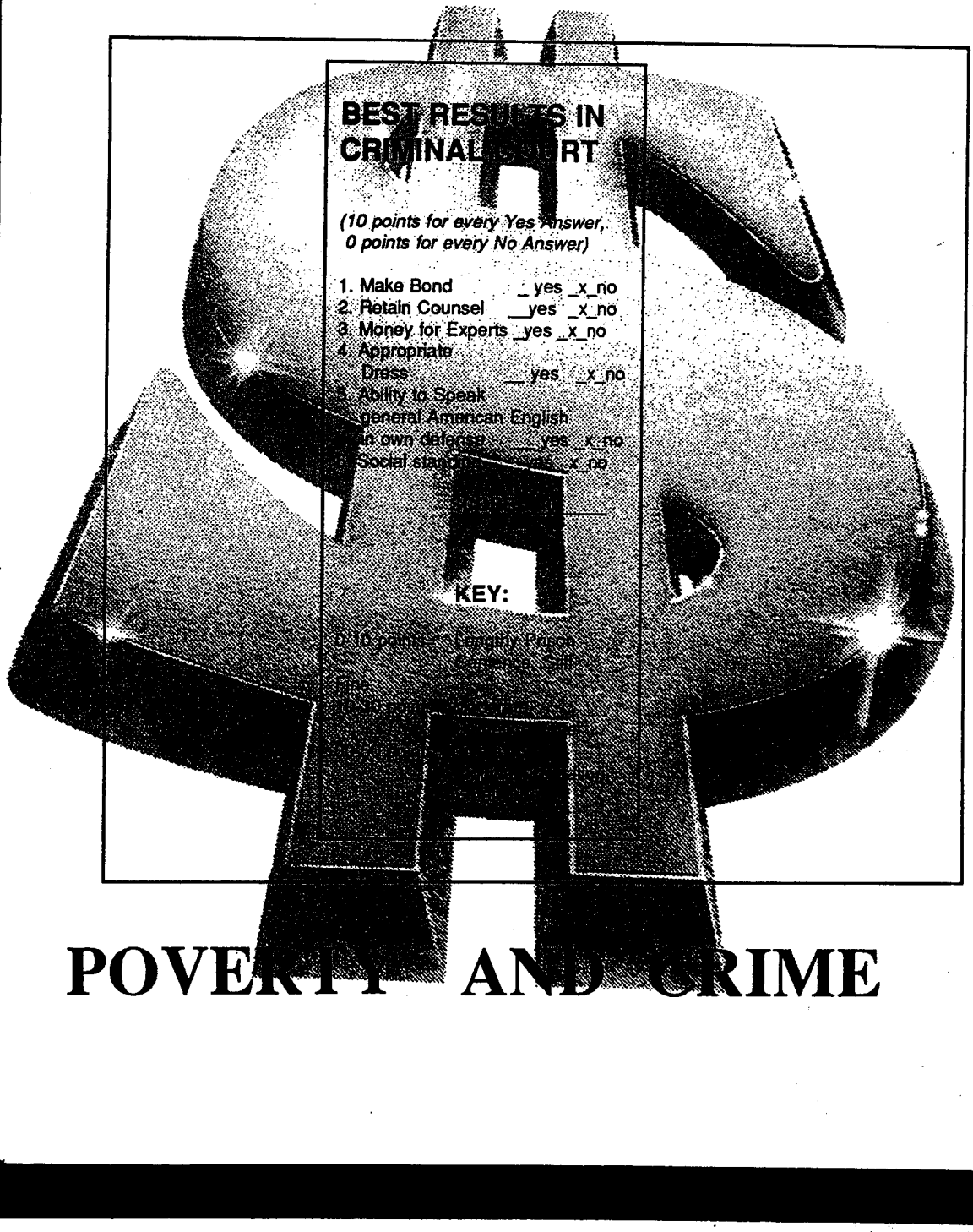
THE ADVOCATE

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



POVERTY AND CRIME

Volume 12, Number 6 **October, 1990**

From the Editor:

KY is Defined by Poverty

Poverty dehumanizes us all, especially the poverty that so insidiously infects the criminal justice system. Leonardo Boff of Petropolis, Brazil has observed: "Poverty as the lack of means to produce and reproduce life with a minimum of human dignity is the most painful and bloody wound in the history of humanity.

"Poverty dehumanizes rich and poor alike. In the first place, the poor: poverty carries with it all kinds of needs; it destroys emotional life, one's relationships with others; it continually places obstacles in the way of the essential vocation of human beings to develop themselves and expand their abilities beyond the survival instinct; it leads them to envy, hatred, violence against those responsible for their misery, and often, against God, raising their fist against heaven.

"It dehumanizes the rich because it leads them to consider the poor as inferior, outcasts of society, the dead weight of history. Both sides live full of fear; the poor because of the continuous threats against them and the rich because of the fear of the vindictive rebellion of the poor. The relationship is fraternal, and society is organized on principles of equality and justice only in a euphemistic way."

Kentucky is defined by poverty. Yes, we have new industry, a new committment to education, plentiful fossil fuel resources, but most of all we have *poverty*. The Uncommon Wealth of Kentucky is poverty. Its violence is the work of our criminal justice system.

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of 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 Editor.

Edward C. Monahan, Editor 1984-Present
Erwin W. Lewis, Editor 1978-1983
Cris Brown, Managing Editor, 1983- Present

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Printed with State Funds KRS 57.375

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Katherine Burton dies at age 39

IN MEMORIAM

She Chose to Spend the Last Days of Her Life Continuing Her Public Defender Work

Katherine Burton Assistant Public Advocate died on September 24, 1990 at the Western Baptist Hospital, Paducah after a recurrence of cancer. She learned of the cancer in January, but kept it to herself continuing her duties with DPA, appearing in court and keeping up with her cases until her hospitalization.

Circuit Judge Bill Graves was quoted in the obituary in the *Paducah Sun* as saying of Katherine, "She was a good lawyer and a good person who put wholehearted effort into defending her clients who were often the disadvantaged without funds...She liked the unlikeable... She had a cheerful personality and saw the best in everyone... She had a lot of commonsense and very good judgement and will be a big loss to [the Paducah] office."

Don Muir, Director of the Paducah office said of Katherine, "She was a truly fine lawyer and a great person."

Donations in remembrance of Katherine may be sent to Grace Episcopal Memorial Gardens Fund, 820 Broadway, Paducah, KY 42001.

DEFENDING WOMEN

These Lawyers Didn't Listen to the Experts

You're a woman thirtysomething with at least one degree. Divorced, with one or two children and a good paying job, you have a strong conviction to do more with your life. There's a nagging desire to go back to school and embark on a second career in a profession long dominated by men. With another degree in hand, you accept a job at much less pay than your earlier career, knowing you face heavy workloads and long hours while filling the role of a single parent. At the same time, you have defied the experts' predictions that you can't parent children and attend law school at the same time. Would you tackle it?

It was coincidental that three women followed these similar but separate paths, applied for jobs as public defenders and were assigned to the Paducah office of the Office of Public Advocacy. And, true to their convictions, each, while remaining a single parent, has become an advocate of the poor in the two counties served by the Paducah office — McCracken and Graves. "We practice criminal law for poor people and we believe in their right to a fair trial," said Charlotte Scott. "Poor people deserve a good lawyer, I really believe that."

To be represented by a public defender, a defendant must have a lack of income or other resources to hire a lawyer. "These people don't have money and need somebody to believe in them and work for them," said Patricia Byrn. Public defenders represent these people on misdemeanor and traffic charges, detention and mental competency hearings in district courts; juvenile court cases; and felony cases, detention and parole and probation revocation hearings in circuit courts of both counties. "Our job is to get a fair trial for our client and make sure to protect the conviction," Kathy Burton said. "If the trial is not fair (according to case law) we try to provide some type of appellate relief to make sure." Scott said, "Our goal is for people that are criminally liable to get the best deal we can get them. One thing we cannot do is change the facts, the facts are given to us."

Scott said the normal progression for public defenders starting out is to begin with misdemeanor or traffic cases in district court or juvenile court. "You practice in a lower court till you get your feet wet. It doesn't take long to move up. "I was here only six weeks before defending a rape case in circuit court."

The Paducah office is one of 10 in the state outside Louisville or Lexington staffed by full-time trial attorneys. The Office of Public Advocacy also contracts with private attorneys to defend clients in areas not served by the so-called "trial" offices. The local office also includes three male public defenders: Don Muir, directing attorney, Rex Duff and Kevin Bishop. All six carry 100 cases or more.

The women have also become defenders of their jobs because of misconceptions they say both their clients and the public have. "We're real lawyers too," Byrn said in noting their clients tend to think of only paid lawyers as the real thing. "We went to the same law schools and took the same bar (examination)," Byrn said. "I think people forget that we do that. We're attorneys, too." Scott added, "Sometimes I get disgruntled with a public perception that somehow what we do is unethical or against society."

Byrn and Burton, both former teachers, had more in common than they knew when they met for the first time at an orientation session for night school at Chase School of Law at Northern Kentucky University. They had grown up 20 miles apart in Mayfield and Murray, taught school, married, had children, divorced and were working full-time while training for second careers.

Patricia Byrn

PROFILES

Byrn, 44 received both a bachelor's degree in sociology and master's in education from Murray State University, and 30 hours above the master's degree from Xavier University. She taught special education for 10 years in Memphis, Tenn., North Carolina and for five years in northern Kentucky while attending law school. Byrn moved two children who were in the third and seventh grades 250 miles "from everyone they ever knew" to attend law school. Her daughter, Stacey, 21, is a student at the University of Kentucky, and 16-year-old son Brady, a student at Paducah Tilghman High School.

"I don't think I would have gone through law school and worked if I had not had exactly the two kids I had," Byrn said. "Both were very independent out of necessity and never any problem or gave me any reason to worry about them. They were real supportive of my going to law school."

Byrn said that while a public defender's job is used by many law school graduates to gain valuable experience before entering private practice, she will always be a "public defender" in one respect or another, either as a criminal lawyer or some other form of legal aid. "It's an ego thing for me, I have to be needed. I think it fulfills a lot of my own personal needs."

Burton, 39, received a degree in political science and speech as Murray State. "The reason I got an undergraduate degree in political science and speech was because I wanted back then to go to law school, but I got sidetracked. I wasn't quite sure, and also I wanted to teach." She taught in Louisville for nine years and while teaching obtained her master's degree in education at Indiana University. Later, she got 30 hours above a master's degree at Murray State.

Burton, who has an 11-year-old daughter, Mary Margaret, came to Paducah and worked in the Displaced Homemakers program at Paducah Community College following her divorce. It was during this time she decided to attend law school and worked as a law clerk while attending school.

Stunned by a major illness and surgery last fall, Burton said she resumed her job in January by assisting other attorneys in the office two days a week. After reaching a caseload of 178 cases at the time of her illness, she said, she has had to go slow in resuming a full-time schedule, working primarily in district and juvenile court. She has, however, worked as co-counsel with Byrn on two or three recent felony cases. "I know it is fulfilling to me," Burton said. "I love to do trials, that's the

LYNN ALDRIDGE RESIGNS

Lynn Murphy Aldridge, a paralegal with the Dept. for 9 years resigned on September 14, 1990. Lynn has a Bachelor's Degree in Paralegal Studies from Eastern Kentucky University received in 1979. She has a Masters Degree in Public Administration received from Murray State University in 1986. She began working for DPA at a salary of $10,000 when she joined the Eddyville Post-conviction office back in October 16, 1981. Her ending salary was $18,000.

Lynn was a favorite among the inmates at the Kentucky State Penitentiary (KSP) because of her quick response to their requests for post-conviction assistance. At KSP, she was a much relied on resource for Frankfort attorneys who needed something done with inmates or the administration. Lynn testified at the *Kendricks v. Bland* federal district court hearing which resulted in a consent decree on imate's fair treatment and access to legal resources. Additionally, Lynn provided trial assistance on trial level cases in the area, particularly death penalty cases. In January, 1990, she testified at a recusal hearing in *Commonwealth v. Grooms.*

While working at Eddyville, her father, who suffered from Altzheimers, died in 1982 of cancer. Despite her personal tragedy, she kept up her end of the work-load and continued to provide excellent service to the men at KSP.

A Louisville native, Lynn soon made the transition to Western Kentucky. She married Eddyville native, Pharmacist Greg Aldridge in 1982. They have two children Lauren Elise, 5.5 years old, and Bryan Patrick, age 3. They bought their first home in 1983 and then built a new home in 1988. Greg has been more than tolerant of Lynn's unofficial job as Lyon Co. Humane Society. She has 15 kittens and 20 cats (her favorite is Ding, but don't tell the others), numerous food, litter and veterinary bills, and 3 dogs. The kids love the animals.

We're losing a person with an exemplary attitude of dedication to her clients and the philosophy of defense. Despite the fact that a dear friend from college days, Rebecca O'Hearn, was murdered in

Lynn Aldridge

Richmond in 1980, Lynn is a staunch death penalty opponent. She says the death penalty is not applied equitably, that people on the yard in Eddyville have committed much more heinous acts than persons on death row. Lynn also had primary responsibility for serving the men on death row for many years and she said she'd "rather work with the guys on death row than anybody in the prison, she liked most all of them."

Her views on the death penalty were challenged yet again with the deaths of prison workers, Ms. Pat Ross and Mr. Fred Cash. Mr. Cash and family attended church with Lynn at St. Marks in Eddyville.

Lynn left the Penitentiary in 1987 because the work was wearing her down, partly because a favorite legal aide, Ben Higgins, was stabbed to death by another inmate. When she became pregnant, she became particularly concerned about her safety, given the summer riots at Eddyville. When the job for Personnel Director for the Dept. opened she twice applied and was overlooked.

She joined the Paducah office as an Alternative Sentencing Placement Worker in 1987. Lynn found that travel from her home in Eddyville and childcare for her two children left her with $10 per month in profit. She hopes to continue as an alternative sentencing advocate in the western Kentucky area on a private basis.

Cris Brown

Charlotte Scott

reason I like to do what I do, and to know I have helped somebody."

Scott, 40, got an associate's degree at Lindsey Wilson College in her native Adair County, attended Eastern Kentucky University for a year and quit. She later finished her bachelor's degree on her lunch hour and at night while working as a secretary at the University of Louisville. On graduation day, she decided to become a lawyer. "I saw graduates from law school and decided then to go to law school," she said. "I told myself, 'I want to do that.' It was the first time I ever seriously thought about it." She worked at the secretarial job full time for 10 years before entering U of L night school, graduating in 1983.

Scott, whose 17-year-old son, Robbie, is a student and football player at Tilghman High School, worked for a Louisville law firm two years before joining the Paducah public defender's office.

She said her Louisville job was limited to carrying her partners' briefcases and, since they handled a lot of complex civil litigations, carrying boxes and boxes of information. She also did research and depositions. "I never got to stand on my feet in a courtroom," Scott said. "I thought the only way to do trial work quickly is in public defender's office. I love my job."

Reprinted from the *Paducah Sun*. The story ran April 2, 1990. Written by staff writer, Verne Brooks.

DPA Attorney Depletion

Since October 1, 1988, 21 attorneys have left DPA with a combined total service experience of 107 years.

DPA's turnover rate is 3 1/2 times that of other state government agencies.

LETTERS TO THE EDITOR

Race and Criminal Justice

Dear Ed,

I've just received the June issue of *The Advocate*, and find it interesting and useful, as it always is. I wanted to respond to a couple of points raised in the magazine regarding race and criminal justice.

Your exchange with Judge Johnstone in the letters column was a good discussion. One point you did not respond to, though, was Judge Johnstone's reference to the California study which was covered on National Public Radio. In case you are not familiar with this, it is the RAND Corporation study on sentencing in California. [Ed. Note: Published in this issue] The study has gained a fair amount of attention for its main conclusion that, when the variables of prior record and current offense were controlled for, race was not a factor at sentencing. I think it's important to note, though, 2 cautions raised by the authors. First, Joan Petersilia and her colleagues state that this was a study of 1 state only, with a determinate sentencing act, and its results do not necessarily apply to other states. Second, they state: "The current study did not examine decisions made at other justice system decision points (those made by the police and prosecutor) nor did it examine the more global relation between poverty and minority representation in the justice system."

In the article on page 19, "Black Males in Prison," reprinted from the *Kentucky Council of Churches*, I am quoted as saying, "These figures finally give some substance to the cries of genocide of young black males." I was somewhat surprised to see this for 2 reasons. First, I don't recall ever speaking with anyone from the Council (although it's possible I've forgotten). More importantly, I am generally very careful to stay clear of the word "genocide" in speaking about these issues. This is because the term is very emotion-laden and because I am not convinced that there is a conscious policy to eliminate young black males. The end result of our criminal and social justice policies is very tragic, of course, and this is what I believe we should focus on.

I don't expect that you will necessarily get any adverse reaction to the article, but I wanted to make clear my position in case there is any comment. Keep up the good work.

Sincerely,

Marc Mauer
Assistant Director
The Sentencing Project
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FAX (202) 628-1091

The Advocate Features: Hugh Convery

Dear Mr. Monahan:

I am writing to commend your publication for the article that featured the background and philosophy of Mr. Hugh J. Convery, the Director of the Morehead Post-Conviction/Trial Office here in Morehead, Kentucky.

Mr. Convery and his staff do an outstanding job in this area, and their professionalism and demeanor are a credit to our profession.

Also, as I have little time to write letters, I take this opportunity to thank you for sending district judges copies of *The Advocate*. Of all the periodicals that we receive, I obtain more benefit from your publication than all others.

Kindest regards,

John R. Cox
District Judge, Division II
21st Judicial District
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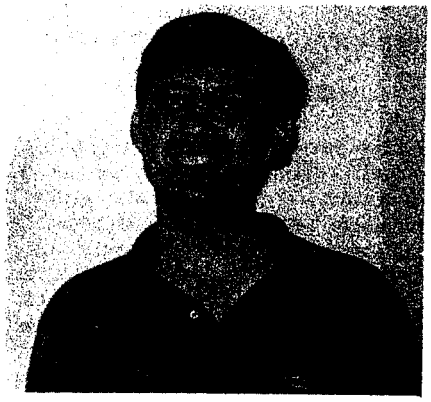
& Rowan County
P.O. Box 9
Morehead, Kentucky 40351
(606) 784-6888

REX DUFF RESIGNS



Rex Duff, an attorney who has been with the Paducah office since December 1, 1986, resigned effective September 9, 1990. Rex has applied for a position with the Special Prosecution Unit of the Attorney General's Office, Frankfort . Rex may be reached at Rt 1, Box 631, Hardin Ky 42048. (502) 354-9210.

POVERTY IN KENTUCKY

Who Are the Poor?

INTRODUCTION

While poverty has always existed, there are still questions concerning its nature, definition, and effects. The strategies of dealing with poverty are also questioned. The answers to these questions elude us because they are framed within different religious, philosophical, and political viewpoints. Although we do not have all the answers, we can try to understand the nature of poverty and its consequences for individuals and their communities.

This report examines 6 issues of poverty in Kentucky:

- Poverty's effects on individuals, families, and communities.
- Definitions of poverty.
- Characteristics of individuals, families and communities in poverty.
- Poverty trends in Kentucky and the United States.
- Programs designed to assist and support the poor.
- Policy recommendations.

POVERTY: A CHARACTERISTIC OF INDIVIDUALS OR COMMUNITIES?

Imagine you are standing in a line waiting to find a job. Your place in the line is determined by your age, race, gender, education, work experience, and marital status as well as the number and characteristics of those waiting with you. In some communities the wait would seem endless. The line is long and the available jobs are few and undesirable, that is they are part-time or offer low wages. In other communities, the line is shorter and the available jobs are more desirable.

Someone viewing this scenario would recognize that a person's place in line depends on individual characteristics such as race and work skills. But a person's ability to move out of the line and obtain a decent paying job depends on the characteristics of the total population as well as the condition of the local economy. This picture shows that the extent of poverty reflects the social and economic characteristics of a community, while the distribution of poverty reflects the characteristics of the individuals.

POVERTY AND THE COMMUNITY

Most of us tend to think that individuals are responsible for their poverty. We hear remarks such as, "People are poor because they don't work." "The poor are lazy." "If only they had more education, or more training they would be better off." While the unemployed and uneducated are more likely to be poor, the majority of the poor are not fully responsible for their dilemma.

The phrase "the working poor" has meaning in our society, for thousands of persons are poor despite their being employed. Three out of 5 families in poverty have at least 1 worker, and 1 in 5 has 2 or more workers. In Kentucky, the head of the household works in 1/2 of all families in poverty.

The irony of the marketplace is that single parents working full time at a minimum

Poverty's Impact on the Criminal Justice System
The Views of Supreme Court Justice, Dan Jack Combs

Is poverty a cause/contributor to crime in Kentucky? Yes, it is both a causative and contributing factor.

Why? Limited job opportunities; inadequate housing, food and clothing; and illiteracy. Being deprived of these essentials cause many people to resort to drugs as users and/or dealers; and to crimes of robbery, burglary and related acts of violence. Hunger, lack of clothing and medical needs also cause many people to commit illegal acts in order to provide for their family members.

How can we solve the problem of poverty in Kentucky? A "modern day Solomon with the Midas touch" would go a long way towards solving this problem.

Justice Combs

Educating the illiterate as is being done through Martha Wilkinson's "Martha's Army" program; and C. J. Bailey's "Sentenced to Read" program; and providing counselling and referral services to those in need to various alcohol and drug programs, would alleviate much of the crime and suffering.

A massive public works program to build housing for the homeless, clean up the watersheds, make secondary road improvements, and locally sponsored vocational training centers manned by competent and dedicated craftspersons would provide employment, and also provide incentives to become productive, thereby relieving boredom, and *hopefully* reducing poverty.

KENTUCKY SUPREME COURT JUSTICE DAN JACK COMBS
Capitol Frankfort, KY 40601 (502) 564-4720

wage job ($3.35 an hour) earn only 83% of federal poverty guidelines if they have 1 child; 68% if they have 2 dependent children; and only 58% if they have 3 dependent children. Moreover, having both parents work full time at minimum wage jobs will only raise a family with 2 children to slightly above the poverty threshold; with 3 dependent children they fall back under the official level.

Having a job is not a guarantee that a person can escape poverty. It is just as important to have the right kind of job, one that pays a decent wage with employee benefits. However, many jobs pay at or just above minimum wage. A full-time (40 hours a week), year-round (52 weeks a year) job at the minimum wage produces a gross (before deductions) weekly salary of $134, or $6,968 a year. Even if the only paycheck deduction is Social Security (about $500 a year), the maximum weekly take home pay is $124.39.

Many of us would find it extremely difficult to support a family on this wage. However, as recently as 1986, workers in 16 Kentucky counties in certain industries (especially wholesale/retail trade) had average wages of less than or within $10 of $134 per week. Four counties, Clinton, Clay, Hickman, and Metcalfe, had average weekly wages of less than $200 across all industries. These figures are averages, meaning many Kentuckians are trying to get by on much less.

Only a small proportion of all persons who are in poverty remain there for an extended period. A study from 1969 to 1978 found that only 1 in 20 persons was poor for 5 or more years and less than 1 in 100 was poor for the entire 10-year period.[1] "Persistently poor" persons tended to be the elderly, persons living in rural areas (particularly the rural south), blacks, and female family heads. This study found that losing or finding a job affected men's movement in and out of poverty, while divorce and marriage precipitated women's movement in and out of poverty.

These findings suggest that poverty is related to the economy, job availability, and wages. In fact during the 1960s when the US economy was expanding rapidly, unemployment dropped to a low of 3.5% by 1969 and the rate of poverty also declined. However, during the recessions in the 1970s and the 1980s, when unemployment rose, the poverty rate also increased.

Economist Michael Harrington argues that structural changes in our national economy have reduced available jobs with breadwinner salaries - salaries capable of providing a family's needs. A recent study by the Federal Reserve Bank of Kansas City confirms this argument by noting that nearly 60% of the new jobs added to the economy between 1982 and 1986 paid annual wages of $7,000 or less. Poverty, then, can be viewed as a characteristic of a nation, a state, or a community and it varies considerably from 1 community to another, reflecting economic conditions within that community relative to others. This is especially true in Kentucky.

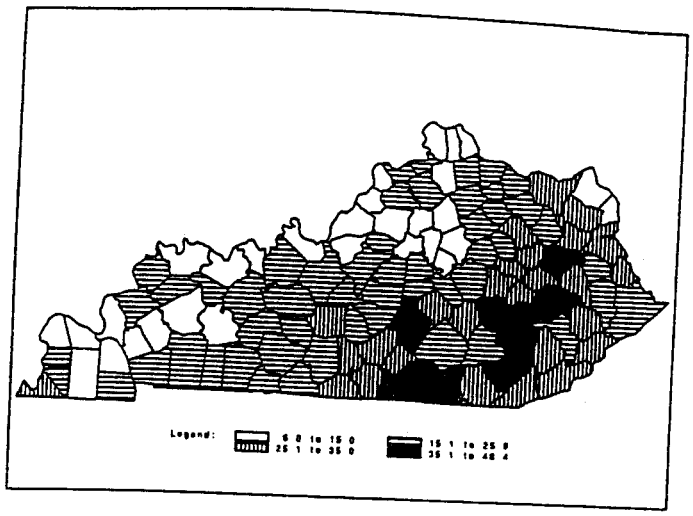


Figure 1. Individual Poverty Rates for Kentucky Counties, 1980.

POVERTY AND THE INDIVIDUAL

However, it is also true that certain groups in the population are more likely to live persistently in poverty. These groups include female household heads and their children, blacks, and the elderly. They are more susceptible to falling in and out of poverty because of their marginal value in the workplace. When economic times are good they generally receive the lowest paying jobs. When times are bad they are generally the first to lose their jobs. Thus, low education levels and skills, lack of child care, and discrimination will affect a person's ability to find a decent job.

Given that some communities have far better employment opportunities than others, it has been argued that unemployed persons or those employed in low-paying jobs should move to new locations. Many do move to a different area. However, not everyone can move easily and there are no guarantees that a new location will offer higher paying jobs.

Some workers are at such a disadvantage because of lack of skills or social support that they find themselves in the back of the line no matter where they go. Others who have skills may find that many job markets do not need their particular set of skills. Even people with highly specialized skills may not always be in demand. For example, many aeronautics engineers in Seattle in the mid-1970s lost their jobs when the demand for new airplanes dropped. Although highly skilled, there was little demand for their particular skills in Seattle or elsewhere. Many endured an extended period of unemployment even though they moved to other cities. Others were compelled to return to school for retraining.

Thus, while individual characteristics may be the basis for the distribution of poverty among the members of a community, the nature of the local economy is the basis for the extend of poverty in that community.

CHARACTERISTICS OF POOR COMMUNITIES

A recent study identified 243 "persistent poverty counties" in America. Thirty four of these are in Kentucky, representing more than 1/4 of Kentucky's counties.[2] Persistent poverty counties have had median per capita incomes in the bottom fifth of a ranking of all US counties since 1950. The persistent poverty counties in Kentucky tend to be concentrated in the eastern and southern regions of the state (see Figures 1 and 2). According to our model, the extent of poverty reflects an area's social and economic characteristics.[3]

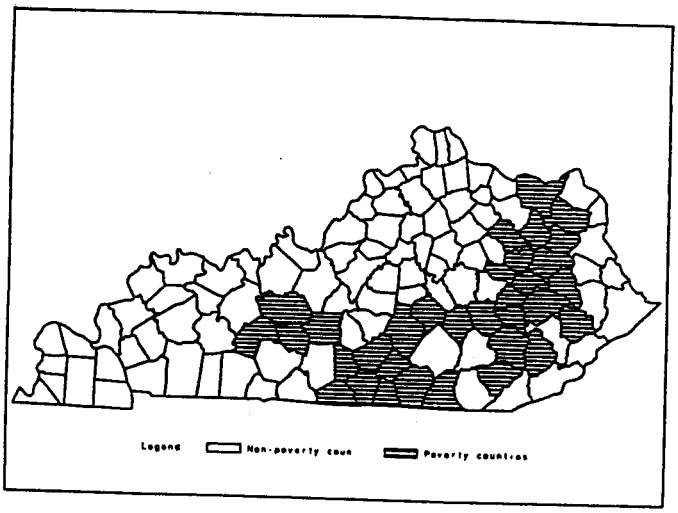


Figure 2. Persistent Poverty Counties in Kentucky.

What factors characterize the communities with high levels of poverty in Kentucky? None of these counties has a city of 25,000 or more persons. They are primarily rural counties having no major urban areas around which economic growth can be concentrated. The labor force participation rates, that is, the proportion of the population 16 years and older that is employed or seeking employment, is lower than the state average. One factor that accounts for this is that these counties have a higher proportion of adults with a work-limiting disability. Most of these counties have significantly higher levels of unemployment than the state average. In other words, the opportunities for employment are smaller than the line of persons seeking jobs.

In some high poverty counties the local economy depends heavily on 1 industry, such as coal. Thus, local employment opportunities depend on booms and busts in the industrial sector, with few alternatives in hard times. Moreover, a limited industrial base often decreases competition for workers and, hence, decreases the incentive to increase wages. This tends to be true in many rural counties, even those with a more diverse economic base, because the number of firms competing for workers is small.

Wage rates are depressed in those counties with a high and persistent incidence of poverty. The national study of nonmetropolitan counties with a high incidence of poverty found that persons in these counties derived a comparable proportion of their personal income from earnings as did those living in counties with a low incidence of poverty. The key to the higher rate of poverty was that wages in the poverty counties were very low.

Moreover, rural wage levels are substantially below those in urban areas. Nationally, rural males earn $162 a week less than urban males, while rural women earn $102 less than urban women. The Federal Reserve Bank of Kansas City estimates that in 1984, rural per capita income was only 74 cents for every 1 dollar of urban per capita income. What this means is that in Kentucky, which has a low per capita income compared to the rest of the nation, persons who live in rural counties are at an even greater income disadvantage.

The economic opportunities are not likely to improve in Kentucky's high poverty counties. During the first half of the 1980s, these counties experienced either net employment losses or only marginal gains in new jobs. A study by the Economic Research Service (USDA) in 9 rural Kentucky counties revealed that between 1974 and 1979 new businesses were typically small, low-paying, service firms.[4] Because labor costs are their single biggest operating expense, nearly 40% of these businesses reported no full-time workers and paid average weekly wages of less than $202. These new businesses accounted for two thirds of the new jobs added to these counties. Thus, in many rural counties, even when economic growth occurs, the jobs added to the marketplace offer limited opportunities for workers to improve their standard of living. These conditions have forced many people to move to other areas.

In summary, impoverished communities offer fewer and lower paying jobs. Furthermore, these communities lack the essential human and economic resources that would encourage sustained economic growth.

These factors inhibit economic growth in several ways, including:

(1) Depressed wages translate into lower family or household incomes and decreased consumption. As a result, fewer dollars circulate in the local economy to support commercial businesses.

(2) Lower earnings and lower family incomes also mean lower bank deposits, thus limiting assets for investment in local economic growth.

(3) A limited industrial base means that potential manufacturing or wholesale trade firms must consider the costs of getting raw materials and finding outlets for their products outside the community.

Poverty's Impact on the Criminal Justice System Views of Attorney Gail Robinson

Gail Robinson

Is poverty a cause/contributor to crime in Kentucky? Yes

Why? When people lack the resources to support themselves adequately, they may resort to illegal acts to provide support. Additionally, poverty often promotes desperation. People relieve desperation through drugs and alcohol which are correlated with impulsive criminal acts.

How can we solve the problem of poverty in Kentucky? 1. Better education so better job skills. 2. Higher minimum wage.

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(4) Low income counties have limited tax bases and thus limited public funds to invest in schools and industry.

(5) Residents in these communities bring fewer and less competitive skills to the marketplace. In other words, the skills of the people waiting in the line often are not those that new businesses need.

CHARACTERISTICS OF INDIVIDUALS IN POVERTY

Who are the poor? Myths about the poor have been portrayed in the news, in entertainment, and in popular writing. Some people believe the poor are members of an underclass made up primarily of women with illegitimate children in urban ghettos of particular rural areas - Appalachia, the Ozarks or Indian reservations - and who do not want to work because welfare provides a comfortable living.

Reality is much more complex. Nationally, the number of poor 2-parent families is similar to the number of poor female-headed households. Only about 1/3 of all poor families received public assistance in 1984, and nearly all of the able-bodied in poor households worked.

The following section examines the major characteristics, such as age, race, gender, and education, of individuals in poverty in Kentucky. Many of these characteristics overlap.

AGE

Some of the most dramatic changes in poverty rates have occurred among different age groups. Nationally, in 1959, 35.2% of those in poverty were age 65 and over, 26.9% were under 18, and 17.4% were 18 to 64. While the poverty rate has declined for all age groups, it has declined most for those over 65. However the absolute number of elderly persons in poverty has begun to rise since the late 1970s. This is due to the general aging of our population as more and more people live longer.

In contrast to national trends, the elderly in Kentucky have a higher poverty rate than other age groups. In 1980, the poverty rate for those over 65 was 23.3% compared to 14.8% nationally. Moreover, older Kentucky women are more likely than me to be in poverty. Why are elderly Kentuckians more likely to be in poverty than elderly Americans nationally?

Nationally, poverty rates for the elderly have declined primarily because of government support programs such as Social Security. Throughout the 1960s and 1970s increased attention to Social Security led to increased benefits, the indexing of the program for inflation, Supplemental Security Income for poor elderly and the disabled, and Medicare. These programs have had a remarkable impact on reducing the number of elderly who are poor. For example, in Kentucky, the poverty rate for elderly persons (aged 65+) who receive no Social Security income (33%) is substantially higher than for those who receive some Social Security income (24%).

Several factors may account for the higher rate of poverty for Kentucky's elderly. First, a substantial proportion of Kentucky's elderly reside in rural areas and the rural elderly are far more likely to be in poverty than the urban elderly (18 vs. 11% nationally). Second, given the persistence of poverty and depressed wages in Kentucky, elderly Kentuckians have not built the private pensions and private savings or established the Social Security wage base necessary to provide for a comfortable life upon retirement.

While the national poverty rate for the elderly has declined dramatically, it has increased for children after some earlier declines. In 1959 the rate for children under 18 was 26.9%. This rate decreased to a low of 13.8% in 1969 and has increased to over 22% in the 1980s. Children in rural families are at a greater risk of poverty - 24% of all rural children are poor compared to 19% of all urban children.

In Kentucky, the poverty rate for children (21.6%), although slightly lower than the elderly rate (23.3%), is very high. Furthermore, the rate for children has been rising, according to recent estimates. The Kentucky Youth Advocates estimate that in 63 counties in 1984, more than 30% of the children lived in poverty, and in 18 counties, more than half the children under the age of 17 lived in poverty. Overall, their study estimated that about 29% of Kentucky's children live in poverty compared with a national rate of 22%.

The reason most often cited for the increase in poverty among children is the increase in female-headed households. Female-headed households with no male present are far more likely to be in poverty than are other households. Other factors influencing the poverty rate of children in the 1980s include a decrease in expenditures for assistance programs for children (to be discussed later) and the declining economy. Family income has declined in the 1980s because of higher unemployment rates, thus the poverty rates of traditional 2 parent families have increased. In fact, 75% of the increase in children in poverty during the 1980s has been among children in traditional family settings.

The changing fortunes of young and old has been a cause of concern for many public policy analysts. Some believe that benefits for elderly constituents have been politically driven; the elderly tend to be a strong voting block. However, benefits for the elderly are consumptive; they do not add to production capabilities. On the other hand, benefits to children are an investment in human capital and future economic growth, and the growing incidence of poverty among children may be a portent of future problems. As Bickley Townsed notes, "Disinvesting in America's children is eating our seed corn, stunting a future crop of citizens, producers, and parents." If we fail to provide for our youth we are under-investing in Kentucky's future.

RACE

Nationally, most of the poor are white (72 out of 100). However, the poverty rate of whites is much lower than that for blacks. Thirty % of all blacks live in poverty, while the rate for whites is 9.4%. Although there are more poor whites in rural areas than blacks (7 million vs. 2 million), rural blacks are far more likely to be in poverty than urban blacks (43 vs. 28%). The relative differential between black and white poverty rates has changed little over the past 30 years; blacks continue to have poverty rates that are approximately 3 times higher than whites.

The higher poverty rate for blacks is primarily the result of the discrimination that has persisted in this country for decades. Blacks have higher rates of unemployment, receive lower average wages, and work in lower status jobs than do whites. In the context of our analogy of the line of persons seeking employment, blacks are more likely to be found waiting behind similarly qualified whites, and often behind whites with fewer skills and less experience. There is also a greater likelihood of female-headed families among blacks.

In Kentucky, 92 out of 100 persons living in poverty are white. The black poverty rate is 33%, while the rate for whites is 16.4%. The major reason for the lower differential between blacks and whites has more to do with a higher than average rate for whites in Kentucky, than it does with a low black poverty rate. In fact, the black poverty rate in Kentucky is 3 percentage points higher than the national rate.

Poverty's Impact on the Criminal Justice System

Cris Brown

Is poverty a cause/contributor to crime in Kentucky? Yes, a contributor.

Why? 1. It affects Identity : a.) Learned Helplessness: Decisions are made for you, not by you. You feel you have no control over your life. b.) **Self-Image:** Due to reflections back to you a sense of shame develops. You are invisible and when not, you're a figure of pity or derision. Shame is reinforced constantly. Once your sense of identity is breached, you lose the ability to be controlled by the normal societal controls that regulate behavior.

2. It creates Educational Limitations which leads to diminished job possibilities.: a.) In school sometimes **poor equals stupid:** Deficits due to social environment versus innate intelligence often place children of poverty in lower groups and teachers have lower expectations of them. b.) **Self-Image:** Children are very cruel and a sense of shame and poor self-image are reinforced. Activities in school lead to shame and differences are made more glaring: extra fees for activities, extra-curricular activities that require transportation, class projects that ask for example the kids to draw a family tree where there may be an absent or unknown father, free-lunch programs, periodic check-ups on hygiene- being sent out of the classroom to wash up or to take a shower. c.) **Concentration:** an essential element of learning is disrupted as family/home problems, such as spouse abuse, family fights, occupy the child's thoughts and make it difficult to concentrate. Children school-age generally have a fair amount of chores and responsibilities at home that kept them out of school or leads to a lack of sleep that makes good school performance impossible. Parents may not see the value of an education, thus they don't encourage a child to attend school. There's a high drop-out rate.

3. It Leads to a Reservoir of Anger: Feeling weak, hopeless, helpless, dependent, male roles particularly strained. A loss of the ability to empathize and to feel. Survival becomes an art and to that end, many emotions are sacrificed.

4. Dysfunctional families are not Healthy Families: Families have incest, spousal abuse, sexual abuse, physical abuse, abandonment, constructive abandonment, unwanted children, no support system. Parent with their own problems pass them on to the kids and are poor role models. Often there are no role models for male children. Mothers and fathers who do not nurture and are emotional unavailable to their children.

5. It may lead to Alcohol/Drug Use: Studies have indicated that there may be a genetic disposition towards alcoholism. People may resort to self-medication to forget pain and disappointment.

There are many drug and alcohol crimes on the books: PI, DUI, Cultivation, use, possession, trafficking.

6. It can create Health/Mental Health Problems: Poverty is mostly borne by women with dependent children. Poor diet, prenatal care, smoking, drug or and alcohol use during pregnancy can lead to life-long problems of organic brain damage and low mental functioning for children born into poverty. Incest creates children of close consanguinity. Many crimes are the outgrowth of impulsivity and poor judgement.

Improper health care and malnutrition can lead to life-long problems.

7. Welfare System Promoting Wrong Values: a.) Aid for Dependent Children (AFDC) given only to "single parent families- fathers leave [or pretend to] to get the check. b.) Rates are not the glorious amounts the public envision. Starvation amounts are paid. c.) In order to survive on the welfare system the recipients "fudge" on the information they supply to the caseworker. For instance, if a person tries to better themselves, *i.e.* go to college on grants and loans, that money is subtracted from their checks as income as if the money was spent on the children. d.) Welfare system is stigmatized as a "handout."

8. Violence is commonplace: Kids are desensitized. They've seen mom and dad fight, cut each other, shoot at each other. Family members and community friends fight and shoot each other. That's real life; that doesn't even begin to approach the television and violence issue. [See Doug Magee's article on the Causes of Crime in the *Advocate* Vol. 11 #5.]

WHAT CAN BE DONE? 1. Get more money to poor people- raise the minimum wage and welfare stipends. Penalize companies that hire person for less than full time in order to avoid paying fringe-benefits. 2. As most of the children in poverty are in single-family households, see that women's salaries are equitable to men's salaries. 3. Empower people in poverty by revamping the welfare system . Have money contingent on jobs such as weather-proofing houses, clean-up projects in the community. Have more programs like Job Corp, OJT jobs. Give daycare to dependent children and transportation allowances or arangements for working parents. Make increased education *i.e.* getting G.E.D. part of receiving welfare check. Give incentives for getting off welfare, such as not making a person turn in their college tution money as income. 4. Stop cutting social programs that benefit the children of poverty. See it as an investment, paying now rather than for prison cells. 5. Have uniforms for school children and issue them to the children. 6. Be active in community Literacy programs. 7. Have a socialized system of medicine so that all citizens can have adequate health care. 8. Instead of spending money to penalize drug and alcohol use, balm the spirits that are in trouble. 9. Rethink our glorification of old west outlaws and the Al Capones and get a consistent view against violence.

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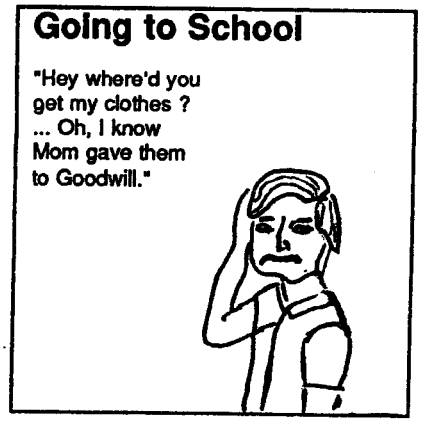
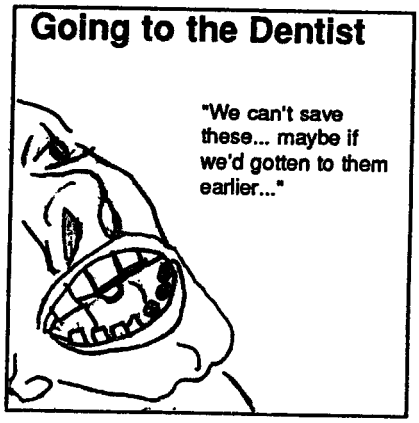




EDUCATION

Education is a critical factor in an individual's ability to secure a job and earn a good income. Economists use the concept of human capital to represent the skills and abilities people bring to their jobs. A person makes an investment in his or her own human capital through formal education, a training program, or on-the-job experience. This investment, in turn, makes the person more valuable in the labor market, paying dividends in the forms of higher wages and increased job stability. A person with a poor education faces limited job opportunities and is more likely to fall into poverty.

As an individual's education increases, his or her likelihood of falling into poverty declines. However, poverty rates drop more rapidly with increasing education for men than they do for women. For example, while 3% of the white families headed by a male with at least 1 year of college are in poverty, the figure for families headed by women with at least 1 year of college is nearly 15%.

The importance of education in preparing people for employment is increasing with each generation. In 1973, workers with only an elementary school education had an unemployment rate 3 times that of college graduates. By 1986, the unemployment rate for elementary school graduates (12.7%) was 5 times that of college graduates (2.5%).

Hence, the failure of individuals to invest in education results in limited employment opportunities and limited income. In fact, a recent study of factors associated with personal income in rural areas of the South revealed that low education achievement was the best predictor of low income.

The relationship between poverty and education is a critical one in Kentucky. Only 53% of Kentucky's adults (persons 25 years and older) are high school graduates; this is the lowest percentage of high school graduates in the nation. Tragically, this educational poverty continues with this generation, for in nearly 3 out of 4 Kentucky counties, 1/4 of the 1985 senior class dropped out of school before graduating.

Limited educational achievement is also a community problem. As noted, low educational attainment of the population is a key defining trait of these counties. In 7 counties (Clay, Cumberland, Jackson, McCreary, Owsley, Wayne and Wolfe) less than 30% of the populations were high school graduates, and these counties also had the highest proportions of their populations in poverty.

EMPLOYMENT STATUS

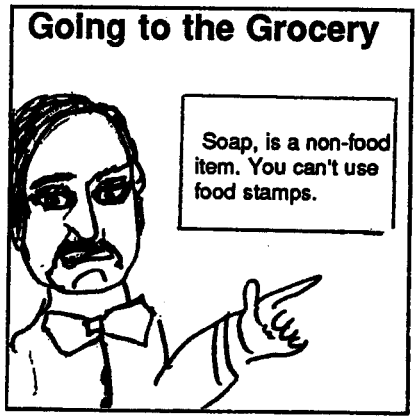
The popular conception of the poor is that they don't want to work: if they wanted to, they could get out of their poverty. However, evidence suggests that this is not so. In the 1984 Current Population Survey, an estimated 14.9 million men and women age 22-64 were in poverty. Of these, 7.3 million (49%) said they had worked during the previous year. Another 1.5 million (10%) indicated that they had looked for work but were unable to find a job.

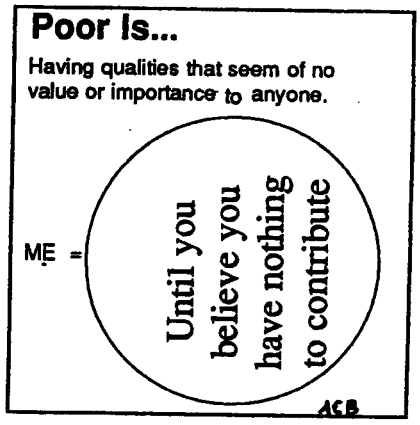
Thus, nearly 6 out of 10 indicated that they were in the labor force (*i.e.*, they were working or looking for work). In terms of the 7.9 million families in poverty, 61% had 1 worker and 21% had 2 or more workers. Of those people who were not in the labor force, 44% indicated that they were keeping house, 22.7% were disabled, 5.6% were going to school, and 4.4% were retired. In fact, throughout the 1980s, there have been as many poor adults who were in the labor force as there were poor adults who didn't work or look for work.

These figures hardly suggest a population that does not want to work. Moreover, if we examine the job characteristics of the working poor some interesting findings come to light. Only 1.9 million (26%) of the working poor were working full time. The rest were either working part time or on a temporary basis. Many of these people worked in low income jobs that paid very little. These jobs were not likely to become full-time jobs because the working poor tend to be marginal workers. They are unskilled or have limited skills that make them less competitive in a job market that increasingly demands, at a minimum, a high school education, and, more frequently, a college education. The well-paid secure jobs for unskilled workers that once typified our manufacturing industries have disappeared due to automation and the shift of production operations to overseas sites where labor is cheaper.

Kentucky's average unemployment rate of 10.1% in 1985 was the 5th highest in the nation. While the skills brought to the labor market account for some of this unemployment, increased skill levels mean little when they exist in labor markets that offer few opportunities. For example, between 1984 and 1985, Kentucky had a net loss of nearly 8,000 manufacturing jobs. Furthermore, the structure of some job markets may actually discourage educational upgrading. A study of mining-dependent counties in Appalachia found that the only high-paying jobs were in the mines and many men left school to get these jobs.

Several factors are critical, then, to an understanding of the relationship between employment status and poverty. First, people find work when unemployment rates are low. Second, people find work when their skills or qualifications are in demand. Third, the wages of jobs that people can find in their area determine whether they can move out of poverty once they do find a job.





GENDER

Recently, attention has been given to the feminization of poverty, a concept which recognizes that women are more likely than men to be in poverty. However, this is not a new trend. Since 1960, women have been more likely than men to be poor. Nationally, the poverty rate for females is 13.8, compared with 10.9 for males. In total, 58% of the poor are female. The differential between males and females increases with age. Counting only those 16 and over (since male and female children are equally likely to live in poverty), females comprise 61.6% of all the poor in the United States.

In 1980, the poverty rate for Kentucky's women was 18.9% compared to 16.2% for Kentucky's men. This meant that 55% of the poor in Kentucky were female. When children are factored out (since they tend to be divided equally by gender), 58% of the poor aged 16 and over in 1980 were women.

Women who live in Kentucky's rural counties with elevated poverty rates experience substantially higher rates of poverty than do either women in the rest of Kentucky or the men who live in their counties. Indeed, between 20 and 27% of the women aged 18 to 64 in these counties are in poverty (compared to a state average of 15%) and women who are over 65 average between 27 and 41% in poverty (compared to a state average of 26%). Hence, residing in a high poverty area increases a woman's likelihood that she will live in poverty.

The poverty rate for women is high for several reasons. One is the increase in the number of female-headed households in the United States over the past 20 to 30 years. The increases in divorces, separations, and out-of-wedlock births have resulted in far more women with young children without husbands present than ever before.

In 1980, nearly 13% of all Kentucky households were headed by a woman, and 6 out of 10 of these female-headed households had children under the age of 18. While teenage pregnancy in Kentucky has declined from 221 births for every 1,000 women under the age of 15 in 1980 to 188 births in 1985, it is still substantially higher than national rates.

Teenage mothers are more likely to drop out of school and, as a result face fewer employment opportunities. Moreover, teenage mothers who do marry are more likely to divorce than are women who wait to marry until they are older. Once divorced, these women are less likely to receive child support than other divorced women. Finally, less than 6 out of 10 divorced women are awarded child support or negotiate child support agreements, and of these, less than half actually receive the full amount of child support.

Another reason for the high female poverty rate is that a segregated labor market confines women to low paying jobs in low-wage industries. Although the media often highlight women who are employed in nontraditional jobs (those in which 75% or more of the workers are men), only 1 in 10 working women have found employment opportunities in these jobs. The rest of Kentucky's working women are confined to the "pink collar ghetto." In Kentucky, 8 out of 10 working women are employed in 3 occupational groups: sales, clerical and service jobs. Furthermore, women are more likely than men to work part time because the industrial sections that employ them (service and sales industries) tend to rely heavily on part-time workers.

Michel Mollat, the renowned scholar on the historical phenomenon of poverty, in *Les pauvres au moyen-age* (Paris, 1978), defines the poor in this way:

He is the one who temporarily or permanently finds himself in a situation of weakness, dependence, humiliation, characterized by the lack of means, variables according to the age and society: means of power and social consideration: money, relationships, influence, power, science, technical qualifications, honorable birth, physical strength, intellectual ability, personal freedom, and dignity. Living day to day, the poor man has no possibility of changing his state without the help of another.

As a result of these employment conditions, the earnings gap between women and men who worked year-round, full time in 1983 was 57 cents. What this means is that the median earnings for Kentucky women who worked year-round, full time was $8,988, but for men it was $15,850. Another way to see this tremendous earnings differential is that 2 out of 3 of Kentucky's working women earn less than $10,000 a year, while 3 out of 4 of Kentucky's working men earn more than $10,000 a year.

To a great extent, these differences in salary reflect that nearly two-thirds of all minimum wage earners are women employed in the female-dominated service, retail trade, and domestic service industries. Equally important is the real wage discrimination that women confront. For example, male social workers with 5 or more years of college earn $20,113 while female social workers with 5 or more years of college earn $16,873. Male secondary school teachers earn $20,446, while their female counterparts earn $16,419.

The type of employment that women can find also determines their likelihood of being poor. Only 4% of Kentucky's single, never married women who worked full time (35 hours a week for 50 to 52 weeks a year) were in poverty in 1979 compared with 31% of the single women who worked less than 35 weeks that year. Again, we see that employment alone is not enough to lift people out of poverty.

FAMILY TYPE

The family is the basic social unit of our society. It is also a basic economic unit. In times of economic depression, a family with 2 parents present has a better chance of weathering the storm than do single individuals or families headed by only 1 parent, especially if that parent is a woman. For example, in 1980 in Kentucky, the overall poverty rate for persons in families was 14.6% compared to 33.6% for persons who did not live in families. Older persons who live in families have a poverty rate of 17%, but those who do not live in families have a poverty rate of nearly 41%.

However, there are major differences between male-headed and female-headed families. Nationally, for all female-headed families the poverty rate is 3 times higher than for male-headed families (35 vs. 12%). For white women who head families with children under the age of 18, the poverty rate is nearly 44%, while for black women, the rate is 62%.

A smaller proportion of the rural poor live in female-headed households than do the urban poor (27 vs. 39%). Yet, those persons who do live in rural female-headed households have a much greater likelihood of being poor than do their urban counterparts. For example, nearly 6 out of 10 children in rural female-headed households are in poverty. Black children in rural female-headed households have a poverty rate of 83%.

What factors lead to the different rates of poverty among the various types of families?

One factor is divorce. A study of divorced, middle-aged white women with children

found that their risk of poverty rises from 10 to 25% when their marriages end, while the risk for black women increases from 44 to 60%. National studies indicate that nearly two-thirds of divorced women with children receive no child support payments, or they receive less than the agreed upon amounts. Divorced women then must assume the primary responsibility for supporting their children. This task is difficult because of limited employment opportunities and the low wages associated with women's jobs. Furthermore, the lack of reasonably priced child care affects women's opportunities to find employment.

Widowhood often leads to poverty for older women, and less than two-fifths of older women are still married. Theoretically, income form assets saved during one's lifetime, private pensions, and Social Security benefits should provide 3 bases of support for older persons. However, all too often these supports are inadequate.

First, women have fewer opportunities to accumulate assets during their lifetime given their more limited economic opportunities. Moreover, their husbands' final illness and funeral expenses often dissipate family savings. One study of older widowed women found that one quarter have gone through all the money their husbands left them within 2 months and more than half have nothing left after 18 months. Also, less than 1/5 of the women who work in the private section (non-government jobs) are covered by private pensions and, only 2% of widows ever collect on their husbands' pensions.

Finally, Social Security was never intended to be the only source of financial support in old age; it was intended to supplement the other 2 types of economic resources. Also, because Social Security benefits are calculated on the basis of average wages earned over a fixed period, the benefits women receive reflect the wage inequities in the job market. Unfortunately, the vast majority of older women rely on Social Security as their main source of income, and this accounts for the high rate of poverty among older widows. In 1986, the average Social Security benefit for retired women was $334 per month, while for retired men it was $548.

This discussion of the characteristics of individuals in poverty illustrates the complexity of this problem. There is an intricate relationship between a person's sex, race, educational attainment, employment and family status, and residence.

Our tendency to see individuals as entirely responsible for their poverty prevents us from recognizing the interdependence of individual characteristics (such as race, gender, and education) and the labor market. This interaction is a key to understanding the diversity in poverty populations in Kentucky and the nation.

PROGRAMS OF ASSISTANCE AND SUPPORT

Programs of assistance and support have significantly changed the extent and distribution of poverty in America. When considering these programs, remember that most social service programs and government transfer payments do not go to poor persons. For example, in 1984, only 18% of the federal government expenditures on human resources went to programs that were based on the income level of recipients (*e.g.*, Aid to Families with Dependent Children; Women, Infants and Children Nutrition Program, Medicaid).

Also, remember that not all poor persons receive welfare benefits. Nationally, in 1985, only 35% of the households with incomes below the poverty level received cash welfare benefits and only 59% received any kind of means-tested benefits. In Kentucky, the Kentucky Youth Advocates estimate that only 58% of those in poverty received noncash benefits in the mid-1980s.

Persons in Kentucky must be poorer than persons in any other state to qualify for state assistance. During the late 1970s and early 1980s when inflation was reducing the purchasing power of the dollar. Kentucky did not adjust its eligibility requirements for social welfare programs. Thus, the number of recipients declined from 175,100 in 1980 to 161,200 in 1985. In addition, inflation diminished the "real value" of Aid to Families with Dependent Children (AFDC) benefits by 25% between 1972 and 1984.

As a result, in 1986, at $197 per month for a mother and 2 children, Kentucky's benefits under AFDC were about 1/4 the poverty level for a family of 3. The maximum AFDC benefit for a family of 4 in 1986 in Kentucky was $246, placing our maximum benefit at 43rd in the nation. The average for all Southern states at that time was $254, while the national average was $417. Furthermore, there is no minimum benefit level for AFDC in Kentucky.

PROBLEMS WITH SUPPORT PROGRAMS

To a certain extent, the guidelines for the operation of Kentucky's support programs function at cross purposes. For example, AFDC provides support primarily for 1-parent families. Generally, 2-parent families are not eligible, regardless of income. This limitation, many have argued, encourages the break-up of intact families in extreme financial circumstances and, given the limited economic opportunities available to female-headed families, contributes to the feminization of poverty.

In addition, disincentives to seeking employment are built into most assistance systems, including Kentucky's. For example, if a woman finds employment, she can only work for 17 hours a week or less before her wages are deducted from her AFDC grant and her eligibility for food stamps and Medicaid and other assistance programs are jeopardized. Hence, if a working mother with 2 children earns a gross monthly income of $364 or more, she will lose her eligibility for AFDC. And, if this woman loses her AFDC benefits, her eligibility for Medicaid ends within 4 months.

As we have seen, the employment most women can find offers little or no benefits, and so the potential loss of Medicaid would threaten their children's access to health care. Thus, "even though benefit levels are low, it is impossible for some welfare recipients to cope with total loss

POVERTY'S IMPACT ON THE CRIMINAL JUSTICE SYSTEM

Is poverty a cause/contributor to crime in Kentucky? Yes

Why? Poverty is a minor cause of crime. Sometimes a person steals food, cigarettes or drugs because they feel the need for those items and don't have the money to buy them. However, there are many other causes of crime, some of them related to poverty, some not related. Many poor people commit no crimes at all, and some rich people commit crimes.

How can we solve the problem of poverty in Kentucky? I believe the individual must take the initiative to start his/her own business, or move to a different area where jobs are not so scarce.

Hopefully, the new education law will help to provide a better education to Kentucky students, and more industry will locate in Kentucky. In the long run, this may help.

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Stanton

of welfare benefits, the impending loss of Medicaid, and the costs of child-care, transportation, and other employment expenses immediately incurred upon obtaining low-wage employment."[5]

The poor have paid more taxes in recent years because the increase in the tax threshold has not kept pace with inflation or with the increase in the poverty threshold. For example, in 1976, people had to start paying federal income tax on their earnings at 19% above the poverty threshold, but in 1986 the income tax threshold was 17% below the poverty level. Hence, in 1986, many people had to pay taxes on earnings that did not even raise their income to the poverty level. Recent tax reform legislation will reduce the federal tax burden on persons in poverty, but the state burden will remain.

The Job Training Partnership Act (JTPA), which replaced the federally funded Comprehensive Employment and Training act (CETA) in 1982, also hinders poor persons seeking to improve their human capital. Current regulations require that projects using JTPA funds place their participants in a job within 14 weeks and have a 96% rate of placement. Thus, program officials are forced to "skim the cream" of the unemployed and disadvantaged, seeking participants who will enable their programs to meet these regulations.

JTPA programs can offer financial assistance for tuition, books and transportation, but if a program participant receives such educational assistance, his or her AFDC and food stamp benefits are reduced accordingly. Thus, many JTPA participants must "choose" between supporting their families and educating themselves to improve their employment opportunities.

Finally, state-supported child care for low-income families is woefully lacking. In 1986, less than half of Kentucky's counties provided assisted child care to low-income families. Child care can cost between $35 and $65 per child per week, a cost that is usually beyond the means of parents working in minimum wage jobs. And, 13 Kentucky counties did not have any licensed day care facilities, while 24 counties had fewer than 30 licensed slots. Thus, child care, when available, is costly. But for rural residents, it is often not available at all. The difficulty of finding adequate day care in isolated rural areas may account for the lower labor force participation rates of women in the cluster of high poverty Kentucky counties.

National studies indicate that the lack of affordable and reliable child care is a critical barrier to employment for single parents. The lack of day care, or the financial assistance to use existing services, when combined with the disincentives to work built into Kentucky's assistance programs, increases the likelihood that families and individuals will become trapped in a cycle of poverty and welfare dependency.

SUGGESTIONS FOR THE FUTURE

There are probably as many suggestions for reducing poverty as there are those who have thought about this issue. Poverty, as we have discussed, cannot be blamed on the poor. Poverty is as much a symptom of a malnourished economy as it is a reflection of the work-limiting characteristics of individuals. A commitment to reducing or alleviating poverty in Kentucky must involve both short- and long-term solutions.

SHORT-TERM SOLUTIONS

Short-term solutions involve strengthening and expanding the "safety net" we provide to families who do not have access to the minimum requirements for life - a nutritionally adequate diet, a safe and healthy shelter, health care, education, and job training. State assistance programs must be expanded and redesigned so that participants have adequate resources and incentives to improve their work skills and, yet, are not penalized for work-limiting characteristics. Below are some examples of actions that could accomplish these goals.

First, the standards of need for assistance programs must be raised substantially. Currently, AFDC parents who do find jobs face reductions and eventually elimination of their benefits as much lower levels of earnings than in most other states. Raising the standards of need for AFDC and Medicaid allows parents to retain their access to Medicaid until they earn enough to acquire health care coverage. This would provide greater resources for families in need and reduce the disincentives for employment.

Second, programs of assistance must be redesigned so that intact 2-parent families can be eligible for benefits. This would provide a bridge of support for unemployed 2-parent families while they search for a new job and enable intact families to remain together.

Third, while the most recent revision of the federal income tax will virtually eliminate the tax burden on persons below the poverty level, they also need relief from state and local taxes. Additionally, increasing the earned income tax credit with adjustments for family size would help many rural poor specifically, because such an action would benefit only the working poor, many of whom are in rural areas.

Fourth, educational assistance job training programs must be expanded to meet the needs of those persons with the least marketable work skills. In other words, current program requirements for JTPA virtually require that training programs focus on those persons who have the greatest likelihood of quickly entering the job market. This leaves behind thousands of poor persons who need more intensive training and educational assistance to become competitive in the job market. Restructuring state job training programs to address the needs of those who are least marketable would contribute to Kentucky's human resources.

Finally, current programs must assist participants with transportation, child care, and job placement costs. Once again, the expansion of current programs to cover these expenses would be cost-effective since such changes would reduce the inherent disincentives to work in the current system.

LONG-TERM SOLUTIONS

To create numerous high-paying jobs the skill levels of Kentucky's adults must be enhanced if our citizens are to become an attractive labor force to new businesses. At this time, by any measure, Kentucky's work force fails to offer the skills necessary to be competitive in the 21st century. For example, Kentucky has the highest adult illiteracy rate in the nation; ranks 50th in the percentage of adults over 25 years of age who have graduated from high school; ranks 46th in enrollment in higher education; and, is 12th out of 13 Southern states in enrollments in 2-year and vocational programs.

If we are to have a competitive labor force we must develop and aggressively sponsor programs that both enhance the work skills of adults and insure that the next generation of workers, our children, will enter the labor market as prepared as their counterparts nationally. Programs directed at reducing illiteracy - encouraging adults to obtain their GED (high-school equivalency, General Educational Development) certificates; expanding opportunities for vocational education; and increasing high school and college graduation rates - are all critical to this effort. Perhaps as important is to plant the seed of commitment to education throughout our lives and to nurture a recognition among our citizens that an

educationally impoverished people are inevitably economically impoverished.

New strategies of economic development must be found. Poor counties do not have the tax base to invest in new businesses or better schools. These counties need sustained assistance from state and federal governments to overcome their economic limitations. Such efforts could include regional or state-sponsored investment corporations that would either provide new business loans directly or insurance for banks that invest in higher risk business loans. As we have seen, new businesses have added the largest proportion of new jobs in rural communities in the last decade. Although these businesses have limited payrolls and few employees, they help communities keep money at home that used to "leak out" to other, usually larger communities. Thus, development strategies should encourage the establishment of new businesses of all sizes.

Entrepreneurs are persons who see the opportunities to transform local advantages in demand, resources, or service into new businesses. Hence, entrepreneurs create economic growth in places where it otherwise would not occur. Entrepreneurs can be nurtured through programs that provide financial and technical assistance, and the state has a role to play in this process.

Programs that would allow welfare benefits to be used to subsidize wages in private sector jobs should be created. Such programs would provide incentives to businesses to employ persons with fewer work skills because their investments in training would be off-set.

It is critical that the minimum wage be raised to a level that enables persons who work year-round, full time to bring their families out of poverty. While some would argue that this would discourage economic development, this is a short-sighted statement. Higher wages translate into greater consumer demand, and thus, greater business activity. In the long run, higher family incomes are the springboard for sustained economic growth.

Finally, the persistence of poverty in clusters of rural communities demands strategies directed at stimulating rural economic development. These efforts must be multifaceted for no single strategy will suit the particular needs and problems of all rural communities. Rural development initiatives include a variety of activities. For example, community leaders can be helped to identify unique characteristics that offer than a competitive advantage in developing or attracting new businesses. These characteristics might be advantages such as environmental conditions, particular craftsmen, or local labor skills, or particular commodities that can be transformed through additional (value-added) processing into new business ventures. A program similar to this is operating in Missouri. Or, state government can offer tax advantages to businesses or firms that locate facilities in high poverty counties, a program that could be especially effective if job training programs were oriented to offsetting the costs of hiring and training hard-to-place workers.

If a free society cannot help the many who are poor, it cannot serve the few who are rich.

President John F. Kennedy
Citing Clement Attlee

CONCLUSIONS

Poverty affects many individuals. The likelihood that any person will slip into poverty is, to a certain extent, more a matter of external circumstances than individual motivation. Loss of a job due to a plant's unexpected closing, a family member's extended illness, divorce, or the death of a family member can all lead to a sudden onset of poverty, regardless of a person's educational level, work skills, or desire to work. Furthermore, for thousands of persons who live in communities with a high incidence of poverty, most of which are rural, the lack of jobs or well-paying jobs almost always signals low family income and limited opportunities.

Too many Kentuckians stand waiting in line for well-paying jobs with good benefits, only to find that the line is long and their chances of finding gainful employment are slim. Development efforts in Kentucky need to emphasize a 2-pronged approach that improves limited opportunities and increases the skills and education of its citizens. Development efforts that focus solely on the acquisition of new plants will fail unless the workforce is skilled and trained to meet new demands. Similarly, investments in education without parallel efforts in development, often resulting in educating people to leave, will not succeed. A sound development strategy should seek to balance new job development with job training and education, while providing assistance to families caught in the transition. Only then can we begin to make an impact on the persistent high level of poverty in Kentucky.

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Lorraine Garkovich received her Ph.D. from the University of Missouri, Columbia, in 1976 with a specialization in demography. At the University of Kentucky, her research has focused in 2 areas; consequences of population change for rural communities and, patterns of family and work roles in farm households. Her current research merges these 2 interests by examining how population and economic changes in farm communities are related to changes in the enterprise structure and family relationships on family farms. Her book, Migration and Rural Population Changes in the United States, was published by Greenwood Press this fall and she is currently co-authoring a book on contemporary farm families. Her published articles appear in Rural Sociology, Teaching Sociology, and the Journal of the Community Development Society.

FOOTNOTES

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KENTUCKY NEEDS THE WISDOM AND FORESIGHT OF JEFFERSON, MADISON, NICHOLAS, CLAY

A 1990 Law Day Address by Thomas D. Clark

Thomas D. Clark

It is easy enough, and maybe trite, for a historian to stand before a group of young lawyers who have just gone through the emotionally taxing processes of securing an undergraduate education, law school, and passing the bar examination and tell them they enter the ranks of a prestigious profession. Perhaps of all the professions which American youth have entered and served none has a more consistent record of influence on the course of society than that of lawyer. Whatever solutions people have sought to their challenges in the past there has always been legal considerations which would enable them to live together in some degree of social and political order and harmony. From the very beginnings of human organizations men have had to set some kinds of parameters to their relationships. The family, the tribe, the colony, and the state have all had either to observe certain limitations and establish rules of decorum or they failed. Thus through the ages the lawyer has borne a heavy burden of social, political, and profound human responsibility. How well the social and political systems of civilization have worked has depended in varying measures upon the practitioners of law all the way from the lowliest barrister to the highest ranking judicial body.

In Kentucky literally thousands of lawyers have preceded you. Many have set noble precedents, established superb reputations as practitioners of the law, as judges, as statesmen, and as public leaders. Unhappily, others have generated into lowly fee-grabbing shysters. Perhaps this negative condition will always prevail. Lawyers are not alone in this respect. For the young practitioner just beginning his or her career these things will prove a certainty. This closing decade of the twentieth century and the opening ones of the twenty-first will be a complex age when society will prove incapable of functioning in an orderly fashion without resorting to myriad legalisms. Doubtless it is true that no other age in human history has been confronted with so many interrelated problems, associations, and potentially disrupting complications in everyday life. For Americans generally we have lived well out beyond the era of the frontier when men could be a law unto themselves without trespassing on or infringing the rights of others. The age is well past when men could discriminate among themselves on the basis of race, sex, economic condition, or geography. In an age of instant communication, rapid transportation, and the capability of moving rapidly monstrous tonnages of goods and scientific equipment to almost unimaginable distance on both land and space, society has developed difficult problems for itself, all of these testing to the fullest extent the making and application of laws.

No more blessed thing could happen... than for... young lawyers to step forward with the wisdom and foresight of a Thomas Jefferson, a James Madison, a George Nicholas, or a Henry Clay ....

No other generation of lawyers has entered the profession at a time when so complex a revolution in every aspect of institutional and human life has been such global and pervasive proportions. For all of us as a national people there are few present and fundamental issues which apply to so provincial an area as a community, a county, or a state alone. Think of the social revolution which has occurred in the Nation since that momentous May day in 1954 when the Supreme Court of the United States rendered its decision in *Brown v. Board of Education*. No historian at that date could have even begun to imagine the revolutionary repercussions and changes which that decision has brought to American society, or will bring in the future. In many respects the whole matter of human rights was placed in a new perspective. Literally, a small and substantial library of articles, books, legal decisions, and endless press commentaries have been written, all stemming from this one decision. More significant is that ancient human relationships were brought into harsh review, and generations of future Americans will be forced to make social, cultural, political, and economic adjustments to its real and implied mandates.

In another area, no doubt the publication of the 1990 results of the census count will reveal the depths of changes which have occurred in so short a time as the past decade. None of these will have greater basic meaning for the functioning of our national society than the fact we have become overwhelmingly an urban national people generating persistent needs and demands of an intensified human culture of the street, the factory, the office, schools, churches, and health care institutions. These will be the needs of a predominantly American society far removed from the traditional ones of the field, the furrow, and of crossroads America. No longer is there a major demand for the enactment and application of laws applying almost solely to rural America. To sense the depth of this fact one has only to resort to even the most elementary statistical sources, to the most recent additions to the legal statutes, or to the latest court decisions. The major problems of society are almost of urban origins entirely.

Think how far in our national history we have come from the age of the log cabin birthplace of nobility to the power of wealth in the legislative and administrative areas. It has been a long time since the basic problems of rural America were uppermost in the minds of congressmen, senators, presidents, judges, and state legislators. There is an entirely new set in the American mind in the consideration of issues of primary local and national significance. Here one example of radical social change will suffice. No current discussion of the monstrous educational challenges which face state, nation, or the universe can ignore a root problem, the disintegration of the family as a centralizing force in human affairs. Historically the family has been the very bedrock foundation of social order and human unity. Both patriarchal and matriarchal figures have been as highly revered in our national society as the bald eagle symbol and the

flag. Like a persistent ghost in an ancient haunted house, the disintegration of the family structure is pervasive in all the discussions of educational reforms. In the revolutionary changes which have occurred in our social systems, far too many parental responsibilities have been delegated, *in loco parentis*, to the schools and other public institutions. Far too much of the shaping of minds and attitudes are now left to agencies outside the family circle. So many of the problems which schools face currently are almost entirely and basically intellectual and educationally irrelevant to learning. Two alone will illustrate the point, discipline and dietary deficiencies. Any teacher possessed of even the barest power of observation knows that it is utterly impossible to offer instruction to an undisciplined room full of students, or hungry ones.

In the case of discipline, this second or third generation of highly permissive parents, of moral laxities, and indiscrete material affluence inevitably there will arise major social, political, and intellectual problems. Unless some decided standards of social decorum are set, then society will find itself facing more and more knotty problems crying for solution. Freedom is one thing, but license is an altogether different thing, and the line between the two is fine if not almost indefinable. In the case of dietary deficiencies which are so highly emphasized, it is a deep stain of shame which brings into serious consideration the inefficiencies of our distributive systems in areas of delivering goods, jobs, and flexible opportunities. One of our proudest national boasts over 2 centuries has been our capabilities of production, but we have never quite solved the problem of efficient distribution, this still challenges a free and open society which seeks stability of the human condition. No segment of the American professional community can play a greater hand in helping solve this chronic problem than the legal one. In one instance, think what role the legal profession must play in the massively involved savings and loans scandal of the moment? More and more the legislative branches of governments have concerned themselves with the socio-legal processes.

Scarcely a week passes in which a group somewhere in the Nation is not passionately involved in seeking an answer as to where we go in seeking solutions to problems in the future. In most instances emphasis on where we go in the future will be placed on the technological applications which have become so vital a part of every human endeavor and transaction. While one segment of our society seeks diligently to find solutions to our social ills and maladjustments, another is just as diligent in perfecting the processes of dehumanizing our daily labors and the productive procedures of our creative industrial economy. It may be pleasant to sit back and contemplate an electronically controlled robot lifting from human shoulders the arduous burdens of performing repetitive tasks of producing consumer goods and rendering services; on the other hand there is considerable horror associated with the introduction of every new labor-voiding machine introduced into the industrial system. Each one creates its own island of human uselessness.

Three industrial revolutions in the areas of labor and production suffice as illustrations of the technological and socially ominous impact on human beings. During the 1930's the Rust Brothers in the neighborhood of Memphis, Tennessee, tinkered with their idea of perfecting a mechanical cotton picker which would alleviate the arduous human task of harvesting cotton. They, along with a giant farm implements manufacturer, created a practical machine, and with its expanding use there were created great reservoirs of functionally illiterate laborers who were unable to cope with the social displacement caused by use of the new machine. The introduction of sophisticated machines in the timber harvesting and processing industries has left almost comparable islands of human beings with little or no place to go in the socio-economic system. Near at home the introduction of behemoth earth-moving machines which permit the removal of dirt for atop shallow veins of coal, and the use of longwall mining machines which have largely supplanted need for human laborers in the extraction of coal from the bowels of the earth have created problems of almost unfathomable human proportions in at least 2 areas of Kentucky. No one yet knows the depth of change which will be wrought by use of the computer, fax machine, and other steadily advancing technological processes.

For the young lawyer, you enter upon the practice of your profession in a moment of national and state history when radical changes are imminent. However much you and your clients might like to cling to old ways and traditions of the past, the privilege must not be yours to abuse and overlook the future. For generations to come Kentuckians will look back upon the 1990 General Assembly's actions either with great praise and reverence, or with bitter disappointment and disdain. The die has been cast for good or evil, Kentucky must now either succeed or wear eternally the mark of Cain because of soul and abject shattering failure. In failure of House Bill 940's aggressive application future generations for decades to come will be further handicapped by lack of foresight and unwillingness of its people to seize this moment's opportunity to lift themselves, not necessarily out of the pit of statistical doldrums in so many social, educational, and economic areas, but to polish its image. A reasonable populace must work diligently and with deep devotion to see that this state is properly set on the road to planning and operating an effective and efficient educational program. Perhaps never in its history have so many anxious observers, nationally, and even internationally, focused their attention upon a single act of the Kentucky General Assembly as upon the passage and application of House Bill 940. No doubt lawyers will play a powerful role in the success or failure of this monumental piece of legislation.

Already the hounds of pessimism and despondency are baying, even ominously. Well before an effective and efficient new educational program can be designed and placed in operation there are those who predict it will fail. There will be lawyers and clients who will drag issues into court, not because they have fundamental educational philosophies or intellectual concern with training youthful Kentuckians to fit into the spectrum of rapidly changing human society and endeavors in the onrushing twenty-first century, but because they are selfish and socially myopic.

If the prophets are correct in their prognostications literally hundreds, if not thousands, of current occupations will disappear, and as many new ones will come into existence. The modes of earning livelihoods will no longer be permanent routines in American industry and services. The prophets are going well beyond a mere assertion of occupational job changes, they are saying almost dogmatically that at intervals of at least every 5 years most of the labor and services forces will have to be retrained to perform entirely new tasks.

How well are masses of Kentuckians fitted to enter modern careers and jobs? Post-Toyoto experiences in this area render a gloomy answer. How is the educational training of most modern Kentuckians to fit them to perform sophisticated tasks? How effective is their motivation? Though it is by no means a simple task to deal with abject illiteracy, the task is relatively simple as compared with breaching the great barrier of functional illiteracy which is currently indicated statistically to prevail in Kentucky. For an organized social and cultural society to tolerate this condition is far more costly than any increase in taxes. For a modern state government anticipating certain fu-

ture challenges to permit such a condition to prevail is little short of being grossly obscene.

The time is at hand when Kentuckians must pause and seek answers to questions of "How efficient and effective is their state government?" How many outmoded institutional appendages and procedures are now costly and useless? How much constitutional deadwood should this Commonwealth be willing to drag into the next century, and at great cost to services? No more blessed thing could happen to this Commonwealth than for a group of its young lawyers to step forward with the wisdom and foresight of a Thomas Jefferson, a James Madison, a George Nicholas, or a Henry Clay and bring about a modernization of the state's government by creative constitutional revision. They could glorify their names by erasing the last trace of hypocrisy of by-passing the clutches of the dead hand of the 19th century.

The Court and the General Assembly have not set a truly creative precedent by mandating that the public endeavor of the Commonwealth in the field of education start at its pediment and devise and place in operation educational opportunities with open access to all young Kentuckians to fit them to adapt to the challenges of a rapidly changing age. No doubt, if Kentucky succeeds in this, it will have the name of this proud Commonwealth writ large in the annals of modern America. Why not take a comparable second step in these anniversary years and do, as the forefathers did in 1792, design a modern constitutional government capable of meeting the complex demands of the future?

Again, Kentucky in the immediate future could set a noble precedent in the field of state government. No professional or associative group in this Commonwealth is more capable of assuming leadership in this area than is the membership of the Kentucky Bar Association; and no group would profit more professionally from a genuine modernization of the state's outmoded constitution.

Traditionally Kentuckians have been served by a respective leadership fraternity of lawyers. From their ranks have risen some of the most distinguished names in the state's 2 centuries of history, and conversely it has also been mis-served by some of the shallowest and most self-serving shysters. Already the gathering of the objective materials of the current decennial census will doubtless reveal some of the most remarkable changes which have occurred in any single decade since 1790. Already demographers are utilizing statistics which indicate enormous changes, and especially in the field of human relationships. The place of the individual in an already complex society will become more challenging. Individual rights and the rule of law will almost certainly become more and more fragile in the face of such pressing demands of an ever-growing population of diverse ethnic origins and social mores. The lawyer and the courts, as in the immediate past, will become more and more involved in the protection of human rights in an open society. They, in the future, will share greater social and moral responsibilities than ever before. This has become a moment in history when Tom Paine's somewhat hackneyed term, "The Common Good," has its greatest legal pertinency.

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Thomas D. Clark received his M.A. from the University of Kentucky in 1929. He has a Ph.D. from Duke University received in 1932. He was a Professor of History at UK from 1931 to 1968, and headed the History Department from 1941-1965. Thomas has authored some 20 scholarly books exploring aspects of Kentucky and the region, frontier America and the emergence of the modern South and edited numerous historical works. He has received the Hallam Book Award, the Award of Merit from the National Association of State and Local History and the Indiana Authors Award.

George Nicholas moved to Kentucky in 1790. He was a member of the 1792 Convention that drafted the 1st Kentucky Constitution. He became Kentucky's 1st Attorney General when the state was admitted to statehood.

New evidence of the wisdom of the Constitution's authors

The flag protection amendment is about to assume its rightful resting place in the constitutional landfill. Before it does, let us pay tribute to the group of Americans whose wisdom enabled this nation to survive an emotional attack on its fundamental liberties.

No, not the 42 senators and 177 representatives who derailed this attempt to amend the Bill of Rights. These men and women surely deserve praise, but their good sense would not have prevailed had it not been for the foresight of the men who met in Philadelphia in 1787 to draft a constitution for their new nation.

Those men were not resistant to change. They had, after all, overthrown British rule. But they were wise enough to know, as Thomas Jefferson noted in the Declaration of Independence, that a government's framework should not be altered for "light and transient causes" — for what we might call every shift in the political wind.

Thus, the Philadelphia convention made it somewhat difficult to amend the Constitution. Amendments must be approved by a two-thirds vote of each house of Congress, and be ratified by legislatures in three-fourths of the states.

These requirements ensure that a decision to change the structure of government or limit the rights of individuals is not made in the heat of the moment. The time-consuming amendment process promotes deliberate debate of proposed amendments and allows passions to cool.

That is what happened with the flag amendment.

After the U.S. Supreme Court ruled last year that burning an American flag was a protected form of political expression, widespread public outrage made a flag amendment appear to be a certainty. But as time passed and people began to understand the danger of tampering with the Bill of Rights, this hot issue cooled down. When the court handed down a similar ruling this year, the outcry came more from nervous Washington politicians than from the public.

Time brought reason to the debate. And that gave strength to the senators and representatives who denied this amendment a chance to become part of the Constitution.

Sadly, no such strength was evident among the Kentucky delegation. On Tuesday, the state's two senators — Democrat Wendell Ford and Republican Mitch McConnell — followed the lead of Kentucky's seven House members and voted for the amendment.

It is a tribute to the wisdom, foresight and courage of the nation's founders that, 200 years later, names like Washington, Madison, Franklin and Hamilton — to mention a few — are still familiar to Americans. What is the chance that, 200 years from now, Americans will remember the names of any of the senators who voted to sacrifice the First Amendment on the altar of political expediency?

Lexington Herald Leader, June 29, 1990
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WEST'S REVIEW

Published Criminal Law Decisions

Linda West

KENTUCKY COURT OF APPEALS

COMMONWEALTH'S CHARGING DISCRETION/VENUE

Commonwealth v. Self
37 K.L.S. 10 at 1
(August 3, 1990)

In this case, the commonwealth appealed from an order of the Bullitt Circuit Court dismissing the indictment charging Self with first degree wanton endangerment and unlawful transaction with a minor. The charges were based on Self's conduct in providing liquor to a minor and then permitting the minor, who was unlicensed, to drive Self's car. A fatal accident resulted. Because of the fatality, the trial court reasoned that the proper charge was some degree of homicide, not wanton endangerment. The Court of Appeals reversed, holding that the commonwealth acted within its discretion in charging a lesser offense. The Court cited *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), which states that "so long as the prosecutor has probably cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."

The trial court also dismissed the charge of unlawful transaction with a minor because, although the fatal accident occurred in Bullitt County, the liquor was given to the minor in Hardin County. The trial court concluded that the proper venue was Hardin County. The Court of Appeals reversed citing the provision of KRS 452.550: "If acts and their effects constituting an offense occur in different counties, the prosecution may be in either county in which any of such acts occur."

Finally, the Court rejected Self's argument that since the charges against him were dismissed after a jury was sworn his retrial following the dismissal was barred on double jeopardy grounds. The Court noted that the dismissal was not a finding of insufficient evidence.

VOLUNTARINESS OF GUILTY PLEA/INEFFECTIVE ASSISTANCE

Centers v. Commonwealth
37 K.L.S. 10 at 7
(August 10, 1990)

In this case, the Court rejected the argument that Center's guilty plea was involuntary because he was not advised that his sentence might be ordered to run consecutively to other sentences he was serving. The Court reiterated the rule stated by it in *Turner v. Commonwealth*, 647 S.W.2d 500 (Ky.App. 1982) that "...a knowing, voluntary, and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea." Center's counsel was also not ineffective for failing to advise Centers of the possible consecutive sentencing. The Court further held that Center's counsel was not ineffective for failing to investigate possible defenses since Centers had "...not specifically shown anything that his counsel failed to investigate or discover...."

SECOND DEGREE BURGLARY - "DWELLING"

Stewart v. Commonwealth
37 K.L.S. at 14
(August 17, 1990)

This case presented the question of whether a basement with no interior entrance to a house's living areas constitutes a "dwelling" within the meaning of KRS 511.010(2). The statute defines a dwelling as "a building which is usually occupied by a person lodging therein." The Court cited *Mitchell v. Commonwealth*, 88 Ky. 349, 354, 11 S.W. 209 (1889) as authority for its decision that the basement was included within the dwelling.

KENTUCKY SUPREME COURT

MURDER-SUFFICIENCY OF EVIDENCE/REBUTTAL EVIDENCE/APPELLATE RECORD/POLYGRAPH/PRIOR INCONSISTENT STATEMENT/DEATH QUALIFICATION OF JURY

Davis v. Commonwealth
37 K.L.S. 10 at 23
(September 6, 1990)

The Court held in this case that there was sufficient evidence from which the jury could conclude that the Davis' husband was the victim of a homicide. The Commonwealth's Medical Examiner testified that the cause of death was a blunt force injury to the head. The fact that experts for the defense testified to other possible causes of death did not entitle Davis to a directed verdict. Moreover, the circumstantial evidence was sufficient to permit the jury to find that Davis killed the victim in order to collect insurance proceeds and continue an extra-marital affair.

The Court also held that the trial court did not err in allowing the commonwealth to present evidence-in-chief during rebuttal. After the commonwealth had closed, a previously unknown witness revealed to the commonwealth the defendant's statement that she wanted [her lover] to kill the victim for his life insurance. RCr 9.42(a) permits the introduction of evidence-in-chief during rebuttal for "good reason in furtherance of justice." In the absence of bad faith by the commonwealth the trial court did not abuse its discretion.

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.

Davis raised on appeal the erroneous admission of statements obtained from her in violation of *Miranda*. However, a transcript of the suppression hearing held by the trial court on this issue was not made part of the record on appeal. The Court held that the failure to produce a transcript precluded appellate review.

The Court held that there was no error in excluding the results of a polygraph that Davis sought to introduce after a prosecution witness referred to Davis having taken the test. The witness was not a law enforcement officer and the fact of the polygraph test was not specifically elicited by the commonwealth. The trial court also properly excluded the tape recording of alleged prior inconsistent statements of a prosecution witness where a proper foundation for admission of the statements was not laid and where the witness admitted the prior statements under cross-examination.

In regards to voir dire, the Court held that four jurors were properly struck by the trial court under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) which provides that a juror may be struck when his views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." The Court also held that the trial court had no affirmative obligation to question jurors as to whether they could consider imposition of the minimum penalty. Justice Lambert dissented.

INEFFECTIVE ASSISTANCE ON APPEAL
Hicks v. Commonwealth
37 K.L.S. 10 at 29
(September 6, 1990)

In this important decision the Court delineated the procedure to be followed by an appellant who has been denied the effective assistance of counsel on appeal. The Court looked to its decision in *Wine v. Commonwealth*, 694 S.W.2d 689 (Ky. 1985), that a defendant who has been denied his right to an appeal due to the neglect of counsel must obtain a belated appeal by motion to the Court which would hear the appeal. Drawing a parallel to *Wine*, the Court held that the proper procedure for raising a claim of ineffective assistance of appellate counsel is by petition to the court which heard the appeal, not by motion under RCr 11.42. The petition must be filed "within a reasonable time" and "within one year from the date of finality of the affirmation from which relief is sought." The Court did not apply the one year limitation to the petition before it. In appropriate cases the Court indicated that a Special Commissioner would be appointed "for the purpose of taking testimony from counsel on appeal in which he may fully state the reason [an] issue was not raised."

DISCOVERY-SOCIAL WORKER'S REPORT/HEARSAY-SPONTANEOUS STATEMENT
Mounce v. Commonwealth
37 K.L.S. 10 at 33
(September 6, 1990)

After the minor victims at Mounce's trial on sex charges had testified, the defense discovered the existence of a social worker's report regarding interviews of the minor victims. The report contained statements of the victims that were inconsistent with their testimony at trial. The trial court refused to permit the defense to introduce the report on the grounds a proper foundation had not been laid and refused to permit the defense to recall the witnesses in order to lay a foundation.

The Kentucky Supreme Court reversed. The Court first held that the defense was entitled to discovery of the report as exculpatory evidence. The Court secondly held that the trial court erred by not allowing the defendant to recall the victims to lay a foundation for introduction of the report. "[I]t was impossible for defense counsel to lay the necessary foundation at the time the prosecuting witnesses were on the stand since counsel did not know the report existed at that point."

The Court also found reversible error in the admission of hearsay testimony of the victims' mother as to statements the victims made to her 9 to 22 days after the alleged acts. The testimony failed to meet the requirement for admissibility under the "spontaneous statement" exception to the hearsay rule in view of the time lapse, the victims' lack of nervous excitement at the time they made the statements, and the fact that the statements were made in response to questioning.

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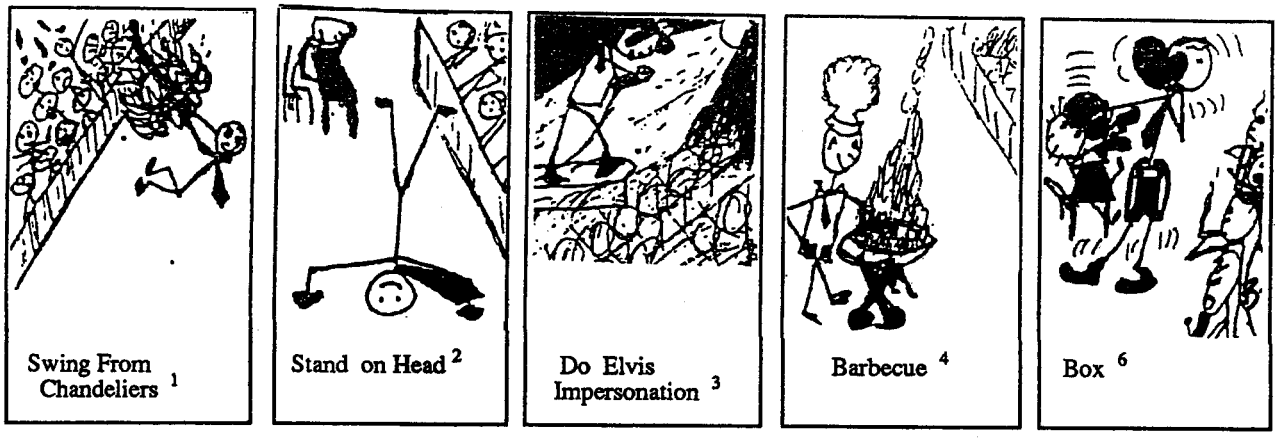
Being a prepared lawyer means approaching preparation as a creative encounter; with an intense desire to conceive, organize, integrate, and present in court a work of art.

-Justice Charles M. Leibson
Kentucky Supreme Court

THE IMPOSSIBLE CASE ANNOTATED by Bill Spicer



PLAIN VIEW

Search and Seizure Law

Ernie Lewis

The August *Advocate* featured a flurry of search and seizure cases written by the U.S. Supreme Court during the close of the October 1989 term. In what seemed exaggerated terms, I lamented the loss of the vigorous protection provided by the 4th Amendment. Since that time, Justice Brennan stepped down. Judge Souter of New Hampshire waits in the wings for confirmation. My desk is piled high with small cases, law review articles, newspaper articles, and such, all in need of some attention. This all points toward a grab bag approach to this months' column. We won't really be able to draw many conclusions for awhile. Justice Souter could moot any such conclusions anyway. So here goes. Maybe someone will find something of use here.

THE KENTUCKY COURT OF APPEALS

Commonwealth v. Cook

Commonwealth v. Cook, __Ky. App.__(August 24, 1990)(to be published) found consent in an unlikely place. One Cook, a vehicular homicide suspect with a .21% alcohol content, was asked to consent to have his blood drawn by hospital personnel. He remembered very little at a later suppression hearing, although he believed he had not consented. Although Trooper Westbrook testified that *Cook* had given oral consent, the trial court found the Commonwealth had failed to meet their burden of proving a knowing and intelligent waiver.

Relying upon *Schneckloth v. Bustamonte*, the Court of Appeals reversed, saying that a "knowing and intelligent" waiver, while required under the 5th Amendment, was not similarly required under the 4th. The trial court's suppression was reversed without so much as a wink and a nod toward deference usually given to the trial court's findings at suppression hearings. Section 10 was not addressed.

THE SIXTH CIRCUIT

United States v. Flowers

United States v. Flowers, 19 SCR 16 (May 21, 1990). The 6th Circuit took this opportunity to set out the different kinds of searches now occurring in our nation's airports: "contact initiated by a police officer without any articulable reason whatsoever," a *Terry* stop, and a probable cause arrest. Because the contact with *Flowers* here was "low-key, non-intimidating, and noncoercive," and further because consent to search his luggage was unambiguous, the Court found no 4th Amendment implications.

One interesting note about this case is the pragmatic approach taken towards officers who testify at suppression hearings. Officers, according to the court, usually testify at such hearings in such a way as to "maximize the 'suspicious' conduct of the defendant." This kind of pragmatism, if extended into more egregious situations, could bear positive fruit.

United States v. Lane

United States v. Lane, 19 SCR 16 (July 31, 1990). *Alabama v. White*, __U.S. __(June 11, 1990) has borne immediate fruit in this case. Here, housing police in Cleveland received an anonymous tip that there was an unauthorized person possibly selling drugs in one of the housing projects. When the police arrived, four men began running. Officer Barry chased *Lane* up the steps and eventually caught him, frisked him, and found a sawed-off shotgun concealed. *Lane* received 15 years on a conditional guilty plea.

The 6th Circuit approved the search, as had the district court. The Court said the slightly corroborated anonymous tip combined with the flight of the four men was sufficient to justify a stop. The intrusion was justified by the nature of the encounter and *Lane's* trying to go under his coat. This case demonstrates the extent to which *Terry* has subsumed the normal police/suspect street encounter.

United States v. Bennett

United States v. Bennett, 19 SCR 13 (6th Cir. 6/11/90). A sheriff's deputy wrote in a search warrant affidavit that an informant had told him that he had seen marijuana in the defendant's barn and house, that he had bought marijuana from *Bennett* and that he had seen paraphenalia there as well. An anonymous informant also told the officer that *Bennett* was selling drugs on a particular day. In executing the warrant, however, no drugs were found — only illegal weapons.

At a *Franks* hearing, the officer admitted his affidavit to be untrue as to what the informant had told him.

The 6th Circuit held that "*Bennett* proved by a preponderance of the evidence that Horn's material statements were false and were made either intentionally or with reckless disregard for the truth. We further hold that absent the material misstatements, the affidavit is insufficient to support a finding of probable cause."

United States v. Radka

United States v. Radka, 19 SCR 13 (6/5/90). The 6th Circuit again reversed a district judge's overruling of a motion to suppress.

Here, the police were watching a particular house that they suspected of containing drugs, when the search of one Pelkey's car revealed the presence of hashish. The police entered the house, and

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.

only then began to make efforts to obtain a warrant.

The Court agreed that a warrantless entry of the home was justifiable due to the reasonable belief that a third party was present there, half of the test for an exigent circumstance exception to the warrant requirement. However, the Court further found there was no reasonable belief that the evidence was about to be destroyed. Thus, the warrantless entry into the home was illegal, and the evidence had to be suppressed.

In what appears to be a companion case, the Court also overruled the district court in *United States v. Buchanan*, 904 F.2d 349 (6th Cir. May 25, 1990). Here, the Court found an illegal warrantless entry into the home to have spoiled the discovery of hashish found there. The Court rejected a number of fact-bound justifications for admission, including exigent circumstances, consent, and inevitable discovery.

United States v. Nabors

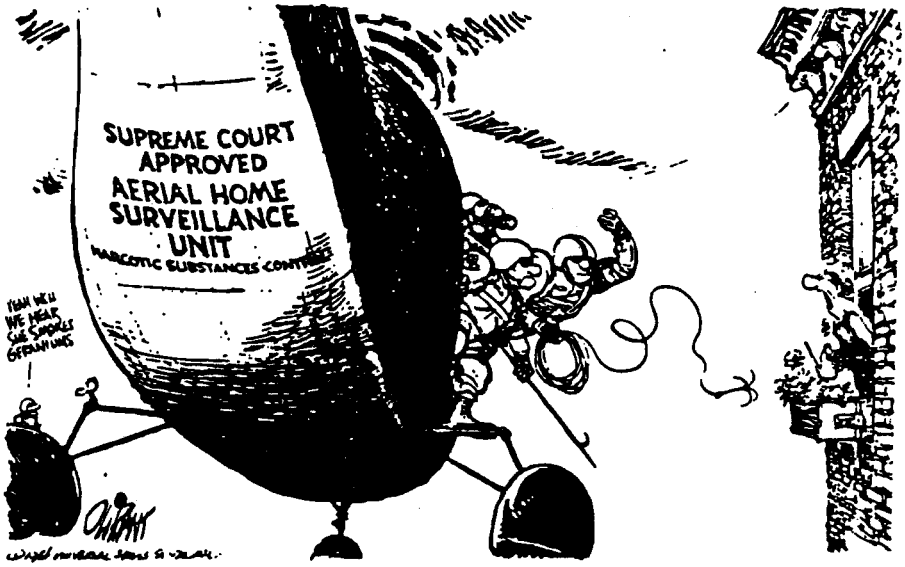
United States v. Nabors, 901 F.2d 1351 (4/27/90). The 6th Circuit found here that an arguable violation of the knock and announce rules of 18 U.S.C. 3109 would not spoil the execution of the search warrant. Here, *Nabors* was suspected of possessing a firearm, wore a bulletproof vest, and was suspected of having narcotics in his possession. Accordingly, exigent circumstances allowed for entry seconds after knocking without waiting for a refusal.

United States v. Hughes

United States v. Hughes, 901 F.2d 830 (6th Cir. 3/12/90). The 6th Circuit analyzed a standard street confrontation under the factors set out in *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981). Because the detectives observed Hughes in a "notorious" drug trafficking area, because she was observed handing something to another and accepting money in return, because she fled from the police, and finally because she denied possessing the crack found on her person at the time of her arrest, the Court found that probable cause to arrest existed.

United States v. Baranek

United States v. Baranek, 903 F.2d 1068 (6th Cir. 5/24/90). The police had a Title III wiretap order on the phone of one Borch. The phone was left off the hook, enabling the police to record a conversation between Borch and Baranek which was clearly incriminatory. Does this conversation have to be suppressed as outside the wiretap order? No, according to the Court. The 6th Circuit analogized the situation to plain view, and held that because the phone was left off the hook inadvertently, and because there was no police misconduct, that suppression would not be justifiable. Interestingly, the United States Supreme Court thereafter in *Horton v. California*, 47 Cr.L. 2135 (June 4, 1990) held that inadvertence was not an integral part of the plain view doctrine. In *Baranek* the Court stated that "an inadvertent discovery is the cornerstone of the entire doctrine," calling into question the ultimate holding of the Court.



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United States v. Bowling

United States v. Bowling, 900 F.2d 926 (6th Cir. 4/9/90). In this Kentucky case, the 6th Circuit overruled the district court but upheld the search anyway. Here, the Forest Service found marijuana, and two people there attributed it to the Bowlings. Thereafter, a warrant was sought from a state judge. At the same time, *Bowling* consented to a search of his trailer. Nothing was found in that search. The magistrate was not told about the fruitless consent search, and the warrant was issued. A more extensive search revealed incriminating evidence.

The Court held that the second search was illegal, because the first search had dissipated probable cause. "[W]here an initial fruitless consent search dissipates the probable cause that justified a warrant, new indicia of probable cause must exist to repeat a search of the same premises pursuant to the warrant."

The Court, however, held the evidence admissible because "even if a neutral magistrate were apprised of the prior fruitless consent search, probable cause for a second search would still have existed." The Court relied upon the fact that the first search was not as intricate as the second, and further that marijuana seeds were found during the second search in a car unsearched during the first search.

THE SHORT VIEW

Connecticut v. Marsala

Connecticut v. Marsala, Conn. Sup. Ct., 47 Cr.L. 1400 (8/7/90). Yet another state has rejected the good faith exception to the exclusionary rule under their state constitution. The Connecticut Supreme Court rejected in this case the basic premise of *United States v. Leon*, 468 U.S. 897 (1984), that because the exclusionary rule has as its only purpose the deterrence of unlawful police misconduct, that where such deterrence does not

occur neither should exclusion. The *Marsala* case said that the integrity of the "warrant issuing process" is more important than deterring police misconduct. The Court feared that "the good faith exception would encourage some police officers to expend less effort in establishing the necessary probable cause to search and more effort in locating a judge who might be less exacting than some others . . ." The Court was likewise concerned that both trial courts and appellate courts would take less care in upholding privacy rights if the good faith exception were to be adopted. Finally, the Court was convinced that police departments would instruct their officers more carefully in what is required to obtain search warrants without a good faith exception.

Charles Short Congratulations to Monica Townsend of the Richmond Office for winning a suppression issue which resulted in the dismissal of an indictment. Charles Short was charged with possession of a handgun by a convicted felon and carrying a concealed deadly weapon. Short was pulled over by an officer who suspected him of driving under the influence of intoxicants. After several field sobriety tests, the officer said you are free to go. Short and the officer walked back to Short's vehicle. When Short opened the door to get in, the officer saw the butt of a rifle. The officer then conducted a search of the car which revealed three guns. Ms. Townsend filed a motion to suppress based upon the illegality of the search and the judge agreed, thereby suppressing the evidence.

Idaho v. Myers, Idaho Ct. App. 47 Cr.L. 1380 (7/20/90). Detective Tudbury saw *Myers* riding his motorcycle one day and make a right turn without signaling. Knowing *Myers* had prior drug involvement, Tudbury called three other officers to assist. The traffic stop immediately turned into a drug investigation, revealing methamphetamine in a locked area of the cycle. The Idaho Court of Appeals held this to violate the 4th Amendment. They found the stop not to have been a routine traffic stop, and the questioning about drugs to have been unrelated to the reason for the stop. Because the officers could only conduct a routine stop, and went beyond that without justification, *Terry* was violated and the statements and drugs were the product of an illegal detention.

From Steve Mirkin of the Capital Trial Unit in Frankfort comes an interesting dissent from an obscure New Hampshire Supreme Court Justice back in 1985. In ***State v. Koppel***, 499 A.2d 977 (N.H. 1985), the Court held DUI roadblocks to be violative of the New Hampshire Constitution. Despite the fact that this particular roadblock resulted in 1680 stops with only 18 DUI arrests, the dissenter found the seizures reasonable. He also found the two minute stopping of each vehicle as "minimally intrusive." He declined to join the majority opinion's fear that DUI roadblocks and such raised the spectre of a "police state." He should feel right at home on the U. S. Supreme Court.

State v. Hempele, N. J. Sup. Ct. 47 Cr.L. 1356 (7/17/90). The New Jersey Supreme Court has demonstrated once again its well deserved reputation as guardian of its citizens' privacy rights. Rejecting *California v. Greenwood*, 486 U.S. 35 (1988), the Court relied upon its state constitution to mandate a warrant to search garbage bags left on the curb. The Court rejected all of the *Greenwood* majority's reasoning, stating the quaint and obviously outdated opinion that the police should have a bit more respect for reasonable expectations of privacy than do children and dogs.

State v. Becker, Iowa Sup. Ct. 47 Cr.L. 1361 (7/18/90). Two brothers were picked up for speeding. The trooper had both driver and passenger get out of the car, which led directly to the discovery of controlled substances. The Court held that while the driver could be ordered out of the car, under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the passenger could not be so required. Requiring the passenger to get out is not justifiable "unless some articulable suspicion exists concerning a violation of law by that person, or unless further interference with the passenger is required to facilitate a lawful arrest of another person or lawful search of the vehicle."

Commonwealth v. Lewin, 557 N.E. 721, Mass. Sup. Jud. Ct. 47 Cr.L. 1283 (6/12/90). A police officer is shot executing a search warrant at an apartment house. Protective sweeps of three apartments resulted in the arrest of a number of people. Thereafter, full searches of the apartment occurred, lasting three hours and resulting in the seizure of a great deal of evidence. The Massachusetts Supreme Judicial Court rejected the trial Court's finding that the officers' actions were merely protective sweeps after which all evidence was admissible as in plain view. Rather, the Court held that under *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Thompson v. Louisiana*, 469 U.S. 17 (1984) that all evidence had to be suppressed because it had been seized without a warrant and any exigencies had dissipated following the arrests of the suspects.

United States v. Jefferson, 47 Cr.L. 1287 (8th Cir. 6/21/90). One Hayden gets a friend to rent a car for him so he can take Jefferson home. They stop in a rest area to wait for a fog to lift. A state trooper pulls up behind them, asks about their safety and then asks Hayden to get in his patrol car, with her identification and the rental agreement. When she refused to allow a search of the car, the trooper obtained permission from the rental company to impound the car. An inventory search revealed 9 kilos of cocaine in two suitcases. The 8th Circuit affirmed the district court's suppression, saying a seizure had occurred at least by the time Hayden was told to get in the patrol car with her papers, and that this seizure was based on no suspicion whatsoever.

Remarkably, one Judge Bowman claimed that such a warrantless, suspicionless fishing expedition was an illustration of the "perversity of the exclusionary rule." According to this judge, the trooper should be "commended for good police work but instead he is held out as a blunderer. There has been a dramatic increase in violent crime since *Mapp v. Ohio*, 367 U.S. 643 (1961)" [hasn't there also been an increase in violent crime since breast feeding became more prevalent?] "and I believe it would be foolish to pretend that the exclusionary rule, and the zeitgeist it has created, is to blame for none of it. It is time to re-examine the merits of the exclusionary rule . . ." Now we know what causes violent crime: the "zeitgeist created by the exclusionary rule." Where do they get these guys?

Commonwealth v. Danforth, Pa. Super Ct. 47 Cr.L. 1265 (6/14/90); *Commonwealth v. Kohl*, Pa. Super Ct., 47 Cr.L. 1277 (6/18/90). The Pennsylvania law, as opposed to KRS 186.565, authorized a blood test in any case in which a wreck results in death or serious injury. KRS 186.565, on the other hand, implies consent only following an arrest, a crucial difference. Because evidence of intoxication to justify a seizure of blood was not required, the statute is unconstitutional. By requiring an arrest, on the other hand, Kentucky's statute would pass scrutiny at least under these two cases.

United States v. Cardona, 47 Cr.L. 1171 (1st Cir. 5/10/90). In this son-of-*Griffin* case, the 1st Circuit upholds the warrantless arrest of a parolee by a police officer inside the parolee's home when authorities have reasonable cause to believe he has violated his parole. *Griffin v. Wisconsin*, 483 U.S. 868 (1987), upheld a warrantless search by a probation officer accompanied by the police pursuant to written regulations by the Department of Probation and Parole. *Cardona* authorizes a police officer unaccompanied by a parole officer to arrest the parolee without a warrant inside his home. While such seems shocking, certainly it is precisely what *Griffin* contemplated.

State v. Johnson, 561 So.2d 1139 (Fla. 1990). A drug courier profile was insufficient to justify the stopping of a 30 year old male doing exactly the speed limit in an out-of-state car early in the morning on I-95. The Court noted that the profile would "permit police to stop tens of thousands of law-abiding tourists . . . The resulting intrusion upon the privacy rights of the innocent is too great for a democratic society to bear." The Court held that the government had to demonstrate a "rational inference" between the observed facts and the "criminal conduct believed to exist." Counsel should remember this case when the next "I-75 drug corridor" traffic stop resulting in cocaine case comes along.

State v. Talbot, 792 P.2d 489 (5/19/90). Turning around to avoid a DUI roadblock does not in and of itself justify stopping the motorist.

State v. Damm, 787 P.2d 1185 (3/2/90). The police stopped Norman Damm for driving a car with a broken taillight. He then demanded identification of the two passengers and ran a records check which revealed a failure to appear on one Smidl. The officer arrested Smidl, and searched Damm's car incident thereto, discovering cocaine. The Kansas Supreme Court damned the search, saying "Damm It." He could challenge his own detention while Smidl's record was being checked.

That will have to do for this month. While no conclusions can be reached from all of the above, the reality is that some courts in some states continue to swim upstream and uphold the privacy rights of their citizens. Even more heartening, many courts are looking to their state Constitutions to resist the accommodation to the needs of law enforcement which is now the major feature of the federal courts' treatment of search and seizure. The Kentucky Courts have shown some willingness to do just that. It is now up to the defense bar to encourage this trend. Don't give up.

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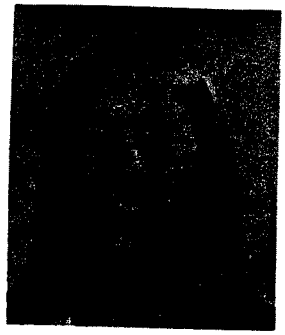
6TH CIRCUIT HIGHLIGHTS



Donna Boyce

CONFESSIONS

United States v. Hall

In *United States v. Hall*, 905 F.2d 959 (6th Cir. 1990), the Sixth Circuit held that the defendant's waiver of his right to counsel under *Miranda* was constitutionally valid even though he had been appointed counsel on an unrelated charge.

Hall was serving a sentence in the Kentucky state penitentiary at Eddyville. He escaped from there, was recaptured, returned and arraigned in August 1988. *Hall* was brought before the Lyon Circuit Court where counsel was appointed. He spoke with that attorney regarding his escape charges. In October 1988, a threatening letter signed by *Hall* was sent to President Reagan. The return address on the envelope was that of Eddyville penitentiary. Secret Service agents came to interview *Hall*. After receiving *Miranda* warnings, *Hall* admitted he had written the letter, that he meant what he had said and would kill both Reagan and Bush if he had the chance. *Hall* was subsequently convicted in federal court for mailing the threatening letter.

The Sixth Circuit distinguished *Arizona v. Roberson*, 486 U.S. 675 (1988) and its own recent opinion in *United States v. Wolf*, 879 F.2d 1320 (6th Cir. 1989) in upholding admission of *Hall's* statements to the Secret Service agents. The Court found it significant that the accused interrogated in both *Roberson* and *Wolfe* had not yet had the opportunity to speak to counsel and remained in custody. *Hall*, the Court pointed out, had spoken to his attorney on the escape charge three months before he mailed the threatening letter. Additionally, the Court stated he was not "in custody" in the traditional sense since he was serving a prior prison sentence and was probably more comfortable with the surroundings than the Secret Service agents. The court also found it noteworthy that *Hall's* interrogation took place three months after counsel had been appointed while *Roberson's* occurred within 3 days and *Wolf's* on the same day.

CONTEMPT

In Re Chandler

The Sixth Circuit held that a lawyer's failure to attend court is not a contempt in the presence of the court in *In Re Chandler*, 906 F.2d 248 (6th Cir. 1990).

Attorney *Chandler* was 95 minutes late for an appearance in federal district court. He was late because he had an appearance scheduled at the same time in state court. *Chandler* did not know of the scheduling conflict until the morning of the hearings. When he discovered the conflict, *Chandler* went to the state court hearing early and attempted to gain permission to leave in order to appear on time in federal court. The state court denied permission to leave and, thus, *Chandler* was late for the federal court hearing. When he realized he would be late, he attempted, without success, to inform the federal court of his quandary.

When *Chandler* arrived at federal court 95 minutes late, the court announced he was in contempt and fined him $95. After he was fined, *Chandler* requested and received permission to explain his lateness but the court did not reconsider its fine. Several days later, the court issued a written order imposing the fine and indicating that the court was angered not only by *Chandler's* tardiness but also by previous conduct, including the inadequacy of counsel who stood in for *Chandler* during prior absences.

The Sixth Circuit found that *Chandler's* fine was clearly for criminal contempt because it was imposed for punitive purposes. Before criminal contempt can be imposed, the accused is entitled to the protections of Fed.R.Crim.P. 42 which provides for summary criminal contempt where the proceeding is accompanied by an order reciting the relevant facts and certifying that the conduct was committed in the presence of the court.

Reviewing courts analyze the substance of a criminal contempt citation in light of 4 factors: the conduct must constitute misbehavior under 18 U.S.C. 401(1); the misbehavior must amount to an obstruction of the administration of justice; the conduct must occur in the court's presence, and there must be a form of intent to obstruct. In this case, the Sixth Circuit concluded that absence or tardiness alone cannot be contempt. The court must learn why the attorney was late or absent in order to determine if the attorney had criminal intent.

The Sixth Circuit found procedural and substantive problems with the imposition of criminal contempt in this case. The contempt was inappropriately imposed in summary fashion since the court could not have known why *Chandler* was later until he arrived. Nevertheless, the court imposed the contempt citation in a summary fashion, not after a notice and hearing. The court's post-fining decision to listen to *Chandler's* explanation for his lateness did not constitute notice and hearing.

With regard to the substantive merits, the 6th Circuit found that *Chandler's* explanation of his lateness did not warrant a finding that he possessed the requisite intent to commit criminal contempt. For criminal contempt, the defendant must have engaged in his conduct with a willfulness that implies a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation. Under the circumstances, *Chandler's* choice to be late to federal court did not represent a deliberate or intentional violation of the requirement to appear in time.

SELF-REPRESENTATION/ ACCESS TO LAW LIBRARY

United States v. Smith

In *United States v. Smith*, 907 F.2d 42 (6th Cir. 1990), the 6th Circuit held that a defendant who voluntarily waived his right to counsel as well as standby counsel was not entitled to access to a law library.

Smith argued that the interplay between *Bounds v. Smith*, 430 U.S. 817 (1977) and *Faretta v. California*, 422 U.S. 806 (1975), mandates that a criminal defendant who waives his right to counsel be given access to an adequate law library to satisfy his constitutional right of access to the courts. The Court found *Bounds* to be completely inapplicable to criminal defendants. Access to an adequate law library could never be a constitutionally acceptable substitute for providing counsel. The Court stated that *Faretta* does not address meaningful access to the courts. Indeed, *Faretta* acknowledges that a defendant's voluntary waiver of counsel in and of itself may result in a denial of meaningful access. The Court found that by knowingly and intelligently waiving his right to counsel, *Smith* also relinquished his access to a law library.

JENCKS ACT/*BRADY* VIOLATION

United States v. Tincher

The Sixth Circuit held that prosecutorial misconduct in failing to disclose information pursuant to requested production of *Jencks* Act or *Brady* material required reversal in *United States v. Tincher*, 907 F.2d 600 (6th Cir. 1990).

At trial, the defendants requested disclosure of any relevant information and documents in possession of the government under the *Jencks* Act (comparable to RCr 7.26) and *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecutor responded that he did not know of any.

Tincher argued that the grand jury testimony of Agent Gregory Campbell was improperly withheld, and that the government refused to provide a copy of the statement or to deny that *Campbell* testified before the grand jury. At the Sixth Circuit oral argument, the government admitted that *Campbell* had testified before the grand jury, that the trial prosecutor was present during that testimony, and that the *Campbell* testimony was withheld from *Tincher* and the trial court.

The Sixth Circuit concluded that it could not view the trial prosecutor's statement that he knew of no additional *Jencks* Act/*Brady* material as anything but deliberate misrepresentation. The case was reversed and remanded to the district court for a review of the grand jury testimony to determine if it related to the witness' testimony at trial.

DONNA BOYCE
Assistant Public Advocate
Frankfort

FEDERAL JUDGE SWORN

Judge Richard F. Suhrheinrich Takes Oath

JUDGE RICHARD F. SUHRHEINRICH, 54, formerly of the U.S. District Court for the Eastern District of Michigan, took his oath of office July 13, 1990, to become the newest judge of the U.S. Court of Appeals for the Sixth Circuit. **CHIEF JUDGE GILBERT S. MERRITT** presided over the swearing-in ceremony held in Cincinnati, and administered the oath of office. In addition to family and friends of Judge Suhrheinrich, Sixth Circuit Judges Nathaniel R. Jones, George Edwards and David A. Nelson took part in the ceremony. Judge Suhrheinrich said he was "deeply gratified and humbled" by the moment, and added that he hoped he could "continue the work you have all done so well over the years." He offered a special thanks to the city of Detroit, saying that "had it not been for that city and the opportunities it afforded to me, I would not be here today."

Chief Judge Gilbert S. Merritt swears in Judge Richard F. Suhrheinrich.

President George Bush signed the commission appointing Judge Suhrheinrich to the Sixth Circuit on July 10, during a break in the economic summit conference in Houston. The U.S. Senate had confirmed the appointment on June 28. Judge Suhrheinrich fills a vacancy left when Judge Albert J. Engel took Senior Status in October 1989, and is the 14th active Sixth Circuit judge. A 15th seat on the appellate bench, vacant since Judge Pierce Lively took Senior Status, remains unfilled.

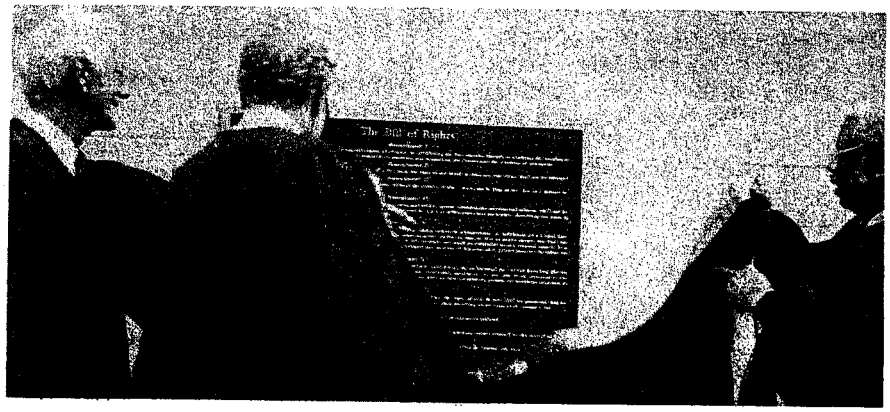
Judge Suhrheinrich, a 1984 Reagan appointee to the federal judiciary, is a graduate of the Detroit College of Law. From 1968-1984 he was a partner with Kitch, Suhrheinrich, Saurbier & Drutchas of Detroit, with an extensive medical defense and personal injury practice. His academic credentials include serving as associate professor of law at the Detroit College of Law; associate professor of law at the University of Detroit School of Law; and Master of the Bench of the American Inns of Court, a University of Detroit School of Law advocacy program.

Numbered among the professional appointments during his career are board of trustees, Detroit College of Law; board of trustees, Hutzel Hospital; executive board, Federal Bar Association; board of directors, Family Service; board of trustees, Sparrow, Inc.; board of trustees, Southwest Detroit Hospital Corp.; board of trustees, Marygrove College; board of trustees, HGH Health System; and board of directors, Michigan Hospital Mutual Insurance Co.

He has been a member of the American Bar Association, the State Bar of Michigan, the Detroit Bar Association, the Macomb County Bar Association, the Catholic Health Association of the United States, the Michigan Society of Hospital Attorneys, and the American Academy of Hospital Attorneys.

Judge Suhrheinrich has authored articles which have appeared in the *Michigan Hospitals Journal* and the *Detroit College of Law Review*, a chapter in the 1982 series *Dental Clinics of North America*, and the script for a movie sponsored by the Michigan Hospital Association Mutual Insurance Co. entitled "Legal Liability of Nursing." Judge Suhrheinrich has also lectured widely at hospitals, schools and seminars throughout Michigan and other states.

BICENTENNIAL OF THE U.S. CONSTITUTION



More than 350 guests, 17 judges of the U.S. Court of Appeals for the Sixth Circuit, and the 113th U.S. Army Band and Color Guard of Ft. Knox, Kentucky, gathered on June 13 to dedicate a bronze plaque of the U.S. *Bill of Rights*, now permanently displayed outside the west entrance of the U.S. Post Office and Courthouse in Cincinnati. The dedication ceremony is one of a series of commemorative events honoring the Bicentennial of the U.S. Constitution through 1991. Important dates recalled during this celebration include the June 21, 1788, ratification of the Constitution; the September 24, 1789, enactment of the Judiciary Act; and state ratification of the Bill of Rights by December 1791.

Coordinating the Bicentennial nationwide is a congressionally authorized committee of the Judicial Conference of the United States. The Committee is headed by Sixth Circuit Judge Damon J. Keith, who explains that the Committee's goal "is to remind Americans of the freedoms guaranteed by the Constitution and the Bill of Rights, and of the creation of a judiciary sworn to uphold those rights."

The plaque is a replication of the first 10 Amendments to the U.S. Constitution, or the Bill of Rights, first proposed in 1789 by James Madison. Those Amendments enumerate special privileges and rights reserved to all Americans.

"The Bill of Rights stands as a constitutional shield — for all of us of whatever race, creed or persuasion — and it is as vitally essential to our nation today, indeed perhaps even more so, than when those great Amendments were added to our constitution 2 centuries," observed Judge John D. Holschuh, Chief Judge of the U.S. District Court for the Southern District of Ohio and a speaker at the Sixth Circuit ceremony.

To illustrate how frequently the Bill of Rights are invoked, Judge Holschuh described "a day in the life of a district court judge." Directly or indirectly, he said, that judge would face a number of those Amendments. "Those fundamental rights — so critically important then and now — are daily being asserted by the citizens for whose protections they were enacted and enforced by the courts whose duty it is to be certain that the Bill of Rights continues to provide the protection intended by Thomas Jefferson, James Madison and other founders of our nation," he concluded.

The plaque was unveiled by Judge Gilbert S. Merritt, Chief Judge of the U.S. Court of Appeals for the Sixth Circuit; and Judge Damon J. Keith, of the Sixth Circuit. Judge Keith observed that, by 1991, 160 of these plaques will have been installed on federal courthouses across the nation.

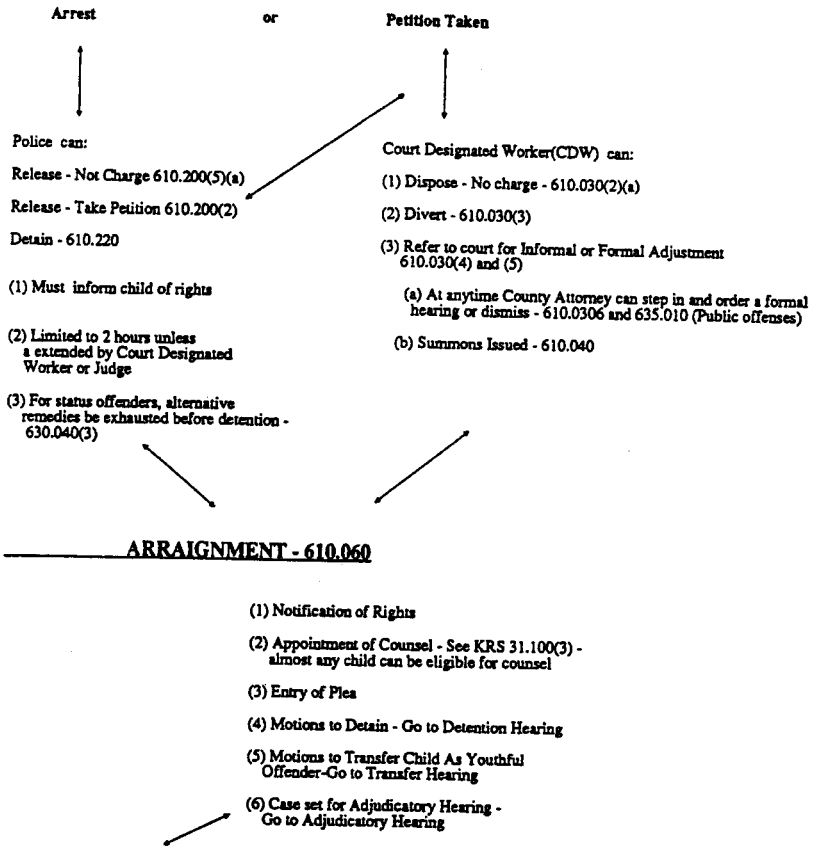
The ceremony, and a reception which followed, capped an unusual day for the Court of Appeals. Only twice each year do all the active judges of the Court meet to hear oral arguments as a group. Arguments heard before all the judges, or *en banc*, occur only in extraordinary or precedent-setting cases.

In addition to arguments in an appeal stemming from the collapse of the Butcher banking enterprise in Tennessee, the Court heard arguments in the *Kordenbrock* habeas appeal from Kentucky, the first death penalty appeal to reach the Sixth Circuit since the revival of the death penalty in 1976.

Fittingly, the *Kordenbrock* case presented to the 6th Circuit a chance to implement our Bill of Rights in a case where the defendant's life is at stake in the only way they have true meaning.

JUVENILE LAW

A SIMPLIFIED GUIDE TO THE JUVENILE COURT PROCESS: ANY KID CAN DO IT



DETENTION HEARINGS

(1) Purpose of Code specifically states that court shall show that least restrictive alternatives has been attempted or are not feasible before child removed from home. 600.010(2)(c)

A. Least restrictive alternative defined at 600.020(31) "no more harsh, hazardous or intrusive than necessary.

(2) Detention permitted for both status and public offenders. 610.280(1)

A. Status offender cannot be held more than 10 days following hearing. 630.090.

(3) Hearing must be within 24 hours or release. 610.265(2)(a) and 610.290.

(4) Detention must be in approved facility or release. 610.265

(5) Procedure of Hearing. 610.280

A. Burden of proof on Commonwealth. 610.280(2)(a)
B. Statute analogizes to preliminary hearing in adult court - therefore hearsay testimony permissible. 610.280(2)(a); RCr 3.14.(2)
C. State must prove both:

1. Probable Cause - 610.280(2)(a) - and
2. Whether detention is suitable this child, this petition.

a. Criteria: seriousness of offense, possibility child poses danger to self or community, prior record and existence of other pending charges. 610.280(2)(b).

(6) Remedy for illegal detention is by writ of habeas to circuit court. 610.290(1).

(7) Best course - Shoot for Alternative Detention - argue least restrictive alternative and produce one!

A. House arrest
B. Release with conditions - curfew, behavior contact with court or parent. 610.250.
C. Placement with relative, family friend or other responsible adult. Especially effective if parents are complaining witness. See 610.050 - Temporary change in custody.
D. Placement in emergency foster home or shelter. 610.255.

Barbara Holthaus

(8) If detention appears to be inevitable, use hearing as discovery tool to gain as much information as possible from complaining witnesses and lock in witnesses for impeachment at adjudicatory hearing.

(9) Once detention hearing held, go to Adjudicatory Hearings.

ADJUDICATORY HEARINGS

(1) All hearings should be speedy. 610.070(1)

A. Must be within ten (10) days of detention hearing for status offenders. 610.070(1)

(2) Purpose is to determine truth or falsity of petition - can be hearing or guilty plea. 610.080(1).

(3) Criminal rules apply upon motion by child. 610.080(2)

(4) Burden of proof on state to show guilt beyond reasonable doubt. 610.080(2)

(5) Unless plea bargaining is desirable counsel should strive for total formality and strict adherence to formal rules of evidence.

(6) Use motion practice same as adult court. Suppression hearings, discovery motions, expert witnesses, competency hearings (both child and witnesses) - anything relevant and appropriate.

(7) Know your case - county attorneys rarely investigate or prepare for hearings. Acquittals do happen, especially if you know more than they do.

(8) All family members, custodians and guardians share absolute right not to incriminate the child. Invoke whenever possible. 610.060(2).

(9) CDW's cannot testify against child.

635.010(4), 630.060(1).

(10) Status petitions may be converted to dependency actions in appropriate cases upon motion of counsel.

(11) If adjudicated, go to Dispositions.

DISPOSITIONS

(1) Court must use least restrictive alternative and presumption of code is to keep the child in the home. 600.010. (See also 630.120(3) for status offenders.

(2) Focus on code is treatment not punishment. 600.010 (Court must consider all appropriate local remedies. 630.120. Status offenders only).

(3) Dispositional hearings are separate from adjudicatory hearings unless child waives 610.080.

A. Child may invoke formal hearing, 610.070(2), 630.120, and rules of Criminal Procedure 610.080(2).
B. Hearings must be held within ten (10) days of adjudicatory hearing for status offenders. 630.010.

(4) Predisposition investigation and report must be prepared by suitable public or private agency (usually CHR) 610.100(2).

A. Counsel entitled to report 3 days before hearing. 610.100(1)
B. Child may waive report. 610.100(1)

(5) Dispositional Alternatives:

A. For status offenders:

1. Informal Adjustment - 610.100(3)
2. Family counselling and/or other community-based treatment. 630.120(1)
3. Informal probation with or without treatment. 630.120(1)
4. Commitment to CHR for:

a. Supervised home placement. 605.090
b. Resident treatment in non-secure public or private residential facility. 630.120(5)
c. Foster care. 630.120(5) or 605.090

B. For public offenders:

1. Informal adjustment. 610.100(3)
2. Make restitution. 635.060(1)
3. Unsupervised probation with or without conditions. 635.060(2).

a. Probation lasts until 18th birthday. 635.060(2)
b. Exception: Children more than 17 years and 6 months old can be probated for one year. *id.*

4. If child is 16 or older court may impose fine in lieu of commitment if court finds child able to pay and fine is in best interest. 635.085
5. If child is 16 or older court may impose detention for no more than 30 days. 635.060.
6. Commit to Cabinet until 18 for home supervision or residential placement. 635.060(3) and 605.090.

a. Exception: Children more than 17 years and 6 months can be committed up to one year.

7. Children eligible for transfer but not waived can be committed to CHR up until their 19th birthday. 635.090

a. Minimum commitment under this section is 6 months.
b. Children committed under this section are eligible for shock probation after 30 days.
c. Commitment under this section precludes transfer proceedings.

TRANSFER HEARINGS (AKA Certification or Waiver Hearings)

(1) Purpose - to determine if child should be treated as "public offender" in juvenile court or "youthful offender" in adult (circuit) court. 635.020.

(2) Child is eligible if currently charged with felony and:

A. Offense is Capital, Class A, or Class B felony and child is 14 or older. 635.020(2)
or
B. Offense is Class C or Class D felony and child is 16 or older and has two prior, separate felony adjudications. 635.020(3)
or
C. Child was previously convicted as Youthful Offender. 635.020(4) or
D. Child committed current offense prior to 18th birthday and child is now 18 or older. 635.020(5).

(3) Transfer Hearing Procedure. 640.010. Burden on state to show:

A. Probable cause.
B. Transferability of child via seven criteria: 640.010(2)(b)

1. Seriousness of crime.
2. Person or property crime.
3. Maturity of child as measured by environment.
4. Child's prior record.
5. Best interest of child and community.
6. Prospect of adequate protection of public.
7. Likelihood of rehabilitation through juvenile justice system.

a. Findings of fact required or transfer not valid. 640.010(c)

(4) Once transfer order entered, case goes to circuit court and grand jury and proceeds as adult felony case.

A. If child not indicted on different charge than the one sent up from juvenile court, case returned to juvenile court. 640.010(3)
B. Once indicted as youthful offender, any child eligible for bail. 640.020(1).
C. If can't make bail, children under 18 still detained in juvenile facility even though indicted. 640.020(2)

(5) Sentencing of Youthful Offenders. 640.030

A. CHR prepares the Presentencing Investigation 640.030(1), and may make recommendationas to disposition. 640.050(2).
B. Entitled to probation or conditional discharge regardless of age. 640.030.
C. Either CHR or Corrections may supervise probation, decision up to trial court. 640.050
D. Not subject to capital punishment if under 16 at time of the offense but may be sentenced to life without parole for 25 years regardless of age. 640.040(1).
E. Can't be sentenced as PFO. 640.040(2)
F. Use of firearm in offense does not affect eligibility for probation or conditional discharge. 640.040(3)
Compare to 533.060 for adults.

(6) If incarcerated, child goes to CHR treatment facility rather than penitentiary until age 18. 640.030(2)

A. Child eligible for parole by Kentucky Parole Board. 640.030(2) and 640.080.
B. If sentence not expired by 18th birthday, child returns to circuit court which may:

1. Probate or conditionally discharge rest of sentence. 640.030(2)(a).
2. Return child to CHR for completion of treatment program not to exceed an additional six (6) months.
3. Commit child to Corrections cabinet as adult for remainder of sentence.

(7) Youthful Offender's already 18 at time of sentencing can be sent to CHR facility until age 19 but must be returned to court after six (6) months for review. 640.030(3).

(8) Youthful Offenders who cannot be treated at CHR facility due to mental illness or lack of cooperation may be transferred to Corrections prior to 18th birthday upon notice and hearing. 640.070.

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EVIDENCE IN CRIMINAL CASES

YEARLY REVIEW OF EVIDENCE CASES

David Niehaus

September is the month appellate lawyers generally consider to be the beginning of the new legal year. The Supreme Court of Kentucky has returned from its summer recess and because it is the beginning of a new term, this is a good time for a review of the year's evidence cases. In this article I will review cases decided from September, 1989 until September, 1990. In this review I have included a few federal cases that have been decided during the period because they deal with important subjects that Kentucky courts have not considered.

As usual, sentencing cases played a big role in this past year's decision making. Another large area has been hearsay and confrontation. The courts dealt with a number of cases dealing with authentication, chain of custody, and admissibility of records and physical evidence. The rules on preservation were tightened up and the rules concerning evidence justifying lesser included instructions were fleshed out somewhat. There were no blockbuster cases decided in the past year, but the number of cases added considerably to the evidence law that every attorney needs to know. What follows is a subject grouping according to my own eccentric classification system that roughly parallels the steps of a criminal proceeding.

DISCOVERY

Barnett v. Commonwealth, Ky., 763 S.W.2d 119 (1988) was explained in *Milburn v. Commonwealth*, Ky., 788 S.W.2d 253 (1989) and the court restricted somewhat the operation of the *Barnett* rule. In *Milburn* the court noted that failure to provide information concerning the expert's opinion had prevented *Barnett* from preparing a case to show that one of the necessary assumptions of the expert was not so. In *Milburn*, the information on which the muzzle to victim range was determined was contained in the expert's report and therefore the trial court was not bound to exclude the expert's testimony.

ADMISSIBILITY AND RELEVANCE

There were six major decisions under this heading dealing with topics such as allegations of AIDS infection and consideration of the new police technique of crime scene videos.

Commonwealth v. Johnson, Ky.App., 777 S.W.2d 876 (1989). In this case the prosecution introduced evidence that the police in conducting the search had used rubber gloves for fear that the defendant might have AIDS. The Supreme Court, although it held the error to be harmless, noted that the possibility of prejudice against persons with AIDS was so great that unless there was a substantial basis for even mentioning the disease, it should not be done.

Turpin v. Commonwealth, Ky., 780 S.W.2d 619 (1989). The Commonwealth sought in this trial to introduce writings of the defendant made two years and one year before her husband was murdered. The court held that the evidence was not too remote and that it was admissible because it bore on her state of mind. The court noted that it is not improper to show the commission of other crimes if such evidence is relative to the issue of motive, intent, or state of mind.

Reneer v. Commonwealth, Ky., 784 S.W.2d 182 (1990). Reneer was charged with sodomy and with narcotics offenses which were tried jointly. He sought to introduce evidence that he had had prior sexual contact with the prosecuting witness, each instance of which was initiated by the prosecuting witness. The court set out the three part test of the Rape Shield statute and commented on the earlier case of *Bixler v. Commonwealth*, Ky.App., 712 S.W.2d 366 (1986) to the effect that admissibility under rape shield "relates both to the question of consent by the victim and the question of the credibility of the victim and defendant as witnesses." The court then went on to assure the reader that the key facts necessary to admissibility were not present in the record of the case. Justice Leibson concurred in the result on the rape shield question but pointed out that the trial court had no discretion to refuse the defendant an opportunity to introduce relevant evidence of recent sexual activity with the prosecuting witness on the grounds that the trial judge questioned the credibility of such evidence. *Reneer* has the potential to be a real trouble maker because the Supreme Court has, perhaps unintentionally, given the trial judge in sex offense cases the option of excluding evidence because he does not believe what the defendant is saying.

Howard v. Commonwealth, Ky.App. 787 S.W.2d 264 (1989). *Howard* presents a reverse silver platter type of case. Before the application of the 4th Amendment exclusionary rule to the states in the early 1960's, federal agents were allowed to use illegally seized evidence obtained by state officials (who were not bound by the 4th Amendment) on what was called a "silver platter." In *Howard*, the federal agents obtained a wiretap after complying with all federal requirements. They offered it to state agents for introduction at Howard's trial. The court held that "absent collusion between the state and federal authorities to circumvent the state statute prohibiting wiretaps" a federal wiretap can be admitted at a state criminal proceeding.

Milburn v. Commonwealth, Ky., 788 S.W.2d 253 (1989). *Milburn* presents the question of the rules of admissibility of "crime scene videos" which are becoming more prevalent. Police in Jefferson County, and presumably elsewhere, are now videotaping crime scenes as part of their investigation. Milburn objected to the admission of the crime scene video because of the prominence of a large pool of blood and the commentary of the investigating police officer. The Supreme Court held that the admissibility of videotape evidence is to be determined under the standards for admissibility of photographs, *i.e.*, courts are to follow the "liberal approach" set out in *Gall v. Commonwealth* and other cases.

Campbell v. Commonwealth, Ky., 788 S.W.2d 260 (1990). In this case the Supreme Court confirmed its previous rule that in murder cases a certain amount of information concerning the deceased "is relevant to understanding the nature of the crime." The important consideration is whether the evidence would tend to make the jury decide the case "because of the identity of the victim." Because this seemed unlikely in this case, the court found no error.

PRESERVATION OF ERROR AND REQUEST FOR RELIEF

As the following cases show, the courts continue to make it more difficult to preserve issues for appeal. In these cases a fairly large amount of wrongdoing was insulated from review because of strict application of preservation rules.

West v. Commonwealth, Ky., 780 S.W.2d 600 (1989). In this case, the prosecutor made an outrageous closing argument. The defense objected and requested admonitions which were given. The court pointedly noted that the defendant did not move for mistrial. Relying on RCr 9.22, the court held that a party must timely inform the court of the error to which he objects and the relief which he considers necessary, or the issue "may not be raised on appeal." Even RCr 10.26 may not avail because the court notes that even a constitutional right can be waived. The court went through a number of cases and noted that even in capital (i.e. death) cases objections must be made or else the court will not review except for errors that go to the very heart of a fair trial. In this case admonitions were given and because the defendant failed to request any further relief, the court concluded that defendant must have believed the admonitions were sufficient to correct the situation.

Turpin v. Commonwealth, Ky., 780 S.W.2d 619 (1989). In this case the Supreme Court again pointed out that even constitutional issues can be waived if they are not presented to the trial judge. *Turpin* did not object to improper questioning of a witness and also asked the same sort of questions. Under these circumstances the court found waiver of any complaint.

Brown v. Commonwealth, Ky., 789 S.W.2d 748 (1990). In *Brown*, a trial judge threatened to revoke a defendant's bond pending new trial as a result of the defendant's motion for mistrial. The defendant turned down the mistrial motion because he did not want to go to jail. The Supreme Court held that the trial judge could not change the conditions of release without complying with RCr 4.40. Thus, the Commonwealth's argument that the defendant had turned down a mistrial was rejected.

Templeman v. Commonwealth, Ky., 785 S.W.2d 259 (1990). A defendant's complaint on appeal that improper questions denied him a fair trial was denied because defense counsel did not ask for the appropriate relief. Each time the prosecutor asked objectionable questions, defense counsel objected, and the trial court sustained. The questions were not answered and the court therefore held that defendant could not seek any further relief on appeal. Where defense counsel initially won an objection but did not object to a rephrased version of the question, the Supreme Court said that the issue was not properly preserved for appeal and refused to consider the issue.

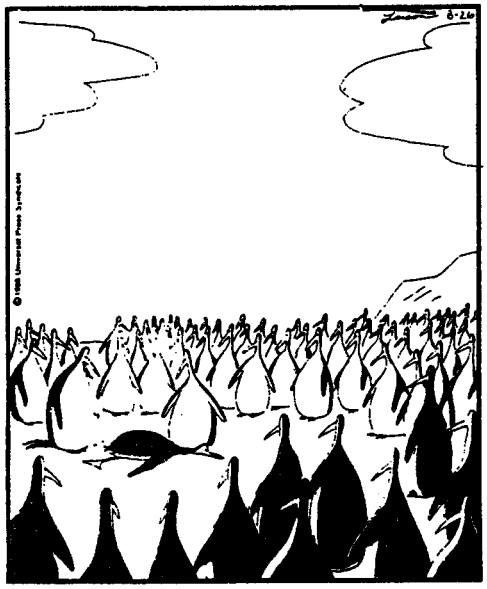
Campbell v. Commonwealth, Ky., 788 S.W.2d 260 (1990). Here, counsel objected and obtained an admonition concerning improper use of a statement taken after defendant had invoked the right to silence. However, because no motion for mistrial was made, the Supreme Court stated that this failure to ask for further relief meant that "appellant received all that he asked and cannot now complain.:

DIRECTED VERDICT/ INSTRUCTIONS

West v. Commonwealth, Ky., 780 S.W.2d 600 (1989). It is hard to tell whether the Supreme Court means what the language says in this opinion. In discussing directed verdict and self-defense, the court noted that a defendant is rarely entitled to a directed verdict in a self-defense case. The court noted that the jury may not believe the evidence concerning self-defense and therefore could conclude that the defendant is guilty. Then the court noted that while the Commonwealth always bears the burden of proving every element of a crime, "a defendant relying upon self-defense bears the risk that the jury will not be persuaded of his version of the facts." This appears to be a misstatement of the law. Under KRS 500.070 the law is that when the defendant introduces enough evidence to raise self-defense the Commonwealth must disprove its existence. Lawyers should beware of prosecutors or judges trying to read into this unclear statement some sort of change in the law. The Commonwealth always has to disprove self-defense, the defendant only has to introduce evidence raising it. While the court's statement is in one sense true, (the jury probably does expect the defendant to prove self-defense), it is an incorrect statement of law and one that can cause trouble.

Logan v. Commonwealth, Ky.App., 785 S.W.2d 497 (1989). This case presents a good statement of the rules concerning lesser included offenses. In *Logan* the Court of Appeals noted that where the defendant's theory is that his actions amount to a lesser crime than the one contained in the indictment, this "essentially" is a defense to the higher charge and therefore if there is any substantial evidence to support this theory the defen-

THE FAR SIDE *by Gary Larson*



"He's dead, all right — Beaked in the back... and you know this won't be easy to solve."

dant is entitled to his requested instruction on the lesser offense "rather than the jury being left with no alternative except to convict or acquit of the principal charges." However, in *Logan*, the court held that the evidence did not support the requested instruction.

Clayton v. Commonwealth, Ky., 786 S.W.2d 866 (1990). In *Clayton*, a witness declined to testify relying on his 5th Amendment right. Clayton wanted an instruction to the jury concerning the unavailability of the witness. Although the court did not say what instruction the defendant tendered, it did say that the trial court might have, under a case styled *Bowles v. U.S.*, 439 F.2d 536 (D.C. Cir., 1970), given an instruction stating that the witness was unavailable for either side to call. However, because the defendant did not request this instruction or make specific objection to failure to give one, the court considered the unpreserved.

Howard v. Commonwealth, Ky.App., 787 S.W.2d 264 (1989). The police were unable to seize any of the controlled substance that they claimed that Howard was selling. The court noted that in this case the Commonwealth had to prove not only the quantity to demonstrate possession for purpose of sale, it also had to prove that the substance was a controlled substance. The Commonwealth had only circumstantial evidence to do this. The court reviewed the evidence and stated that it would not be clearly unreasonable for the jury to find the defendant guilty beyond a reasonable doubt although it would have been desirable for the Commonwealth to have a sample of the marijuana. The court noted that the defendant had offered to sell a substance he had with him and that he claimed that it was marijuana. The person to which it was offered examined it and believed that it was marijuana. For these reasons, the court held the evidence was sufficient.

Brown v. Commonwealth, Ky., 789 S.W.2d 748 (1990). The *Sawhill* standard was examined in this case. The court interpreted *Sawhill* to mean that a reviewing court must review a record to see if it contains sufficient probative evidence which, when viewed in its totality and in a light most favorable to the Commonwealth, would permit a jury reasonably to return a verdict of guilt. Examining the record as a whole, the court believed that it was not clearly unreasonable for the jury to find the defendant guilty and therefore upheld the conviction.

EXPERT TESTIMONY

Mitchell v. Commonwealth, Ky., 777 S.W.2d 930 (1989). This is the most recent in a series of cases dealing with child sexual abuse accommodation syndrome. The court held that expert testimony concerning this subject should not be admitted because there is no medical testimony that the syndrome is a generally accepted concept. The court also held that the testimony in this case had no substantial relevance to the issue of the appellant's guilt or innocence because the syndrome is not "like a fingerprint in that it can clearly identify the perpetrator of a crime."

Commonwealth v. Craig, Ky., 783 S.W.2d 387 (1990). This case deals with battered spouse syndrome. Relying on Section 6.10 of Lawson's Evidence Handbook the court said that battered wife syndrome need not be testified to by expert witnesses and that the battered wife syndrome is not a mental condition. The court explicitly overruled *Commonwealth v. Rose*, Ky., 725 S.W.2d 588 (1987). The witness in this case, a social worker with a master's degree in counseling who qualified to testify concerning the characteristics and consequences of the battered wife syndrome should be allowed on retrial to give her opinion as to whether the defendant was suffering from the syndrome at the time of the shooting. Of course, she would not be permitted to say whether the shooting was the result of the syndrome.

Leibson and Stephens dissented saying that battered wife syndrome is a mental condition but that it has no specific medical significance. If that is so, Leibson wrote, it is profile testimony which should not be admitted for any purpose. Leibson argued that *Rose* should be upheld. Vance wrote a dissent, joined by Stephens, in which he pointed out that there was no real definition of battered spouse syndrome in the record. Because battered spouse syndrome is a condition of mind Vance believed it was essential that only those qualified to diagnose mental conditions be permitted to testify concerning it.

Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990). In this case the court decided to adopt FRE 803(4) which expands the hearsay exception for statements for purposes of medical diagnosis or treatment. The court noted that the federal rules place emphasis on whether the statement is the kind of information on which the expert customarily relies in the practice of his profession. Therefore, as long as the statements made by an individual were relied on by the physician in formulating his opinion, these statements are admissible. Of course, in each instance the trial court must also decide the question of relevancy.

RECORDS AND AUTHENTICATION

This past year resulted in a number of case dealing with admissibility of medical records and authentication of types of physical evidence not previously dealt with. It is interesting that in one case the Court of Appeals left some doubt as to whether it was simply stating a common law rule or whether it was adopting one of the federal rules of evidence.

Young v. J. B. Hunt, Inc., Ky., 781 S.W.2d 503 (1989). This case involved KRS 422.300. The Supreme Court stated that the statute is "merely a convenient device for authenticating medical records. It does not assure their admissibility or abrogate other rules of evidence relating to the admission of documentary evidence." The court went on in the case to say that the balancing test described by Lawson and also set out at FRE 403 must be applied in each instance where medical records are sought to be introduced. The court focused primarily on the calculus of probative value/prejudicial potential and held that in this case that the trial court did not abuse its discretion in admitting the records.

Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990). In this case the Supreme Court explicitly adopted FRE 803(4) which makes statements to physicians for purposes of medical diagnosis or treatment including history symptoms, pain sensation, cause or general character of the injuries not hearsay. The court noted that under this rule children may testify about sexual acts performed upon them. However, the court cautioned that on retrial the trial judge had to make a determination as to whether prejudicial effect outweighed the probative value of such statements. This was done because the court noted that although FRE 803(4) would allow admission of statements not necessarily made for purposes of treatment, these statements have "less inherent reliability than evidence admitted under the traditional common law standard" which limited admissibility only to statements for treatment. The court again cautioned that the statements sought to be introduced must be relevant to an issue at trial. The court also dealt with business records of a home for abused children and noted that while the business records exception would allow admission, the social worker's opinions and conclusions were not expert testimony and therefore should not be admitted.

Reneer v. Commonwealth, Ky., 784 S.W.2d 182 (1990. *Reneer* raised the issue of chain of custody because the officer who had inventoried the items in the property room at the police department had died before trial. However, the court reviewed the circumstances showing that the evidence was checked into the unit by the deceased officer but was taken from that unit the next month for testing. Because there was "no showing that anyone could have a reason or opportunity to tamper with the evidence" the court found that the proof of chain was sufficient.

Howard v. Commonwealth, Ky.App., 787 S.W.2d 264 (1989). In this case the court was presented with a question of the sufficiency of authentication of an audio tape. The court ruled that a party need not produce an "expert" witness to identify a voice on a tape but simply needed someone who could testify that he had heard the voice before and could identify it. The court noted that under Rule 901(b)(5) of the federal rules this would be sufficient authentication. The court did not state that it was adopting Rule 901, but it is becoming clear that the courts are going to look to the federal rules in answering evidence questions.

Campbell v. Commonwealth, Ky., 788 S.W.2d 260 (1990). The court noted in this case that it had never specifically considered the admissibility of messages recorded on an answering machine. However, the court noted that these could be analogized to audio tape and cited *Commonwealth v. Brinkley*, Ky., 362 S.W.2d 494 (1962) as the example for foundation showing in audio tape cases. As long as the proponent can convince the court that the tape is what it purports to be, the court said, the tape can be admitted.

Smith v. Commonwealth, Ky., 788 S.W.2d 266 (1990). This case was another case dealing with medical records. Here the defendant wanted to introduce medical records showing the mental instability of a witness. Although the court agreed that the records were relevant, the court held that because defendant did not comply with the notice requirement of KRS 422.305, the trial court did not err by excluding the records.

PRIVILEGES

Dean v. Commonwealth, Ky., 777 S.W.2d 900 (1989). Dean's wife was called to testify before the Grand Jury. She asserted her marital privilege under KRS 421.210(1). However, the prosecutor told her that she would not be questioned about confidential communications. On this assurance, she testified, but testified "in full". At trial Dean tried to suppress this testimony but the trial court deferred the ruling. His wife testified "in full" again. The court noted that the prosecutor had confused defendant's wife over the distinction between the testimonial privilege and confidential communications. The court did not answer the question of whether the testimony should have been suppressed. However, the court did say that the prosecutor, either through ignorance or design, came close to violating the Rules of Criminal Procedure. In the future when a witness asserts a privilege, the prosecutor is required by RCr 5.14 to advise the Grand Jury so that the foreman of the Grand Jury can report the refusal of the witness to testify to a circuit court. This is preferable to a "stand off of wits" with the prosecutor which is what happened in this case.

Brown v. Commonwealth, Ky., 780 S.W.2d 627 (1989). The defendant in this case wanted to suppress statements made to police before she requested an attorney. The trial judge suppressed only that part made after the request for the attorney. The police officer testified at the suppression hearing that Brown was given her *Miranda* rights at the beginning of the interrogation. Therefore it was not error to introduce statements made before the request for counsel.

Smith v. Commonwealth, Ky., 788 S.W.2d 266 (1990). This case demonstrates the difference between the two forms of the spousal privilege. In this case defendant's wife was not married to him at the time of the shooting, but had married him by the time of trial She was allowed to assert the testimonial privilege at trial, but the court stated that her statement inculpating her husband made to a police dispatcher at the time of the killing was admissible as an excited utterance. In this case the court reviewed the considerations for excited utterance and cautioned that the criteria stated in the various cases were not rigid requirements but simply guidelines.

HEARSAY/CONFRONTATION

As usual, there were several cases dealing with hearsay and confrontation in the past year. Included in this section are three federal cases which may prove useful.

Dean v. Commonwealth, Ky., 777 S.W.2d 900 (1989). The personal nature of the right to confrontation set out in Section 11 of the Constitution of Kentucky and supplemented by RCr 8.28 was shown in this case. In this case the Commonwealth wanted to take a deposition. Counsel waived the right to appeal, but the court held that this was not good enough. Section 11 requires a waiver by the defendant which is clear enough to "indicate a conscious intent".

Muse v. Commonwealth, Ky.App., 779 S.W.2d 229 (1989). The question here was the admissibility of a prior inconsistent videotape statement of a minor sex abuse victim. The court noted that under *Jett* inconsistent statements could be introduced not only as impeachment but also as substantive evidence. The court noted that the persons present at the time of the videotape statement could have testified under *Jett*, and that it was preferable to have a videotape of the statement since it would not be subject to the vagaries of witness memories. While it is true that KRS 421.350(2), which would have allowed the statement in, has been held unconstitutional, the court held that the circuit judge had sufficient information on which to allow the evidence under *Jett*.

Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1989). This case presents an instance of waiver of the right to confront. In this case, a witness was to be deposed. Carter was not incarcerated. Carter's attorney appeared and advised that he had written Carter telling him of the deposition and telling him that he might wish to be present. The attorney said that he could not properly represent Carter without his presence, and therefore did not stay. Under these circumstances, where Carter made no effort to show why he had been prevented from appearing at the deposition, the court held that waiver occurred.

When the Commonwealth wanted to use the deposition, Carter objected saying that the Commonwealth had not made a good faith effort to procure the attendance of the witness. For the deposition of the Commonwealth had obtained the witness under KRS 421.250 but it did not attempt to locate the witness at trial time because the Commonwealth did not know where he was. The court stated that the question of showing of unavailability is within the discretion of the trial court.

This case also comments on investigative hearsay and again quoted *Sanborn* to the effect that hearsay is not less hearsay because a police officer is testifying. However, the court noted that background information supplied to a police officer may be admissible under the "verbal act doctrine" in circumstances where it has a "proper non-hearsay use" to the police officer. Otherwise, the court said, the police officer may not report hearsay.

Fitch v. Burns, Ky., 782 S.W.2d 618 (1989). This is another case in which the

Supreme Court of Kentucky has rejected the residual hearsay exceptions found in FRE 803(24) and FRE 804(b)(5). However, I think that in the appropriate case the courts will be required to accept the residual exception in 804(b)(5) which has been adopted by the General Assembly as its part of the new evidence code. The defendant has the right to put on a defense and the courts will be hard pressed to insist that the rule should not apply since one branch of the government of Kentucky has already approved it.

U.S. v. Martin, 897 F.2d 1368 (6th Cir. 1990). This case provides a more complete discussion of investigative hearsay under the federal rules. In this case the court stated that the hearsay rule does not apply to statements that are offered merely to show that they were made or that they had some effect on the hearer. The court also noted that statements offered for "the limited purpose of explaining why a government investigation was undertaken" have been admitted. However, an admonition concerning the use of the evidence is necessary.

Templeman v. Commonwealth, Ky., 785 S.W.2d 259 (1990). The ease with which the court will find a waiver of confrontation is demonstrated in this case. When a police officer started telling what another witness had told him. Defense counsel objected. The prosecutor then asked if what the witness told him confirmed what another detective had told him. Counsel did not object. The court ruled that this issue was unpreserved and did not review on the merits.

Idaho v. Wright, 110 S.Ct. 3139 (1990). This is a child hearsay case. The Supreme Court held that statements under the residual hearsay exception were not firmly rooted hearsay exceptions and therefore child out-of-court statements had to be shown to have particularized guarantees of trustworthiness. The court rejected a defense claim that child statements are presumptively unreliable, but found on the circumstances of the case that there was nothing to show that the statements were trustworthy.

Maryland v. Craig, 110 S.Ct. 3157 (1990). This is a second child hearsay case which notes that the central concern of confrontation is to insure reliability of evidence by subjecting it to rigorous adversary testing before the trier of fact. The court held that face-to-face confrontation was not necessary under the federal constitution and therefore the closed circuit TV testimony conducted contemporaneously with the trial was satisfactory. The court noted that the determination to use this method had to be "case specific" and that the state bore the burden of proving danger to the child's emotional or physical well-being.

TIS/PFO/SENTENCING

Hill v. Commonwealth, Ky.App., 779 S.W.2d 230 (1989). The question here is whether district court computer printouts were admissible to prove prior misdemeanor convictions after district court jackets, which are the original records, were destroyed. The court held that the best evidence rule did not prohibit introduction because the computer records were the best (and apparently only) record of the prior convictions. Because the risk of error in presentation of the evidence was slight, the rule was not applicable.

Boone v. Commonwealth, Ky., 780 S.W.2d 615 (1989). The Supreme Court of Kentucky took only two columns of the reporter to point out that the 6th and 14th Amendments and Section 11 of the Constitution of Kentucky require the courts to allow the defendant to introduce evidence of parole eligibility in a TIS case if the Commonwealth does not. The court noted that if the objective of TIS is to be achieved, either party should be permitted to introduce evidence of minimum parole eligibility. The court specifically extended the statute to permit the defendant to do so.

Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1989). Carter maintained that the trial court denied him due process by telling the jury the sentencing range for the offenses of possession and trafficking. The jury had convicted Carter of both possession and trafficking. When the court instructed them concerning the need to pick one or the other, the judge said that trafficking carried a stiffer penalty. The court agreed with Carter that telling the jury sentencing information during the guilt/innocence phase of the trial violated the bifurcated trial scheme set out in KRS 532.055.

Templeman v. Commonwealth, Ky., 785 S.W.2d 259 (1990). In this case the court noted the distinction between PFO and the capital sentencing phase. While KRS 532.080 defines a prior conviction for purposes of that hearing, 532.025 does not do so. Therefore, the court interpreted the statute to require the commonly understood meaning of the phrase. The court noted that it was appropriate for the jury to consider any of Templeman's convictions "which were final at the time of sentencing" as one of the circumstances bearing on the appropriateness of death.

Logan v. Commonwealth, Ky.App., 785 S.W.2d 497 (1989). In this case the Court of Appeals was required to deal with the question of what a "prior" conviction was for TIS purposes. Because the statute contains no definition of the phrase, the court determined that because both the offense and the conviction used as the prior occurred before the trial in the present case, (but after commission of the offense being tried), it could be used. It is important to realize that this issue is also governed by the Supreme Court ruling in *Melson v. Commonwealth*, Ky., 772 S.W.2d 631 (1989) which prohibits use of prior convictions until the appeal of right guaranteed by Section 115 of the Constitution is either waived or completed.

U.S. v. Robinson, 898 F.2d 1111 (6th Cir. 1990). In this case the 6th Circuit held that a court may consider hearsay evidence in determining a sentence, but that the accused must be given an opportunity to refute it, and the evidence "must bear some minimal indicia of reliability" in order to protect the defendant's right to due process. The defendant must be given an opportunity to show that the evidence is materially false or unreliable and, on appeal, the defendant must show that the evidence was actually used in determining sentence.

Commonwealth v. Crawford., 789 S.W.2d 799 (1990). This was a certification in which the court had to answer the question of what to do when there was no transcript of guilty plea proceedings in the record of a prior conviction. In this case, Crawford executed a plea of guilty form which contained advice concerning trial rights. The trial judge held the piece of paper up before Crawford and asked him if he had signed the paper and if he had understood it. Crawford answered yes to both questions. The Supreme Court held that under all circumstances the record was sufficient to show the entry of a valid plea.

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Procedures, Practices, and Issues of Interest

Mike Williams

SENTENCING PHASE EVIDENCE
Boone v. Commonwealth

Ever since the Kentucky General Assembly enacted KRS 532.055 (Truth In Sentencing) it seems that lawyers and judges have had to tread with extreme caution in exactly what evidence may be presented at the penalty phases of trials. The prosecutors have open season on our clients as they relish in presenting all the priors, some of which may sound heinous to the sentencing jury, and, after they have told the jury your client's past, they then tell the panel just how "short" of a time it *will be* before the dastardly fellow is "back out on the streets." (Minimum parole eligibility).

Since *Commonwealth v. Reneer*, Ky., 734 S.W.2d 794 (1987) and through *Offutt v. Commonwealth*, Ky., 37 KLS 5 (5/2/90) (petition for rehearing pending), the decisions have been anything but predictable. After all, how predictable can the case law be when the Court has agreed that the Truth In Sentencing statute is unconstitutional, but allows its use to continue? *Reneer, supra.*

Until just recently trial attorneys did not have any case law support for creating issues relative to KRS 532.055. Now, however, we have ***Boone v. Commonwealth***, Ky., 780 S.W.2d 615 (1984). In *Boone* the Supreme Court decided that portion of the statute permitting only the Commonwealth to present evidence of minimum parole eligibility was unconstitutional. This provision was a violation of defendant's 6th and 14th due process rights, and it violated Section 11 of the Kentucky Constitution.

The Court espoused the need for "enlightenment of the jury" just as it did in *Reneer*. Quoting from *Reneer*, the opinion stated: *"... to place this phase of the enlightenment solely in the hands of the prosecutor is a denial of due process...."* (at 616). The "enlightenment" refers to the jury's being informed about the "...defendant's past criminal record *or other matters that might be pertinent to consider in he assessment of an appropriate penalty...."* *Boone, supra.*, at 616. (emphasis added).

The criminal trial lawyer reviewing KRS 532.055 will find that there are 4 general categories of evidence, the presentation of which the General Assembly gave exclusive discretion to the prosecutors of this Commonwealth. They include minimum parole eligibility, the nature of the prior offenses, the date of commission of priors, and the release dates from confinement, and the maximum expiration of sentences as determined by the division of probation and parole. The defendant, on the other hand, was limited to merely negating the Commonwealth's proof or proving "no significant history of criminal activity," whatever that means.

Does the *Boone* decision mean that a defense lawyer can put *real* mitigation evidence on in the penalty phase? Can he use witnesses to explain to the jury that the defendant was released prior to the maximum expiration of his sentence because he was a model prisoner? Can we now demonstrate that our client is a productive member of the community, but for this trouble in which he now finds himself? Is this type of evidence, as well as hundreds of other examples of possible mitigation evidence permissible? No one knows yet, but we should preserve this as much as possible by proffering evidence by avowal. We might attempt to get rulings from the trial judge *before* the trial, and then be ready with either live witnesses and/or affidavits depending upon how the judge limits you in the presentation of the evidence in the event you must put it in by avowal.

Is is worth the effort? Well, the answer to that would depend upon whether the individual lawyer knows in all cases exactly what a juror might consider as significant to impose a lower sentence, and the fact is, we don't know. At least you don't have to sit passively while the prosecutor paints a picture of your client as being another Charles Manson!

Gary Johnson tells me that he has recently taken a similar issue to our appellate courts in *Boone v. Commonwealth II and Williams v. Commonwealth.* He would be glad to talk to you about it if you call him.

A DIRECT HIT ON THE CONFRONTATION CLAUSE
Taylor v. Commonwealth

On September 6, 1990, the Ky. Supreme Court in ***Taylor v. Commonwealth,*** 37 K.L.S. 10 at 37 (9/12/90), dealt a severe blow to our client's right of confrontation and, at the same time, neutralized the protections of *Bruton v. United States*, 391 U.S. 123 (1968). Taylor was convicted *and sentenced to death* after he and a codefendant purportedly kidnapped, robbed, and killed two high school students who were lost on their way to an athletic event. The codefendant, Wade, gave detailed confession to the police; however, he asserted his 5th Amendment right not to testify at Taylor's trial. Wade had been tried first, but his appeal was pending.

Holding that codefendant's confessions were only "presumptively unreliable", and since Wade's statements were corroborated in every material detail, the Court determined these statements were "statements against (his) penal interest". FRE 804(b)(3). The trial court had found that Wade was "unavailable" pursuant to FRE 804(1) and *Crawley v. Commonwealth*, Ky., 568 S.W.2d 927 (1978). The statements were allowed to be read to the jury (after editing out references to other criminal activity), and Taylor could not cross examine.

This case has serious implications for those of us who practice criminal law, and whose clients quite often prefer to commit criminal acts while in the company of others. The trial court may find the "snitch" in your case to be "trustworthy" and I'm sure those in the criminal law arena will be surprised to learn that snitches are "trustworthy"! After all, who is more reliable than a snitch who has been promised a deal? Isn't he trustworthy?

Isn't his statement so reliable that your client should not even have a chance to cross examine him? In any event, after reading the decision, consider the following:

1. The defense attorney will have to aggressively pursue discovery of any and all such witnesses and statements.
2. Discovery of exactly what "penal interest" was involved when a person snitches on your client. The *Taylor* decision doesn't clarify just how substantial that penal interest must be.
3. If the out of court statement is admitted, then can you present evidence that the out of court declarant made inconsistent statements? You will need to preserve this issue.
4. We must move for evidentiary hearings to determine whether all the elements considered in *Taylor* are present in our own cases.
5. What is the "best evidence" of the out of court declaration against penal interest? Is it the word of the police officer doing the questioning? Is it the video and/or audio tape? Is it a transcript (if your motion to preserve any and all recordings comes too late - assuming it would be good strategy to do so)? If you have more than two codefendants that have given conflicting statements, then can we get the out of court statements of others who have given confessions, but which may be exculpatory as to your client?
6. How much corroboration is needed to satisfy *Taylor*?
7. Should we demand that the court permit a pretrial cross examination of the non-testifying codefendant to determine what the real circumstances surrounding his "cooperation" might have been? If so, could the Court give some sort of "testimonial immunity" for such a hearing if the snitch "takes the Fifth"?
8. At trial, you may be able to explore the true circumstances of the "declaration" by arguing the "Anti-Sweating" statute found in KRS 422.110.

The above is by no means an exhaustive listing of potential issues. I am sure you can think of others. Please let me know if you do. Hopefully this case will be accepted by the U.S. Supreme Court to be eventually overturned. Until then, trial lawyers must protect their records by objecting to the use of these statements under the 6th and 14th Amendments to the U.S. Constitution, and Section 11 of the Kentucky Constitution. If a death penalty case, then include the 5th, 6th, 8th and 14th Amendments to the United States Constitution as well as Sections 2, 7, 11, and 17 of the Kentucky Constitution.

If anyone encounters this in their cases, please contact me here in Frankfort. We will be rounding up various motions which relate to the issues created by this *Taylor* decision.

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HOORAY FOR *HICKS* .

A PROCEDURE FOR REVIEW OF IAC CLAIMS OF APPELLATE COUNSEL

Appellate attorney's finally get their chance to meet the allegation of ineffective assistance of counsel under a recent decision by the Kentucky Supreme Court. In *Hicks v. Comm.*, File No. 89-SC-213-TG, rendered September 6, 1990, Justice Vance, writing for a unanimous court, held that a petition in the original appellate court by the convicted citizen will invoke a hearing, conducted by a special commissioner, on whether the original counsel on appeal was effective in the first round. It's a whole new procedure, sort of an "11.42 plus" or something, but one thing is clear: the performance of counsel on appeal is going to be more closely scrutinized than ever before. The appellate courts will now look at whether counsel on appeal's performance was so ineffective "...that critical issues [were] never ... presented or [were] so poorly presented that proper consideration of those issues could not be given." *Hicks*, at 4.

We've enjoyed a false sense of security about our performance as appellate counsel, false because our security was based not on self confidence that we were always competent, but false because it was based on the knowledge that there was no clearly defined procedure for review of our performance. Not any more.

Hicks will flood the appellate courts with petitions for review, as the trial courts have been flooded with challenges on the competency of trial counsel. And that is as it should be. Any decision that encourages any of us to evaluate constantly the quality of our performance for our clients, or even encourages that evaluation by others, keeps us honest and on our toes.

Admittedly, there are parts of *Hicks* that are problematic. The opinion is not final, and questions abound about how this new procedure will work. Will the hearing permit testimony of other witnesses, or will only the testimony of the original appellate attorney be considered? The opinion suggests the latter. Why may sanctions be imposed for IAC on appeal, when no sanctions are suggested anywhere for a prosecutor who provokes a reversal by prosecutorial misconduct? Sounds a little one sided, doesn't it? A one year statute of limitation from the time of final affirmation of the first appeal is imposed, and this may prove unworkable. More importantly, the standard for review of these claims is even weaker than the standard for review imposed on trial counsels in *Strickland v. Washington.*

Despite these misgivings and ambiguities, some of which may be resolved by the Court in the petition for reconsideration filed by both sides in the case, *Hicks* is good for us all for at least two reasons: clients will be better able to challenge appellate counsel's performance, and the process of evaluating the performance of appellate and trial counsel is equalized.

In the past, there has been an unspoken schism between trial and appellate lawyers. It was usually appellate lawyers who first raised the question of the quality of a trial lawyer's representation, and trial lawyers often felt that this process was nothing more than Monday morning quarterbacking. We felt that it was in some way unfair for appellate lawyers to raise these questions, since many of them rarely if ever try cases. We felt threatened, even though the overwhelming number of allegations of IAC at the trial level are later determined to be unfounded. As an appellate attorney, I feel a little threatened by a *Hicks* review, even though it's a safe bet that allegations of IAC at the appellate level will likewise often be fruitless for the client. One of the salutary effects of *Hicks*, however, is that the schism disappears: we're all in the same boat now.

The performance of trial counsel for the defense and the performance of appellate counsel for the defense will both be subjected to scrutiny, and we will all be better lawyers for it. If appellate lawyers know that another lawyer will critically evaluate their work, as trial lawyers have always known, common sense tells us that the work will improve. If the quality of our advocacy improves, at any level, clients are better served, and isn't that what we should all be about?

I used to be a trial attorney, and I tried cases with the clear understanding that my performance would be reviewed later by another lawyer. It often made me uncomfortable, but it also made me a better advocate for my client. I practice appellate defense work now, and *Hicks* will probably make me a little more uncomfortable in that role; I like to think, however, that the potential for review of my appellate advocacy will cause me to be more diligent and conscientious, and if the client benefits, who can argue with that?

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RACE AND IMPRISONMENT DECISIONS IN CALIFORNIA

Crime has become an increasingly important element in American life. If the justice system is to operate fairly and efficiently, each of its aspects created to control crime deserves careful and objective scrutiny. Problems related to the speed of judgment, the appropriateness of sanctions, racial prejudice, and so on, should be analyzed to determine which components are operating correctly and which need improvement. One of the most controversial and frequently mentioned issues is the number of blacks in prison. Establishing the reason for that number - whether poverty, discrimination, failure of the justice system, or other causes - is essential for guiding those responsible for guaranteeing an equitable system.

Although blacks constitute less than 11% of the U.S. population, they make up nearly half of the national prison population. This startling disparity has prompted charges of racial discrimination. But are more blacks in prison because of racial bias in the criminal justice system or because they are more likely than whites to commit those crimes that lead to imprisonment? Young men are also overrepresented, but no one has yet suggested that this disparity is evidence of discrimination. The record clearly indicates that young men simply commit more serious crimes than women or older people do.

The distinction between racial discrimination and racial disparity is too often glossed over in research and the debate on this issue. Discrimination occurs if officials of the justice system make ad hoc decisions based on an offender's race rather than on clearly defined, legitimate standards. In contrast, racial disparity occurs when fair standards are applied but the incidence is different for racial groups.

Numerous studies have attempted to establish whether the racial disparity is due to discrimination in the criminal justice system or to other factors. The results have been mixed, largely because the analyses in most studies have failed to control for a range of variables related to imprisonment (for example, conviction crime, criminal record, and demographic factors) and for the possibility that many of these variables may be proxies for race.

We conducted an analysis that controlled for these variables and examined the proxy issue, using data on California sentencing practices. The study focused only on sentencing (prison or probation and length of term) for offenders convicted of 6 felony offenses in California. Thus, it did not address issues of possible discrimination in arrests and prosecution or in capital sentencing, and its results may not apply to other states.

RESEARCH BACKGROUND

Two recent studies have addressed the racial question by examining the correlation between imprisonment and crime committed, on the basis of 2 different measures of the latter. Blumstein[1] focused on arrests, controlling for number of offenders of each race arrested for each crime type and assuming there was no bias in processing these arrests. Under these conditions, he estimated that 43% of the prisoners in the United States would be black, an estimate 5 to 6 percentage points below the actual percentage of black prisoners.

Langan[2] examined racial disparities in imprisonment using data on victims' responses about the race of those who commit crime. His study used data from the National Crime Survey (NCS), conducted by the U.S. Census Bureau on a nationally representative sample of households. The NCS investigators inquired about crimes these households experienced (including crimes not reported to the police) and the race of the criminals who committed them. This approach frees the data from any racial bias that might stem from who reports crime or from police arrest or prosecution decisions. Langan found that the percentage of black prisoners was only 4 to 5% higher than would be expected on the basis of the NCS data.

Neither Blumstein nor Langan controlled for legitimate sentencing factors (such as the offender's prior record and victim injuries) that might explain the 4 to 6% difference their studies found. The need to control for such factors is illustrated in Kleck's[3] review of 57 studies that examined racial discrimination in sentencing (RDS). He found that 26 studies contradicted the RDS hypothesis, 16 had mixed results, and 15 found evidence of bias. For 13 of the studies that found evidence of bias, Kleck concludes that they:

> failed to include even the most rudimentary controls for the defendant's prior record and thus failed to eliminate the possibility that black defendants receive more severe sentences than whites because they generally have more serious official records of criminal behavior. Only 2 out of 24 studies which introduced such controls showed consistent evidence of RDS (and 1 of these 2 failed to control for offense type) ([4], p. 274)

Kleck's and others' reviews of the racial disparity literature suggest that, in studies which control for factors legitimately considered in sentencing decisions, these factors often account for most or all of the observed racial disparities. This is especially true for studies that focus on offenders outside of the deep South.

An important exception to this trend was a study Petersilia[5] conducted on 1400 male prison inmates in California, Michigan, and Texas. Petersilia found that, in these states, courts typically imposed heavier sentences on Latinos and blacks than on whites who were convicted of the same crimes and who had similar criminal records. Further, the minority inmates also tended to receive and serve longer prison terms than their nonminority matched counterparts.

Petersilia expressed several concerns about the data in her study[5] and urged that it be replicated. These concerns ranged from the reliability of data sources to the lack of detailed information about the inmates' crimes and prior records. She also speculated that fuller implementation

of determinate sentencing guidelines might change court and parole decisions markedly. These sentencing reforms were instituted, in part, to reduce judicial discretion and the influence of factors not legally relevant in criminal sentencing.

Our study examined racial bias controlling for the nature of crimes committed, prior record, other offender characteristics, and race. It used data on sentencing in California after the state implemented its 1977 Determinate Sentencing Act. Although previous studies are not directly comparable to the present one, some tentative support for reduced racial disparity after implementation of determinate sentencing is suggested by the present study.

ANALYZING SENTENCING DECISIONS

Overview. Our analyses focus on 2 sentencing decisions separately: (i) the decision to send an offender to prison or put him on probation and (ii) the length of term imposed on those imprisoned. We conducted 3 separate analyses for each decision: The first identifies by conviction crime what percentage of black, Latino, and white offenders received prison or probation sentences, and what the average lengths of their prison terms were. This step establishes whether there are racial disparities in sentencing based on conviction crime alone. The second analysis addresses 2 questions: First, controlling for offense and offender characteristics that legitimately enter judicial decisions, are there still unexplained racial disparities in sentencing? Second, does adding race to those factors add any explanatory power? The third analysis seeks to determine whether any of the other explanatory variables is a proxy for race - that is, does it mask racial effects?

Samples. Our samples of prisoners and probationers came from data collected by the California Board of Prison Terms (CBPT) on all offenders sentenced to prison in California in 1980 and on a sample of those sentenced to probation in Superior Court during that same year. This was a 1-time collection effort underwritten by the legislature for purposes of analyzing consequences of implementing the Determinate Sentencing Act. To our knowledge, the resulting database is unique: it contains the richest source of information in the country for analyzing imprisonment decisions, albeit for only 1 year.

The database contains detailed information on the offender's criminal, personal, and socioeconomic characteristics as well

Table 1. Number or prisoners and probationers, and the percentage in each racial group by crime type.

Conviction crime type	Sample type	Weighted number of offenders	Defendant's race %		
			Black	Latino	White
Assault	Prisoners	460	39	32	29
	Probationers	684	27	32	41
Robbery	Prisoners	1870	43	25	32
	Probationers	753	36	32	33
Burglary	Prisoners	1877	33	31	37
	Probationers	3644	26	32	41
Theft	Prisoners	969	39	17	44
	Probationers	3044	32	22	46
Forgery	Prisoners	169	35	15	49
	Probationers	369	31	15	55
Drugs	Prisoners	419	23	58	20
	Probationers	1079	23	33	44

Note: The sum of the percentages within a row may not equal 100 because of rounding off.

Table 2. Variables available for analysis and their code names.

Code	Variable
	Prior record and crime characteristics
NCOUNTS	Number of conviction counts
JCON	Number of juvenile convictions
ACON	Number of adult convictions
PROB	Number of probation terms
JAIL	Number of jail terms
PRISON	Number of prison terms
JINC	Number of juvenile incarcerations
PROBREV	Number of probation revocations
CON16	First conviction before age 16?
INC16	First incarceration before age 16?
APROBPAR	On adult probation/parole?
JPROBPAR	On juvenile probation/parole?
JUSTOUT	Recent (year) released from incarceration?
WEAPON	Weapon involved in offense?
INJURY	Any injury caused in offense?
VULNER	Any vulnerable victims?
KNOWRELT	Offender known or related to victim?
COMPANY	Any accomplices?
DRUGINVL	Drugs involved in offense?
DRUGADDT	Drug addict?
	Demographics
HSGRAD	High school graduate?
EMP	Employed?
MARRY	Married?
FAMKIDS	Living with spouse/kids?
PARENTS	Living with parents?
MNTLPROB	Any history of mental problems?
ALCHOLIC	Alcoholic?
AGE2125	Age 21-25?
AGE2630	Age 26-30?
OVER30	Over 30?
	Process variables
TRIAL	Convicted by trial?
PDAPATTY	Public defender attorney?
PVTATTY	Private attorney?
RELEASE	Obtained pretrial release?
	Race
BLACK	Black?
LATINO	Latino?

as important aspects of the case and details of court handling. From both the prisoner and probationer samples, we selected all the adult males who were convicted of assault, robbery, burglary, theft, forgery, or drug offenses (that is, crimes that could result in either a prison or a probation sentence).

The CBPT drew its probationer sample from 17 highly populated urban counties. These counties account for 80% of the felony convictions in the state. Because the probability of being incarcerated differs among counties and crime types, we restricted the prisoner sample to offenders from these same 17 counties. We also weighted the prisoner and probation samples to provide an accurate representation of the true proportions of prisoners and probationers in these counties. We have described the weighting procedures and their effect on sample sizes[6] (they had no impact on the percentage distribution of offenders by race).

Variables. Racial bias in sentencing would be evidenced by disparities in the in/out decision (that is, whether the offender was sent to prison or granted probation) or the length of the prison term imposed, or both. We examined 4 groups of correlates of these 2 outcomes: (i) characteristics of the crime (for example, the use of a weapon by the criminal) and the offender's prior record, (ii) the offender's demographic characteristics (including age), (iii) process variables (such as whether the offender had a private attorney, and (iv) the offender's race.

Choice of statistical models. We used different models for the in/out decision and the length-of-term decision[7]. For the in/out analyses, we used Fisher's linear discriminant function. For computational ease, this was done using OLS (ordinary least squares) multiple regression to fit a 0-1 variable indicating this decision. If b is the vector of estimated regression coefficients from OLS, the maximum likelihood estimates of the coefficients for Fisher's linear discriminant function are given by kb, where k = n/SSE, n is the sample size, and SSE is the residual sum of squares from the 0-1 regression. Thus, all significance probabilities are unaffected by the choice between OLS and discriminant function analyses. We used OLS for the analysis of the log of the length-of-prison term analyses because this outcome was a continuous variable[8].

PRISON OR PROBATION: IN/OUT SENTENCING

In our 17-county sample of convicted felons, 44% of the blacks, 37% of the Latinos, but only 33% of the whites were sent to prison (10% of the whites were Asian, Indian, or other).

Table 3. OLS regression results for the in/out decision.

Variable	Assault	Robbery	Burglary	Theft	Forgery	Drugs
NCOUNTS	0.1655**	0.0306**	0.1067**	0.1524**	0.1022**	0.2611**
JCON	0.0387*	0.0056	-0.0165*	-0.0131	-0.0198	-0.0415*
ACON	0.0311**	0.0058	0.0168**	0.0020	0.0221	-0.0099
PROB	-0.0345*	-0.0024	0.0015	-0.0074	-0.0329	0.0157
JAIL	-0.0025	-0.0008	0.0000	0.0273**	0.0247	0.0049
PRISON	0.0006	0.0315**	0.0600**	0.0834**	0.0816**	0.0724**
JINC	0.0305	0.0052	0.0748**	0.0307	0.1615*	0.0621
PRO_REV	0.0045	0.0290	0.0014	0.0276	0.1257*	-0.0297
CON16	-0.0469	0.0436	0.0695*	0.0047		0.0622
INC16	0.0424	0.0074	-0.0084	-0.0379	-0.1875	0.0491
APROBPAR	0.1714**	0.0622**	0.1131**	0.0746**	0.0441	0.1296**
JPROBPAR	0.0355	0.2021**	0.1690**	0.1886**		
JUSTOUT	0.0748*	0.0464*	0.0333*	0.0484*	-0.0337	0.0569
WEAPON	0.1457*	0.2142**	0.0607**	0.0579		0.0051
INJURY	0.0579	0.1555**	0.0634*		0.4848	0.0793*
VULNER			0.0471	0.0488		0.5588
KNOWRELT	-0.0252	-0.0622*	-0.0785**	-0.1032*		-0.0236
COMPANY		-0.0115	-0.0045	-0.0209		0.0501*
DRUGINVL	0.0587	0.0881*	0.0747*	-0.0014	0.4052	
DRUGADDT	0.2368**	0.1450**	0.1752**	0.1357**	0.0913	0.1725**
HSGRAD	-0.0253					-0.0198*
EMP			-0.0086	-0.0130		
MARRY		-0.0153	-0.0690**			
FAMKIDS			0.1037**			
PARENTS		0.0446**				-0.0472
MNTLPROB			-0.1522**			-0.1100
ALCHOLIC	-0.1033*	-0.1335**	-0.1639**			
AGE2125		0.1357**	0.1453**	0.1062**		
AGE2630		0.1563**	0.1630**	0.1132**		
OVER30		0.1847**	0.1080**	0.0808**		
TRIAL	0.3209**	0.1501**	0.1458**	0.2763**	0.0195	0.1203*
PDAPATTY	-0.0822**	-0.0850**	-0.0626**	-0.0497**	-0.0018	-0.0591*
PVTATTY	-0.1608**	-0.3712**	-0.1562**	-0.0888*	-0.1087	-0.0966*
RELEASE	-0.2677**	-0.1606**	-0.1730**	-0.1705**	-0.1979**	-0.2766**
BLACK	0.0756*	0.0332	-0.0098	-0.0130	-0.0162	0.0531
LATINO	0.0453	-0.0386*	-0.0178	-0.0587**	-0.0364	0.1419**
N	1128	2580	5066	3724	504	1337
SSerror	154.5	352.4	749.5	499.0	65.7	165.2
AdjRsq	0.41	0.31	0.36	0.29	0.37	0.41

*P 0.05
**P 0.01

The distribution of prisoners and probationers by crime type and racial group is shown in Table 1. These data show that black and Latino offenders were more likely to go to prison than white offenders, especially for assault and drug offenses. For example, 39% of those sent to prison for assault were black, whereas only 27% of those who received probation for this crime were black. Table 1 also reveals proportional differences in racial representation across crime types. Latinos constituted more than half of those convicted of drug crimes, for example, but less than 25% of those convicted of theft or forgery.

Our analyses of the in/out decision sought to establish whether these disparities were explained by differences in sentencing variables besides crime type. Table 2 lists the variables that were available for analysis.

This part of the analysis consisted of 4 steps. In step 1, we grouped the prisoners and probationers convicted of the same crime together, thereby reforming 6 offense groups. We then divided each group randomly into 2 subgroups, A and B, forming 12 subgroups (2 for each of 6 crime types).

In step 2, we used the procedures we have described[6] to construct 2 discriminant rules to predict the in/out decision in each of the 12 subgroups. Rule 1 used all the

prior record and crime characteristics, and all the offender demographic variables that had a statistically significant correlation with the in/out decision and/or added significantly to the overall prediction of this decision when used with other prior-record and offense variables. Rule 1 also used all the process variables. Rule 2 used all the foregoing variables plus race.

The OLS regression coefficients in the total sample of offenders in each crime type are shown in Table 3.

In step 3, we applied rule 1 developed on subgroup A to all the offenders in subgroup B to predict whether they would go to prison, and applied rule 1 developed on subgroup B to all the offenders in subgroup A. These 2 subgroups were then recombined and a count was made of the number of offenders in each group whose predicted in/out status was the same as their actual in/out status (where the number predicted to be incarcerated was set equal to the number who were incarcerated). We then inserted these counts into the formula below to compute the percentage of cases whose status was predicted accurately:

$$\text{Percentage predicted accurately} = 100 \times \left[\frac{\text{Number incarcerated who were predicted to be incarcerated} - \text{Number given probation who were predicted to be given probation}}{\text{Total number of offenders}} \right]$$

Step 4 was the same as step 3, except that we used rule 2 rather than rule 1. The difference in accuracy of the predictions between steps 3 and 4 is a good index of the effect of race on the in/out decision, because an offender's data were not considered in computing the equation used to predict his sentencing decision.

How well the actual in/out decisions coincided with the predicted decisions based on rule 1 and rule 2 is shown in Table 4. For 4 of the 6 crimes, predictive accuracy does not improve when race is considered. The two exceptions are robbery and drugs. However, in both cases, the inclusion of race improved accuracy by only 1%. Moreover, racial disparities were not the same for the 2 crimes. For robbery, blacks had a relatively higher and Latinos a lower probability of going to prison, whereas for drugs, Latinos had a higher probability and white offenders had a lower probability.

The variables that were predictive of going to prison for 1 crime were generally the same as those for another crime. They were:

- Having multiple current conviction counts, prior prison terms, and juvenile incarcerations.
- Being on adult or juvenile probation or parole at the time of the current offense. *Having been released from prison within 12 months of the current offense.
- Using a history of drug or alcohol addiction or both.
- Being over 21 years of age.
- Going to trial, as opposed to pleading guilty.
- Not being released before trial.
- Not being represented by a private attorney.

Across all crime types, we predicted with 80% accuracy which offenders would be sentenced to prison. Adding race to the prediction formulas did not improve this accuracy rate by even 1%.

These results suggest that, once we consider the other factors related to sentencing, knowing the offender's race does not improve our ability to predict who will be sentenced to prison or probation (the in/out decisions). This implies that, for our samples, any racial disparity in sentencing does not reflect racial discrimination.

However, it is still possible that other variables may be proxies for race. In other words, the relation of these factors with race may hide racially biased decisions. To address this concern, we examined the relation between the in/out decision and offense and offender characteristics in 2 ways.

We first examined the extent to which race was correlated with each of the predictors used in rule 1. The results of this analysis showed again that a potentially high correlation between the predictors and race did not mask racial bias in the in/out decisions. For example, the best single predictor of going to prison was the number of conviction counts. "Counts" refers to the number of separate crimes the offender was convicted of during the current court proceedings. Within a given crime type, all 3 racial groups had about the same average number of counts (for example, the values for black, Latino, and white burglars were 1.3, 1.2, and 1.3, respectively). Similarly, the percentages of black, Latino, and white burglars whose cases went to trial (as opposed to being settled through plea bargaining) were 7, 7, and 5, respectively.

To pursue the matter further, we investigated whether race effects were hidden by measuring the degree to which race was related to the predicted probability of imprisonment generated by rule 1 in the analysis above. We found that with 1 exception, less than 1% of the variance in these predictions could be explained by offender race. The exception was drug crimes, where race accounted for 7% of the variance. Moreover, drug crimes were the only type for which race, by itself,

Table 4. Percentage of offenders whose predicted in/out sentence was the same as their actual in/out sentence.

Conviction crime type	Rule 1: without race	Rule 2: with race
Assault	80	80
Robbery	80	81
Burglary	80	80
Theft	81	81
Forgery	76	76
Drugs	83	84

Table 5. Average prison term imposed, by race and crime type.

Offenders	Prison term (months) for					
	Assault	Robbery	Burglary	Theft	Forgery	Drugs
All	48	58	32	26	27	36
Blacks	49	57	33	26	29	35
Latinos	47	58	31	26	26	37
Whites	48	59	33	26	26	35

Table 6. OLS regression results for the length of prison term imposed.

Variable	Assault	Robbery	Burglary	Theft	Forgery	Drugs
NCOUNTS	0.0998**	0.0885**	0.1221*	0.1134**	0.0893**	0.1470**
JCON		0.0036	0.0059			
ACON		0.0001	-0.0001	0.0064	-0.0055	
PROB						-0.0019
JAIL		-0.0136*		-0.0131*		-0.0143
PRISON	0.0359*	0.0711**	0.0781**	0.0345**	0.0331	0.0296
JINC	0.0496*	0.0308*	0.0312*	0.0259		
PROBREV	-0.0814*	0.0513*	0.0162	0.0518*	-0.0710	
CON16		0.0215	-0.0053*	0.0597*		
INC16	-0.1596**	-0.0411	0.0315	-0.0142		0.0468
APROBPAR	-0.1029**	0.0415*				
JPROBPAR			-0.0361			
JUSTOUT		0.0111				
WEAPON	0.2316*	0.2697**	0.2450**	0.0777**	-0.2922	0.0172
INJURY		0.0385*	0.2014**			
VULNER	0.0147		0.2139**			
KNOWRELT			-0.0128	0.1019*		
COMPANY		0.0255	-0.0179	0.0240		0.0662
DRUGINVL			0.0210	0.0145		0.4684**
DRUGADDT		0.0378	0.0862**			
HSGRAD						
EMP	-0.1169**					
MARRY						0.0547
FAMKIDS						
PARENTS						
MNTLPROB			0.1025*			
ALCHOLIC		-0.0932**				
AGE2125		-0.0343*		-0.0328		
AGE2630			0.0546**			-0.1334**
OVER30						
TRIAL	0.2219**	0.2283**	0.3111**	0.1766**	0.0490	0.2920**
PDAPATTY	-0.0205	-0.0434**	-0.0485**	-0.0482**	0.0047	-0.0237
PVTATTY	0.0361	-0.2928**	-0.0302**	0.0527*		-0.1791
RELEASE	0.0364	-0.0507**	-0.0115	0.0204	-0.0237	-0.0190
BLACK	0.0356	-0.0132	-0.0037	0.0035	0.0711	-0.0696
LATINO	0.0335	-0.0077	-0.0155	-0.0025	0.0134	0.0231
N	616	2172	2279	1225	165	481
Adj Rsq	0.18	0.34	0.38	0.22	0.20	0.24

*P 0.05; **P 0.01.

explained more than 2% of the variance in the in/out decision[9]. Latinos convicted of drug crimes had a higher probability of imprisonment, even after the factors known to affect the in/out decision (and measured here) are statistically controlled. Taken together, these findings demonstrate that the variables most highly correlated with the in/out decision are not proxies for race.

LENGTH OF PRISON TERM IMPOSED

Under California's 1977 Determinate Sentencing Act, judges may assign 1 of 3 specified terms (short, middle, or long) for each conviction offense. The Act further instructs judges to impose the middle term unless there are aggravating or mitigating circumstances. If the short or long term is imposed, the judge must specify the circumstances that led to the selection of this term in the sentencing documentation. Enhancements for particular aggravating circumstances, such as prior record or weapon use, must be formally pled and adjudicated. The Act was designed to "eliminate disparity and provide uniform sentences throughout the State" [California Penal Code 1170.(a)(1)].

Petersilia[5] found that minority offenders sentenced to prison before this Act became law were likely to receive somewhat longer sentences than whites whose official criminal records showed them similarly culpable. The CBPT prisoner database let us examine whether this trend still held for offenders incarcerated after the Act became law.

The high degree of agreement in the average (mean) prison term imposed across racial groups is shown in Table 5. None of these means differed by more than 3 months. Moreover, an analysis of variance indicated that within a crime type, the means were not different from each other by a statistically significant (P 0.05) amount. Across crime types, the offenders in 1 racial group did not tend to receive shorter or longer sentences than those in another group.

We also used OLS regression to examine how well offender prior record, offense variables, offender characteristics, process variables, and race predicted the length of the prison term imposed. The dependent variable for these analyses was the log of the length of the term imposed, Again, we found that including offender race in the regression model did not improve predictive accuracy for any of the 6 crimes studied. Thus, offender race did not appear to influence prison sentence lengths.

The regression model and the percentage of variance explained for each crime are shown in Table 6. These models predicted with about 70 to 80% accuracy whether an offender received a sentence that was above or below the median sentence (which corresponds to a 40 to 60% improvement over chance).

CONCLUSIONS

Taken together, our findings indicate that California courts are making racially equitable sentencing decisions. The racial disparities apparent in the in/out decision are not evidence of discrimination in sentencing - once we control for relevant crime, prior record, and process variables. This finding held for 5 of the 6 of the crimes studied (assault, robbery, burglary, theft, and forgery). Drug crimes were the exceptions, where Latinos faced a higher probability of imprisonment. We found no evidence of racial discrimination in the length of prison term imposed for any of the crimes studied.

It is also clear that the other variables are not proxies for race - that is, they are not masking what are actually racially influenced decisions. Moreover, sentencing decisions were predictable, even though out database contained only some of the many variables that legally can be considered in imposing criminal sentences. For example, we did not know in multiple-offender robberies whether the defendant was the ringleader or just the driver of the getaway car, and we had no way of measuring the credibility of witnesses. Nevertheless, in more than 80% of the cases, we predicted accurately whether the offender would receive prison or probation; including offender race in the

formulas did not increase predictive accuracy.

The current study did not examine decisions made at other justice system decision points (those made by the police and prosecutor) nor did it examine the more global relation between poverty and minority representation in the justice system. The present study does show, however, that 2 very important sentencing decisions do not show evidence of discrimination against minority offenders.

At this point we cannot tell why the present results differ from those of the earlier California results[3]. A tentative conclusion could be that California's Determinate Sentencing Act has contributed to racial equity in sentencing. However, because of differences between studies, this remains an open question.

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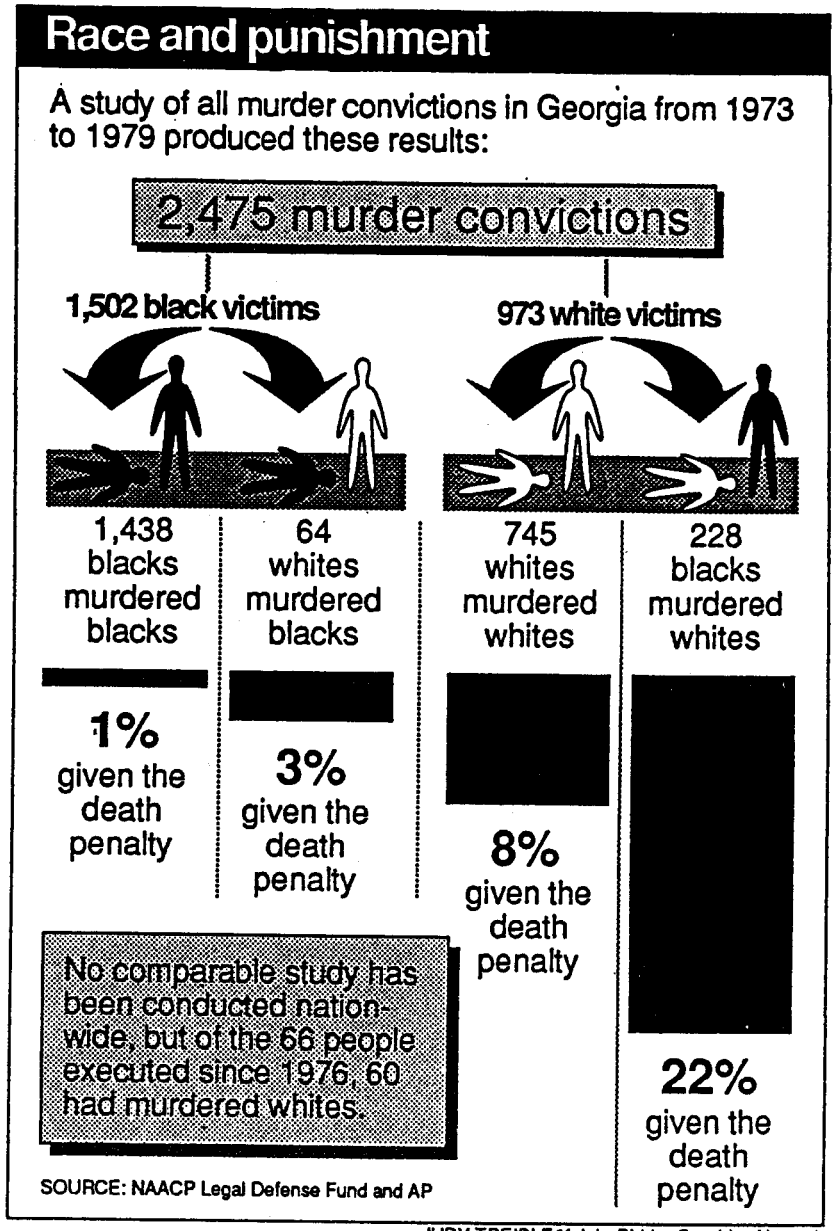
[7]*Some analysts consider the latter decision as conditionally dependent on the former and would therefore prefer to utilize Tobit or Heckman's sample-selection model [J. Heckman, Ann. Econ. Soc. Meas. 5,475 (1976)]. This preference stems from concerns about models that do not directly correct for the correlation between outcomes. However, W. Manning et al. [J. Econometr. 35, 59 (1987)] have demonstrated that the overall prediction bias in 2-part models (such as ours) is negligible if one does not know the true model specification and relies on the available data. These authors conclude, "In effect, picking a specification that fits the observed data largely eliminates the bias from 'ignoring' the selection effect. In the absence of a priori information (e.g., exclusions of the exact specification of the right-hand-side variables), these results raise the issue of whether the selection model can be distinguished from an empirically derived 2-part-model, even in a case favorable to the selection model" (p. 60).*

[8]*G. Haggstrom, J. Bus. Econ. Stat. 1, 229 (1983).*

[9]*Preliminary analyses indicated that adding interactions between race and predictor variables to the models would not produce a practical increase in the accuracy of these models to predict the in/out decision or sentence length. These analyses began by constructing 2 interaction terms for each independent variable: black x variable and Latino x variable. Thus, there were twice as many interaction terms as there were predictor variables. Given the larger number of these terms, we did not test them individually (because several were likely to achieve statistical significance simply by chance). Instead, we examined whether predictive accuracy could be improved by using all of them together. This liberal omnibus test was run 12 times, once for each combination of the 6 crime types and 2 outcomes (in/out and sentence length). However, despite the large sample sizes and extensive number of interaction terms considered, they produced very small F values (the only F greater than 2.0 was for the in/out decision on robbery, which was 2.16). These results indicate that adding race interaction terms to the model would not produce a meaningful increase in predictive accuracy and, thus, these terms were not included in subsequent analytic steps.*

[10]*The views expressed in this article are those of the authors and are not necessarily shared by the RAND Corporation or its research sponsors.*



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CRIME, PUNISHMENT AND PUBLIC OPINION

A SUMMARY OF RECENT STUDIES AND THEIR IMPLICATIONS FOR SENTENCING

Recent surveys of public opinion on crime and punishment contain important information for consideration of sentencing practices and policies. The surveys yield some surprising results with implications for those involved in the sentencing process.

Some of the most significant findings of recent public opinion polls challenge many common assumptions. These findings are:

- The public believes that prisons should be more rehabilitative and less punitive.
- The public becomes very supportive of alternatives when informed about the cost of prisons and the effectiveness of alternatives to incarceration.
- Most public officials and criminal justice personnel, including legislators and judges, hold supportive views of rehabilitation which are similar to those held by the general public. However, these officials often perceive the public as vindictive and hostile to alternatives.
- Public officials are reasonably well informed about some aspects of the criminal justice system, but they are strikingly misinformed about others. This misinformation may discourage support for alternatives.

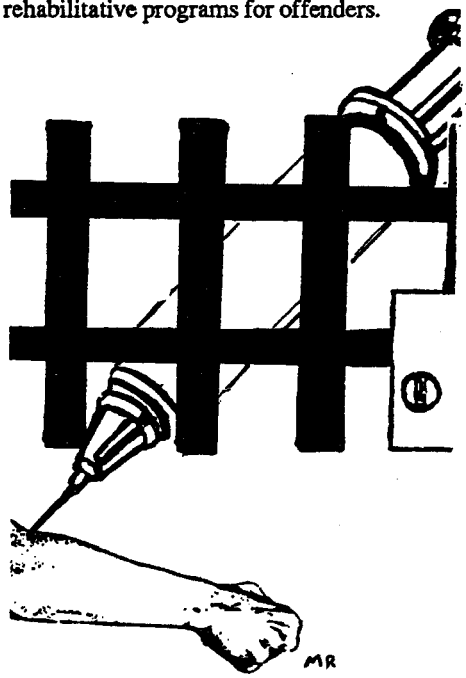
Public Attitudes on Crime, Courts, and Prisons

- Public opinion data from polls conducted since 1975 document the prominence (though not dominance) of crime as an issue of public concern.

A 1986 report by The Public Agenda Foundation (PAF), *Crime and Corrections: A Review of Public Opinion Data Since 1975*, states that while polls show that the public believes courts are "too lenient on criminals," *the public also believes poverty and unemployment are more significant as causes of crime.* The report documents a lack of confidence in plea bargaining and in the courts themselves, exceeded only by the even greater lack of faith in prisons.

- To an unusual degree, answers to questions about the goals of prisons are influenced by the wording of the questions in different polls.

Gallup and other polls show public commitment to stiffer sentences *and* stronger rehabilitative programs for offenders.



- Surveys also show that most people believe incarceration fails to rehabilitate.

Polls indicate that people are generally reluctant to spend tax monies on prisons, particularly if given a choice of spending money on police, aid to dependent children, or job creation programs.

- The public believes the primary goal of the criminal justice system should be to *prevent* crime before it happens.

Crime and Punishment: The Public's View, a second report by the Public Agenda Foundation and published by The Edna McConnell Clark Foundation in 1987, used in-depth focus group discussions to explore underlying public perceptions and sentiment. The PAF analysts contrast the public's stress on prevention with the focus of justice professionals on responding to crime *after* it occurs.

- People in the focus groups wanted prisons to be "corrective," not instruments of vengeance, but they did not believe that prisons do much to "correct." While people understand that overcrowding hinders rehabilitation, they do not know the full extent of overcrowding in today's prison systems and its impact on prospects for rehabilitation. When informed of the effects of overcrowding - prison violence, suicides, idleness — people become quite concerned about this problem.

Alternatives to Incarceration

- The public favors alternatives to incarceration not so much as a means of reducing, overcrowding but because they believe prisons fail to accomplish their objectives.

When presented with facts from actual cases, including a multiple vehicular homicide, focus group participants favored alternatives such as community service, restitution, and drug treatment. Somewhat inconsistently, the report notes that focus groups would have excluded violent as well as repeat offenders and drug dealers from alternative sanctions. Focus group participants apparently defined "violent offenders" by the charge placed against them, rather than a profile of individual character.

- Research shows significant public support for alternatives to prison for nonviolent offenders.

Results from several other recent polls — in North Carolina, South Carolina, Ohio, and nationally — are reported by Russ Immarigeon in an article, "Surveys Reveal Broad Support for Alternative Sentencing" (*The National Prison Project Journal*, Fall 1986). One poll, undertaken for the North Carolina Center on Crime and Punishment (Hickman-Maslin Research, *Confidential Analytical Report*), found strong support for alternatives for non-violent first-time offenders in the

state. The poll found, though, that this support declined for more serious offenses, including possession of stolen goods, breaking and entering a house or store, and embezzling a large sum of money.

The North Carolina survey further investigated survey respondents' opinions about alternatives after informing them about prison conditions, the cost of incarceration, and alternatives programs. The poll found that particularly after being informed of the costs of prison construction and operation, support for community (alternatives) sentencing rose more than 25%. Moreover, once informed, respondents tended to favor alternatives for *repeat* offenders as well as first-time offenders.

Policymakers' Attitudes and Perceptions

- Polls and studies also reveal that in the area of criminal justice, public officials do not accurately perceive public opinion.

This was demonstrated quite clearly in a report by researchers Stephen D. Gottfredson and Ralph B. Taylor, "Public Policy and Prison Populations," (*Judicature*, October-November 1984), based on a study of corrections reform efforts in Maryland in 1980. The authors that *the public, "contrary to general belief" was not especially punitive, but instead supported the goal of rehabilitation along with deterrence and incapacitation.* Further, the public and policymakers' attitudes were similar "almost without exception." But policymakers incorrectly perceived public attitudes to be punitive and, echoing what they erroneously assumed to be public opinion, opposed reform initiatives in Maryland.

A 1985 study by the Michigan Prison and Jail Overcrowding Project reached similar conclusions about decisionmakers in that state (*Perceptions of Criminal Justice Surveys*). When Michigan decisionmakers were asked to estimate public support for alternatives, they *grossly underestimated* that support to be 12%, compared to the actual level of 66%. Defense attorneys and alternatives program service providers strongly favored alternatives, and were closer than other groups to the attitudes of the general public.

As in Maryland, decisionmakers in Michigan may have developed overly punitive policies based on an incorrect assessment of public opinion. It appears that in both states, a base for reform existed which would have been used by political leaders to develop creative responses to crime and justice issues.

- Many state decisionmakers lack certain knowledge about their own criminal justice system.

When Michigan decisionmakers were asked to provide estimates of key facts, such as the number of reported felony *crimes* which resulted in arrest, conviction, and jail/prison sentences, their estimates were frequently quite inaccurate. In other areas, such as the number of felony *convictions* leading to prison sentences and the number of trials versus pleas, the decisionmakers were much better informed. While decisionmakers were knowledgeable about their own areas of the criminal justice system, the researchers concluded that, across groups, "it appears that decisionmakers have grossly overestimated the effectiveness of the criminal justice system and its impact upon crime."

- Decisionmakers in the Michigan study "overestimated the proportion of all crime that is violent or person-related."

This kind of information suggests that decisionmakers are misinformed in ways which may bias them against alternative sentencing programs and reforms which reduce reliance on incarceration. If, as polls indicate, people are opposed to alternatives for "violent" offenders, it is likely that the decisionmakers who overestimate the incidence of violent crime will be less inclined to support alternatives legislation for any class of offenders than they would if correctly informed.

Implications for Criminal Justice Policy

- These public opinion surveys offer important information for developing public support for sentencing alternatives. Among the most significant issues are the following:

1. *Relatively weak public support for incarceration* - The surveys show that the public wants prisons to both punish *and* rehabilitate, yet knows that prisons fail at rehabilitation. The challenge in proposing alternatives to incarceration, therefore, is to demonstrate that alternatives are much more effective at rehabilitation and that they incorporate punitive aspects as well, including community service, restitution, intensive supervision, etc.

2. *Limited cost-benefits of prison* - Polls reveal that the public's reluctance to spend money on prisons when offered a range of other options, including police services, welfare benefits, and job creation. The exorbitant costs of prison construction (over $50,000 a cell) and incarceration (about $20,000 a year) should be compared to other social services and the costs of alternatives to incarceration.

3. *Individualized support for alternatives* - Public support for alternatives to incarceration is much greater when discussed in terms of individual defendants and victims than in the abstract. Thus, given the facts of an individual case, people may support an alternative sentencing plan that they might oppose if just asked about a particular charge and its appropriateness for alternatives. Thus, individual sentencing plans may be viewed favorably on a case-by-case basis even when if public *seems* hostile to non-incarcerating sentences.

4. *Policymaker and judicial support for alternatives* - Although there are a variety of attitudes toward prisons and alternatives, both the public and political leaders generally are receptive to alternatives in certain cases. Unfortunately, public leaders often oppose alternatives because they believe that the public does not support them. Legislators need to realize that public support for alternatives and the concept of rehabilitation does exist and needs to be discussed in ways that will increase its appeal.

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MENTAL ILLNESS PREVAILS IN URBAN JAILS

A trio of serious mental disorders - schizophrenia, severe depression and mania - are 2 to 3 times more common among men in urban jails than among men in the population at large, a study of Chicago inmates indicates.

Although no one has demonstrated an increase in the imprisonment of people with mental disorders, jails are ill equipped to deal with such a large number of severely disturbed individuals, asserts psychologist Linda A. Teplin of Northwestern University Medical School in Chicago.

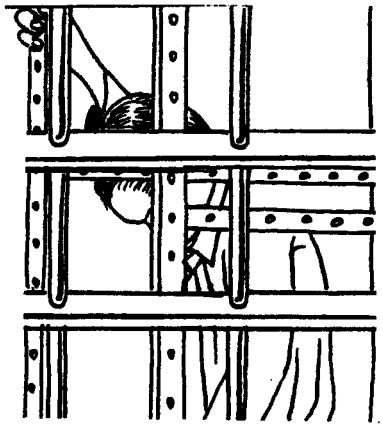
"Teplin's study clearly shows the extreme prevalence of mental disorders in urban jails," says psychologist John Monahan of the University of Virginia in Charlottesville. "In many cities today, jails function as mental hospitals."

More than 6% of all men arrested for misdemeanors or felonies - about 1 in 16 - suffer from severe mental disorder upon arriving at jail, Teplin observes in the June *American Journal of Public Health.* Many jails do not screen incoming inmates for mental disturbances or make referrals to nearby mental hospitals, she maintains. In her view, mentally disordered individuals who have committed minor crimes, such as trespassing or disorderly conduct, should be sent to such facilities.

Increased funding is urgently needed for the development of innovative treatment programs in jails, she adds.

Teplin randomly recruited a group of 627 men sent to the Cook County (Ill.) Department of Corrections jail between November 1983 and November 1984. Misdemeanors and felonies were about evenly split in the sample. Clinical psychologists interviewed the men in a soundproof booth placed within the intake area. Volunteers responded to a standardized psychiatric interview developed at the National Institute of Mental Health (NIMH) in Bethesda, Md.

Teplin then compared the study group's current and lifetime rates of schizophrenia, severe depression and mania with those of the U.S. adult male population, as detailed in a previous NIMH study (SN: 10/6/84, p.212). Less than 2% of the general population currently suffers from any of the 3 disorders, whereas the urban jail rate surpasses 6%. Almost 4.5% of the U.S. population has a history of schizophrenia, severe depression or mania; the inmates showed a lifetime rate of 9.5%.



Young black men make up much of the jail population, but the study statistically controls for race and age, Teplin says.

Because poor estimates of mental illness among inmates are unreliable, she contends, the new results cannot show that people with severe mental disorders are increasingly shunted into jails. Of 18 studies of mentally disordered offenders in jails conducted between 1976 and 1986, only 4 used random samples, and none accounted statistically for the low rates of schizophrenia, depression and mania in the general population, she says.

But the Chicago study provides evidence that mental illness is being "criminalized" in large cities, Teplin holds. Current jail rates of mental disorders were more than 3 times greater than current population rates - a much higher ratio than that for lifetime prevalence rates. Thus, she asserts, many arrests occurred "during a period of active illness."

Over the past 15 years, many mental health professionals have maintained - without the benefit of solid empirical evidence - that the nation's jails have incorporated ever-larger numbers of people with mental disorders. One estimate put the total number of mentally ill and retarded jail inmates at 600,000 (SN: 6/30/84, p.405).

Teplin's findings fuel the argument that "the need for mental health services by inmates is great, and probably growing," write Douglas Shenson of the Montefiore Medical Center in New York City and 2 colleagues in an editorial accompanying the new report. They cite several reasons for this trend. The large-scale release of patients from state mental hospitals in the early 1970s, strict new commitment laws and the scarcity of low-income housing have put many disturbed people on the streets, they note. The lack of community mental health care clinics keeps them on the streets, increasing the likelihood of arrests for trespassing, vagrancy or disturbing the peace.

Moreover, greater numbers of substance abusers are being sent to jails and prisons the editorial's authors point out. Teplin contends that mentally ill substance abusers may be among the most vulnerable to arrest because they have access to few treatment alternatives.

While noting that the relationship of drug abuse to mental disorders and crime remains unclear, Monahan says, "Teplin's data provide a good picture of urban jails in the early 1990s."

B. BOWER

RESPONSIBILITY BASED ALTERNATIVE SENTENCING

At the August, 1990 Alternate Sentencing Conference produced by Kentucky's AOC and DPA in conjunction with the Washington D.C. based Sentencing Project, judges, prosecutors, probation and parole officers, defense attorneys and DPA sentencing specialists discussed alternatives to prison sentences.

As we learned, creative sentencing plans in some cases presented to judges can meet the accepted sentencing goals as well or better than prison sentences. Innovation can create more effective judicial sentencing.

For judicial and public acceptance, alternate sentencing plans must :

1) be realistic;
2) include achievable behaviors for the client;
3) avoid building a failure;
4) be punishment.

FACING UP TO KENTUCKY'S SENTENCING REALITIES

Kentucky's citizens, legislature and its criminal justice system have to face up to Kentucky's harsh sentencing realities:

1. it costs a lot to imprison;
2. there are limited prison spaces;
3. we are at or fast approaching the fact that when one person is sent to prison, another is released.

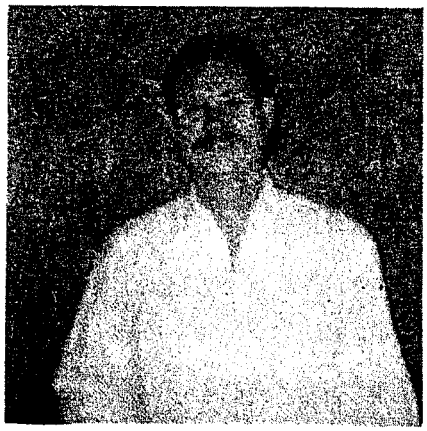
WE MUST IMPRISON THE RIGHT PEOPLE

Kentucky will always have *limited* prison capacity. We will never have unfilled prison cells with this harsh reality. We must make sure that only those *most* in need of prison are sent there. Defense attorneys, prosecutors and judges will have to learn to consider alternate sentences for defendants who would normally be sentenced to prison. The public needs to be aware that their concerns for punishment and restitution can be addressed effectively with an alternate sentence. The legislature needs to review our punishment laws (HJR 123 established a legislative Task Force on sentences and sentencing practices) remembering that punishments can come in many forms and that for a punishment to be effective the criminal justice system must have the ability to deliver an appropriate punishment to a specific defendant.

Good Sentencing Goals

1) Punishment/Restitution/Fines
2) Public Safety/Incapacitation
3) Deterrence
4) Treatment/Rehabilitation/Work/ Counselling
5) Cost-effective
6) Public Policy

Young, Allena, Johnson



Brady

If this is not done, we will all be contributing to and, effectively, causing prisoners to be paroled who should not be released from prison. If this is not already occurring in Kentucky, it will soon be the reality. Any prison built will be filled to capacity no matter how many we build in Kentucky. We can deny that this scenario will happen but our denial does not change the ultimate physical reality of one in one out.

SENTENCE MORE EFFECTIVELY

A realistic sentencing alternative can succeed at holding the defendant accountable for his actions better than prison, can in some ways repair the victim and the com-

munity, and can increase the chance that the defendant will not repeat.

GOALS OF SENTENCING

Sentencing purposes are many and varied. Most have the overriding concern of offender responsibility. Good sentencing goals meet the needs of the *community*, the *victim* and the *defendant.*

Most often, it is believed that the public and judges identify **punishment** as the number one goal of sentencing. There are many forms of punishment other than prison. These alternate forms of punishment can more effectively punish.

Deterring the defendant from repeating the crime and deterring others from committing this kind of crime are also important sentencing goals with specific deterrence more important.

Increasingly, **reparation of the victims,** restoring or satisfying the victim, is a sentencing objective.

Community reparation is also a goal of good sentencing.

Public safety is an essential component of sentencing. An alternate sentence can provide longer range protection to the public than prison.

Rehabilitation is a cornerstone of any good sentencing since behavior must be modified with some treatment process.

PRISONS COST A BUNDLE

We have just built the Morgan County Prison (Eastern Kentucky Correction Complex) at a cost of $89,900 per cell! We couldn't finish it fast enough. It is already full. There are 1096 state prisoners backed up in Kentucky jails.

In 1990-91 our Corrections Cabinet received a 53% increase in its state funding. Their budget jumped $76 million from $147 million to $219 million.

SENTENCES ARE MORE SEVERE AND PAROLE IS LONGER

A combination of forces is leading Kentucky to more prisoners with longer sentences and less frequent paroles.

The legislature continues its trend to increase sentence lengths and is more active in setting longer parole eligibility dates.

The Parole Board is drastically reducing parole as a possibility:

- 1/4 of all inmates receive a serve out at their 1st parole hearing;
- only 1/4 of all inmates are paroled when first eligible;
- only 1/3 of minimum security inmates are paroled when 1st eligible;
- 91% of maximum security inmates are deferred or receive a serve out at their initial parole hearing;
- a minimum security inmate who receives a deferment at his 1st parole hearing is given on average a 17 month set back;
- 80% of the maximum security inmates receive a 3 year set back when 1st appearing before the Board; and,
- serve outs have tripled in last 6 years.

PUBLIC MUST BE EDUCATED

Judges, defense attorneys and prosecutors can and must lead in the education of the public and other criminal justice actors in understanding the costs of incarceration and how the philosophy of limitless incarceration misuses Kentucky's very limited resources.

Costs and common sense mandate that we confront, consider and implement alternate sentences.

If the public is not informed of this more progressive viewpoint, it is unlikely that Kentucky's prison crisis has a chance of being mitigated.

THE PUBLIC'S VIEWS

Public officials are generally mistaken about the views of the public on prisons. It is commonly believed that the public only wants criminals severely punished by imprisonment. However, the facts indicate otherwise.

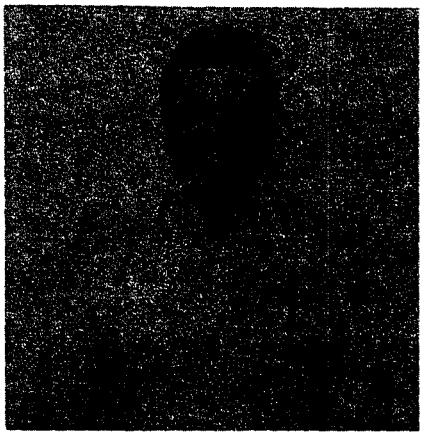
As the article on page 42 indicates, the public is interested in more than punishment. When informed, they are supportive of alternatives to imprisonment.

If we care to inform the public, they will support sentencing which is more meaningful than prison.

JOHN DAUGHADAY, Circuit Judge
52 Judicial District
Mayfield, Kentucky

DAVE NORAT
Director, Defense Services
Frankfort

Dick



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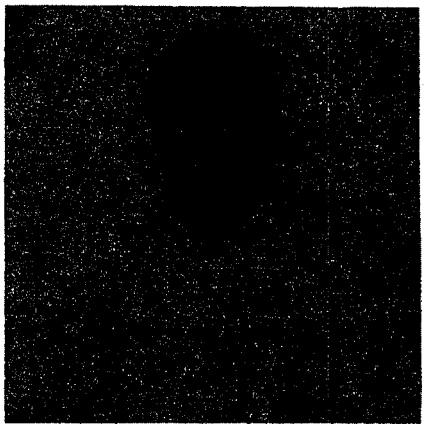
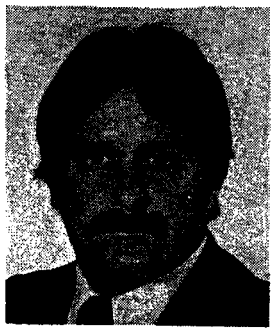


Venters

SENTENCING ADVOCACY DEMANDS USE OF LITIGATION SKILLS



J. Vincent Aprile, II

"The right to effective assistance of counsel is subservient to a defendant's right under *Faretta* to represent himself," and in preparing to represent clients at sentencing, criminal defense lawyers would do well to remember that "if we could infuse the veins of our clients with our experience, expertise, and education," it is unlikely that they would "turn their backs on sentencing." Our clients "would seek every legitimate sentencing option under law."

With this, Vincent Aprile, special counsel to the Kentucky Department of Public Advocacy, launched into a thought-provoking, candid, and fiery discussion on effective advocacy and sentencing. Aprile made his presentation before approximately 200 attorneys and sentencing specialists at the National Conference on Sentencing Advocacy held in Washington, D.C.

"*Faretta* told us something we, as criminal defense lawyers, do not want to know," and are inclined to forget, Aprile said, which is that "we are an extension of our clients." He was referring to the United States Supreme Court opinion in *Faretta v. California*, 422 US 806 (1975), which recognized a criminal defendant's constitutional right to defend himself if his waiver of right to counsel is both knowing and intelligent.

"I once saw *Faretta* in action," Aprile told the audience, when a defendant spoke up at his sentencing hearing to say that the prior felony convictions the judge was considering had been reversed on appeal. Both the defense attorney and the judge ignored him, apparently thinking that the defendant couldn't possibly know what he was talking about. After a successful appeal, brought by Aprile, the defendant had a second sentencing hearing. That hearing was also fraught with error and when the case was assigned to him a second time for appellate briefing, Aprile succeeded in getting yet another sentencing hearing for the defendant.

Aprile said the trial judge called him in frustration to see if Aprile would accept appointment to represent the defendant at resentencing, since he "knew so much about this," Aprile responded that he was an appellate attorney, not a trial lawyer, and would need 6 months to prepare for a sentencing hearing in order to render effective assistance of counsel. The judge granted Aprile's request, and appointed him to represent the defendant, "partly" Aprile thought, "out of frustration over the 2 earlier reversals." Aprile's argument for a reduction in sentence prevailed, making his client immediately eligible for parole; the client was released the following week.

DUTIES OF DEFENDANT'S REPRESENTATION

In *Estelle v. Smith*, 451 US 454 (1981), commonly referred to as the "doctor death case," Aprile said that attorneys learned that a defendant's right to be free from self-incrimination continues after a finding of guilt. In *Estelle v. Smith*, the United States Supreme Court held that defendant's 5th and 6th Amendment rights were violated by an uncounseled pretrial psychiatric examination, relied upon at the sentencing phase of a death penalty case to predict the defendant's future dangerousness (one of the determinative factors under the Texas death penalty statute). "It is our duty as a defendant's representative," Aprile told defense attorneys, to guard against self-incrimination in the sentencing process, as well as at trial.

Aprile, who frequently lectures on legal ethics, lamented that criminal defense lawyers have come to see themselves as "involved in the administrative process" of sentencing. "Judges should not be asking defense attorneys about a defendant's prior record," he said, as such questions violate the work product privilege and the attorney client privilege. "The canons of ethics say we cannot allow the judge to rely on misinformation" in making a sentencing determination, he said, but that is not the same thing as being the one who provides information known only to the defendant and his counsel.

If it takes a change in local rules of court or state ethics rules to end sentencing practices that call upon defense attorneys to violate their ethical duties, Aprile said, then defense attorneys should focus their energy on effecting these changes.

THEORY OF SENTENCING

"You cannot prepare or investigate your case with blinders on" as to the sentencing outcome, Aprile said. Too many attorneys, he said, are ignoring sentencing as they go about their investigation and preparation for the guilt phase of the trial. "You must have a theory of sentencing, as well as [of] trial," he said.

As an example of ineffectiveness of counsel in sentencing, Aprile said he sometimes receives frantic calls from counsel after conviction in death penalty cases, asking "Who can I call to testify for my client?" "It's too late by then," Aprile said, adding that the same ineffectiveness exists "when the stakes are not the ultimate punishment."

In addition to being prepared for sentencing, Aprile suggested that attorneys "investigate, prepare, and litigate issues in the sentencing phase the same as you would in the guilt phase." Procedural, statutory, and evidentiary issues doesn't dry up during the guilt phase, he emphasized.

"Look at the victories we won before *Mistretta* got to the U.S. Supreme Court," Aprile said, referring to *Mistretta v. U.S.*, US SupCt, 44 CrL 3061, No. 87-7028, Blackmun, J., 1/18/89. He pointed to the nationwide sharing of information by defense counsel concerning the Federal Sentencing Guidelines, which led to "a focused litigation effort" and success in many lower courts. He contended that the same kind of focused litigation effort could yield victories in other areas of sentencing as well.

Aprile advised defense attorneys to be more aggressive early in the case, always looking for ways to create "leverage" for sentencing. Begin at the guilt phase, he advised, by arguing that the statute is vague or ambiguous, that it constitutes a denial of due process or equal protection. "Maybe the judge or prosecutor will not want to battle on those terms," and will ease up at sentencing as a result.

"When you got to a sentencing hearing," Aprile told defense attorneys, "it is your courtroom, it is up to you to be prepared." He suggested that attorneys give the judge a proposed agenda for sentencing, and "ensure that absolutely nothing happens off the record." The first time he gave a judge a proposed agenda, Aprile said, it created quite a stir, but it doesn't anymore. "It is that type of advocacy - confrontation - that earns respect," Aprile said.

BUILDING ALLIANCES

"You've got to look for where your allies will be, even though it's tough" to find them, Aprile said, and remember that only you can educate others about your role in the criminal justice system. He described meetings his office (which provides representation to indigent defendants) had had with victims' rights groups. "We listened to what they had to say, and they said some awfully hostile things about criminal defense lawyers." After hearing them out, and giving them an opportunity to vent their feelings, criminal defense attorneys met with members in small groups where "we were able to conduct a dialogue," Aprile explained.

"We focused on some of the myths of the criminal justice system," he said, one of which is that criminal defense lawyers ask for continuances solely to delay the trial. "We told them that the prosecutor's case is completely prepared before the defendant is charged," and explained that in many cases "we ask for continuances so that we have an opportunity to catch up with the prosecutor's degree of preparedness."

In some cases, Aprile said, it may be necessary to seek closure of a sentencing hearing. "If you can't close it, and if there are court watcher groups in the courtroom, you need to explain to them what [the hearing] is all about, what you are trying to do," he said.

Aprile emphasized that "you've got to seek sentencing leverage at every opportunity," and said that sometimes allies are found in unexpected places. He gave the example of a check forgery case where the personnel of the court's diversion program advised Aprile that they were amenable to his sentencing plan but that the victim had to agree with the plan as well. When an officer of the bank which was the victim refused to approve an alternative sentence, Aprile wrote the officer a 5-page letter outlining the reasons why an alternative sentence was appropriate in this case.

The letter failed to move the officer, but the diversion program told Aprile that if he would allow them to use his letter as a model in obtaining approval from victims, they would "break the rule [requiring victim approval] and recommend diversion."

Although Aprile won diversion for his client [which would result in charges being dropped upon successful completion of the program], his client forged 5 more checks while he was in the program. When the diversion program sought to "revoke" his client, Aprile constructed a challenge to the constitutionality of the procedures followed by the diversion program. "I argued that as a matter of fact, if not law, my client had complied with the requirements of the program" by making restitution. This potential attack became a bargaining chip, Aprile said, and "they let the diversion stand, and agreed to a plea to probation on the 5 new check forgeries."

EARLY ACCESS TO PSI

Aprile suggested that criminal defense attorneys ask for early access to presentence reports. "Let the court know that if you get it late, you will request a continuance," he said, observing that courts often base rulings on court convenience- meaning that continuances will be denied if they are inconvenient to the court. He advised filing a motion requesting early access to the PSI, notifying the court that "if you do not get it early, and if it contains derogatory information, and if you're denied a continuance, there will be an appeal."

When using a sentencing advocate to develop a plan for the client, Aprile noted the importance of drafting a letter of engagement, spelling out the relationship between the advocate and the attorney, so that the attorney client privilege will cover the advocate's work product. If the prosecutor seeks to open your files to obtain the information compiled by the advocate, your contract of employment will "put the heat back on the criminal defense lawyer."

KEEP YOUR MIND OPEN

Aprile advised criminal defense attorneys to be vigilant, keeping their mind open to new ideas, because "you never know where an idea that will help your client will come from." He cited the recent popular movie, *A Fish Called Wanda*, in which the character Ken, who has a severe stuttering problem, is arrested for criminal activity.

"Let's suppose you were going to represent Ken. Because Ken is pretty much defined by his stuttering problem, wouldn't you want to seek help for Ken's stuttering problem as part of his sentencing plan," Aprile asked, adding that it may be that Ken's stuttering problem is at the root of his anti-social behavior. Aprile said that the example came to mind because a magazine he was reading on the flight to Washington listed a number of organizations devoted to helping people who stutter.

"Your client is not the only person out there with this problem," Aprile said, and there may be a self-help group in the community that you can ask for help in making a case for funds to hire an expert to evaluate your client. If the problem is not discovered until the case is on appeal, you may be able to argue that the discovery is grounds for resentencing.

There are many resources in the community, or across the country, Aprile said, that defense attorneys can tap either for assistance in developing alternative sentences or as *amicus curiae*. As examples, he cited AARP (American Association of Retired Persons), and organizations devoted to advocacy on behalf of retarded persons. Your client's disability may be an affirmative defense, Aprile suggested, and if it isn't, then perhaps it can be considered as a mitigating factor at sentencing.

Aprile told of being at a cocktail party where a woman was talking about educational testing. He learned about tests to determine reading ability, and then used the information in a challenge of a written waiver of *Miranda* rights, arguing that the defendant, whose reading skills were negligible, could not have made an intelligent waiver of rights. "I didn't win it," Aprile said, but the point he raised bothered the prosecution enough that the defendant was offered a plea bargain reducing the charges in exchange for a guilty plea to the minimum sentence (20 years). When Aprile made his challenge, the case was charged as a death penalty case.

JUDGES HELD ACCOUNTABLE

Discussing the impact victims have had upon sentencing, Aprile cited the case *Booth v. Maryland*, 107 SCt 2529 (1987),

which reversed a death sentence upon a finding that the 8th Amendment prohibits a capital sentencing jury from considering victim impact evidence. "The judge, not the victim, should sentence the defendant," Aprile stressed. "It should not matter whether the victim was a good person or a bad person as to what sentence defendant receives."

And be aware that allocution, allowing defendant to make a statement in his own behalf at sentencing, can be the equivalent of a judicial confession if retrial is won on appeal, Aprile said.

Another aspect of practice that bothers Aprile is the language prosecutors use to convey potential plea agreements to victims. "Be aware of how the information is being communicated to the victim or the victim's family by the prosecutor. Require that the prosecutor say 'this is what I am willing to offer' as opposed to 'defendant is willing to plead guilty to X in exchange for Y'. If the witness or victim has any doubts that the defendant did it, they will believe or be affirmed that defendant is the offender," Aprile maintained.

Criminal defense attorneys are obliged to investigate sentencing issues, prepare for sentencing, and give effective presentations on their client's behalf, Aprile said. "Make the judge accountable" for the sentence he pronounces, Aprile advised, by asking him to state, for the record, his findings and the grounds for the particular sentence.

"Sometimes judges abandon their discretion," Aprile said, by making statements outside the courtroom concerning the case before them, or by making statements in other cases that you can use to your client's benefit. For instance, if a judge has said "I will never give probation in an armed robbery case," then he has essentially said he is unable to exercise his discretion in such cases, and he should be challenged on that point, Aprile said.

Aprile stressed the importance of knowing the case of characters in the criminal justice system. Guard against potential conflicts of interest in the cast, and look beyond the obvious players (judge and prosecutor) to the probation officer. If the probation officer was a personal friend of the victim, Aprile speculated, "you would be derelict in your duty" if you failed to challenge the fact that he was making a sentencing recommendation in this case. Just as you would "hopefully" challenge a judge who was a personal friend of the victim, make all the actors in the system be free of conflict that could hurt your client, Aprile concluded.

J. VINCENT APRILE, II
General Counsel
Assistant Public Advocate
Frankfort

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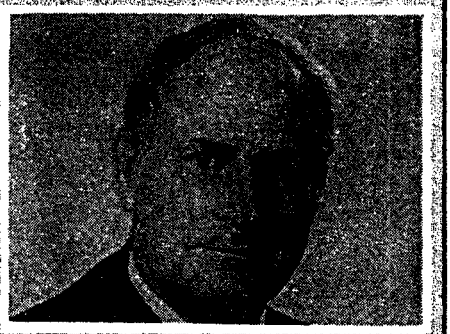
AMENDMENTS TO CRIMINAL RULES



Justice Donald C. Wintersheimer

Justice Donald C. Wintersheimer of Covington, Chairman of the Criminal Rules Committee, has announced that proposed amendments to the criminal rules will be presented at a public meeting at the next annual meeting of the Kentucky Bar Association in Louisville on June 4 through 8, 1991.

In order to provide the opportunity to all members of the profession to consider any suggested rule changes, the Supreme Court has directed that all suggestions must be printed in the KBA *Bench & Bar* publication prior to the June annual meeting. As a practical matter, that means the suggested rule changes must be presented to the Supreme Court in January in order to meet the printing deadline of the KBA magazine which is in February. According, all suggested rules changes must be submitted to the committee *before Friday, December 28, 1990*. The criminal rules committee will then consider the proposed changes immediately thereafter and make a report of all the suggestions to the Supreme Court on January 29, 1991. All suggestions are submitted to the Supreme Court whether or not they are recommended by the Committee. The Supreme Court determines which proposed changes will be submitted to the entire profession for public hearing at the annual KBA meeting.

The purpose of the criminal rules committee, as well as the civil rules committee, is to provide members of the legal profession, both lawyers and judges, with an opportunity to make suggestions and comment on any proposed rules before they are finally adopted by the Supreme Court. Obviously, the final rule making authority remains in the Supreme Court.

All suggestions for amendments are circulated to all the committee members for comment, and the members express their opinions in writing with copies to all the other members of the committee before a discussion is held at the January meeting. Meetings are called at the direction of the chairman but there is at least one annual meeting during the first week of January to consider all of the suggested amendments and to develop a report to the Supreme Court.

Experience indicates that amendments to the criminal rules are generally initiated as the result of members of the practicing bar. Occasionally, members of the judiciary, the clerk's office or court staff attorneys will make suggestions. All suggestions and amendments are welcome.

In addition to Justice Wintersheimer, the other members of the committee are: Hon. John S. Gillig, Frankfort, Assistant Attorney General; Hon. William L. Graham, Franklin Circuit Judge, Frankfort; Hon. Frank E. Haddad, Jr., Louisville (defense bar); Hon. Frank W. Heft, Jr., Public Defender, Louisville; Hon. William B. Johnson, Frankfort (defense bar); Hon. Penny R. Warren, Lexington (former Asst. Atty. Gen.).

The most effective way of presenting a suggested rule change is by listing the existing rule and then presenting the proposed rule, clearly indicating what language would be removed or added to the existing rule. In regard to a totally new rule, the suggested language for the new rule should be presented. In all cases, a brief commentary should also be included with precise reasons for the suggested changes or additions.

Last year there were 19 changes submitted to the committee. Among proposals considered last year were: A proposed rule dealing with the qualification of counsel for indigent defendants in capital case, not recommended and rejected; a proposed new rule to permit *ex parte* requests for funds for experts, recommended but rejected; RCr 11.32, regarding absence, not recommended and rejected; RCr 12.78, appeal bond, rejected; RCr 8.18, validity of prior convictions rejected with leave to resubmit; RCr 7.10 and 7.12 depositions, rejected with leave to resubmit; RCr 11.42, rejected with leave to resubmit; RCr 8.08, not guilty by reason of insanity, rejected; RCr 7.24 and 7.26, withdrawn by sponsor; RCr 9.78, suppression, rejected.

STANDARDS FOR CAPITAL REPRESENTATION IN THE 6TH CIRCUIT

KENTUCKY MAY SOON BE THE ONLY STATE WITHOUT THEM

Randall L. Wheeler

Jurisdictions around the country are beginning to recognize the need for ensuring competent representation in capital cases by adopting standards governing the qualification and performance of counsel in such cases. Mardi Crawford, then with the National Legal Aid and Defender Association (NLADA), published an article in the *Advocate* in February, 1989 ("National Standards for Capital Representation") discussing the history of the movement toward standards and the reasons why standards are necessary. Crawford noted then that the Ohio Supreme Court in October 1987, had adopted capital standards for the appointment of counsel for indigent defendants that were similar in many respects to those which had been recommended by the NLADA. Ohio Supreme Court Rule 65 (hereinafter OSCR).

Recently, the Rules Committee of the Tennessee Supreme Court also recommended standards which will be considered by the Tennessee Supreme Court after September 1990. If adopted, Tennessee's standards, like Ohio's, will address the requirements for the qualification and performance of counsel appointed to represent those charged or convicted of capital crimes. Tennessee Supreme Court Rule 13.1 (hereinafter TSCR). Both states will also have a committee established to oversee the application of the standards. Bill Reddick, Executive Director of Tennessee's Capital Case Resource Center, who was a member of the committee that proposed standards for the state, has said that the prospects for adoption are good. Accordingly, by the end of 1990, Kentucky may be the only state in the 6th Circuit without any standards. (Michigan has no death penalty.)

RECENT CONSIDERATION IN KENTUCKY

As Mardi Crawford pointed out in her article, the NLADA contacted the chief justices of state supreme courts when the NLADA adopted its Recommended Standards for the Appointment and Performance of Counsel in Death Penalty Cases in 1987. Chief Justice Robert F. Stephens of the Kentucky Supreme Court said at that time that his court saw no need for capital standards because representation in death penalty cases at trial and on appeal had been "excellent." But since that time it has become apparent that this has not always been the case. As Crawford pointed out, 7 attorneys who represented defendants at trial who received death sentences have been disbarred, left their practice before disbarment or have been suspended.

Nevertheless, in January of this year, the Criminal Rules Committee of the Kentucky Supreme Court reached a similar conclusion after evaluating the Ohio standards to determine whether the standards should be adopted in Kentucky. Supreme Court Justice Donald C. Wintersheimer, Chairman of the Criminal Rules Committee, in a recent interview said that the Committee discussed the Ohio Standards and concluded that certain portions of the rules would need to be amended in order to address situations peculiar to Kentucky. Ultimately, however, Justice Wintersheimer said that the Committee did not believe that standards were necessary at that time and did not forward a recommendation to the Supreme Court to adopt such rules.

Justice Wintersheimer did indicate, however, that he was interested in the refinement and proposed adoption of the Ohio standards in Tennessee and the fact that Kentucky, if the Tennessee standards go into effect, will be the only state in the 6th Circuit without such standards. Justice Wintersheimer said that the adoption of standards in Kentucky would be considered again if the Committee received indications of interest.

OHIO AND TENNESSEE STANDARDS COMPARED

At first glance, the Ohio and Tennessee standards appear to be virtually identical. But, minor additions and changes in language in the Tennessee standards have resulted in significant differences. Tennessee's proposed standards would require heightened criteria for qualification, impose specific requirements on appointing courts to police the standards and apply those standards not only at trial, but also at the appellate and post-conviction levels.

Among other requirements, the Ohio standards demand that lead trial counsel in a capital case have 3 years of "litigation experience" in "criminal or civil" cases, "some specialized" death penalty defense training and various levels of experience in particular types of cases, not necessarily including experience in murder trials. OSCR 65 I (A)(2). Tenn. on the other hand, would require that lead trial counsel have 3 years of "substantially criminal competent trial experience", "a minimum of 12 hours" of specialized death penalty defense training and various levels of "competent" experience necessarily including murder trials. TSCR 13.1 I.A(2). Co-counsel in Tenn. trials would, likewise, be required to have a minimum of 12 hours of capital defense training and various levels of "competent" experience necessarily including murder trials, unlike Ohio. TSCR 13.1 I.A.(3); OSCR 65 I(A)(3).

At the appellate level, Tennessee's proposal has specifically provided that trial counsel may continue as long as the qualifications for being appellate counsel have been met. The trial court, however, is given the option if "it is in the best interest of the defendant or if prior counsel is otherwise unavailable" to substitute new counsel. Counsel is also expected to represent the defendant "through every stage of appellate litigation" including to the United States Supreme Court. TSCR 13.1 I.B(1). Ohio has no similar provision.

Tennessee would require appellate counsel, similar to trial counsel, to have a minimum of 12 hours of specialized training in the trial or appeal of death penalty cases. TSCR 13.1 B(3)(ii). Tennessee would also require that the committee on the appointment of counsel receive from counsel a copy of the briefs that have been prepared in the cases to be considered for eligibility. TSCR 13.1 I.B (3)(iii).

Both Ohio and Tennessee's proposal allow for the appointment of trial and ap-

pellate attorneys who do not meet the specific qualifications in exceptional circumstances. OSCR 65 I(A)(3); OSCR 65 I(B)(3); TSCR 13.1 I.A(4), TSCR 13.1 I.B(4); But Tennessee, unlike Ohio, would require that the attorney so appointed at trial have "competent" experience in "criminal jury trials" or special training as "defense counsel" in criminal trials, among other requirements. TSCR 13.1 I.A(4). Appellate counsel must also have experience in the trial or appeal of criminal cases "as defense counsel". TSCR 13.1 I.B(4)(b).

Tennessee 's proposal, at least, has also recognized that competent counsel should be required at the post-conviction stages of capital cases, TSCR 13.1 I.C. Those attorneys in Tennessee must have the same qualifications as appellate counsel, TSCR 13.1 I.C(a), have competent experience in state post-conviction at the trial and appellate level in 3 felony cases, 2 homicide cases, or 1 capital case, TSCR 13.1 I.C (b), and have a competent working knowledge of federal habeas corpus practice which can be satisfied by 6 hours of specialized training in the representation of death sentenced persons in federal court. TSCR 13.1 I.C(c).

Tennessee would also place the burden of ensuring that the standards are met upon the appointing court. That court can only appoint counsel that has been recognized by the committee to be eligible. TSCR 13.1 II(1). The minimum obligations for eligibility apply automatically "as a matter of rule" to court appointed counsel and the trial judge has the obligation to assess counsel's performance on a continuing basis using the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, (see *infra*) being given the authority to appoint substitute or additional counsel if dissatisfied. TSCR 13.1 II(2). If counsel has not been recognized by the committee as eligible they cannot be compensated. TSCR 13.1 IV. C.

Tennessee's proposed standards also allay the fears of many that capital standards could be used to prevent, or at least inhibit claims of ineffective assistance of counsel, by stating specifically that the fact an attorney meets the minimum qualifications cannot be used as a criteria for making that assessment in a particular case. The rules, however, do state that noncompliance with the standards is a factor to consider. TSCR 13.1 II (3).

Both Ohio and Tennessee's proposal forbid the appointing court from assigning and counsel from accepting an appointment "which creates a total workload so excessive that it interferes with or effectively prevents rendering of quality representation in accordance with constitutional and professional standards". TSCR 13.1 IV. A(2). But the Tennessee standards, once again, go further in requiring that the court appoint the "best qualified counsel available", TSCR 13.1 IV. A(4), preferably attorneys "who have had competent experience with federal habeas corpus practice." TSCR 13.1 IV. A (5). Tennessee courts are also encouraged by the standards to confer with and advise the Capital Case Resource Center of Tennessee concerning the appointment of counsel in all capital cases and are required to confer with the Resource Center concerning appointments for post-conviction relief. The court must then appoint counsel recommended by the Resource Center or state on the record its reasons why the recommendation was not followed. TSCR 13.1 IV. A(6).

Finally, while the Ohio and Tennessee standards both require that "support services" (including investigators, social workers, mental health professionals or other forensic experts and "other support services reasonably necessary for counsel to prepare and present an adequate defense at every stage of the proceedings") be provided as dictated by state and federal constitutions, statutes and professional standards, TSCR 13.1 IV.C; OSCR 65 III(C), Tennessee's would specifically include the requirement of such services during the appeal and state post-conviction actions. Additionally, Tennessee's standards go beyond the Ohio rules in requiring not only the appointment of experts to assist defense counsel in relation to "competency to stand trial, a not guilty by reason of insanity plea" and "the cross-examination of expert witnesses called by the prosecution" but also experts that can aid in "jury selection" and "the presentation of mitigating evidence and the rebuttal of aggravating evidence at the sentencing phase of the trial, and any other relevant forensic expertise that an adequate defense may require, particularly if necessary to rebut forensic evidence offered by the state." TSCR 13.1 IV. C. Ohio simply states that support services must be provided for "disposition following conviction, and preparation for the sentencing phase of the trial". OSCR 65 III (C). Tennessee would also require that such requests be made *ex parte* and for the court to preserve those requests along with its orders under seal. Confidentiality is required until final disposition of the case at the trial level and the records must be made a part of the appellate record if any appeal results. TSCR 13.1 IV. C.

A disappointing recent development in Tennessee was the deletion of provisions from the proposed standards applying them to retained counsel. Accordingly, if adopted in their current form Tennessee's standards, like Ohio's will apply only to appointed attorneys. Before this revision the standards provided that if counsel was retained but was not eligible for appointment, the court would have the burden "to inquire on the record into the qualifications of counsel even if hired by the defendant and must observe counsel's performance on a continuing basis", using the ABA Guidelines. If dissatisfied with counsel's qualifications or performance the court would have been obligated to advise the defendant of his right to effective assistance. The defendant would have then been given sufficient time and opportunity to hire a substitute or additional eligible counsel or to accept an appointment of the same if unable financially to obtain that assistance. "If necessary, the court [would have been required to] inquire into the competency of the defendant's choice of counsel." TSCR 13.1 II(5).

ABA GUIDELINES

Following the lead of the NLADA the American Bar Association (ABA) in February, 1989, adopted "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases". These guidelines, essentially the same as the NLADA Standards, are far more comprehensive than the standards which have been adopted in Ohio and proposed in Tennessee. The ABA Guidelines not only delineate the qualifications for attorneys who are appointed to represent clients in death penalty cases, but are also are quite specific in the performance standards that must be met when providing such representation at all levels of the judicial system. (While not specifically setting out performance guidelines, the proposed Tennessee standards do refer to the ABA Guidelines as controlling the evaluation of attorney performance in that state.)

Because they are so thorough and well conceived the ABA Guidelines or NLADA Standards should be considered for adoption in Kentucky with certain variations, of course, to take into account matters peculiar to the Commonwealth. If not adopted in full they should at least be utilized to provide a sound basis as was done in Ohio and Tennessee. Unfortunately, the ABA Guidelines are too extensive to discuss in detail here, however, it is significant to note the numerous areas which are covered:

1. Objective
2. Number of attorneys per case
3. Legal representation plan
4. Selection of counsel

5. Attorney eligibility
6. Workload
7. Monitoring; removal
8. Supporting services
9. Training
10. Compensation
11. Establishment of performance standards
12. Minimum standards not sufficient
13. Determining that the death penalty is being sought
14. Investigation
15. Client contact
16. The decision to file pre-trial motions
17. The plea negotiation process
18. The content of plea negotiations
19. The decision to enter a plea of guilty
20. Entry of the plea before the court
21. General trial preparation
22. Voir dire and jury selection
23. Objection to error and preservation of issues for post-judgment review.
24. Obligation of cousel at the sentencing phase of death penalty cases
25. Duties of counsel regarding sentencing options, consequences and procedures
26. Preparation for the sentencing phase
27. The official pre-sentence report
28. The prosecutor's case at the sentencing phase
29. The defense case at the sentencing phase
30. Duties of trial counsel in post-judgment proceedings
31. Duties of appellate counsel
32. Duties of post-conviction counsel
33. Duties of clemency counsel
34. Duties common to all post-judgment counsel

One area the ABA and NLADA clearly emphasize is the need for adequate compensation in capital cases. Specifically, the ABA Guidelines recommend: "Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation. Capital counsel should also be fully reimbursed for reasonable incidental expenses. Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan." ABA Guideline, 10.1.

KENTUCKY'S FUTURE

When Ohio's standards were initially proposed one critcism was that very few people would qualify. This, however, did not prove to be true. At present approximately 650 attorneys have been qualified by Ohio's commission to provide capital representation.

It is also clear that the standards have resulted in substantial savings to the state. The number of pleas to lesser charges in capital cases have increased while the number of capital cases going to trial have decreased. Nevertheless, the capital cases that are taken to trial have resulted in an increased percentage of those cases going to the penalty phase, a clear indication that the cases actually taken to trial are those which truly warrant consideration of the capital sanction. Additionally with fewer constitutional errors there will inevitably be a cost savings because of the decreased expenditures in post-conviction review and the need for fewer retrials.

Recently, in an *amicus curiae* brief submitted to the Kentucky Supreme Court in the case of *Wilson v. Commonwealth*, (File No. 88-SC-896-MR) (an appeal of a death sentence that Gregory Wilson received in Kenton County after being represented by an attorney with no death penalty experience due to the inability of the trial court to obtain counsel for the low amount of compensation that could be provided), the NLADA has requested the Kentucky Supreme Court to adopt the NLADA Standards. Specifically, the brief argues that an indigent defendant in a capital case is entitled to the appointment of counsel with the skill, knowledge and support services adequate to render the capital trial a reliable adversarial testing process. In *Wilson* no mitigation was presented or even investigated.

The *amicus* brief in *Wilson* also asserts that the trial court must replace appointed counsel or at least conduct a hearing when it is notified of factors which raise questions about counsel's ability to render effective assistance. The brief also urges that the Commonwealth refrain from seeking a death sentence if there is insufficient funding for qualified counsel.

The NLADA's *amicus curiae* support for standards in *Wilson* and Justice Wintersheimer's willingness to continue to consider the adoption of capital standards through the Criminal Rules Committee of the Supreme Court is encouraging. Also, the Capital Sub-Committee of the Northern Kentucky Blue Ribbon Committee, a committee created by the Northern Kentucky Bar Association to evaluate problems related to the securing of counsel in criminal cases, is currently exploring solutions to financial and other problems of capital representation and is considering of recommending to the Kentucky Supreme Court the adoption of standards for the certification of counsel in capital cases or at least the implementation of a required Court approved capital litigation training program.

The increasing number of death penalty trials, appeals and post-conviction actions will certainly require more participation by a growing number of members of the Bar. Therefore, even if the Kentucky Supreme Court's assessment of the quality of capital representation until this time is correct, the proliferation of cases and the need for attorneys alone would appear to require some standards to prevent a diminution of quality.

But, a compensation standard, which was not adopted by Ohio or proposed in Tenn. despite being recommended by the NLADA and ABA also must be adopted or otherwise addressed in Kentucky. Attorneys providing representation in capital cases must receive reasonable compensation for their services. Ohio provides a maximum compensation limit of $40,000 for 2 attorneys and Tenn. has no upper limit at all (although it does have an hourly rate of $20/hour out-of court and $30/hour in-court). In Kentucky, the maximum fee allowable for any stage of a capital case is $2,500 plus reasonable expenses. This extremely low ceiling, among the worst in the nation, which has resulted from inadequate funding for capital cases, does nothing to encourage private attorneys to provide such vital services. Public defenders cannot be expected to bear the entire burden of these multiplying cases. In order for capital standards to mean anything at all then, the state must be willing to make a commitment to encourage attorneys monetarily to participate.

Finally, any standards proposed for Kentucky should address the qualifications and performance of retained counsel, not just those appointed to capital cases. The irrevocability of the penalty and the complexity of the cases would appear to demand no less. Because a person's very life is at stake this is one area of the criminal law with such a drastic difference that anyone who undertakes such representation, even if chosen by the defendant, should be qualified to provide the necessary services and should render those services competently. Certainly, a general practitioner in the medical field would not be allowed by the state to undertake brain or heart surgery even if the patient desired him to do so. The state should, similarly, regulate the provision of comparable legal services. The failure of Ohio and Tennessee to recognize this is regrettable. Kentucky should not repeat the mistake.

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HABEAS CORPUS: THE NEED FOR REFORM IN DEATH PENALTY CASES

The views of the Chief Justice of the United States Supreme Court

We have a serious malfunction in our legal system — the manner in which death sentences imposed by state courts are reviewed in the federal courts. Today the average length of time between the date on which a trial court imposes a sentence of death, and the date that sentence is carried out — after combined state and federal review of the sentence — is between 7 and 8 years. More than 3 years of this time are taken up by collateral review alone, with little certainty as to when that review has run its course. Surely a judicial system properly designed to consider both the claim of the state to have its laws enforced and the claim of the defendant to the protections guaranteed him by the federal Constitution should be able to reach a final decision in less time than this.

The essence of the question is not the pros and cons of capital punishment, but the pros and cons of federalism. The Supreme Court has held that capital punishment is lawful if imposed consistently with the requirements of the Eighth Amendment. Whether or not a state should choose to have capital punishment must be up to each state: 37 states have elected to have it, and 13 states have chosen not to have it. The capital punishment question is one which deeply divides people, and always has. But this question is only tangentially involved when we consider the procedures designed to provide collateral review in the federal courts for federal constitutional claims of defendants who have been sentenced to death. Surely the goal must be to allow the states to carry out a lawful capital sentence, while at the same time assuring the capital defendant meaningful review of the lawfulness of his sentence under the federal Constitution in the federal courts. This, as I have said, is essentially a question of federalism — what is the proper balance between the lawful authority of the states and the role of federal courts in protecting constitutional rights?

The writ of habeas corpus was originally a creature of the English common law, not designed to challenge judgments of conviction rendered after trial, but to challenge unlawful detention of citizens by the executive. It played much the same role in this country for the first century and a half of our existence. As a result of judicial decisions and congressional ratification of these decisions over the past century, however, it has evolved into something quite different. In civil litigation, once the parties have had a trial and whatever appeals are available, the litigation comes to an end and the judgment is final. But in criminal cases a defendant whose conviction has become final on direct review in the state courts may nonetheless raise federal constitutional objections to that conviction and sentence in a federal habeas proceedings. This system is unique to the United States; no such collateral attack is allowed on a criminal conviction in England where the writ of habeas corpus originated.

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Reasonable people have questioned whether a criminal defendant ought to have as broad a "second bite at the apple" in the federal courts as he presently does, but that is a question of policy for Congress to decide. So long as we are speaking of non-capital defendants, the present system does not present the sort of practical difficulties in the administration of justice that it presents in the case of capital defendants. This is because someone who is convicted and sentenced to prison for a term of years in state court, and wishes to challenge that conviction and sentence in a federal habeas proceeding, has every incentive to move promptly to make that challenge. He must continue to serve his sentence while his federal claims are being adjudicated in the federal courts. Therefore, the sooner he obtains a decision on these claims, the sooner he will get the benefit of any decision that is favorable to him. This is true even though there is no statute of limitations for bringing the federal habeas proceedings.

But the incentives are quite the other way with a capital defendant. All federal review of his sentence must obviously take place before the sentence is carried

out; consequently, the capital defendant frequently finds it in his interest to do nothing until a death warrant is actually issued by the state. States also have varying systems of collateral review and one of the rules of federal habeas corpus is that certain kinds of claims must first be presented to the state courts in collateral proceedings before they may be decided on the merits by the federal courts. There is no constitutional right to counsel in state collateral review proceedings, and therefore a capital defendant is frequently without legal advice as to how to proceed. The upshot is that often no action by the defendant is taken until shortly before the date set for execution. The result is foreseeable: arguments in state and federal courts over whether the execution should be stayed pending decision on the merits, because there is no provision for an automatic stay.

Not only is there no statute of limitations for filing for federal habeas, but normal rules of *res judicata* do not apply. A criminal defendant is not necessarily barred from bringing a second petition in federal court after his first petition has been decided against him on the merits. Instead of *res judicata*, a doctrine of "abuse of the writ" has been developed, but its outlines are not fully developed. As a result, a capital defendant, after his first federal habeas petition is decided against him, may file a second petition, and even on occasion a third petition. On each occasion, arguments are pressed that an additional stay of execution is required in order for a court to consider these successive petitions. The result is that at no point until death sentence is actually carried out can it be said that litigation concerning the sentence has run its course.

The system at present verges on the chaotic. The 8 years between conviction in the state and final decision in the federal courts is consumed not by structured review of the arguments of the parties, but in fits of frantic action followed by periods of inaction. My colleagues and I can speak with first hand experience of this, and so can the district judges and the judges of the courts of appeals who regularly pass on these applications. It is not unknown for the Supreme Court to have pending before it within a period of days not merely one application for a stay of execution but 2 from the same person: one seeking review of collateral state proceedings, and the other seeking review of federal habeas proceedings, both brought in the court of first instance within a matter of days before the execution is set to take place. Thus delay is not the only flaw in the present system. The last-minute nature of so many of the proceedings in both the state courts and the federal courts leaves

LITTLE IS HEARD BUT A FRUSTRATED CRY FOR FINALITY

On the whole, we in the United States consider ourselves to be a civilized nation. We are proud of our democratic heritage and our belief that we are a fair and just society. Yet when it comes to the issue of capital punishment, we often take leave of our senses.

Out of frustration, justifiable anger and fear, our perception becomes clouded. We have a rash tendency to focus in on the offender - to the exclusion of all else. Our cry for the death penalty places the United States in isolation from virtually all of the world's democracies and in the company of the worst dictatorships. Nonetheless, regardless of its clear lack of benefit, in spite of viable alternatives to its use and in spite of the offensive company with which it places us, capital punishment is a reality in our civilized society.

Whether one agrees or disagrees with capital punishment, it cannot be disputed that death is different from all other criminal sanctions that we impose. The death penalty is final, irrevocable and leaves no room for error. We must be absolutely certain that the criminal defendant is tried fairly and that guilt is determined beyond a reasonable doubt. Under our system of justice, we attempt to ensure this by providing jury trials and a layered process of appeals. We have been admittedly fallible people struggling to attain infallible judgments.

But times are changing. In our frustration over violent crime and in our fervor to exact death as a punishment for murder, our cry has been to shorten or do away with the appellate process for those convicted of murder. In our passion for the death penalty, we no longer view the appellate process as a safeguard against miscarriages of justice. Instead, we view appeals as a delaying tactic employed by "criminals" to thwart our final judgments or as an unnecessary obstacle to justice. Our cries for quicker executions are being heard by our elected officials and our criminal justice system.

With the approval - indeed, the urging - of Chief Justice William H. Rehnquist, the Supreme Court is finding ways to drastically limit or eliminate death-row appeals. In recent decisions, the court has arbitrarily narrowed the grounds on which condemned defendants can appeal and severely limited the means by which such appeals may be pursued. Obdurate procedural rules are being stringently enforced to bar judicial review of legitimate errors, entire appeals and any newly discovered evidence that may come to light in a case. The same court has determined that states need not provide attorneys to represent the condemned on appeal (mental retardation and illiteracy notwithstanding).

Fundamental fairness and justice are no longer our overriding concerns. Only our frustrated cry for finality matters.

Last year a majority of the Supreme Court justices recognized that there is "a high incidence of uncorrected error" in capital cases and that a "substantial portion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings. . ." Two years ago, a study in the Stanford Law Review pointed out that since the turn of the century, at least 23 innocent people have been wrongfully executed in this country.

Even under today's allegedly "reliable" capital punishment statutes, innocent people have been sentenced to death. Just last year the cases of Jerry Bigelow in California, James Richardson in Florida, Timothy Hennis in North Carolina, Randall Dale Adams in Texas, and this year the case of Clarence Brandley in Texas stand as testaments to our fallibility. Their innocence was discovered through totally fortuitous circumstances and not through the normal operation of the appellate system.

In virtually every case, the only reason innocent death-row prisoners had not been executed before their innocence was proved was the "delay" occasioned by pending appeals or post-conviction proceedings on other issues - the very delays condemned by Chief Justice Rehnquist and a majority of the public.

Out of frustration, we seek to circumvent the only process in place that affords any safeguard against miscarriages of justice. In capital cases, where life is at stake, we must ensure that our judgments of death are correct. If we must have a death penalty, then we cannot let our anger and frustration blind us to our own fallibility.

JOSEPH M. GIARRATANO

Joseph M. Giarratano is on death row at the Mecklenburg Corrections Center in Boydton, Va.

one with little sense that the legal process has run an orderly course, whether a stay is granted or whether it is denied.

Consider the case of Jesse Tafero, who was executed on May 4, 1990. The death sentence imposed in his case was upheld by the Supreme Court of Florida in 1981, and in 1982 the Supreme Court of the United States denied a petition for certiorari. Tafero then filed a federal habeas petition, which was denied in 1985. The denial was affirmed by the Court of Appeals in 1986, and the Supreme Court denied certiorari in 1987. Tafero then filed another federal habeas petition, which was denied by the District Court in 1988. That denial was upheld by the Court of Appeals in 1989, and the Supreme Court denied certiorari on April 16, 1990 — approximately a month ago. By this time Tafero had had 2 federal habeas petitions proceed through every level of the federal courts following the earlier direct review of his sentence b{ the Supreme Court of Florida. The state scheduled his execution for May 2, 1990.

On April 27th, Tafero filed an application in the Supreme Court of the United States to suspend the order denying certiorari pending filing for a rehearing, which was denied. Three days earlier, on April 24th, he had filed with the Florida Circuit Court his third motion to vacate the judgment of death under the Florida proceeding for collateral review. This determination was affirmed by the Supreme Court of Florida on April 30th. Tafero then filed his third federal habeas petition in the District Court, and that court granted a 48-hour stay of execution to consider it. On May 3rd the Court denied the petition, the Court of Appeals affirmed that denial, and the Supreme Court denied a stay of execution.

Tafero was executed the following day.

This system cries out for reform. I submit that no one — whether favorable to the prosecution, favorable to the defense, or somewhere in between — would ever have consciously designed it. The question is how the present law can be changed to deal with these problems while still serving the federalism goal which I mentioned previously.

In June 1988 I established an *Ad Hoc* Committee on Federal Habeas Corpus in Capital Cases under the chairmanship of retired Associate Justice Lewis F. Powell, Jr. In addition to Justice Powell, I appointed to this Committee, the Chief Judges of the Fifth and Eleventh Circuit Court of Appeals, the 2 federal appellate courts having had the most experience with litigation about capital sentences, and a district judge from each of these circuits. I thought it best to have people on the Committee who not only had a judicial perspective, but who had "hands on" experience in dealing with capital sentence proceedings.

The Committee investigaved ways of improving both the fairness and efficiency of our system of collateral review in death penalty cases. In September of 1989 it issued its report recommending the coordination of our state and federal legal systems in capital cases and the structuring of collateral review. The Report concluded that capital cases "should be subject to one fair and complete course of collateral review in the state and federal system, free from time pressure ofxc impending execution and with the assistance of competent counsel."

Under the Powell Committee proposal, persons convicted of capital crimes and sentenced to death would, after a full set of appeals, have one opportunity to collaterally attack their sentences at the state level and one such opportunity at the federal level. Second and successive petitions for collateral review would be entertained only if the petitioner could cast doubt upon the legitimacy of his conviction of a capital crime. In the absence of underlying doubt concerning guilt or innocence, itself, courts would not entertain repetitive petitions attacking the appropriateness of the death sentence.

In the interests of reliability and fairness, the Powell Committee proposal would permit states to opt into the unified system of collateral review only where they agreed to provide competent counsel in state collateral proceedings. Under current federal law, counsel is provided in federal habeas corpus proceedings, but not in state proceedings. The Powell Committee proposal would also require an automatic stay of execution to permit the prisoner to bring his petition in an orderly fashion and without the pressure of pending execution, and would create a new automatic right of appeal from the federal district court to the new federal court of appeals.

The Powell Committee Report strikes a sound balance between the need for ensuring a careful review in the federal courts of a capital defendant's constitutional claims and the need for the state to carry out the sentence once the federal courts have determined that its imposition was consistent with federal law. The Conference of State Chief Justices at its meeting last February unanimously endorsed the report of the Powell Committee. When that report was presented to the Judicial Conference of the United States in March, 5 changes were proposed to make it closer to the position taken by the American Bar Association, which would not only enlarge the scope of federal review but make successive habeas petitions more readily available than at present. The Judicial Conference was closely divided on each of these 5 amendments, and adopted only 2 of them.

The first adopted would set more stringent standards for the appointment of counsel in state proceedings, and make those standards applicable not merely on collateral review but in trial and appellate proceedings in the state courts. The second would allow a successive habeas petition if the defendant bases the claim on a "factual predicate" that could not have been discovered with due diligence and would "undermine" the court's confidence "in the appropriateness of the sentence of death." This latter amendment, in particular, strikes me as so vague and ill-defined as to substantially defeat the purpose of the recommendations of the Powell Committee.

Congress is now considering the question of habeas corpus reform. Two bills have been introduced by Senator Strom Thurmond, the ranking minority member of the Senate Judiciary Committee. The first would allow federal habeas review only where a prisoner is unable to secure "full and fair adjudication" of his claims in state court. My own view is that, while this approach might commend itself some years hence, it does not do so at the present time. There have been a significant number of capital sentences set aside because federal courts decided that the sentences did not conform to the requirements of the Eighth Amendment. Very likely this is because the contours of the Eighth Amendment as applied to capital sentencing have only evolved over the last 15 years. If the present scope of federal habeas review can be retained without delay and other faults contained in it, I think it should be. The second bill introduced by Senator Thurmond embodies the Powell Committee report, and I think that report shows how the present scope of federal habeas review can be retained without unnecessary delays.

Another bill, S.1757, has been introduced by Senator Joseph Biden, the Chairman of the Senate Judiciary Committee. It, in my view, is at the other end of the spectrum and would actually exacerbate the delays and repetitiousness of the present system. It would allow successive petitions where there is a claim of "miscarriage of justice." This phrase is apparently derived from recent decisions of our Court in another

area of habeas law; as applied to capital cases it is not well-defined, and its use in regulating successive petitions may, as Justice Powell pointed out in his testimony, "produce confusion and open the door for abuse."

Another area where the Powell Committee recommendations are, in my judgment, superior to the proposals contained in S.1757 is the area of procedural default. Under the rules of procedural default, a defendant must object to errors at the time of trial. Where the defense fails to object to an error, it waives its opportunity to raise the claim. The purpose of the procedural default rules is to assure that errors are pointed out at a time when they can easily be corrected, not years later in an attempt to obtain a new trial. The Powell Committee Report would leave these rules in effect. S.1757, by contrast, would make it easier for a prisoner to raise claims for the first time years after trial, thus exacerbating the problems of piecemeal litigation and delay that characterize the present system. And, it would accomplish this highly questionable goal by overturning a series of Supreme Court cases.

S.1757 would also overturn an entire body of Supreme Court precedent in an area where Congress has never previously legislated. For nearly a quarter of a century the Supreme Court has wrestled with the problem of whether constitutional decisions announcing a new rule of law should or should not be applied "retroactively." The Court has gradually, one might say by a process of trial and error, decided that decisions which announce a new rule should be applied across the board to cases on direct review of a state conviction, but that with certain exceptions they should not be applied by federal habeas courts to a defendant whose trial took place before the new rule was announced. The reason for such a doctrine seems obvious: unless the new rule is truly a "fundamental principle," essential to a just result, state courts should not be penalized for applying the federal constitutional law which was in effect at the time of trial. But S.1757 would simply abrogate these decisions and permit capital defendants to challenge their convictions and sentences on the basis of constitutional decisions which had not even been announced at the time the case was in the state courts.

The bill introduced by Senator Thurmond, the bill introduced by Senator Biden, and the Powell Committee Report all provide some form of statute of limitations to regulate the time in which capital defendants must avail themselves of the opportunity for collateral review. The Powell Committee Report sets the statute of limitations at 6 months; S.1757 introduced by Senator Biden sets it at 1 year. A statute of limitations is essential if we are to obtain orderly federal habeas review of the sentences, and so long as the capital defendant has counsel at this stage it imposes no unreasonable burden on him.

At this moment, there are about twenty-two hundred capital defendants on the various "death rows" in state prisons. There is no doubt that when some of these defendants present their constitutional claims to federal courts, their sentences will be set aside. Others of these defendants will, after full federal review, obtain a determination that the sentences imposed on them were consistent with the federal Constitution. Defendants who will ultimately prevail in their claims should not have to wait 8 years for a decision to that effect, and states seeking to carry out the sentence upon defendants whose claims are rejected by federal courts should not have to wait 8 years to do that. Fair-minded people, whether they personally oppose or favor the death penalty, should have no difficulty agreeing that the present system is badly in need of reform.

All of the pending Senate bills on this matter are clothed in garb of "reform," but, unfortunately, not all of them are designed to achieve the sort of reform which the system badly needs. The proposal of the Powell Committee, in my view, accomplishes the task while the others do not. Under that proposal the capital defendant is given the necessary tools and the necessary incentives to make all of his constitutional claims in his first federal habeas proceeding, and that proceeding is allowed to run its full course in both the district court and in the court of appeals without any threat of imminent execution. If the result of these proceedings is a determination that the state sentence is consistent with the United States Constitution, that should (with rare exceptions) conclude the federal review, and the state should be able to carry out its sentence. This is a solution to the problem in the best tradition of our federal system. It is a solution which will restore public confidence in the way capital punishment is imposed and carried out in our country.

WILLIAM H. REHNQUIST
Chief Justice of the United States Supreme Court

This address was delivered by Chief Justice Rehnquist at the Annual Meeting of the American Law Institute at the Mayflower Hotel, Washington, D.C., May 15, 1990. Reprinted by permission.

Kentucky Capital Litigation Resource Center

The primary goals of the Kentucky Capital Litigation Resource Center are to find competent counsel to represent death row inmates in state and federal post-conviction, and to develop and coordinate all available resources to aid those attorneys.

To accomplish the first mission the resource center attorneys will directly represent some capital clients in post-conviction actions. Additionally, the resource center will spend considerable efforts in recruiting private practitioners to be on a panel from which attorneys are chosen to handle capital post-conviction actions. Private practitioners will be encouraged to participate on a *pro bono* basis. They will 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. Possibly an entire firm would be assigned to the case. Ideally the DPA attorney involved will be an attorney that was designated and 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 will be 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 will expand the present death penalty library, and 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 will coordinate its resources with other state and national organizations providing assistance to death sentenced clients. The resource center, in conjunction with the resource centers in other states, will establish and develop a computerized indexed pleadings bank. A newsletter and a Sixth Circuit Habeas Corpus Manual are also planned. The resource center will also develop and coordinate training concerning capital litigation in the post-conviction area; develop and expand existing expert witness lists; assist in organizing investigation efforts; and will monitor all Kentucky capital cases.

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Karen DeFew

Offender Records Supervisor Changes.

In August, 1990, Karen DeFew became the third "ASK CORRECTIONS" contributor. She assumes this responsibility as part of her new duties in the Corrections Cabinet as Offender Records Supervisor. Shirley Sharpe, Karen DeFew's predecessor, transferred to the Eastern Kentucky Correctional Complex as Assistant Unit Director. This column wishes her well in her new position and welcomes Karen DeFew.

Ms. DeFew began her career in Corrections in 1978. She worked as a Classification and Treatment Officer at the Kentucky State Penitentiary for over eight years. From 1986 to 1989, she instructed an Employability Skills Program which helped inmates secure employment upon their release from prison. This program was operated at the Western Kentucky Correctional Complex.

In 1989, she began working for the Office of Corrections Training. She worked as an instructor for the new employees under the Basic Academy Program.

She assumed her new position as the Administrator of Offender Records in August.

Ms. DeFew holds a Bachelor of Science Degree with a major in Criminal Justice and a minor in Sociology. She obtained this degree at Murray State University.

TO CORRECTIONS

The last session of the General Assembly changed the Good Time Law (KRS 197.045) to provide an educational Good Time Credit. Would such credit be in addition to Statutory Good Time? Would it be in addition to the amount of Meritorious Good Time a prisoner may be awarded? What school courses could an inmate participate in order to receive such credit?

TO READER:

The General Assembly revised KRS 197.045(1) to allow the Corrections Cabinet to provide an educational Good Time Credit of sixty (60) days to any prisoner that successfully completes a Graduate Equivalency Diploma, a two (2) or four (4) year college degree or who passes state certification for any vocational program provided by the Cabinet.

The educational Good Time Credit is in addition to Statutory Good Time, and is in addition to any Meritorious Good Time which the prisoner may be awarded. The inmate may receive additional educational Good Time Credits upon completion of additional courses.

TO CORRECTIONS:

Can Meritorious Good Time be forfeited for any reason?

TO READER:

Meritorious Good Time can be forfeited for reasons of disciplinary actions. When Good Time is forfeited, Statutory Good Time shall be forfeited before Meritorious Good Time is taken. Meritorious Good Time given for acts of heroism where the inmates life is in danger or where he saves the lives of other inmates and staff shall not be forfeited.

Meritorious Good Time, which has been forfeited, will not be subject to restoration.

TO CORRECTIONS:

Why does the Corrections Cabinet only give an inmate Good Time Credit of twenty-five percent (25%) of his sentence when KRS 197.045 authorizes credit of ten (10) days per month?

TO READER:

In accordance with KRS 197.045(1) any person convicted and sentenced to a state penal institution may receive a credit on his sentence of not exceeding ten (10) days *for each month served*, known as Statutory Good Time.

For bookkeeping purposes Statutory Good Time is credited upon sentence computation and amounts to one-fourth (1/4) of the total sentence. As an example, a person serving a two (2) year sentence would serve one (1) year and six (6) months, earning Good Time Credit in the amount of ten (10) days per month for eighteen (18) months served for a total of one hundred eighty (180) days, or six (6) months, one fourth (1/4) of the total sentence and would be discharged having served one (1) year and six (6) months of his two (2) year sentence.

NOTE:

Good Time Allowance is not computed on actual sentence length but on the actual time served, which amounts to one fourth (1/4) of the total sentence.

This regular *Advocate* column responds to questions about calculation of sentences in criminal cases. Karen DeFew is the Corrections Cabinet's Offender Records Administrator, State Office Building, Frankfort, Kentucky 40601. For sentence questions not yet addressed in this column send to Dave Norat, DPA, 1264 Louisville Road, Frankfort, Kentucky 40601.

FORENSIC SCIENCE

THE AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM (AFIS)

Jesse Skees **Sara Skees**

In 1986 the Kentucky State Police acquired an Automated Fingerprint Identification System (AFIS) This was the beginning of a new era for the identification of fingerprints.

Before the AFIS was acquired a latent fingerprint identification was virtually impossible to make without a known suspect. With the advent of AFIS an unknown latent fingerprint is placed into the system and searched against the data base and identified.

The data base consists of those individuals arrested, fingerprinted and submitted to the Kentucky State Police. Despite Kentucky law, KSP has never received all fingerprint cards from all felonies and shopliftings where an arrest has been made and due to its lack of enforcement it may never receive this necessary information, and thus an incomplete data base.

You may wonder how a fingerprint may be entered into a computer. Without going into too much detail, the computer "sees" ridge endings and their flow. The ridge endings are generally referred to as "minutiae" or "points of identification."

The minutiae can be entered either manually or automatically. Entering the minutiae manually exercises more quality control; minutiae entered automatically results in less quality control.

Latent fingerprints minutiae from crime scenes are entered manually. Virtually all of the known fingerprints minutiae, in the database, are or were entered automatically.

The human eye can more readily determine what is or is not a minutiae better than a computer. The technician that enters the minutiae or oversees the entry of minutiae can override the computer and delete or add minutiae if needed. Usually when the computer is operated in the automatic mode the minutiae that was plotted by the computer is not checked for accuracy due to time constraints.

Unlike the human eye, the computer cannot "see through" lightened or darkend areas; therefore it may mark false minutiae. The phase "garbage in — garbage out" really becomes apparent when you consider the millions of fingerprints in the database that were entered into the system virtually unchecked. Only when they became apparent as problems later on are they marked to be re-entered.

Sometimes when entering the minutiae of a latent fingerprint some of the minutiae will be deleted or added. The same latent fingerprint could be entered 2 or more times in anticipation of increasing the chances of making an identification.

The computer will print out a list of people (respondents) that may be a fingerprint match. The technician can view the possibilities along with the latent fingerprint at a video terminal.

The number of "hits" (identifications) statewide has not been impressive since the database has a lot of garbage entered into it and due to the lack of submission of the necessary fingerprint cards.

Remote terminals were set up for Lexington and Louisville, Kentucky, since they had a lot of latent case activity and they had Latent Print Examiners that were certified by the International Association for Identification (IAI).

Since Lexington and Louisville submitted a lot of the known fingerprint arrest cards from their regions and a lot of these were properly inked there resulted less garbage going into the system and more identifications being effected. Another factor that has also aided regional success is the fact that they can perform a search of only those cards that were submitted by them. By doing this they can eliminate searching time against all of the fingerprints in the system.

The AFIS is a great tool and is an essential aid in identifying fingerprints but too much emphasis should not be placed on it. The investigating officer should still try to develop a suspect(s) and not depend on the computer solving the case for him/her.

Since some amount of garbage can always be in the computer the perpetrator can be overlooked while the incorrect respondents are being considered for comparison purposes.

When writing about fingerprint identification it must be pointed out that there are 2 separate and distinct entities. One is the identification of a complete set of 10 fingerprints of an individual taken at the time of arrest searched against the AFIS data base of fingerprints of prior arrest records. The other is the identification of an unknown single fingerprint lifted at a crime scene and searched against the database of fingerprints of prior arrest records.

The second entity is what has been the biggest selling point of the AFIS system. The possibility of identifying a single fingerprint lifted from a crime scene which would lead to an arrest and a crime solved. However, the negatives must also be pointed out.

Point one: if the latent print left at a crime scene was made by an individual who had never been arrested or fingerprinted before an identification could never be made.

Two: The AFIS system requires a practically picture perfect latent print which has at least 10 or more points of identification in order to get a good set of respondents.

Three: The AFIS system does not see nor think; therefore, it does not know that it is recording the minutiae of a fingerprint. It basically is making a plat of the breaks in the lines (friction skin ridges).

Four: The AFIS system cannot be used to identify a palm print, foot print, or the areas of the second and third joints of the fingers because only the first joint of the fingers is recorded and stored in the database.

Five: The AFIS system does not know which way is up. Therefore, a fingerprint recorded in a more slanted position on the fingerprint card than the latent print lifted from the crime scene will not "hit" a correct respondent.

Six: The AFIS system does not know left from right. Therefore if some unthinking law enforcement officer allowed a fingerprint card to be submitted in which the hands were reversed (the left thumb recorded in the right thumb block and so on) a latent print lifted from a crime scene which could be determined as a right thumb would never be matched.

Seven: The AFIS system does not know a thumb print from a little finger fingerprint or any of the other digits for that matter. Therefore if an unthinking law enforcement officer did not check the correct order in which the fingerprints were recorded and a latent print lifted from a crime scene was determined to be a right forefinger, for example, a correct respondent could not be obtained.

Eight: The AFIS system cannot reason. Therefore, the human element is a necessity. In other words, the machine is only as good as the people giving it the information. (GIGO: garbage in, garbage out).

JESSE C. SKEES
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Jesse Skees has 19 years of experience in the science of fingerprint identification. He has worked for the FBI in Washington, D.C., and the Identification Unit/AFIS Section of the Kentucky State Police in Frankfort, Kentucky. He is also certified by the International Association for Identification as a Latent Fingerprint Examiner and co-founder of Latent Print Analysts of Kentucky, Inc.

Sara Skees has 18 years of experience in the science of fingerprint identification. She has worked for the FBI in Washington, D.C., the State Bureau of Investigation in Raleigh, North Carolina, and the Identification Unit/AFIS Section of the Kentucky State Police in Frankfort, Kentucky. She is also certified by the International Association for Identification as a Latent Fingerprint Examiner and co-founder of Latent Print Analysts of Kentucky, Inc.

CHALLENGING THE CATEGORY OF A DRUG AND THE DELEGATION OF THE DUTY TO CATEGORIZE

A. Challenging Category

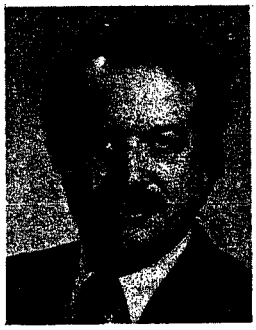
The previous article in *The Advocate*, Vol. 12, #5, Drug Schedule set out a listing by the Cabinet for Human Resources of what categories it has placed certain drugs. As with all matters in a criminal case, the defense may have the duty to challenge determinations made by the state's witnesses.

In *Hohnke v. Commonwealth*, Ky., 451 S.W.2d 162 (1970) the Court held that a defendant had the right to challenge the schedule assigned to a drug by the state agency. *Id.* at 166. The statutes set out certain criteria for the classification of drugs by the administrative authority. The defense can challenge the correctness of the classification made pursuant to KRS 218A.020: "It may not be doubted that a judicial review to test the validity of an administrative regulation must be afforded to satisfy the demands of due process." *Id.*

B. Challenging Delegation

Further, Courts have held that a legislature's requiring an administrative agency to place drugs within certain categories is an unconstitutional delegation of legislative authority. See Kentucky Constitution Sec. 27 and 28; *State v. Rodriguez*, 379 So.2d 1084 (La. 1980); *Utah v. Gallion*, 572 P.2d 683 (Utah 1977). But see *Hohnke, supra*, at 165; *Commonwealth v. Hollingsworth*, Ky., 685 S.W.2d 546 (1985) (Vance, J., dissenting).

CASES OF NOTE... IN BRIEF



Ed Monahan

The Deaf Cannot be Excluded from Jury Service
***DeLong v. Brumbaugh*,**
703 F.Supp. 399 (W.D.Pa. 1989)

The Court held that a deaf person who could speak and understand via an interpreter could not be excluded from jury service under a state juror qualification statute since the Congress Rehabilitation Act of 1973 precluded discrimination against handicapped persons.

Defense Expert Cannot be Ordered to Prepare a Report
***State v. Hutchinson*,**
766 P.2d 447 (Wash. 1989)
(En Banc)

Darrin Hutchinson was charged with aggravated 1st degree capital murder. His defense was diminished capacity. The trial judge ordered the defense's mental health experts that the defense intended to call at trial to prepare written reports and turn them over to the state before trial. The prosecutor sent the order to the defense experts. The defense instructed its experts not to comply with the order while appellate review of it was in process.

The Court noted that a defendant may under its rules of discovery be required to disclose any existing report of an expert who he intends to call at trial. However, the Court held that an expert cannot be forced to make a report at the request of the prosecution. *Id.* at 450. An "adverse part cannot be required to prepare or cause a writing to be prepared for inspection..." *Id.* at 451.

Incompetent Defendant; Involuntary Confession
***State v. Benton*,**
759 S.W.2d 427 (Tn.Cr.App. 1988)

In spite of his insanity defense, Charles Benton was sentenced to 40 years for two counts of aggravated rape and one count of aggravated sexual battery. He confessed.

The Court held that the defendant who had an I.Q. of 47 and who operated at best at a 7 year old level was incompetent by a preponderance of the evidence.

Additionally, Benton's confession was not voluntary since the defendant did not have the ability to form a will of his own and to reject the will of others. It wasn't that the defendant was overreached; it was that he was never reached. He could not "rationally and intelligently grasp the concept of waiver as preserving a profoundly critical choice." *Id.* at 432.

EED
***People v. Chevalier*,**
521, N.E.2d 1256 (Ill.App. 1988)

The Court held that "where voluntary manslaughter is properly an issue, a murder conviction is proper only if the evidence is sufficient to prove beyond a reasonable doubt the absence of the element which would reduce the homicide from murder to voluntary manslaughter." *Id.* at 1263. It was error to fail to instruct the jury on this negative essential element. *Id.* at 1264.

Half-Truth-in-Sentencing
Darrell Erlewein v. Commonwealth Ky., No. 88-SC-898-MR (2/8/90) (unpublished)

At the "half-truth-in-sentencing", KRS 532.055, hearing the Commonwealth called a Probation and Parole officer who testified incorrectly that a person convicted of 1st degree rape and sodomy would serve 20% of his sentence before becoming eligible for parole. KRS 439.3401 requires 50% parole eligibility. Even though this error was not timely preserved, the Kentucky Supreme Court unanimously found this "manifest error" under RCr 10.26, and remanded for resentencing.

Attorney Fees/Appeals
***In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*,**
Florida, ___ So.2d ___ (May 3, 1990)
(1990 WL 59673, 15 Fla.L.Week 278).

In response to a huge backlog of indigent appeals in this district, the Florida Second District Appellate Court issues a *sua sponte* order regarding the appellate public defender system. The District Appellate Court stated that the briefs of non-indigents were being filed at least a year sooner than those of indigents, creating a "constitutional dilemma" due to the equal protection clause. The order mandated that the public defender of each judicial circuit must handle appeals of indigents from its own circuit, and that if a conflict arises due to an inability to ably represent all assigned clients, the circuit judge may appoint counsel from the bar's private sector.

The responsibility for compensation of appointed counsel was placed on the county governments, and six counties appeals this order.

The high court held that although the Tenth Circuit's public defender was obligated by statute to take the cases of the other defender offices in the district, this public defender could move to withdraw in any case which would result in a "backlog conflict." A court could then appoint counsel, the Supreme Court held, as provided for in the original order.

The Court also upheld the placement of fiscal responsibility upon the counties, but stated that "the [state] legislature should live up to its responsibilities and appropriate an adequate amount for this purpose. Finally, to deal with the backlog that already exists, the Court ordered "massive employment of the private sector bar on a 'one-shot' basis."

To help persuade the legislature to meet its responsibilities to these ends, the Court ordered that, after 120 days from the filing of its opinion, state courts will entertain habeas motions for "backlogged" appellant's immediate release unless the legislature should appropriate funds.

Money for Attorney Fees
***State v. Ryan*,**
444 N.W.2d 656 (Neb. 1989)

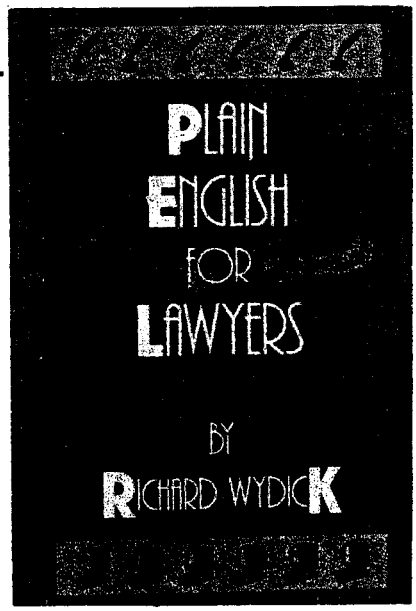
The court held that the 2 court-appointed attorneys who represented the indigent defendant charged with 2 counts of murder were entitled to $33,000 for their representation at $50 per hour, not the $8,776 approved by the trial judge. *Id.* at 661. "In horrifying cases such as this case, it is vital that we, as a State and a nation, maintain our decree of civilization and reliance on our Constitution. We must not sink to the level of nations that execute transgressors the morning after alleged offenses occur. Defense attorneys perform an absolutely essential function under our Constitutions and must be treated as honorable persons performing a necessary legal duty." *Id.* at 662.

ED MONAHAN
Director of Training
Assistant Public Advocate

This regular Advocate column reviews selected unpublished opinions of the Kentucky Supreme Court and Kentucky Court of Appeals, and selected cases of interest from across the country.

BOOK REVIEW

Plain English For Lawyers
By Richard Wydick
Carolina Academic Press
Durham, North Carolina
$7. 50



The law is not an abstraction. "[I]t is part of a world full of people who live and move and do things to other people." When it comes to writing, Wydick believes in words that convey that life and motion.

In seventy, short, concise, pages he prescribes seven steps to better writing. His methodology focuses on the importance of engaging the reader. Thus, he believes your writing should convey who did what to whom.

In preparing this book review I asked myself, how do you succinctly review a book entitled - ***Plain English For Lawyers?*** Well, according to Wydick you follow seven principles:

1) Omit Surplus Words; Verbose Simple the fact that her death she had died he was awake he knew of the fact that that was a situation there the court in which the court for the period of for

2) Use Base Verbs not Nominalizations; Base Verb Nominalization assume assumptions conclude conclusions collide collision

3) Prefer the Active Voice;

4) Use Short Sentences;

5) Arrange Your Words With Care;

6) Use Familiar, Concrete Words;

7) Avoid Language Quirks.

Wydick quotes Cardozo's *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928) as a good example of plain english for lawyers. He recommends Justice Lewis F. Powell's opinions for an example of modern plain english.

A sentence contains glue words and working words. Working words carry the meaning of the sentence, glue words hold the working words together. Wydick suggests that we reduce the glue words in our sentences and thus strengthen the impact of our working words. For example, "[a] trial by jury was requested by the defendant," can become "[t]he defendant requested a jury trial."

He urges us to focus our attention on the actor, the action and the object. Those situations which call for the passive voice are few and far between in writing. Use of the passive voice requires more words per sentence than does use of the active voice. In addition, with the active voice you can usually tell who did what to whom. The passive voice, in contrast has too much potential for ambiguity. For example: "It has been determined that you do not qualify for benefits under the program?" Who determined it?

The passive voice does have its purpose. It may be appropriately used when the thing done is more important than the one who did it. For example, "the subpoena was served." The passive voice is appropriate when the actor is unknown. For example, "the ledgers were mysteriously destroyed." Good writers use the passive voice to place a strong element at the end of the sentence for emphasis; "When he walked through the door he was shot." Lastly, we can use it when detached abstraction is appropriate; "all humans were created equal in the eyes of the law."

To maintain an emphasis on who did what to whom, Wydick, also prefers short sentences over long ones. However, he acknowledges the need for variation in sentence length. Wydick passes on Mark Twain's advice about long sentences. A writer should rework a long sentence until "when he has done with it, it won't be a sea-serpent with half of its arches under the water; it will be a torch-light procession" so that the reader will remain engaged.

Wydick abhors the use of redundant legal phrases like "null and void," "cease and desist" or "last will and testament." Tautologies abound in the language of the law because the English have always had two languages to rely upon. First it was Celtic and Anglo-Saxon, then English and Latin and finally English and French. Thus, for example: the property term "free and clear" originated from the Old English, freo and Old French, cler. Wydick challenges us to slay these redundancies which deaden the impact of our writing.

Plain English for Lawyers is a dense, accessible handbook. Each chapter concludes with exercises. There are two appendixes, one contains the reader's exercise key, the other, additional exercises. These exercises make you rethink your own writing style and internalize his literary lessons. The End Notes are also worth reading. All in all I appreciate having this manual close at hand.

REBECCA DILORETO
Assistant Public Advocate
Appellate Branch
Frankfort

NEED A DEFENSE LAWYER?

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

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

TRIAL OFFICES

Boyd
P.O. Box 171
Catlettsburg, KY 41129
606/739-4161

Eddyville
260 Commerce Street
P.O. Box 50
Eddyville, KY 42038
502/388-9755

Hazard
233 Birch Street, Suite 3
P.O. Box 758
Hazard, KY 41701
606/439-4509

Hopkinsville
South Main Street
P.O. Box 991
Hopkinsville, KY 42240
502/887-2527

LaGrange (T.S.B.)
300 North First Street
LaGrange, KY 40031
502/222-7712

LaGrange (P.C.)
Kentucky State Reformatory
LaGrange, KY 40032
502/222-9441 ext. 313

Lexington
111 Church Street
Lexington, KY 40507
606/253-0593

Louisville
200 Civil Plaza
701 West Jefferson
Louisville, KY 40202
502/625-3800

London
408 North Main Street, Suite 5
P.O. Box 277
London, KY 40741
606/878-8042

Morehead
Rt. 32 South
P.O. Box 1038
Morehead, KY 40351
606/784-6418

Madisonville
8 Court Street
Madisonville, KY 42431
502/825-6559

Northpoint Training Center
P.O. Box 479
Burgin, KY 40310
606/236-9012 ext. 219

Paducah
400 Park Avenue
Paducah, KY 42001
502/444-8285

Pikeville
335 Second Street
Pikeville, KY 41501
606/432-3176

Richmond
201 Water Street
Richmond, KY 40475
606/623-8413

Somerset
224 Cundiff Square
P.O. Box 672
Somerset, KY 42501
606/679-8323

Stanton
108 Marshall Street
P.O. Box 725
Stanton, KY 40380-0725
606/663-2844

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

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

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

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

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

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

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

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

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

MENTOR PROGRAM NEEDS SENIOR CITIZENS

Three people are out to prove to Kentucky's youth that experience does indeed bring wisdom.

David E. Norat, Earlene Huckleberry and Nancy Andrews are trying to establish a mentor program called Linking Lifetimes. It will allow senior citizens to share time and wisdom with juveniles who have had a brush with the law.

"A mentor is a tutor, a coach, a trusted counselor," said Norat, Director of the Defense Services Division for the Kentucky Department of Advocacy. "It's a special relationship. They can help a youth sort out everyday frustrations."

Andrews, aging-services coordinator for Fayette County, said the program would capitalize on the skills of senior citizens.

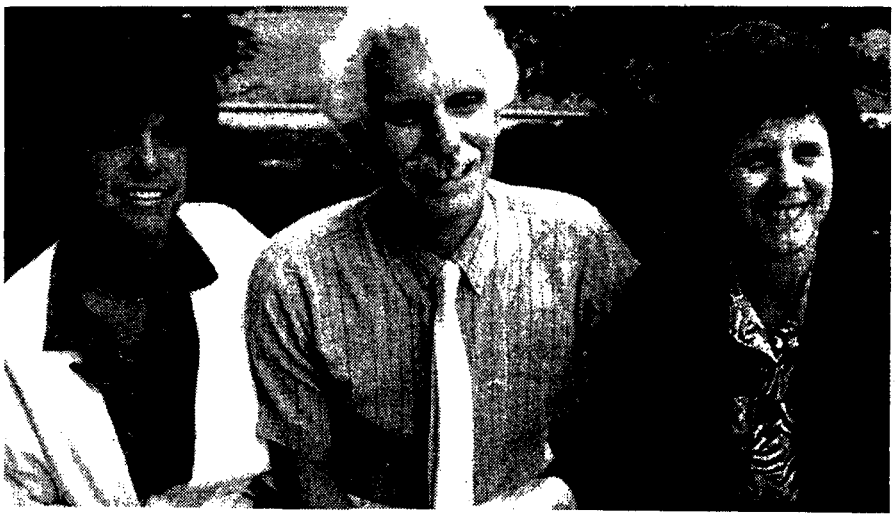
"Some people think older people are out of touch with what is going on in the world," Andrews said. "They just have a different perspective. When you are young, everything just seems so important because it's the first time you've come up against problems."

Huckleberry said today's youth could be ignorant of life's problems.

"What we are trying to do is get them to become more knowledgeable in their decision-making and discuss job options and careers," Huckleberry said. "These kids have a lot of unreal expectations because they haven't had anyone talking to them."

Linking Lifetimes got its start last year when Temple University asked for proposals for mentor programs. Norat was asked to write a proposal for a mentor program involving senior citizens. He included Andrews and Huckleberry, a Division of Children's Services counselor.

Although they did not get the grant, they decided to continue the program by getting corporate and private donations.



L to R: Earlene Huckleberry, David E. Norat, Nancy Andrews

Norat said they would speak to senior citizens groups this summer to recruit mentors. They hope to get at least 20 adults, all older than 55.

"We look for someone who is caring," Norat said. "Someone who has time, makes decisions and can explain the thoughts that went into those decisions."

Beginning in September, Huckleberry said, the mentors will begin five hours of training each Tuesday and Thursday. Afterward, they will be matched with a juvenile.

"The big thing is a desire to work with the young people in the community," Huckleberry said. "So when they get angry, instead of throwing a brick through a window in downtown Lexington, they can call their mentor."

Senior citizens interested in the Linking Lifetimes program can contact Earlene Huckleberry at the Division of Children's Services, (606) 253-1581 or David E. Norat at the Department of Public Advocacy, (502) 564-8006.

MICHAEL L. JONES
Herald-Leader staff writer

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FUTURE SEMINARS

Mark Your Calendars!

1990

DPA TRIAL PRACTICE INSTITUTE
October 28-Nov. 2, 1990
Kentucky 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

ICOPA V

The Fifth International Conference on Penal Abolition (ICOPA V) is a place where reformers, activists and academicians come together to engage in dialogue, and to create a greater understanding of what we can do about crime, other than imprisoning and punishing offenders. Crime and punishment are a form of civil war. The Fifth Conference will bring together the people and groups representing the international civil peace movement. This Conference will be held May 21-25, 1991 in Bloomington, Indiana. For more information, contact Hal Pepinsky at Criminal Justice Department, Indiana University, Bloomington, Indiana 47405.

19th ANNUAL PUBLIC DEFENDER CONFERENCE
June 2-4, 1991
Quality Inn Riverview
Covington, KY
(502) 564-8806

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