THE ADVOCATE

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

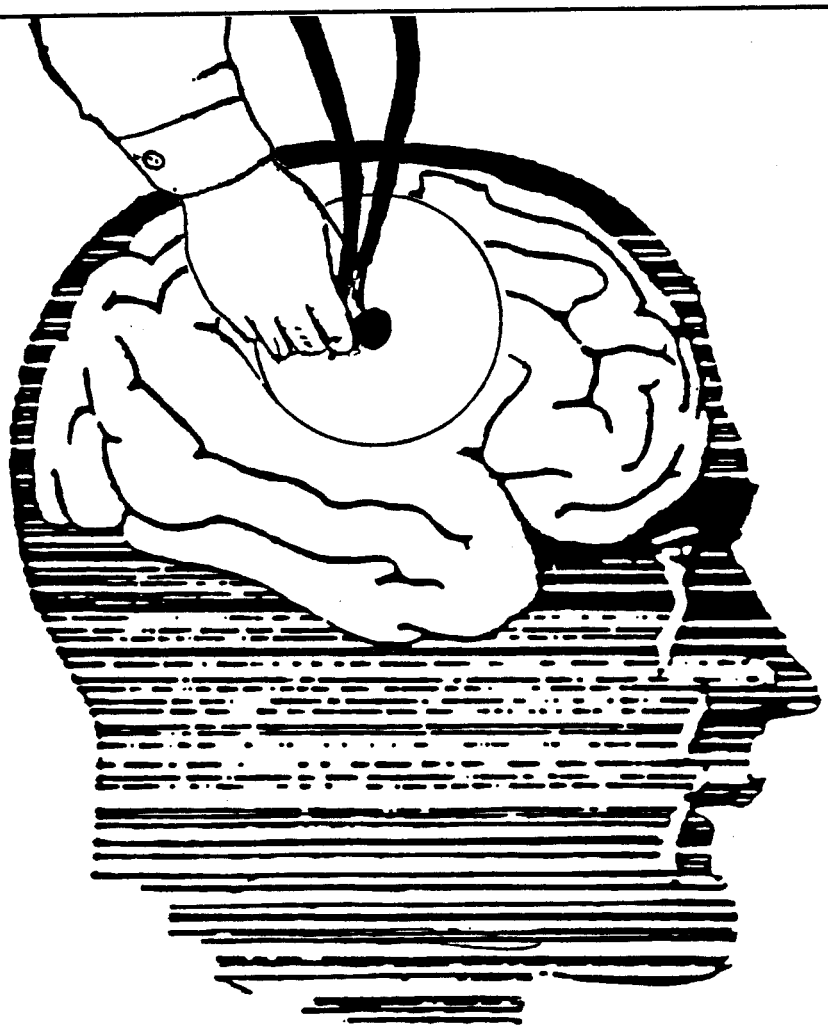

Illustration by Mike Reedy

The Competency of Mental Health Examinations

Volume 12, Number 5 August, 1990

From the Editor:

It rests within our skull's bony armor. Our brain. Enormous in power, ever complex. We are defined by it. Ironically, when something goes awry with it which causes a criminal act, the brain is overlooked as an explanation. Public defenders and criminal defense attorneys too often do not explore the true causes of a client's acts. Prosecutor's discount mental disorders. Juries seldom have illnesses of the mind explained to them, and too often judges order punishment without taking into account the cause of the criminal behavior. The corrections system hardly ever treats the mind, seemingly satisfied with warehousing inmates. Fellow citizens are being executed without full explanation and presentation of the influence of the mind on their acts.

The Advocate is trying to better educate our readership on the *meaning of the mind.* Some of the articles featured to this end during the last year are: 1. *Battered Women Syndrome* (8/1989) 2. *Battered Parent Syndrome* (10/1989) 3. *Your Mental Health Expert is Confused* (10/1989) 4. *Corrections Statistics on Mentally Ill Inmates* (12/1989) 5. *Obtaining Funds for Experts* (2&4/1990) 6. *Incompetency in the Mentally Retarded: The CAST-MR* (6/1989) 7. *Treatments of Psychiatric Disorders* (4/1990) 8. *The Comprehensive Textbook of Psychiatry* (10/1989) 9. *A Look at the Relationship Between Anger and Aggression* (6/1990). This issue we continue to emphasize the critical nature of understanding how problems with the brain can explain our client's acts with a feature article by John Blume.

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.

Edward C. Monahan, Editor 1984-Present
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IN THIS ISSUE

FEATURES

MENTAL HEALTH ISSUES IN CRIMINAL CASES 42
COMPETENT COUNSEL: LETTERS TO THE EDITOR 4
DPA & THE 1990 LEGISLATURE: FUNDING RESOURCES 7
PUBLIC DEFENDER BAKESALE TO RAISE FUNDS 11
FRANKLIN CO. DEFENDERS QUIT 13
BETTE NIEMI RESIGNS 14
ABA PRESIDENT, STANLEY CHAUVIN AT DPA CONFERENCE 15

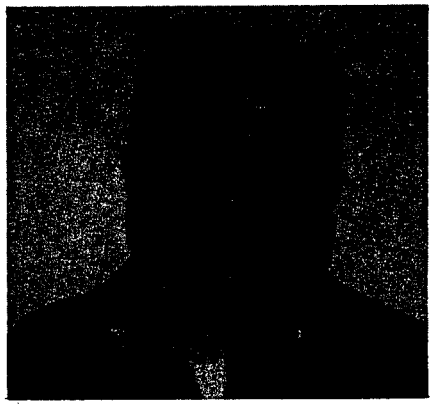
REGULAR COLUMNS

The Advocate Features: Hugh J. Convery 3
West 's Review 18
Death Penalty: Impact of Race on the Death Penalty in Kentucky 22
Racial Climate in Shelbyville 25
Involuntary Hospitalization of the Mentally Retarded 26
Doe v. Cowherd (formerly *Doe v. Austin*) Update 28
Sixth Circuit 29
Plain View: Death Throes of the 4th Amendment? 30
Juvenile Law: Sex Offender Label 36
Evidence: Kentucky's New Evidence Code, Part 3 38
F.Y.I. : Procedures, Practices, and Issues of Interest 41

TRIAL TIPS

Daily Events Shape a Child's Life 47
Addiction: No Quick Fixes 49
Drug Schedule: By Schedule & Alphabetically 51
Drug Chart: Crimes and Penalties in KRS 218A 58
Legislative Highlights: Criminal Law Legislation 61
Alternative Sentencing Plans 65
1990 Annual DPA Conference 67
Ask Corrections 37

THE ADVOCATE FEATURES



Hugh J. Convery

Hugh J. Convery joined the Department in December, 1988. He is the Director of the Morehead Post-Conviction/Trial Office with a staff of 2 legal secretaries, 4 attorneys, a paralegal and an investigator. The office is still one attorney short. The Morehead office covers Rowan, Carter, Elliot and Morgan Counties and includes the new Eastern Kentucky prison.

Originally from Cleveland, Ohio, Hugh left the area after high school joining the army where he served as a supply officer for three years. From 1965-67 he worked as an insurance claims adjuster, a claims examiner, and later as a staff claims representative for Allstate Insurance Co. in Cincinnati, Ohio while attending the Salmon P. Chase Law School at night. He graduated from Chase in 1964. Hugh began working as an attorney for the Dept. of Highways in Frankfort in 1967 and in 1968 was moved to the district office in Madisonville. He was elected Hopkins County Attorney from 1969-73. He was appointed City Attorney in 1973 by Mayor Curtis McCoy, who appointed him to serve as Madisonville City Judge from 1973-76.

He is an "old hand" at criminal defense work having been in private practice from 1975-1988 with an estimated 35% of his practice in criminal law. Ron Butler was his partner from 1978-85. Ron is now with the firm of Bussey, Horn, Hayden & Butler in Lexington.

Hugh described the difference between his private cases and the public defender work as being a matter of use of time, and not having the worries that private practice brings, such as meeting bills. "As a general practitioner, you have to give your time to other cases that are just as important or place demands on your time. There are many instances when you find yourself at trial and while your intentions were good, you really didn't put the amount of time into the case you wanted to due to time and other constraints." Hugh particularly liked to try felony cases. His enjoyment of the criminal defense practice led him to seek a position with the Department. Recognizing his experience and leadership, he was appointed to the Morehead Office.

Hugh intends to stay with DPA until retirement. In a Department where there is an incredible amount of turn-over, that's a rarity. Most attorneys are hired newly out of law school and they stay with the Department long enough to get some experience before moving on. Particularly in Eastern Kentucky, it is hard to keep an office fully-staffed due to the geographic isolation of the region and the relative youth of newly hired attorneys. Most favor urban areas.

Hugh has demonstrated an unwavering commitment to the defense of the poor.
- Allison Connelly, Regional Supervisor of the Morehead Office.

Hugh admitted he was concerned at first about the age differential, but has found that younger attorneys seek him out for advice and help. Learning can go both ways with the proper attitude. Hugh sees trial work as a creative process and particularly benefits from the enthusiasm and creative approaches utilized by new attorneys. He's found their suggestions work.

Hugh is commited to service of the poor. Hugh looks to the model of Jesus Christ to love and attend to the needs of the poor and under-privileged. His faith led him to do public defender work and it sustains him. He says: "Every client deserves a good defense regardless of his status in life, ethnic origin, personality or mental defect."

He is a practicing Catholic and is involved in Cursillo training which is a weekend retreat to bring recommitment to the Catholic faith.

When Hugh joined the Department in December, 1988, he was separated from his wife, Sandra and their youngest child, Shannon Lynn, age 15, for a period of 5 months, as they attended to matters in Madisonville, regarding the sale of the family home and business.

Hugh has two other children. Hugh John, age 27, received a fellowship to study International Relations at Tulane University. He just received his MA. Heather Joy, age 20 is a junior at the University of Kentucky studying sociology.

Now the Convery family-base has relocated to Morehead. Hugh is very family-centered. He hasn't had a great deal of trouble making the demands of his job and the time he needs to devote to his home life work. Often he combines the two by having staff members over to his home.

Hugh said of the Morehead office, "I am really happy with the office now that we've moved to a new location. Everyone seems to be getting along fine, and all of the attorneys show a lot of potential in the work they're doing. The secretaries are terrific. Lynn Toy, the paralegal is great. The new investigator has already done a terrific job." As in the best leaders, Hugh leads by example, and with a full heart.

CRIS BROWN

" I've known Hugh since he began practicing law and he's a very successful criminal defense lawyer. He has a knack for criminal cases. During his private practice, he had some big murder cases where he received acquitals. He is very effective. He's a conscientious lawyer and always does a good job.

Hugh wanted to be a professional golfer at one time, but his love of the law led him to concentrate on that. I wonder how far he could have gotten if he'd stayed with golf. He sure could have made more money, but he loves the law, and I'd say he's never regretted his choice. He enjoys his work with the state and has won most all of his cases. You're lucky to have him. He's a super fellow. "

- Hon. William Whitledge
Madisonville Attorney

LETTERS TO THE EDITOR

Competent Counsel - A Life & Death Matter

April 19, 1990

Dear Director of DPA Capital Litigation:

I believe I understand why you wrote the article on attorneys who are willing to take death penalty cases. I assume it is to show the need for more funding to hire competent lawyers to handle death penalty cases.

I may be in "error", but I doubt the department will ever be awarded funds for death penalty cases which can compete with private attorney fees. It is extremely difficult for us to find conflict attorneys to handle any cases for us, much less death penalty cases. A private attorney who is willing to take such a case is a rarity in this area, and I believe it would be a gross error to assume the attorney took the case "for the money." Your article may have made finding attorneys to help us an impossibility. If you recall, our office tried to call on your "major litigation" section to take the Robert Alan Smith case. Since we were denied counsel from our own Department, how dare you impede our ability to get private attorneys who are willing to come to our aid.

Tip Reed is a brilliant attorney. If I, or any member of my family, were in criminal trouble, Tip Reed is the defense attorney I would want. Did you ever question Mr. Reed on why he chose not to use Smith's psychological?

Your comparison with the Sommer's case was unfairly misleading. Granted, Mike Williams was able to scare Mark Bryant out of asking for the death penalty but, what the hell do you call the 1,000 years you failed to mention? "Term of years" is a little misleading, wouldn't you say? At least Robert Alan Smith gets all the appellate rights that come with a death penalty. By the way did Rex Duff have anything to do with Sommers case?

Yes, I'm writing this letter before I cool off. If I waited, I might get too busy to do what I know should be done. You have done a grave disservice to Tip Reed and to our office.

Patricia J. Byrn
Assistant Public Advocate
Paducah

May 8, 1990

Dear Editor:

When I began my employment with the Department of Public Advocacy, an attorney in the office who had been with the Department for approximately 5 years told me that the Department of Public Advocacy, "eats its young." It appears that the Department's appetite has now expanded to include competent conflict attorneys. This is in reference to the recent article in *The Advocate*, Volume 12, No. 3, April, 1990, written by Neal Walker. The content of this article deeply concerns me and I feel it necessary to respond for my sake and the sake of other attorneys that may be requested to provide assistance to this department.

I am not naive enough not to understand the motivation behind Mr. Walker's article. The Department is presently lobbying the legislature, along with many other strong-interest groups for funds to provide the support we need in capital litigation. However, the Department of Public Advocacy does not do only capital litigation. The Department of Public Advocacy is the keeper of our constitutional rights whether we are an accused citizen or an employee of this department. Mr. Walker has ignored the facts surrounding the cases mentioned in his article and he has unfairly and falsely represented the excellent capabilities of one of our best conflict attorneys, L. M. Tipton Reed, Jr.

The Honorable L. M. Tipton Reed, Jr., represented Robert Allen Smith in the McCracken Circuit Court on charges of Murder and First Degree Arson arising out of the death of a Pamela Wren. Mr. Smith was sentenced to death on January 24.

Mr. Walker's article states that Mr. Reed's law license had been suspended for approximately 3 years by the Kentucky Supreme Court. Mr. Walker is raising the question of the adequacy of representation that Mr. Smith received due to the fact that his attorney had at one time been suspended from the practice of law. The article leads you to believe that but for, the trial attorney's license being suspended, Robert Allen Smith would not have received the death penalty. However, Mr. Walker did not discuss with the trial attorney his procedures at trial or his reasons for presenting any of the evidence on behalf of Robert Allen Smith, or not presenting evidence on behalf of Robert Allen Smith.

Mr. Walker failed to mention in his article that a client that he represented in a capital case also received the death penalty. This conviction increased the percentage of women on death row 100%. No one wrote an article questioning Mr. Walker's adequacy as a trial attorney. No one wrote an article giving his client grounds for post-conviction relief. No one wrote an article exposing any personal tragedies of Mr. Walker's that would have caused his client to receive the death penalty.

Walker's article indicates that if the trial attorney had not been previously suspended from the practice of law, if the trial attorney had presented mitigating evidence at the penalty phase, and required the presence of the Defendant during the penalty phase, that Robert Allen Smith would not have received the death penalty. Did Mr. Walker poll any of the jurors that sentenced Robert Allen Smith to death?

Had he polled the jurors, he would have discovered their reasons for sentencing the Defendant to death. The jurors wanted to ensure that there would be no possible way that Robert Allen Smith would ever be released from prison. When they agreed on a death sentence, it is my

opinion, that they sentenced him to death in the "abstract." It has been a long time since there had been an execution in Kentucky. Many jurors feel that even though they issue a sentence of death, that the individual they are sentencing will probably never actually be executed. The death sentence will only ensure that that person be incarcerated for the rest of their natural lives. Many jurors personally fear for their safety and want to make sure that this person can never harm them or any of their families. Jurors do not feel that a death sentence actually means that that person will die.

The article proceeds to compare the adequacy of the representation of Robert Allen Smith with the adequacy of the representation of David Sommers. David Sommers was not given the death penalty and Mr. Walker would have you believe that the reason David Sommers did not receive the death penalty is because he had adequate representation. The aggravators in the case of David Sommers were weak compared to the Smith case. It was medically established that arson was not the cause of death to the victims. I was personally appalled at the fact that Mr. Walker used information that he had received from the *Paducah Sun* rather than researching the true facts of the case as a basis for his comments on the similarity of these two cases. Also Mr. Walker failed to mention the other attorney that was involved in the David Sommers case other than Mike Williams. Mr. Walker also failed to mention that the major litigation division of the Department of Public Advocacy had failed to respond affirmatively to the request by the Paducah Office for assistance in the Robert Allen Smith case.

I sit here wondering who will be next? I wonder about cases that I have handled and whether I will become the target of an article in *The Advocate*. Mr. Walker has unfortunately underestimated the political influence of persons other than himself in influencing any type of funding for major litigation. I myself am withdrawing any type of support that I have pending a retraction from Mr. Walker of his article. He has with the stroke of a pen, alienated many competent private attorneys from involving themselves in capital litigation for the Department of Public Advocacy. He has also alienated attorneys within the Department of Public Advocacy from putting themselves on the line for a client that has been charged with a capital offense. Who will the Department of Public Advocacy eat next?

Katherine Converse Burton
Assistant Public Advocate
Paducah

TO BE OR NOT TO BE MARK ANTONY?

Dear Editor Ed:

Many could disagree with your decision to print the letters from Burton and Byrn from the Paducah office, mostly because they made such a low brow attack on *The Advocate's* article on this decade's first death sentence, which incidentally occurred in their jurisdiction and thus on their watch. Their *ad hominem* attacks on the author were not intellectually sound and are scary in their implications. Nevertheless, I understand your reasoning (that education occurs through this kind of debate), so print the letters, and extend the same right to this rebuttal.

There's a lot to rebut here. How does one demonstrate the weakness of an argument that starts with the premise that we must accept that indigents will never be represented by attorneys who are as adequately compensated as private attorneys are (*Byrn*), includes cheap personal shots at an opponent (one of Walker's clients was the first female to get a death sentence in Kentucky, and thus increased the female death row population 100%; *Burton*), and implies that any critical review of our performance as trial lawyers is a disservice (*Byrn* and *Burton*)? My first reaction is to respond in kind, and simply be supportive of Walker, my friend, as they are supportive of Reed, their friend. I'll refrain from that, however, and discuss only what I think the letters tell us about the way we respond to critical analysis, and where the real disservice to the 6th lies.

Taking the analytical high road is the only rational reply to these letters, I suppose, but Brutus is not an honorable man.

Burton and Byrn protest the fact that Walker questioned Tip Reed's competency based on Reed's two prior suspensions from the Bar. *See Ky. Bar Ass'n v. Reed*, 635 S.W.2d 228 (1981) and 631 S.W.2d 633 (1982). He had neglected duties owed to clients. Actually, they protest any questions of competency being raised at all. They say Reed is competent, and maybe they're right. They say Walker didn't have all the facts, or had them but used them selectively, and maybe they're right about that, too. But the issue is not Walker's journalistic skills, nor even Reed's competence in particular. To critique or not to critique, that is the question.

My heart tells me that were I to need the services of a cardiac surgeon to save my life, knowing whether he'd twice had his medical license revoked for neglecting patients would be a critical question I'd want to have answered, and if I died under his knife, I'd want my family to factor that into their malpractice case. Losing one's life at the hands of an incompetent lawyer is no less critical. Reed, Burton, Byrn and the rest of us should expect and demand no less.

Death penalty cases, in particular, require an analysis of the lawyer's performance because most death penalties are inflicted on the poor, and the poor often get the bottom of the barrel of lawyers' performances. As Walker's article pointed out, 7 out of 28 present and former death row inmates in Kentucky were represented by lawyers who are now disbarred or who resigned rather than be disbarred. What an alarming statistic! Read Steve Bright's Statement before Congress. (Reprinted on following page, *Ed.*)

Among the journal's findings, lawyers who represented death row inmates in the 6 states have been disciplined, suspended or disbarred up to 46 times the overall rates for those states.
-National Law Journal Report.

It isn't just death cases, you see, and these letters demonstrate the bigger underlying problem: lawyers try to protect their own, and eschew any criticism of their performance.

I've encountered the attitudes of the likes of Burton and Byrn across the board in the criminal justice system, in practice before the Supreme Court and in the state District Courts, in prosecutors and defenders, both public and private. Mention to your brother or sister lawyers that you have been hired or appointed to evaluate an RCr. 11.42 motion for a client they've represented, and watch their faces. No matter that you assure them that no malpractice is to be pursued, or that no referral to the Bar is appropriate, no matter that the standards of proof and even the issues themselves are entirely different in those actions, too many lawyers just don't want the critique. The legal community springs to the defense of the lawyer so-questioned, and attacks the questioner. Is it any wonder that the public doesn't trust us?

We are motivated by self protection, and the protection of fellow lawyers, perhaps for nothing more than our own egos.

Burton and Byrn's letters display those attitudes. What misplaced values!

Burton even threatens to withdraw her support for increased and adequate funding for all death penalty defense lawyers (whatever her support has been worth on the issue) unless *The Advocate* retracts. Apparently, she'd rather see inadequate funding, thus less competent defense of death cases, thus increased possibility of unfair executions, than tolerate a little criticism. That idea should create fear and loathing amongst us all.

Even unfair criticism should be welcomed when freedom and life are at stake. Burton calls Reed's prior suspensions "personal tragedies". They're also professional tragedies, and so is her implication that we shouldn't talk about them. Scrutiny of any lawyer's adequacy of a criminal defense goes with the territory, and should be met by all of us with an open mind to becoming better at our job. We might even start beginning to think of our client's interest rather than our own, an idea that I'm sure Burton and Byrn would find startling. (Notice that their letters nowhere mention any concern for Reed's client.)

Their letters call Walker's questions about Reed's competence "eating our young." Your readers, Editor Ed, will recognize that phrase as a quote from Justice Wintersheimer's interview with *the Advocate* in April, 1988 (Vol.10, No.3, P.7). In that interview, Justice Wintersheimer makes some of the same criticisms these letters make. He also responds to other questions by noting that in 1987 he voted to affirm criminal cases 161 times and voted to reverse only 5. A review of his decisions in capital cases since 1984 shows that he voted to affirm 26 of the 30 death sentences,and dissented 9 times in the 13 reversals from the Court. What does it say about Burton and Byrn's priorities, and the priorities of those who think like they think, that they resurrect this language used by Justice Wintersheimer? 3 of Justice Wintersheimer's 4 votes for reversal from the 30 death cases he has considered have occurred during the last two years; perhaps his views on the degree of scrutiny demanded of all participants in death trials are evolving, even as Burton and Byrn's appear to be regressing.

It's not "eating our young;" it's advocating the right of an accused to have adequate counsel, especially when a life is at stake.

Although you may have known Mark Antony, Editor Ed, and although, Editor Ed, I may be no Mark Antony, if Brutus isn't honorable, I'm not going to be reluctant to say so. Neither will I be subtle and ironic, like the Shakespearean Antony; in fact, I'm going to shout it loud and clear, and so should we all.

Gary E. Johnson
Assistant Public Advocate
Frankfort

Dear Sirs:
I certainly appreciate being on the mailing list to receive your publication. I think your magazine is well written, and I find your analysis and comments most helpful.

COLE, BRODERICK MINTON, MOORE & THORNTON Attorneys at Law, 921 College Street - Phoenix Place
Bowling Green, Kentucky 42102-1869

Congressional Testimony on the Representation of Capital Clients

The system of imposing the death sentence in this country is not working. It completely fails to select for the ultimate punishment those offenders who have committed the most heinous crimes. A member of the Georgia Board of Pardons and Paroles has said that if you take 100 cases punished by death and 100 punished by life and shuffle them, it is impossible to put them back in the right categories based upon information about the crime and the offender.

One reason is the quality of justice that poor people receive in capital cases. A black man was sentenced to death in Georgia in a trial that started with jury selection at 9 a.m., and ended 17 hours later at 2 a.m. with a death sentence. In between, the jury was deadlocked as to guilt, but the defense lawyer agreed to replace the one holdout juror with an alternate. Three minutes later a guilty verdict was returned. In Mississippi, a man was sentenced to death at a trial where he was represented by a third-year law student.

Capital cases have been assigned to defense lawyers on a low-bid system in one Georgia circuit. The only qualification to submit a bid was membership in the Georgia bar. The lowest bidder got the case. In 4 different capital trials in Georgia, the defense lawyer at some point in the proceedings referred to his client as a "nigger." The death sentence was imposed in all 4.

A defense lawyer who has handled a number of capital cases in Georgia testified recently that the only criminal law decisions from any courts with which he is familiar are "*Miranda* and *Dred Scott*." (The latter decided in 1857, was not a criminal case.) Last year in Alabama, a capital trial had to be delayed for a day in mid-trial because the defense lawyer was drunk. He was held in contempt and sent to jail to dry out. The next morning he and his client were both produced from the jail, the trial resumed, and the death penalty was imposed a few days later. One-fourth of those now on death row in Kentucky were represented at their trials by lawyers who have since been disbarred, suspended or imprisoned.

Much of the support for the death penalty is bolstered by the belief that the legal process for imposing a death sentence is elaborate. Reading the Supreme Court's decisions upholding capital punishment in 1976, one would think that a number of procedural protections ensure that death is imposed only for the most aggravated crimes committed by the most depraved killers. The reality of capital punishment is quite different. Inadequate legal representation is pervasive in the death-belt states of the South for several reasons, but the primary one is money. Alabama limits compensation for out-of-court preparation in capital cases to $20 per hour, up to a limit of $1,000. Mississippi and Arkansas limit the total compensation of defense counsel in a capital case to $1,000. Perversely, the mistakes these lawyers make are insulated from appellate review. The courts hold that such defense lawyers "waive" the rights of their clients when they fail to recognize and object to violations of the Constitution. Thus, the poorer the level of representation that the defendant receives, the less scrutiny the case will receive on appeal. Consider the case of 2 codefendants, Smith and Machetti, who were both sentenced to death by unconstitutionally composed juries in separate trials. Machetti's lawyers challenged the jury composition; Smith's lawyers did not. A new trial was ordered for Machetti at which a life sentence was imposed. The federal courts refused to hear Smith's case, because his lawyer had not raised the issue at trial. Smith was executed.

Nonetheless, a number of proposals have been introduced to Congress to cut back further on review of death sentences by federal courts. Proposals have also been introduced to improve the quality of legal representation, but they do not address the need for adequate compensation to attract qualified lawyers and the need for specialists to handle capital cases. Throughout history, the death penalty has been inflicted upon the poor and members of racial minorities. Nothing has changed with the new statutes approved in 1976. Too frequently the death penalty is punishment not for committing the worst crime but for being assigned the worst lawyer.

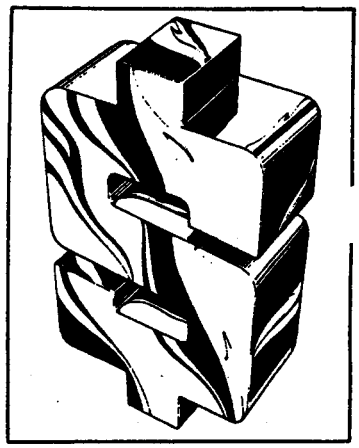
STEPHEN B. BRIGHT

Steve is a graduate of the University of Kentucky's Law School. He practices law in Atlanta. This article is taken from his testimony before Congress. Reprinted by the permission of Steve Bright.

Ed. Note: Copies of Steve's cogent testimony before Congress are available upon request from DPA.

DPA & THE 1990 LEGISLATURE

Funding Significantly, But Insufficiently, Increased



New Money Provided

The 1990 Legislature raised an unprecedented amount of new revenue. As a part of this effort, the Department of Public Advocacy received additional funding from the 1990 Legislature. The most significant increases were in full-time salaries and the funding of an Alternate Sentencing Program.

While DPA received more money in significant areas that will make real differences, the amount of new funds was not nearly what indigent Kentucky citizens who are accused of crime need in these times, and the amount of new money did not account for DPA's long term substantial underfunding.

Starting Salaries Increase

The 1990 Legislature granted DPA substantially better starting attorney salaries. A new law school graduate hired by DPA now starts at $21,600, which is up substantially from $16,600. This increase allows the Department to again approach competitiveness. The last time this starting attorney salary was raised was in 1981 when it went from $13,860 to $16,600. (See Table 1).

Even with this very substantial entry level salary increase, the DPA starting salary for an attorney is the lowest public defender starting salary in the 7 surrounding states (See Table No. 2).

TABLE 1

DPA ATTORNEY ENTRY LEVEL SALARIES OVER THE YEARS

OCTOBER, 1981	$13,860
JUNE, 1983	$16,608
JULY, 1990	$21,600

Louisville Starting Salary Lags Far Behind

The Louisville public defender office is still only able to start its attorneys at the incredibly inadequate salary of $15,000.

TABLE 2

1990 STARTING SALARIES FOR PUBLIC DEFENDERS 7 SURROUNDING STATES AND KENTUCKY

1. West Virginia	$25,000-28,000
2. Ohio	$26,936
3. Missouri	$23,220
4. Virginia	$27,000
5. Illinois	$25,536
6. Tennessee	$25,000
7. Indiana	$23,478
Average for 7 Surrounding States	$25,167
Kentucky, State Public Defender	$21,600
Kentucky, Louisville Public Defender	$15,000
Kentucky, Lexington Public Defender	$15,500

This at the same time the Louisville Commonwealth Attorney is receiving substantial new federal funds that allow for significant improvements for the prosecution. (See accompanying article, page 10.)

Other Full-time Public Defender Salaries Increase

The 1990 Legislature also raised other public defender salaries by very significant amounts. An attorney with the Department for one year is now eligible for a salary of $26,292. An attorney with the Department for two years can now be paid $31,944. An Office Director (4 years experience) will now start at a salary of $35,220.

Inequity for Career Public Defenders

At the same time the Legislature made these full-time public defender salary levels more competitive, the Legislature chose to do little for the salary inadequacies of DPA career public defenders.

Immensely Unfunded Needs

The 1990 Legislature once again chose to do nothing for the ridiculously low funding of the defense of the poor accused of committing a capital crime, and failed to adequately raise the contract county money.

Capital Funding

There was no new money for appointed attorney fees for capital cases and no new money for full-time public defenders to defend capital clients at trial, appeal and state post-conviction. An appointed public defender still is paid but a $2,500 fee for representing a capital client.

Danville criminal defense attorney P. Joseph Clarke, Jr. termed this "not even a token amount to undertake a capital case." (*Advocate* Vol. II, No. 4, June 1989). Florence criminal defense attorney Will

> "The amount of resources available to an attorney is very essential in the representation of a client. If you have no money to provide these resources, you can not adequately compete with the Commonwealth with its vast resources. The amount of money paid an attorney is also very important because that attorney cannot afford, with his overhead and expenses, to represent an indigent when he could apply his time to people paying him the hourly rate that he is really entitled to."
>
> **Frank Haddad**, President KBA 1977, *The Advocate*, February 1990.

Zevely said, "$2,500 is a joke!" (*Advocate* Vol. II, No. 3, April 1989).

Funding for Local Systems

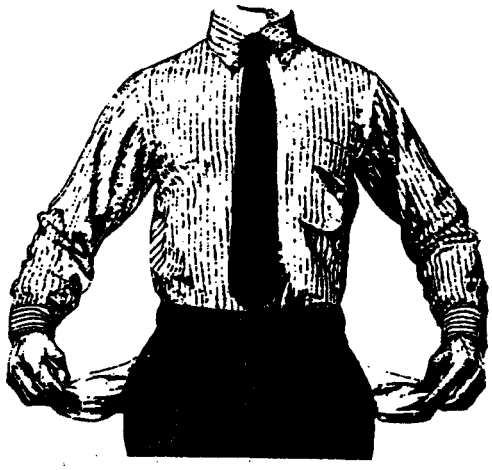
The Legislature increased funding for local contract public defender systems by $350,000 for '90-'91, a 12% increase for these programs.

While 12% sounds like a lot, it is far from what is needed in light of the fact that most systems are operating by paying their attorneys the equivalent of minimum wage salaries, and it is not much when spread over the 80 contract counties.

For example, under this 12% increase the Franklin County system's allotment rises from $33,464 ($64.00 per case) to $37,453 ($70.00 per case). The Kenton, Boone, Gallatin system rises from $138,656 ($45.25 per case) to $155,187 ($50.00 per case).

These 12% increases just do not bring the local contract public defender systems up to even minimum financial levels. Nationally, in 1986, the average funding for each indigent criminal case was $223. Kentucky continues to lag embarrassingly behind. Why are the low funding of attorney fees such a critical matter? *Adequate compensation is necessary for adequate representation.*

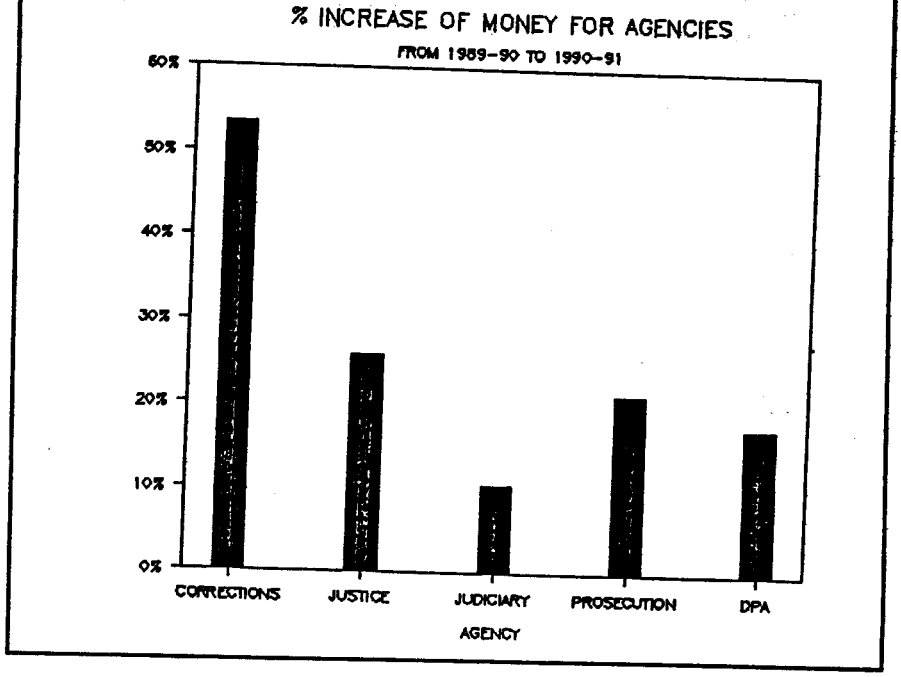
If the Legislature and the county fiscal courts fail to adequately fund the state and county public defender systems, they are denying poor Kentucky citizens their constitutional rights to adequate, effective counsel.



DPA Increase Compared to Other Criminal Justice Agencies

Of the 5 most significant Kentucky criminal justice efforts (Corrections, Justice, Judiciary, Prosecution and DPA), DPA received the least dollar increase and the second lowest percentage increase in funding for the 1990-91 fiscal year. (See Table 3).

TABLE 3



The Corrections Cabinet's funds were increased a whopping 53%. Justice received a 26% increase. The prosecution was given 21% more funds. DPA was allocated 17% more. The Judiciary received an 11% increase. (See Table 3).

The 17% increase for DPA is a bit misleading though. Of the $1.6 million in new money, $136,000 is from the federal government for capital federal habeas work and P & A. Another $104,700 is for alternate sentencing workers; $90,000 is for computer equipment, and $137,000 is for increased operating expenses. Therefore, $467,700 is not really new money for representing indigents. The real DPA increase is $1.1 million or 11% in new funds.

The Corrections Cabinet received a huge increase of $76.3 million. Justice was given a healthy $23 million increase. The Court of Justice's funding rose $8.6 million. The Prosecution funds jumped $6 million and DPA received $1.6 million in new money. (See Table 4).

Corrections: 53% Increase

The Corrections Cabinet received an enormous $76 million in new resources with their budget skyrocketing from $142.8 million to $219.1 million. No doubt this was in recognition of both Corrections' needs and the longstanding underfunding of Corrections efforts. (See Table 5). The Corrections allocations for '90-'91 break out as follows:

a) Corrections Management	$19,585,000
b) Adult Institutions	$97,998,000
c) Community Service & Local Facilities	$45,336,700
d) Local Jails Support	$15,476,600
e) Capital Projects	$40,734,500
Total Funds	**$219.1 million**

Justice: 26% Increase

The Justice Cabinet's allocation for the 1990 Legislature jumped from $88.9 million in 1989-90 to $111.9 million in 1990-91. (See Table 5). A breakdown of the '90-'91 funds:

a) State Police	$82,900,000
b) Justice Administration	$10,325,000
c) Criminal Justice Training	$17,296,600
d) Capital Projects	$ 1,412,400
Total Funds	**$111.9 million**

Judiciary: 11% Increase

The funds for the Court of Justice rose from $81.5 million in 1989-90 to $90.1 million in 1990-91. (See Table 5). Those

funds for 1990-91 were allocated as follows:

a) Court operation & administration	$76,826,800
b) Local facility fund	$11,380,400
c) Judicial Retirement System	$ 1,765,000
Total	**$90.1 million**

Prosecution: 21% Increase

The funds allocated to the Prosecution rose $28.1 million in 1989-90 to $34.1 million in 1990-91. (See Table 5). Those funds for 1990-91 were allocated follows:

a) Attorney General's Office	$12,030,200
b) Commonwealth's Attorney	$10,713,600
c) County Attorneys	$11,352,600
Total Funds	**$34.1 million**

DPA: 17% Increase

DPA's funding for 1989-90 was $9.7 million. This funding increases to $11.4 million for 1990-91. (See Table 5). These 1990-91 funds are as follows:

a) General Fund	$10,220,300
b) Restricted Funds	$ 373,900
c) Federal Funds	$ 806,800
Total Funds	**$11,400,900**

Supplemental Appropriations

The 1990 Legislature primarily decided funding for the next bienium, 1990-91 and 1991-92. However, many agencies requested supplemental appropriations for 1989-90 since the funds the 1988 Legislature allocated turned out to be insufficient. Many agencies received a substantial amount of the supplemental funds they requested.

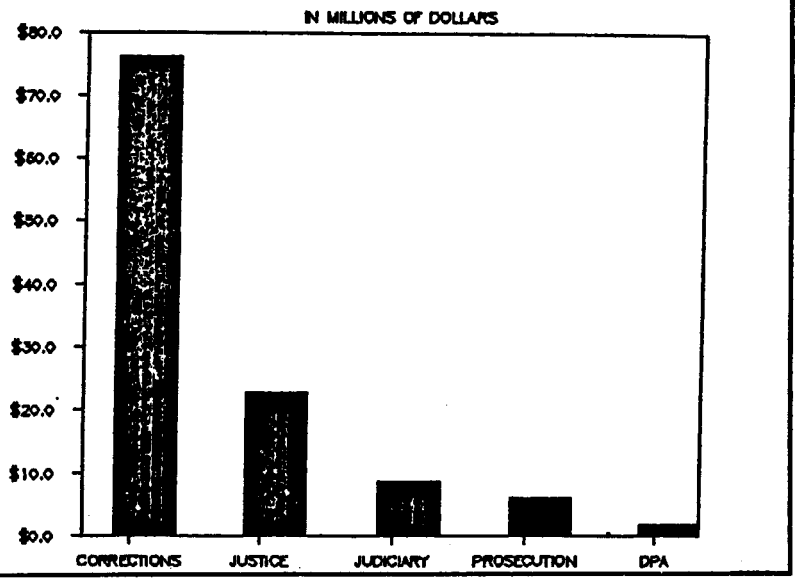
The 1990 Legislature allocated $79,600,900 from the General Fund for supplemental appropriations to 20 agencies for 1989-90 funding deficits. The supplemental appropriations from the General Fund for 1989-90 were as follows:

1. County Attorney	$181,100
2. Vietnam Veteran's Bonus Trust Fund	$35,000,000
3. Athletic Commission	$50,000
4. Kentucky Retirement System	$3,656,700
5. Corrections' Adult Institutions	$1,548,500
6. Corrections' Community Service and Local Facilities	$1,935,000
7. Economic Development	$5,404,100
8. Education's School Foundation Program	$6,600,000
9. Education's School Administrative and Finance	$79,000
10. Education's Instruction	$760,000
11. Finance's Department of Information Services	$250,000
12. CHR's Department of Social Insurance, Benefits	$2,746,900
13. CHR's Department of Social Insurance, Welfare Reform	$697,800
14. CHR's Department for Medicaid, Administration	$275,000
15. CHR's Department for Medicaid, Benefits	$17,627,600
16. Natural Resources' Department for Environmental Protection	$1,093,400
17. Natural Resources' Department of Law	$58,000
18. Revenue's Department of Property Taxation	$1,002,200
19. Transportation's Vehicle Registration	$380,000
20. Department for the Blind	$93,600

The $181,000 supplemental appropriations for county attorneys was used to reinstate funds to equate county attorney's salaries with commonwealth attorney salaries under KRS 15.765. The salary for a Commonwealth Attorney is $54,947.16.

TABLE 4

NEW MONEY FOR AGENCIES IN 1990–91



The Department of Public Advocacy was not alloted any supplemental appropriations by the 1990 Legislature.

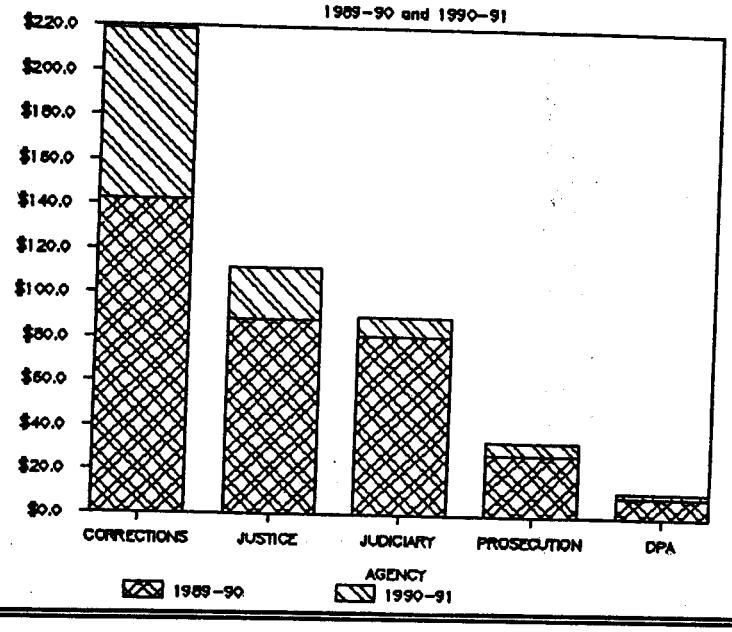
DPA Not Receiving Fair Share

DPA is not only underfunded, it is not receiving its fair share of the criminal justice funds, and it is not receiving its fair percentage increase in criminal justice funds. Additionally, DPA's longstanding underfunding is not being fully recognized by our Legislature.

The overall state budget for 1990-91 is $8.922 billion. The 5 criminal justice agencies of state government received a combined funding of $466 million or about 5% of the overall state funding. DPA received .1% of the overall state funding and 2% of the funding for state

> "As I stand before you today, I recognize that some of you may feel that as a public defender you are outside the mainstream of the legal profession in Kentucky. If you hold such a view, it is not surprising since it is an accepted fact that you are woefully underpaid, substantially less I have learned than your colleagues in surrounding states. I recognize also that many of you struggle with a caseload which exceeds any reasonable level of work which could be expected of an attorney. And perhaps worst of all, I suspect that many of you feel that your work is not only unappreciated by the public, but is condemned by many as amounting to an interference with the judicial process, rather than an integral part of the process."
>
> Justice Joseph E. Lambert at the 17th Annual Public Defender Training Seminar,

TABLE 5



LARGE CASELOAD LEAD JASMIN TO HIRE 5 NEW PROSECUTORS

Saying the number of felony indictments has mushroomed in the past 3 years, Jefferson County Commonwealth's Attorney Ernest Jasmin announced that he will use a $127,000 federal grant and other resources to add 5 prosecutors to his staff.

Jasmin also announced an office reorganization he hopes will help him deal with the surging caseload. The reshuffling cuts in half the number of prosecutors in administrative positions."I want to get more prosecutors in the courtroom," Jasmin said.

The boost in cases has been caused by a huge increase in the number of drug arrests, fueled in part by an infusion of federal anti-drug money and lower cocaine prices, police and prosecutors say. Drug arrests locally have tripled in the past 3 years as Louisville and Jefferson County police have used more than $428,000 in federal money to pay overtime to officers, buy drugs and pay informants. Overall indictments in Jefferson Circuit Court have increased by 32 percent, from 1,784 in 1987 to 2,363 in 1989. And drug cases now make up a third of Jasmin's felony criminal caseload. When he took office in 1987, Jasmin said, drug cases made up less than a fifth of the caseload.

In the past, 8 prosecutors held administrative positions; under the new setup, only 4 will act as supervisors. Also, 4 prosecutors, whose salaries will be paid by the federal grant, will handle nothing but drug cases; that's up from 2 prosecutors.

Jasmin also said he will put 3 senior prosecutors in a new Major Offenses Bureau. Those 3 - Tom Wine, Joe Gutmann and Jim Lesousky - will handle "major impact cases," which will include most death penalty and major white-collar-crime prosecutions, Jasmin said.

There are now 33 prosecutors - including Jasmin and his top aide, John W. Stewart - in the commonwealth's attorney's office. The reorganization ends the office's diversion program for first-time offenders, freeing up at least $65,000. Jasmin said a secretary and a case worker will lose their jobs as a result of the reorganization.

Under the diversion program, prosecutors agreed to drop charges against defendants who performed community service and made restitution. The program stopped accepting people July 1. About 250 people participated in the program last year. Most were arrested on theft, shoplifting and bad check charges. Jasmin said he hopes the types of defendants monitored previously in the program could be placed in the county attorney's diversion program, which handles people charged with misdemeanors. County Attorney Mike Conliffe has said he believes his office can handle the increased caseload.

MARY O'DOHERTY, *Courier Journal*, July 7, 1990.

criminal justice agencies.

Underfunding Denies Kentucky Citizens Justice

All Kentuckians have a vital interest in the criminal justice system. It must be a system that works. Since it involves the life or liberty of fellow citizens, it must work fairly- even for the poor. As long as Kentucky's public defender services remain so dramatically underfunded, Kentucky's poor citizens accused of committing a crime will continue to not receive a fair criminal justice process.

ED MONAHAN
Director of Training
Assistant Public Advocate
Frankfort

Priorities Misplaced?

B-2 Stealth Bomber	$1.1 Billion
UK Athletic Budget	$15.9 Million*
UL Athletic Budget	$10.7 Million*
Yellow Paint (Line down KY Highways 1989)	$2.3 Million

*Donations

"Providing proper legal defense to indigent defendants in capital cases has reached crisis proportions in Kentucky. The work load exceeds the capacity of the few public defenders we have. The level of stress involved in defending only capital punishment cases creates a tremendous burn-out factor. The public defenders are paid approximately one-third the salary given to a student straight out of law school who commences work for a major law firm in Louisville or Lexington. Providing only $2500 to an attorney in private practice to defend a capital case doesn't begin to provide an adequate defense."

Sheryl G. Snyder President KBA 1989-90
The Advocate, February, 1990.

"The capital case fee of $2500.00 is an insult. What is the value of 6 months to a year of a lawyer's professional life, to say nothing of the emotional trauma."

Charles R. Coy, President KBA 1968-69
The Advocate, February, 1990

LAWYERS MUFFED CHANCE TO IGNORE DUMB BOSS

ONE OF THE HAZARDS of working for someone other than yourself is that you often end up working for idiots. Most working people are resigned to this.

Well-adjusted working people have learned how to handle the goofy suggestions that come from a boss. "That's a great idea, Chief," an experienced working person will say. "I'll get right on it."

Then the working person will march out of the boss' office, roll his or her eyes and go talk to the other working people in the office."You wanna hear a really stupid idea? Let me tell you what Pea Brain suggested..." After getting a laugh or two at the expense of the boss, the working person will totally disregard the boss' suggestion.

Of course, it takes years of experience to develop this attitude, and years of experience are exactly what the lawyers in the public defender's office don't have.

That's why they had a bake sale earlier this week.

Although public defenders are generally short on experience, they're usually long on enthusiasm and idealism. This is remarkable when you figure that public defenders are underpaid, overworked, and represent people who are most often guilty of whatever it is they're charged with.

As they say in the law business, you can't make a living defending innocent people.

Oh sure, sometimes an innocent person is in the wrong place at the wrong time, and - no question about it - there are innocent people in prison. But still, the majority of the defendants who trudge into the public defender's dungeon-like office in the basement of the Muny court building - nicknamed "The Dirty Building" - are guilty of more than being in the wrong place at the wrong time.

Consequently, in the public defender's office, wins and losses are not counted in terms of acquittals and convictions.

That would be too demoralizing.

Instead, the game is "Beat the Rec." Every Thursday morning, a committee from the circuit attorney's office meets and discusses the various cases the office is preparing to prosecute. Each defendant is assigned a "recommended sentence." A defendant can accept the recommended sentence and plead guilty. Or the defendant can take his chances at trial.

If a case goes to trial, the defense considers it a victory if the final sentence is better - shorter - than the recommended sentence.

Such is life for a public defender. Underpaid, overworked and getting by on moral victories.

I thought about these things - mitigating factors - when the public defenders emerged from their office earlier this week to hold their bake sale.

Officially, the bake sale was intended to raise money. Unofficially, it was intended to embarrass the bosses who had come up with the goofy idea that public defenders should ask their clients for "donations." Like most really stupid ideas, on the surface this one sounded good.

After all, it's expensive to hire a private attorney. A person has to shell out hundreds of dollars, sometimes thousands of dollars. A public defender is free.

Common sense tells you that there must be a lot of people who have 50 bucks to spend, or 20 bucks, or 150 bucks. These people end up with a public defender. Why shouldn't they "donate" whatever they can afford?

On the other hand, you're not dealing with Boy Scouts. If a crook can get something for nothing, what makes anybody think he's going to pay for it? The only people who are going to be honest are the people who are honest. They probably didn't commit a crime in the first place.

That means the only people we're going to be charging are the innocent people whom we shouldn't be charging. But the best argument against the "donation" idea is the brainpower of the bosses who came up with the idea. It's low kilowatt.

That became obvious when Peter Sterling, the so-called trial director of the Missouri Public Defender System, threatened to fire any of the lawyers who participated in the bake sale. Only a boss could be so dumb.

In the first place, the bosses should have been delighted that the lack of funding for public defenders was going to get some publicity.

Even if the bosses were too dense to figure that out, they should have understood that if they actually did fire anybody for participating in the bake sale, the firing would get national publicity. Then the bosses would really be laughingstocks.

At any rate, the bake sale went off just fine.

But the next time the bosses, who operate out of very posh offices in Columbia, come up with a stupid idea, the public defenders should do what we more experienced workers would do.

"Donations? That's a great idea, Chief. It sure is nice working for political appointees."

BILL MCCLELLAN *St. Louis Post Dispatch* 900 North Tucker Boulevard St. Louis, Missouri 63101 (314) 622-7007

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

Donations for Doughnuts

PDs hold bake sale to protest client contribution policy

Under threat of being fired, public defenders in St. Louis recently staged a sidewalk bake sale outside the municipal court to protest a policy that requires them to ask their indigent clients for voluntary cash contributions.

Pastries ranged from the mundane to the exotic, including doughnuts, banana muffins, chocolate cakes, cookies, brownies and a gourmet cheese souffle.

The more than $600 raised in the sale was promptly turned over to the state's public defender office to be used at the director's discretion.

One attorney who declined to be identified said the contributions policy, mandated by a 1982 law, was not the only grievance that led to the bake sale protest.

"We're all terribly overworked here," said the attorney. "Some lawyers have caseloads that include more than 100 felonies.

"More importantly, many defenders feel that having to ask their clients for up-front contributions unnecessarily strains the attorney-client relationship.

"A lot of our clients already come to us with a lack of confidence in our abilities to perform. If we ask them for cash, it makes them feel that if they don't have cash to contribute, we won't work as hard on their cases."

St. Louis public defenders sell their baked goods.

Verbal Melee

When attorneys in the St. Louis office broached the idea of holding a bake sale at an April 4 meeting with Peter Sterling, trial director of the Missouri Public Defender System, a verbal melee ensued.

According to a news report of the meeting in the *St. Louis Post-Dispatch*, Sterling rebuked the attorneys for going public with their complaint. He reportedly said that anyone participating in the bake sale might be disciplined or even fired. The report added that a representative of the ACLU at the meeting promised to take action if any of the bake sale participants were fired or otherwise sanctioned.

"The bake sale would be an exercise of free speech," the ACLU representative reportedly warned.

Later, after the sale had been held, Missouri State Public Defender System Director Joseph Downey, a former head of the St. Louis office, denied that any real threat to fire or otherwise discipline the attorneys had ever been made.

"It was all a mix-up of communications," said Downey. "To make a long story short, we have no intention of firing any of the participants in the bake sale. As far as we're concerned the matter is fully behind us."

Downey defended the practice of asking public defender clients for money, explaining that "it gives some clients a sense of dignity and pride to contribute what they can to their defense."

Downey added that over the past eight years, about $730,000 had been collected from voluntary contributions, mostly from having judges assess attorney fees as a condition of probation. He said just over $1,000 had been collected in the St. Louis office, which handles 20 percent of the state's public defender caseload.

According to Robert Spangenberg, a legal consultant in Newton Center, Mass., 23 states now have laws on the books requiring public defenders to ask their clients for voluntary cash donations.

The ABA's Standards for Criminal Justice give tacit approval to asking for voluntary contributions from clients if "proper procedural safeguards" are followed, according to Norman Lefstein, chair of the ABA Criminal Justice Section Committee on Criminal Justice Standards and dean of Indiana University School of Law, Indianapolis. However, he said, the standards frown on the practice of seeking reimbursement from the client at the end of the proceeding.

Lefstein cautioned that the ABA's standards are being updated, and the proposed revisions will be submitted to the ABA House of Delegates in August.

Both Lefstein and Spangenberg believe that asking indigent clients for donations can interfere with the attorney-client relationship. If donations must be solicited, Spangenberg said, "it should be done by the court or some screening agency working for the court."

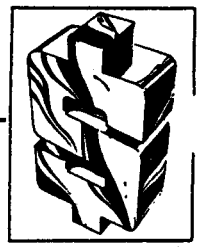
Richard J. Wilson, the reporter for the revision of the ABA's Criminal Justice Standards, said that the U.S. Supreme Court has upheld a statute requiring convicted indigent defendants to repay the cost of their representation when they later can afford it. (*Fuller v. Oregon*, 417 U.S. 40 [1974].)

The question of whether it is legal to dun clients up front for voluntary contributions, however, is still unresolved, asserted Wilson, a law professor at American University in Washington, D.C.

—Charles-Edward Anderson

PUBLIC DEFENDERS QUIT

MEAGER FUNDS BLAMED



Franklin County's 2 public defenders have quit the program, leaving indigent people charged with crimes without an attorney. That could force judges to release people from jail if the program is not restored soon. Every citizen, regardless of income, has a constitutional right to have an attorney.

"I'm not sure what will happen," said Franklin District Judge Joyce Albro. She said a person charged with a felony can only be held in jail up to 10 days after arraignment, without having a preliminary hearing which requires an attorney.

"It's going to have a very adverse impact on the criminal justice system," said Franklin Circuit Judge Ray Corns. "Hopefully, they'll be able to get it resolved post-haste."

Money is the problem. A meeting with county, city and court officials is being scheduled to find a solution. Frankfort attorneys Joseph Newberg and Scott Getsinger for the past year have been the only attorneys in the county routinely accepting indigent criminal cases. They used to be law partners, and last year split $33,460 from the state to handle 515 indigent criminal cases. From that money, Newberg and Getsinger had to pay office expenses, such as telephone bills, research and secretary wages.

They say the money - broken down on an hourly or case-by-case basis - falls far below what the state requires for public defender compensation. And they don't want to go on with the break-neck pace, considering the meager wages which were boosted this year to $37,453 - to be split between them. The law says attorneys in the public defender program should receive $25/hour outside of court and $35/hour in court, with a maximum $500 per misdemeanor case and $1,250 per felony case.

Newberg said he has 40-50 felony cases pending, which alone could mean $50,000 under the state compensation law.

Paul Isaacs, the state's public advocate, said Newberg and Getsinger have been making only 42% of what state law says they are entitled to receive. "It's a problem in a lot of counties," Isaacs said. The fiscal court of Kenton County in northern Kentucky recently raised its allocation for the public defender program from $5,000 to $25,000 a year, he said.

Franklin County's fiscal court does not pay anything into the program, which Newberg and others say is the crux of the problem. According to Isaacs, Scott County, with a population of 21,931, adds $10,000 to the state's $17,000; Bourbon County, with a population of 19,273, adds $10,000 to the state's $15,000; Woodford County, with a population of 18,000, adds $9,500 to the state's $14,000.

The state allocation is based on population. Franklin County's population is 43,888, Isaacs said. The law says fiscal courts must make up the difference between what the state pays and the hourly rate required by state law. But Franklin County Attorney James Boyd said the law isn't firmly established by the courts, and the county's financial responsibility for the program is debatable.

Boyd said the county doesn't have a contract with Newberg and Getsinger. The 2 attorneys asked to participate in the public defender program, administered by the state Office for Public Advocacy, Boyd said. When Newberg and Getsinger started in the program 4 or 5 years ago, several other attorneys were involved. The caseload wasn't as burdensome then for individuals, Newberg said.

Attorneys gradually dropped out of the public defender program, which often is used as a training ground for young lawyers. Money was the most often cited reason, Isaacs said. While the number of attorneys in the program declined, the caseload dramatically increased, Newberg said. "It's just gotten to be such that I'm not doing these people justice," he said.

Newberg said one day, he was in a circuit court trial the same time he was supposed to be in district court. "At one time, I had 4 murder cases in various stages," Newberg said. "It's not fair to ask people to sit in jail and wait. If they're guilty, their fate should be determined. If they're innocent, they shouldn't be in jail." Newberg said he'll rejoin the public defender program if the county adds money to the state's allocation. "You're not going to get any more experienced attorneys to do it," he said. More money may attract more attorneys, Newberg said.

Politics also complicates the situation. "When you put money in for roads or a fire station, that's something that people can see and something they want," said Franklin County Judge-Executive Bob Arnold. "But when you start putting in money to build jails or defend alleged criminals, then the public has a hard time understanding why it's their responsibility to spend tax dollars in that fashion," Arnold said.

Franklin Circuit Judge William Graham disagrees. "I take a more optimistic view, that the public understands there are people who are indigent and are entitled to an adequate defense," Graham said. Arnold said the public defender program isn't just the fiscal court's responsibility. "There should be some responsibility among the legal community to provide *pro bono* counsel," he said. "I think there's also an obligation upon the judicial system to make sure that these individuals claiming to be indigent are in fact, indigent."

Franklin County's district and circuit judges agree responsibility falls on many shoulders. When the 2 circuit court judges were practicing lawyers, judges assigned indigent cases to all lawyers in town, and the lawyers handled them for free. "A lot of older lawyers cut their teeth on these kinds of cases," Corns said.

The state formed the public defender system in 1972, when the Supreme Court ruled no lawyer could be required by a judge to accept a case without adequate compensation.

Corns said he supports Newberg and Getsinger's quest for more money in the public defender program. "There's no way they can handle the workload and not be compensated."

If the defender program isn't revived with more money, "We'll just have to start going down the list of attorneys to seek their help," Corns said.

Graham agrees with Arnold that judges must guard against abuse of the program by people who can afford attorneys, but don't want to pay them. Graham said he tries to make it a condition of probation that indigent people reimburse the public defender program upon release from jail. But collection efforts haven't been effective, he said. Also, many indigents are sent to prison, where they never will be able to repay the program.

Graham said the program needs more money, more lawyers and efficient management. The current problem "doesn't reflect well on anyone," he said. "And I think the bar has the responsibility to help find a solution." Without a solution, a case backlog will develop quickly, Graham said.

Newberg said he realizes dropping out of the program caused a problem. But he feels it is time to force the money issue. "Something will happen, now," he said. "It wasn't going to unless we made it happen."

KAREN HERZOG, *State Journal*, July 3, 1990 (*State Journal* Staff Writer Amy Carman also contributed to this report.). Reprinted with permission.

BETTE NIEMI RESIGNS

A Model of Indefatigable Advocacy

Bette Niemi

11+ Years of Service

After 11-1/2 years of service to indigents accused of crime, Bette Niemi has resigned from her work for the Department of Public Advocacy. It is difficult to presume why Bette is leaving. She has been frustrated over the past few years over our inability to recruit high quality attorneys, our severe problems with staff attorney turnover, and DPA's stagnation in the growth of the full-time public defender system. She has been deeply involved in capital litigation. The toll such involvement takes on a person's psyche and emotional well-being is immense. She was quite frustrated over DPA's and State Government's unwillingness to pay reasonable salaries to experienced attorneys. The last 3 raises for state employees, benefited entry level staff as opposed to experienced staff. There are public defenders in the federal government and many states who earn what Bette does when they start. While public defenders don't ask to get rich, at a minimum they should be paid enough to know they are appreciated. Bette often was not appreciated.

Bette's Education and Experience

Bette graduated from the University of Kentucky in 1972. She worked for 2-1/2 years as a Cabinet for Human Resources social worker in Jefferson County while going to law school. She graduated from the University of Louisville Law School in 1976.

She started with DPA in 1979 as a trial attorney in the Somerset office. Later, she transferred to LaGrange to work as a post-conviction attorney at the Reformatory. On June 16, 1985, Bette became Director of the Oldham, Henry, Trimble Counties trial office. On August 17, 1985 Bette became Regional Director for DPA's three Western Kentucky trial offices, LaGrange, Hopkinsville and Paducah. These 3 offices cover 10 counties.

Bette's Advocacy

The epitome of zealous advocacy, Bette has been presented with many cases where any less advocacy would have been inadequate for the client. In 1984 she represented Parramore Sanborn with Rick Receveur in the Henry County capital case. The community hostility for her client infected the trial, its prosecution and the result. Bette and Rick's unrelenting defense insured a record that revealed the extensive prosecutorial misconduct that led the Kentucky Supreme Court to reverse the conviction with condemnation for the way it was prosecuted.

In 1985, Bette represented Kevin Fitzgerald along with Ed Monahan for the double ax murder of an elderly couple in Carrollton. Bette relentlessly investigated and prepared this complex capital case, and her representation avoided a death sentence for Kevin. To the amazement of many, the defendant was convicted of only manslaughter.

Working in the LaGrange Office, Bette represented most all of the inmates charged with committing a crime in the Reformatory. She soon became a favorite with the inmates because of her dedicated advocacy and loyalty to her clients.

Bette is a charter Board member of the Kentucky Association of Criminal Defense Lawyers, and Chair of its Membership Committee.

Bette has been one of the top public defenders in the state, and will be missed immeasurably. Bette kept her eye on the vision, the ideal, and always asked why that could not be attained. She was an excellent trainer — her voir dire demonstrations were outstanding. One key to beating the death penalty in Kentucky is having people like Bette, aggressive, committed, and experienced, representing those charged with these crimes.

Experienced Attorneys Leave DPA

Since October 1, 1988, 20 attorneys have left DPA with a combined total service and experience to DPA of 105 years.

DPA's turnover rate is three and one half times that of other state government agencies.

Continued Drain of Top DPA Lawyers

Over the last few years DPA has lost many people like Bette, whose experience and leadership are difficult to replace. Jay Barrett, Tom Kimball, Kevin McNally, Gail Robinson and others fit this category. Their leaving, and especially Bette's leaving saps us of our leadership, and our vision of what it means to be a public defender. It is troubling that we are losing our highest ranking woman in the DPA. We recruit a lot of women, and they need to see women attorneys of the calibre of Bette in leadership roles in the Department. Bette was also committed to recruiting the highest quality staff attorneys, and retaining them with reasonable salaries — she will leave a gap on these issues.

DPA needs to commit to all of their people. DPA needs to ensure that all positions are career positions, including experienced staff lawyers. Salaries need to communicate this commitment. DPA needs to communicate further an openness to the ideas of all of our people, including experienced staff. In order to address the burnout problem, it may be that DPA needs to explore the possibility of paid sabbaticals and other potential solutions. The important thing is that DPA acknowledges we have a problem with retaining its very best lawyers and somehow try to do something about it.

New Endeavors

Bette resigned August 15, 1990 to go into private practice in Louisville. She can be reached at 4116 Dellridge Drive, Louisville, Kentucky, 502-893-2769. She will also work for the Department of Corrections under an 18 month contract to bring the Women's Prison Legal Aid Office at Pewee Valley up to an acceptable level. This contract is the result of the litigation against Corrections. *Canterino v. Wilson*, 562 F.Supp. 174 (1982).

A Significant Loss

Bette Niemi is one of a handful of this country's dedicated public defenders. Her indefatigable representation of poor citizens represents the best of our legal profession. On a daily basis, she has made the individual liberties guaranteed us all in our Bill of Rights come to life for Kentucky citizens. The Commonwealth is indebted to Bette for her long, dedicated service.

I am naturally delighted that Bette can pursue her professional ambitions, but selfishly I'll miss her. I want to underscore that Bette is a very skilled and capable advocate with a good appreciation of defendant's rights under the Constitution, and she asserted those rights vigoriously. She was an immense help to the Court with the assistance she gave in her professional capacity. I'll miss her. I wish her well.

Judge Dennis A. Fritz, Oldham, Henry, Trimble County Circuit Judge

ADDRESS AT ANNUAL PUBLIC DEFENDER CONFERENCE

ABA PRESIDENT, STANLEY CHAUVIN, JR.

It's a particular pleasure to be here this afternoon. I guess we all have the parental instinct. I'm glad to see my son, Stan, is with me and is getting his CLE credits. I need some myself, particularly in the ethics field, so I'm going to pick up some while I'm here. I'm admitted in 11 states, so I'm the only person here, I guess, who heard Vince's lecture and can pick up about 11 hours.

I'm one of the few speakers who'll digress before I start my remarks, but let me digress to tell you that in another life I was Chair of the House of Delegates of the ABA when the ABA Code of Professional Conduct was adopted. As legislative history of how the thing came to be, it was the result of some of the most bitter division I've ever seen in my career. Most of it over the very thing Vince covered this afternoon. The duty to report attorney misconduct. I was told at that time in California, if it became an ethic it would simply be transmitted as another rule of practice. The trial would stop while they turned each other in. They told me up front that would happen. We had the longest debate in the ABA. Every lawyer in America had a opportunity to come and we filed, circulated and saw that all the people read this.

The cumulation of it all is, as we expected, that now after about 6 years it may be proper to take a look at it again to see how in some of these case the rules are working in reality. It was a Herculean effort on behalf of the bar. I think it was a very good framework and promulgated the squeal rule you talked about today.

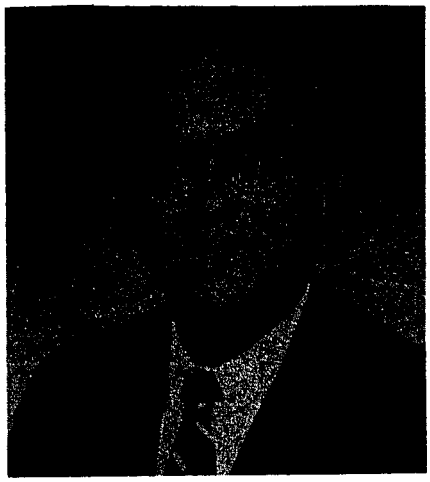
I attended a program not long ago in Phoenix entitled, "For whom the bell tolls - it tolls for thee," and followed the *Hemel* case in Illinois. That poor devil got suspended. The lawyer who he didn't blow the whistle on was disbarred for something else, which I think might give him the right to reapply. He was suspended by the judge who presided over the suit that was filed to collect the money, that the lawyer he didn't report absconded with. Nothing yet has happened to the judge. There's some talk about making a report of that but that's a good case to read - the *Hemel* case, just to see how it comes about.

The drug crisis in this country is something I want to spend some time with you on this afternoon, because I think in the last couple of years as I have traveled around the United States and, indeed, around the world, I have seen a storm which is going to come in from the sea and when it hits none of us are going to know exactly what to do about it. But it's going to virtually short circuit and shut down state courts of this country if we don't do something about it and do something about it pretty quickly. Already this year, Vermont, a small state, but a pretty good model, had to stop about two months ago trying any more civil cases until the beginning of the fiscal year because the state is out of money due to the overtime required to try the drug cases that have come up. California has a good court system, and an efficient court system, but today in Los Angeles when a civil case is announced ready for trial it's docketed. The wait today is 6 years for the trial, once all of the discovery and all of preparation has gone in. These cases are coming in at a rate which no one could anticipate and no one knows what to do anything about.

What's the background of it and what can you as practicing lawyers do to see to it the system doesn't fall of its own weight? We know if we don't do something about it, it's going to just push us completely out of sync with what courts and lawyers in the justice system are suppose to be about.

To put your mind at ease [it always puts my mind at ease, to think that if something's a problem here if I see the same problem exists somewhere else. I'm not comforted that the problem is widespread, but I am comforted that it is not a problem we can't deal with.] it is a problem in all of the states of the union. It is an international problem.

I was in Ireland two weeks ago and shortly before that in Scotland, England,



Stan Chauvin

Australia, New Zealand, Germany, France and Belgium. In every country I have been to, I've been told time and time again, that if they don't do something about the drug cases which are coming in, they don't know how much longer their system is going to continue to be able to operate.

I think we can start by looking at some of the reasons for it and then I might offer some solutions, not that these solutions will get rid of it this afternoon. Maybe I should call them observations, rather than solutions.

First of all we, and I'm talking mostly about lawyers my age, and judges my age, people in the legislatures my age, do not understand the drug problem worldwide. Legislatures all want to pass mandatory sentences. It makes for better talk on Saturday mornings at the bus station to summarily announce, "we are now going [votes in the legislature whether it's Kentucky or Nevada or Florida, wherever it is] to lock them up." That is good talk on Saturday morning for a legislator, state or federal.

The problem is that only about 15% of the people who are arrested on drug cases are actually involved in the heinous affair of

selling and distributing drugs. Most of them have, share or sell a small amount, but they are picked up on the new mandatory sentences. There is no differentiation between Noreiga and someone who shares with one of their friends.

Secondly, most judges and legislators my age do not understand what drugs are all about. I would dare say a lot of them my age probably think you inject marijuana. They don't know a damn thing about it. One of the contributions I hope I made at the National Judicial College in Reno where I served on the Board for 7 years was to start a course there called "Perceiving Stereotypes," and this is the way the course worked: we had people come over from the medical school to tell judges the properties, the reasons, the backgrounds of different types of drugs.

Then we had some other things, because I wanted them to know, most of them were out of the same mold as I am, about the same age I am, I wanted them to, in fact, know it is possible, highly possible, for a person to come to court in an undershirt with long hair and a Harley-Davidson tattoo on his arm - "keep my gun or kill me" belt buckle and a chain on his side with a billfold, and still be innocent. That is not an indication of guilt, just the way you look.

Most of them don't know anything about people who are living together and aren't married. They can resolve the conflicts of two corporations, but can't do a damn thing about a bunch of second hand furniture and a stereo- they simply do not understand these things. It's not in their background, people are sitting there that don't know what's going on the street and it happens time and time again.

So I think particularly at this time in the drug situation, legislators and judges of my vintage don't understand the problem. They think that treatment is coddling. Treatment is education; people need to be told why not to use drugs. The $50,000 a year it costs to keep a person in penitentiary can pay for a lot of treatment. We all think in terms of solving the drug crisis in this country by having more police officers and prosecutors. That's important, but I can tell you, we can have police officers and prosecutors holding hands around the entire perimeter of the United States and it will not reduce the availability of drugs.

Synthetic drugs have taken on. "Ice" has replaced crack. You have to remember that 5 years ago there wasn't anything known as crack and now it's out of style or going out of style. Ice is taking its place.

These are the elements for the storm which I mentioned to you earlier. If we don't deal with the sheer numbers, the fact that they may require mandatory sentences which are going to put plea bargaining out the window. Courts were not designed to try every case. That's why sentences historically have been from 2 to 10 or 5-20.

There are gradations of case and if every case is a mandatory sentence, then the possibility of working out a solution to it is going out a window. Why would a person plead guilty to the worst thing that could happen to them, namely a sentence in jail? So until the people who are making the laws understand that what's needed is education and treatment to try to get to some of the root causes, it's going to continue to come in and cascade on the court system. A civil trial will be something you public defenders have heard about in law school, but have never seen.

The whole sentencing procedure was loaded without the mandatory sentences. It's gotten now where you have almost got to have a reservation to get in the penitentiary. It's easier to get hotel rooms on Derby weekend than it is sometime to get in the penitentiary. They're all full. The same people who want to lock them up will walk right down the street and vote against a bond issue for a new facility.

The whole system of criminal justice is going to have to be revamped. Probably on a percentage basis, sheer percentages of population of about the right number are in institutions, but not the right people. There are a lot of people there because they are ignorant. There are a lot of people who do not understand how to cope with society and I'm telling you today, making license plates won't make them any smarter when they get out than when they went in.

The prison system fails 70% of the time. If anybody in business had something that failed that often, they'd fold. If you walk down the hall of a penitentiary and see 10 people, 7 of them been there one or more times. Anything that fails 70% of the time has to be changed. So we are looking at a system that is a failure.

What are we doing about it? We are encouraging it, amplifying and making it even bigger with mandatory sentences. Many people who get involved with the criminal side of the law, need some guidance and some sort of treatment.

Talking about coddling people, we just got to find some way to treat because you can't have a criminal sentence served for everyone who comes through the judicial system. It is a physical impossibility and it is ridiculous to even think about.

We put together recently a Crisis in Courts Committee commission of the American Bar. It was a result of two things the report said. First of all we were seeing the system begin to creep just a little bit, seeing it begin to strain when we did our own study. The study was presided over by professor Sam Dash of Georgetown Law School. Professor Dash, you may remember, was one of the lead prosecutors in the Watergate Committee of the Senate. Their conclusion after holding hearings all over the United States, talking to people of all the various disciplines involved in the court system, particularly police officers, was that the crisis in the court is not the result of silly decisions or tricky lawyers, it is the result of two measurable identifiable things.

One, an embarrassingly inadequate amount of resources devoted to the justice systems. I was in Texas not long ago, it's one of my favorite states, and I talked to some people. They made an analysis that in Texas they spend more money for yellow paint to divide highway lanes than they do on the entire justice system. Now it will make the roads look good, but it won't do much for reducing the crisis which is there. Judge Martin would be interested to know the entire federal judicial system runs for just a little more than one B-1 bomber costs. So these absolutely meager resources are making the system contract, making it unable to deal with matters which are being put before it.

So what do we do about it? The first thing that I would propose, and have done on a pretty consistent basis and it had worked pretty well is to increase budgets to what it would take to run it. Most any agency can get a 6%, 7 maybe, even 10% increase without any great difficulty, but we are looking at 300, 400, and 500% increases to bring the system of justice up to be even. To catch up, I believe that once people know what's required, once they can be told, there will be a reaction to it. I am firmly persuaded the public, those people who aren't involved in it every day as we are, are now more interested and more willing to do something about system of justice than they have been in the past, and will do so in an enlightened way.

Secondly, on civil dockets and in some of the matters of criminal case, alternatives to the traditional role of resolving the dispute. We have tried the ADR technique for

a long time and we were concerned that it might work into a system civilly that the poor folks would have to go to ADR and folks with money would continue to use the courts. The reverse has been true. Now the transnational companies, the big computer companies, the big Fortune 500 companies are catching on to the ADR and are finding it most successful in California.

The "rent a judge" concept has caught on. The retired judges who rent themselves out for a fee to resolve disputes. I was told in New York not long ago by the head of one of the larger corporations in American they just resolved a case. They got a decision in 90 days and in his opinion saved about $600,000 in attorneys fees and about 4 years in time. He also told me something else that was interesting. He said, "Stan, you know clients are sometimes disappointed, but never really surprised. They know pretty well going in what the results going to be. They know who's going to get hit with what."

Professor Arthur Miller of Harvard made a study that showed over a period of 20 years, from 1960-1980, the federal Congress alone created over 200 new federal substantiative rights. Everything from odometer roll backs to sex discrimination. It could best be termed the substantiative right of the month club. Each of these provided you could go into the United States District Court and if successful there, your lawyer would be paid. That will not cut down on litigation. Are you going to tell some client for Christ sake, "I'd like to help you out but I'm trying to the best I can to keep from overworking judges and the court officials." I know you're not going to do that. Why should you?

Warrant desks are open 24 hours a day. Is that going to cut down? No. We have a system that is designed to be user friendly and it's going to continue to be that way. I hope in many of the civil cases that the statutes can be amended to provide for ADR. The market is good and the crop is growing and it's going to be harvested in a court system that can't get to it and that is what we do not want because the great fallacy in people's mind is that courts are there to decide issues that afternoon. That isn't true. It never has been true, but more and more people, as more of these rights are being created are finding it out.

Still even today about 65% of the people in America have never dealt with a lawyer or even been in court. So if we can reduce the load that's there and use these other techniques, I think it will be extremely helpful. Most lawyers today who are practicing primarily on the civil side of the docket aren't aware of the crisis. Why should they be? It's not something that comes up.

I spent a lot of time talking to the courts and insurance practice section of the American Bar Association and the Litigation Section, these have 40, 50, and 60,000 members. The American College of Trial Lawyers and other people are saying, "you better get involved in this!" It's not something that is happening to someone else because your case is the one that's going to go!

We are getting a lot of help now. Our commission has on it some people that are well aware that the civil docket is the one that's going to fall first. We are trying to find ways they can encourage their own people to do what they can to reduce the civil load. We won't be able to get ahead but it will free up some docket to try to catch up a little bit.

I spent a lot of time lately, working on the habeas corpus death penalty reform - most are now convinced that our proposal to move it back and try to make the trial the main event rather than the appeal. That's what we're looking to, as a certifying agency, in every state. 50% of these death penalty cases are set aside on habeas corpus in the federal system. Well over 50% of them, are as a result of the lawyer incompetence, not maliciousness, incompetence. You're looking at a fellow who has tried capital cases as a prosecutor and defended as a defender, but I am telling you today I would come well into that category of incompetent to try a capital case because I haven't tried one since the law changed so dramatically.

There have been a few that were right interesting. One of them the lawyer was appointed and didn't appeal the death penalty. They called him up and asked him why and he said he'd read the record and he kind of agreed with the jury. They had another one who filed a brief and cited no cases. They said in that jurisdiction they use a "mirror test" to appoint lawyers. I said, "how does it work? They said, "hold a mirror under their nose, if it clouds up, they are okay." All this is free work they were asked to do. Top fee was $1,500 - that had to be for a pretty grizzly case.

So we are trying to get it back to where the trial is the main event and if it is tried properly in the first instance, then it will give a lot more streamlining to it as it reaches the federal system. Just 2 weeks ago, I met with some of the people in Washington- I'm not particularly interested in being remembered as a person that made a significant contribution in being efficient in carry out the death penalty - it just not something by nature given to a cubbyhold to be checked off as being efficient. So we can expect it to be as simple as some of the civil matters, other criminal matters, but that's important and it's there.

I invite you to look at the drug problem, not as only as people who defend the accused, but to look at the broad spectrum-what it's doing to the system. Take my word for it, it's getting worse every day. The drug problem in this country is not improving, it's deteriorating by the day and we have to have new and innovative ways to deal with it. If we work at it together, and if lawyers point out the problem of it, then we'll make a long step towards getting it solved.

In closing, I'm delighted that Stan is a public defender. I'm also happy to announce I have another son who's a lawyer - a prosecutor. I think one of the greatest lines I've heard in my 30 years at the Bar was when Stan came in the other night and said, "the Chauvin boys had a string of acquittals this week, but you got to remember my brother's a prosecutor."

It's a great pleasure to see all of you this afternoon. I wish for you the very best of everything. I commend you for the work you're doing. You're doing fine work. It shows one can sometimes have an idea and it will come about. I was one of the original incorporators of the public defender's office in Louisville and on the committee that hired Paul Tobin. I believe in the system and I believe in what you're doing. Thanks so much for letting me be part of the program. Best wishes to you.

STANLEY CHAUVIN, JR.
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Stan is a member of the Louisville Law firm of Alagia, Day, Marshall, Mintmire and Chauvin. Stan has been particularly active in the field of court modernization, penal reform, obtaining aid for victims of crime and bail bond reform which he considers of vital concern to all citizens.

WEST'S REVIEW

Linda West

KENTUCKY COURT OF APPEALS

FAILURE TO MAKE REQUIRED DISPOSITION

Davidson v. Commonwealth
37 K.L.S. 7 at 6
(June 7, 1990)

The Court reversed Davidson's conviction of theft by failure to make required disposition. Davidson's conviction was based on his failure to return videotaped movies to Video Attractions, a video rental company, pursuant to a rental agreement. Davidson contended that the tapes had in fact been returned. The tapes themselves were never located. The Court stated as its holding that "...KRS 514.070 was not enacted to penalize the contractual relationship of debtor/creditor. We are convinced that KRS 514.07 was used by Video Attractions to attempt to collect a debt...."

AUTOMATIC PAROLE REVOCATION UPON SUBSEQUENT CONVICTION

Boulder v. Parke
37 K.L.S. 7 at 7
(June 8, 1990)

In this case, the Court held that Boulder's rights were not violated when his parole was revoked without a hearing based on his conviction of a subsequent offense. The Court cited KRS 439.352, which requires the parole board to revoke parole upon recommitment for a new conviction. The Court held that *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) does not require a hearing in these circumstances because, under the statute, the parole board has no discretion as to whether to revoke.

PROMOTING CONTRABAND - USABLE AMOUNT

Commonwealth v. O'Hara
37 K.L.S. 7 at 8
(June 8, 1990)

Appellant, an inmate at the State Reformatory, was indicted for promoting contraband in the first degree based on his possession of less than a 10th of a gram of marijuana. The trial court dismissed the indictment stating that, because this was not a "usable amount," it could not form the basis for a prosecution. The commonwealth appealed. The Court of Appeals reversed.

The Court held that the language in KRS 520.010 that defines dangerous contraband as "capable of such use as may endanger the safety or security of a detention facility..." does not require that to sustain a conviction a "usable amount" must be proven. "The legislature could easily have required a usable amount test had it so desired."

EX POST FACTO

Lattimore v. Corrections Cabinet
37 K.L.S. 7 at 9
(June 8, 1990)

KRS 533.060(2), which provides that a sentence imposed for an offense committed while released on parole shall not run concurrently with any other sentence, became effective in 1976. In 1980, while released on parole from a sentence imposed for a crime committed in 1973, Lattimore was convicted of a second offense. Pursuant to the statute, Lattimore's sentence for the second offense was deemed by Corrections to run consecutively to his first sentence. Lattimore argued that this was an impermissible *ex post facto* application of the statute.

The Court disagreed. In its view the statute did not increase the punishment for a crime committed before its enactment. The statute "merely specifies when his subsequent sentences shall begin to be served...."

STATUTORY PRESUMPTIONS

Collins v. Commonwealth
37 K.L.S. 7 at 12
(June 15, 1990)

KRS 218A.990(6) provides that: "If any person knowingly and unlawfully plants, cultivates or harvests 25 or more plants of marijuana, it shall be presumed that the plants of marijuana were planted, cultivated or harvested for the purpose of sale." Pursuant to this provision, Collins was denied a jury instruction on the misdemeanor offense of possession of marijuana not for the purpose of sale. The Court of Appeals held that this was error. The statutory presumption's purpose is to avoid a directed verdict of acquittal on the "for sale" issue where 25 or more plants are involved. However, it does not preclude an instruction on the lesser included offense.

KENTUCKY SUPREME COURT

GUILTY PLEA - WAIVER OF RIGHTS

Commonwealth v. Crawford
37 K.L.S. 6 at 11
(May 24, 1990)

At his PFO proceeding, Crawford moved to suppress evidence of his prior conviction on the grounds that his guilty plea was obtained in violation of *Boykin v. Alabama*, 395 U.S. 738, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The commonwealth then introduced Crawford's "Waiver of Further Proceedings with Petition to Enter Plea of Guilty," which specified the rights

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.

waived by Crawford and was signed by him and the "Certificate of Counsel," signed by Crawford's attorney, stating that the indictment and Crawford's rights had been explained to him and that Crawford's rights were being voluntarily waived. The commonwealth also introduced the videotape of Crawford's guilty plea in which Crawford affirmed that he understood he was waiving his rights.

Viewing the totality of the circumstances the Kentucky Supreme Court stated: "We hold that this record is adequate to show that the petitioner intelligently and knowingly pleaded guilty." In the Court's view, the trial judge is not required to read the defendant's rights to him when the defendant has "waived those rights by written waiver, has acknowledged his signature thereto, and has further acknowledged that he understood those rights."

BATSON/EED-EXCLUSION OF EVIDENCE/FIRST DEGREE MANSLAUGHTER/ OTHER CRIMES/WITNESS' MENTAL HISTORY/KIDNAPPING EXEMPTION/ MOTIONS *IN LIMINE*

Stanford v. Commonwealth
37 K.L.S. 6 at 15
(May 24, 1990)

Stanford objected to the prosecutor's use of peremptory challenges to strike black members of his jury panel. The commonwealth then stated its "neutral explanation" for striking the jurors. The Kentucky Supreme Court held that the commonwealth's reasons were racially neutral where one juror was struck because her cousin had been the victim of a rape/murder and where a second juror was struck because of his flamboyant dress and because the prosecutor perceived him to be "slow." The Court rejected the defense claim that the stated reason was a subterfuge for a racially motivated peremptory strike.

The Court held that evidence offered by Stanford in support of a showing of extreme emotional disturbance was properly excluded. The evidence consisted of psychiatric testimony regarding Stanford's long-standing history of mental disorder. The evidence was properly excluded because the defense had failed to give written notice, as required by KRS 504.070(1), of his intent to introduce evidence of mental illness. The evidence was also irrelevant to a showing of extreme emotional disturbance since, under *McClellan v. Commonwealth,* 715 S.W.2d 464 (Ky. 1986), "extreme emotional disturbance is not established by evidence of insanity or mental illness, but requires a showing of some dramatic event which creates a temporary emotional disturbance...." Because no such disturbance was shown, Stanford was not entitled to an instruction on first degree manslaughter based on an extreme emotional disturbance.

The trial court also acted properly when it admitted evidence that, when Stanford picked up the victim, a stranded motorist, and robbed and killed him, Stanford was driving a stolen car and used a stolen gun. The Court states without explaining, that "[a]ppellant's theft of the gun...and theft of the automobile...are so interwoven with the commonwealth's proof as to render this evidence admissible despite the fact that it tended to prove collateral uncharged criminal conduct."

The trial court correctly excluded defense evidence regarding the psychiatric history of a jail cell informant. "[P]rior mental treatment of a witness is not relevant as to credibility unless it can be demonstrated that there was a mental deficiency at the time of the testimony or at the time of the matter about which the testimony was given."

Stanford was convicted of first degree robbery, murder, and kidnapping. The Court held that Stanford was not entitled to the benefit of the kidnapping exemption statute because his interference with the victim's liberty exceeded that ordinarily incidental to the commission of the underlying crime in that, instead of returning the victim to his own car as promised, Stanford diverted his course of travel and then forced the victim into a ditch where Stanford shot him.

The trial court did not err in refusing to rule on Stanford's motion *in limine.* "Whether to rule on a motion *in limine* is a matter which rests within the sound discretion of the trial court."

Finally, the Court held that the trial court did not err in refusing to order a psychiatric examination of Stanford after Stanford attempted to commit suicide following the guilt phase of his trial. The trial court took the testimony of a nurse, a psychologist, and a psychiatrist who saw Stanford following the attempt, and concluded on the basis of their testimony that Stanford was competent.

HEARSAY/OTHER CRIMES

Barnes v. Commonwealth
37 K.L.S. 8 at 3
(June 28, 1990)

The Court reversed Barnes' conviction of murder in the death of his wife. Barnes' defense was that the shooting was an accident.

As part of its proof, the commonwealth introduced an affidavit of the victim executed by her 2 1/2 years before her death in support of a restraining order against Barnes. In the affidavit the victim stated that Barnes had threatened to shoot her. The Court held that this evidence should have been excluded as hearsay. The fact that the victim's statement was sworn was irrelevant. "At most a statement made under oath might be regarded as possessing a greater degree of trustworthiness, but such is not sufficient to overcome the general rule [excluding hearsay]."

The Court also held that error was committed in the admission of evidence that the defendant had assaulted the victim seven years and again four years prior to her death. "Acts of physical violence, remote in time, prove little with regard to intent, motive, plan or scheme; have little relevance other than establishment of a general disposition to commit such acts; and the prejudice far outweighs any probative value in such evidence." Justice Wintersheimer dissented.

MULTIPLE REPRESENTATION

Conn v. Commonwealth
37 K.L.S. 8 at 5
(June 28, 1990)

In this case, the Court affirmed Conn's conviction but reversed his sentence because of the failure of the trial court to comply with RCr 8:30(1). The rule prohibits multiple representation of individuals charged with the same offenses unless the trial court explains to the defendants the possibility of a conflict of interest and each defendant enters into the record a statement acknowledging that the possibility of a conflict of interest has been explained to him and stating that he nevertheless desires to be represented by the same attorney as his codefendant. The commonwealth contended that the trial court's failure to have the necessary waiver entered into the record was harmless error.

In *Commonwealth v. Holder,* 705 S.W.2d 907 (Ky. 1986), the Court held that failure to comply with RCr 8.30(1) is harmless unless the record shows a "possibility of prejudice." Applying *Holder* to Conn's case, the Court found no possibility of prejudice in the guilt phase. The testimony of all defendants was consistent. However, at the sentencing phase, the attorney argued for mitigation of the codefendants' sentences by offering Conn as an unfavorable contrast. A conflict of interest thus existed at the penalty phase and required a new sentencing hearing.

COSTS OF EXPERTS FOR INDIGENT

Lincoln County Fiscal Court v. Department of Public Advocacy
37 K.L.S. 8 at 10
(June 28, 1990)

This decision reversed the Court of Appeals' decision in *Commonwealth v. Lincoln County Fiscal Court*, 36 K.L.S. 1 at 2 (1989). The Court held that KRS 31.200(3) was unambiguous in requiring DPA to bear "expenses incurred in the representation of needy person confined in a state correctional institution." The Department had contended that, as to persons being tried for crimes committed prior to their incarceration, the county should bear the expenses of their defense. The Court rejected the Department's position in view of the statute's "clear and unambiguous meaning." Justices Leibson and Gant dissented.

DOUBLE JEOPARDY - STATE AND FEDERAL OFFENSES

Smith v. Lowe, Jr.
37 K.L.S. 8 at 11
(June 28, 1990)

Smith was indicted for the federal offense of disabling a motor vehicle used in interstate traffic based on his act of firing a shotgun into a coal truck, killing the driver. Although not an element of the offense, the instructions to the jury required a finding that Smith's conduct resulted in the death of the truck driver. The jury acquitted Smith.

Smith was subsequently indicted for murder of the truck driver in the Pike Circuit Court. Smith sought a writ of prohibition enjoining his prosecution on double jeopardy grounds.

The Court agreed that Smith's acquittal of the federal charge was a bar to his prosecution on the state charge because the federal prosecution "required a determination inconsistent with [a] fact necessary to a conviction in the subsequent prosecution." KRS 505.050(2). Justices Wintersheimer and Vance dissented.

TRAFFICKING - SECOND OFFENSE

Woods v. Commonwealth
37 K.L.S. 8 at 15
(June 28, 1990)

Woods was convicted of trafficking, second offense, and sentenced to an enhanced penalty, based on his earlier conviction of misdemeanor possession of marijuana. The record was uncontroverted that Woods' guilty plea to the marijuana charge was entered in absentia pursuant to RCr 8.28(4) and without the affirmative showing of voluntariness required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The Court held that its rules allowing the trial of misdemeanors *in absentia* do not obviate the federal constitutional requirements with respect to guilty pleas. The Court additionally held that the Circuit Judge, who had also served as the District Judge who accepted Woods' guilty plea, was not entitled to rely on any off the record knowledge he had that he had canvassed Woods' *Boykin* rights with him. If the judge did rely on knowledge outside the record, he was required under KRS 26A.015(2) to recuse himself.

Finally, the Court held that, in any event, a misdemeanor conviction of possession of marijuana may not be used to enhance a subsequent trafficking offense. The Court's decision overruled *Rudolph v. Commonwealth*, 565 S.W.2d 1 (Ky. 1978). Justices Vance and Wintersheimer dissented.

UNITED STATES SUPREME COURT

DOUBLE JEOPARDY

Grady v. Corbin
47 CrL 2091
(May 29, 1990)

In this case, traffic violations committed by the defendant while intoxicated resulted in a fatal accident. The defendant plead guilty to the traffic violations and to DUI. The defendant was subsequently indicted for manslaughter. In a bill of particulars, the state indicated it would rely on the defendant's earlier guilty pleas to prove the manslaughter charge.

The majority held that the manslaughter prosecution was barred by the prohibition against double jeopardy. The Court noted that the prosecution would not be barred under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 40, 76 L.Ed. 520 (1932) which asks whether each offense requires proof of a fact that the other does not. However, the Court held that the *Blockburger* test was inadequate to counteract the risk that the state would utilize a succession of prosecutions to hone its case. The Court instead applied the rule expressed by it in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980) that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Justices O'Connor, Scalia, Kennedy, and Chief Justice Rehnquist dissented.

INTERROGATION

Illinois v. Perkins
47 CrL 2131
(June 4, 1990)

The Court held in this case that a law enforcement agent posing as a jail inmate is not required to give *Miranda* warnings before questioning his target about a crime with which the target has not yet been charged. The Court held that, since the target does not know he is being questioned by an officer, the inherent coerciveness of custodial interrogation is not present and the prophylactic concerns of *Miranda* do not apply. Justice Marshall dissented.

INVESTIGATIVE DETENTION

Alabama v. White
47 CrL 2148
(June 11, 1990)

In this case, the majority held that an anonymous tip that a particularly described car would drive at a certain time from a particular apartment to a particular motel and that there would be cocaine in the car was not sufficient alone to validate stopping the car under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, when the police drove to the scene and observed the predicted behaviour this provided sufficient corroboration of the tip to provide "sufficient indicia of reliability to justify the investigatory stop...." Justices Stevens, Brennan, and Marshall dissented.

INTERROGATION - *MIRANDA*
Pennsylvania v. Muniz
47 CrL 2167
(June 18, 1990)

The defendant in this case was arrested for DUI. He was then taken to a police station and videotaped while answering questions concerning his name, address, birthdate, age, weight, height, and eye color. The defendant was also asked whether he knew the date of his sixth birthday to which he answered "No." No *Miranda* warnings were given.

The majority held that, except for the question regarding his sixth birthday, the defendant's responses to the questions were not testimonial in nature since their evidentiary value was limited to the defendant's demeanor including slurred speech and impaired muscle coordination. Thus, *Miranda* warnings were not required. However, the question as to whether the defendant knew the date of his sixth birthdate did call for a testimonial response since the defendant's inability to answer the question had evidentiary value. That question should have been preceded by *Miranda* warnings. Justice Marshall dissented.

***EX POST FACTO* LAWS**
Collins v. Youngblood
47 CrL 2180
(June 21, 1990)

Youngblood was convicted of an offense and sentenced to imprisonment and a fine. He sought a state writ of habeas corpus on the grounds that Texas law did not permit a sentence of both imprisonment and a fine. At the time of commission of Youngblood's offense, Texas law mandated a new trial in such circumstances. However, following his offense, a statute went into effect authorizing Texas courts to amend improper sentencing verdicts without remand. Pursuant to this statute, Youngblood's fine was vacated and his request for a new trial denied.

The U.S. Supreme Court held that this application of the new statute to Youngblood did not violate the *Ex Post Facto* Clause. The Court stated that the Clause was not intended to prohibit mere changes in procedure simply because they disadvantage an accused. The Court delineated three types of changes in the law which the Clause protected against: those which punish acts that were lawful when done, those that increase the penalty for a crime after its commission, and those that deprive an accused of a defense that was available when the charged offense was committed.

CONFRONTATION
Maryland v. Craig
47 CrL 2258
(June 27, 1990)

The Court held in this case that a defendant's right to face-to-face confrontation may take second place to "an important public policy." Specifically, the Court held that a state's interest in protecting alleged victims of child abuse from trauma resulting from testifying face-to-face with their alleged abusers is a sufficiently important public policy to justify allowing the child to testify from outside the courtroom via television. However, such a denial of face-to-face confrontation must be based on evidence supporting a case-specific finding of "necessity," a finding that the trauma to the witness would stem from the presence of the defendant, not just the courtroom setting, and finally, a finding that the trauma would be more than "*de minimis.*" Justices Scalia, Brennan, Marshall, and Stevens dissented.

CONFRONTATION
HEARSAY
Idaho v. Wright
47 CrL 2250
(June 27, 1990)

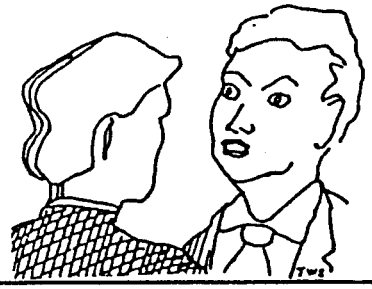
In this case, the Court held that, in order for hearsay statements of alleged child victims of sexual abuse to be admitted as "residual hearsay," the circumstances under which the statements were made must demonstrate "particularized guarantees of trustworthiness," to be determined under the "totality of the circumstances." In the case before it the statements, made in response to leading questions by a pediatrician, lacked sufficient indicia of reliability. The majority also held that corroborating evidence, such as physical indications of abuse, are irrelevant to the question of admissibility but may be considered by a reviewing court as part of a harmless error analysis. Justices Kennedy, White, Blackmun, and Chief Justice Rehnquist dissent.

LINDA WEST
Assistant Public Advocate
Appellate Branch
Frankfort

CRIME PAYS
by Ed Monahan

Oh, No! Here come the Mutant Ninja Turtles!

Don't be silly. They're just the Reagan Court.



MATERIALS AVAILABLE

DPA MOTION FILE INSTRUCTIONS MANUAL

The Department of Public Advocacy has collected many motions and instructions filed in actual criminal cases in Kentucky, and has compiled an index of categories of the various motions and instructions. Instructions are categorized by offense and statute number. Many motions include memorandum of law.

CAPITAL CASES

The motion file contains many motions which are applicable to capital cases, and that includes many motions filed in capital cases on non-capital issues.

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COPIES AVAILABLE

A copy of the index of available instructions and the categories and listing of motions is free to any public defender or criminal defense lawyer in Kentucky.

Copies of any of the actual instructions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict.

Criminal defense advocates can obtain copies of any of the motions for the cost of copying and postage. Each DPA field office has an entire set of the motions.

HOW TO OBTAIN COPIES

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

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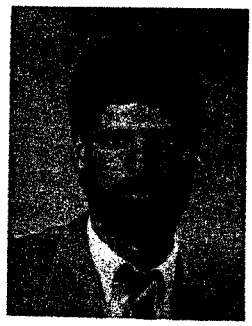
THE DEATH PENALTY

The Impact of Race on the Imposition of the Death Penalty in Kentucky

"We remain imprisoned by the past as long as we deny its influence in the present"
-Justice William Brennan, dissenting in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

"I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is... the white moderate who is more devoted to order than to justice; who prefers a negative peace, which is the absence of tension, to a positive peace, which is the presence of justice."
-Martin Luther King, Jr.



Neal Walker

Like most Southern states, Kentucky once had "slave codes" which prescribed different criminal penalties depending on the race of the defendant and the victim. For instance, the rape of a white woman was punished by as little as 2 years if the defendant was white, but with mandatory execution if the accused was Afro-American.

Even after the Civil War and the passage of the Civil Rights Act of 1866, Kentucky courts continued to enforce racist laws, including a restriction on testimony by Afro-American witnesses, even when a crime had been committed against them by a white person.

Kentucky was the only state to deny blacks the right to testify during this period. The defeated Southern states, now under Union control, admitted such testimony following passage of the civil rights legislation of 1866. Kentucky, though, had officially remained a Union state. Thus, it was granted an autonomy not extended to the former Confederate states. Many white Kentuckians, although pro-Union, were bitterly opposed to emancipation, and refused to restructure the legal system to give Afro-Americans equal rights. Ultimately, the federal courts were forced to intervene to ensure the right of blacks to testify against whites in the courts of Kentucky. Howard, Victor, B., *Black Liberation in Kentucky*, pp. 131-145 (U.K. Press, 1983).

"Judge Lynch"

Lynchings of blacks were also commonplace in Kentucky during Reconstruction and the decades which followed. In fact, a researcher has recently documented 353 lynchings in Kentucky, a figure he acknowledges as conservative. Wright, George C., *Racial Violence in Kentucky*, 1865-1940 (L.S.U. Press, 1990).

Wright, a history professor and director of the African and Afro-American Studies and Research Center at the University of Texas, has published the first study of its kind to target the racial patterns of a particular state. Among the scores of lynchings he describes is that of 18 year old Richard Coleman in Maysville on December 6, 1889. Coleman was suspected of rape and murder. His lynching presented "a number of the different aspects of lynching Afro-Americans for rape: a family member selected the form of punishment, no one wore a mask, the lynching occurred in broad daylight, local citizens knew well in advance that the lynching would occur, and officials took no steps to prevent the lynching." *Id.* at 93.

Burned At The Stake

Although Coleman was taken to Covington for safekeeping, following his indictment he was returned to Maysville. The victim's family, who had been maintaining a vigil at the jail, boarded the same train compartment with him and the sheriff for the trip back to Maysville. Thousands of people awaited his return, and the sheriff turned Coleman over to the mob upon arrival. He was then burned at the stake. "The mob then took Coleman to the pyre, which had been selected as the execution site several weeks earlier. [The victim's husband] set Coleman on fire, to the roar of the crowd. Hundreds of people, from little children, who placed weeds around Coleman, to the elderly, contributed to the fire." *Id.* at 94. "The corpse was eventually dragged through the streets, and people cut off fingers and toes from it for souvenirs." *Id.*

Racial Violence Today

Echoes of this and other lynchings can unfortunately still be heard in Kentucky. In Danville, members of a Centre College fraternity staged a mock public hanging of a black man in the fall of 1988. About 40 students watched.[1] Cross burnings have occurred across the state in Hopkinsville, Maysville, Louisville and elsewhere in the last few years (in Hopkinsville a cross was burned in the yard of the local NAACP chapter president).[2]

The violence has not always been symbolic. In August 1987 a Grayson Co. man set fire to the home of a biracial couple. He was sentenced to only 6 months in prison.[3] In Todd County last year, a hit and run driver mowed down three young girls, killing one. The driver "made racial slurs both before and after the incident in which three black girls were struck."[4]

Kentucky Death Notes

Number of people executed since statehood	470
Number of people executed in the electric chair	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	2
Number of persons sentenced to death in Kentucky and later proven innocent	1

Legal Lynchings

The decade of the 1930s ushered in a drastic decline in the number of lynchings in Kentucky. This was due in part to the efforts of Afro-Americans, enlightened state officials and organizations like the NAACP. The decline in the rate of lynchings, though, did not mean that blacks were no longer being killed for crimes against whites. Instead, Afro-Americans began to be summarily executed by the state after sham trial proceedings. We refer here to "legal lynchings." Wright describes the development of this phenomenon. "Whites manipulated the legal system, ensuring that the vast majority of blacks accused of rape or murder received the death penalty, the same punishment meted out by the lynch mob." Wright, p. 12. During this period and the years that followed "countless numbers of black men were tried in hostile environments with judges and juries convinced of their guilt before hearing any evidence. Some of these cases took less than an hour from start to finish with the jury not even leaving the courtroom to deliberate on the fate of the defendant." *Id.*

One of these cases is described in a recent book written by Kentucky lawyer Perry T. Ryan, aptly titled *Legal Lynching* (Alexandria, 1989)*. Ryan's book documents the trial of Sam Jennings, a black man convicted and sentenced to death for raping a white woman in Breckinridge County. Jennings' execution in 1932 was one of the last public hangings in the United States.

The Execution of Sam Jennings

His case is a story of an inadequate legal defense, of an all-white jury, of procedurally barred appellate claims, of an eleventh hour habeas petition filed by a volunteer lawyer, and of a last ditch effort to declare Jennings incompetent to be executed.

If this sounds like a story which is replayed in courtrooms across the country today, consider the political climate that Ryan describes as existing during Jennings' trial. "Citizens who remember Breckinridge County as it was in 1930 state that there was a common feeling among the population that it was time to get tough with criminals." Ryan, p. 2. Another manifestation of this "get tough" attitude was Prohibition, the complete national illegalization of alcoholic beverages. The notion was that the crime rate would drop with the banning of alcohol together with the imposition of harsh criminal sanctions in general. Some may see contemporary parallels with the "War on Drugs", which more and more appears to be a war on the Bill of Rights.

Many Kentucky readers will recall the 1986 session of the General Assembly and the hurried passage of draconian sentencing legislation euphemistically captioned the "Truth In Sentencing" bill. This statute, which the Kentucky Supreme Court has upheld even while ruling it to be unconstitutional,[5] was largely the product of outrage over the imposition of a life sentence in a sensational Kentucky capital trial. Sam Jennings' prosecution reminds us that this phenomenon, too, is not a new one.

In 1910, the General Assembly provided that all executions would be carried out by electrocution. Thus, the legislature replaced the traditional method of public hanging with a technology believed to be more humane - the electric chair. The first electrocution occurred the next year in the state penitentiary at Eddyville. As is so frequently the case, though, a single sensational crime prompted the legislature to amend the law. Following public outrage over the rape of a 9 year old Lexington girl, the 1920 legislative session resulted in an amendment directing that convicted rapists be hung rather than electrocuted. Before this amendment was repealed 9 years later, 9 men were hanged for rape. In all cases, the victims were white. All but one of the defendants were black (in the other case the victim was pregnant). Sam Jennings was one of these men.

Ryan's book is a compelling account of Jennings' prosecution and execution. He wisely lets the story tell itself by quoting extensively from the trial transcript and legal pleadings. Ryan tells us of a black man convicted of rape on the basis of eyewitness identification testimony of dubious reliability. Jennings was defended by 2 court appointed lawyers who conferred with him one time prior to trial. And he was sentenced to die by an all-white jury.

All-White Juries: The 1930s

It was this latter point which was one of the chief grounds advanced in a last minute habeas petition. In his petition for habeas corpus relief, Jennings alleged that he was denied a fair trial in violation of Section 11 of the Kentucky Constitution and the 14th Amendment to the United States Constitution because "in Breckinridge County members of his race are and have been systematically excluded from the jury by reason of their color."

A claim of improper jury selection procedures had also been raised on direct appeal. However, the Kentucky Court of Apreals refused to review the assignment since it was "precluded by Section 281 of the Criminal Code of Practice." *Jennings v. Commonwealth*, 40 S.W.2d 279, 280 (Ky. 1931). Section 28 provided, in essence, that any challenge to the composition of the jury could be litigated in the trial court but was not "subject to exception" and could not be raised on appeal. *Id.* at 280. This was true "[i]ndependent...of the merits of the question." *Id.*

While it was on the books, Section 281 effectively kept black defendants from litigating unconstitutional jury selection methods in the appellate courts. Although it was overruled long ago, our courts continue to rely on procedural bars to avoid addressing the claims of black death row inmates. In *Simmons v. Commonwealth*, 746 S.W.2d 393 (Ky. 1988), a black condemned inmate complained on appeal that the prosecutor used his peremptory challenges in a racially discriminating manner by striking 5 of 7 prospective black jurors. The Kentucky Supreme Court refused to review the merits of his case finding that his objection was untimely.

All-White Juries: The 1990s

Black men continue to be sentenced to death in Kentucky by all-white juries. In fact, Kevin Stanford, a black youth charged with murder and sexual assault of a white female, was sentenced to death by an all-white jury even though he was only 17 at the time of the crime. If Stanford is executed he will share much in common with the 7 other juvenile executions carried out in Kentucky this century. All but one of the 7 juveniles executed have been black, all were convicted of crimes against whites (4 for raping, but not killing, white women), and all were sentenced by all-white juries.

In another case, a black prison inmate (whose conviction was reversed on other grounds) was sentenced to death by an all-white jury whose members admitted during voir dire to being biased against the defendant due to his attraction to the white female victim. One juror "stated that he did not like the fact that Grooms (a black man) had developed a 'crush' on the white female victim." Another juror "also did not approve of [Grooms'] 'affection' for the victim for racial reasons".[6]

No *Batson* Reversals in Kentucky

Of course, all this was supposed to change in 1986, when the Supreme Court ruled that a prosecutor's use of peremptory challenges to purge Afro-Americans from the jury violated the equal protection clause. *Batson v. Kentucky*, 476 U.S. 79 (1986). But little has really changed in

Kentucky since the 1930s, for although *Batson* claims are frequently pressed on appeal, not once has a Kentucky appellate court granted relief.[7]

Batson may have been conceived in this state, but Kentucky judges and prosecutors treat it as if it was stillborn. Our appellate courts have never refused to credit a prosecutor's justification for striking a black prospective juror, no matter how transparent, absurd or even sexist. In a case from Paducah, prosecutor Will Kautz struck the only black juror, explaining that he wanted an older jury. The black juror was 35. However, he had left a 25 year old white female on the jury:

> "The Commonwealth Attorney explained he left her on because she was attractive and would 'pump him up' during the trial."

The Court of Appeals held that this was a race neutral explanation and upheld the conviction. *White v. Commonwealth*, No. 88-CA-765-MR, Slip Opinion at 5, (unpublished opinion) (decided April 14, 1989).

Black capital defendants have had no more success in recent years challenging the racial makeup of the pools from which jurors are drawn.[8]

Race Still Matters

In 1972 the Supreme Court effectively struck down every death sentence in the country on the grounds that the penalty was being inflicted in an arbitrary, discriminatory manner.[9] The rest seems like distant history, as Kentucky and other states passed new "refined" death penalty statutes designed to eliminate discriminatory death sentencing patterns.

Ten years after the new enactment, researchers from the University of Louisville undertook a study of its operation in an attempt to divine whether or not the new statute eliminated the old racial death sentencing patterns. Vito, G. and Keil, T., *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*, 79 Journal of Criminal Law and Criminology, p. 483 (1988). They reach the harsh conclusion that Kentucky's effort to establish a rational system of capital punishment "has produced the same flawed, discriminatory result which characterizes all of the capital sentencing systems evaluated during the post-*Gregg* period to date." *Id.* at 503.

The authors considered all murder indictments over a 10 year period (1976-1986). This universe of 864 cases was reduced to all death eligible, or aggravated, murders. Included among these cases were 104 death qualified jury trials and 35 death sentences. Acquittals were excluded. Using presentence reports and other data, information was gathered on the offender, the victim and the offense. A total of 97 such variables were addressed. From there the researchers used sophisticated statistical analysis to identify why some murderers went to death row while others didn't. The answer is race. "In Kentucky, blacks who kill whites have a generally greater risk of arriving on death row than other murderers." *Id.* at 503. This was attributed to prosecutorial decisions. "[C]ontrolling for differences in the objective heinousness of the offense, prosecutors are more likely to seek the death penalty when a black kills a white than in other homicide cases." *Id.* at 502.

A follow-up study by the same researchers has determined that Kentucky capital juries also discriminate on the basis of race in determining who lives and who dies. Vito, G. and Keil, T., *Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale*, 27 Criminology, 511-534 (August 1989). "When we examined the entire pool of individuals who were eligible for the death sentence, the combination of race of the accused and race of the victim also helped determine who would be sentenced to die. Blacks who killed whites were significantly more likely to end up on death row." *Id.* p. 527.

Additionally, the follow up study contains further evidence that Kentucky prosecutors view black-on-white homicides as most worthy of the death penalty: "Our equations also show that Kentucky 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. 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). Indeed, none of the whites who killed blacks in Kentucky was charged with a capital offense. Fourteen such cases met the legal qualifications for capital prosecution but none was tried before death-qualified juries." *Id.* at 527.

The study concludes with a devastating indictment of the impact of race on Kentucky's death sentencing scheme. "In Kentucky, race is inextricably bound up with the way in which the capital sentencing process operates." *Id.* at 528.

The Kentucky studies were included in a comprehensive review of all such research on race and capital sentencing recently conducted by the Government Accounting Office. The G.A.O. study, released on February 27, 1990, found "a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the *Furman* decision."

While the United States Supreme Court has held that such statistical evidence is not sufficient to prove that a black defendant's death sentence violates the federal Constitution,[10] our state Supreme Court has not been presented with a similar claim based on the Vito/Keil studies.

A Legacy of Shame

It is scandalous and shameful that the death penalty in Kentucky is reserved exclusively for killers of whites, that black men continue to receive death sentences at the hands of all-white juries in Kentucky, and that we accept the *status quo*.

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Chief, Major Litigation Section
Frankfort

Footnotes:

[1] *National Catholic Reporter* (11-25-88)
[2] *Lexington Herald Leader* (11-27-86); *Conley v. Commonwealth*, No. 86-CA 2019-I (Ky.Ct.App., 12-23-87) (unpublished opinion); *Louisville Courier Journal* (2-1-90).
[3] *Louisville Courier Journal* (1-20-89)
[4] *Frankfort State Journal* (4-23-89)
[5] *Reneer v. Commonwealth*, 754 S.W.2d 794 (Ky. 1987)
[6] *Grooms v. Commonwealth*, 756 S.W.2d 131, 144 (Ky. 1988) (Stephens, C.J., concurring and dissenting).
[7] In *Commonwealth v. Hardy*, 775 S.W.2d 919 (Ky. 1989), the state Supreme Court reinstated Hardy's conviction after it was reversed by the Court of Appeals due to *Batson* error; *Simmons v. Commonwealth*, 746 S.W.2d 393 (Ky. 1988) (relief denied); *Hannon v. Commonwealth*, 774 S.W.2d 462 (Ky.Ct.App. 1989) (*Batson* inapplicable to gender based strikes); *Stanford v. Commonwealth*, __S.W.2d ____, Slip Opinion at 3 (Ky., decided 5/25/89) (prosecutor's explanation that black juror was unsuitable because he had "a handkerchief flowing out of his suit with a red shirt on" held to be race-neutral).
[8] *Ford v. Commonwealth*, 665 S.W.2d 304 (1983)
[9] *Furman v. Georgia*, 408 U.S. 238 (1972).
[10] *McCleskey v. Kemp*, 481 U.S. 279 (1987)

WAFORD CASE TURNS SPOTLIGHT ON RACIAL CLIMATE

SHELBYVILLE - To some people, the Vanissa Waford murder case is as simple as black and white. Waford, a 17-year-old shoe store clerk who was robbed and slain in June, was white. William Stark Jr., the 22-year-old Louisville man who has been charged in the case, is black. It was a distinction immediately evident to some people watching a house fire in Shelbyville in March.

When several newspaper and television reporters showed up and someone found out they were in town to cover Stark's arraignment, several people began openly using a racial slur to refer to Stark. And earlier this month, the prosecutor in the case drew a sharp reaction from Stark and his attorney when he mentioned in court that Waford was white.

Local officials insist their town of 6,000, between Lexington and Louisville, is not racist. Others say racism in such crimes is more subtle, more a part of a system that goes farther than Shelbyville or Shelby County. They say our legal system is stacked against blacks in such cases. By its very nature, the Waford case has generated enormous interest. Waford, a Sunday school teacher and cheerleader who was voted most likely to succeed at Shelby County High School, was bludgeoned in the head several times with one or more blunt objects, including a stepladder. She died June 25. Police said $269 was taken from a cash register at Maxie's shoe store. Police later found Waford's wallet in a field behind the store. Pictures from it had been carefully placed on tree branches in the field, which ironically is owned by the judge in the case.

At one point, police were looking for a white Satan worshiper, then released a composite drawing of another white man they wanted to question. Then attention focused for a while on John Howard, a 6-foot-5 black man, before settling on Stark, who is 5-foot-8. Stark already faces 537 years in prison after being convicted of 26 robberies and 2 assaults in Louisville, 35 miles to the west.

Despite the long sentence, Stark would be eligible for parole in 12 years. But Steve Mirkin, his public advocate, said early parole was unlikely. "It's a pipe dream to think he would have any type of parole after 12 years - probably not until he is an old man," Mirkin said last week. Shelby County Commonwealth's Attorney Ted Igleheart wants to reduce the chance of parole completely. He has said he will ask that Stark be executed if convicted of murder.

Questions about race

Shelbyville is more racially mixed than many towns in Kentucky. Mayor Neil Hackworth said that at one point, blacks made up about 25 percent of the town's population. That percentage might have shrunk some in recent years as the town has grown, he said. The black population of Shelby County as a whole is about 15 percent, he said. Both Hackworth and Police Chief John Miller said the town was not racist. "I'll hold my city up to any in the state," Hackworth said.

The Rev. Louis Coleman of Shelby Congregational Methodist Church agreed that race relations in Shelbyville generally were good, but added that problems remained. Specifically, he said, some blacks remain distrustful of the court system. "I have a woman who every Sunday gets up in church and makes an announcement, whenever any of our young ladies or gentlemen are incarcerated," he said. "She will say, 'Please, please check it out to make sure justice is done, because Shelbyville is Shelbyville, and it doesn't change very quickly.'" Coleman, who is black, said suspicions about the Waford case were raised when people saw the composite sketch of a white man in *The Sentinel-News*, the local newspaper, then read that police attention was focusing on a black man.

Miller said last week that he could not comment on the case because it was before the court. But at one point, after it became known that police had a black suspect, Miller told a reporter he hoped people would not stop calling with tips about white suspects, and vice versa.

Coleman said suspicions in the black community grew stronger when Igleheart, in a pretrial hearing April 3, referred to Stark as being responsible for the "beating of a young white woman to death," putting emphasis on the word white. Mirkin objected loudly, calling Igleheart's statement "absolutely outrageous." Igleheart said he was trying to comply with Mirkin's request to make the charges against Stark more specific. "There was no racial connotation to that whatsoever," Igleheart said later. "We refer to black males, white females, young white females. That's a standard police reference to a victim without calling her name." Asked about Coleman's comments about mistrust of the court system in the black community, Igleheart said, "I've had experiences with Louis Coleman before, and he can find something racial in any and every issue that comes up." Mirkin said he knew nothing about Shelby County race relations, but added that Igleheart's comment in court still was out of place. "I was really bothered when out of the blue ... he found it necessary to state that the victim was white. "What's offensive is not that the victim was white, but that it seems to matter to the prosecutor." The race issue had been raised before in court documents filed by Mirkin. He argued that Igleheart was more likely to seek the death penalty for Stark because he is black and Waford was white.

Mirkin cites a study on capital cases in Kentucky that says the death penalty is more likely when the accused killer is black and the victim is white. The study considered 458 cases between 1976 and 1986 in which someone was charged with murder and convicted of some crime. Gennaro F. Vito, a professor of justice administration at the University of Louisville who is co-author of the study, said the work was similar to studies done in other states. "It's pretty consistent across states that race of the victim - meaning murder of a white - definitely influences the probability of receiving the death sentence," Vito said. "In some states like Kentucky, it's even further than that, it's a black that kills a white. So it's the race of the offender and the race of victim."

The statistical difference shows up at 2 levels: Prosecutors are more likely to ask for the death penalty for blacks who kill whites, and juries are more likely to sentence those blacks to death. "It's not that legal factors aren't involved. They are," Vito said. "But race becomes an extra legal factor that's also in the mix. "The 2-part trial and all these other procedures that were developed to eliminate discrimination from the death sentencing process do not appear to have worked with regard to race."

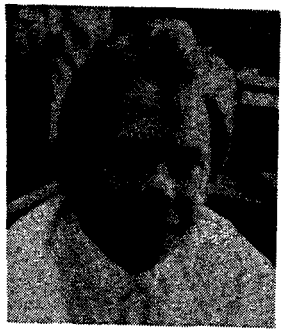
Will the trial be moved?

Igleheart and Mirkin agree on one point: There has been a great deal of publicity about the case. Mirkin has not asked that the case be moved from Shelby County, but he clearly is considering the possibility. He asked for $3,500 to conduct a public opinion survey in Shelby and 6 surrounding counties to determine whether Stark could get a fair trial "in this county or region." Igleheart argued against the request, which he said was unprecedented. "The publicity written and shown by the metropolitan newspapers and television stations has reached all sections of the state and even out of state," Igleheart wrote. "No other county, even the remotest in Eastern or Western Kentucky, would be free from or immune form the pervasive publicity given this trial." Shelby Circuit Judge Harold Saunders denied the request for money for the survey. He has said the trial would take place no later than October.

ANDY MEAD, *Lexington Herald Leader*, April 22, 1990, Reprinted by permission.

WHAT PROCESS IS DUE ?

Legislative Changes in KRS 202B and the Effect on Involuntary Hospitalization of Mentally Retarded Citizens.



Rob Riley

Since the early 1980s, a sometimes not so quiet battle has been raging in the courtrooms of this Commonwealth involving the rights of mentally retarded citizens who are facing involuntary hospitalization in a mental health facility. The 1990 Legislative Session produced House Bill 511 (hereinafter H.B. 511), which was signed into law by Governor Wilkinson. H.B. 511 significantly alters the rights and procedures employed in involuntary commitment procedures for mentally retarded citizens. While the most important changes will be discussed below, the changes, as a whole, diminish those protections traditionally afforded to citizens whose liberty is threatened.

BACKGROUND

The statutory framework for involuntary commitment of mentally retarded adults is contained in KRS Chapter 202B. Prior to H.B. 511, the principle focus of 202B was to grant, by reference to KRS 202A, the same rights and procedures to mentally retarded citizens as those granted to mentally ill citizens. See KRS 202B.050. H.B. 511 deletes 202B.050 and establishes a new procedural framework.

BURDEN OF PROOF

Kentucky courts have traditionally held the Commonwealth to the highest standard of proof where a citizen's liberty is in jeopardy, holding that such a citizen is entitled to the "same constitutional protection as is given to the accused in a criminal case. *Denton v. Commonwealth*, 386 S.W.2d 681 (Ky.App. 1964). KRS 202A.076 guarantees the beyond a reasonable doubt standard in mentally ill cases.

In adopting H.B. 511, Section 15(2), the Legislature lowered the standard of proof necessary to the constitutional floor of "clear and convincing" evidence. See *Addington v. Texas*, 441 U.S. 418 (1979). As such, at least to its retarded citizens, Kentucky has abandoned its traditional protective stance and eased the way to institutionalization for that segment of society the least able to speak for itself.

WHAT MUST BE PROVEN

KRS 202B.040 contained the traditional 4 part test for determining who was appropriate for forced hospitalization. Its criteria were virtually the same as those in 202A.026 for the mentally ill. However, H.B. 511, Section 7(B) alters the "least restrictive alternative mode of treatment" element by adding "presently available." While this change seems innocuous, it does suggest that some individuals who might otherwise have found their way to a less secure group home setting as opposed to hospitalization will be, in fact, hospitalized because no group home bed is "presently available."

WHO MAY PROVE IT

In perhaps the greatest jump from prior procedure, H.B. 511 alters the traditional Commonwealth vs. Citizen format. H.B. 511, Section 15(3) grants party like status to "guardians and immediate family members of the mentally retarded respondent." It allows them to hire private counsel and to participate, cross-examine, and to appeal. H.B. 511, Section 12 allows the mentally retarded respondent's "parent or guardian" to hire a mental health professional who can participate in any examination and submit his/her finding. The purpose of such provisions are, at best, unclear. A family or guardian concerned with defending against hospitalization of the mentally retarded respondent has always had the right to hire an attorney [for respondent] and to participate in that manner. The same is true of the hiring of expert witnesses. Party like status granted to "guardians and immediate family members" is only of value if the "guardian or immediate family members" have an interest antagonistic to the mentally retarded respondent. As such, the mentally retarded respondent must now defend not only against the accusations of the Commonwealth, presented presumably by an experienced and/or politically popular county attorney, but also against whomever his/her family retains to insure that he/she is not released.

The propriety of such a situation have been addressed, unfavorably, by the U.S. Supreme Court. In *Young v. U.S. ex rel. Vuitton et Fils S.A., et al.*, 481 U.S. 787 (1987), the practice in Federal Court of appointing private attorneys with a potential interest in the outcome to prosecute criminal contempt was struck down. However, in *Hubbard v. Commonwealth*, 777 S.W.2d 882 (Ky. 1989), our Supreme Court upheld the long-standing practice of hiring private attorneys to assist prosecutors in criminal cases. The Court was careful to distinguish *Young, supra*, due to the control maintained by the Commonwealth's attorney over the case, and precluded potential private prosecutors from being involved in related civil matters. 777 S.W.2d at 884. At present, it seems legally permissible to stack the deck against the mentally retarded respondent.

WHO MAY DEFEND

In another surprising shift from prior practice, H.B. 511 20 makes appointment of the public advocate a matter of last resort. Section 20 requires appointment of counsel in all cases to continue "unless respondent retains private counsel." However, appointment comes from a list of attorneys who have "volunteered" to represent mentally retarded respondents. Compensation of the "volunteers" is determined by reference to KRS 620.100(l)(a), thus suggesting a limit of $250.00 per case.

KRS Chapter 31.010 established the Department of Public Advocacy and thereby guaranteed that indigent persons "accused of crimes or mental states which [could] result in incarceration or confinement" would be represented by counsel. H.B. 511, Section 20 obliterates the indigency requirement and sets up a new fund to pay attorneys regardless of the mentally retarded respondent's resources. The establishment of the 620.100(1)(a) fund was necessary because those offenses covered by KRS Chapter 620 would never meet the definition of "serious crime" contained in KRS 31.100(4)(b), and, as such, those citizens charged solely

pursuant to the provision of Chapter 620 would never have been eligible for appointment of counsel pursuant to KRS 31.110 regardless of their indigency. Since 31.010 would guarantee representation to indigent mentally retarded respondents, it appears that Section 20 was not motivated by statutory necessity to insure representation but rather by a separate and arguably mean spirited objective.

The potentially troublesome aspect of Section 20 is the potential for representation by well-meaning "volunteers" who lack the training to be sufficiently sensitive to the special requirements of involuntary commitment of the mentally retarded cases. The Department of Public Advocacy regularly conducts training on involuntary commitments, and the Jefferson District Public Defenders' Office maintains a staff attorney whose primary responsibility is defending mental health commitment cases. As such, state funds are being spent to train attorneys to sit idly by while state funds are spent to pay potentially untrained attorneys to represent mentally retarded respondents.

Attorneys participating in the "volunteer" plan should be aware of Rule 1.1 of the Kentucky Rules of Professional Conduct, effective January 1, 1990. Rule 1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

It is up to the appointing court, individual "volunteer" attorney, the other members of the Bar, and the Bar Association to insure that the priniciple of Rule 1.1 has meaning to that class of citizen least likely to notice, complain, or vote.

WHAT HAPPENS IF HE/SHE WINS

In the most legally indefensible aspect of H.B. 511, those with party like status (discussed above) may appeal an "adverse" decision. As above, third parties seeking to defeat forced hospitalization need no special standing, as an appeal from an order of commitment has always been available to the unsuccessful respondent. What H.B. 511, Section 15(3) and Section 22 do is grant the family and the Commonwealth the opportunity to appeal after a jury verdict or other ruling against hospitalization. The traditional concerns of double jeopardy are certainly present in a system that effectively allows a dry run through the proof without real penalty. In *Burks v. U.S.*, 437 U.S. 1 (1978), the U.S. Supreme Court held that:

> [t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. 437 U.S. at 11.

While *Burks* is admittedly a criminal case, fundamental fairness should dictate a similar result where the Commonwealth, with the aid and support of private counsel and privately retained experts, cannot convince a jury that there is clear and convincing evidence that a mentally retarded respondent needs "help" and that the local ICF/MR is the best place "presently available." Certainly, the consequences of release are different in an involuntary commitment case, and the need for correct legal rulings is paramount, but the third party standing to appeal is not necessary to provide assurance that potentially disastrous mistakes do not occur. An appeal right limited to the Commonwealth would insure against inappropriate release, although might still be constitutionally suspect. Giving appeal rights to the family, who might have to make alternate plans for care and are, therefore, not necessarily motivated by lofty ideals of justice and fair play, can have no real justification, except to further tilt the so-called scales of justice against the mentally retarded respondent.

An added complication is the fact that it is unclear if, on appeal, the original "volunteer" attorney must represent the respondent's interest *pro bono*, if at all. Section 20, by reference to KRS 620.100(1)(a), makes no reference to appeals. KRS 31.110(2)(b) would guarantee appellate counsel in those "last resort" cases where DPA is appointed, further evidencing the suppositional ulterior motive behind the "volunteer" plan.

CONCLUSION

In sum, KRS 202B, as amended by H.B. 511, will make it more difficult to successfully represent the mentally retarded respondent. In addition to those blatant problems discussed above, the statute is rife with small faults, all of which work against the interest of the citizen accused. The terms used to describe these third parties with standing are not uniform nor are they defined. H.B. 511, Section 14 relaxes the time periods for having the hearings from 21 days, pursuant to 202A.071 and *Kendall v. True*, 391 F.Supp. 413 (W.D. Ky. 1975), to 30 days. H.B. 511, Section 4 envisions "voluntary" admissions but nowhere is "voluntary" discharge authorized. The list goes on and on, and arguably pickier and pickier. Nonetheless, for those citizens whose liberty, however it is defined, is dependent upon the procedures of H.B. 511, the answer to the question, "How much process is due?", is not what it was, not what it should be, and, hopefully, less than it will be in the future.

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System for Penalizing Drivers in Jeopardy

FRANKFORT - The state's system for punishing persistent traffic offenders has been placed in jeopardy by a continuing dispute between the legislature and other state officials over administrative regulations.

According to legislators, the so-called points system will expire. The Transportation Cabinet and officials in Gov. Wallace Wilkinson's administration say the system for identifying and penalizing bad drivers will continue as usual. "The crucial issue is whether or not we're going to be able to take the drivers' licenses of people who violate traffic laws. We're going to continue to do that," said Doug Alexander, Wilkinson's press secretary. Pat Abell, Wilkinson's general counsel, said the issue probably would have to be resolved in the courts.

Administrative regulations, the rules written by state agencies to put laws into effect, often are hard to fathom. But in this instance, the issue is familiar to anyone who has ever gotten a speeding ticket.

Kentucky, like most other states, assigns points to various moving violations. Failure to stop for a school bus, for example, is 6 points. Failure to yield the right of way is 3 points. The accumulation of 12 or more points in a 2-year period means driving privileges can be suspended for up to 6 months. The list and procedure for suspending licenses are contained in administrative regulations of the Transportation Cabinet.

But last year, the Administrative Regulation Review Subcommittee of the General Assembly determined the regulation went beyond the intent of the law. Specifically, there was a law that said no points would be assessed for speeding on a rural interstate highway less than 10 mph over the posted limit. The cabinet created a regulation extending that exemption to other limited access highways, such as parkways. Under another law, if an administrative regulation that is found deficient is not enacted into law by the next legislature, it expires. The legislature enacted no new law on assigning points.

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July 11, 1990.

CURRENT STATUS OF *DOE V. COWHERD* AND THE RIGHTS OF THE MENTALLY RETARDED

In 1982, the Legal Aid Society in Louisville, Kentucky, filed a class action in the United States District Court, Western District of Kentucky, concerning admission to and discharge from Kentucky's Mental Retardation Residential Treatment Centers (MRRTC). The case challenged the Cabinet for Human Resources' redundant refusal to provide existing statutory protections to mentally retarded individuals facing involuntary commitment to institutions. In 1985, Judge Charles Allen concluded that Kentucky's practice of indeterminately placing its retarded citizens in state facilities, without using the existing commitment procedures, violated the Fourteenth Amendment's equal protection guarantee. In 1986, the Kentucky General Assembly responded to the court order by amending the civil commitment statutes to explicitly exclude mentally retarded persons from the purview of the civil commitment laws. In November, 1986, Judge Allen summarized the situation "The 1986 Amendments effectively eliminated the rights of mentally retarded persons to judicial hearing prior to the involuntary commitment." The plaintiffs successfully challenged the amendments, obtaining a preliminary injunction and partial summary judgment again requiring the Cabinet for Human Resources to provide basic procedural protections to the class of mentally retarded adults. The Cabinet appealed to the United States Court of Appeals for the Sixth Circuit, asking the Court to uphold the 1986 amendments, which allowed parents of mentally retarded adults to "voluntarily" commit their adult children, thereby circumventing the involuntary commitment procedures. The Sixth Circuit affirmed Judge Allen's decision and found that, for purposes of equal protection, the mentally retarded are similarly situated to the mentally ill with regard to the need for judicial determination of the eligibility for civil commitment. Therefore, the Sixth Circuit agreed that equal protection requires the Commonwealth to provide a judicial hearing to the mentally retarded, either upon admission to an MRRTC or, if now committed, when they reach adulthood. The United States Supreme Court denied the Cabinet's petition for a writ of *certiorari* in 1988. As a result, the parties submitted an agreed final compliance plan on October 30, 1989, in accordance with the decisions of the United States District Court and the Sixth Circuit Court of Appeals in *Doe v. Austin* (now *Doe v. Cowherd*). The plan would require Kentucky to give the same rights and procedures to the adult mentally retarded person, with respect to involuntary commitment, as the state already gives to the adult mentally ill. The compliance plan is currently pending before Judge Charles Allen.

However, a new law governing the commitment of the mentally retarded was passed by the Kentucky General Assembly in its regular 1990 session and signed by the governor on March 22, 1990. The new law, House Bill 511 (HB 511) takes effect July 13, 1990. Prior to HB 511, the Kentucky Legislature mandated that all rights guaranteed by KRS 202A to mentally ill persons shall apply to mentally retarded persons. KRS 202B.050. As a result of HB 511, that the reference in KRS 202B.050 to KRS 202A, setting forth the rights of the mentally ill, has been deleted: the rights and procedures guaranteed to mentally ill persons facing commitment to a state institution under that chapter are no longer thereby guaranteed to the mentally retarded. HB 511 makes the following changes, among others, in KRS 202B governing the civil commitment of mentally retarded adults:

1) it deems the admission of some mentally retarded adults to be voluntary;
2) it prohibits a "voluntary" admitted adult from discharging himself or herself from the institution;
3) it lowers the burden of proof for commitment from beyond a reasonable doubt to clear and convincing evidence;
4) it affords immediate family members or guardians standing to act as parties in the involuntary commitment of mentally retarded adults or in any appeal of an adverse decision;
5) it attempts to preclude mentally retarded adults from obtaining counsel through the Department of Public Advocacy as set out in KRS Chapter 31. As a result of the amendments to KRS 202B, the class of mentally retarded adults facing commitment once again lack procedural protections afforded to the mentally ill. The right of the mentally retarded adult to the safeguards found in the civil commitment procedures afforded to the mentally ill has been impermissibly narrowed by the passge of HB 511. As a result, constitutional issues once resolved have arisen anew, causing the plaintiffs to seek relief again from the United States District Court, Western District of Kentucky.

On May 18, 1990, the plaintiffs filed a Motion and Memorandum for a preliminary injunction and/or summary judgment. The Cabinet filed its response on June 22, 1990. State Representative Robert Heleringer, attorney for *Amicus* (Concerned Parents of Hazelwood), also filed a response to the plaintiffs' motion. The case is now pending before Judge Charles Allen.

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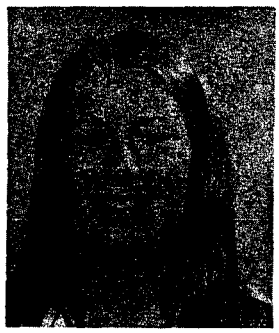
Ms. Miller has acted as plaintiffs' counsel since the filing of the 1982 challenge to the existing statutory procedures for involuntary commitment of the mentally retarded. She was a featured speaker in a seminar on Involuntary Commitment of the Mentally Retarded presented by the Department of Public Advocacy on October 19, 1987, and has written previously for The Advocate.

6TH CIRCUIT HIGHLIGHTS



Donna Boyce

BAIL

Dotson v. Clark

In *Dotson v. Clark*, 900 F.2d 77 (6th Cir. 1990), the Sixth Circuit joined the majority of circuits in holding that a bail order pending review of a habeas corpus petition is appealable. The Court stated that the bail order is severable from the merits, it conclusively determines the disputed question and is effectively unreviewable on appeal from a prior judgment. The Court found no reason to distinguish the right to an appeal based on the fact that the petitioner is in state or federal prison custody or based on whether the appeal is brought by the state or federal government.

CONFESSIONS OF THE MENTALLY RETARDED

United States v. Macklin

The Sixth Circuit found no constitutional impediments to the admission of confessions given by two mentally retarded defendants in *United States v. Macklin*, 900 F.2d 948 (6th Cir. 1990). Federal agents went to the home of the two defendants who had become chief suspects in the investigation of a forged endorsement on a U.S. Treasury check. They found Macklin in front of the house. At the agents' request, Macklin gave them a handwriting sample. The agents compared it to the forged endorsement and concluded that Macklin was probably the forger. Macklin had been told he was not under arrest and that he was free to walk away from the interrogation. At the time of Macklin's interrogation, co-defendant Mack was inside the house. When the agents finished speaking to Macklin he went inside and brought out Mack. She was also informed that she was not under arrest, was free to leave, and did not have to answer any questions. After interrogating Mack, the agents asked the two to come to their office the next morning. They did so and were again advised they were not under arrest and were free to leave. They agreed to assist the agents in preparing written statements about their involvement in the forgery. An agent wrote out the statements which the defendants signed. They also initialed a printed paragraph that said their statements were voluntary and that they were free to leave at any time.

Expert testimony revealed that Macklin has a full scale I.Q. of 59, that he is not able to read written instructions and has a very severely limited capacity to understand verbal instructions. Mack's I.Q. is 70.

The Sixth Circuit found that the defendants were not in custody when interrogated and, thus, the agents were not required to advise them of their *Miranda* rights.

The Court also found the confessions to be voluntary since there was no evidence that the agents exerted any coercion on the defendants. There was no evidence that the defendants did not understand the consequences of their actions. The Court noted that the defendants had the capacity to devise a scheme to defraud and concluded they also had the capacity knowingly to admit to having devised such a scheme.

The Court also pointed out that "[w]hile it would obviously be to the benefit of the defendants in this case to view their status as retarded individuals as depriving them of the free will necessary to make a voluntary confession, such a rule would not be in the interests of retarded citizens generally, or of these individuals in other circumstances. Confessions are allowed in evidence as a concomitant of the free will of individuals to make meaningful statements. That same free will is the basis of a host of valuable concomitants of citizenship: the right to testify, the right to conduct a defense, the right to make contracts, and the right to vote, for example. If the retarded citizens before us in this case are to be treated as lacking the free will necessary for making a valid confession, by what logic could they not also be denied the other rights mentioned above? ...We believe that ... [mentally retarded] defendants should be held to the standards of other citizens, just as they should be permitted the same opportunities."

DONNA L. BOYCE
Assistant Public Advocate
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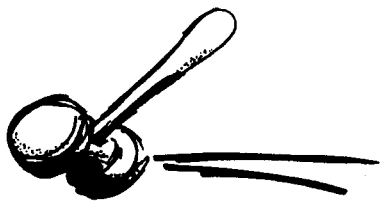
DETROIT JUDGE FILLS SPOT ON APPEALS COURT



CINCINNATI - Richard F. Suhrheinrich, a U.S. District Court judge from Detroit, has been sworn in as a judge on the 6th U.S. Circuit Court of Appeals.

Suhrheinrich, 53, became the 14th active judge on the Cincinnati-based appeals court, which handles appeals from all federal district courts in Ohio, Michi-gan, Kentucky and Tennessee.

The court, which also has seven semi-retired judges who handle some cases, is authorized for one more full-time judgeship but has not been told when that position will be filled, court officials.

Suhrheinrich fills the vacancy created when appeals Judge Albert J. Engel, of Grand Rapids, Mich., took the senior (semiretired) status last October.

"I am grateful and humble. I hope I can continue the work you've done so well," Suhrheinrich told fellow appeals Judges Gilbert Merritt, David Nelson, Nathaniel Jones and George Edwards after taking his oath to serve on the court.

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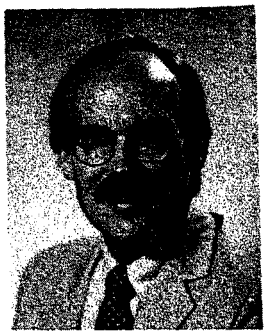
PLAIN VIEW

Search and Seizure Law



Ernie Lewis

When did you realize as a criminal defense lawyer that our rights to privacy under the 4th Amendment were dying? For many, I am sure it occurred when *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) and *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d. 677 (1984) were written in the middle 1980s. For some, it may have occurred upon reading in the *Lexington Herald Leader* on June 10, 1990 that drug czar William Bennett is "building an electronic data base of everyone suspected of drug dealing, not just those arrested or convicted." In that same article, the author noted that "the FBI this spring won blanket permission from a federal appeals court to order from photo stores duplicate prints of films left by customers for developing."

For many, I am sure it was the release of the *Washington Post* ABC news poll taken on September 6, 1987. That poll revealed an alarming bi-product of the war on drugs. For example, it revealed that 62% of our citizenry would give up some of their freedoms in order to reduce the amount of drug use in our country. An alarming 67% would allow police to stop cars at random to search for drugs. Most appalling of all, 52% revealed that they would favor allowing police officers to search without a warrant the homes of persons suspected of dealing in drugs.

Even the media has finally begun to notice that one of our cherished freedoms is withering. Interestingly, I believe that the media has been responsible for perpetrating one of the greatest myths of the criminal justice system, that is that numerous criminals were being released from jail and prison due to "legal technicalities." The greatest legal technicality of all of course was the 4th Amendment. I have noticed a dramatic shift, however, among those in the not so liberal media who now with some regularity are sounding the alarm concerning the decline of the 4th Amendment. In a recent *Lexington Herald Leader* editorial of June 9, 1990, after recounting numerous recent Supreme Court 4th Amendment opinions, the author stated "one wonders what American patriots of the revolutionary era would make of these rulings, or of their descendants' reactions to them. Far from rebelling, or even objecting, modern Americans actually support the loss of their security in their persons, houses, papers, and effects."

Certainly, during the years of authoring this column, I have been under varying degrees of distress at the cavalier attitude displayed in case after case by the United States Supreme Court. This distress has been made all the more acute in recent years as Justices Kennedy and Scalia have joined the now strong majority who favor the rights of government over the rights of the citizens, particularly in the 4th Amendment context. However, cases such as *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) and the reluctance of the Court to expand the good faith section into warrantless searches and seizures have continued to leave some room for hope. Having just reviewed the cases written since March of 1990, however, I now hold out little hope for the continued vitality of the 4th Amendment. A review of these cases will reveal the extent to which the above is not an exaggeration.

Alabama v. White
47 CrL 2148
(June 13, 1990)

The most alarming case of them all is *Alabama v. White, supra*. It was a case that I had some peripheral involvement in, having read the pleadings and sent my thoughts to people writing an *Amicus* brief for the National Association of Criminal Defense Lawyers. At the time that I read the pleadings, I did not think that the issue was even close. Thus, I was shocked upon finding that six members of the Court, led by Justice White, had reversed the Alabama Court of Criminal Appeals' decision finding that the citizen's rights of privacy had been denied.

The alarming nature of this case comes from its applicability to everyday life. One Corporal Davis of the Montgomery Police Department in Alabama received an anonymous telephone tip stating that Vanessa White would be leaving her apartment at a particular time in a brown Plymouth station wagon which had its right taillight lens broken. The tipster furthered added that she would be going to a named motel, and that she would have an ounce of cocaine inside a brown brief case. The tipster obviously left no information regarding how he or she knew the facts underlying the allegation, or who he/she was. In response to the tip, officers staked out a car matching the description given by the tipster. The officers saw Vanessa White leave the apartment with nothing in her hands. She got into her car and drove toward the motel. The police stopped her short of the motel, and asked her if they could look in her car. After her consent, the police found a locked brown attache case. White then consented to a search of the attache case in which marijuana was found. After her arrest, and while being booked, cocaine was found in her purse.

Not surprisingly, the Alabama Court of Criminal Appeals found insufficient reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) a holding that the Supreme Court of Alabama upheld by denying *cert.* The United States Supreme Court however granted *certiorari* in order to decide whether "an anonymous tip may furnish reasonable suspicion for a stop."

The majority held that in fact Vanessa

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

White's privacy rights had not been denied her due to the fact that there was a reasonable suspicion that she was involved in criminal activity at the time that she was pulled over by the Montgomery Police Department. The Court relied upon the fact that an anonymous tip had been made and that the facts of that tip had been corroborated. While the Court found this to be a "close case," they relied upon the fact that a car was found matching the description, that Ms. White got into the car, and that she headed in the direction of the motel.

The Court inferred that an anonymous tip alone cannot supply reasonable suspicion. Rather just like *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), corroboration of information in the tip is vital to supply reasonable suspicion. "[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable."

Justice Stevens was joined by Justices Brennan and Marshall in a short dissent. The dissenters focused on the problems with the majority's holding, saying that it was open to great abuse by "anybody with enough knowledge about a given person to make her a target of a prank, or to harbor a grudge against her." The dissenters also questioned the holding because "every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based upon an anonymous tip predicting whatever conduct the officer just observed ... [t]he 4th Amendment was intended to protect the citizens from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection."

One must remember that *Illinois v. Gates, supra*, upon which the majority relies was a probable cause case. There, the police had probable cause to believe that criminal activity was afoot. Further, the police were able to corroborate the anonymous tip in numerous details in order to make the seizure of the defendant in that case reasonable under the totality of the circumstances. It is a big step from that to allow police on simply a reasonable suspicion to interfere with the privacy rights of citizens. This demonstrates the extent to which *Terry v. Ohio, supra*, has expanded.

One interesting facet of this case unaddressed by the Court is that the anonymous tip regarding the attache case was not corroborated by the police prior to the stopping. The tipster stated that Ms. White would be carrying cocaine in a brief case. It would have appeared to me that once Ms. White was seen by the police without a brief case that that would rebut the suspicion that she had drugs in a brief case. Interestingly, the Court did not touch on what occurs when the facts contradict the anonymous tip.

This opinion alarmed the editorial writers from the *Lexington Herald Leader*. They stated "if the 4th Amendment to the Constitution were alive and well, Americans would be protected from such pranks and police abuse. An anonymous phone call would not be considered reasonable cause for stopping and questioning anyone the police choose. But the 4th Amendment, and the 5th, are becoming mere words at the hands of the Supreme Court these days." *Lexington Herald Leader*, June 22, 1990. Strong words indeed.

Michigan Department of State Police, et.al. v. Sitz
47 CrL 2155
(June 14, 1990)

The *White* case has clear applicability to our practice involving vehicle stops, particularly DUI stops. The Court made clear not only in White but also in *Michigan Department of State Police, et.al. v. Sitz, supra*, that they were going to be very receptive to interference with privacy rights in order to stop drunk driving in our country.

There, the Michigan State Police operated a road block for approximately one hour and 15 minutes prior to its being stopped by an order of the court. During that period of time, over 100 people were pulled over. The police used 25 seconds per driver, and eventually pulled two people over for field sobriety tests, one of whom was then arrested for driving under the influence of alcohol. Another person drove through the road block without stopping, after which he was stopped and charged with DUI.

Justice Rehnquist wrote an opinion for the five justice majority, holding that the state's use of a sobriety check point was not violative of the 4th or the 14th Amendments.

The Court used its familiar balancing test, borrowing from *Brown v. Texas*, 443 U.S. 47 (1979) and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The interest of the drivers going through the checkpoint was viewed as "light." The interest of the state in deterring drunk driving obviously was viewed as strong by the Court. In the balance, "the state's interest in preventing drunken driving, the extent to which this system can be reasonably said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the 4th Amendment."

One interesting facet of the majority opinion was that strong evidence had been presented and relied upon by the Michigan trial court that such sobriety checkpoints were an ineffective means for deterring drunk driving. Despite that evidence, the majority continued to find the state's interest outweighed the privacy interests of those drivers who were being stopped.

Justice Brennan dissented, joined by Justice Marshall. He lamented that the majority opinion allowed for the balancing test to be used with no requirement that individualized suspicion be found that a person was engaging in criminal behavior. "Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the public against even the 'minimally intrusive seizures' involved in this case."

Justice Stevens also wrote a dissent which was joined in part by Justices Brennan and Marshall. Justice Stevens attacked the majority opinion for ignoring the evidence that the sobriety checkpoint was ineffective. He noted that in a Maryland study, in which a larger data base had been used, such checkpoints arrested only .3 % of drivers and that while such checkpoints reduced accidents over a period of time by some 10%, the control county reduced accidents by 11%. Justice Stevens complained that "the court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen's interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is 'virtually no difference' between a routine stop at a permanent fixed checkpoint and a surprise checkpoint."

Justice Stevens' dissent also went beyond the direct issue before the Court and put the majority's holding into the context of what has occurred to the 4th Amendment. "[U]nannounced investigatory seizures are, particularly when they take place at night, the hallmark of regimes far different from ours; the surprise intrusion upon individual liberty is not minimal. On that issue, my difference with the Court may amount to nothing less than a difference in our respective evaluations of the importance of individual liberty, a serious albeit inevitable source of constitutional dis-

agreement."

One can expect that this decision will result in numerous sobriety checkpoints. Perhaps the only thing keeping this from occurring is the strong evidence in the law enforcement community that such sobriety checkpoints are grandstanding and highly ineffective.

One also wonders how far the reach of the *Sitz* opinion will go. Can, for example, a drug checkpoint be set up on the streets of our cities? After all, the interest of the citizen under such circumstances is minimal under the reasoning of the *Sitz* court. Why would being stopped in the street be any more intrusive than being stopped in one's car in the middle of the night? Can a dog then be used to sniff persons being stopped at the checkpoint? On the other hand, certainly the interest of the state in "winning the war on drugs" would be viewed by the Court as an interest heavily in favor of such stops in high crime areas.

New York v. Harris
47 CrL 2024
(April 18, 1990)

Both *White* and *Sitz* involve a seizure of a person while driving an automobile, one based upon reasonable suspicion, and the other based upon "reasonableness." While both are troubling, neither go the "core value" of the 4th Amendment, that is the home. Not so, however, with *New York v. Harris, supra*, the next case under review. In this case, the police had probable cause to believe that Harris had killed a woman. They went to his house without a warrant, entered his home, read him his rights, after which he confessed. At the police station, he gave two more confessions, during the last of which he stated that he wanted to end the interrogation. While the trial court suppressed statements one and three, he allowed statement number two, the first statement given at the police station, to be admitted at Harris' trial. Harris was convicted after which the New York Court of Appeals reversed, citing *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) and *Brown v. Illinois*, 422 U.S. 590 (1975).

Justice White wrote the opinion reversing the New York Court of Appeals, joined by the now familiar other four members of the conservative majority. The Court held that the New York Court of Appeals erred when it suppressed the statement of Harris on the grounds that it had been tainted by the *Payton* violation, that is by the arrest of Harris in his home without a warrant. In doing so, the Court seriously undermined three of the giant opinions of the Burger Court in this area, *Brown v. Illinois*, 422 U.S. 590 (1975), *Dunaway v. New York*, 442 U.S. 200 (1979) and *Taylor v. Alabama*, 457 U.S. 687 (1982). In all of those cases, the Court had found that where a person had been illegally arrested, and where nothing occurred which attenuated the taint of the illegal arrest, that the subsequent statement had to be suppressed. The Court here carved out a major exception to that exclusionary rule. In each of those cases, according to Justice White, there was not probable cause. "We hold that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the state's use of a statement made by the defendant outside of his home even though the statement is taken after an arrest made in the home in violation of *Payton*."

Justice Marshall wrote a dissent that was joined by the now familiar other three dissenters. He revealed in his dissent, that in New York an arrest warrant does not issue until an accusatory document is filed, at which time an attorney must be obtained for the defendant prior to being

WHY ARE AMERICANS WILLING TO SURRENDER THEIR FREEDOMS?

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sound familiar? It would to Americans of the late 1780s.

Freed finally from the arbitrary application of law meted out by King George III's occupying army, they refused to accept the Constitution of the United States without a written recognition of what Revolutionary theorist Thomas Paine described as the natural rights of man. Included in what became known as the Bill of Rights is the paragraph above, the Fourteenth Amendment to the Constitution.

How odd it is, then, that Americans of the late 1980s, many generations removed from their forefathers' struggle for liberty, raised not a whimper as the U.S. Supreme Court whittled away at Fourth Amendment protections.

The court has said police can stop and question people at random on highways. They can stop and detain people at random at airports. They can plant electronic beepers on vehicles. They can search your garbage and spy on your property from the air without warrants. They can seize all assets and property of a suspect, even before a trial and conviction.

Illegally obtained evidence can be used against a person in court if the police demonstrated "good faith" (whatever that is) in obtaining the evidence. Undercover police agents can obtain a confession from a suspect without informing the suspect of his rights.

One wonders what American patriots of the Revolutionary era would make of these rulings, or of their descendants' reactions to them. Far from rebelling, or even objecting, modern Americans actually support the loss of their security in their persons, houses, papers and effects.

A 1989 poll showed that 52% of Americans would allow police to search without a warrant the homes of suspected drug dealers, even if their own homes were searched by mistake. 67% of respondents in the poll favored allowing police to stop cars at random to search for drugs, even if they were also stopped. And 62% saw nothing wrong with giving up some of their freedoms to reduce the amount of drug use.

It is surely true that illegal drug use and trafficking pose a threat to modern American society. But this nation has always faced threats of all kinds. It is in the face of such threats that we need to be most vigilant in defense of our liberty, because that is precisely the time our freedoms are most at risk.

It was that way early in the nation's history when Congress passed the Alien and Sedition Act, later declared unconstitutional. It was that way as recently as the 1950s when Sen. Joe McCarthy waved the red flag of communism in front of the nation. It will be that way again in the future.

Make no mistake; the drug threat is real. It generates violence and death, and has forced entire neighborhoods of our cities to live in fear. It is the nation's duty to restore peace and safety in these streets. But we must not do so by sacrificing the ideals and principles of American democracy.

Threats to the nation will come and go. But the greatest danger, the one that is always with us, is the loss of the individual liberties that make this a free nation.

June 9, 1990 *Lexington Herald-Leader Editorial*. Reprinted by permission of the *Lexington Herald-Leader*.

questioned. In the police department under review, it was policy to take defendants into custody prior to getting a warrant, in violation of *Payton*. The obvious rationale is that the police wanted to question the defendants prior to their having an attorney. One would have presumed that on this record, the flagrancy of the misconduct would have led the Court to a different conclusion. However, according to Justice Marshall, the Court created "powerful incentives for police officers to violate the 4th Amendment," referring of course to the police desire to place a defendant in custody in order to obtain a confession from him without having to appear in front of a magistrate where he would obtain counsel.

An interesting facet of this opinion is that in the past the court has held allegiance to bright line rules. If anything, *Payton v. New York, Dunaway v. New York, Brown v. Illinois*, and *Taylor v. Alabama* had all formed such a rule. By creating this exception, the majority has now made the rule fuzzy indeed. Now, rather than determining whether there is a *Payton* violation, which is rather easy since the police either do or don't have a warrant at the time of the arrest inside the home, the trial courts will be called upon to make the determination of probable cause. Where probable cause is found prior to the entry of the home, subsequent statements will be admitted.

Another practical consequence of this decision is its application to third parties. Assume that the police have probable cause to arrest an individual. Do they then have authority to arrest that person inside the home in order to obtain a confession from him outside the home, or does *Payton v. New York* continue to condemn that? If they do have such authority, is anything in plain view, including personal effects of the third party seizable? One truly wonders why the Court saw the need to disturb a simple line of cases substituting in its place this new rule.

Horton v. California
47 CrL 2135
(June 4, 1990)

In the *Harris* case above, the Court revisited some major search and seizure cases and carved out of them a major exception to their basic holdings. In the next case under review, *Horton v. California*, 47 Cr.L. 2135 (June 4, 1990), the Court revisits the decision of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and carves out a new understanding of that case, specifically as it applies to the inadvertence requirement of a plain view seizure.

In this case, one Sgt. LaRault filed an affidavit for a search warrant which referred to the proceeds of a robbery, and to weapons. The magistrate, however, authorized only a search for 3 specific rings that had been taken in the robbery. Sgt. LaRault then searched Horton's house pursuant to the warrant and did not find the 3 rings. What he did find, however, was a .38, two stun guns (a stun gun had been used in the robbery), a handcuff key (the victim had been handcuffed), a San Jose Coin Club brochure (the robbery had occurred after a show at the San Jose Coin Club), and clothing which had been identical to that described by the victim. At the suppression hearing in this case, Sgt. LaRault testified that while he had gone to the house to look for the three rings, he was also looking for all of the other items that he ended up finding during the search.

Coolidge v. New Hampshire, supra, had held or at least inferred that in order for a plain view seizure of evidence to be admissable, the seizure had to have been "inadvertent." Thus, a police officer when executing a warrant, could not go to a particular place and attempt to seize something not named in the warrant and justify it under the rubric of the plain view seizure. Rather, in order to seize the evidence, it had to have appeared to the officer unexpectedly or inadvertently. As noted in the appendix, some 46 states interpret *Coolidge v. New Hampshire* to require inadvertence for there to be a plain view seizure. *Patrick v. Commonwealth*, 535 S.W.2d 88, 89 (Ky. 1976) is listed in the appendix of this decision as including Kentucky within those 46 states. Justice Stevens, however, was joined by a 7 person majority in reading the inadvertence requirement out of *Coolidge v. New Hampshire*. Thus, the plain view seizure of evidence can now be conducted without inadvertence. Inadvertence was rejected for 2 reasons: 1) Justice Stevens thought evenhanded law enforcement is best achieved by looking at objective standards of conduct rather than the subjective mind of the police officer; 2) the requirement of inadvertence is not necessary to ensure against a general warrant because that interest is already served by the particularity requirement for warrants, and the requirement that "warrantless searches be circumscribed by the exigencies which justifies initiation."

Following *Horton*, a warrantless plain view seizure will require three elements: 1) the officer cannot violate the 4th Amendment in getting to the place where the evidence can be plainly viewed; 2) "not only must the object be in plain view, its incriminating character must be also be 'immediately apparent'"; 3) the officer must "also have a lawful right of access to the object itself."

One other significant limitation continues to exist on the plain view seizure. Where the police officer finds the item named in the warrant at the beginning of the search, even where the officer expects other evidence to be in the house or car, the officer cannot then continue to search for those expected items under the *Horton* case. Rather, at that time the search would have to end.

Justice Brennan wrote the dissenting opinion joined by Justice Marshall. According to Justice Brennan, Justice Stewart had been correct in writing inadvertence into the plain view exception in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). That requirement was necessary due to the fact that the 4th Amendment warrant requirement involves not only that places be named with particularity but also that the things to be seized be named with particularity. Justice Brennan expressed concern that if the inadvertence requirement were no longer present, that the warrant requirement naming the items to be seized would become meaningless.

One practical effect of this decision, however, is that police officers will be tempted to obtain warrants to search for one or two items that they clearly have probable cause to obtain. During the execution of that warrant, they will look in areas other than where the named items would be expected to be found, looking for other items that they believe might be present. That seems to be invited by the decision in *Horton*. Justice Brennan in his dissent,

however, assumes that the majority's opinion "should have only a limited impact, for the Court is not confronted today with what lower courts have described as a pretextual search," which he assumes would continue to be prohibited by *Coolidge v. New Hampshire, supra.*

Illinois v. Rodriguez
47 CrL 2186
(June 21, 1990)

The Court revisited yet another case in *Illinois v. Rodriguez*, 47 Cr.L. 2186 (June 21, 1990). In *United States v. Matlock*, 415 U.S. 164 (1974), the Court had held that warrantless search was not illegal if the officers obtained "a consent of a third party who possesses common authority over the premises. *Matlock* however had reserved the question of "whether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believed to possess common authority over the premises, but who in fact does not do so."

In this case, one Gail Fisher lived for several months with Edward Rodriguez in his apartment. She moved out after taking a key to the apartment with her. Later, the police received a call from Gail Fisher's mother asking them to come to the mother's house. Upon arrival they found Gail, who appeared to have been beaten. She said that she had been beaten at Edward's apartment, and agreed to go with the police to let them into the apartment. Gail went to the apartment and let the police in with her key. There, officers found Rodriguez asleep on the couch, and found cocaine in plain view. He was charged with possession of cocaine with intent to deliver. However,the trial court found Gail to be "an infrequent visitor" and thus found that she did not have authority to consent to the search. The appellate court agreed and the Illinois Supreme Court denied *certoriari.*

Justice Scalia wrote the opinion for the six justice majority. The Court reversed the opinion below and remanded to the lower court. First of all, the Court found that the state had not met its burden of proving that Gail Fisher had common authority over Rodriguez' apartment and thus had authority to consent to the search of that apartment. However, the Court did not stop there. Rather the Court shifted the focus to whether the police reasonably believed that Gail Fisher had "common authority" over the premises. After the *Rodriguez* case, trial courts will be called upon to judge whether consent to search exists based upon "an objective standard: would the facts available to the officer at the moment ... 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises? *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). If not, then warrantless entry without further inquiry is unlawful unless authority actually exists." In this case, the Court remanded to the lower court to hold a hearing on the question of whether the police had a reasonable belief in Gail Fisher's authority to consent to the entry of Rodriguez' apartment.

Marshall wrote the dissent. joined by Justices Brennan and Stevens. Marshall immediately went to the core issue involved in the *Rodriguez* case, that is the erosion of the core value of the 4th Amendment, the sanctity of the home. "'[P]hysical entry of the home is the chief evil against which the wording of the 4th Amendment is directed.'" Marshall also focused on the fact that in *Stoner v. California*, 376 U.S. 483 (1964), the court had rejected a hotel clerk's consent to a search of Stoner's room. Finally, Marshall attacked the use of the reasonable belief standard which henceforth will be used in third party consent cases. "Where this free floating creation of 'reasonable' exceptions to the warrant requirement will end now that the Court has departed from the balancing approach that has long been part of our 4th Amendment jurisprudence is unclear. But by allowing a person to be subjected to a warrantless search in his home without his consent and without the exigency, the majority has taken away some of the liberty that the 4th Amendment was designed to protect."

Florida v. Wells
47 CrL 2021
(Aprll 18, 1990)

One of the patterns for the decisions during this period of time is revisiting what appeared to be settled opinions and carving out exceptions that expand the right of law enforcement to invade the privacy rights of citizens. *Florida v. Wells*, 47 Cr.L. 2021 (April 18, 1990) is no exception. There, Wells was stopped for speeding, and thereafter arrested for DUI at which time he was taken to the police station. Wells was told that his car would be impounded and he consented to the opening of his trunk. During the inventory search of the car, the police found a locked suitcase and opened it where a garbage bag full of marijuana was found. The Florida Appellate Courts condemned the opening of the locked suitcase and *certiorari* was granted.

Justice Rehnquist was joined by Justices Scalia, White, O'Connor and Kennedy in overturning the decision of the Florida Supreme Court. The Court revisits *Colorada v. Bertine*, 479 U.S. 367 (1987), where the Court had firmly held that containers could only be opened pursuant to the explicit authority of police inventory regulations. The Court rejected the inference from *Bertine* that those regulations had to either call for every closed container to be opened during the inventory, or no closed containers. The Court backed away from such a bright line rule and instead stated that "a police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself... the allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the 4th Amendment."

There were no dissents but rather were a number of concurring opinions written by the usual dissenters. Justice Brennan's concurrence was joined by Justice Marshall. He criticized the majority for including dicta in the case regarding using discretion in inventory searches saying that such *dicta* was inconsistent with Bertine. Justice Brennan criticized Justice Rehnquist for casting "doubt on the vitality" of the *Bertine* decision. Justice Blackmum in his concurrence also expressed a concern similar to Justice Brennan's. He criticized the majority for "doing more than refuting the Florida Supreme Court's approach; it is opining about a very different and important constitutional question not addressed by the state courts here and not raised by the circumstances of this case."

Justice Stevens repeated his criticism of the Court for granting *certiorari* in the first place. "It is a proper part of the judicial function to make laws as a necessary bi-product of the process of deciding actual cases and controversy. But to reach out so blatantly and unnecessarily to make new law in a case of this kind is unabashed judicial activism."

United States v. Ojeda Rios
47 CrL 2059
(May 2, 1990)

This case involved the statutory construction of 18 U.S.C. 2510 *et. seq.*,the federal wiretap statute. Here, the government lawyer who was in charge of the surveillance misinterpreted the wiretap statute that extensions of their surveillance could be obtained without the sealing of the tapes that had been obtained pursuant to the wiretap orders. The Court found that this position taken by the government prosecutor had been a reasonable position to take, although erroneous, and remanded the case to see whether the government's "extension theory" had been advanced in

the district court. If it had not been advanced, then the explanation was not a "satisfactory" explanation, as that language exists in the statute for the delays in the sealing of the tapes, and thus the tapes would be held to be inadmissible.

Minnesota v. Olson
47 CrL 2031
(April 18, 1990)

The last decision during this time period is *Minnesota v. Olson*, 47 Cr.L. 2031 (April 18, 1990). Really, this is the only decision won by a citizen and is a case of virtually no application to anyone other than Olson.

In this case the police had probable cause to believe that Olson was involved in a robbery/murder. Later they found out where he was and surrounded the house where a woman and her daughter lived. The police called the house and talked to the woman. During the conversation, the police overheard a male voice say "tell them I left." The woman then repeated the words that the police had overheard. The police then entered the house and arrested Olson in a closet. An hour later, at the police station, he made an inculpatory statement.

Justice White wrote the opinion of the majority joined by Justices Brennan, Marshall, Stevens, O'Connor, Scalia, and Kennedy. Only Rehnquist and Justice Blackmum dissented. The majority concentrated on the question of standing. Olson had stayed over night as a guest in the house. That, according to the Court was sufficient standing to challenge the *Payton* violation committed by the police. The Court concluded that "Olson's status as an overnight guest is alone enough to show that he has an expectation of privacy in the home that society is prepared to recognize as reasonable." The Court further deferred a Minnesota Supreme Court's determination that there were no exigent circumstances. Justice Rehnquist and Blackmum dissented without opinion.

This opinion is significant solely due to the clear expression that an overnight guest has a reasonable expectation of privacy and thus has standing to challenge violations of his rights to privacy. However, one must notice that this is a very similar case to *New York v. Harris, supra*, detailed above. Because the state had not raised the *Harris* question below, the court declined to address it *sua sponte*. However, it would appear that the *Olson* case would be covered by the holding in *New York v. Harris*. Thus, even though Olson has a reasonable expectation of privacy, his inculpatory statement would still have come in because the police had probable cause to believe that he had been involved in criminal activity.

Thus, even the one case in which the rights of the citizen prevailed has as its downside.

CONCLUSION

I do not recall a term of the Supreme Court in which so many prior decisions were revisited, and the Court balanced citizens' rights away as extensively as was done during the October 1990 term. While certainly in the past the decisions allowing for searches of students' lockers, allowing helicopters to hover outside in our bedroom windows and our backyards, allowing our garbage to be rummaged through, allowing government employees' desks to be searched, have been alarming decisions. The Court this time truly outdid itself in a short period of time.

Am I exaggerating? Am I asking too much when I ask when did we all notice that the 4th Amendment was dying? The *Lexington Herald Leader* certainly noticed it this past June of 1990. Commentators in the ivory towers have also noticed. Two brief quotes will demonstrate that the *Herald Leader* is on target in noticing what is occurring. Professor Laurence Benner in his "Diminishing Expectations of Privacy in the Rehnquist Court," 22 *John Marshall Law Review* 795 (1989) states as follows:

> "the threat to freedom may seem far in the distance but as the recent decisions of the Rehnquist Court clearly signal, the horizon is rapidly approaching. The implications of a 'national' norm for 'reasonable expectations of privacy' determined by a bare majority of the Court made up of only the elite members of society is antithetical to the commitment to minority values which has formed the bedrock of America's unique form of government. Looking back the path which the assault upon privacy has taken indeed confirms the wisdom of holding firm to the principle that the rights of even the most despised members of society must be protected. For a while the erosion of Fourth Amendment protection began as an attack on the rights of suspected criminals, it has steadily encroached upon the rights of businessmen, public school children, and now public employees. Can the rest of us be far behind?"

Matthew Lippman in "The Decline of 4th Amendment Jurisprudence," 11 *Criminal Justice Journal* 293 (1989) argues that the Fourth Amendment is virtually gone. He states that "the 4th Amendment is being interpreted so as to have little practical significance in protecting the rights of Americans and has been reduced to a mere symbol of personal freedom."

Kentucky Courts have also noticed. In a recent unpublished case in the Court of Appeals, *Pepper v. Commonwealth*, (June 29, 1990), Judge Lester said some remarkable things. "Since *Gates*, the philosophy of the Federal Supreme Court has taken an even greater conservative bent in that it has disregarded more of the fictitious rights of criminals in favor of the states' function of providing protection to the citizens."

In light of the editorials, the polls, and the law review articles, it might do well for all of us to remember the words of Justice Jackson spoken after his return from the Nuremberg trials in the late 1940s, when he said in his dissent to *Brinegar v. United States*, 338 U.S. 160, 180 (1949) the following:

> "these [4th Amendment rights], I protest, are not mere second class rights but belong in the catalog of indispensable freedoms. Among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

So indeed, if the 4th Amendment is dying, perhaps the words of Justice Jackson will be read by our courts in Kentucky as they interpret a reinvigorated Section 10 of the Kentucky Constitution.

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STRIP SEARCH
MOVING VIOLATION

On November 27, 1989, the United States Supreme Court turned down an appeal by Kentucky law enforcement officials sued for strip-searching a woman charged with operating her car without proper registration or insurance. The court, without comment, let stand a ruling that strip-searching people accused of minor traffic violations generally violate their rights.

THE JUVENILE SEX OFFENDER LABEL

THE NEW SCARLET LETTER?

Barbara Holthaus

In 1986, the Kentucky legislature enacted a pilot program for treatment of juvenile sexual offenders, KRS 208.800 - 208.850. Because it is codified under the old code "208" number rather than included in the new Unified Juvenile Code found in KRS Chapter 600, its existence has, until recently, gone relatively unnoticed. Essentially, the Cabinet for Human Resources (CHR) is mandated to set up a treatment program for juveniles adjudicated for sex offenses. The decision to assign the child to this program is left to the discretion of the juvenile court judge. An examination of this statute reveals that while it offers the advocate some potential for avoiding a transfer to adult court, it carries the potential to hurt more than to help.

A juvenile sex offender is defined as "an individual under age of 18 who has committed an offense under KRS Chapter 510 or other offenses, when, within the discretion of the juvenile court judge as based on case history, the judge deems the child in need of such treatment." KRS 208.805-(1). Section 2 goes on to state that a juvenile sexual offender becomes an "eligible sexual offender" when the juvenile court determines that the offender:

(a) is at least 5 years older than the victim;
(b) uses physical force or threat of force, express or implied; or
(c) has a case history that provides documentation of a long-term pattern of sexually inappropriate behavior."

The statute does not indicate at what stage of the proceedings this determination should be made.

Once the judge has "used his discretion" to determine that a child is an "eligible sexual offender," and the child has been adjudicated as a public offender, the next section, KRS 208.810 permits the judge to refer the child for a treatment period of "*not less than two years*" apparently regardless of the age of the child at the time of commitment. CHR is charged with developing the program (KRS 208.815) and developing individual treatment plans for all children relegated to the program. No maximum length for treatment appears in the statute.

In addition, there is an analogous youthful offender sexual offender provision set forth in KRS 640.030(4). It ties parole eligibility to successful completion of the 208 based program for youthful offenders who are treated in a CHR facility rather than transferred to the Corrections Cabinet.[1]

Michael Foley, Branch Manager of Program Development and Training for CHR's Children Residential Services Program developed the program for CHR after the passage of the statute. Ms. Foley based the program from a model developed by the Hennepin Home School Program in Minneapolis, Minnesota. The program is based on a nationally accepted model that was adopted by the National Counsel of Juvenile Court Judges in 1988. CHR's program was implemented in 1988.

The sex offender program itself is based on a 24 month model. It involves a multi-level approach to treatment within the residential facilities for children run by CHR. Currently 6 of the facilities have the program. Participants are involved in both group and individual counselling. All the facilities use the same approach including one group home designed for transitioning participants form the treatment facility into the community. The model is based on the concept that sex offenders are special because sex offenses are a manifestation of "addictive behavior that often occurs after the offenders suffers physical or sexual trauma themselves."

Ideally, the program should involve community-based treatment as well as residential treatment according to Ms. Foley. Unfortunately, at this point only Jefferson County has out-patient community based programs specifically designed to treat sex offenders. This means that even though the statute provides that treatment could be given to the committed child in a community setting, the reality of the situation is that virtually every child is going to be committed to Residential Treatment if designated a sex offender. In addition, 4 of the 6 facilities with the program are located in the Louisville area so most children are going to be uprooted from their community and transferred to Louisville making post-treatment transition that much more difficult. It also conflicts with CHR's avowed preference to treat children within their own community whenever possible even if the child is involved in residential treatment.

According to Ms. Foley, the Cabinet is doing all that it can to increase community awareness and to generate more community based treatment programs. She acknowledges though that at this time the residential component is the bulk of the program. This appears to conflict with the model's assumption that sex offenses are the result of addictive behavior and offenders are "controlled" rather than "cured," requiring on-going participation in support groups or other out-patient treatment to prevent relapse after de-institutionalization.

Another troubling aspect of the program is the requirement that the child admit to the act. When asked about the scenario where a child's case is on appeal and the child is told by an attorney not to make any admission should the case be retried, Ms. Foley expressed indignation that a "public defender" would interfere with the program. She felt that such advice would undermine the entire treatment program. She also indicated that she was unaware what would happen if a child continued to deny culpability for two years—the minimum commitment period. A youthful offender could be returned to court and threatened with a transfer to the Corrections Cabinet. A public offender, however, could only be ordered to comply. Ms. Foley conceded that there was no mechanism in the statute to further punish a child who did not acquiesce to treatment. She felt that the statute would permit indefinite commitment up to the age of 19 or perhaps even 21. (It should be noted that a non-sex offender cannot be committed past age 18 except where the child has reached 17 1/2 at commitment and can then be committed for a year. See 635.060). From

CHR's perspective, the ideal commitment was a youthful offender, sex offender label which Ms. Foley said was the "best motivation for treatment" since the threat of prison "puts a lot of motivation to do well in treatment."

Ms. Foley was also disturbed by plea bargaining which often rendered children statutorily ineligible for the sex offender label. She felt this was the "fault" of the defense attorney. This author was troubled by CHR's assumption that all children who are adjudicated are guilty and that all children who are adjudicated of any sexual offenses must be sick in precisely the same way regardless of their particular role in the offense.

The statute appears to raise more problems than it solves. Obviously, the lack of a maximum commitment length gives rise to equal protection and vagueness/overbreadth challenges. Also quite troubling is the fact that the committing judge makes the determination to put a permanent label on a child as an addict with a lifelong, incurable disease before CHR has even evaluated him or her. This is compounded by the lack of concrete guidelines and the total discretion granted to the judge in making the determination. (For example, what exactly constitutes sexually inappropriate behavior?) There is also no indication as to who presents the evidence and what the burden of proof should be. Thus the entire labelling process appears to be inherently lacking in due process.

At this point in time not enough children have successfully completed two years of treatment and therefore recidivism could not be measured. Also, the statute is relatively unknown to many judges and attorneys as it lies outside the Unified Code section. Ms. Foley indicated that CHR does not want the statute to be widely utilized as the program does not have room and is too new to handle a large amount of children. There are currently about 50 children in the program but only about 20 of them are actual "208" commitments. The rest are regular public offenders placed by CHR and must be released at age 18.

CHR is hoping to implement some changes in the statute with the next legislative session. Meanwhile, vigilant child advocates may want to examine the statute and make some changes of their own through advocacy and litigation.

BARBARA HOLTHAUS
Assistant Public Advocate
Post-Conviction Branch
Frankfort

[1] *Note - KRS 439.340(11) requires all adult sex offenders to complete the Corrections Cabinet version of the program in order to become eligible for parole. The legislative guidelines for the program are set forth in KRS 197.400-.440. A comparison of this program with CHR's juvenile program will be the subject of a future article.*

ASK CORRECTIONS

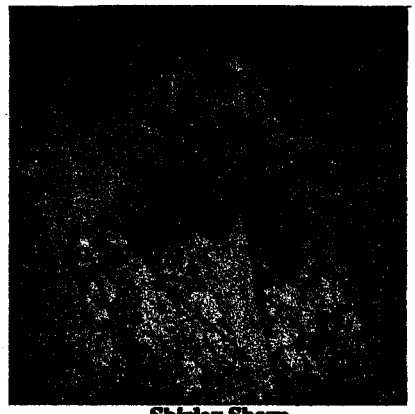
TO CORRECTIONS: My client has questioned me about a new procedure concerning the release of inmates who have completed their sentences.

TO READER: The recent session of the General Assembly revised KRS Chapter 197 to create a new section to provide that the Secretary of the Corrections Cabinet *may* permit the release of prisoners on the first day of the month in which their sentences would expire. This would mean that regardless of the prisoner's actual conditional release, minimum expiration, or maximum expiration date, they *may* be released on the first day of the month, (*i.e.*, if a prisoner's conditional release date is September 16, 1990, then he *may* be released on September 1, 1990).

If the first day of the month falls on Saturday, Sunday or a legal holiday, then arrangements should be made to release the prisoner on the first working day following the first of the month (*i.e.*, if the first falls on Sunday, then arrangements should be made to release the prisoner on Monday, the second day of the month.

TO CORRECTIONS: What if my client's actual release date falls on a Saturday, Sunday or holiday?

This regular Advocate column responds to questions about calculation of sentences in criminal cases. Shirley Sharp is the Correction's Cabinet Offender Records Administrator. For sentence questions not yet addressed, call Shirley Sharp (502) 564-2433, or Dave Norat, (502) 564-8006. Questions may be submitted to Dave Norat, DPA, 1264 Louisville Road, Frankfort, KY 40601



Shirley Sharp

TO READER: If a prisoner's release date is on the first day of the month, and falls on a Saturday, Sunday or legal holiday, then he would be released on that date.

TO CORRECTIONS: What if my client has an outstanding detainer and arrangements for his release to detaining authorities cannot be completed until after the first of the month.

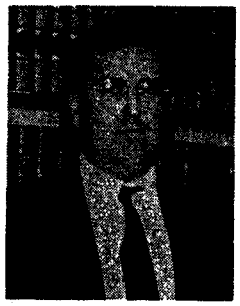
TO READER: Arrangements should be made prior to the month in which the inmate's sentence will expire for the inmate to be released on the first of the month, or the first day administratively possible after the first of the month.

TO CORRECTIONS: When will this change in procedure become effective:

TO READER: This change will be implemented August 1, 1990.

EVIDENCE IN CRIMINAL CASES

Looking at the New Evidence Code- Part II



David Niehaus

Inpeachment, Prior Convictions and the Abrogation of *Jett*

Under the proposed Kentucky Rules of Evidence, the Supreme Court of Kentucky is going to have to decide whether it wants to modify the impeachment by felony rule set out in *Commonwealth v. Richardson*, Ky., 674 S.W.2d 515 (1984) and whether it wants to do away with the impeachment/hearsay rule in *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). Both rule proposals on these issues require serious examination and consideration because they will be departures from current practice. Under the Federal Rules the 6 methods of impeachment are (1) character for truth and veracity [FRE 608(a)], (2) prior act of misconduct [FRE 608(b)], (3) prior conviction [FRE 609], (4) partiality, *i.e.* interest, bias, corruption, or coercion, (5) contradiction by other evidence, and (6) self contradiction by prior inconsistent statements. [FRE 801(d)(1)(A) and FRE 613]. [Graham, *Evidence*, 2d Rev. Ed., Ch. 13, Section (B)(1), pg. 432]. The proposed code covers all these topics, generally assigning the same number to each concept. But there are a number of changes from the federal rule.

(1) General Rules of Impeachment

KRE 607 continues the Kentucky practice currently provided for in CR 43.07, which allows any party, including the party calling the witness, to attack that witness' credibility. This section is significant chiefly because of the Commentary, which explains the general approach to impeachment followed by the drafters. Following the example of the Federal Rules, the drafters of the proposed Kentucky Rules did not intend to "provide an exhaustive treatment of the law relating to impeachment and rehabilitation of witnesses." To foreclose any argument that the listing of some modes of impeachment implies the abrogation of others, the drafters have made a clear statement that any relevant impeachment evidence can be admitted, subject to the specific limitations set out in the various impeachment provisions. Thus, evidence of bias, interest, corruption, or coercion can be introduced despite the absence of any particular rule authorizing such impeachment. [KRE, 1989 Final Draft, Rule 607, Commentary, p. 58].

(2) Character Evidence

Evidence of the character and conduct of a witness are governed by KRE 607, 608, 609, 404, 405 and 412. A criminal defendant is always allowed to introduce evidence of good moral character or of a particular trait that is germane to the charge. [KRE 401(a)(1)]. The Commonwealth may introduce evidence on these issues, but only after the defendant has "opened the door." The Commentary to KRE 404 makes it clear that the prosecution may not introduce evidence of the defendant's character during its case in chief. [KRE 404, Commentary, p. 24]. For those rare occasions in which the character of the alleged victim of the crime is important, KRE 404(a)(2) allows evidence of a pertinent trait of character except for "criminal sexual conduct" cases. The prosecution is, of course, allowed to rebut this evidence, but only after the defendant has injected the issue into the case. A special provision concerning homicide cases allows the Commonwealth to introduce the "character trait of peacefulness of the victim" to rebut the evidence that the victim was the "first aggressor." [KRE 404(a)(2)].

According to the Commentary, KRE 404(a) differs from the federal rules only by allowing use of evidence of "general moral character" in addition to evidence of "pertinent traits." The drafters could find no good reason for denying an accused his long held right to defend against a criminal charge by introducing evidence of good moral character. [KRE 404, Commentary, p. 25].

The Rape Shield Rule is set out in KRE 412. Subsection (a) of that rule provides that in any criminal prosecution under Chapter 510 of the Penal Code, whether for completed act, attempt, or conspiracy, "reputation or opinion evidence related to the sexual behavior of an alleged victim is not admissible." However, some evidence of particular acts may be admitted under certain conditions. Upon written motion filed no later than 15 days before the date the trial is scheduled to begin, the defense may introduce evidence of (1) past sexual behavior with persons other than the accused in order to show that the accused was not "the source of semen or injury," (2) past sexual behavior with the accused on the issue of consent, or (3) "any other evidence directly pertaining to the offense charged." The written motion must be accompanied by a written offer of proof. If the trial court determines that the written offer of proof meets one of the exceptions set out in Subsection (b), then the court "shall" conduct a hearing in chambers to determine the admissibility of the evidence. At this hearing, witnesses, including the prosecuting witness, may be called. If the court finds that the evidence the accused seeks to offer is relevant and that the probative value outweighs the danger of unfair prejudice, the evidence can be admitted at the trial, but only "to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined."

Rules 405 and 608 are similar in their discussion of the methods of proving character. Rule 405 provides that in all cases where evidence of character or traits is admissible a witness may testify either as to general reputation in the community or as to his or her personal opinion on the issue. The prosecution may, on cross-examination, examine the witness to see if the witness "has heard of or knows about" specific instances of conduct. However, the state may not ask these questions unless there is a "factual basis" for the inquiry. Rule 405 represents 2 departures from previous Kentucky Law. It allows personal opinion testimony concerning character and it allows the cross-examiner to examine the witness to see if the witness has heard of or knows from personal

knowledge specific instances of conduct that could cast doubt on the validity of the witness' opinion. The previous limitation to what the witness had heard was rejected as unrealistic and pointless. [KRS 405, Commentary, p. 28].

Rule 608(a) carries over the general rule by providing that the credibility of a witness may be attacked or supported by opinion or reputation evidence. The limitations are that the evidence may refer only to character for truthfulness or untruthfulness and that evidence of truthful character may be introduced only in response to an attack on the witness's veracity. Evidence of specific instances of a witness's conduct introduced for attacking or supporting credibility may not be proved by extrinsic evidence. However, the trial court may, in its discretion, allow a cross-examiner to inquire into specific instances to determine the witness' character for truthfulness or untruthfulness or to determine the character for truthfulness or untruthfulness of another witness about whom the witness has testified. Again, a factual basis for the inquiry is necessary. [KRE 608(b)].

(3) Prior Convictions

KRE 609(a) is a combination of *Commonwealth v. Richardson*, Ky., 674 S.W.2d 515 (1984) and the federal rule. The rule allows introduction of evidence concerning prior conviction for the purpose of "reflecting upon the credibility of a witness" if the crime was punishable by death or imprisonment for 1 year or more under the law under which the witness was convicted, or if the crime involved dishonesty or false statement, regardless of the punishment. The trial court must determine that the probative value of admitting the evidence on the issue of credibility outweighs its prejudicial effect on the opposing party. The identity of the crime may not be disclosed upon cross-examination unless the witness had denied conviction. The witness retains the option of disclosing the identity of the prior conviction. The evidence may be elicited from the witness or proved by introduction of public records. Prior convictions more than 10 years old may not be admitted unless the trial court determines that the probative value of the convictions substantially outweighs their prejudicial effect.

To the extent that the proposal retains the *Richardson* rule, which limits impeachment evidence to the fact of prior conviction, the proposal is an improvement on the federal rule. And the requirement of balancing probative value against prejudice in every instance continues the rule that was set out in *Richardson* but which has not often been followed. The 10 year time limit is a welcome standardization. By creating a presumption against admissibility for convictions more than 10 years old, the rule will change the situation in which one division of a circuit court follows the 10 year limit while another does not. The problem with the rule is that there is no sound basis for impeaching with prior convictions that do not relate to honesty.

In the literature talking about this problem there are a number of well thought out discussions of the problems of impeaching with any type of felony. The most concise statement of the problem was something I heard from another lawyer when I was talking about this proposal with him. This attorney simply asked the question *"What does a conviction for hitting someone in the head have to do with the ability to tell the truth?"* The treatise writers and the commentators make the same point in more involved arguments. Although there is at least some basis for using convictions involving falsehood as impeachment, there really is no excuse for using just any felony. There is no historical basis for a belief that a person convicted of a felony is less worthy of belief than any other person brought into court.

At Common Law, disqualification as a witness was a part of the punishment for those felony convictions that did not result in the death of the defendant. Several commentators believe that the theory that a convicted felon is unworthy of belief is an after-the-fact rationalization made up after the disqualification rules were abandoned in the 19th Century. [4 *Weinstein's Evidence*, Section 609(02), p. 58]. According to Weinstein the theory that all convictions are relevant to credibility depends on 2 assumptions: 1) a person with a criminal past has a bad general character, and 2) a person with such a bad general character is the sort of person who would disregard the obligation to tell the truth on the stand. [Weinstein, Section 609(02), p. 59]. The problems with these assumptions are that they predicate the witness's unreliability on the basis of a single act, which may not be typical of the witness' character and on conclusions which logically do not hold up. As Weinstein notes, the assumption that crimes of violence are probative of credibility "because a person convicted of assault is a bad man, and a bad man is also a lkar, does not hold water." [Weinstein, Section 609(02), p. 59]. The problem is magnified when this rule is applied to the criminal defendant, because "uncharged misconduct evidence [which necessarily includes prior convictions] will usually sink the defense without (a) trace." [Imwinkelried, *Uncharged Misconduct Evidence*, Section 1.02, p. 4 (1984)]. There is no sound legal, logical or psychological basis for KRE 609 as currently written. The arguments that impeachment has always been done this way and that the defendant should be treated no differently from other witnesses are weak supports. Impeachment by prior convictions appears to be simply another method of punishing those who have been convicted of crimes.

With the adoption of the new rules, Kentucky has an opportunity to abandon illogical and unjust rules and to build on the experience of the federal rules. This is one of the instances in which Kentucky should strike out on its own. There is no justification for impeaching any witness with a prior crime that does not involve lying to some governmental agency or some person in authority. The fact that the defendant punched someone in the nose, (or even shot someone with a pistol), has no real bearing on his willingness to tell the truth in a particular case. Impeachment by proof of prior felony conviction should be rejected as an archaic practice unjustified by logic or experience.

A stronger case can be made for impeachment by prior convictions for perjury or giving false statements in an official proceeding. A person previously convicted for disregarding his oath to tell the truth is more likely to disregard the oath in other proceedings. Therefore, the court should revamp impeachment by prior convictions rules by enacting a rule that will allow impeachment by prior convictions only where those prior convictions involve perjury, misrepresentation, or false statement given under oath in an official proceeding or any branch of government. This is the only fair basis to allow impeachment and is something the court should give some consideration to.

Another unfortunate aspect of Rule 609 is found in Subsection (d) in which juvenile adjudications are permitted as impeachment. I have already written about this in a previous article and repeat that this rule which would allow rummaging in juvenile records is contrary to the philosophy expressed in the Unified Juvenile Code. It should be rejected.

A final novel feature of the rule in Subsection (e) which provides that the pendency of an appeal does not prevent use of a prior conviction. This rule would change the current Kentucky practice under *Commonwealth v. Duvall*, Ky., 548 S.W.2d 832 (1977). The Commentary states that the federal rule was adopted because of the "presumption of correctness of judi-

cial proceedings" which gives the evidence sufficient probativeness.

(4) Contradiction

The final method of impeachment provided for by rule is contradiction by means of prior statements of the witness. These rules are set out at KRE 613 and 801. A change in procedure is authorized by Subsection (a) and Rule 613. Under current law, a witness must be shown a writing with which he is impeached before questions can be asked. Following the federal practice, Subsection (a) provides that a witness need not be shown or told about the prior statements before examination. However, opposing counsel may look at the written statement or request information about the contents of any oral statement which is introduced. [KRE 613, Commentary, p. 65]. A party may not introduce extrinsic evidence of prior inconsistent statements unless the witness is given an opportunity to explain or deny the statements and the opposing party is given an opportunity to interrogate the witness. However, the Commentary notes that these opportunities need not be given while witness is still on the stand. According to the Commentary, it is enough for the witness to be recalled at some point in the proceeding. [KRE 613, Commentary, p. 65].

The one section of the proposed code that has generated the most controversy is KRE 801-A, which effectively abrogates the rule created in *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). Some articles have already appeared on this subject [*e.g.* Sanders, "The Jettison of *Jett*", KATA *The Advocate*, Vol. 18, No. 3 (May/June 1990)]. Apparently there was some argument about it at the recent bar convention. However, it is important to keep in mind that *Jett* is the exception to the generally accepted practice around the county.

KRE 801-A(1)(A) reads as follows:

> A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, . . .

Under *Jett*, any statement attributed to the witness not only can be admitted, it can come in as substantive evidence. The main problem with the *Jett* rule has always been the fact that these out of court statements, invented or not, could be the basis of a jury verdict or the basis for denial of a defendant's directed verdict motion. Because the statements under *Jett* are substantive evidence, they can be considered by the judge or the jury in determining the outcome of the case. This is not so in most federal rules-type jurisdictions. The federal rule formula has been adopted in 20 jurisdictions while rules similar in effect to *Jett* have been adopted in 10. [13A Uniform Laws Annotated, Rule 801, pp. 681-685; 1990 Pocket Part, pp. 232-238; 4 Weinstein's *Evidence*, Section 801(d)(1)(A)(09). If the number of adopting jurisdictions means anything, the 2 to 1 margin in favor of the federal rule approach suggests that this proposal of the drafters should be followed.

The purpose of the federal rule is to provide a party with protection against a "turncoat witness" who changes his story on the stand and deprives the party calling him of evidence essential to his case. [*U.S. v. Grandison*, 780 F.2d 425 (4th Cir., 1985)]. However, in keeping with the federal rules approach in other hearsay areas, the language and history of 801(d)(1)(A) show that only those prior inconsistent statements that are "highly reliable and firmly anchored in the probability of truth" may be admitted as substantive evidence. [*U.S. v. Day*, 789 F.2d 1217, 1221-1222 (6th Cir., 1986)]. [A short history of the evolution of the rule is set out in footnote 2 of *U.S. v. Day*). The importance of this premise is well-stated in *Day* where the Sixth Circuit noted that several other circuits had already "incorporated the congressional intent into decisions that have refused to admit statements given under informal circumstances tantamount to a station house interrogation setting which later proved inconsistent with a declarant's trial testimony and have denied their admissibility as substantive evidence pursuant to 801(d)(1)(A)." In plain terms, this rule means the demise of oral statements attributed to witnesses by the police as result of their investigation. Of course, under KRE 801-A(2)(A) the police will be able to attribute statements to the defendant. A party's own statement always has been admissible at trial. But statements attributed to other witnesses cannot be admitted under the rule unless they were given under oath subject to the penalty of perjury at a trial, a hearing, a deposition, or other proceeding. This means that affidavits, taped statements, or written statements given by witnesses to the police are not admissible as substantive evidence at trial. These statements may be used to impeach, but they cannot be used as the substantive evidence that makes the Commonwealth's *prima facie* case.

The drafters of the Kentucky rule state that the decision to adopt the federal rule and to abolish *Jett* was "carefully considered." The drafters noted that statements under *Jett* could constitute the sole basis for conviction of a serious offense and that many times such statements are denied by their purported makers. [KRE 801-A, Commentary, pp. 77-78]. To avoid this problem, the Federal Rule excludes *Jett*-type statements unless those statements fall within one of the hearsay exceptions in Article VIII of the Rules.

Jett has been the law of Kentucky for over 20 years. People are used to it. But it is important to remember why the *Jett* rule was needed in the first place. In 1969, evidence law bristled with restrictions on impeachment and admission of out-of-court statements [*e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)]. The Federal Rules were being drafted but would not be adopted for 6 more years. *Jett* was decided the way it was, in my opinion, because the law contained too many foolish and unnecessary restrictions on the admissibility of hearsay. Under the proposed KRE, many hearsay restrictions will be lifted. Much of what formerly could only be admitted under *Jett* will be admissible under the new rules. Only unreliable hearsay will be excluded. The exceptions to the hearsay rule listed in KRE 803 and 804 will allow introduction of reliable hearsay evidence in its own right, not under the guise of impeachment. Under the new scheme, the only purpose of a *Jett* rule would be to admit dubious statements that cannot qualify under one of the many exceptions to the hearsay rule found in Article VIII.

In criminal cases any sworn testimony at a judicial proceeding, including a grand jury, may be used as substantive evidence under KRE 801-A(1)(A). In civil cases, parties can protect themselves by taking depositions of all important witnesses. Other reliable hearsay can be introduced through expanded hearsay exceptions. The abrogation of the *Jett* Rule is an important advance in the law of Kentucky. For 21 years the Commonwealth has been able to make its *prima facie* case not on the testimony of witnesses in court, but on the recollection (often times unsupported by any written memorandum) of what some witness said about some point of the case several months or years before. This change in the law is one that should receive the support of every lawyer.

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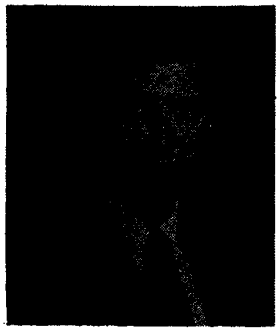
F.Y.I.

Procedures, Practices, and Issues of Interest



Mike Williams

The purpose of this new column is to provide a forum in which interesting or unique procedures, practices and issues can be shared with defense attorneys throughout the state. It is hoped that lawyers will contact me to discuss anything going on in their cases that might be helpful to others.

I realize this will take some time to catch on. In any event, I had some response from "out there."

Please remember that if you need additional information on any of the issues discussed herein, just give me a call [or write me] at the DPA office in Frankfort.

MOVING PRISONERS FROM COUNTY JAILS INTO STATE FACILITIES

Bill Mizell, Boyd County Public Defender Administrator, contacted me about another matter recently, but during the discussion we compared notes about how long it takes prisoners to be transported out of county jails to their "new homes" within the Department of Corrections.

He drafted a motion by which he hopes to accomplish speeding up the process. He moved that the Department of Corrections pay the fine based on the recent case out of Campbell County, *Campbell County Fiscal Court v. Kentucky Department of Corrections*, Ky., 762 S.W.2d 6 (1989), in which the appellate courts determined the Department of Corrections may be liable in monetary "fines" if prisoners remain in county jails longer than 45 days.

In his motion he asks that some of the money be given to the local public defender's organization since a PD brings the motion.

Bill would be happy to discuss the motion with you. You can call him in Catlettsburg at (606) 739-4161. Copies of the motion are available upon request.

PRESERVATION OF EVIDENCE

To all the attorneys who appear in the arraignment courts here in Kentucky: PLEASE make a motion on the record to preserve any evidence, including crime scenes [*e.g.* arson scenes, tissue samples, bones recovered, etc.] when you first appear in Court at the arraignment.

In murder cases recently assigned to me [and I hear this from other attorneys who are not assigned at arraignment] evidence is destroyed or lost, making it more difficult to have experts appointed, and, if appointed, limiting the possible exculpatory evidence available for examination.

Remember, if there is a request to preserve evidence at arraignment, it is much more difficult for the police and prosecutors to claim "good faith" if the evidence is destroyed and thus unavailable for defense counsel and his or her experts.

If anyone thinks this will be a problem, just give me a call. MLS routinely has to deal with this legal issue, and we can give you some law to provide guidance to your local judges.

DNA TESTING

In case you missed the annual seminar, DNA evidence will begin to be introduced by prosecutors throughout the state.

This evidence cannot possibly meet the *Frye* test here in Kentucky. If the court takes the time to review the literature, it will be obvious to judges throughout Kentucky that DNA evidence obtained from "forensic samples" does not yet have a place in our criminal courts.

Much more research is needed before this type of procedure will be appropriate for use against a criminal defendant. (Paternity testing is another matter).

If you have a criminal case in which this might be an issue, give me a call. I can send you a bibliography of materials available at DPA on DNA Testing.

DO NOT STIPULATE TO THIS EVIDENCE!

TRUTH-IN-SENTENCING/ CAPITAL CASES

Be aware that the Supreme Court has recently held in *Offutt v. Commonwealth* that all murder cases are "capital crimes"; therefore, eligibility for parole is 12 years under the statute. KRS 439.340(1).

A motion for reconsideration was filed by both sides on the appeal. The Court has granted the petition for rehearing and is going to hear oral arguments again in the case.

If the decision stands, the Court held that the failure to assert this at trial cannot be waived.

Are there any defendants out there whose cases should be the subject of post-trial motions? You might give Ernie Lewis a call in Madison County (606) 623-8413. He recently filed such a motion.

What about those cases wherein a person has been sentenced to some ridiculous number of years, like 1000 years? Should post-trial relief not be sought, and soon?

That's it for this issue. Please let me know what you might be doing that is innovative, or fill me in on interesting or unique issues confronting you on appeal. Let's hear from you!

MIKE WILLIAMS
Assistant Public Advocate
Major Litigation Section
Frankfort

MENTAL HEALTH ISSUES IN CRIMINAL CASES

The Elements of a Competent and Reliable Mental Health Evaluation

I. INTRODUCTION.

A persistent problem in the defense of criminal trials especially capital trials, is inadequate and unreliable evaluations regarding a client's mental state at the time of the offense and at trial. I constantly review trial records where a psychiatrist, called by the state (or even at times by the defense), testifies that a defendant was competent to stand trial, not insane at the time of the offense, and met all the criteria for the diagnosis of antisocial personality disorder. Another frequent scenario is to review a trial record where no mental state evidence was put on at all by the defense at trial. Then, either in reviewing trial counsel's file or in talking to trial counsel, it is revealed that no evidence was presented because there was a "bad" pretrial mental health evaluation.

Over the years, I have learned, through mistake, trial and error (and consultation with persons much wiser than I) to view *all* previous mental health evaluations and expert trial testimony in any particular case with a jaundiced eye. I do so for the simple reason that many of the conclusions reached are wrong. They are wrong because a large number of these evaluations, as will be discussed subsequently in this article, do not meet existing standards in the mental health profession governing the adequacy of a forensic mental state examination. However, as tragic as the consequences of an incomplete or incompetent mental state evaluation might be, the situation is not necessarily irredeemable. An incompetent and unreliable mental health evaluation may, under some circumstances, be a constitutional violation.

The importance of a competent mental health evaluation in criminal and capital litigation can not be underestimated. It can provide powerful evidence to support a range of mental health issues in addition to traditional questions concerning sanity at the time of the offense, competency to stand trial, and mitigation. It can offer a basis for challenging the validity of prior offenses and convictions, for defeating specific intent for underlying felonies as well as the murder itself, and for defending against premeditation and malice. Diminished capacity, duress, domination by others, and non-accomplice status are all factors that can be addressed by mental health professionals. A defendant's mental status has obvious implications for defense challenges to events surrounding the arrest and its aftermath such as consent to search, *Miranda* waiver, voluntariness of confessions, and reliability of confessions. A thorough and reliable mental health evaluation is also relevant to any waivers of counsel, specific defenses, right to be present, mitigating circumstances, or a jury and to any determination of competency at the various stages of litigation, from the preliminary hearing to an execution. The point is clear: *defense counsel should not be precluded from pursuing avenues of defense by an incompetent mental health evaluation.*

II. THE CONTOURS OF *AKE*.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the United States Supreme Court held that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition," when the defendant's mental health is at issue. *Id.* at 70. The Court, after discussing the potential help that might be provided by a psychiatrist, stated:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, *assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.* 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, and as in the case of the provision of counsel we leave to the states the decision on how to implement this right. *Id.* at 83 (emphasis added).

This holding recognized the entitlement of an indigent defendant, not only to a "competent" psychiatrist (*i.e.*, one who is duly qualified to practice psychiatry), but also to a psychiatrist who performs competently—who conducts a professionally competent examination of the defendant and who on this basis provides professionally competent assistance.

The rationale underlying the holding of *Ake* compels such a conclusion, for it is based upon the due process requirement that fact-findings must be reliable in criminal proceedings. *Id.* at 77-83. Due process requires the state to make available mental health experts for indigent defendants, because "the potential accuracy of the jury's determination is . . . dramatically enhanced" by providing indigent defendants with competent psychiatric assistance. *Id.* at 81-83. In this context, the Court clearly contemplated that the right of "access to a competent psychiatrist who will conduct an appropriate examination," would include access to a psychiatrist who would conduct a professionally competent examination. To conclude otherwise would make the right of "access to a competent psychiatrist" an empty exercise in formalism.[1]

Other courts have explicitly or implicitly recognized this aspect of *Ake*. For example, in *Harris v. Vasquez*, No. 90-55402 (9th Cir. 1990), a judge of the United States Court of Appeals for the Ninth Circuit held that the due process requirements of *Ake* are violated if a mental health professional retained by the defense conducts an incompetent evaluation. Judge Noonan stated:

> If Harris was denied competent psychiatric assistance, he was denied a federal constitutional right of due process of law secured by *Ake*.

Similarly, in *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), the court recognized that the defendant's right to effective assistance of counsel was impaired by the State's withholding of evidence "highly relevant, or psychiatrically significant, on the question of [defendant's] sanity" from

the psychiatrist who was ordered to evaluate the defendant's sanity. 758 F.2d at 532. Even though that evidence was disclosed to the psychiatrist on the witness stand at trial, "[o]bviously, he was reluctant to give an opinion when confronted with this information for the first time on the witness stand. . . . This was hardly an adequate substitute for a psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Id.* at 532 n.10, 533.[2]

Several state courts have also recognized that the due process clause entitles an indigent defendant not just to a mental health evaluation, but also to a professionally valid evaluation. *See, e.g., Mason v. State*, 489 So.2d 734 (Fla. 1986). Because the psychiatrists who evaluated Mr. Mason pretrial did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior," or his history "indicative of organic brain damage," and because the court recognized that the evaluations of Mr. Mason's mental status were flawed if the physicians had "neglect[ed] a history" such as this, the court remanded Mr. Mason's case for an evidentiary hearing. *Id.* at 735-37; *see also Sireci v. State*, 536 So.2d 231 (Fla. 1988);[3] *but see Waye v. Murray*, 884 F.20 765 (4th Cir), *cert denied* ___U.S.___, 110 S. Ct. 29 (1989).

The purpose of this article, however, is not to discuss in detail the legal bases of a challenge to an inadequate evaluation, but rather to attempt to outline *what is an adequate evaluation.*

III.THE ELEMENTS OF A COMPETENT AND RELIABLE MENTAL HEALTH EVALUATION.

As the *Ake* Court held, the due process clause protects indigent defendants against incompetent evaluations by appointed psychiatrists. Accordingly, the due process clause requires that appointed psychiatrists render that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances.[4] In psychiatry, as in other medical specialties, the standard of care is the national standard of care recognized among similar specialists, rather than a local, community-based standard of care.

A.The Proper Standard of Care Involves a 5 Step Process Before Diagnosis

In the context of diagnosis, exercise of the proper level of care, skill and treatment requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. On the basis of generally-agreed upon principles, the standard of care for both general psychiatric and forensic psychiatric examination reflects the need for a careful assessment of medical and organic factors contributing to or causing psychiatric or psychological dysfunction. H. Kaplan & B. Sadock, *Comprehensive Textbook of Psychiatry* 543 (4th ed. 1985). The recognized method of assessment, therefore, must include the following steps:

1. *An accurate medical and social history must be obtained.*

Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub & F. Black, *Organic Brain Syndromes* 42 (1981), an accurate and complete medical and social history has often been called the "single most valuable element to help the clinician reach an accurate diagnosis." Kaplan & Sadock *supra* at 837.

2. *Historical data must be obtained not only from the patient, but from sources independent of the patient.*

It is well recognized that the patient is often an unreliable and incomplete data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan & Sadock *supra* at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id.* Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant. Kaplan & Sadock *supra* at 550.

See also American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," *Issues in Forensic Psychiatry* 202 (1984); Pollack, *Psychiatric Consultation for the Court*, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, *Forensic Psychiatry* 38-39 (2d ed. 1965).

3. *A thorough physical examination (including neurological examination) must be conducted.*

See, e.g., Kaplan & Sadock *supra* at 544, 837-38 & 964. Although psychiatrists may choose to have other physicians conduct the physical examination, psychiatrists:

> [s]till should be expected to obtain detailed medical history and to use fully their visual, auditory and olfactory senses. Loss of skill in palpation, percussion, and auscultation may be justified, but loss of skill in observation cannot be. If the detection of nonverbal psychological cues is a cardinal part of the psychiatrists' function, the detection of indications of somatic illness, subtle as well as striking, should also be part of their function. Kaplan & Sadock *supra* at 544.

In further describing the psychiatrist's duty to observe the patient s/he is evaluating, Kaplan and Sadock note in particular that "[t]he patient's face and head should be scanned for evidence of disease. . . . [W]eakness of one side of the face, as manifested in speaking, smiling, and grimacing, may be the result of focal dysfunction of the contralateral cerebral hemisphere." *Id.* at 545-46.

4. *Appropriate diagnostic studies must be undertaken in light of the history and physical examination.*

The psychiatric profession recognizes that psychological tests, CT scans, electroencephalograms, and other diagnostic procedures may be critical to determining the presence or absence of organic damage. In cases where a thorough history and neurological examination still leave doubt as to whether psychiatric dysfunction is organic in origin, psychological testing is clearly necessary. *See* Kaplan & Sadock *supra* at 547-48; Pollack *supra* at 273. Moreover, among the available diagnostic instruments for detecting organic disorders, neuropsychological test batteries have proven to be critical, as they are the most valid and reliable diagnostic instruments available. *See* Filskov & Goldstein, *Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery*, 42 J. of Consulting & Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, & Snow, *The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment*, 162 J. of Nervous and Mental Disease 360

(1976).

5. The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment.

As Kaplan and Sadock have explained, "[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," and such loss can be characterized as "(1) impairment of orientations; (2) impairment of memory; (3) impairment of all intellectual functions, such as comprehension, calculation, knowledge, and learning; and (4) impairment of judgment." *Id.* at 835. While the standard mental status examination (MSE) is generally used to detect and measure cognitive loss, the standard MSE—in isolation from other valuative procedures—has proved to be very unreliable in detecting cognitive loss associated with organic impairment. Kaplan and Sadock have explained why:

> When cognitive impairment is of such magnitude that it can be identified with certainty by a brief MSE, the competent psychiatrist should not have required the MSE for its detection. When cognitive loss is so mild or circumscribed that an exhaustive MSE is required for its recognition then it is likely that it could have been detected more effectively and efficiently by the psychiatrist's paying attention to other aspects of the psychiatric interview.
>
> In order to detect cognitive loss of small degree early in its course, the psychiatrist must learn to attend more to the style of the patient's communication than to its substance. In interviews, these patients often demonstrate a lack of exactness and clarity in their descriptions, some degree of circumstantiality, a tendency to perseverate, word-finding problems or occasional paraphasia, a paucity of exact detail about recent circumstances and events (and often a lack of concern about these limitations), or sometimes an excessive concern with petty detail, manifested by keeping lists or committing everything to paper. The standard MSE may reveal few if any abnormalities in these instances, although abnormalities will usually be uncovered with the lengthy MSE protocols.
>
> The standard MSE is not, therefore, a very sensitive device for detecting incipient organic problems, and the psychiatrist must listen carefully for different cues.
> *Id.* at 835.

Accordingly, "[c]ognitive impairment, as revealed through the MSE, should never be considered in isolation, but always should be weighed in the context of the patient's overall clinical presentation—past history, present illness, lengthy psychiatric interview, and detailed observations of behavior. It is only in such a complex context that a reasonable decision can be made as to whether the cognitive impairment revealed by MSE should be ascribed to a organic disorder or not." *Id.* at 836.

In *sum*, the standard of care within the psychiatric profession which must be exercised in order to diagnose is most concisely stated in Arieti's *American Handbook of Psychiatry:*

> Before describing the psychiatric examination itself, we wish to emphasize the importance of placing it within a comprehensive examination of the whole patient. This should include a careful history of the patient's physical health together with a physical examination and all indicated laboratory test. The interrelationships of psychiatric disorders and physical ones are often subtle and easily overlooked. Each type of disorder may mimic or conceal one of the other type.... A large number of brain tumors and other diseases of the brain may present as "obvious" psychiatric syndromes and their proper treatment may be overlooked in the absence of careful assessment of the patient leading him to the diagnosis of physical illness. Indeed, patients with psychiatric disorders often deny the presence of major physical illnesses that other persons would have complained about and sought treatment for much earlier.
> *Id.* at 1161.

IV. COMMON DEFICIENCIES IN FORENSIC EVALUATIONS.

It can be readily seen that many, if not most, of the mental health evaluations conducted in criminal cases do not satisfy this 5 step process. This is not surprising because, as in many other areas, the indigent defendant receives short shrift in the criminal justice system. However, in this section of the article, I will focus in on the elements of an evaluation which, in my experience, are generally most deficient and result in the most unreliable results.

A. Client's History

Many forensic evaluations are unreliable because the history upon which they are based is inadequate. All too often, the medical and social history relied upon by mental health professionals is cursory at best and comes exclusively from the client, or possibly from the client and discussions with one or two family members.

This is inadequate because clients, and even their family members, are in many cases very poor historians and may fail to relate significant events which are critical to a proper determination of an individual's mental state at the time of the offense.

For example, individuals who are physically and/or sexually abused often minimize the severity and extent of the abuse. Similarly, individuals with organic impairments generally are unable to recall significant events regarding their medical history which may be critical to a reliable diagnosis. It is also well established that many mental illnesses, *e.g.*, bipolar mood disorder and schizophrenia, run in families and thus it is important to know the family as well as the client's medical and psychiatric history.

It is for this reason that it is essential that a mental health professional obtain as much information as possible regarding a client's social and medical history to reliably determine what genetic, organic, environmental, and other factors may have played a role in the client's mental state at the time of the offense. Thus all available records for both the client and significant members of his family should be obtained. These records include, but are not limited to:

*Client's and sibling's birth records

*Client's medical records and family medical records

*Any social services records relevant to client or his family *Client's and siblings' school and educational records

*All jail and/or department of corrections records, including medical records

*All records relevant to any prior psychiatric or psychological evaluation for client or any family members including grandparents, parents, siblings, *etc.*, including the evaluating professional's raw data and notes (do *not* be content with obtaining the discharge summary or final report)

*Death records for any immediate family members

*Any military records, including medical records

*All police or law enforcement records regarding the arrest, offense, and any prior offenses

*All records relevant to any co-defendants

*Family court records for parents and client

*Attorney files, transcripts, and court files for any prior offenses by the client or his family members

Reviewing these records will often lead to additional records, documents and material which should be obtained. You should do so because it is impossible before an investigation is complete to determine what will be the fruitful sources of information.

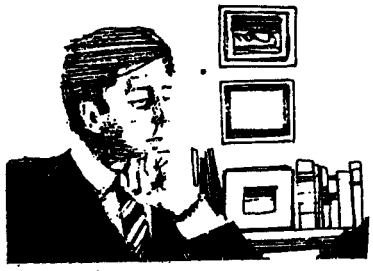
However, you cannot prepare the history solely from talking with your client and obtaining records. Other family members, friends and persons with knowledge about your client must be interviewed. These people, especially family members should not be talked to in a group, but individually. It is important to bear in mind, for example, that any family member or caretaker you interview potentially abused your client or other members of the family. This information will rarely come out in a family gathering, and will even more rarely come out the first time you talk with the individual. In addition to family members, your client's friends, prior counsel, teachers, social workers, probation and parole officers, acquaintances, neighbors, employers, spouses (current or former), and any witnesses preceding, during and after the offense should be interviewed. Any or all of these persons may have critical information relevant to your client's mental state.

B. Inadequate Testing for Neurological Dysfunction

While not all of our clients have organic brain damage, many do. Organic brain damage can and does affect behavior. It can impair judgment and rob an individual of the ability to make decisions in crises rationally and responsibly. It can destroy and diminish a person's ability to learn, to carry out a plan of action, to understand long term consequences of actions, to appreciate cause and effect, and to mediate impulse driven behavior. However, and despite its obvious relevance in a capital case, neurological impairment is often not diagnosed.

Another very common deficiency in state forensic evaluations is the inattention to the possibility of organic damage, other neurological dysfunction, or a physiological basis for psychiatric symptoms. Based on my experience, many of our clients are at risk for organic brain damage. They have a history of serious head injuries from chronic childhood physical abuse, car accidents, and falls. Their developmental years are plagued with chronic illnesses and fevers, frequently untreated, and malnutrition or undernourishment. Poor or nonexistent prenatal care and/or birth trauma are routinely found in their histories. Many clients had mothers who drank alcohol or used drugs during their pregnancies, now well recognized as a cause of permanent and devastating mental disabilities in the developing fetus. Most of our clients are chemically dependent, and their early and prolonged use of drugs and alcohol, including brain damaging organic solvents, can cause permanent brain damage.

However, partly as a result of inadequate histories, and for other reasons which are often difficult to identify specifically in any particular case, inadequate attention is frequently given to the possibility of neurological impairment. For example, very few of my clients have ever been examined by a neurologist, despite indications in their histories that warrant a neurological consultation. Occasionally, the extent of the neurological evaluation may be an EEG. It is also a rare case in which any neuropsychological testing has been conducted, even though neuropsychological testing is one of the best ways to determine the presence of more subtle brain damage prevalent in our clients. Unfortunately, I have been involved in numerous cases where it was only discovered after the trial that the defendant had a serious organic deficit. For example, in one case we discovered during the federal habeas corpus proceedings that our client had a brain tumor that was present at the time of the offense. While this is a dramatic example, in countless other cases we have discovered that our clients have serious neurological impairments that went undiagnosed in earlier evaluations.



This can have tragic consequences. It can deny your client of a concrete way to reduce his blameworthiness. It is a fact of death penalty life that juries, and judges, are generally less impressed with psychosocial explanations for violent behavior than they are with organic explanations. Organic deficits frequently have their origin in events and situations over which the defendant had no control, such as Fetal Alcohol Syndrome, measles, encephalitis, or neurotoxins such as those found in lead-based paint. They can be presented in an empathy provoking manner, as part of a constellation of factors that affected your client's behavior. While we may understand, and believe in, psycho-social diagnoses such as post-traumatic stress disorder, in some cases it is not compelling enough unless it is accompanied by a physical explanation. For example, if you can show that part of your client's brain is literally missing, most jurors and judges can understand that it might affect an individual's behavior. The same presentation can be made with less dramatic or "softer" neurological impairment, *e.g.*, diffuse brain damage. The important thing is to insure that the evaluation your client received at trial, or receives in connection with post-conviction litigation, fully considered the possibility of neurological impairment.

This cannot be done without a reliable history and appropriate testing and examination. A competent neurologist, psychiatrist, or neuropsychologist will recommend a complete neurological examination when indicated by physical symptoms such as one sided paralysis or weakness, facial asymmetry, seizures, headaches, dizziness, blurred vision, or imbalance. Laboratory tests, including blood and endocrine work ups, may also be necessary to determine the presence of diseases that affect behavior. Magnetic Resonance Imaging (MRI), Electroencephalogram (EEG), and CT scans can also be useful in this regard. However, it is important to note that a negative (or normal) result on a CT scan, EEG, or MRI does not rule out the possibility of neurological impairment. While a positive finding proves organicity, a negative finding does not rule brain damage out. Organicity may still be discerned through neuropsychological testing and/or a neurological evaluation.

IV. CHOOSING EXPERTS

There are a number of different types of experts you may need in any particular case. However, you will not know exactly what type of experts you will need until the social-medical history is completed. As I have stressed throughout this article, this must always be the first step. It is useful, in compiling and understanding the social and medical history, to obtain the assistance of a social worker. Social workers are trained not only in gathering the type of information you need—both from documents and individuals—but also in interpreting the data. While you or someone in your office can collect most documents and interview the witnesses, you may not be attuned to significant facts in the records, or be less able to obtain information from the client, the client's family and friends, and other persons with relevant knowledge about your client. Thus, you should consider obtaining the assistance of an individual with a social work background in the investigation, compilation and assimilation of the social and medical history.

Depending on the results of the social history, it is then time to obtain your own experts. In doing so, you should search for professionals with expertise in the themes that have developed in the social history, *e.g.*, child abuse; alcoholism and/or substance abuse; familial or genetic pre-disposition to certain mental illnesses; head

injuries or other indicators of organicity; mental retardation, or all of the above. It is important to note that one mental health professional can very rarely help you with all of these things.

It is frequently necessary to put together a multidisciplinary team of professionals, including a social worker, to determine the client's mental state reliably. For example, if the history indicates a history of chronic child maltreatment and abuse, it may be best to begin with a full psychological battery, including neuropsychological testing. This testing may confirm or deny the presence of post-traumatic stress disorder, organic impairment or other diagnoses resulting from the abuse. Similarly, in many cases involving child abuse, the individual will often have a long history of substance abuse. Thus, it may be necessary to retain a pharmacologist to explain the nature of the substances abused, their effects on an individual's judgment, impulse control, cognitive functioning, etc., and to explain the long-term effects of these drugs on a person's brain. Furthermore, depending on the results of the neuropsychological examination, a neurological consult may be in order.

Other types of experts may also be necessary. We have enlisted the assistance of audiologists, mental retardation experts, special education teachers, and a variety of other types of experts, in addition to social workers, psychologists, neurologists, neuropsychologists, pharmacologists, and psychiatrists.

The important thing, however, is to assemble the necessary mental health professionals on the basis of the history as you determine it. Furthermore, it is frequently a good idea to have one professional who can "bring it all together." In other words, many of your experts may be testifying as to only one piece of the mental health picture, for example, your client's history of substance abuse. It is useful to have one person who, in consultation with all the other members of the team, is prepared to discuss all the history, testing, and diagnosis and give the sentencer a comprehensive picture of the individual's mental state at the time of the offense, and, if relevant, at trial.

V. ATTACKING ANTI-SOCIAL PERSONALITY DISORDER.

Many of our clients are diagnosed by mental health professionals, employed by either the state or the defense, as having an anti-social personality disorder. This diagnosis is not only very harmful, but, unfortunately for many of our clients, it is often arrived at erroneously. In my opinion, anti-social personality disorder is the lazy mental health professional's diagnosis. The criteria for the disorder is really only a description of people's behavior. For example, one of the characteristics is that the individual engaged in sexual activity at a young age, or began using substances at an early age.

Besides the fact that many of these characteristics are economically and racially biased, the diagnosis is often erroneously arrived at because of an inadequate history and lack of other adequate testing and evaluations. For example, if there is an organic or other cause such as mental retardation for some of the behaviors, then the diagnosis should not be given. In this regard, it is useful to look at and study the decision trees published in *the American Psychiatric Association's Diagnostic and Statistical Manual-III*. These "trees" indicate a number of other diagnoses that preempt the diagnosis of anti-social personality disorder. However, because all many psychologists do is talk to the client, and look at his or her criminal record and other behaviors, the diagnosis is often arrived at despite other factors which would either prevent the diagnosis or move it sufficiently far down on an axis as to make it irrelevant to the other more significant diagnoses in explaining the individual's behavior.

The point of this discussion is that you should never accept at face value any professional's, including your own, determination that your client has anti-social personality disorder. The consequences of this diagnosis are devastating. While in some case the diagnosis may be unavoidable, in many it is not. If the steps outlined previously in this article are followed, you dramatically increase your chances of avoiding a diagnosis that establishes aggravating factors, and obtaining one that offers a compelling basis for mental health related claims.

VI. DON'T BE FOOLED BY THE CLIENT.

Many times when I consult with lawyers, I hear them say when we are discussing the possibility that their client is mentally ill or mentally retarded that "Well, I've talked to him and he seems pretty sharp to me." Or they say "Well, he seems normal to me." Sometimes they describe their client as manipulative, evasive, hostile, or street smart. It is crucial to remember that as lawyers we are not trained to recognize signs and symptoms of mental disabilities. It is equally important to keep in mind that many mentally retarded, mentally ill or brain damaged individuals are quite adept at masking their disabilities. For example, the one universal skill that mentally retarded people have mastered is some degree of hiding their disability. One client of mine sat in his cell for hours at a time pretending he could read because he thought if people thought he could read they wouldn't believe he was mentally retarded. Other clients with severe mental illnesses are often good at masking their illness for short periods of time.

Unfortunately the quality of many attorney client conversations does not allow probing into the client's mind to determine delusional or aberrational thought processes. However, this does not mean that they are not there. Many ill people, for example, know that other people don't think like they do, and may need to get to know you before they share their thoughts. Similarly, many people with brain damage may not appear dysfunctional when engaged in casual conversation. The important thing is that neither you nor any mental health professional should pre-judge a client's mental state based upon casual contact. It is only through the assistance of competent mental health professionals who recognize the importance of a documented social history and who are trained in appropriate testing that you can reliably and adequately determine your client's mental state.

VII. ESSENTIAL REFERENCES

Because of the pivotal role of mental health issues in criminal and capital litigation, counsel must gain a working knowledge of behavioral sciences. Whether an attorney has only one criminal or capital case or several, it is essential to become familiar with the diagnosis and treatment of psychiatric disorders. Two publications need to be on the shelves of attorneys in criminal litigation and studied: *Comprehensive Textbook of Psychiatry, Fifth Edition*, edited by Harold I. Kaplan, M.D., and Benjamin J. Sadock, M.D. (Williams & Wilkins, 1989) and *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, published by the American Psychiatric Association in 1987. These references offer a guide through the labyrinth of mental health information and allow counsel to participate fully in developing appropriate mental health claims.

VIII. CONCLUSION.

Defense counsel in criminal, especially capital, litigation can and should insure that their clients receive a competent and reliable mental health evaluation. In order for a mental health evaluation to meet the nationally recognized standard of care in the psychiatric community it must involve a multistep process that requires far more

than a clinical interview. A thorough and documented social history, physical examination, and appropriate testing are necessary components of any psychiatric diagnosis. Mental health professionals must consider if there is an organic cause for behavior before reaching any psychiatric diagnosis. Counsel has a responsibility to ensure that psychiatric evaluations reflect this multistep process.

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Footnotes

[1] See also *Youngberg v. Romeo*, 457 U.S. 307 (1982) (recognizing that psychiatrist's performance must be measured against a standard of care when due process demands adequate performance.)

[2] Although the *Blake* court analyzed the impairment of the psychiatrist's ability to conduct a professionally adequate evaluation in terms of its impact on the right to effective assistance of counsel, it recognized that its analysis was "fully supported" by *Ake*. In support of this conclusion, the court gave emphasis to *Ake's* requirement that "'the state must at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and in presentation of the defense.'" 758 F.2d at 530-31 (quoting *Ake*, 470 U.S. at 83). Thus, *Blake* recognized that if an appointed psychiatrist's ability to "conduct an appropriate examination" is impaired, due process is violated.

[3] Other cases involving similar claims associated the effect of the actions by the state court, the prosecution and psychiatric witness with the issue of effectiveness of cousel. Courts have "recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974).

[4] *See generally*, Note, *A Question of Competence: The Indigent Criminal Defendant's Right to Adequate and Competent Psychiatric Assistance After Ake v. Oklahoma*, 14 Vt.L.Rev. 121 (1989).

Daily Events Shape Child

Children's personalities are shaped more by everyday interactions with parents than by dramatic events or major developmental stages, according to a new theory that has gained widespread adherence but has also stirred bitter debate.

Assailing some of the most revered ideas in behavioral science, the theory asserts that there are no critical phases in a child's life - the oral and anal periods theorized by psychoanalysis - but rather a long continuum of important moments.

An infant discovers the first inkling of autonomy, according to the new thinking, from small acts of assertion. At 4 months of age it averts its eyes; at about 12 months it can walk away and at 18 months is says, "No."

All of these are acts of will, each given a different flavor by the natural development of the central nervous system. As that evolution goes on, there is a drumbeat of self-affirmation that creates the sense in a child's mind that he or she is an individual with a will.

It is a development that can be stymied or skewed, however, by parents or other adults whose own needs thwart a child's normal urge for independence. It will happen continually, quickly and in ways so small that it is not realized. The mother who always insists on meeting her child's gaze even when he turns away, for instance, is engaged in a subtle battle of wills.

That kind of battle has been witnessed in rigorous scientific studies by Daniel Stern, a psychiatrist at Cornell Medical School, and by other psychoanalytic researchers. But Stern draws the most far-reaching conclusions and poses the deepest challenge to established psychoanalytic thought and practice.

Stern has videotaped newborn infants and their mothers during their normal activities, filming them periodically for about 2 years. While Stern's work has focused on mothers and their infants, he said he believed it applied as well to fathers and infants or anyone else who spent prolonged periods caring for a small child.

There is a danger that Stern's work will unduly alarm mothers. "What matters most about a baby's caretakers, whether the mother or someone else, is that they love the baby, are reasonably relaxed, and generally sensitive," said Paula Caplan, director of the Centre for Women's Studies in Education at the University of Toronto. Caplan has studied the tendency of some psychological theories to blame mothers for problems of their children.

Stern's results show the importance of the countless small exchanges of daily life between mother and child for shaping the child's pattern of interaction in later relationships in life.

For instance, in a typical study, Stern videotaped all the activity between a 25-year-old mother and her twin sons, Mark and Fred, in periodic 3-hour sessions until they were 15 months. The films of the mother and her twins were exhaustively analyzed.

The results were telling. At 3 1/2 months there were repeated exchanges in which the mother and Fred would gaze at each other. Fred would avert his face, his mother would respond by trying to engage eye contact again and Fred would respond with a more exaggerated aversion of his face.

As soon as the mother looked away, though, Fred would look back at her, and the cycle would begin all over, until Fred was in tears.

With Mark, the other twin, the mother virtually never tried to force continued eye contact. Mark could end contact with his mother when he wanted.

According to Stern, when the infants were seen at 12 to 15 months, Fred seemed notably more fearful and dependent than Mark, and often used the same aversion of his face he had used with his mother to break off contact with other people.

Mark, however, greeted people openly, looked them straight in the eye, to break eye contact, instead of turning his face down and away, Mark would turn his head slightly to the side and up, with a winning smile still visible.

Cases such as those, in Stern's view, raise the question of whether a temperamental mismatch between infant and mother may lead to problem such as Fred's. He has also found that a mother's hidden beliefs and fantasies about her children can shape her relationship with the infant; in his case, the mother felt Mark was more like herself and Fred "more like father."

Stern believes infants learn extremely powerful lessons from such continually repeated interactions. "These small moments, rather than the traumatic or dramatic moments of a baby's life, make up the bulk of the expectations that adults bring to their relationships," he said.

Of special importance, Stern believes, is a sort of attunement in which mothers somehow let their infants know they have a sense of the infants' feelings. If a baby squeals in delight, for instance, the mother might given the baby a gentle shake.

In that interaction - which mothers and infants go through about once a minute while actively engaged with each other - the main message is in the mother's more or less matching the baby's level of excitement.

"If you just imitate a baby, that only shows you know what he did, not how he felt," said Stern. "To let him know you sense how he feels, you have to play back his inner feelings in another way. Then the baby knows he is understood."

The pattern of an infant's lifelong social relationships begins with such simple encounters, though that pattern can change later in life.

Stern's theory holds that it is from those attunements that an infant begins to develop its "subjective self," a sense that other people can and will share in its feelings. That aspect of the personality begins to emerge at around 8 months, and will continue to develop throughout life, Stern says. In the same way, other aspects of the sense of self - such as the sense of having a personal history and of being independent - first emerge in the earliest months of life and grow through the lifespan.

Attunements can be as subtle as a mother matching the pitch of her voice to her baby's squeal, or as obvious as her giving a quick shimmy in response to his shaking a rattle. In Stern's view, they give an infant the deeply reassuring sense of being emotionally connected to someone else.

An infant will not overtly acknowledge that feeling of being connected, Stern says, but will often respond to its absence. In one experiment, he had mothers purposely over- or under-respond to their infants, rather than matching them in an attuned way. The babies reacted with surprise or dismay. "The infants would stop and look around as though to ask "What was that about?'" Stern said.

When parents consistently fail to match the child in this way, it affects the child's development, Stern finds. With one mother who continually undermatched her baby's level of activity, he found, the baby eventually learned to be passive. "An infant treated that way learns, When I get excited, I can't get my mother to be equally excited, so I may as well not try at all," said Stern.

The psychological imprints of those early encounters, Stern believes, are not irrevocably set. "Relationships throughout life - with friends or relatives, for example - or in psychotherapy continually reshape your working model of relationships," he said. "An imbalance at one point can be corrected later; there is no crucial period early in life - it's an ongoing, lifelong process." "There is no data yet that shows any grave effects for a child who has a non-attuned mother," said Jerome Cagan, a developmental psychologist at Harvard. "Many mothers are away from their infants and toddlers much of the day, and the children seem to turn out just fine."

Stern's work is part of a broad effort by psychoanalytic researchers to study infants and children directly. Unlike other researchers, Stern has used his findings to mount a vigorous challenge to basic tenets of psychoanalytic thought. "Our findings, like Dr. Stern's, put some psychoanalytic theories in question," said Robert Emde, a psychoanalyst who is studying infants at the University of Colorado School of Medicine in Denver. "But Dr. Stern goes much further in the implications he draws.

"My research questions more clinical assumptions than it confirms," Stern said. One of the main psychoanalytic views challenged by his research is that psychological growth, as Stern puts it, "is a parade of specific epochs, in which each of the most basic clinical issues of life passes by in its own separate turn. They do not."

Daniel Goleman
New York Times News Service
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Kentucky Capital Litigation Resource Center

The Kentucky Capital Litigation Resource Center finds competent counsel to represent death row inmates in state and federal post-conviction, and develops and coordinates all available resources to aid those attorneys.

To accomplish this resource center attorneys directly represent some capital clients in post-conviction actions. Additionally, the resource center recruits private practitioners to be on a panel from which attorneys are chosen to handle capital post-conviction actions. Private practitioners are encouraged to participate on a *pro bono* basis. They also develop criteria for the appointment of panel attorneys to a case.

For the foreseeable future 1 DPA attorney with capital litigation experience will be assigned to work with at least 1 private attorney after the direct appeal is affirmed. An entire firm could be assigned to the case. Ideally the DPA attorney involved is the attorney that was participated as lead counsel when the direct appeal was first assigned. The 2 attorneys would remain on the case through state & federal post-conviction, including any clemency proceedings.

The resource center staff is active in assisting the attorneys in identifying federal constitutional issues, formulating strategy and preparing appropriate documents and arguments when necessary. To that end the center is expanding the present death penalty library. Eventually all cases, pleadings, articles, etc. will be indexed so that identification of a topic by an attorney will give ready access to all current information on that issue. The resource center networks with other state and national organizations providing assistance to death sentenced clients and plans to establish a computerized indexed pleadings bank. The newsletter, *Capital Concerns*, is published bi-monthly. A *6th Circuit Habeas Corpus Manual* are planned. The resource center develops and coordinates training concerning capital litigation in the post-conviction area, develops and expands existing expert witness lists, assists in organizing investigation efforts, and monitors all Kentucky capital cases.

Capital Trial Assistance

The Major Litigation Section offers a host of services to attorneys defending cases at the trial level. Staff lawyers are available to consult with trial lawyers about their cases. The section's mitigation project paralegal Cris Brown is available to conduct intensive day-long client interviews. The purpose of these interviews is to gather comprehensive information about the client's life as a starting point for a complete psycho-social history. Following the interview, a memorandum is prepared condensing the information she has gathered. It is forwarded to the trial lawyer along with suggestions for further areas of investigation relevant to mitigation.

NO QUICK FIXES

Sister Gosser

Honesty and living life one day at a time, not empty promises, are keys to overcoming addictive behavior, says Oregon counselor. Conditions in our society are fertile for the development of addiction. We are a "quick-fix" culture. We rely on substances - whether rapidly acting pain relievers or elegantly styled automobiles - to ease our disease.

Addiction is receiving a good deal of attention today, and it is evident that the dynamics of the addictive process are rampant in our image-conscious, success-oriented, materialistic society. As products of our culture, we are seduced by advertising promises that certain products will make us more attractive, successful, or powerful. Our credit debt is evidence of our addictive society, according to A.M. Washton and Donna Boundy in *Willpower's Not Enough.* This 1989 book notes our collective debt totals $650 billion, or twice the 1981 figure. Less than half of what we buy replaces worn out items. Mostly, we're just shopping around for something to make us feel better.

If we examined seriously our own compulsions and obsessions, we would probably feel much more compassion for chemically dependent people. Most of us don't realize it, but we are probably on the road to addiction if we continue to use a substance or engage in a particular activity when the undertaking causes problems in our lives. Furthermore, we might stop the activity if we realized it would result in progressive deterioration of our physical, mental, emotional and spiritual well-being.

These ideas have become apparent to me during the last 18 months since I began work as a chemical dependency counselor. Never in my wildest dreams did I ever imagine myself in such a role. My images of alcoholics and addicts were much like the views of the population at large. I thought alcoholics and addicts are people who live on the streets, are dangerous and unpredictable, and probably engage in illegal activities to support their habits. I had heard they are hard to treat.

Those stereotyped notions changed dramatically for me soon after I began work at De Paul Treatment Center in Portland, Ore., a chemical dependency treatment center that helps women and men without means to be treated elsewhere. The majority of our clients are poor and at odds with their families and most of society, but not all began life that way. They are women and men whose alcoholism or drug addictions have robbed them of dignity and any measure of control over their own destinies. Rather than thinking of them as scary or dangerous, I have come to know them as women and men who are victims of an insidious illness - the disease of chemical dependency.

One of my clients talks about his process as one of progressively lowering his expectations. When his alcohol and drug use interfered with his ability to work a regular job he decided he didn't need such stressful employment. When he couldn't afford to pay monthly rent on an apartment he moved to a cheap hotel. From the hotels he looked down on those who lived in shelters. When he landed in a shelter because he couldn't work enough to pay the rent in a rooming house, he looked down on those who were dirty and slept in parks. He said he had to keep looking down at whoever had a little less control over life than he did because looking up was terrifying. Today he describes his life as insane. Alcohol and drugs were more important than food, shelter or self-respect.

Some clients seek treatment because they are sick and tired of "being sick and tired." Courts refer other clients, or they come to us directly from prison. Other referred by a children's services division must complete treatment if they hope to have their children returned to their care. No matter how they come to us, the majority who finally end up in treatment are tired, desperate, and usually filled with shame about the compromises, the dishonesty, and the pain addiction has caused in others' lives. Often an addict's preferred defenses - denial and projection - mask the pain and shame. Addicts tend to minimize the fact that their involvement with alcohol or drugs is out of control. Addicts project blame for their problems on almost any event, person or situation to avoid facing the reality that because of the substances their lives are unmanageable.

The chemically dependent person's reality is skewed, and the presence of these defenses initially make the person difficult to work with and appear to want no help.

Still, many of us, including alcoholics and addicts, find it difficult to accept the reality that alcoholism or drug addiction is a disease. We who have never struggled with addictive illness still want to believe that the alcoholic or addict's problem is basically one of lack of self-control. Nothing could be further from the truth. Like cancer or heart disease, the person with a predisposition towards chemical dependency will develop the disease if the conditions are right.

So just how does an addiction develop? First it is important to acknowledge that the development is a multi-determined phenomenon. There is likely a biological predisposition to the development of a chemical dependency. While efforts to identify an alcoholic personality are futile, most recovering people I work with admit that predating their addictions were many problems. These include low self-esteem, uneasiness in interpersonal relationships, having to guess at what's normal, difficulties expressing feelings and handling frustrations. Children who grow up in homes with chemically dependent parents usually emerge from their families with such problems. While these personality characteristics may predispose someone to develop an addiction, it may also result from a pathological relationship with a mood- or mind-altering substance.

Most of the people I work with - today's casualties of the drug epidemic - grew up in families affected by alcohol or drug addiction, but to their neighbors they looked like "normal" families. We know that addicted parents usually create problems in children's development. It is confusing to grow up in such a home. Children are never sure what to expect. Their experience tells them there is a problem, but Mom or Dad tells them this is not so. Children are usually told not to talk about the problem. If something is not supposed to be discussed, it must also be pretty shameful.

One of my clients put it well when she explained how she always promised her

children she wouldn't drink. When she couldn't keep the promises, she tried to hide her drinking and drug use. She told the children she was fine and wasn't drinking, but they knew. She was so ashamed that her drinking was getting out of control that she sent the children out to play so they wouldn't catch her using alcohol. The children became confused. They learned if they questioned their mom, they were scolded. They learned not to talk about Mom's drinking and to suppress their feelings about it.

It's tough to know something is not right and not have that truth validated. On one level children learn not to trust their own reality. Often the child thinks, "Something is wrong with me." This idea carries to adolescence and adulthood as low self-esteem, insecurity and a nagging sense of shame about one's identity. Also carried into adulthood is the experience of suppressing normal emotional needs and feelings. The child learns early these might be bothersome to the alcohol- or drug-involved parent. Therefore, one learns to deny one's reality, to suppress feelings, and not to trust one's environment. If emotional needs surface they may not be met, so the child learns how to keep everything under control and avoid disappointment.

No one sets out to become chemically dependent. Initially the substance offers something promising, like relief from pain or uneasiness. Authors Washton and Boundy outline a 5-stage process in addiction progression. The first stage of involvement with a mood-altering chemical is infatuation. Many addicts tell me how wonderful things were when they first discovered the relief or pleasure resulting from ingestion of a particular substance.

A "honeymoon" period follows infatuation. The substance continues to deliver desired effects and is sought in times of stress or discomfort to provide relief from uncomfortable or undesirable feelings. As with love affairs, the individuals think a lot about their next opportunities to use or drink. At this stage budding addicts think they are "safe" because they probably aren't daily users. They believe they are in control.

Betrayal follows the honeymoon and often takes more and more of the substance to deliver desired effects. Negative consequences emerge. Users may be cited for drunk driving or spend more than they planned for drinks or a drug. Other people become concerned. Addicts fear being out of control or being perceived that way. They begin to skew the truth.

Following betrayal, the relationship between addicts and their drugs of choice is like a "marriage on the rocks." Addicts are increasingly desperate to recapture the illusions of the honeymoon. Use of substances is more compulsive in an effort to keep at bay feelings of depression, failure, shame and inadequacy.

Ultimately persons are "trapped" in a downward spiral. The substances organize users' lives. Alcoholics at this stage tell us they need to drink to ward off the shakes and make it through the day. Addicts so want relief from withdrawal discomfort that they lie, cheat and steal even from those they love. Shame and guilt mount but are mollified temporarily by the next fix. Life becomes unmanageable. But the disease keeps the denial going. Addicts tell themselves they've tried to control use but it hasn't worked. In their minds, they're beyond hope.

So what's involved in the treatment of addictions? How will we make headway in this War on Drugs? Two tools that hold the most promise are treatment and education for the prevention of addiction. While controlling the flow of drugs and stiffening sanctions against dealers are strategies not to be discounted, it is important to change attitudes about chemical use, and we must be less preoccupied with quick fixes. Otherwise, urges to alter moods or bring uncomfortable feelings under control will continue, and untreated and ever-resourceful addicts will find ways to get what they need.

When we talk about treatment, we don't mean "curing" addiction. We talk about arresting the disease's progression, bringing it into remission and helping addicts learn to avoid relapse. Paradoxically, treating addictions has to do more with teaching people to "let go" or surrender than it does with teaching strategies to "control" desires for substances. Addictions generally develop around needs to control uncomfortable or undesirable feelings. Early use of addictive substances creates the illusion that control is possible. Recovery involves learning how to accept oneself as one is - limited in what one can and cannot control. Recovery includes honestly confronting grandiose fantasies that early substance use promised, learning the dynamics of the disease process, and facing realities of what chemicals do physiologically, mentally, emotionally and spiritually.

Much of what works in treating addictions comes from the wisdom of Alcoholics Anonymous. The first 3 stages of AA's 12-step program provide the foundation for the initial recovery phases. These steps invite addicts to admit how bad things are, to be open to possibilities that help and changes are possible and to risk allowing some power beyond themselves - God or the wisdom of the group - to show the way. Addicts are relieved to finally acknowledge what is so obvious to everyone else - that things are out of control. When denial that has reigned so long is let go, addicts are finally reachable and teachable.

The next treatment phases involve dealing with the physical, mental, emotional and spiritual wreckage the disease has wrought and the addict's relationship with God and other people. The need to heal physically is obvious because addicts' bodies have sustained terrible abuse. Addicts also need to heal mentally and learn to recognize distortions that have become habits in their ways of thinking. They need to learn new ways of coping with life's stresses and how to deal with the shame and guilt that has fed their addictions and can easily throw them into relapses. Finally addicts must heal spiritually. Spiritual healing involves becoming reconciled with and developing their relationship with their higher power. It involves that process of reconciliation with oneself and members of the human community.

The recovery agenda is no small task, but work with recovering people is rewarding. I witness miracles daily. Many who share their stories with me say things like, "I shouldn't be here today. I've been through so many detoxes. God must have a reason for me to live." Or they say, "I never imagined that life could be like this. I never thought I could exist without drinking."

I've learned how much I am a product of my own culture, and I don't want to deny the complexity of the drug epidemic. Addictions develop over a long period, and the solution to our Drug War is not going to be a quick fix. I'm hopeful that what we're learning about recovery from recovering people will benefit us all. From the tradition of Alcoholics Anonymous we learn to take things one day at a time, to live life on life's terms, and get back to the basics of honesty with ourselves and one another.

SISTER GOSSER

Sister Gosser is a chemical dependency counselor at De Paul Treatment Centers in Portland, Oregon. She received an M.S.W. from CUA in 1988. From 1980 to 1987, she was associate director in CUA's campus ministry office.

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SCHEDULING OF DRUGS UNDER KRS CHAPTER 218A

CHR DRUG CATEGORIES

KRS Chapter 218A defines various schedules of drugs. KRS 218A.020 requires the Cabinet for Human Resources (CHR) to place substances which are not listed in the statute into schedules based on the statutory criteria for each schedule.

Below are compilations of CHR's listing of drugs that fall into various schedules. The first list is by schedule; the second list is alphabetical. The lists are not guaranteed to be all-inclusive.

CHANGES

The drugs placed in a particular schedule may be changed by either DEA or CHR. The change may be a movement from one schedule to another or removal from the controlled schedule. New drugs marketed are screened for abuse potential and may be placed into a schedule at the time of marketing or later depending on experience once the drug is in use. Therefore, **one must check the validity of the scheduling of any drug at periodic intervals.**

ADMINISTRATIVE REGULATIONS

In addition to the KRS 218A, 902 KAR 55:010 - 55:060 will list drugs in the various schedules.

ANABOLIC STEROIDS: 1990 LEGISLATION

The 1990 General Assembly enacted H.B. 112. An act relating to anabolic steroids. This act amended KRS 217 instead of KRS 218A—The Controlled Substance Act. However, the amendment to KRS 217 places restrictions on anabolic steroids and creates penalities for infringement of those restrictions.

The anabolic steroids had previously been designated prescription legend only, which restricted their distribution to those persons who had a physicians order or prescription for them. H.B. 112 defines certain circumstances under which anabolic steroids may not be prescribed and prescribes penalties for each type infraction that might occur.

In addition to illegal possession of an anabolic steroid without a valid prescription or drug order for such from a duly authorized practitioner in the State of Kentucky, H.B. 112 further states that:

It is now unlawful for a prescription or order to be written for an anabolic steroid, for such steroids to be distributed and/or sold for the following purposes:

— enhanced performance in exercise, sport or game,

— the hormonal manipulation necessary to increase muscle mass, weight, strength without a medical necessity

and further it is unlawful for anyone to intentionally make or deliver an anabolic steroid whether in a pure or unpure state and it is unlawful to possess an anabolic steroid for the purpose of illegal delivery or manufacture.

The following anabolic steroids are a material compound mixture or preparation that contain any of the following:

1) Chorionic Gonadotropin
2) Clostebol
3) Dehydrochlormethyltestosterone
4) Ethylestrenol
5) Fluoxymesterone
6) Mesterolone
7) Metenolone
8) Methadienone
9) Methandrostenolone
10) Methyltestosterone
11) Nandrolone decanoate
12) Nandrolone phenpropionate
13) Norethandrolone
14) Oxandrolone
15) Oxymesterone
16) Oxymetholone
17) Stanozolol
18) Testosteronepropionate
19) Testosterone like related compound

Penalties are described in House Bill 112." This bill became law on July 1, 1990.

ANABOLIC STEROIDS: CONGRESSIONAL ACTION

The Congress is also looking at the steroid issues. H.R. 4658 Hughes (D-NJ) relates to Anabolic Steroids Control Act of 1990 which will become an amendment to the Controlled Substances Act and would assign criminal penalities for illicit use of anabolic steroids if it is passed into law.

FURTHER INFO

Inquiries may be addressed to **Mr. Edward Crews, R.Ph.**, Pharmacy Services Program Manager, Drug Control, Department of Health Services - (502) 564-7985; or to **Helen Danser, R.Ph.** Pharmacy Services Program Manager, Department for Mental Health and Mental Retardation Services, Cabinet for Human Resources, Frankfort, Kentucky 40601, (502) 564-4448.

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St. Louis, MO 63146 - August

3. 902 KAR 55

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Oradell, New Jersey 07649

CHR DRUG LIST BY SCHEDULE

SCHEDULE I

A. Opiates

Acetylmethadol
Alfentanil
AllyIprodine
Alphacetylmethadol
Alphameprodine
Alphamethadol
Alpha-Methylfentanyl
Benzethidine
Betacetylmethadol
Betameprodine
Betamethadol
Betaprodine
Clonitazene
Dextrommoramide
Dextrorphan
Diampromide
Diethylthiambutene
Difenoxin
Dimenoxadol
Dimepheptanol
Dimethylthiambuten
Dioxaphetylebutyrate
Dipipanone
Ethylmethylthiambutene
Etonitazene
Etoxeridine
Furethidine
Hydroxpethidine
Ketobemidone
Levomoramide
Levophenacylmorphan
Morpheridine
Noracymethadol
Norlevorphanol
Normethadone
Norpipanone
Phenadoxone
Phenampromide
Phenmorphan
Phenoperidine
Piritramide
Propheptazine
Properidine
Propiram
Racemoramide
Tilidine
Trimeperidine

B. Opium Derivatives

Acetorphine
Acetyldihydrocodeine
Benzylmorphine
Codeine Methylbromide
Codeine-N-Oxide
Cyprenorphine
Desomorphine
Dihydromorphine
Drotebanol
Etorphine
Heroin
Hydromorphinol
Methyldesorphine
Methyldihydromorphine
Morphine Methylbromide
Morphine Methylsulfonate
Morphine-N-Oxide
Myrophine
Nicocodeine
Nicomorphine
Normorphine
Phoclodine
Thebacon

C. Hallucinogenic Substances

3,4 Methylenedioxy amphetamine
5, Methoxy - 3,4 Methylenedioxy Amphetamine
3,4,5 - Trimethoxy Amphetamine
Bufotenine
Diethyltryptamine
Dimethyltryptamine
4-Methyl-2,5-dimethoxy amphetamine
Ibogaine
Lysegic acid diethylamide - LSD
Marijuana
Mescaline
Peyote
N-ethyl-3-piperidyl benzilate
N-Methyl-3-piperidyl benzilate
Psilocybin
Psilocyn
Tetrahydracannabinols
Hashish
Phencyclidine
4 - Bromo-2,5 - Dimethoxy-Amphetamine
2,5 - Dimethoxyamphetamine (2,5 DMA)
Ethylamine Analog of Phencyclidine (N-ethyl-1-phenylcyclohexylamine, cyclohexamine, PCE)
4 - Methoxyamphetamine (PMA)
Parahexyl (Synhexy 1)
Pyrrolidine Analog of Phencyclidine (1-(1-Phenylcyclohexyl) - Pyrrolidine, PCPy, PHP)
Thiophene Analog of Phencyclidine (1-(1-(1-(2-Thienyl)Cyclohexyl) Piperidine, TCP, TPCP)

D. Depressants

Mecloqualone
Methaqualone (2-methyl-3-otolyl-4(3H)-quinazolinone) Quaalude

E. Stimulants

Fenethylline
N-ethylamphetamine

SCHEDULE II

A. Opioid Narcotics

Pantopon - (Hydrochlor pium alkaloids)
Opium Tincture Deodorized
Morphine Sulfate - [Roxanol, RMS Uniserts (rectal suppositories)]
Hydromorphone - (Dilaudid)
Oxymorphone - (Numorphan)
Levorphanol - (Levo-Dromoran)
Methadone - (Dolophine)
Meperidine - (Demeral, Pethadol)
Fentanyle - (Sublimaze)
Alphaprodine HCL - (Nisentel)
Sufentanil - (Sufenta)
Codeine
Oxycodone HCL

B. Combinations of Opioids

B & O Supprettes No. 15A
B & O Supprettes No. 16A
Opium & Belladonna Suppositories
Oxycodone & Acetominophen tablets
Tylox Capsules
SK - Oxycodone with Acetamenophine
Oxycodone HCL, Oxycodone Terephthalate & Aspirin tablets
Codoxy Tablets
Percodan Tablets
SK - Oxycodone with aspirin tablets
Oxycodone HCL/Oxycodone Terephthalate & aspirin half strength
Percodan - Demi tablets
Demerol APAP
Mepergan Fortis Capsules
Mepergan Injection

SCHEDULE II - NON-NARCOTIC

Amobarbital + Secobarbital - (Tuinal)
Amobarbital - (Amytal)
Cocaine
Biphetamine - (Resin Complex of amphetamine with dextroamphetamine)
Dextroamphetamine - (Dexamex), Ferndex, Osydess II, Spancap No. 1
Methamphetamine - (Desoxyn)
Methylphenidate - (Ritalin)
Obetrol - (various salts of amphetamine and dextroamphetamine)
Pentobarbital - Nembutal
Phenmetrazine - Preludin
Secobarbital - Seconal

A. Immediate Precursors

1 - Piperidinocyclohexanecarbonitrile and 1 - Phenylcyclohexylamine, immediate precursor to Phencyclidine
Phenylacetone - other names include phenyl-2-propanone, P2P, benzyl methyl ketone and methylbenzylketone - immediate precursor to amphetamine and

methamphetamine

SCHEDULE III - OPIOID NARCOTICS

A. Products Containing Codeine

Aspirin with Codeine
Anatuss with Codeine tablets
Colrex compound capsules
Copavin Pulvules
Hycodan tablets
Empirin with Codeine
Fiorinal with Codeine
Nucofed
Nucofed Expectorant Syrup with Codeine
Phenaphen with Codeine
Tylenol with Codeine

B. Products Containing Hydrocodone

Adatuss D.C. Expectorant
Bacomine
Bacodan
Bay Cotussend
Baycomine Pediatric Syrup
Codiclear DH Syrup
Codimal DH Syrup
Codamine
De-tuss
Detussin
Detussin Expectorant
Donatussin DC Syrup
Entuss Expectorant Syrup
Hycodan
Hycotuss Expectorant
Hycomine
Hycomine Pediatric Syrup
Hydropane
Hydrophen
Hydro-Propanolamine
Promist HD Syrup
Promist Expectorant
Psuedo - Hist Expectorant
P.V. Tussin Syrup and tablets
Ru-Tuss - with Hydrocodone
SRC Expectorant
S.T. Forte Liquid
Triaminic Expectorant DH
Tussanil DH Tablets
Tussanil DH Syrup
Tussend Expectorant
Tussionex

C. Products Containing Opium

B.P.P.
Corrective Mixture with Paregoric - Kentucky only
Diabismule Tablets
Diabismule Syrup - Kentucky only
Diaquel
Donnagel P.G.
Hista - Derfule caps
Kadonna P.G.
Kaopectolin P.G. - Kentucky only
Kaodene with Paregoric
KBP/O
Paregoric - Kentucky only
Parelixir - Kentucky only
Parepectolin - Kentucky only
Nalline - Nalorphine
Talwin - Pentazoicine - all forms

SCHEDULE III - NON-NARCOTICS

Amphetamine sulfate 2.5 mgm; aspirin 162 mgm, Phenacetin 162 mgm - Edrisal
Benzphetamine
Butabarbital - Butisol
Chlorhexadol - Lora, Mecoral, Medodorm
Chlorphentermine
Chlortermine
D Amphetaminesulfate 2.5 mgm, mephenesin 500 mgm; Salicylamine 2 mgm; chlorpromazine HC1 10 mgm - Special Formula 711 Tablet
Dextroamphetamine sulfate 5 mgm; chlorpromazine HC1 25 mgm - (Thora-Dex No. 2 Tablet)
Glutethimide - (Doriden)
Lysergic Acid
Lysergic Acid Amide
Mazindol
Mephobarbitol - (Mebaral)
Methamphetamine HC1 1.2 mgm, chlorpheniramine maleate 3.8 mgm; phenacetin 120.0 mgm; salicylamide 180.0 mgm; Caffeine 30.0 mgm; Ascorbic acid 50.0 mgm - (Genegesic Capsules)
Methamphetamine HC1; conjugated estrogens - equine' 0.125 mgm Methyl testosterone 1.25 mgm amylase 10.0 mgm protease 5.0 mgm, aullulase 2.0 mgm nicotinyl alcohol tartrate 7.5 mgm; dehydrochloric acid 50.0 mgm; ferrous fumerate 6.0 mgm - (Hovizyme Tablet)
Methamphetamine HC1 1mgm; conjugated estrogen - equine 0.25 mgm; methyl testosterone 2.5 mgm - (Mediatric Tablet or Capsule or Solution [above ingredients in 15 cc's of solution])
Methyprylon - (Noludor)
Metharbital- (Gemonil)
Phendimetrazine
Phenobarbital
Sulfondiethylmethane
Sulfonethylmethane
Sulfonmethane
Talbutal - (Lotusate)

The following combination products are located in Schedule III: "any material, compound, mixture or preparation containing amobarbital, secobarbital, pentobarbital or any salt thereof and one or more other active medicinal ingredients which is not a controlled substance.

Products containing acetaminophen, caffeine, butabital are not controlled by the Federal regulations - however they are considered to be controlled under Schedule III in Kentucky. This information may not be explicit in the regulations, reference is made to Federal Register of 1984 which does not exempt these products.

"Any suppository dosage form containing amobarbital, secobarbital, pentobarbital or salt thereof" which has been approved by the U.S. Food and Drug Administration for marketing only as a suppository."

SCHEDULE IV

Chloral Betaine - (Beta-Chlor, Somilan)
Chloral Hydrate - (Noctec, Somnos, Nycton, Lorinal, Chloraldurat)
Ethchlorvynol - (Placidyl)
Ethinamate - (Valmid)
Meprobamate - (Equanil, Miltown, Meprospan)
Paraldehyde
Pentaerythritol Chloral - (Petrichloral, Periclor)

A. Stimulants

Fenfluramine HCL - (Pondimin)
Diethylpropion HCL - (Depletite - 25; Tenuate; Tepanil; Tenuate Dospan; Tepanil Ten-Tab)
Phentarmine HCL - (Phentrol; Tora; Fastin; Obe-Nix; Obephen; Obrmine; Obestin-30; Phentrol 2; Unifast Unicells; Wilpowr; Adipex-P; Dapex-37.5 Ionamin; Parmine; Phentrol 4; Phentrol 5)
Pipradrol - (Detaril; Gerodyl; Meratran; Pipradol)
SPA-1(-)-1-Dimethylamino-1, 2-Diphenylathane

B. Depressants

Alprazolam - (Xanax)
Bramazepam
Camazepam
Chlordiazepoxide - (Librium; Libritabs; A-Poxide; Lipoxide; SK-Lygen; Murcil; Reposans-10; Sereen)
Clobazam
Clonazepam - (Clonopin)
Clorazepate - (Tranxene)
Clothiazepam
Cloxazolam - (Enadel; Sepazon)
Delorazepam
Diazepam - (Valium)
Estazolam - (Eurodin; Julodin)
Ethyl loflazopate
Fludiazeopam
Flunitrazepam - (Rohypnol)
Flurazepam - (Dalmane)
Halazepam - (Paxipam)
Haloxazolam
Ketozolam
Loprazolam
Lormetazepam
Lorazepam - (Ativan; Emotival; Lorax;

Psicopax; Tavor; Temesta)
Mebutamate - (W-583; Capla; Butatensin; Carbuten; Mebutina; Prean; Sigmafon; Vallene; Mega; No-Press; Axiten; Ipotensivo)
Medazepam - Ansilan; Diepin; Elbrus; Esmail; (Medazepol; Mezepan; Megasedan; Nobrium; Pazital; Psiquium; Resmit; Rudotel; Serenium; Siman)
Methohexital - (Brevital; Brevital Sodium; Brevimytal Sodium, Brietal Sodium)
Nimetazepam
Nitrazepam - (Benozalin; Calsmin; Eunoctin; Mosadan; Mogadon; Nelbon; Nitrenpax; Paxisyn; Pelson; Radedorm; Relact; Sonebon; Sonnolin)
Nordiazepam
Oxazepam - (Serax; Aplakil; Bonare; Enidrel; Hilong; Isodin; Limbial; Nesontil; Praxiten; Propax; Quilitrex; Rondar; Serenal; Serenid; Serepax; Seresta; Sobril; Tazepam)
Oxazolam - (Serenal)
Pemoline - (Cylert; Azoksodon; Dantromin; Deltamine; Endolin; Hyton; Kethamed; Nitar; Notair; Pioxol; Pondex; Ronyl; Sigmadyn; Sistral; Sofro; Tradon; Volital)
Pinazepam
Prazepam - (Demetrin; Verstran; Centrax)
Temazepam - (Myolastin, Restoril)
Tetrazepam
Triazolam - (Halcion)

C. Analgesics

Dextropropoxyphene - (Darvon)

SCHEDULE V

Tricodene #1 Syrup
Tricodene #2 Syrup
Phenergan with Codeine Syrup
Phenergan VC with Codeine Syrup
Cophene - 5 Syrup
T-Koff Syrup
Alamine - (C Liquid)
Codehist DH Elixir
Phenhist DH with Codeine Liquid
Novahistine DH Liquid
Actifed with Codeine Cough Syrup
Midahist DH Liquid
Dimetane DC Cough Syrup
Colrex Compound Elixir
Kolephrin with Codeine Liquid
Codimal PH Syrup
Baytussin AC Expectorant
Cherocol Syrup
Clydeine Cough Syrup
Guiamid A.C. Liquid
Guiatuss A.C. Liquid
Guiatussin with Codeine Liquid
Halotussin with Codeine Phosphate Liquid
Nortussin with Codeine Liquid
Robitussin A.C. Syrup
Tolu-Sed Cough Syrup
Tussi-Organdin Liquid
Prunicodeine Liquid
Terpine Hydrate with Codeine Elixir
SK-Terpin Hydrate and Codeine Elixir
Calcidrine Syrup
Cetro-Cirose Liquid
Alamine Expectorant
Deprosit Expectorant with Codeine
Isoclor Expectorant
Novahistine Expectorant
Nucofed Pediatric Expectorant
Phenhist Expectorant
Robitussin - DAC syrup
Ryna - CX Liquid
Dihistine Expectorant
C-Tussin Expectorant
Midahist Expectorant
Naldecon - CX Suspension
Triaminic Expectorant with Codeine
Histadyle EC Syrup
Promethazine HCL Expectorant with Codeine
Phenergan Expectorant with Codeine Syrup
Prothazine with Codeine Expectorant Syrup
Tussar 2 Cough Syrup
Tussar SF Cough Syrup
Iophen - C Liquid
Ambay Expectorant Liquid
Ambophen Expectorant
A-Nil Expectorant
Bromanyl Expectorant
Ambenyl Cough Syrup
Ru-Tuss Expectorant
Conex with Codeine Syrup
Tussirex with Codeine Liquid
Promethazine HCL VC Expectorant with Codeine
Mallergan - VC Expectorant with Codeine syrup
Phenergan VC Expectorant with Codeine Syrup
Anatuss with Codeine Syrup
Actacin C Liquid
Actamine C Expectorant
Actifed C Expectorant
Tracin C Syrup
Triafed C Expectorant
Triafed C Expectorant Syrup
Poly Histine Expectorant with Codeine
Bromphen DC Expectorant with Codeine
Midatane DC Expectorant
Normatane DC Expectorant with Codeine
Tamine Expectorant DC Syrup
Pediacof Cough Syrup
Lomotil
Buprenorphine

A. Phendimetrazine Products

Adaphen
Bacarate
Bontril PDM
DI-AP-trol
Melfial
Metra
Obalan
Obeval
Phenzine
Plegine
Sprx-1
Statobex
Statobex G
Trimstat
Trimtabs
Weightrol
Anorex
Sprix 3
Weh-Less
Adipost
Bontril Slow-Release
Dyrexan - OD
Hyrex 105
Melfiat - 105 Unicells
Prelu - 2
Slyn II
Sprx - 105
Trimcaps
Wehless 105 Timecells

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ALPHABETICAL LISTING

A

Actacin C Liquid - Schedule V
Actamine C Expectorant - Schedule V
Actifed with Codeine Cough Syrup - Schedule V
Actifed Expectorant - Schedule V
Acetarphen - Schedule I - opiate
Acetyldihydrocodeine - Schedule I - opiate
Acetylmethadol - Schedule I - opiate
Adaphen - Schedule V
Adatuss - D.C. Expectorant Schedule III Containing Hydrocodone
Adipost - Schedule V
Alamine - C Liquid - Schedule V
Alamine Expectorant - Schedule V
Alfentanil - Schedule I - opiate
Allylprodine - Schedule I - opiate
Alphacetylmethadol - Schedule I - opiate
Alphameprodine - Schedule I - opiate
Alphamethadol - Schedule I - opiate
Alpha - Methylfentanyl - Schedule I - opiate Alphaprodine Hcl - Nisentel - Schedule II - opiate
Alprazolam - xanax - Schedule IV - depressant
Amobarbital + Secobarbital = Tunial - Schedule II - non-narcotic
Amobarbital = Amytal - Schedule II - non-narcotic
Ambay Expectorant Liquid - Schedule V
Ambenyl Cough Syrup - Schedule V
Ambophen Expectorant - Schedule V
Amphetamine Sulfate 2.5 mgm;

Aspirin 162 mgm; Phenacetin 162 mgm = Edrisal - Schedule III - non-narcotic
Anatuss with Codeine Syrup and tablets - Schedule V
Anil Expectorant - Schedule V
Anorex - Schedule V
Aspirin with Codeine - Schedule III - Contains Codeine

B

Bacarate - Schedule V
Bacomine - Schedule II - Containing hydrocodone
Bacodan - Schedule II - containing hydrocodone
Bay Cotussend - Schedule II - containing hydrocodone
Baycomine Pediatric Syrup - Schedule II - containing hydrocodone
Baytussin AC expectorant - Schedule V
Benzethidine - Schedule I - opiate
Benzphetamine - Schedule III - non-narcotic
Benzylmorphine - Schedule I - opiate
Betacetylmethadol - Schedule I - opiate
Betameprodine - Schedule I - opiate
Betamethadol - Schedule I - opiate
Betaprodine - Schedule - opiate
Biphetamine = Resin Complex of Amphetamine with Dextroaphetamine - Schedule II - non-narcotic B & O Supprettes No. 15A - Schedule II - non-narcotic B & O Supprettes No. 16A - Schedule II - non-narcotic
B.P.P. - Schedule II - contains opium
Bontril PDM - Schedule V
Bontril Slow Release - Schedule V
Bramazepam - Schedule V
Bromanyl Expectorant - Schedule V
Bromphen DC Expectorant with Codeine - Schedule V
Bufotenine - Schedule I - opiate
Butabarbital - Butisol - Schedule III - non-narcotic
Buprenorphine - Schedule V

C

Calcidrine Syrup - Schedule V
Comazepam - Schedule IV
Cetro-Cirose Liquid - Schedule V
Cheracol Syrup - Schedule V
Chloral Betaine - Betachlor, Somilan - Schedule IV
Chloral Hydrate - Noctec, Somnos, Nycton, Lorinal,
Chloraldurat - Schedule IV
Chlordiazepoxide - Libruim, Lebritabs, A-Poxide, Lipoxide, Sk-Lygen, Murcil, Reposans-10, Sereen - Schedule IV - depressant
Chlorhexadol - Lora, Mecoral, Medodorm - Schedule III - non-narcotic
Chlorphentermine - Schedule III - non-narcotic
Chlortermine - Schedule III - non-narcotic
Clydeine Cough Syrup - Schedule V
Clobamzam - Schedule IV
Clonazepam - Klonopin - Schedule IV - depressant
Clonitazene - Schedule K
Clorazepate - Tranxene - Schedule IV - depressant
Clothiazepam - Schedule IV
Cloxazolam - Enadel, Sepazon - Schedule IV
Cocaine - Schedule II - opiate
Codamine - Schedule III - containing hydrocodone
Codehist DH Elixir - Schedule V
Codeine - Schedule II - opiate
Codeine Methylbromide - Schedule I - opiate
Codeine-N-Oxide - Schedule I - opiate
Codiclear DH Syrup - Schedule III - containing hydrocodone
Codimal DH Syrup - Schedule III - containing hydrocodone
Codimal PH Syrup - Schedule V
Codoxy Tablets - Schedule II - opiate
Colrex Compound Elixir - Schedule V
Colrex Compound capsules - Schedule III - containing Codeine
Conex with Codeine Syrup - - Schedule V
Copavin Pulvules - Schedule III - contains Codeine
Cophene 5 Syrup - Schedule V
Corrective Mixture with Paregoric - Schedule III - Kentucky only - contains opium
C-Tussin Expectorant - Schedule V
Cyprenorphine - Schedule I - opium derivative

D

D-Ampletamine Sulfate 2.5 mpm; Mephenesin 500 mpm; Salicylamine 2 mpm; Chlorpromazine HCL 10 mpm = Special Formula 711 Tablet - Schedule III - non-narcotic
Delorazepam - Schedule IV
Demerol APAP - Schedule II - opiate Combination
Deprosit Expectorant with Codeine - Schedule V
Despomorphine - Schedule I - opiate
Detuss - Schedule II - Containing hydrocodone
Detussin Expectorant - Schedule II - Containing hydrocodone
Detussin - Schedule II contains Hydrocodone
Dextroamphetamine Sulfate - Dexamex Ferndex, etc. - Schedule II - non-narcotic
Dextroamphetamine Sulfate 5 mgm; chlorpromazine HCL 25 mgm = Thora - Dex No.2 tablet - Schedule III - non-narcotic
Dextromoramide - Schedule I - opiate
Dextropropoxyphene - Darvon - Schedule IV - analgesic
Dextrorphan - Schedule I - opiate
Diabismule Tablets - Schedule III - Contains opium
Diabismule Syrup - Schedule III - Kentucky only contains opium
Diampromide - Schedule I - opiate
Di-Ap-trol - Schedule V
Diaquel - Schedule III - contains opium
Diazepam - valium, valrelease - Schedule IV - depressant
Diethylpropion HCL - Depletite 25; tenuate; tenuate Dosepan; Tepanil - Schedule IV - Phendimetrazine
Diethylthiambutene - Schedule I - opiate
Diethyltriptamine - Schedule I - Hallucinogenic
Difenoxin - Schedule I
Dihistine Expectorant - Schedule V
Dihydromorphine - Schedule I - opiate
Dimenoxadol - Schedule I - opiate
Dimepheptanol - Schedule I - opiate
Dimetane DC cough syrup - Schedule V
Dimethylthiambutene - Schedule I - opiate
Dimethyltryptamine - Schedule I - Hallucinogenic
Dioxaphetylebutyrate - Schedule I - opiate
Dipipanone - Schedule I - opiate
Donnagel P.G. - Schedule III - Contains opium
Donatussin D.C. Syrup - Schedule III - contains hydrocodone Drotebanol - Schedule I - opiate Dyrexan O.D. - Schedule V

E

Empirin with Codeine - Schedule III - Contains Codeine
Entuss Expectorant Syrup - Schedule III - Contains hydrocodone
Estazalam - Eurodin; Julodin - Schedule IV - depressant
Ethchlorvynol - Placidyl - Schedule IV - depressant
Ethinamate - Valmid - Schedule IV - depressant
Ethylamine Analog of Phencyclidine (N-ethyl-1-phenylcyclohexylanine, Cyclorexamine, PCE) - Schedule I - Hallucinogen
Ethylloflazopate - Schedule IV - depressant
Ethylmethylthiambutene - Schedule I - opiate
Etonitrazene - Schedule I - opiate
Etorphine - Schedule I - opiate
Etoxeridine - Schedule I - opiate

F

Fenethylline - Schedule I - Stimulant
Fentanyle - Sublimaze - Schedule II - opioid
Forinal with Codeine - Schedule III - Contains Codeine
Fludiazeopam - Schedule IV - depressant
Flunitrazepam - Rohypnol - Schedule IV - depressant
Flurazepam - Dalmane - Schedule IV - depressant
Furethidine - Schedule I - opiate

G

Glutethimide - Doriden - Schedule III -

non-narcotic
Guiamid AC Liquid - Schedule V
Guiatuss AC Liquid - Schedule V
Guiatussin with Codeine Liquid - Schedule V

H

Halazepam - paxipam - Schedule IV - depressant
Halotusin with Codeine Phosphate Liquid - Schedule V
Haloxazolam - Schedule IV - depressant
Heroin - Schedule I - opium derivative
Hesta - Derfule Caps - Schedule III - Contains opium
Histadyle EC Syrup - Schedule V
Hycodan - Schedule III - contains hydrocodone
Hycotuss Expectorant - Schedule III - contains hydrocodone
Hycomine - Schedule III - contains hydrocodone
Hycomine Pediatric Syrup -Schedule III - contains hydrocodone
Hydromorphinal - Schedule I - opium derivative
Hydromorphone - Dilaudid -Schedule II-opioid
Hydropane - Schedule III - contains hydrocodone
Hydrophene - Schedule III - contains hydrocodone
Hydro - propanolamine - Schedule III - contains hydrocodone
Hydroxypethidine - Schedule I - opiate
Hashish - Schedule I - Hallucinogen

I

Ibogaine - Schedule I - Hallucinogenic
Iophen C liquid - Schedule V
Isoclor Expectorant - Schedule V

K

Kadonna P.G. - Schedule III - contains hydrocodone
Kaopectolin P.G. - Schedule III - Kentucky only - contains hydrocodone
Kaoden with Paregoric - Schedule III - contains hydrocodone
KBP/O - Schedule III - contains hydrocodone
Ketobemide - Schedule I - opiate
Ketozalam - Schedule IV - depressant
Kolephrin with Codeine Liquid - Schedule V

L

Levormoramide - Schedule I - opiate
Levophenacylmorphan - Schedule I - opiate
Lomotil - Schedule V
Loprozolam - Schedule IV - depressant
Lormetazepam - Schedule IV - depressant
Levorphanl - Levo - Dromoran - Schedule II - opioid
Lorazepam - Ativan, Emotival, Lorax etc. - Schedule IV - depressant Lysergic Acid - Schedule III - non-narcotic
Lysergic Acid diethylamide - LSD - Schedule I - Hallucinogen

M

Mallergan - VC Expectorant with Codeine syrup - Schedule V
Marihuana - Schedule I - Hallucinogen
Mazindol - Schedule III - non-narcotic
Mebutamate W 583, Capla, Butatensin, etc. - Schedule IV - depressant
Melfial - Schedule V
Melfiat 105 - Unicells - Schedule V
Mecloqualone - Schedule I - depressant
Medazepam - Ansilan, Diepin, Elbrus, Simon, etc. - Schedule IV, depressant
Mephobarbital - mebaral - Schedule III - non-narcotic
Mepergan Fortis Capsules - Schedule II - opioid
Mepergan Injection - Schedule II - opioid
Meperidine - Demeral - Schedule II - opioid
Meprobamate - Equanil, Miltown - Schedule IV - depressant
Mescaline - Schedule I - Hallucinogen
Methadone - Dolophine - Schedule II - opioid
Methampetamine - Desoxyn - Schedule II -opioid
Methamphetamine HCL 1.2 mgm, Salicylamide 180 mgm, Caffeine 30.0 mgm, Chlorpheniramine Maleate 3.8 mgm - Phenacetin 120.0 mgm. - Ascorbic Acid 50 mgm, genegesic Caps. - Schedule III - non-narcotic
Methamphetamine HCL, Conjuate estrogens equine 0.125 mgm,
Methyl testosterone 1.25 mgm, amylase 10.0 mgm, protease 5.0 mgm, et.al. Hovizyme tablets. Schedule III - non-narcotic
Methaqualone (2 - methyl - 3 otolyl -4 (3H) - quinazolinone) quaalude - Schedule I - depressant
Metharbital - Gemonil - Schedule III - non-narcotic
Methohexital - Brevital, etc. - Scheudle IV - depressant
Methyldesorphine - Schedule I - opium derivative
Methyldihydromorphine - Schedule I - opium derivative
Methylphenidate - Ritain - Schedule III - non-narcotic
Methyprylon - Noludar - Schedule III - non-narcotic
Metra - Schedule V
Midahist DH - liquid - Schedule V
Midahist Expectorate - Schedule V
Midatone DC Expectorant - Schedule V
Morpheridine - Schedule I - opiate
Morphine Methylbromide - Schedule I - opium derivative
Morphine Methylsulfonate - Schedule I - opium derivative
Morphine-N-Oxide - Schedule I - opium derivative
Morphine Sulfate - Roxandol - Schedule II - opioid
Myrophine - Schedule I - opium derivative

N

Naldecone CX Suspension - Schedule V
Nalline - Nalorphine - Schedule II - opiate
N-ethyl - 3 piperidyl benzilate - Schedule I - opium derivative
N-Ethylamphetamine - Schedule I - stimulant
Nicocodeine - Schedule I - opium derivative
Nicomoprhine - Schedule I - opium derivative
Nimetazepam - Schedule IV - depressant
Nitrazepam - Benozalin, Sonnolin, etc. - Schedule IV - depressant
N-Methyl - 3 Piperidyl Benzilate - Schedule I - opium derivative
Noracymethadol - Schedule I - opiate
Nordiazepam - Schedule IV depressant
Norlworphanol - Schedule I - opiate
Normethadome - Schedule I - opiate
Normorphine - Schedule I - opium derivative
Norpipanone - Schedule I - opium derivative
Normatane DC Expectorant with Codeine - Schedule V
Nortussin with Codeine Liquid - Schedule V
Novahistine DH Liquid - Schedule V
Novatistine Expectorant - Schedule V
Nucofed - Schedule III - contains Codeine
Nucofed Expectorant Syrup with Codeine - Schedule III - contains Codeine
Nucofed Pediatric Expectorant - Schedule V

O

Obalan - Schedule V
Obetrol - Schedule II - non-narcotic
Obeval - Schedule V
Opium & Belladonna Suppositories - Schedule II - opioid combinations
Opium Tincture Deodorized - Schedule II - opioid
Oxazepam - Serax, propax, serenal, serepax, etc. - Schedule IV - depressant
Oxazolam - Serenal - Schedule IV - depressant
Oxycodone & Acetominophen tablets - Schedule II - opioid combinations
Oxycodone HCL,
Oxycodone Terephthalate & Aspirin tablets - Schedule II - opioid
Oxycodone HCI,
Oxycodone Terephthalate & Aspirin half strength - Schedule II - opioid comination
Oxycodone HCI - Schedule II - opioid
Oxymorphan - Schedule II - opioid

P

Panton - Schedule II - opioid
Paregoric - Schedule III - Kentucky only - contains opium
Parelixir - Schedule II - Kentucky only - contains opium
Parahexyl (Synhexy 1) Schedule I - Hallucinogen
Paraldehyde - Schedule IV
Parepectoin - Schedule III - Kentucky only - contains opium
Pentobarbital - Nembutal - Schedule II - non-narcotic
Pediacof cough syrup - Schedule IV
Pemoline - Cylert, Dantromine, Notair,
Treadon - Schedule IV - depressant
Pentarythritol Chloral - Petrichloral, periclor - Schedule IV
Percodon tablets - Schedule II - opioid
Percodon Demi tablets - Schedule II - opioid
Phenadoxone - Schedule I - opiate
Peyote - Schedule I - Hallucinogen
Phenampromide - Schedule I - opiate
Phenaphen with Codeine - Schedule II - contains Codeine
Phencyclidine - Schedule I - hallucinogen
Phendimetrazine - Schedule III - non-narcotic
Phenergan with Codeine syrup - Schedule V
Phenergan VC with Codeine Syrup - Schedule V
Phenergan Expectorant with Codeine Syrup - Schedule V
Phenhist Expectorant - Schedule V
Phenhist DH with Codeine liquid - Schedule V
Phenergan VC Expectorant with Codeine Syrup - Schedule V
Phenmetrazine Preludin - Schedule II - non-narcotic
Phenmorphan - Schedule I - opiate
Phenobarbital - Schedule III - non-narcotic
Phenoperidine - Schedule I - opiate
Phentarime HCI, Phentrol, Fastin, Ionamin, etc. - Schedule IV - stimulant
Phenylacetone - Schedule II - immediate precursor
Phenzine - Schedule V
Phoclodine - Schedule I - opium derivative
Pipradol, Detaril, Meratron, etc. - Schedule IV - stimulant
Pinazepam - Schedule IV - depressant
Plegine - Schedule V
Poly Histine Expectorant with Codeine - Schedule V
Prazapam - Centrax, etc. - Schedule IV - depressant
Prelu - 2 - Schedule V
Propheptazine - Schedule I - opiate
Properidine - Schedule I - opiate
Propiram - Schedule I - opiate
Promist HD Syrup - Schedule II - contains Hydrocodone
Promist Expectorant - Schedule II - contains Hydrocodone
Promethazine HCI - Expectorant with Codeine - Schedule V
Promethazine HCL, VC Expectorant with Codeine - Schedule V
Prunicodeine Liquid - Schedule V
Pseudo - Hist Expectorant - Schedule II - contains Hydrocodone
Psilocybin - Schedule I - Hallucinogen
Psilocyn - Schedule I - Hallucinogen
P.V. Tussin Syrup & Tablets - Schedule II - contains Hydrocodone
Pyrrolidine Analog of Phencyclidine, etc. - Schedule I - Hallucinogen

R

Racemoramide - Schedule I - opiate
Robitusin AC syrup - Schedule V
Robitussin DAC syrup - Schedule V
Ryna CX liquid - Schedule V
Ru-Tuss Expectorant - Schedule V
Ru-Tuss with Hydrocodone - Schedule II - contains Hydrocodone

S

Secobarbital - Seconal - Schedule II - non-narcotic
Slyn II - Schedule V
SPA - 1 (-) - 1 - Dimethylamino - 1, 2 - Diphenylathane - Schedule IV - stimulant
SPRX - 1 - Schedule V
SPRX - 3 - Schedule V
SPRX - 105 - Schedule V
SRC Expectorant - Schedule II - contains hyrocodone
Statobex - Schedule V
Statobex G - Schedule V
Sufentanil, Sufenta - Schedule II - opioid
Sulfondiethylmethane - Schedule III - non-narcotic
Sulfonethylmethane - Schedule III - non-narcotic
Sulfonmethane - Schedule III - non-narcotic
SK - Oxycodone with Acetaminophen - Schedule II - opioid combination
SK - Oxycodone with Aspirin - Schedule II - opioid combination
SK - Terpin Hydrate with Codeine Elixir - Schedule V
S.T. Forte Liquid - Schedule II - contains Hydrocodone

T

Talbutal, Lotusate - Schedule III - non-narcotic
Talwin, Pentazoicine - Schedule II - contains opium
Temazepam, Myolastin, Restoril - Schedule IV - depressant
Tetrahydracannabinols - Schedule I - Hallucinogen
Terpine Hydrate with Codeine Elixir - Schedule V
Tetrazepam - Schedule IV - depressant
Thebacon - Schedule I - opiate
Thiophene analog of Phencyclidine Etc. - Schedule I - Hallucinagen
Tilidine - Schedule I - opiate
Tolu - sed Cough Syrup - Schedule V
Tracin C. Syrup - Schedule V
Triafed with Expectorant - Schedule V
Triafed Expectorant Syrup - Schedule V
Triaminic Expectorant DH - Schedule II - contains Hydrocodone
Triaminic Expectorant with Codeine - Schedule V
Triazolam, Halcion - Schedule IV - Depressant
Tricodene #1 syrup - Schedule V
Tricodene #2 syrup - Schedule V
Trimeperidine - Schedule I - opiate
Trimstat - Schedule V
Trimtabs - Schedule V
Trimcaps - Schedule V
Tussanil DH Tablets - Schedule II - contains Hydrocodone
Tussanil DH Syrup - Schedule II - contains Hydrocodone
Tussar 2 cough syrup - Schedule V
Tussar SE Couch Syrup - Schedule V
Tussend Expectorant - Schedule II - contains Hydrocodone
Tussl - organdin Liquid - Schedule V
Tussionex - Schedule II - contains Hydrocodone
Tussirex with Codeine Liquid - Schedule V
Tylenol with Codeine - Schedule III - contains Codeine
Tylox capsules - Schedule II - opioid combination

W

Wehless 105 Timecells - Schedule V

3;4 methylenedioxy amphetamine - Schedule I Hallucinogen
5; Methoxy -3,4 methylenedioxy Amphetamine - Schedule I - Hallucinogen
3,4,5, - Trimethoxy Amphetamine - Schedule I - Hallucinogen
1 - Piperidinocyclohexanecarbonitrile and 1 - Phenylcyclohexylamine immediate Precursor to Phenycyclidine - Schedule II

KRS CHAPTER 218A DRUG CHART

The drug chart first appeared in *The Advocate* in October 1983. It continues to be an attempt to simplify the *penalty provisions* of KRS Chapter 218A, a most awkward drug statute.

This drug chart is not designed to replace the statutue, but to act as a quick-reference research tool. In this regard, each statutory penalty provision has been inserted at the bottom of the section labeled "Conduct."

Only those provisions which deal with *sanctions* have been included.

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Traffics or transfers KRS 218A.990(1)	I or II [narcotic or included in KRS 218A.070 (1)(d)]	5-10 years 10-20 years *	$5,000-$10,000 $10,000-$20,000*
Traffics KRS 218A.990(2)(a)	I or II [*non*-narcotic; *not* included in KRS 218A.070(1)(d); *not* marijuana; *not* LSD; *not* PCP] III	1-5 years 5-10 years*	$3,000-$5,000 $5,000-$10,000*
Manufactures, sells or possesses with intent to sell KRS 218A.990(2)(b)	I LSD,PCP	5-10 years 10-20 years*	$5,000-$10,000 $10,000-$20,000*
Traffics Transfers KRS 218A.990(3)	IV or V I, II, or III [*non*-narcotic; *not* included in KRS 218A.070(1)(d); *not* marijuana]	Up to 12 months- jail 1-5 years*	Up to $500 $3,000-$5,000*
Manufactures, sells or possesses with intent to sell a. less than 8 oz b. 8 oz.or more but less than 5 lbs. c. 5 lbs. or more d. hashish KRS 218A.990(4)(a)-(d)	 MARIJUANA MARIJUANA MARIJUANA HASHISH [Any Amount]	 Up to 12 months- jail 1-5 years* 1-5 years 5-10 years 1-5 years	 Up to $500 $3,000-$5,000* $5,000-$10,000
Sells or transfers [D18 or over-V under 18] KRS 218A.990(5)	MARIJUANA [Any Amount]	1-5 years 5-10 years*	
Plants, cultivates, or harvests for purposes of sale KRS 218A.990(6)(a)	MARIJUANA	1-5 years	$3,000-$5,000

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Possession KRS 218A.990(7)	I or II [narcotic or included in KRS 218A.070 (1)(d)]	1-5 years 5-10 years*	$3,000-$5,000 $5,000-$10,000*
Possession KRS 218A.990(8)(g)	I, II, or III [*non*-narcotic; *not* included in KRS 218A.070 (1)(d); *not* marijuana; *not* LSD; *not PCP* IV or V	Up to 12 mos. - jail+ Up to 12 mos. - jail*	Up to $500 Up to $500*
Possession for own use; Transfers less than 8 oz. KRS 218A.990(9)	MARIJUANA	Up to 90 days - jail+	Up to $250
Possession for own use KRS 218A.990(10)	I LSD, PCP	1-5 years 5-10 years*	$3,000-$5,000 $5,000-$10,,000*
KRS 218A.140(3-5) violation [False prescriptions, etc.] KRS 218A.990(11)	I, II, or III	1-5 years	$3,000-$5,000
KRS 218A.140(3-5) violation [False prescriptions, etc.] KRS 218A.990(12)	IV or V	1-3 years	$1,000-$3,000
KRS 218A.140(6) violation [Advertising]; Catch All violation KRS 218A.990(13)		Up to 90 days - jail	Up to $500
KRS 218A.350 violation [Simulation] KRS 218A.990(14)		Up to 12 mos. - jail 1-5 years*	
KRS 218A.500(2-4) violation [Paraphernalia] KRS 218A.990(15)		Up to 12 mos. - jail	
Traffics: In any building used primarily for classroom instruction in a school or On any premises located within 1,000 yards of any school building used primarily for classroom instruction KRS 218A.990(16)	I, II, III, IV, or V	1-5 years If a more severe penalty is set forth in Chapter 218A, then higher penalty shall apply	$3,000-$5,000

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Criminal Conspiracy to traffic in a controlled substance KRS 218A.990(17)		Punished as if trafficked in that controlled substance	
Prescribe, order, distribute, supply or sell anabolic steroid for a. enhancing performance in sport; or b. hormonal manipulation in the human species without medical necessity - - - - - - - - - - - - - - - - - - Possess or use an anabolic steroid without valid prescription or drug order issued by practitioner authorized to issue such prescription or order KRS 218A.990(18)	III Anabolic Steroids	5-10 years	$5,000-$10,000
D between 14-17; and convicted of a violation of any offense under Chapter 218A; or adjudged delinquent for an act which would be offense under Chapter 218A Has motor vehicle or motorcycle operator's license KRS 218A.991(1)(a-b)		May recommend revocation of license for 1 year May recommend revocation of license for 2 years so long as suggested period of revocation does not extend past D's 18th birthday*	
Has no motor vehicle or motorcycle operator's license KRS 218A.991(1)(c)		May recommend no license be issued for 1 year May recommend no license be issued for 2 years so long as suggested period does not extend past D's 18th birthday*	

* - Subsequent Offense
\+ - Optional Commitment Treatment
D - Defendant
V - Victim

Legislative Highlights

Lisa Davis

1990 Session Statistics

	Senate	House	Total
Bills Introduced	410	940	1350
Bills Passed	152	326	478
Bills Vetoed	10	13*	23
Vetoes Overridden	7	7	14
Bills Enacted into Law	149	321	4701

*Includes one joint resolution

Although the central focus of the 1990 General Assembly seemed to be on education reform and tax increases, there were several significant changes made in Kentucky's criminal laws. The following is a brief description of some of the legislation that was enacted into law.

July 13, 1990 is the effective date for legislation enacted during the '90 General Assembly unless an emergency clause is attached. The following measures all have an effective date of July 13 with the exception of House Joint Resolution 123, which was effective upon the Governor's signature (March 30, 1990). House Bill 214 is subject to approval of the Supreme Court of Ky. and will be effective July 1, 1992.

1990 Senate Bills

Senate Bill 51

This bill creates a new section of KRS Chapter 533 to permit the court, in any case where imprisonment is authorized and not required by statute, to sentence a defendant to work at community service related projects as a form of conditional discharge.

Community related service project means work for: "The state or an agency thereof, A county Urban county government, City, Special district or agency thereof, Non-religious sponsored nonprofit, charitable, or service organization."

Senate Bill 82

This bill amends KRS 61.592 to provide Hazardous Duty Retirement for Correctional Officers/Employees who daily have face to face contact with inmates. This also includes employees of the Kentucky Correctional Psychiatric Center.

Senate Bill 172

This bill creates a new section of KRS Chapter 532 to prohibit the execution of a mentally retarded person. A seriously mentally retarded defendant is referred to in this act as: "A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period." "Significant subaverage general intellectual functioning" is defined as an I.Q. of 70 or below.

This legislation requires the defendant to allege that he is a seriously mentally retarded defendant at least 30 days prior to trial. This should be done by filing a motion with the trial court and presenting evidence concerning the defendant's retardation. The Commonwealth may offer evidence in rebuttal. The court will make a determination, at least 10 days prior to trial, as to whether the defendant is seriously mentally retarded. This judicial determination does not preclude the defendant from raising any legal defense during the trial. Once a defendant is determined to be a seriously mentally retarded offender, then execution will not be an option for the jury in the sentencing phase, although life imprisonment without parole eligibility for 25 years will remain an available sentence.

For a more thorough analysis of this bill see Neal Walker's discussion in the Death Penalty Column in the Vol. 12, No. 4, June, 1990 edition of The Advocate.

Senate Bill 305

This bill amends KRS 500.080 relating to the definition of "dangerous instrument" to include "parts of the human body when a serious physical injury is a direct result of the use of that part of the human body."

1990 House Bills

House Bill 38

This bill amends KRS 510.010 to eliminate the defense of marriage in a rape or sexual assault case. It requires that such an offense must be reported to the authorities within one year after the commission of the offense in order to be formally prosecuted. The report must be signed by the victim of the offense.

A new section of KRS Chapter 510 is created to prohibit any evidence that one has been charged with a violation of this statute in any proceeding to determine custody of or visitation with children. KRS Chapter 510.300 is amended in order to expunge the records if charges brought under this section against a defendant are dismissed with prejudice or the defendant is found not guilty. In such an instance, any person whose records were expunged shall not be required to answer "yes" when asked the question "Have you ever been arrested?" or any similar question with regard to the offense for which the records were expunged.

Another section of KRS Chapter 510 is created to ensure that a person who engages in sexual intercourse, deviant sexual intercourse, or sexual contact with another person to whom the person is mar-

ried, cannot commit an offense under this chapter solely because the other person is under 16 years of age or mentally retarded.

House Bill 40

This bill creates the Class B misdemeanor offense of giving a false name or address to a peace officer in response to a request, made in the officer's official capacity, for information and the false answer is given with the intent to mislead the officer as to the person's identity. This shall only apply in instances where the peace officer has first warned the person whose identification he is seeking that giving a false name or address is a criminal offense. Was this legislation enacted merely to create another vehicle to allow police officers to arrest someone when probable cause is otherwise absent?

House Bill 172

With the passage of this bill, the Juvenile Code, Chapter 620.040, is amended to allow the Cabinet for Human Resources or its designated representative to participate in non-custodial child abuse investigations at the request of local law enforcement agencies or the Kentucky State Police.

Public defenders need to be aware that if they represent the adult/parent in connected matters, they should be ready for cross-examination of these CHR workers. Some questions, left unanswered by this legislation, are: What training have the CHR workers had for investigating these cases? What assumptions do these workers have when they begin their investigations of these cases? Have these CHR workers taken notes or taped interviews? Can their reports be obtained through routine discovery motions?

House Bill 214

This act establishes KRS Chapter 422A which contains the new Kentucky Rules of Evidence (KRE) - an evidence code designed for use primarily in the state trial courts of Kentucky. This evidence code adopts in large part the Federal Rules of Evidence and departs from those rules only when established Kentucky evidence law theoretically provides a better approach than the federal evidence code. This legislation is subject to the approval of the Supreme Court of Kentucky. This legislation, upon judicial approval, becomes effective July 1, 1992.

"The Kentucky Rules of Evidence, as passed by the 1990 General Assembly, are in actuality the final draft of the KBA's Evidence Rules Study Committee, but this is not necessarily the final version of these evidence rules," says Vince Aprile, DPA's Gen. Counsel. "During the next year," Aprile notes, "KRE will be the subject of local bar meetings and will again be presented for a hearing of the bench and bar at the 1991 KBA annual conference." "Criminal defense lawyers, both public and private, should register their complaints, compliments, and revisions at those bar meetings or by letter addressed to Susan Stokley Clary, Court Admin./Gen. Counsel, Supreme Court of KY, Capitol, Frankfort, KY 40601," Aprile advised. "Specific changes in Ky. practice, such as legitimizing the motion *in limine* while abolishing the avowal, make KRE," from Aprile's perspective, "a mixed bag for the criminal practitioner."

Ed. Note: See The Advocate, Vol 12 #'s 3,4,5, Evidence Column for an indepth discussion of the New Evidence Code.

House Bill 247

This legislation will allow any peace officer who charges a person with alcohol intoxication or drinking in a public place to issue a citation and/or to take the offender to a designated shelter in lieu of jail.

House Bill 261

This bill relates to parole hearing notification. It requires the Commonwealth's Attorney to notify the sheriff and the chief of police of every city and county in which the prisoner committed any Class A, B, or C felony. It allows all those notified to make comment, either in person or in writing, to the parole board.

A trial attorney should endeavor, where appropriate, to inform the sheriff and police chief of plea bargains or other court proceedings to enhance their understanding or, at least, appreciation of the defendant's version of the situation. This could in some cases persuade those law enforcement officers from commenting, either in person or in writing, adversely about the defendant.

As a rule, in a high profile case, people involved with the case have always monitored them and contacted the board with their opinions by phone or letters so this change probably will have little effect in those cases. The bottom line is that parole is a quirky creature of the legislature with little relevance to the fundamental rights guaranteed to a criminal defendant by the federal Constitution.

Nevertheless, the dedicated criminal defense attorney will consider keeping local officials informed of a former client's outstanding progress in prison. This tactic might permit defense counsel to solicit favorable comments from these law enforcement officers when the defendant has his parole hearing. To accomplish this maneuver, defense counsel must impress on the client the need to be informed by the client of both his success in prison and the date of his parole hearing.

House Bill 272

This bill amends KRS 218A.410 relating to asset forfeiture in drug related cases. This legislation adds to the list of objects subject to forfeiture "[a]ll real property... which is used...to commit..a violation of this chapter excluding any misdemeanor offenses relating to marijuana...with the knowledge or consent of the owner." Real property subject to forfeiture may be seized only pursuant to final judgment and order of forfeiture by the judge. A temporary seizure order may be entered if the Commonwealth demonstrates that there is probable cause to believe that there is the need to preserve the availability of the property in question.

KRS 218A.415 is amended so that personal property can now be seized by law enforcement officials provided a warrant of arrest or search warrant is issued by any judge empowered to do so and in whose jurisdiction the property is located. Seizure without a warrant may be made if the law enforcement agency has probable cause to believe the property is subject to forfeiture pursuant to this chapter.

KRS 218A.420 relating to the disposition of property seized is amended so that any vehicle seized may be retained by the seizing agency for official use or sold. Proceeds from this sale will remain within the agency and can be utilized for purposes consistent with this act. The first $50,000 of cash and currency or of the proceeds from sale of any property shall not be paid into the trust fund. 90% shall go directly to the law enforcement agency or agencies which seized the property. This money can be used for direct law enforcement purposes. 10% will go to the Commonwealth's attorney or county attorney who participated in the forfeiture proceedings. 45% of all proceeds above $50,000 will also be returned to the law enforcement agency who seized the property and the remaining amount will be placed in a trust fund to be disbursed as follows:

18% to the unified prosecutorial system to

be disbursed to those Commonwealth's attorneys or county attorneys who have participated in the forfeiture case. 36% to the Cabinet for Human Resources to be used solely for the purpose of drug and alcohol abuse education, prevention, and treatment. 36% to the Corrections to be used solely for programs related to drug enforcement and incarceration. 10% to the Justice Cabinet to be used solely for the purpose of training related to asset forfeiture or payments to state or local agencies for programs relative to crime prevention, or other similar purposes relating to drug enforcement.

This act also creates new Chapters under KRS 218A to provide for a lien procedure and jurisdiction in forfeiture cases.

House Bill 318

This legislation repeals KRS 413.310 relating to time limits placed on prisoners to file civil actions as plaintiffs. Under this legislation, prisoners who are potential plaintiffs in any civil action are no longer exempt from the pertinent statute of limitations until released from their incarceration. Instead, prisoners, absent some other disability, will be subject to the appropriate statute of limitations. Attorneys should advise their incarcerated clients that any potential civil actions that they are entitled to bring should be commenced as soon as possible since the controlling statute of limitations after July 13, 1990 will no longer be tolled by incarceration.

House Bill 319

This bill amends KRS 508.025 relating to assault in the third degree. It adds, as an offense, the throwing of feces or urine on a correctional officer. This is a Class D felony.

House Bill 349

Under this act, KRS 29A.040 is amended so that the master list of prospective jurors will be compiled not only from the voter registration list for the county, but also from a list, provided by the Transportation Cabinet, of persons over the age of eighteen who hold valid drivers licenses in the county in question.

Up until 1982, the master list of prospective jurors consisted of "all voter registration lists and property tax roles." In 1982, the master list was changed by eliminating property tax roles.

This act expands the list once again with the obvious intent to come closer to having a master list that represents the constitutionally required fair cross section of the community. *People v. Harris*, 679 P.2d 433 (Cal. 1984).

Many county voter registration lists contain only a percentage of the eligible voters and thus, only a percentage of the prospective jurors in the county. Across the state 933,501 of the 2,760,000 eligible voters are not registered to vote. As a result, the voter registration lists do not contain 34% of eligible jurors!

House Bill 349 enhances the judicial system by moving Kentucky's state court juries closer to the constitutionally mandated true cross section of the community. Unfortunately, House Bill 349 does not indicate how the lists are to be used in combination. Are the two lists to be combined, for all practical purposes, into one list? Are duplicate names to be eliminated? Are 50% of the names selected from each list? What if one county eliminates duplicate names, but another does not? What if one county picks 75% of the names from the voter lists and only 25% from the drivers list? Does this skew the resulting list of names and preclude the possibility of a fair cross section of the community? The legislature, in the near future, needs to enact specific guidelines to prevent both the spirit and intent of this legislation from being defeated. Perhaps the best method for using both lists is to eliminate duplicates and then merge the lists.

Also the legislature should take the next step to insure total fairness: eliminate jury commissioners and require selections to be truly random by using a computer. Currently, under part 2 section 5, administrative procedure of the court of justice, jury commissioners can be eliminated at the option of the chief circuit judge of the county, and random computer selections used. Random computer selections occur in many Kentucky counties. The legislature should mandate this for all counties.

The current system of jury commissioners allows a chief circuit judge to hand select jury commissioners who have the ability to select prospective jurors by other than the constitutional criterion of randomness. All people of the community must be fairly represented in the pool, whether poor, female, young, minority, new to the community, etc. Random selection by a computer would better serve this value of fair cross section representation, which is the bedrock of our jury system.

Expanded Jury Lists, Better Justice

It didn't receive as much notice as education reform, taxes or a score of other matters that the 1990 legislature handled. But a new law that took effect last week could be as important as any of them in the long haul.

That law expands the pool of people from which juries will be drawn. In the past, juries were drawn from lists of registered voters. Now, everyone with a driver's license will be in the pool of potential jurors.

That's an improvement, because it broadens the pool of likely jurors. Unfortunately, a list of registered voters is less apt to contain younger citizens, recent arrivals and members of minority groups than is a list of people with driver's licenses. And the more representative a pool of prospective jurors is, the more likely it is that justice will be rendered in the courtrooms of the commonwealth.

Lexington Herald Leader, July 15, 1990. Reprinted with permission.

House Bill 506

The juvenile code is amended to create a new section of KRS Chapter 620. Under this act a "special advocate" is created, in each judicial district, for the purpose of providing "independent, efficient and thorough representation for children who enter the court system as a result of dependency, abuse, and neglect." These "special advocates" will be volunteers who have completed a minimum of fifteen hours of initial training and taken an oath of confidentiality. The "special advocate's" role in the proceedings will be:

1. Advocate a prompt, thorough review of the case
2. Maintain complete written records
3. Report abuse or neglect to authorities
4. Interview all parties and observe the child
5. Assess permanent plan created for the child
6. Attend all hearings and make recommendations to judge
7. Visit and observe the child, making sure essential needs are being met and court orders are being followed
8. Participate in treatment planning and conferences

Attorneys for the children should make sure that "special advocates" act in the best interest of the child and not in accordance with some other standard. If public defenders are representing parents charged with some form of abuse stemming from a dependency action, they should advise their clients/parents that anything the parents tell "special advocates" will NOT be confidential and will be turned over to the juvenile court judge.

House Bill 511

This bill amends and creates various sections of KRS 202B relating to voluntary and involuntary admission and discharge of mentally retarded persons to facilities for the mentally retarded including involuntary commitment for up to 5 years. This act redefines and creates new terms relating to "danger," "hospital," "least restrictive mode of treatment," and "qualified mental retardation professional." The standard of proof in involuntary admission hearings is changed from beyond a reasonable doubt to clear and convincing evidence by the enactment of this bill. Attorneys appointed to represent these clients will now be chosen from a list of contract attorneys. Public defenders are now advocates of last resort to be appointed only if there are no contract attorneys available. Parties to this procedure can now be family members and they are given the right to appeal decisions of the court. Many provisions of this act are contrary to *Doe v. Austin* and are subject to challenge on federal constitutional grounds.

House Bill 601

This bill allows the Attorney General to file and prosecute a complaint against a local prosecutor pursuant to KRS 61.120. If the office of Commonwealth attorney or county attorney becomes vacant, then the Attorney General or his designee will act on behalf of that prosecutor until a successor is appointed. An appeal procedure is provided for orders entered under KRS 61.130 relating to failure of a prosecutor to perform his duties.

This legislation can be construed to expand the Attorney General's powers to replace local prosecutors under KRS Chapter 15.200, 15.715. A trial attorney should cite this legislation when making a motion to recuse a local prosecutor to demonstrate that County Attorneys and Commonwealth's Attorneys, although elected, are not totally autonomous and are subject, under certain circumstances, to supervision by the Attorney General. This statute should be cited in your motion to recuse a prosecutor along with KRS 15.200, 15.715.

House Bill 603

Under this act, the Kentucky State Corrections Commission is created to facilitate the need for comprehensive planning for the Corrections Cabinet and related matters. This commission will consist of 12 members, one of whom is the state Public Advocate. The commission will maintain current 6 year projections of prison population and develop a 6 year plan for Correction Cabinet operations. They will assist Corrections in preparing legislative proposals and make recommendations to the General Assembly concerning legislative and budget proposals. The commission will also develop and study forms of alternative sentencing.

This bill amends KRS Chapter 500 to require judges to consider whether the person should be sentenced to a term of community service as an alternative to the prison term. It also amends KRS 439.265 relating to shock probation to allow the defendant 180 days rather than 90 days to make the triggering motion. The defendant still must wait the required 30 days after final sentencing before making this motion. KRS 532.050 is amended to not only require the court to provide the defendant's counsel with a copy of the presentence investigation report but also requires that the presentence investigation report shall not be waived. This legislation also expands the definition of a "sexual offender" by amending KRS 197.410. This bill also provides for educational "good time" credit for prisoners who successfully complete GED, vocational and higher education degrees.

Since this is somewhat of a correctional omnibus bill it would be very beneficial for all attorneys handling post-conviction matters to become familiar with this legislation in its entirety.

House Joint Resolution 123

This resolution establishes a legislative task force on sentences and sentencing practices. This task force will review the structures of punishments for appropriateness and consistency, investigate sentencing, probation and parole trends, and the impact of various sentence requirements and practices upon Kentucky's prison population. They will study the disparities in sentences between different jurisdictions and in the treatment of men, women and racial minorities. Alternative forms of sentencing will also be studied by the task force.

On June 27, 1990 the Legislative Research Commission approved the appointment of the following people to this task force:

Rep. Ernesto Scorsone
Rep. Lawson Walker
Sen. Ed O'Daniel
Sen. Kelsey Friend
John Gillig
John Runda
Doug Sapp
Ray Larson
Jim Boyd
Joe Childs
Paul F. Isaacs
Mark Bubenzer
Judge L. T. Grant
Libby Harvey
William H. Fortune

Also, on this topic see Vol. 12, Number 4, The Advocate (June 1990) article by Dave Norat on Alternative Sentencing.

If you are interested in getting additional information as to any of these measures, you could request a copy of the final version of a particular bill by contacting Lisa Davis, Department of Public Advocacy, 1264 Louisville Road, Perimeter Park West, Frankfort, Kentucky 40601; telephone (502) 564-8006 or by contacting the Legislative Research Commission, Third Floor, Capitol Building, Frankfort, Kentucky 40601; telephone (502) 564-8100 ext. 323.

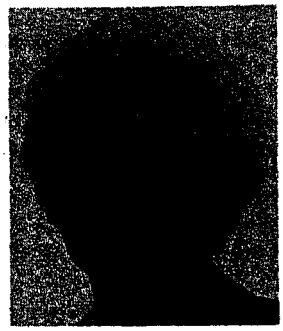
LISA DAVIS
Paralegal
Administrative Services Division
Frankfort

Alcohol Intoxication	HB 247
Alternative Sentencing	SB 51
	HB 603
	HJR 123
Asset Forfeiture	HB 272
Attorney General	HB 601
Conditional Discharge	SB 51
Corrections Commission	HB 603
Correctional Officers	SB 51
	HB 319
Dangerous Instrument	SB 305
Evidence	HB 214
Execution of Mentally Retarded	SB 172
False Name to Peace Officer	HB 40
Feces/Urine thrown on Correctional Officers	HB 319
Hands and Feet as Dangerous Instrument	SB 305
Hazardous Duty Retirement	SB 82
Inmates	SB 51
	HB 261
	HB 318
	HB 319
	HB 603
Involuntary Commitment	HB 511
Jury Lists	HB 349
Juvenile Code	HB 506
	HB 172
Legislative Task Force on Corrections	HJR 123
Marital Rape.	HB 38
Mentally Retarded	SB 172
	HB 511
Parole Hearing Notification	HB 261
Rape, marital	HB 38
Suits, repeal time limits for inmates to file	HB 318
"Special Advocate"	HB 506

*HB—House Bill
*SB—Senate Bill
*HJR—House Joint Resolution
**All Bills Will Be Effective July 13, 1990 Unless Noted

PUBLIC ADVOCACY ALTERNATIVE SENTENCING PROJECT (PAASP)

Part of the Solution to Jail and Prison Overcrowding



Dave Norat

WRITING AN ALTERNATIVE SENTENCING PLAN

The circuit courts of Kentucky now consider a term of community service as an alternative to prison and the availability of a new class of probation, "probation with an alternative sentencing plan." under KRS 500 and KRS 533.010. When developing an alternative sentencing plan (hereinafter ASP) keep in mind the 4 goals of an objective alternative sentence:

1. **Retribution**—remember there are approaches other than prison that can be just as punitive or more punitive to a specific client;

2. **Deterrence**—The threat of imprisonment has little or no deterrent effect to most clients. They or someone they know has been there. But a specific deterrent for a specific client can make a difference;

3. **Rehabilitation**—What factors caused the client to commit the crime in the first place? hen remove or lessen the influence of those factors on an individual basis and;

4. **Incapacitation**—Most of the inmates in prison are serving a sentence range of 1 to 5 years. They serve 20% of their sentences before parole eligibility. A comprehensive and monitorable ASP can incapacitate a client for large amounts of time by keeping track of him.

Areas that should be investigated to meet these goals are the client's: mental health; intelligence; history of substance abuse or use; literacy; educational accomplishments; presence of learning disabilities; physical abilities or disabilities and criminal history. A number of clients coming through the criminal justice system could be classified as Developmentally Disabled (DD), if identified.

A person is considered to have a developmental disability if he/she has a severe and chronic disability which:

(1) is caused by a mental or physical impairment or combination of impairments;
(2) begins before the person becomes 22 years old;
(3) is likely to continue forever; and
(4) requires that the person receive a combination of individually designated services which are needed for a long period of time.[1]

Guidelines that the attorney or the Sentencing Specialist uses to initially determine if the client is DD are:

1. Can the client eat, dress and clean self appropriately?
2. Does the client seem to understand how to change behavior and why the behavior is right or wrong?
3. Is the client able to get around by himself or herself?
4. Is the client able to manage his or her own behavior and protect own self interests?
5. Is the client able to economically provide for self?
6. Is the client able to remember, understand and communicate ideas well?
7. Is the client capable of providing for his/her basic needs (food, housing, clothing, etc.) without outside intervention?

If the answer is no to 3 or more of these questions, then your client should be referred to the local comprehensive care for additional review. If your client has a DD diagnosis, she/he is then eligible for a number of services and resources which would become important components of an alternative sentencing plan.

Work on an ASP should begin as soon as client eligibility has been determined. Presently, sentencing specialists do not become involved in an alternative sentencing plan until the defense attorney has determined that the client, based on the evidence as investigated, will be convicted either by plea or jury and that the judge, based upon the findings of guilt, will send the client to prison unless she is provided with an option that will give her a reason to do otherwise.

The first step is an intake interview which usually lasts 2-4 hours. In this interview, the client's life history, medical and emotional histories, educational history, employment history, family life, military history and other relevant information is obtained. Part of the intake interview is to determine from the client's perspective the client's specific capabilities and problem areas. You also start planning a realistic course of action. Another goal of an initial interview is to gain an understanding of your client. During this initial interview have all needed releases signed. Releases are necessary to gather client information and to verify client information and are required by the agencies having the information you need. You should also use this initial interview to explain to your client what an alternative sentencing plan is, the goals of an alternative sentencing plan, the client's responsibilities under the plan, and that more will be required of him if sentenced to probation with an ASP than if he were to receive a sentence of imprisonment. The client should be kept informed during the plan development process as to the components of the plan and the reasons why. Many times, a client, after becoming aware of the responsibilities he will have under the plan chooses not to have an ASP submitted in his behalf.

Once all the release forms are signed, it is necessary to obtain and document all available records and information on the client. These records, for example, will include educational records or GED certificate, mental health records (include all treatment programs), military records, prior criminal history, relevant Cabinet for Human Resources records, juvenile history and delinquent records, mental retardation documentation, employment records and medical records (specifically head injuries and hospitalizations). This information is not only helpful in documenting what your client has told you but enables you to better understand your client, thus increasing your ability to develop a viable and successful ASP.

The next step is to contact family members and local community members to obtain additional information about the

client. This will inform you as to who would be willing to work with your client, give recommendations and to determine the community's attitude towards the client's possible probation. Suggested contacts would be former teachers, pastors, counselors, coworkers, law enforcement officers or any individuals relevant to the client's past or present situation.

Another individual who is contacted but only after consultation with the defense attorney is the victim. Many times, victims, after being informed as to the purpose of the contact and the goals of an alternative sentencing plan have gone along with probation involving an ASP rather than incarceration.

The sentencing specialists after completing the ASP will submit the plan to the defense attorney who then distributes the plan to the judge, the Commonwealth Attorney and the probation officer prior to the sentencing hearing. In most instances the Commonwealth Attorney and the probation officer have had input concerning the plan prior to its completion.

The development and writing of an ASP is a process that averages 20-40 hours of work for each client. One's first reaction is the amount of time needed to complete a viable ASP. But an investment of 20-40 hours is small if a successful plan is developed. A small investment when compared to the fact that an individual has been reintegrated into the community as a productive member. When an ASP is accepted by the courts, this allows for the more responsible use of the finite number of prison beds available to the courts. Prison beds cost an average of $55,000-$65,000 each to build and an average of $12,000 a year to maintain.

Remember that an ASP should be creative and tailored to the specific needs of the individual and the concerns in that case. There are no creative boundaries except the boundaries of the law. The purpose of alternative sentencing is to provide viable sentencing options to the court which meet the court's concerns of restitution, retribution, accountability and treatment.

Please refer to the checklist of tasks that must be completed in preparing an ASP.

[1] *"Know Your Rights,"* Protection and Advocacy Division, Department of Public Advocacy.

DAVID E. NORAT, Director
Defense Services Division
Frankfort

ALTERNATIVE PUNISHMENT CHECKLIST

NAME: _____

	Completed
I. Intake:	
Intake Interview	_____
Release of information forms	_____
II. Documentation analysis:	
Education/GED Certificate	_____
Substance Abuse	_____
Mental Health	_____
Mental Retardation	_____
Medical Records	_____
CHR	_____
Juvenile history	_____
Delinquency Records/priors	_____
Employment	_____
Military Records	_____
Adult prior check (NCIC, Corrections Cabinet, local court)	_____
III. Social History:	
Family (Spouse & Children)	_____
Family (Parents)	_____
Family (Siblings)	_____
Counselors	_____
Teachers	_____
Ministers	_____
Law Enforcement	_____
Significant Others	_____
IV. Victim:	_____
(comments: _____)	
V. Review Alternative Punishment Plan by Client, Attorney, others:	_____
VI. Sentencing Presentation:	_____
(comments: _____)	
VII. Alternative Punishment Plan Attached Documentation	
Mental Health (MH/MR)	_____
Vocation Education/Rehabilitation	_____
Substance Abuse (inpatient or outpatient)	_____
Job Placement	_____
Home Placement	_____
Support System	_____
Community Support letters	_____
Family letters	_____
Victim letter or information	_____
Law Enforcement comments	_____
Restitution	_____

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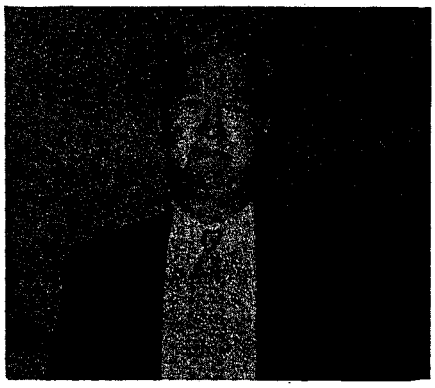
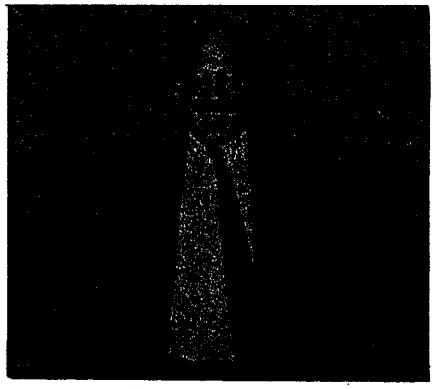
1990 ANNUAL DPA CONFERENCE

The 1990 Annual Seminar had its usual stellar faculty. It is not surprisingly, other states and organizations use DPA's training approach, techniques, materials and faculty as a model. Organization and logistics were superbly handled by Tina Meadows. There were 194 attorneys in attendance for the 3 day seminar at Lake Cumberland State Park. A simultaneous Interviewing Workshop was held in the Lure Lodge for 20 investigators, APW's and paralegals. Participants were invited to bring along family members and the schedule was somewhat relaxed to accommodate family activities.

The emphasis this year was on the Defense of Drug Cases and DNA Evidence. Highpoints of the program, according to participants, were Joe Johnson's lecture on voir dire, Mario Conte on Brainstorming a DUI Case and Vince Aprile's Supreme Court Review. Faculty included: **Vince Aprile**, DPA, General Counsel
L. Stanley Chauvin, Jr., Pres., ABA
Mario G. Conte, San Diego Federal Defender
David E. Davidson, Attorney-at-Law, Covington, KY
Harry P. Hellings, Jr., Attorney-at-Law, Covington, KY
Barbara Holthaus, DPA, Assistant Public Advocate, Frankfort, KY
Joe Johnson, Attorney-at-Law, Topeka, Kansas
William E. Johnson, Attorney-at-Law, Frankfort, KY
Boyce Martin, Jr., Federal District Judge, 6th Circuit Court of Appeals, Cincinnati, Ohio
Peter Neufeld, Attorney-at-Law, New York
David Niehaus, Jefferson District Public Defender, Louisville, KY
Dana Parker, Interpreter Administrator, KY Commission on the Deaf and Hearing Impaired
Rob Riley, DPA, Assistant Public Advocate, LaGrange, KY
Barry C. Scheck, Professor of Law, Cardozo Law School, New York

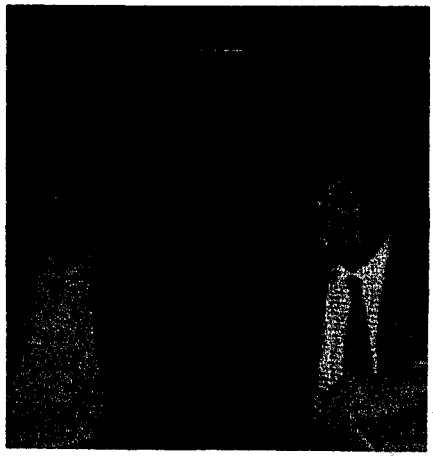


One of Kentucky's most prominent criminal defense attorneys, **William E. Johnson**, educated us on the benefits of joining the Kentucky Association of Criminal Defense Lawyers.

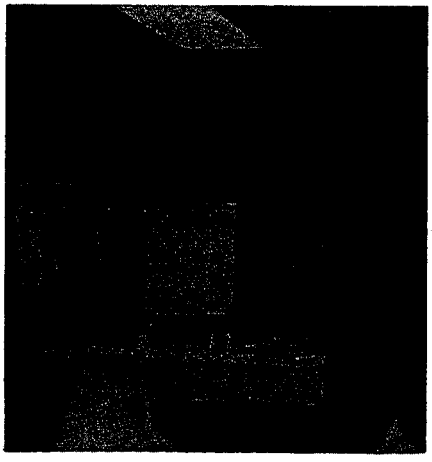


David Davidson attempted the impossible - explaining Kentucky's "Half Truth-in-Sentencing" Laws.

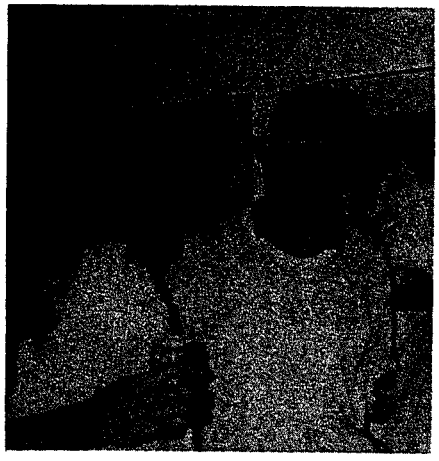
After storming our brains with his teaching, San Diego Public Defender, **Mario Conte** joins the DPA staff!



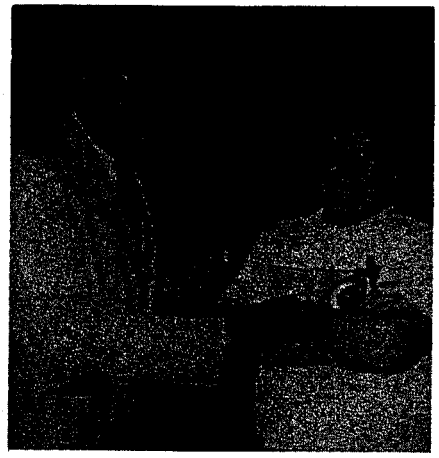
Sixth Circuit Judge, **Boyce Martin** and ABA President **Stan Chauvin** inspired our folks.



Peter Neufield and **Barry Scheck** repeatedly dazzled our folks with DNA.



Bob Hoge, with baby Scott, and Rebecca Diloreto chat with Conference Evaluator, **Bill Fortune**, Associate Dean of the University of Kentucky Law School.



Joe Johnson of Topeka asks, "Would you let your son be represented by this guy- **(Vince Aprile)** ?"

FUTURE SEMINARS

Mark Your Calendars!
1990

ALTERNATIVE SENTENCING CONFERENCE FOR DPA, JUDGES, PROSECUTORS AND PROBATION & PAROLE
August 19-21, 1990
KY Leadership Center
Faubush, KY
(502) 564-8006

DPA TRIAL PRACTICE INSTITUTE
October 28-Nov. 2, 1990
KY Leadership Center
Faubush, KY
(502) 564-8006

4TH KACDL ANNUAL SEMINAR
Featuring Charles Brega of Denver
December 7 & 8, 1990
Louisville, KY
(502) 244-3770

1991

19th ANNUAL PUBLIC DEFENDER CONFERENCE
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Covington, Ky
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