi | 107 |
| Virginia | 111 | Virginia | 116 |
| Maine | 112 | Kentucky | 118 |
| Arkansas | 115 | Illinois | 130 |
| Nebraska | 117 | Connecticut | 138 |
| Idaho | 121 | Georgia | 138 |
| Mississippi | 123 | Massachusetts | 143 |
| Illinois | 130 | Nebraska | 152 |

Note: Sampling error may affect the precision of the order of States in this table.

## IV. Average Cost Per Case

The nationwide average cost per case in 1986 ranged from a low of $63 in Arkansas to a high of $540 in New Jersey. Six of the 10 states with the lowest average costs per case in 1986 were in the South. Kentucky ranked 47th with a $118 average cost per case. (See Tables 6 and 8).

## V. Unconstitutional Contract Systems

The Report stated, " In contract programs there are a variety of payment mechanisms. One of the most common is to establish a cost level for each type of case. For example, a county may contract with a private lawyer or law firm to handle a given number of felony cases at $1,000 per case. In other jurisdictions, the funding source may offer to pay a total annual amount for the handling of all cases requiring appointment of counsel in a given jurisdiction. This contract method has recently been under attack in several States and was held unconstitutional by the Arizona Supreme Court in *Smith v. State*, 140 Arizona 355 (1984).

In the *Smith* case, the Arizona Supreme Court found that the Mohave County contract system, which by design assigned the indigent defense system representation to the lowest bidder, violated the fifth and sixth amendments to the U.S. Constitution for four reasons:

1) The system did not take into account the time the attorney is expected to spend in representing his share of indigent defendants.

2) The system did not provide for support costs for the attorney, such as investigators, paralegals, and law clerks.

3) The system failed to take into account the competence of the attorney. An attorney, especially one newly admitted to the bar, for example, could bid low in order to obtain a contract but would not be able to represent adequately all of the clients assigned according to the standards

. 4) The system did not take into account the complexity of the case".

## Conclusion

It is common knowledge that Kentucky ranks among the lowest states in the country in many critical education categories. It is not very well known that Kentucky ranks at the bottom in its commitment of money to the defense of indigent citizens accused of crimes. Kentucky's system is providing an unconstitutional system of funding in many of its counties. Kentucky is ripe for a *Smith v. State*, 681 P.2d 1374 (Ariz. 1984) challenge.

**ED MONAHAN**
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**Indigent defense**

According to the Constitution, all those accused of crimes punishable by incarceration have a right to an attorney. The courts have ruled that the defense of accused persons must be provided regardless of the defendant's ability to pay for such counsel. Therefore, the costs of indigent defense services are borne by the public.

The Nation spent almost $625 million during 82 for indigent criminal defense services in about 3.2 million State and local court cases.

The 1982 expenditure for indigent defense was 44% more than the estimated $435 million cost during 1980 and 213% more than the estimated $200 million spent in 1976.

The average cost of an indigent defense nationwide was $196, ranging from $567 in Hawaii to $85 in Oklahoma.

Assigned counsel systems that require the appointment of private attorneys dominate service delivery patterns. Sixty percent of all counties use assigned counsel systems; 34% use public defender systems; and 6% use contract systems.

Public defender systems are the dominant system in 43 of the 50 largest counties in the United States and serve 68% of the Nation's population.

A growing number of cases are no longer being handled by public defenders, primarily because of the increasingly strict definition of what constitutes a conflict of interest and limits on the number of cases the public defender is able to handle.

Of all counties studied, 75% have some form of recoupment requiring defendants to repay a portion of their defense costs; but 25% of the counties that have recoupment reported that no payments were received in 1982.

*Criminal defense systems: A national survey*

Table 6. Per capita and average cost per indigent defense case, by State, 1986

| State | Total expenditures | Per capita cost Amount | Per capita cost Ranking | Caseload estimates | Average cost per case Amount | Average cost per case Ranking |
|---|---|---|---|---|---|---|
| Total | $991,047,250 | $4.11 | | 4,441,000* | $223* | |
| Alabama | 6,153,292 | 1.52 | 44 | 32,000 | 192 | 29 |
| Alaska | 6,892,400 | 12.91 | 2 | 15,000 | 468 | 2 |
| Arizona | 16,240,654 | 4.89 | 10 | 71,000 | 230 | 20 |
| Arkansas | 1,636,500 | .69 | 51 | 26,000 | 63 | 51 |
| California | 251,504,768 | 9.32 | 3 | 886,000 | 284 | 10 |
| Colorado | 12,126,270 | 3.71 | 21 | 53,000 | 229 | 21 |
| Connecticut | 9,251,316 | 2.90 | 25 | 67,000 | 138 | 45 |
| Delaware | 2,750,000 | 4.34 | 14 | 18,000 | 153 | 40 |
| District of Columbia | 18,089,976 | 28.90 | 1 | 54,000 | 334 | 7 |
| Florida | 82,133,008 | 7.03 | 5 | 307,000 | 268 | 13 |
| Georgia | 8,318,500 | 1.36 | 47 | 60,000 | 138 | 44 |
| Hawaii | 4,382,609 | 4.13 | 18 | 20,000 | 219 | 22 |
| Idaho | 2,622,000 | 2.62 | 28 | 16,000 | 164 | 35 |
| Illinois | 33,101,784 | 2.87 | 26 | 255,000 | 130 | 46 |
| Indiana | 10,966,497 | 1.99 | 37 | 68,000 | 162 | 36 |
| Iowa | 11,536,008 | 4.05 | 20 | 42,000 | 274 | 11 |
| Kansas | 4,262,333 | 1.73 | 41 | 26,000 | 165 | 34 |
| Kentucky | 7,664,000 | 2.06 | 36 | 65,000 | 118 | 47 |
| Louisiana | 10,842,017 | 2.41 | 34 | 69,000 | 158 | 38 |
| Maine | 1,962,694 | 1.67 | 42 | 10,000 | 187 | 31 |
| Maryland | 20,042,024 | 4.49 | 13 | 102,000 | 196 | 27 |
| Massachusetts | 20,761,822 | 3.56 | 22 | 145,000 | 143 | 43 |
| Michigan | 43,612,176 | 4.77 | 11 | 138,000 | 316 | 8 |
| Minnesota | 14,165,242 | 3.36 | 24 | 54,000 | 261 | 14 |
| Mississippi | 2,912,000 | 1.11 | 50 | 27,000 | 107 | 49 |
| Missouri | 6,746,272 | 1.33 | 49 | 37,000 | 183 | 32 |
| Montana | 4,220,507 | 5.15 | 8 | 10,000 | 413 | 4 |
| Nebraska | 4,335,000 | 2.71 | 27 | 29,000 | 152 | 42 |
| Nevada | 6,382,795 | 6.63 | 6 | 22,000 | 291 | 9 |
| New Hampshire | 4,329,960 | 4.22 | 16 | 11,000 | 402 | 5 |
| New Jersey | 31,025,000 | 4.07 | 19 | 57,000 | 540 | 1 |
| New Mexico | 6,283,700 | 4.25 | 15 | 23,000 | 269 | 12 |
| New York | 111,671,160 | 6.28 | 7 | 457,000 | 244 | 17 |
| North Carolina | 16,480,870 | 2.60 | 29 | 70,000 | 235 | 19 |
| North Dakota | 1,225,963 | 1.81 | 39 | 6,000 | 198 | 26 |
| Ohio | 26,518,090 | 2.47 | 32 | 141,000 | 188 | 30 |
| Oklahoma | 4,496,538 | 1.36 | 48 | 44,000 | 102 | 50 |
| Oregon | 22,432,300 | 8.31 | 4 | 141,000 | 160 | 37 |
| Pennsylvania | 28,636,000 | 2.41 | 33 | 148,000 | 193 | 28 |
| Rhode Island | 2,083,091 | 2.14 | 35 | 8,000 | 254 | 16 |
| South Carolina | 4,699,868 | 1.39 | 46 | 31,000 | 152 | 41 |
| South Dakota | 1,781,804 | 2.52 | 31 | 5,000 | 367 | 6 |
| Tennessee | 7,792,823 | 1.62 | 43 | 38,000 | 206 | 24 |
| Texas | 32,897,000 | 1.97 | 38 | 213,000 | 154 | 39 |
| Utah | 2,327,765 | 1.40 | 45 | 12,000 | 198 | 25 |
| Vermont | 2,777,798 | 5.13 | 9 | 16,000 | 177 | 33 |
| Virginia | 10,122,671 | 1.75 | 40 | 87,000 | 116 | 48 |
| Washington | 21,190,420 | 4.75 | 12 | 101,000 | 209 | 23 |
| West Virginia | 4,848,921 | 2.53 | 30 | 20,000 | 242 | 18 |
| Wisconsin | 20,061,508 | 4.19 | 17 | 77,000 | 261 | 15 |
| Wyoming | 1,749,543 | 3.45 | 23 | 4,000 | 431 | 3 |

Note: Sampling error may affect the precision of the ranking of States in this table. Per capita estimates based on 1986 population data are from the Statistical Abstract of the United States, 1988, table 26. Caseload estimates include the following casetypes: felony, misdemeanor, juvenile, appeals, mental commitments, probation/parole revocations, postconviction relief, and other criminal matters.
*Average calculated on unrounded data.

*Bureau of Justice Statistics*

# BOOK REVIEW

*QUESTIONING AUTHORITY*
David L. Bazelon
(Alfred A. Knopf, 1988)
295 pages

David Bazelon served on the Court of Appeals for the District of Columbia for 35 years, 15 as chief judge, before retiring in 1985. *Questioning Authority* is a collection of his writings on criminal law, focusing on the insanity defense. While some of the writings first appeared many years ago as opinions or articles, most of the first half of the book appears to have been written for this publication.

The first half of *Questioning Author-ity* is excellent. Judge Bazelon's thesis is that poverty and social injustice breed crime and that a just society will not ignore that relationship. In commenting on *United States v. Brawner* (1972), Judge Bazelon says,

*If, in a given case involving criminal responsibility, social and economic deprivation is a substantial component of behavior, evidence of this personal history should not be categorized as irrelevant and therefore excluded. The issue of criminal responsibility, like other subjects in the criminal law, does not permit us to ignore the relationship between antisocial conduct, on the one hand, and poverty and social injustice, on the other.*

Judge Bazelon argues convincingly that incarceration is not a cost effective means of dealing with street crime. Those who would rob or steal rarely think beyond the risk of being caught and will not be deterred by lengthy sentences imposed on others. Those who are caught are incapacitated for a time, but at great public expense and in institutions that inevitably serve as graduate schools for further criminal conduct.

On a different plane, Judge Bazelon points out the fallacy of the notion that criminal conduct is all a matter of choice, by quoting from Mike Royko-

*You take some teen-ager in an affluent suburb. He has just returned from playing tennis or football after school. ... He walks into a 7- or 8-room house in which he has his own room, equipped with a stereo and maybe his own TV set and a closet full of clothes. ... After dinner with his father who has a well-paying job, and his mother, who might work but who also might be home every day, he goes in his room, looks in the mirror and asks himself, "What is in my heart? Do I want to join a gang and go out and mug somebody on the street and pursue a life of violence and crime? Or do I want to go to college and become a CPA?"*
*Goodness, thank goodness, usually prevails over evil. So the lad does not go out and join a street gang.*
*A similar decision is made by a youth in one of the city's many slum areas. His home is a dismal flat or a congested housing project. Income is his mother's welfare check. School is a place where the most important thing you learn is not to turn your back on strangers. Security and social life are the other kids on the street - the gang.*
*So he looks in the mirror and asks, "What is in my heart? Do I want to become a CPA, or a physician, or a lawyer? Do I want to someday make $50,000 or more a year? Do I want to go to Northwestern or Georgetown or maybe Yale? Hell no. I want to pursue the life of crime and violence. I want to go out and mug somebody. I want to wind up doing 10 to 20 so I can be with my friends.*

Judge Bazelon believes in internal controls -- that people do the right thing because they want to do the right thing, not because they are afraid of the consequences of doing the wrong thing (as those who rely on external controls urge). We must strive to create a society in which most people will have positive internal controls and therefore want to do the right thing. This means that we must work seriously to alleviate poverty and social injustice and reverse the decline of family, church and community values.

*Questioning Authority* is at its best when it asks its middle class privileged readers to acknowledge the blatant unfairness of ignoring the relationship between environment and crime. Acceptance of the fact that crime is not totally the product of a free will works against mandatory incarceration and fixed sentences and in favor of probation, work release, and other flexible means of dealing with offenders. Unfortunately, Judge Bazelon provides no clear prescription for dealing with those whose "rotten social background" has made them dangerous to other people. He provides us with the example of Murdock Benjamin, who killed two people over a racial epithet, a man who had been turned into "blasting powder by bitterness and racial injustice." In the end, we don't know what to do with Murdock (as he is referred to in the book) except lock him up in the psychiatric ward of a prison hospital.

That Judge Bazelon provides us with no answers for the problem of the violent criminal does not detract from the worth of his message -- that society must try to make life better for those born to a life of poverty and the criminal justice system must be sensitive to offenders' backgrounds. At the same time, however, *Questioning Authority* is seriously deficient in ignoring the voices of victims (many of whom are themselves from deprived backgrounds) who want protection and who see (many would say validly) the criminal law as an agent of retribution for the harms they have suffered. Concern for victims is not inconsistent with concern for offenders.

*Questioning Authority* barely acknowledges the relationship of drugs to street crime, at one point even suggesting that alcohol reduces crime because a grim world looks better after a few drinks. Leaving drugs out of the discussion is hard to figure, since most people today equate street crime with drugs.

While the first half of *Questioning Authority* is thought-provoking, the second half of the book is a cut and paste job of old articles and opinions that are out of date and add little to the basic theme. For example he includes an article written in 1981 on *Robbins v. California*, even though *Robbins* was overruled in 1982 by *United States v. Ross*. He discusses the unreliability of predicting dangerousness but does not mention *United States v. Salerno* (predicting dangerousness in pre-trial release decisions) or *Barefoot v. Estelle* (predicting dangerousness in capital cases).

The book is also disappointing in failing to provide the flavor of the court on which Judge Bazelon served for so long. We read very little of other personalities and nothing of the debates on the significant cases decided by the Court of Appeals for the District of Columbia during Judge Bazelon's 35 years on the court. You'll be disappointed if you pick up this book expecting to read what Judge Bazelon thinks about Judge Burger -- as the former Chief Justice was known when he served on the DC Court of Appeals.

**WILLIAM FORTUNE**
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Bill has been a Law Professor at UK for the past 20 years. He attended the University of Kentucky school of law graduating in 1964. He was a federal public defender for the Easten District of Kentucky 1978-79 . Prior to that 1975-76, he was a Los Angeles public defender. Bill is also a frequent CLE speaker for AOC, DPA and other organizations around the state.

# Brain defects may be linked to sex crimes

Associated Press

SAN FRANCISCO — Many child molesters and sadists suffer subtle damage in the parts of the brain responsible for sexual fantasy, possibly explaining the source of their abnormal urges, a study suggests.

And a separate study of a rare kind of rapist found abnormalities in the part of the brain that allows conscience to control instinctive emotions. The men were loners who committed their crimes during sudden brain seizures without anger or motive.

Both studies were presented Wednesday during a session on the biological roots of instinctive behavior at the annual meeting of the American Association for the Advancement of Science.

The first study, of 400 men, found abnormalities in the portions of temporal lobes — the part of the brain near the ears — in 40 percent of the sadists and half the child molesters, said Ron Langevin, senior research psychologist at the University of Toronto's Clarke Institute of Psychiatry.

The other study — by Dr. Anneliese Pontius, a Harvard University associate clinical professor of psychiatry — dealt with two offenders who committed their crimes without premeditation, feeling or anger, and who remembered their acts despite hallucinations.

*The Cincinnati Post*, January 19,1989

## *STAFF CHANGES*

**Since August 1, 1988, 11 attorneys have left the Department having a combined total of 68 years of service and experience.**

### JOANNE YANISH RESIGNS

After 7 years of providing representation to appellate and post-conviction branch clients, JoAnne Yanish resigned from DPA effective January 9, 1989. Larry Marshall said of her, "JoAnne is the kind of person who comes along rarely in life. I have been made all the more richer by her association with and friendship toward me. It is good to know that JoAnne will continue to fight for the have nots of society."

JoAnne, who began her career as a legal aide attorney prior to becoming a public defender, will continue her dedicated service to public interest law in her new job with the Consumer Protection Division of the Attorney General's office. JoAnne's DPA friends will miss her tenacious spirit and common sense as well as her day-to-day support and advice. We wish JoAnne the best and are certain she will continue to do well and do good.

**There are currently 10 attorney vacancies in DPA field offices. The vacancies are in Hazard, Stanton, London, LaGrange, Morehead, Frankfort, and Paducah.**

# BOOK REVIEW

CRIS BROWN

## *THE ANGRY BOOK*

Theodore I. Ruben
1970; Macmillan
paperback, $4.95

A friend of mine, seeing that I was reading this book, volunteered that he had his anger under control. It was the one thing in his life he'd dealt with because of an extremely angry father. He said he hardly ever felt angry and when he did, he managed to so understand the other side of the argument that his anger disappeared. He admitted he admired "stand-up" kind of people and felt himself a "wimp." It was obvious he has a problem with anger. He grew up without an example of the healthy exchange of honest thoughts, which is the author's definition of anger. He saw anger as an emotion that should be divorced from his personality.

### NO ANGER

No anger is anger out of touch. My friend had lost touch with his anger, subjugating it because he'd been constantly berated by his father. He survived the verbal abuse by "not making waves" because it was not smart to speak up. Unresolved anger is laid away into a storehouse or "slush fund."

### SELF-ESTEEM

The author of *The Angry Book* writes in depth about the visible signs of stored anger that affect a person's image of himself. Unhealthy coping with anger, as explained by the author, takes the form of scheming, brooding, trying to second guess or be one step ahead of the game, and blowing up over nothing (anger inappropriate to the situation).

The biggest problem is that the person is pretending to be someone he is not. Trying to be likeable and easy-going gets in the way of one's best interest in conflicts.

The poor manager of anger finds himself going along with something he really doesn't want to do simply to "be nice." Afterward, he feels put upon and berates himself for agreeing. The object of the anger is unaware of this anger, so the anger tactics of the poor anger manager, such as shunning the offending party, are wasted on the other person.

### INAPPROPRIATE ANGER

Often the frustrated poor manager of anger inappropriately opens the floodgates of the storehouse, lambasting a person who has no idea what set the tirade off.

The poor manager can let anger escape when he trusts someone to love him regardless of his anger (in my friend's case - his mother) or he may weigh the situation and see a chance to unload the anger on someone who isn't important to him or that may be never seen again.

The key here is the calculated manner in which anger is controlled -- consciously withheld or released.

### UNCONSCIOUS CLUES

Anger will "out" even in the most controlled person. Manifestations will be unmistakeable -- the overly-aggressive angry driver, or a person with a spiteful tongue -- no matter what or who the subject. The author said he's never met an overweight person who did not have a tremendous storehouse of anger.

### MANIPULATIVE ANGER

There are people who are not really in touch with their anger or are not interested in the honest exchange of thoughts, but who manipulate with anger to get their way. They experience the opposite of repression -- they merely spout.

### VIOLENCE

Violence is the antithesis of healthy interplay and becomes the metamorphosis of the storehouse of anger. We see the destructive results of stored anger -- overkill, murderers who empty a gun into a victim. The author lists others as suicide victims, spouse abusers, and rapists. The person is in touch reactionally with his anger and inappropriately strikes out - sometimes at the source of his anger, but often the anger is displaced on a stranger.

The author does an excellent job of presenting hidden forms of anger. Unfortunately, as the book is primarily a self-help book, it doesn't suggest ways to deal with newly found anger. For our purposes it presents a new way to understand criminal defense clients and ourselves.

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# Court Ordered Birth Control a Step Toward Chemical 'Jails'

**George F. Will**
*Washington Post* columnist

WASHINGTON — When Debra Forster was 11, she was raped. At about that time, she began drug abuse that has included cocaine and LSD. She was married at 15; by 17, she was the mother of two boys. Not surprisingly, she was a terrible mother. Today, she is 18 and the focus of a legal controversy.

A year ago in Mesa, Ariz., she left her infant sons, ages 18 months and 6 months, alone for three days in a sweltering apartment without air conditioning. She was on a binge because motherhood was, she says, too much for her. The boys nearly died. She was arrested and, while in jail, gave birth to a girl.

She could have been sentenced to 30 years. Instead she was put on probation, with an especially troubling wrinkle: Her sentence of life probation not only forbids her to reestablish contact with her children, it requires her "to remain on some method of birth control" for life.

One sympathizes with the sentencing judge, a woman exasperated with "babies having babies." However, this sentence is a step down a dangerous path.

Presumably, Forster will be required to furnish written evidence that she is using birth control pills. To compel the use of a drug is an intrusive act. To compel the use of a drug that controls an important human capability, as a birth-control pill does, is especially intrusive.

When government tampers with sexuality, it is touching personal identity. In light of the recent elaboration of a woman's privacy right, as defined in constitutional law concerning abortion, it is hard to imagine the sentence withstanding the scrutiny of an appeals court.

But regardless of its constitutional standing (Forster is a Catholic, so the sentence may violate not only the privacy right but the guarantee of free exercise of religion), it is morally repellent.

Compelling Forster to use birth control pills is not as intrusive as, say, compulsory sterilization would be, not least because what the pill does can be reversed. But intrusiveness is not made acceptable by being reversible.

The seriousness of such an intrusion is suggested by this sensible intuition: It is less troubling for government to remove a child from incompetent or abusive parents than for government to stipulate who shall not procreate.

Forster's sentence cannot be considered mandatory preventive medicine. What is to be prevented —pregnancy — is not an illness. And for a court to mandate medicine for punitive purposes conflicts with the fundamental moral imperative of medicine: "Do no harm."

What the sentencing judge is trying to prevent is not a disease but bad behavior.

But the practice of administering drugs for behavior modification has enormous potential for mischief. Compulsory medication for persons incapacitated by psychosis is not uncommon. But such involuntary medication is undertaken only when the will of the patient is presumed not to exist, or to be so attenuated that only chemical intervention can even partly restore it.

This is utterly unlike the mandating of a drug in Forster's case. There, the purpose of the drug is to incapacitate her body so that society will not have to count on her will to make her behavior better.

There are many potential uses of "chemical penology," all of them subversive of individual autonomy. Rapists could be sentenced to "chemical castration," drug treatments that reduce the body's production of testosterone. Violent recidivists could be sentenced to perpetual sedation. Perhaps drunken drivers could be sentenced to remain on a drug that would make them painfully ill if they consumed any alcohol.

Clearly many such punishments would be crueler, in the sense of more demeaning, than the normal punishment of imprisonment for serious offenses. Forster's offense was serious. She should have been sent to jail. The law should try to regulate behavior by the traditional mixture of influences: The law should appeal to conscience by stigmatizing certain behavior, and should pose a threat to be feared.

# FUTURE CRIMINAL DEFENSE SEMINARS

**NCDC Advanced Cross-Examination Seminar**
April 14-16, 1989
Atlanta, Georgia
(912) 746-4151

**NLADA Defender Management Training**
May 4-6, 1989
New Orleans, Louisiana
(202) 452-0620
A program that trains public defender supervisors on management skills.

**17th Annual KY Public Defender Training Program**
June 4-6, 1989
Holiday Inn North,
Lexington, Kentucky
Featuring Stephen Rench, Joe Guastaferro, Lenore Walker, Gerald Goldstein, Terrance McCarthy, Doug Magee.

**National Criminal Defense College Trial Practice Institute**
June 11-24 and July 16-29, 1989
Macon, Georgia

The College was formed in 1985 to continue the important work which had been performed by the National College for Criminal Defense in Houston after that organization closed its door in 1983. Each year, the NCDC presents 2 sessions of the Summer Trial Practice Institute on the campus of Mercer Law School in Macon, Georgia.

About the Trial Practice Institute: Each two week session is limited to 96 participants, who are divided into small groups according to trial experience. The least experienced groups normally have had no jury trials. It is not unusual for members of the most experienced group to have tried 50 or more jury cases.

Topics covered in the group exercises include client interview, jury selection, direct and cross examination, impeachment, expert witnesses and closing argument, among others. Each participant performs each daily assignment under the supervision of a member of the nationally recognized faculty. Faculty members rotate daily, and videotape is provided in every room.

In addition to the small group exercises, daily lectures and demonstrations are presented by the faculty. Professional actors are used in the roles of clients and witnesses.

Tuition: $900.00 per session. Registration Fee - $25.00

The registration fee, which will be applied to tuition, is non-refundable and must accompany application. Tuition is payable upon receipt of invoice, and must be paid in advance, unless other arrangements are made. Delayed payment arrangements may be made with public defender offices where necessary. Tuition includes lunches/coffee breaks on weekdays and scheduled social events. Participants are on their own for all other meals. *NCDC, c/o Mercer Law School, Macon, Georgia 31207, (912) 746-4151*

**Death Penalty Practice Institute**
October 1-6, 1989
Ky. Leadership Center
Faubush, Ky. (1/2 hour west of Somerset)
The program covers trial, appeal, and state and federal post-conviction capital litigation using the trial practice format.

**NLADA Annual Conference** November 14-17, 1989
Kansas City, Missouri
(202) 452-0620

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