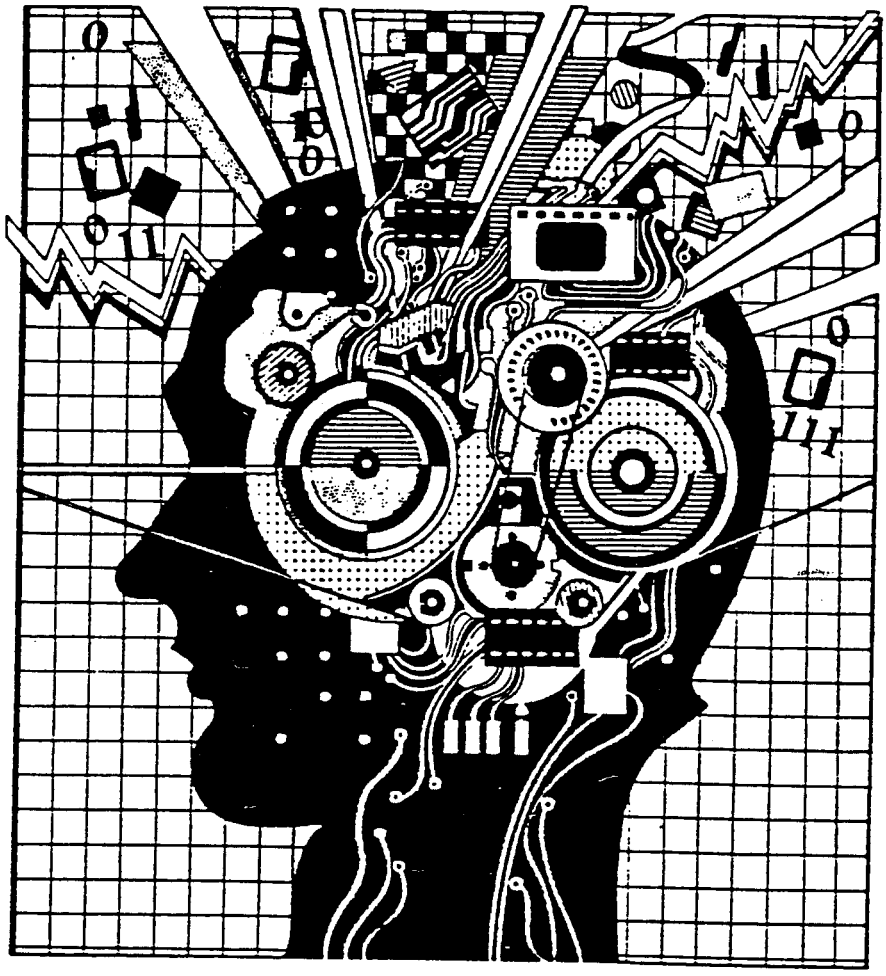
THE ADVOCATE

A Bi-monthly Publication of the Kentucky Department of Public Advocacy
Advocacy Rooted in Justice



PSYCHIATRIC DISORDERS CAN BE TREATED

Volume 12, Number 3 **April, 1990**

THE ADVOCATE FEATURES

Bourbon County Public Defender, Lee Greenup

Lee Greenup, our public defender contract administrator in Paris, his hometown, likes the quote of Oliver Wendell Holmes that "a man's mind stretched by a new idea can never go back to its original dimensions." Lee has experienced that. Although there are several lawyers in Lee's family, he didn't get interested in law until his sophmore year at Transylvania when he took a pre-law course. After graduating from the U.K. School of Law in 1983, Lee began practicing law in Paris.

Lee never considered doing criminal defense work, until the Bourbon Co. public defender resigned in 1985. Lee filled the breach and had some of his "most satisfying moments as a lawyer." That led him to seek the contract for the county.

Lee finds the work stimulating and particularly likes the increase in litigation. He estimated that 75% of his practice is public defender work. From July 1, 1988 - January 30, 1989, his felony caseload was 75 cases; his misdemeanor caseload was 104 cases. He is often motivated by the thought that he's "the only person standing between the often defenseless defendants and the assembled forces of the Commonwealth." Lee believes that every case provides a different opportunity and every client possesses some redeeming virtue. That attitude has "warded-off" the burn-out factor due to the heavy caseloads and demands of the job.

Lee Greenup

Lee calls upon 4 area attorneys to handle conflict cases. He is placed in the uncomfortable position of asking them to work for what he feels is an unfair hourly rate- $25/$35. Even then Lee has only a 40% collection rate on fees billed, as funds are prorated. The "going" rate in Bourbon Co. is $70 hourly.

The criminal justice system is best served by providing equal funding for both public defenders and prosecutors as "the rationale of the adversary system presupposes some type of state approaching equity between the parties." As in other counties around the state, this simply isn't happening in Bourbon Co. The FY '89 DPA Contract for Bourbon Co. pays $15,524. With the county contribution of $10,000, Lee has a total of **$25,524** to provide a defense for indigents. Yet, the prosecution receives **$135,145.** This figure is misleading because it only represents the salaries of the Bourbon Co. Comm. Atty., Asst. Comm. Atty., and their 2 staff- a detective and a secretary; the salaries of the Bourbon County Atty., Asst. Co. Atty., and their secretary. It does not include operating expenses, etc. which is included in the public defender's $25,524. On its face, it is **a difference of $109,621!**

Lee plans to continue as a contract public defender for a year or two and then focus on his general practice in Paris. He attributes his many successes to his parents, who were "excellent role models." C.L. Watts, Probation and Parole Officer of the 14th Judicial Dist. of Ky. said, "I've worked with Lee for a long time and I've always found him honest, fair, above board and looking for the best results for all concerned. He is willing to do a job that requires a lot of time and never complains about low pay and long hours. I suppose he's able to do that because he's not a married man with a family. He's a real asset to your Department." We think so too. Thanks Lee.

CRIS BROWN
Paralegal
MLS/Training Sections
Frankfort, KY

NORA MCCORMICK

"The caseload was such that I was not being compensated on an adequate basis. I figured out for the number of hours worked I was being paid less than $10 hourly. Under those circumstances I felt that my private practice was subsidizing the public defender work. Yet I gave the public defender work more emphasis, because the stakes were higher. I finally decided that was not fair to my private clients, or to me, so I resigned my contract."

Nora McCormick
Assistant Attorney General
Director
Consumer Protection Division

HARRY BUDDEN

Harry Budden, Attorney at Law, was actively a public defender from 1973-1976, and did contract work 1982-1985 under Nora McCormick's administration. He "got out of public defender work when they changed the law allowing the attorney to represent a client privately retained by the family after having represented him initially at the preliminary hearing as a public defender."

"Given that legislation and that it is impossible to do an adequate job when you have an overburdened caseload, no access to experts, staff, or facilities and that you can't find attorneys willing to help out with the burgeoning caseload, attorneys have learned they can't make any money doing public defender work in Bourbon Co."

Harry said of Lee, "He does a very good job given those limitations, but it's unfair to expect an attorney to work under those conditions, when you're facing the Commonwealth which has such an incredible fund of resources."

From The Editor:

Mental illness is a frequent and large explanation for much of our crime, yet public defenders, criminal defense attorneys, prosecutors, police, judges and corrections officers in the criminal justice system too often are ignorant of progressive mental health knowledge.

We need to educate and implement the insights of social workers, psychologists and psychiatrists into the explanation for the behavior of criminal clients. We also must educate ourselves, the courts and corrections on the many possibilities for treating mental disorders.

This issue we continue to focus on exploring meaning for criminal behavior and the chances of that behavior changing in the future. Dr. Weitzel reviews a monumental new work, *Treatments of Psychiatric Disorders,* and relates its importance to the criminal justice system.

We continue in this issue to explore the pernicious effects of *racism* in the criminal justice system. What can we do to make color irrelevant to crime?

As the Catholic Bishops have rightly observed, "Racism is not merely one sin among many, it is a radical evil dividing the human family...."

Ed Monahan

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet for administrative purposes. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the attention of the Editor.

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Dan Goyette	**Rob Riley**
Ethics	In the Trenches
David Niehaus	**Dave Norat**
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KORDENBROCK V. SCROGGY, DECISION VACATED BY 6TH CIRCUIT

Petition for Rehearing En Banc Granted

On February 20, 1990, the 13 judges of the Sixth Circuit Court of Appeals voted to rehear *Kordenbrock v. Scroggy*, 889 F.2d 69 (6th Cir. November 3, 1989) *en banc*. They also vacated the previous panel opinion in the case.

The case was restored to the docket, and a supplemental briefing schedule was set by the clerk with oral argument to be scheduled as soon as practicable.

Kordenbrock is the first death penalty case to be considered by the Sixth Circuit since *Furman*.

Since 1985, the Sixth Circuit has granted 20 *en banc* petitions for rehearing. *Kordenbrock* was the 21st since 1985 and the second in 1990. In 1989 seven *en banc* petitions for rehearing were granted.

Incredibly, both the Sixth Circuit panel and the federal district court, *Kordenbrock v. Scroggy*, 680 F.Supp 867 (E.D. Ky. 1988), denied relief even though the jury was prevented from hearing that Paul Kordenbrock was emotionally disturbed and mentally ill because the State of Kentucky boldly refused to pay the defense's psychiatric witness as ordered by the state trial judge. The panel and the district judge both ruled that the indigent Paul Kordenbrock was not entitled to rebut the state medical doctor's testimony with a psychiatrist; rather, the panel and district judge said rebuttal by the defense's pharmacist would have to do.

Amazingly, the panel and the district judge said that Paul Kordenbrock could have used a state employed psychiatrist even though that psychiatrist was 1) not Board certified, 2) could not guarantee confidentiality, and 3) would not assist the defense in cross-examining the state's doctor.

No. 89-5107

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ED

FEB 20 1990

LEONARD GREEN, Clerk

PAUL KORDENBROCK,

Petitioner-Appellant,

v.

GENE SCROGGY, WARDEN, KENTUCKY STATE PRISON,

Respondent-Appellee

ORDER

BEFORE: MERRITT, Chief Judge; KEITH, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this Court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Even though every practicing lawyer in Kentucky knows that in fact and in law the jury, not the judge, fixes, not recommends, the sentence, the panel and the district judge held otherwise. The Kentucky Supreme Court rules and caselaw indicate that the jury fixes sentence. See RCr 9.84.

Is it any wonder that the petition for rehearing *en banc* was granted?

Kordenbrock originated out of Boone Co. Paul is represented by Tim Riddell and Ed Monahan.

PUBLIC ADVOCACY ALTERNATIVE SENTENCING PROJECT **(PAASP)

Part of the Solution to Jail and Prison Overcrowding

Judge John T. Daughaday

Sentencing has always been an integral part of our criminal justice process; however, in recent years it has taken on a new and burdensome context. Who among us, prosecutor, defense counsel, or judge, has not been affected in our respective role by the overcrowded conditions in our state's jails and penal institutions? The demand for space in these facilities and the lack thereof has grown to increasing dimensions and now impacts directly on the quality and quantity of the criminal justice system.

Our system is still struggling with this issue, and from all apparent indicators, we have yet to come to terms with the many factors that impact on jail and prison overcrowding. Each time the legislature passes a law intended to stiffen the penalty for certain types of criminal conduct, that law impacts directly on prison and jail populations.

Statistics compiled by the state's Correction Cabinet estimate that the passage of the 1986 truth-in-sentencing law, which increases parole eligibility for certain violent offenses from a minimum of 20% of the sentence to a minimum of 50%, has cost the state over $30 million since its enactment. The persistent-felony offender law enacted in 1974 accounted for less than 50 inmates ten years ago; however, by late last year, that figure had grown to 1,850 inmates.

Can Ky. come to grips with this growing problem that threatens to undermine our system? The question might be better stated as "what steps can Ky. take to come to grips with this problem?" One approach is to build more prisons and jails, yet this approach fails to realistically consider the cost of jail and prison construction and the cost to maintain prisoners. That cost is estimated to be approximately $50,000 per cell and $20,000 per year to maintain each prisoner.

Experiences from other states, such as Minnesota, indicate that the more contributing factors that can be identified and addressed, the better the state's chances of coming to grips with this problem in fiscal terms that are realistic in light of state and local government revenues. Minnesota has approximately 500,000 more people than Ky., yet it has about 3,000 inmates compared to Ky.'s 8,300.[1] Many contributing factors have been identified, among them: disparity in judicial sentencing; laws affecting the term of imprisonment; laws affecting eligibility for parole and probation; lack of adequate funding for probation; lack of alternative sentencing options.

These problems and others have been addressed in a variety of ways, and some of these measures should be considered, if Ky. is to solve its problem of growing demand for jail and prison space. Among those that may be worthy of consideration for us: sentencing guidelines; revision of penal statutes; increase in number of probation officers; more funding for resource facilities; and alternative sentencing.

For the past 2 years, Ky. has experimented with alternative sentencing under the auspices of the Public Advocacy Alternative Sentencing Project (PAASP). Under this project, four Public Advocacy trial offices, covering a number of judicial districts, were each provided with an alternative punishment worker. The PAASP is a grant jointly funded by state and private funds. Statistics compiled by the Public Advocate's office show that 184 cases were referred to PAASP, 115 alternative sentencing plans were developed and presented to circuit courts. Of those 115 plans, 54 were followed in whole or in part by the sentencing court (47%), and only 7 of these alternative sentencing plans have been revoked (12%).

My judicial district, the 52nd (Graves Co.), was one of the districts covered, and local statistics from the area office in Paducah show that a total of 18 cases were referred to them for alternative sentencing plans. Of that number, 7 plans were prepared and submitted for consideration for the Graves Circuit Court, with the Court accepting 5 of those plans and granting probation to the defendants and incorporating all or a portion of the alternative sentencing plan. Of the 5 defendants probated by the Court, one defendant's probation has been revoked and one motion for revocation is now pending.

These results show quite clearly that not only does the sentencing judge have a viable alternative at sentencing, but the state has a powerful new weapon to utilize in the fight against overcrowding in jails and prisons. This resource deserves to be funded for the next biennium and to be expanded so that other judicial districts can avail themselves of this sentencing alternative.

Having spent the last 20 years in the legal profession, including the past 12 years on the bench, I feel that I can make certain observations based on where we are coming from and where we should consider heading with regard to the overcrowding problem. This problem did not arise overnight and will not be solved quickly; however, if we are to find a solution, we must chart a course now and embark upon the journey with as much dispatch as possible.

The Executive, Legislative, and Judicial branches of state government must make a commitment to realistically address the problem, identify the issues, and be willing to agree on solutions across the board, if we are to gain any measure of success. We should take advantage of the PAASP and the momentum it has generated and build upon and expand our efforts.

JUDGE JOHN T. DAUGHADAY
52nd Judicial District
Graves Co. Courthouse
P.O. Box 428
Mayfield, Ky. 42066
(502) 247-8726

Judge Daughaday received his J.D. from the University of Kentucky in 1970. He was Lexington City Attorney from 1970-71, and was in private practice from 1971-77. He served as a District Judge for Graves Co. 1978-1983. He was president of the Ky. District Judge's Association 1980-83. He was elected Circuit Judge and he's served in that capacity since 1984.

[1] ***Statistics based on Kentucky Corrections Cabinet reports and an article by Todd Murphy, staff writer, Louisville Courier-Journal, "Maximum Insecurity," January 7, 8, 9, 1990.***

**PAASP is a joint private and state-funded, multiagency effort involving the Department of Public Advocacy, Developmental Disability Planning Council and the Public Welfare Foundation. The initial grantor was the Kentucky Developmental Disability Planning Council (DDPC). For more information contact Dave Norat at (502) 564-8006.

STATE OF JUDICIARY ADDRESS TO THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY

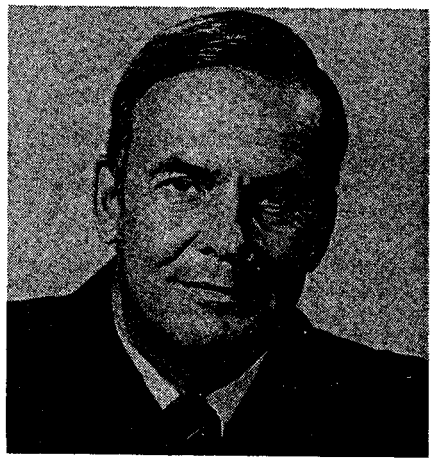
MARCH 14, 1990

Governor Wilkinson, Lieutenant Governor Jones, President *Pro Tempore* Rose, Speaker Blandford, Senators, Members of the House, Secretary of State Erhler, Attorney General Cowan, Fellow Justices and Judges, Circuit Court Clerks, Guests of the General Assembly, friends, my family and my fellow Kentuckians.

It is with a sense of duty and with a sense of pleasure that I appear before this joint session of the Kentucky General Assembly to deliver, as Chief Justice, my constitutionally mandated address of the state of the judiciary in this Commonwealth.

Before proceeding with that task, I want to pause - for a moment - to express to this General Assembly and to its predecessors, on behalf of the nearly 2,300 employees of the Kentucky Court of Justice, our deepest appreciation for your continuing concern, interest and support of Kentucky's judicial system. The mutual respect and cooperation between the Kentucky judicial branch of government and the Kentucky legislative branch of government is very rare in this country. At a recent historic national meeting, sponsored by the National Conference of State Legislators, the Conference of Chief Justices, and the National Center for State Courts, to address the problem of legislative—judicial relations, Kentucky was repeatedly cited as an example of how these two branches of government should relate to each other, while still preserving and respecting each other's constitutional duties and responsibilities. For your leadership in making this valued and unique relationship possible, I salute you. You certainly make my job easier, more productive, and more rewarding, all of which directly benefits those Kentucky citizens who are users of the judicial system.

When one ponders the condition of Kentucky's judiciary, one's conclusion depends upon one's perspective. For example, if you are the Chief Justice of Kentucky, with a daily continuing stream



Chief Justice Robert F. Stephens

of complaints, problems, brush fires, requests for jobs, requests for pay raises, requests for everything from pencils to computers, and a myriad of other administrative problems, one would occasionally conclude that the Kentucky Judicial System seems to be bogged down in a miasma of mistakes, confusion, delays and incompetence. I am sure these feelings are not unknown to the members of the General Assembly, who face similar problems and frustrations on a daily basis.

On the other hand, if one is a Chief Justice, or Court Administrator, of another state, or if one is a staff member of the National Center for State Courts, or if one is a student of the judiciary, one views Kentucky as having the finest judicial system in the United States, particularly with respect to its constitutional and statutory structure. That viewpoint would cite the uniform, integrated system, with the Supreme Court acting as a Board of Directors, with the Chief Justice as Chairman of the Board. That viewpoint would acknowledge that the total finding of the courts by the General Assembly provides a strong vehicle to solve the problems of the business of judging, with regular input by the General Assembly. That viewpoint would give accolades to the General Assembly and to the people of Kentucky who, by the enactment of the judicial article in 1975, brought Kentucky's judicial system out of the dark ages and into leadership in this century.

Because I am Chief Justice, and because my time is filled with the day-by-day operation of the court system, I sometimes neglect to think about and recognize the absolute truth of that second viewpoint. Daily fatigue and frustration sometimes tend to diffuse the broad picture of any situation. Perhaps it is a matter of being to close to the trees to see the forest. It is my view, however, that, even with its problems, clearly Kentucky has the finest judicial system in the United States.

All of you know that, for the past 15-20 years, we have been in a litigation explosion in this country, and in this Commonwealth. Our case load - at all levels of the court system - has been on the increase. This increase is continuing and, although the rate of increase has slowed considerably, the difficulty and complexity factor of the cases has increased, thus necessitating more and more study time and thought by jurors as they reach their decisions.

Because of the assistance the General Assembly has given us over the years, and because we have made many administrative changes, we have managed to handle, at least in part, that increasingly complex case load. Our overall annual disposition rate has increased and the overall length of time for disposition of cases has also dropped every year. The bottom line is that we are getting more work done and we are getting it done more quickly. The positive achievements have been primarily due to the efforts of individual judges who, after recognizing the problem, have made great personal efforts, and have effectively used the technological and administrative devices with which we have provided them.

We have addressed the problem of appel-

late delay by the use of video taping systems which are now installed in 37 courtrooms in the Commonwealth. Today, transcripts of evidence are ready immediately upon completion of the trial, and six hours of testimony, (which are totally accurate and not subject to human error) is available to litigants for $15.00 while a normal transcript would cost $750-$1,000 and would take weeks or months to complete. In long trials, the results are even more dramatic.

Since I have last talked with you, the Ford Foundation and the John F. Kennedy School of Government, at Harvard, honored Kentucky video courts with one of its $100,000 innovation awards for excellence in state and local government. More than 1,000 applicants for those awards are received each year. Moreover, Kentucky's lead in the use of video taping of trials is being followed by 12-15 states, and the federal government. While other recordation systems are floundering in the past, our video system has thrust Kentucky into the 21st century. Our video system is the wave of the future. The taxpayers and the litigants who pay the freight in the judicial system are the direct beneficiaries of this system. Our commitment to further expand and improve the system is a firm one.

In 1986, the General Assembly passed a far reaching bill which mandated that the Court of Justice develop a system to keep broad-based statistical data of the activities of the Kentucky courts. Although no financial appropriation was made in that act, we have responded by developing a local-state computer information system which will comply with the mandate. We have pilot projects - installed and functioning - in 4 counties - Johnson, Clark, Warren and Kenton. We are now ready to proceed, full bore, with the implementation of the statewide system and meet the mandate of the General Assembly. In our budget for 1990-1992 we have sought funds for installation of the computers - called sustain - in 36 counties. In the foreseeable future, the information mandated by the General Assembly will be available. This system will attack court delay by allowing judges to manage their dockets and will bring more "sunshine" into the court system.

Since the implementation of the new judicial article, in 1976-1978 - the AOC has been responsible for providing all court house space. Since 1976, with your appropriations, we have assisted local governments in building or remodeling 40 courthouses. We have, in that process, seen the cost of construction rise to $100 per square foot. Nearly 25% of the space we provide is for storage of the incredible amount of paperwork with which we have been inundated. Two years ago I made mention to you of a "paperless court," I can report to you today that - in Jefferson County - the process has begun. Two so-called laser optical disc storage units have been installed and are working. Each storage disc, about the size of an old "78" record, holds 128,000 pages of legal sized paper. A whole years work can be literally kept in a small filing cabinet, instead of 1200-1500 square feet of precious and expensive office space. A readily accessible and simple index makes the individual pages available for inspection and printing. Kentucky again, has achieved a first. We would like to continue with refining of this technology and broadening its use.

We are planning a statewide system to use modern facsimile machines. This system, under special rules of procedure, will serve litigants and attorneys well by being available to all circuit clerks offices. No longer will litigants and attorneys suffer the expense and stress of meeting procedural deadlines by often unreliable mail or even personal delivery.

I take pleasure in reporting to the people of this Commonwealth that the Kentucky Supreme Court, with the help many people, has adopted a new and more stringent code of professional ethics. In order to further sensitize attorneys as to their ethical standards, we have passed a rule which requires all law students to pass a national examination on ethics before they are eligible to even take the bar examination. We have strengthened our mandatory continuing legal education for judges and lawyers. Along with the Kentucky Bar Association, we have established a blue ribbon commission to study, identify and eliminate gender bias in the legal profession and in the courts of this Commonwealth. **The President of the KBA and myself, are in the process of establishing a similar blue ribbon commission to search out and elimnate racial bias in our judicial system.** The Kentucky Bar Association is in the process of reviewing, with the assistance of the ABA, the entire process of lawyer discipline.

One of the great weaknesses of the legal system in the country, and in Kentucky, is the failure of too many lawyers to involve themselves in the lives and needs of their community. Too many of us have forgotten the traditional and historical role of lawyers. As a beginning, we had passed a voluntary rule which authorizes the interest earned on attorneys trust accounts to be used in a statewide program, called IOLTA, whose purpose is primarily to fund programs which provide legal services for the indigent. Recently, over $200,000 in grants were made. This is a just beginning.

One last point in this area. Because of the limited amount of funds - both state and federal - available to provide legal service for the poor, I will soon propose to the Supreme Court a rule which will require each and every attorney to donate a regular amount of his or her time for *pro bono* work. I believe this is a small price for attorneys to pay for the privilege of practicing law in this great Commonwealth.

As I indicated earlier, much has been done, but much, much more remains to be done, so that the Kentucky judicial system lives up to those great purposes for which it was enacted. I can assure you and the people of the Commonwealth that each and every member of the Kentucky Supreme Court is dedicated to seeing that such goal is reached.

I will not dwell on the court of justice budget. Suffice it to say that I am keenly aware of the many monumental tasks before you this session. Our budget, which is somewhat less than 2.2% of the Governor's proposed budget, is small, in comparison to other demands placed on you this session. Needless to say, however, it is critical to the continuing success of the court system, and to the solving of present and future problems, that you give it every possible consideration. We have appeared before both Appropriation and Revenue Committees and have answered questions. As all of you know, I am always available - at your pleasure - to answer any questions you might have or to consider any suggestion you might make. The budget document provided to you represents a realistic evaluation of the needs of the Court of Justice for the next two years. Your favorable consideration will be greatly appreciated.

So much for yesterday and today. What about tomorrow? What about the decade of the 1990's. With your indulgence, I would like to spend a few minutes more of your precious time, and take out my somewhat dusty crystal ball. I would like to respectfully suggest some items which I believe are deserving of your attention, as we enter the last decade of this century.

To begin with, I hope that in the next two years you will give some thought to the

process of selecting judges in the Commonwealth. There is no doubt in my mind that our present method of electing judges is one whose time is coming to an end. 35 states and the District of Columbia have adopted some form of retention election. As the big monied, special interests turn their attention, and their money, to the election of judges, the quality of objective, non-political justice will diminish. I submit that SB 308 is a good example of what can and should be done. This bill, will, in my opinion, cure the only major flaw in our judicial article.

A continuing problem is the compensation of judges. We must continue to attract and keep quality men and women on the bench. In the past year, we have lost 4 circuit judges in our system who were attracted by the much greater compensation offered by private firms. Financial sacrifice will always be a part of public service, but we must be sure that judicial salaries will keep pace so that the allure of the private sector does not become overwhelming. I would suggest to you that a committee on judicial compensation be established by this body, and that its task be to evaluate judicial compensation, on a continuing basis.

In our circuit courts, over 53% of the civil dockets are domestic relations cases. Those cases are, normally, highly emotionally charged, and seem to last forever. The impact of divorces on society, in general, and on the affected children, in particular, can be devastating. To be candid with you, I'm not sure that any court system is doing a satisfactory job. I can tell you that there is a school of thought developing, albeit slowly, in this country, that recommends that many of the traditional functions of courts in divorce cases should be removed from the courts and assigned to professionals who are better qualified to solve those problems. I do not necessarily agree with those views, but, I believe you should join with the court system and, at least, consider them.

This general assembly is well aware of the problem of the disparity of the case load in the district courts and circuit courts of the state. In response to the problem, several years ago I created a system of regional judges, the main purpose of which was to assign cases from the judges who had an excessive case load to those judges who did not. I can report to you that while those efforts met with modest success, the problem still exists. For example, in Letcher County, the circuit judge has 421 cases per year, while in Pulaski and Rockcastle counties, the circuit judge has 1,334 cases per year. Yet, the two men get the same compensation. The situation is the same in the district courts. I must tell you that re-circuiting and re-districting is the only answer. When the circuits and districts were created, in 1976 and 1978, there was much "guesstimating" in creating them. Since then, populations have shifted and the resulting changes in case loads have exacerbated the problem. Re-districting and re-circuiting are a massive and politically risky task. This is particularly true when one considers that re-circuiting also affects Commonwealth Attorneys. I suggest to you that the General Assembly and the Supreme Court create a long range planning committee to work on this problem.

In the past year, I have had the occasion to review the work of the new Workers Compensation Board and the new Administrative Law Judges. In my opinion, the concept and the work product, have been superior. I suggest to you that the General Assembly should consider the creation of a whole layer of Administrative Law Judges to deal with the growing legal issues in the area of administrative law. It seems to me that the results achieved in the workers compensation area could be duplicated in the Public Service Commission, the Department of Transportation, Cabinet for Human Resources, and all other state agencies. There is available to you a wealthy of research done by the American Law Institute in their proposed model administrative code. I suggest that such a code - tailored to Kentucky's needs - would be a measurable improvement over the present system.

From 1976 through 1979, I was Attorney General of the Commonwealth. During that time, we developed the so-called unified prosecutorial system. Since 1979, I have been on the bench and my experience and interest in the criminal justice system has not lessened. I fought long and hard, in the late 1970's, to retain the system of County Attorneys and Commonwealth Attorneys, most of whom are part time. I now believe that my advocacy was misplaced. Effective prosecution at a local level, and at an appellate level, I believe would be better served and achieved by the concept of one full time local prosecutor who would "handle" the cases in the district courts and in the circuit courts. Policies would be uniform and much waste, duplication and inefficiency would be eliminated and professionalism would be increased. The limited resources available to prosecutors would be better used. I know this is controversial, but I believe it is an idea whose time has come. I suggest to you that the General Assembly, the Attorney General, and the prosecutors of the Commonwealth, should begin a study of this problem.

Ancillary to the last suggestion, is the need for more full time public defenders and a generous increase in the compensation of these dedicated and hard working men and women. While theirs is not a "popular cause," the Department of Public Advocacy truly serves as a champion and sentinel of our most cherished legal principle - innocent until proven guilty. Theirs is an invaluable dedication to public service without which many would be denied access to justice.

One of the great criticisms that the judicial system sustains is the fact that judges do their work in the same local areas where they are selected - by whatever method. Prejudice or at least the appearance of prejudice, and favoritism, are thought to be present. The people demand and deserve judges who have no friends, who have no bias, and who have no political favors to repay. I know this is an idealistic dream, but it is one which can be achieved. For exampled, in North Carolina, trial judges do not sit in the same districts from which they are elected. It works. I would like to suggest that the General Assembly and the Supreme Court, together, study this as a possibility as we enter the 1990's.

There are many other areas in which I believe improvements in the legal system could be made. I am sure you have many ideas of your own. I hope you will consider these suggestions in the spirit in which they have been given - with respect.

As Senator Rose said to you in his speech on the state of legislative branch, separately we can't achieve anything, but together we can accomplish anything. Our state motto - "United we stand, divided we fall" - further reminds us of the mutual benefits of our continued partnership.

Thank you for your support in the past, at present, and in the future.

Reprinted with permission of Justice Stephens. (Emphasis Added)

KY'S NON-SUPPORT STATUTE RULED UNCONSTITUTIONAL

On February 23, 1990 Kenton District Judge Schmaedecke ruled Kentucky's criminal non-support statute unconstitutional. David R. Steele represented the defendant in the action. The opinion and views of David R. Steele follow:

COMMONWEALTH OF KY
V.
STEPHEN MILLS

This prosecution commenced on a felony complaint of flagrant non-support. Preliminary hearing was held and the matter was referred to the grand jury of Kenton Co. The Commonwealth returned an information for misdemeanor nonsupport under KRS 530.050 but without specification about the subsection of KRS 530.030(1) that applied to the facts of the case. On the date the information was returned in open court, the defendant was arraigned and entered a plea of not guilty. The court set the matter for trial by the court on Dec. 19, 1989.

A jury demand was filed before Dec. 19, 1989 and by local rule the previously scheduled trial became a discovery and pretrial conference. At the discovery-/pretrial conference the matter was set for trial in March 1990 and the Commonwealth, by its Asst. Kenton Co. Atty., the Hon. John Meier, elected to prosecute the cause under KRS 530.050(1)(b).

The defendant filed his motion to declare KRS 530.050(1)(b) unconstitutional. The motion, with memorandum, was filed and originally noticed for hearing on Jan. 30, 1990. The Commonwealth requested and received additional time to respond to the Motion and memorandum. The court set the matter for hearing on Feb. 20, 1990 and the court at the Jan. 30 appearance asked the defendant's attorney to serve notice on the Atty. Gen. of Ky. The record of the pleadings reflects that the defendant accomplished notice on the Atty. Gen .on Feb. 1, 1990 by serving upon him a copy of the motion / memorandum. The Commonwealth filed its memorandum on Feb. 16, 1990. The Atty. Gen. of Ky. has not entered his appearance in this case nor tendered a memorandum in support of the Commonwealth's position.

On Feb. 20, 1990 the motion by the defendant to have KRS 530.050(1)(b) declared unconstitutional was heard by the court. Present for the Commonwealth was the Hon. John Meier, Asst. Kenton Co. Attorney. The defendant was represented by the Hon. David R. Steele. No appearance was entered for the Atty. Gen.

The Commonwealth again reasserted its intention to proceed under KRS 530.050(1)(b) indicating that the proof would consist of the payment record of the Kenton Co. Domestic Relations Clerk which demonstrated lack of compliance by the accused with a judgment entered regarding child support.

The Motion to Declare KRS 530.050(1)(b) Unconstitutional relies on Ky. Constitution Sections 18 and 51. The defendant argues that under Ky. Constitution Sec.18 it is unconstitutional to imprison an accused for debt. He argues that KRS 530.050(1)(b) does precisely that.

The defendant also bases his argument of unconstitutionality of KRS 530.050(1)(b) on Ky. Constitution Sec. 51 which requires that enactments of the General Assembly conform to the title of the enactment.

When KRS 530.050(1)(b) was enacted in 1988 the title to the enactment read "An Act relating to child support recovery and declaring an emergency." He argues that the language of KRS 530.050(1)(b) in no way relates to child support recovery nor any emergency declared relating to child support recovery. The arguments of the Commonwealth are set forth in its memorandum filed Feb. 16, 1990.

The language of KRS 530.050(1)(b) appears to be plain and without ambiguity. There is no language in the text of KRS 530.050(1)(b) which is commonly associated with criminality of an accused. The statute requires no *mens rea*, no proof of scienter nor any other state of mind nor fraudulent intent attributable to the accused. The language creates no elements of factual proof which give rise to any rebuttable presumption.

The language of KRS 530.050(1)(b) speaks out of obligation created by judgment for payment of child support. Enforceable debts of numerous variety are often the result of a judgment.

The statute refers to the accused as a "defendant obligor." The term "delinquent" is, with only one exception known to the court, applied in cases of debt and not to criminality of an individual. The term "delinquent" is defined as "... due and unpaid at the time appointed by law or fixed by contract ..." - *Black's Law Dictionary* (Rev. 4th Ed. West 1968). In the text of KRS 530.050(1)(b) the term "delinquent" is used as an adjective modifying the words "defendant obligor". The statute itself further delineates the definition of "delinquent" in that it states that such conduct is denoted when the "defendant obligor" is:

> "... [late] in meeting the full obligation established by such order and has been so delinquent for a period of two (2) months duration."
> - KRS 530.050(1)(b)

The language of KRS 530.050(1)(b) appears to authorize the imposition of imprisonment sanctions if the accused has for two months (not necessarily consecutive) paid an amount less than the full amount set out in the judgment which made the defendant an obligor.

The General Assembly entitled the enactment which brought into existence KRS 530.050(1)(b) as "An Act relating to child support recovery and declaring an emergency". Therefore KRS 530.050(1)(b) appears to be designed by the General Assembly to enforce the collections of child support debt by use of the criminal sanction of imprisonment. Neither guilty knowledge nor guilty purpose nor fraud is constituent part of the elements of proof to obtain a conviction under the offending statute. Further, while the intent of the General Assembly in the enforcement of Child Support obligations is a noble one, such noble intent should not abolish the historical common law and statutory required elements of criminal conduct.

The statutory enactment of K.R.S. 530.050(1)(B) is directly at odds with the statutory language of the preexisting K.R.S. 501.030(1) which specifically provides that "a person is not guilty of a criminal offense unless: he has engaged in conduct which includes a voluntary act or the omission to perform a duty which the law imposes upon him and which he is *physically capable* of performing (emphasis added).

While this Court is mindful the law generally favors the presumption of Constitutionality of Ky. Statutes and further is mindful that District Court is not the forum for general construction of statutes, (that forum is the Ky. Court of Appeals), and accordingly is very reluctant to pass Judgment contrary to the presumption of Constitutionality of Ky. Statutes, it is the opinion of this Court that the statute in question is so blatantly unconstitutional, that to delay the entry of such a finding at this time would be to deny this defendant his substantive and constitutional rights.

The Opinion of this Court does not affect the constitutionality of K.R.S. 530.050-(1)(a), the preexisting criminal offense of criminal nonsupport. The Court believes that K.R.S. 530.-050(1)(b) clearly violates the prohibition contained in Sec. 18 of the Ky. Constitution. Since the court has reached the decision of unconstitutionality based on Sec. 18 of the Constitution of Ky. it is not necessary to consider the issues raised by the defendant regarding Sec. 51 of the Constitution of Ky.

JUDGMENT

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. K.R.S. 530.050(1)(b) is determined to be unconstitutional in violation of Section 18 of the Kentucky Constitution; and

2. The criminal offense charged in the information herein, which the Commonwealth has based on K.R.S. 530.-050(1)(b), is dismissed with prejudice.

At Covington, Kentucky, this 23rd day of February, 1990.

WILLIAM L. SCHMAEDECKE
Judge
Kenton District Court 3rd Division

VIEWS OF DAVID R. STEELE

The portion of the misdemeanor non-support law (KRS 530.050(1)(b)) that the Kenton District Judge ruled to be unconstitutional was likely enacted as the result of pressure on the Ky. Gen. Assembly from organized special interest organizations who in their zeal to legitimately collect past due child support desire to use a criminal remedy to collect a debt by use of extortionary tactics. It is an ethical maxim that no lawyer may use threat of criminal prosecution in furtherance of the collection of a debt or lawful obligation. Such tactics are deemed extortionate. The stricken portion of the non-support statute is no different.

The offending statute provides no defense for non-payment. The nonpaying obligor who has not paid for any two months is guilty and there is no factual defense that can be raised. So if the defendant had a good reason, it is of no avail to him/her. As far as KRS 530.050(1)(b) there is no defense to nonpayment. Not loss of job, not work related injury where the employer contests liability, not disability or any other numerous good reasons provides a defense.

While there is a legitimate need for non-custodial parents to pay support for their minor or handicapped children, civil remedies are available and effective. Parents under a duty by court order arising from a civil proceeding who have the ability to pay can be held in civil contempt of court for this refusal to pay and suffer similar jail penalties and other penalties not available in a criminal court. Courts using their civil and equity jurisdiction can fashion a remedy to meet the particular needs of the parties in a support matter. In a criminal action the court is often unable to fashion a complete remedy since often the non-payment of child support is the result of the complainant's violation of a court's visitation order or some other relevant order over which it has no control.

The Cabinet for Human Resources (CHR) together with local county attorneys (and private attorneys who take advantage of this process too) misuse the criminal process to enforce delinquent child support. Private attorneys contribute to abuse this process because they use it to gain advantage in a collateral civil proceeding as part of their domestic practice.

The process sometimes goes as follows with steps eliminated depending on where the matter starts: 1. A non-custodial parent in a paternity, custody or dissolution proceeding is placed under a civil duty to provide a determined amount of child support. 2. For some reason (be it a number of factors) the non-custodial parent is unable to pay the determined amount. 3. If the custodial parent is on AFDC the Commonwealth through the CHR on the relation of the IV-D recipient lodges a criminal non-support complaint alleging non-payment. 4. The non-custodial parent-client is charged with the misdemeanor crime (or felony, if flagrant) of non-support, there usually being no enquiry at this point about whether the obligor parent has the ability to pay. 5. The obligor appears in court and is arraigned for a crime. Where he is unable to pay support because he lacks the ability to pay he likely qualifies for a public defender. 6. Often times his attorney advises the non-custodial parent-client that the offer of the Commonwealth in a plea negotiation is that in exchange for a guilty plea the defendant will receive a six month sentence with probation conditioned on timely payment of child support for the next two years (the longest probation authorized for a misdemeanor). The client, possibly afraid of the outcome before the judge or the uncertainty of the outcome before the jury, seeing a result that for the immediate future keeps him from jail is easily persuaded by his attorney to go along with the worked out plea. Where that same person is not represented by counsel because he may not qualify for a public defender he views this plea process as an easy way out of an expensive predicament that he can ill afford to endure for long. 7. Judgment is entered according to the plea agreement. At this time and in many cases the courts condition probation on the payment of a certain amount, now calculated with reference to the "federally mandated" (I hate those words) support guidelines. But in a criminal court the safeguards inherent in the determination as it relates to inability to pay as well as taking of proof as to other sources for support for the child are not present. In short the court only applies guidelines to the accused's half of the question without necessarily considering the custodial parent's resources nor providing for adequate discovery of other resources.

You may also have a district court attempting to replace or supercede an otherwise valid circuit court judgment as to the appropriate amount of child support. Now two courts have inconsistent orders regarding the client's liability and both claim jurisdiction.

A few short weeks later a payment is missed. The client's probation is often easily revoked for violation of the conditions of probation because the question no longer is "could you make the payment?" but rather becomes "did you make the payment?" This is a subtle but important distinction to the client. His immediate liberty is at stake. There is an irony to be pointed out about this process. It is that every day in this Commonwealth our courts accept pleas from defendants from the crime of nonsupport after the court has already diligently inquired and found that the defendant is unable for lack of funds to retain counsel and therefore has been appointed a public defender. Evidence is clear of the client's inability to pay for essential legal services but this essential element of proof negating criminal non-support is disregarded in the rush to judgment.

In Kenton Co. even before the adoption of the stricken statute in 1988 the criminal misdemeanor non-support statute had become the Commonwealth's tool of choice in the enforcement of federal IV-D obligations. With few exceptions the result is the poor are putting the poor in jail. The non-custodial parent-client now has a criminal record which creates additional hurdles to the non-custodial parent-client seeking employment so that support in any amount can be paid.

The remedy for this is for courts to enforce their civil judgments establishing these legal obligations. There are examples of knowing and intended nonpayment of child support which are criminal in nature. The criminal law may be the appropriate way to handle that matter but it should be remembered that the penal code is designed to punish and not extort. The criminal law should not be the first tool the Commonwealth lays hold of to enforce civil support obligations. If the Commonwealth insists on using the criminal law to satisfy debt obligations as its tool of choice, defense attorneys should advise their clients that jury trials are a curb to such abuse.

Because of the political volatility of the issues surrounding collection of past due child support and the fact that judges must run for election in Kentucky you may not get a judge who will exercise independence of thought.

As I have represented clients in numerous courts I have had several judges tell me that the public will not accept particular positions I have advocated despite the fact that the argument was well within the law and authorized by the statutes. The judge possesses much discretion and may honestly feel that good judgment requires him to rule against my client. That I can accept. But as a representative of your client you must recognize that he is also telling you that if your client is travelling against the current of public opinion, as the judge perceives it, then while he is on the bench your client loses even if the position is meritorious. My response to that is to go get the opinion straight from the horse's mouth. Have the court swear in a jury and try it to that very public the court says it knows so well. My experience is that the public is not nearly as severe as the judges believe and especially so when it comes to misdemeanor sentencing.

Kenton County has sought review of Judge Schmaedecke's ruling in *Commonwealth v. Mills*. The defense has cross-appealed based on Section 51 of the Kentucky Constitution.

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23% OF YOUNG BLACK MALES UNDER CORRECTIONAL CONTROL

More Young Black Males Under Correctional Control in the U.S. Than in College

Overview

For close to two decades, the criminal justice system in the United States has been undergoing a tremendous expansion. Beginning in 1973, the number of prisoners, criminal justice personnel, and taxpayer dollars spent has increased dramatically, with new record highs now being reached each year. Between 1973 and 1988, the number of felons in state and federal prisons almost tripled from 204,000 to 603,000.[1] By 1989, the total inmate population in our nation's prisons and jails had passed the one million mark.[2]

Record numbers of persons are also being placed under probation or parole supervision.[3] These aspects of the criminal justice system are sometimes overlooked when the problems of prison and jail populations and overcrowding are explored.

The extended reach of the criminal justice system has been far from uniform in its effects upon different segments of the population. Although the number of women prisoners has increased in recent years at a more rapid pace than men, the criminal justice system as a whole still remains overwhelmingly male — approximately 87%. And, as has been true historically, but even more so now, the criminal justice system disproportionately engages in minorities and the poor.[4]

American Correctional Assoc.

The grim figures in the study "are overwhelming to us," said Tony Travisono, executive director of the American Correctional Association, which represents 24,000 corrections professionals. Travisono traces the problem through "at least the last 30 years during which inner-city youngsters who are denied opportunities for decent educations and jobs just fell into the criminal justice system"

TABLE 1

1989 Criminal Justice Control Rates

Population Group 20 - 29	State Prisons	Jails	Federal Prisons	Probation	Parole	TOTAL	Criminal Justice Control Rate
MALES							
White	138,111	94,616	15,203	697,567	109,011	1,054,508	6.2%
Black	138,706	66,188	7,358	305,306	92,132	609,690	23.0%
Hispanic	36,302	24,357	6,155	134,772	36,669	238,255	10.4%
TOTAL						1,902,453	8.4%
FEMALES							
White	6,320	7,099	944	141,174	8,712	164,249	1.0%
Black	6,072	6,095	665	58,597	6,988	78,417	2.7%
Hispanic	1,509	2,036	488	29,850	3,210	37,093	1.8%
TOTAL						279,759	1.3%

Impact of the Criminal Justice System

This report looks at the impact of the criminal justice system as a whole on the new generation of adults — those people in the 20-29 age group. In particular, it examines the devastating impact that the criminal justice system has had on the lives of young Black men and Black communities.

This report does not attempt to explain whether or why Blacks are disproportionately involved in the criminal justice system. Other studies have attempted to document whether Black males commit more crimes or different types of crimes than other groups, or whether they are merely treated more harshly for their crimes by the criminal justice system.[5] Instead, this report looks at the end result of that large-scale involvement in the criminal justice system, and highlights the implications this raises for crime control policies.

Using data from the Bureau of Justice Statistics and the Bureau of the Census, we have calculated the rates at which different segments of the 20-29 age group come under the control of the criminal justice system. The analysis looks at the total number of persons in state and

federal prisons, jails, probation, and parole, and compares rates of criminal justice control by race, sex, and ethnicity.[6] Because of the unavailability of complete data in some categories of the analysis, the total rates of control should not be considered exact calculations, but rather, close approximations of the numbers of persons in the system. As described in "Methodology," in all cases where data were lacking, conservative assumptions were used in making calculations. (Sufficient data were not available to analyze criminal justice control rates for Native Americans or Asian Americans.)

Our findings are as follows:

*Almost 1 in 4 (23) Black men in the age group 20-29 is either in prison, jail, or probation, or parole on any given day.

*For white men in the age group 20-29, one in 16 (6.2%) is under the control of the criminal justice system.

*Hispanic male rates fall between these two groups, with 1 in 10 (10.4% within the criminal justice system on any given day).

*Although the number of women in the criminal justice system is much lower than for men, the racial disproportions are parallel. For women in their twenties, relative rates of criminal justice control are:

Black women - one in 37 (2.7%) White women - one in 100 (1%) Hispanic women - one in 56 (1.8%)

*The number of *young* Black men under the control of the criminal justice system — 609,690 — is greater than the *total* number of Black men of *all ages* enrolled in college — 436,000 as of 1986. For white males, the comparable figures are 4,600,000 total in higher education and 1,054,508 ages 20-29 in the criminal justice system.

*Direct criminal justice control costs for these 609,690 Black men are $2.5 billion a year.

*Although crime rates increased by only 2% in the period 1979-88, the number of prison inmates doubled during that time.

These findings actually *understate* the impact of present policies upon Black males ages 20-29. This is because the analysis presented here covers criminal justice control rates *for a single day in mid-1989*. Since all components of the criminal justice system admit and release persons each day, though, the total number of persons processed through the system in a given year is substantially higher than the single day counts. For this reason, the proportion of young Black men processed by the criminal justice system *over the course of a year would be even higher than 1 in 4.*

Implications for Social Policy

The findings of this study, particularly those pertaining to young Black men, should be disturbing to all Americans. Whatever the causes of crime — be they individual or societal — we now have a situation where 1 in 4 Black men of the new adult generation is under the control of the criminal justice system.

The implications of this analysis for social policy both within and outside the criminal justice system are far-reaching:

1. Impact on the life prospects for Black males

The repercussions of these high rates of criminal justice control upon young Black men are greater than their immediate loss of freedom. Few would claim that today's overcrowded corrections systems do much to assist offenders in becoming productive citizens after release. Despite the ideal that offenders can "pay their debt to society," the fact is that most carry the stigma of being ex-offenders for some time to come. Thus, given these escalating rates of control, we risk the possibility of writing off an entire generation of Black men from having the opportunity to lead productive lives in our society.

2. Impact on the Black community

For the Black community in general, nearly one-fourth of its young men are under the control of the criminal justice system at a time when their peers are beginning families, learning constructive life skills, and starting careers. The consequences of this situation for family and community stability will be increasingly debilitating. Unless the criminal justice system can be used to assist more young Black males in pursuing these objectives, any potential positive contributions they can make to the community will be delayed, or lost forever.

A particularly ominous trend further emphasizes this point. At the same time that an increasing proportion of Black males ages 20-29 have come under the control of the criminal justice system, Black male college enrollment fell by 7% in the decade from 1976-86.[7] The cumulative effect of these separate measures is that fewer Black males are being prepared to assume leadership roles in their community.

3. Failure of the "get tough" approach to crime control

In many respects, the past decade can be viewed as an "experiment" in the "get touch" approach to crime. Proponents of this policy contend that cracking down on crime through increased arrests, prosecutions, and lengthy sentences will have a deterrent effect on potential lawbreakers. Yet even with a tripling of the prison population since 1973, at tremendous financial cost, victimization rates since that time have declined less than 5 percent.

4. Implications for the "war on drugs"

National drug policy director William Bennett's drug strategy similarly emphasizes a law enforcement approach to a social problem. This approach is likely to result in even higher rates of incarceration for Blacks and Hispanics since drug law enforcement is largely targeted against "crack," more often used by low-income Blacks and Hispanics. As drug offenders make up an increasing share of the prison population, the non-white prison population will become disproportionately larger. In Florida, for example, Blacks inmates now make up 73.3 percent of all drug offenders, compared to 53.6 percent of prison admissions for other offenses.[8]

The Bennett proposal to lock up more offenders is hardly a novel one. For more than twenty years, politicians have campaigned on this basic platform. A continued emphasis on law enforcement at the expense of prevention and treatment has little hope of achieving long-term results.

5. Strategies for more effective criminal justice policies and programs

While the reasons why Black men enter into the criminal justice system are complex and need to be addressed with long-term vision, there are immediate opportunities for change through the criminal justice system. The goals of such changes should be to reduce the harm caused by the system and to reduce the likelihood of offenders returning to the system. The outlines of such a strategy are as follows:

*Divert as many youthful, minor and first-time offenders as possible from the criminal justice system entirely. Diversion programs, dispute resolution processes, counseling and other more satisfactory means for modifying offensive behavior could be used more frequently than they are now.

*Reverse the trend to "criminalize" socially undesirable acts and to increase criminal penalties as a means of controlling public behavior. Mandatory and lengthy prison terms add to correctional populations, but do little to reduce crime.

*Jail and prison should be sanctions of last resort for offenders who cannot be diverted from the system. A range of community-based sentencing options exist which are less costly and more effective than incar-

National Urban League

Billy Tidwell, research director of the National Urban League, said the study underscored the league's "longstanding concern about the condition of the African-American male. Once again, we are reminded that large segments of the African-American population lack opportunity to participate effectively in society's mainstream."

ceration. More could be made available through legislative appropriations. These include:

- restitution to victims
- community service
- intensive probation supervision
- treatment programs
- employment and education
- community corrections programs

*Utilize the sentencing process — the one point in system when there is the opportunity to craft a meaningful response to the needs of victims, offenders, and the community — to counteract the trend toward increasing criminal justice control over Black males. This can be accomplished by individual judges adopting constructive alternatives and by developing true rehabilitative programs designed to reverse current correctional priorities.

6. The need for a broad approach to crime and crime control

The problem of cries is one that can not be solved entirely by the criminal justice system. Even with the most resourceful police, prosecutors, judges, and corrections officials, the criminal justice system is designed to be only a *reactive* system, not one of *prevention.*

At the same time that the nation has engaged in a criminal justice control strategy over the past decade, funding to address the conditions that contribute to crime has declined. While the criminal justice system has processed young Black men ages 16-24 remains at 24%. (Adding the numbers of persons discouraged from or not "officially" in the labor market would result in a significantly higher figure.) It is time now to "experiment" in crime control by attacking those social factors that many believe provide a more direct link to crime, such as unemployment, poverty, and substance abuse.

Conclusion

The problem of crime is a complex one and will not be resolved overnight. Rather than viewing the solution as hopeless or too long-term, though, there are real and immediate actions which can be taken to prevent the next generation of Black males form further swelling the ranks of correctional populations.

Some of these steps involve a change in priorities and emphasis within the criminal justice system. Programs and policies exist in jurisdictions around the country which offer modes of more constructive resolution of criminal justice problems.

Addressing the conditions which lead to crime in the first place is a broad agenda which requires serious thought, attention, and action. The decisions made today, though, in the areas of policy, programs, and funding, will determine whether the criminal justice system exerts as much control over the next generation of Black males as it does for the current generation.

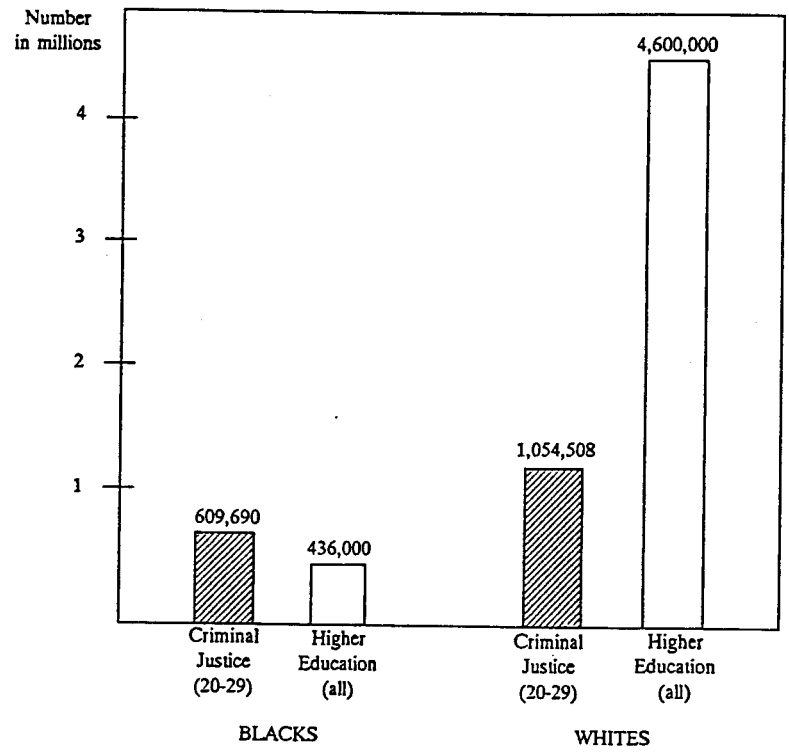
Rep. Conyers

Rep. John Conyers, D-Mich., a leader of the Congressional Black Caucus and a member of the House Judiciary Committee's criminal justice subcommittee, said the report "finally gives some substance to the crimes of genocide of young black males."

Conyers said the study challenged "the increasing severity of punishment as the main strategy in the criminal justice system. It won't work. What we need instead are alternatives to incarceration, drug treatment, and to go in-depth into education, employment, housing and health — that quadrangle of social concerns which spawn the crime and violence."

TABLE 2

MALE PARTICIPATION IN CRIMINAL JUSTICE AND HIGHER EDUCATION



Methodology

The data on which these calculations are made are taken from reports of the Bureau of Justice Statistics of the Department of Justice, the Bureau of the Census, and the Department of Education. A breakdown of the incarcerated population by age, sex, and race was available for state prison inmates (1986) and jail inmates (1983). Data on sex and race, but not age, were available for federal prisoners, probationers, and parolees (all 1986). Data for the age distribution for state prisoners and jail inmates were used to develop a ratio of the proportion of each group of prisoners (*i.e.* male and female whites, Blacks, and Hispanics) in the 20-29 age group. These proportions were as follows: White Males - 49.6%; Black Males - 52.4%; Hispanic Males - 51.6%; White Females - 52.7%; Black Females - 52.8%; Hispanic Females - 60.0%.

This ratio was then used to develop estimates by age for federal prisoners, probationers, and parolees. While parolees and federal prisoners are probably older on average than the state prison population, probations are probably younger. The greater number of probationers would therefore make the overall estimate of the 20-29 age group a conservative one. While some margin of error is inevitable in these estimates, it seems reasonable to assume that it is not of a substantial nature.

Rates of criminal justice control were then developed for all parts of the system for 1986 (except for 1983 figures for jail). These figures were then extrapolated to June 1989, based on the percentage increase for each component of the system. The most recent overall population figures available were: state and federal

prisons - June 1989; jails - June 1987; probation and parole - December 1988. Annual growth estimates of 5% for probation, 10% for parole, and 6% for jails, based on trends for the past two years, were used to derive June 1989 population estimates based on the 1987 and 1988 data.

The use of overall population increases results in some additional margin of error in the total population figures. For example, available data appear to indicate that the rate of increase for prisoners for the period 1986-89 has been greater for Blacks, Hispanics, and women than for the population as a whole. Reports also indicate that Blacks make up an increasing share of the total number of drug arrests, a major source of the increasing criminal justice populations. Therefore, the total criminal justice control rate for Black males is probably understated in the calculations.

Cost figure for various components of the criminal justice system are those cited by the Department of Justice in *Report to the Nation on Crime and Justice: Second Edition*, 1988. Many observers believe that current cost figures are substantially higher than those presented here. For example, we have used the figure of $11,302 per year for state prisoners in 1984 from the Report. Many current estimates for costs of incarceration are in the range of $15,000-25,000 per year.

Population figures within each category are based on Census Bureau estimates of the U.S. resident population.

As the available data for Hispanics are fairly limited in most instances, these results should be interpreted with caution.

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EQUAL OPPORTUNITY?

	%Blacks
DPA	4%
KY State Police	31%

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FOOTNOTES

[1] See Bureau of Justice Statistics, Department of Justice, *Correctional Populations in the United States, 1986*, and "Prisoners in 1988."

[2] See The Sentencing Project, "A Nation of One Million Prisoners," October 1989.

[3] In the period 1984-88 alone, the probation population increased 35.4% and the parole population 52.8%. Bureau of Justice Statistics, "Probation and Parole 1988."

[4] In 1983, for example, half of all jail inmates had annual incomes of less than $5,600 prior to their arrest. See Bureau of Justice Statistics, *Report to the Nation on Crime and Justice: Second Edition*, March 1988, p. 49.

[5] See, for example, Alfred Blumstein, "On the Racial Disproportionality of United States Prison Populations," *Journal of Criminal Law and Criminology*, Vol. 73, No. 3, 1982, and Joan Petersilia, *Racial Disparities in the Criminal Justice System*, The Rand Corporation, June 1983.

[6] The analysis begins with the basic definition of "criminal justice control rates" as developed by the National Council on Crime and Delinquency in their research, but excludes juveniles. The NCCD studies, though, (see "Sources") do not attempt to analyze control rates by race, sex, or age.

[7] See U.S. Department of Education, Office of Educational Research and Improvement, "Trends in Minority Enrollment in Higher Education, Fall 1976-Fall 1986."

[8] James Austin and Aaron McVey, "The Impact of the War on Drugs," National Council on Crime and Delinquency, December 1989.

Racism is not merely one sin among many, it is a radical evil dividing the human family and denying the new creation of a redeemed world. To struggle against it demands an equally radical transformation in our own minds and hearts as well as the structure of our society.

....

The structures are subtly racist, for these structures reflect the values which society upholds. They are geared to the success of majority and the failure of the minority. Members of both groups give unwitting approval by accepting things as they are. Perhaps no single individual is to blame. The sinfulness is often anonymous but nonetheless real. The sin is social in nature in that each of us, in varying degrees, is responsible. All of us in some measure are accomplices.

Brothers and Sisters to Us

Pastoral letter of the United States Catholic Bishops

PREGNANT AND IN PRISON

House and Senate conferees met to reconcile differences between bills passed to reauthorize the federal program providing special food assistance for low-income pregnant women, infants and children (WIC). Because of budget restraints, only about half the individuals eligible for this assistance actually receive it. But one group specially in need — pregnant women in jails and prisons — are specifically excluded from the program by a regulation of the U.S. Department of Agriculture. The House-passed WIC bill would remove this barrier, and the Senate should accept that provision.

The prison population of this country is growing enormously, but the number of women incarcerated is increasing at a much faster rate than that of the male population. Of the 31,000 or so women now in prison, about 10% present special problems because they are pregnant. Many have been drug users and alcohol abusers whose babies are already at great risk. But the obstacles to a successful pregnancy are increased if special attention is not paid to their nutrition. A survey conducted in 38 states revealed that 58% of the institutions serve exactly the same diet to pregnant inmates as to others and in most cases that diet does not meet the minimum recommended allowances for pregnancy.

The House provision does not require that WIC money be used for prisoners. It simply makes that option available to the states. Nor does the proposal provide any additional federal funds for this purpose. Why then, should states divert any of the scarce money to offenders some would find unworthy of help? First, of course, because the real beneficiaries are babies for whom an extra egg, an extra carton of milk or a piece of cheese every day can made a life-saving difference. Second, if one chooses to be hardheaded about it, because improving prenatal nutrition costs society less in the long run. Prisoners' babies with health problems must be cared for with public funds; even the healthy ones almost all go into foster care soon after birth.

Finally, decent care must be given to these women because they are in the custody and care of the state, which has a special obligation for their welfare. Unlike pregnant women in the community, prisoners cannot expect help in the form of supplementary food from family, friends or charity. They are entirely dependent on the prison system for what they eat and for the medical care they receive. The House bill recognizes society's obligations not only to these unfortunate women but to their completely innocent children. The Senate should go along.

THE RESURGENCE OF RACISM THE "NOEBEL PRIZE" FOR CIVIL LIBERTIES IS AWARDED

On January 19, 1990 Kentucky's Anne Braden was awarded the first annual Roger Baldwin Medal of Liberty from the National ACLU for her 40 years of work for civil rights and civil liberties. Part of her remarks follow:

We need to mount a massive counter-offensive against the resurgence of racism that we've seen in the past two decades. Not just because we all know racism is a bad thing but because unless we do mount such an offensive, there may not be any freedom for any of us in the future.

We live in a society that was actually built on racism; this was the factor that from the beginning contradicted and corrupted our democratic ideals. Therefore, because this is the base, it has always occurred that when a struggle was mounted against racism, a struggle that involved whites as well as people of color, the doors to a better society opened wider for us all. All of our history proves this. It was true in the anti-slavery movement; it was true during Reconstruction; it was true in the union movement in the 1930s; and it was certainly true in the 1960s.

I feel compelled to talk about this now because, as we enter the 1990s, I feel we are at a crossroads on this issue. It's a seeming contradiction. On the one hand, we are at a moment in time when it is possible to build truly multi-racial coalitions around primary issues - the environment, housing, economic justice, rebuilding our cities - and that's happening in many places. We are at that moment because more and more white people really are ready to move beyond racism. That has come about because the struggles for racial justice, in which we've all been involved, really did open up minds to new ways of thinking. And let us not forget that people died for this moment.

Yet at the same time we see this great opportunity, we also see an alarming rise in racism - racist violence, bombs killing a judge and civil rights attorney in the South and threatening our civil rights leaders and the "respectable" racism that has made that violence possible - a whole generation of whites that has grown up hearing from their national leaders that now it is whites who are being discriminated against.

Photo courtesy of and article reprinted by permission of the American and Kentucky Civil Liberties Unions.

PUBLIC ADVOCACY COMMISSION

In 1972 the General Assembly enacted legislation to create a statewide public defender system in response to the litigation that originated in Campbell Co. challenging the requirement that a lawyer had to represent an indigent criminal defendant *pro bono. See Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972).

KRS Chapter 31 set up a statewide public defender system whose funding was shared by county fiscal courts and the state, with the ultimate responsibility on the fiscal court for any money shortfalls. When established, the public defender's office was within the Justice Cabinet. Its first head was Tony Wilhoit.

In 1982 the General Assembly enacted legislation, KRS 31.015, that created a Public Advocacy Commission. DPA became part of the Public Protection and Regulation Cabinet in 1982.

The Public Advocacy Commission reviews and adopts an annual budget for DPA and provides support for budgetary requests to the legislature. Upon a vacancy of the Public Advocate position, the Commission recommends 3 attorneys to the Governor for appointment as Public Advocate.

The Commission is charged with insuring the *independence* of the Department of Public Advocacy. It is a 12 person Commission. Each person serves a 4 year term. It is currently composed of the following persons:

Law School Deans or Designee (3 Positions)

1. Susan Kuzma - Appointed August 16, 1989 to the unexpired term of Kathleen Bean. Her term will expire July 15, 1990. She was appointed by Dean Barbara Lewis of the University of Louisville Law School to the Commission. She replaced Kathleen Bean.

2. John Batt replaced William H. Fortune whose term expired on July 15, 1989. His term expires September 18, 1993. Batt was appointed by Dean Rutherford Campbell of the University of Kentucky Law School.

3. William R. Jones - Current Chair of the DPA Commission. Appointed July 15, 1982. Reappointed March 4, 1985 and September 13, 1988. His term expires July 15, 1992. Former Dean (1980-1985) of Chase School of Law. He received his J.D. from the University of Kentucky in 1968, and his L.L.M. from the University of Michigan in 1970. He is currently a Professor at Chase Law School. He was appointed and reappointed by Dean Henry L. Stephens, Jr. of Chase Law School.

Governor's Appointment From KBA Recommendations (2 Positions)

4. Robert W. Carran - First appointed February 29, 1984 by Gov. Collins and reappointed by Gov. Collins on February 5, 1986 and reappointed on October 10, 1989 by Governor Wilkinson. His term expires July 15, 1993. Bob is the lawyer administrator of the Northern Kentucky Public Defender System serving Boone, Gallatin and Kenton Counties. He is a 1969 graduate of Chase Law School. He is a member of the KACDL. He replaced Henry Hughes of Lexington on the Commission.

5. Allen W. Holbrook - Appointed May 23, 1986 by Governor Collins from KBA list. His term expires July 15, 1990. Allen is with the firm of Holbrook, Wible and Sullivan, 100 St. Ann St., Owensboro, Kentucky. Prior to private practice, he worked as both an appellate lawyer in Frankfort and trial lawyer in Morehead with DPA, and served as a federal public defender for the Eastern District of Kentucky, Lexington. He is a Board member of the Kentucky Association of Criminal Defense Lawyers. He replaced Max Smith of Frankfort on the Commission.

COMMISSION CHAIRS AND THEIR TERMS

Anthony M. Wilhoit from September 29, 1982 to October 28, 1983.

Max Smith from October 28, 1983 to January 6, 1986.

Paula M. Raines from March 21, 1986 to June 10, 1986.

William R. Jones from October 10, 1986 to Present.

Kentucky Supreme Court Appointments (2 Positions)

6. Susan Stokley-Clary - Was reappointed on June 29, 1989. She was originally appointed June 26, 1985 by the Court of Justice. Her term expires July 15, 1993. Susan is the Supreme Court Administrator, and serves as General Counsel for the Supreme Court of Kentucky. She is a 1981 graduate of the University of Kentucky School of Law. She replaced Frank Heft of the Louisville Public Defenders Office on the Commission.

7. Martha Rosenberg was appointed on July 17, 1989 to the unexpired term of Margaret H. Kannensohn by the Court of Justice. Her term expires July 15, 1990.

Governor's Appointment From Protection and Advocacy Advisory Board Recommendations (1 Position)

8. Denise Keene - Appointed to an unexpired term on May 16, 1989 by Governor Wilkinson; reappointed by him on October 10, 1989. She is an certified public accountant in Georgetown and is President of the Ky. Association for Retarded Citizens. The younger of her two sons is multi-handicapped. Her term will expire on July 15, 1993. She replaced Helen Cleavinger who served on the Commission August 1987-May 1988.

Governor's Appointments (2 Positions)

9. Gary D. Payne - Appointed May 16, 1989 by Governor Wallace Wilkinson to the unexpired term of Jesse Crenshaw of Lexington. His term expires July 15, 1990. Gary Payne was appointed Fayette District Judge in 1988 by Gov. Wilkinson. He was elected to that position in 1989. He was an Assistant Fayette Co. Attorney and for the Corrections Cabinet, General Counsel to the Secretary of State, Chief Legal Officer for the 138th Field Artillery Brigade and is a member of the State Child Sexual Abuse and Exploitation Prevention Board. He is a 1978 graduate of UK's law school.

10.VACANT due to the resignation of Cynthia Sanderson in January, 1990. Ms. Sanderson is an attorney in Paducah and was appointed by Gov. Wilkinson on October 10, 1989 to fill expired term of Patsy McClure. Ms. Sanderson resigned in order to take a position in the County Attorney's office in McCracken County.

Speaker of the House Appointment (1 Position)

11. Lambert Hehl, Jr. - Appointed June 28, 1982 by the Speaker of the House. Reappointed July 14, 1986 by Governor Collins. His term expires July 15, 1990. He has been a Campbell Co. District Judge since 1984. He was Campbell County Fiscal Court Judge-Executive for 1978-82. He is a 1951 graduate of the Chase School of Law.

President Pro Tem of the Senate (1 Position)

12. Currie Milliken - Appointed by Gov. Wilkinson on December 16, 1988. His term expires July 15, 1990. He is a senior partner in the Milliken Law Firm, 426 E. Main Street, Bowling Green. He received his J.D. from the University of Kentucky in 1964. He served as Mayor of Smiths Grove from 1982-85, and is currently its City Attorney. He is a member of the Kentucky Association of Criminal Defense Lawyers. He replaced Lee Huddleston on the Commission.

Former DPA Commission Members

Kentucky Supreme Court Appointments

1. J. Calvin Aker, Kentucky Supreme Court Justice - July, 1982-February, 1983.

2. Frank W. Heft, Louisville Public Defender - February, 1983-July, 1985.

3. Margaret H. Kannensohn - Supreme Court Appointment. May 25, 1988 - June 1989.

4. Paula M. Raines, Lexington Criminal Defense Attorney - January, 1984-June, 1986.

5. Anthony M. Wilhoit, Kentucky Court of Appeals Judge - July, 1982-October, 1983.

Governor's Appointments

1. Helen Cleavinger - August, 1982-May, 1988. Appointed by Governor Brown.

PUBLIC ADVOCATES AND THEIR TERMS

1) Anthony M. Wilhoit 1972-1974

2) A. Stephen Reeder* Dec. 27, 1974 (ONE DAY ONLY)

3) Jack E. Farley March, 1975- October 1,1983

4) Paul F. Isaacs October 1, 1983-Present

*Appointed but did not serve.

2. Jesse Crenshaw - Lexington Criminal Defense Attorney - August, 1982-July, 1986. Appointed by Governor Brown.

3. Lee Huddleston - July, 1986-August, 1988. Appointed by Governor Collins.

4. Henry Hughes - August, 1982-February, 1984. Appointed by Governor Brown.

5. Patsy McClure- February, 1986- July, 1989. Private citizen, Boyle Co., Kentucky

6. Nora McCormick - Paris Criminal Defense Attorney - July, 1986-April, 1988. Appointed by Governor Collins.

7. James Parks, Jr. - Kentucky Court of Appeals Judge - August, 1982-July, 1985. Appointed by Governor Brown.

8. Max Smith - Frankfort Criminal Defense Attorney - March, 1983-January, 1986. Appointed by Governor Brown.

9. Paul G. Tobin - Louisville Public Defender - August, 1982-December, 1982. Appointed by Governor Brown.

Law School Deans or Designees

1. Kathleen Bean - January 19, 1988-July, 1989.

2. William H. Fortune - Appointed July 15, 1984- September 18, 1989.

3. Robert G. Lawson - July, 1982- June, 1984.

4. Barbara B. Lewis - July, 1982-January, 1988.

President Pro Tem of the Senate Appointment

1. William E. Rummage - July, 1982-July, 1984. Reappointed on September 25, 1984 by Governor Collins.He served until July 14, 1986.

WRITTEN INTERVIEW WITH PUBLIC ADVOCACY COMMISSION MEMBER SUSAN M. KUZMA

Tell us a bit about who you are, your background, what qualities you bring to the Commission.

Susan M. Kuzma

I am an Assistant Professor of Law at the University of Louisville School of Law, a position I have held since August 1988. I teach primarily in the areas of Criminal Law and Criminal Procedure.

I was born and raised in Cleveland, Ohio, and attended undergraduate school at Ohio State University. I graduated in 1975 with a major in Classical Languages (Latin and Greek). I then attended law school at Ohio State, receiving my law degree in 1978 and being admitted to the Bar in Ohio in November of that year. I served as a law clerk to the Honorable William K. Thomas, United States District Judge for the Northern District of Ohio, from July 1978 to July 1989, and to the Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, from July 1980 to September 1981.

I then took a position as a trial attorney with the Criminal Division of the United States Department of Justice in Washington, D.C. Beginning in January 1982, I was assigned to the Public Integrity Section of the Criminal Division. That Section investigates and prosecutes cases involving public corruption at the federal, state, and local levels, and is responsible for handling matters that fall under the Independent Counsel Statute. During my tenure with the Public Integrity Section, I was involved in various investigations and prosecutions, both in Washington and throughout the country. I also had a brief tour of duty in the office of the United States Attorney for the District of Columbia, where I was involved in prosecuting local crime.

Because of my background in prosecution and my teaching in the areas of Criminal Law and Procedure, I believe I have a good base of knowledge, both theoretical and practical, about the needs of criminal justice systems and the role of defense lawyers in them.

Why are you willing to serve on the Public Advocacy Commission?

I believe it essential to the fair administration of justice that adequate provision be made for defending persons accused of crime, not simply to ensure fairness of treatment in the individual case but also to ensure that as a general matter the exercise of governmental authority by the main players in the criminal justice system — police, prosecutors, judges — is fair and even-handed. I, therefore, am interested in contributing my efforts toward the achievement of this goal by serving on this Commission.

What do you see as the Department of Public Advocacy's major strengths and weaknesses?

Having been a member of the Commission for only a few months and having lived in Kentucky for a relatively short period of time, I think it premature to offer an opinion on these issues at this point.

What do you hope to accomplish as a Public Advocacy Commission member?

I am concerned about the financial situation of the Department of Public Advocacy, particularly with respect to starting salaries for attorneys seeking positions in the public defender system. I would like to do what I can to make some progress in this area, to ensure that qualified lawyers are not discouraged from working in the public sector taking appointments in criminal cases because compensation levels are so low.

INTERVIEW WITH MARTHA ROSENBERG

Martha Rosenberg

Can the DPA Commission change the political atmosphere in which DPA operates for the better? How?

I'd like to see it happen, but I'm not sure we can because of the increasingly conservative views of the population of Kentucky. They're not inclined toward DPA's work and do not want to pay taxes to defend criminals. They don't realize that it is necessary to preserve all citizen's rights.

How can the Commission advance the interests of DPA in the Legislature?

The best way to advance DPA's interests is to lobby for more funds for DPA. It is the biggest area of need as the Department is blessed with excellent attorneys, but keeping them becomes a problem because the salaries offered are so low.

What do you see as DPA's major strengths and weaknesses?

DPA's strength lies in the extremely dedicated attorneys that work for the office. DPA's weakness is the lack of funding that leads to burnout of the attorneys. Another weakness is the way the public perceives the Department.

Why should attorneys want to do public defender work in Kentucky?

Personally, I feel what public defenders do goes to our most basic constitutional rights and goes for the better good of all since benefits overflow to the general public. I am idealistic perhaps, but you protect one person and thereby preserve the rights of all.

Why is it important for Kentucky to have quality public defender services?

The Public Advocates handle the majority of criminal cases and therefore are most likely responsible for changing our laws and they must be good attorneys in order to preserve the rights of their clients for purposes of appeal and thereby we're all affected.

How can the Commission insure real independence for DPA?

The Department's will have a sign of independence when its financial needs are met, so decisions aren't based on a shortage of funds.

INTERVIEW WITH SUSAN CLARY

Susan Clary

Can the DPA Commission change the political atmosphere in which DPA operates for the better? How?

Due to politics, the Commission came into existence in 1982 as a check on the power and performance of the Public Advocate. KRS 31.015 empowers the Commission to recommend nominees to the Governor for appointment as public advocate; to assist in developing procedures for staff selection; to review and supervise the public advocate's performance; to assist in ensuring the department's independence through public education and review; and to adopt and propose budget requests in the General Assembly.

Currently, the Commission is examining its statutory mission and discussing ways to more effectively advance the interests of the Department within the Executive Branch and before the General Assembly. DPA rests on the horns of a dilemma, as a member of the Executive Branch which must often advance a budget before the legislature that may be inadequate. In the future, members of the Commission plan to become more involved in the process, meeting prior to the submission of the Department's budget to the Cabinet and giving input thereon.

How can the Commission advance the interests of DPA in the Legislature?

In order to advance the interests of the DPA in the legislature, Commission members and all advocates for the department's interests need to work to develop an ongoing relationship with members of the legislature. While Commission members and DPA staff have always communicated their support for DPA's budget to the leadership in the legislature and the appropriate committees, commission members this year attended and became more active in budget hearings. Commission Chair Bill Jones testified before the Appropriations and Revenue Committees urging an increase in the Cabinet's budget recommendation. During the 1989-90 biennium budget period the Public Advocate worked effectively for increased funding, securing $800,000 more than the Cabinet's request. Hopefully, these continued efforts on behalf of DPA will be reflected during this biennial budget.

What do you see as DPA's major strengths and weaknesses?

The strengths are the commitment, dedication and skills of the staff.

The Department's weaknesses largely stem from its underfunding. Excessive caseload and low salaries lead to attorney burnout and problems that rise therefrom.

Why should attorneys want to do public defender work in Kentucky?

Obviously, salary is not the lure that attracts an attorney to public service. Kentucky is a poor state, and many of its citizens are indigent and cannot afford counsel. Theirs is not a popular cause. Public service offers the opportunity to help Kentucky's disenfranchised and DPA offers attorneys immediate "hands on" experience and excellent education and training programs.

Why is it important for Kentucky to have quality public defender services?

There are many reasons. As a society we are judged by our treatment of and commitment to those with special needs or unpopular causes, such as, juveniles, indigents, and the mentally ill. Such commitment to quality public defender services is also beneficial on a more practical level, serving as a check on the prosecution and judiciary, thereby ensuring that the legal system functions effectively. Provision of quality public defender services is good economics since it minimizes judicial time.

How can the Commission insure real independence for DPA?

Recognizing the need for improved funding and the conflicts inherent within the system, the Commission has begun long term planning within the department. Included in this process will be an evaluation of the need for a fully funded statewide system of full-time offices. By becoming more active in the budget process, and by reevaluating the long term needs of the Department, the Commission hopefully will more effectively advance the interests of the Department.

WEST'S REVIEW

Linda West

KENTUCKY COURT OF APPEALS

SUFFICIENCY OF EVIDENCE-PRESERVATION OF ERROR
Schuttemeyer v. Commonwealth
37 K.L.S. 1 at 12
(January 12, 1990)

In this case, the defendant challenged the sufficiency of the evidence to support his involuntary commitment pursuant to KRS Chapter 202A. The statute sets out four criteria which must be established before involuntary commitment may be ordered. Schuttemeyer specifically argued that there was insufficient proof that hospitalization was the "least restrictive mode of treatment." However, this issue was not preserved at trial.

The Court nevertheless addressed the error, stating: "We will consider the issue on the merits, since at least one essential element to support the hospitalization of the defendant was not established [citation omitted]. Such a failure amounts to a palpable error affecting the substantial due process rights of Schuttemeyer, and a manifest injustice has resulted, which allows us to consider the issue even though it was not specifically preserved."

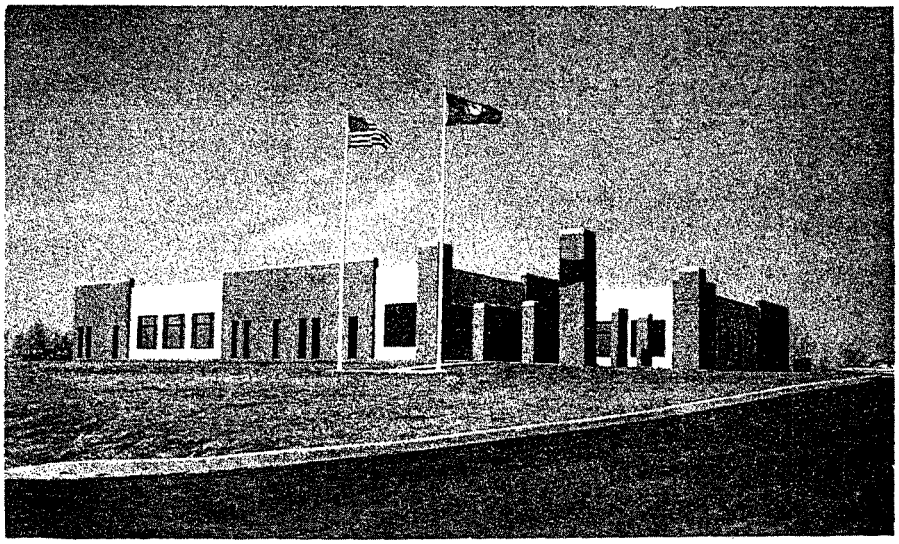
INSANITY AS DEFENSE TO THEFT
Martin v. Commonwealth
37 K.L.S. 2 at 13
(February 2, 1990)

Martin defended a charge of shoplifting on the theory that his addiction to cocaine was a mental illness which rendered him insane. On appeal, he urged error by the trial court in refusing him a jury instruction on insanity and in refusing to allow the introduction of proof that the *Diagnostic and Statistical Manual* of the American Psychiatric Association lists cocaine addiction as a mental illness.

The Court of Appeals rejected both of Martin's arguments. "Although we have been directed to no cases specifically interpreting Section 2 of KRS 504.020, that section of the statute excludes from the definition of 'mental disease or defect' an abnormality manifested only by repeated criminal or otherwise antisocial conduct. We hold that chronic drug abuse necessarily falls within that exclusionary clause."

DUI - SHOW CAUSE HEARING/ LAW ENFORCEMENT OFFICER
Schneider v. Commonwealth
37 K.L.S. 2 at 16
(February 2, 1990)

After he was arrested for DUI, Schneider refused a Breathalyzer test. A Jefferson County Corrections employee, or "peace officer," as defined by KRS 196.007, warned Schneider that his license could be



COURT OF APPEALS RELOCATED

The Court of Appeals has new offices to house their staff of 8 attorneys, 4 legal secretaries, 11 law clerks, 1 micro-film technician and 4 administrative staff. The building has an office for Chief Judge Howerton, a conference/pretrial room and a courtroom with seating for 55 persons. The building is visible from I-64. Their new address is Democrat Drive, Frankfort, Kentucky 40601, (502) 564-7920.

This regular *Advocate* column reviews the published criminal law decisions of the United States Supreme Court, the Kentucky Supreme Court, and the Kentucky Court of Appeals, except for death penalty cases, which are reviewed in *The Advocate* Death Penalty column, and except for search and seizure cases which are reviewed in *The Advocate* Plain View column.

revoked because of his refusal, but Schneider still declined to take the test.

After proper notice a revocation hearing was held. Neither Schneider or his attorney appeared. However, an associate of Schneider's counsel appeared and requested a continuance. The continuance was denied and Schneider's license revoked.

The Court of Appeals rejected Schneider's argument that the continuance should have been granted. The Court held that "[KRS 186.565(4)] allows the secretary to summarily revoke a license without further consideration of any evidence, should the party in question fail to appear, or fail to have a good excuse for not appearing." The Court also rejected Schneider's argument that the Corrections officer who requested he submit to a Breathalyzer and advised him of the consequences of refusing had no authority to do so because he was neither the arresting officer or a "law enforcement officer" as specified in KRS 186.565(3). In the absence of any statutory definition of "law enforcement officer," the Court held that a "peace officer" had sufficient law enforcement authority to require a Breathalyzer test.

JUVENILE TRANSFER
Garvin v. Commonwealth
37 K.L.S. 3 at __
(February 9, 1990)

At Garvin's juvenile transfer hearing, the commonwealth introduced evidence that Garvin had plead guilty to a felony within one year of the charged offense. Defense counsel then moved for a psychological evaluation of Garvin on the grounds that Garvin could not "knowledgeably and fully" waive his constitutional rights and therefore his previous conviction was invalid. Defense counsel also offered to introduce the testimony of a CHR employee as to Garvin's mental status. Both requests were denied.

The Court of Appeals held that the district court committed reversible error. "[KRS 640.010(2)] specifically provides that a defendant may put on proof showing reason why a given case should remain in District Court. By refusing to hear the appellant's tendered proof and by precluding the appellant of the opportunity to develop the evidence, the District Judge, in essence, summarily deprived the appellant of a statutorily granted right."

KENTUCKY SUPREME COURT

PFO ENHANCEMENT OF SENTENCE FOR MURDER/DISCOVERY
Berry v. Commonwealth
37 K.L.S. 1 at 14
(January 18, 1990)

The PFO statute provides for enhancement of sentences assessed under KRS 532.060, the statute establishing penalties for Class A, B, C, and D felonies. Berry argued that his sentence for murder was not subject to enhancement under the PFO statute because under KRS 507.020(2) murder is a "capital offense" and the penalties for it are not set out in KRS 532.060 but in KRS 532.030(1).

The Court agreed. "This Court holds that the trial court committed reversible error in imposing an enhanced sentence under the persistent felony offender statute because murder is a capital crime and not subject to such enhancement." The fact that the commonwealth did not seek the death penalty did not transform the offense into a Class A felony.

The Court additionally held that Berry was not prejudiced when he did not become aware of a photo identification of him until the day of trial where the commonwealth had accorded the defense open file discovery and Berry refused a continuance in order to adjust his defense. There was also no error in the trial court's ruling that Berry was not entitled to another witness' oral suggestion that she would identify him at trial.

MISTRIAL
Brown v. Commonwealth
37 K.L.S. 1 at 15
(January 18, 1990)

Brown requested a mistrial when the commonwealth introduced evidence of other crimes in violation of a pretrial agreement. The Court granted the mistrial but stated he would revoke Brown's bond while the case was continued because Brown had "threatened" two witnesses. At that point the defense withdrew its motion for mistrial.

The Kentucky Supreme Court held that "the trial court erred in imposing the condition of detention upon its decision to grant a new trial." The trial court's announcement that it would alter Brown's conditions of release was in violation of RCr 4.40, which states that the court may alter conditions of release upon a motion by the commonwealth and based upon clear and convincing evidence. Neither of those conditions were met in Brown's case. "That this error was prejudicial to the defendant is beyond question, as it induced him to decline the new trial to which the court had determined he was entitled." Justices Leibson, Gant, and Wintersheimer dissented.

WITNESS CLAIMING FIFTH AMENDMENT PRIVILEGE
Clayton III v. Commonwealth
37 K.L.S. 1 at 16
(January 18, 1990)

At Clayton's trial on charges of trafficking in cocaine, he unsuccessfully sought to introduce the testimony of a witness who asserted his Fifth Amendment privilege. The appellate court held that "[t]he trial judge did not commit reversible error in refusing to allow Clayton to call a witness who stated he would exercise his Fifth Amendment right to refuse to answer questions." The trial court also did not err in refusing to instruct the jury regarding the unavailability of the witness. The defense could have obtained an instruction to the jury that the witness was unavailable to either side but did not request such an instruction.

Finally, Clayton was not entitled to have the prosecutor disqualified because Clayton's father had punched the prosecutor on a prior occasion where an inquiry by the trial court showed "that the prosecutor bore no ill feeling toward Clayton." KRS 15.733(3).

BATTERED WIFE SYNDROME
Commonwealth v. Craig
37 K.L.S. 1 at 17
(January 18, 1990)

This decision affirms a decision of the Court of Appeals reversing Craig's conviction of manslaughter in the shooting death of her husband.

The Court held that Craig should be permitted to introduce as expert testimony the testimony of a spouse abuse center director who had a Master's degree in counselling and five to six years experience working with battered women and researching and writing with regard to "battered woman syndrome." At a retrial the witness should be permitted to testify as to whether or not Craig was suffering from the syndrome at the time she shot her husband. The decision specifically overrules *Commonwealth v. Rose*, 725 S.W.2d (Ky. 1987), which held that battered woman syndrome was a mental condition and as such could be testified to expertly only by a psychiatrist or clinical psychologist. Chief Justice Stephens, and Justices Leibson and Vance dissented.

CONSTITUTIONALITY OF KRS 412.355/ HEARSAY OPINION EVIDENCE/ OTHER SEXUAL OFFENSES
Drumm v. Commonwealth
37 K.L.S. 1 at 20
(January 18, 1990)

This case holds KRS 412.355 unconstitutional as an encroachment by the legislature upon the rule-making power of the judiciary. The statute purports to make admissible the out-of-court statements of "a child victim regarding physical or sexual abuse." The Court refused to extend comity to the statute "because it fails the test of 'statutorily acceptable' substitute for current judicially mandated procedures. Fundamental guarantees to the criminally accused of due process and confrontation ...are transgressed by a statute purporting to permit conviction based on hearsay where no traditionally acceptable and applicable reasons for exceptions apply."

With respect to the child victims' out-of-court statements to a physician the Court abandoned the requirement that such statements are admissible under an exception to the hearsay rule only if they were made for the purpose of seeking medical treatment. The Court instead adopted Federal Rule of Evidence 803(4) which makes admissible "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The Court directed the trial court to decide the admissibility of the children's statements "by making a judgment as to whether 'prejudicial effect outweighs ...probative value.'"

The Court additionally held that evidence of aberrant sexual conduct other than that charged should be excluded unless it was similar to that charged, not too remote in time, and relevant under an exception to the rule excluding evidence of other crimes. Justice Vance, Chief Justice Stephens, and Justice Combs dissented from that portion of the opinion adopting Fed.R.Evid. 803(4).

UNITED STATES SUPREME COURT RULES

On December 5, 1989, the Court revised its Rules, effective January 1, 1990. The new Rules may be found in Volume 110, No. 4 of West's Supreme Court Reporter (December 15, 1989), and in West's Federal Reporter, No. 53 (December 10, 1989).

Among the changes are the following:

1. The Rules have been rearranged and renumbered: The Rules governing review on writ of *certiorari*, formerly set out in Rules 19 through 23, now appear in Rules 10 through 16.

2. A criminal defendant now has 90 days in which to file a petition for *cert* from a state court judgment; an additional extension of up to 60 days may be granted "for good cause shown." (Rule 13.1, 13.2)

3. Although the time for filing a *cert* petition runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment, a "suggestion made to a United States court of appeals for a rehearing *en banc* pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule." (Rule 13.4)

4. The questions presented "must be set forth on the first page following the cover with no other information appearing on that page." (Rule 14.1(a).)

5. In addition to other arguments, "the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which may have a bearing on the question of what issues would properly be before the Court if *certiorari* were granted... Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction **may be waived** if not called to the attention of the Court by respondent in the brief in opposition." (Rule 15.1; second emphasis added.)

6. If the date a pleading is due falls on a Saturday, it is due on the following Monday. (Rule 30.1.)

7. Colors have now been specified for the covers of various pleadings. (Rule 33.3.)

8. Where typewritten pleadings are permitted, counsel may use 8 1/2 by 11 inch paper. (Rule 34.1.)

9. An original and two copies must be filed of any application addressed to an individual Justice. (Rule 22.2.)

Gail R. Weinheimer
California Appellate Project
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TRAFFICKING - SUFFICIENCY OF EVIDENCE/BEST EVIDENCE RULE
Goddard v. Commonwealth
37 K.L.S. 1 at 24
(January 18, 1990)

In this case the Court held that there was sufficient evidence that Goddard was in possession of cocaine based on his presence in the apartment where the drug was found along with his personal effects, his proximity to items of drug paraphernalia, and the presence of mail addressed to Goddard at the apartment. However, the Court held that the best evidence rule was violated when the commonwealth was allowed to introduce testimony regarding mail addressed to Goddard at the apartment without producing the letters themselves. The best evidence rule is stated in R. Lawson, *The Kentucky Evidence Law Handbook*, Sec. 7.15 (2nd ed. 1984) as follows: "When attempting to prove the contents of a writing, a party must intro-

duce the 'original' of that writing unless there is a satisfactory explanation for its nonproduction." The Court concluded that: "[T]he name and address on the envelope was precisely the 'contents of the writing' the Commonwealth sought to prove. Without production of the writing, the envelope itself, testimony as to its content constituted a violation of the best evidence rule." Chief Justice Stephens and Justices Gant and Wintersheimer dissented.

CHANGE OF VENUE/VICTIM'S CHARACTER/ AUTHENTICITY OF TAPE RECORDING/ IMPEACHMENT OF DEFENDANT WITH VOLUNARYADMISSION/ SENTENCING BY OTHER THAN TRIAL JUDGE

Campbell v. Commonwealth
37 K.L.S. 2 at 18
(February 8, 1990)

The Court in this case rejected various allegations of error and affirmed Campbell's first degree manslaughter conviction. First, the Court held that there was no error in the trial court's denial of Campbell's motion for change of venue. The Court reiterated the rule that whether to grant a change of venue addresses itself to the "sound discretion of the trial court." The Court found no abuse of discretion.

The Court held that the introduction of favorable evidence regarding the victim's character was not error where only one witness offered the testimony, as opposed to five in *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky.1988), and where the testimony was not "riddled with emotional outbursts, nor was it overly expounded upon by the prosecution."

200 YEARS AGO, HIGH COURT OPENED WITH LOW PROFILE

WASHINGTON — The Supreme Court turns 200 today, marking the bicentennial of what by all accounts was a slow start. Indeed, not enough justices even showed up Feb. 1, 1790, to give the high court a quorum. Chief Justice John Jay had to put off the court's first meeting until the next day. It didn't matter; no case had arrived.

The Constitution, written in 1787 and ratified the next year, called for "one supreme court," but President Washington did not nominate justices to the bench until late 1789. The next February, only three of the six showed.

One, Justice William Cushing of Massachusetts, appeared in a powdered wig — a British custom that never caught on in the new nation.

The next day, Justice John Blair of Virginia arrived and a quorum was had. The court did some administrative chores, then adjourned its first term on Feb. 10. The second term later that year lasted two days; still no case.

These days, a court term lasts nine months or so and about 5,000 new cases are presented. The court now announces about 150 decisions each term. Noting that fewer than 70 decisions were issued in the court's first decade, retired Chief Justice Warren Burger said recently: "I suspect that members of the court would like the docket to move in that direction."

By the time the court announced its first decision in 1792, Jay declared that he had found life in the capital "intolerable." Two years later, he took a leave of absence to become ambassador to England. I 1795 he quit to take what he considered a more prestigious job, governor of New York.

Much has changed besides the court's caseload in two centuries. Since 1869, there have been nine justices. Since 1935, the court has had its own building. Since 1981, members of the court have not addressed each other as "Mr. Justice." That ended shortly before Sandra Day O'Connor joined the bench.

But some things haven't changed. The chant that ends with "God save the United States and this honorable court" still opens each session. Brass spitoons are still hidden behind the bench. Quill pens are still given to each lawyer appearing before the justices. And absenteeism is still a problem. The court marked its birthday Jan. 16 because several members planned to be out of town today.

Reprinted from the *Courier-Journal*, February 1, 1990

The Court held that a sufficient foundation for the admission of a taped message, left by the defendant on the victim's answering machine, was laid where chain of custody of the tape was unbroken and where the voice on the tape was reliably identified as the defendant's.

The Court held that the trial court was not required to declare a mistrial *sua sponte* when the commonwealth attorney cross-examined the defendant regarding her statement to police which the trial court had previously ruled inadmissible under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The statement was admissible to impeach the defendant's testimony. *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975).

Finally, the Court held that the defense had waived any error by its failure to object when a judge other than the judge who presided at trial conducted the sentencing hearing and signed the judgment.

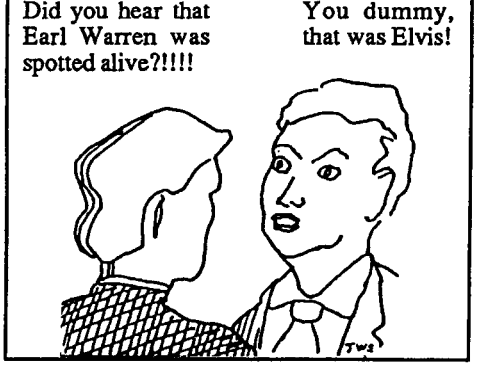
RAPE SHIELD LAW/PFO-VALIDITY OF PRIORS/SEARCH AND SEIZURE

Reneer v. Commonwealth
37 K.L.S. 2 at 25
(February 8, 1990)

The Court held that the trial court did not err in disallowing pursuant to KRS 510.145, testimony by the defendant to alleged prior consensual sex acts between him and the victim. The exclusion of the evidence was not error where the victim denied ever having previously had sex with the defendant and where there were two witnesses to the charged offense who testified that the victim did not consent.

The Court also held that two prior convictions based on guilty pleas were properly introduced at Reneer's PFO proceeding. Reneer's contention that the guilty pleas were obtained without counsel and were involuntary was disproven by the testimony of the attorneys who represented

CRIME PAYS
by Ed Monahan



him at the time. For a discussion of search and seizure issues in *Reneer*, see Plain View.

KRS 209.990 - ABUSE OF AN ADULT
Morris v. Commonwealth
37 K.L.S. 3 at
(February 23, 1990)

In this case, the Court reversed the defendant's conviction of abuse of an adult as defined in KRS 209.990. The instructions to the jury erroneously permitted them to convict Morris if they found that the defendant had, *inter alia*, "permitted or suffered [the victim] to be subjected to torture, cruel confinement and punishment." While first degree criminal abuse, as set out in KRS 508.100, may be committed by one having custody of a person allowing another to abuse that person "[t]he offense of abuse of an adult by a caretaker simply does not emcompass a situation in which the caretaker permits, rather than instigates, a third person to cause injury."

UNITED STATES SUPREME COURT

JURIES - *BATSON*
Holland v. Illinois
46 CrL 2067
(January 22, 1990)

In this case the Court held that the Sixth Amendment's guarantee of an impartial jury does not protect a defendant from a prosecutor's racially motivated exercise of peremptory challenges. Thus, a white defendant from whose jury blacks were struck has no Sixth Amendment objection. According to the majority, the Sixth Amendment fair cross-section requirement is satisfied when the pool from which the jury is to be selected represents a fair cross-section.

Although a white defendant cannot challenge the prosecution's use of its peremptories under the Sixth Amendment, a majority of the Court suggested that such a defendant could assert a claim under the Fourteenth Amendment Equal Protection Clause, despite language in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) that would require racial identity between the defendant and the jurors struck. As stated in the concurring opinion by Justice Kennedy, "[T]he availability of a Fourteenth Amendment Claim by a defendant not of the same race as the excluded juror is foreclosed neither by today's decision, nor by *Batson*. Justices Marshall, Brennan, Blackmun, and Stephens dissented.

IMPEACHMENT USE OF ILLEGALLY SEIZED EVIDENCE
James v. Illinois
46 CrL 2051
(January 10, 1990)

The Court held in *James* that evidence seized during an illegal search may not be used to impeach defense witnesses other than the defendant. Such evidence may be used to impeach the defendant, *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 62 L.Ed.2d 64 (1954) on the theory that otherwise the exclusionary rule would become a license for perjury. However, that consideration is not applicable to witnesses other than the defendant. Such witnesses' motives to lie are less clear than are the defendant's and they may be more daunted by the threat of perjury charges than the defendant. Moreover, a contrary rule "likely would chill some defendants from presenting their best defense - or sometimes any defense at all - through the testimony of others." Justices Kennedy, O'Connor, Scalia, and Chief Justice Rehnquist dissented.

LINDA WEST
Assistant Public Advocate
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Frankfort, KY

> To experienced lawyers it is commonplace that the outcome of a lawsuit-and hence the vindication of legal rights-depends more often on how the fact-finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.
>
> *SPEISER V. RANDALL*, 78 S.Ct. 1332 (1958)

State leaders to get pay increases

Associated Press

FRANKFORT — Gov. Wallace Wilkinson will get a $4,918 raise this year. The state's other seven constitutional officers will get pay increases of $4,199.

And they can all thank a nearly 30-year-old interpretation of the Kentucky Constitution that created the "rubber dollar."

Section 246 of the Constitution sets a maximum annual salary for the constitutional officers at $12,000. Voters have defeated numerous attempts to increase that amount by constitutional amendment.

Since those efforts have failed, the Court of Appeals determined that the framers of the Constitution in 1891 really meant $12,000 a year plus annual increases of the Consumer Price Index since 1949 — what has come to be known as the "rubber dollar."

As a result, $12,000 in 1949 has grown to $63,462 in 1990 for the seven constitutional officers except the governor. Their salaries in 1989 were $59,263, including a required 2 percent salary increase set in the budget.

Another switch in the law requires the governor's salary to be determined by multiplying $60,000 by the change in the Consumer Price Index since 1984.

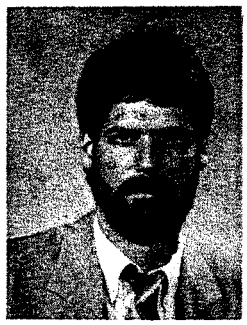
Thus, Wilkinson will receive a salary this year of $74,649.

The calculations are made by the Department of Local Government and approved by the attorney general's office, which did so in an opinion released Tuesday.

A similar interpretation of the law was applied to local officials' salaries, such as county judge-executives, clerks, jailers, sheriffs, magistrates and coroners and mayors everywhere but Louisville.

The Cincinnati Post, **February 28, 1990. Reprinted by permission.**

THE DEATH PENALTY



Neal Walker

"To kill for murder is an immeasurably greater evil than the crime itself."

Fyodor Dostoevsky:
The Idiot (1869)

We have witnessed a series of momentous death penalty developments as we turn the corner on a new decade. As usual, the news ranges from the very bad to the very good. We look initially at the first Ky. death sentence of the new decade and then at the new G.A.O. study on race disparities in death sentencing. We will also look at Ky. legislative developments and briefly at new Supreme Court death penalty decisions.

LIFE AND DEATH IN PADUCAH DECADE'S FIRST DEATH SENTENCE RAISES QUESTIONS ABOUT ADEQUACY OF REPRESENTATION

ROBERT ALLEN SMITH

On Jan. 24 Robert Allen Smith became the first person sentenced to death in Ky. this decade. Smith was convicted in the McCracken Circuit Court of murder and first degree arson arising out of the death of Pamela Wren. He was defended by assigned counsel L. M. Tipton Reed, Jr.

LAW LICENSE SUSPENDED

In 1981, Reed's law license was suspended by the Ky. Supreme Court for, among other things, "willfully neglecting matters entrusted to him." *Ky. Bar Ass'n v. Reed*, 623 S.W.2d 228, 232 (Ky. 1981). Less than a year later, the suspension was extended for 2 more years for a "continuing pattern of misconduct," which included, once again, "gross neglect of a legal matter entrusted to respondent." *Ky. Bar Ass'n v. Reed*, 631 S.W.2d 633 (Ky. 1982).

Reed presented no evidence in mitigation on his client's behalf, even though Smith was diagnosed by a state psychiatrist in 1979 as functioning "within the borderline range of mental retardation." Mental retardation is, of course, a statutory mitigating circumstance in Ky. KRS 532.025(2)(b)(7). The U.S. Supreme Court has held that mental retardation is, as a matter of constitutional law, mitigating. "It is clear that mental retardation has long been regarded as a factor that many diminish an individual's culpability for a criminal act." *Penry v. Lynaugh*, 109 S.Ct. 2934, 2956 (1989). "[T]he sentencing body must be allowed to consider mental retardation as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a given case." 109 S.Ct. at 2957. Robert Smith's jury, though, was unable to consider such evidence since his lawyer neglected to present it.

In fact, it appears that Smith himself was not in court during the penalty phase. According to a newspaper account, "Smith went back to jail before the penalty phase began. Reed said Smith was too emotional to continue after the guilty verdict." *The Paducah Sun*, November 12, 1989, p. 1.

Unfortunately, Robert Smith's case is not an aberration in Ky. A number of his cellmates on death row were defended at trial by lawyers with similar difficulties. Of the 28 inmates on death row at the beginning of 1989, 7 had been defended at trial by attorneys who have since been disbarred or who have resigned rather than face disbarment. Walker, The Death Penalty, *The Advocate*, June 1989, at 16, Col. 2. One of these lawyers is currently incarcerated in a federal prison. Still another condemned inmate was defended by a court appointed attorney who had been successfully sued for malpractice.

DAVID SOMMERS

Smith's death sentence, the first in 14 years in Paducah, stands in stark contrast to the result in another recent capital prosecution in the same county. Smith's sentence was imposed only a few weeks after David Sommers was sentenced to a prison term for his convictions for 2 counts of capital murder and first degree arson.

A Paducah newspaper noted similarities

Kentucky Death Notes

Number of people executed since statehood	438
Number of people executed this century	162
Number of people who applied for the position of executioner in 1984	150
Number of people now on death row	26
Number of Vietnam Veterans on death row	1
Number of women on death row	1
Number of juveniles on death row	1
Number of inmates who have committed suicide	1
Number whose trial lawyers have been disbarred or had their license suspended	6
Number of these lawyers who are now incarcerated	1
Number who can afford private counsel on appeal	0
Number sentenced to death for killing a black person	0
Percentage of death row inmates who are black	20%
Percentage of Kentucky population that is black	7%
Number of black prisoners who were sentenced by all white juries	1
Number of persons sentenced to death in Kentucky and later proven innocent	1

between the two cases. "The trials were similar in that both involved females killed during the commission of first degree arson - a specific circumstance which permits seeking the death penalty. Another similarity: Wren may have been raped and the girls had accused Sommers of molesting them." *The Paducah Sun*, November 12, 1989, p. 2.

But Sommers avoided a fate similar to Smith's after his attorney, Mike Williams convinced the prosecutor that seeking the death penalty would result in a needless waste of judicial resources. Sommers was convicted and sentenced to a term of years. Mike Williams, of the DPA's Major Litigation Section, has substantial experience in litigating capital cases.

GEORGIA SUPREME COURT RECOGNIZES DEATH CASES REQUIRE SPECIAL SKILLS

In *Amadeo v. State*, 384 S.E.2d 181 (Ga. 1989), the Ga. Supreme Court reversed a trial court's order refusing to appoint two lawyers who had previously represented Amadeo and instead appointing local counsel to represent the defendant at his capital retrial.

Lawyers Bright and Warner, specialists in defending death penalty cases, had represented Amadeo for nearly a decade as he challenged his death sentence in the federal courts. Ultimately, they convinced the U.S. Supreme Court that his death sentence was unconstitutional. See *Amadeo v. Zant*, 108 S.Ct. 1771 (1988).

Upon remand for retrial, though, the trial court "appointed 2 well-respected local lawyers, neither of whom had previously tried a death penalty case." 384 S.E.2d at 181. After conferring with attorneys Bright and Warner, local counsel sought permission to withdraw while previous counsel sought appointment. The trial court denied both motions and the Ga. Sup.Ct. reversed and remanded for appointment of attorneys Bright & Warner.

In reversing, the Georgia Court relied heavily on the ABA *Guidelines For the Appointment and Performance of Counsel in Death Penalty Cases*, which mandate that prior capital experience is a prerequisite to appointment in a death case. Significantly, the Court also emphatically recognized that litigating a death penalty case calls for extraordinary skills not required in a non-capital prosecution. "[I]t has become apparent that special skills are necessary to assure adequate representation of defendants in death penalty cases." 384 S.E.2d 182.

KORDENBROCK OPINION WITHDRAWN (IT AIN'T OVER 'TIL IT'S OVER)

On February 20, 1990, the Sixth Circuit Court of Appeals granted Paul Kordenbrock's petition for rehearing and withdrew the opinion previously issued in the case which had upheld the district court's denial of his federal habeas petition. See *Kordenbrock v. Scroggy*, 889 F.2d 69 (6th Cir. 1989). The case will now be heard by the full court sitting *en banc*.

Kordenbrock's case is the first death penalty case to reach the 6th Circuit not only from Ky., but from any of the death penalty jurisdictions in the region that the circuit embraces. It is hard not to be enthusiastic about the rehearing order, even while recognizing that the *en banc* Court may ultimately uphold Kordenbrock's sentence. One of the reasons the panel opinion was so disheartening was its extremely parsimonious reading of *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985).

Ake, of course, holds that due process requires that where his "mental condition is seriously in question," an indigent capital defendant must be provided access to "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 105 S.Ct. 1095, 1097. The panel opinion, though, held that *Ake's* guarantee of psychiatric assistance extended only to cases where an insanity defense was pled. 887 F.2d at 76. Further, the opinion held that *Ake's* guarantee of psychiatric assistance did not embrace a right to investigate and develop mitigating evidence for use at the sentencing phase. *Id.* Finally, the Court held that *Ake's* command of psychiatric assistance would have been satisfied by utilizing the services at KCPC. 889 F.2d at 76. Now all these issues will be revisited by the *en banc* Court. It ain't over 'till it's over!

FEDERAL STUDY CONFIRMS RACIAL DISPARITIES IN DEATH SENTENCING

On February 27, 1990 the General Accounting Office (GAO) released a study finding "a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the *Furman* decision." GAO, Gen. Gov. Div., *Death Penalty Sentencing*, p. 5 (B-236876, Feb. 26, 1990). The GAO study was prepared in response to a provision added to the 1988 Anti-Drug Abuse Act (which provides for the death penalty for certain drug related killings).

The federal legislation required the GAO to study capital sentencing procedures to determine if either the race of victim or the defendant influences the likelihood that defendants will be sentenced to death. To fulfill its mandate, the GAO undertook an evaluation synthesis- a review and critique of existing research. The analysts identified and collected all potentially relevant studies done at national, local and state levels. A total of 53 such studies were identified, but only 28 were analyzed, since the remainder were either duplicative or did not contain empirical data.

The remaining studies were then analyzed and found to be "of sufficient quality and quantity to warrant the evaluation synthesis approach." GAO at 3. Two of these studies were conducted by researchers from the Univ. of Louisville. See Keil, Thomas and Gennaro Vito. "Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-*Gregg* Outcomes." Forthcoming in *Justice Quarterly*; Keil, Thomas and Gennaro Vito, "Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale." *Criminology*, Vol. 23, No. 3, pp. 511-535 (1989).

The GAO report concludes that the race of the victim is a strong predictor of the outcome of a capital case. "In 82 % of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, *i.e.*, those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks." GAO, p. 5-6. "This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques." *Id.*

Even after controlling for legally relevant variables, such as the offender's record, number of aggravating circumstances, etc., the racial variables remained. "The analyses show that after controlling statistically for legally relevant variables and other factors thought to influence death penalty sentencing (*e.g.* region, jurisdiction) differences remain in the likelihood of receiving the death penalty based on race of victim." GAO, p. 6.

Over half of the studies analyzed by the GAO found that race of the defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty, although the race of the defendant is not so powerful at predicting a death sentence as is the race of the victim. "To summarize, the synthesis supports a strong race of victim influence." GAO p.7.

THE KENTUCKY RACE STUDIES

The Ky. studies cited in the GAO publication document the powerful role that race plays in the administration of the death penalty in this state. "Our equations...show that Ky. prosecutors regard the murder of a white by a black as an especially heinous infraction of the law, independent of the objective seriousness of the homicide." Keil and Vito, *Criminology, supra*, at 527. "Blacks who kill whites are more likely to be charged with a capital crime than are others (*i.e.*, blacks who kill blacks, whites who kill whites, and whites who kill blacks)." *Id.* The impact of race also shows up at the other end of the process - the sentencing stage. "Ky. juries are...more likely to send blacks who kill whites to death row." *Id.* at 523. The study concludes with a damning indictment of the impact of race on death sentencing practices in this state. "In Ky., race is inextricably bound up with the way in which the capital sentencing process operates." *Id.* at 528.

PROVING RACIAL BIAS IN COURT

A federal district court in Georgia has ruled that a black habeas petitioner who claims that race was a factor in his death sentence for killing a white person has a right to depose jurors to ascertain if, in fact, racial considerations operated during the deliberations.

In *Dobbs v. Zant*, 720 F.Supp. 1566 (N.D. Ga. 1989), the Court acknowledged that Fed.R. Evid. 606(b) ordinarily forbids the use of jurors' post-decision statements about mental processes in an effort to impeach their verdict. However, the Court also acknowledged that black prisoners who have been sentenced to death for killing whites and who challenge their death sentences on the grounds of racial bias must show that "the jurors acted with discriminatory purpose when they decided to impose the death penalty" in order to establish an equal protection violation. *Dobbs*, 720 F.Supp. at 1572, citing *McClesky v. Kemp*, 107 S.Ct. 1756, 1766 (1987). Similarly, to establish an 8th Amendment violation, Dobbs would have to show that "the jurors possessed racial biases that created an 'unacceptable risk' that race affected the sentencing decision." *Dobbs*, 720 F.Supp. at 1572. See *Turner v. Murray*, 106 S.Ct. 1683, 1686, 1688, n. 7 (1986).

With respect to the 8th Amendment issue, the Court equates racial bias with "mental bias," and notes that Rule 606(b) does not forbid juror testimony about any mental bias unrelated to the specific issues the juror was called on to decide. "A habeas petitioner in a capital case, therefore, may take testimony from a trial juror to show that the juror possesses racial biases that, under the 8th Amendment standard, created an 'unacceptable risk' that race affected the death penalty decision." *Dobbs*, 720 F.Supp. at 1573.

The only conflict emerges with the Equal Protection claim, where "Dobbs must go further and show that the sentencing decision was actually motivated by racial prejudice." 720 F.Supp. at 1573. "A conflict emerges between these two rules: whereas the *McClesky* standard requires a petitioner to show actual bias in the sentencing decision, Rule 606(b) precludes inquiry into the decision making process." *Id.*

The Court resolves the conflict in favor of Dobbs, holding that he had a right to depose the jurors to explore whether or not racial bias contributed to their decision to sentence him to death. "The balance between the defendant's rights and society's interest in protecting the jury system would not be met by enforcing Rule 606(b)." 720 F.Supp. at 1574.

U. S. SUPREME COURT CASES

The first batch of death penalty opinions during the 1989 term show a sharply divided court which continues to insist that states remove any barriers to the jury's ability to consider mitigating evidence, *Butler v. McCoy*, 46 CrL 2164, (3/5/90) while also insisting that the sentencing decision be a rather clinical "moral" one, rather than being based on a "sympathetic" view of the defendant's mitigation. *Saffle v. Parks*, 46 CrL 2193 (3/5/90). The darker side of the Court emerges in two opinions upholding sentencing statutes which amount to little more than formulas for processing aggravation and mitigation which mandate a sentence of death when the formula yields a certain result. *Blystone v. Pennsylvania*, 46 CrL 2147 (2/28/90); *Boyde v. California*, 46 CrL 2172 (3/5/90). Finally, with the grace of a Guatemalan death squad, the Court has just about succeeded in burying the great writ of habeas corpus in capital and non-capital cases alike. *Butler v. McKellar*, 46 CrL 2164 (3/5/90).

FEDERAL HABEAS CORPUS 1867-1990

The writ of habeas corpus was the most celebrated writ in the English law. Originally available only to federal prisoners, Congress extended its protections to federal prisoners over 100 years ago. Judiciary Act of February 5, 1867, 14 Stat. 385-86.

With *Butler v. McKellar* and *Saffle v. Parks*, though, the Court has virtually sealed off the federal courts to state prisoners under the guise of retroactivity. An exhaustive treatment of the implications of these decisions for federal practitioners will appear in the newsletter of the Ky. Capital Resource Center. A few words are in order here, though.

In both cases, slim majorities (5-4) held that condemned inmates were not entitled to relief since the claims they pressed would have established a "new rule" of federal constitutional law. Last term, in *Teague v. Lane*, 109 S.Ct. 1060 (1989), the Court radically restructured the doctrine of retroactivity in holding that a habeas petitioner may not even have his claim heard unless, as a threshold matter, the court determines that a favorable ruling would not establish a new rule of constitutional law. With *Butler* and *Saffle*, the Court gives such an expansive interpretation of what constitutes a "new rule" that, as Justice Brennan observes in his dissent in *Butler*, "the Court strips state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration." 46 CrL at 2168 (emphasis in original).

JURY UNANIMITY ON MITIGATION UNCONSTITUTIONAL

In *McCoy v. North Carolina, supra*, the Court addressed the constitutionality of the unanimity requirement in N. C.'s capital punishment scheme. That requirement prevents the jury from considering any mitigating circumstance which the jury does not unanimously find. The court held (6-3) that, under *Mills v. Maryland*, 486 U.S. 367 (1988), this unanimity requirement violates the constitution by preventing the sentencer from considering all mitigating evidence. The relevance of this opinion to Ky. practice will be addressed in the next death penalty column.

MANDATORY SENTENCING FORMULAS

In *Boyde* and *Blystone*, the Court upheld (5-4) California and Pennsylvania death sentencing statutes which provide that death must be imposed if the statutory calculus of processing mitigation and aggravation yields a certain result. In California, a jury must impose death if aggravation outweighs mitigation. Similarly, in Pennsylvania, death is mandatory if the jury finds one aggravating circumstance and no mitigating circumstance. The Court upheld both of these statutes against challenges that they amounted to mandatory death sentencing schemes as condemned in *Woodson v.*

North Carolina, 428 U.S. 280 (1976).

These opinions also hold that a jury does not have to weigh aggravation. Indeed, the Court reduces the function of aggravating circumstances to distinguishing capital from non-capital murder. "The presence of aggravating circumstances serves the purpose of limiting the class of death eligible defendants, and the 8th Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." *Blystone*, 46 CrL 2147.

MITIGATION: EMOTIONAL VS MORAL RESPONSES

In *Saffle v. Parks, supra*, the Court found no fault with a jury charge directing the jury to avoid any influence of sympathy. The Court rejected the argument that such an "anti-sympathy" instruction violates *Lockett* inasmuch as jurors who react sympathetically to mitigating evidence could interpret the instruction as barring them from considering that evidence altogether. But the Court holds that emotion should play no role in the process, which it describes as a moral one. "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror." 46 CrL at 2196.

TO BE CONTINUED...

These opinions are not fully analyzed here as they were handed down as we go to press. All 5 opinions will be discussed in detail in the next issue of *The Advocate*.

KENTUCKY SENATE VOTES UNANIMOUSLY TO BAR EXECUTION OF RETARDED OFFENDERS

On February 22, the Ky. Senate voted 36-0 to bar the execution of mentally retarded offenders. The bill now moves to the House. If the House also approves the measure, Ky. will become only the third state to prohibit such executions.

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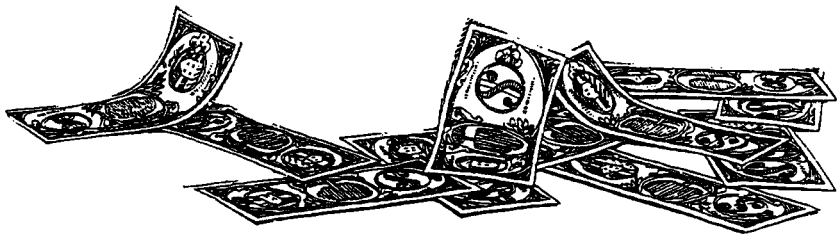
Lawyers Shun Appointed Cases



Many Ohio and Kentucky counties don't pay enough to cover office overhead for court-appointed defense lawyers in long cases. Consequently, few lawyers are willing to take them.

Last February, Michael Williams barely made federal minimum wage as a Campbell Co. public defender when he defended Gregory Combs. Combs set the apartment house fire that killed 5 people in Dayton, Ky. He was charged with capital murder; he was convicted of manslaughter. Williams said he was paid an extra $2,500 to handle the case by the public defender's office. He put in about 725 hours.

On the other hand, there's no shortage of lawyers in Hamilton Co. who are willing to accept court appointments at $30 an hour to defend murder suspects. The difference is the maximum that counties pay each lawyer in an aggravated murder case. Butler Co. has a $2,500 cap, the lowest in Ohio, regardless of how many hours a lawyer works.

But in Hamilton Co., judges can ignore the $6,000 limit and authorize payments for every hour worked by up to 2 defense lawyers assigned to each case. Dale G. Schmidt, a veteran trial lawyer, estimated that defendants who hire their own attorneys end up paying $150 to $250 an hour. Schmidt said overhead- rent, utilities, secretaries, copying machines, insurance - eats up more than 1/3 of everything a lawyer earns.

In a lean operation, those expenses are $20 to $25 an hour, but often they're twice that. Even so, few counties pay more than $30 an hour for lawyers who take court appointments.

The problem has surfaced in recent high-profile Kenton Co. cases: W. Robert Lotz accepted a court appointment to defend Michael Funk, accused of killing 7-year-old Jenny Sue Iles. He was to be paid at the new, higher rate of $25 an hour in court and $15 an hour for out-of-court work. But Edwin Kagin agreed to represent Funk privately for $1. Ronald Rigg agreed to serve as his co-counsel for even less.

When Gregory Wilson's first court-appointed lawyers quit, Circuit Judge Raymond E. Lape appealed to members of the Kenton Co. Bar Assn. *"Please help! Desperate!"* his letter began. The Problem? The old rate of $15 an hour in court and $9 an hour for out-of-court work. Wilson went to trial with 2 court-appointed lawyers who served without pay. One had never tried a death penalty case; the other had never tried any felony case. Wilson was convicted of kidnapping, raping, robbing and killing Deborah Pooley and sentenced to death.

Ohio's Butler Co. is having similar problems: Both court-appointed attorneys for Patrick Henry Goins tried to quit, saying they each had invested more time than the $2,500 maximum justified.

Forcing them to continue would violate their rights and jeopardize Goins' right to a fair trial, they argued. Goins pleaded guilty to killing Lucille Susong and her son, James, before an appellate court resolved the payment issues.

All 6 local lawyers certified to serve as lead counsel in a death penalty case refused to represent Kenneth J. Lovett, accused of shooting Jena Mayo. A staff attorney from the Ohio Public Defender's Office is handling Lovett's case.

Robert Carran, coordinator of the public defenders office in Kenton, Boone and Gallatin Co., said, "Lawyers have been very good about taking our cases, but they can't keep taking losses of thousands of dollars."

Finding defense lawyers is more than a scheduling problem; criminal defendants have a constitutional right to adequate counsel. In Ohio, where lawyers must be certified by the Supreme Court before they can take capital punishment cases, the burden falls on overwhelmed state public defenders when county judges can't find private defense lawyers.

In Ky., no certification exists, and in some cases, courts accept inexperienced defense lawyers. So it's not uncommon for death-row inmates in both states to appeal their convictions, saying they were denied adequate counsel.

Cincinnati Enquirer, Feb. 11,1990. Reprinted by Permission.

GUILTY UNTIL PROVEN INNOCENT

DUI PRESUMPTIONS

Rob Riley

INTRODUCTION

If you stopped the average citizen on the street and asked them to state one *rule of law*, the most likely answer would be that *you are innocent until proven guilty*. The Supreme Court left little room for argument when, in *In Re Winship*, 397 U.S. 358 (1958), they announced that:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.
> 397 U.S. at 364.

The Justices would no doubt be surprised to discover that in Kentucky their emphatic holding would protect the most loathsome murderer, the most wily of thieves, the most repetitive of con man, but would offer only hollow promises for the average citizen stopped by a police officer after having a few beers with friends.

BACKGROUND ON PRESUMPTIONS IN KY

Pursuant to KRS 189.520, the percentage of alcohol in a defendant's blood gives rise to various presumptions regarding his or her sobriety. The most offensive is KRS 189.520(3)(c) which creates a presumption that a driver is *under the influence* when his or her blood alcohol level is a .10% or greater. The utilization of this presumption stems from *Marcum v. Commonwealth*, 483 S.W.2d 122 (Ky.App. 1972). *Marcum*, while holding that it would be reversible error to actually instruct the jury as to the presumption, established admonishing the jury as the appropriate method for conveying the presumption to the jury. The *Marcum* court clearly envisioned the use of the presumption by the jury to prove a fact [under the influence] that "otherwise would require expert testimony." 483 S.W. at 128.

The Court carefully reviewed the history of presumptions and concluded that to instruct the jury regarding a presumption would, as it had consistently held, invade the province of the jury and was thus error. In establishing the admonition as appropriate, however, the Court shed no light into its reasoning. In subsequent decisions, however, it has become clear that the presumptions at issue are to be viewed not as "rules of law given by the Court but rather evidence," *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky.App. 1978), and further were "devised for prosecutorial convenience." *Id.* Additionally, the DUI presumptions remain "the only presumption of fact, essential to establish guilt of a crime, of which the trial court is permitted to inform the jury." *Overstreet v. Commonwealth*, 522 S.W.2d 178 (Ky.App. 1975). In so doing, the *Overstreet* court refused to expand the use of the presumptions in a DUI/Manslaughter case, stating that the benefit "cannot reasonably or fairly be extended to provide the same convenience for the prosecution in cases of a more serious character." 522 S.W.2d at 179. As such, post *Marcum*, 2 things are clear: 1) the use of presumptions in a DUI case stand alone in Kentucky practice, and 2) Kentucky courts, while acknowledging the basic unfairness, have not found reason to change the procedure.

CHALLENGING *MARCUM*

While the Kentucky appellate courts apparently remain content with this policy, a line of cases from the United State Supreme Court suggest that the use of the presumptions causes greater constitutional problems than those recognized and tolerated by the *Marcum* line of cases.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the United States Supreme Court struck down mandatory presumptions as being inconsistent with due process. The presumption at issue was a jury instruction stating "the law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 513. The Supreme Court found the presumption constitutionally infirm on 2 separate theories: 1) such a presumption shifts the burden of persuasion as previously condemned in *Mulany v. Wilbur*, 421 U.S. 684 (1975), and 2) the presumption was conclusive in violation of *Morissette v. United States*, 342 U.S. 246 (1952). Obviously, the second prong of the *Sandstrom* holding is not violated by the *Marcum* procedure because KRS 189.520(4) allows the:

> Introduction of any other competent evidence bearing on the question of whether the defendant was under the influence....
> *Id.* at 274.

However, this very right to rebut thus granted conclusively shifts the burden in violation of the first prong of the *Sandstrom* holding. In effect, the jury is admonished to presume guilt unless the defendant can persuade the jury as to innocence. Although KRS 500.070 envisions placing the burden of going forward on the defendant in certain narrowly defined situations, it does not, nor could it constitutionally, countenance the wholesale burden shifting that occurs once the *Marcum* admonition is given.

In *Francis v. Franklin*, 471 U.S. 307 (1985), the Court addressed the issue of a presumption the defendant could rebut. The Court once again emphatically held:

> This bedrock 'axiomatic and elementary' [constitutional] principle (cite omitted) prohibits the state from using evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every

essential element of a crime. 471 U.S. at 313.

The Court went on to note that "a mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but is no less unconstitutional. 471 U.S. at 317.

Just last term, the United States Supreme Court revisited the issue of the use of presumptions in a criminal trial. *Carella v. California*, 491 U.S. ____, 105 L.Ed.2d 218; 109 S.Ct. 2419 (1989). The presumptions at issue in *Carella* involved the imputing of criminal intent from the fact of failing to return rented property within a given statutory time period. Without dissent, the Supreme Court struck down the presumption and reversed the convictions. In one simple paragraph, the Court distilled the constitutional problems with the *Marcum* procedure:

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. (Cite omitted). Jury instructions relieving States of this burden violate a defendant's due process rights. (Cite omitted). Such directions subvert the presumption of innocence accorded to accused persons, and also invade the truth-finding task assigned solely to juries in criminal cases.
> 105 L.Ed.2d at 221.

Such a holding leaves little doubt as to the continued constitutionality of the *Marcum* procedure which is specifically designed to ease the prosecution's burden. See *Wells, supra,* and *Overstreet, supra.* Nonetheless, in a recent federal habeas corpus action,[1] the U.S. District Court for the Western District upheld the *Marcum* procedure. The Court reasoned that, despite the fact that KRS 189.520(3)(c) states that when there is:

> .10 percent (10%) or more by weight in such blood, it *shall be presumed* that the defendant was under the influence....
> Id. at 273 (emphasis added),

The statute, when read as a whole, including the rebuttal provisions, created only a permissible inference. The Court's decision, while citing the *Francis* distinction between rebuttable and nonrebuttable, totally ignores the test for mandatory versus permissive that was established in *Sandstrom.* Regardless of how the state courts interpreted the presumption, 442 U.S. at 516, the use of the presumption is invalid if a juror "*may* have interpreted the Judge's instructions as constituting...a conclusive presumption.... 442 U.S. at 524. (emphasis added).

The logic of the district court's holding was further diminished by *Hayden v. Commonwealth*, 776 S.W.2d 956 (Ky.App. 1989). In *Hayden*, the Court made it clear that impaired driving was not an element of the offense as had been suggested by *Cruse v. Commonwealth.*[2] As such, the only element to be proven is "under the influence" which according to KRS 189.520(3)(c) shall be presumed merely from the offering of a test reading of .10 or greater. Adding to the lack of any substantive requirements beyond the mere existence of the number,[3] it is logically inconsistent to find that a reasonable juror might not find the presumption conclusive.

The final constitutional development is one that destroys the artificial distinction the *Marcum* court sought to draw between admonishing and instructing. In *James v. Kentucky*, 466 U.S. 15 (1984), the United States Supreme Court held that:

> Kentucky distinction between admonition and instruction is not the sort of firmly established and regularly followed state practice that can prevent the implementation of federal constitutional rights.
> 80 L.E.2d at 346.

Obviously, it is of little solace to the defendant that the jury is merely told by the judge to presume guilt as opposed seeing it in writing. Likewise, the Supreme Court has recognized the distinction not one of constitutional impact. This is especially true in light of even the Kentucky courts previously discussed hesitancy about the rule.

CONCLUSION

The continued validity of this isolated rule of procedure specifically designed to reduce the prosecution's burden of proof is suspect. The proper use of the presumptions contained in KRS 189.520 are the same as other presumptions to be utilized by the Court in granting a directed verdict. See Milward, *Kentucky Criminal Practice*, Section 47.07 (2d Ed. 1984). The state should prove each element of the offense beyond a reasonable doubt by competent evidence. Only in this way can each citizen accused be provided due process of law.

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FOOTNOTES

[1] *Morgan v. Shirley*, (Civil Action C-88-0049-B6(M), rendered 7-19-89).

[2] 712 S.W.2d 356 (Ky.App. 1986).

[3] See *Owens v. Commonwealth*, 487 S.W.2d 897 (Ky.App. 1972). "As a minimum this proof must show that the operator was properly trained and certified to operate the machine and that the machine was in proper working order and that the test was administered according to standard operating procedures."

Ruling on Official to be Appealed

The state attorney general's office is seeking to overturn dismissal of drunken driving and speeding charges against Boyd County Attorney Jerry Vincent.

Johnson Circuit Judge Stephen Frazier dismissed the charges against Vincent, citing a procedural error by the attorney general's office.

The office asked Frazier to vacate his ruling and also will ask the judge to reconsider his decision, according to Deputy Attorney General Brent Caldwell. An appeal calls for the state Court of Appeals to review the ruling.

Frazier's ruling marked the second dismissal of charges against Vincent because of procedural errors by the attorney general's office.

Vincent was arrested in July in Ashland. He refused to take a breath analysis test, saying he was afraid the arresting officer would manipulate the test because he and the officer had a long-standing dispute.

The Courier-Journal, February 6, 1990.

DRUNK-DRIVING CASE AGAINST BOYD OFFICIAL DROPPED AGAIN

Drunken-driving and speeding charges against Boyd County Attorney Jerry Vincent were dismissed — the second time charges against Vincent have been dropped because of procedural errors by the state attorney general's office.

The handling of the case prompted harsh criticism of the state attorney general's office by Vincent and his attorney, who say the case was incompetently handled and politically motivated.

The ruling by Johnson Circuit Judge Stephen Frazier says that the attorney general's office was late in filing an appeal on the drunken-driving and speeding charges against Vincent, who has been Boyd County attorney for 8 years.

The charges against Vincent were initially dropped in Boyd District Court in November when a district judge from Jefferson County ruled that Jeff Mackin, of the attorney general's office, failed to state the charges and evidence against Vincent in the prosecution's opening argument.

Local judges and prosecutors asked to be excused from the case because of their working relationships with Vincent.

The attorney general's office, which contends the case should not have been dismissed, will, within the next 5 days, ask the state Court of Appeals to review it, Deputy Attorney General Brent Caldwell said.

Vincent was arrested last July in Ashland. He refused to take a breathalyzer test, saying he was afraid the arresting officer would manipulate the test because he and the officer had had a long-standing dispute.

Vincent's license was suspended recently by the state Transportation Cabinet because of his refusal to take the test.

The charges against Vincent have caused controversy in Boyd County because of his status as a public official.

Moreover, the subsequent dismissals have prompted harsh questions about the competency of the attorney general's office and the possibility that Vincent received preferential treatment. Vincent also was co-chairman in Boyd County for Attorney General Fred Cowan's election campaign.

Sandi LeMaster, vice president of the Boyd County Chapter of Mothers Against Drunk Driving, which has been outspoken about the case, said she is shocked and frustrated by Vincent's case.

"I don't know which is worse," LeMaster said, "to play favoritism or to have someone employed in the attorney general's office that is totally incompetent."

But Caldwell said the attorney general's office complied with the law in handling the case. And he contended that there is no validity to charges of preferential treatment.

"We feel like we've done what was recommended under the law," Caldwell said. "At this point, we have not had a court that agreed with that."

Regarding the first dismissal, Caldwell said that the prosecutor's opening argument need not lay out all the facts and evidence to be used in the case and that Mackin gave enough information in his opening remarks.

District Judge Donald Eckerie of Jefferson County disagreed, and his decision was appealed by the attorney general.

The attorney general's office, however, waited to file its appeal until receiving a written order from Eckerie. An appeal must be filed within 10 days of the judge's order.

In his motion for dismissal, Vincent's attorney, David Mussetter, said the appeal was late because it should have been filed when the judge made the order and signed the court calendar, or docket.

Reading from Frazier's ruling, Linda Craft, Frazier's court administrator, said the trial court's calendar notation constituted a ruling from the judge. "Hundreds of cases are determined every day in Kentucky by the various district courts," the ruling states. "These decisions are evidenced not by formal written judgment, but by calendar notation signed by the court.... This procedure has been followed since the implementation of the district court system."

Mussetter discounted any talk that Vincent received preferential treatment, citing the scrutiny the case has received because he is a public official.

Of Mackin, who tried the case, Vincent said: "He's just incompetent. And the things that Mr. Cowan has said in response to public pressure...I think he's trying to make political hay out of a case."

Cowan has said he intends to run for governor in 1991.

But Vincent maintains that the facts of the case have been overlooked — that his arrest was the result of a long-standing dispute he has had with an Ashland Police officer.

The Ashland police report said an officer saw Vincent's car swerving across the center line and speeding. When stopped, he refused to take the breathalyzer test, saying he feared Officer Tim Wallin would manipulate the results.

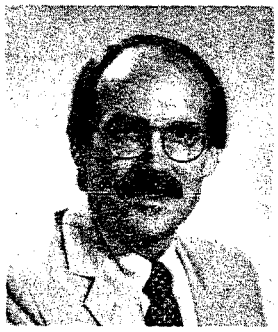
Vincent, who is a neighbor of Wallin's in Ashland, has filed two criminal complaints alleging Wallin harbors vicious dogs.

Ashland Police Capt. Tom Kelley said that Wallin would not have conducted a breath test on Vincent because he is not a breathalyzer operator. Kelley added that the complaints against Wallin have not been resolved.

The Courier-Journal, February 1, 1990.

PLAIN VIEW

Search and Seizure Law



Ernie Lewis

UNITED STATES SUPREME COURT

James v. Illinois

Here is one view of the exclusionary rule: *"'[T]he rule excluding evidence seized in violation of the 4th Amendment has been recognized as a principal mode of discouraging lawless police conduct . . .[W]ithout it the constitutional guarantee against searches and seizures would be a mere 'form of words'."*

Here is another view of the same rule: *"[T]he exclusionary rule does not apply where the interest in pursuing truth or other important values outweighs any deterrence of unlawful conduct that the rule might achieve."*

Both views are expressed in the same United States Supreme Court case, ***James v. Illinois***, 493 U.S. __, 110 S.Ct. 648, 107 L.Ed.2d 676 (1990). This case is a dramatic example of the division in the court over the issue of the value of the exclusionary rule, that is whether it is judicially created or inherent within the 4th Amendment, and whether it has as its purpose merely deterring police misconduct or whether it has a broader purpose. Surprisingly, in *James v. Illinois*, the first view quoted above belongs to the majority opinion, the latter view that of the conservative (in-this-case) minority. The facts were rather simple. Darryl James, a juvenile, told police investigating a murder that he had red hair the previous day, but had then dyed it black "in order to change his appearance." The murderer had been described as having reddish hair. James' statement was suppressed prior to trial as taken following an illegal arrest.

James did not testify at trial. However, he did present Jewel Henderson, who testified that on the day of the murder James has black hair. The prosecution then introduced James' previously suppressed statement to contradict Henderson's testimony. James was convicted of murder and sentenced to 30 years in prison. Justice Brennan authored the opinion for a surprising majority including Blackmun, White, Marshall, and Stevens. The majority held that the use of Henderson's statement was erroneous, and reversed the judgment.

The holding halted a trend of recent years to permit the prosecution to use suppressed matters for impeachment purposes. In *Walder v. United States*, 347 U.S. 62 (1954), the court allowed suppressed heroin to be used to impeach the defendant's testimony that he had never possessed narcotics. In *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) and *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), statements taken in violation of *Miranda* were said to have been properly used to impeach a defendant's testimony. And in *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980, the court allowed a prosecutor to ask the defendant questions on cross-examination that were within the scope of direct examination and then to impeach the answers given with evidence that had previously been suppressed.

Under this line of cases, it appeared the court would further expand the exception to the exclusionary rule by extending it to defense witnesses. Indeed, the four justice minority of Kennedy, Rehnquist, O'Connor, and Scalia would have so crafted the exception under the rationale that where "the jury is misled by false testimony, otherwise subject to flat contradiction by evidence illegally seized, the protection of the exclusionary rule is 'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances'."

The majority, however, decided to draw the line at the defendant's testimony. After *James*, only where the defendant testifies contrary to suppressed evidence can that evidence be used for impeachment purposes. The majority felt that a threat of perjury would be effective against the perjuring defense witness. Further, were the dissenter's rule to be adopted, the majority feared this "would chill some defendants from presenting their best defense — and sometimes any defense at all — through the testimony of others." Significantly, the majority also feared that the proposed exception would "significantly weaken the exclusionary rules' deterrent on police misconduct."

James can only be used under limited circumstances. Its importance lies, however, in the court's unwillingness, at least at this time, to consider further significant erosion of the exclusionary rule.

Maryland v. Buie

Once, the "physical entry of the home [was] the chief evil against which the wording of the 4th Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). However, 3 years ago the court allowed the home to be entered without a warrant in order to search a probationer's residence. *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). This intrusion has now been further extended in *Maryland v. Buie*, 46 Cr.L. 2133 (1990).

Following an armed robbery, the police obtained an arrest warrant for Jerome Buie. During the warrant's execution, Buie was found in his basement. After arresting him, Detective Joseph Frolich went into the basement to see whether

This regular *Advocate* column reviews all published search and seizure decisions of the United Supreme Court, the Kentucky Supreme Court, and the Kentucky Court of Appeals and significant cases from other jurisdictions.

anyone else was there. Instead, he found a red jogging suit matching the description of clothes worn by the robber. The Maryland Court of Appeals held that the seizure of the jogging suit was illegal because there was not probable cause to believe that there was a potentiality for danger at the time of the protective sweep.

A 7-2 majority reversed. In a decision written by Justice White, the court held that a protective sweep of a house may be performed when there are articulable facts which "would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The case was remanded back for a factual determination on the reasonable suspicion issue.

The majority relied explicitly on a *Terry v. Ohio*, 392 U.S. 1 (1968) analysis. *Terry* allowed a stop-and-frisk of individuals based upon reasonable suspicion. *Michigan v. Long*,. 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), authorizing a "'frisk' of an automobile for weapons" was also explicitly utilized. The majority found *Terry* and *Long* useful in the situation of an officer facing a potentially dangerous situation.

The court placed significant limitations, however, on the protective search. Officers may not fully search a house; rather, the search extends "only to a cursory inspection of those spaces where a person may be found." Further, the court refused to overrule *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), which held that a search incident to a lawful arrest "could not extend beyond the arrestee's person and the area from within which the arrestee might have obtained a weapon." Thus, *Buie* cannot be used to justify a "top-to-bottom" search of a house following the arrest of an accused on a warrant.

Justice Brennan, joined by Justice Marshall, dissented. Brennan has been the biggest critic of the court's expansion of the *Terry* exception to the warrant requirement, saying the exception is beginning to "'swallow the general rule.'" The dissent would have required probable cause to justify a protective sweep of a house.

United States v. Rene Martin Verdugo-Urquidez

The defendant, a Mexican citizen, was thought to be a narcotics smuggler. He was arrested on a warrant and transported from Mexico to California. Following his arrest, the DEA and Mexican police searched the defendant's house without a warrant and found incriminating evidence. The district court suppressed the evidence, and the 9th Circuit affirmed the suppression.

The Supreme Court reversed. ***United States v. Rene Martin Verdugo-Urquidez,*** 110 S.Ct. 1056 (Feb. 1990). In a decision by the Chief Justice, the 5 justice majority held that the 4th Amendment does not apply to searches of aliens' property located outside the US. The court found the defendant to be excluded from "the people" within the text of the 4th Amendment. Because he was not "a person," and because his property was located in Mexico, the 4th Amendment was held to have had no application. Justice Stevens concurred in the judgment, but wrote separately to express his opinion that while the 4th Amendment did apply to the defendant, the warrant clause did not. He concurred because he thought the search to have been "reasonable."

Justice Brennan, Marshall, and Blackmun dissented. Brennan, joined by Marshall, would have found the 4th Amendment applicable due to the fact that the defendant was being prosecuted in American courts. "If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them." Justice Blackmun dissented separately.

Smith v. Ohio

The court almost reached unanimity in this *per curiam* decision. ***Smith v. Ohio,*** 110 S.Ct. 1288 (March 1990). Smith had been walking with a grocery bag when he was told to "come here" by the police. When they identified themselves as the police, Smith threw his bag on his car and faced them. The police took the bag, opened it, and charged Smith upon discovering drug paraphenalia therein.

The Ohio Supreme Court affirmed Smith's conviction upon grounds that the search was incident to a lawful arrest, despite the fact that the arrest had followed the search. The court reversed, saying that they had many times held that "an incident search may not precede an arrest and serve as part of its justification." See for example, *Sibron v. New York*, 392 U.S. 40, 63 (1968). Justice Marshall dissented, saying that while the majority's decision appeared correct, that a summary disposition on the merits was inappropriate.

KENTUCKY SUPREME COURT

Reneer v. Commonwealth

The Kentucky Supreme Court addressed one search and seizure issue recently in the case of ***Reneer v. Commonwealth,*** Ky., __S.W.2d__ (Feb. 8, 1990). Here, Reneer was arrested on a warrant. Following arrest, he asked to urinate, and when he did so he was accompanied by the police. While securing the bathroom area, a pillbox in which morphine was found was seized. Reneer challenged the search and seizure on the grounds that the warrant did not specifically describe the items to be seized.

The court did not address the warrant issue, however, in affirming the legality of the search. Rather, the court approved the search as incident to a lawful arrest, citing *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

SHORT VIEW

In re Hodari D., Cal.Ct.App., 1st Div., 46 Cr.L. 1293 (12/15/93). The act of chasing a fleeing juvenile was a seizure under *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). Thus, when the juvenile threw down a piece of rock cocaine once the police caught up with him, that cocaine had to be suppressed because the police had no probable cause to seize the juvenile;

United States v. Barrett, 890 F.2d 855 (6th Cir. 1989). In this fact bound case, the 6th Circuit found probable cause to search Barrett's car, in which a pouch was found to possess one ounce of cocaine. The police executed a search warrant on Jeffrey Dolan, who had sold one ounce of cocaine to an informer, and had told the informer that he would later have another ounce for him. Based upon this information, the Tenn. Bureau of Investigation and the DEA obtained a search warrant, whose execution revealed little. However, while the warrant was being executed, Jeffrey Barrett drove up and got out of his car. Upon being told that Dolan had been arrested, Barrett and "nervously" got back into his car, "nervously" tried to conceal the pouch from the police. Thls brought the case under the automobile probable cause umbrella of *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.,Ed.2d 572 (1982) and thus the search of the car was legal;

State v. Jardine, Idaho Ct. App., 46 Cr.L. 1317 (12/29/89). An anonymous informer told the police that Jardine was growing marijuana in his house. The police checked the electrical usage and presented an affidavit to the magistrate which stated that Jardine's electrical usage had increased 453% over a previous occupant's usage. The police omitted, however, that during the period of time compared, the house had been mostly unoccupied. This constituted a "reckless disregard for the truth" under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The court adopted the analysis in *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985), amended 769 F.2d 1410 (9th Cir. 1985), which had applied *Franks* to reckless omissions of facts as well as deliberate misstatements;

United States v. Thomas, 893 F.2d 482 (2nd Cir. 1990). Exigent circumstances sufficient to omit the warrant requirement before entry into a house must be present apart from the actions of the police. Thus, where officers had probable cause to believe the defendant was selling drugs out of his apartment, 7 police officers went there with battering ram and guns drawn, the fact that movement was heard inside after the officers had knocked did not constitute exigent circumstances sufficient to break into the apartment without a warrant;

United States v. Jacobsen, 893 F.2d 999 (8th Cir. 1990). The 8th Circuit explored the relationship between privacy rights under the 4th Amendment and due process rights under the 14th Amendment. The government began an undercover operation against Jacobsen once he legally placed an order for 2 nudist magazines. For 2 1/2 years the government targeted him for crimes involving child pornography. Eventually, Jacobsen ordered such a magazine and was arrested and convicted. The court reversed, finding him to have been entrapped as a matter of law. In so doing, however, the court held that the government must have a "reasonable suspicion" against a person prior to targeting them for a sting operation. Thus, the court used a 4th Amendment analysis. "[R]easonable suspicion based on articulable acts is a threshold limitation on the authority of government agents to target an individual for an undercover sting operation. If a particular individual's conduct gives rise to reasonable suspicion, the government may conduct any undercover operation it so desires, as long as it does not give rise to a claim of outrageousness."

Simples v. State, Md.Ct.App., 46 Cr.L. 1379 (1/11/90). Without more, the police may not frisk a person who is being cited for a "civil violation," such as selling beer to a minor. "The very minor offense authorizing the stop here cannot, in and of itself, justify the frisk. To so hold would mean that every motorist issued a citation for a minor traffic offense would enjoy no constitutional protection from a protective search for weapons."

City of St. Paul v. Uber, 450 N.W.2d 623 (1990), and ***Lowery v. Commonwealth***, 388 S.E.2d 265 (1990). In both cases, the courts declined to allow racial considerations to justify a stop of a person. In *Uber*, the fact that a white suburbanite was in an urban area known for prostitution did not allow him to be stopped. Likewise, despite the fact that a drug courier profile advised looking for black or Hispanic males driving rental cars, the court ruled that race could not be considered as a relevant factor under either the 4th or 14th Amendments.

United States v. Lewis, 728 F.Supp. 784 (1990). Approaching a person in a Greyhound bus, standing over him, asking questions, and asking for consent to conduct a body search constitutes a seizure; accordingly, cocaine found on Lewis had to be suppressed. "If passengers on a bus passing through the Capital of this great nation cannot be free from police interference where there is absolutely no basis for the police officers to stop and question them, then the police will be free to accost people on our streets without any reason or cause. In this 'anything goes' war on drugs, random knocks on the doors of our citizens' homes seeking 'consent' to search for drugs cannot be far away. This is not America."

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Gun Clips Suppressed

When is consent to a police search voluntary? Not, apparently, if one has agreed to do it with the proviso that the searching officers feed one's dogs, or if one is a juvenile lurking in a bus terminal late at night. Those are the recent rulings of two New York trial courts. Yolanda Dieudonne was arrested at her Bronx apartment on June 23, 1988, after several people were seen fleeing from the building in which she lived. They reported that a woman was shooting a gun. The woman was apparently Dieudonne, and she was arrested. At the precinct station she granted permission for officers to search her apartment on the condition that they feed her dogs. The search disclosed a gun, clip and bullets in a can in the pantry. Dieudonne was charged with a variety of offenses, including criminal possession of a firearm in the second degree. In a pretrial motion she moved to suppress the gun and bullets from evidence on the ground that she had not consented voluntarily to the search that produced them. Justice Dominic R. Massaro of the Supreme Court agreed. The overriding issue, Massaro said, was "whether the consent is in fact voluntarily given or otherwise was the product of an extenuating circumstance.", Massaro concluded that Dieudonne's "free will was [sufficiently] burdened by an overriding concern for the welfare of her dogs" that her consent was not freely given. "For some people," he said, "pets are every bit as important in the most central aspects of their lives as children. ... [Dieudonne's] dogs ... are as important to [her] mental and physical health as medical care itself" and her worries about them in effect amounted to coercion.

For Mark A., the problem was not dogs but the fact that he bumped into Officer John Ryan of the New York City Police Department at 12:30 on the morning of May 31, 1989. Mark was alone in a bus terminal, carrying a bag. The terminal is a haunt of runaway children, and Ryan has a policy of questioning unaccompanied juveniles after 8 p.m. on the chance that they are runaways. Mark was questioned and apparently gave unsatisfactory answers, because Ryan searched his bag. A hard rectangular object at the bottom of the bag turned out to be a gun clip with 16.9 millimeter bullets. The bullets fit into a Luger pistol being carried by a person Mark pointed out to the officer elsewhere in the terminal. Mark was arrested and charged with criminal possession of the weapon. He moved to suppress the evidence on the ground that Officer Ryan lacked probable cause to detain him, and the Family Court of New York County agreed. "While it is possible that the Port Authority ... may well be a gathering place for runaway children," the court said, that did not "justify the *de facto* imposition of an 8 p.m. curfew" by Ryan. Noting that Mark was a 15-year-old youth facing an adult police officer who failed to tell him he had the right to refuse the search of his bag, the court declared that the boy merely "acquiesced to lawful authority" instead of giving voluntary consent to the search.

(*People v Dieudonne*, Ind. No. 4131/88, Nov. 27, 1989; *Matter of Mark A.*, Dec. 14, 1989.)

JUVENILE LAW

THE CHILD ABUSE-DELINQUENCY CONNECTION

David N. Sanberg
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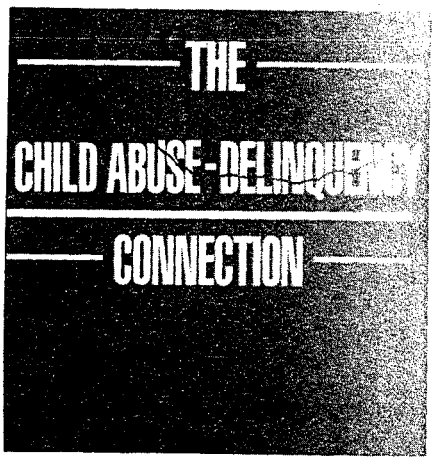
1989



Many of us who have represented children in juvenile court have been horrified to read the dispositional reports and psychological evaluations detailing the family histories of our clients. Beatings, rapes, exposure to alcoholism, drug use and the physical abuse of a parent or sibling are commonplace in the lives of these children from infancy on.

Advocates spend fruitless hours in court trying to explain away a client's current delinquency as part of a dysfunctional family cycle. We lament with social workers, probation officers and county attorneys over the home environments that are exposed through their involvement in the courts. Yet, in the end it never seems to make much difference in the ultimate outcome. The crime has been committed and society demands punishment. The judges have heard the same sad stories countless times. Child abuse is duly noted as a factor leading to the child's delinquency and their children are sent off to pay for being who their parents raised them to be.

David N. Sanberg's book, ***The Child Abuse-Delinquency Connection*** (Lexington Books, 1989) fully documents what those of us in the juvenile justice system have always known—*child abuse and violent home environments invariably create children who are prone to delinquency and anti-social behavior.* While the book can't provide child advocates with the ammunition to keep their clients from being incarcerated it does provide insight into the problems and provides a framework from which the advocate can critique the prevailing "get tough approach" to juvenile crime and advance the cause of prevention and intervention to further the best interest of the children.

In addition, the format of the book represents a microcosm of the juvenile justice system. The link between early abuse and subsequent delinquency is explored from the individual perspectives of the typical cast members of a juvenile court proceeding: individual chapters were written by among others, a juvenile court judge, a probation officer, a defense attorney (noted author and child advocate, Andrew Vachss), a psychiatrist and, most remarkably, a victim—a young man who was terribly abused as a child, became delinquent as an adolescent and ultimately progressed through treatment to become a counsellor of other victims. This unique, multifaceted perspective captures the blend of law, medicine, social science and emotion that comprise the juvenile justice system.

One consensus of the contributors is that the prevention of child abuse would eliminate much of the crime and delinquency that plagues society today. While it is true that not all abused children grow up to be criminals, the bulk of the evidence indicates that a disproportionate number of anti-social and self-destructive adults share a common experience childhood trauma and violence.

However, the contributors varied in their assessments of the best approach to dealing with victims who've become delinquents. For example, the probation officer had faith that the present system with some refinement was adequate to deal with the problem, while the judge was happy with the legal system as a means of dealing with delinquency but wanted to see more comprehensive and better coordinated intervention into the families of the children during court involvement. Andrew Vachss felt that the emphasis should be on the child protective continuum of care rather than waiting for the children to come into the justice system. Everyone agreed that the optimal solution was pre-adolescent screening and intervention for children at risk before they themselves begin to act out and become involved in the system as delinquents. Unfortunately, the contributors also agreed that there were no easy answers to dealing with either delinquency or child abuse.

Mr. Sanberg is an attorney specializing in children in youth law as well as director of the Program on Law and Child Maltreatment at Boston University School of Law. The views and contributors represented in this book are on the cutting edge of the juvenile justice system. The book is full of thought-provoking case examples and a valuable source of statistics and studies concerning many facets of the system. It should be on the reading list of everyone connected with the juvenile justice system.

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ALSO OF NOTE

Court of Appeals Recognizes Juvenile's Right to Present Mitigation at Waiver Hearing.

A recent decision from the Kentucky Court of Appeals, ***Garvin v. Commonwealth***, 88-CA-1957-MR, rendered February 9, 1990, reaffirmed the right of juvenile defendants to present mitigating evidence at a transfer hearing. The case, which was ordered to be published, is currently under attack by the attorney general's office which is seeking to depublish and extend the opinion.

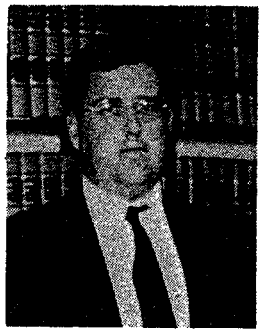
In *Garvin*, the child, who was 17, was charged with two counts of first degree burglary. Motion to transfer was made in the district court pursuant to the interim version of the transfer statute, KRS 640.010, that was then in effect. At the time, proof of a prior felony was required before a waiver could take place. The child was waived to circuit court where he pled guilty and subsequently appealed the transfer as a conditional plea pursuant to RCr 8.09.

The Court said the child was entitled to present mitigating evidence at the transfer hearing. The district court had previously denied the child's motion for psychiatric evaluation and also denied the proffered testimony of a CHR social worker concerning his mental competency. (The issue of his competency related to the validity of the prior felony which was required to permit the waiver.)

Garvin's appellate attorney, Marie Allison, is vigorously opposing the attorney general's attempt to depublish and undermine the opinion. Ms. Allison views this case as a very important one for child defendants in that it clearly delineates that they are entitled to the full panopoly of rights accorded to all individuals in the criminal justice system and it recognizes the grave consequences of waiving children to adult court. It is time that the courts officially recognize in a published opinion the need for every safeguard possible to protect the best interests of these children. (Note that the *Garvin* case is not final and should not be cited as legal precedent.)

EVIDENCE IN CRIMINAL CASES

LOOKING AT THE NEW EVIDENCE CODE - PART I



David Niehaus

This is the first of a series of articles about Kentucky's proposed evidence code.

SCHEME AND INTENT OF NEW RULES

Few people are enthusiastic about the technical parts of a code although they are the most important parts of any comprehensive revision of the law because they determine how the statutes or rules will be applied. For every major revision of the law there are a number of technical questions that have to be decided so that the revision will not work too much havoc when it is enacted.

An example of a situation in which this was not done was the truth-in-sentencing statutes [KRS 532.055; 439.3401] which generated a whole new sub-speciality of legal argument and a steady stream of cases before the appellate courts. However, the drafters of the November, 1989 Final Draft of the Kentucky Rules of Evidence (KRE)have taken the time to propose specific rules and make specific recommendations for the application and interpretation of the substantive provisions of the proposed evidence code.

This perhaps is an unglamorous topic to start a review of the new rules, but I think it is essential to an understanding of what the rules mean, what the codification of evidence law is intended to accomplish, and how these rules will affect practice in the courts. The operative provisions of the proposed rules will be much more understandable once the overall scheme and intent of the rules are understood.

BOOKS ON EVIDENCE

This series of articles will not be a rule by rule examination of the proposals of the drafting committee. In the first place, there is not enough space in *The Advocate* to allow such a review. And in any case, there are two first-rate single volume texts that explain the operation of the rules much better than I can. These books are Michael H. Graham, *Evidence: Text, Rules, Illustrations and Problems*, (Rev. 2d Ed.), published by the National Institute for Trial Advocacy (NITA) South Bend, Indiana in 1989 which costs $30 and Michael Martin, *Basic Problems of Evidence*, (6th Ed.), ALI/ABA, Philadelphia, Pennsylvania (1988), price unknown. One of these two books along with Lawson's *Handbook of Kentucky Evidence* will be essential for any attorney who intends to study the new rules before the expected effective date of July 1, 1992.

These texts are very good because they are aimed at practitioners learning new rules of evidence rather than at law students learning rules for the first time. But the focus of this article and the ones that follow is going to be on specific strengths and problems that I see in the Final Draft submitted in November, 1989. A sound grasp of the scheme of the rules and the intention of the drafters is essential to make the following articles dealing with specific portions of the code understandable. This inquiry starts with a brief description of the contents of the code.

CONTENTS OF THE CODE

Like the Federal Rules of Evidence from which it is copied, the 1989 Final Draft consists of 11 articles, 9 of which deal with substantive rules of evidence and 2 of which deal with intent, interpretation, and procedure. Unlike the Federal Rules of Evidence but like the Kentucky Penal Code of 1974, the Final Draft has a Commentary for each section which is intended to be used in applying and interpreting that section. The drafters have also included a "Prefatory Note" which explains the purposes and intent of the drafters for the rules. The 2 interpretative and procedural articles, I and XI, and the Prefatory Note are the subject of this article.

PREFATORY NOTE

The Prefatory Note is divided into 3 numbered paragraphs which deal with specific assumptions and intentions of the drafting committee.

The first paragraph recounts the decision of the Committee to strive for uniformity with the Federal Rules of Evidence and to depart from the Federal Rules only for good reason. The Committee notes that uniformity between state and federal rules would minimize forum shopping in civil cases and would in time add to the efficiency of the judicial system. The Committee notes that the Federal Rules have been in operation since 1975 and that several states have adopted rules patterned after the Federal Rules. Therefore, there is a "substantial and growing body of case law construing these rules,...which can be of invaluable assistance in the application" of the new evidence rules for Kentucky.

The second paragraph deals with the Commentary that the drafters have prepared. The drafters state that they used the advisory notes and committee reports on the Federal Rules as well as cases construing those rules. The structure of the Commentary is: (1) a brief description of the particular rule, (2) an explanation of any difference between the Kentucky and federal rule, and (3) a comparison between pre-existing law and the new rule, if that is necessary. The Prefatory Note advises courts and attorneys that the Commentary should be used in the application and construction of the rules. This is reinforced by Rule 1104 (KRE 1104) which says that the Commentary accompanying the rules may be used as an aid in construing the rules.

The final portion of the Prefatory Note deals with the inevitable inconsistencies and conflicts that attend the introduction of a new codified body of rules into an already extant legal system. The committee states that it has attempted to amend all other rules of court to avoid inconsistency or conflict, but that if conflict occurs, the evidence rules shall take precedence over the rules of criminal and civil procedure. The Committee makes no mention of the possibility of conflict with statutes, two instances of which I have already noticed. In the following paragraphs I deal with some of the consequen-

ces of the approach of the drafting committee as explained in its Prefatory Note.

COPYING FROM THE FEDERAL RULES

Even without the statement of the Committee it would be apparent that in almost every instance the proposed Rules of Evidence are copied almost word for word from the Federal Rules. This is not surprising because at latest count 31 other jurisdictions have adopted evidence codes that follow this pattern. [Joseph and Saltzburg, *Evidence in America: The Federal Rules in the States*, p. iii, (Michie, 1989)]. Copying our evidence rules from those of the federal courts solves many problems of interpretation and construction.

The adoption of a code of rules from the federal system creates a body of case law for interpretive purposes. In *Lexington Cemetery v. Commonwealth*, 181 S.W.2d 699, 702 (1944) the former Court of Appeals noted that "where a state government, acting independently in its own sphere, copies a federal statute, the state act will be construed to have the same meaning as the federal act." And in *Regenhardt Construction Co. v. Southern Railway*, 181 S.W.2d 441, 444 (1944) the Court of Appeals stated that where a federal act is copied, the courts will "presume conclusively" that the legislature not only adopted the language of the federal law but also adopted and approved the construction placed on that language by the federal courts. This rule applies regardless of subsequent federal court decisions that might place a different construction on the same language. These principles should also apply to court rules and mean simply that because Kentucky is adopting the language of the federal rules of evidence Kentucky courts should predicate their actions under the rules on the meaning and the prior construction of the identical federal passages as of the date of adoption.

Thus, the enactment of the proposed rules will incorporate into Kentucky law an entire body of federal judicial opinions concerning the meaning of the language we adopt.

To the extent that the Commentary to the Evidence Rules does not demand a contrary conclusion, where the language of the federal and Kentucky rules is the same, we will be getting not only the language of the rules but also the interpretation and construction placed on those rules by the federal courts. The courts apparently are not sure whether this precedent is binding or persuasive, [*KCHR v. Commonwealth, Department of Justice*, Ky.App., 586 S.W.2d 270, 271 (1979)], but it probably won't be necessary to decide since it is safe to say that the generally accepted federal interpretation of the language is likely in most cases to be adopted by the courts.

In addition, there is a fair amount of unanimity among the state jurisdictions that have adopted the federal rules as to what many of the provisions mean. But the fact that we getting an established body of case law to help interpret these rules does not necessarily mean that there will not be problems.

Article 6 in the Federal and Kentucky Rules deals with witnesses and impeachment. Although the rules allow impeachment by character, criminal convictions and prior statements, the rules make no mention whatever of impeachment by showing bias, prejudice, or interest on the part of the witness. This created something of a problem in the federal courts until the U.S. Supreme Court in *U.S. v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) dealt with the question.

In that case the U.S. Supreme Court had to dance around the absence of impeachment by bias in Article 6. The problem arose because generally when a comprehensive code is enacted and is intended to cover an entire area of law the previous law is considered abrogated whether it is repealed explicitly or not. Thus, the question in *Abel* was whether the Federal Rules, by listing the types of impeachment available, foreclosed any other type of impeachment. The Supreme Court really did not have much trouble deciding that bias impeachment was authorized although it had to do so under FRE 401 and 402, the federal relevancy and admissibility provisions. The court relied on language in the Advisory Committee report to the federal rules which noted that although in principle no common law of evidence remained after enactment of the Rules, in reality "the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers." [469 U.S. at 51-52; 105 S.Ct. at 469].

In federal courts impeachment to show bias, interest or prejudice is permissible under the general rules of admissibility set out at FRE 401 and 402. Under the rules of construction set out in *Lexington Cemetery* and *Regenhardt Construction*, *Abel* should be incorporated along with the rules language. The Commentary to KRE 607 indicates that this is so. This type of problem raises two questions about what should be done in Kentucky's case where we are adopting a body of rules that has been in existence for 15 years.

First, there is a question of whether there should be a statement more explicit than the KRE 607 Commentary, either in the Prefatory Note, the Code itself, or the Commentary, as to what effect previous Kentucky common law is going to have under the new rules. Judge Jack Weinstein (of Weinstein's *Evidence*) has stated that the federal rules are not comprehensive and that therefore, in spite of the codification, the common law approach is still important. [Martin, *Basic Problems of Evidence*, p.2]. To some extent this is implied in the second paragraph of the Prefatory Note which observes that most evidence codes contain only broad general rules which leave the judiciary room to flesh out those rules through appellate opinions. It is said more clearly in the Commentary of KRE 607 but only with respect to impeachment. Obviously, the drafters are following the usual approach to evidence rules, which is to say that general rules exist but that specific applications will be developed on a case-by-case basis. But perhaps a more explicit statement as to the use of previous common law would be helpful.

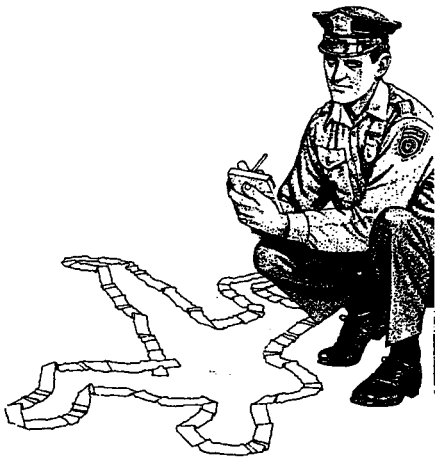
An example of such a helpful statement is found in the Penal Code of 1974. In KRS 500.020 all common law criminal offenses were abolished and a strict provision was made that no act could be criminalized except by statute. The General Assembly also enacted a draconian retroactivity provision in KRS 500.040 which underscored the sharp and unbridgeable break between the criminal law that existed before 1974 and the statutory provisions in the Penal Code of 1974. The courts were not left in any doubt as to what the General Assembly intended. The General Assembly intended a marked change in the criminal law with interpretation to be made only by reference to the text of the statutes and the Commentary. In the opinion of most experts, evidence rules cannot be subjected to such a strict separation of common law and court rule. [Martin, *Basic Problems of Evidence*, p. 2]. However, it would be very useful for interpretive purposes to have a statement that says what the drafters expect the role of previous common law to be under the Rules of Evidence.

The other issue that arises here is a question of whether it might not be better to add to the proposed Rules a provision that allows impeachment by showing of bias, prejudice or interest. In favor of such a course of action are five models of such a rule currently available. Joseph and

Saltzburg in *Evidence in America* note that the Uniform Rules Commissioners have drafted a bias rule and that Florida, Hawaii, Oregon, and Utah have added specific provisions to their adaptations of the federal rules. I agree that the Kentucky rules should depart from the federal rules only for compelling reasons, but it seems to me that it might be better to take care of this obvious oversight in the federal rules by inclusion of a specific provision in the Kentucky Rules rather than by indirect adoption of the U.S. Supreme Court's opinion saying that such impeachment is allowed under the general rules of relevancy and admissibility.

A real problem that is apparent from following the federal rules too closely is found in proposed Rule 609 which allows impeachment by evidence of prior convictions. Subsection (3) of that rule says that evidence of juvenile adjudications generally will not be admissible under KRE 609. However, in a criminal case evidence of a juvenile adjudication of a witness other than the accused can be admitted if (1) the offense would be admissible to attack the credibility of an adult, and (2) the court is satisfied that admission is necessary for a fair determination of the issue of guilt or innocence. The Commentary frankly notes that this provision is "borrowed" from the Federal Rules and that it is inconsistent with previous practice. It appears that a fair number of states have not adopted this portion of the rule. [Joseph and Saltzburg, *Evidence in America*, Rule 609, Sec. 43.4]. The question is whether this change in Kentucky law is desirable or whether this is an instance in which good reason exists not to copy the federal rule in its entirety.

It appears that this provision conflicts squarely with KRS 610.340(1) and (2) which provide that all juvenile court records shall be held confidential except upon showing of good cause or to permit "public officers or employees engaged in the prosecution" of criminal cases to inspect and use these records to the extent "required in the investigation and prosecution of the case." It is clear that KRS 610.340(2) refers to the records of the subject of the investigation or prosecution. It does not refer to persons who may be subpoenaed as witnesses. The main question is whether snooping around for previous juvenile adjudications would be considered good cause under KRS 610.340(1). This rule is likely to lead to a lot of trouble. It is not hard to imagine Commonwealth and County attorneys routinely going to the juvenile court clerk to see if any witness had prior adjudications and to move the district judge for access to the records if any were found. This could create something of a problem for the district court logistically simply by the number of applications that might made and would also prevent the court from carrying out its mission. In *FTP v. Courier-Journal*, Ky., 774 S.W.2d 444 (1989) the Supreme Court approved the purposes and theory that underlie the Unified Juvenile Code. An important element of UJC is the confidentiality of proceedings that assists the Juvenile Session of the district court in carrying out its function of treating and rehabilitating a juvenile. The juvenile court, under the Unified Juvenile Code, stands in the place of the parent and treats rather than punishes. This is the quid pro quo for the surrender of many of the child's constitutional and statutory rights. The court would be hampered in carrying out its duties of rehabilitation and treatment if at the same time it was put in a position of releasing confidential information about a child, not because the child had committed another crime, but simply because



the child was a witness in a criminal case. This is one instance in which adherence to the federal rules creates problems that should be avoided. It justifies divergence form the federal rule as written.

An example of how the drafters avoided a problem that could have arisen under the policy of close adherence to the federal rules is KRE 609(a). In May, 1989 the U.S. Supreme Court decided *Green v. Bock Laundry Machine Co.*, 490 U.S. —, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989) which held that the language of FRE 609(a)(1) required judges to allow impeachment of civil witnesses with prior felony convictions regardless of any unfair prejudice that resulted. KRE 609(a) has avoided that problem by requiring courts to balance probative value against prejudice in every instance. In this instance the drafters have taken a federal rule of long standing and amended it to meet an unfair situation. In this regard the drafters have beaten the federal courts to the punch because the federal amendment that would require balancing in all cases was not proposed until January, 1990. [46 CrL 19, p. 2093 (2-14-90)].

The three examples set out above illustrate matters that have to be taken into account before the Final Draft is approved. Adherence to the federal rules is the only sensible way to proceed in developing an evidence code. Most of the provisions of the Federal Rules of Evidence have received a settled interpretation and their application should not present much problem. However, it is important before the Kentucky rules are enacted to give the entire code a thorough review to avoid conflicts with already existing laws and policies and to see if Kentucky can cure problems already identified in case law by drafting provisions to meet situations not covered by the Federal Rules. The drafting committee has done this in a number of rules. It may be wise to do so in a few other instances.

USE OF A COMMENTARY

The drafting committee has continued the practice of providing a commentary for major changes of Kentucky law. The last comparable event was the enactment of the Penal Code in 1974. As noted in the preceding section, the Penal Code needed a commentary because the Code was intended to be a break between previous law and a new, integrated code of statutory law. That is not the case here. In the case of the Rules of Evidence, it will not be possible to make that sharp delineation between pre- and post-enactment law. The Commentary should provide a good guide to what the rules intend.

The drafting committee forthrightly encourages courts and attorneys to develop a body of appellate opinion using the Commentary as a guide. It is obvious also that any other source, including cases from other jurisdictions or the federal system, can be employed in working out the intricacies of each rule. However, this Commentary is the closest approximation of legislative intent that is likely to be provided and it should therefore be given primacy over cases from other jurisdictions and the federal system if there is a conflict. The committee stops short of saying so in KRE 1104, because in the Commentary to that rule the drafters note that "the Commentary is not an authoritative statement of legal principles; it is instead an explanation of the thoughts and considerations that motivated the drafters of the rules." The drafters intend for the

language of the rules themselves to be the law, and the Commentary is intended simply to "explain its provisions and aid in interpreting them."

At least initially the hierarchy of authority should be: (1) language of the rule, (2) Commentary, and (3) authorities from other jurisdictions. It will be very important in the first cases that arise under the Evidence Code to develop this sort of disciplined presentation of the arguments in favor of or in opposition to a particular interpretation of the rule. After the first decisions are made by the Kentucky appellate courts, SCR 1.040(5) will dictate a different order because the circuit and district judges will be bound to follow any published cases construing the rules. To prevent creation of bad precedent defense attorneys have to be ready to litigate under these rules as of July 1, 1992.

The rules present an opportunity to do away with many unfortunate practices that have existed in Kentucky evidence law for a long time. The first precedents under the new evidence rules will set the tone and govern practice under these rules and therefore it is very important to be ready to litigate and to get the rules interpreted right the first time. The Commentary will be a very useful means of achieving correct decisions.

CONFLICTS WITH OTHER LAWS

The third paragraph of the Prefatory Note sets up an order of precedence among rules. Where the rules of evidence apply, they should be regarded as superseding any conflicting or contrary provisions in the rules of civil or criminal procedure. The drafters make a statement that the rules should be determinative of all issues concerning the admissibility of evidence in the trial of civil and criminal cases.

The Prefatory Note does not contain a statement concerning an order of precedence where rules and statutes conflict. This reflects to some extent the comprehensive nature of the amendment of evidence law that is being undertaken. The plan of the drafters is to place all questions of evidence law in the rules of evidence. This is a major departure from the federal rules which had previously left important matters like privileges outside of the rules and in the hands of the legislative branch.

The Kentucky rules will deal with privileges within the evidence code. Conflicting statutes will be repealed or amended. If after this there is still some conflict or inconsistency, the rules should prevail over statutes.

These rules are promulgated under Section 116 of the Constitution of Kentucky which gives the Supreme Court exclusive authority to enact rules of practice and procedure for the Court of Justice. Section 124 of the Constitution provides that to the extent any other portions of the Constitution conflict with the judicial article those provisions should be regarded as impliedly repealed. If there is a real conflict, the rules prevail over the statute. This conclusion is supported by the language of KRE 101 which instructs courts to follow the rules of evidence and by KRS 447.154 in which the General Assembly acknowledges that it cannot enact laws that amend, repeal or supersede rules of court. Therefore, a specific statement concerning conflict with statutes probably is unnecessary.

PROCEDURAL PROVISIONS

Most of the important procedural and structural provisions of the rules are found in Articles I and XI. As noted above, KRE 101 states simply that the rules of evidence govern proceedings in the courts of Kentucky. However, there are limits to the applicability of this basic rule, and these limits are stated in Rule 1101.

The Commentary of KRE 101 says that the rules are designed "principally for the trial of cases in the district and circuit courts of the Commonwealth of Kentucky."

In Rule 1101 the drafters provide that the rules apply generally to all civil actions and proceedings and to criminal cases and proceedings except as provided in Subsection (d) of Rule 1101. Subsection (d) says that, except for the rules governing privilege, the Kentucky Rules of Evidence will not apply where the judge is deciding a question of fact preliminary to the admission of evidence under KRE 104, to proceedings before grand juries, to proceedings in small claims courts, to summary contempt proceedings, and to a variety of criminal proceedings including extradition, preliminary hearings, judge sentencing, granting or revoking probation, issuance of warrants, and proceedings governing bail.

What this means for public defenders in practical terms is that the rules will apply to suppression hearings, competency hearings, trial, sentencing under KRS 532.055, sentencing under 532.080 and sentencing under KRS 532.025.

Some problems are evident. For example, in *Peacock v. Commonwealth*, Ky., 701 S.W.2d 397 (1985) the Supreme Court said that in all cases involving bail pending appeal "the court shall conduct an appropriate adversary hearing to determine the propriety of such requests." An "adversary hearing" is one in which due process guarantees, including the use of proper evidence, are required. The wisdom and constitutionality of the policy of non-application to these aspects of a criminal proceeding are matters that need to be explored before the rules are enacted.

The final interpretive section is KRE 102 which is similar in language and intent to RCr 1.04. KRE 102 says that the rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, promotion of growth and development of the law, all to the purpose of ascertaining the truth and determining justly the issues in every proceeding. This provision will serve the same purpose as the purpose statement in the criminal laws and is something that should be kept in mind in the interpretation and application of every rule.

CONCLUSION

The next several Evidence column articles will look at specific aspects of the proposed evidence rules that will affect criminal lawyers. The following articles will not be as abstract as this one might appear. However, it is very important for every attorney to understand now what the drafters are interested in accomplishing with this code and to understand how they intend it to work.

As Professor Kathleen Brickey noted about the Penal Code shortly after it was enacted, a code is not simply a convenient gathering of unrelated rules. Like all codes the provisions of KRE are interrelated and it is important to know both the general scheme and the specific provisions of this Code in order to use it advantageously. To a large extent, it appears that the drafters have found the federal rules of evidence satisfactory and are therefore content to have adopted along with the rules themselves the federal case law interpreting this language. This plan certainly will make the law of evidence much more accessible and will cut down on the number of cases in which criminal lawyers will have to rely on railroad crossing cases from 1916 to establish basic points of evidence.

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ETHICS

STATE'S LAWYER SDIVIDED ON NEED FOR 'SQUEAL LAW'

When the state Supreme Court adopted a package of ethics rules, it dropped a requirement that lawyers must "squeal" on other attorneys suspected of misconduct.

Kentucky and California are now the only two states without the so-called "squeal law."

Some legal experts said the court's decision raised questions about the commitment of the state's lawyers to police themselves.

"The signal that the public gets is that we're not that concerned about regulating ourselves," said George Kuhlman, ethics counsel for the American Bar Association. "To say that we have rules, but we don't have an obligation to turn ourselves in is quite a startling departure."

The quiet deletion of the squeal rule was described as "disturbing" and "illogical" by Richard Underwood, chairman of the Kentucky Bar Association's ethics committee and a University of Kentucky professor.

But some Northern Kentucky lawyers say the change may simply mean attorneys will police themselves without filing official complaints.

"The old rule was not enforced," said Martin Huelsmann, a professor at Chase Law School at Northern Kentucky University. "There were very few reported disciplinary cases for lawyers not reporting other lawyers."

Huelsmann, who formerly was chairman of the Kentucky Bar Association's ethics committee, said a lot of lawyers reported misconduct because of the rule. The change may cause the number of misconduct reports to decrease, he said.

Now, there may be more in-house solutions to misconduct and talking between lawyers before a complaint is filed, he said. "That may be a good cure."

W. Robert Lotz, a Northern Kentucky attorney on a committee that is writing rules of ethics for defense of criminal cases for Chief Justice Robert Stephens, agrees with the deletion.

"It's discretionary, a lawyer can still (make a report)," Lotz said. "They will still be reported," Lotz said. "Reports should be made on major errs any way."

Kenton Circuit Judge Raymond Lape said lawyers reporting other lawyers for misconduct "is rarely done anyway. If there are bad apples in the barrel, they will show anyway."

The deletion of the requirement won't keep lawyers from reporting improper conduct, he said. "It's the minor matters that won't be reported," Lape said. "Any matter that would affect the ability to practice. ... I still believe dishonesty and impropriety would still have to be reported."

The state's highest court deleted the mandatory reporting requirement when it adopted a new set of ethics rules - the American Bar Association's Model Rules of Professional Conduct - effective Jan. 1.

A special panel headed by Underwood had recommended some technical revisions in those rules, but not the elimination of the squeal rule.

Kentucky Chief Justice Robert Stephens said the court, which considered the Model Rules last July, dropped the reporting requirement because "we didn't think lawyers should be policemen."

Justices Charles Leibson and Donald Wintersheimer said they recalled no discussion of the deletion and appeared surprised that it was done.

"Frankly, it would seem that substantial misconduct should be required to be reported," Wintersheimer said.

The court voted 6-1 to adopt the package of new rules; Justice Roy Vance dissented.

Raymond Clooney, the Kentucky bar's disciplinary counsel, estimated that 10 - 15% of the complaints filed against lawyers in Kentucky were filed by lawyers.

The Cincinnati Post, February 27, 1990. Reprinted with permission.

NO COMMENT

[PROSECUTOR CRAFT EXPLAINING HIS PEREMPTORIES] Juror Marion Burge, as we perceived her was a very strong leader; she's a very intelligent woman and ... We took her off for those reasons Judge. We perceived her as a leader and we didn't particularly want a woman leading this jury so the Commonwealth felt that it would probably be better if we took her off, [it] had nothing to do with her ideas on the death penalty..., but just the fact we perceived her as a leader **and we felt like some man ought to be the leader.**

MS. MORRIS: If that's not one of the most sexist remarks I have ever heard—

MR. CRAFT: Oh yeah, I—

MR. TUSTANIWSKY: We object in that the Commonwealth used peremptory challenges on the basis of sex.

•••

BY THE COURT: All through?

MR. TUSTANIWSKY: Is that overruled your honor?

BY THE COURT: Yes it is.

-Commonwealth v. Epperson

(Submitted by Gary Johnson)

THE RIGHT TO FUNDS FOR EXPERTS:

ITS CONTINUED EXPANSION

Edward C. Monahan

This is the final of a 3 part series on funding of indigent resources in criminal cases.

To no one will we sell, to no one will we refuse...justice.
Magna Carta

DEFENSE ATTORNEYS EXPAND RIGHT TO FUNDS FOR EXPERTS

Over the last 55 years, courts have more and more interpreted the United States Constitution to require funds for resources for indigents in criminal cases. Not long ago a person without means who was accused of a crime was not even entitled to an attorney at trial. Now an attorney is required for indigent criminal defendants in many circumstances, and other resources are available to indigents in certain situations. But not until 1985 did the Supreme Court clearly determine that our United States Constitution required that a criminal defendant was entitled to funds for an expert in a capital case.

These constitutional guarantees of adequate resources for indigent criminal defendants only take on meaning when a criminal defense attorney invokes them on behalf of an individual client. *The expansion of the law which has occurred and continues to occur is due to criminal defense advocates fighting for its expansion so that the client has a fair process and fair result.*

MONEY SPENT ON EXPERTS IN FEDERAL SYSTEM

Nationally, each year courts order more money for experts in criminal cases.

In Fiscal Year (FY) 1966, $26,287 was paid experts in federal cases. That amount increased to $78,216 in FY 69. *United States v. Schultz*, 431 F.2d 907, 911 n.5 (8th Cir. 1970).

In FY 1986 (October 1, 1987-September 30, 1988) $2,065,015 were expended. $2,545,143 has been paid experts in CJA cases handled by full-time federal public defenders and appointed lawyers in federal courts for cases opened in FY 88, and is in addition to the money spent on full-time investigators in federal public defender offices.

In FY 89 (as of 12/89) $3,413,756 has been spent on funds for experts in federal criminal and habeas cases.

A further breakdown of the amount of money paid to particular types of experts is provided in the table accompanying this article.

This information has been provided by Mark Silver, (202) 633-6051, who is with the Criminal Justice Act Division of the Administrative Office of the United States Courts, Washington, D.C. 20544.

UNITED STATES SUPREME COURT CASES

Funds for experts for indigent criminal defendants has been infrequently addressed by the United States Supreme Court. We review the 4 cases of the Court.

(1) Baldi

In *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S.Ct. 391, 97 L.Ed.2d 549 (1953) (6-3) the defendant pled guilty to first degree murder. He had a significant history of mental difficulties. While his defense attorney produced documentary evidence of his prior mental commitments to show the defendant was insane, the defense attorney did not ask for psychiatric assistance. The issue of lack of funds for a defense psychiatrist was raised for the first time in federal court.

With boilerplate analysis, the Supreme Court held that defense assistance by a psychiatrist was not required in this case by 14th amendment due process or in order to afford Smith adequate counsel, stating "...the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices." *Id.* at 395.

(2) Streater

In 1981, the Court held in a unanimous opinion written by Chief Justice Burger that in a quasi-criminal paternity action the state cannot deny the putative father blood grouping tests if he cannot otherwise afford them because the indigent father is entitled to a meaningful opportunity to be heard under 14th amendment due process. *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981).

(3) Ake

Over 30 years after its decision in *Baldi*, the Court addressed the funds for experts issue in a fully deliberate way. The Court effectively overruled *Baldi*. In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (8-1) the Court determined that when the defendant's mental condition is seriously in question, the defense under 14th amendment due process is entitled at the guilt and penalty phases to a psychiatrist to:

a. conduct a competent professional exam on "issues relevant to the defense...";
b. help determine whether insanity defense is viable;
c. present testimony;
d. assist in preparing cross of state's psychiatrist;
e. aid in preparation of penalty phase; f. rebut aggravating evidence in capital penalty phase;
g. present mitigating evidence.

The Court in its opinion in *Ake* seemed to limit the right to an expert:

FEDERAL FUNDS FOR EXPERTS FY '66-FY '89

Year	Amount
FY '66	$ 26,287
FY '69	$ 78,216
FY '86	$2,065,015
FY '88	$2,545,143
FY '89	$3,413,756

This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed.
Id. at 1097.

However, when the entire *Ake* opinion is read, it effectively determined that a criminal defendant is entitled to an *independent* or *defense* expert when a sufficient threshold showing is made. As stated in *Ake*, the defendant is entitled to an expert:

...to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witness....
Id. at 1096.

Ake requires an expert who will help the defendant, "...marshal his defense," Id. at 1095, by performing the traditional, valuable role of a psychiatrist:

> In this role, psychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers.
> *Id.* at 1095.

The right to expert assistance in order to marshal the defense and in order to cross the prosecution's expert only allows for the conclusion that an independent or defense expert is required by the Constitution. Justice Rehnquist in his dissenting opinion in *Ake* virtually recognized that the majority had, indeed, held that access to a defense expert was required. *Id.* at 1099.

(4) Caldwell

Shortly after *Ake* was decided, the Court held that money for experts for indigent defendants was not constitutionally required when the defense attorney did not make a sufficiently specific showing of need to the trial judge. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (ballistics and fingerprint experts). In the opinion of the Court written by Justice Marshall, criminal defense attorneys were warned that general requests for experts are just not adequate. *Id.* at 2637 n.1.

STATE EXPERT NOT ENOUGH

Courts have held that assistance from a "neutral" state expert is constitutionally and statutorily insufficient. In *United States v. Crews*, 781 F.2d 826 (10th Cir. 1986) the Court held:

> Such a psychiatrist is necessary not only to testify on behalf of the defendant, but also to help the defendant's attorney in preparing a defense.... Although four treating or court-appointed psychiatrists testified with respect to Crews' mental condition, Crews also was entitled to the appointment of a psychiatrist "to interpret the findings of...expert witness[es] and to aid in the preparation of his cross-examination."
> *Id.* at 34.

In *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985) the Tenth Circuit held that under *Ake* the defendant was entitled to more than a nonpartisan state doctor:

> The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution. In this case, the benefit sought was not only the testimony of a psychiatrist to present the defendant's side of the case, but also the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination. Without that assistance, the defendant was deprived of the fair trial due process demands.
> *Id.* at 929.

In *Holloway v. State*, 361 S.E.2d 794 (Ga. 1987) the Court held that a capital defendant who had been examined by a state psychologist and state psychiatrist was nevertheless entitled to an independent psychiatrist under *Ake* on the issues of criminal responsibility and mitigation of sentence. See also *Lindsey v. State*, 330 S.E.2d 563 (Ga. 1985) (defense psychiatrist); *Commonwealth v. Plank*, 478 A.2d 872, 874 n.3 (Pa.Super. 1984) (psychiatrist of defendant's choice); *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975) (firearms examiner of own choosing); *Marshall v. United States*, 423 F.2d 1315 (9th Cir. 1970) (defendant entitled to investigator that will serve him unfettered by conflicts). But see *State v. Gambrell*, 347 S.E.2d 390 (N.C. 1986) (a state doctor *may* fulfill the state's constitutional obligation but did not in this case).

COMPETENT EXAM REQUIRED

Court-appointed psychiatrists who fail to conduct competent and adequate pretrial evaluations of a defendant's mental state and mitigation deny a defendant due process of law. *State v. Sireci*, 536 So.2d 231, 233 (Fla. 1988). In *Sireci* the capital client had organic brain damage that went unrecognized.

Kaplan and Sadock, *Comprehensive Textbook of Psychiatry* (5th ed. 1989), is an extensive work that details the standards for acceptable practice in a wide variety of areas, including the psychiatric interview, history of the person examined, psychological testing, physical exams, mental exam and reports.

INEFFECTIVE TO RELY ON STATE EXPERT

While all courts have not agreed, many have not hesitated to find that relying on state experts when representing an indigent without requesting and obtaining an independent or defense expert is ineffective assistance of counsel since a defendant does not receive the required partisan perspective he is entitled to and which he would obtain if he were not indigent. *Commonwealth v. Cosme*, 499 N.E.2d 1203 (Mass. 1986); *Loe v. United States*, 545 F.Supp. 662 (E.D.Va. 1982); *United States v. Fessel*, 531 F.2d 1275 (5th Cir. 1976); *United States v. Edwards*, 488 F.2d 1154 (5th Cir. 1974). See also *United States v. Bass*, 477 F.2d 723 (9th Cir. 1973).

In *Curry v. Zant*, 371 S.E.2d 647 (Ga. 1988) the trial judge had assured the appointed counsel that a psychiatrist would be appointed upon any reasonable request for one. On its own motion, the trial court had the defendant tested at the state hospital for competency. The state doctor found the defendant to be organically brain damaged and to have a borderline personality disorder. The doctor also found that the defendant may be malingering or manipulating. Defense counsel did not ask for a defense expert. On a plea of guilty, the defendant was sentenced to death for murder.

On his state habeas challenge to his death sentence, the defendant produced a mental health expert who testified that the defendant had an IQ of 69; had the intelligence of a 12 year old with an IQ of 100; that he was seriously mentally ill, and that he could not waive his constitutional rights. Also, at the habeas hearing, the defendant's trial counsel said he did not ask for an independent expert because he felt it would be futile based on the state doctor's report. The court held that the defendant was denied effective assistance of counsel:

> We find that although trial counsel met with Curry on many occasions, consulted with Curry and Curry's family on the decision to enter a guilty plea, and conscientiously prepared for the sentencing phase of the trial, his failure to take a crucial step of obtaining an independent psychiatric evaluation of Curry deprived his client of the protection of counsel. Con-

scientious counsel is not necessarily effective counsel. The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in miti-gation, so prejudiced the defense that the guilty plea and the sentence of death must be set aside.
Id. at 649.

STATE AND OTHER FEDERAL CASE LAW GRANTING FUNDS FOR EXPERTS

Many appellate court decisions since *Ake* have not found reversible error when a trial judge has failed to authorize funds for experts. While this may indicate appellate hostility to this issue, it more probably is evidence that criminal defense attorneys have to do a better job of making the threshold showing very specific and the prejudice quite plain. (See Obtaining Funds for Experts in Criminal Defense Cases: Making The Threshold Showing, *The Advocate* Vol. 12, No. 2, pp. 42-47).

In spite of this, there are many good appellate decisions finding funds for experts to be constitutionally required in a variety of contexts when there has been the specific showing that an expert is "reasonably necessary" to the defense. A sampling of favorable decisions follows.

BLOOD

In rape cases, a defendant is entitled to an expert in blood to test the defendant's blood. *Bowens v. Eyman*, 324 F.Supp. 339 (D.Ariz. 1970).

CARDIOLOGIST

It was reversible error in *People v. Gunnerson*, 141 Cal.Rptr. 488 (Cal.App. 1977), a murder case, for the trial judge to fail to grant money to the indigent defendant to employ a cardiologist to prove that the victim's death was due to a heart attack that occurred simultaneous with the robbery and not as a cause of it.

CONFESSION - *MIRANDA* ISSUES

The court held in *In Re Allen R.*, 506 A.2d 329 (N.H. 1986) that the defendant was entitled to funds to employ a psychologist as an expert on *Miranda* issues to be used in an attempt to convince the judge to suppress statements.

A defendant is entitled to money for a physician who is an expert on narcotics in a murder case where the defense moved to suppress the confession since it was obtained a few hours after the defendant had been administered a narcotic drug. *People v. Mencher*, 248 N.Y.S.2d 805 (N.Y.Sup.Ct. 1964).

DENTAL

In *Thornton v. State*, 339 S.E.2d 241 (Ga. 1986), the court determined that the defendant was entitled to money to obtain assistance of a court appointed forensic dental expert since that dental evidence was critical to the state's case. It was the one item linking the defendant to the murder, and experts consulted by the defense questioned the reliability of dental impression evidence in general.

While *Thornton* noted that the defendant was not entitled to an expert of his choosing, the court said the trial judge "should follow a defendant's preference, if, in its discretion, such appears to be appropriate as to qualifications, availability, cost to the public, and other pertinent factors." *Id.* at 241 n.2.

The court also required appointment of an expert who was comparable to state's expert: "the trial could shall appoint an appropriate professional, whose experience, at minimum, is substantially equivalent to that of the state's expert witness...." *Id.* at 241.

DEPOSITION COSTS

Because a defendant is entitled to an effective defense, an indigent defendant, himself, and his attorney are entitled to reasonable travel and living expenses to take a deposition. RCr 7.12(2); Federal Rule of Criminal Procedure 15(c); *United States v. Largan*, 330 F.Supp. 296 (S.D. NY 1971).

DRUG ANALYSIS - DETERMINATION OF IDENTITY OF SUBSTANCE

The court in *Patterson v. State*, 232 S.E.2d 233 (Ga. 1977) decided: "...we recognize the general right of a defendant charged with possession or sale of a prohibited substance to have an expert of his own choosing analyze it independently. Where the defendant's conviction or acquittal is dependent upon the identification of the substance as contraband, due process of law requires that analysis of a substance not be left completely within the province of the state." *Id.* at 234.

DRUGS/INTOXICATION - INFLUENCE ON BODY AND MIND

Recently, it was decided in *State v. Coker*, 412 N.W.2d 589 (Iowa 1987) that an indigent defendant was entitled to an expert "to examine [him] and assist him in the evaluation, preparation, and presentation of his intoxication defense," where he was charged with first degree robbery and where he had a serious substance abuse problem. *Id.* at 593.

"Although trial court should prevent random fishing expeditions undertaken in *search of* rather than in *preparation of* a defense..., it should not withhold appointment of an expert when the facts asserted by counsel reasonably suggest further exploration may prove beneficial to defendant in the development of his or her defense." *Id.* at 592.

In *State v. Lippincott*, 307 A.2d 657 (N.J. 1973) the court held that an indigent defendant charged with driving while intoxicated was entitled to money for the services of an expert witness to testify as to the consumption, ingestion and absorption rate of alcohol and the effects of alcohol on the human body.

A defendant is entitled to money for a physician who is an expert on narcotics in a murder case where the defense moved to suppress the confession since it was obtained a few hours after the defendant had been administered a narcotic drug. *People v. Mencher*, 248 N.Y.S.2d 805 (N.Y. Sup.Ct. 1964).

ELECTROENCEPHALOGRAM (EEG)

The defense in this attempted armed robbery case was entitled to money to have an EEG run when the defendant's defense "turned on his mental condition." *United States v. Hartfield*, 513 F.2d 254, 258 (9th Cir. 1975).

FINGERPRINTS

The court in *United States v. Patterson*, 724 F.2d 1128 (5th Cir. 1984) held that the defendant was entitled to appointment and funding of a fingerprint analyst under the federal indigent expert witness statute, 18

U.S.C. Section 3006A(e). That statute, like most state's, requires appointment when the expert is "necessary" for the defense.

In *Patterson*, the prosecution had introduced fingerprint evidence against the defendant along with eyewitness identifications. The defense expert was required not only because a defense expert "might have reached a different result" but also because "the assistance of an expert undoubtedly would have facilitated [the defendant's] cross-examination of the government's expert." Id. at 1131. See also *United States v. Fogarty*, 558 F.Supp. 856, 857 (E.D.Tenn. 1982); *United States v. Durant*, 545 F.2d 823 (2nd Cir. 1976); *Bradford v. United States*, 413 F.2d 467 (5th Cir. 1969).

FIREARMS

In *Commonwealth v. Bolduc*, 411 N.E.2d 483 (Mass.Ct.App. 1980) the defendant was entitled to a ballistics expert who would analyze the defendant's jacket to see if there was gun powder residue on it, indicating whether or not its wearer fired a weapon even though the prosecutor had the jacket analyzed by a police department criminalist who found no trace of gun powder.

"There is no question that the evidence desired by the defendant was relevant to one of the issues in the case, namely, the identity or not of the defendant as one of the two participants in the holdup who had fired at the police.... And the judge failed to recognize that the desired evidence might well be all the more valuable to the defendant because his substantial criminal record might deter him from taking the stand in his own behalf." *Id.* at 486.

Since a gun and bullet used in a crime is "critical evidence whose nature is subject to varying expert opinion," a defendant is entitled to an expert of his own choosing according to the 5th Circuit. *Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975). See also *United States v. Pope*, 251 F.Supp. 234 (D. Neb. 1966).

HABEAS CORPUS/ STATE POST-CONVICTION

In order not to be rendered a toothless tiger, a habeas corpus petitioner must be provided funds for lay and expert witnesses, and litigation expenses "as are determined by the state habeas court to be reasonably necessary for petitioner's habeas case to be factually and legally presented in his state habeas proceeding." *Gibson v. Jackson*, 443 F.Supp. 239, 250 (M.D. Ga. 1977).

HYPNOSIS

The 8th Circuit in *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (*en banc*) determined the obvious: *Ake* applies when the expert is not a psychiatrist and when the case is not capital. It also looked at the "perils of hypnotically enhanced testimony" and concluded that an expert would have aided the defendant in his defense: "Given these perils of hypothetically enhanced testimony, it is clear that an expert would have aided Little in his defense. The expert could have pointed out questions asked by Officer Lincecum which were suggestive or could have caused confabulation. The expert could have presented the limitations of hypnosis, and explained theories of memory. This would probably have had far more impact on the judge at the suppression hearing and the jury at trial than Little's lawyer's attempts at impeaching the state's expert by reading from one of the psychology textbooks he found at a college library, or using information developed from interviewing a professor of psychology." *Id.* at 1244.

IDENTIFICATION PROCEDURE

In *United States v. Baker*, 419 F.2d 83 (2nd Cir. 1969) identification of the perpetrator was critical. The victim identified the perpetrator as black. There was a courtroom identification during trial by the victim of the defendant with the only blacks in the courtroom being the defendant and 2 jurors.

The Second Circuit noted that the trial judge before trial encouraged defense counsel to use some ingenuity and bring other blacks into the courtroom. Defense counsel responded to the trial judge by saying he knew of no way to practically accomplish that. The Second Circuit observed that the expenses of bringing other blacks in would be appropriately paid under 18 U.S.C. 3006A(e). Id. at 90.

INTERPRETER

An indigent defendant is entitled to funds to hire an interpreter when necessary to the defense. KRS 30A.420; *United States v. Largan*, 330 F.Supp. 296 (S.D. NY 1971).

INVESTIGATION

In *Mason v. Arizona*, 504 F.2d 1345 (9th Cir. 1974) the "effective assistance of counsel guarantee of the Due Process Clause requires, when necessary, the allowance of investigative expenses or appointment of investigative assistance for indigent defendant's in order to insure effective preparation of their defense by their attorneys." *Id.* at 1351.

JURY SELECTION EXPERT

In *Corenevsky v. Superior Court*, 204 Cal.Rptr. 165 (Cal. 1984) the trial court permitted $8,740 for a jury selection expert in this noncapital murder case. On a writ of mandate, the appellate court determined this was within the discretion of the trial court to grant. *Id.* at 173.

MITIGATION/SENTENCING PHASE IN CAPITAL CASES

The Florida Supreme Court determined in the capital case of *Perri v. State*, 441 So.2d 606 (Fla. 1983) that it was error to deny the defendant the assistance of a psychiatrist when the defendant had previous alcohol problems and mental hospital treatment even where there is no defense of insanity because the defendant was entitled to present psychiatric evidence on factors that, while not a defense, could *mitigate* his sentence. Other courts readily adopt this holding. *Holloway v. State*, 361 S.E.2d 794 (Ga. 1987); *State v. Gambrell*, 347 S.E.2d 390 (N.C. 1986); *State v. Wood*, 648 P.2d 71 (Utah 1982).

NEUROLOGIST

A defendant who exhibits bizarre and irrational behavior and who has had previous neurological exams evidencing damage was entitled to funds for a neurologist in a malicious destruction of property and resisting arrest case. *People v. Dumont*, 294 N.W.2d 243 (Mich.Ct.App. 1980).

PATERNITY BLOOD TEST

The equal protection and due process clauses of the 14th amendment are violated when an indigent is denied a blood grouping test in a paternity case since the test's results *may* be significant in determining if the person is the father. *Burns v. State*, 312 S.E.2d 317 (Ga. 1984); see also *Little v. Streater*, 452 U.S. 1 (1985)

PATHOLOGIST

The defendant in *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) shot the victim. She was paralyzed from the wound and died 8 months later. The state medical examiner believed that death was caused by a pulmonary embolism resulting from a thrombosis that formed in her leg due to immobilization caused by the paralysis from the gunshot wound.

Defense counsel requested an independent pathologist since medical books said there are numerous causes of a pulmonary embolism, and since the 8 month

length of time raised a complex issue of medical causation. The defense was self-defense.

The South Carolina Supreme Court found no error since 1) the autopsy demonstrated to the highest possible degree of medical certainty that the gunshot wound caused the death; and 2) there was no showing that another pathologist would have aided his defense.

The Fourth Circuit held that the defendant was denied equal protection, due process and effective assistance by the failure to be provided a pathologist since there was a substantial question over an issue requiring expert testimony from its resolution, and since the defense could not be fully developed without professional assistance.

PHYSICIAN/PSYCHIATRIST - PHYSICAL AND MENTAL EVIDENCE IN SEX CASE

In *People v. Hatterson*, 405 N.Y.S.2d 297 (1978) the prosecution put on an expert in psychotherapy who testified the prosecutrix in this rape, sodomy, robbery trial was a "compliant," "obedient" person "suffering from an anxiety reaction" who would not try to escape from a captor but would rather appease them. The state's physician testified that the prosecutrix was examined and that seminal fluid was found in her vagina; and he concluded she had sexual intercourse within 72 hours.

The Court held it was error for the trial court to deny money for the defense to hire a physician and psychiatrist. The defendant's defense was that the prosecutrix went with him voluntarily and no sexual intercourse took place. See also *Turner v. Commonwealth*, Ky., 767 S.W.2d 557 (1988).

POLYGRAPH

A defendant is entitled to funds to hire a polygraphist when he makes a showing that such a service is "reasonably necessary" to a defense "as effective" as one which would be presented by a defendant with adequate resources. The trial court can consider the following factors: 1) the cost of the test; 2) the purpose for needing the test, 3) the defendant's defense; 4) whether the defendant has a criminal record which might deter him from testifying absent the ability to counteract the introduction of the priors with the results of the polygraph. *Commonwealth v. Lockley*, 408 N.E.2d 834, 838 (Mass. 1980).

PSYCHIATRISTS

There are more favorable appellate cases when funds for a psychiatrist are at issue than in any other area. See, e.g., *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985); *Lindsey v. State*, 330 S.E.2d 563 (Ga. 1985); *United States v. Reason*, 549 F.2d 309 (4th Cir. 1977); *Brinkley v. United States*, 498 F.2d 505 (8th Cir. 1974); *United States v. Tate*, 419 F.2d 131 (6th Cir. 1969).

In *State v. Gambrell*, 347 S.E.2d 390 (N.C. 1986) the court held that the defendant was entitled to psychiatrist where there was a sufficient threshold showing demonstrated. Under *Ake*, the question for the threshold showing "is not whether the defendant has made a *prima facie* showing of legal insanity," but rather is whether "under all the facts and circumstances known to the court at the time the motion for psychiatric assistance is made, defendant has demonstrated that his sanity when the offense was committed will likely be a significant factor." *Id.* at 394.

If "a reasonable attorney would pursue an insanity defense," then funds for a psychiatrist must be forthcoming. *Guither v. United States*, 391 A.2d 1364, 1367 (D.C.Ct.App. 1978). The trial judge should tend to rely on the judgment of defense counsel who has the primary duty of providing an adequate defense. *Id.*

A defendant is entitled to at least one psychiatrist of his own choice with an adequate opportunity for examination and consultation. Having access to a court appointed psychiatrist who was not fully qualified for a 50 minute interview is not enough. *United States v. Chavis*, 486 F.2d 1290 (D.C. Cir. 1973).

Courts have recognized that psychiatric evaluations are demanding efforts and indigent defendants are entitled to a psychiatrist that meets the demands of the profession:

> The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject.... More than three or four hours are necessary to assemble a picture of a man. A person sometimes refuses for the first several interviews to reveal his delusional thinking, or other evidence of mental disease.... From hours of interviewing, and from the tests and other materials, a skilled psychiatrist can construct an explanation of personality and inferences about how such a personality would react in certain situations....
>
> *Williams v. United States*, 310 A.2d 244, 246-47 (D.C. Ct.App. 1973).

PSYCHOLOGIST - DIMINISHED CAPACITY

In *State v. Poulsen*, 726 P.2d 1036 (Wash.Ct.App. 1986) the defendant was convicted of second degree assault of his mother and father. He assaulted them after they refused to allow him to make long distance phone calls.

The defense asked for funds to hire a psychologist to determine if the defendant had organic brain disorder caused by physical abuse that kept him from forming the intent to commit the assaults, or that his capacity to form the intent was diminished. The defense informed the court that the defendant had blows to his head; had severe headaches; exhibited irrational behavioral changes; had fits of rage, especially when drinking.

The Washington Court of Appeals held that the defendant was entitled to funds to employ a psychiatrist since *Ake* required funds where a defendant's mental condition is likely to be a significant factor at trial.

QUALIFICATIONS OF DEFENSE EXPERT

The defense is entitled to an expert who is at least as qualified as the state's. *Thornton v. State*, 339 S.E.2d 240 (Ga. 1986).

QUESTIONED DOCUMENT ANALYST

The defendant in *People v. Mencher*, 248 N.Y.S.2d (N.Y. Sup.Ct. 1964) was entitled to money for a handwriting expert where there was an issue of whether a detective signed a report when he testified that the signature looked like his but was not his. See also *United States v. Fogarty*, 558 F.Supp. 856 (E.D.Tenn. 1982).

SEROLOGY

It is error to fail to appoint a defense requested expert to test the seminal fluid removed from the vaginal tract of the victim in a rape case. *Bowen v. Eyman*, 324 F.Supp. 339 (D.Ariz. 1970).

STATE "FACILITIES" INADEQUATE

In *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) the defendant requested money for defense investigative assistance. The trial court appointed the FBI. The 10th Circuit determined it was plain error to do this.

"Just as an indigent defendant has a right to appointed counsel to serve him as a loyal advocate he has a similar right under properly proven circumstances to investigative aid that will serve him unfettered by an inescapable conflict of interest. The Bureau, following leads furnished by an accused, is obviously faced with both a duty to the accused and a duty to the public interest. The dilemma, and danger, is glaringly apparent in the events that occurred in the case at bar." *Id.* at 1319.

STATISTICS AND DEMOGRAPHY

The Maine Supreme Court has decided that a defendant is entitled to money to hire experts in statistics and demography to analyze the composition of the grand jury. Defense counsel produced evidence that there were 148,000 licensed drivers in the country but the country voter registration list contained but 90,000 persons. *State v. Anaya*, 438 A.2d 892 (Me. 1981).

TRAVEL

In *United States v. Gonzales*, F.Supp. 838 (D.Vt. 1988) the Court determined, "The plain language of [18 U.S.C.] section 4285, economic realities, and the dictates of the equal protection clause support the finding that, after appropriate financial inquiry, this Court may order the government to pay or arrange for the noncustodial transportation of defendant from Texas to Vermont to enter his guilty plea." *Id.* at 842.

WITNESSES

KRS 421.015 (in-state) and KRS 421.230-270 (out-of-state) detail payment authorization for witness fees. OAG 75-682 (Nov. 17 1975) states that KRS 421.230 only applies to prosecution witnesses.

In *Kathi S. Kerr v. Commonwealth*, Ky.App., No. 86-CA-2564-MR (Feb. 5, 1988) (unpublished) the defendant was convicted of trafficking in cocaine and possessing marijuana with intent to sell. The defendant and her paramour, a foreign national, were arrested on an informant's tip. The foreign national pled guilty and stated in his confession that Kern had not participated in the illegal sales. Several months before trial, defense counsel subpoenaed the foreign national who was in the county jail. Prior to trial, the foreign national was transferred to a Florida federal prison for deportation. The defense obtained a writ of habeas corpus *ad testificandum* for the federal authorities to produce the prisoner, and an order was entered to require the county police to transport the prisoner to Kentucky but changed its mind on motion of the Commonwealth, saying the defendant could have deposed the witness when in the county jail.

The Court held the defendant had a statutory and constitutional right to have the costs of transporting the material witness paid by the county. See also *Hancock v. Parker*, Ky., 37 S.W. 594 (1896); Federal Rule of Criminal Procedure 1706)

CONCLUSION

This Country's major contribution to the advancement of civilization is that it enacted a Constitution which has 1) institutionalized fairness and its process, and 2) assured that if fairness and a fair process is not available to everyone, it should not be available to anyone. This bedrock of fair treatment has its greatest meaning when an indigent person's freedom or his life is at stake at the hands of the state. The degree to which fairness is assured an accused individual is in our hands as criminal defense advocates. The extent to which fairness and its process expands is up to us. The increased access of indigents to funds for experts in their criminal defense is no small part of the ever expanding concept of process that is due each of us.

ED MONAHAN
Assistant Public Advocate
Director of Training
Frankfort, KY

FEDERAL FUNDS FOR EXPERTS FY'89

Expert	Fee	Other Expenses	Total
1. Investigator	990,493	172,994	1,163,487
2. Interpreter	439,032	69,852	508,884
3. Psychologist	41,438	2,070	43,508
4. Psychiatrist	288,718	17,047	305,765
5. Polygraph	30,774	577	31,351
6. Documents	55,746	12,429	68,175
7. Fingerprint	18,027	439	389,161
8. Accountant	225,877	163,284	389,161
9. Chemist	21,977	352	22,329
10. Ballistics	4,130	1,227	5,357
11. Other	736,901	120,372	857,273
GRAND TOTAL	**2,853,113**	**560,643**	**3,413,756**

FUNDS RESOURCES AVAILABLE FROM DPA

A compendium of authorities supporting an indigent defendant's right to funds for experts, counsel, transcripts and witnesses is available for $10.00. Send a check payable to the KY State Treasurer to:

Ed Monahan
DPA
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006

EDUCATION OF KY INMATES

Average Inmate's Level of Achievement is 6th Grade

Ky. Corrections Education is directed toward the effective, cognitive and educational improvement of the prison population. The role of education and vocational training is extremely important since 80% of the population have not completed high school, and the average level of achievement is 6th grade. The percentage of enrollment is increasing so that currently 62% of the inmate population is participating in educational programs.

Education classes are offered at several levels; Literacy, with and 80% completion rate, Adult Basic Education, GED, Associate and Bachelor's degrees, and Computer Literacy.

COMPLETION 1989

GED	414
Literacy	181
8th Grade	433
College	
Associate Degree	46
Bachelor's Degree	12
Vocational Certificate	115
Occupational Title	665
Personal Development	
Life Management	
Employability Skills	1,938

Some of the trades offered in Vocational Education are interior finishing, building maintenance, carpentry, meat cutting, and electronics. Life Management and Employability Skills are strongly encouraged, since education must be supplemented with the information necessary for success in all areas of life to which a former prisoner returns. Life Management classes explore: problem solving, communication, budgeting, getting a job and stress management. Employability classes teach practical skills including: self-assessment in terms of skills, attitudes, aptitude, values, interest and personality, career exploration, short and long-term objectives, resume and cover letters, filling out applications, finding and following up on job leads, interviews, and how to keep a job. Corrections education strives to prepare each inmate to not only find employment upon release, but to be motivated to continue advancements in his/her chosen field.

Cynthia Wilburn, M.A., a teacher at KCIW, said that education is vital to a correctional program, because so many women come to corrections without a diploma and without the most basic skills. Not having completed their education contributes to a sense of failure. In the educational program, they are allowed to work at their own pace and find that they can succeed.

Ms. Wilburn stresses that a diploma is a minimal qualification for a good job and that as the women are responsible for their children and families an education helps them make better decisions. She said that so many women end up in prison simply because they make poor decisions. She teaches a class in Personal Development that explores decision-making, values, self-concept and short/long-term goals. For more information on the educational programs available to Ky. inmates write or call:

DON E. KENADY, Ph.D.
Principal Assistant to the Commissioner
Superintendent of Corrections Education
Corrections Cabinet
Frankfort, KY 40601
(502) 564-2220

Sentenced to Read Program

The General Assembly in 1988 created a new section of KRS Chapter 533 (codified as KRS 533.200) which provided that anyone convicted of a misdemeanor or felony who is not a high school graduate or has a G.E.D. may be sentenced to attend and successfully complete a program designed to improve his/her reading, living and employment skills as a form of probation in addition to the other requirements of probation. Of course, any person who receives this type of probation and who fails to successfully complete, attend, or make progress toward successful completion of the program may have their probation revoked unless the failure is due to a mental condition, retardation or reasons beyond the offender's control.

The program is administered by the Dept. of Education who licenses qualified persons or organizations to conduct these type of programs. In order to determine who is conducting these programs in your area, you should contact the Ky. Literacy Commission. I am sure many of you are aware of this statute and have been advocating its use on behalf of your clients but if not, it is an extremely worthwhile program for our clients. This is another tool to use in our aggressive sentencing advocacy.

If you need further information about this program or if there is no program in your area and you would like to get one started, please let me know and I would be happy to work with you.

PAUL F. ISAACS
Public Advocate

THE KY LITERACY COMMISSION

More than 400,000 Kentuckians are functionally illiterate.

47% of adults in Ky. (25 years or older) do not have a high school diploma or a G.E.D.

More than 650,000 adults in Kentucky have less than an 8th grade education.

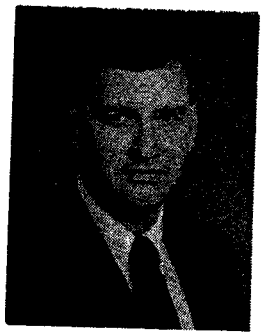
Ky. counties with a higher population of adult non-readers are also the counties suffering from high unemployment, higher crime, increased welfare, and low incomes.

The Commission duties include, but are not limited to: Formulating a statewide strategy and program plan for adult literacy; Review and recommend grants to public and private groups to support literacy programs; Review and evaluate literacy programs and report findings; Provide public information and education to promote literacy; Enlist the support of business and industry for literacy programs.

Established as an agency of the Education and Humanities Cabinet, the Commission began a state-wide effort to combat Kentucky's high illiteracy and to address the problem. The Kentucky Literacy Commission now supports, through grant awards to local communities, a large volunteer network responding to the needs and goals of 113 Kentucky counties.

Audrey Y. Tayse
Executive Director
Kentucky Literacy Commission
110 U.S. 127 South
Frankfort, KY 40601
(502) 564-4062 or 800-654-7323

COMPUTER USES FOR THE LAWYER/ SMALL LAW OFFICE



Mike Williams

I am not a "computer expert." I only know how to type marginally well and how to follow directions well enough so that computers/word processors work very well for me. In the beginning, I used Apple IIe and IIc computers, I now use the Apples and an IBM PS2. My familiarity with software programs has grown to include Appleworks, PFS WRITE, Displaywriter 4, Microsoft Works 2, and Wordperfect 5.

DON'T BE INTIMIDATED

First of all, computers are nothing to fear. All the user needs is an ability to read directions along with minimal typing skills. With the right word processing software your computer becomes a "super typewriter" which can store, retrieve, and allow you to correct/add to documents. It is not necessary to know how to program a computer, do routine maintenance or "fix" one if it should "break." As it is generally inexpensive to have it done by Computerland, I just take my equipment to them, and they take care of everything.

From 1974-1989, I was a sole practitioner who shared space with 3-4 other lawyers. I found a computer useful in my practice of law to stay on top of the variety of cases, clients, and issues- a computer can make that easy. It is particularly useful to a lawyer who handles criminal cases.

CREATION /REGENERATION

As a part-time public defender with duties that included 725 hours spent on a capital case, and as a civil practitioner who did quite a bit of "routine" motion practice, a computer becomes indispensable as it permits a lawyer to create motions, store them for later reference, amend them for other cases and to keep up with changing statutes, rules, and case decisions.

You avoid the redrafting of documents by keeping the "basic" motions/memoranda on disks. Your secretary merely retrieves the document and make appropriate deletions/additions. While I don't approve of filing "form motions," many necessary pleadings, motions, *etc.* are so similar that each time they only require minor revisions to a basic format. There are certain motions/memoranda filed in almost every case to preserve issues (*e.g.* discovery issues). The time saved from having to redraft or redictate is time that can be used for other matters.

The words "...but counsel failed to preserve this issue..." are a very popular phrase seen in appellate court opinions. A nice feature of the computer is that it makes routinely attaching appropriate memoranda of authority (and tendered orders) easy. Even if all judges don't require it, you have a duty, in good faith, to protect your clients. It also makes your malpractice carrier happy when you appropriately preserve issues.

AN ORGANIZATIONAL TOOL

The computer-assisted lawyer is better organized. Computer access gives you the capability to index state and federal decisions which are helpful to your cases, with ease. Retrieval for incorporation into motions is a simple matter as well. I usually keep a synopsis of opinions in a running document. Surprizingly, to maintain such a file on the computer takes less than an hour of work every few weeks. As opinions are published, I keep them in a "file," and then every week or so, I update the file by typing in "key words" and the case cite onto the "document." Ultimately it saves me time and frustration, as I avoid spending an hour or more looking for "that case I read somewhere" when I need it.

For trial work I have a basic "Trial Brief" form that contains items such as "Motions To Be Filed," "Evidence Requiring Foundation Proof," "Suppression Issues," etc. By retrieving this basic form and creating a "new document" for each new case and inserting information onto it as the case develops, I save an immeasurable amount of time of pretrial preparation.

Before I learned to use a computer, I always dictated witnesses statements, and most attorneys would either do this or write it down anyway, but it is just as easy to type it into a document to be saved to a computer disk. You then have a ready-made "witness outline," the contents of the statement which can be added, deleted, or moved around to prepare for trial, thus eliminating "last minute" writing upon the inevitable legal pads.

Don't get the impression this takes more time to do than the "old way." It doesn't. It takes less time. As a matter of fact, in the time it has taken you to read this article I could probably have amended my basic pretrial motion file, printed it, and copied it! You are probably already accumulating the same information anyway, just in a less useful form. A computer allows you to store and retrieve it in a readily available, usable format. Your productivity is substantially increased, because there is no repetition of tasks.

STORAGE/RETRIEVAL

Computer disks provide a more efficient means of storage of information. The motions, memoranda, witness statements, correspondence, etc. for my first capital trial which in hard copy completely filled 2 full sized file storage boxes could be carried in my suit coat pocket on disk! Instead of redrafting and researching new discovery, suppression, and *in limine* motions/memoranda I revise this material.

CONCLUSION

This article does not even "scratch the surface" on the uses of computers for the small general practitioner, but it gives a few ideas for rethinking the technology. If you need more information about the best programs and anything related to this article, don't hesitate to call .

MICHAEL L. WILLIAMS
Assistant Public Advocate
Major Litigation Section
Frankfort, KY

KENTUCKY PAROLE BOARD

On December 1, 1989, the Parole Board issued its 1989 Annual Report, we reviewed segments of the report previously in the December, 1989 and February, 1990 issues of The Advocate. Here's an excerpt from the report that gives information on the members of the Kentucky Parole Board.

KENTUCKY PAROLE BOARD

CHAIRMAN

John C. Runda, Ph.D.

MEMBERS

Phillip R. Baker
Helen Howard-Hughes
Larry R. Ball
Lou C. Karibo
James W. Grider
Newton McCravy, Jr.

ADMINISTRATIVE LAW JUDGES

James E. Deese
Keith Hardison

RESEARCH ANALYSTS

Brenda Adams Howard
Charles R. Little
Margaret Kinnaird
Sharon Parrent

STAFF

Sandra Hill - Administrative Section Supervisor
Brenda Smith - Legal Secretary Senior
Jackie Tucker - Victim Coordinator
Mary Campbell - Secretary
Sandy Davis - Secretary
Angie Lee - Secretary

THE PAROLE BOARD AND ITS MEMBERS

The Parole Board is comprised of seven members each of whom is appointed by the Governor for a term of four years. The Governor selects each Board member from a list of three names submitted to him by the Commission on Corrections and Community Service, who interviews prospective candidates. By statute, there can be no more than four members from the same political party. The Governor also appoints one of the seven members as Chairman who retains that position for the duration of his term.

The 1988 General Assembly passed a bill which was signed into law by Governor Wilkinson which established a quorum of three Board members to conduct parole hearings. This legislation permits the Board to meet an increasingly demanding schedule by holding simultaneous hearings at different sites as necessary. With the anticipated addition of new prisons, this flexibility will prove to be invaluable.

The Parole Board is the primary releasing authority for individuals confined in the Department of Adult Institutions and the Department of Community Services and Facilities of the Corrections Cabinet. All convicted felons, except those still serving on a sentence of Life Without Parole and a sentence of Death are reviewed by the Parole Board when they are eligible for a parole hearing. Parole eligibility is determined by both statute and regulation. The Board determines whether each convicted felon is to be released by parole or by the full service of his sentence. Parole release decisions are made by the application of the criteria as set forth in the Board's regulations.

The following Parole Board members were currently serving in that capacity on June 30, 1989.

John C. Runda, Ph.D. -
Chairman (Democrat, Madison County)
*Appointed by Governor Collins, May 23, 1986 to May 23, 1990.
*Appointed by Governor Collins as Chairman, December 7, 1987.
*Bachelor of Arts, Sociology, Thomas More College.
*Master of Arts, Sociology, The Ohio State University.
*Doctor of Philosophy, Sociology, The Ohio State University.
-Dissertation, "Religiosity and Racial Prejudice".
*Experience - Faculty member and Chairman, Department of Sociology, Social Work and Criminal Justice, Thomas More College;
Owner, Berea Health Care Center.

Phillip R. Baker -
(Republican, Pulaski County)
*Appointed by Governor Wilkinson, December 16, 1988 to June 30, 1992.
*Bachelor of Science, Cumberland College.
*Master of Arts, Eastern Kentucky University.
*Rank I, Eastern Kentucky University.
*Experience - Teaching, 8 years; Principal, 17 years.

Larry R. Ball -
(Republican, Jefferson County)
*Appointed by Governor Collins, May 23, 1986 to May 23, 1990.
*Bachelor of Science, Murray State University.
*Experience - Juvenile Probation Officer, Jefferson County, 9 years.

James William Grider -
(Republican, Casey County)
*Appointed by Governor Wilkinson, March 3, 1989 to March 1, 1993.
*Bachelor of Arts, Eastern Kentucky University.
*Experience - Legislative Research Commission, Staff Member, 12 years.

Helen Howard-Hughes -
(Democrat, Fayette County)
*Appointed by Governor Brown, March, 1982.
*Re-appointed by Governor Collins, May, 1986 to March 1, 1989.
*Bachelor of Arts, Social Science, Marshall University.
*Experience - Executive Director, Kentucky Commission on Women, 4 years; Executive Director, Kentucky Occupational Safety and Health Review Commission, 2 years.

Louis C. Karibo -
(Democrat, Fayette County)
*Appointed by Governor Collins, December 7, 1987 to June 30, 1990.
*Bachelor of Arts, University of Kentucky.
*Experience - High School Teaching, 5 years; Kentucky State Police, 3 years; Vocational Rehabilitation, 1 year; Private Industrial Management, 20 years.

Newton McCravy, Jr. -
(Democrat, Jefferson County)
*Appointed by Governor Ford, 1972-1974.
*Re-appointed by Governor Ford, 1974.
*Re-appointed by Governor Carroll, 1978.
*Re-appointed by Governor Brown, 1982.
*Re-appointed by Governor Collins, December 7, 1987 to June 30, 1990.
*Bachelor of Arts, University of Louisville.
*Master of Science of Social Work, Kent School of Social Work.
*Experience - Social Worker, 8 years; Social Work Administrator, 6 years; Assistant Professor, University of Louisville, 2 years.

Being A Kid- Not Easy

Knight-Rider Newspaper's recent collection of statistics from the Children's Defense Fund, the 1988 Census Data, Annual Crime Reports dating from 1985-1988 tells the story of how *It's not easy being a kid* in America. Consider what happens to children in America IN ONE DAY.

In just one day , an average:

*2,795 teen-agers become pregant, 1,106 have abortions, 372 later miscarry.
*1,027 babies are born drug- or alcohol exposed in utero.
*67 babies under one month old die
*105 babies under one year old die.
*211 children are arrested for drug abuse.
*437 children are arrested for drunken driving.
* 10 children die from gunshot wounds.
* 30 children are wounded by gunfire.
* 135,000 children bring a gun to school.
* 1,512 teen-agers drop out of school.
*1,849 children are abused or neglected.
*6 teenagers commit suicide.
*3,288 children run away from home.
*1,629 children are in adult jails.

"Reprinted with permission from the February 1990 issue of the *ABA Journal*, The Lawyer's Magazine, published by the American Bar Association."

JUSTICE POWELL'S HABEAS PLAN TAKES BEATING FROM SENATE COMMITTEE; BIDEN AND ABA PRESENT ALTERNATIVES

[Excerpted, in part, from AM-LAW News Service report]

With momentum mounting to shorten the time it takes either to reverse or carry out a sentence of death, the U.S. Senate Judiciary Committee opened debate recently on the Powell Commission Plan to link a streamlining of the federal *habeas* process to a state's willingness to provide competent counsel for the condemned. AM-LAW News Services (Ann Woolner). [See also last month's "Greasing the Skids: The Rehnquist Committee Reports on Federal *Habeas* in Capital Cases".]

What emerged from these Senate hearings is the existence of deep divisions within the federal judiciary about the advisability and even the propriety of the controversial proposal to severely limit the *habeas* petitions of Death Row inmates. Justice Lewis Powell, Jr. testified for two hours before the committee, followed by a panel of three U.S. Court of Appeals judges from the West and Midwest, who attacked the Powell proposal. AM-LAW News Services (Ann Woolner).

The judges were not kind to the Powell Commission's recommendations: "Finality and speed ... seem to outweigh the concerns for fairness and justice," testified 9th Circuit U.S. Court of Appeals Judge Stephen Reinhardt regarding the proposal. *Id.* Impassioned assaults also came from Chief Judge William Holloway, Jr., of the 10th Circuit and Chief Judge Donald Lay of the 8th. The 6 month provision is too short, these judges said, the committee spelled out no minimum standards for *habeas* counsel; the plan does nothing toward providing competent lawyers for trial and direct appeal; and the panel failed to come up with a factual basis for its recommendations. These judges attributed the delay in death penalty cases to error at the state trial or appellate level. "It's probably because so many constitutional errors are committed in state proceedings that the federal courts proceed slowly," Judge Reinhardt argued, noting a 2/3 reversal rate, at the *habeas* level, of state convictions. *Id.*

Some participants at the hearing also had problems with the dual system, wherein states can decide whether or not to participate. Committee Chairman Senator Joseph Biden asked, "Should a man or woman be sentenced to death based on the ability or inability of the state to provide competent counsel?" Indeed, the Ninth Circuit's Reinhardt said, if a state is unwilling to provide competent lawyers for people accused of capital crimes, it should not be allowed to impose the death sentence. But the chief issue for detractors is the virtual elimination of successive *habeas* petitions. "Are we going to let people lose their lives because a lawyer defaulted and neglected to raise an issue?" Chief Judge Lay of the Eighth Circuit asked. *Id.*

Biden asked "What if a lawyer for a death row inmate learned that the prosecution had put up perjured testimony at the prisoner's sentencing hearing? If the lawyer learned of the perjury after the prisoner's first trip through federal *habeas*, could the inmate still appeal the fairness of the death sentence under the proposed streamlining?" "That rarely ever happens," Powell responded to Biden. Finally, he said, "If the trial judge is satisfied there was perjured testimony, he or she is going to do something." *Id.*

None of the other judges at the hearing, supporters or detractors, said that the Powell Plan would allow a judge any discretion at that point in the *habeas* process. *Id.*

With the amount of resistance shown to the Powell Commission proposal by Senators Biden and others, attention has begun to focus on other proposal that will likely be introduced in the next Congress. Part of the motivation of all concerned is to avoid the more onerous proposal of Senator Strom Thurmond, R-S.C., to entirely abolish any federal review of state convictions.

Committee Chairman, Senator Joseph Biden, D-Del., wrote a proposal similar to Powell's, except that it extends the period for filing a federal *habeas* proceeding to one year, and would allow successive petitions if the condemned can show either that he or she is raising a new claim not previously presented, due to state action, new law, or new facts; or that there are new facts which, if shown, would undermine confidence in the jury's determination of guilt; or, where not allowing a successive petition to be heard would result in a "miscarriage of justice." Biden's plan also includes provisions for defining the qualification of counsel in death penalty cases, and for compensating counsel, consistent with the Anti-Drug Abuse Act of 1988. The Anti-Drug Abuse Act standards require that a capital lawyer have five years experience at the trial level, and three years of appellate experience, to qualify for representation of a capital defendant.

A task force of the Criminal Justice Section of the American Bar Association has recently released its recommendations for changes in the *habeas* process. This task force recommended a provision requiring that counsel be provided at all stages of a capital case, in all courts, that such counsel should meet ABA Death Penalty Standards for qualification as capital counsel, and be compensated in accordance with Anti-Drug Abuse Act standards. Although the ineffectiveness claims could not be made against post-conviction or *habeas* counsel, under these guidelines, the failure to provide qualified counsel would considerably broaden the discretion and power of a federal court to review state court judgments.

In addition to the longer limitations period of one year given under Biden's plan, the ABA-CJS task force would protect a death row inmate by allowing a stay of execution to be extended so long as pending matters were diligently prosecuted.

This ABA Task Force also would allow successive petitions to be filed when the more liberal Biden standards were met, and unlike the Powell Committee, would not find procedural default where the failure to raise the claim was a result of

counsel's ignorance or neglect", or when failing to do so would constitute a miscarriage of justice.

The Litigation Section of the American Bar Association has also put forward a proposal which strongly resembles the Criminal Justice Section's proposal, except that it would be directed almost entirely toward the problem of motivating states to provide competent counsel to capital defendants at all stages of proceedings in all courts. No provision is made to bar *habeas* petitions, by a statute of limitations or other similar device. In fact, the Litigation Section would establish procedures to obviate the necessity of periodic recourse to the federal courts to stay an execution.

Yet another proposal has been advanced by Senators Strom Thurmond of South Carolina and Phil Gramm of Texas, which would remove much of the federal court's jurisdiction in *habeas* cases.

Esther Lardent of the ABA's Post-conviction Death Penalty Representation Project calls the legislative situation complex, but said the situation will likely be clarified following Congress' holiday recess.

Both the Biden and Powell Committee proposals will be "in play" in the congressional arena, as will the Thurmond-Gramm proposal to substantially gut *habeas* review, according to Ms. Lardent. The ABA Litigation Section will likely get behind the Criminal Justice Task Force's proposal. Debate on the Biden and Powell proposals will begin in early February; it is also in that month that the ABA proposal will be introduced in some form, if at all.

The most direct effect of such legislation on trial level public defenders, according to Ms. Lardent, is the likely change in qualifications required of attorneys in death penalty cases.

Although Congress adjourned without taking any action limiting *habeas* review, the fixed determination of Chief Justice Rehnquist, Justice Powell, and others to do something about their perceived problem, will likely result in continued efforts to curb such review. With support for more moderate proposals surfacing, there is some promise that if there is legislative action on the issue, the final product will not be as draconian as the original Powell Committee recommendation. But there are certainly no guarantees.

THE DUTCH UNCLE

Although the solicitor general of the United States is sometimes called the "tenth justice" of the Supreme Court, there now seems to be a real "tenth Justice."

Since his retirement from the Court in June 1987, Lewis F. Powell, Jr., now 82, has redefined the job description of a former Supreme Court justice, emerging as a combination trouble-shooter, Dutch uncle and general justice-without-portfolio.

Like other retired justices before him, Powell sits several times a year by special appointment to the federal court of appeals, often in the Fourth Circuit.

Two events in the past year, however, mark Powell's retirement as a uniquely productive time.

First, he waded into the controversy over federal habeas corpus remedies in death-penalty cases, chairing for the Judicial Conference the *Ad Hoc* Committee on Federal Habeas Corpus in Capital Cases.

The Powell Committee Report, released last August, offered a legislative proposal for controlling post-conviction litigation while attempting to ensure adequate representation for capital defendants.

In October, Powell delivered a remarkable address to the Association of the Bar of the City of New York in which he chided the nine active justices for neglecting constitutional precedent, for following ideology rather than case law, and for deciding too many cases without a majority opinion.

For many years Powell helped pull the Court toward the middle by pressing for relatively narrow rulings and attending carefully to the specific facts of each case.

Now, no longer participating in the Court's weekly conferences, Powell pointed the Court back to the middle by reminding the justices of the judicial values he urged while on the Court.

Unprecedented

The subject of Powell's address was "*Stare Decisis* and Judicial Restraint," and he stressed three primary benefits from the *stare decisis*: 1) enhancing the public stature of the Court by demonstrating that it follows precedent and is "not composed of unelected judges free to write their policy views into law"; 2) providing stability in the law; and 3) simplifying the work of the courts.

Powell recognized that some overruling of outdated precedents is necessary. Reviewing the 16 years of the Warren Court and the 17 years of the Burger Court, he concluded that throughout both periods the Court overruled prior decisions in fewer than four cases per term.

When he turned to last term's decisions, however, Powell expressed concern about "recent threats to *stare decisis*....."

He also commented pointedly on *South Carolina v. Gathers* (109 S.Ct. 2207 [1989]), in which four dissenting justices voted to overrule a case decided only two years earlier, *Booth v. Maryland* (482 U.S. 496 [1987]).

Powell noted approvingly that "Justice White, who had dissented in the *Booth* case, declined to overrule it," and he added with considerably less approval that Justice Scalia's dissent "argued that a justice must be free to vote to overrule decisions that he or she feels are not supported by the Constitution itself, as opposed to prior precedents."

In a footnote, Powell inserted a quiet dig at Scalia, observing that Scalia's idea of relaxing *stare decisis* had been expressed in 1949 by liberal Justice William O. Douglas, who is not a likely model for the conservative Scalia.

In plain language, Powell added that "this view of *stare decisis* also has little to commend it," and that "elimination of constitutional *stare decisis* would represent explicit endorsement of the idea that the Constitution is nothing more than what five justices say it is. This would undermine the rule of law."

CIVIL LAWYERS DOING CAPITAL HABEAS CASES: *A BAD MISTAKE*

Like other states, Alabama faces an acute problem in obtaining counsel for the defense of capital cases. The following thought-provoking commentary was contained in a letter sent to the Action Group on Post-Conviction Capital Representation.

This article appeared in the Nov. 1989 *The Alabama Lawyer*. Reprinted with permission of *The Alabama Lawyer* and the author, David A. Bagwell.

Members, Action Group on Post-Conviction Capital Representation Board of Directors, Alabama Capital Resource Center, Inc.

RE: Civil Trial Lawyers in Death Penalty Cases

As you might have read in the newspaper, my client Michael Lindsay was executed on May 26. That, along with the execution of my client Wayne Ritter in 1987 (the last man executed in Alabama), puts me in the unique and unenviable role of having represented, at the time of execution, 50% of all the people executed in Alabama in the last 23 years, a fact I do not plan to list in *Martindale-Hubbell*. Considering my personal history[1] it is remarkable.

After a Memorial Day weekend of rest, fishing and skiing, I am moving on in my life, never to take another death penalty case even if they disbar me for my refusal (there are 105 on death row there, I think, and one or two more from Mobile alone are convicted every week, it seems, but there are lots more lawyers than that). Like those who served in WWII and Korea, I figure I've done my duty, and the next war can be fought by somebody else.

Before I move on in my life, though, I owe it to those 105 or more civil trial lawyers who will be drafted in the next two years or so, to do what I can to pass on my lessons to somebody, so their role will be easier, and for that limited purpose I send this letter. I couldn't think of anybody to send it to other than the bar's Task Force on Post-Conviction Capital Representation, and the board members and executive director of the Alabama Capital Representation Resource Center, Inc., the organ that Albert Brewer and the task force kicked into life to work on this stuff.

Here are my lessons:

1. *Appointing civil trial lawyers in death penalty cases is a bad mistake*—I have believed this all along, and I believe it more strongly now than ever. Those of you who have been on this project from the start know that I have never made a secret of it. Lest you think I have kept my mouth shut when I should not have, I should add that in the last 2 months I have filed motions and mandamus petitions and appeals in 5 different courts (3 different one in the 11th Circuit alone) based on federal and state statutes which I believed (and still believe, though the judges don't) to require the appointment of lawyers with 3 years' (federal) or 5 years' (state) criminal experience.

My strong opinion is that the public needs to hire some death penalty public defenders. If they burn out, then replace them, or pay them enough to keep them.

Obviously, this is not likely in the short run, at least until 105 or more middle-aged civil trial lawyers get galvanized by the experience I have had, at which point the politics of it may change. The rest of this letter proceeds on the assumption that ordinary civil trial lawyers will continue to be appointed in death penalty habeas cases.

2. *Your opponent*—Your opponent will be Ed Carnes of the Attorney General's office. He is very, very bright, he has a narrow specialty, and he knows it cold. He could beat anybody in the county on this subject (he is also, in my experience, entirely fair and ethical). On your first solo flight you will not meet the Red Baron. Good luck.

3. *What your opponent knows that you do not know*—There are 4 applicable bodies of law that your opponent and the federal judges know perfectly and you do not know at all, and you will never know as well as your judges or your opponent. They are (1) general substantive criminal law and criminal procedure needed for the non-death issues (*Brady*, *Massiah*, *Sandstrom*, etc.), (2) the operation and constitutional overlay of the Alabama death penalty statute, (3) the rules of "procedural default" and the ways to get around it and to stop lawyers from getting around it, and (4) the doctrines of "abuse of the writ."

To some extent in the "original habeas" case you will have time to do adequate research to try to catch up, but your lack of depth will clearly hurt at oral argument in the 11th Circuit.

Where your ignorance will clearly hurt you is in "the subsequent habeas case," discussed next.

4. *The "Subsequent Habeas Case"*—You and all civil trial lawyers will say, "I plan to give it my best shot at first, and not file those last-minute appeals like those Godless commie civil rights lawyers." Sure, so did I.

What happens is that after you have filed and litigated your first habeas corpus case, there will be some new development in the law in the supreme court or in some other circuit which on the merits, would entitle you to relief. You may learn about it on your own, or more likely some "death penalty expert" will tell you about it maybe the week before the execution. (Or, you may be unlucky like I was, and get appointed for the first time after the first habeas, and only the week before the execution). My experience is that a second habeas case is simply a normal and expectable part of the process for a good lawyer.

Just as a spring bass fisherman who does not get his lure caught in the stumps and bushes is not casting in the right places, so too the habeas lawyer who does not get involved in a subsequent habeas cas may not be serving as effectively as possible.

A subsequent habeas case (with an outstanding execution warrant and date) is to a first habeas case as "Space Mountain" is to riding to church with your father. In both my cases it involved taking a brand new issue—cold and with absolutely no time for preparation—from the district court through the court of appeals to the U.S. Supreme Court in less than 3 and a half days, the days immediately preceding the execution. Spicing up the process are the unexpected calls from the AP, UPI, the local press and the television and radio stations, the ACLU, Amnesty International in London, women in Maine who want to make sure you really believe your client is innocent and that you are working hard enough and—the most fun yet—funeral homes.

Here is where your lack of depth will kill you, on the doctrines of "procedural bar," "successive habeas" and "abuse of the writ," the common battlefields of successive habeas. In addition, since you will be going cold on a new case involving an unfamiliar area, your lack of depth will hurt.

You will spend all of your available time physically moving papers to and from increasingly high courts, one each day (if you are lucky). You will be battling with unfamiliar precepts, and everybody else involved—the judges and your opponent—will know the rules cold.

At the end, the court will enter an order saying that your failure to have either known about or even to have anticipated that new development in the unfamiliar area of death penalty law makes your filing the case "an abuse of the writ." Therefore you lose, and your client dies. That day, usually within hours.

At least, that is what happened to me in both cases, and it will likely happen to most of you.

4. *What can be done to help civil trial lawyers in death penalty cases*—Just from seeing what I needed, I have a pretty good idea what can be done to help civil trial lawyers in death penalty habeas corpus cases.

a. *Review of record to spot issues*—The first thing that is needed is a review of the record by somebody who knows what he/she is doing, simply to spot the issues. What was not raised in state court by the trial or appellate lawyer often is even more important than what was raised, and only an experienced death penalty hand can spot that. Anybody who thinks a middle-aged civil trial lawyer can do that is just wrong.

Somebody (not me) needs to provide an experienced death penalty hand at the outset to read the whole record and to spot and list the issues to be followed up by the civil trial lawyer.

As far as I know, nobody is doing that.

b. *Newsletter*—Expecting middle-aged civil trial lawyers to be able to keep up with death penalty developments is a serious mistake, Somebody (not me) needs to compile and send a newsletter every two weeks or month to point out hot new death cases and hot new death issues. This is the only way to help avoid the "abuse of the writ" trap. If nobody will undertake such a task, at a minimum somebody ought to suggest that the lawyer's firm subscribe for one year to the *Criminal Law Reporter*, or whatever else passes in the trade as a newsletter.

Even better, but more labor intensive, would be for somebody to maintain a current listing of the issues in each pending death case, with bullet memos to all lawyers involved in a particular issue.

c. *Abuse of the writ advice*—Somebody needs to tell the appointed lawyer that there is a high (though unquantifiable) probability that he/she will be involved in a subsequent habeas case on short notice based on some new development, and that a high priority during the original habeas phase should be mastering the "abuse of the writ" and "successive habeas" and procedural bar issues and, particularly, every loophole and exception and ground in them.

This cannot be learned in the last minute, when every second counts just to get the paperwork on the last Federal Express plane to Atlanta, or the last fax to the supreme court clerk's office.[2]

Good luck to you if you are next. I am not.

Very truly yours,

David A. Bagwell
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(205) 432-6751

FOOTNOTES

[1]My practice is entirely civil. I never volunteered for such cases. When appointed, I politely resisted appointment. I do not consider it the duty of civil trial lawyers in big firms to handle such cases, any more than it is the personal duty of metropolitan dermatologists to fill the gap of obstetrics in rural counties (both are public problems requiring public solutions). Almost alone among "death penalty lawyers," I don't even care much whether we have the death penalty or not (I generally favor it because mad dogs ought to die, but I have occasional qualms that Jesus might not agree with that, and I am supposed to consider every now and then what he might do and try to do roughly the same).

[2]Just to let you know the rush, I actually faxed a handwritten note (a "supplemental brief" I guess) to the U.S. Supreme Court while my stay motion was pending at 5:30 CDT (6:30 EDT) with an execution set that evening. The motion to stay was denied one minute later. There is no time for research then.

Racist Joke in Jury Room

The Illinois Supreme Court ordered a retrial for a black man convicted of murder and sentenced to death by an all-white jury because three jury members said they read a racist joke in the jury room.

A courthouse janitor discovered a mimeographed copy of a racist joke and turned it over to the bailiff, who notified the trial judge. The trial court denied the defendant's motion for a mistrial, but the supreme court reversed.

Justice Goldenhersh held that prejudice to the defendant will be presumed in "such intolerable circumstances." He surmised that the failure of the jurors to bring the material to the attention of the court could be "indicative of either lack of appreciation for their responsibility as jurors, or that they did not consider it offensive."

The court refused to disseminate the "scurrilous material," saying "it suffices to note that it contains denigrating, racist comments which are insulting to black people."

Illinois v. Jones, 475 N.E.2d 832 (1985)

PREPARING WITNESSES

In marketing testimony, the package is sometimes as important as the contents

How easy witness preparation would be if one only had to say, "Go into the court-room and tell the truth." Unfortunately, there is more to it than that; the judge or jury must be convinced that the witness' story is true. Witness preparation is a form of marketing- the attorney is packaging the truth in a witness so that it will sell to the trier of fact.

There are 2 elements to this marketing process:

*the package - the witness's appearance, demeanor and attitude, which hopefully will impress the court or jury; and

*the contents - the witness's testimony.

Before witness preparation even begins, the attorney needs to analyze his case to determine what testimony is needed and what witnesses are available to provide it. As a general rule it is best to subject as few witnesses as possible to cross-examination. Thus, if physical or documentary evidence is needed, try to introduce it through a witness who would be testifying anyway.

The next step is witness evaluation. Cases are often won by deciding not to use a certain witness; other are lost by using the wrong witness. Meet all prospective witnesses face to face. When representing corporations, partnerships or other business entities, you often have a choice of people who could testify to certain facts. See who would make the most effective witness at trial or for depositions. Don't let someone make the decision for you.

You rarely have a choice of witnesses when representing an individual. But if your client would not make a good witness, consider carefully whether his testimony is really needed. Several years ago I was representing a client I had never met, who had moved out of state before the suit was filed. Our first meeting was when he arrived in California during trial to testify.

I met my client at the airport during trial. He had fueled a long-standing drinking problem during the flight and he looked awful. When he looked no better the next day, I sent him home. There was nothing I really needed him to testify about. Fortunately, I had been careful in my opening statement to avoid saying my client would testify. I did not want to promise testimony from someone I had never seen. We won the case without him.

If the only way to introduce necessary testimony is through a "bad" witness, there are ways to limit your risks: Expose a weak witness to as little cross-examination as possible; place a weak witness between strong witnesses; and never open or close your case with a weak witness.

THE PACKAGE

I often tell witnesses that testifying is like interviewing for a job. How a witness sits, looks, sounds and moves- the impression he makes- is often more important than what he says.

Dress is extremely important. I always encourage at least sports coats for men and conservative dresses for women. I used to tell witnesses, "Dress as if you're going to church." But then a client showed up for trial in a bright blue leisure suit, a flowered shirt, and a gold chain- that's what he wore to church!

Attorneys should always check how a witness is dressed, preferably somewhere away from the courthouse. If you are dissatisfied with the way the witness looks, you can be sure the judge or jury will be as well. Don't hesitate to send a client or witness home to change clothes if necessary. It may even be worth the expense to buy clothes for a client in order to make a good impression. Consider not using a witness if dress or appearance cannot be improved.

Witnesses can be seen and heard by jurors in many places. They can be seen entering and leaving the courtroom. They can be heard talking in the corridors or restrooms. They may even be recognized by jurors in a store or bar. The overheard comment, the impolite gesture, the flashy clothes or car leave an impression that will be remembered when the witness testifies. Attorneys should caution witnesses, particularly clients, that they are always on stage during trial.

If you are calling a witness who is not directly connected with the matters in dispute, foster and protect an image of impartiality and objectivity. Seat the witness away from your client, and have the witness maintain that distance outside the courtroom as well.

One final point about witness demeanor: Anyone who testifies has a right to be nervous. Tell witnesses it is expected and normal to be nervous. Jurors are nervous when they are called and questioned during voir dire, so they understand and sympathize with the nervous witness. There may be times when a witness is so nervous that his testimony will suffer. In such cases, it may help him to observe a trial and watch others go through- and survive - the process.

THE CONTENTS

A witness has an obligation to tell the truth. The lawyer's obligation is to stress that fact. But sometimes it is necessary to help the witness know what is true. There are three forms that this assistance might take: helping the witness remember; convincing the witness that what he remembers cannot be accurate; and acknowledging that the witness has no recollection about a particular fact.

It is not uncommon- indeed, it may be unavoidable- for a witness to forget some details of something that took place a while ago. There is nothing wrong with refreshing a witness's recollection, and there are several ways to do that. The first is simply to go over slowly what the witness does remember, asking questions to spur recollection.

If a witness or client has given a previous deposition or other statement, the witness should read it before testifying. This not only helps the witness remember; it also guards against impeachment. Bear in mind, however, that a non-privileged writing used before testimony to refresh recollection must be produced if requested. [If a client interview has been transcribed or written out by the lawyer it can safely be shown to the client to refresh recollection, since it remains privileged. *See Sullivan v. Superior Court* (1972) 29 CA3d 64, 105 CR 241.]

You should avoid letting any witness see a document that you don't want the other side to have. It's better for the lawyer to use the document in framing questions to the witness, so the witness can truthfully answer that he did not see or use the document before testifying. On the other hand, if the other side already has the document it can be disastrous not to have the witness read and review the material before testifying.

A visit to the scene of an accident or the location of an event is very important. Besides helping the witness remember, viewing the locations of street lights, cross-walks, stop signs and other landmarks will contribute to accurate and truthful testimony. Measuring or estimating sizes, distances and times at the scene results in accuracy and believability in a courtroom.

A witness should never be permitted to testify under oath to a fact that can be disproved by physical evidence. A situation I have often seen in auto cases helps illustrate this point: The

witness says he never saw the other car before impact, even though the police report shows skid marks before impact. The physical evidence clearly shows that the witness saw the other car and even applied the brakes. If the witness had simply been shown that evidence during preparation for trial, he would have been convinced of his inaccuracy and would have been comfortable on the stand saying that he indeed had seen the other car.

The witness should see photographs or diagrams that might be used on direct or cross-examination. When working with a scale diagram, be sure the witness understands the scale being used and is able to measure distances with confidence.

These preparation techniques can help improve a witness's testimony, but they should not be used to create a witness. Witnesses are often reluctant to admit that they don't remember. They may guess, or make assumptions, rather than admit a lack of recollection. Consequently, you should caution witnesses during preparation that testifying in court or in a deposition is not a test - guessing at answers will not produce a better grade. If a witness simply can't remember, or doesn't know certain facts, leave it that way.

When going over testimony with a witness, an attorney has the opportunity to influence what will be said in court or during a deposition. Obviously, witness preparation cannot be used to convince the witness to lie or to convince him that something is the truth.

When preparing witnesses who are not clients, the conversation is not protected by the attorney-client privilege. Everything that is said in preparation can be discovered. Tell the witness he should admit to the preparation meeting and that it is customary for an attorney and witness to meet before trial or deposition. If asked what was said during the meeting, the witness should answer, "The attorney told me to tell the truth."

It is improper and unethical to pay a witness other than an expert to testify. It is not improper, however, to reimburse a witness for out-of-pocket expenses, including wages lost while testifying. The amount of money a witness will receive should be agreed upon in advance. The witness should be prepared to testify to that amount and to the fact that the reimbursement was not contingent on what he says.

Witness preparation is a vital part of presenting evidence. There is no simple formula that will apply in every case. How a witness is prepared will vary from witness to witness and case to case. One rule, however, never varies: Always give a witness some preparation before testifying.

ROBERT S. LUFT

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JUSTICE

Death Rides a Judicial Roller Coaster

An inmate's fate

Every courtroom lawyer knows that you're supposed to ask only questions to which you already know the answer. But sometimes that rule can't be honored. In the summer of 1987, convicted killer Warren McCleskey had five days to live and his attorney was desperate. At an Atlanta federal hearing, Jack Boger of the NAACP Legal Defense Fund called to the witness stand every local law-enforcement official he could find to ask what they might know about the case. Late one afternoon a local jailer testified that Atlanta police detectives had asked him to move a known informer, one Offie Evans, into the cell next to McCleskey's to elicit information; at trial, Evans testified that McCleskey had confessed to the murder. This ploy was a clear violation of his constitutional right to counsel. The impact in the courtroom was as palpable as anything a Perry Mason melodrama might invent. "I have given Mr. Boger a few days to go on a fishing expedition," said federal district Judge J. Owen Forrester, "and they've caught a pretty big fish." He ordered a new trial.

McCleskey never got one. On the day before Thanksgiving last year, in a little-noticed decision, the federal appeals court in Atlanta threw out the reversal. Why? Because McCleskey's lawyers should have raised the informer issue during their first round of appeals in 1981. There is, of course, a logical gap: McCleskey's lawyers had no reason nine years ago to suspect that Evans was a plant. "The court is telling us that we should have known something that we couldn't possibly know because the state deliberately concealed it," complains Boger.

Fatal shots: Federal judges are appointed for life and don't have to explain their actions outside their opinions. It is no secret, though, that federal courts in the South have grown irritated with protracted death-row appeals—even though many are successful—and McCleskey's has been as drawn out as any in recent history. The start of the case was all too direct. In 1978, Georgia sheriffs arrested him and three confederates for the murder of a white police officer during a furniture-store robbery. On Evans's testimony, McCleskey was convicted of firing the fatal shots and sentenced to the electric chair.

Since then McCleskey has ridden a roller coaster through the federal courts. The verdict was reversed once, only to be restored. Then he became the named plaintiff in the most important death-penalty case of the 1980s. Working on his behalf, a team of lawyers and statisticians developed overwhelming evidence that Georgia's death penalty was imposed disproportionately on the killers of whites than of blacks. (McCleskey is black, his victim was white.) But in a bitterly divided 5-to-4 decision announced in April 1987, the U.S. Supreme Court rejected the constitutional claim. That's when Boger began grasping at straws and came up with Evans, the secret snitch. Boger has asked the appeals court to review its decision; it's unlikely to since judges rarely admit their own errors.

McCleskey's current constitutional argument is more than technical mumbo jumbo. Without Evans's statement incriminating him as the triggerman, Georgia prosecutors would have little else on which to seek the death penalty. McCleskey would simply be serving a prison sentence for felony murder like his codefendants.

The latest McCleskey ruling came as both Congress and Chief Justice William Rehnquist are considering changes that would severely restrict the appellate options of death-row inmates. If the decision stands, legislative reform won't be necessary: short-circuiting the route to the chair will already be the law.

DAVID A. KAPLAN

Just Say No To Gun Control

Henry Curry

Do not let tragedies such as the insane actions of Joseph Wesbecker influence you into imposing gun restrictions upon law abiding citizens. Our constitutional right to bear arms should never under any circumstances be infringed upon. The actions of the few should not eliminate the rights of the masses. The right to bear arms is the teeth of our Constitution.

Anti-gunners attempt to exploit isolated events to achieve their goal of banning guns. The anti-gunners and their supporting media cronies intentionally (or through their own ignorance) ignore the facts. According to the U.S. Department of Justice, all rifles, whether semi-automatic, bolt-action, lever-action, or pump-action, account for less than 4% of the firearms used in crime nationally. Further, of the firearms seized by police, less than 3% are the military look-a-likes the gun prohibitionists claim are preferred by criminals. Contrary to what the anti-gunners would have the American public believe, these military look-a-likes are not fully-automatic military "assault weapons"; they are semi-automatics firearms, like the tens of millions of other semi-automatics owned by law-abiding Americans. These firearms fire a single round for each pull of the trigger. The gun prohibitionists want to ban guns that are similar to fully-automatic firearms only in appearance-not in function or rate of fire.

Anti-gunners like to mislead the public into believing that semi-automatic military look-a-likes have more firepower than other rifles. This is not true. In fact, most of the so called "assault weapons" use relatively low powered pistol cartridges such, as the 9mm. Those that do not use pistol cartridges, use rifle cartridges that are 1/2, or even 1/3, as powerful as a common hunting rifle cartridge. The anti-gunners in England are attempting to eliminate "deadly" shotguns. They have already banned semi-automatic and hunting rifles.

The term assault rifle was derived from the German expression "STURMGEWEHR," and it has 3 main characteristics. First and most important, "assault rifles" are capable of full automatic fire. The rifles used at the Stockton, California, schoolyard or the recent Louisville, Kentucky, shooting were semi-automatic. Second, they are chambered for so called intermediate sized cartridges, not pistol calibers. And finally, they must be lightweight, although there is no agreed upon standard in this area.

Semi-automatic-only versions of assault and battle rifles appear externally sinister to the uninitiated. There is no functional difference between semi-automatic rifles that trace their origins to military weapons and semi-automatic rifles designed for sporting civilian uses.

Bills are often introduced by representatives that are unaware that all semi-automatic firearms are identical in function and capability - they only differ in appearance. If I use my rifle for target practice and personal enjoyment then my so called "assault" rifle is in fact a "target or practice" rifle isn't it.

President Bush banned the importation of certain semi-automatic firearms. He did not prevent criminals and drug shippers from acquiring these firearms. He did not increase penalties for the possession of these firearms by criminals. He did cause the price of these firearms to double and triple in cost for those law abiding citizens who wish to legally purchase one of these "target" firearms. Bush seems to have possibly increased the product line of these aforementioned illegal shippers.

Everyone should do all that you can to prevent the erosion of our constitutional right to bear arms. I enjoy target practice with single shots, semi-automatics, and automatics. My friends also enjoy shooting these firearms and it would be a great loss if our legislature put an end to this hobby.

Less than 0.2% of the firearms and less than 0.4% of handguns will be involved in criminal activity in any given year. Survey research suggests that about 650,000 Americans every year use handguns for protection from burglars, robbers, rapists, assailants, would be murderers, etc.

Based on 1987 FBI Uniform Crime Reports, no gun law, in any city, state or nation has ever reduced violent crime, or slowed its rate of growth, compared to similar jurisdictions without such laws. With a virtual handgun ban, enforced with federal aid, violent crime rose in Washington, D.C., over twice as fast (48% vs. 22%, 1976-1982) as the rest of the nation. Chicago's (1982-1987) violent crime rate rose 150% while rising just 10% nationally. NYC now boasts 1/5 of the nation's gun-related robberies and more homicides than the total of 23 states. The two crimes most feared by Americans are murder in the course of another crime (50%) and robbery (43%) (1978 DMI poll); robbery and robber-murder rates are consistently higher in cities with restrictive firearms laws and/or hostile enforcement of such laws. (*FBI Uniform Crime Reports 1987*).

All criminologists studying the firearms issue reject simple comparisons of violent crime among foreign countries. (James Wright, *et al.*, *Under the Gun*, 1983). "Gun control does not deserve credit for the low crime rates in Britain, Japan, or other nations...Foreign style gun control is doomed to failure in America; not only does it depend on search and seizure too intrusive for American standards, it postulates an authoritarian philosophy of government fundamentally at odds with the individual, egalitarian...American ethos." (David Kopel, *Foreign Gun Control in American Eyes*, 1987). Gun laws and firearms availability have no relationship with murder or suicide rates. North-

"Americans have the right and advantage of being armed - unlike the citizens of other countries whose governments are afraid to trust the people with arms."

James Madison

ern Ireland, with a restrictive gun ban, has a murder rate higher than the U.S., Switzerland and Israel, with more households armed, have murder rates comparable to England and Japan - or lower.

England has twice as many homicides with firearms as before adopting its repressive laws; yet counters rising crime by increasing strictures on rifles and now on most shotguns. Yet during the past 12 years, handgun related robbery rose over 200% while dropping in the U.S.

Murder rates of Japanese-Americans, who have access to firearms, is even lower than the murder rate in Japan, where a virtual gun ban is in effect; Japan's suicide rate is twice as high as the U.S. rate. (*NRA Fact Card, 1989*).

A prisoner survey by the Rand Corp., James Wright *et al.*, finds that criminals are more afraid of being shot by victims than by police. Of career handgun predators 53% did not commit a specific crime for fear that the victim was armed. 57% of the predators surveyed were scared off or shot by armed victims; 88% think criminals will always be able to get handguns; absent handguns, 75% would use sawed-off shotguns. Unarmed felons listed tougher penalties for using a gun as an important reason for not arming.

It was estimated by the Rand Corp. survey that a burglar runs twice the chance of being shot by a victim as by the police. They also found that using a gun for protection from violent crime- rape, robbery, assault- reduces the likelihood crime will be completed and reduces the likelihood intended victims will be injured.

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"The Constitution shall never be construed...to prevent the people of the United States who are peaceable citizens from keeping their own arms."

Alexander Hamilton

RESOLVING CONFLICT THE PEACEFUL WAY

The means by which individuals communicate their thoughts and feelings and manage their differences largely determines how successful they will be in their personal and professional relationships. When people are troubled, pressured, and highly emotional, it is even more difficult to communicate clearly. In these situations, people need to be able to call upon a more sophisticated set of skills called conflict resolution skills.

This field of conflict resolution has been burgeoning in recent years. As Dr. George Lopez of Notre Dame University notes, there has always been a focus on the peaceful settlement of disputes in the international relations literature. Now a recent explosion in material available on mediation, negotiation, and conciliation emerges from a number of domestic developments and pressures arising from community disputes, environmental issues, and legal alternatives to courts.

Moreoever, educators and researchers have become more aware that the seeds of conflict become ingrained in children early. Old, hostile, nonproductive patterns of response to human conflict situations are passed on from generation to generation. The goal of new programs for children is to reach children early enough in their formative years so that they might come to understand how appealing human relationships can be when openness and honesty are coupled with creative approaches to problem solving.

The link to conflict resolution is direct: teaching parents the skills to create an environment where children are listened to taken seriously and affirmed for who they are and the unique contribution they make is the first step in preventing or resolving effectively any future conflict. A number of excellent resources are available.

The best overall book for the real "nitty-gritty" of conflict resolution is *Communication and Conflict Resolution Skills* (Kendall/Hunt, 1985) by Neil H. Katz and John W. Lawyer. This excellent book, which is suitable for classroom application (senior high or college), covers communication, information sharing, reflective listening, problem solving, assertion and conflict management.

Dr. Dudley Weeks' *Conflict Partnership* (Trans World Productions, 1984) describes 21 techniques for effective, nonviolent resolution of all conflicts- between individuals, groups, businesses, institutions, and governments. The conflict partnership techniques are also valuable as relationship patterns that can use differences among people for mutual growth.

Influencing with Integrity: Management Skills for Communication and Negotiation (Syntony, 1983) by Genie Z. Laborde is a more advanced book utilizing the understanding of neurolinguistic programming. She emphasizes special patterns of communication that help a person achieve desired outcomes in negotiation and personal relations.

How Should Congregations Talk About Tough Issues? (Tribune Media Services, Inc., 1988) by Richard G. Watts is a very informative little booklet which utilizes a 6, one-hour lesson plan format to discuss conflict and its resolution.

Getting to Yes (Houghton-Miffin, 1981) by Roger Fisher is a must. Fisher develops the practice of "principled negotiations" and "win-win situations." All the basics are in this popular little book.

Ronald S.Kraybill's *Repairing the Breach: Ministering in Community Conflict* (Herald Press, 1981) is a first-rate analysis of the role of outside observers in conflict and discusses the settlement of disputes involving police and communities, housing code authorities, and church groups.

Two books for conflict resolution with children, *A Manual on Nonviolence and Children and the Friendly Classroom for a Small Planet*, are excellent, chock full of hands-on exercises. The exercises include those for affirmation, communication, cooperation, and conflict resolution.

Raising Self-Reliant Children in a Self-Indulgent World: Seven Building Blocks for Developing Capable Young People (Prima, 1988) is a real gem. The book is a practical help on ways to work with children to promote learning, confidence, and mutual enjoyment. The inspiring formula helps develop closeness, trust, dignity and respect.

These resources are part of an exciting, creative approach to conflict that is not based on compromise or lessening of principle. On the contrary, interests and values are respected and usually the relationship is deepened. I recommend them highly for churches, schools and famillies.

PAT McCULLOUGH

Pat has been the Director of the Kentucky Council of Churches, Council on Peacemaking and Religion in Louisville, KY for the last 9 years. She has a masters degree in political science from U of L and is a part-time political science instructor at U of K. She has 4 children, ages 15-23.

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CASES OF NOTE... IN BRIEF

Ed Monahan

Revocation of Driver's License for Sex Offender is Unconstitutional
People v. Lindner, 535 N.E.2d 829 (Ill. 1989)

Daniel Lindner was convicted of sex offenses and was sentenced to 3 years probation. Illinois has a provision that requires revocation of a criminal's driver's license if convicted of certain sex offenses. The Court held that the defendant's driver's license in this case could not be revoked. "A driver's license is property interest for purposes of the due process clause." *Id.* at 831.

In order not to violate the due process guarantee, a statute must bear a reasonable relationship to the public interest intended to be protected, otherwise this is an unreasonable and arbitrary exercise of the state's police power. Here the public interest of the revocation statute was to keep the roads free of drivers who threaten the safety of others, who have driven illegally, or who have used a vehicle to commit a criminal act. *Id.* at 832-33.

The Court held that the revocation law did not bear a reasonable relationship to these interests since the defendant did not use a vehicle to commit the offenses. Revocation bears no relationship to the offense.

Condition of Probation Unreasonable
Beckner v. State, 373 S.E.2d 469 (S.C. 1988)

John Beckner pled guilty to distribution of marijuana, second offense, and received 10 years imprisonment, suspended upon the service of 5 years with 5 years probation. One condition of probation was that he not "be in a place of business that sells alcohol."

Recognizing that a sentencing judge has broad discretion to set conditions of probation, the Court held that the conditions must be reasonable and that this condition was unreasonable:

> While the challenged condition may have been reasonable at an earlier time, we do not believe that the condition is reasonable in today's society where alcohol is sold in a wide variety of businesses. The practical effect of the challenged condition is to prohibit petitioner from entering or working in virtually every grocery and convenience store in South Carolina. Additionally, it excludes petitioner from a large number of restaurants in this State. The burden imposed on petitioner by this condition is greatly disproportionate to any rehabilitative function it may serve. Therefore, it is our opinion that the condition is unreasonable.
> *Id.* at 469.

State's Destruction of Taped Statements of Victim
State v. Williamson, 540 A.2d 386 (Conn.App. 1988).

Anthony Williamson was convicted of 1st degree robbery. The victim reported the crime by calling the 911 emergency number. The call was tape recorded and then erased 38 days later according to standard police procedure. The victim went to the police station and she gave a statement under a peculiar procedure. The officer asked the questions on tape; turned the recorder off while the victim answered, and then turned the recorder on while rephrasing her answer. The victim did not listen to the tape. The tape was transcribed and destroyed. One day before trial the victim read her transcribed statement and verified its accuracy. The Court held that the 911 tape recording and the victim's tape recording were statements within the meaning of the discovery rule. Id. at 388.

"Statements of potential witnesses which may be required to be produced and made available to the defense in a criminal trial must be preserved.... In this case, it was foreseeable by the state and its agents that the victim's recorded statements would be required to be produced in the event of trial. The police, therefore, were required to preserve the statements..." *Id.*

The Court held the intentional destruction of the tapes in this case to be in bad faith:

> The present case does not involve negligent destruction but, rather, involves intentional destruction. The 911 tape and the tape recording were destroyed in accordance with standard police procedure. The mandatory provisions of the rules of practice and the General Statutes have been rendered ineffective by the state's intentional conduct in erasing discoverable material after sufficient and exhaustive warnings to comply with these provisions have been issued. Such violations can no longer be considered conduct performed in the absence of bad faith.
> *Id.* at 389.

The burden to show that there was no prejudice from the destruction is on the state since it acted in bad faith. *Id.* at 390. The court held that the inconsistencies of the victim were extensive and that the state had not proven the harmlessness for the defendant not to have the most concrete from of her prior statements. *Id.* at 391.

State's Duty to Collect Favorable Evidence
Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989)

Charles Miller was convicted of assault with a deadly weapon, with prior serious felony enhancement and sentenced to 14 years. The victim informed the investigating policeman that the coat she was wearing during the attack had a spot of blood on it. The policeman never collected the jacket. She washed it a few days later.

The 9th circuit held that the bad faith failure to collect evidence that is potentially favorable violates the due process clause, and that the federal district court had to reconsider the evidence of bad faith. *Id.* at 1102-21.

Brady Materials of Prosecution Witness
United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988)

Ronald and Carla Strifler were convicted of attempting and conspiracy to manufacture and distribute methamphetamine.

The 9th circuit held that the trial judge improperly failed to release *Brady* information prior a prosecution witness' probation file - the witness' entire criminal record, information about motives to inform on the defendant, previous over compensation by the witness for problems, longstanding financial needs of the witness and reports of repeated lying to authorities. "The trial court must release what it finds relevant, material and probative as to the witnesses credibility." *Id.* at 1202.

ASK CORRECTIONS

Shirley Sharp

Lately, Ask Corrections has received a number of inquiries concerning questions asked in previous issues. To make the column more useful to the reader, an index to all questions which have appeared in "Ask Corrections" since its beginnings in April, 1987, has been compiled for this issue.

Concurrent and Consecutive Sentences

The effect of state time running concurrent with federal time; June '87, p. 39.

The effect of state time running with another state's time; June '87, p. 39.

The effect on simultaneous consecutive sentences from different jurisdictions when one sentence is reversed and no retrial is ordered; October '88, p. 45.

The effect on staggered consecutive sentences if the first sentence received is reversed and no retrial is ordered; October '88, p. 45.

Controlled Intake

How jail time, good time and parole eligibility dates are calculated for a controlled intake inmate; October '87, p. 38.

How parole eligibility dates are calculated and where parole eligibility hearings are held for a controlled intake inmate; October ' 88, p. 38.

How to obtain a resident record card; December '87, p. 50.

Parole eligibility for an inmate in controlled intake with a sexual offense who is required to complete a treatment program pursuant to KRS 439.340(10).

Calculating jail credit and sentence credit; August '89, p. 48.

Merit time and good time; August '89, p. 48.

Good time and jail time; February '90, p. 72.

Expiration Dates

Expiration dates defined: Normal maximum expiration, adjusted maximum expiration and conditional release date; August '87, p. 37.

Normal adjusted expiration date and conditional release date explained; February '90, p. 72.

Inmate Files

How to obtain documents from an offender record file; December '87, p. 50.

Intensive Supervised Parole

Intensive supervised parole (ISP) defined; October '89, p. 53.

How to determine eligibility; October '89, p. 53.

Interstate Agreement on Detainers (IAD)

Procedures when inmate requests disposition under IAD; October '89, p. 56.

Procedures when prosecutor requests disposition under IAD; December '89, p. 56.

Where to obtain IAD forms; December '89, p. 56.

Parole

When does time start accruing for a client arrested for a technical parole violation; April ' 87, p. 30.

Parole eligibility on a new sentence committed while on parole; June ' 87, p. 39.

List of crimes with 50% parole eligibility or 12 years if life sentence; August '87, p. 37.

When is a client's parole finally revoked; October '87, p. 38.

How parole eligibility is calculated for a controlled intake client and where are the hearings held; October ' 88, p. 38.

Parole Board membership, who and how many; February '88, p. 34.

What is the difference between release from parole supervision and final discharge from parole; February '88, p. 34.

How parole eligibility is determined for a client who is given a deferment and later receives a sentence for a new charge; April '88, p. 39.

How parole eligibility is determined for a client who is returned as a parole violater, is given deferment and then receives a new sentence; April '88, p. 39.

What is the effect on parole for a client who is given a serve out and then receives a misdemeanor or felony sentence based on a charge committed while in the institution; April '88, p. 39.

Automatic parole violation pursuant to KRS 439.352 no longer valid; June '88, p. 34.

This regular *Advocate* column responds to questions about calculation of sentences in criminal cases. Shirley Sharp is the Corrections Cabinet's Offender Records Administrator, State Office Building, Frankfort, KY 40601. For sentence questions not yet addressed in this column send to Dave Norat, DPA, 1264 Louisville Road, Frankfort, KY 40601.

Decision invalidating KRS 439.352 is not retroactive; June '88, p. 34.

What happens when a parole is violated due to a new sentence and the jail time on the new sentence exceeds parole eligibility criteria; June '88, p. 34.

Effect of KRS 439.340(1) on parole eligibility for a kidnapping offense where there was no serious physical injury; August '88, p. 49.

How does Offender Records determine if a charge involves serious physical injury; August '88, p. 48.

How does a charge of criminal attempt affect parole eligibility pursuant to KRS 439.340(1); August '88, p. 48.

Eligibility for capital murder with a sentence of 180 years; October '88, p. 45.

What effect does the sexual offender treatment program have on parole eligibility for controlled intake inmates; April '89, p. 36.

What effect does KRS 439.342 have on the length of parole supervision when a client has less than twelve months remaining to serve on a paroled sentence.

What is the difference between release from parole supervision and final discharge; February '90, p. 72.

Parole/Jail Time Calculations

Jail time calculation errors; August '87, p. 37.

How jail time, good time and parole eligibility are calculated for controlled intake inmates; October '87, p. 38.

Difference between jail credit and sentence credit for controlled intake prisoner; August '89, p. 48.

Merit time and good time for controlled intake inmate; August '89, p. 48

Good time and jail time calculations for controlled intake inmates; February '90, p. 72.

Persistent Felony Offender (PFO)

The effect of a PFO conviction on total time to serve and parole eligibility when received while on parole; April '87, p. 30.

Total time to serve and parole eligibility for a client sentenced to multiple consecutive PFO first degree convictions; April '87, p. 30.

Resident Record Card

What is a resident record card and how to obtain one if the inmate is in prison; December '87, p. 50.

Automatic receipt of a resident record card by an inmate; December '87, p. 50.

How a controlled intake inmate can receive a resident record card; December '87, p. 50.

Defining the terms adjusted maximum expiration date, conditional release date and final discharge from parole; April '89, p. 36.

How to obtain a resident record card while in jail; February '90, p. 72.

Sentence Calculations

Calculating total time to serve when serving simultaneous consecutive sentences from different jurisdictions and one sentence is reversed and no retrial is ordered; October '88, p. 45.

Calculating total time to serve when serving staggered consecutive sentences and the first sentence is reversed and no retrial is ordered; October '88, p. 45.

Calculation of expiration dates: Normal maximum, adjusted maximum and conditional release date; August '87, p. 37.

Explanation of normal, adjusted and conditional release dates; February '90, p. 72.

Family of slain man sues police

By Jeanne Houck
Kentucky Post staff reporter

Relatives of a man who was stabbed to death by a woman he lived with have sued the city of Covington, its police department and three officers.

The daughter and mother of Lester David Roberts say in a suit filed in Kenton Circuit Court that Roberts was killed as a result of negligence on the part of Officer Dan Furnish, Patrolman Anthony Williams and Sgt. James Liles, who responded to three domestic dispute calls that preceded the slaying.

Roberts' daughter, Deborah Tobertge of Elsmere, and his mother, Florence Roberts of Covington, say the officers failed to use all reasonable means to prevent further abuse, as required by state law.

They also contend that the officers intentionally delayed responding to the third call to Roberts' home on Promontory Drive last Feb. 7.

The two are asking for an unspecified amount of compensatory and punitive damages in the lawsuit, which was filed by Cold Spring attorney Robert Blau.

Roberts, 57, died of a stab to the heart. The woman he lived with, Mary Ann Marshall, 34, pleaded guilty to a charge of second-degree manslaughter, and Kenton Circuit Judge Daniel Goodenough sentenced her in December to eight years in prison.

Former Police Chief Al Casson brought administrative charges against Furnish and two other officers not named in the lawsuit after the stabbing.

Casson said Furnish performed poorly and Sgt. Paul Flinker and Lt. Charles Mitchell failed to follow up properly as supervisors. Furnish, who also faced charges from several other incidents, was suspended for 30 days. Departmental charges against Flinker were later dropped and Mitchell retired.

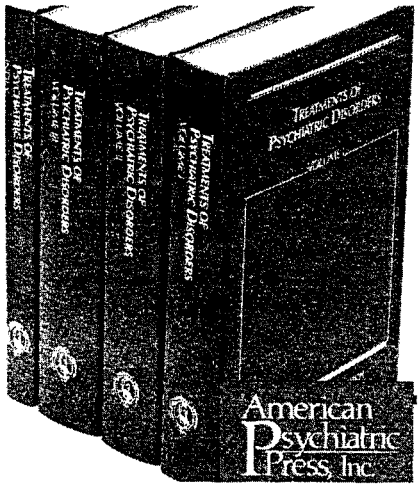
City Attorney Joe Condit said Wednesday the city, which would investigate the lawsuit, was not negligent: "There were some allegations made regarding whether or not a supervisor should have come to the scene.

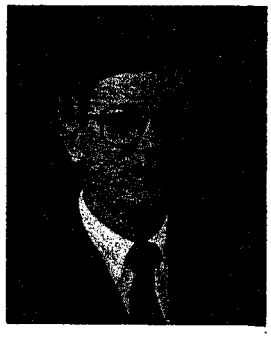
"That had more to do with intra-departmental policy, rather than any acts that would have affected whether this person would have been stabbed or not."

***The Kentucky Post*, February 8, 1990. Reprinted with Permission.**

BOOK REVIEW

Treatments of Psychiatric Disorders
May 1989
American Psychiatric Press, Inc.
$250.00





William Weltzel

What's afoot? When both the prestigious professional journal *Science*[1] and the up scale, trendy monthly *The Atlantic*[2] take note of the publication of a psychiatric treatment manual, something newsworthy has happened. This 4 volume, 3068 page, hard cover set is intended as a companion to that procrustean nosological text, *Diagnostic and Statistical Manual III-Revised (DSM III-R)*. The latter text lists all the legitimate, recognized psychiatric disorders treated by American psychiatrists and other mental health clinicians.

Treatments of Psychiatric Disorders arrived in May 1989, ahead of its time but already obsolescent in its application. In 1982, the first efforts to develop a treatment manual began amidst a chorus of concern that psychiatry was more art than science and couldn't/shouldn't be limited by boundary definitions. Motivation for the project derived from widely shared concerns that a lucid, evenhanded description of current treatments did not exist. Benefits would follow for psychiatrists and research pursuits if such a compendium were written. Dr. Byram Karasu of Albert Einstein College of Medicine in New York City accepted the role of Task Force Chairperson and eventually engaged 679 experts to contribute.

During gestation, this opus was conceived of as an official American Psychiatric Association document. As the work product moved laboriously toward publication, alarm grew among rank and file psychiatrists that attorneys and third party payors would seize on recommendations and clobber those whose practice deviated. Balloting determined that this would be a Task Force report and is not an official position statement. Each volume begins with a disclaimer that the chapters do not represent statements about standard of psychiatric care.

The tone of the work product is set with the dictum, "Science provides only interim knowledge." Different presentations are organized into 26 sections with 263 chapters authored by single or multiple contributors. The reader is presumed to possess specialized training in psychiatry which provides a body of knowledge and acquired clinical skills. This is a different expectation from the perspective of a traditional textbook like *Comprehensive Textbook of Psychiatry-V (CTP-V)*[A review of the *Comprehensive Textbook* appears in the October, 1989 *Advocate*, Vol II, No. 6 at pp. 54-55].

The authors started with a clinical model that assumes that a patient with specific characteristics can be diagnosed with a given disorder or combination of disorders as described in *DSM III-R*. Experienced clinicians describe preferred treatments and/or combinations as well as acceptable alternatives and possible adjunct treatments. Integration of a biopsychosocial perspective into one chapter involving multiple points of view was made the goal. Sometimes, this approach proved not to be feasible. Then, multiple chapters were included from diverse perspectives. An example of this format involved discussion of alcoholism from vantage points including the use of medication, individual psychotherapy, family therapy, group therapy, and behavior therapy. Site specific chapters about alcoholism include office management, hospitalization, community based treatment, Alcoholics Anonymous, and Employee Assistance Programs in industry.

Dr. Karasu stresses that this effort is a professional document developed to aid in suggesting treatment for psychiatric disorders and as an aid for treatment plan-

PSYCHIATRISTS GET TREATMENT MANUAL

A task force of the American Psychiatric Assn. has recently produced a weighty new manual, the first of its kind, to serve as a guide for the treatment of mental disorders. The 4000-page, 4-volume opus is designed as a companion to psychia-try's diagnostic bible, the DSM III-R.

The undertaking was 7 years in the making under the direction of T. Byram Karasu of the Albert Einstein College of Medicine. A distillation of knowledge about what works for what disorders, the treatment standards represent the consensus of 28 committees and 400 consultants.

The work has drawn criticism from those who regard psychotherapy as still more of an art than a science and who fear the guide will dampen innovation and discourage the exercise of discretion by individual therapists.

The treatment manual's editor, Karasu, also appears to have bruised some egos at the American Psychological Association. Russ Newman, an association executive, is quoted in its newspaper, the APA Monitor, as being particularly annoyed with a comment by Karasu that "non-physician therapists, who can't prescribe the medication, tend to improvise therapeutic acrobatics that may not be appropriate." Most psychologists are not physicians.

The four-volume set, Treatments of Psychiatric Disorders, is available for $250 from the American Psychiatric Press, 1400 K Street, NW, Washington, D.C. 20005.

1 Research News article, Vol. 245, Pp. 934, 1 Sept. 1989, "*Psychiatrists Get Treatment Manual.*" Crawford, M. Copyright by the AAAS. Reprinted with permission.

ning. Time will tell which therapeutic approaches are best after use by individual practitioners who employ clinical judgment, experience, and assessment of evolving scientific literature.

Treatments of Psychiatric Disorders is aptly titled. It does not deliver the encyclopedic description of a topic that a textbook conveys. It presumes that you know how to use *DSM III-R* to reach a likely diagnostic description for a patient. How to return your patient to independent functioning and to control symptom expression stack up as the text's intent. Cure is an elusive goal for psychiatry as well as the rest of medicine.

Obsolescent in its application? These volumes serve me well as a reference in my role as treating physician but the times call for more.

In the fall of 1988, when the responsible American Psychiatric Association components gave the go ahead for publication, some members feared the misuse of this text by attorneys and insurance companies. Hence, the disclaimer that the effort is not an American Psychiatric Assn. policy document and is not to be construed as a standard for psychiatric care.

As I write this review in the early spring of 1990, the consensus has changed. Recently enacted Medicare legislation will determine new rules for physician fees. Health care delivery corporations are engaged in vertical integration. Managed care intrusions are coming like a tidal wave for both inpatient and outpatient settings. The times require psychiatry to set carefully delineated parameters for delivery of different types of treatments. The American College of Physicians and The American Academy of Neurologists already issue official position statements about treatment matters. Members of these 2 organizations support this activity.

It is likely that there will be more efforts like *Treatment of Psychiatric Disorders* in the future. Subsequent editions will be more rigorous and specific about what works and what shouldn't be tried. It is easy to be nostalgic about the old days when America could pay for anything. No more.

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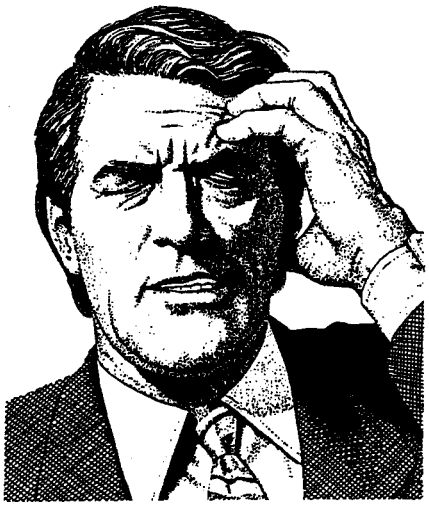
FOOTNOTES

[1] Crawford, MH: "Psychiatrists Get Treatment Manual." *Science* 245: 934, 1989.

[2] *Alper, J: "Order on the Couch." The Atlantic, May, 1989, pages 24-30.*

DPA's Library has all of the books discussed in this review. Contact DPA's Librarian, Tezeta Lynes, for access to them.



One in 5 people will have a mental illness at some point.

Nearly 13% of U.S. citizens suffer from a mental disorder.

10 million Americans have some form of depression, 12 million have a phobia, 1.5 million are schizophrenic, 2.4 million suffer from obssessive-compulsive disorders and 1.5 million have panic disorders.

LEWIS L. JUDD, M.D.
Director
National Institute of Mental Health

QUESTIONS, ANSWERS ON POSTWAR DISORDER

Question: What is post-traumatic stress disorder?

A: A mental condition suffered by victims of combat or other conditions of extreme stress. Symptoms include recurring memories of horror; anxiety; numbness; insomnia; guilt; inability to concentrate.

It was identified by the American Psychiatric Association in 1980.

Q: How many Vietnam veterans have the disorder?

A: Fifteen percent, or 470,000 of the 3.14 million men who served in Vietnam and about 7,000 women, mostly nurses, according to the National Vietnam Veterans Readjustment Study. About 18,000 including 400 in Kentucky, have been granted disability compensation.

Q: Do other people besides Vietnam veterans get post-traumatic stress disorder?

A: Yes. Almost anyone who experiences war, criminal assault, disaster or torture shows some symptoms of post-traumatic stress.

Q: What is the treatment?

A: There is much uncertainity about the best form of treatment, especially for chronic and severe cases. Treatment involves psychotherapy, individual and family counseling, relaxation training and desensitization. Some victims require medication. People with chronic cases tend to become easily addicted to drugs, so some psychiatrists are cautious about prescribing tranquilizers.

Q: What services are available in Lexington?

A: The Vet Center at 1117 S. Limestone Street offers counseling. The Lexington VA Medical Center has a mental health outpatient clinic and separate outpatient counseling groups for Vietnam combat veterans and their wives at Leestown Road and a 29-bed inpatient unit at Cooper Drive.

FUTURE SEMINARS

NLADA DEFENDER MANAGEMENT SEMINAR
May 31- June 2, 1990
Philadelphia, PA
(202) 452-0620

DPA 18TH ANNUAL PUBLIC DEFENDER SEMINAR
June 3-5, 1990
Lake Cumberland State Park
(502) 564-8006

DPA TRIAL PRACTICE INSTITUTE
October 28-Nov. 2, 1990
KY Leadership Center
Faubush, KY
(502) 564-8006

4TH KACDL ANNUAL SEMINAR
December 7 & 8, 1990
Louisville, KY
(502) 244-3770

VORP GATHERING; THE ANNUAL CONFERENCE OF THE U.S. ASSOCIATION FOR VICTIM-OFFENDER MEDIATION
June 28-30, 1990
Louisville, KY
(219) 293-3090

Bar committee to study public defender system

The Northern Kentucky Bar Association (NKBA) announced the formation of a Blue Ribbon Committee to study the Northern Kentucky Public Defender System.

This Committee will identify problems with the current systems and formulate recommendations which will be acceptable to the community, the courts and the various governmental bodies involved. The Committee will be meeting on a regular basis beginning March 13, 1990.

The Blue Ribbon Committee co-chairs are Judge Bernard J. Gilday, Jr., a former Cincinnati criminal attorney, now an Administrative Law Judge with the Department of Labor; and Kenneth L. Lucas, CLU, CIGNA Financial Services. Lucas is also currently serving as Regent of Northern Kentucky University and as President of the NKU Foundation.

The committee members are: Judge-Executives Bruce Ferguson (Boone), Clarence Davis (Gallatin) and Ken Paul (Campbell); Commissioner Charles Summe (Kenton); County Attorneys Larry Crigler (Boone), Stephen Huddleston (Gallatin), John Elfers (Kenton) and Paul H. Twehues (Campbell); Commonwealth Attorneys Donald Buring (Kenton), William Mathis (Boone) and Louis Ball (Campbell); Judge Joseph Bamberger representing the District Judges; and Judge Raymond E. Lape representing the Circuit Court Judges; Public Defender Trustees Robert Carran, David Davidson and John G. Patten, Jr.; Martin Sheehan (Legislator); NKBA members Beverly R. Storm, President, and Arnold Taylor.

Community Representatives are Arnold Simpson, Covington attorney; Roy A. Cotcamp, Proctor & Gamble; Brother John Murphy, Florence Christian Church; Albert Howe, former Sheriff of Campbell County; Chamber of Commerce Chairman John Finnan and Judy Clabes, Editor of the Kentucky Post.

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