THE ADVOCATE

A Publication of the Kentucky Department of Public Advocacy

Advocacy Rooting Out Injustice

Volume 13, No. 2 February, 1991

George Mason
Father of our *Bill of Rights*

Celebrating the 200th anniversary of our *U. S. Bill of Rights* on December 15, 1991
Celebrating the 100th anniversary of our *KY Bill of Rights* on September 28, 1991

CELEBRATING OUR RIGHTS

1991 is a significant year for us. We celebrate the 200th anniversary of our United States *Bill of Rights*, and the 100th year of our Kentucky *Bill of Rights*. Throughout 1991 *The Advocate* will run articles to celebrate how the *Bill of Rights* distinguishes our country from all others.

Judge Miller's article commemorates The Forgotten Founding Father, George Mason, and his lasting legacy as the Father of our *Bill of Rights*. Mason's personal crusade to insure a government that guaranteed individual liberties is one that lives today and defines us as a nation of freedom.

Defense lawyers have an enormously important duty to maintain and further promote Mason's legacy by advocating the application and expansion of our *Bill of Rights* when representing individual clients accused of crime. In many ways we have failed to fully meet this challenge over the years, especially in our failure to advocate Kentucky's *Bill of Rights*. Ernie Lewis' magnificent article calls us to renew our efforts to urge Kentucky's Section 10 be applied in the context of its rich history.

Empowered by the valuable insights of Judge Miller and Ernie Lewis, we advance ourselves as *Bill of Rights* enforcers.

E.C.M.

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.

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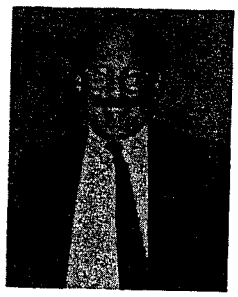
THE ADVOCATE FEATURES

David E. Davidson



David E. Davidson

David E. Davidson has been with the firm of Cobb & Oldfield in Covington for the past 10 years. He clerked with the firm while in law school at the University of Cincinnati. His practice is a mix of civil, and paid criminal defense, but he also is available for public defender work as a roster attorney of the Northern Kentucky public defender system.

David became a lawyer because he had the necessary skills, and it always seemed to fit in with his personality, allowing him to do, within reason, what he wanted to do.

David likes trial work. "Criminal trials are the most intense and challenging." The elements of criminal practice that David particularly enjoys are legal issues that arise from the facts of a case, the challenge of representing a person accused of a crime which brings to play confrontation of an overwhelming system.

FACELESS JUSTICE

David sees crime as a natural part of the human experience. In densely populated areas like Covington, there are "more weird people per city block and strangers don't tolerate each other well."People who know people take more off them." More crime tends to occur in these areas and the punishments tend to be harsher and less tailored to the defendant's situation. He is concerned about what he calls *faceless justice* caused by modern and metropolitan lives. He explained the concept by saying that in a small community, jurors recognize the person and know their history and circumstances, and, consequently, may be more able to mete out a just sentence.

David looks for alternatives to imprisonment. He feels best about a case that was resolved to correct weaknesses in a client. In a case that started out with multiple charges of sodomy by the stepfather of the victim, David's client received a sentence of probation by Kenton County's toughest sentencing Judge. After pleading guilty to only one reduced charge, David prepared a sentencing hearing that explained the weaknesses of his client, the plans in place and underway to correct those weaknesses, and the small risk of repeating the offense. The hearing began with his client "struggling to read from a first grade reading text."

While David recognizes that perfect justice is unattainable and that, due to time constraints and other realities, one has to settle for the best results given the adversary system, David looks forward to the Northern Kentucky system getting an alternative sentencing worker to help develop diversionary programs.

CYNICISM

David likes trying cases persuasively to jurors by challenging and changing preconceptions about persons accused of crimes. He feels the American jury system is the best. It achieves the fairer result by not relying upon judges to secure freedom or to acquit the innocent. "Juries are not perfect, but they are not hardened and cynical as are many trial judges who handle too many cases."

That cynicism affects the way an attorney practices a case also and David is careful to remember to check out the facts even if he's heard, "they've got the wrong man," or "I didn't do it" a thousand times.

NORTHERN KENTUCKY PUBLIC DEFENDER SYSTEM

David readily admits his civil practice subsidizes public defender work, but he's unwilling to give up the work. He does public defender work out of his own sense of obligation. He can do that because his firm does not pressure him to put in a certain number of billable hours. Nevertheless, he must carry his own weight, if it affected his ability to contribute to the firm he'd have to discontinue public defender work. These economic realities are exactly why the legal community can't be counted on to solve the public defender funding crisis.

He described the Northern Kentucky system as, "a burlap-bag loosely held together and coming apart." He sees the problem as 2-fold. First, there's not enough money to attract lawyers to work. Whereas there used to be 80-90 lawyers involved with the system, there's now only 20-30, with Kenton County being an exception.

The second problem with the Northern Kentucky public defender system is that high-profile cases are attractive to lawyers wanting the press or to help out judges as a personal favor, but these same lawyers lack the skills and experience needed to handle major cases. While most attorneys can translate their trial skills of their civil practice into criminal practice, there are areas of substantive law that aren't adequately handled when civil lawyers step into high profile cases.

David offers the following solutions to the Northern Kentucky public defender crisis: 1. Limiting types of crimes public defender appointments on (*i.e.* misdemeanors). 2. Reduce the number of crimes both by removing statutes legislating morality and by decriminalizing conduct that can best be deterred by other means, *i.e.* drug and alcohol offenses. 3. Reducing sentences for many crimes, but making the sentence to be served more predictable and certain.

CONCLUSION

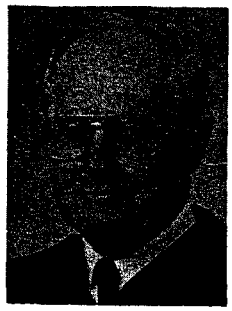
David credits his wife of 14 years, Sally, as his resource. "I am lucky to be married to a very intelligent and thoughtful woman. She has shown me how to bear the enormous burden that we all sometimes bear while also enjoying life and living with hope and expectation."

Bob Lotz a partner in the firm and a public defender as well, said of David: "David E. Davidson, being like Perceival, a legal knight, who is trustworthy, pure at heart and motivated toward whole deeds in his work and personal life."

CRIS BROWN
Frankfort, KY

George Mason and His Declaration of Rights

A Presence in Kentucky



Judge John D. Miller

THE VIRGINIA DECLARATION OF RIGHTS

A DECLARATION OF RIGHTS made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government.

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community, of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick weal.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judiciary; and, that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the publick good.

7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

8. That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

15. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

This eloquent manifesto, drawn by George Mason, a Virginia planter shy of formal education but steeped in the history of humankind, is the blueprint of a republic. The didactic proclamation that "all men are by nature equally free and independent," entitled to "the enjoyment of life and liberty" and to "pursuing and obtaining happiness" is the creed of free people everywhere and forms the infrastructure of democratic government. In June 1776, but a few days before our separation from England, these principles, called by Mason a Declaration of Rights, were embodied in Virginia's Constitution and served as a beacon for Thomas Jefferson when drafting our national Declaration of Independence.

And so it was on a day in June 1789 that diminutive James Madison, the narrowly-elected Virginia representative, arose with customary genius in the very first session of the House of Representatives

assembled in New York and proposed amending the new Constitution. Early amendment of the Constitution was desired "in order to prevent misconstruction or abuse of its powers" and to extend "the ground of public confidence in the Government." Congress quickly considered Madison's efforts and on September 25, 1789, proposed twelve articles of amendment to the Constitution of the United States. On December 15, 1791, the final ten of the proposed amendments were approved by Virginia, the last ratification necessary to make them a part of our Constitution, now known to every school child as the Bill of Rights. These amendments, too, embodied Mason's Declaration. The mind of Mason became forever embedded in our Constitution.

Many are unaware of the values embodied in the Bill of Rights and why the amendments were offered at such an early date when the fledgling government was grappling with extant issues pertaining to foreign affairs, commerce, debt, and the onerous task of elevating the new republic to world status. Both the values and the urgency to an immeasurable extent can be laid to the same gout-ridden Virginia planter, a man described by Thomas Jefferson as "of the first order of greatness," yet never elevated to a proper position in history.

Mason's life [1725 - 1792] spanned the greater part of the 18th Century. He was a person of extraordinary wealth residing at Gunston Hall on the Potomac in the vicinage of George Washington's Mount Vernon. He and Washington were lifelong friends and adjoining landowners.

Mason first advanced to public prominence in 1769 as author of Virginia's Non-Importation Resolutions calling for the boycott of English goods and designed, *inter alia*, to combat taxation without representation. The resolution was introduced into the Virginia House of Burgesses in Williamsburg by his friend, Washington, causing royal Governor Lord Botetourt to order the dissolution of the assembly, whereupon the members adjourned to the Raleigh Tavern across the street and hastened their rebellious efforts. Again, in 1774, Mason authored twenty-four Fairfax Resolves which Chairman Washington read at a meeting of the county's freeholders. These resolves clearly stated the colonists' position in relation to Britain on matters of representation and taxation, and made a strong denunciation of slave trade. Although Mason, as well as Washington, was a slave owner, his attack on that institution was a position he vehemently demonstrated at the Constitutional Convention four years later. Mason denounced slave trade as "wicked, cruel and unnatural," and considered slavery both morally wrong and an impractical labor force for the nation. From these times on, Mason's views of government and mankind were etched along the road to revolution and establishment of the new nation.

Mason came to own thousands of acres of western land, much being in the then-unformed state of Kentucky in and around what is now Owensboro in Daviess County. It is particularly appropriate that we as Kentuckians know more of Mason and his impact on our federal Constitution and what might, in great measure, be called his gift of the Bill of Rights.

When the Constitutional Convention was to assemble in Philadelphia on May 14, 1787, the second Monday of that month, for the limited purpose of amending the Articles of Confederation toward strengthening the confederacy in areas of commerce, defense, and revenue, the Virginia legislature had designated Mason a deputy. After reflection, he accepted the commission and prepared to attend.

Mason was supremely attuned to the art of government. He possessed a voluminous library, shelving works of the world's leading philosophers and scholars. His formal education was tutorial as mandated by the Piedmont gentry of his age. Mason had never travelled so far from home as would be required of the five-day trip by private coach to Philadelphia. He was, indeed, provincial by any standard. Moreover, he eschewed gatherings, conventions, and, in general, the political arena. On occasion, he had begged pardon of participating in public affairs by reason of near-insufferable gout and the loss of his wife, Ann Eilbeck Mason, leaving him with nine children to whom he was "father and mother both." His shunning of public life warranted description by biographer Robert A. Rutland as the "Reluctant Statesman."

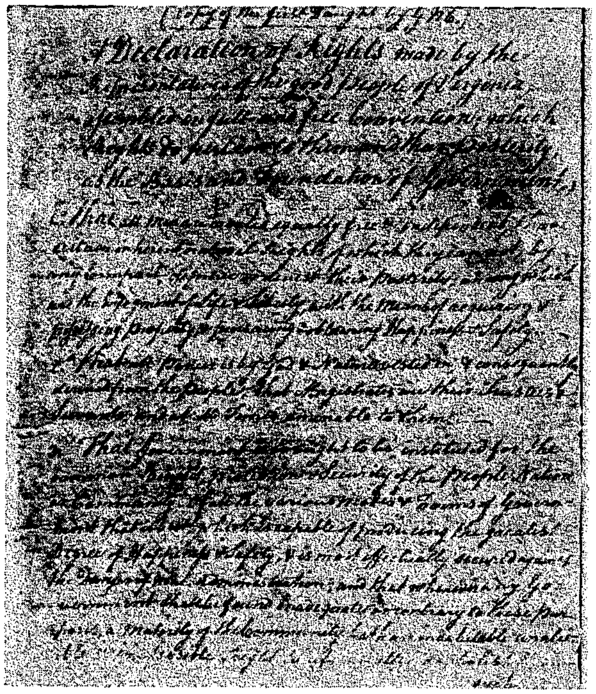
Nevertheless, in keeping with his commitment, Mason, accompanied by his son John, arrived in Philadelphia on May 17, three days after the convention was originally to commence. Dressed in fine black silk and travelling in a carriage befitting landed wealth, Mason's presence was indeed imposing. He bore a certain air about him that led the rankest stranger to know he had approached a man of standing and importance. He and son John took accommodations at the Indian Queen Tavern at 4th and Market Streets, a noted stage terminal for the travelling elite. Washington and Madison were already in attendance, as well as four other Virginia deputies of imposing stature. Virginia's seven-member delegation was second in number only to that of Pennsylvania. Two famed Virginians were conspicuously absent: Patrick Henry, who chose not to serve, and the incomparable Jefferson, at the time our consul in France. By the twenty-fifth of May, the states were represented by quorum. Ultimately, 12 of the 13 states would participate. Rhode Island, fearing inundation at the hands of larger states, declined to send representatives.

Madison, a graduate of the College of New Jersey (Princeton), held plans in his ubiquitous valise for a tripartite government of the people — a variety unprecedented in the history of civilization. These plans, subsequently introduced by Virginia compatriot Edmund Randolph, formed the anvil for forging the new republic.

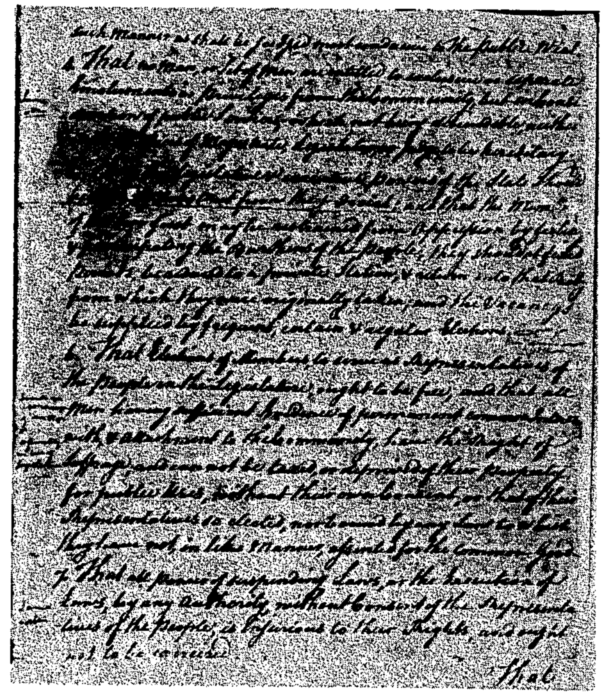
Sweltering heat gripped the summer from end to end. Flies were atrocious, by some accounts requiring the sweeping of public floors throughout the day to remove dead carcasses. Mason, comfortably ensconced at the Indian Queen, gave piercing attention to the foundation of the new nation. His attendance was extraordinary. He spoke to virtually every aspect of the Constitution, taking exception and offering incisive advice to those of more formal accreditation, always demonstrating a fear of an overly-strong government, too far removed from the people, that might someday oppress human rights. Mason characteristically left behind a record reflecting a mind distrustful of authority. His effort in forming a Constitution to check unbridled power of those privileged to govern was monumental, easily comparable to Madison and Jefferson, the latter acting vicariously from abroad.

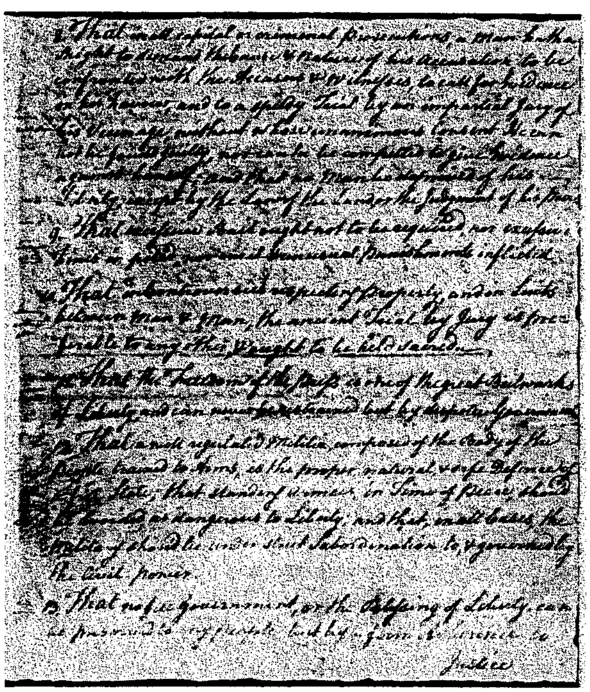
As the summer dragged on, Mason became disenchanted with the direction of the convention. It became apparent the Constitution would be submitted to the states for ratification without his Declaration. This and lesser objections led him to join with fellow-Virginian Randolph and Massachusetts's Elbridge Gerry as three deputies in attendance on September 17th who would not sign the proposed Constitution.

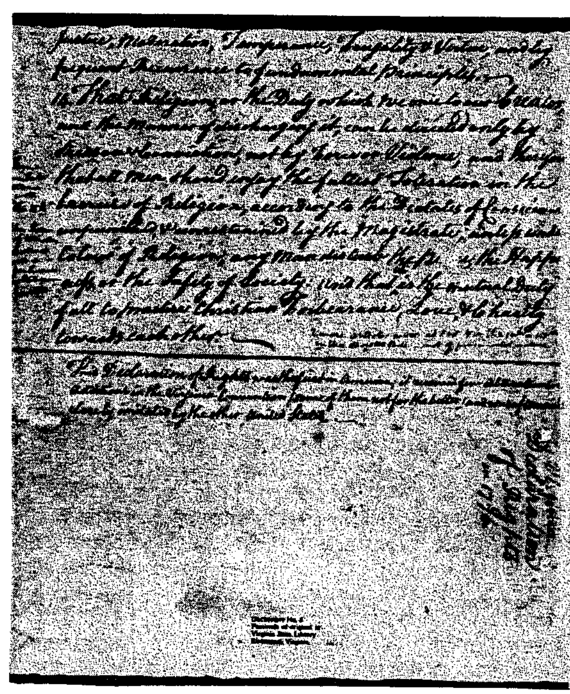
Mason maintained that a Bill of Rights was essential to insulate the people from oppressive government. Opponents pointed out that the Constitution already contained personal safeguards, such as preservation of trial by jury in criminal cases, condemnation of *ex post facto* laws, and maintenance of the ancient writ of *habeas corpus*. Moreover, they contended the Constitution itself and the es-



A Declaration of Rights made by the







tablishment of the republican government presupposed that Mason's enumerated rights already existed in each individual and that to enumerate them within the Constitution was superfluous. Then, too, it was suggested that the enumeration of such rights in a bill to the Constitution might mislead future generations into thinking those the only rights held by the people. For whatever their individual reasons, the assembled states on that September day unanimously sent forth the proposed Constitution consisting of seven articles without Mason's Declaration of Rights. The document was submitted to the respective states for ratification.

Chagrined and dismayed, Mason left in considerable huff. En route home, he suffered a carriage accident in Baltimore. Convalescing at Gunston Hall and fuming over his rebuff in Philadelphia, Mason joined forces with the redoubtable Patrick Henry in a campaign opposing ratification of the Constitution. It was disseminated throughout the states that Mason "would sooner chop off his right hand than put it to the Constitution" as written. This was Mason's way of protesting the absence of a Declaration of Rights which he believed indispensable in safeguarding the "free and independent" and "inherent" rights of man against government.

Mason's forces, known as the anti-federalists, were formidable, but no match for the pro-federalists. Henry's charming oratory and the political savvy of Mason were not equal to the genius of Madison, Hamilton, and Jay who collectively brought forth the *Federalist Papers*, logically and skillfully explaining the proposed document with hermetic reason.

Debate over the Constitution raged throughout the states. Pros and cons were fervently argued at every village and crossroad. The Virginia convention reduced the argument not to whether the Constitution would be ratified, but whether it was to be amended by a Bill of Rights before or after ratification. Originally, Randolph, one of the three not signing the document in Philadelphia, supported the anti-federalist Henryites in holding for amendment before ratification. He vacillated, however. Finally, he left the ranks of anti-federalists and opted for amendment subsequent to ratification. On the convention floor, Henry delivered what, in modern terms might be considered a "sellout" charge. Randolph responded appropriately. Almost immediately, Henry's second called upon Randolph for satisfaction upon the dueling field. Friends intervened and a probable tragedy was averted.

In France, Jefferson was dismayed that the Constitution was submitted for ratification without a Bill of Rights. A letter to Madison reflects his position.

> Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inferences.

On December 7, 1787, Delaware, by unanimous vote, was the first state to adopt the Constitution. On June 21, 1788, New Hampshire, by close count, became the ninth and final state necessary to place the document in effect as the Constitution of the United States. On June 25, Mason's Virginia, as the tenth state, voted approval with 89 yeas and 79 nays. Mason, Henry, and the anti-federalist movement had failed. Or had they?

Several states approved the Constitution very narrowly. premised upon the understanding that a Bill of Rights would be forthcoming. North Carolina withheld ratification until November 21, 1789, after Congress had proposed a Bill of Rights. The nation's pulse was throbbing in favor of a bill restricting the new and untried government.

It is now apparent why Madison arose in the initial Congress to offer proposals embodying Mason's manifesto destined, in measure, to become our Bill of Rights. His honor was at stake, for in the"heat of seeking ratification, he had committed himself to offer those amendments. By that time, however, he had clearly succumbed to Mason's notion that a Bill of Rights was necessary to insulate the people from government and to protect their "inherent" rights.

In the end, Mason had won. The planter's values were to be forever incorporated within the Bill of Rights to the Constitution of the United States of America. By his death on Sunday, October 7, 1792, Mason had wanly approved the Constitution and its Bill of Rights. With a few other amendments (relating largely to constricting the federal judiciary), he wrote, "I could cheerfully put my hand & heart to the new government."

Although Mason's contribution to our Constitution is quintessential, it is certain that world scholars and historians are more acquainted with his amazing mind than are the people of this Commonwealth. His views on government had immediate impact upon our Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen. Post World War II constitutions, the United Nations charter, and indeed free governments of the ensuing two hundred years have emulated Mason's views. When emerging democracies consider constitutional government, they are inextricably drawn to the blueprint left by the Virginia planter.

Mason's presence in Kentucky is marked by ownership of vast tracts of land on the waters of Panther Creek in Daviess County. That creek, finding its source in the thin hill country east of Daviess County, is a zigzagging tributary of Green River. It traverses the entire county, intersecting the Green at Curdsville, west of Owensboro, at a point just briefly before the Green empties into the Ohio. Today, the lands adjacent the creek are some of the Commonwealth's finest soil given to the raising of cattle and the production of fine tobacco, corn, wheat, and soybeans. In Mason's day, the land, yet a part of the Commonwealth of Virginia, was "waste" and "unappropriated."

In 1779, while Mason was engrossed in public concerns, the Virginia legislature opened lands along Panther Creek and the Ohio River for purchase. Any person paying into the Virginia treasury "forty pounds" per one hundred acres would receive a certificate which, when presented to the land office, entitled that person to a "land warrant" for described acreage. The warrant authorized the surveying of the boundary purchased. The stated purpose of the legislature was to sell the waste and unappropriated lands for the raising of revenue needed to discharge public debt and, at the same time, encourage migration into the area. Mason was one of the first to purchase under the law.

In 1780, Mason obtained warrants for two tracts numbering 8,400 and 8,300 acres on Panther Creek. Because of a blunder in describing one of the tracts, a dispute arose with one George Wilson, the holder of a conflicting warrant. In 1784, the parties sued each other in the state court of Virginia. The suit dragged on. After Mason's death in 1792, the action was revived in the name of a grandson, Richard Mason, and, upon diversity jurisdiction, was transferred to the federal court in the newly-formed Commonwealth of Kentucky. Mason prevailed in the United States District Court, but Wilson carried the litigation to the United States Supreme Court in a matter styled *Wilson v. Mason, etc. and Mason, etc. v. Wilson* [5 U.S. 45 (1801).] The great Chief Justice John Marshall, a federalist appointee, delivered the opinion of the Court deciding adversely to Mason. Had George Mason lived, he would doubtless have borne unbelievable insult. Not only had he lost an important litigation at the hands of Marshall, but the opposing counsel, Joseph

Hamilton Daveiss, later married the sister of Justice Marshall. Daviess County is named (albeit misspelled) for Joseph Hamilton Daveiss, pronounced "Davis." The error occurred when a clerk, inscribing the law creating the county, inadvertently transposed the "e" and the "i" in Daveiss's name, thus explaining the local custom of pronouncing Daviess County as "Davis."

Presumably, Mason never visited his Kentucky holdings. His presence, however, is patently evidenced by yellowing pages of legal documents reflecting his struggle for "acquiring and possession property," a right he equated with the "enjoyment of life and liberty." A towering limestone monument in tiny St. Lawrence Cemetery in eastern Daviess County marks the grave of Mason's grandson, George W. Mason, who died in that county on June 11, 1855. Northside moss and the ashen gray of weathering lime have all but obscured the Mason name. Only the curious trouble to know the relationship of the grave's occupant to one of the world's greatest lawgivers.

Today, Mason descendants abide in Daviess County, enjoying prosperity in a nation predicated upon the principles espoused by their ancestral genius.

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John D. Miller was born in Daviess County, Kentucky. He is a 1953 graduate of the University of Kentucky College of Law. A former state representative, he has served on the Court of Appeals since 1983.

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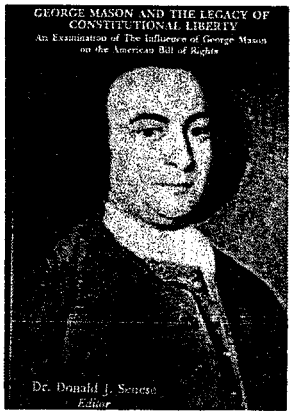
Essays on Mason

The Fairfax County History Commission has published a special collection of essays on one of our most important Founding Fathers: *George Mason and the Legacy of Constitutional Liberty: An Examination of the Influence of George Mason on the American Bill of Rights.* [1989] The essays inspire a greater knowledge of George Mason and the United States Constitution.



This contribution has lasted over two hundred years and has been a great influence on other nations as well.

The members of the Fairfax County History Commission hope that the work stimulates in our school children and our adults a greater awareness of our history and the importance of knowing it as a guide to our future.

The essays are:

The Early Years

"George Mason and the Preparation for Leadership" by *Diane D. Pikcunas.*

"George Mason and the Fairfax Court" by *Joseph Horrell.*

The Constitution Years

"George Mason and the Constitution" by *Josephine F. Pacheco.*

"George Mason's 'Objections' and the Bill of Rights" by *Robert A. Rutland.*

"George Mason on the Tension Between Majority Rule and Minority Rights" by *Robert P. Davidow.*

The Lasting Influence

"George Mason - His Lasting Influence" by *Sandra Day O'Connor.*

"George Mason - Influence Beyond the United States" by *Edward W. Chester*

"George Mason - Why the Forgotten Founding Father" by *Donald J. Senses.*

Copies of this work may be purchased from:

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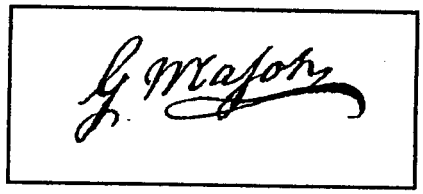
Additional information can be obtained by calling (703) 237-4881.

GEORGE MASON and the BILL of RIGHTS

Albert Rosenthal / Gunston Hall



In May and June of 1776, George Mason wrote Virginia's Declaration of Rights, a statement of principles that became a model for other states, as they wrote their own constitutions, and later inspired the federal Bill of Rights.

When the Confederation Congress called a meeting for May, 1787, Mason was chosen as one of Virginia's delegates, and he hastened to Philadelphia.

During the 4 months of the Federal Convention, George Mason was very active. His comments appear frequently in Madison's notes of the proceedings. But Mason had 2 concerns. First, he was unhappy that the new Constitution permitted the continuation of slavery - and, second that the new Constitution contained no guarantee of individual rights.

On September 12, 1787, Mason spoke in favor of a bill of rights and told the convention one could "be prepared in a few hours." A motion to include a bill of rights failed, with 10 states - including Virginia - voting no and Massachusetts abstaining.

Mason was crushed. He told the convention that as the Constitution then stood, he "could neither give it his support or vote in Virginia," and he "could not sign here what he could not support in Virginia." When the Constitution was signed on September 17, 1787, George Mason refused to sign it, despite his conviction that the strong central government it established was the only hope of survival for the newly independent United States.

In the Virginia ratifying convention of June, 1788, Mason and Patrick Henry led those opposed to ratification, but for different reasons: Mason because of the lack of a bill of rights; Henry to preserve the sovereignty of the states. On June 25, Virginia ratified the Constitution, then appointed a 20-member committee - from both sides - to draw up a list of desired amendments. The list included a bill of rights taken from Mason's Virginia Declaration of Rights of 1776 and 20 other amendments.

After the Constitution was ratified, Mason retired from public life and refused to become a candidate for the Senate in the new Federal Congress. Poor health and family considerations kept him from straying far from his plantation, Gunston Hall, located about 20 miles south of the present city of Washington, D.C. on the bank of the Potomac River. From there, he watched as James Madison led the right for a Bill of Rights in the First Federal Congress and noted the progress of the Bill of Rights as the states ratified it, culminating with Virginia on December 15, 1791.

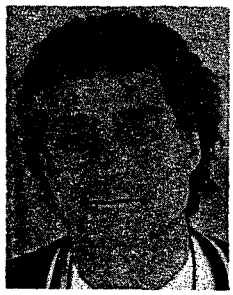
Mason died on October 7, 1792 at Gunston Hall, secure in the knowledge that the Constitution he helped draft now had a Bill of Rights.

Gunston Hall, built in 1755 by Mason, is open to the public every day except Thanksgiving, Christmas, and New Year's Day. Work continues to restore the home to its original appearance.

Charles Baptie / Gunston Hall

Defenders: Keep the Bill of Rights

Liberty's First Champion



Martin S. Pinales

Remarks of Marty Pinales at the Oct., 1990 DPA Trial Persuasion Practice Institute at the Kentucky Leadership Center.

WHY WE DO THIS WORK

If we count the number of heads here, we'll get that many answers as to *why we do this kind of work.*

There's a very fine attorney from Houston, Texas, Richard "Race Horse" Haynes, who wrote the book, *Blood and Money.* He says that, and I have to apologize in advance because I don't have the Texas accent that he has, he says that down in Texas we got these little lizards. They're about eight inches long. They like to hop up on the railroad tracks in the Texas sun and they can just sit back and enjoy the sun. All of a sudden they feel a vibration in the track. Then, all of a sudden, they get up on their hind legs and they start looking around. Soon they can see a 10-ton locomotive coming down the track and it squashes them flat as a pancake.

Sometimes, however, a little 8-inch lizard gets up on the track and it listens, it feels the vibration of the railroad cars and gets up on its hind legs. All of a sudden it can see this 10-ton locomotive coming down the track. It can see the steam, it can hear the whistle, and this little lizard starts spitting at this 10-ton locomotive. You know what happens; that little bitty lizard will derail the whole damn train. *That's what being a criminal defense lawyer is like.*

Most of the time you get squashed flat as a pancake, but every once in a while we sit up on our back legs and we spit and hiss at the government and we derail the whole damn train.

You know when Ernie Lewis was talking Sunday night about his client, the client with the dumpster and the fight. That is the kind of client many of you have. I want you to keep that in mind as we go through this little talk. We're going to go back and talk about them.

When you look around the courtroom on any given day, think about who in that courtroom is there to protect the *Bill of Rights* and the *United States Constitution.*

We all know it's not the *judge.* We all know it's not the *prosecuting attorney.* It's not the *bailiff* who is sitting in the corner of the courtroom throwing his choke chain up in the air. *It is the criminal defense lawyer.*

The National Association of Criminal Defense Lawyers has as its logo, as its motto, "Liberty's Last Champion — Your Criminal Defense Lawyer." Think about that for just a second. The criminal defense lawyer is the only one who will be in that courtroom and who will ever raise any constitutional objections to anything going on.

Ed Monahan has said, "I'm just amazed that the faculty are down here. Why are you here? Why do you as a private lawyer come to Faubush, Kentucky and give up your time to be with us?" It's just a wonderful feeling for me to be here, and I'm going to tell you what some of those feelings are.

About 9 to 10 months ago, I got a letter from a federal defender in Tucson who said, "you know I remembered something that came out in one of the trial practice sessions with you Marty which I never did before, and I did it and I won a case. Now I don't know if I won the case because I did it, but I just wanted to let you know I did it and I won the case."

I got a letter from a young attorney just a few weeks before coming down here from Knoxville, Tennessee, a private attorney, who said basically the same thing.

So I'm here because hopefully one of you will get a victory - will hear, as a result of what you learn here, two of the most wonderful words in the world, *not guilty.*

Most of the time you've got to understand I'm like that pancake. I don't get a lot of not guilties. The same as you, I get a lot of pancakes. Every once in a while when you derail the train, it's the same thing as one of us derailing the train.

There was a minister that was in a Nazi concentration camp. Before he was in the concentration camp, he said "they came for the gypsies. I wasn't a gypsy so I didn't cry out. They came for the Jews, but since I wasn't a Jew, I didn't cry out. Then they came for the Catholics. I wasn't a Catholic so I didn't cry out. Then they came for me and there was no one left to cry out."

Now let's go back to the dumpster. These are the people who they are going to start rounding up first. It's your clients that are the gypsies and Jews and are the people that are going to be trampled upon. Their rights will be trampled on first because they believe that no one cares. We're going to stand up and say, *"wait a minute, you're not going to do that. You're not going to come for the gypsies. You're not going to come for the Catholics. And you're not going to come for the Jews."*

I believe that the National Association of Criminal Defense Lawyers should change their logo. You are not really liberty's last champion, but you are *liberty's first champion.* And that the public defender, and I'm a private attorney and I say this very seriously, the public defender has to stand up first. My clients are sometimes the fat cats. My clients are the ones who the police will be a little more polite to. But your clients are fighting back by the dumpster. Your clients are the ones that they are going to trample upon.

As Linda Miller says, sometimes you

have to fight for the cause. Every time you have to fight for the cause and there's not a client out there, as despicable as he or she may be, that still does not fall within the umbrella of the Bill of Rights.

Instead of saying keep the faith, it is your task when you leave here to *keep the Constitution, to keep the Bill of Rights* and to keep it alive and to keep it well, because you have to see that they don't come for us.

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Martin Pinales, admitted to bar, 1968, Ohio. Education: University of Cincinnati (BBA, 1964); Salmon P. Chase College of Law (J.D., 1968). Author: Drugs and the Law, W.H. Anderson Co., (1972); Cross Examination of Chemists in Narcotic and Marijuana Cases, Contemporary Drug Problems, Federal Legal Publications, (1973). Chapter 6, Representing a Witness Before the Grand Jury, for Criminal Defense Techniques, Matthew Bender Co. (1990) - Lecturer, White Collar Crime, University of Cincinnati, 1974 to present - Lecturer, Criminology, University of Cincinnati, 1988 - Guest Lecturer, Xavier University, 1974 to present - Faculty, NCDC since 1985 - Member: NACDL (Member, Board of Directors, 1978 - 1985); Cincinnati Association of Criminal Defense Lawyers, Trustee, 1988. Director of the Strike Force of the Lawyers Assistance Committee, NACDL; CJA Panel Advisor; U.S. Judicial Conference Defender Services Committee.

The Advocate has been focusing on racism in the criminal justice system in a continuing series of articles, interviews and tables.

This series has been compiled in a 43 page booklet and is available from The Department of Public Advocacy for $3.50, the cost of xeroxing and mailing. Make your check out to the Kentucky State Treasurer and mail to:
Racism Reports
The Advocate
Department of Public Advocacy
1264 Louisville Road
Frankfort, KY 40601

Our Outstanding Faculty

Our 100 Participants Hard at Work

Participants Relaxing Amidst Nature

100 Attorneys Complete DPA Trial Persuasion Practice Institute

DPA Leads the Nation in State Public Defender Training

DPA's reputation for offering the very best state public defender training was once again witnessed by the 7th Kentucky DPA Trial Practice Persuasion Institute.

100 ATTORNEYS TRAINED

100 attorneys from 13 states were educated to a commitment to serve poor criminal clients with better skills and dedication to advocacy. 53 full and part-time public defenders and 13 Kentucky private criminal defense attorneys participated in the Persuasion Institute. We also had 34 attorneys from 12 other states come to Kentucky to take advantage of this defender advocacy education.

In addition to providing a more varied participant body, the out of state attendees helped offset a substantial portion of the cost of the program.

OUR NATIONAL FACULTY

A faculty of 19 included the cutting edge national criminal defense advocates: DERYL DANTZLER, Dean of the preeminent NCDC Trial Practice Institute; LINDA MILLER, a Colorado attorney who is a NCDC faculty member; KIM TAYLOR, Director of the highly respected Washington, D.C. public defender office and NCDC faculty member; MARTIN PINALES, prominent Cincinnati criminal defense attorney and NCDC faculty member; LINDA HOTES, Colorado public defender since 1976 and national lecturer; PHYLLIS SUBIN, Philadelphia public defender since 1973 and its Director of Training; JOE GUASTAFERRO, a highly regarded Chicago teacher, actor, director, lecturer, trial consultant and NCDC faculty member; JIM CLARK, a clinical social worker and assistant professor at the University of Kentucky; BOB CARRAN, Kenton County public defender administrator and nationally recognized defender; PAULA RAINES, lawyer and psychologist; BILL MIZELL, long-time Boyd County public defender; DPA's own two NCDC faculty members, VINCE APRILE and ERNIE LEWIS; and also the excellent DPA faculty of GARY JOHNSON, GEORGE SORNBERGER, JIM COX, BILL SPICER, ALLISON CONNELLY, and ED MONAHAN.

OUR PERSUASION PROGRAM

The Persuasion Institute increased the attorneys' criminal defense trial skills. The Institute improved the ability of the participants to persuade as advocates for their criminal clients in the increasingly hostile criminal justice environment. The major trial aspects of a criminal case were covered:

- Preparation and Theory of the Case
- Voir Dire
- Opening Argument
- Trial Communication and Creative Persuasion
- Meeting and Making Trial Objections
- Preparation of Witnesses and Direct Examination
- Cross Examination Closing Argument

The program had daily lectures and demonstrations by the presenters, and active participation by participants. The participants divided into small groups and paired with other participants according to experience. The most experienced participants represented hundreds of clients. The least experienced represented no clients. Every participant performed each day in the small groups and received individual feedback from the faculty. Participant performances were video taped with the participants keeping their video.

The *learning by doing* practice format proved once again to be an extremely effective way to educate the participants.

The client interview exercises and Jim Clark's lecture called all of us to develop a *caring relationship with those we serve.* Inmates from the Marion County Adjustment Center played the role of clients. It was hard to tell who benefited more from that realistic dialogue: the inmates or the attorneys. The inmates led us to new ways of viewing our clients - as people in need of and deserving quality service.

Joe Guastaferro imbued in us the knowledge that *there is no persuasion without commitment.* Linda Miller told us that closings required more than commitment, they required passionate belief in our clients. Marty Pinales showed us a passionate closing and reminded us that *we* are the enforcers of our Bill of Rights (see his remarks in this issue).

REMARKS OF PARTICIPANTS

"I really liked the food, location and opportunity to be reminded 'how to,' and be critiqued in a safe environment."

"The best part of the Institute was the small group interaction. It helped me overcome my fear of getting up on my feet."

"I found the learning by doing process and the critiquing by the tremendous national and Kentucky faculty to be the most helpful."

"It was fantastic to meet so many great lawyers from so many different places."

"Watching excellent trial lawyers show and encourage us with their creative ideas was priceless."

"I grew, learned, and am grateful for your commitment."

"Best program in the nation."

COMMITMENT TO EXCELLENCE

Kentucky's DPA is dedicated to training its attorneys to provide excellent service for our poor clients who have been accused of committing a crime. We strive for no less, as we continue to commit ourself to an *advocacy that roots out injustice.*

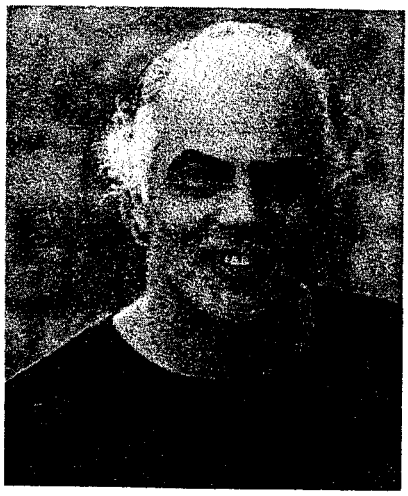
Lexington's Jim Clark

Covington's Bob Carran

D.C.'s Kim Taylor

Colorado's Linda Miller

Cincinnati's Marty Pinales



Chicago's Joe Guastaferro

Lexington's Paula Raines

Philadelphia's Phyllis Subin

Denver's Linda Hotes

Mothers Against Drunk Driving

Examining the Problem of Drunk Driving and the Solutions to that Problem

THE PROBLEM

During the next 23 minutes, somewhere in the United States, at least one person will die in an alcohol-related crash. Here are some additional, rather sobering, statistics that we should consider before getting into an introduction about MADD:

Drunk driving is the most frequently committed violent crime in the nation today. DWI (driving while intoxicated) arrests in 1988 totalled approximately 3 times the total for all other violent crimes (murder, robbery, forcible rape, and aggravated assault).

Nearly 540,000 people are injured each year in drunk-driving crashes.

About 49% of all fatal crashes in 1989 were alcohol-related.

It is estimated that 2 out of every 5 Americans will be involved in an alcohol-related crash during their lifetime.

In 1989, approximately 8 persons, aged 15-19, died each day because of drunk-driving crashes.

In 1989, nearly 26% of all fatally injured drivers between the ages of 15 and 19 were intoxicated.

Drunk driving crashes are the leading cause of death for Americans age 3-30.

Each year, 25,000 Americans suffer brain damage as a result of an impaired driving crash.

Drunk driving costs Americans about $24 billion each year.

In 1989, there were 1.7 million arrests for drunk driving in the U.S. For every arrest, it is estimated that 1,000 trips by drunk drivers went undetected.

Only 1 in 500 to 1 in 2,000 drivers with a BAC over .10% are arrested in any given 24 hour period.

A drunk driver can drive 5,000 miles before being stopped (equivalent of a cross-country trip).

When we look at the consequences of the drunk driving crash, we aren't just looking at deaths and broken limbs. We are looking at permanent brain damage, spinal injuries, loss of limbs, and recurring nightmares as well as other emotional longterm injuries.

Statistics on alcoholism reveal that over 18 million adults are either alcoholic or have a serious substance abuse problem. At least 4.6 million adolescents annually become addicted. Three out of every 10 teenagers have alcohol problems and 9 out of 10 teenage crashes involved alcohol.

The National Highway Traffic Safety Administration recognized the seriousness of this problem in the 1970's. Several demonstration projects were developed throughout the country to implement countermeasures to combat the problem. At that time, efforts centered around enforcement through specialized training, probation and long-term followup, and treatment for the offender.

But during this period of time, a major element in the movement was missing. That element was in the area of public attitude and concern. A significant boost for the initiative to impact the drunk driving problem began in 1980, with the development of Mothers Against Drunk Driving and several other citizen activist groups. The participation of these groups in focusing the public's attention on the problem, as well as the media's growing attention to the effort to rid the nation's highways of the impaired driver, represented a link that had been missing previously.

In looking back upon the early 1980's, the factors that contributed significantly to a reduction of alcohol-related fatalities during that period of time primarily included the following:

1) Citizen Activism
2) Media Attention
3) Effective Legislation
4) Stepped-up Enforcement
5) Administrative License Sanctions
6) The increased perception and fear of the public that if they drove after drinking, they were likely to be arrested, lose their driver's license, and possibly serve time in jail.

From 1982 to 1985 alcohol-related fatalities decreased. During this time, the greatest number of reductions in fatalities was seen among our youth. This was a very positive outcome of the initiative, because youthful drinking drivers, and alcoholics, were considered less deterrable than other groups. And with the passage in 1984 of the minimum drinking age of 21, the nation saw a significant reduction in total fatalities from ages 16 through 20 and especially for ages 17 through 20.

But even with the significant strides made during the first five years of the 1980's, the problem of drunk driving still remains a number one national health threat. Still, more than 1/2 of fatal crashes continue to be alcohol related. More than 80% of the crashes involve a driver with a Blood Alcohol Content greater than .10. And, still, each year, approximately 24,000 Americans die as a result of the irresponsible actions of the drunk driver.

MADD BACKGROUND

MADD has evolved over the past 10 years from a one woman crusade to a national movement. It began with the efforts of Candy Lightner, in Fair Oaks, California, who refused to accept the lenient and ineffective response of the criminal justice system toward a hit-and-run drunk driver who took the life of her 13 year old daughter, Cari, in May of 1980. The driver had been involved in another hit-and-run drunk driving incident just two days earlier and was free on bond when he killed young Cari.

When MADD was founded in 1980, national statistics were reflecting an average annual alcohol-related death rate of 28,000. After joining forces with other agencies and organizations, particularly with the National Highway Traffic Safety Administration, MADD began to see a drastic change in the way both the media and the public began to view the problem of the slaughter on the nation's roadways. As a direct result of the combined efforts of experts in the field, activists, and the media attention, the nation began to see a significant increase in DUI legislation, number of arrests and convictions, tougher sanctions for the repeat

offender, and a greater public awareness and sensitivity to the problem. And, most importantly, the nation saw a general change in public attitude toward the crime of drunk driving.

Presently observing its Tenth Year Anniversary, MADD is one of the fastest growing non-profit organizations in the country. It has a following of almost three million members and supports and has over 404 chartered chapters throughout the United States, with affiliates in several other countries.

MADD's membership is composed of men and women from all walks of life, including victims, survivors, and concerned citizens who are fed up with the problem of impaired driving, and who are joining together to both change public opinion concerning the problem and to support efforts designed to eventually eliminate the problem altogether.

MADD's mission statement is to mobilize victims and their allies to promote the public conviction that impaired driving is both unacceptable and criminal, in order to promote corresponding public policy, programs, and personal accountability. In other words, MADD's goals are two-fold: to stop drunk driving and to help the victim of this violent crime.

MADD is not a temperance league. Its members believe that drinking is a private matter. It only becomes a matter for public concern when the person who is drinking gets behind the wheel of a motorized vehicle and drives under the influence.

At a National Leadership Conference and Tenth Year Anniversary Kick-off held in Washington, D.C. in August of 1990, MADD President Micky Sadoff commented, "Over the past decade, MADD's grassroots movement has moved the hidden and socially-accepted tragedy of drunk driving from the back-page obituaries to the front-page headlines and into the nation's consciousness."

The driving force behind this national organization is the belief that the problem of impaired driving can eventually be eliminated through the combined efforts of many agencies from the public and private sector. MADD's comprehensive approach to eliminating the problem includes promoting public awareness and education, developing and supporting prevention programs, providing strong support for more effective DUI countermeasures, supporting stiffer sanctions for offenders, including assessment and treatment of problem drinkers, and effecting a general change in the opinion of the public toward the drunk driver.

VICTIMS ASSISTANCE

The second, but equally important goal of MADD is to provide a strong voice for the victims of this very violent and devastating crime.

Drunk driving is not just an issue of financial costs or a violation of the law, it is also an issue of human loss. Each year, besides looking at the reality of over 23,000 alcohol-related fatalities, MADD is also very conscious of the 500,000 individuals who sustain injuries as a result of drunk driving crashes.

As the largest victims assistance organization in the country, MADD is both champion of the rights of victims and a sensitive ally in their time of need. Its members, made up of victims, survivors, and advocates, provide the following:

Crisis Intervention: MADD provides emotional support to help victims cope with their grief and anger. Victims are also provided practical information on resources they may need in the aftermath of their victimization.

Written Information and Referrals: MADD provides brochures ranging from understanding the grief process to understanding the criminal justice process, and offers a clearinghouse on other available resources.

Criminal Justice Advocacy: Besides receiving criminal justice orientation and an explanation of their rights, victims are encouraged to submit Victim Impact Statements and are provided with court accompaniment upon request.

Group Support: Many Chapters provide support groups to help victims cope with the many problems they face, allowing them to share their feelings and concerns with other victims who have had similar experiences.

Victim Impact Panels: As victims move through grieving and begin to recover from the powerlessness they felt when the crash happened, many wish to tell their story so that others who might consider drinking and driving will be moved to make a commitment not to do so. About 1/3 of the chapters bring together 3 or 4 victims to tell their stories as a panel before the most important audience who could ever hear them—convicted drunk drivers ordered by the court to attend.

The victims on the panel do not blame or judge those who attend. They simply tell their stories and how their lives and families have been affected by the crash. Victims never speak to groups in which their own offender is present. There is no interaction between victims and offenders during the Panel presentation, but question and answer periods may follow.

Judges or probation officers require convicted drunk driving offenders to attend a Victim Impact Panel as an element of their sentences. The Panel does not replace conventional sentences but adds a creative component to it. Immediately after the sentence is pronounced, a court clerk informs the offender verbally and in writing of the date, time and place of the Panel to be attended. A probation officer or other agent of the court attends each Victim Impact Panel to monitor attendance. Offenders who fail to attend must return to court for appropriate sanction.

Follow-up research is just beginning on the panels and it looks very promising. In a study of 94 offenfers who attended a panel in Dallas, Texas, 87% said before attending the panel that they would continue to drink and drive or were unsure. After hearing the panel, 95% said they would never drink and drive again. A large study in Clackamas County, Oregon, followed up 1,275 offenders for one year. 534 of them had been ordered to attend a Victim Impact Panel, 741 were not. The group who did not attend the panel had three times as many drunk driving offenses within the next year as the non-panel offenders.

VICTIM ASSISTANCE FIVE POINT PLAN

In August of 1990, at the Tenth Anniversary National MADD Leadership Conference held in Washington, D.C. MADD unveiled its new Victim Public Policy Five Point Plan: Elements: "ABCDE"

1. *A*mendments for Victim Rights MADD believes that since Statutory Bills of Rights are only sporadically and intermittently enforced, State Constitutional Amendments for victim rights will more definitively offer victims of drunk driving crashes the right to be informed of, present at, and heard in the criminal justice process.

2. *B*ankruptcy Protection for Victims of Drunk Driving Crashes MADD believes that persons who kill or injure others as a result of driving impaired by alcohol or other drugs should not have the privilege of filing bankruptcy to avoid paying restitution or civil judgments to their victims.

3. *C*ompensation for Victims of Drunk Driving Crashes MADD believes that victims of crashes caused by drivers impaired by alcohol or other drugs should not be categorically excluded from any State Crime Victim Compensation Program and should be subject to the same eligibility requirements as other victims of violent

crime.

4. Dram Shop Recovery for Victims MADD supports, by means of legislation or case law, the right of victims of alcohol-related traffic crashes to seek financial recovery from establishments and servers who have irresponsibly provided alcohol to those who are intoxicated or to minors, or who serve past the point of intoxication individuals who then cause fatal or injurious traffic crashes.

5. Endangerment of Children Sanctions MADD supports the enhancement of sanctions against convicted drunk drivers when the offender was driving with a minor child in the vehicle. MADD also supports amendments to State Family Codes indicating that evidence of driving while intoxicated with children in the vehicle is considered against the "best interest of the child" in suits affecting the parent-child relationship.

PUBLIC AWARENESS

As previously stated, a major component of the comprehensive effort to combat the problem of drunk driving is in the area of Public Awareness. Over the past several years, MADD has developed and supported several different major public awareness campaigns:

Project Red Ribbon: 1990 will mark the fifth year of observance. Through the combined efforts of MADD, NHTSA, and many other groups focusing upon transportation safety, the country will hopefully be blanketed in red ribbons during the upcoming holiday season. This program was developed in an effort to combat the high number of deaths and injuries each holiday season, from Thanksgiving through New Year's. The red ribbon tied to a vehicle is a symbol of the motorist's pledge to drive safe and sober. MADD says that this public campaign will give a new meaning to the saying "Tie One On." Over 40 million ribbons were distributed in 1989.

The National Candlelight Vigil: No single event throughout the year focuses more attention on the victims of drunk driving crashes than this vigil of Remembrance and Hope held in December of each year. The vigils which are observed simultaneously throughout"the country, are designed not only to remember victims, but also to support their families, to alert the nation to the reality of drunk driving, and to express hope for a less violent holiday season.

Project Graduation: MADD has joined forces with over 20 other national and state organizations as an active co-sponsor of Operation Prom/Graduation, providing information for our youth on sponsoring substance free parvies as well as information to increase the awareness of the dangers of alcohol and drug use.

MADD Poster/Essay Contest: This year will be MADD's fourth year of sponsoring this contest. Last year, it drew more than 45,000 entries. This contest challenges our youth to combine their creativity with their knowledge about impaired driving. This year's theme will be "Driving Straight Into the 1990's." The poster competition is for grades 1-12; the essay contest is for grades 4-12.

"Keep It A Safe Summer": "K.I.S.S." is MADD's summer safety program observed between Mgmorial Day and Labor Day. During the summer months, MADD promotes public service announcements, sponsors blood drives with American Red Cross, and provides a family packet of safety tips on travel and specialty items.

Drive For Life: This is a Labor Day public awareness campaign cosponsored with Volkswagon, asking the driving public to make a personal commitment to drive sober by shining headlights during the Labor Day weekend.

YOUTH ISSUES

In 1989, the National Parents Resource Institute for Drug Education conducted research on youth and drug abuse. The results of the research reflected that beer was the number one drug of choice among teens. Basef upon the belief that the only true way to assure the elimination of the drunk driving probnem is to focus upon prevention"efforts aimed at our youth, MADD has stepped up its efforts to curb youthful drinking through numerous public awareness caopaigns.

From its inception, MADD has been concerned about the vulnerability of young people to vhe hazards and consequences of alcohol- and other drug-impaired driving. Inexperienced at both drinking and driving, young people are at increased risk when they combine the two activities Research indicates in the past that young drivers are disproportionately involved in traffic crashes, injuries and fatalities involving alcohol or other drugs.

MADD believes that the solution to the problem lies in efforts on many fronts: education and prevention programs, to inform youths of the dangers of impairment; intervention, to redirect youth who have become involved in substance use; sanctions, for those who commit alcohol and other drug offenses (as well as for adults who provide substances illegally to minors); and limits on advertising and marketing strategies which blatantly target those under the legal drinking age.

MADD therefore endorses the following concepts and countermeasures to reduce alcohol- and drug-impaired driving by youth:

1. Enforcement of the Minimum Drinking Age Law - MADD believes there should be more effective and stringent enforcement of the minimum drinking age law, by means of administrative, civil, and criminal measures, to further limit illegal underage access to alcohol and thus reduce youthful involvement in alcohol- and other drug-related traffic crashes.

2. .00 BAC - MADD advocates that it be illegal for those under 21 to drive with any measurable level of blood alcohol.

3. Fake ID/Fraudulent Licenses - MADD advocates requiring that driver's licenses and other documents used as primary sources of identification for the purchase of alcohol be standardized to facilitate age identification and that measures be taken to discourage falsification. MADD also supports appropriate sanctions for those who falsify ID and seek "fake IDs" for illegal purchase of alcohol.

4. Marketing to Youth - MADD believes alcoholic beverages must not be marketed to those who have not reached the age for legal purchase or possession.

5. Driver License Sanctions for Underage Purchase and/or Possession of Alcoholic Beverages - MADD advocates that each state adopt and implement laws which provide driver's license sanctions for underage persons convicted of purchase or possession of alcoholic beverages.

6. Provisional Licenses - MADD advocates that each state adopt laws providing that persons under 21 receive driver's licenses which are more restrictive than full licenses, under which violations would result in driver improvement actions and license revocation and civil sanctions in addition to any criminal sanctions and penalties.

7. Alcohol-Free Zones for Youth Gatherings - MADD advocates that schools and other organizations hosting social and athletic gatherings for youth take positive steps to ensure that alcoholic beverages not be present at those gatherings and that persons with alcohol in their systems be prohibited from such events.

8. Adults Providing Alcohol to Minors - In order to further limit youthful involvement in alcohol-related crashes,"MADD advocates criminalization of actions by adults who provide or allow alcoholic beverages at events for underage participants; further, MADD believes that when minors attend adult events where alcohol is present, the responsible adults present must ensure that the minors do not consume alcohol.

9. Alcohol Education - Solving the impaired driving problem in the long term will require a nationwide commitment to alcohol/drug abuse prevention and education. MADD supports the implementation for every state and community of comprehensive alcohol/drug education curricula in schools, alcohol/drug education programs in colleges, universities and trade schools and community-based prevention/education programs for the general population.

ENFORCEMENT OF DUI LAWS

Tougher laws against alcohol- and other drug-impaired driving are crucial for reducing the number of lives lost on our nation's highways. But no law is any better than its actual enforcement. At the same time, effective enforcement of tough laws provides one of the best deterrents to impaired driving offenses and resulting fatalities. Statistics show that where DUI arrests in a state have gone up, deaths from impaired driving crashes have fallen.

It is essential, then, to maintain and constantly improve active enforcement of DUI laws.

Enforcement efforts can be enhanced through a number of means, including availability of effective tools and new technology, as well as more accurate definitions of impairment.

To maximize the enforcement of laws against impaired driving, MADD advocates measures such as the following:

1. Sobriety Checkpoints - MADD supports the use of sobriety checkpoints to detect and apprehend alcohol and drug-impaired drivers, and as a visible deterrent to drinking and driving.

2. Preliminary Breath Tests - MADD supports the use of Preliminary Breathj Testers (PBTs) by police officers investigating drunk drivers, both to increase the efficiency of the arrest process and to protect the innocent.

3. .08 *Per Se* and .05 Presumptive - MADD supports setting the legal Blood Alcohol Content (BAC) limits for drivers at .08 *per se* and .05 presumptive.

4. Mandatory BAC Testing for Death & Serious Injury - MADD advocates the requirement of alcohol/drug testing of all drivers in all traffic crashes resulting in fatalities or serious bodily injury.

5. Enforcement Technology - MADD supports the testing and development, evaluation and implementation of new technology to assist police in the enforcement of DUI laws. Examples of such new technology include passive alcohol sensors, videotaping of DUI offenders and in-vehicle computer terminals for license/criminal records checks.

6. Drug Recognition Expert Program - MADD supports more widespread training and certification of Drug Recognition Experts to better equip law enforcement agencies in the apprehension, identification and prosecution of alcohol- and other drug-impaired drivers.

7. Open Containers In Vehicles - MADD endorses open container restrictions which prevent the consumption of alcohol or the possession of open containers of alcohol in any motor vehicle.

SANCTIONS

MADD believes that driving impaired by alcohol or other drugs is a crime, and the crashes which result are not accidents.

Virtually every state's laws acknowledge impaired driving as a crime, and the seriousness of the consequences that can result make punitive sanctions appropriate and imperative.

Such sanctions help to prevent repeat offenses as well as to raise public awareness of enforcement efforts. Research confirms lives are saved by the impact of such sanctions. While education and rehabilitation have a role in a comprehensive approach, they are no substitute for firm, effective sanctions.

In addition, MADD recognizes the integral part tracking systems play in assuring the implementation of appropriate sanctions. An example would be the National Driver Register, which facilitates tracking of driver license sanctions and makes that information available from state to state as well as within states.

In order to help prevent future offenses and thus save lives, as well as to respond firmly and appropriately to impaired driving incidents, MADD advocates the following:

1. Administrative Revocation - MADD advocates implementation of administrative drivers license revocation for drivers whose blood alcohol content exceeds the legal limit defined by law.

2. Plate/Vehicle Confiscation - MADD advocates confiscating (or impounding) vehicles or plates from the vehicles of habitual impaired drivers or those who drive while under driver's license suspension.

3. Progressive Sanctions - MADD advocates a two-track system of penalties applied in both the administrative and criminal justice systems. Designed to reduce impaired driving by repeat offenders and deter those who have not been detected, the system will administer progressively more severe sanctions to deter offenders who have not been detected and reduce recidivism of those who have been detected.

4. Mandatory Confinement for Repeat Offenders - MADD favors confinement which cannot be suspended or probated for those convicted more than once of driving while under the influence. Drunk driving is a crime, and continued incidence of such offenses warrents the punitive effect of a certain jail sentence. Making the sentence mandatory removes the uncertainty and increases deterrent value of the sanction.

5. Minimum Security DUI Facilities - MADD calls for the development of special minimum security facilities for incarceration of convicted DUI offenders, which include assessment and treatment while incarcerated.

6. Anti-Charge Reduction - MADD believes that all who are charged with DUI offenses should be prosecuted as charged, rather than be allowed to negotiate to a lesser offense, especially a non-alcohol-related offense.

7. Equal Penalties - MADD believes that all impaired driving violations resulting in death or serious bodily injury, as well as leaving the scene of a crash, should be felonies. The penalties for these offenses should be equal.

8. DUI Tracking Systems - MADD supports the implementation of integrated DUI tracking systems that record pertinent information on DUI offenses from arrest to final disposition by the courts and driver license agencies. Tracking systems should include arrest records from all police agencies, prosecution court deposition and driver licensing records and should be accessible by all law enforcement agencies and courts.

9. Probationary Technology - MADD supports investigation and evaluation of new scientific technology designed to prevent individuals from driving under the influence of alcohol, such as an ignition interlock device; however, MADD does not support the use of such technology as a substitute for appropriate traditional penalties and sanctions for drunk driving, such as license revocation and jail sentences.

SELF-SUFFICIENT PROGRAMS - USER-FUNDED

The increasing public concern with the impaired driving problem has led to new legislation programs and awareness, resulting in a substantial reduction in alcohol-related fatalities during the 1980

Unfortunately, some programs initially proving effective fail when funding which originally made them possible runs out.

A system for ensuring consistent, long/term funding for impaired driving programs is essential for continued progress against this serious problem. To develop such a program it is appropriate that those most responsible for the problem — the users of alcohol and the DUI enforcement system — provide the means for its control.

MADD therefore supports funding of impaired driving programs through measures such as the following:

1. DUI Fees, Fines and Assessments - MADD supports efforts to provide funds for impaired driving programs including adequate DUI prevention, deterrence programs education, law enforcement, substance abuse treatment and victim assistance through the use of offender-generated fees and fines as well as other assessments including alcohol beverage taxes to ensure a reliable source of funding for effective programs.

RESPONSIBLE MARKETING AND SERVICE OF ALCOHOL

It is incumbent on persons and organizations which market, sell and serve alcoholic beverages to do so in a responsible manner. MADD believes that several specific actions will help in making such practices more likely. Studies have indicated that as many as half of impaired driving arrests involve persons who last consumed alcohol at public drinking establishments. Therefore, steps should be taken to encourage more responsible serving practices in retail establishments. Laws which extend civil liability to establishments which have served persons whose impaired driving results in death, injury and damage may tend to encourage such responsible behavior. Training in responsible serving practices which promote supportive management policies and equip servers with the skills that enable responsible serving also would help reach that end. Education in responsible serving techniques for social hosts would extend that benefit to other settings.

One marketing practice which is contradictory to responsible marketing and service is "happy hours," which many believe promotes excessive consumption. Multiple drink and free drink promotions common during "happy hours" should be prohibited by law. Additionally, all marketing efforts should include messages encouraging responsible use on the part of the consumer, including the use of designated driver programs.

MADD therefore endorses the following concepts and countermeasures to move toward more responsible marketing and service of alcohol.

1. Responsible Serving Practices - MADD advocates more widespread implementation of responsible beverage serving practices and training to include instruction of both management and servers for licensed outlets, and expanded education on responsible social hosting.

2. Dram Shop - MADD strongly supports by means of legislation or case law the right of victims of alcohol-related traffic crashes to seek financial recovery from establishments and servers who have irresponsibly provided alcohol to those who are intoxicated or to minors, or who serve past the point of intoxication individuals who then cause fatal or injurious traffic crashes.

3. Designated Driver - MADD advocates the promotion of "Designated Driver" programs in both social host settings and licensed establishments, in order to further reinforce a responsible public approach to alcohol use wherever driving may be involved.

4. Practices Which Encourage Excessive Alcohol Consumption (Happy Hours) - MADD calls upon the hospitality industry to voluntarily end all practices associated with excessive alcohol consumption. MADD also supports state agencies and legislatures which pass clear and comprehensive guidelines which prohibit such practices in all 50 states.

5. The Responsible Use of Alcohol - MADD urges that those Americans of drinking age who choose to drink do so in a responsible manner, avoiding any driving after drinking.

6. Alcohol Advertising - MADD encourages producers, advertisers and the media to exercise responskbility with respect to promotion of alcohol products, to avoid depiction of dangerous or illegal uses of such products, and to eliminate any advertising practices which target those who cannot legally use or purchase alcohol.

7. Alcohol Warning Labels - MADD has endorsed the concept of requiring warning labels on alcoholic beverages stating that alcohol will impair skills necessary for operation of motor vehicles or heavy machinery. The use of such warnings is consistent with similar warnings on other hazardous substances and will provide a direct opportunity to educate the public concerning the risks involved in alcohol consumption.

8. Uniform Bar Closing - MADD advocates setting uniform statewide cut-off limits on the sale of alcoholic beverages in order to end the practice of "barhopping" to find establishments with later closing hours for "one last drink," with the likelihood of impaired driving as a result.

MADD OF KENTUCKY

In 1981, in Louisville, Lois Windhorst founded Kentucky's first MADD chapter. For the past nine years, Mrs. Windhorst has been very active in the anti-drunk driving movement and she presently serves as the Legislative Liaison for MADD's Kentucky's State Coordinating Committee. Since 1981, chapters have also been developed in the following counties: Bath, Carter, Christian, Daviess, Franklin, Hardin, Marion, McCracken, Northern Kentucky, Pike, Rockcastle, and Warren.

The State Coordinating Committee is composed of a representative from each chartered chapter. Chairman of that Committee is Earl Bell of Frankfort. Treasurer is Mrs. Lelia Haddle of Radcliff.

In January of 1990, Kentucky hired its first State Administrator, Paula B. Freeman, and opened a State Office in Harrodsburg, Kentucky.

The goals of the State Office and State Coordinating Committee, under the direction of the National Office based in Dallas, Texas, include the following:

1. Leading a statewide effort to strengthen existing chapters and develop new chapters, providing both technical assistance and an avenue for coordination and information sharing.

2. Developing, through local chapters, a direct victim service component.

3. Expanding the public awareness effort through such avenues as the victim panel implementation and court monitoring expansion.

4. Supporting a major thrust in legislation to assure that Kentucky comes into compliance with the national standards.

5. Taking a proactive interest in working with youth groups.

6. Establishing resource and funding development for future expansion of services.

Paula B. Freeman
Kentucky State Administrator
MADD Mothers Against Drunk Driving
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Should Kentucky Have Blue-Ribbon Juries?

76 of Kentucky's 120 Counties use Computers; 44 use Jury Commissioners

HOW SHOULD MADISON COUNTY CHOOSE ITS JURIES?

The public defender says Madison County's system of jury selection is outdated and needs to be changed. The judge says it's working well and should remain as it is. And those who practice here are divided on the question.

The issue arose November 20 when Ernie Lewis, head of the local office of the Department of Public Advocacy, wrote a letter to Chief Circuit Judge James S. Chenault suggesting that he abolish the practice of using a commission to choose jurors in favor of using a computer.

Although at the time he wrote the letter, Lewis was representing a client convicted of manslaughter, he stated that he was not raising the question in regard to any specific case.

He wrote that it was his "heartfelt experience.... that a more random selection procedure would be beneficial for all litigants who have cases tried before a jury in our county."

"The goal of the jury system, it seems to me, has to be that litigants perceive that there is inherent fairness in the selection of those persons that will be sitting on their jury," the letter stated. "If the jury is not fairly selected, then the ultimate result will not be trusted and finality and closure will not be achieved."

> Some counties are switching from random jury selection to jury commissioners instructed to choose strong citizens. With a jury of mothers, teachers and other professionals, [Franklin] Stivers [Assistant Commonwealth Attorney for Leslie and Clay counties] says: "I'll clean clocks."
>
> *Lexington Herald Leader*, Oct. 14, 1990

According to Lewis, who has practiced law in Madison County for more than seven years, the jury pool tends to favor older persons, whites, males, middle-class persons and those who have lived in the county for a long time.

He cited a study which showed that, in 1990, women made up only 45% of jurors, although they are 53% of the county's population. Five years ago, they made up 35%.

He noted that in a recent case involving a young defendant, Harvey Dale Fryer, the average age of the jurors was 53.6 years. "I suspect that he did not feel that he was being tried by a jury of his peers," the letter stated.

By using a computer to randomly select potential jurors from voter registration and motor vehicle registration lists, Lewis said, the result would be a better cross-section of the population. "Unless your computer is randomly selecting from a bad pool, it eliminates any statistical challenge," he noted.

He explained that jury commissioners tend to select people who are like themselves in some respects, whereas the computer would remove that subjective element.

But Chenault argues that there should be some subjectivity.

"The purpose of having the jury commission is, of course, to have some screening process in picking jurors," he said. "I think the trial of any criminal or civil matter is far too important to just randomly select a hodgepodge of whoevers." The goal, he said, should be to get a variety of "responsible" people. "If you pick every 18th person in the county, you're going to pick every 18th drunk, you're going to pick every 18th thief, you're going to pick every 18th prostitute," he said. "Perhaps that's what the public defender is striving for, but I don't think that's a cross-sectional jury."

Chenault said that, as chief judge of the 25th Circuit, he picks three jury commissioners in consultation with the circuit's other judge, William Jennings. One year, there will be two women on the commission, the next year, two men. Likewise, they alternate commissioners on the basis of political partisanship. Every other year, there is a black commissioner, although blacks make up only 7% of the population.

He said he instructs the commissioners to pick jurors whom they would feel comfortable having sit in judgment of them if they were on trial. The names are then put in a hopper, and drawn by the clerk just before trial.

In his 25 years on the court, Chenault said, he has gotten no complaints about juries other than from public defenders who use the issue in their appeals. "They always attack the jury," he said. "That's as standard as the sun rising in the east. They start attacking the jury. They attack the judge. They attack the system."

Lewis disputed the notion that his recommendation was any kind of ploy. All attorneys are sworn to try to improve the justice system, he explained.

Most attorneys who were questioned about the matter said they would favor more random selection.

"I think it's important to get as good a cross-section as we can get," said Michael Eubanks. "To that end, whichever does the best job is what I'd like to see."

Peter J. Flaherty III said that use of computers could "cut both ways." "I do

> Defendants are not entitled to a jury of any particular composition, ... but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.
>
> *Taylor v. Louisiana*, 419 U.S. 528, 532, 95 S.Ct. 692, 702, 42 L.Ed.2d 690 (1975).

criminal defense work, and I think it would benefit me there, but I think it might hurt my other business," he noted.

John Lackey, who does mostly civil work, said he thinks a computer would be more likely to get jurors who would "be more receptive to claims of pain and suffering and loss of income of plaintiffs."

Lackey said he thought it was ironic that Chenault, who is renowned as an advocate of technological innovation in the courts, would oppose the use of computers. "The bar has been chafing at this issue for a long time," he remarked. "Ernie's often out there alone on things, but on this, I think he has a lot of support."

Neal Martin said he had no problem, however, with the use of the jury commission. "I think here in Madison County, it's been impartially administered for years," he said. "In some districts it may be, 'Bring in the usual jurors,' but that's not been the case here."

David Smith, a local prosecutor, said he too was satisfied with the commission process. "I don't think there's any need for changing it," he said. "I think it's a good cross-section of Madison Countians. I had nine jury trials this year, and I thought it was representative."

Lewis said he thought the jury commission system tended to be weighted in favor of the prosecution. In his letter, he mentioned that a recent article quoted the commonwealth's attorney for Leslie, Clay and Jackson counties as saying that he could get jurors who would "clean clocks" if his circuit had a commission.

According to Jim Davis, an attorney for the Administrative Office of the Courts, 76 of Kentucky's 120 counties now use computers. They began to be used about five years ago, when the law first allowed them. "I definitely feel it's fairer," he said. "It boils down to one thing: The computer does not recognize personalities."

Davis said the use of computers also speeds up the jury selection process. He said that the AOC can quickly provide a list of names of potential jurors based on voter and vehicle registration rolls. Duplicate names and names of those who don't qualify as jurors are eliminated before the county gets the list. "If they need a 100 jurors, we can give them a 100 names in just a few minutes," he said.

In Fayette County, where a computer system has been used since 1985, several judges said they liked it.

Circuit Judge John Keller said he's seen no "substantial difference" in the process, but that it does eliminate time-consuming hearings over jury challenges.

Circuit Judge Rebecca Overstreet said she was "quite comfortable" with the use of computers, but added that it was the only system she had ever used.

District Judge Gary Payne said he was definitely in favor of computer selection. "In my opinion, it almost has to be better," he said. "Any system is better if it isn't picking people you know."

RANDY PATRICK
Register Staff Writer
The Richmond Register
Dec 8, 1990.
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> The exclusion by jury commissioners of medical doctors, attorneys and policemen from the jury pool is reversible error.
>
> *Reid v. Commonwealth*, 659 S.W. 2d. 217 (KY App, 1983)

Why Do We Have Jury Commissions?

Guest Column to *Richmond Register*.

In your Saturday article on "How Should Madison County Choose Its Juries?," you raise some interesting questions. It was surprising that the article commanded a six column, front page, lead article position, but it is refreshing to have any court procedures discussed in the press as most people have only the vaguest notion of exactly how courts operate.

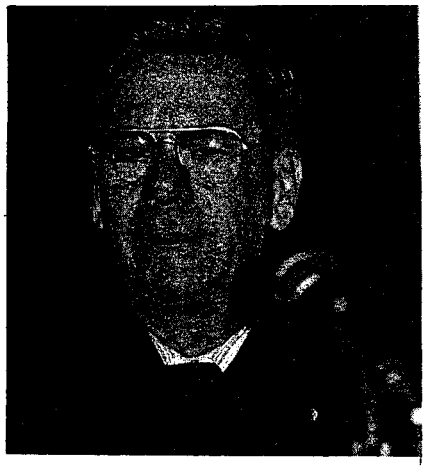
The article raises two questions about jury selection: First, from what source are jurors selected, and second, who does the selection and how it is accomplished?

Obviously, there must be some method of selecting jurors, however selected and whomever chosen. State law has long directed the manner and method of jury selection, although it has changed throughout the years. During this century, jurors were first chosen only from the property tax rolls. About 40 years ago, the law was changed to allow for the selection of jurors both from the tax rolls and from the voter registration lists.

More recently, perhaps 20 years ago, the legislature changed the law so that jurors would be selected only from the voter registration lists. This year the legislature again changed the law and provided that jurors should be chosen from both the voters registration lists and from a list of persons over 18 who hold valid driver's licenses. This now constitutes the pool from which prospective jurors must be chosen. It is designated as the Master List.

In order to select prospective jurors from this Master List, the law requires that the chief circuit judge of each circuit appoint a three member jury commission "to prepare a list of prospective jurors for the following year." Jury commissions have been required and used for well over a hundred years. A jury commissioner must be at least 18 years old, a resident of the county, not involved in any pending litigation, and not holding any public office. The jury commission serves for 1 year and the members cannot succeed themselves.

Annually, in October, three citizens are appointed and instructed as to their statutory duties. They are instructed as to jurors' qualifications: (1) must be 18 years old or over; (2) must be a resident of Madison County; (3) must not be under indictment; (4) if ever convicted of a felony, must have been pardoned by the governor; (5) must be able to speak and understand the English language.



Judge James Chenault

They are further instructed to give no consideration to prospective juror's sex, race, political affiliation, age, religious affiliation, economic condition, job or profession, or any other extraneous consideration. They are told to select the type, character and quality person that, (Con't next page)

were they themselves to have some matter before the court, they would have no objection to that person sitting in judgment of their case. By using the voter registration roles, they were able to see that a proportionate amount of jurors were chosen from each precinct of the county, thus eliminating the charge that any area was over-represented or under-represented. The use of voter registration lists also gave indication that the person was a functioning, thinking and participating member of society.

Under the statutory formula required to be followed, 1,950 names are chosen in Madison County for possible jury service during the ensuing year. The names are placed in small vials and placed in the jury drums, lock and returned to the Court. At least 30 days before the next jury term, the jury drums are unlocked and a sufficient number of names drawn to make up the next jury panel. A jury panel is usually from 32 to 40 persons. Fifty to 60 names must be drawn to allow for people who have moved, are sick, or otherwise unavailable for jury service at that term (many are deferred to a later term).

Several years ago, the legislature authorized, as an alternative method of jury selection, the option of using "an electronic or mechanical system or device in carrying out" the jury commission's duties.

In large metropolitan areas such as Louisville, with 16 circuit judges, and Lexington, with 6 circuit judges, electronic random selection has been utilized by their jury commissions for several years. Jury commissions of a number of other courts have also utilized this type of random selection.

When the legislature added the driver's license holders to the master list of potential jurors, I discussed with my fellow judge, Judge William T. Jennings, whether Madison County has now grown so metropolitan as to warrant the use of random electronic selection of jurors from the Master List.

Judge Jennings and I decided that the jury commission selection rather than random selection was more suited to Madison County. We felt that we had high quality jurors over the years, that the system worked well, that the jury verdicts were honestly and fairly arrived at, and that the community, as a whole, respected the circuit court and the jury trial of cases as presently achieved.

From time to time it has been contended that the prospective jurors pool should be enlarged. Some contend that the roll of welfare recipients should be included; some seek inclusion of people in public housing; some suggest the use of telephone directories; others propose other lists. All of these proposals are grounded on the contention that the present jury pools eliminate certain classes, or groups, or types of people and thus are not truly representative and cross-sectional of the area from which they are chosen. Most of these complaints come from special interest groups but, to say the least, complaints about jury selection methods and procedures are nothing new.

There is no method of jury selection that will suit everyone. However, the guarantee of trial by a jury of one's peers does not now and has never meant anything other than a jury of one's political equals. It certainly does not mean that an 18-year-old person can only be tried by 18-year-olds or that a male person can only be tried by males, or that a person with a particular personality or mental quirk can only be tried by a jury made up of people with the same personality traits or mental quirks. Short of cloning an individual, no person has a true equal except in the political sense.

There are three basic groups interested in every criminal trial: (1) the (sometimes-forgotten) victims, (2) the accused, and (3) the public. If the jury were chosen to please either of the first two, the other would be grossly dissatisfied. If the jury is chosen to suit the third group, for whose basic benefit the system is geared to operate and who must bear the costs of the system and live with the results, then it is likely that, although neither of the first two groups may particularly like the choice, the jury is fairly chosen.

There are problems with the use of the various type lists previously mentioned, including driver's licensee lists. Many foreign students have driver's licenses, as do ex-felons, and some aliens. Driver's licenses are for four years and, on an average, over half would have moved during the four-year period without their licenses reflecting the move until renewed.

Be that as it may, the jury commission selects from both voter's registration lists and driver's license lists.

The local public defender representative was quoted as saying, "The jury commission system tended to be weighted in favor of the prosecution." He did not favor us with his reasons for such belief or any facts to support such conclusion. It is my firm belief that our jurors take their duties with great seriousness, that they honor their oath as jurors with total commitment. From time to time jurors reach verdicts that I may not have reached, but I have never questioned their commitment, integrity or honesty. As I have often told jurors, if it had been intended for the judge to make the verdict, a jury would not have been sworn to do so.

This gentleman further contends that women are discriminated against because, from his counting, in some past year, according to his "random sample." less women were called for jury service that year than were men. In my tenure, I have appointed 75 jury commissioners. Thirty eight of these commissioners were women. In the last jury case defended by this gentleman, 26 jurors were called, 12 of whom were women. Five of the 8 strikes (peremptory challenges) exercised by the defendant were to excuse women from that jury. I am absolutely confident that if an overall examination was made of the jurors selected over the past 24 years, there would be no significant difference between men and women chosen, one way or the other. As a matter of interest, the most recent Grand Jury, empanelled in June and just finally discharged, consisted of ten women and only two men.

In any event, if there is any identifiable or discernable difference in the verdicts made by women as opposed to those made by men, it has wholly escaped my attention despite my careful observation over the years.

Surprisingly, one lawyer was quoted as saying, "It was ironic that Chenault, who is renowned as an advocate of technological innovation in the courts, would oppose the use of computers." Our circuit court records are in the process of being fully computerized at this time. Clark County Circuit Court records were computerized nearly two years ago, the first in the state (along with Johnson County) to be computerized.

Computers do mechanical tasks beautifully. So far, they cannot make rational judgmental decisions. The selection of potential jurors is a judgmental decision. The use of computers eliminates the judgmental part. It also guarantees us a certain percentage of every type person, many of whom I believe even the most jaundiced critic of the court would agree are unsuitable for jury service.

Our society daily becomes more depersonalized. The trend in selecting potential jurors as in every other endeavor seems to be drifting toward a hodge-podge homogenization of mediocrity. I doubt that this is what the people of Madison County want. I firmly believe that the majority of Madison Countians want a quality juror selection process. During my tenure on the bench, it is estimated that over 7,500 persons have served as jurors. These people are probably the best judge of the efficiency, fairness and dedication of the trial juries. These jurors have included people from every walk of life: farmers, loggers, factory workers, medical doctors, bus drivers, store clerks, lawyers, chiropractors, mechanics, nurses, proprietors of every type business, retired persons, secretaries, unemployed persons, welfare recipients, surgeons, tenant farmers, barbers, preachers, grade and high school teachers, administrative personnel, dentists, college professors, an occasional student, public officials, and so on.

I am of the opinion that the real test of whether we should change our method of selection of prospective jurors resides with these people, the people who are not breaking the laws, rather than with the few who are.

CIRCUIT JUDGE JAMES CHENAULT
Richmond Register, Friday, Dec. 14, 1990.
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Public Advocacy Commission

Three New Members Appointed, Two Members Reappointed

The Public Advocacy Commission had three new appointments made by Governor Wallace Wilkinson on Oct. 2, 1990:

1) Robert C. Ewald of Louisville.

2) Jesse Crenshaw of Lexington.

3) Paul E. Porter of Louisville.

These three new members replaced:

1) Allen Holbrook, who had been a commission member since 1986.

2) Gary D. Payne, who had been a commission member since 1989.

3) Cynthia Sanderson who had been a commission member since 1989.

The Commission is charged with insuring the *independence* of the Department of Public Advocacy.

It is a 12 person Commission. Each person serves a four year term. It is currently composed of the following persons:

LAW SCHOOL DEANS OR DESIGNEE (3 Positions)

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

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

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

GOVERNOR'S APPOINTMENT - KBA RECOMMENDATIONS (2 Positions)

4. Robert W. Carran - First appointed February 29, 1985 by Gov. Collins. Reappointed on October 10, 1989 by Governor Wilkinson. His term expires July 15, 1993. Bob is the lawyer administrator of the Northern Kentucky Public Defender System serving Boone, Gallatin and Kenton Counties. He is a 1969 graduate of Chase Law School. He is a member of the Kentucky Association of Criminal Defense Lawyers. He replaced Henry Hughes of Lexington on the Commission.

5. Robert C. Ewald - Appointed October 2, 1990 by Governor Wilkinson, representing the Kentucky Bar Association, to replace Allen Holbrook, Owensboro, whose term expired. Mr. Ewold serves for a term expiring July 15, 1994. Robert is with the firm of Wyatt, Tarrant & Combs, 2600 Citizens Plaza, Louisville, Kentucky.

KENTUCKY SUPREME COURT APPOINTMENTS (2 Positions)

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

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

LAW SCHOOL DEANS

Susan Kuzma

William R. Jones

GOVERNOR'S APPOINTMENT FROM PROTECTION AND ADVOCACY ADVISORY BOARD RECOMMENDATIONS (1 Position)

8. Denise Keene - Appointed to an unexpired term on May 16, 1989 by Governor Wilkinson; reappointed by him on October 10, 1989. She is an certified public accountant in Georgetown and is President of the Ky. Association for Retarded Citizens. The younger of her two sons is multi-handicapped. Her term will expire on July 15, 1993. She replaced Helen Cleavinger who served on the Commission August 1982-May 1988.

GOVERNOR'S APPOINTMENTS (2 Positions)

9. Jesse Crenshaw - Lexington Criminal Defense Attorney - August, 1982 - July, 1986. Appointed by Governor Wilkinson to replace Gary D. Payne. Crenshaw is the former head of Criminal Justice Studies at Kentucky State University. His term will expire July 15, 1994. Jesse served with the Commission previously from Aug., 1982 - July, 1986 by appointment by Gov. Brown.

10. Paul E. Porter, Attorney - Appointed by Gov. Wilkinson to replace Cynthia Sanderson to serve the remainder of her unexpired term ending July 15, 1993.

SPEAKER OF THE HOUSE APPOINTMENT (1 Position)

11. Lambert Hehl, Jr. - Appointed June 28, 1982 by the Speaker of the House. Reappointed July 14, 1986 by Governor Collins. His term expires July 15, 1994. He recently resigned as a Campbell Co. District Judge. He was Campbell County Fiscal Court Judge-Executive for 1978-82. He is a 1951 graduate of the Chase School of Law. Reappointed by Gov. Wilkinson.

PRESIDENT PRO TEM OF THE SENATE (1 Position)

12. Currie Milliken - Appointed by Gov. Wilkinson on December 16, 1988. Reappointed on Oct. 2, 1990 by Gov. Wilkinson. His term expires July 15, 1994. He is a senior partner in the Milliken Law Firm, 426 E. Main Street, Bowling Green. He received his J.D. from the University of Kentucky in 1964. He served as Mayor of Smiths Grove from 1982-85, and is currently its City Attorney. He is a member of the Kentucky Association of Criminal Defense Lawyers. He replaced Lee Huddleston on the Commission.

KBA APPOINTEES

Robert W. Carran

Robert C. Ewald

SUPREME COURT APPOINTEES

Susan Stokley-Clary

Martha Rosenberg

PAST COMMISSION APPOINTMENTS

KY SUPREME COURT

1. J. Calvin Aker, Kentucky Supreme Court Justice - July, 1982 - February, 1983.
2. Frank W. Heft, Louisville Public Defender - February, 1983 - July, 1985.
3. Margaret H. Kannensohn - Supreme Court Appointment. May 25, 1988 - June 1989.
4. Paula M. Raines, Lexington Criminal Defense Attorney - January, 1984 - June, 1986.
5. Anthony M. Wilhoit, Kentucky Court of Appeals Judge - July, 1982 - October, 1983.

GOVERNOR'S

1. Helen Cleavinger - August, 1982 - May, 1988. Appointed by Governor Brown.
2. Allen Holbrook - May, 1986 - July, 1990. Appointed by Governor Collins.
3. Dee Huddleston - July, 1986 - August, 1988. Appointed by Governor Collins.
4. Henry Hughes - August, 1982 - July, 1985. Appointed by Governor Brown.
5. Patsy McClure - Private citizen, Boyle Co., Kentucky - February, 1986 - July, 1989.
6. Nora McCormick - Paris Criminal Defense Attorney - July, 1986 - April, 1988. Appointed by Governor Collins.
7. Gary Payne - Fayette District Judge - May, 1989 - July, 1990. Appointed by Gov. Wilkinson.
8. James Parks, Jr. - Kentucky Court of Appeals Judge - August, 1982 - July, 1985. Appointed by Governor Brown.
9. Max Smith - Frankfort Criminal Defense Attorney - March, 1983-January, 1986. Appointed by Governor Brown.
10. Paul G. Tobin - Louisville Public Defender - August, 1982 - December, 1982. Appointed by Governor Brown.
11. Cynthia Sanderson -County Attorney, McCracken County - October, 1989 - January, 1990. Appointed by Governor Wilkinson.

LAW SCHOOL DEANS

1. Kathleen Bean - January 19, 1988 - July, 1989.
2. William H. Fortune - July 15, 1984 - July 15, 1989.
3. Robert G. Lawson - July, 1982 - June, '84.
Barbara B. Lewis - July, 1982 - January, '88.

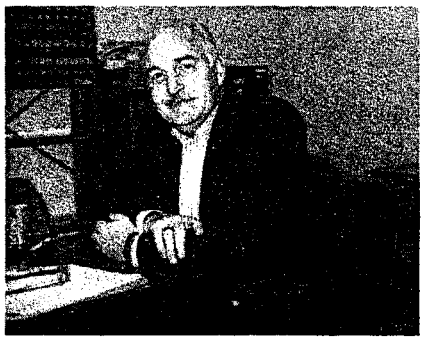
PRESIDENT *PRO TEM* OF THE SENATE

1. William E. Rummage - July, 1982 - July, 1984. Reappointed on September 25, 1984 by Governor Collins. He resigned in September, 1986.

SENATE APPOINTEE

Currie Milliken

SPEAKER OF THE HOUSE APOINTEE



Lambert Hehl, Jr.

Photographs for **John Batt** and **Denise Keene** were not available.

RACE IN KENTUCKY

	Number	Percent
DPA Employees		
White	161	96.4%
Black	6	3.6%
DPA Attorneys		
White	68	89.5%
Black	8	10.5%
State of Kentucky		
White	31,667	92.3%
Black	2,638	7.7%
Kentucky Population		
White	3,379,006	91.8%
Black	281,771	8.2%

Written Interview with Robert C. Ewald, New Commission Appointee

Tell us a bit about yourself, your background, why its appropriate that you serve on the Commission.

My work in the area of public advocacy and *pro bono* law began in the early 1970s when I was appointed as a member of the Board of the Legal Aid Society of Louisville. At that time there was no public defender program anywhere in the State of Kentucky. The Legal Aid program did not provide criminal defense services. Recognizing this void in Jefferson County, several other lawyers and I organized the Louisville and Jefferson County Public Defender Corporation, the first such program in Kentucky. At the same time we wrote the first state-wide public defender statute which allowed a county several options, including a non-profit corporation, for the delivery of public defender services. That statute has been amended several times since, but the present public advocacy statute is based on the one which we originally wrote. With the help of Wallace Grafton, who was then legislative assistant to Governor Wendell Ford, we worked very hard to establish funding for a state-wide public defender program. This funding was realized during Governor Ford's administration and resulted in the birth of what is now the Department of Public Advocacy. Since those beginnings I have remained active in the local legal aid and public defender programs. I serve as President of the Louisville-Jefferson County Public Defender Corporation and as Vice-Chairman of the Legal Aid Society of Louisville.

Why do you want to be on the Commission?

My service on the Commission is a natural extension of the work I have been doing in this area for nearly 20 years. I believe I can be of assistance to the Commission in facing its current problems. Certainly, my involvement in the startup of the present program is evidence that I can be of some help.

What are the critical issues facing DPA?

The critical issue always facing the Department of Public Advocacy is the delivery of quality legal services to those in need. Of course, it is obvious in Kentucky that the issue of inadequate funding is the greatest impediment to those goals. Surely there are other problems to be faced, but the critical problem is the funding issue.

DPA's funding is miniscule vs. other criminal justice funding, what can the Commission do to make the funding fair?

I wish I knew what could be done to resolve the funding problem, but there are no simple answers. It is my goal as a member of the Commission to answer this question. The Louisville program, with which I am very familiar, suffers from a starting salary that is ridiculously low and a per lawyer caseload which is about double that recommended by authorities in the field. I understand that the same problems exist throughout the Kentucky program, although not as serious as in Louisville.

What are your goals as a Commission member?

Obviously, resolving the funding problem must take the highest priority.

Any other thoughts you have?

I know that the staff of the Public Advocacy Department is made up of some of the most dedicated individuals anywhere. I consider it an honor and privilege to be involved in this program and have the opportunity to work with these fine people.

GOVERNOR'S APPOINTEES

Jesse Crenshaw

Paul E. Porter

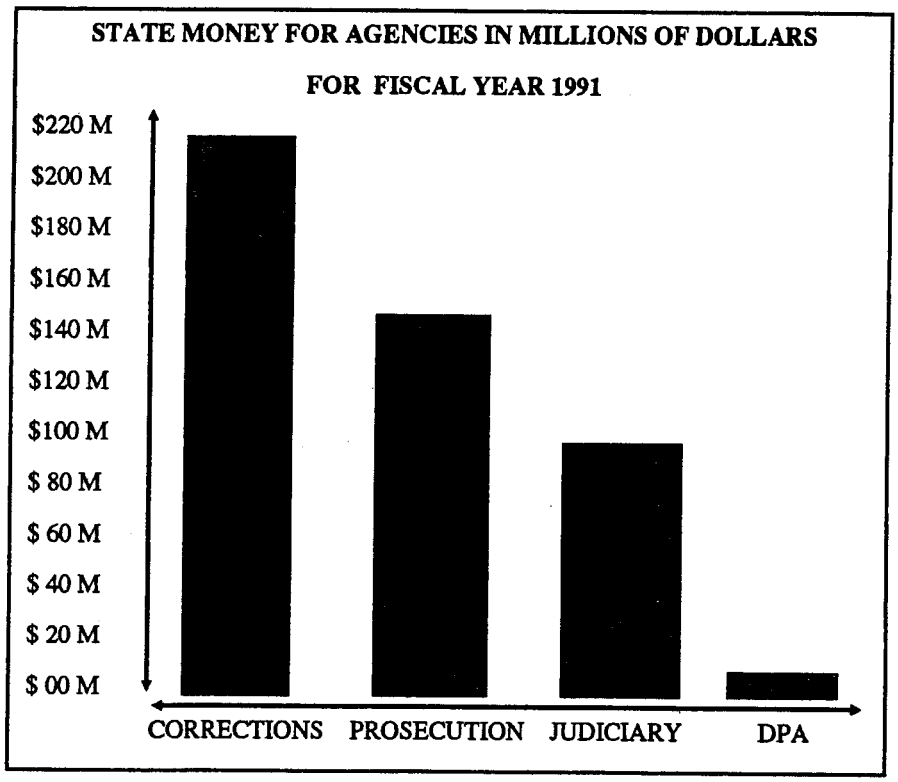
1990 STARTING SALARIES FOR PUBLIC DEFENDERS IN SEVEN SURROUNDING STATES AND KENTUCKY

SURROUNDING STATES

1. WEST VIRGINIA	$25-28,000
2. OHIO	$26,936
3. MISSOURI	$23,200
4. VIRGINIA	$27,000
5. ILLINOIS	$25,536
6. TENNESSEE	$25,000
7. INDIANA	$23,478
AVERAGE SALARY	**$25,167**

KENTUCKY

KENTUCKY STATE PUBLIC DEFENDER	$21,600
LEXINGTON PUBLIC DEFENDER	$17,000
LOUISVILLE PUBLIC DEFENDER	$15,000



Kenton Co. public defender Bob Carran is presented the prestigious NLADA 1990 Smith Award for his two decades of work on behalf of equal justice by Ed Monahan. The Awards presentation took place Nov. 16, 1990 at the Westin William Penn Hotel in Pittsburg. For further reading on the award, please see the December, 1990 *Advocate*, page 63.

Ten Characteristics of a First-Rate Public Defender's Office

Excerpts from San Francisco Public Defender Jeff Brown's presentation at the Indigent Defense Management Conference, August, 1990

Although each public defender's office exists in a unique governmental and political environment, certain qualities are inherent in all solid public defender offices:

1. COMMITMENT

A strong public defender's office must have a strong commitment to protect the rights and well-being of the clients.

The intensity of commitment reflects the health of the office. Without it, the office becomes a lethargic bureaucracy, and starts to serve other goals - calendar efficiency, the recoupment of client costs, and the on-the-job retirement of the staff.

2. PERSONNEL

Selection, evaluation, promotion, and retention are processes indispensable to strong personnel development. They are processes to be safeguarded, as friendship, sympathy, and local pressure will rear their heads to undermine them.

The *selection* of personnel is too important to be left to one person. A formal interview structure must be established. In San Francisco, an interviewing committee screens applicants and recommends whether the public defender and the chief attorney should do a second interview.

Evaluations are essential for the employee's professional growth and should be more than a perfunctory exercise.

Promotions are the recognition, hopefully stemming from the evaluation process, of professional growth.

3. RETENTION

The key to retention is the use of honest and thorough evaluations.

4. MUTUAL RESPECT AND UNDERSTANDING

It is critical that management have the trust and respect of the line troops. Equity, consistent standards, and a willingness to listen to staff concerns and grievances will solidify the relationships between the director and staff and contribute to the productivity of the office.

5. COMPREHENSIVE SERVICE

All Communities are mandated to provide indigent representation in felony and misdemeanor cases. All counties do not have the ability (or willingness) to respond to the arrestee seeking advice, to line-ups, and to critical out-of-county, or even out-of-state, defendants. Many offices reflect a paucity of resources that prevents them from providing basic investigation, experts at trial, or even appellate services.

6. CONSISTENCY OF QUALITY

A first-rate public defender office has good lawyers at every phase of its operation. A few stars will help the reputation of the office a bit, and it will help the clients they get, but it will not compensate for poor overall commitment, poor policies, and neglected areas of representation.

7. ADAPTABILITY OF CHANGE

Criminal law and procedure is constantly in change. For the most part, this change reflects a more punitive attitude about defendants and a desire to make it easier to convict. Offices must be able to respond to these changes. Survival requires a thorough analysis of the impact of legislation, a plan of action, and monitoring of the effect of responding policies.

Adaptability also means that offices can respond to budgetary cut-backs. Good offices plot their consolidation of resources, and they live through lean years.

8. TRAINING

Offices must train the staff on the law, its procedures, and on the art of the practice. Training is essential for the communication of legal information. It breaks the defender out of a shell and provides a sense of mission and camaraderie with his or her colleagues.

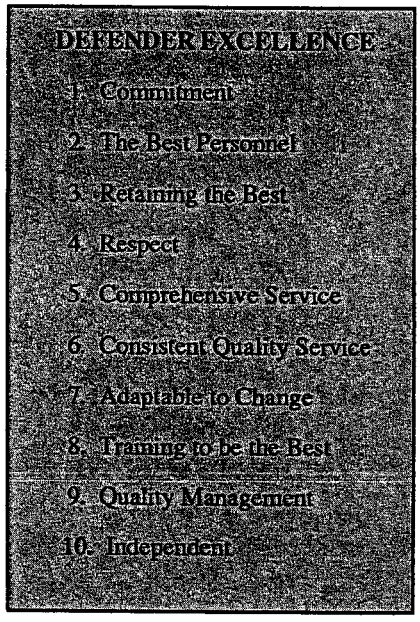
9. MANAGEMENT CAPABILITY

Good management must be able to say authoritatively, with numbers, what is going on. A good office can tell you the caseload, what the attorneys or investigators are doing, and the over-all performance of the office.

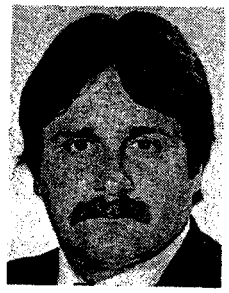
10. INDEPENDENCE

Public defenders work is controversial, unpopular, and contrary to the goal of every other agency in the justice system. A tough office will irritate politicians, judges, victim groups, and newspapers. Forms of intimidation are used, *e.g.*, budget cuts, grand jury investigations, firing the director. A first-rate office must have institutional protection against such possibilities. Public defenders must work with the bar, the judiciary, and the community to ensure the protection of office; so that the rights of the defendants are beyond compromise.

Reprinted from the October/November 1990 issue of *The Oregon Defense Attorney*, a publication of the Oregon Criminal Defense Lawyers Association.



Vince Aprile Honored at U. S. Claims Court Special Session



J. VINCENT APRILE II

At the United States Claims Court Special Session on November 28, 1990, J. Vincent Aprile II was recognized for the contribution he made to the Federal Courts Study Committee. Introduction and remarks made by Thomas M. Susman included Vince's honorary admission to the Claim Court Bar.

The United States Claims Court Bar Association was officially organized on March 6, 1987. The formation of the Association was a joint effort of the Claims Court Advisory Council, the Court, and other members of the legal community. Its overall goal is to facilitate the administration of justice at the Court. Specifically, the Association strives to:

- Enhance the quality of practice before the court.
- Provide a sounding board and support group for court related initiatives.
- Recommend and support high quality appointments to the court.
- Preserve and protect the unique heritage and tradition of the court.

EXCERPT OF REMARKS

CHIEF JUDGE SMITH: One person who was instrumental in the work of the Federal Courts Study Committee was Vince Aprile. Vince is [an Assistant] Public Advocate in the State of Kentucky, appointed by the Chief Justice of the United States to serve as one of the 15 members of that momentous commission that spent hundreds of hours in about 20 cities taking testimony on every facet of the American judicial system. The commission's final report was several 100 pages. Preliminary reports went into the 1,000-page range.

And of the various problems, our problem was brought to the attention of the Federal Courts Study Committee rather late. But Commissioner Aprile at the hearings held in the Supreme Court raised the question when I testified on an unrelated matter - "what was our tenure system?" And after giving an answer, he indicated it was probably too late to do anything about it. This was at the end of January 1990. The draft of the committee's report was supposed to be published the beginning of April 1990.

For people who know how things work in this time the answer will be nothing is going to happen. But they did not count on one member of that commission who is dedicated to doing what he thought was right and would improve justice. And Vince Aprile went to work. I think he requested 2 or 3 times from me materials and submissions on the issue. And once he became convinced there was a serious problem for the court there was a vote on the committee and the committee voted unanimously to make that change and recommendation. It is that kind of dedication to an idea, to a principle, that makes things happen in this world.

The Court would like to recognize the general counsel of the Advisory Commission, Mr. Tom Susman, for a motion with respect to Commissioner Aprile.

MR. SUSMAN: It is my pleasure today to move the admission of Vince Aprile to become an honorary member of this court. As the Chief Judge explained, Mr. Aprile's role was very important, came at a very key time for the legislative effort of this court.

...

But as with football games and political campaigns, there comes a time when the momentum changes or begins to build. And that time was when Vince Aprile decided to become not public advocate for the citizens of Kentucky but public advocate for the U.S. Claims Court on the Federal Courts Study Committee.

...

And Vince took up the advocacy for the court's right in the Federal Courts Study Committee. The committee report contained a recommendation relating to tenure. The staff members and members of Congress, who you will hear more about shortly, picked that up and, along with the ABA's hard work, moved towards making this new system of tenure a reality. So with that background in mind I take great pleasure in moving today the admission as honorary member to the bar of this court J. Vincent Aprile of Louisville, Kentucky. (Motion granted.)

VINCE APRILE'S REMARKS

Let me begin by saying that I am an unlikely person to be an advocate on behalf of the Claims Court, someone who represents every day indigent defendants charged with crimes. But I think there is a very important lesson here. I come from the State of Kentucky. I come from a system where judges are elected. My major practice in the federal court system is before the United States Supreme Court in the Sixth Circuit on federal habeas corpus writs.

It is very important to me as a criminal defense lawyer representing indigent defendants to see an independent judiciary, no matter how they are selected, no matter how they are appointed or elected. And I guess if I have learned one thing from my clients it is the appearance of impropriety, even when there is no impropriety there, that makes people so uncertain about the judicial system.

And what Chief Judge Smith convinced me of that day over in the Supreme Court building, in January I believe it was, was that you had an appearance of impropriety problem here. And it was one thing that it was late coming to us. It was another thing that we had missed it; that we had not been sensitive to it. And while it may have been something that reached out to me and became part of my agenda, I think you must say that you are really giving me this honorary admission on behalf of the whole Federal Courts Study Committee because, as you know if you look through the recommendations, there are some recommendations even where I was not the dissenter that have other people dissenting. And your recommendation was a unanimous one from all my colleagues on the Federal Courts Study Committee.

So it is a great pleasure for me to be able to accept this honorary admission and to also tell you that long, long ago when I was working up here in the JAG Corps of the United States Army one of the last things I did before I left Washington, D.C., and went back to Kentucky to become a public advocate was to swear admission in two courts. One was the United States Supreme Court and one was your predecessor court, the United States Court of Claims. So I am, although I have never practiced a case there, I have been in your tradition as a member of your bar at least in the past. Thank you very much for this honor.

WEST'S REVIEW

Kentucky Caselaw

Linda K. West

FIFTH AMENDMENT
No person shall be subject for the same offense to be twice put in jeopardy of life and limb, nor shall be compelled in any criminal case to be a witness against himself....

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.

KENTUCKY COURT OF APPEALS

INSTRUCTION ON DEFENSE THEORY OF THE CASE
Bristol v. Commonwealth
37 K.L.S. 13 at 6
(November 2, 1990)

Bristol was convicted of second degree robbery based on the victim's testimony that he approached her and her child in a mall parking lot, grabbed the child, and then threatened to kill the child if the victim did not hand over her purse. In his defense, Bristol testified that he found the purse abandoned in a men's restroom and stole credit cards from it.

The Court of Appeals reversed Bristol's conviction based on the refusal of the trial court to instruct the jury on the offenses of theft and receiving stolen property. The Court held that the trial judge was not entitled to disregard Bristol's testimony, despite its lack of credibility. "[T]he credibility of witnesses is to be decided not by the judge but by the jury, and it is the privilege of the jury to believe the unbelievable if the jury so wishes.'"

POSSESSION OF HANDGUN BY CONVICTED FELON - PROOF OF PRIOR CONVICTION/CHARACTER EVIDENCE
Cornwell v. Commonwealth
37 K.L.S. 14 at 1
(November 9, 1990)

Cornwell's RCr 11.42 motion to vacate his conviction of possession of a handgun by a convicted felon on the grounds of ineffective assistance of counsel was denied without a hearing. The Court of Appeals reversed.

The Court held that trial counsel's repeated failure to object to inadmissible evidence entitled Cornwell to a hearing on his motion. Counsel first failed to object when, as proof of Cornwell's status as a convicted felony, the McCracken Circuit Court clerk read to the jury a 1984 indictment charging Cornwell with a felony, but also with a misdemeanor and a PFO charge that was dropped. The Court of Appeals stated: "We can see no purpose in reading irrelevant and dismissed charges to the jury except to impress upon them the defendant's criminality." Trial defense counsel also failed to object when the prosecutor cross-examined a defense character witness by asking him if he was familiar with a lengthy list of previous offenses with which Cornwell had been *charged*. The Court of Appeals held that Cornwell's character evidence had not "opened the door to a recitation of everything the defendant had been charged with, not convicted of." The Court concluded that: "We cannot say from the record alone, that no actual prejudice resulted from the commonwealth's remarks, and defense counsel's failure to object to them." Thus Cornwell was entitled to a hearing.

DUI - KRS 189.520(6) - "QUALIFIED MEDICAL TECHNICIAN," "ARRESTING OFFICER"
Spears v. Commonwealth
37 K.L.S. 15 at
(December 21, 1990)

KRS 189.520(3)(c) creates the statutory presumption that, for purposes of a DUI charge, a defendant whose blood alcohol is 0.10% may be presumed to have been under the influence of intoxicating beverages. Subsection (6) of this statute enumerates who may draw blood from a suspect:

> Only a physician, registered nurse or qualified medical technician, duly licensed in Kentucky, acting at the request of the arresting officer can withdraw any blood of any person submitting to a test under this section or KRS 186.565.

In this case, the Court held that the phrase "duly licensed in Kentucky" does not have the effect of prohibiting medical personnel who are unlicensed, such as a paramedic or phlebotomist, from drawing blood for purposes of the statute. The

Court reasoned that the licensing requirement applies only to those categories of medical personnel who can be licensed.

The Court also held that the fact that a defendant was not under arrest when the blood was drawn was irrelevant. "Nowhere in the motor vehicle statutes...is it stated that an actual arrest must take place before the test is administered for the results to be admissible at trial."

INEFFECTIVE ASSISTANCE OF COUNSEL
Geralds v. Commonwealth
37 K.L.S. 16 at
(December 28, 1990)

The Court reversed Gerald's conviction of receiving stolen property based on the ineffectiveness of trial counsel. Although the commonwealth's case was weak, trial counsel "filed no discovery motions, apparently did not secure a record of the grand jury proceedings, filed no post-trial motions, made no motions for directed verdict, made no opening statement, made a limited closing argument of 56 words, presented no mitigating evidence during the penalty phase, and made no objections to questionable hearsay and other questionable evidence such as cocaine dependency."

In order to reach the issue of ineffective assistance, the Court held that the issue was preserved by Gerald's motion for new trial which stated as its grounds that the verdict "was not supported by competent, admissible evidence, and because the defendant did not get a fair and impartial trial." The Court further stated that even if the motion for new trial did not preserve the issue, the issue was reviewable under RCr 10.26 "which allows this Court to review and grant relief when manifest injustice has resulted from the error."

KENTUCKY SUPREME COURT

CONSENT TO SEARCH AS CONDITION OF PAROLE/ TRAFFICKING - SUBSEQUENT OFFENSE
Clay v. Commonwealth
37 K.L.S. 13 at 17
(November 8, 1990)

While at Clay's home arresting him for parole violations, parole officers noticed bullets on a bedroom dresser. The parole officers subsequently returned and searched the home. They did not find any firearms but did find a quantity of cocaine. The Kentucky Supreme Court held that appellant had waived any objection to the warrantless search because "he had signed an agreement wherein he consented to a search of his person or property any time probable cause existed for the parole officer to believe that appellant possessed contraband."

At his trial, Clay moved for a bifurcation of the proceedings so that no evidence of his prior drug-related conviction would be heard until the sentencing hearing. This motion was denied pursuant to *Smith v. Commonwealth*, 707 S.W.2d 342 (Ky. 1986). The Kentucky Supreme Court overruled *Smith* prospectively stating "in all drug cases tried after the effective date of this opinion, when a subsequent offense is charged, the trial shall be bifurcated in accordance with the Truth-in-Sentencing Act [KRS Chapter 532]. No reference shall be made to the prior offense until the sentencing phase of the trial..." Justice Combs dissented.

MURDER-PFO ENHANCEMENT/SENTENCING INSTRUCTIONS
Offutt v. Commonwealth
37 K.L.S. 14 at 6
(November 29, 1990)

In this case, the Court reaffirmed its holding in *Berry v. Commonwealth*, 782 S.W.2d 625 (Ky., 1990) that a sentence for murder is not subject to enhancement under the PFO statute. The fact that the indictment charging Offutt with murder misdesignated the murder as a class A felony rather than a capital offense, and that this error was unobjected to, did not entitle the prosecution to seek an enhanced penalty.

The Court also held that it was error to deny Offutt's request at his sentencing hearing that the jury be instructed that, standing convicted of a capital offense, he would be ineligible for parole for 12 years. Justice Leibson dissented in part.

COMPLICITY TO THEFT BY DECEPTION- SUFFICIENCY OF THE EVIDENCE
Burnette v. Commonwealth
37 K.L.S. 14 at 10
(November 29, 1990)

Burnette, the state Commissioner of Agriculture, appealed from his conviction of complicity to theft by deception, Burnette alleged insufficiency of the evidence. At issue was whether one Linda Campbell was employed by the Department of Agriculture from June 1 through June 19, 1988. The evidence showed that Campbell was first introduced to employees of the Department by Burnette on June 20, 1988. At that time Burnette stated he wanted to put Campbell to work and Campbell was assisted in filling out forms necessary to her employment. A form which requested the information "Date Employment Began" was filled in as June 20, but the date was later changed to June 1. Various employees testified that they had never seen Campbell prior to June 20. A State Police Detective further testified that Campbell was unable to show him any work product dated prior to June 20, or the name of anyone she had spoken to on the phone during the period in question. The Kentucky Supreme Court stated: "Although the appellant refers to the evidence by the commonwealth as negative evidence, we do not know what other kind of evidence could have been elicited in discussing someone who was not there. It is the opinion of this Court that this matter was properly submitted to the jury...."

PROOF-INSTRUCTIONS/*BOYKIN* CHALLENGE TO PRIOR CONVICTION
Conklin v. Commonwealth
37 K.L.S. 14 at 11
(November 29, 1990)

Conklin testified at his trial on first degree robbery and PFO charges that when he waited in his car in the parking lot while a companion went into a Super-America store he did not know the friend intended to commit robbery. Conklin further testified that he accepted part of the proceeds of the robbery only because his companion was armed with a knife and questioned whether Conklin would tell on him. The Court held, based on this evidence, that Conklin was entitled to a jury instruction on receiving stolen property.

The Court held, however, that Conklin was not entitled to exclusion of a prior felony conviction obtained pursuant to his guilty plea, even though obtained without the colloquy required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The Court noted that a hearing was held on Conklin's motion to exclude the conviction, at which Conklin "at no time stated that he did not understand his constitutional rights prior to the entry of his plea of guilty...." The Court then held that "[s]ince the appellant offered no such attack upon the prior conviction after the judgment was introduced, there was no error in failing to suppress it."

VIOLATION OF INSURANCE CODE
Taylor v. Commonwealth
37 K.L.S. 14 at 14
(November 29, 1990)

Taylor, an insurance agent, was convicted of theft by failure to make required disposition based on his intentionally converting to his own use insurance premiums he had collected from clients.

Taylor contended that he was entitled to an instruction on violation of the insurance code, KRS 304.9-400 and KRS 304.99-010. Those statutes provide that an agent convicted of misappropriating premiums to his own use may be penalized by fine and loss of license.

The Court disagreed, stating: "Taylor could be acquitted of theft and convicted of the lesser offense only if he had withheld the premiums but had not intentionally dealt with them as his own. No reasonable jury could doubt...that by spending the monies Taylor intentionally treated them as his own."

Special Justice Oldfather dissented.

DOUBLE JEOPARDY
Ingram v. Commonwealth
37 K.L.S. at
(December 27, 1990)

Ingram was convicted of the separate offenses of selling marijuana to a minor and of trafficking within one thousand yards of a school. The Kentucky Supreme Court held that the multiple convictions violated the prohibition against double jeopardy of 13 of the Kentucky Constitution.

The Court acknowledged that because each of the offenses required proof of an element not required by the other under *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct. 180 (1932), the federal constitutional prohibition against double jeopardy was not offended. However, the Court chose to give Kentucky Constitution 13 a broader sweep. The Court initially noted its decision in *Hamilton v. Commonwealth*, 659 S.W.2d 201 (Ky. 1983) reversing on double jeopardy grounds convictions of rape and incest involving a single act. The Court then stated:

> Like *Hamilton, supra*, the instant case presents a single impulse and a single act, having no compound consequences. By virtue of additional, circumstantial facts, the behavior was offensive to two criminal statutes.

The Court concluded that dual convictions were impermissible under the state constitution. Justice Wintersheimer dissented.

UNITED STATES SUPREME COURT

INTERROGATION-RIGHT TO COUNSEL
Minnick v. Mississippi
48 CrL 2051
(December 3, 1990)

In this case the Court expanded the protection it afforded criminal suspects in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Court held in *Edwards* that questioning of a suspect must cease once the suspect has requested counsel. In *Minnick* the Court held that once counsel has been provided, questioning may not be thereafter resumed in counsel's absence. The Court stated that "a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning." Justice Scalia and Chief Justice Rehnquist dissented.

LINDA WEST
Assistant Public Advocate
Appellate Branch
Frankfort, KY

The Object of Justice: Right

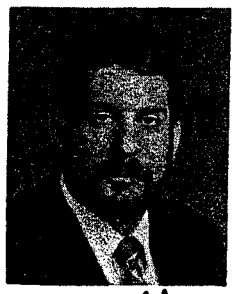
Duty to Enforce Our Bill of Rights

The dissent of Judge Combs in *Dowty Shaffer v. Commonwealth*, 87-CA-2492-MR (August 26, 1988) calls the criminal justice system and society to task:

> I would vacate the judgment and sentence, and remand the cause for a new trial.
>
> The reasoning of the majority is not flawed and its conclusions are logically derived. Yet the majority far too tightly dismisses appellant's first two arguments on procedural grounds without recognizing what is actually at stake here and that is something far more important.
>
> KRS 532.110(1)(c) undisputably prohibits the two consecutive life sentences received by the appellant. The majority rightly concludes that appellant's collateral attack upon these consecutive sentences under RCr 11.42 is misplaced and that he should have raised the issue on direct appeal. KRS 23.110(1) undisputably prohibits the extension of the jury's term as was done in the Whitley Circuit Court. The majority rightly concludes that appellant failed to preserve this issue for consideration on appeal.
>
> Nevertheless, KRS 22A.060 permits this Court to set aside a judgment of a lower court for errors appearing on the record. RCr 10.26 permits this Court to grant appropriate relief for palpable error which affects the substantial rights of a party even though insufficiently raised or preserved for review. Even in those cases where issues have not been properly preserved, an appellate court can review them in order to prevent manifest injustice. *Sanders v. Commonwealth*, Ky., 609 S.W.2d 690 (1980).
>
> True, appellant did not preserve one issue, and insufficiently raised another, but it is the prosecuting attorney's duty to see that justice is done. *Lockhart v. Commonwealth*, 249 Ky. 95, 60 S.W.2d 355 (1933). The prosecuting attorney is obliged to see that the legal rights of the accused, as well as the Commonwealth, are protected. *May v. Commonwealth*, Ky., 285 S.W.2d 160 (1956). The prosecuting attorney is under a strict obligation to see that every defendant receives a fair trial, a trial in accordance with the law, which means the law as laid down by the duly constituted authorities. *Niemeyer v. Commonwealth*, Ky., 553 S.W.2d 218 (1976).
>
> The duly constituted authority in this case is the legislature. It had already told the prosecuting attorney in KRS 532.110(1)(c) and KRS 23.110(1) what would not be tolerated during appellant's trial, but the prosecution allowed there to occur in dereliction of his sworn duty.
>
> The consideration that the appellant should have previously raised legal issues on direct appeal, or that he failed to preserve legal issues, must be balanced against the consideration that the courts and the Commonwealth should themselves have previously followed the applicable law. As there is a much higher duty upon the Commonwealth to insure that the criminally accused receives a fair trial than any that is upon the criminally accused's attorney to force the prosecution to provide one, when the scales come to a rest the greater weight is seen to be on the side of the appellant.
>
> Tocqueville keenly observed more than one hundred and fifty years ago that
>
> > Governments in general have only two methods of overcoming the resistance of the governed: their own physical force and the moral force supplied to them by the decisions of courts.
> >
> > A government for whom war was the only means of enforcing obedience to its laws would be on the verge of ruin. One of two things would probably happen to it: either, if it were feeble and moderate, it would use force only in the last extremity and would connive at many partial acts of insubordination; in that case the state would gradually fall into anarchy.
> >
> > Or if it were audacious and powerful, it would have recourse to violence every day and would soon degenerate into a pure military despotism. Either its inaction or its activity would be equally fatal for the governed.
> >
> > The great object of justice is to substitute the idea of right for that of violence, to put intermediaries between the government and the use of its physical force.
> >
> > Alexis de Tocqueville
> > Democracy In America (1835).
>
> Where is the moral force and content of a judicial decision which turns a deaf ear to a citizen who has been penalized unjustly and contrary to existing law simply because he did not properly ask for that which was the responsibility of the Commonwealth to provide in the first instance? The majority may excuse me for answering "Nowhere".

THE DEATH PENALTY

1990 in Review



EIGHTH AMENDMENT, UNITED STATES CONSTITUTION
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

SECTION 17, KENTUCKY CONSTITUTION
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

This regular *Advocate* column reviews all death decisions of the United States Supreme Court, the Kentucky Supreme Court, the Kentucky Court of Appeals and selected death penalty cases from other jurisdictions.

1990 was a mixed year for developments in the death penalty in Kentucky. The best news, of course, is that Kentucky's electric chair remained inactive for the 28th consecutive year. The most dramatic good news was the granting of a new trial to Paul Kordenbrock, by the Sixth Circuit in its first *en banc* opinion in a capital case. This relief was hard-fought and long overdue. The opinion will be discussed further on in this column.

SKAGGS

An unexpected source of bad news in 1990 was the Kentucky Supreme Court. After a long string of reversals, the Court affirmed four death sentences in the last four months of 1990, and also affirmed the denial, without an evidentiary hearing, of RCr 11.42 relief to David Skaggs. (As we go to press, none of these opinions is yet final). In *Skaggs v. Commonwealth*, 37 K.L.S. 13, p. 35 (11-8-90), Justice Combs' opinion affirmed the Barren Circuit Court's summary denial of 11.42 relief, and of an RCr 10.02 motion for new trial, on a number of grounds, most interesting of which was the fact that each side at trial had presented an expert witness who later turned out to be a fraud. Skaggs' insanity defense had been keyed to the testimony of the now-notorious "Dr." Elya Bresler. The Court gave short shrift to Skaggs' argument that his trial counsel was ineffective in hiring the bogus shrink instead of a real one, reasoning that since Skaggs had no other viable defense than insanity, and since Bresler had done a "credible" job in testifying in support of the defense, he was not prejudiced under the Strickland[1] test by the fact that his expert witness was "a fake and a fraud." I am not making this up. The Court was also unimpressed that the Commonwealth "expert" firearms examiner had likewise fabricated his credentials. Since Skaggs had ultimately confessed to the killings and directed the police to a .25 caliber pistol, the Court reasoned, it mattered little to the Court that he had previously implicated another man as the shooter, and the ballistics evidence identifying Skaggs' .25 as the murder weapon might have been fabricated by a fraudulent State Police "expert." Whether or not these holdings can be justified under the individual rationales advanced, their implications for the quality of "justice" required to justify an execution are frightening.

TAYLOR

Victor Taylor's conviction and death sentence were affirmed, 37 K.L.S. 10, p. 37 (9-6-90), in an opinion by Justice Wintersheimer that turns the "statement against penal interest" hearsay exception on its head. Taylor's co-defendant, Wade, recognizing that he was a prime suspect in a double kidnap-robbery-murder, confessed to involvement but blamed the murders totally on Taylor. Wade was tried first, convicted and sentenced to life, and took the Fifth at Taylor's trial, whereupon an "edited" version of his statement was admitted. Breezily blowing off Bruton[2] and casually dismissing the Confrontation Clause, the Court found no error in the admission of the statement, because it was made "against [Wade's] own interest [and not any less so] simply because it also implicated Taylor." The Court apparently failed to consider that Wade's statement could have, and obviously did, serve to keep him off death row while landing Taylor there. For a further discussion of this aspect of the case, the reader is referred to Mike Williams' F.Y.I. column in the October, 1990, *Advocate*, pp. 34-35.

The Court also approved the trial judge's refusal to consider a change of venue motion because it was "filed late." Taylor's trial began in Lexington within a week of Wade's sentence in the same city; the Wade jury's failure to fix a death sentence produced a public uproar which culminated in the legislature's adoption of "Truth in Sentencing" legislation (evidently without reading it first, see *Offutt v. Commonwealth*, 37 K.L.S. 14, p. 6 (11-29-90)). Apparently late-breaking prejudicial publicity cannot be considered in a motion to change venue if it does not occur far enough in advance of trial to give the Commonwealth time to present evidence in opposition. Forty-two other issues raised by Taylor were

rejected without discussion. The Court also had no problem finding the death penalty "appropriate" for Taylor, a teenager whose life history reads like a chronicle of the worst imaginable failures of a social service "system" in serious disrepair.

EPPERSON / HODGE

The *Bruton* issue surfaced again, and received even less careful treatment, in *Epperson and Hodge v. Commonwealth*, 37 K.L.S. 13, p. 25 (11-8-90), a case which demonstrates yet again the undesirability of joint trials for multiple defendants. Space does not permit a discussion of all the issues addressed in the unanimous opinion by Justice Wintersheimer, but the case has negative implications relating to production of exculpatory evidence, identity of informants, cross-examination of co-defendants-turned-prosecution-witness, and change of venue, among others. Most prominent is the role played by the now-disbarred Lester Burns, Epperson's trial counsel. At the time of trial, Burns was facing numerous federal indictments alleging mail fraud and conspiracy, and was being represented by Hodge's trial counsel. He had also been publicly implicated in laundering money stolen from the very crime with which Epperson and Hodge were charged. These charges resulted in conviction, disbarment and a federal prison sentence for Burns. No harm, no foul, said the Court.

SANDERS

David Lee Sanders' appeal was hamstrung from the outset by the fact that many issues were not preserved, or even raised, by his trial counsel (who has since been disbarred). Justice Combs' majority opinion, 37 K.L.S. 11, p. 23 (9-27-90), touches on a number of issues, granting relief on none. Perhaps most significant is the unequivocal adoption of *Ross v. Oklahoma*, 1908 S.Ct. 2273, 101 L.Ed.2d 80 (1988), to govern jury selection in Kentucky. Under *Ross*, there is no violation of right to an impartial jury unless an unqualified juror actually participates in the decision. Thus, even if the defendant is forced to use up his peremptory challenges on jurors who should have been, but were not, excused for cause, there is no issue as long as no such juror sat on the trial. So much for the right to exercise peremptory challenges.

The Court had no problem with the prosecutor's attempt to define reasonable doubt; introduction of an allegedly similar crime in another county, for which Sanders had been charged but not yet tried; introduction of bloody crime scene photos where cause of death or identity of the perpetrator were not in issue; or introduction of hearsay from a lay witness through the prosecution's expert psychiatrist from KCPC as to Sanders' sanity. Nor was relief granted on penalty phase instructions which provided the jury no guidance in weighing mitigating factors, and "used the word "recommend." All these issues were unpreserved. Finally, the Court clucked its tongue - and granted no relief - at "excessive" improprieties in the prosecutor's closing penalty phase argument.

SMITH

In addition, there were two death sentences imposed by jury in Kentucky in 1990. Robert Alan Smith was sentenced to death in Paducah in January. *Advocate* readers will recall the discussion by Neal Walker in the April issue concerning Mr. Smith's trial attorney, L.M. Tipton Reed, Jr., having been twice previously "suspended for neglect of matters entrusted to him, and the resulting controversy over Mr. Reed's efforts in Mr. Smith's behalf (August 1990, *Advocate*, pp. 4-6). By order dated 11-29-90, the Supreme Court has suspended Mr. Reed's license for four years, finding that he failed to file a complaint on behalf of a client and twice lied to the client about it. *KBA v. Reed*, 37 K.L.S. 14, p. 14 (opinion not yet final). The Court noted that this is Mr. Reed's fourth suspension since 1981.

BOWLING

In December a Lexington jury fixed the penalty at death for Thomas Clyde Bowling in a double homicide.

It is again worth noting that nobody is on death row for a crime committed against a black person.

DEATH SENTENCES AVOIDED

On the plus side is the fact that there were, in fact, only two death sentences imposed this year. A number of potential death sentences were avoided around the state as a result of aggressive and creative litigation by defenders leading to acceptable plea offers or jury verdicts of less than death. There's not space enough here to credit everyone who deserves it, but I'll note a few: DPA's **Rodney McDaniel** and **Oleh Tustaniwsky** were successful at making a showing under the State's new law exempting the retarded from execution. **Ron Rigg** and **Deanna Dennison** in Northern Kentucky secured a manslaughter verdict for an imprisoned client charged in the sexual assault and death of a child. Meade County Public Defender **Kent Mitchner** parlayed an aggressive motion practice into a plea offer which he had been promised would never be forthcoming. **Bette Niemi** began her post-DPA career with a life/25 verdict in a highly publicized kidnap/rape/murder case from Louisville. And tremendous credit is due the Louisville defense bar, both Public Defender staff and private practitioners; for the fourth consecutive year, no Jefferson County jury has imposed a death sentence.

Moreover, two Louisville men were among the four who bid permanent farewells to death row this year. Teddy Cosby and Chris Walls, whose convictions and death sentences were reversed in 1989[3] because of the trial court's refusal to grant separate trials, both received life sentences in December 1990 - Cosby by plea, Walls from a jury. Jo Jo Morris, whose conviction and death sentence were reversed in 1988[4] because of *voir dire* errors and prosecutorial misconduct, pled to life/25; a similar resolution was reached for Roy Wayne Dean, whose conviction and death sentence were reversed in 1989[5] for errors in admitting Booth evidence, improper argument by the prosecutor, violation of marital privilege before the grand jury, and admission at trial of depositions taken in his absence.

KORDENBROCK

The best news, of course, came the day before Thanksgiving with notice from the Sixth Circuit Court of Appeals in Cincinnati that it had granted habeas relief to Paul Kordenbrock, and directing a new trial as to both guilt and sentence. The *en banc* opinion reverses a previous opinion by a panel of the Sixth Circuit, denying relief;[6] it represents the first death penalty opinion from the Sixth Circuit *en banc*. A text of the opinion, *Kordenbrock v. Scroggy*, Nos. 88-5467/89-5107, may be found on Westlaw at 1990 WL 180584.

While the opinion is great news for Paul, it is also troubling in many respects. The pivotal issue had to do with his confession; despite numerous requests by Paul that the questioning cease, the police continued to intentionally push the interrogation until he finally admitted to committing the robbery and shooting. Even then, the police wrote out a "confession" for him to sign, which edited out what he had told them indicating a lack of premeditation and the influence of drugs, and which read like a statement of premeditation. While the 13 judges all agreed that there was a *Miranda* violation, only seven found the error not to have been harmless as to the guilt phase; one additional judge agreed it was error in the penalty phase.

Of greater concern is the Court's failure to grant relief on the *Ake*[7] issue. Although

the trial court ordered funds for a psychiatrist, psychologist and psychopharmacologist to consult with defense counsel in developing a defense, the Boone County Judge Executive refused to authorize payment, and the psychiatrist who had been retained ultimately refused to file a report or testify without guarantee of payment, which was not forthcoming. As a result, Kordenbrock was forced at trial to attempt to present a diminished capacity defense without a psychiatrist, and with only a pharmacologist. By a 7-4 majority (two judges not reaching the issue), the Court held that *Ake* does not extend to a diminished capacity defense, and found that Paul's *Ake* rights were adequately protected by the availability of a KCPC state psychiatrist to evaluate, prepare and present a defense, even though such an expert would not have been willing to serve as a confidential consultant to the defense. The majority's reading of *Ake* is so narrow as to be described by Judge Martin in dissent as "unusually myopic," and stands in stark contrast to the views taken by other circuits, see, *e.g., Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987), *cert.* denied, 487 U.S. 1210 (1988); *U.S. v. Sloan*, 776 F.2d 926 (10th Cir. 1985); *Buttrum v. Black*, 721 F.Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990).

The Court also declined to award relief on a number of other issues, including denial of a change of venue, instructing the jury that it would "recommend" a sentence, failure to preserve evidence, exclusion of the penalty phase testimony of an ethicist regarding Kordenbrock's remorse and rehabilitative prospects, and *Mills*[8] error in failing to instruct the jury that mitigating factors did not need to be found unanimously to be considered by individual jurors.

Nonetheless, the Court granted habeas relief to Paul Kordenbrock, for which he (and his post conviction counsel, Ed Monahan and Tim Riddell and his trial counsel Burr Travis and Ed Monahan) are to be congratulated. It is our hope that in the future the Sixth Circuit will continue to abide by the ringing declaration contained in the preamble by Chief Judge Merritt to the Court's opinion:

> As in many death penalty, habeas corpus cases, the problem presented here is not whether the prisoner is innocent of a homicide — the killing is conceded — but rather whether he received the full benefit of fair rules of constitutional procedure and a fair opportunity to offer to the jury mitigating circumstances that might dissuade them from imposing a sentence of death.
>
> It is not the Court's duty to determine whether Kordenbrock deserves or does not deserve the death sentence for his crime. The Court's duty is to insist upon the observance of constitutional forms of procedure.

JUSTICE SCALIA

Speaking of rehabilitation, here's a good one from Justice Scalia. In *Minnick v. Mississippi*, 48 CrL 2053 (December 3, 1990), the Supreme Court by a 6-2 decision extended *Edwards v. Arizona*[9] to prohibit police-initiated questioning of a defendant who has requested counsel and consulted with counsel. In dissent Justice Scalia, joined by the Chief Justice, expressed his frustration that an "honest confession" was to be suppressed. "While every person is entitled to stand silent," he declares, "it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, admission of guilt, if not coerced, is inherently desirable because it advances the goals of both justice and rehabilitation." 48 CrL 2058 (citations omitted). Minnick, of course, had been sentenced to death.

CONCLUSION

The Death Penalty column, you may have noticed, is in new hands. After two years of Neal Walker's insightful writings, not to mention the moving testimony of David Bruck which appeared here last issue, my efforts may suffer by comparison. Nonetheless, the primary purpose of this column is to benefit the capital practitioners around the Commonwealth and elsewhere. Therefore, any and all suggestions, requests, and contributions will be cheerfully accepted and acted on. Let's dedicate ourselves to a goal of no new death sentences in 1991.

STEVE MIRKIN
Assistant Public Advocate
Capital Trial Unit
Frankfort, KY

[1] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[2] *Brown v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

[3] 776 S.W.2d 366

[4] 766 S.W.2d 58

[5] 777 S.W.2d 900

[6] *Kordenbrock v. Scroggy*, 889 F.2d 69 (1989)

[7] *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)

[8] *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1987)

[9] 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)

County Must Pay Funk Fees

A Kenton circuit judge has ordered the fiscal court to pay more than $14,500 in expenses to one of the attorneys who defended Michael Funk.

But Judge Douglas Stephens ordered the second attorney, Deanna Dennison, to account for the approximately $1,000 she has received in contributions to Funk's defense before ordering the county to pay her expenses

Funk, 24, of Norwood, Ohio was convicted of manslaughter and burglary in the death of 7-year-old Jennifer Iles of Covington. After a 6-week trial, the jury found Funk guilty but could not agree on a sentence, so Stephens gave Funk the maximum 30-year term.

Funk is appealing to the Kentucky Supreme Court.

In the orders issued, Stephens said the fiscal court is responsible for $14,564 in expenses paid out by attorney Ronald Rigg of Maysville. The money includes $4,339 for investigative services and about $3,000 for Funk's psychological evaluation. Rigg also will receive some $4,000 in out-of-pocket expenses.

County Administrator George Neack said the money will come out of a special public defender fund. However, the county likely will have to transfer funds from another area to pay the bill.

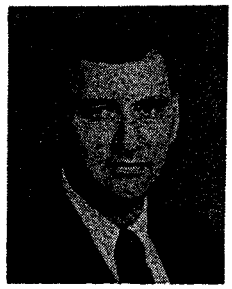
Judge-Executive Clyde Middleton said he doesn't see how the fiscal court can refuse to abide by a direct judicial order, although "we won't be very pleased about it."

Rigg and Ms. Dennison volunteered to defend Funk, who said he could not afford a lawyer. Nonetheless, Stephens said state law requires that the county help defray their expenses.

Ms. Dennison, who is handling Funk's appeal, received about $1,020 from people who believe Funk is innocent. Stephens said she must show how she spent the donations.

PAUL A. LONG
Jan. 5, 1991
Kentucky Post staff reporter
Reprinted by permission.

Mike Williams Becomes Chief of Capital Trial Unit



Michael L Williams

Mike Williams became Chief of CTU. (Capital Trial Unit) on December 1, 1990. He replaces Neal Walker who resigned.

Mike is a 1974 graduate of the Salmon P. Chase Law School. His undergraduate degree in Business with a minor in Philosophy is from Xavier University in Cincinnati. While in law school and for a year thereafter, Mike taught Business Law, Math, Democracy and Consumer Economics at St. Henry High School. He also worked from 1976-1982 as a volunteer EMT (Emergency Medical Technician) in the cities of Erlanger, Florence and Point Pleasant.

From 1974-1978, Mike was in private practice with the firm of Metzger, Phillips, and Nicohols, in Cincinnati, Ohio. He was admitted to the Ohio Bar in 1975. While in private practice, he was on the public defender roster in both Cincinnati and in Northern Kentucky.

From June, 1978 - March, 1986, he was an Assistant Campbell Co. Attorney. His duties included juvenile court, primarily child physical and sexual abuse cases as well as a rotation in "adult court" obscenity and other vice cases. He was a special DUI prosecutor in Campbell Co. from 1986-1988.

In the last ten years Mike has given over 100 lectures primarily on child abuse issues for the Ky. Bar Association, and Bar Association Committees, Child Victims Trust Fund, Juvenile Justice Commission and others. He has also presented information to various Kentucky Legislative Committees. He is a past Board member of the Rape Crisis Center, Covington, Child Victims Trust Fund, Brighton Center (a social services project), Newport. He is a current Board member of the KACDL and a Member of NACDL.

From 1988, he served as a public defender attorney under the Campbell Co. public defender system. He, along with Mott Plummer, represented Gregory Combs on 5 counts of capital arson murders. Mike spent over 700 hours preparing the case. Gregory received a sentence of 45 years; however, he can serve no more than 20 years on the 5 counts of manslaughter for which the jury actually convicted him.

> Mike said in a February 24, 1989 *Kentucky Post* interview: "It's your worst nightmare. Because all of a sudden what you do or say (affects whether) somebody may live or die. He felt 'outmanned and outgunned' by vhe commonwealth. They have state police, city police, cooperative federal agencies. They have investigators, they have ponice officers who can go out and run witnesses down, take statements. A typing staff.

Mike joined DPA on September 1, 1989. He currently is lead counsel for 9 trial level capital cases, the sole counsel on 5. Mike has negotiated 3 pleas. He said:

> Since the current formation of CTU extensive pretrial litigation of issues has resulted in several death cases being resolved in plea agreements wherein the death penalty was successfully avoided. We are proud these cases were resolved without the enormous expenses, court time, and trauma which are always imposed upon the system, the surviving family members, and the families of our clients. We are lawyers first, and both sides have a duty to these courts and families to attempt resolution without extensive litigation.

MIKE ON THE ROLE OF C.T.U.

A life, *all life*, has significant value regardless of the direction that a particular life has taken. The unnecessary taking of any life has no place in a civilized world. It is possible for courts and government, without ordering the killing of its people, to protect society from those who have been labeled 'threats.'

The Capital Trial Unit cannot assume all of these cases. I believe the challenge inherent in being a member of this Unit is to provide needed assistance to lawyers having the courage and conviction to take on the enormous resources of the Commonwealth and to convince courts, juries, Fiscal Courts, prosecutors, and others, that the death penalty is as unnecessary, as it is barbaric, and that there are alternatives which are consistent with the notion that all life has value that should not be needlessly destroyed.

I hope that lawyers will contact the Unit as soon as they get involved in a capital case.

THE PRIVATE MAN

Mike is a committed nature conservationalist, and an avid hiker. He combines his interest in photography with his love of nature and is still waiting for a perfect photo of the Land Between the Lakes eagles. He is a rabid Cincinnati Reds fan and has been insufferable since their 1990 World Series win. He exercises daily at the gym or bicycles/jogs, even if the weather doesn't permit, to relieve the stress of the job. He is a perfectionist and can be found most nights at the office until 11 p.m.

Mike is an unrelenting advocate for poor capital defendants and I am proud to have enticed him to forego a lucrative private practice to work with CTU. His unflinching courage, excellent courtroom skills and bold visions mark him as a leader. -**Neal Walker**

When Kevin McNally left the position of CTU (formerly MLS) director, he had done such a groundbreaking job that I doubted anyone could equal his performance, let alone exceed it, even though my friend Neal Walker got the job. When I learned that Neal was leaving, after having brought together a team of attorneys and staff for CTU unequaled anywhere in skill, dedication, and results, I had that same doubt. But when I learned that Mike Williams was to be the new director, it was "*deja vu* all over again." I was reassured.

Mike brings his own unique blend of professional history, skill, and vision to the Unit. His stint as a prosecutor gives him a special perception of the work, and gives him especially effective tools for working with police officers and others on the prosecutorial team. His early service as a volunteer EMT has textured his legal knowledge with an understanding of the wrongness of violence committed upon others, and has helped make Mike a fierce warrior against it, especially when it is state sanctioned violence, like death sentences. His deep commitment to preserving the sanctity of human life fuels his vision for CTU, and his defense of capital defendants as a private attorney and as a public defender is a manifestation of that vision. This advocate is ready for the job. **Gary Johnson,** Assistant Public Advocate, Frankfort, KY

Record of Death Row Attorneys Questioned

Two recent residents of Kentucky's Death Row were represented by three lawyers who resigned while facing disciplinary charges. The convictions were reversed last year because of errors by a judge and prosecutor. The *Courier-Journal* reported.

In fact, 5 of the 27 men on Kentucky's Death Row were represented by three lawyers who have been disbarred or suspended or who resigned under terms of disbarment. Public defenders say the seemingly abysmal track record of lawyers defending Death Row inmates raises disturbing questions about the quality of counsel in the most important criminal cases - where defendants' lives are at risk.

But the state's chief justice and prosecutors contend that the disciplinary histories of the state's Death Row attorneys are misleading and irrelevant. They cite the fact that none of the disciplined lawyers were sanctioned for their work on the death penalty cases. Moreover, none of the inmates has yet shown they received ineffective counsel. The criticism, however, remains.

Mary Broderick, a director of the National Legal Aid and Defender Association, calls it a badge of shame for the Kentucky bar.

Neal Walker, [then] chief of the state Department of Public Advocacy's major litigation section, said Kentucky taxpayers would pay later for poor capital defense work in the form of new trials and hearings.

Chief Justice Robert F. Stephens says there is no relation between the lawyers' unethical conduct and their death-penalty work. In fact, Stephens said, "there's a lot of quality lawyers that get disbarred."

John Gillig, director of the attorney general's criminal appeals division, defends the lawyers representing Death Row inmates.

Three lawyers who have five clients on Death Row - J. Kevin Charters, Lester Burns, Jr. and L.M. Tipton Reed Jr. -

Choosing lawyers . . .

INCONCEIVABLE as it may seem, imagine that a Kentucky Supreme Court justice is charged with a capital crime. Would he settle for a lawyer who gave out a tavern's phone number for his business number? Would he accept an attorney who had been suspended for neglecting clients' matters? Would he stand still for an attorney who forgot it was a death penalty case?

It's unthinkable that any justice would accept such an attorney. But if the shoe is on another fellow's foot, the script changes. Kentucky's justices have taken few measures to keep lawyers fitting those descriptions from representing people who face the death penalty. Indeed, five men on Kentucky's death row were represented by lawyers who were disbarred or suspended or resigned under terms of disbarment.

ILLUSTRATION BY ELEANOR MILL

Furthermore, Chief Justice Robert F. Stephens contends there is no correlation between the lawyers' unethical conduct and their death penalty work. He even says, "There's a lot of quality lawyers that get disbarred." That's an extraordinary claim considering that discipline of lawyers is rare in Kentucky, and last year only six were forced to stop practicing law.

The problem of inadequate representation in capital cases is a costly one that raises serious ethical questions. Too poor to pay for top-flight counsel, many defendants are represented by inexperienced or even incompetent lawyers. That regularly leads to costly petitions for retrials.

Kentucky's record in capital cases argues for the adoption of standards that would require defense counsel in such cases to have substantial prior trial experience in serious felony cases. Ohio has adopted standards along those lines and Tennessee has similar ones under consideration. The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are even more comprehensive.

The failure of many states, including Kentucky, to address the problem is an argument in favor of a federal competency standard. One that appeared briefly in this year's federal crime bill would have required a lawyer assigned to represent someone charged with a capital crime to have practiced felony criminal law for five years and to have participated in at least two homicide cases.

Even though the provision failed, there's nothing keeping the Kentucky Supreme Court from establishing a similar standard. Nothing, that is, except apathy.

***Courier - Journal* Editorial, Nov 18, 1990**

were all respected criminal defense lawyers who won numerous acquittals for other clients, Gillig said.

Discipline of lawyers is rare in Kentucky - 23 of 10,000 lawyers were sanctioned last year, and only six were forced to stop practicing law.

Critics of Kentucky's record in capitals cases say standards should be adopted that would require attorneys in capital offense cases to have substantial prior trial experience in serious felony cases. In Ohio, where such standards were adopted in 1987 for appointed counsel in indigent cases, the number of death sentences and cases reversed because of mistakes by defense counsel have been reduced, said state Supreme Court Justice Andy Douglas. In Kentucky, the Supreme Court's criminal rules committee last year voted down such a measure.

Justice Donald Wintersheimer, the panel's chairman, said members were concerned that adopting such standards would make it even harder to find lawyers willing to represent indigent capital defendants. Kentucky pays lawyers $2,500 for handling such cases. The committee is expected to reconsider the proposal next month.

Roger Dale Epperson, whose murder conviction was affirmed by the Supreme Court this month, was represented by Lester Burns Jr. Burns, himself, was later sentenced to eight years in prison, in part for taking as his fee $175,000 that Epperson and co-defendants had stolen. The Supreme Court said Burns provided a vigorous defense and did not have a conflict of interest, although his alleged conflicts probably will be the subject of later appeals.

A former Death Row inmate, Teddy Lee Cosby, was represented in succession by Louis McHenry, who resigned from practice a month after withdrawing as counsel, and by Chris Seaman, who resigned in 1986, seven days after Cosby was sentenced to death. Cosby's co-defendant, Christopher Walls, was represented by Joe Martin Jr., who was charged in December 1988 with unethical conduct, including neglecting an estate, and with misrepresenting to a client the status of an appeal. Martin later resigned. Walls and Cosby were convicted in the 1984 murder of an assistant manager at the now defunct Applegate's Landing in Jefferson County. The Supreme Court has ordered new trials for both, in part because they were not tried separately the first time.

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Mississippi Passes Kentucky

Finally, the state of Mississippi stands on the threshhold of the modern age, at least as far as death penalty appeals are concerned.

In a decision that marks a real breakthrough, that state's Supreme Court has recognized reality and lifted the ludicrous $1,000 cap on attorney fees for indigents.

Under Mississippi law, said the high court, judges are allowed to reimburse "actual expenses" in addition to the $1,000 maximum fee paid to each attorney. And those expenses must include "the actual costs to the lawyer for the purpose of keeping his or her door open to handle this case." According to a 1988 poll, that amount came to $25 an hour. The state or the defense attorney would be free, however, to try to prove the figure should be higher or lower.

While lifting the cap won't solve the problem of indigent capital defense by itself, it is hoped that the action will spur the state Legislature to devise a viable and effective public defender system.

National Law Journal, Jan. 14, 1991. Copyright 1991. Reprinted with permission.

Courts Strike Limits on Fees for Defenders in Execution Cases

The U.S. Constitution provides that anyone accused of a crime is entitled to legal representation. However, most states do not adequately fund their public defender offices.

Recently judges have struck down statutes limiting attorney fees in death penalty cases. As little as $1,000, in one instance, had been deemed a "reasonable" fee for an attorney defending a death penalty case. However, the courts have called such fee caps grossly inadequate and unrealistic. Rulings maintain that the restrictions constitute confiscation of a lawyer's law practice and a violation of the defendant's due process rights.

The State of Georgia for the third time recently reversed a death sentence under guidelines set by the U.S. Supreme Court in 1984 on determining effective counsel.

The National Law Journal issued a report after a study covering six southern states in which several death sentences had been imposed. The journal reported that murder defendants often are represented by ill-trained, unprepared and grossly underpaid lawyers appointed by the courts.

However, Arkansas recently ruled that $1,000 was adequate for an attorney in a death penalty murder case. Most state legislatures have not been inclined to increase greatly the sums paid to attorneys representing indigent defendants in death penalty cases.

The Oklahoma Supreme Court recently held that the state's $3,200 limit on fees in death penalty cases was so paltry as to amount to an unconstitutional taking of private property, the property being the lawyer's practice. The Oklahoma court ruled that one attorney had lost $48 an hour in overhead costs alone. Oklahoma became the fist state to develop a formula for paying appointed counsel in death-penalty cases. The counties must reimburse overhead costs and pay fees equal to the hourly rate earned by prosecutors with similar qualifications.

In cases not subject to the death penalty, the court postponed implementation of its ruling until August 1992 to give the legislature time to address the problems involved in providing defense for indigent persons.

The case involving the $1,000 maximum fee is now before the state Supreme Court. Meanwhile, a trial judge recently awarded two local lawyers an additional $5,000 each for their work on a death penalty case.

The Ohio Supreme Court established a system that attracted four times the anticipated number of lawyers - 850 - for mandatory certification and death penalty cases. From mid-1987 to mid-1990 the number of capital convictions dropped from 18 to 8. Ohio's system is being used as a model by other states, including Tennessee and Indiana.

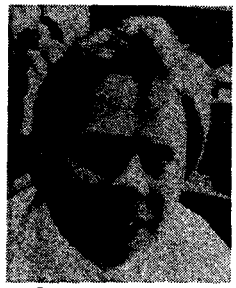
G. WAYNE BRIDGES

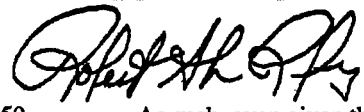
Wayne Bridges practices law in Covington and lectures at seminars and the Chase Law School. He was named the Kentucky Bar Association's "Outstanding Lawyer" in 1986.

The *Kentucky Post*, Jan. 7, 1991. Reprinted by permission.

DISTRICT COURT PRACTICE

The Relation Back Doctrine in DUI Cases





SIXTH AMENDMENT
...the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

This regular *Advocate* column features law and comment on practice in Kentucky's district courts, except for juvenile caselaw and practice which is reviewed in *The Advocate* Juvenile Law column.

It is axiomatic that in every criminal case, no matter how slight, the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S.358, 364 (1970). No competent criminal defense lawyer would allow, in order to prove unlawful entry on a Tuesday burglary, that the defendant was in the building on Wednesday. Nonetheless, how often in a DUI case do we sit idly by while the Commonwealth introduces the results of blood alcohol tests procured some lengthy period of time after the alleged violation is to have occurred?

KRS 189A.010 defines the offense of driving under the influence and states specifically:

> No person shall operate a motor vehicle anywhere in this state *while* under the influence of alcohol or any other substance which may impair one's driving ability. (Emphasis Added).

By designating *while* driving as the operative time period for criminalizing the act of being under the influence, the legislature has elevated this fact to one of constitutional dimension. Having previously addressed the constitutional problems involving the use of the presumptions contained in KRS 189.520.[1] it is merely necessary to point out here that the "under the influence" element is routinely proven by reliance of a blood alcohol percentage generated as a result of a blood, breath, urine, or saliva test.[2] The greater the span of time between the alleged driving and the giving of the selected test,[3] the greater constitutional question presented by the *while* element.

According to the Kentucky State Police *OFFICIAL KENTUCKY DRIVERS MANUAL (1990)*, "when alcohol enters your stomach, it goes directly into your bloodstream and then to all parts of your body. It reaches your brain in 20 to 40 minutes." p. 57. The time period for absorption is affected by external factors. "Food in your stomach slows down how fast alcohol gets into your blood." *Id.* at p. 59. As such, even given this basic anatomical fact, it is impossible to argue that the amount of alcohol present in a person's blood, breath, *etc.*, for presumption's purposes, is the same an hour or two after arrest or detention as it was while he/she was driving. Nonetheless, this is the evidence that is putting citizens in jail, costing them their jobs, depriving them of their privilege to drive, and branding them as criminals.

This issue was squarely presented to the Arizona Supreme Court in *Desmond v. Superior Court*, 779 P.2d 1261 (Ariz. 1989), where the Court framed the question as:

> Is a defendant's blood alcohol level admissible in evidence absent evidentiary foundation relating the blood alcohol level at the time of the test to the level that existed at the time of apprehension. 779 P.2d at 1262.

The Court found no problem with the admission of the presence of blood alcohol without relating it back to the time of driving as a matter of relevancy. 779 P.2d at 1267. However, in order to establish a *prima facia* case of "under the influence," which, just as in the Kentucky scheme, can be based on the use of the statutory presumption, the Court held "there be some evidence of the BAC at the time the defendant was stopped and not just at the time of the test." *Id.* As such, the prosecution faces this option: either give up the presumption of under the influence and allow the jury to utilize the presence of blood alcohol along with all proof in determining if the defendant was under the influence while driving or relate the evidence back to the time of driving and use the presumption based on what the level would have been at the time. *See State v. Carter*, 458 A.2d 1112 (Vt. 1983). Either option is constitutionally acceptable pursuant to *Winship*, but the prosecution must be required to choose.

In an unpublished decision, the Kentucky Court of Appeals touched on this issue without deciding it or firmly offering guidance to either judges or lawyers on either side faced with this issue. The

Court did suggest that:

> Investigating agencies should make every effort to determine and prosecutors should prove the element of "operating a motor vehicle at the time the operator was made under the influence of alcohol or some other substance." *Schoener v. Commonwealth*, Ky.App., unpublished decision, rendered August 26, 1988.

As such, the Court has signaled its acceptance of the basic principle behind the "relation back" doctrine and apparently await a precedent worthy case to address it fully. The issue can arise in two basic forms. In the simplest form, there will merely have been a passage of time sufficient to call into question the accuracy of the proof.[4] Based on the absorption times listed above, any period between stop and test in excess of 20 to 40 minutes would seem to raise the issue, assuming proof that the defendant did not drink following the driving and prior to the test. In such a case, using a technique known as "retrograde extrapolation," it is arguably possible to relate the alcohol level back to the time the driving occurred.[5] It is on this percentage that the appropriate presumptions pursuant to KRS 189.520 should be based.

In the more difficult case, there will be evidence that the suspect/defendant consumed alcohol subsequent to any driving but prior to the arrival of the police and, thus, the giving of the test. Assuming the proof rises to the base level of credibility necessary for admissibility,[6] then the later blood/breath test *clearly* bears no relevance to the blood alcohol level at the time of operation. When faced with this issue in its purest form, no evidence of intoxication while driving, but drinking prior to arrest, courts in other jurisdictions have had little trouble reversing convictions on insufficiency of the evidence. See *Boyle v. Tofany*, 355 N.Y.S.2d 208 (1974); *State v. Dodson*, 496 S.W.2d 272 (Mo. 1973); *People v. Wells*, 243 N.E.2d 427 (Ill.App. 1968). Where the evidence is not as clear, the courts have tended to view the issue as one of weight not admissibility. *See State v. Chester*, 445 S.W.2d 393 (Mo. 1969); *People v. Knott*, 545 N.E.2d 739 (Ill.Ct.App. 1989). This, of course, does not dispense with the additional question of whether the 189.520 presumptions can be given based on a blood alcohol percentage generated by a test taken from an individual who has consumed alcohol post driving. Some evidence relaving back, such as retrograde extrapolation, must be presented to satisfy the "while" requirement. *Desmond, supra; Carter, supra.*

While Kentucky currently has no *per se* law, the legislative and prosecutorial rumblings seem to promise that the passage of such a provision, criminalizing the act of driving with a blood alcohol level above a certain percentage, would somehow be the magic spell that would end drunk driving in this Commonwealth. The *per se* concept does not lessen the necessity of proving the "while" element beyond a reasonable doubt. *See Desmond, supra.* Currently, the Commonwealth need only prove "under the influence" which they may do by proving a blood alcohol percentage at some point after arrest and either relate that back and rely on the KRS 189.520 presumptions, or forego the presumptions and let the jury weigh the facts and decide for itself. Having to prove the precise percentage at an earlier time will be a more difficult task indeed. However, so long as *while* remains an element of whatever scheme Kentucky decides to use, we, as defense advocates, must make them prove it.

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FOOTNOTES

[1] *See GUILTY UNTIL PROVEN INNOCENT, THE ADVOCATE Vol 12, No 3, (APRIL 1990) at 29*

[2] *KRS 186.565(1)*

[3] *Id.*

[4] *Some jurisdictions have statutorily adopted time periods for the giving of the test and so long as it falls within the "window" the rgsults are presumptively valid. See Ex. Ark. Stat., Subsection 75.1031.1(A) (MichieSupp.1984); Cal. Veh. Code, Subsection"23152(b) (West Supplement 1985). Note that the presumption here suffers potentially from the same constitutional frailty as the presumptions from 186.520. (See Note 1 above).*

[5] *This technique is itself not without significant problems that are beyond the scope of this article. It is discussed in Erwin, DEFENSE OF DRUNK DRIVING CASES (1990), Subsection 1.04(f)ii)(1990).*

[6] *This assumes that such a level exists. See Akins v. State, 335 S.E.2d 487 (Ga.Ct.App. 1985). Denial of such evidence as a matter of law would arguably invade the province of the jury and deny the defendant his constitutional right to present a defense. See Chambers v. Mississippi, 410 U.S. 284 (1973).*

SIXTH CIRCUIT HIGHLIGHTS

Federal Court of Appeals Action

Donna L. Boyce

ARTICLE 1, SECTION 9,
CLAUSE 2,
U.S. CONSTITUTION
The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public safety may require it.

This regular Advocate column highlights published criminal law decisions of significance of the 6th Circuit Court of Appeals except for search and seizure and death penalty decisions, which are reviewed in The Advocate Plain View and The Death Penalty columns.

5TH AMENDMENT AND SENTENCING
Bank One v. Abbe

The Sixth Circuit held that convicted but unsentenced defendants may avail themselves of the fifth amendment privilege against self-incrimination in *Bank One v. Abbe*, 916 F.2d 1067 (6th Cir. 1990).

Bank One had sued numerous individuals and corporations for civil damages under RICO and common law claims of fraud. A year later, two of the defendants, Abbe and Strouse, were indicated on bank fraud charges. Abbe and Strouse eventually entered pleas of *nolo contendere* in the criminal proceedings but their sentencing was continued for one year. During that year, the district court in the civil action entered default judgments and sanctions against Abbe and Strouse for their refusal to appear at some scheduled depositions and their refusal to answer questions at depositions they did attend due to their concerns about self-incrimination.

The Sixth Circuit ruled that the fifth amendment self-incrimination rights continue in force until sentencing and were available to Abbe and Strouse at the time of the scheduled depositions.

DOUBLE JEOPARDY
States v. White & Humes

In *States v. White & Humes*, 914 F.2d 747 (6th Cir. 1990), the Sixth Circuit Court of Appeals rejected White's claim that he was entitled to a dismissal on double jeopardy grounds because the prosecutor intentionally goaded him into moving for a mistrial. The Court found no such intent and concurred with the district court's finding that the assistant U. S. Attorney's conduct was motivated by prosecutorial inexperience, even though his conduct was deliberate.

White's co-defendant, Humes, fared better. Humes at no time joined in his co-defendant's motion for a mistrial. The government argued that Humes' failure to object to the mistrial declaration precluded him from raising the issue of his lack of consent to the mistrial. However, the court found no waiver. The Court stated that Humes did not positively indicate his willingness to acquiesce in the order and was unwilling to construe Humes' silence as consent.

Noting Humes' valued right to have his trial completed by a particular tribunal, the Sixth Circuit found no manifest necessity for the declaration of a mistrial in regard to Humes. The prohibited line of inquiry was prejudicial to White, who did request a mistrial, not to Humes. Because Humes did not consent to the declaration of a mistrial and there was no manifest necessity for declaring a mistrial in regard to him, the Court held that a subsequent trial of his was barred on double jeopardy grounds.

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Chief Judge Requests President to Make Appointments

Citing numerous vacancies on the bench of the Sixth Circuit United States Court of Appeals, Chief Judge Gilbert S. Merritt has alerted the White House to "this breakdown in the judicial appointment process," and said that "delays should not go on much longer."

In a January 8 letter to Borden Gray, counsel to President Bush, Judge Merritt said, "On November 7, 1990, I wrote your Ms. Lee Lieberman in The White House requesting information about whether the Kentucky vacancy on the Sixth Circuit Court of Appeals will be filled now that the mid-term election is over. I have not had a response to my letter.

The retiring judge, Harry W. Wellford, from Kentucky gave notice of his retirement more than 2-1/2 years ago. The judgeship has been vacant for more than two years.

It is the President's responsibility to appoint Court of Appeals judges under the Constitution, and such appointments have not heretofore been regarded as a congressional prerogative.

Senior Judge Pierce Lively, of Danville, Kentucky, took senior status in January of 1989.

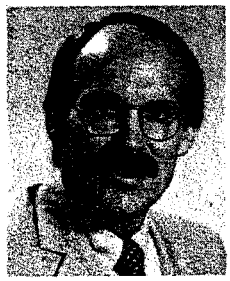
Judge Merritt continued, "In addition, we have two other vacancies on the Sixth Circuit, one from Tennessee as a result of the retirement of Judge Wellford and one under new legislation. In addition, one of our Ohio judges will soon be taking senior status. That means that within a month we will have four vacancies on our Court."

Judge Harry W. Wellford is taking senior status as of January 21, 1991. Congress created the additional judgeship for the Sixth Circuit in the Judicial Improvements Act of 1990 (the Biden Bill) Public Law Number 101-650, which was signed by President Bush on December 1, 1990. The new law increases the number of judgeships on the appellate court to 16.

Concluding, Judge Merritt said, "The delays should not go on much longer. The Senators from several of the states in the Sixth Circuit have inquired of me about what is happening with respect to vacancies both at the district court and at the court of appeals level within the Sixth Circuit. I am at a loss to tell them what the problem is. Would you please bring this breakdown in the judicial appointment process to the attention of the President so that he will be aware the problem exists."

PLAIN VIEW: SEARCH AND SEIZURE LAW

Celebrating the Rich History of Kentucky's Section 10



Ernie Lewis

FOURTH AMENDMENT
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause....

SECTION 10, KENTUCKY CONSTITUTION
The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizures; and no warrant shall issue to search any place or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

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.

SECTION 10: *USE IT OR LOSE IT!*

My attention has once again been drawn to Section 10 of the Kentucky Constitution.

Judge John D. Miller of the Court of Appeals of Kentucky recently stated at a KACDL seminar that defense attorneys need to rely increasingly upon their state constitutions rather than the federal constitution in defending their clients. Justice Hans Linde of the Oregon Supreme Court recently was quoted in the May 27, *1988 Congressional Quarterly's Editorial Research Reports* as saying that a defense lawyer "is skating on the edge of malpractice when he doesn't rely upon his own state constitution." *Id.* p. 282.

Justice William Brennan called upon defense attorneys to look at their state constitutions rather than always citing the federal constitution. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harvard Law Review 489 (1977).

In the Congressional Quarterly article, it was noted that the 500 rulings since 1970 utilizing the state constitutions have made prosecutors and state judges uncomfortable. "In a 1986 survey of state Supreme Court judges, a member of the Georgia Supreme Court candidly confessed that he and his colleagues did not favor the use of the state constitution in deciding criminal matters simply because the document offered more protection to defendants than does the United States Constitution." Understandably, prosecutors "are not very enthusiastic about the trend in state constitutional law."

Finally, I open up the December issue of NACDL'S *The Champion*, and I find a wonderful article entitled *State Constitutions and the Criminal Defense Lawyer* by John Henry Hingson III, which should be mandatory reading for all of us.

With this kind of support, and not one to want to "skate on the edge of malpractice," I have begun to question what Section 10 of the Kentucky Constitution is all about. Is it enough for us to begin to cite Section 10 along with the 4th Amendment in our suppression motions? Does Section 10 differ in any way from the 4th Amendment? Is there any substance in our state constitution that can be used to protect the rights of our clients?

SECTION 10 COMES FROM THE 4TH

The 4th Amendment to the United States Constitution states:

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

One year after the 4th Amendment was adopted in 1791, Kentucky wrote in Section 9 of article 12 of the Kentucky Constitution of 1792:

> The people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures and searches; and that no warrant to search any place or to seize any person or thing shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Section 10 of the Kentucky Constitution of 1891 was taken directly from this provision of Kentucky's older Constitution. It now reads:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Thus, historically Kentucky's search and seizure provision was born in the nation's Bill of Rights. Our forefathers' desire to be free from oppressive governmental

searches and seizures lives on in Kentucky's present Constitution.

SECTION 10'S DIFFERENCES: POSSESSIONS, NOT EFFECTS

Yet, there are obvious differences, mostly in syntax. The only significant difference is the substitution of "possessions" for "effects."

Justice Flem D. Sampson of the Court of Appeals wrote in the *Kentucky Law Journal* Vol. XIII, May, 1925 that the word "effects" is *"property or worldly substance, devoting property in a more extensive sense than goods; embraces every kind of property, real and personal, including things in action; while the word 'possession' not only relates to the property owned but such things, both real and personal, as are under the dominion and control of the owner or possessor. In considering and construing the word 'possessions,' as employed in our constitutional provision, we have given it a broader and more general meaning than the word 'effects' is generally allowed."* *Id.* p. 253.

Counsel for a defendant should utilize this difference to counter any argument that a defendant has no standing in something that he or she possesses.

How about garbage, a student's locker, or our backyards? Does Section 10's "possession" clause provide enough of a difference to reach a different result from that reached by the United States Supreme Court under the 4th Amendment?

KENTUCKY CASELAW

Beyond the syntax, caselaw offers a wealth of material for discovering the content of Section 10. Unfortunately, during the century following its writing, Section 10 was seldom used. According to Justice Sampson, there were only three such cases. His conclusion as a result: "Kentuckians were not, therefore, greatly annoyed or harassed by these unusual processes called 'Search Warrants' during the formative and the greater part of the progressive period of the Commonwealth." *Id.* at 251. If that's the reason for the paucity of cases, Kentuckians must have been mightily harassed in the century that followed.

YOUMAN

Any exploration of Section 10 must begin with *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920). *Youman* penned by Justice Carroll, is well and passionately written. An obvious reaction to prohibition, its language soars. The facts were simple enough. Officers went to arrest a man with an arrest warrant, but not a search warrant. When they found him absent, they searched his house, and found prohibited whiskey. The Court first noted the problem that had developed in Kentucky:

> [I]t is not an uncommon thing in this state, for officers of the law, urged in some cases by popular clamor, in others by advice of persons in a position to exert influence, and in yet others by an exaggerated notion of their power and the pride of exploiting it, to disregard the law upon the assumption that the end sought to be accomplished will justify the means, and therefore no attention need be given to constitutional authority, when public approval will commend the unlawful conduct.
> *Id.* at 861.

Sound familiar? The Court next addressed the question of whether the search was *"reasonable,"* and thus legal, despite there being no warrant. The reader will recall that our nation's high Court is toying with using the reasonableness clause irrespective of the existence of a warrant. Section 10, however, forecloses such a consideration in Kentucky. "[I]t might be thought that a reasonable search and seizure; or one that was not unreasonable, would be allowed without a search warrant. But there is no foundation for this construction. The section does not permit any kind or character of search of houses, papers, or possession without a search warrant." *Id.* p. 863.

Youman says any warrantless search is *per se* unreasonable under Section 10. It was "inserted to meet a practice that had grown up in Revolutionary times, and to protect citizens, not only against this practice, but against all searches and seizures of their property without a warrant" *Id.*

Youman also expresses little sympathy with those who would trade security for better law enforcement, a most "modern" sentiment expressed often by today's judiciary. "[T]his absolute security against unlawful search or seizure exists, without reference to the guilt or innocence of the person whose property or premises are searched. The mere fact that he is guilty, or that there may be reasonable grounds to believe that he is guilty, of the charge preferred against him, or the offense of which he is suspected, will afford no excuse or justification for an unlawful search or seizure." *Id.*

It has become fashionable recently to denigrate the and minimize exclusionary rule, to say that even though a search is illegal, that evidence so seized should still be admissible against the accused. After all, can our society bear to exclude evidence against a criminal merely due to some judicially created nicety known as the exclusionary rule? *Youman* forecloses such denigration of the exclusionary rule under Section 10. The Court asked:

> Will a high court of the state say in effect to one of its officers that the Constitution of the state prohibits a search of all person without a search warrant, but if you obtain evidence against the accused by so doing you may go to his premises, break open the doors of his house, and search it in his absence, or over his protest, if present, and this court will permit the evidence so secured to go to the jury to secure his conviction?
>
> It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that courts had no respect for the Constitution or laws .. . We cannot give our approval to a practice like this.
> *Id.* at 866.

Youman puts to rest the notion that the exclusionary rule in Kentucky is judicially created, and a rule merely intended to deter the police. Section 10's exclusionary rule is part of the very fiber of our Constitution.

Youman does not apologize for the exclusion of evidence, even where the result is that a guilty person might go free. This Court understood that the constitutional right to privacy is much more important than the transient needs of law enforcement in one case. Every defense lawyer in Kentucky should use the following language somewhere in 1991:

> **It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital, fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in a particular case, it is better for the public good that this should happen than that a great Constitutional mandate should be nullified.**
> *Id.* at 866.

So much for the good faith exception in Kentucky!

FLEMING: HOUSE

There are several other cases in the 1920's that similarly make that period the golden years of Section 10. *Fleming v. Commonwealth*, 217 Ky. 169, 289 S.W. 212 (1926) interpreted "house" to include a still located in a house located some 300 yards from the defendant's dwelling house.

MULLINS: POSSESSIONS

"Possessions" included the woodlands 30 yards from the defendant's residence in *Mullins v. Commonwealth*, 220 Ky. 656, 295 S.W. 987 (1927).

MORSE: HOUSE

Morse v. Commonwealth, 204 Ky. 672, 265 S.W. 37 (1924) extended "house" to a dugout (again with a still in it). Section 10 "means to include more than a mere dwelling house when it uses the word 'houses' . . . We know from common experience and ordinary observation that men often have protected and sheltered many of their valuable possessions in houses other than their dwelling houses." *Id.* at 38.

CHILDERS: GARDEN & POND

California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) beware! Both "houses" and "possessions" apply to areas surrounding one's dwelling. "It would be practically if not utterly impossible to enjoy the full and free use of the 'houses' and 'possessions' without the garden and pond in such close proximity." *Childers v. Commonwealth*, 198 Ky. 848, 250 S.W. 106 (1923).

BRENT: OPEN FIELDS

Section 10 was not without its limit. In *Brent v. Commonwealth*, 194 Ky. 504, 240 S.W. 45 (1922) one will find the genesis of the open fields concept. There, the Court held that "possessions" has its limits in the context of the open field. Section 10's primary purpose is to protect a person's home. "[E]very man's house is his castle and is inviolable ...the framers of those Constitutions had inherited no practice or tradition that impelled them to safeguard vast tracts of land, but,"profiting by the experience of their forefathers, they were desirous of preserving inviolate the person of every citizen and those possessions intimately associated with his person, his house, his papers, and his effects." *Id.* at 49.

ASH: SUITCASE

No discussion of the golden age of Section 10 would be complete without *Ash v. Commonwealth*, 193 Ky. 452, 236 S.W. 1032 (1922). There, the Court held the search of a suitcase without a warrant was illegal. The Court reiterated the importance of the judiciary's protection of our privacy rights.

> It is doubtful if our boasted constitutional form of government boasts any greater single protection or bulwark to American liberty than the one against unreasonable search and seizure. . . [The stopping of the Germans at Verdun by the French] was no more essential to the preservation of the liberties of France, in our humble opinion, than is the prevention of the encroachment upon the constitutional provision under consideration essential to the continued perpetuity of our constitutional liberty. *Id.* at 1036.

MCMAHAN'S ADM'X: GOOD FAITH

The period which followed, loosely 1930-1970, saw the continued use of Section 10, even if enforcement was uneven, and the language used less soaring. *McMahan's Adm'x v. Draffen*, 242 Ky. 785, 47 S.W.2d 716 (1932), is the most notable, and was not surprisingly written early in the period. *McMahan's Adm'x* not only establishes how a search warrant is to be executed, it also conclusively rejects the good faith exception.

> In executing a valid search warrant, the officer must not only be considerate of the comfort and convenience and feelings of the person of the occupants of the premises at the time of the search, but must not exceed or abuse his authority with which he is clothed and under which he is acting. He may not unnecessarily injure the feelings of the defendants or unnecessarily mar the premises searched. *Id.* at 718.

The good faith of the officer, or that he was acting in full belief, and with reason to believe that the evidence of the crime sought or desired was present on the premises searched, will not justify a search without a warrant, or with a void search warrant.

MILLER: ENTRY BY RUSE

The Court condemned the use of a ruse to gain entry to a defendant's home in *Miller v. Commonwealth*, 235 Ky. 825, 32 S.W.2d 416 (1930). Section 10, "the chief corner stone upon which the liberties of the citizens . . . [are guaranteed] preserves and guarantees the privacy of the home . . . It is our first duty to uphold that section as part of our Constitution." *Id.* at 418.

MANSBACK SCRAP: ADMINISTRATIVE SEARCH

The beginning of the "administrative search" can be found in *Mansback Scrap Iron Company v. City of Ashland*, 235 Ky. 265, 30 S.W.2d 968 (1930). There, the Court held that Section 10 did not make illegal an ordinance requiring a junk dealer to consent to inspection and sgarch of his junkyard as a prerequisite to obtaining a license.

CHAPLIN: AUTOMOBILE EXCEPTION

The Court used Section 10 to reject the automobile exception to the warrant requirement established in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543.

In *Commonwealth v. Chaplin*, 307 Ky. 630, 211 S.W.2d 841 (1948), the Court held that searching a car requires a warrant, or a legal arrest. "The protection afforded by section 10 of our Constitution consists in requiring that probable cause for searching any place or seizing any person or thing shall be determined by a neutral judicial officer instead of by the often over-zealous police or enforcement officer." *Id.* at 845.

In *Alfred v. Commonwealth*,, Ky. 272 S.W.2d 44 (1954), the Court held a search to be illegal where the police walked onto the defendant's property to look into his truck, which contained whiskey.

YOUNG: EXCLUSIONARY RULE

Young v. Commonwealth, 313 S.W.2d 581 (1958), while holding against the defendant, reemphasized the view of the exclusionary rule established in *Youman*. The rule was created "to give actual effect to the purpose of Section Ten of the Kentucky Constitution. Without such rule of evidence the constitutional guaranty against unreasonable search and seizure would be sadly lacking in verity."

BENGE: GOOD INTENTIONS

Benge v. Commonwealth, Ky., 321 S.W.2d 247 (1959), was the highwater mark of this period. There, the officers serving a bench warrant were held to have made an illegal search when they searched her apartment. Although two U.S. Supreme Court cases would have approved the search, the Court held that Section 10 did not.

While "Section 10 of the Constitution of Kentucky does not materially differ in its language from the Fourth Amendment to the Constitution of the United States,"

that did not end the matter. Section 10 "did not mean to substitute the good intentions of the police for judicial authorization except in narrowly confined situations. History, both before and after the adoption of the Fourth Amendment, upon which Section 10 of the Kentucky Constitution is based, has shown good police intentions to be inadequate safeguards for certain fundamental rights of man." *Id.* at 250.

How can *Leon* possibly gain a foothold with language such as this?

LANE: MINOR VIOLATION SEARCH

A very interesting case during this period is *Lane v. Commonwealth*, Ky., 386 S.W.2d 743 (1965). There, a person was arrested for a minor violation and placed in another car. The police then searched his car, which the Court held to be illegal due to being conducted without a warrant. One wonders whether *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Gd.2d 768 (1981) is the law in Kentucky, given this interpretation of Section 10.

MITCHELL: ROADBLOCKS

While it can be said that historically Section 10 has been interpreted to require a warrant in most situations, that did not prevent the Court from approving roadblocks to look at drivers' licenses in *Commonwealth v. Mitchell*, Ky., 355 S.W.2d 686 (1962). This foreshadowed *Michigan Dept. of State Police et.al. v. Sitz*, 496 U.S. __, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) by 28 years.

SECTION 10 FROM 1970 - 1990

It was during the last 20 years, 1970-1990, that Section 10 has fallen into woeful disuse. Reading the cases during this period demonstrates that lawyers and judges alike have either forgotten or ignored Section 10. Gone is the separate interpretation of Section 10. Often, Section 10 is not even mentioned. Sadly lacking is the special dedication to the rights of privacy so hallowed by the Court of Appeals during the earlier periods.

The low point is *Beemer v. Commonwealth*, Ky. 665 S.W.2d 912 (1984). There, the Court states enthusiastically that "[w]e are fully in accord with the relaxation of the Federal requirements as expressed in *Illinois v. Gates* . . ." *Id.* at 915. There is virtually no discussion of Section 10 as the Court adopts the probable cause definition of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Estep v. Commonwealth, Ky., 663 S.W.2d 313 (1984) is similar. There the Court adopts *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), thereby overruling *Commonwealth v. Chaplin, supra*, discussed earlier. Yet, while *Chaplin* seemed to rely on Section 10, the *Estep* Court seemed to make only a 4th Amendment analysis. In overruling *Wagner v. Commonwealth*, Ky., 581 S.W.2d 352 (1979), and *City of Danville v. Dawson*, Ky., 528 S.W.2d 687 (1975) the Court merely stated that their holding was "in harmony with Section Ten of the Kentucky Constitution .. . ." *Id.* at 215. How so?

Most of the decisions in the modern period have merely made a 4th Amendment analysis. One wonders how often defense counsel made only a 4th Amendment argument, thereby allowing the Court to confine itself to the increasingly conservative law coming from the federal bench?

That is not to say that the Court has ignored Section 10 altogether in recent times.

Justice Osborne, in a dissenting opinion in *Craig v. Com. Dept. of Public Safety*, Ky., 471 S.W.2d 11 (1971), stated that in his opinion, Section 10 prohibited taking someone's blood from him or her without their consent.

In *Rooker v. Commonwealth*, Ky., 508 S.W.2d 570 (1974), the "Court used Section 10 side by side with the 4th Amendment to hold invalid a warrant signed by a judge who had not read the affidavit. Justice Lukowsky, again in dissent, urged his colleagues to be more "sensitive" to the privacy concerns of civizens, basing his consent out of "respect" for the 4th Amendment and Section 10. *Collins v. Commonwealth*, Ky., 574 S.W.2d 296 (1978) (J. Lukowsky, dissenting).

The Court of Appeals relied upon Section 10 and the 4th Amendment to invalidate an "any other person" warrant. *Johantgen v. Commonwealth*, Ky. App. 571 S.W.2d 110 (1978).

In an intriguing opinion, the Court of Appeals relied wholly on Section 10 in *Commonwealth v. Bertram*, Ky. App., 596 S.W.2d 379 (1980). There, the Court held that "it is clear as a matter of state constitutional law that when a defendant testified in support of a motion to suppress evidence alleged to have been seized illegally, his testimony may not be used against him later at trial over his objection."

TODAY'S POSSIBILITIES & PROMISE

There is even more hope today. The present Kentucky appellate courts in recent cases at least hint that they are willing to look at Section 10 separately from the 4th Amendment.

In *Paul v. Commonwealth*, Ky. App. 765 S.W.2d 24 (1989), the Court of Appeals cited Section 10 with the 4th Amendment in holding that a passenger in a car could not be arrested where contraband is found in the car.

More promising than *Paul* is the Court's finding a search warrant illegal where issued by a trial commissioner in a county other than his own. *Commonwealth v. Shelton*, Ky., 766 S.W.2d 628 (1989). The importance of this case is not that Section 10 is used because it is not. Rather, the court declined to use the *good faith* exception of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). It make sense for the Court to so decline.

As has been seen, Kentucky's exclusionary rule has been around as long as the exclusionary rule under the 4th Amendment. The 4th Amendment's exclusionary rule is now said to be based solely upon deterrence of police misconduct. Thus, it makes at least intellectual sense not to utilize the exclusionary rule where the officer is relying in good faith on the magistrate's issuance of a warrant.

On the other hand, Section 10's exclusionary rule established in *Youman* and *Ash*, has a much broader rationale. Essentially, our rule is there because without it, people will not respect our Constitution, because it is anathema to have a rule requiring a warrant or forbidding an unreasonable search and then to allow the police to flaunt that law by admitting evidence in violation of the law against an accused.

While the Court in *Shelton* did not spell out their declining to use "good faith," it is time for them to do so. They will not do so unless counsel begins to make this argument.

Most promising yet is *Commonwealth v. Johnson*, Ky., 777 S.W.2d 876 (1989). There, the Court expressly declined to condemn a search of a defendant's motel room based upon the 4th Amendment. Rather, they held "that the warrantless, forced entry by the police into appellant's room at the Ramada Inn, violated Section Ten of the Constitution of Kentucky." *Id.* at 880.

CONCLUSION

This is my survey of Section 10 of the Kentucky Constitution. It is by no means complete. There is alot to use in trying to protect the privacy rights of our clients.

As we have seen, Section 10 does not abide a *good faith* exception to the warrant requirement.

It appears to emphasize more the warrant requirement, and deemphasizes the "reasonableness" clause that is now being used so often to justify warrantless searches and seizures under the 4th Amendment.

Section 10 may provide broader standing to challenge searches and seizures of one's "possessions" than is available under the 4th Amendment.

Section 10 appears to provide more protection to outbuildings and other areas surrounding one's dwelling house.

Section 10 may not allow a search of a car incident to a lawful arrest that is allowed by *New York v. Belton.*

In short, Section 10 has a rich history. Section 10 *establishes more protection than does the 4th Amendment.* Because of that, we must use it. If we don't, we'll lose it and have no one to blame but ourselves.

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CRIME AND THE BILL OF RIGHTS

SEPARATING MYTH FROM REALITY

Do certain Bill of Rights decisions frustrate police and prosecutors in their efforts to fight crime? Some charge that the Fourth Amendment's exclusionary rule and the Fifth Amendment's *Miranda* protections go too far, and serve to protect criminals from prosecution. Many members of the general public also share a sense of unease about the effect of these Bill of Rights decisions on society's ability to defend itself. Ironically, the Bill of Rights was the fulfillment of a promise of amendments designed to protect individuals from government abuses that was critical to ratification of the Constitution. As the 1991 Bicentennial of the Bill of Rights approaches, we must examine if these current concerns are based on myth or reality.

Toward that end, the ABA's Criminal Justice Section established in 1986 a special committee to evaluate whether such constitutional protections under our Bill of Rights prevent effective crime control. The Committee on Criminal Justice in a Free Society, chaired by Samuel Dash, Professor at Georgetown University Law Center and former counsel to the Senate Watergate Committee, released its report this month. Committee members included a federal appeals judge, a defense lawyer, a chief of police, a county district attorney and a state attorney general. Steven Goldblatt, also a law professor and a former prosecutor, is the committee's reporter.

The committee held hearings in three major cities and conducted a methodologically developed opinion poll of nearly 1,000 police officers, prosecutors, defense attorneys, judges and other participants in the criminal justice system. The hearings and survey focused on whether constitutional protections prevented police from solving crimes and frustrated the prosecutor's ability to obtain convictions.

The committee found that the vast majority of prosecutors, police and others interviewed do not believe that these constitutional protections significantly restricted their ability to fight crime. Their opinion was corroborated by the committee's examination of numerous exclusionary rule studies. According to these studies, only 0.6% to 2.35% of all adult felony arrests are screened out before filing or dismissed by the court because of illegal searches. Indeed, most criminal justice professionals queried responded that the rigors of the exclusionary rule have actually promoted professionalism in police departments across the country.

Similar results were found with regard to the *Miranda* decision, which requires police to inform suspects of their right to counsel and their right to remain silent before conducting a custodial interrogation. The police, prosecutors and others surveyed do not believe that the *Miranda* requirements significantly inhibit effective interrogation or prosecution.

What, then, are the core issues confronting the criminal justice system? The committee report notes that only a small fraction of the serious criminal acts committed in the United States ever enters the system. Out of the estimated 34 million serious crimes committed in the United States in 1986, only 2.5 to 3 million resulted in arrest, and of these, only several hundred thousand led to felony convictions punished by imprisonment. This failure, however, is not due to constitutional restrictions. According to criminal justice professionals interviewed, it is due in large part to lack of resources. Less than 3% of all government spending in the United States went to support all civil and criminal justice activities in fiscal year 1985. Less than 1% of all government spending was devoted to operating the nation's correctional system.

In its report, the committee also discusses the inability of law enforcement agencies to cope with the nation's drug problems and the failure of the victims to report crimes. The committee will make many recommendations to the Criminal Justice Section, and ultimately to the ABA House of Delegates. Some of these will certainly focus on the role of the bar in increasing public understanding of the Bill of Rights and the criminal justice system.

The committee has already made a significant contribution by examining the charge that the prevention and solution of serious crime is seriously handicapped by constitutional protections. As the committee has documented, that contention is not justified by either the opinion or experience of a representative cross section of police, prosecutors, or others involved with administering criminal justice in this country. That contention apparently is based on myth, not reality.

ROBERT D. RAVEN
President, ABA, 1988

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JUVENILE LAW

Protecting Kentucky's Kids

Barbara Holthaus

SECTION 11, KENTUCKY CONSTITUTION
In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

DETENTION HEARINGS:ONE ATTORNEY'S RUMINATIONS

CHILDREN TREATED DIFFERENTLY

Juvenile cases are significantly different from adult criminal matters in many ways. A significant distinction is the absence of bail. While adults have a constitutional right to bail, (Kentucky Constitution Section 16, RCr 4.02); children are subject to preventive detention upon a finding of probable cause that they committed the offense they are charged with. Their only remedy is a detention hearing to determine whether probable cause exists and whether there is a possibility that the child would pose a danger to him or herself or others if not detained. In *Schall v. Martin*, 467 U.S. 271, 104 S.Ct. 2403 (1984), the United States Supreme Court held that a juvenile's liberty interest is subordinate to the state's *parens patriae* interest in preserving and promoting the welfare of a child. Therefore, pretrial detention of children based on a finding of a serious risk that the child might commit another offense is permissible. The court held that it was not a denial of due process to treat juveniles differently from adults in this situation.

In addition, children can be charged with "status" offenses—behaviors which would not be a chargeable offense if the child were over the age of 18. For example—a child can be brought to court for failing to obey the rules of his parent or guardian ("beyond control"), for failing to attend school or for running away from home. KRS 610.010(1)(b). The code permits detention of both public offenders and status offenders. KRS 610.265. This means that children can be locked up with no possibility of bail for behaviors that an adult could not even be arrested for!

THE DECISION TO DETAIN

The decision to detain a child charged with a public or status offense is generally initiated by the court's designated worker (CDW) or the arresting officer, if an arrest initiates the child's contact with the juvenile justice system. KRS 610.200(2) and (5). In many jurisdictions, the ultimate decision to detain appears to be routinely made by the juvenile court judge after consultation with the CDW. Once the decision to detain is made, a hearing must be held within 24 hours excluding holidays and weekends. KRS 610.265.

There are no statutory criteria for determining when a motion to detain should be made (although there are standards for the judge in determining whether detention is upheld). The decision is usually based on the type of crime, the child's prior court contacts, the appearance and attitude of the child, the availability of the parents at the time of arrest and their willingness to take the child home, and the availability of alternative placements other than detention. Girls are rarely detained for public offenses but frequently detained for status offenses while the opposite is true for boys.[1] Children arrested for contempt violations or failing to appear in court are almost invariably detained.[2] Studies indicate that juveniles who are detained stand a better chance of being convicted than children who are arrested on similar charges and released pending adjudication.[3] In addition, children who are detained and then adjudicated are more likely to be institutionalized at the disposition than kids convicted of similar offenses who are not detained.[4]

PREPARATION FOR THE HEARING

Given the fact that detention has an influence on the outcome of the case and that a detention hearing is a one-shot chance to obtain a child's release, it would appear that a detention hearing is a highlight of juvenile justice proceedings. However, the hearings are often the most useless and frustrating part of a juvenile case.

The time of the hearing is usually a major crisis point in the life of the child and his/her parents. Emotions run high and parents may be confused and unable to think rationally. Often, they'll refuse to allow a child to come home out of shame

or embarrassment or the desire to "teach the kid a lesson." The child is usually overwhelmed with fear and unable to convey much practical information concerning the charge. It is crucial to take the time to calm the child and make him/her understand your role in the proceedings. Otherwise, she/he may be tempted to mislead you or minimize the facts, hoping it will help him/her get out. When interviewing the child, be sure to find out exactly when he/she was detained and see if the time limits for a hearing have been exceeded. If they have been, detention cannot take place and theoretically the charges should also be dismissed.

Also at this point, make sure that the client understands the purpose of a detention hearing. Explain to the child that it's not a trial and that the child will not be taking the stand to testify about the offense at this stage. Make sure the child understands there will be more of an opportunity to have his/her side of the story told. This is often a major sticking point with children at detention hearings.

Some other things to discuss with the child at this time are, of course, the child's account of the events. Find out what alternative placements there may be for the child, including relatives or other responsible adults who might be willing to take custody of the child. Find out if the child has any prior court involvements, who the child has talked to so far and whether the child is on probation or after care or has pending charges. Also determine out if the child has a history of drug abuse or involvement, if there was drug or alcohol involvement at the time and determine whether tests should be made to prove intoxication or lack of intent as a defense.

Detention hearings are usually instant appointments, leaving counsel no time to investigate the events or contact alternative placement possibilities. Often matters are hampered by court personnel's insistence on "getting this over with so we can get out of here." Another factor that can dampen counsel's enthusiasm is the admissibility of hearsay during the hearings. KRS 610.280(2)(a) and RCr 3.14(2). This means that the sole witness will usually be a police officer with reams of incriminating statements, while counsel does not have the information or witness available to perform meaningful cross-examination.

The best way to fend off detention is through negotiation. Determine which individual is behind the decision to detain and deal with him or her directly. If the police officer feels the parent won't supervise the child, find a responsible family member who can control the child to take temporary custody and introduce them to the officer. Offer house arrest, behavior contracts and daily check-ins with the CDW as concessions. If the parents are behind the decision to detain, give them a chance to calm down and reason with them. Remind them that children perceive time differently and that even one day in jail is much longer to a child than to an adult. Ask them to think back to when they were small and try to get them to remember how long one summer vacation was compared to how quickly summer goes by to them now. Offer to set the case for an immediate review date so that the parent feels that the court will help them maintain the child's behavior. If there are no parental or family resources, try to locate a placement in a shelter home or foster care.


Tom Scott

THE DETENTION HEARING

If a hearing is inevitable, use it as an opportunity to minimize the impact of the offense or the child's role in it. Children are often overcharged—a shove in thg hall becomes an assault charge—and an airing of the evidence may convince the judge that people are overreacting. Remember that the judge must find probable cause for the offense charged. Make a motion to amend the charge once the evidence comes out.

If worse comes to worse, use the hearing as an opportunity for discovery. Explore suppression issues, find out if tests or examinations have been performed. Find out who has been interviewed and who has made statements. Find out how any statements have been extracted from your client. The judge will usually allow most of this. This is also a good time to make an oral motion for the prosecution to turn over all this information that you have discovered. The judge will usually grant it.

Even if probable cause is established, it is still incumbent on the prosecution to also show that detention is the only viable alternative. Offer the judge all of the same arguments made during your negotiations prior to the hearing. Also, probe the court for conditions of release it would accept if available. Often, a judge may be reluctant to return a child to the home but would be willing to release the child later if a suitable relative or third party can be presented to the court.

DETENTION AFTERMATH

If the child is incarcerated, the remedy for abuse of discretion or illegal detention is a writ of habeas corpus to the circuit court. Remember if the child is incarcerated on a contempt charge to argue right to treatment, in that the child is better off going to court-ordered counseling or community care, rather than sitting in detention. Use the incarceration period to your client's advantage if possible. Have the court order physical examinations or dental care if the child needs it. Use the time spent incarcerated as a bargaining chip at the disposition. Have the child tell the judge what she/he learned from being incarcerated as part of the dispositional hearing. Often, that is enough to sway the court towards probation.

Finally, remember to take a deep breath and relax before going into the courtroom for the hearing.

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1. My own personal observations.

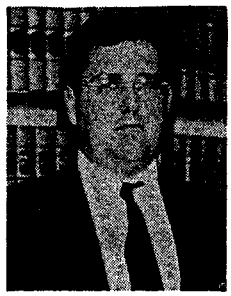
2. *Id.*

3. Volenik, Adrienne, *Checklist for Use in Juvenile Delinquency Proceedings*, American Bar Association, 1985, page 16.

4. *Id.*

EVIDENCE

Kentucky's New Evidence Code - Part IV



J. Dan Mesa

FOURTEEN AMENDMENT
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This regular *Advocate* column reviews new evidence cases decided in Kentucky and federal courts, and deals with specific evidentiary problems encountered by criminal defense attorneys.

HEARSAY EXCEPTIONS

The hearsay exception rules (803 and 804) appear to generate the most interest in court cases and journal articles. In large part, I think that this is because Rule 803 (FRE 803 and KRE 803) is so long that people are not comfortable with it. Federal Rule 803 has 24 specific exceptions. The proposed Kentucky rule has 23 exceptions and leaves off the residual exception that is found at FRE 803(24). A lot of the exceptions found in Rule 803 are not unfamiliar to most practicing lawyers. The exceptions in Rule 804 are, by and large, novel ideas, or at least they were in 1975, and therefore, there is a lot of disagreement about what this rule authorizes. It is difficult to give an explanation of proposed KRE 803 simply by going down the list of exceptions. There really is very little system to the rule, which I think is a failing of the federal rules that could be corrected in Kentucky. This rule could be broken up into five related sub-rules dealing with types of evidence that can be considered as exceptions to the hearsay rule. This is the way I will approach Rule 803 in this article. There are a few preliminary comments that should be made in order to facilitate discussion of these proposed rules.

THE OTHER REASON FOR THE HEARSAY RULE

In the last article I examined the Kentucky and federal holdings concerning the right of confrontation and the impact of this right on hearsay as a general concept. There is another aspect of the hearsay exclusion rule that I did not discuss last time which should be brought up here. This is the idea of the trial as the "main event" in criminal cases. Although confrontation is an important limit on hearsay in criminal trials, another slightly different reason for the rule is the right to a public trial, a right applicable to civil and criminal trials. In Kentucky, trials on all issues except those that formerly were considered to be solely matters of equity are to be conducted in open court with witnesses testifying orally under oath. [CR 43.04(1)]. I assume, without knowing for sure, that CR 43.04(1) was enacted to secure the right to the "ancient mode of trial by jury" guaranteed by Section Seven of the Constitution of Kentucky. Rhetoricians who have considered criminal trials say that testimony is expected to be given orally "on the assumption that the spoken, not the written, word is a truer reflection of the state of mind of a witness." [Postman, *Amusing Ourselves to Death*, p. 19 (1984)]. According to Postman, on the one hand there is a residual belief in the power of speech alone to provide the truth. On the other hand, "there is a much stronger belief in the authenticity of writing and, in particular, printing." [Postman, at 19]. Proposed KRE 803 seems to be a compromise between these two competing theories. On the one hand, witnesses are theoretically supposed to appear in court unprepared so they will speak the truth. Lawyers are expected to be able to cross-examine the witnesses to show any bias or falsehood. The idea of a witness appearing in open court and saying out loud in public what he has to say is still one of the premises of criminal trials. It is probably the chief justification for the existence of the hearsay rule in civil actions. The idea is to have the declarant in court where the jury can observe him or her, whether or not the person is cross-examined or cross-examined effectively or not cross-examine at all. And this appears to be one of the governing ideas of the hearsay exceptions found in proposed KRE 803 and KRE 804 which appear to be compromises between necessity and convenience and the desire to have a public determination of guilt or innocence.

KRE 803

A review of KRE 803 shows that the type of evidence found to be "not excluded by the hearsay rule" under any circumstances is evidence that theoretically is so likely to be accurate and reliable that it is not worth the trouble to make a witness come to court. The first line of the rule states that the numbered exceptions are not excluded by the hearsay rule "even though the declarant is available as a witness." The question of admissibility is one determined by the trial court under KRE 104 and, of course, the evidence

must satisfy other provisions of the rules such as relevancy (KRE 401), authentication (KRE 901), and personal knowledge of a declarant. One interesting innovation in the rule, as I show below, is the increased admissibility of opinions found in records admitted under the rule. It is important to remember that KRE 803 simply deals with the objection to hearsay. It does not have anything to do with admissibility or prejudice under other rules.

The easy way to approach KRE 803 is to divide it into five sections. The first section deals with traditional hearsay exceptions with which most people are familiar. The second has to do with private records that are considered sufficiently reliable that they may be admitted without too much danger of incorrect information. The third group consists of various types of public records that are also considered reliable. The fourth group has to do with reputation evidence on different subjects while the last group considers the admissibility of judgments to prove prior conviction or matters of history or boundaries. These groupings require consideration of the exceptions out of the order found in KRE 803, but this is really the only easy way to approach this somewhat unwieldy rule.

TRADITIONAL EXCEPTIONS

KRE 803 includes five hearsay exceptions with which you are probably already familiar. The first has to do with present sense impression, which simply is an exception that allows introduction of statements made while the person was observing an event which statement describes or explains the events or the condition. The Commentary to the Final Draft says that this may be a new exception in Kentucky law because no case in support of it can be found. However, in my experience this type of statement has been considered admissible although generally as some sort of off-shoot of the excited utterance rule.

Excited utterance has received a considerable amount of attention recently, most recently in the case of *Mounce v. Commonwealth*, Ky., 795 S.W.2d 375 (1990) which engages in a rather lengthy examination of the concept and of the foundation requirements. In KRE 803(2) the rule is stated that a party can introduce a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Readers of *Mounce* will find that this is the same concept used to explain excited utterance in that case. Under these circumstances it's clear that the proposal will not change Kentucky law much. The focus is on whether the declarant can be said to be still under the "stress" of the unusual event. If the declarant can be said to be "stressed", then the actual lapse of time probably is not determinative.

Subsection (3) deals with statements concerning existing mental, emotional or physical conditions and in the text states that it includes matters such as intent, plan, motive, design, mental feeling, pain and bodily health. The exception originally existed as a rule of necessity since such statements often were the only source of evidence on the matter. [McCormick, *Evidence*, 294, p. 843 (3d Ed., 1984)]. According to the Commentary, in addition to the obvious uses as proof of pain or bodily condition, this exception is used to show a state of mind that is an element of a claim or defense, to permit inference of the existence of an identical state of mind at another time, and to permit inference that the person did an act after making the statement. [Kentucky Rules of Evidence, Final Draft, Commentary, p. 84 (1989)]. The drafters say that the provision makes no significant change in Kentucky law.

In *Drumm v. Commonwealth*, Ky., 783 S.W.2d"380 (1990) the Kentucky Supreme Court adopted FRE 803(4), the exception for statements made for purposes of medical treatment or diagnosis. As the language of KRE 803(4) suggests, the statements are not limited solely to responses to questions by physicians in the course of a medical examination. Rather, statements of past or present pain, symptoms, and the cause of the condition can be introduced. Nor is there a limit as to who may make the statements or to whom the statements can be made. Statements can be made even to family members according to the Commentary. [KRE, Final Draft, p. 85]. Obviously, this rule has great potential for misuse in criminal cases, particularly those involving child abuse. Statements by the child to a parent concerning the cause of injury which statements are then relayed to the physician apparently can come in under this rule. The important consideration, according to *Drumm*, is whether or not the statements were relied on by the physician in formulating an opinion or making a diagnosis. [783 S.W.2d at 384]. Federal circuit court cases limit the application of the rule. Rule 803(4) allows the admission of statements only "insofar as reasonably pervinent to diagnosis or treatment." These statements can be statements about the cause of the medical condition, if it is pertinent to diagnosis or treatment. However, statements concerning "fault" cannot qualify. [*Cook v. Hoppin*, 783 F.2d 684, 690 (7th Cir., 1986), cited in Graham, *Evidence*, p. 147 (1989)]. Where both fault and cause are included in the same statement, courts are required to redact the inadmissible part of the statement. Obviously, KRE 803(4) is an extension of Kentucky law. It will be up to the defense bar to make sure it is not extended beyond reasonable bounds.

The last traditional exception is called "recollection recorded" provided for under KRE 803(5). This exception exists to permit a witness who once knew about a fact material to the case but who has now forgovten it to testify fully and accurately. The requirements are simple. The proponent must show that the witness cannot remember matters about which he once had personal knowledge and that the record that the proponent wishes to use is an accurate reflection of knowledge that was once had. Although the rule itself does not talk about refreshing the memory of the witness, the Commentary anticipates a two step process. First, the witness should be given an opportunity to review the record to see if that refreshes the witness's memory. If so, the Commentary says, then the exception is not applicable and the witness should testify from personal memory. However, if the witness' memory is not refreshed, then upon proper foundation the record "may be read into evidence but may not be received as an exhibit unless offered by an adverse party." This exception is primarily a codification of existing practice. [KRE, Final Draft, p. 85-86].

PRIVATE RECORDS

Eight of the exceptions in KRE 803 can be classified as private records exceptions. Included in this group is an exception called records of regularly conducted activity which is a revised form of the much misused business records exception. Also included in this group are records of religious organizations [KRE 803(11)], marriage, baptismal"and other religious certificates [KRE 803(12)], and family records [KRE 803(13)]. The well known exceptions for ancient documents, market reports and learned treatises are also included in this group.

As to this last group, little needs to be said. KRE 803(16) provides that a correctly authenticated document at least 20 years old can be admitted. The foundation is made by showing that the document is at least 20 years old, that it is "unsuspicious" and that it was found in its proper place of custody. [KRE, Final Draft, p. 90]. Market reports, telephone books and city directories are admissible under Subsection (17). Under Subsection (18), a party can introduce "learned treatises" as exhibits and as substantive evidence. The proponent must introduce the exhibit through the testimony of an expert witness who says that it is a "reliable authority."

Records of religious organizations, marriage and baptism certificates, and family records [KRE 803(11), (12), and (13)], are allowed for the limited purpose of proving "facts of personal or family history." [KRE, Final Draft, p. 89]. Subsection (13), the family records exception, differs from the federal rule because it has a specific list of matters that may be proved by testimony or records concerning family events, birth, marriages, divorces, deaths, ancestory, relationship and legitimacy. The drafters state that the addition of these words are intended to limit the use of these records to matters of personal or family history.

An exception most likely to be used in criminal cases in Kentucky is the new version of the business records rule. The rule and its converse are set out at KRE 803(6) and (7). The drafters note that the exception is entitled "records of regularly conducted activity" for the purpose of showing that it is not limited simply to entries in business records. Many of the same requirements in the present rule are found in the proposed rule. The drafters state in the Commentary that a business record has the reliability needed to overcome hearsay concerns "only if the making of that record and the person who provides the information for the record are both acting under a business duty." [KRE, Final Draft, p. 86]. The reliability justifying the exception is found in the "unusual reliability of business records" which is "supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." [KRE, Final Draft, p. 86]. Either the maker of the record or the person reporting the information to the maker must have personal knowledge of the information that is recorded. However, if the provider of information is not known, it is sufficient under this rule for the foundation witness to show that the organization keeping the record has a "regular practice of getting information for the records from persons with knowledge." [KRE, Final Draft, p. 86]. Because the exception allows more types of records to be introduced, both Congress and the drafters of the Kentucky proposal felt it necessary to include a provision that would allow the trial court to exclude evidence if the court is convinced that the "source of information or the method or circumstances of preparation indicate lack of trustworthiness." [KRE 803(6)]. Kentucky has two important sections not found in the federal rule. KRE 803(6)(a) sets out a foundation exemption for medical records librarians as long as the records sought to be introduced have sufficient authentication under KRE 902 or some other "statutory exemption." The second provision, KRE 803(6)(b), is a well-taken precaution against bootlegging improper opinion evidence into a case through medical records.

The subsection provides that no opinion or diagnosis evidence can be admissible under the records exception "unless such opinion or diagnosis would be admissible under Article VII (the expert opinion evidence) of these rules if the person whose opinion or diagnosis is recorded were to testify to the opinion or diagnosis directly." This subsection allows the exclusion if the opinion is of a type which the declarant would not be permitted to offer if called as a witness because the declarant either is not qualified to express the opinion or because the opinion would not assist the triers of fact. [KRE, Final Draft, p. 87].

The absence of an expected entry in a record is admissible under KRE 803(7). Although Rule 803(7) does not contain any particular foundation requirement, early on after the adoption of the federal rules the federal courts followed Weinstein's opinion that the custodian of the records must appear and testify to a "diligent" search of the records before the absence of an entry can be introduced through this exception. [Graham, Evidence, p. 163 (1988)]. The drafters of the Kentucky proposal make no mention of this unstated requirement in their Commentary. They do note that actually such evidence would not be a matter of hearsay, but would be instead a matter of proving the non-existence or non-occurrence of some event. It appears that this rule is simply included because it is related to the records exception in KRE 803(6).

PUBLIC RECORDS

There are four types of public records admissible under this grouping of exceptions. Vital statistics documents are admissible under KRE 803(9). Documents affecting interest in property [KRE 803(14)] and the statements contained in those documents [KRE 803(15)] are also admissible. These exceptions are not cause for much comment. Obviously, vital statistics documents must come from the public offices of the Commonwealth of Kentucky or of some other state. Obviously, they must be authenticated as required by KRE 901 or 902. Documents concerning interest in property cannot be considered true public documents because the deeds, UCC statements and other documents of this sort are typically prepared by attorneys and then recorded with the clerk. KRE (14) and (15) exist to allow introduction of properly authenticated documents dealing with interest in property. The drafters state that "the reliability of recorded title documents is at least as good as most public records" and therefore sufficient to overcome worries about unreliability. [KRE, Final Draft, p. 89]. The exception will allow introduction of the documents for two purposes, first as proof of the contents of a document and second to prove execution and delivery of the document. [KRE 803(14)]. Subsection (15) according to the Commentary allows introduction of the "recitals of fact contained in the recorded title documents, *e.g.*, that the grantor is the sole heir of the prior record owner", as long as those recitals are relevant to the purpose of the document and dealings with the property since execution of a document have not been incompatible with the truth of the recitals.

The important exceptions under "public records" are found at KRE 803(8) and 803(10) which deal with public records and reports. In this instance, the drafters have adopted the Uniform Rule rather than the federal rule. The exceptions state that unless the sources of information or other circumstances indicate lack of trustworthiness, the records, reports and other compilations of other information from a public office or agency "setting forth its regularly conducted and regularly recorded activities" or matters observed pursuant to duty imposed by law which the agency was required to report, or factual findings resulting from an investigation made pursuant to an authority granted by law may be introduced. The rule specifically states that except when offered by the accused in a criminal case, "investigative reports by police and other law enforcement personnel" are not admissible. In addition, investigative reports compiled by agencies of government cannot be introduced in cases in which the agency is a party. Finally, factual findings in public records offered by the government in criminal cases cannot be allowed. Although the rule has no explicit provision concerning "personal knowledge" or "official duty" of the maker of the record or the person providing the information, the rule is to be interpreted to require that personal knowledge be shown with respect to records dealing with the activities of the office or matters observed pursuant to a legal duty. [KRE, Final Draft, p. 87-88]. As noted above, this exception excludes "private documents" that are recorded in public offices. In addition, it is important to note that the trial judge has the authority under the explicit language of the proposed rule to exclude any public documents where the circumstances concerning the preparation of the record or the sources of information on which the record is based are questionable. The drafters made a judgment call on the three limitations in the rule because it is

desirable to allow the defendant in criminal cases to cross-examine the makers of the documents in open court.

Subsection (10) serves the purpose of showing that an event did not happen because it was not recorded. A certificate that complies with KRE 902 would allow introduction of a custodian statement that no such record exists without further foundation.

REPUTATION

There are three reputation exceptions and they are listed here primarily because there was no other convenient place to put them. Reputation evidence as to character is listed as not hearsay so that the impeachment rule is not cluttered up by it. [KRE 803(21)]. The other two exceptions, reputation concerning family history and reputation concerning boundaries or general history [KRE 803(19) and (20)] are admissible simply because they may be the only evidence available. Although the Commentary does not indicate that a trial court should be especially suspicious of such testimony, it seems that common sense would require a very close examination of this type of reputation evidence. [KRE, Final Draft, p. 90]. In the great majority of cases, reputation evidence concerning character is not much of a factor in the outcome of a trial, either because the parties are unable to get the witness actually to deal with reputation, or because the basis for the opinion on reputation is weak. However, where the reputation evidence concerning facts comes only from the memories of a family member or of a person in the community, the chance for error is much greater and the chance of improper effect on the jury's finding of fact is much more likely. By use of the term reputation evidence, the drafters indicate that the evidence will come in through the testimony of a witness appearing in court, and therefore, to a certain extent cross-examination may help meet the problem. However, it appears that the drafters of the federal rules and of the Kentucky rules do not expect many problems out of these particular exceptions since neither has given them much attention.

JUDGMENTS

Judgments are excepted from the hearsay rule under KRE 803(22) and (23). This is an instance where it seems odd to characterize the evidence as hearsay. Because a court speaks only through its records, evidence of a conviction is direct evidence that the person was guilty of the crime charged. Therefore, when KRE 803(22) authorizes introduction of a final judgment "to prove any fact essential to sustain the judgment" in a case, there really is no hearsay objection. The person is put in jail on the strength of this judgment, and it seems an uncommonly fine point of law to worry about being able to use the judgment to show that the jury found the defendant guilty of every fact necessary to sustain the conviction. However, the rule is in KRE 803. The important thing to note about the rule is that it will not allow use of a judgment when offered by the prosecution in a criminal case for purposes other than impeachment against persons other than the accused. In addition, the pendency of an appeal does not affect admissibility under this rule. KRE 803(23) allows judgments to be introduced as proof of matters of personal, family or general history if the judgment necessarily included disposition of those questions and the fact would be provable by evidence of reputation.

ABSENCE OF A RESIDUAL EXCEPTION

The drafters of the rules are quite straightforward in their explanation of the absence of a residual exception of the type found in FRE 803(24). The drafters having made the exceptions they believe reasonable wkth respect to the rights of persons to an adversarial trial with witnesses testifying under oath, they are not willing to put in the hands of trial judges the authority to make new exceptions. This is an excellent idea. In many cases evidence introduced under KRE 803 will be paper documents. Of course, a party cannot cross-examine a piece of paper. And in any KRE 803 exception the declarant or maker of the evidence sought to be introduced need not be present in court. The absence of a residual exception in KRE 803 is an important protection for litigants both in civil and criminal cases.

KRE 804

KRE 804 allows introduction of evidence where the declarant is unavailable. This is a rule of necessity, and requires proof by the proponent that the evidence is reliable. The general scheme of the rule is that a party who has not procured the absence of a witness may, upon proving one of five circumstances, introduce hearsay testimony in the case in chief. The definition of unavailability is fairly straightforward. A person is unavailable as a witness if exempted by a ruling of the court on the ground of privilege, if contumaciously he refuses to testify despite an order of the court, if she cannot remember, if she is unable to be present because of illness or death, or is absent and cannot be found by reasonable means. The only addition to the federal rule is the requirement that the proponent show that the party was unable to obtain the deposition of an absent witness. Of course, the proponent of the evidence has to demonstrate a good faith effort to procure attendance. As to the refusal to testify, the proponent must show that the trial court exempted the witness from testifying by means of a specific finding. [See *Clayton v. Commonwealth*, Ky., 786 S.W.2d 866 (1990)]. Under the federal rule, a person who has been convicted of a crime but has not been sentenced may still claim the privilege if the person can show a real danger that the testimony would lead to further criminal action against him. [*Bank One of Cleveland v. Abbe*, 916 F.2d 1067 (6th Cir., 1990)]. Presumably, current Kentucky law that allows a defendant to retain the privilege against self-incrimination until disposition of the appeal of right would continue. Subsection (a) of KRE 804 is not new to Kentucky because the Supreme Court of Kentucky in *Crawley v. Commonwealth*, Ky., 568 S.W.2d 927 (1978) adopted the entire subsection. There have only been four or five cases dealing with this subject, and they indicate a tendency on the part of the Supreme Court of Kentucky to require strenuous, rather than good faith, efforts to obtain the presence of the witness.

SPECIFIC EXCEPTIONS

There are four specific exceptions and one residual exception. The first exception is that for former testimony. Testimony given as a witness at another hearing in a legal proceeding or in a deposition taken in compliance with the law may be offered against a party if the party had an opportunity and "similar motive" to develop the testimony by direct, cross or redirect examination. According to the Commentary the most common uses of the exception are the retrial of a case, sequential trial of multiple causes of action (*i.e.* including sequential criminal trials of charges arising from the same transaction), and use of preliminary hearing testimony. The im-

portant question is whether the party against whom the evidence is introduced had at one point not only an opportunity to cross-examine, but a motive to cross-examine as if on trial. According to the Commentary, this is not a major change from Kentucky law. [KRE, Final Draft, p. 94].

Dying declarations have always been one of the more troublesome aspects of hearsay. The requirements of the rule are that the statement must be made by the declarant while the declarant believed that death was "imminent," and may only concern the cause or circumstances of the death. [KRE 804(b)(2)]. This clear statement of the limits of the dying declaration should avoid any difficulty in application.

The same thing cannot be said of the third exception, the "statement against interest" exception. This particular exception was adopted by the Supreme Court in *Crawley v. Commonwealth*. There are two main parts. The first section deals with the admissibility of a statement that was against the declarant's pecuniary, proprietary, civil or criminal liability interest such that a reasonable person will not have made the statement unless he believed it to be true. The second part is a serious limitation on the use of the exception. A statement tending to expose the declarant to criminal liability "is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." This last sentence was added by the Congress because it feared a flood of phony confessions under the rule. *[McCormick, Evidence*, 278, quoted in Graham, *Evidence*, p. 216]. The original drafters of the rule feared that defendants would introduce hearsay evidence of iron clad confessions made by unavailable third persons as exculpatory evidence at trial. To combat this, they imposed a rule requiring a clear showing of trustworthiness. There is a good deal of dispute in the federal courts as to what a judge may consider in determining trustworthiness. Some courts focus only on the statement itself, the circumstances under which it was made, and its potential to expose the declarant to criminal liability. Other courts allow consideration of the credibility of the witness testifying to the incriminating statement as well. This matter has not been settled. Unfortunately, the Commentary does not state which rule it desires the judge conducting the KRE 104 hearing on admissibility to follow. This is a case where absence of clear direction can lead to a good deal of difficulty in applying the rule.

The objective of Subsection (4) of Section (b) is to "admit into evidence statements which are normally made about facts of personal or family history under circumstances of apparent sincerity and trustworthiness." [KRE, Final Draft, p. 96]. The exception is limited to personal or family history and deals only with events such as adoption, marriage, divorce or relationship.

The final exception is the residual exception. It is drafted to allow introduction of evidence not previously considered by the rules where that evidence is necessary and possesses strong guarantees of trustworthiness. The rule, KRE 804(b)(5), requires the proponent to show that the statement is offered as evidence of a material fact, that the statement is more probative on the point for which it is offered than any other evidence which can be reasonably obtained, that the general purposes of the rules and the interest of justice will be served by admission of the statement and that the statement has "equivalent circumstantial guarantees of trustworthiness" making it as reliable as other exceptions set out in KRE 804. In the Commentary the drafters say flatly that "adoption of this exception does not reflect an intention to open the flood gates to hearsay evidence. The rule is adopted with a contrary intention, one that will see the rule used sparingly and with great caution." [KRE, Final Draft, p. 96]. The Supreme Court of Kentucky in several cases in the past few years has refused to accept this residual exception. Most recently, in *Fitch v. Burns*, Ky., 782 S.W.2d 618 (1989) the Supreme Court of Kentucky said that it had not accepted the residual exception, that it did not intend to, and that litigants should quit asking. This is ample indication that the Supreme Court will interpret this exception very strictly. And probably, it is well to do so.

The federal rules were drafted in the early 1970's and adopted in 1975. As I have said on earlier occasions, 31 states have adopted these rules. In that time, although there has been some dissatisfaction with respect to the provisions of certain rules, there have not been that many occasions where states have used this exception to create new law. It may be that this rule serves the purpose of providing a codified *Chambers v. Mississippi* rule. In that case, the Supreme Court of the United States noted that state evidence rules cannot be employed to deny a defendant a reasonable opportunity to present a defense. [*Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1975)]. Although Chambers dealt more specifically with the statement against interest exception, it did announce a principle that where the defendant needs to introduce certain evidence, which evidence is reliable, and which evidence has a material bearing on guilt or innocence, the states must come up with some way to allow that evidence in. By setting out a residual exception the drafters of the Evidence Code appear to have recognized that it is impossible to foresee all the situations that can occur in the prosecution of a criminal case. It is necessary to keep in mind, however, that there is a countervailing interest in permitting the opposing party to cross-examine the declarant if this is possible. Thus, it seems likely that the necessity prong of the foundation will be interpreted strictly and that evidence will be admissible under the residual exception only where there is literally no other way to avoid a miscarriage of justice.

CONCLUSION

Hearsay consumes a lot of time in any discussion of evidence. However, I believe by providing a codified approach to hearsay, the proposed Evidence Code will cut down on the difficulties involved in understanding and applying the rule. A good deal of the trouble about hearsay comes from having only general statements about hearsay to guide the trial judge in the admission or exclusion of evidence. In the Evidence Code, the drafters have set out several specific hearsay rules which have been interpreted and applied for over 15 years. It seems to me that the hearsay article of the Evidence Code will prove to be the most useful part of the new Evidence Code.

There is one remaining major section of the Evidence Code that has to be reviewed. Article V which deals with privileges presents a number of important departures from Kentucky law. The next article in this series will deal with these privileges and with some general comments and observations about evidence law reform. It is not too early to start sending your comments about the Evidence Code to the Supreme Court of Kentucky. Justice Joseph Lambert is in charge of the Evidence Code on behalf of the Court and any comments you would care to make about the proposal should be sent to him. Although the Court probably will not consider adoption of the rules until next fall or winter, it is important now to get specific proposals for change before the Court so that they can be considered in a timely manner. Please give some thought to the proposals and if you do have a specific comment or suggestion, please let the Supreme Court know.

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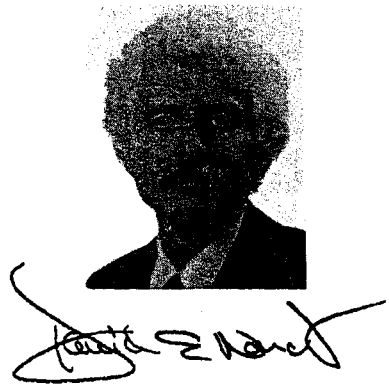
ALTERNATE SENTENCING

Restorative Justice at Work



SECTION 7, KENTUCKY CONSTITUTION
The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

This regular *Advocate* column features information about sentencing alternatives to prison.

DETERRING DEATH: *STATE V. FRANKLIN* AND THE GOALS OF SENTENCING

INTRODUCTION

"James Franklin" blindly drove his pick up truck against a red light and into the side of a car driven by Mary Banks and carrying her two children, Robert and Adeline. The blow killed Adeline, age 9, and left Mary Banks impaired for life. Franklin was not injured. He was legally drunk at the time of the accident, and had three prior convictions for DWI in the last two years.

James Franklin's case is representative of a major national problem. In recent years great attention has been paid to the problem of drunken driving, much of it directly attributable to lobbying by special interest groups such as Mothers Against Drunk Driving (MADD) and Remove Intoxicated Drivers-USA (RID).[1] At least 25,000 deaths annually are attributed to alcohol-related traffic accidents.[2]

Partly because of the activism of groups such as MADD, many people would agree with any judge who sentenced James Franklin to prison for a solid terms of years. Such a sentence would in part satisfy our need to punish.

But if James Franklin was sentenced to a prison term, chances are good that the underlying reason, in the judge's mind, would be to *deter* others from driving after drinking in excess. The sentencing goal would likely be to prevent another similarly horrible crime. This paper addresses the issue of the effectiveness of deterrence in cases such as James Franklin's.

THEORY AND APPLICABILITY OF "DETERRENCE"

Judges often express their desire to deter others from committing a bad act by imposing a sentence so severe that it will "send a message" to the community. And certainly it seems to make sense, that a sentence consisting of a number of years of incarceration would scare — deter — most citizens from engaging in the conduct that resulted in the sentence.

Unfortunately, it is far less than clear that this is so. The observations of court room practitioners and the results of many studies raise serious doubts about this. The bulk of scientific research does not support a claim that stiff prison sentences act to deter drunken driving or decrease incidents of DWI accidents. For example:

Despite the expectation that a serious penalty will attract the public's attention, the fact is that in all but the most notorious cases, there are few if any courtroom participants or observers. For most defendants, there will be only family and friends, if anyone. Even more noted is the absence of press attention in most cases.

When imprisoned DWI offenders are released from custody, the community seems to forget the entire episode. Jail time for most DWI offenders is expensive but invisible to the community at large. It is hard to see just how anyone will "learn a lesson" when most people ignore courtroom trends in sentencing and the movement and release of prisoners in society.

For years research has challenged the theory of deterrence through stiff criminal sanctions. Experimental programs attempting to alter drinking and driving patterns by imposing stiff jail sentences in Chicago in the 1970s revealed little or no decline in Chicago's death rate for drunken driving accidents.[3] Research in several jurisdictions reached the same or more negative conclusions.[4] More recently in New Philadelphia, Ohio, Judge Edward Emmett O'Farrell took the bench as the sole judge having jurisdiction over drunk driving cases in his area, and immediately and consistently imposed mandatory jail sentences on DWI offenders. His actions received national attention and support from organizations such as the National Highway Traffic Safety Administration. The AAA Foundation for Traffic Safety funded a research project on this policy by two leading experts. Their con-

clusions were surprising:

The general deterrent impact of [Judge Farrell's policies] was measured by surveys of drivers in New Philadelphia and in [the neighboring town of] Cambridge on five weekend nights. Results indicated that drivers in New Philadelphia were aware of more severe sanctions in the event of conviction, corresponding to reality. They also had a somewhat higher estimate of the risk of being caught if they drove while drunk, though this appeared to lack an objective basis. *However, the surveys failed to show less drinking and driving in New Philadelphia.* No important difference was found in the number of subsequent accident reports or of drunk-driving violations in the two communities.[5]

Other research based on different research techniques produces findings similar to those coming out of New Philadelphia. For instance, a scientifically-based telephone survey of drivers who drink on occasion in the Minneapolis-St. Paul, Minnesota area over a two-year period produced the conclusion that "informal threats of sanctions" (social disapproval from peers, moral commitment) as well as age, marital status and gender are "better predicators" of involvement in drunken driving behavior than are formal sanctions (criminal penalties).[6]

Much of the research findings are in fact inconsistent with frequently held public perception and public policy calling for increased criminal penalties as a means of discouraging drunk driving. This is an area, for instance, in which the National Institute of Justice has described "more severe sanctions such as mandatory confinement" as a legal "reform."[7] But while policies that increase incarceration do not seem to actually decrease drunken driving, they do have other effects which is also described in the research literature: increased arrests, court workloads, and strain on corrections.[8]

The research which finds little relationship between stiff prison terms and drunken driving does not leave us without any possible solutions to the problem of drunk driving. As the National Institute of Justice suggests,[9] publicity of imposed sanctions might be important, and would certainly provide a remedy to empty courtrooms and silent newspapers on sentencing day. But perhaps publicity of the problem of drunk driving and of its human toll would be even more effective. Some of the research, which suggests that peer pressure and moral commitment have more effect on behavior than the threat of criminal sanctions, supports this conclusion.[10]

Intuition, upon some reflection, also suggests that sanctions not including imprisonment have their own considerable deterrent values.

Even without imprisonment, the consequences of a serious or fatal accident to the drunk driver are horrendous. First, the offender must live with the fact of having taken a life. Second, humiliation, time immersed in the court system, financial costs and other burdens result just from the experience of civil as well as criminal litigation. Third, sanctions such as a loss of license and probation pose a great burden upon most people.[11]

Criminal justice research also supports the idea that non-incarcerating sanctions are equally or more effective as deterrents to drunk driving than incarceration. A study of the effects of probation, fines and jail sentences on DWI recidivist offenders over a three year period in Houston, Texas, resulted in findings of *no significant difference* in outcomes among sanctions, although persons with a DWI history did recidivate slightly sooner than first offenders.[12]

But if imprisonment does little to deter others from driving while drunk, sentencing courts are hardly without responses which may do more to prevent others from repeating the tragedy of drunken driving accidents.

Sentences which take advantage of individual talents to publicize the tragedy at least challenge the general apathy and lack of attention to the problem. See, "Endless Penance: Drunk Driving and Death," *Washington Post*, 4-27-86, describing the actions taken on court order by a reporter who drove and killed while drunk.

Imposition of fines, community service, and other non-incarcerating penalties do as much to keep the issue in the public's attention and to deter as does a prison sentence.[13]

CONCLUSION

Sentences which keep the tragedy of a drunken driving accident in the public consciousness may do as much as a long-term prison sentence to actually educate and deter others. The Sentencing Project recommends: that offenders be ordered to make periodic contributions to a charity or organization that in some way responds to the needs of the victim; that periodic community service lasting the length of probation provide continued visibility of the offense as well as punishment for the offender; and, that offenders be ordered to speak or write to specific audiences, news outlets and organizations on set occasions over the length of probation.

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1 Donald E. Green, "Past Behavior as a Measure of Actual Future Behavior: An Unresolved Issue in Perceptual Deterrence Research," 80 T*he Journal of Criminal Law and Criminology* (Fall 1989) p. 781, 784. (Hereafter, Green, "Past Behavior").

2 U.S. Department of Justice, National Institute of Justice: "Jailing Drunk Drivers: Impact on the Criminal Justice System" a publication in the Research in Brief series reprinted with this article; also printed in National Institute of Justice NIJ Reports SNI 192 (July 1985) p. 2 (Hereafter, "Jailing Drunk Drivers").

3 Rich L. Robinson and R. L. Ross, "Jail Sentences for Driving While Intoxicated in Chicago: a Judicial Policy that Failed," Law and Society Review (1973) pp. 55-67; see National Center on Institutions and Alternatives, "Drunk Driving: Considerations Concerning Imprisonment as a Deterrent" (Unpublished Paper circa 1986).

4 *Id.*

5 H. Laurence Ross and Robert B. Voas, The New Philadelphia Story: The Effects of Severe Penalties for Drunk Driving, AAA Foundation for Traffic Safety (Washington, 1989) pp. 3,4; see also pp. 23-25 (emphasis added).

6 Green, "Past Behavior," *supra* at pp. 802-804.

7 See "Jailing Drunk Drivers,", supra, at p. 1. The National Institute of Justice acknowledges the lack of any proven direct cause and effect relationship between adoption of mandatory incarceration policies and a decrease in drunken driving-related fatalities. See "Jailing Drunk Drivers" at p. 3.

8 *Id.*

9 "Jailing Drunk Drivers."

10 Green, "Past Behavior," *supra.*

11 These are described by Kelly Burke in "Endless Penance: Drunk Driving and Death." A U.S. Department of Transportation study involving a 15-month review of DWI laws in 15 states concluded that mandatory jail terms are costly, and that restricting driving licenses may be more effective than mandatory confinement in some states, particularly for multiple offenders. U.S. Department of Transportation National Highway Traffic Safety Administration, DWI Sanctions: the Law and the Practice (June 1983).

12 Gerald R. Wheeler and Rodney V. Hissong, "Effects of Criminal Justice Sanctions on Drunk Drivers: Beyond Incarceration," 34 Crime and Delinquency 29 (January 1988).

13 See "Effects of Criminal Sanctions," *supra.*

DAVE NORAT
Director
Defense Services
Frankfort, KY

Treatment for Kids with Emotional or Behavior Problems and Their Families

Kentucky Re-Ed

Jeanmarie Placsek, Re-Ed Nurse

What can be done for young people before they enter the criminal justice system? Can early intervention be obtained for families at risk? Does it seem that society puts all its resources into punishing offenders? There are programs that are preventive in nature and available to citizens of Kentucky.

WHAT IS RE-ED?

Central Kentucky Re-Ed Center (Re-education of Emotionally Disturbed) is a short term residential treatment facility operated by the Cabinet for Human Resources, Department For Social Services, Children's Residential Services, Clinical Services Branch. Re-Ed serves children, ages 6 through 12, and their families. Students at Re-Ed have been identified as emotionally disturbed or behaviorally disordered whose behavior prevents them from receiving their education in their home school. The goal for all students is to return to their homes and successfully attend their local schools.

Re-Ed's maximum capacity is 30 students and current enrollment is 21 students. The average length of stay for a child is eight months, but can range from 5 months to 2 years. All students admitted to the program are re-evaluated after 30 days for appropriateness of placement.

CENTRAL KENTUCKY RE-ED CENTER, 690 Newtown Pike, Lexinton, Kentucky, phone (606) 253-2636, serves the eastern half of the state and the **RE-ED TREATMENT PROGRAM**, 1804 Bluegrass, Louisville, Kentucky, serves the western half of the state.

MARY DAVIDSON is the Director of Central Kentucky Re-Ed and **WILLIAM GRIFFIN** is the Director of Re-Ed Treatment Program. The Re-Ed Treatment Program has the capacity for 32 children.

TREATMENT OF THE KIDS AND THE FAMILY

Treatment consists of behavior management for the children stressing consistent application of consequences and family therapy for families to identify problem areas and strategies for managing them as well as educating parents in behavior management. All staff at Re-Ed are responsible for applying consistent behavior management. Parents are required to attend family therapy appointments once a week and to attend parent group once a week. Parent group meets for one and one-half hours and is led by two Re-Ed family counselors. A number of different systems of behavior management are taught such as, "Parent Effectiveness Training - How To Talk So Your Kids Will Listen." Parent group occasionally has guest speakers to discuss a specific topic such as medications or talking to children about sexuality. Additionally, parent group is a source of support to the families who are experiencing varying degrees of stress simply by virtue of the fact that they have a child in residential treatment.

The children are assigned to 1 of 4 teams when they are admitted, based on age and sex. Each team consists of:

1) a family counselor whose credentials are typically a master's degree in social work or psychology;
2) a night teacher counselor whose credentials are typically a bachelor's degree in education, social work, or psychology; and
3) a residential counselor whose duties are similar to a "house parent."

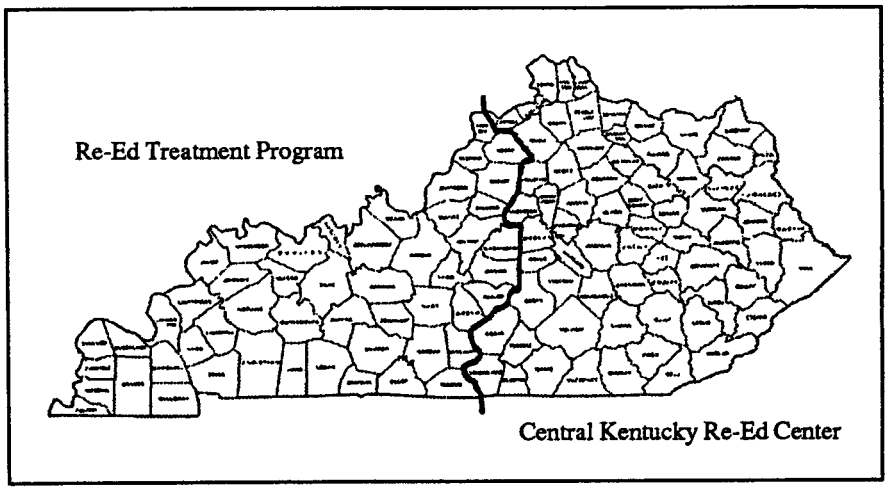
Re-Ed has:

> a director, an assistant director, a supervisor of family and community counselors, a night supervisor, day and evening program counselors, and a nurse.

In addition, the program contracts with mental health professionals in the community for consultations. Classroom teachers, a school based consultant, and aides are provided through Fayette County Schools. Children live in their team cottage and attend school during the day in a separate classroom building.

THE PHILOSOPHY OF TREATMENT

The philosophy of treatment is the use of group dynamics to foster behavioral changes and growth. Some important points of the philosophy are that children are free to make choices, and they can learn most effectively if they are allowed to experience the consequences of their choices. If the natural consequence of an unwise choice is a risk to a child's health or safety, the treatment team applies a logical consequence. For example: Children must wear seat belts when in vehicles. If they choose not to wear a seat belt, they miss the activity that involves riding in a vehicle. We strive to help a child develop the skills to make choices



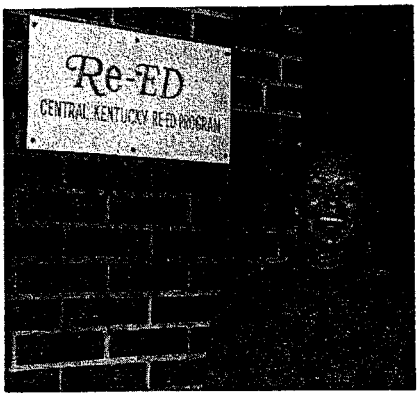
that have positive consequences rather than negative ones. All children use point cards during the day which are tallied at set times. Children earn points by following rules which are:

1) follow direction;
2) stay on task
3) raise hand
4) keep hands and feet to self
5) stay in area
6) respect people and property
7) a personal goal for that child such as, "mind your own business" or "use appropriate tone and volume when speaking."

Children move up levels, which have increased privileges, by earning a set percentage of their points. The points system is used both during the school day and the evening social program. Each child's treatment plan is individualized to make it possible for the child to achieve at least some success. The program strives to encourage competence in the child through achieving success in schoolwork, chores, athletic, friendship, social skills, and recreational activities.

PARENTS ARE RESPONSIBLE FOR CHILD

Children in Re-Ed are not committed to the state. Their parents remain responsible for them during their stay. Children also go home every weekend and have special goals for their behavior that are developed by the family with the guidance of the family counselor.



Mary Davidson
Re-Ed director

MEDICAL CARE

Parents are responsible for the medical care of the child, but Re-Ed can obtain care in situations where the parent is unable to provide necessary care. Screening for vision and hearing is done on all children. Some children are already taking medication when admitted to Re-Ed, most commonly drugs like Ritalin, to reduce attention deficit disorder. Children are also evaluated by the nurse and the treatment team to determine if the child could benefit from psychotropic drugs, at which time a referral to a medical doctor is made if the family agrees.

FUNDING OF RE-ED

The Re-Ed programs are state funded. Families who are able are required to pay room and board based on a sliding scale. Maximum cost to families is $8.75 per day (approximately $175.00 per month). Travel can be an additional expense for families, and depending on circumstances, the referring school system will sometimes provide transportation. No child is denied services because of inability to pay.

STAFF

Re-Ed's greatest resource is its ability to attract and keep staff to provide the therapeutic milieu necessary to make the program work.

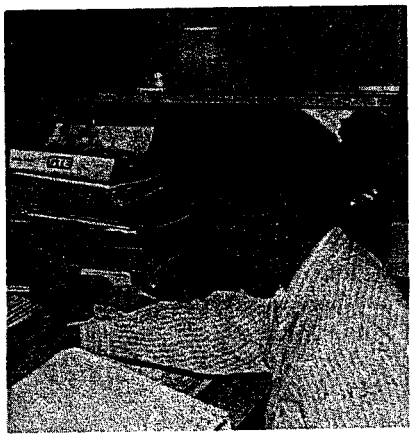
UNMET NEEDS

The biggest deficits in the program are:

1) a lack of funding for follow-up on families after they leave Re-Ed, and
2) a lack of funding for on-going upkeep of the physical facility.

Central Kentucky Re-Ed is located on the grounds of Eastern State Hospital in buildings originally constructed as apartments and homes for staff. Unfortunately, the physical plant is fairly old and requires much maintenance.

During the 1990 budget process, the Cabinet for Human Resources requested a $2.4 million project to replace the facility, but failed to have it approved.



Rosalynn Faulkner
Re-Ed program secretary

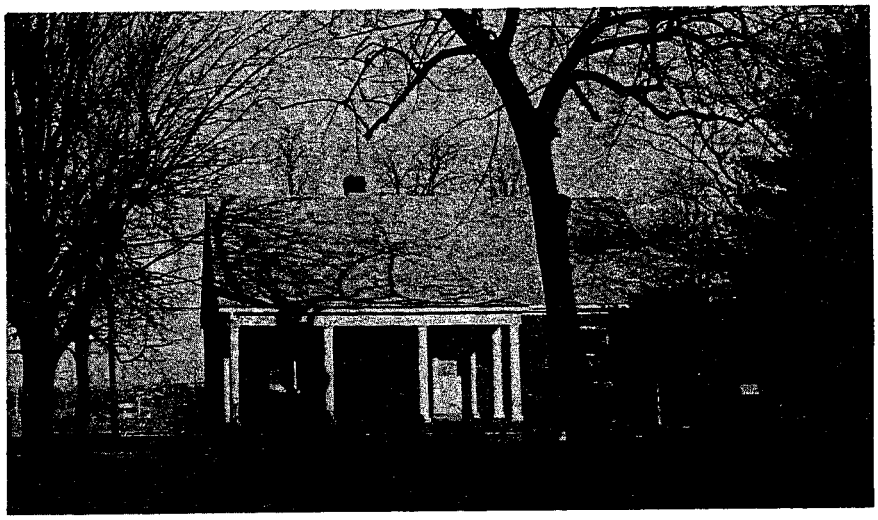
Hopefully, this project will be funded by the next General Assembly. The exterior was recently painted and funds are in the present budget for interior painting.

REFERRALS

Children are referred to the program by schools, parents, community agencies, the Department For Social Services, and private practitioners. The capacity if for 30 residents and the census is currently 21. More referrals would likely be made if the program had more staff to do intake and increase the public's awareness of the program's services. In addition, because of the young age of our children, many families are reluctant to make the decision to refer their children for residential care hoping they'll "grow out of it."

CRIMINAL JUSTICE SYSTEM INVOLVEMENT

Members of the criminal justice system could consider Re-Ed programs for refer-



A Team Cottage Where the Re-Ed Children Live

ral as early intervention in young delinquents and truants, or referring other family members of offenders. Ideally, Re-Ed could provide services to children before they enter the judicial system.

KIDS OVER TWELVE

Children older than 12 can receive services through private psychiatric hospitals, special education in the community, out-patient mental health facilities, and private long-term child care, *i.e.*, Buckhorn Childrens Home or Danville Christian Childrens Home.

INFORMATION

Interested people may visit Re-Ed to learn more about the program. Tours are by appointment and may be arranged by contacting the Family Counselor Supervisor, **GAIL GILLESPIE**, Phone 606-253-2436. You may also contact Mrs. Gillespie for more specific information regarding referring a child to Re-Ed.

JEANMARIE PIACSEK, RN
Central Kentucky Re-Ed Center
690 Newtown Pike
Lexington, KY 40508
(606) 253-2436

Brain May Program Murder

Is Violence Predictable?

Henry Lee Lucas once called killing "a habit, like smoking a cigarette."

He didn't murder for profit or for fun. Killing was a compulsion - something the Texas drifter said he felt "driven" to do. Lucas confessed to killing as many as 360 people in a cross-country rampage that lasted more than a decade.

In traditional psychiatric circles, that compulsion might be explained by Lucas' childhood. His mother, a bootlegger and occasional prostitute, beat her son viciously. When the boy left his dirty, backwoods home for school each day, he smelled so bad that he became a classroom outcast.

But a growing number of scientists believe there also are biological links to violent behavior. In time, they think parole boards may be able to use evidence of brain damage or chemical imbalances to predict the likelihood that a troubled adult will become a violent one.

Psychologist Joel Norris, who with Harvard University neurologist Dr. Vernon Mark ordered a $25,000 battery of tests on Lucas, found evidence of brain damage dating to before the confessed serial murderer was 5-years-old.

The tests revealed pools of spinal fluid around dead tissue in the temporal lobe of Lucas' brain - the part that directs emotions. Although everyone has that kind of fluid, the pools are enlarged at the expense of tissue in Lucas' brain, Norris said. The frontal lobe of his brain, the part that controls the "conscience," also was damaged, Norris said.

Norris said that all 100 serial murderers he studied for an upcoming book displayed symptoms pointing to neurological damage. The clues included sleepwalking, bedwetting, seizures, pronounced feelings of *deja vu*, epilepsy and birth defects - like webbed fingers - that suggested genetic problems.

Many of the murderers also had suffered severe head injuries as children. Richard Ramirez, California's "Night Stalker," toppled off a train, fell from a swing and was hit in the head during a fight when he was young.

Dr. William Walsh of Chicago, who worked with Norris found an unusually large amount of cadmium - a kind of lead - in Lucas' system, possibly because the future killer painted often and drank moonshine as a youngster. Curiously, a hair analysis of James Huberty, the mass slayer at McDonald's restaurant in San Diego, and John Wayne Gacy Jr., convicted in the sex killings of 33 young men and boys in Chicago, also showed high levels of cadmium.

Other scientists have found similar connections. In a study of 30 murderers, New York University's Dr. Dorothy Otnow Lewis discovered 19 had histories of severe head injuries, motor defects, psychoses and family violence. A study presented at a meeting of the American Association for the Advancement of Science showed teenagers who committed violent crimes had eight times the incidence of brain damage as non-violent offenders.

Richard Herrnstein, a Harvard University psychologist and co-author of "Crime and Human Nature," said many criminals had abnormal brain wave patterns even as children. Criminals also were more likely to have been hyperactive, hyperkinetic or to have had reflex problems in their youth, he said.

"By the age of 10, most of the people who are to become chronic criminals have shown themselves to be problem children," Herrnstein said.

But some psychologists think the evidence isn't strong enough to prove a relationship between physical traits and violent behavior.

"Brain-injured people are common, but murder is rare," said Dr. John M. MacDonald, director of forensic psychiatry at the University of Colorado-Health Sciences Center. "By and large, most people with brain injuries don't kill."

Dr. Martin Symonds, New York City police psychiatrist, said the evidence of genetic and biological links to violence is "iffy" at best.

"Violence comes out of feelings of powerlessness. If you feel powerless, you try to restore the feeling of power through violence," Symonds said. "All of us are capable of being violent."

Norris agreed that no single characteristic is a solid indicator of criminal tendency. But when a combination of patterns is present - like child abuse, neurological problems and misuse of alcohol - the probability of violent behavior rises, he said.

With that in mind, some experts have tried to develop "predictor scales" that look at the background of criminals to detgrmine whether they will turn to violence again. Parole boards in several states are using those scales.

Even some scientists who believe in biological links to violence, however, are skeptical about those prediction tools.

In a study at a Philadelphia hospital, University of Pennsylvania criminology professor Marvin Wolfgang found a connection between criminal behavior, birth defects and brain damage. In spite of that, he cautions that experts often overpredict violent behavior.

"I think you should be punished on the basis of the 'just desserts' model," Wolfgang said. "You should be punished on the basis of what you've done in the past, not on the basis of what you might do."

LISA CARDILLO ROSE

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Scheduling of Drugs Under KRS Chapter 218A

An Update of The Advocate's August, 1990 Article

QUESTIONS RAISED

Questions have been received by CHR's Pharmacy Services concerning the scheduling of some of the substances in the Controlled Substance Categories as shown in Volume 12, November 5 of *The Advocate*, August, 1990. Items of specific concern include: Kaeopectolin PG; Donnagel PG; Parapectolin and other agents listed in Schedule V according to the Federal Regulations which I had included in Schedule III and noted - Kentucky only. It seems to be in order for me to attempt to clarify the standing of these agents.

KRS 218A.130

According to KRS 218A.130 "Unless otherwise rescheduled by Regulation of the Cabinet for Human Resources the controlled substances listed in this section are included in Schedule V: Any compound, mixture or preparation containing limited quantities of any of the following narcotic drugs, which also contains one or more non-narcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone: not more than 200 milligrams of codine, or any of its salts, per 100 milliliters or per 100 grams."

WHAT PHARMACISTS SAY

This being the more restrictive ruling it was used in the data submitted for the issue the *The Advocate* cited above. After questions were raised several pharmacists were asked if they would dispense Donnagel PG without a prescription as a Schedule V or, as an exempt narcotic preparation. About 50% said they would, the remainder would not. Additional review of the Statutes and Regulations found 902 KAR 55:035 Schedule V Substances states The Cabinet for Human Resources hereby designates as "Schedule V" controlled substances in addition to those specified by KRS 218A.130, the following:

1)(a) Not more than two and five-tenths (2.5) milligrams of diphenoxylate hydrochloride and not less than twenty-five (25) micrograms of atropine sulfate per dosage unit; and
(b) not more than 100 milligrams of *opium* per 100 milliliters or per 100 grams.

2) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation containing any of the following narcotic drugs and their salts: Buprenorphine.

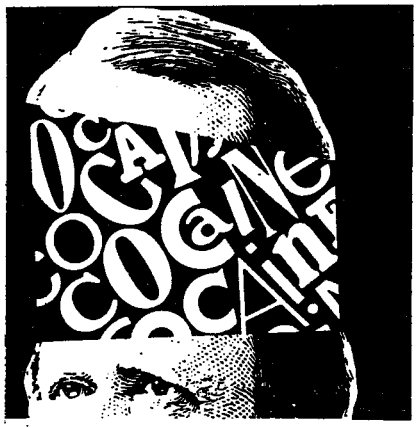

Illustration by Leigh Ann Smith

SECTION 2. DISPENSING WITHOUT A PRESCRIPTION.

A controlled substance listed in Schedule V which is not a prescription drug under the Federal Food, Drug and Cosmetic Act, may be dispensed by a pharmacist without a prescription to a purchaser at retail, provided that:

1) Deals with the composition of the product.

2) Not more than 240 cc (eight (8) ounces) nor more than forty-eight (48) dosage units of any such controlled substance containing opium, may be dispensed at retail to the same purchaser in any given forty-eight (48) hour period.

Therefore, 902 KAR 55:035 will permit Donnagel PG and related products to be sold over the counter in Kentucky.

LEGAL OR ILLEGAL?

Because these products are legally available without a prescription does not prevent a person being in illegal possession.

For example if a person has 16 ounces of Donnagel PG in possession and the product was obtained without a prescription, there could be a question raised concerning legal possession of the product.

902 KAR 55:035 stipulates several procedures to be followed for the legal sale without a prescription. If any one of those procedures are violated, a question of illegal possession might exist.

Therefore, should questions arise concerning the legality of possession and use of Schedule V substances as defined above by 902 KAR 55:035 one would need to review the circumstances against the total regulation to answer the question of legal possession.

ANABOLIC STEROIDS

When the August issue of *The Advocate* went to press we were still under the impression that the anabolic steroids legislation provided increased penalties for improper use of these products, but did not increase control beyond their prescription legend status.

As a matter of fact, the anabolic steroids are rescheduled by the Cabinet for Human Resources to Schedule III effective July 1, 1990.

According to pharmacist legal briefing at a December continuing-education program, Conjugated Estrogens with Testosterone should be included in the list. However, it was not included in any lists available to me.

You may wish to alert your readers to the increased control of this group of drugs and to the ambiguity concerning the status of Conjugated Estrogen with Testerone.

HELEN L. DANSER, R.PH.
Pharmacy Services Program Manager
Cabinet for Human Resources
Frankfort, KY 40601
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Parole is Evaporating as a Reality in Kentucky

Kentucky's Prison Crisis is Primed to Flourish

A combination of forces is quickly leading Kentucky down a path of total elimination of even the **possibility** of parole. The half-truth-in-sentencing craze has handed a lot of KY juries the ability to sentence criminal defendants to life without parole. Additionally, the Parole Board, as evidenced by their recently released statistics, is deliberately reducing parole drastically.

PAROLE BOARD STATISTICS RELEASED

The Kentucky Parole Board has released statistics for the recently completed fiscal year, July 1, 1989 - June 30, 1990 (FY 90). The Parole Board is requiring inmates who make their initial appearance before the Board and those that have been before the Board previously to spend a lot more time in prison.

What follows is a look at parole statistics for the last year and the last seven years for the following categories:

1. parole at initial hearings,
2. parole rates for all inmates
3. parole by security levels
4. deferment lengths when not paroled.

A. INITIAL PAROLE HEARINGS

1) FISCAL YEAR 1990

These Parole Board statistics demonstrate that when inmates first are eligible for parole, the Board continues to parole fewer inmates and to order more inmates to serve out their prison sentences.

In FY 90, there were 2,860 inmates who came before the Parole Board for the first time. Only 22% received parole (see Table 2), while 32% were required to serve out their sentence. From FY 89, that is a 5% decrease and increase respectively.

2) LAST SEVEN YEARS

Over the last seven years, the Board has chosen to drastically reduce the number of inmates who are paroled when first eligible for parole, and likewise have chosen to dramatically increase the number of inmates who serve out their sentences.

In FY 84, 2,475 inmates came before the Parole Board for the first time. Of these, 43.6% were paroled while only 10% were required to serve out their sentence.

In the last seven years, the percentage of inmates paroled when first eligible has declined 21% (see Table 1), and over the same time period those inmates being required to serve out their sentences rose 22%.

B. ALL PAROLE HEARINGS

1) FISCAL YEAR 1990

The results of all parole hearings (regular, deferred, and others, excluding parole violation hearings and early parole hearings) indicate that of the 4,530 inmates considered for parole, parole was recommended for 37%. However, 25% received serve outs. From FY 89, this represents a 6% drop and 5% increase respectively.

2) LAST SEVEN YEARS

Looking at all parole hearings over the last seven years, the Parole Board has dramatically reduced the number of inmates who receive parole, and have more than tripled the number who serve out their sentence.

In FY 84, 55% of the 3,845 inmates who had parole hearings were granted parole, and 7.6% received a serve out.

In the last seven years, the percentage of inmates paroled declined 18% from 55% to 18%. During the same time, the percentage of inmates receiving a serve out jumped nearly 17% from 7.6% to 25%.

C. PAROLE BY SECURITY LEVEL - INITIAL HEARING

Incredibly, 71% of **minimum** security inmates are deferred or receive serve outs. Only 29% receive parole when first eligible. A bare 11% of the **maximum** security inmates receive parole the first time up with 89% being deferred or receiving a serve out. Indeed, **parole is evaporating as a reality in this state.**

D. DEFERMENT LENGTHS BY SECURITY LEVEL

A minimum security inmate going before the Board for the first time who receives a deferment has to spend an average 16 more months in prison before he has another chance at parole. It is clear that the term minimum security has become a gross misnomer or perhaps a fraudulent representation of how these inmates are really viewed.

The Parole Board has effectively extended initial parole eligibility for the average **maximum** security inmates by more than three years. 81% of the maximum security inmates going before the Board for the first time receive a deferment that averages 39 months.

CONSEQUENCES OF NO PAROLE

As criminal defense attorneys advising clients, we best take heed of these endlessly incredible statistics when advising clients what is in store for them parole-wise if sentenced. We also must communicate to them the clear, inexorable trend.

Regressive parole news springs eternal in Kentucky. It won't be without adverse consequences.

CONCLUSION

The above reveals an increasingly dark reality:

- 1/3 of all inmates receive a serve out at their first parole hearing;

- less than 1/4 of all inmates are paroled when first eligible;

- less than 1/3 of minimum security inmates are paroled when first eligible;

- 89% 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 first parole hearing is given on average a 16 month set back;

- 81% of the maximum security inmates receive on average a three year, three month set back when first appearing before the Board; and,

- serve outs have more than tripled in last seven years.

With these trends, Kentucky's prison crisis is primed to flourish into the 1990's without pause. It is additionally fueled by the Legislature's enacting long prison terms and the newly concocted half-truth-in-sentencing scheme. Effectively, parole is being eliminated in Kentucky as a reality.

Eventually, the lack of parole and the increasing likelihood of a serve out will have consequences beyond just unmanageable explosion of inmates to house. It will no doubt mean that more persons deciding whether to plead guilty or go to trial will take the latter course. **Kentucky's criminal justice system is encouraging another prolonged crisis that will cause results opposite those the public really desires.**

ED MONAHAN
Frankfort, KY

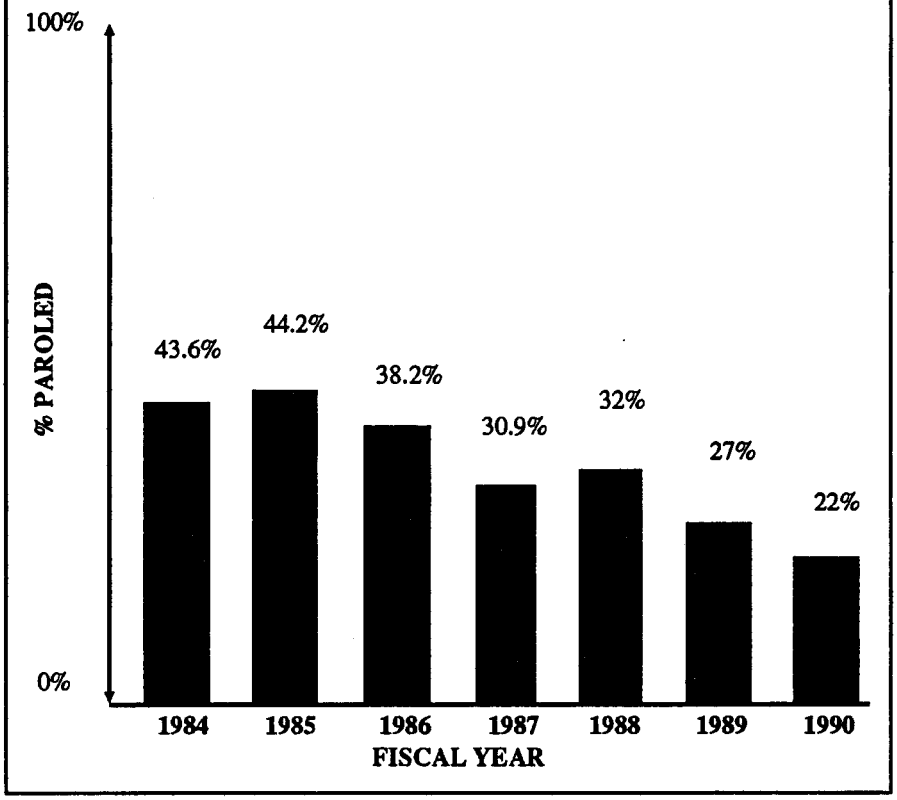
Advising Clients About "Lack" of Parole

Post conviction attorneys are seeing more and more inmates who were either erroneously advised or not advised at all about their "parole" chances. Attorneys must relay to their clients that parole eligibility is not a good indicator of actual prison time. Rather, parole is fast becoming the exception to the rule of lengthy deferments or serve-outs. Since "gross misadvice" concerning parole eligibility can amount to ineffective assistance of counsel, it would be wise for an attorney to carefully and pessimistically express a clients' chances for parole.

ALLISON CONNELLY
Manager
Post-Conviction Branch
Frankfort, KY

TABLE 1

INMATES Paroled When First Eligible, For Fiscal Years 1984 - 1990



Parole Disinformation Causes More Trials

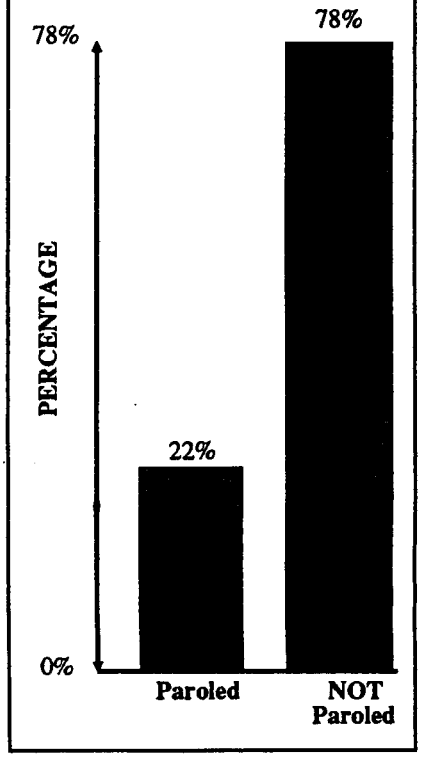
The parole changes in Kentucky equal hard-wired ineffectiveness. I can't, in good conscience, advise a client of the likely release date on any given sentence, and that's the one question clients want answered accurately when they consider a plea. Merely being pessimistic about chances for parole isn't enough, since it encourages clients to go to trial when they shouldn't. This pessimistic advice likely leads clients to say, "Why not roll the dice if the potential date of release is not reasonably predictable, or a serve-out is likely?"

Prosecutors justify their sentencing recommendations on the assumption of parole at first eligibility, mostly because the victims and their families want a higher "minimum" sentence. The truth, of course, is that the parole eligibility date is not the minimum sentence the client is likely to serve, but prosecutors and courts continue to encourage this fiction. It's unfair, it's disinformation, and it's going to log-jam the courts and corrections as more accused citizens decide that if you can't accurately figure when you're going to get out, you might as well take your chances and try the case.

Gary E. Johnson
Assistant Public Advocate
Frankfort, KY

TABLE 2

Parole Results When First Eligible For Fiscal Year 1990



Kentucky Drug Arrests Skyrocket Since 1987

Police & Prosecutors Receive Generous New Resources for Drug Cases....
Public Defenders Receive None

114% INCREASE IN ARRESTS

Drug arrests in Kentucky have increased dramatically virtually overnight. Since 1987 drug arrests in Kentucky have increased from 9,213 per year to 19,724 per year in 1990. (See Tables 4 & 5)

RESOURCES GIVEN TO PROSECUTORS AND POLICE

This 114% increase in four years should not surprise us. Prosecutors and police have received a bunch of money to increase the investigation, arrest and prosecution of drug cases.

In fiscal year 1989, Kentucky police and prosecutors received $4,614,190.64 from civil seizures and forfeitures in drug cases.

In fiscal year 1990 they received $6,080,000 from grants under the federal Comprehensive Crime Control Act.

The $6 million fiscal year 1990 federal drug money was distributed by Kentucky's Crime Commission as indicated in Table 2.

In July, 1990 Jefferson County Commonwealth Attorney Ernest Jasmin said he was using a $127,000 federal grant to hire five new prosecutors due to a hugh increase in drug arrests. The drug arrests increase was caused in part by the infusion of federal anti-drug money.

Jefferson County police used more than $428,000 in federal money to pay overtime to officers, buy drugs and pay informants. Drug cases make up 1/3 of Jasmin's felony caseload.

UNBALANCED FUNDING; NO RESOURCES FOR DEFENDERS

No money was allocated to any criminal defense or public defender effort, yet prosecutors and police have had $10.7 million more at their disposal. (See Table 1). Ironically, the prosecutor and police have merited large new financial resources to fight the drug problem yet public defenders have received nothing to deal with the influx of new cases. Why have Kentucky public defender resources not been increased to deal with the many more drug cases?

TWO PENDING DEFENSE FUNDING REQUESTS

The Department of Public Advocacy has two program requests pending before the Kentucky Crime Commission. One program requests $511,000 for more public defenders and staff in the three counties with the largest increase in drug cases; Jefferson, Fayette, Kenton (See Table 3), and in the state office.

The second program requests $24,000 to start an alternate sentencing program for drug cases in Louisville.

FUNDING BALANCE REQUIRED

The 1990 amendments to the federal Comprehensive Crime Control Act clarifies that there must be a *balance* in the distribution of the federal money between the judiciary, police, prosecution and public defenders.

THE KENTUCKY CRIME COMMISSION

Kentucky's Crime Commission is composed of the following persons:

Mark Bubenzer
Executive Director
Kentucky Crime Commission

W. Michael Troop
Ex officio - Chairman
Secretary, Justice Cabinet

Frederic Cowan
Ex officio
Attorney General

Paul E. Patton
Pike County Judge/Executive

Gary D. Payne
District Judge
Lexington

Paul Barry Jones
Circuit Judge
Columbia

Philip E. Mullins
Private Sector Representative

Dr. William V. Pelfrey
Director
School of Justice Administration
University of Louisville

Kelsey Friend
State Senator
Pikeville

John Schickel
Boone County Jailer

John E. Bouvier
Daviess County Sheriff

Bobby Crouch
Louisville

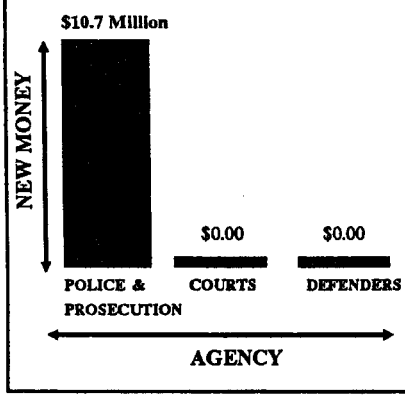
Mary Elizabeth Byrd
District Judge
Paducah

NO DEFENSE REPRESENTATION

There is no representative on the Crime Commission from the many criminal defense attorneys and public defenders in this state. There is no representative from the Kentucky Association of Criminal Defense Lawyers or the Department of Public Advocacy.

Table 1

New Money for Police and Prosecutors in Drug Cases; Courts and Defenders Receive None.



Available Drug Money

The *Lexington Herald* reported on December 28, 1990 that Kentucky ranked 50th among the 53 states and territories in spending federal anti-drug grant money over the last four years.

The Office of National Drug Control Policy issued a December 1990 white paper, *Federal Drug Grants to States*, which indicated that in the last four years Kentucky has received $11,699,000 in federal justice drug grants and as of the report date spent only $3,600,000 of those grants or 30%.

The Federal Report indicated that Kentucky has not spent any of the 1990 federal justice drug grant money which amounted to $6,080,000.

When the 1991 expected $6.5 million drug money is added to this amount on June 1, 1991, it appears that Kentucky has $14.5 million as of 1991 in unexpended drug money.

Ed Monahan
Frankfort, KY

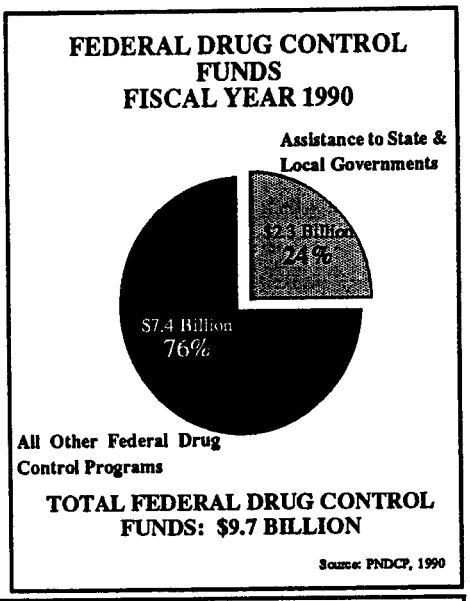


Table 2

FISCAL YEAR 1990 FUNDING

PROGRAM / PROJECT TITLE	IMPLEMENTING AGENCY SUBGRANTEE	IMPLEMENTS BJA PROGRAM BRIEF	DISTRIBUTION OF FUNDS	
		TITLE - PROGRAM BRIEF	FEDERAL AMOUNT	MATCH AMOUNT
ADMIN of NCAP	KY Justice Cabinet, Crime Commissions Staff, Div. of Grants		$ 304,000	$ 101,333
D.A.R.E.	KY State Police Local to be Named	D.A.R.E D.A.R.E	290,000 114,000	96,666 38,000
Multi-jurisdictional Task Forces	Ashland, Paducah, Hopkinsville, Kenton Co. & Pennyrile area	Organized Crime Narcotics	3,510,000	1,170,000
Crime Prevention	Nat'l Crime Prevention Institute, U. of L.	Community Crime Prevention	150,000	50,000
Intelligence	KY State Police	Organized Crime Narcotics	93,365	31,122
Asset Forfeiture	KY State Police		66,400	22,133
Pre-Sentencing Testing & Treatment Programs (2 projects)	Boone Co., Laurel & Knox (Tom Handy)	TASC	287,500	95,833
Lab Upgrade; expansion of Western KY & Northern KY labs; staff	KY State Police		418,000	139,334
Drug Free Workplace Initiatives - Law Enforcement	KY State Police		50,000	16,667
Information Systems	KY State Police	ICAP; 911; Local Computer Hookups to Criminal Records	428,250	142,750
Innovative Programs			118,485	37,495
Regional Juvenile Detention Placements	16 - 20 Counties in Purchase & Pennyrile Areas		250,000	83,334
		TOTALS:	$6,080,000	$2,026,666

Table 3

Drug Arrests in Three Kentucky Counties

Counties	1987	1988	1989	% Change 1987-1989
Fayette	382	525	1,401	+382%
Jefferson	1,462	2,074	4,826	+238%
Kenton	519	602	926	+ 78%

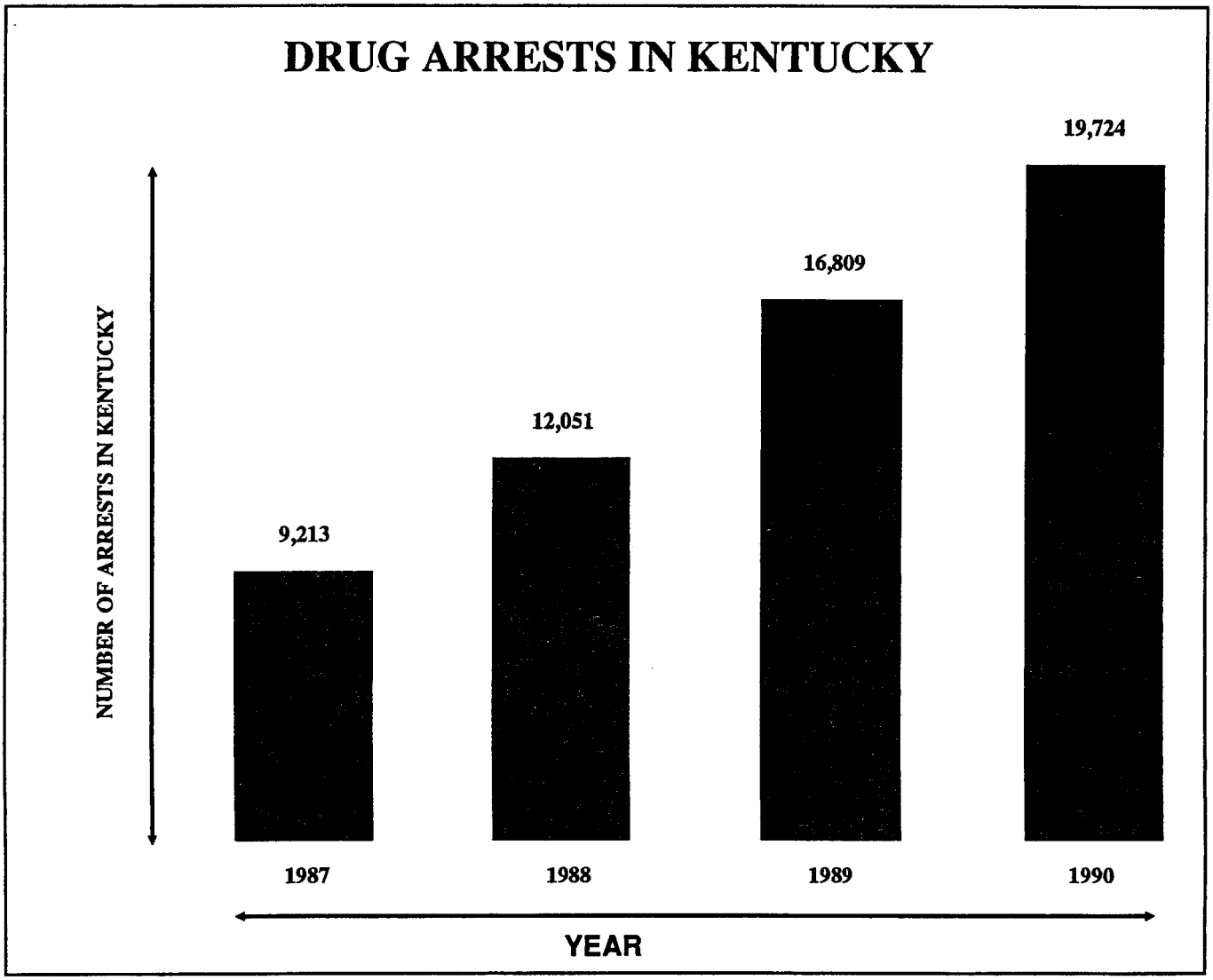
Table 4

Drug Arrests in Kentucky

Year	Arrests	Yearly% Increase
1987	9,213	.....
1988	12,051	31%
1989	16,809	40%
1990 *	19,724	17%

* The data for 1990 is for the fiscal year. The data for the other years listed are for calendar years. When the calendar year 1990 data becomes available, we anticipate a significant increase over the 1989 total.

Table 5



A 114% increase in Kentucky in the last 3 years

Resist a Take-No-Prisoners Drug War

Last fall Congress approved a $1 billion increase in federal spending on prisons. Drug czar William Bennett wants states to devote $5 billion to $10 billion more for the same purpose this year. And if the Bush administration has its way, states will add more gas chambers to accommodate the drug kingpins it wants executed.

The idea that the answer to the drug problem is more arrests and executions is becoming increasingly popular, especially on the right. Eleven states effectively decriminalized marijuana in the 1970s, but many legislators and analysts are urging states to reverse course and lock up first-time users. The death penalty has been a conservative campaign favorite for years. On "Meet the Press," Mr. Bennett opined that major drug-money launderers should be killed; last year he declared that he had no problem with beheading dealers.

Despite the high hopes of enforcement enthusiasts, more executions and jailings are likely to fail. Over the last eight years the number of inmates in the United States has nearly doubled, to 673,565, in large part due to the drug war. Drug arrests are up 119% for men and 85% for women. Many of the 900,000 arrested annually for drug offenses are users; federal convictions for possession climbed 340%, compared to 142% for trafficking.

Yet for all of this effort drug supplies have increased. The State Department reports that world production was higher last year than ever before. And the Justice Department admitted in 1988 that "the availability and purity of cocaine have increased, 'marijuana' is easily accessible nationwide," synthetic drug laboratories "are plentiful in some rural areas," and heroin use "may be shifting back upward."

As for executions, we already have a death penalty on the street. In 1988, some 775 dealers in New York City, 475 in Chicago, 300 in Washington, D.C., and 90 in Miami were murdered in the course of their trade. If those killings won't stop dealing, then a few more executions dispensed annually by the cumbersome American judicial system are unlikely to make a difference.

The "jail 'em and fry 'em" strategy is not only impractical. It's also immoral.

The first issue is whether users should be imprisoned. Sitting in one's home shooting up heroin may be stupid, but it is not wrong in the same sense as robbing, raping, or murdering someone else. Indeed, the act of lighting up a marijuana joint is morally equivalent to lighting up a cigarette, a highly addictive product responsible for 390,000 deaths a year. That one is illegal and the other is legal is an artifact of law, unrelated to the relative evilness of the actions. Neither warrants a jail sentence.

People who commit crimes while on drugs obviously deserve to be imprisoned. But the mere use of a forbidden substance is not the same as committing another crime.

Even stronger is the case against executing drug dealers and money launderers. Should someone who supplies a drug to a willing buyer be killed because the majority disapproves of the product? Especially when the substance is less harmful than legal substitutes? Crack may be addictive, for example, but with only 10% of its 8 million users consuming it once a week or more, the addiction rate appears comparable to that of alcohol. And liquor is implicated in far more crimes and innocent deaths than is crack.

The suggestion that we kill to eliminate a market that has so far proved impervious to government crackdowns - real enforcement spending this year will run almost ten times that during the first ten years of Prohibition - ignores the many other crimes that harm more innocent victims. We may be disturbed by addicts wasting their lives, but they are relatively harmless compared to the rapists, muggers, and murderers who would serve lesser sentences than drug dealers.

The frustration felt by politicians and law enforcement officers over their inability to kill the hydra-headed drug monster makes the draconian temptation a strong one. But our overriding commitment must remakn to justice. Prison camps for users and gallows for dealers may sound good on the campaign trail, but they are ill-suited for law in a free society.

DOUG BANDOW

Doug Bandow is a senior fellow at the Cato Institute in Washington.

The article was originally published in the April 13, 1990 *Christian Science Monitor*. It is reprinted here by permission of the author.

Staff Changes

Paducah

Carolyn Keeley, joined the Paducah office on Dec. 1, 1990 as an Assistant Public Advocate. She is a 1990 graduate of the University of Kentucky School of Law.

Susan Burrell, a 1990 University of Tennessee Law School graduate, joined the Paducah office as an Assistant Public Advocate on Dec. 1, 1990.

Investigators

Gary Billingsley, transferred from LaGrange as a correctional officer to the Paducah office DPA investigator position on November 16, 1990.

Thomas Smith, a Hazard Patrolman since 1987, joined the Hazard office as DPA investigator on February 1, 1990.

Alternative Sentencing Specialist

Jim Deshazer, who received his B.A. from E.K.U. and worked at F.C.I. from 1982 - 89, took the position of alternative sentencing specialist on February 1, 1991, serving the Northern Kentucky area.

Robin Wilder, received her B.A. from E.K.U., was appointed as an Alternative Sentencing Specialist to Fayette County on Dec. 1, 1990. Her address is: 111 Church Street, Lexington, KY 40507, (606) 253-0593.

Correction:

The photo of the new attorneys in the December, 1990 *Advocate* was reversed by the printer. As shown, the new attorneys are:

John West, Jim Chambliss, Teresa Gray, Bill Donaldson, Rob Sexton, Donna Hale, Dilissa Milburn, Harolyn Howard and Debbie Bailey, from left to right.

Further, **Rob Sexton** who is with the Somerset office, prefers Rob, not Bob, and is a 1990 graduate of the University of Louisville, not University of Kentucky.

Legal Rights of Deaf Defendants

This is the second installment of a series of articles on deaf defendants.

It is critical to remember, as we mentioned in our last article, that merely providing a deaf defendant with an interpreter is not sufficient. Great care must be taken to insure that the interpreter is one which will meet the particular communication needs of that specific defendant. To do this, it is necessary to know as much about the deaf defendant and his preferred language (American Sign Language or English) and communication mode (speech, sign or written language) as possible. Although we should never forget that no two deaf individuals are exactly alike, it is often helpful—from a communication perspective—to think of general classes or "types" of deaf persons, each class of which consists of individuals who have similar communication needs.

TYPES OF DEAF / HEARING IMPAIRED PERSONS

One of the most well-known descriptions of types of deaf individuals is presented in *The Red Notebook* (subtitled "Communicating With Hearing People"), a loose-leaf notebook found in many public libraries and containing information of interest to deaf persons and hearing persons concerned with deafness. *The Red Notebook* lists and describes seven types of deaf and hearing impaired individuals which make up "the Deaf Community." We suggest that you first read over this information (which we have excerpted "as is"), then consider our comments about it. The seven *Red Notebook* categories are as follows:

1. Oralists
—have no or some knowledge of American Sign Language
—primary communication mode is speech and speechreading
—low to average level of reading skill (those with high level reading skill may have same needs as no. 5 below)

2. American Sign Language Users
—may comprehend basic English constructions and/or may have some difficulty with English terminology and idioms
—may or may not use speech
—have extensive, clear and satisfying communication with those who know American Sign Language (ASL)
—low to average reading skill

3. Users of American Sign Language and English (Bilinguals)
—use ASL and English to some degree
—are able to read and write English and use Pidgin Sign English and ASL
—some may be more comfortable with his/her first language (ASL) than with second language (English) or vice versa
—may or may not use speech

4. Minimal Language Users
—have little or no knowledge of either English or ASL
—may have his/her own communication systems (*i.e.*, home made signs, natural gestures, mime, drawings, or other non-verbal methods)

5. Deafened Adults
—become deaf during or after high school (usually as a result of accident, noise pollution, war injuries or sickness)
—may or may not know sign language (usually not)
—English is their first language

6. Hearing Impaired Elderly
—suffer hearing loss in advancing age
—may be hesitant to use modern technology of captioned media, telecommunication devices for the deaf
—English is their first language
—may not want to admit their deafness

7. Hard of Hearing Individuals
—sometimes can discriminate speech (with the aid of amplification devices and auditory training)
—sometimes gain information through radio, TV, telephone, theatre and movie sound track the same way as hearing people do, but with occasional gaps
—usually need technical aids (*e.g.* audio loop, infrared)
—may want to be treated as hearing persons no matter how great hearing loss
—may not want to admit their deafness

POINTS TO REMEMBER

Several points should be made about the information just presented. To begin with, the preferred language and communication mode of a deaf defendant cannot be inferred from his degree of hearing loss alone. Language and modal preferences are, instead, attitudinal and cultural in nature, and are usually related to one's life experiences. As a quick example, let us consider two deaf individuals, Ron and Joe, both of whom have profound—virtually identical—hearing losses. Ron, however, has been deaf since birth, attended a state residential school for the deaf from first grade on, and has a strong preference for communicating in American Sign Language, in which he is quite fluent. Joe, however, grew up in the "hearing" world, attended regular public high school, and—since he did not become deaf until he was 30 years old—continues to communicate in English and has no desire to learn American Sign Language. For Ron, an interpreter fluent in American Sign Language will be a crucial aid during the criminal justice process. For Joe, however, an oral interpreter may be the best choice, at least at present. A more recently explored alternative which seems to hold promise for the future is the use of computer technology to offer Joe "captioning" of courtroom proceedings on a virtually real-time basis.

It is important to remember, as *The Red Notebook* suggests, that deaf individuals span the range of reading abilities. Some deaf individuals, particularly those who become deaf after acquiring reading skills, may be very good readers who can process printed information very rapidly.

A second point, as *The Red Notebook's* description of elderly and hard of hearing individuals (categories 6 and 7) suggests, is that some deaf individuals may *not* need an interpreter if an appropriate assistive listening device (such as an audio loop or infrared system) is provided them. The major function of most assistive listening devices is to make a desired sound (*e.g.*, the voice of a courtroom speaker) louder while at the same time eliminating extraneous sounds which interfere with good listening. Although space does not allow a detailed description of these systems here, additional information about them is available from the Commission on the Deaf and Hearing Impaired (phone 1-800-372-2907 V/TDD) or from Self Help for Hard of Hearing People (SHHH), 7800 Wisconsin Avenue, Bethesda, MD 20814, phone

(301) 657-2248 (voice) or (301) 657-2249 (TDD).

A related point to emphasize here is that a person's preferences for language and communication mode may change during his lifetime—sometimes within a relatively small time span. For example, the man named Joe described above may decide, after exposure to and association with persons who use American Sign Language, that he prefers signing to speaking, and may then become fluent in ASL within a relatively short time. Indeed many individuals such as Joe become interested in learning ASL when they realize how easy it is to understand spoken communication through sign language interpreters. A deaf defendant who returns to the criminal justice system for a second or third time may have a different set of communication needs than he did when he first encountered the system. Specific needs and preferences should thus be assessed *each time* the individual enters the criminal justice process.

Another question which arises from *The Red Notebook* information is this: What happens when a defendant or witness does not want to admit that he or she has a hearing problem? Should it become apparent that this is the case, we recommend that the best approach is for the judge and/or appropriate attorney to hold a frank discussion with the hearing impaired person, stressing the importance of accurate communication to reliable testimony. Hopefully a solution can be found which guarantees the defendant his/her right to a fair trial or hearing and at the same time is acceptable to all parties concerned.

A related precaution concerns the possible tendency, on the part of a public defender or attorney, to question the right of a severely hearing impaired person to an interpreter simply because that person has good speech. It should never be assumed that, just because a hearing impaired person has intelligible speech, that person does not need an interpreter to understand others. Severely deaf persons, especially those who lose their hearing later in life, may have good speech, but may have great difficulty understanding the speech of others.

DEAF CULTURE

Users of American Sign Language (category 2 above) and bilinguals (category 3 members) with strong ASL skills are the deaf individuals who are often referred to as members of "the Deaf culture." An all-important (and likely *the* most important) value or "trademark" of the Deaf culture is its respect for and use of American Sign Language. Not surprisingly, there is a general tendency among culturally Deaf people *not* to use speech and to use only limited mouth movements. As author Carol Padden explains in her essay entitled "Culture of Deaf People":

> Since speech has traditionally been forced on Deaf people as a substitute for their language, it has come to represent confinement and denial of the most fundamental need of Deaf people: to communicate deeply and comfortably in their own language. Deaf people often distrust speech communication for this reason.

Criminal justice proceedings tend to be stressful times under the *best* of circumstances, particularly for defendants and witnesses. For this reason, as well as for the legal and ethical reasons discussed in our first article, it is imperative that the criminal justice system provide deaf defendants and witnesses with the means to communicate in their desired language and mode. For a judge to require that an interpreter use English-based signing with a deaf person preferring ASL would be as unfair as if the judge required that a French defendant hear testimony in French words presented in English word order. The grammar and word order of ASL is very different than the grammar and word order of English, just as French and English differ greatly in their grammar and word order.

As we stressed in our first article, it should never be inferred that a deaf person with a preference for, or greater fluency in, American Sign Language is less intelligent than a deaf person who communicates via signed or spoken English. To make such an assumption would be like saying that all persons who speak French are less intelligent than those who speak English. At the same time, however, it should not be forgotten that deafness is a condition which can and often does cause *experiential* deficits within an individual. Much of the learning acquired by hearing people occurs through "passive" or "incidental" exposure to auditory information around them—human voices, radio, television. Because deaf people do not have this advantage, they may have "knowledge gaps" in appropriate courtroom etiquette and other areas which are in no way related to a lack of innate intelligence. Like hearing people, deaf individuals span the entire range of human intelligence and, like the hearing, they are entitled to justice under the law *regardless* of their level of intelligence.

Partly because of this "experiential" deficit, even though more deaf persons are becoming aware of their legal rights, many are still not. Another factor which influences this is that often, schools do not spend adequate time educating deaf students about these rights. Some deaf people have heard of Section 504 and realize that it is beneficial to them, but still do not understand its basic contents. Therefore regulations were promulgated to ensure that agencies obligated to comply with the law make attempts to inform handicapped people of those rights.

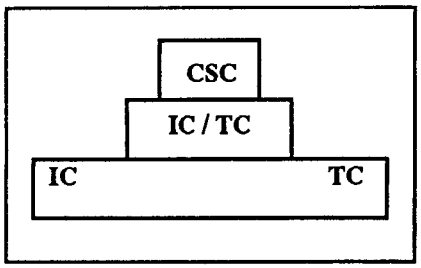
NEW GENERAL SIGN LANGUAGE CERTIFICATIONS

The national Registry of Interpreters for the Deaf (RID) is the only national certifying body for sign language interpreters. RID offers a variety of certifications which can be very confusing to lay persons. We will begin by discussing the general certificates, starting with the newest. First, is the Certificate of Interpretation (CI), holders of which have demonstrated a minimum level of skill in interpreting from spoken English to American Sign Language (ASL) and from ASL to spoken English (voice interpreting or "reading" the deaf person's signs). As previously mentioned, ASL is a language distinct and separate from English with its own syntax and grammar. The second new certificate offered by RID is the Certificate of Transliteration (CT). Holders of this certificate have demonstrated a minimum level of skill in interpreting (or rather "transliterating") from spoken English to an English-based sign system and vice versa. Those who hold both certificates are said to have CI/CT. **Since the vast majority of certified interpreters in our state hold certification under the old system—certification which is still valid—please read on.**

GENERAL SIGN LANGUAGE CERTIFICATIONS UNDER THE OLD SYSTEM

Certifications under the old RID evaluation system were based on percentages of accuracy. First, a Comprehensive Skills Certificate (CSC) holder is an individual that demonstrated 75% accuracy in four categories...interpreting spoken English to ASL and vice versa and transliterating spoken English to an English-based sign system and vice versa. Individuals with CI/CT, CSC, or IC/TC are more versatile than those who specialize in one or the other (ASL or English). The second certificate offered under the old system was Interpretation Certificate (IC) and the third was Transliteration Certificate (TC). Those who hold both IC and TC are said to have IC/TC. The accuracy requirements for holders of an IC and a TC were less stringent than those of a CSC. Try not to confuse the old IC, TC, IC/TC with the new CI, CT, or CI/CT. To be

honest, it is even mindboggling for those in the interpreting profession. The following diagram illustrates the certification hierarchy in the old system which takes into account accuracy requirements and versatility:



To further confuse you, deaf individuals can obtain certification from RID also. They are tested on their ability to understand ASL and an English-based sign system. They are generally used with a hearing interpreter as an "intermediary" or "relay" interpreter as mentioned elsewhere in this article. These deaf individuals who hold RID certification are frequently part of the team that evaluates other candidates for RID certification.

Also under the old system, there was a certificate called a Master Comprehensive Skills Certificate (MCSC) which was awarded to persons who held a CSC for at least four years and who met the standards of a CSC at a higher competency level.

SPECIALIST CERTIFICATIONS UNDER THE OLD SYSTEM

The specialist certificates under the old system were awarded to CSC holders who had the specialized skill to qualify for standards for interpreting in the area of specialty in which they were seeking certification. These were the Specialist Certificate: Performing Arts (SC:PA) and the Specialist Certificate: Legal (SC:L). Holders of the SC:L had to hold a CSC for at least three years. To our knowledge, there are no MCSC, SC:PA, or SC:L holders in our state.

ORAL CERTIFICATIONS UNDER THE OLD SYSTEM

There are three oral certificates under the old system. The first is Oral Interpreter Certificate - Comprehensive (OIC-C). Holders of this certificate have the ability to paraphrase/transliterate a spoken message with or without voice and with natural lip movements with hearing impaired persons and understand the speech and/or mouth movements of a hearing impaired person and repeat it exactly or in essence for the benefit of a third person. The second oral certificate is Oral Interpreter"Certificate - Spoken to Visible (OIC-S/V). Holders of this certificate have the ability to paraphrase/transliterate a spoken message with or without voice and with natural lip movements with hearing impaired persons and possess limited or minimal skills in understanding the speech and/or mouth movements of a hearing impaired person and repeat it exactly or in essence for the benefit of a third party. The third oral certificate is Oral Interpreter Certificate - Visible to Spoken (OIC-V/S). Holders of this certificate have the ability to understand the speech and/or lip movements of a hearing impaired person and repeat it exactly or in essence for the benefit of a third person.

In our state, oral interpreters are extremely rare. Even so, for a legal situation it is critical to secure skilled oral interpreters. It may be necessary to work very closely with the interpreter (especially an oral interpreter) to determine dates that he/she is available to interpret legal situations in which interpreter services are needed.

MATCHING INTERPRETERS TO CLIENTS

From the information presented about the different categories of deaf individuals, as well as on the different types of skills which various interpreters possess, we can make the following assumptions of whct type of interpreters or other communication assistance an individual in any of the categories is likely to need:

1. **Oralists**—are likely to need an oral interpreter.

2. **American Sign Language (ASL) Users**—an ASL interpreter.

3. **Users of American Sign Language and English (Bilinguals)**—an ASL interpreter if the deaf individual is more comfortable with ASL; a transliterator if the deaf person is more comfortable with English-based sign. (Note: You may have noticed that *The Red Notebook's* description of bilinguals states that they "use Pidgin Sign English and ASL." Pidgin Sign English is generally understood to be ASL signs presented in English word order.)

4. **Minimal Language Users**—may be served by one interpreter with experience in dealing with deaf persons having minimal language skills, or may require the services of two interpreters—a deaf interpreter acting as an "intermediary" interpreter between the deaf person and a hearing interpreter, and a hearing interpreter who "completes" the relay of information between the deaf interpreter and the hearing persons present.

5. **Deafened Adults**—an oral interpreter if the deaf indivkdual does not know or use sign language; a certified transliterator if the client does not know and prefer sign; appropriate assistive technology for any client who can benefit from its use.

6. **Hearing Impaired Elderly**—speech presented in a natural way, but a little more slowly than usual, may be helpful to elderly hearing impaired individuals. Since some repetition and paraphrasing may be necessary, patience is also important.

7. **Hard of Hearing Individuals**—assistive listening devices and/or an oral interpreter.

In all cases where an interpreter is being used, it is desirable to have the interpreter be close to, and in plain view of, the deaf individual being served. It is generally desirable that the interpreter be positioned as closely as possible to the hearing speaker, so that the hearing speaker and the interpreter can "become one," as much as possible, in the mind of the deaf viewer. In cases where the deaf individual is "listening for himself" via speechreading and/or assistive listening devices, it is likewise important for the speaker to be positioned close to, and in full view of, the deaf individual.

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Dahlia Haas works as Information Coordinator for the KY Commission on the Deaf and Hearing Impaired (KCDHI) in Frankfort. The mother of a deaf high schooler, she holds a B.A. and M.A. Ed. in Special Education of the Hearing Impaired from Eastern KY University.

Dana Parker works as Interpreter Administrator for KCDHI. She holds a B.S. in Speech and Hearing Science and an M.S. in Deaf Education from Lamar University in Beaumont, TX. She also holds an Interpretation Certificate (IC) and a Transliteration Certificate (TC) from the Registry of Interpreters for the Deaf.

Doubts Rise on Children as Witnesses

Researchers Quarrel Over the Suggestibility of Young Minds.

An article of faith among many authorities investigating sexual abuse of children, that "they do not make these things up," is coming under fire as some researchers find that young children can be readily influenced by those who question them.

The debate hinges on just how suggestible young children are. The issue is crucial in thousands of cases.

But there have been few scientific studies on the subject, and most involved innocuous situations. Only within the last two years, for example, have researchers sought to study situations in which a young child is called upon to remember unusual actions of an adult stranger. Many of these projects have reached contradictory conclusions.

At the center of the legal dispute are the interview methods used with very young children by investigators, usually police officers or child abuse workers. One of the most common, in which children are asked to show what happened to them using anatomically explicit dolls, is under sharp legal and scientific attack.

Another method, in which researchers closely analyze the accounts children give, is put forward as a substitute, but advocates of the dolls say this method is also flawed.

The scientific debate is complicated, forensic experts say, by the fact that the doll method tends to elicit more accounts of abuse while the statement analysis method is less likely to produce a conclusion by the interviewer that abuse has taken place.

Many researchers complain that the issue has become so emotionally charged that it has begun to bias experiments and reviews of scientific literature, particularly among scientists who offer expert testimony for prosecutors or defendants.

"Once you get involved you tend to become an advocate," said Stephen Ceci, a psychologist who studies the suggestibility of children at Cornell University.

Elizabeth Loftus, a psychologist at the University of Washington who is an expert on eyewitness testimony, said, "It's become an emotional issue of defending the child versus protecting innocent defendants, and it's creeping into people's scientific objectivity."

Adding to the confusion is the fact that the studies that are most directly relevant to sexual abuse of children have been conducted only in the last year or two, and most of these have yet to be published. Many will appear in "The Suggestibility of Children's Recollections," to be published early next year by the American Psychological Association.

A study commissioned by the National Center on Child Abuse and Neglect found that 155,000 cases were reported in 1986, the most recent year for which national statistics are available. But because most cases are not reported, the actual prevalence is probably 6 to 10 times that number, said David Finkelhor, director of the Family Research Laboratory at the University of New Hampshire.

But studies have also found that many charges of sexual abuse are false, especially those made in divorce and custody battles. A 1986 article in *The Journal of the American Academy of Child Psychiatry* found that among allegations of sexual abuse made by children in custody disputes, 36% were false.

"In such cases one parent, usually the mother, becomes convinced the other has taken sexual liberties with a child, who is then encouraged to repeat the accusations," said Spencer Eth, a child psychiatrist at the University of California at Los Angeles. Those making the first, often crucial investigation of possible sexual abuse must tread a fine legal line between coaxing a coherent account from a youngster, who may not have words or an understanding of what went on, and asking leading questions that will contaminate the account so that it cannot be used as evidence.

In an important study by Karen Saywitz, a psychologist at U.C.L.A., and Gail Goodman, a psychologist at the State University of New York at Buffalo, not yet published, the researchers interviewed 72 girls 5 and 7 years old after routine physical examinations, which for half of them included vaginal and anal exams. The girls were first asked only what happened, then they were asked to show what happened by pointing to anatomically explicit dolls. Finally, the researchers asked, "Did the doctor touch you here?" while pointing to genital areas on the dolls.

Just eight mentioned the vaginal exams in their free recall, and another six showed it spontaneously when they were given the dolls and asked to tell what happened. But when asked directly about the genital area of the doll, 31 of 36 who had the exam confirmed it.

None of the other 36 girls who did not have the vaginal exams claimed they did until they were asked directly about it with the doll. At that point, three claimed they had vaginal or anal exams, including one who made up the detail, "the doctor did it with a stick."

The experiment shows that "if you don't ask you very likely won't find out," Dr. Goodman. But it also shows that if an interviewer does ask such questions, "you may get some false reports."

On the other hand, other recent studies show young children to be more highly susceptible to leading questions when the interviewer is persistent. Typical of these is a study reported by Alison Stewart-Clarke, a psychologist at the University of California at Irvine, at the 1989 meeting of the Society for Research on Child Development.

Her study involved 75 children 4 and 6 years old and a man who cleaned the room while they watched. At one point he picked up a doll and cleaned it. In a later interview, the interviewer told some of the children that she suspected that the man had actually been playing with the doll, not cleaning it.

A quarter of the children said the man was playing, not cleaning, at the first gentle suggestion by the interviewer. But the interviewer became more accusatory and persistent and by the end of the most pointed questioning, all but two of the children were completely swayed to the interviewer's version.

Studies like Dr. Goodman's have been seized upon by prosecutors seeking to show that children are unlikely to fabricate claims of sexual abuse, while studies like Dr. Stewart-Clarke's have been cited by defense lawyers who want to show that young children's memories are easily influenced by adults.

Critics charge that the anatomically explicit dolls are too often used before children make any mention of sexual activity, possibly leading them to talk about sexual acts that did not happen but which then become fixed in their minds.

For instance, the September issue of *The Journal of the American Academy of Child and Adolescent Psychiatry* reports a study with 223 children 2 to 5 years old who had not been involved in any known sexual abuse. When shown the explicit dolls, 6% of the children played with them in a way that would suggest sexual activity, which is often taken as a sign by investigators that a child has been abused.

On the other hand, many child therapists argue that the dolls are a valid way to draw from young children accounts of acts they may not have words for or are too timid to describe.

The conclusion by Mark Everson and Barbara Boat, psychologists at the University of North Carolina Medical School, is that the dolls "are not overly suggestive to young, sexually naive children, but are useful" in assessing exposure to sexual activities.

In response to the need for a more objective interview method, the National Institute of Child Health and Development has begun to study an alternative. The method, called "statement validity analysis," has been used for more than 30 years in German courts, and more recently in Sweden.

In this technique, interviewers scrupulously try to avoid leading questions while they encourage children to tell about what happened. The account is then analyzed for internal clues to its truthfulness, like the presence or absence of vivid detail.

Such details lend credibility because they give a specific, realistic context for the subsequent events, while fabricated accounts typically do not mention what was going on apart from the molestation.

In the national study, investigators in Phoenix, Kansas City, New Orleans and Marion County, Fla., are being trained in the technique. Prosecutors in these locales are then selecting videotapes of sex abuse interviews and dividing them according to whether guilt was later proven or refuted in court.

The tapes will be sent to trained scorers in other cities who will evaluate the children's testimony for 19 clues to truthfulness. The analysis by the scorers will then be compared with actual outcomes to determine the validity of the approach.

The method has fared well in two unpublished pilot studies reported last year.

But some researchers question the quality of the pilot studies. "Most defense lawyers say you should ask only open-ended questions, while the scientific literature shows you get very little information from young children with open questions like, 'Tell me what happened,'" which are used in the statement validity method, said Dr. Goodman.

Some forensic psychiatrists also object that statement validity analysis is biased against child witnesses.

"The statement validity analysis seems designed to discredit the child's account of sexual abuse," said Dr. Eth. "I tend to believe the child in such cases. Any evaluation for sexual abuse starts and ends with what the child says, especially it if is said spontaneously, and there is no obvious motive for lying."

DANIEL GOLEMAN
The New York Times
November 6, 1990

ASK CORRECTIONS

Sentencing in Kentucky

Karen S. DeFew

SECTION 13, KENTUCKY CONSTITUTION
No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

This regular *Advocate* column responds to questions about calculation of sentences in criminal cases. Karen DeFew is the Corrections Cabinet's Offender Records Administrator. For sentence questions not yet addressed in this column, call Karen DeFew, (502) 564-2433 or Dave Norat, (502) 564-8006. Send questions for this column to Dave Norat, DPA, 1264 Louisville Road, Frankfort, KY 40601.

TO CORRECTIONS:

My client's parole eligibility date on his murder conviction was calculated under KRS 439.3401, requiring the service of fifty percent (50%) of his 30 year sentence before becoming eligible for parole consideration. In accordance with the recent decision of the Supreme Court of Kentucky, is the Corrections Cabinet going to recalculate his parole eligibility as 12 years to serve for parole eligibility?

TO READER:

In accordance with the Opinion of the Supreme Court of Kentucky, *Juan Offutt v. Commonwealth of Kentucky*, the Corrections Cabinet is going to recalculate the parole eligibility dates of those individuals who were convicted of Capital Offenses of Murder and/or Kidnapping committed after July 15, 1986 and received a sentence of a term of year. These individuals will be given 12 years to serve for parole eligibility instead of 50% of the sentence imposed.

TO CORRECTIONS:

I have been asked by a client who is now on parole what is the procedure for restoration of civil rights. Could you please advise?

TO READER:

To be eligible to apply for restoration of civil rights your client must meet the following criteria:

a. has received a final discharge from parole;
b. the sentence has expired;
c. there are no pending charges; and
d. all fines have been paid.

An application for restoration of civil rights can be obtained from any Probation and Parole Office or by writing: Deborah Smith, Community Services and Facilities, Corrections Cabinet, Room 514, State Office Building, Frankfort, KY 40601.

The completed application is then returned to Community Services and Facilities. The address is also indicated on the application. The $2.00 fee for processing must be returned with the completed application.

KAREN DEFEW
Corrections Cabinet
Offender Records Administrator
State Office Building, 5th Floor
Frankfort, KY 40601
(502) 564-2433

Our December, 1990 *Advocate* feature article, *Making Peace* by Hal Pepinsky, Vol. 13, No. 1, Dec. 1990 at 5, made the point that the common perception of crime often is not based on reality. The following December, 1992 *Lexington Herald* article is an interesting example of this:

SURVEY: EMPLOYEES OUT-STEAL CUSTOMERS BY SEVEN TIMES

Employees caught stealing took seven times as much per person in 1989 as did 93% of the customers apprehended for the same crime, according to a new survey.

The report from Ernst & Young showed that the average recovery per customer was $196 but soared to a recovery average of $1,350 for the employee.

"This is not a front-door/back-door issue," the survey said. It also said retailers reported 45% of the thefts were detected at the cash register.

Common ploys include ringing up a sale and then voiding it, doing a telephone return and undercharging friends for merchandise. Only 10% of the thefts were detected in the stock area, said the survey, co-sponsored by the International Mass Retail Association.

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PAULA M. RAINES, Lexington lawyer and psychologist
JAMES CLARK, Clinical social worker, U. of K. professor
THOM ALLENA, Trainer, alternate sentencing consultant, former public defender investigator
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MARCH 1991

SUN	MON	TUES	WED	THUR	FRI	SAT
					1	2
3	4	5	6 DPA COMMISSION MEETING	7	8	9
		DPA DEFENDER / MANAGEMENT CONFERENCE →			NLADA CAPITAL SEMINAR →	
10 NLADA con't →	11	12	13	14	15	16
17 St. Patrick's Day	18	19	20	21	22	23
24	25	26	27	28	29	30
31 EASTER						

APRIL 1991

SUN	MON	TUES	WED	THUR	FRI	SAT
	1	2	3	4	5	6
7 Daylight Savings Time Begins	8 KACDL DRUG SEMINAR IN LEXINGTON	9	10	11	12	13
				NLADA APPELLATE TRAINING →		
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28 MARYLAND RATIFIES CONSTITUTION	29	30 GEORGE WASHINGTON INAUGUATED AS PRESIDENT				

FUTURE SEMINARS

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 that 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, (812) 855-9325.

KACDL Defense of Drug Cases Seminar
Monday, April 8, 1991
Hyatt Regency, Lexington, KY
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Featuring Judy Clarke, director of widely acclaimed San Diego Federal Defenders.

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