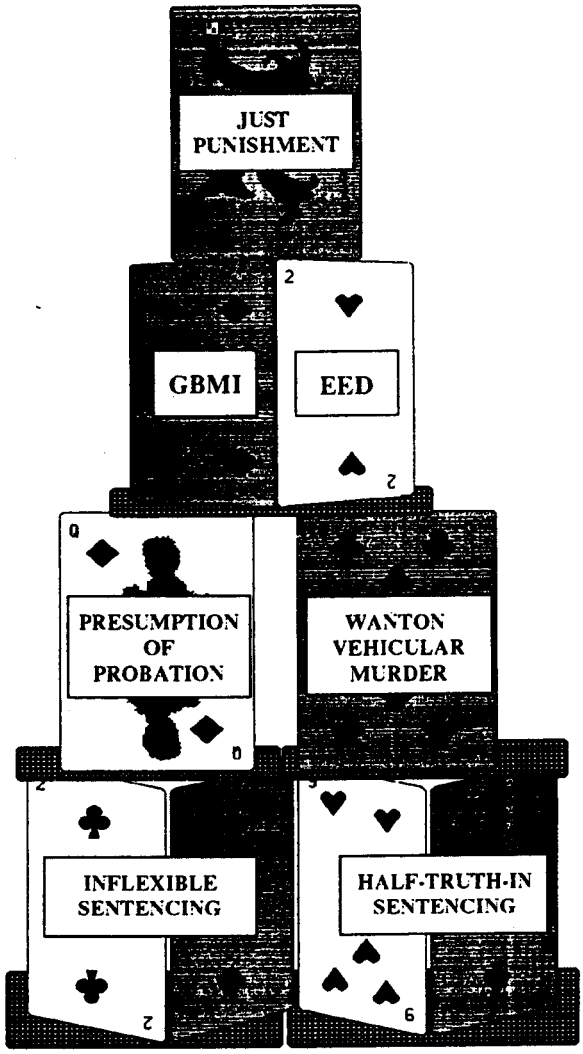
THE ADVOCATE

A Publication of the Kentucky Department of Public Advocacy

Advocacy Rooting Out Injustice Volume 13, No. 3 April, 1991



IS KENTUCKY'S PENAL CODE BECOMING A HOUSE OF CARDS?

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

From the Editor

A House of Cards?

A penal code which is an organic whole that promotes progressive societal values cannot long achieve its hoped for purposes amidst repeated attacks which occur in the *heat of passion.* Frank E. Haddad, Jr., recognized as this state's criminal justice cornerstone, calls all of us to reexamine the code in light of the code's degeneration over the years due to *ad hoc* changes. We could honor our devotion to individual liberties by responding to his call.

A Hollow Tribute

The new DUI *per se* guilty law has been passed. Does it meet our duty to treat the disease of alcoholism? Ironically, in this 200th anniversary of our *Bill of Rights*, the new law gives 15% of the federal funds to prosecutors while public defenders receive none. *A hollow tribute to individual liberties.*

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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Printed with State Funds KRS 57.375

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THE ADVOCATE FEATURES

Gary E. Johnson

GARY E. JOHNSON

On March 4, 1991, I met with Gary Johnson in his home in Lexington. He is currently on a medical leave from DPA due to a deteriorating hereditary cardiovascular disease.

In Dec. 1984, when he had his first heart attack, Gary was in private practice. He decided if he was lucky enough to be given additional time, he was going to use it to work on something he believed in - public defender work.

In 1988, while at the Morehead office, he had significant health problems and became unable to try cases, so he "plea bargained" with his doctor to do appellate work. The move to Frankfort has been good. He enjoys working as an appellate attorney and has learned that the skills that he'd used at trial were "fully transferable" to appellate work.

A maverick, a dynamic lecturer, sometimes controversial, an advocate trueborn, Gary shares his thoughts on a process he's been involved with as a public defender for the last 15 years.

Education: Alice Lloyd College, two years undergraduate study. One semester as an exchange student at Oberlin and one semester at UK. He finished his undergraduate work at Berea College in ommunication with theater as a minor.

Employment history: Worked as a public defender administrative intern in January of '73 when the office was on Leawood Drive and had only four lawyers, Tony Wilhoit, Dave Murrell, Bill Ayer and Paul Isaacs, one investigator, Les Mahoney, and two secretaries. Gary worked primarily with Dave Murrell, who is blind, driving him to study PD operations all over the eastern half of the United States, from New Orleans to Boston. Aside from learning about other public defender systems, they attended trials. Gary also was Dave's "eyes" at trial. Watching the trials got Gary hooked on trial practice.

Law School: In the fall of '73, Gary went to UK while continuing to clerk for the office full-time. He was part of a group, along with Dick Burr and others, that created a National Lawyers Guild Chapter (which had been termed by McCarthyites as the legal arm of the American Communist party). They challenged the requirement that freshman couldn't work, and that second and third year students could only work 20 to 30 hours a week. Gary argued that as he was poor he could not attend law school unless he was allowed to work.

Background: Clients he dealt with had a similiar background to his.

Gary grew up in Floyd County. His grandfather was a deputy sheriff who was twice brought up on murder charges. He described his grandfather as an "enforcer" for the coal company, who protected company interests during the union wars. All of his uncles were union men. Two uncles were killed in the mines. One was shot and killed in an union related gun battle in Wheelwright.

Gary has nine brothers and sisters, all living. Gary is the sixth child, the last boy. Gary said he picked up a lot of jury selection skills watching his father work the church crowd on Sunday before service. His father is a retired Southern Baptist minister and coal miner.

In the coal camp in Eastern Kentucky where he grew up, many people spent a couple of years locked up by the government. The first job he ever had making money was as a 10-year old writing letters for his neighbor to her husband who was in the federal penitentiary for making moonshine. She let him "back her letters" to her husband who also had someone in the penitentiary writing his letters to her.

His background gave him a healthy disrespect for the law as it is "corrupt and designed to protect monied and propertied people." He never needed a course in sociology, given his UMW background, to learn that the government exploits people who can't protect themselves.

Clients: The favorite part of criminal defense work for Gary is his relationship with his clients. Frequently they've had keener insight into the political forces at work that were going to decide whether they go to prison or not, than he did himself and while theirs may not be as sophisticated as his analysis, frequently it was more accurate.

Clients also kept him "honest." Lawyers have to deal with their ego. He said spending time with clients kept one from getting "the big head" by reminding the lawyer whose life was at stake. It's easy to avoid pitfalls and traps, such as becoming stuck on one's own voice or personae, when you realize who will have to do the time in prison.

For three years in law school they taught him that a lawyer had to be distant from the clients, but Gary saw that as an armor that lawyers use to keep from getting wounded. While it may lessen the impact on the lawyer, it does the clients no service. He says, "if clients can't touch you, they can't touch anyone else."

During the past few years that I have been Gary's secretary, I have seen a dedication to his clients that goes far beyond the call of duty. Gary has never done an appeal at face value. He always keeps digging and probing until he finds a discrepancy in the case to investigate and pursue. Gary's clients could not possibly realize how fortunate they are to have Gary going that extra mile for them. The one thing that I admire most about Gary is his drive. He never gives up on any situation whether it is something personal or professional. We can all learn from that.

KATHY COLLINS, Legal Secretary
Frankfort Office

Gary Johnson has been an essential part of the Department of Public Advocacy from its beginnings as: an undergraduate intern, a law school intern, a trial attorney and an appellate attorney. His commitment to his clients is an inspiration to all of those who have had an opportunity to share this work with him. This commitment is equaled only in his dedication to his colleagues and the demand for excellence in the service of our clients. It is proper that we honor him because he has honored us with his work and ideals.

PAUL F. ISAACS, Public Advocate
Frankfort Office

In the late 70s, he represented an Iranian student. This was at the time the hostages were taken. The Iranian student had an unusual name that was hard to pronounce. People laughed at the name as if it were a joke. Gary went to the jail and practiced saying the client's name correctly. At arraignment, the judge couldn't say the name so he spelled it into the record. Gary argued that the judge say it. Gary repeated it until the judge could say the name. When he insisted that the client be treated with dignity, it changed the whole atmosphere of the case.

Case Control: Frequently attorneys and clients have a problem as to who controls the case. Those problems occur in direct proportion to how much time and energy the attorney is willing to give to the client. Gary gets to know the client so well and the client knows him so well that decisions become mutual and not far off the mark from what is most effective in the case. A lawyer looking at who should make the call is missing the point. The real problem is the relationship with your client, not whether something should or should not be used.

Training: He doesn't understand people's resistance to training - it's anti-intellectualism, and the ones that complain most are the ones without the skills. He's never heard an experienced lawyer complain about training. Every private institution and business has intensive technical training. He doesn't understand why it's an on-going debate in the department. Further, Gary feels that attorneys ought to be interned as physicians are.

Juries: Gary said with juries he strove as hard as he could to be disassociated from being a lawyer. He has never been a "good old boy" and he never wanted to be one - people will respect competence more than trying to get along. He saw himself as being more credible with juries because of that.

Having grown up in a coal camp in Appalachia, Gary has always identified strongly with the dispossessed. For years he defended these people brilliantly in virtually every county courthouse in Eastern Kentucky. Crowds would marvel at this public defender who spoke so forcefully and eloquently in defense of some of the most villified and despised people in the state. No judge could bully him, no prosecutor could intimidate him. He would not be silenced as long as his client's liberty or life was at stake. No case was impossible, no client unsalvageable. I learned more from him than any attorney I ever worked with.

NEAL WALKER
Loyola DP Resource Center
New Orleans, LA

Direction the office should take: The next step is for field offices to be brought into the process of governing and directing the agency. We now have the technology and means to pull lawyers in the field in on decisions. It is not happening at present.

On the one hand, there is still a "them and us" mentality. The leadership in Frankfort needs the front line experience on how to deliver service, as they for the most part, have no concept of what being a public defender is, as they've never met clients, and are ensconced in essentially bureaucratic jobs. They need to get out and see what's going on in the front lines.

On the other hand, there is a veil of secrecy that the field offices use to protect their activities that Frankfort doesn't perceive. There should be a more democratic process, and the people who actually have to deliver the services should have more input in directing the agency.

Death row: Gary said we are currently not meeting the needs of men on death row as we don't have a permanent capital litigation expert on the row either daily or even weekly.

Fee Cap: Sometime ago a group of public defenders predicted that if capital punishment didn't end, it would soon consume DPA and our resources. Field offices in the state are currently short-cutting other work to bear up under the load of doing capital work. It's a "Hobson's choice." Again, it is not "benign neglect" that we are not adequately funded to meet the needs of capital defendants. We need to enlist the help of the private bar to get funding to provide adequate services. Gary has a great deal of regret that while in private practice, he did capital cases for Kevin McNally. At the time he felt good about doing that work, charging little or no fee, but that only made the problem worse. He admires the work of KACDL and courageous people who say if you're going to inflict capital punishment, you have to provide an adequate funding for that defense and stop propping up a system that would otherwise fall. He calls for attorneys to strike, as any other labor organization, if there's no change.

Capital cases: The death penalty reflects a false answer to a lot of problems in our civilization. It gives false hope that we are doing something about the worst problems in our society.

Defendants are not given a reasonable amount of time to prepare because prosecutors and judges know that it's easier to impose capital punishment if the defendant is unprepared. Again, it's by design, not benign neglect. A "rush to trial panders to the interest group elements, not fairness."

Funding: I don't believe the lack of funding for poor criminal defendants is a benign neglect. Neglect is a misnomer- it signifies no intention. This is deliberate. It isn't without intention that with all the recovered drug money that is being passed out to agencies, none is going to defense services. It doesn't take a genius to figure out that if the public defenders office has adequate staff and funding, the state will have a harder time incarcerating poor people.

Good public defenders: Gary said the common thread in public defenders, that is good public defenders, is the sensitivity for the fallibility for human nature, a dose of healthy mistrust of the power of government to be fair, and the willingness to take personal and professional risks on the behalf of others.

The other consistent trait of a good public defender is their ability to form defense teams that includes paralegals, secretaries, investigators and clients. The staff of a public defender office is the muscle of the effort. The days of the "lone ranger" lawyers are gone. Recognizing the contribution of other advocates brings better representation for the client.

Ethics: Gary said no one should feel badly about considering how aggressive advocacy might affect other aspects of their practice. That consideration, however, should last only for 30 seconds, then end. If you're not able to resolve that question immediately and take whatever action you need to take to the best benefit of your client, you're putting your entire practice and profession at risk and need to examine yourself ethically. It is a myth that aggressive advocacy with police officers or court personnel is held against you. If you strike hard and fair blows for the client, you may end up representing that cop's relatives. Good work is respected, even if it is perceived as adverse at the time.

A defense lawyer has the duty to use every legal authority in support of a client's rights - be that investigation of bar association complaints of unethical behavior of prior lawyers representing the client, prosecutors having conflicts of interest, or exposing perjury by alleged experts who testify against clients and lie about their qualifications, or grades in medical school. He said it's up to lawyers to also pursue disciplinary procedures.

Advice to young lawyers: Gary said young lawyers ought to turn their backs

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The Kentucky Penal Code

A Time for Reexamination

FRANK E. HADDAD, JR.

"Our present criminal law is a product of historical accidents, emotional overreactions, and the comforting political habit of adding a punishment to every legislative proposition." [1]

Almost twenty years ago, Professor Kathleen Brickey began her review of the "new" Kentucky Penal Code with the above quotation. At the time, the 1972 Kentucky General Assembly had recently passed House Bill 197 creating the Kentucky Penal Code. As Professor Brickey observed with the passage of the Code ". . . the criminal law of Kentucky was dragged, screaming, into the twentieth century." [2]

The twenty-first century is now looming large on the horizon. This year we will celebrate the two hundredth anniversary of our U. S. *Bill of Rights* and the one hundredth anniversary of our Kentucky *Bill of Rights*. It is only appropriate in view of this historic occasion that the Kentucky Bar pause to reexamine the Penal Code. Many statutory amendments and judicial reinterpretations of the Code have developed over the past seventeen years. In the author's view, a significant number of these *ad hoc* changes represent an unfortunate departure from the underlying purpose and policy of the 1974 Code.

The original Penal Code was drafted to be a comprehensive but highly flexible codification, a codification that would fully define all criminal offenses, eliminate the need for "special legislation" and provide a uniform classification of crimes. Probation was to be a primary sentencing option for a broad range of offenses. Judges were to be given substantial flexibility in determining the concurrent or consecutive service of multiple terms of imprisonment. The absence of extreme emotional disturbance was intended to be a statutory element of the offense of intentional murder.

That is not the way that things have worked out, however. Seventeen years of piecemeal special legislation and judicial reinterpretation, have created a Kentucky Penal Code that in significant respects no longer represents the structure or intentions of the original drafters. The comprehensive and highly flexible sentencing plan of the Code has been ravaged by special legislation that undermines the most important elements of sentencing discretion. Judicial interpretation has in certain instances rewritten the statutory elements of certain crimes. Many of the very problems the Code sought to cure are back in force, reanimated by ill-conceived, special legislation. It may well be time once again, in the words of Professor Brickey, that the criminal law of Kentucky is "dragged, screaming," into the twenty-first century.

I. THE PENAL CODE: AN HISTORIC PERSPECTIVE

There is an old maxim that to know where you are going you must first know where you are and where you have been. This observation applies well in the present circumstances. It is difficult, if not impossible, to appreciate the problems that have developed in the present Penal Code without at least a brief understanding of Kentucky criminal law as it existed prior to the code.

Some new attorneys might be surprised to realize that the Kentucky Penal Code is a relatively recent statutory creation. The Code originated in a joint resolution of the 1968 General Assembly that directed the Legislative Research Commission and the Kentucky Crime Commission to study the statutory criminal law of the state. [3] In 1971, a team of four drafters working under the guidance of a twelve member advisory committee presented a final draft of the proposed Penal Code which was presented to the 1972 General Assembly as House Bill 197. [4] The proposed Kentucky Penal Code was the first complete revision and codification of Kentucky's substantive criminal law. [5] The new Code was a revision that was sorely needed at the time.

Kentucky criminal law prior to the Code consisted of a patchwork of haphazardly proliferated penal statutes that, in the words of one jurist, "bristled with inconsistencies and incongruities." [6] Over the years, the legislature had randomly codified most of the common law criminal offenses. The criminal statutes were widely scattered throughout the revised statutes and poorly indexed. Each criminal statute carried its own separate penalty. Many times, this piecemeal codification of common law crimes had led to irrational disparities in the punishment for similar crimes.

Examples of inequitable punishment for similar offenses were common. For example, petty larceny was punishable by a maximum of twelve months while the theft of a chicken worth two dollars could result in a five year prison sentence. [7] Carrying a concealed deadly weapon was punishable by two to five years of imprisonment, but reckless shooting into the back of an automobile carried a maximum of twelve months of imprisonment. [8] Drawing a deadly weapon at a school, church or on a public highway carried a maximum of fifty days imprisonment, while drawing a deadly weapon inside the platform of an occupied passenger coach was punishable by twelve months of imprisonment. [9] Finally, the rape of a child under twelve was penalized by a sentence of life imprisonment *with* the privilege of parole, while the rape of a child over twelve years of age was punishable by life imprisonment *without* privilege of parole. [10]

To remedy these inconsistencies, the drafters of the Penal Code created a unified codification of the criminal law "consisting of more than two hundred and eighty interrelated provisions . . . carefully meshed to achieve internal consistency with a unified statutory framework." [11] A major policy underlying this unified system of classification and sentencing was flexibility in sentencing. As one commentator aptly observed, "the drafters of the Kentucky Penal Code stressed the importance of flexibility in the alternatives available to the sentencing authority." [12] Automatic sentences for various crimes, without consideration of alternatives such as probation, were to be avoided. [13] The breadth of the sentencing judge's discre-

tion to impose probation was broad under the code: Any person convicted of a crime who had not been sentenced to death was eligible to be sentenced to probation. [14] The liberal use of creative sentencing tools such as probation and conditional discharge was to be encouraged. [15] This policy was well-summarized by one commentator who observed that probation is,

> Not a mere gratuity bestowed upon criminals by lenient or weak trial judges, probation is a legitimate device for the treatment and rehabilitation of offenders; consequently, it should be given as much consideration in the sentencing decision as the more common forms of punishment, imprisonment and fines. [16]

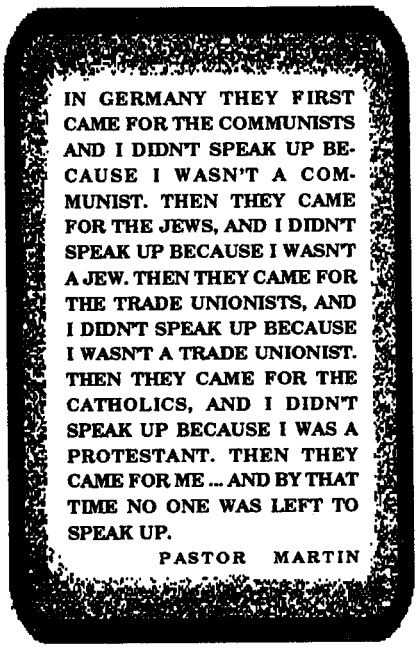
The Commentary of the Kentucky Crime Commission left little doubt about the drafters' intentions on the use of probation and conditional discharge. The Commentary accompanying KRS 533.010 unequivocally states that,

> This section provides encouragement in several specific ways. First of all, (1) provides that probation or conditional discharge may be granted to any offender, without regard to the seriousness of the offense, unless that offender has been sentenced by a jury to death. This provision reflects the judgment that powerful and important mitigating circumstances may exist even with commission of the most serious of criminal offenses. No reason exists for denying to the trial court sufficient flexibility to exercise discretionary judgment as to probation or conditional discharge following conviction of such a crime.
>
> . . . This subsection seeks to start the sentencing process with probation or conditional discharge as the desired disposition with a movement from there to a sentence of imprisonment only upon a finding of some particular reason justifying the latter. It is to be acknowledged that the trial court must be granted substantial discretion in deciding upon the disposition of convicted offenders. [17]

The substantial discretion of the sentencing court to decide the disposition of convicted offenders also was reflected in other provisions of the Penal Code. For example, KRS 532.110 as originally drafted was intended to afford the sentencing court extensive flexibility in determining whether multiple sentences ran concurrently or consecutively. The Kentucky Crime Commission in its Commentary provided that KRS 532.110,

> [H]as as its underlying basis the idea that a trial court should be given as much flexibility as possible in providing for the disposition of an offender. In this respect, the section is consistent with the general policy of this entire chapter. Under this provision, when faced with the task of imposing multiple sentences, the court is given discretion to run them concurrently or consecutively. Pursuant to (2), if there is no designation as to the manner in which the sentences are to run, they must run concurrently. The reason for this combined effect was stated well in the Commentary to the New York Penal Code:
>
> The rationale of these rules of construction is that consecutive sentences ought to be the result of deliberate action and not inadvertence or rote. [18]

The discretion to impose concurrent or consecutive sentences applied even to defendants who committed offenses while on parole. The sentencing judge was to have discretion to determine whether the defendants new sentence was to be served concurrently or consecutively to the unserved portion of his previous sentence. The court was to be obligated to designate the second sentence as consecutive if it was to be so treated. Without the designation, the new sentence and the unserved portion of the old sentence were to be served concurrently. [19]



Unfortunately, these policies of sentencing flexibility, and other important elements of the code, were soon to be diluted or entirely abandoned. Almost from the inception of the code, the legislature began to materially alter its unified structure. Although House Bill 197 passed the House on March 7, 1972, the substituted bill contained several major changes, including the deletion of the abortion provisions and reinstatement of the existing pre-code obscenity statutes. [20] The House of Representatives also modified the provisions of the Code relating to culpable mental states.

The original draft of the Code proposed four mental states:

1) intentional,
2) knowing,
3) reckless and
4) criminal negligence.

The House version redesignated the definition of reckless conduct to be wanton conduct and relabeled criminal negligence to be a reckless mental state. [22] Fortunately, the Senate substantially reinstated the original version of the culpable mental states with only a minor changes in the labels used to designate two of the four states of mind.

Such legislative tinkering with the Code's was quick to cause concern among legal scholars. Professor Brickey in her article on the Kentucky Penal Code pointed to the dangers inherent in sporadic and isolated changes to the structure of the code.

> A problem which frequently impairs the effectiveness of a code is the tendency of legislatures to respond to public reaction when new forms of old problems surface. Viewed in isolation from their proper context, these problems give rise to the emergence of 'special legislation' . . . [23]

In retrospect, Professor Brickey's warning has proved to be all too prophetic. Special legislation and judicial departure from the policy of the drafters have significantly undercut the Code. Over the years, the flexibility and discretion once vested in the sentencing court have been gradually eroded to the point that the Code no longer reflects the sentencing policies of its original drafters. Many of the inequities and irrationalities that prompted the enactment of the original code have crept back into the statutory picture.

II. SPECIAL LEGISLATION AND THE PENAL CODE

The legislature did not waste any time in beginning its retreat from the sentencing policies underlying the newly-enacted penal code.

A mere two years after the effective date of the code, the legislature in 1976 enacted the first special legislation un-

dercutting the code's flexible approach to sentencing. This first special legislative departure appeared in KRS 533.060, the statute that prohibits a sentencing court from considering probation, shock probation or conditional discharge for defendants convicted of a Class A, B or C felony involving the use of a weapon.[24] Not only did the new statute summarily exclude such defendants from consideration for probation or conditional discharge, it continued in Subsection (2) to remove the discretion of the sentencing court to impose either concurrent or consecutive sentences for offenses committed by a defendant while awaiting trial on another offense, on probation, shock probation, or conditional discharge.

In one fell swoop, the legislature had dealt a devastating blow to the ability of sentencing judges in Kentucky to consider probation or conditional discharge based on the individual circumstances of a defendant.

The legislature, by its special legislation, created a conclusive presumption that defendants such as those described in KRS 533.060 are *automatically* ineligible for probation or parole, a result that flies directly in the face of the intent of the drafters of the code.

The automatic ineligibility provisions of this first special legislation have caused recurrent problems for Kentucky courts. The provisions of Subsection (2) of KRS 533.060 are irreconcilable with the concurrent and consecutive sentencing provisions of KRS 532.110, which were intended to give sentencing judges the discretion to impose consecutive or concurrent sentences for offenses committed while on probation or parole.

As the matter stands, KRS 533.060 has been interpreted in *Devore v. Commonwealth*, Ky. 662 S.W.2d 829 (1984), to *require* the imposition of consecutive sentences for offenses committed while a defendant is on parole. *Devore* further departs from the policy of the penal code by holding that the limitation on the maximum length of consecutive sentences found in KRS 532.110(1)(c) does *not* apply to sentences imposed on defendants who commit further offenses while on parole. Unlimited, consecutive sentences now appear to be the rule for offenses committed while on probation, parole or conditional discharge.[25] The special legislation of KRS 533.060 and the judicial gloss of *Devore* represent a 180 degree departure from the sentencing policies underlying the Kentucky Penal Code.

The sentencing problems created by Subsection (1) of KRS 533.060 were further exacerbated in 1985 when the concept of strict vicarious liability was judicially incorporated into Subsection (1) by *Pruitt v. Commonwealth*, Ky., 700 S.W.2d 68 (1985), to deny the option of probation to a defendant convicted of complicity to commit murder in the shooting death of her husband. Although the defendant did not "use" the weapon herself, the court ruled that her vicarious use of the weapon rendered her ineligible for consideration for probation under Subsection (1), a result that overruled an earlier Court of Appeals decision, *Commonwealth v. Reed*, Ky. App., 680 S.W.2d 134 (1984). The result in *Pruitt* represents another departure from the sentencing policies of the Code.

The Denegration of KY's Penal Code

I learned during the turbulent enactment process that sensible revision could not be accomplished on an *ad hoc* basic. That experience prompted me to urge that reform of the state's criminal law should be viewed as an organic and ongoing process requiring an independent, permanent body of qualified persons to advise the legislature on how proposed criminal legislation would affect the structural and substantive integrity of the Penal Code. We cannot expect careful analysis of how an isolated bill interrelates with the rest of the Penal Code by legislators who convene 60 days every two years and who consider, as in 1972, more than one thousand bills and more than 250 resolutions. That much is clear.

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The next piece of special legislation appeared from the General Assembly in 1984 in the form of KRS 532.040. This statute, similar to the special legislation of 1976, was enacted to exclude a broad class of defendants from consideration for probation or conditional discharge. Under KRS 532.045, defendants convicted of rape, sodomy, sexual abuse, promoting or permitting prostitution, incest, or using a minor in a sexual performance are *automatically* denied consideration for probation or conditional discharge. The statute completely strips the sentencing judge of any sentencing discretion he or she might previously have had under the Penal Code. With regard to probation or conditional discharge, sentencing is a rote process involving no individual consideration of the circumstances of any single defendant. The constitutionality of this statute was upheld by the Court of Appeals in *Owsley v. Commonwealth*, Ky. App., 743 S.W.2d 408 (1987).

The third piece of special legislation appeared in 1986 in the form of the controversial "truth-in-sentencing" law. Undeniably an unconstitutional violation of the separation of powers doctrine, the statute was enacted to legislatively revise Kentucky's sentencing procedures by permitting juries to consider the existence and nature of a defendant's prior felonies and misdemeanors, along with minimum parole eligibility and maximum expiration of sentence. It is simply impossible in the context of this article to discuss the many problems created by this one piece of special legislation. The statute has been propped-up repeatedly over the past five years by a series of controversial decisions founded only on comity.[26] One has only to read these decisions to appreciate the serious problems created by this latest special legislation.

In terms of sentencing, KRS 532.055 immediately runs afoul of the sentencing policies of the 1974 Penal Code by permitting the jury to recommend concurrent or consecutive service of sentence. The Kentucky Penal Code intended that judges make this important determination, free from outside influences, and that they be afforded maximum flexibility when doing so. Indeed, the entire impetus of KRS 532.055 is the imposition of harsher punishments through "truth-in-sentencing." This runs directly contrary to the policy of the Code drafters to make rehabilitation the primary objective of the code.[27] The "judicial band-aids" (as one judge has referred to the opinions on KRS 532.055) relied on to save the statute only further remove sentencing from the unified structure envisioned in the Code.

Over the years, special legislation such as KRS 532.055, 532.040 and 533.060 has so-degraded the uniform sentencing structure envisioned by the drafters of the Code that the very inflexibility they struggled to remove is now indelibly ingrained in the present code. Probation and conditional discharge are the *exception*, not the rule, for a large class of criminal defendants. Sentencing judges have absolutely *no* discretion to consider probation or conditional discharge for a wide variety of offenses regardless of the individual circumstances of the defendant. It is difficult to imagine a sentencing scheme less flexible and more contrary to the policies of the 1974 Code.

Consecutive sentences are now the rule for offenses committed by defendants awaiting trial, or on probation, conditional discharge or parole. The sentencing judge has *no* discretion to consider concurrent sentences, again a result that is one hundred and eighty degrees the opposite of what was intended under the original Kentucky Penal Code. In these important respects, sentencing is now the type of automatic, rote sentencing, that the code specifically sought to prevent.

III. EXTREME EMOTIONAL DISTURBANCE

Another troubling departure from the original provisions of the penal code centers on the treatment of extreme emotional disturbance under KRS 507.020, Kentucky's murder statute. Extreme emotional disturbance was intended by the drafters to be a negative essential element of murder, an essential element of manslaughter and a mitigating circumstance of capital punishment. Under KRS 507.020(1)(a), a person is guilty of murder when he causes the death of another with intent to cause that death,

> Except that in any prosecution, a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. [28]

The negative element of extreme emotional disturbance was created by the penal code drafters to replace the common law element of sudden heat of passion with a broader concept. Under this new broader concept, the circumstances which would constitute a reasonable explanation for the defendant's disturbed emotions were to be viewed from the standpoint of an individual in the defendant's situation under the circumstances as the defendant believed them. This new language introduced an element of subjective evaluation which did not exist under the old common law. Under the old law, provocation was required to be reasonable in an objective sense. [29]

At first, the courts appeared to follow the language of the statute to require the Commonwealth to negate the presence of extreme emotional disturbance as an element of murder. [30]

However, in 1980, the Supreme Court in *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980), began to significantly revise the import of extreme emotional disturbance as an essential negative element of murder. In *Gall*, the court concluded that while the Commonwealth still has the burden of proof in order to justify an instruction on manslaughter, "there must be something in the evidence sufficient to raise a reasonable doubt whether the defendant is guilty of murder or manslaughter."

In *Wellman v. Commonwealth*, Ky., 694 S.W.2d 696 (1985), the Court specifically overruled its earlier decisions in *Ratliff, Bartrug* and *Edmonds* [31] that held that the absence of extreme emotional distress is not an essential element of the crime of murder. The court continued to hold that the absence of extreme emotional distress is merely a matter of evidence rather than an element of the crime. The court also held that mental illness in and of itself is not the equivalent of extreme emotional disturbance.

Gradually, over the years, the Court has continued to narrow the breadth of extreme emotional disturbance to where it is no longer the expansive concept envisioned in the model penal code. For example, evidence of a defendant's drug use is of itself not sufficient to warrant a manslaughter instruction under extreme emotional disturbance. [32] Nor is evidence of the use of alcohol enough to trigger an instruction based on extreme emotional disturbance. [33] Earlier decisions that referred to "any" or "some" evidence as being needed to request an instruction based on extreme emotional disturbance apparently have now been undercut by *Bevins v. Commonwealth*, Ky., 712 S.W.2d 932 (1986). In *Bevins*, the Court speaks in terms of a defendant's burden of proof to establish extreme emotional disturbance as being required to produce "probative, tangible and independent evidence of initiating circumstances."

When one examines the model penal code commentary on extreme emotional disturbance, it is apparent that the drafters of the 1974 Kentucky Penal Code had in mind a much broader meaning. The Model Penal Code contains an expansive concept of extreme emotional disturbance intended to "sweep away the rigid rules that have developed with respect to the sufficiency of particular types of provocation..." [34] As the matter presently stands, extreme emotional disturbance is merely an affirmative defense, not a negative essential element of KRS 507.020. The Courts have by judicial interpretation removed this statutory element. Such judicial surgery violates the due process clause. Only the legislature may constitutionally "reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes." [35] So long as KRS 507.020 contains the negative essential element of extreme emotional disturbance, it is the burden of the prosecution to prove beyond a reasonable doubt the absence of this element included in the definition of the offense. [36]

CONCLUSION

This article began with the words of Professor Kathleen Brickey. It is only appropriate that it end with them as well. More than seventeen years ago, Professor Brickey offered the following warning. In her Penal Code article, she cautioned that,

> Isolated amendments to the Code as adopted threaten to undermine the conceptual basis of the unified sentencing structure. [37]

The professor could not have been more correct. Seventeen years of sporadic and isolated legislative tinkering have left the sentencing structure of the Code riddled with inflexibility and inconsistency. The broad-ranging problems that now exist in the Code have not gone unnoticed by the General Assembly, which this past year created a legislative task force on sentences and sentencing practices [38] or by the federal courts, which recently refused on grounds of comity to consider what was characterized as a "serious question" involving consecutive sentencing in Kentucky. [39]

In sum, the time has come for a serious and deliberate reexamination of the Kentucky Penal Code, its policies and provisions. Until such reexamination is made, it may justifiably be argued that our present criminal sentencing law is the product of "historical accidents, emotional overreactions and the comforting political habit of adding a punishment to every legislative proposition." [40]

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Frank E. Haddad, Jr. is past president of the KBA (1977-78); past president of KATA (1965); past president of the Louisville Legal Aid society (1967-72); past president of NACDL (1973), and is past president of the KACDL.

FOOTNOTES

[1] Brickey, *An Introduction to the Kentucky Penal Code: A Critique of Pure Reason?*, 61 Ky. L.J. 624 (1973) citing M. Morriss and G. Hawkins *The Honest Politicians Guide to Crime Control*, p. 20 (1970).

[2] *Id.*

[3] Palmore, *Preface to Symposium on Kentucky Penal Code*, 61 Ky. L.J. 620 (1973) *citing* Ky. Acts Ch. 232 (1968)

[4] Brickey, *supra*, note 1, at p. 625; HB 197, 1972 Ky. Gen. Ass. Reg. Sess.

[5] Kentucky's Substantive Criminal Law was somewhat revised in 1962 when the existing statutory provisions were reorganized and renumbered, but this earlier revision was not a compreshensive attempt to revise the substance of the criminal statutes. Brickey, *supra*, note 1, at page 628.

[6] Palmore, *supra*, note 3, at p. 622.

[7] Compare KRS 433.230 (repealed effective July 1, 1974) with KRS 433.250 (repealed effective July 1, 1974).

[8] Compare KRS 435.230 (repealed effective July 1, 1974) with KRS 435.190 (repealed effective July 1, 1974).

[9] Compare KRS 435.200 (repealed effective July 1, 1974) with KRS 435.210 (repealed effective July 1, 1974).

[10] Compare KRS 435.080 (repealed effective July 1, 1974) with KRS 435.090 (repealed effective July 1, 1974). *See* Brickey, *supra*, note 1, p. 632, n. 44.

[11] Brickey, *supra*, note 1, p. 631.

[12] Bartlett, *Authorized Disposition of Offenders Under the New Kentucky Penal Code*, 61 Ky. L.J. 708 (1973).

[13] *Id.*, at 709.

[14] KRS 533.010.

[15] Kentucky Legislative Research Commission, Kentucky Penal Code Commentary 285.

[16] Bartlett, *supra*, note 13, at p. 724.

[17] *Id.*

[18] Kentucky Crime Commission, Kentucky Penal Code Commentary 283.

[19] *Id.*

[20] Brickey, *supra*, note 1, at p. 628.

[21] Lawson, *Kentucky Penal Code: The Culpable Mental States and Related Matters*, 61 Ky. L.J. 657, 658 (1973).

[22] *Id.*

[23] Brickey, *supra*, note 1, at p. 635.

[24] KRS 533.060(1).

[25] The courts of Kentucky have uniformly adhered to *Devore* over the years. A long line of Kentucky decisions cites *Devore* with approval. *See, e.g., Riley v. Parke*, Ky., 740 S.W.2d 934 (1987); *Corbett v. Commonwealth*, Ky., 717 S.W.2d 831 (1986); *Commonwealth v. Martin*, Ky. App., 777 S.W.2d 236 (1989); *Harris v. Commonwealth*, Ky. App., 674 S.W.2d 528 (1984).

[26] *See, Boone v. Commonwealth*, Ky., 780 S.W.2d 615 (1989); *Commonwealth v. Hubbard*, Ky., 777 S.W.2d 882 (1989); *Huff v. Commonwealth*, Ky., 763 S.W.2d 106 (1989); *Commonwealth v. Reneer*, Ky., 734 S.W.2d 794 (1987).

[27] Bartlett, *supra*, note 13, at p. 709.

[28] KRS 507.020(1)(a).

[29] *See, Creamer v. Commonwealth*, Ky., 629 S.W.2d 324 (1982) (reasonableness must be viewed through the defendant's eyes no matter how preposterous).

[30] *Edmonds v. Commonwealth*, Ky., 586 S.W.2d 24 (1979); *Bartrug v. Commonwealth*, Ky., 568 S.W.2d 925 (1978); *Ratliff v. Commonwealth*, Ky., 567 S.W.2d 307 (1978).

[31] *See* note 31. *supra.*

[32] *Moore v. Commonwealth*, Ky., 634 S.W.2d 426 (1982).

[33] *Ward v. Commonwealth*, Ky., 695 S.W.2d 404 (1985).

[34] Model Penal Code 201.3, Comments Note 5.

[35] *Patterson v. New York*, 432 U.S. 197, 211 (1977).

[36] *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

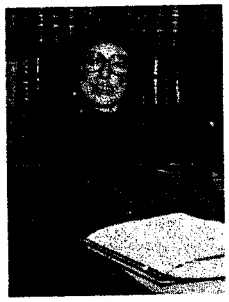
[37] Brickey, *supra*, note 1, at p. 633.

[38] Kentucky Acts, Chp. 156, 1 and 2.

[39] *George v. Seabold*, 909 F.2d 157 (6th Cir. 1990).

[40] Brickey, *supra*, note 1, at p. 624.

Public Service Requirement at the University of Louisville School of Law



SUSAN M. KUZMA

In a nationally recognized action, the School of Law of the University of Louisville has adopted public service as a mandatory part of the curriculum. In November 1990 the faculty approved a proposal to make the performance of 30 hours of public service at an approved placement a graduation requirement. The adoption of this requirement makes Louisville one of a handful of law schools across the country that have incorporated *pro bono* activities as part of the curriculum.

The new requirement applies to students entering in the fall of 1991, and normally will be satisfied in the third or fourth year. Current students, however, may participate in a voluntary pilot program, to begin in the fall of 1991. Student interest in the program thus far has been very enthusiastic; more than seventy students demonstrated support by volunteering to serve on an advisory committee that will work with the faculty in the development of placements.

The incorporation of a public service requirement into the traditional law school curriculum reflects a growing professional concern about making legal services available to persons of limited means and working toward improvements in the law and the legal profession. The rules of Professional Conduct governing Kentucky Lawyers encourage the rendering of public interest legal service, as do the American Bar Association's Model Rules of Professional Conduct. The Law School's public service program seeks to give recognition and substance to this dimension of a lawyer's professional responsibilities, just as the substantive courses traditionally offered at law schools focus upon the lawyer's role as an advocate and advisor for his or her clients.

Because the public service program is grounded in professionalism, it reflects no political viewpoint or agenda. Students will be allowed to choose among diverse public service opportunities. By being exposed to various areas of public service, students may develop an interest in pursuing employment after graduation in offices that have historically provided legal services to the poor, such as the Public Defender's Office or the Legal Aid Society; or they may be attracted to jobs otherwise relating to public service. This exposure will also stimulate interest in handling *pro bono* cases after graduation, whatever the student's ultimate career choice. In this way, the public service program will assist in meeting the goal of the profession to increase lawyers' involvement in public service.

The program will also provide an excellent opportunity for students to contribute positively to the community. In the course of fulfilling the public service requirement, students will be exposed, perhaps for the first time, to various community problems and to unaddressed needs of the community for legal services. During their public service placement, students will not only help to serve those immediate needs, but also acquire practical experience in lawyering that will enhance their academic experience and assist them as they embark upon their legal careers after graduation.

It is anticipated that students will complete their 30 hours of public service in a single semester after they have com-

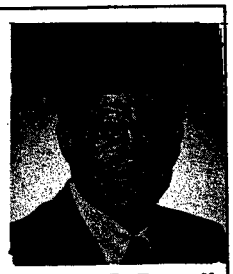
DPA Applauds U of L

Paul F. Isaacs

The Department of Public Advocacy applauds the University of Louisville School of Law's new mandatory public service requirement as a part of their curriculum.

The practice of law is a privilege and all lawyers need to be reminded that public service is a very important part of this privilege. This commitment needs to begin in law school where so many of our values are created. All of us in the Department look forward to working with those students who choose the Department of Public Advocacy as a part of their mandatory public service requirement.

PAUL F. ISAACS
Public Advocate



Thomas B. Russell

The University of Louisville School of Law is to be applauded for instituting a program of 30 hours of public service at an approved placement as a graduation requirement. Rule of Professional Conduct 6.1, as adopted by the Kentucky Supreme Court, emphasizes the concern of the Kentucky Bar Association and the entire legal profession in encouraging public interest legal service.

Several years ago the Board of Governors of the KBA unanimously adopted a resolution encouraging all lawyers practicing in Kentucky to donate 50 hours per year to public interest legal service. During the past year, Ky. lawyers have donated or pledged approximately 38,000 hours of their time to provide legal service to persons of limited means.

This voluntary service of the KBA has been significantly enhanced by the action of the University of Louisville School of Law. Early in their legal education and career, students will be exposed to this significant manner in which they can help others. The KBA joins with others in praising the University of Louisville School of Law for emphasizing the prime criteria to true professionalism - service to others.

RULE 6.1 *PRO BONO PUBLICO* SERVICE

A lawyer is encouraged to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

THOMAS B. RUSSELL
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pleted the equivalent of two years of law school. The law school is developing a list of approved placements, but students will also be permitted to formulate their own proposals for meeting the public service requirement, subject to faculty approval. Because students will be permitted to satisfy this requirement during the summer, when students are not attending school, the placement may be in locations outside the greater Louisville area.

The faculty of the Law School is very excited about this educational opportunity for the student body, and hopes that because of this opportunity the community and the legal profession will reap benefits now and for years to come.

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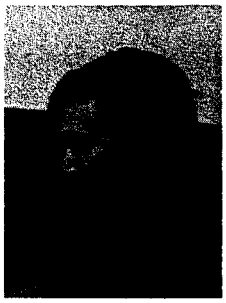
Susan is an Assistant Professor of Law at the University of Louisville School of Law. She began teaching there in 1988. She teaches primarily in the area of Criminal Law and Criminal Procedure. She is a 1978 graduate of the Ohio State Law School. In 1982 she became a trial attorney with the criminal division of the United States Department of Justice in Washington, D.C. working in the Public Integrity Section. Since 1989, Susan has been a member of DPA's Public Advocacy Commission.

Public Defenders Seek Judgeships

David Murrell and Bette Niemi have filed to become judges in Jefferson County.



DAVID MURRELL

David Murrell has filed to become a judge in Division 13. He faces off against Jim Brown, Robert Lahman, Jr., Geoffrey Morris and C. Fred Partin.

David Murrell worked with DPA for seven years. He was DPA's Deputy Public Advocate. He continues, while in private practice to do *of counsel* appeals.

BETTE NIEMI

Bette Niemi has filed to become the Division 9 judge. She faces William Knopf.

Bette Niemi worked for DPA as a trial and post-conviction attorney for 11 years. She was Director of the office covering Oldham, Henry and Trimble counties and Regional Manager of two other full-time offices in Paducah and Hopkinsville.

The National Association for Public Interest Law

The State of LRAP Advocacy: School-Based Programs

What is an LRAP?: Loan Repayment Assistance Programs, LRAPs, are post-graduate financial aid programs which assist law school graduates pursuing low-paying public interest positions in repaying their loans. Loan assistance plans offer a more efficient allocation of scarce financial aid resources to those who are most severely burdened by their educational debts as a result of their career choice.

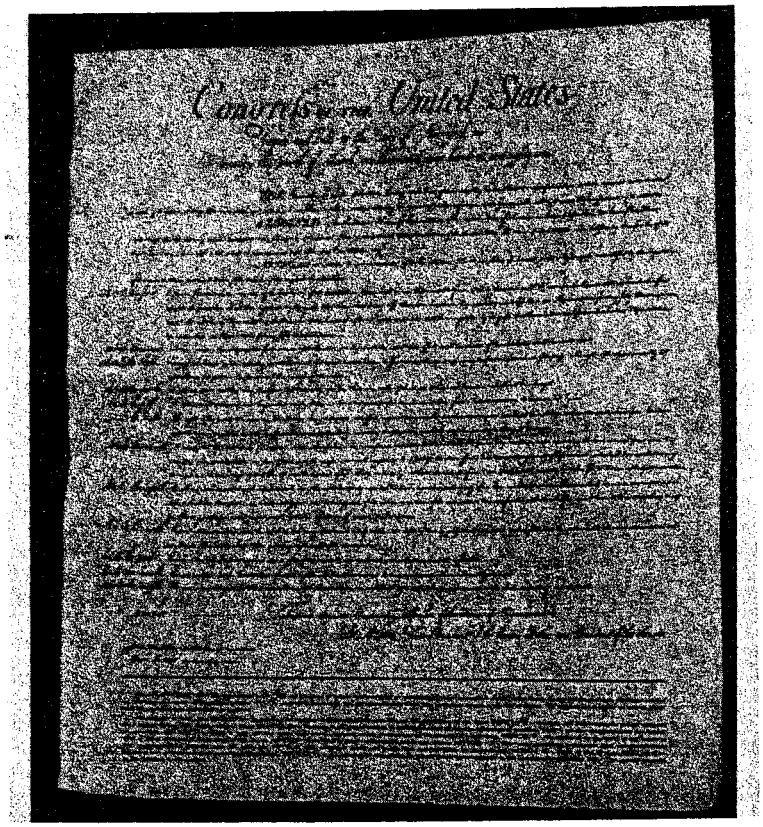
Why Should Law Schools Have LRAPs?: Public interest practice has become virtually inaccessible to young attorneys struggling to reimburse staggering educational debts. While law graduates have repeatedly proven their commitment to public interest law, they are unable to work for organizations which cannot afford to provide them with a basic standard of living. With rocketing tuition rates, an increasing reliance on loans as a means of financing legal education, and a growing disparity between public interest and law firm salaries, graduate debt burdens are increasingly dissuading students from pursuing their public interest law aspirations. As a result, legal services, public interest and government employers have difficulty recruiting and retaining qualified young attorneys. Ultimately the legal needs of clients of legal services, civil rights organizations, consumer and environmental advocates, and other public interest organizations remain unmet.

How Does an LRAP Work?: A graduate benefiting from an LRAP only pays a fixed percentage of her disposable income towards her educational loans. The school then assists the graduate in paying her debts by deferring or forgiving the remainder of the loans. There are two aspects of loan assistance programs: Loan deferral and loan forgiveness. Most of the schools combine the two in their programs, though some offer only one or the other.

NAPIL's Role: NAPIL acts as a national clearinghouse on loan repayment assistance and forgiveness programs. We publish two publications in this capacity: *An Action Manual for Loan Repayment Assistance* and *The NAPIL Loan Repayment Assistance Program Report*.

For further information please contact:
NAPIL, 1666 Connecticut Avenue, N.W., Suite 424, Washington, D.C. 20009; (202) 462-0120.

No document has more meaning to the American Way of Life than does Our *Bill of Rights.*



Q. Who protects and advances the individual liberties guaranteed by our *Bill of Rights*?

A. Kentucky Public Defenders who represent more than 70,000 fellow Kentucky citizens charged with committing a crime but too poor to hire a lawyer.

Department of Public Advocacy
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006

Jefferson County District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, KY 40202
(502) 625-3800

Fayette County Legal Aid
111 Church Street
Lexington, KY 40507
(606) 253-0593

We're looking for a few more exceptional individual liberty litigators.

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

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

FAILURE TO MAKE REQUIRED DISPOSITION OVER $100 - AGGREGATION OF SUM

Commonwealth v. Caudill
38 K.L.S. 2 at 4
(January 25, 1991)

Caudill, a Deputy Campbell County Clerk, was indicted for theft by failure to make required disposition based on her conversion to personal use of fees for driver's licenses issued from October, 1983 to August, 1984. Although no single theft amounted to more than $8, the aggregate of them came to approximately $2,000. The trial court dismissed the indictment, holding that each theft constituted a separate misdemeanor and that the thefts could not be totalled so as to charge a felony. The Commonwealth appealed.

Caudill relied on *Nichols v. Commonwealth*, 78 Ky. 180 (1879), which held that when several items of property are stolen at one time and one place there is only one offense. Caudill argued inversely based on Nichols that where items of property are taken at different times there are multiple offenses. The Court disagreed, choosing instead to apply the rule that if the items of property were taken pursuant to a "single purpose or impulse" there is only one offense. The Court then reversed, stating that the allegations of the commonwealth, if believed by a jury, could form the basis for a conclusion that Caudill acted pursuant to a "general larcenous scheme." Judge Dyche dissented.

SPEEDY TRIAL - INCOMPETENT DEFENDANTS

Commonwealth v. Miles
38 K.L.S. 3 at __
(February 15, 1991)

Miles was first indicted for murder in 1982. The indictment was subsequently dismissed without prejudice when Miles was found to be incompetent. Over the following years Miles was reindicted three times, each indictment being ultimately dismissed due to Miles continuing incompetency. The final indictment was dismissed with prejudice based on the trial court's holding that Miles had been denied a speedy trial. The commonwealth appealed.

The Court of Appeals reversed, stating its reasons as follows:

> Bearing in mind the purposes of the Speedy Trial Clause of the Sixth Amendment, and taking into account that since March 1982 the appellee's liberty has not been impaired for any appreciable period because of the criminal charges against him, that the charges made by each grand jury have been dismissed promptly upon the determination of incompetency so that unresolved criminal charges have not been pending against him for lengthy periods of time, and that the reason for any delay of trial has been the appellee's illness, we conclude that the appellee has not been denied a speedy trial.

The Court of Appeals also held that any finding that Miles had been denied due process of law by the lapse of time in bringing him to trial was premature. "The possibility that the appellee might suffer some actual prejudice by the delay because of the unavailability of or fading memory of witnesses so that he could not receive a fair trial is a question which certainly would present itself when, and if, the appellee is able to stand trial."

KENTUCKY SUPREME COURT

INSTRUCTIONS - DUI, WANTON MURDER / DOUBLE JEOPARDY

Walden v. Commonwealth
38 K.L.S. 1 at 5
(January 17, 1991)

Walden was convicted of DUI and wanton murder arising out of a single incident that resulted in a fatal accident.

At Walden's trial, the judge read to the jury the statutory presumption contained in KRS 189.520(3)(c). The trial court then refused a defense request to admonish the jury that the presumption applied only to the DUI charge and had no bearing on the murder charge. The Kentucky Supreme Court held that the presumption should not have been admitted at all but held that its admission was harmless error since "there is overwhelming evidence from sources other than the reading of the statute to prove the appellant was drunk at the time of the collision" The Court specifically noted evidence that Walden's blood alcohol level was .297%.

Walden next contended that the evidence was insufficient to prove the "extreme indifference to human life" element of the wanton murder charge. The Court rejected this argument, stating: "...the extreme nature of the appellant's intoxication was sufficient evidence from which a jury could infer wantonness so extreme as to manifest extreme indifference to human life."

Finally, Walden asserted that his protection from double jeopardy was violated by his convictions of both DUI and wanton murder arising out of a single incident. The Court agreed stating: "Here, as in *Grady v. Corbin* [495 U.S. ___, 110 S.Ct. 2087, 109 L.Ed.2d 548 (1990)] the proof that the appellant was driving under the influence of alcohol was the same proof used to establish the wanton conduct element of the criminal homicide." The Court refused the commonwealth's urging that the *Blockburger* test be dispositive of the issue, and instead looked to the proof at trial and the commonwealth's closing argument to conclude that: "...driving under the influence was the critical evidence upon which the Commonwealth relied to prove wanton conduct justifying conviction for criminal homicide, and it was the high degree of intoxication upon which the Commonwealth relied exclusively to prove the 'extreme indifference to human life' element of wanton murder.

The Court, however, rejected Walden's argument that the wanton murder verdict should be set aside because it was returned following the DUI verdict. The Court instead set aside the DUI conviction. Justices Gant and Wintersheimer dissented.

UNITED STATES SUPREME COURT

BATSON - PRESERVATION OF ISSUE

Ford v. Georgia
48 Cr.L. 2099
(February 19, 1991)

The Supreme Court held in this case that Ford's claim of racially discriminatory use of peremptories could not be barred under a state procedural rule requiring that his *Batson* claim be asserted prior to the swearing of the jury. The state procedural rule was first announced after Ford's conviction and thus was not a "firmly established and regularly followed state practice" under *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). Consequently, it could not serve as "an adequate and independent state procedural bar" to Ford's constitutional claim.

The Court additionally held that Ford did raise a claim under *Batson* despite his failure to cite *Batson's* Equal Protection Clause basis. In his motion to the trial court, Ford instead argued a history of prosecutorial exclusion of blacks under *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). The Court held that a claim under *Swain* necessarily serves as a claim under *Batson* since *Swain* would require a greater quantum of proof than *Batson*.

LINDA WEST
Assistant Public Advocate
Post-Conviction Branch
Frankfort, KY

No Disputing.

It's Rasputin.

Defense Counsel: Mr. Rasmussen, I notice your demeanor and appearance. There is a very famous individual in Russian History named Rasmussen.

Witness: (Laughter) Rasputin

The Court: That is Rasputin, isn't it?

Witness: Yeah.

Defense Counsel: Close to it, isn't it? And by your particular appearance, you somehow remind me of that.

From Trial Transcript.

A Man, a .44 Magnum,

His Wife; Her Lover

An incident occurred in the parking lot of Knight's Inn where police noticed a man sitting in the back seat of a car.

An officer, who asked the man what he was doing, noticed he had a .44 magnum handgun in his possession.

The man said his wife was in the Knight's Inn with another male and that he planned to kill them.

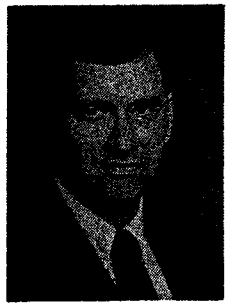
Richmond police then located the woman in the motel, verified that she was in the company of another male, then escorted the two away from the scene.

The gun was then taken from the husband and the bullets removed before it was returned and he was released with no charges, according to police.

Richmond Register
July 20, 1990

THE DEATH PENALTY

Capital Trial Unit of the DPA



Michael L Williams

EIGHT AMENDMENT, UNITED STATES CONSTITUTION
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment 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.

The Capital Trial Unit (CTU) is designed to assist or advise attorneys defending capital murder clients and to first-chair Level I capital murder cases, as time or staff permit.

CTU

The Capital Trial Unit of the Department of Public Advocacy has three attorneys: Michael L. Williams, Steve Mirkin, and George Sornberger. There are two investigators: Randy Edwards and Tena Francis. Both of them approach their work with a great deal of intensity and professionalism. CTU "shares" Cris Brown with the Training Section. Officially, she is the Administrative Assistant to the Unit, but, in addition to that and other roles within the Department, she primary conducts extensive capital client interviews for CTU. CTU has two excellent legal secretaries: Donna Ouelette and Patsy Shyrock. As with other good secretaries in any law office, they essentially make the Unit run well. Now that you know *who* CTU is, you should know there is possible assistance CTU can provide for defense attorneys "in the field."

CASELOAD / TIME NEEDED TO PREPARE

Obviously, there is no possible way CTU could act as lead counsel in every capital case, although there is a popular myth that it can. At the time of this writing the Unit has 16 cases pending. We cannot assume trial responsibility in any new case to be tried in 1991. Unfortunately, prosecutors and some judges believe these cases can be prepared in four to six months, or even less. Of course, if we had the resources of the prosecutor, this would be feasible. With the resources DPA has, forcing a defendant to trial in this period of time is little more than providing a facade of justice. While it is not exactly a "lynching," it is close.

CTU may be able to assist attorneys in making the necessary record to show the court why an appropriate amount of time is needed to prepare for a death penalty defense. Prosecutors know that if given enough time to adequately represent our clients they may lose strategic and political advantages that may result in a death verdict. The cost of this verdict is, of course, our client's fundamental right to a fair trial.

LEVEL I CASES

CTU attempts to prioritize the cases it assumes. Generally, CTU should be handling the "worst" of the cases. We try to get involved in those cases in which there:

1. Are "bad facts" [*e.g.* multiple killings, murder / rapes, prison employee killings, or cases in which there might be a "high level" of brutality";

2. Is a "substantial history" of "serious assaultive convictions," such as a defendant with one or more murder convictions in his past, or similar backgrounds;

3. Is a female victim, an elderly victim, or a child victim;

4. Is a case in which a black defendant has killed a white victim. This is a popular scenario for politically conscious prosecutors and judges to "come out for law and order";

5. Is a prosecutor who is trying his or her case to the media, a case of high media attention, and a case in which the local community "is in an uproar". These too present scenarios in which the political ambitions of some local prosecutors can cause the system to ignore the defendant's fundamental right to a fair trial;

Multiple Defendants

Unless there is a waiver executed by the clients, having first explained what rights they give up by waiver, no DPA field office or private firm can ethically represent two clients or more on the same charge.

6. Are no real triable "guilt-innocence" issues. In other words, there is no real doubt as to the "who" of the killing, but just whether the state is going to kill the defendant or not. CTU members have experience in putting together mitigation phases of a trial;

7. Is a "hopeless case." This is the case in which there is no apparent mitigation evidence, the facts are hideous, and death row seems inevitable.

8. Is an inexperienced attorney handling the case who has had no death penalty trial experience.

These types of cases are of particular interest to CTU because counsel is confronted with the most difficult environments in which to try a case and avoid a death verdict. Attorneys should call the Capital Trial Unit and discuss your case with one of the Unit's members. *Every case* will be considered on its own merits.

NOTIFY US EARLY

If an attorney wishes CTU to consider getting involved, the first task is to make CTU familiar with the case. A phone call is best. You may get a "questionnaire" to complete. It will assist CTU in acquiring the information needed to consider:

[1] whether to become involved; and,
[2] the level of involvement.

When should we be contacted about the case? *Right away!* If possible, let us know prior to the preliminary hearing. Preliminary hearings are invaluable, and there are usually no decent reasons to waive one. We may be of some help in your preparations for it. Ideally, notify us *before* the District Court arraignment. This is the time that an Order should be entered regarding contact with your client, preservation of evidence, seeking of orders relative to destructive testing of substances, and the like.

CONFESSIONS / ADMISSIONS

This is also the time to remind your client to *BE QUIET!* For some reason, facing a potential death penalty offense stimulates defendants to confide in just about anyone who will listen, and, unfortunately, the ones who listen don't keep a secret that well. This makes your job (and ours) more difficult and time consuming.

MOTION PRACTICE

Although a death penalty case will take *at least* 300 - 400 hours to effectively try from first interview till jury verdict, the overwhelming majority of those hours is doing what many of you have been doing for years - "good lawyering." This means that discovery is pursued, witnesses are interviewed, settlement discussions are undertaken and clients are visited in the jails, *etc.*

It also means, however, that many motions are filed that might have been ignored in "routine cases." Venue issues become more important. The obvious effects of race are considered in greater detail. The need for expert funds becomes a major point of litigation. Discovery issues must be litigated relentlessly, and this must all be done when the prosecutor and [all too often] the court is extremely antagonistic toward you within a very political environment.

PRESERVATION

There is an increased emphasis on the "preservation" of issues in the record. Lawyers handling death penalty cases must always be cognizant of "the record." *Every issue*, no matter how trivial the prosecutor and/or judge might tell you it is they must be painstakingly preserved. You never know which one might save your client's life.

CTU can be of benefit to those lawyers who are not familiar with issues peculiar to death penalty cases. We may be able to provide you with the necessary motions, affidavits, exhibits, and other research necessary to successfully preserve these issues in less time than it would otherwise have taken for you or your office to do it.

ISSUES

An attorney will find some benefit in having us consult about issues which may be present in your case, but not yet noticed, or you may be unsure about how to approach them. You'll never know until you call.

SOCIAL HISTORY INTERVIEWS

Cris Brown and Randy Edwards are available to meet with your client and assist you in taking the very first step in preparation of a mitigation phase. That is, your client is interviewed to obtain his "Social History." The preparation of a death penalty case is simply not complete without it.

RESEARCH RESOURCES

Some defense attorneys throughout the Commonwealth don't have the necessary library resources available for all the legal research in a death penalty case. DPA has resources for legal research in addition to the *Death Penalty Manual* and Motion File.

The Death Penalty Resource Center is located near the DPA office, and it has networking capabilities with other states resources centers who pass on information to each other on a continuing basis. The Death Penalty Brief Bank is located at the Resource Center. These briefs are indexed by issue, and the actual briefs on these issues may be available to attorneys who are facing similar issues at the trial level. There is not space to mention or list all of the publications available to the researching attorney. Suffice it to say that if an attorney has a legal question, an answer can usually be found at DPA.

COMPUTER ACCESS

DPA offices are getting a new computer system which will run Wordperfect software. If a local attorney doesn't have this software, someone close to your office most certainly does. DPA has many death penalty related motions available on disk. The potential this offers is that considerable research and typing can be avoided by the local attorney's office.

DEATH PENALTY MANUAL

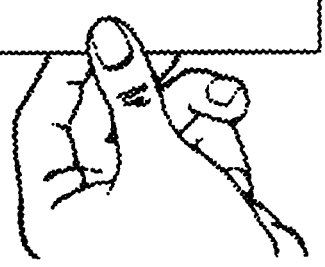
Finally, a defense attorney taking on a death case ought to purchase the DPA's *Death Penalty Trial Manual.* Contact Patsy Shyrock at (502) 564-8006 if you wish to obtain a copy.

MIKE WILLIAMS
Assistant Public Advocate
Chief, Capital Trial Unit
Frankfort, KY

Tracking Potential Death Penalty Cases

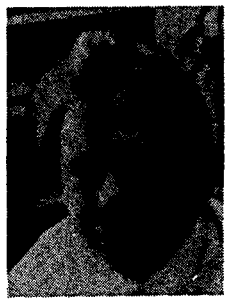
Please help us with our tracking project of active death penalty cases in the state by notifying us if a case crops up in your area.

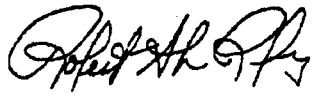
Local public defenders currently have the charge to visit potential clients upon arrest, advise them of *Miranda* rights and to keep CTU informed of cases within their region.



DISTRICT COURT PRACTICE

SLAMMER, II - Highlights of the 1991 DUI Legislation





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.

In spite of a hard fought and reasonably successful effort by the Criminal Defense Bar, including K.A.C.D.L. and various private interests, the 1991 Special Session accomplished its stated task. The governor recently signed into law a comprehensive new drunk driving legislative scheme that:

1) makes convictions easier to obtain, and
2) is more punitive than prior law.

The major changes are as follows.

THE OFFENSE

KRS 189A.010 has been expanded to encompass all of the various ways in which a person could operate a motor vehicle in an impaired state. The most sweeping change of Statute 189A is Section 189A.010(1)(a) which, for the first time, incorporates a *per se* provision in the Kentucky statute. It is now crime in the State of Kentucky to operate a motor vehicle while the concentration of blood or breath alcohol is a .10 or greater. A new definition section has been added to the statute which defines alcohol concentration as "grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Thus, by statute, the Legislature has adopted the "partition ratio" currently utilized by the manufacturers of breath alcohol testing equipment.

Other minor changes to the offense itself include the deletion of the above .10 presumption that currently exists in KRS 189.520. The enactment of the *per se* law makes the previously objectionable presumption unnecessary. In what appears to be an attempt to reconcile the statute with *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky.App. 1986), KRS 189.010(1) now reads, "no person shall operate or be in physical control of a motor vehicle anywhere in this state." KRS 189A.010(1)(c) and (d) seem to clarify the confusion surrounding impairment due to substances other than alcohol that led to *Hayden v. Commonwealth*, 766 S.W.2d 956 (Ky.App. 1989). It is now clear that it is a violation of KRS 189A.010 to operate a motor vehicle under the influence of any substance which impairs one's driving ability. This is further established by KRS 189A.010(3) which precludes "legal use" of any substance as a defense. This would seem to be a codification of the reasoning of *Cruse v. Commonwealth*, 712 S.W.2d 356 (Ky.App. 1986).

PENALTIES

The only substantive change to the penalties for violation of KRS 189A.010 is the designation, pursuant to KRS 189A.010(4)(d), that a fourth or subsequent offense within a five year period is now a Class D felony. Additionally, if convicted of a fourth or subsequent offense, KRS 189A.010(5) specifies that there is a mandatory minimum imprisonment of 120 days. A procedural change in the penalty section promises to be extremely difficult to utilize. Pursuant to KRS 189A.010(4)(e), prior offenses now include convictions in any other state or jurisdiction. The Court "shall receive as proof of a prior conviction a copy of that conviction, certified by the court ordering the conviction." At a minimum, this is constitutionally impermissible unless the Commonwealth can show that the prior conviction satisfies the requirements of *Boykin v. Alabama*, 395 U.S. 238 (1969). Absent such proof, the validity of the prior conviction may not be presumed. *Dunn v. Simmons*, 877 F.2d 1265 (6th Cir. 1989). At a minimum, in these cases, there will be lengthy delays while the prosecution seeks to obtain the necessary proof in order to rely on an out-of-state conviction.

An additional procedural change specifies that the five year time period "shall be measured from the date on which the offenses occurred for which the judgment of convictions are entered." KRS 189A.010(7). As such, it would appear that the length of time between arrest and conviction on the prior offenses may well work to the defendant's favor due to this change.

ALCOHOL TREATMENT

While the length of alcohol treatment programs do not appear to be significantly altered, KRS 189A.040 adds the requirement of an individualized assessment for each individual sentenced to any of the required treatment programs. The Cabinet for Human Resources is directed, pursuant to KRS 189A.040(6), to develop criteria upon which to base the individualized treatment assessments. KRS 189A.070(3) creates a minor change in the procedure necessary to reacquire one's driving privilege. Previously, treatment and license suspension were not necessarily related. This section now specifies that completion of the program is a prerequisite to reinstatement of the driving privilege. Once again, a procedural change in this section seems poorly thought out and unworkable. Pursuant to a new section of KRS 189A specific notice requirements of enrollment in alcohol programs are established. Subsection 1 requires the defendant to enroll "within 10 days of the entry of judgment." Subsection 2 requires the "administrator of the program" to certify to the Court "within five working days" the defendant's enrollment. Failure to enroll or have certified proof of enrollment is punishable as contempt, and "the court shall" conduct a show cause hearing. The obvious problem in this regard is the mandatory jail sentences seem to interfere with the individual's ability to enroll in the program immediately. While this would no doubt be "cause," the mandatory nature of this provision will undoubtedly cause difficulty.

LICENSE SUSPENSION

It is in this area where the most changes have occurred. Pursuant to KRS 189A.070(1), the responsibility for revocation of the license now falls squarely on the district court as opposed to the Department of Transportation. Suspension for a first offense DUI now carries a 90 day suspension as opposed to the previous six month suspension that was reducible. In addition, for fourth or greater offenses, a 60-month suspension period has been added.

Although the Legislature failed to pass an administrative *per se* suspension provision, this plan was replaced by a "suspect class" provision regarding pretrial suspension of the driving privilege. There are now three classes of individuals who license will be suspended merely by being charged, rather than convicted, of an offense. Those three classes are:

a) refusals,
b) under the age of 21, and
c) individuals with either a prior conviction or a prior refusal within the last five years.

Individuals suffering pretrial suspension are now entitled to a court hearing within 30 days of request. The Court is required, at the time of suspension, to advise the suspended individual of his right to this review. An interesting quirk in this new procedure allows the Court, when ordering pretrial suspension, to retain the individual in custody in order to insure the surrender of the license. In the event that the individual claims to have lost his license, the Court is empowered to direct the sheriff to take the individual to obtain a substitute license. No provision for indigency exists in this statute.

Credit is given for this pretrial suspension against any eventual suspension as a result of conviction. In the event that the pretrial suspension lasts longer than the suspension period upon conviction, the individual is entitled to reacquire his license from the circuit court clerk who is the designated recipient of pretrial suspended licenses. Only in the event of a conviction are the licenses transmitted to the Department of Transportation. A new section of KRS 189A is created to outline what facts the Court must find, by a preponderance of the evidence, to justify suspension for each of the suspect classes listed above. They in essence boil down to was there probable cause to believe that the individual is a member of that suspect class? In regard to pretrial suspensions due to prior convictions or refusals, the statute specifically delineates that a finding in that regard "shall not be construed as limiting the person's ability to challenge any prior convictions or license suspensions or refusals." It is unclear from the statute what effect a constitutionally infirm prior would have on the pretrial suspension. Such a provision enhances the need for early review of the validity of any prior offenses.

A new section of KRS 189A specifies those time periods of suspension due to refusal to take a chemical test.

> For a first refusal within five years, the period is six months.
>
> For a second refusal within five years, the period is 18 months.
>
> For a third refusal within five years, the period is 36 months.
>
> For a fourth refusal within five years, the suspension period is 60 months.

The statute specifically requires imposition of this punishment in the event that the defendant is not found guilty pursuant to KRS 189A.010. However, if there is a conviction pursuant to 189A.010, then the length of suspension is determined by either the license revocation penalty for that level of offense or the suspension period for the level of refusal, whichever is longer.

HARDSHIP LICENSE

A new section of KRS 189A creates what promises to be both of benefit to some individuals convicted pursuant to this new scheme and an administrative nightmare. Those individuals convicted of a first offense pursuant to KRS 189A.010 may now petition the Court for a hardship driver's license for the final 60 days of the 90 day revocation. There are basically four circumstances to allow for a limited license: to continue employment; to continue schooling; to obtain medical care; and to attend any court ordered counseling or program. Hardship licenses are unavailable in refusal cases.

In order to obtain a hardship license, a new section of KRS 189A outlines what the individual must be prepared to present to the Court. In addition to proof of motor vehicle insurance, as a general rule, sufficient proof to satisfy the Court as to the legitimacy of the claimed need is required. In the event the reason, and the verification, satisfies the Court, a new section of KRS 189A requires the Cabinet to deliver a permit card setting forth "the times, places, purposes, and other conditions limiting the defendant's use of a motor vehicle." The individual is required to carry the permit at all times, as well as placing an identifying decal on his vehicle. Operating a motor vehicle at a time other than designated in the hardship license is punishable as a Class A misdemeanor and there is an additional 6 months revocation. For this privilege, the individual must pay the Cabinet of Transportation a fee not to exceed $200. No provision is made for indigency.

INFORMED CONSENT

The major change in the area of informed consent deals with the notice that must be given. In a change from current procedure, at the time of the initial request, the individual must be advised of the consequences of refusal, the consequences of testing greater than a .10, and that the individual has the right to his own test by an individual of his own choosing within a reasonable time. A potential source of controversy may arise as Section 2(b) of this new section states that the individual must be advised that if there is a .10 or greater or if the individual is under the influence that the individual could be subjected to criminal penalties and "the person's license shall be revoked for a period of at least 90 days." There does not appear to be this mandatory 90-day

suspension anywhere in the license suspension provisions of the statute. An individual who takes the test but is nonetheless acquitted, would not under the remaining provisions of the statute be subject to a 90-day suspension. The meaning of this notice provision is at best unclear.

BOOKKEEPING

In addition to the substantive changes listed above, there are numerous minor changes within the statute. The statute requires the uniform citation form to be altered to make places for new required information. There is a reworking of KRS 189.520 involving nonmotor vehicles. There is a laundry list of situations where license revocation is mandatory even though KRS 189A.010 is not involved. There is a reworking of the license not in possession statutory procedure. On a more substantive note, there is a periodic requirement that the Administrative Office of the Courts be alerted regarding any cases remaining on the docket in excess of 90 days. And, finally, there is the requirement, which is a change from current law, the DOT must now honor court orders regarding the validity of prior convictions in determining suspension periods.

CONCLUSION

Those individual interests which sought, through House Bill 11, to "get tough" on drunk drivers were successful. It is obvious from the listed changes that House Bill 11 will result, at least in the short run, in an increased number of convictions and lengthier suspension periods. The prosecutor's job has been made easier, and the defendant's penalty harsher. Little, if any, effort is made within the legislation to combat the problem of alcoholism and no effort, short of retribution, is directed towards a reduction of recidivism. It will, without doubt, have a major impact upon the Department of Public Advocacy, which represents and will represent, a major percentage of the individuals charged with this offense in this state. Even in light of this, the final provision of the new bill divides up federal funding amongst various participants in the system who will be effected by the increased caseload as a result of this bill. It comes as no surprise that none of the funds will be directed to offset the Department's increased caseload, although 15% of the funds will be directed towards the prosecution's efforts. As such, an already punitive bill promises to be even more punitive on those indigent citizens charged with its violation.

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Summary of Proposed Criminal Rules Changes

To be Submitted to KBA Annual Meeting - 1991

The Supreme Court has authorized the submission of six new criminal rules or amendments to existing rules at the annual meeting of the Kentucky Bar Association on Wednesday morning, June 5, 1991 in Louisville. A brief summary of the proposed rules, or amendments to existing rules is as follows:

1) A proposed new criminal rule of procedure to require a jury instruction on the disposition of a defendant when the jury is instructed on the absence of criminal responsibility by reason of mental illness, retardation or guilty but mentally ill.

2) A proposed amendment to RCr 7.10, establishing grounds for the taking of depositions.

3) An amendment of RCr 12.78 (2) to provide that when a person has been convicted of an offense and only a fine has been imposed, the amount of bail shall not exceed the amount of the fine, plus interest and costs.

4) Amendment to RCr 8.09 which would eliminate the necessity of consent by the Commonwealth Attorney prior to the entry of a conditional plea of guilty.

5) A proposed new rule involving RCr 8.08 through 8.12 so as to permit the plea of *nolo contendere.*

6) A new rule to require prior judicial approval before a grand jury subpoena.

7) A proposal for a new criminal rule regarding the qualifications of appointed counsel in capital cases is under consideration by the Supreme Court. One of the principal concerns related to such a proposal is the adequacy of funding in order to provide effective implementation of such a rule.

All rules submitted in a timely manner to the committee were forwarded to the Supreme Court. The Supreme Court has final discretion as to whether to submit any rules to the annual meeting in June

The full text of the proposed rules and amendments will be published in the Spring edition of the *Bench & Bar* magazine. Final adoption of all rule changes is within the discretion of the Supreme Court. It should be pointed out

JUSTICE WINTERSHEIMER

that there are other major rule changes to be considered at the annual meeting, including massive changes in the appellate rules. The proposed new code of evidence will be discussed during the afternoon session on June 5.

DONALD C. WINTERSHEIMER
Justice
Supreme Court of Kentucky
Chair, Criminal Rules Committee
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(502) 564-4165

DUI Statistics Often Don't Add Up

HOW TO CHALLENGE THEM IN COURT

Imagine that after sharing two bottles of wine and a fried chicken dinner with several friends on a hot summer evening, a driver whose old car had a burned-out taillight started out for his home across town. Imagine further that 45 minutes later he was run into by a driver who failed to stop at a red light. (Alternatively, he might have been pulled over for weaving or because the taillight was out.) During the investigation at the scene, a police officer detected alcohol on the first driver's breath, took him into custody, and transported him to the police station. There, nearly three hours after the accident, an Intoxilyzer breath test was administered that registered 0.10% blood alcohol concentration (BAC).

At trial, it was presumed by law and supported by the prosecution expert's testimony that: by the time the accident occurred 45 minutes after the defendant had finished drinking, all of the alcohol that he had consumed had been absorbed into his bloodstream; the Intoxilyzer result obtained within three hours of the incident was competent evidence; the Intoxilyzer's 2100:1 breath alcohol concentration (BrAC) to BAC conversion ratio applied to the defendant; the defendant's BAC at the time of the accident had been higher by 0.015% per hour than it was at the time of the breath test almost three hours later (the population average elimination rate is approximately 1.015% BAC per hour), so his BAC at the time of the accident was 0.145% (0.10% as tested, plus 0.045% over three hours); and driving behavior is impaired when the BAC is over 0.10%.

As discussed below, statutes specify BAC because research on alcohol and impairment is based on BAC. However, most tests on defendants are made on BrAC because of the convenience of measuring breath alcohol. A standard conversion ration of 2100:1 is used to estimate BAC based on BrAC. Statutes erroneously assume that the same ratio applies to everyone - that after drinking alcohol, the concentration of alcohol in everyone's blood will be 2100 times greater than the concentration of alcohol in their breath.

Statutes also erroneously assume that alcohol is absorbed and eliminated at the same rates by everyone. Absorption of alcohol takes place mostly in the small intestines and is a highly variable process, ranging from 45 minutes to many hours. (The lowest figure is typically assumed by the statutes.) Once in the body, alcohol is eliminated primarily through several stages of metabolic breakdown in the liver (into energy, water, and carbon dioxide), which requires variable time that ranges from 0.04% to 0.006% BAC per hour. (The average elimination rate is approximately 0.015% BAC per hour).

The various states employ different terminology and different statutory language (*e.g.*, DUI, DUIL, DWAI, DWI, OUI). This article addresses the typical situation in which the state employs statutory presumptions, but does not address the applicability of a statutory savings clause that lets the court hear additional evidence of impaired driving behavior. Other measures of impaired functioning, such as might derive from a field sobriety test, are not addressed here, nor is the presumption that 0.10% BAC produces impairment for everyone.

USE OF PRESUMPTIONS IS UNCONSTITUTIONAL

Jonathan Cowan recently pointed out that Supreme Court rulings against the use of presumptions in jury instructions in other areas of law should apply to DUI and DWI prosecutions as well. (Jonathan Cowan, *Guilt by Presumption*, Criminal Justice, Spring 1989, at 4. *See* also *Francis v. Franklin*, 471 US 307 (1985) (barred rebuttable and irrebuttable mandatory presumptions regarding intent in a murder case); *County Court of Ulster County v. Allen*, 442 US 140 (1979); and *Sandstrom v. Montana*, 442 US 510 (1979)(barred mandatory presumptions that shift the burden of proof to the defendant.) Indeed, such constitutional protection has recently been extended to DUI offenses. (*See*, for example, *Barnes v. People*, 735 P2d 869 (Colo 1987), which held that a statute could constitutionally authorize only a permissive inference rather than a mandatory presumption that the defendant was under the influence of alcohol.) This paper extends Cowan's discussion to examine some of the crucial statistics that the typical statutory DUI presumptions are based on, such as those brought into play in the hypothetical above. Such presumptions should indeed be challenged.

INAPPROPRIATE USE OF STATISTICS

Several DUI-related statutory presumptions are based on statistical averages. However, a fundamental rule of statistics is that *they do not apply to individuals.* All that prosecution experts can testify to is what the averages are. Any presumption that everyone is average on a given characteristic is invalid on its face. Conversely, a given characteristic's description must include its distribution in the population before it is complete. When applied to individuals, the characteristic's range and variation may be even more important than the average.

There are several crucial factual issues in DUI prosecutions to which the application of statistical averages is scientifically invalid. After alcohol is consumed, the rates of absorption and elimination determine both the blood alcohol concentration (BAC) at the time of measurement and the extent to which a BAC measurement can be used to extrapolate back to an earlier BAC level. If breath alcohol

concentration (BrAC) is measured and converted to BAC, the validity of the BAC depends on the validity of assumptions about human physiology and the conversion ratio. Average rates of absorption and elimination and an average blood:breath conversion ratio are invalid as applied to a particular individual.

ALCOHOL ABSORPTION

Alcohol absorption is rapid only when distilled alcohol is consumed on an empty stomach. Even then, an individual may not reach his or her peak alcohol concentration for more than three hours. (*See*, for example, Kurt M. Dubowski, *Human Pharmacokinetics of Ethanol: Further Studies*, 22 Clinical Chemistry 1199 (1976). When food is eaten before or while drinking, or if the beverage contains digestible material, the alcohol is largely retained in the stomach with the food. (*See*, for example, M. F. Mason and K. M. Dubowski, *Alcohol Traffic, and Chemical Testing in the United States: A Resume and Some Remaining Problems*, 20 Clinical Chemistry 126 (1974); Richard E. Erwin, *Defense of Drunk Driving Cases* (Matthew Bender, 1984); Ken Smith, *Science, the Intoxilyzer, and Breath Alcohol Testing*, The Champion, May 4, 1987.)

The function of the stomach is digestion; absorption takes place primarily in the intestines. Only 5% to 20% of alcohol consumed by an individual is absorbed in the stomach. Not until the food is digested is it emptied into the intestines, where the remainder of the alcohol is absorbed into the bloodstream. The time it takes the stomach to digest its contents depends in part on the kind of food eaten: carbohydrates are digested fairly rapidly; protein takes longer; and fat may take up to 20 hours. (Horace W. Davenport, *The Physiology of the Digestive Tract* (Yearbook Medical Publishers, 1971).) In addition, trauma, such as may result from an accident - and possibly even from being arrested, for some people - can cause the stomach to retain its contents for hours or even days. (E. F. Rose, *Factors Influencing Gastric Emptying*, 24 J Forensic Science 200 (1979).)

ALCOHOL ELIMINATION

An alcohol elimination rate of 0.015% BAC per hour is also based on a population average. Research shows that individual elimination rates vary from 0.006% to 0.04% BAC per hour. (M. Bogusz, *Comparative Studies on the Rate of Ethanol Elimination*, 22 J Forensic Science 446 (1977); Kurt M. Dubowski, *Alcohol and Traffic Safety* (U.S. Department of Health, Education and Welfare, Public Health Service Pub No 1043, 1961); *see* also review in K. M. Dubowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, Supp 10 J Studies on Alcohol 98 (1985).) Thus, it may take some people more than twice as long as the average to eliminate the same BAC. In addition, food can affect elimination of alcohol as well as its absorption. (Allen J. Sedman, Paul K. Wilkinson, Ermelinda Sakmar, Donald J. Weidler, and John G. Wagner, *Food Effects on Absorption and Metabolism of Alcohol*, 37 J Studies on Alcohol 1197 (1976); J. J. Vitale, J. DiGiorgio, H. McGrath, J. Nay, and D. Mark Hegsted, *Alcohol Oxidation in Relation to Alcohol Dosage and the Effect of Fasting*, 204 J Biological Chemistry 257 (1953).) Consequently, as Dubowski concluded, "Extrapolation of a later alcohol test result to the time of the alleged offense is *always* of uncertain validity and therefore forensically unacceptable" (Dubowski (1985), *supra* at 106; emphasis added.)

The Arizona Supreme Court cited Dubowski's 1985 study regarding the timing of a BAC measurement and held that there must be evidence relating the BAC back to the time of arrest, or there could be no presumption that a suspect was driving under the influence of alcohol at that time. (*Desmond v. Superior*, No CV-88-0416-SA, April 6, 1989 (Arizona Supreme Court, 1989).)

Thus, assumptions that absorption will be complete within 15 to 30 minutes after drinking stops and that there will be a steady rate of decline thereafter are invalid in many cases - probably the vast majority. Even when they have not eaten, individuals vary in their rates of alcohol absorption. But typically, people eat when they drink. Unless it can be established that a person did not eat for some hours prior to drinking, and that he drank distilled spirits, it will often be impossible to determine whether his BAC was rising or falling at the time of an incident. (Unless it is measured at its peak, every measured BAC will occur at least twice: once during the rise and once during the fall.) Likewise, even if the time when an individual reached her peak BAC were known, her rate of elimination may be so different from the average that it will take more than twice as long for the alcohol to leave her body.

Consequently, any significant delay between incident and BAC measurement typically will render the results meaningless as far as ascertaining the BAC at the time of the incident is concerned. Despite statutory language stating that a BAC measurement made within 3 hours of an incident is "competent" evidence, there is no scientific support for the assumption that a later BAC reveals the BAC at the time of the incident.

BLOOD : BREATH RATIOS

Blood:breath ratios vary between people just like virtually every other human characteristic varies. Such variability is shown by every study on the blood:breath ratio that has been reported in the literature. (*See* review of early studies in M. F. Mason and K. M. Dubowski, *Breath-Alcohol Analysis: Uses, Methods, and Some Forensic Problems - Review and Opinion*, 21 J Forensic Science 9 (1976); A. W. Jones, *Variability of the Blood:Breath Alcohol Ratio in Vivo*, 39 J Studies on Alcohol 1931 (1978); Kurt M. Dubowski and Brian O'Neill, *The Blood:Breath Ratio of Ethanol*, 25 Clinical Chemistry 1144 (1979).) But BrAC testing is scientifically valid only if a single ratio can be applied to everyone within an acceptable margin or error. However, the 2100:1 blood:breath ratio built into the Intoxilyzer is simply an average computed from the findings of several early studies. This average does not apply to the vast majority of people who are not exactly average. The appropriate statistic is the range, not the average, and the range extends at least from 1100:1 to 3400:1 (*See*, for example, *Nebraska v. Burling*, 224 Neb 725, 400 NW 2d 872 (1987).

Even more problematic for presumptive statutes are findings that the blood:breath ratio is not even stable for a given individual. That is not surprising because studies have found that BAC and BrAC measurements themselves fluctuate 0.03% or more over short time periods. (Dubowski (1976), *supra* at 1199. See also review by Dubowski (1985), *supra*.) When repeated measurements of the combined blood:breath ratios were taken over longer time periods, variations as great as 1100 to 3100 were found within the same person. (T. A. A. Alobaidi, D. W. Hill, and J. P. Payne, *Significance of Variations in Blood:Breath Partition Coefficient of Alcohol*, 2 Brit Med J 1479 (1976).) Consequently, it is debatable whether a person's "true" blood:breath ratio can ever be determined, although it may be less than half the average ratio of 2100:1 that is used by the Intoxilyzer.

When expert witnesses for the prosecution testify that the U.S. Department of Transportation has approved the 2100:1 ratio for use in breath alcohol testing, or that the Intoxilyzer has a margin of error of only 0.10%, they completely miss the point. Pronouncements by government agencies are not a valid substitute for scientific research. Furthermore, the accuracy of the Intoxilyzer has nothing to do with variability among people. Precision in measuring BrAC is irrelevant. Consistently finding the same BrAC when measuring a suspect's breath does not validate the use of the 2100:1

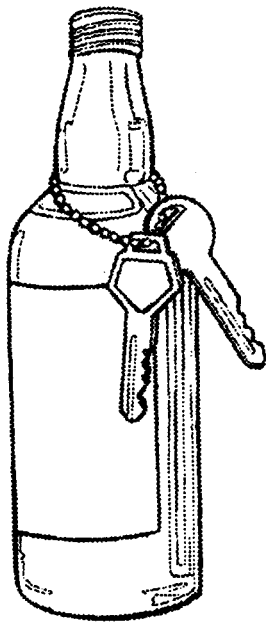
ratio to convert the BrAC to a BAC. Using an average ratio to convert a BrAC into a BAC when the average may not even remotely apply to the defendant is still invalid.

Courts have often considered a defendant's blood:breath ratio as an individual physical characteristic that can be determined only through means of physical tests. Because the defendant is presumed to have exclusive access to that information, he is given the initial burden of producing evidence on that issue. (*People v. Pritchard*, 162 CalApp3dSupp 13, 209 Cal Rptr 314 (1984).) However, in a recent California case, the court noted that the defense's expert witness disputed the notion that a defendant could meaningfully offer the measurement of his blood:breath ratio at a given time, because it would only be speculative that the ratio had been the same at the time of the prosecution's breath test, and the prosecution's expert admitted the ratio could be affected by external factors that vary over time. (*People v. McDonald* 254 Cal Rptr 384, 389 (Cal App 4 Dist 1988).) The *McDonald* court held that the 2100.1 ratio, which it termed a "rule of convenience," should not apply unless the "exonerating fact is peculiarly within the defendant's knowledge." (*McDonald* at 389; *see* also *People v. Pritchard, supra.*) The court stated that the defense does not "have any substantially greater ability to establish [the exonerating fact] than does the prosecution." (*McDonald* at 389; *see* also *People v. Montalvo*, 4 Cal 3d 334, 482 P 2d 205 (1971).) Because the constancy of a defendant's blood:breath ratio was in doubt, the court held that it was error to instruct the jury that it should presume the defendant had a 2100:1 ratio unless he presented evidence as to his personal ratio. The court stated that the instruction "effectively took that question from the jury and cast in stone a fact not proven." (*McDonald* at 389.)

BODY TEMPERATURE

When BrAC is measured, body temperature is assumed to be the same for everyone. In fact, different people have naturally different body temperatures. From the mean body temperature of 37 degrees C (98.6 degrees F) assumed by the Intoxilyzer, normal body temperature ranges between 35.8 degrees C (96.5 degrees F) and 37.2 degrees C (99.0 degrees F). T. C. Ruch and J. F. Fulton, *Medical Physiology and Biophysics* (W. B. Saunders, 18th ed 1966); T. R. Harrison, ed, *Principles of Internal Medicine* (McGraw Hill, 3d ed 1958).) Many individuals pay little attention to fever lower than 38.9 degrees C (102 degrees F). (Mason and Dubowski (1974), *supra* at 134.) Alcohol enters the breath from the bloodstream through the surface of the lungs in a manner roughly analogous to steam rising from the surface of water: As the temperature of the water increases, more water turns to steam. The same is true for body temperature and breath alcohol concentration. Hot weather, infection, fever, and even menstrual cycle changes can alter an individual's body temperature by several degrees; nonetheless, body temperature is not measured when an Intoxilyzer test is made.

Every degree of increase in body temperature (1 degree C or 1.8 degrees F) can cause an increase of 7% to 9% in BrAC. Although BrAC increases when body temperature increases while BAC remains the same, the Intoxilyzer does not take that into account and its standard conversion ratio will falsely inflate its BAC reading. (Mason and Dubowski (1974), *supra* at 134; Smith, *supra* at 15.)



STATISTICS DON'T APPLY TO INDIVIDUALS

The imaginary defendant this paper began with probably had not digested his dinner at the time of the incident. He had eaten a fatty meal, so his blood alcohol was probably still rising at the time he was tested. That alone would render a breath alcohol test invalid after a substantial delay, because his alcohol concentration would have been lower at the time of the incident - not higher, as presumed. (He might have been home in bed before his blood alcohol concentration hit the legal limit, had he not been stopped.) If he was traumatized by the accident or by the arrest, his digestion could have been disrupted and further delayed the alcohol absorption.

Applying the average elimination rate to this defendant in order to extrapolate back to a presumptively higher level at the time of the incident was invalid because his actual elimination rate may have been much different than the average and because he probably had not even reached the elimination phase at the time of the incident. Due to errors of measurement inherent in converting BrAC to BAC, his actual BAC may have been less than half the computed figure. (Because individuals' blood:breath ratios change over time, there is no way to determine what the defendant's ratio actually was at the time of the incident). In addition, because the weather was hot, his body temperature may have been elevated, further inflating the BrAC test results.

DUI defendants are frequently convicted on the basis of presumptions such as those discussed in this paper. Drinking and driving is certainly a problem that should be curtailed. But presumptions are inadequate - and probably unconstitutional - substitutes for facts. Besides, the actual purpose of DUI statutes is to remove impaired drivers from the roads. Under the present system, some alcohol impaired drivers are removed, but drivers who are impaired by drugs cannot be removed by this system (*See* Roberta Mayer, *Get the Drugged Drivers off the Roads*, Criminal Justice, Fall 1989, at 6), nor can drivers who are simply poor drivers. And some drivers who are unimpaired at the time of an accident that is not their fault may be wrongfully punished.

As Cowan notes, if impaired driving is the real issue, that is what should be measured. It should not be too difficult to develop a mobile apparatus using microcomputer technology so that tests of impairment in the field have a demonstrated relationship to actual driving. Then drivers impaired by alcohol can be confirmed, and drivers impaired because of medical problems can be aided and exonerated.

TERENCE C. WADE

Terence C. Wade earned his master's and doctoral degrees in clinical psychology while a graduate research fellow and a teaching fellow in statistics and assessment. He conducts research on the legal relevance of chemically and physiologically altered psychological processes. He has testified as an expert witness on such issues as alcohol absorption and elimination, alcohol concentration, blood:breath ratios, behavioral impairment and field sobriety testing.

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SIXTH CIRCUIT HIGHLIGHTS

Federal Court of Appeals Action

Donna L. Boyce

ARTICLE 1, SECTION 9, CLAUSE2, 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 Sixth 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.

PROSECUTORIAL MISCONDUCT
Sizemore v. Fletcher

In *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir. 1990), the Sixth Circuit affirmed the District Court's granting habeas corpus relief on the ground that prosecutorial misconduct denied Sizemore his right to due process of law.

Sizemore, one of the owners of the Big K Coal Company, had been convicted of two counts of murder in the shooting deaths of two independent coal truck drivers. The Kentucky Supreme Court affirmed Sizemore's Lee County convictions, finding that the special prosecutor's comments were inappropriate but had not denied Sizemore a fair trial.

The U.S. District Court granted habeas relief, adopting the magistrate's findings that the prosecutor's comments had denigrated the credibility of Sizemore's attorneys without any basis in fact, had suggested that Sizemore's speedy consultation with counsel was suspect, and had appealed to class prejudice by referring to Sizemore's wealth and his ability to hire several (actually seven) attorneys.

Sizemore raised 68 instances of alleged prosecutorial misconduct. His primary objections focused on the closing argument by the special prosecutor from the attorney general's office:

> It happens in all cases. After I hear the defense attorney, I wonder what trial I have been to when they started relaying the evidence to me because... I never heard half of what they tell the jury and I start thinking, "where do we get this fairy tale; what fantacy [*sic*] is this?" Then I thought, "How appropriate that we are hearing fairy tales from Mr. Burns...."

Contrasting her sole effort as prosecutor to that of the seven defense attorneys, the prosecutor then told the jury that the lawyers "must look to you all... like Snow White and the seven dwarfs...." In describing the series of events after the shooting, the prosecutor stated:

> And then he [Sizemore] snuck out, went out the back way. Did he go to the KSP [Kentucky State Police] Post and give a statement like the truckers did? No. He went out the back way, and how convenient. Who did he go out with? I think we probably stipulated it and we probably all know a thousand times. He went out with his own special convenient attorney, Larry Allen ...who had been with him from within five minutes of the killing to the very end.
>
> And then on the stand today when Stevie said, "Well, I don't have my gun, I think Larry has it." How convenient. Good old Larry takes care of everything.

Describing a meeting between Sizemore, his attorney and two witnesses to the shooting, the prosecutor told the jury:

> ...Just like he [Sizemore] and L.A. White and Gene Cobb did, and Larry Allen, when they all went up to the tipple to talk about what happened.... Got to get our alibi, got to get our story straight.

Referring to Sizemore's ability to present high quality photographic exhibits as part of his defense the prosecutor said, "He wants you to know the truth so much. A man with his money, his coal trucks...." Speaking of the state's photographs, the prosecutor stated, "They're not fancy, they're not expensive aerial photographs, they're not big color simulations."

The prosecutor also stated that Sizemore's witnesses had not spoken to the authorities, but had "talked to the defendant and one of his multitude of attorneys." Finally, the prosecutor said, "Steve Sizemore would rather kill two men than to give them a raise."

In its opinion, the Sixth Circuit recognized that prosecutors enjoy considerable latitude in presenting arguments to a jury. However, the Court further stated that when a prosecutor has made repeated and deliberate statements clearly designed to inflame the jury and prejudice the rights of the accused, and

the court has not offered appropriate admonitions to the jury, a conviction so tainted cannot be allowed to stand.

The Court faulted both the prosecutor's appeals to wealth and class biases, and her statements concerning Sizemore's consultation with seven attorneys. It found these comments were sufficient to create prejudicial error, violating Sizemore's rights to due process under the 5th and 14th amendments. The Court further stated that no prosecutor may employ language which denigrates the right of a criminal defendant to retain counsel of his choice or to present a vigorous defense.

RES JUDICATA
Hood v. United States

In the unpublished opinion of *Hood v. United States* (No. 90-5807), rendered on February 11, 1991, the Sixth Circuit addressed the issue of whether *res judicata* should bar relief in the face of an intervening change in the law.

Hood was sentenced in federal court to 96 years on a conviction of kidnapping and transporting a stolen vehicle. The trial court ordered, pursuant to a federal statute, that he not be eligible for parole until after service of 30 years. The conviction was affirmed on direct appeal by the Sixth Circuit. The Sixth Circuit also affirmed the district court's judgment denying Hood's motion for a reduction of sentence.

Some time thereafter, Hood filed a motion to vacate alleging that the 30 year parole incligibility term was erroneously applied in his case based on the Sixth Circuit's decision in *States v. Hagen*, 869 F.2d 277 (6th Cir. 1989). In *Hagen*, the Court ruled that district courts did not have statutory authority to set parole ineligibility in excess of 10 years.

The district court denied Hood's motion, finding that the Sixth Circuit's prior decisions upholding Hood's sentence were *res judicata* as to the issue raised in his motion to vacate. In the Sixth Circuit, Hood argued that *res judicata* should not bar relief in the face of an intervening change in the law.

The Sixth Circuit stated that the doctrine of *res judicata* does not apply to *habeas* petitions unless three factors are met:

1) the same ground presented in the subsequent application was determined adversely to the applicant on a prior application,
2) the prior determination was on the merits, and
3) the ends of justice would not be served by reaching the merits of the subsequent application.

In *Hood*, the Sixth Circuit reversed the district court's judgment, finding that the "ends of justice" would not be served by continuing to apply the statutory construction rejected by *Hagen*.

Donna L. Boyce
Assistant Public Advocate
Frankfort, KY

CURRENT EMPLOYMENT OPPORTUNITIES WITH DPA

The Department of Public Advocacy is currently seeking qualified applicants for the vacant positions listed below.

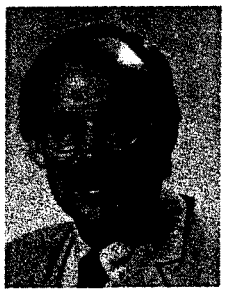
ROY COLLINS

- **Legal Secretary** - This position in the Defense Services Division is located in Frankfort.
- **Alternative Sentencing Specialist** - This position is located in Paducah. The person will submit reports to a Judge considering ordering some means of punishment other than incarceration.
- **Assistant Public Advocate** - The Department currently operates with three vacant attorney positions. These position vacancies are in Hopkinsville, (2) and Pikeville. There will be a vacancy in the Hazard trial office as of November 1, 1991.
- **Paralegal** - This position is located in Eddyville, and provides service to the inmates at the Kentucky State Penitentiary.
- **Supplemental Assistant Public Advocates** - The Department is seeking attorneys to operate out of the Richmond, Frankfort and LaGrange trial offices.

If you are interested in one of these positions, please contact Roy Collins, Personnel Director or Rebecca DiLoreto, Recruitment Director at (502) 564-8006 for further information.

PLAIN VIEW

Search and Seizure Law



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.

It has been a while since we examined cases from our courts. This article will update us on cases addressing search issues since last fall.

THE KENTUCKY COURT OF APPEALS

Docksteader v. Commonwealth

The Kentucky Court of Appeals has written two published opinions of late. The first, *Docksteader v. Commonwealth*, Ky., App., 802 S.W.2d 149 (1991), represents a kind of case being played out all the time across the Commonwealth. Docksteader was a passenger in a car heading the wrong way on a Newport Street at 3:30 a.m. Police officers contended they could see the three occupants of the car arguing, so they approached the car to investigate. They saw a beer between Docksteader's legs, so they asked all the occupants of the car to get out. Docksteader told the officers he had a knife on his hip, which was removed. A pat-down of Docksteader revealed a pouch, which he said contained cigarettes. The officer patted the pouch, and discovered it to have a hard object in it. "Fearing a weapon," the officer opened the pouch and found drugs.

Judge Emberton, joined by Judge Dyche and Hayes, found the scenario to be reasonable. First, the Court found that approaching a stopped car without a show of force does not involve the Fourth Amendment. Secondly, once the officers saw Docksteader with a beer in a public place, it was reasonable to require him to get out of the car.

The Court rejected Docksteader's contention that on a drinking beer in a public place case it was then unreasonable to pat him down, particularly since he had a knife. Further, once the officer felt the pouch, it was reasonable to open it to ensure that it did not have a weapon. "The fundamental question is reasonableness. We believe it would be totally unreasonable to limit the *Terry* search to only the outer clothing of the suspect if the officer possesses an articulable and objectively reasonable belief that weapons are in or about the suspect's immediate control and vicinity. Here, the officer searched a pouch which he reasonably suspected contained a weapon. Had he not done so the appellant would have had access to any weapons inside and the officer left at his mercy." Accordingly, the search was reasonable, and appellant's conditional plea would stand.

Docksteader is not particularly surprising. It demonstrates the extent to which the exceptions to the Fourth Amendment are subsuming the rule against warrantless searches. It demonstrates how little protection one has when in a car. It represents how far courts will lean to meet the exigencies of the law enforcement community. Finally, the case shows how a small justification for a police encounter, drinking in a public place, can balloon into a full blown search in short order, with later review concluding the search was reasonable. Unfortunately, while appellant raised Section Ten, the Court's analysis was entirely from the perspective of the Fourth Amendment.

That same day, Judge Emberton wrote a second opinion affirming a conviction, and search, this time joined by Judges Hayes and Wilhoit.

Woolums v. Commonwealth

Woolums v. Commonwealth, Ky. App., __S.W.2d __ (January 18, 1991). This case is quite similar to *Docksteader*. Here, the Fayette Urban County Police received an anonymous tip that two, tall white males in a blue car on York Street were selling drugs. Officers approaching York Street saw a maroon car leave a blue car. The police blocked the blue car, which had two white males in it. Apparently, the police used some force at this point, although the opinion is unspecific about the quantity of force. The police opened the door, and saw a syringe, a spoon, and a white substance in a bowl. A search of Woolums revealed a buck knife, a roach clip, a bag of marijuana, and cash. After Woolums was placed under arrest, a search of the car revealed marijuana and LSD under the

passenger seat, and syringes under the driver's seat and in the trunk.

The Court found the searches to be legal. First, the Court held that Woolums had been seized when the police blocked the car. However, because the seizure was a *Terry* stop, only articulable suspicion was required, which has been supplied by the corroborated anonymous tip. The Court further called "deminimus" the intrusion of requiring Woolums to get out of the car. The pat down search, justified under *Terry*, revealed drugs, which enabled Woolums to be arrested. That arrest provided justification for a complete probable cause search of the car under *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

The troubling aspect of the case is what is implied but unwritten. What appears to have happened is not the low-key, step-by-step *Terry* detention. Rather, a full blown, screeching tire, pull-Woolums-from-the-car kind of confrontation is implied. The *Terry* analysis used by the Court seems inappropriate for this kind of street confrontation, where it is clear an arrest was intended from the beginning.

Holt v. Commonwealth

The stinkiest case to come along in a long time is the unpublished opinion styled *Holt v. Commonwealth*, written on February 1, 1991. This case demonstrates basically two things. First, if a police officer wants to lie at a suppression hearing, the trial judge will often believe him. Secondly, RCr 9.78 allows an appellate court to turn a blind eye, and justify it by saying there is "substantial evidence" supporting the trial court's factual findings.

Isn't this a little strong? Listen to these facts. One Bardo, a police officer, had tried to get his girlfriend to buy cocaine from Holt. He bragged to another girlfriend that he would have Holt in jail. Then one night, he saw Holt driving, stopped him, and searched his car, finding a weapon and drugs. Bardo testified at the suppression hearing that Holt, a convicted felon, consented to the search, saying "you know me, I'm always happy to cooperate with the police." Holt disputed the consent, as did a third-party witness. At the hearing, Bardo justified the stop by saying Holt had "drifted" through a stop sign, although he "was confused as to where the stop sign was located."

This is a frustrating decision to read. The Court stated that "the trial court believed the testimony of Officer Bardo. We can find no error in this regard, *even if we believed we may have ruled otherwise.*" (Emphasis added). Judge Lester dissented. Does anyone doubt what really occurred here? What is to be gained by giving deference to the trial court's "fact finding?" Does this make us respect the law more? Did Woolums get justice? Does Woolums, sitting in prison, believe the same laws apply to Officer Bardo (such as perjury) as apply to him? A common factual scenario, but troubling nonetheless.

THE SIXTH CIRCUIT

United States v. Clutter

The Sixth Circuit also wrote numerous search and seizure opinions since last fall. In *United States v. Clutter*, 19 SCR 20 (6th Cir., Sept. 18, 1990), the Court looked at the issue of whether children have a right to consent to search a house. Here, Clutter lived with Sizemore's 14, 12, and 10 year old children. One day the children reported to their father that there was a lot of marijuana at the house. The father, Sizemore's former husband, contacted the police. When the father refused to let his children get involved in getting a search warrant, he and the officer decided to try the consent route. The children did let the officer in, and he found marijuana. Based upon this discovery, he obtained a search warrant based upon his affidavit, which did not mention the children's consent.

The Sixth Circuit affirmed Clutter's conviction and the search. "A search does not violate the Fourth Amendment where police obtain consent to search from one who possesses common authority over the premises with the absent non-consenting target of the search." The Court was not troubled by the officer's inaccurate affidavit, calling it not a material omission, nor "crucial to establishing probable cause."

United States v. Cooke

In *United States v. Cooke*, 19 SCR 20 (6th Cir. October 1, 1990), the Court also looked again at the consent issue. Here, the district judge looked at a fact-bound airport case. The Sixth Circuit gave deference to those facts, without indicating in detail the basis for their deference. In doing so, the Court reminded the district judges to make findings indicating "why they are crediting one party over another when the versions of what occurred differ in material detail." The Court also chided the appellant for doing no more than alleging conflicting stories in his effort to convince the Court to abandon its deference to the trial court.

United States v. Winfrey

Another airport search case was *United States v. Winfrey*, 19 SCR 20 (Sept. 28, 1990). Here, four Wayne County Sheriff's deputies looked at a car in a parking facility and saw a lot of cash on the front seat. They began to watch the car. When Winfrey began to get in, the officers approached him and asked to look at his driver's license, plane ticket, and auto registration. He agreed to a briefcase search, and to a pat-down search for weapons. Winfrey asked to leave, but the deputies detained him until the DEA could get there. 10 - 15 minutes later, the DEA arrived. Winfrey again agreed to a pat-down (this was disputed), at which time cocaine was discovered.

Under these facts, the Court again gave deference to the trial court's findings. The Court held there to be no search in initially confronting Winfrey. Thereafter, Winfrey consented to a pat down and search of his brief case. The 10 to 15 minute detention of Winfrey was justified under *Terry* and *United States v Sharpe*, 470 U.S. 675 (1985). Finally, although disputed, the Court deferred to the trial court's finding of consent to the second pat-down search.

United States v. Bradley

A defendant fared a little better in *United States v. Bradley*, 20 SCR 3 (6th Cir. Jan. 10, 1991). Here, after the defendant was indicted, the police went to his home and arrested him. A search of his house, with his consent, revealed narcotics and a weapon. Bradley was taken before a magistrate, after which he again consented to a search of his home.

The good news for Bradley is that the warrantless arrest violated both Tennessee and United States law. The Court viewed this as a clear *Payton v. New York*, 445 U.S. 573 (1980) violation. Because Bradley's consent followed shortly thereafter, the consent was tainted by the illegality. The bad news for Bradley is that the search two days later, conducted after Bradley's appearance before a judicial officer, was viewed as untainted by the illegal arrest.

United States v. Dominquez-Prieto

United States v. Dominguez-Prieto, 20 SCR 3 (Jan. 17, 1991) involved the inspection of a truck in Tennessee pursuant to rules and regulations of the Tennessee Public Service Commission. The driver, who was "nervous and shaking" during the search, had a late log book, an empty rig driven 1600 miles, and a padlocked trailer. These circumstances met Tennessee's "reasonable suspicion" test. Using *New York v. Burger*, 482 U.S. 691

(1987), the Court held the search to be reasonable due to having been conducted "pursuant to the pervasively regulated business doctrine."

United States v. Taylor

In another Sixth Circuit case, *United States v. Taylor*, 48 Cr.L. 1111 (6th Cir. 10/25/90), the Court reversed a conditional plea due to an unconstitutional search. Eddie Taylor, a middle-aged black man dressed in work clothes and carrying a "designer travel bag," deplaned in Memphis after a Miami flight, and walked directly (and nervously) toward the parking lot. Memphis Police officers followed him, asked him questions, and searched his bag twice, discovering cocaine. Using *United States v. Cortez*, 449 U.S. 411 (1981), the Court held the search to have been illegal. Taylor did not meet the amorphous "drug courier profile." Neither his race nor his dress were important factors indicative of being a drug courier. "There is no dress code for passengers taking any flight." Nor could race be so used. "We cannot allow blacks and other minorities to become subject to unreasonable stops and governmental intrusions because of their race."

United States v. Anderson

The final Sixth Circuit case was *United States v. Anderson*, 20 SCR 3 (6th Cir., Jan. 15, 1991). Here, officers saw the defendant's car pulling out of a residence at a high rate of speed. Their license plate was in the window, and the car was heavily loaded. The area had been the site of numerous recent burglaries. The defendants were black. After being stopped, he defendants were asked to accompany the officers to the county jail.

The Court held the district judge was not clearly erroneous in finding the initial stopping to have been constitutional. One troubling fact relied upon by both courts is that the defendants were black in a white neighborhood.

Thereafter, reasonable suspicion ripened into probable cause when the defendants gave wildly inconsistent and implausible answers to questions posed by the officers.

Connecticut v. Hamilton

There has been a little movement of late in the high court. On October 29, 1990, the Court vacated a judgment in a Connecticut case in which the lower court had suppressed evidence not listed in a search warrant and not inadvertently discovered. *Connecticut v. Hamilton*, 48 Cr.L. 3049 (Oct. 29, 1990).

Florida v. Jimerro

On December 3, 1990, th4 Court granted certiorari in *Florida v. Jimerro*. The question to be considered by the Court is whether the scope of a consent search extends to all areas of a vehicle, including closed containers, if the consenting individual is advised of the nature of the investigation and the object of the search.

Connecticut v. Geisler

The Court vacated another Connecticut case in *Connecticut v. Geisler*, 48 Cr.L. 3097 (Jan. 7, 1991). The ruling below had suppressed the defendant's blood alcohol test and statements made after officers made a warrantless entry into his home for the purported reason of rendering medical assistance to him following an accident.

Dunkel v. United States

The Court vacated the judgment in *Dunkel v. United States*. The vacated lower court decision had held that a dentist had no reasonable expectation of privacy in a dumpster located on the curtilage of his office, and thus no warrant was required to search the dumpster.

SHORT VIEW

1) ***State v. Shepherd***, Ark. 798 S. W. 2d 45 (1990). A prosecutor may not use a subpoena to place police officers in a position to look for evidence during service of the subpoena, according to the Arkansas Supreme Court, using both the 4th Amendment and Arkansas law. Five police officers were used to serve the subpoena. One testified they went on the property to "kick the hornet's nest." This was an egregious misuse of the subpoena power, and thus evidence seized as a result had to be suppressed.

2) ***United States v. McNichols***, Nev. Sup. Ct. 48 Cr.L. 1151 (10/25/90). The Nevada Supreme Court used property law concepts to reject a search of a house the defendant had lost due to a foreclosure. The defendant's re-entry onto his property did not create an expectation of privacy society was prepared to recognize as reasonable; rather, it was reviewed as a trespass. Thus, the drug lab found there could be used against McNichols.

3) ***Maxian v. Brown***, NY Sup. Ct. App. Div., 1st Dept., 48 Cr.L. 1160 10/30/90). In New York, as in Kentucky, a person arrested without a warrant must be taken before a magistrate for a probable cause determination "without unnecessary delay." See RCr 3.02(2). Henceforth, however, that phrase will require an arraignment within 24 hours of arrest, after which the defendant can go into court and require the state to explain the reason for delay. *Williams v. Ward*, 845 F.2d 374 (2nd Cir. 1988) had approved a 72 hour prearraignment delay in New York. Thereafter, the 4th Amendment is violated by the continued holding of the defendant without a probable cause determination. *Maxian v. Brown* goes one step further, requiring the state to justify anything beyond a 24 hour delay. It would not be hyperbole to say that this is violated every day in some county in Kentucky.

4) ***State v. Boland***, Wash. 800 P.2d 112 (1990). The police cannot search curbside garbage in Washington State without a warrant, after this decision by the Washington Supreme Court. Using the Washington Constitution, the Court explicitly rejected the 4th Amendment analysis by the Court in *California v. Greenwood*, 486 U.S. 35 (1988). The Washington Constitution prohibits disturbing a person's "private affairs, or his home invaded, without authority of law." The Court focused on whether Boland's "private affairs" were effected, rather than focusing on the reasonableness of the expectation of privacy, as did the *Greenwood* Court.

5) ***People v. New York***, NY Ct. App. 48 Cr.L. 1241 (11/29/90). The New York Constitution requires reasonable suspicion for an officer to use a dog to sniff the outside of a house. The Court was concerned that such a dog sniff gave information about the inside of the house, where increased privacy is expected.

6) ***United States v. McCraw***, 920 F.2d 224 (4th Cir. 1990). Cracking the door open does not give the police the right to force their way into an occupant's hotel room without a warrant according to the Fourth Circuit. The Court used the recent case of *New York v. Harris*, 110 S.Ct. 1640 (1990) to suggest that "the police may not forcibly or coercively gain admittance to a private residence to effect an arrest simply by obtaining the arrestee's presence at the door."

7) ***People v. Ricksy***, Ill.564 N.E.2d 256 (1990). The police may not reach any object discovered during pat-down *Terry* search. Rather, to justify such a search the officer must describe the perception reasonably leading him to believe that a weapon lies underneath.

8) ***United States v. Hedrick***, 921 F.2d 396 (7th Cir. 1991). Pushing *Greenwood* one step further, the 7th Circuit has approved the warrantless search of garbage placed midway between the sidewalk and the garage. "Because the distance between the garbage cans and the public

sidewalk was relatively short, the garbage was collected by the garbage service from that location, and the garbage cans were clearly visible from the sidewalk, we hold that Hedrick possessed no reasonable expectation of privacy in the garbage.

9) ***Commonwealth v. Martinez***, Pa. Sup. Ct., 48 Cr.L. 1404 (1/23/91). A person who leaves a group of people on the street when she sees the police drive by, and who has a "bulge" in her jacket, may not be seized by the police under *Terry*. "At the moment that Martinez was told to come towards the police officers, turn around and put her hands on the car, there was no basis to reasonably believe that Martinez had engaged in any unusual and suspicious conduct. Without that, one cannot reach the issue of whether the suspect is armed and dangerous. The coercive activity was unlawful. The evidence flowing from that unlawful conduct should have been suppressed."

10) ***Commonwealth v. Edmunds***, Pa. Sup. Ct. 48 Cr.L. 1425 (2/4/91). There will be no good faith exception in Pennsylvania. The Pennsylvania Constitution's exclusionary rule, like Kentucky's, is intended not only to deter police misconduct, but also to protect the privacy rights of its citizens and to ensure that warrants are issued only upon probable cause. To adopt a good faith exception would emasculate both of these purposes. Further, adopting the good faith exception would undermine the integrity of the judiciary. Accordingly, there will be no good faith exception under the Pennsylvania Constitution.

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I am only one,
But still I am one.
I cannot do everything,
But still I can do something.
And because I cannot do everything,
I will not refuse to do the
something that I can do.
- - - E. E. Hale

His Brother's Keeper

Man is Indicted; Brother sent to Jail

Veterinarian, Rafael Roca-Suarez spent 26 days in jail before convincing drug authorities he was not his brother, who had been indicted on drug smuggling charges.

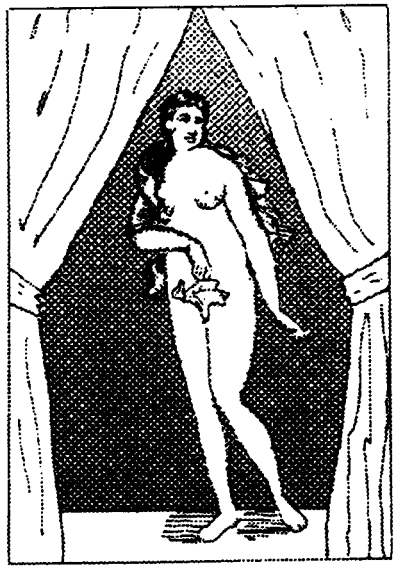
U.S. Magistrate William Turnoff said it was an honest mistake. He ordered Roca-Suarez's release on personal surety bond and gave prosecutors and DEA agents three weeks to finally check the situation.

It is the second time Rafael has been arrested instead of his brother, Renato. In 1983, he was detained in Panama until a DEA man was flown in to say they had the wrong man.

Associated Press.

Jefferson County Faces Strip-Search Suit

A Louisville salesman has filed a lawsuit in federal court contending he was strip-searched after being stopped for speeding and arrested for failing to list his current address on his driver's license.



Steven W. Price, 29, asks for punitive damages in his lawsuit filed in U.S. District Court.

The suit says a federal appeals court already told Jefferson County it cannot strip-search people detained for minor offenses unless there is a reasonable suspicion they are concealing weapons or contraband.

Price, dressed in a jacket and tie, said he hardly looked like a dangerous felon when he was stopped in Audubon Park last year.

Price's suit comes one year after Jefferson County government paid $30,000 in an out-of-court settlement to Karen Masters, who was strip-searched after a traffic-related arrest in 1986. A separate payment of $25,000 was made to her attorney.

Writing for a unanimous three-judge panel in Masters' case, 6th U.S. Circuit Court of Appeals Judge Pierce Lively rejected the county's claims that, to protect inmates from one another, it must strip-search all detainees when they are intermingled with the general population. The U.S. Supreme Court refused to consider the county's appeal.

Richard Frey, Jr. the Jefferson County corrections chief, said he as unfamiliar with the facts of Price's case. But Frey confirmed that before any detainees - including accused traffic offenders - are moved into the general population, the jail still strip-searches them.

"Anyone who comes to the jail, I don't know them," he said, defending the policy. "He could wear a suit and tie, but we have no idea what their background is."

Price's suit names the county Corrections Department, county government, Frey and jail officer Robert Reno as defendants. Price contends that his "appearance and behavior" gave no cause to believe he was concealing weapons or contraband, making the search "unconscionable."

He asks for punitive damages "to ensure that no citizen of Jefferson County is ever again victimized by the blatant and malicious violation of constitutional...rights that were endured by the plaintiff."

Lexington Herald-Leader
March 10, 1991

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JUVENILE LAW

Diversion Programs Help Turn Kids Around

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.

A rogues gallery of youthful crime covers the walls of a small third-floor office in the Kenton County Building. Drawings depict kids in jail cells; kids being led to police cars; a colorful house with broken windows under the crayoned words "Doing Damage is Dumb."

The artists are experts on their art. They are youngsters who have done the damage, shoplifted the cosmetics, burglarized the houses. Most are first-time offenders who painted the posters as part of a program that diverts children from court and substitutes education and community service for incarceration. "We want these kids to teach other kids why what they did was wrong," said Melissa Higgins, 1 of 4 court-designated workers in Kenton County.

Similar workers are attached to each of Kentucky's 59 judicial districts, under a program mandated by the Unified Juvenile Code. The code became law in 1987 in an effort to gear the juvenile justice system more toward rehabilitation than punishment.

The main job of court-designated workers is developing programs to turn children away from crime without sending them to court.

It seems to be working, says Charles Leachman, the state's juvenile services manager. A study of 20 judicial districts from 1988 to 1989 showed only 13% of the children who went through the diversion program showed back up in the juvenile justice system.

Of all children who agree to diversion, 88% complete their programs. If the juvenile fulfills his part of the diversion bargain, the charges are dismissed, his record erased.

Leachman says diversion agreements also have generated $345,000 in restitution and 161,000 hours of community service. "We feel the program has been highly successful," Leachman said.

Under the program, if police pick up anyone younger than 18, the first person they see is the court-designated worker.

The worker reviews the charges with the child, interviews the child, checks the child's record and determines whether the child is lodged in a detention center, a shelter or with his family while awaiting a court appearance. The worker also determines whether the child is eligible for the diversion program.

Under the former system, most of the children who were accused of crimes went straight to a juvenile detention facility and then to the courtroom. "There wasn't much diversion going on before the court-designated workers," said Brad Hughes, spokesman for the state Cabinet for Human Resources.

The new juvenile code lists a set of criteria that is used across the state to determine a juvenile's eligibility for diversion. In most cases, a first-time offender is a prime candidate for diversion. Under previous regulations, eligibility varied in different parts of the state.

Ms. Higgins' work won her statewide recognition last October at the Juvenile Justice Conference at Eastern Kentucky University. She was 1 of 2 court-designated workers in the state to receive the annual conference award for outstanding contributions in providing juvenile justice services.

Ms. Higgins helped develop 15 workshops for juveniles ranging from theft prevention, shoplifting and drugs to temper control, and self-esteem. A workshop called "Just Say No" has left some young offenders crying. The workshop features Debbie and Ed Kentrup, whose young daughter was killed in a wreck caused by a drunken driver. They talk about what it feels like to be a victim of a drunken driver. A 21-year-old who disabled a police officer while driving drunk four years ago tells what it feels like to be the offender.

A good portion of diversions include a workshop on dealing with other people and controlling temper. Ms. Higgins

points to a large penciled poster showing ten acceptable ways to deal with anger. The child who drew it barely knew one acceptable way of dealing with anger before making contact with the court-designated worker program. "The problem is interaction skills, coping skills. We show them if you don't like someone, this is how to deal with that person," Ms. Higgins said.

Other aspects of a diversion program would be tailored to fit the youth's crime. A child arrested for shoplifting might attend a theft prevention workshop, apologize to the store and write a paper about why shoplifting is wrong. The child also may be asked to draw a poster about shoplifting. "If a kid has done damage to somebody's property, I almost always will have him do a work detail. It's important that he pays back to the community for what he did," she said. "Sometimes they get jobs to pay restitution. We have a jobs board in the office. We tell the kids, 'We don't want it coming from mom and dad. We want it coming from you.'"

Youngsters under 16 do such jobs as cutting grass or shoveling snow. Those over 16 can work at more traditional jobs. Ms. Higgins tries to find work that will do more than raise money. "We use nursing homes, the animal shelter. If a kid expresses interest in developing secretarial skills, we try to find a job in an office."

She encourages kids to choose nursing home work whenever possible. "They're doing something for other people. They might be helping someone with lunch trays or wheeling someone around," Ms. Higgins said. "Kids have to feel needed. I think they can get a lot out of helping other people."

PENNY KRIMER
Kentucky Post staff reporter

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Alternatives to Jail

Instead of jail, most juveniles sentenced to long-term state custody stay at a treatment center or a group home. Others stay at home but attend a treatment program during the day. The following programs are listed in order of security, from the most secure and disciplined to the least.

Treatment centers for Youthful Offenders
These four programs take juveniles, ages 13-18, who have been convicted of felonies twice in the past year or have violated the terms of their court-ordered treatment. The dormitory-style institutions include intensive counseling, schooling and vocational training:

Central Kentucky Treatment Center, Louisville: boys, capacity 47.
Morehead Treatment Center, Morehead: girls, capacity 32.
Rice-Audubon Kentucky Children's Home: boys, capacity 42.
Johnson-Breckinridge Treatment Center, LaGrange: boys, capacity 32.

Treatment Centers for Public Offenders
These programs take juveniles, ages 13-18, who are designated public offenders under state law and have committed felony offenses. The dormitory-style institutions include intensive counseling, schooling and vocational training:

Cardinal Treatment Center, Louisville: 30 boys.
Green River Boys' Camp, Cromwell: 44 boys.
Lake Cumberland Boys' Camp, Monticello: 44 boys.
Lincoln Village Treatment Center, Elizabethtown: 32 boys.
Mayfield Treatment Center, Mayfield: 30 boys.
Northern Kentucky Treatment Center, Crittenden: 20 boys and 20 girls.
Owensboro Treatment Center, Owensboro: 33 boys.
Woodsbend Boys' Camp, West Liberty: 40 boys.

Clinical Services
Two programs are for young children, ages 6-12, who are considered severely emotionally disturbed. Children live in the dormitory-type facilities Monday through Friday, but return home on weekends:

Central Kentucky Re-Ed, Lexington: 30 boys and girls.
Re-Ed School of Kentucky, Louisville: 24 boys.

Group Homes
Each group home has a capacity of eight residents, ages 13-18. Boys and girls have separate homes. Most residents are juveniles guilty of a crime; some are status offenders - such as chronic runaways. These are homes, not institutions, which are staffed around the clock:

Ashland, boys.
Bowling Green, boys.
Crescent in Louisville, girls.
Glasgow, boys.
Kennedy in Jefferson County, boys.
Mayfield, girls.
Prospect House in Berea, girls.
Walton, boys.
Winter in Jefferson County, boys.
Bardstown in Jefferson County, boys.
Burnside in Tateville, boys.
Frenchburg in Sudith, boys.
Hopkinsville, boys.
London, girls.
Middlesboro, boys.
Waddy, girls.
Westport in Louisville, boys.

Day Treatment Centers
These offer counseling, schooling and vocational training Monday through Friday. These are not residential facilities. The children - boys and girls - live at home with their families, in foster homes or in group homes:

Ashland, capacity 30.
Lexington, capacity 55.
Covington, capacity 45.
Harrodsburg, capacity 20.
Louisville, capacity 75.
Newport, capacity 45.
Owensboro, capacity 50.
Laurel County at London, capacity 30.
Christian County at Hopkinsville, capacity 30.
Bullitt County at Shepherdsville, capacity 50.
Wilkinson Street at Frankfort, capacity 50.
Hardin County at Elizabethtown, capacity 40.
Hopkins County at Madisonville, capacity 30.
Life Skills at Bowling Green, capacity 36.
Madison County at Richmond, capacity 30.
Shelby County at Shelbyville, capacity 30.

EVIDENCE LAW

Kentucky's New Evidence Code - Part IV

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.

PRIVILEGES

Following the example of 13 other states, the drafters of the proposed rules have created an article which lists certain testimonial privileges that will apply in court proceedings. Because state courts do not face the diversity problems encountered in the federal system there is no impediment to having the privileges clearly explained in the evidence rules adopted by the state. At the same time, these privileges are particularly important because they will be applied in federal diversity cases under FRE 501.

The source for most of these rules appears to be the Uniform Rules of Evidence, a proposal adopted by the Commissioners of Uniform State Rules in 1974. Actually, there is not much difference between the Uniform Rules and the proposed federal privileges that were contained in the original draft of the Federal Rules of Evidence but deleted by Congress before final enactment.

These proposals replace a number of statutes formerly listed in Chapters 421 and 422 of the Kentucky Revised Statutes.

It is interesting to note, however, that three privileges that you might think would be included in the Evidence Code are left in the statutes. At first I was tempted to conclude that the drafters considered these to be second-string privileges. However, I now think they were left in the statutes to give them broad application.

It is important to remember that the Kentucky Rules of Evidence are designed to apply to "all the courts of this Commonwealth." It may well be that the drafters left these three statutes outside the rules in order to make sure they would apply in any proceeding or government investigation. KRE 1101(c) extends the applicability of privileges in court proceedings to "all stages of all actions, cases and proceedings," but the rule limits the application to court actions. This is an important supplement to the rules since it will allow the use of privileges at preliminary hearings on the admissibility of evidence in grand jury proceedings and the like. However, I think that the limitation of the Rules of Evidence to the Court of Justice means that privileges like husband and wife or psychotherapist-patient would not necessarily be available in an administrative or legislative investigation (*e.g.*, parole revocation hearing) although privileges outside the evidence rules would be available. It is unlikely that any administrative board would refuse to honor the privileges set out in the Evidence Code, but there is nothing in the Code that requires compliance with the Code by any entity except the Court of Justice.

The two standard privileges retained outside the Code are the *journalist's privilege*, KRS 421.100 and the *medical records confidentiality privilege*, KRS 422.315. The former statute allows a journalist to refuse to name the source of his information. This of course is particularly useful in investigations or government wrongdoing or negligence. The latter statute permits a patient whose medical records are to be introduced under the certified medical records procedure to ask the trial court for a protective order keeping private matters out of the court record. This is not strictly a privilege, but simply a statute that allows a person to ask a judge to keep embarrassing matters out of public record. Certainly this would not apply to matters relevant to the issues presented by the particular case.

In addition to the two statutes just named, there is an additional statute in Chapter 421 of the Revised Statutes that needs mention here. In some evidence codes, there is a statutory or rule-based self-incrimination provision that as a matter state law protects the defendant from having to testify. Such a provision is not necessary in Kentucky because in Kentucky the privilege is reversed. At common law, the defendant was not allowed to testify in a criminal case. It was not until the forerunner of KRS 421.225 was enacted in 1886 that the defendant had a right to testify at a criminal trial. The statute itself provides that the defendant

may testify only at his own request. If the defendant does not ask to testify, the matter of incrimination does not come up. The statute also prohibits any comment on his refusal to testify. This statute must be left in the body of statute law because without it the defendant would have no state law right to testify in a criminal trial.

Other than this statute and KRS 421.100 and 422.315, every statute in Chapters 421 and 422 dealing with privilege has been repealed effective July 1992.

The only parts remaining in Chapters 421 and 422 are statutes setting out procedures for securing the attendance of witnesses, provisions for replacement of lost documents, a full faith and credit statute and a modified version of the anti-sweating statute.

PRIVILEGES UNDER THE RULES

The privileges contained in Article V of the proposed rules consist of a general rule, an "honest eavesdropper" provision which undercuts the privileges, six specific privileges dealing with lawyer and client, husband and wife, clergy communications, counselor-client, psychotherapist-patient and government informant situations, followed by provisions concerning voluntary waiver, the effect of compelled disclosure, and comment or inference upon claiming of the privilege. I deal with the general rule and the exception first because they tell how the privileges are expected to be applied.

GENERAL REQUIREMENT OF TESTIMONY

The general rule is set out at KRE 501. It says simply that unless otherwise provided by a constitution, a statute or the rules of court, "no person has a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from being a witness or disclosing any matter or producing any object or writing." The Commentary to this rule sets out the plan of the Article which is a general rule requiring testimony by everyone who cannot claim a specific privilege. Right away you can tell that the drafters do not intend to give wide effect to privileges. This impression is confirmed by KRE 502 which presents the "honest eavesdropper" rule. KRE 502 states that a person to whom disclosure is neither intended nor foreseen and who legally obtains a confidential communication may testify or be compelled to testify concerning the contents of that communication. The Commentary states that this follows the common law approach articulated by Wigmore in his evidence treatise. Wigmore stated that the law has done enough for the party who possesses the privilege by allowing him to avoid forced disclosure. "This much, but no more, is necessary for the maintenance of the privilege." [8 Wigmore, *Evidence*, Section 2326, p. 633-634 (McNaughton Rev., 1961)]. The idea is that since the protection of privileged material is "largely in the client's hands" and because the privilege interferes with the truth-finding function of the courts, privileges should be strictly construed and limited. This view has been rejected by most modern commentators.

In *Weinstein's Evidence*, the author criticizes Wigmore's concept of privileges because it does not deal with modern difficulties in keeping private matters private. [2 Weinstein's *Evidence*, Section 503(b) [02], p. 51-54; Martin, *Basic Problems of Evidence*, 6 Ed., Section 9.01(a) (1988)]. In *Suburban Sew 'N Sweep, Inc. v. Swiss Bernina*, 91 FRD 254 (N.D. Ill., 1981) that court discussed the different approach to privileges taken in more recent times. McCormick's *Evidence* text was cited to the effect that at the time Wigmore wrote (his first edition came out in 1904) the incidental hazards of unintended disclosure could be guarded against by being careful. However, "with the advent of more sophisticated techniques for invading privacy in general and intercepting confidential communications in particular, the picture changed and a very different concept of the eavesdropper emerged." There is no other jurisdiction that has a provision similar to KRE 502. Almost all jurisdictions that have adopted statutes or rules for privileges follow what might be called the "reasonable precautions" rule which I think is far better than the present proposal. This is because "certain privacy interests in the society are deserving of protection by privilege irrespective of whether the existence of such privileges actually operates substantially to affect conduct within the protected relationships." [McCormick, *Evidence*, 3d Lawyers' Ed., Section 72, p. 172 (1984)]. When you stop and think about privileges that are set out in the Evidence Code, each deals with the respect that a decent government should have for the privacy rights of individuals. Husbands and wives should be able to talk to each other without fear that someone could force one or the other to testify. People should be able to consult religious advisers, psychologists, psychiatrists, counselors, or social workers, because the purpose for each such consultation is the alleviation of some sort of psychic, emotional or spiritual distress that the person is feeling. A person must be able to tell his or her attorney the complete truth not only to assist in development or disposition of a case, but also to allow the lawyer to advise the client. We live in a society in which the privacy essential to the maintenance of human relationships is constantly under attack. The fact that privileges are created in the first place shows that these forms of communication between people are so important the government should not be able to compel disclosure. It is unreasonable and indecent to undermine privileges by allowing any eavesdropper who disclaims evil intent to violate confidentiality. Wigmore's work was the great achievement of the early part of this century. But that work is rapidly becoming dated. Where a state is deciding on new rules of law, it should not rely on outdated concepts.

The drafters well may hope that the courts will be able to discern the truly "honest" eavesdroppers from the ones who are not quite so "honest." But it requires little imagination to foresee cases in which the determination will be very difficult. Suppose a client is at KCPC. A guard has to be present (or at least outside the door) to protect against violent actions by the client against the attorney. The guard listens through the door for any sounds of impending trouble and instead overhears confidential information that is privileged. Under KRE 502 the prosecutor could subpoena the guard and introduce his testimony at trial. This proposal is a mistake. It is unnecessary and it can only serve to chill communication in several very important areas.

The better approach is that adopted in states like Michigan. In that state, the courts take the position that because privileges are matters of statute, waiver must be the result of an act of the person claiming the privilege, not the result of an unfortunate accident. [*e.g.*, *Sterling v. Keidan*, 412 N.W.2d 255 (Mich. App., 1987)]. There is a provision in the rules for a voluntary waiver. Proposed KRE 510(ii) states that a claim of privilege is not defeated by a disclosure that was "made without opportunity to claim the privilege." Joseph and Saltzburn note in their *Evidence in America: The Federal Rules in the States* (Michie, 1987], that this rule can be interpreted to preclude testimony from eavesdroppers because obviously the parties to the communication have not had an opportunity to assert the privilege. The focus of this construction is on the "reasonable precautions" taken to prevent disclosure. If the parties do not take reasonable steps to protect the confidential information, a court may reasonably conclude that they did not intend the communication to b privileged. This is a better approach than proposed KRE 502 which will demand paranoid precautions by attorneys and

clients and by everyone who wants to have a private communication. KRE 502 is a provision that deserves a quick dismissal.

SPECIFIC PROVISIONS

The structure of the specific privileges is about the same for each. Generally, each privilege starts with a series of definitions describing the persons who may claim the privileged communication and describing exactly what communications are privileged under the rule. Definitions are followed by the privilege itself and then by the exceptions to the privilege. This section will describe each of the privileges and the probable method of implementation.

ATTORNEY - CLIENT

SCR 3.130(1.6) prohibits a lawyer from revealing information concerning a client unless the client consents or unless other law requires disclosure. The Commentary to this ethical rule provides that a lawyer must, in the absence of a waiver by the client, invoke the attorney-client privilege when it is applicable. The Commentary also states that there is a presumption against supersession of this ethical duty by any law or rule of court. The Commentary helpfully states that the question of supersession is "a matter of interpretation beyond the scope of these Rules," but clearly indicates that in case of doubt the lawyer must err on the side of preservation of confidentiality concerning any information. Ethically, lawyers are required to do their best to prevent dissemination of any "information" obtained from their clients, confidential or not, concerning the subject matter of the representation. KRE 501 clearly requires that an attorney, no less than anyone else, must, when summoned, appear and testify on any subject. It is against this background that the proposed KRE 503 should be examined.

The definitions of this rule are quite lengthy. A client is a person of any type, including a public officer, a corporation, an association of any other aggregation that receives professional legal services by a lawyer or who consults with a lawyer for the purpose of obtaining professional legal services from that lawyer. A lawyer is a person authorized to practice law or a person who is "reasonably believed by the client to be authorized" to practice law in any state or nation. A communication is confidential if it is:

(1) not intended to be disclosed to third persons other than those to whom disclosure is made,
(2) in furtherance of the rendition of professional legal services to the client or
(3) made to those persons reasonably necessary for the transmission of the communication.

Both the client and the lawyer may act through representatives who are defined in subsection (a) of the rule as persons employed or authorized by the individuals to act on their behalf with respect to legal services. The general rule is that a client has the privilege to refuse to disclose and to prevent any other person identified in the rule from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client. Although there are a lot of specific provisions here, the rule may be simplified to say that the client can keep anyone acting on his behalf, (his lawyer, his own agent or employee, or the lawyer's agent or employee) from saying anything confidential as long as that statement relates to professional legal services to that client.

Of course there are exceptions. The first and most offensive exception is the statement that the rule of privilege is subject to KRE 502. This means that any innocent or not so innocent bystander who overhears such a communication can immediately blab it to whomever he wishes. If an adverse party finds the statement useful, the eavesdropper can be subpoenaed to testify. There are five numbered exceptions. The first denies the privilege to communications if the services of the lawyer were sough to assist anyone to commit or plan to commit what the client knew or reasonably should have known would be a crime or a fraud. The second one deals with statements between parties who claim from the same decedent. The third denies the privilege where the communication is relevant to an issue of breech of duty owed by the lawyer to the client or vice versa. The fourth notes that there is no privilege where the lawyer receives a communication concerning a document to which he is an attesting witness. The last exception concerns a communication relevant to a matter of common interest among clients if he communication was made by anyone of them to a lawyer retained on consulted by them in common if that statement is to be offered in an action between or among any of the clients.

HUSBAND AND WIFE

The husband and wife privilege is set out at KRE 504. There are no definitions in this rule, and the rule simply is that the spouse of an accused in a criminal proceedings has a privilege to refuse to testify against the accused spouse as to events occurring after the date of the marriage. This is all of the rule. Under the proposal, there will be no more exception for confidential communications as authorized under current practice. This is not a confidential communication-type rule. It is simply a privilege that allows a witness to refuse to take the stand to testify about "events occurring after the date of their marriage." Since a communication is an event, obviously that would be covered by the rule.

There are important exceptions to the rule. There is no privilege where the evidence shows that the spouses are conspirators or acted jointly in the commission of a crime they are both charged with. There is no privilege where one spouse is charged with wrongful conduct against the "person or property" of the other spouse, a minor child of either, an individual residing in the household of either, or a third person if that conduct is committed in the course of wrongful conduct against person in the household of either spouse. In addition, the court may refuse to allow the privilege in any proceeding if "the interest of a minor child of either spouse may be adversely affected." The trial judge is vested with a considerable amount of discretion in denying the privilege where spouses are jointly charged for offenses or where one spouse has injured the other or a minor. Of course, there is not much need for the privilege where the spouses are jointly tried. The federal right against self-incrimination and the Kentucky statutory provision will be sufficient in almost every case to keep the spouses off the stand. There really is not much problem with the second part of the exception, where one spouse is charged with wrongful conduct. This is an instance where the testimony of the other "innocent" spouse is necessary because there is quite likely no other way for the truth to be known. The last part is problematic. The phrase "if the interest of a minor child . . . may be adversely affected" is vague enough to allow denial of the privilege in any case where a minor child is involved. If the interests referred to are the interests listed by the General Assembly in various parts of the Unified Juvenile Code, then there probably will not be much difficulty in application. However, it may be well to draw more specific language, perhaps adding the phrase "substantial interest of a minor child" to give some limit to the discretion of the trial judge in denying the privilege.

RELIGIOUS PRIVILEGE

The "religious privilege" is so named in order to avoid constitutional problems. Apparently, at one time when the privilege was better known as a priest-penitent privilege, there were claims made that the privilege unfairly favored Roman Catholics over other persons from religious traditions that did not

practice individual confession. The proposed rule, which follows proposed FRE 506 defines a clergyman as a minister, priest, rabbi, accredited Christian Science practitioner or other "similar functionary" of a religious organization or an individual reasonably believed to be such by the person consulting him. Again, a communication is deemed confidential if it is made privately and was not intended for further disclosure unless to other persons present in furtherance of the purpose of the communication. A person has a privilege to refuse to disclose and to prevent another from disclosing any confidential communication between the person and a clergyman as long as that clergyman was acting in his professional character as a "spiritual adviser." This last language is meant to exclude communications made to a person who may be a licensed minister acting in a secular capacity as a counselor in a group therapy situation. It is also intended to point out that the person need not be "making a confession" in order for the communication to be confidential. Either the person or the clergyman may claim the privilege on behalf of the communicant. Again, KRE 502 applies so that busybodies or innocent bystanders may overhear and testify as to what they overhear.

COUNSELOR - CLIENT

Next in line is the counselor-client privilege which covers a number of communications. In the definitions section, KRE 506 defines a "counselor" as a certified school counselor, a clinical social worker, a sexual assault counselor, a drug abuse counselor, or an alcohol abuse counselor. Each person must meet particular certification or employment requirements. The client of any of these counselors has a privilege to refuse to disclose or to prevent the other from disclosing a confidential communication made "for the purpose of counseling the client" if the communication was between the client, the counselor, and persons present at the direction of the counselor including members of the client's family. Again, this rule is subject to KRE 502. The client, his guardian or conservator, or his personal representative if deceased may claim the privilege. The counselor may assert the privilege on behalf of the client. In addition to the KRE 502 exception, the privilege is not available if the client is asserting a physical, mental or emotional condition as an element of a claim or defense in the case, or after the client's death where such condition is relied on as an element of the claim or the defense. In addition, if the judge finds that the communication is relevant to an essential issue in the case and there is no alternative means to obtain the substantial equivalent of the communication and that the need for the information outweighs the interest protected by the privilege the judge may deny the privilege for purposes of that case. The judge is encouraged to receive the evidence in an in-camera hearing and to make specific rulings concerning the existence of each of the three factors listed above.

PSYCHOTHERAPIST - PATIENT

Under the psychotherapist-patient privilege, the patient is a person who consults a psychotherapist for the purpose of securing diagnosis or treatment of a mental condition. A psychotherapist is either a person licensed by Kentucky or another state to practice medicine who receives the communication while engaged in the diagnosis or treatment of a mental condition, or, a person licensed or certified by Kentucky or another state as a psychologist. A person reasonably believed by the patient to be either of these two is a psychotherapist for purposes of the rule. Again, the standard confidential communication definition is set out, in which a communication is deemed confidential if it is not intended to be disclosed to persons other than those present for the purpose of furthering the "interest of the patient in the consultation examination or interview." The definition section of this rule contains a definition of a "authorized representative," which means a person empowered by the patient to assert the privilege and any person whose communications are made privileged by this rule. The patient or his authorized representative has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his mental condition, if those communications are between the patient, the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This includes members of the patient's family. The rule is subject to KRE 502 and contains three exceptions. There is no privilege for communications in proceedings to hospitalize the patient for mental illness "if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization." In the *Estelle* exception, the privilege will be deemed waived if the patient, after having been informed that the communication would not privileged, has communicated with a psychotherapist in the course of an examination ordered by the court. The waiver exists only as to issues involving the patient's mental condition. Finally, if the patient is asserting his mental condition as an element of a claim or defense, of if the patient has died, the privilege will not be allowed in any proceeding where a party relies on the existence of a condition.

GOVERNMENT INFORMANT

The last substantive privilege concerns the identity of an informer under KRE 508. This rule allows an "appropriate representative of the public entity to which the information was furnished" (either the Commonwealth of Kentucky, other states, or the United States) to "refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law," if the communication was made to a law enforcement officer or member of a legislative committee or its staff conducting an investigation. There is no mention of KRE 502 in this rule. However, if the informant's identity has been voluntarily disclosed or the informant "may be able to give relevant testimony concerning an issue in the case," the privilege may not apply. Where there is a question concerning the relevance of the testimony, the court must give the "public entity" an opportunity to make an in-camera showing in support of the claim of privilege. The rule permits affidavits, but allows the court to require testimony concerning the matter. In criminal cases, if the judge deems invocation of the privilege improper, on motion of the defendant or on the court's own motion it "shall grant appropriate relief" which may include an order requiring disclosure, a grant of continuance to the defendant, an order relieving the defendant from disclosures required of him, an order prohibiting introduction of evidence, or an order dismissing the charges. In any event, the evidence presented concerning the availability of the privilege must be preserved and sealed for purposes of appeal.

WAIVER AND PROCEDURAL RULES

The remainder of the Privilege Article consists of three procedural rules. KRE 509 provides that a person who voluntarily discloses or consents to disclosure of "any significant part of the privileged matter" waives the privilege. There are two exceptions, the first of which is that the rule does not apply if the disclosure itself is privileged. A second exception allows disclosure of confidential information for "third party payment of professional services" (medical insurance). KRE 510 provides that privilege is not waived by a disclosure which was the result of an erroneous ruling requiring disclosure or disclosure made without the opportunity to claim the privilege. The final rule, KRE 511 is a very useful rule that provides that the claim of privilege is not a proper subject

of comment by anyone in the courtroom and that no inference may be drawn from it. The rule directs that to the extent possible the claim of privilege shall be made outside the presence of the jury. Finally, the rule provides that any party who fears that he might suffer from an adverse inference from a claim of privilege is entitled to an instruction prohibiting any such inference.

CONCLUSION

The privileges set out under Article V of the proposed Rules are not remarkable changes from present practice. The only serious problem is KRE 502 which is based on an outmoded concept of what privileges are for. Privileges express the public policy of the Commonwealth by protecting certain relationships. Privileges are important because they show respect for relationships. It is anomalous to take the step of establishing privileges and then provide that they can be waived unless the people are paranoid enough to ensure that no one can possibly overhear them. It may be that the worst fears about this rule will not be realized. But there is no sense taking a chance.

There is no legal reason why KRE 502 must be adopted. And in light of the true purpose of privileges, protection of personal privacy, it seems clear that the wise move in these circumstances would be simply to delete this proposal.

POSTSCRIPT

Anyone dealing with a DNA case will be interested in the case and annotation at 84 ALR 4th 293 and 313 (1991), *Admissibility of DNA Identification Evidence."* It is a convenient listing of the leading cases and journal articles on the subject

[**Ed. Note:** Mike Williams is the resident "expert" on DNA issues in the Department. He has a collection of articles, etc. on challenging DNA evidence.]

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Staff Changes

Transfers

Linda West, Assistant Public Advocate - Formerly with the Appellate Branch since 1976. Joined the Post-Conviction Branch on Feb. 16, 1991.

Barbara Holthaus, Assistant Public Advocate - Formerly with the Post-Conviction Branch since 1989. Joined the Appellate Branch Feb. 1, 1991.

Rebecca DiLoreto, became Recruitment Director in Mar., 1991. She took over that duty from George Sornberger who transferred to CTU.

Rodney McDaniel, became Franklin County Administrator on Jan. 4, 1991. He replaced George Sornberger who transferred to CTU.

New Staff

Susan Burrell, Assistant Public Advocate - Shown here being sworn in, joined the Paduach office on Feb. 1, 1991. She is a 1990 UT Law School graduate.

Stuart Ulferts, Assistant Public Advocate - Joined the LaGrange Trial Services office on Mar. 1, 1991. He is a 1990 graduate of the UL School of Law.

Bill Reynolds is the graphics, layout and design Editor. Have you noticed the changes to *The Advocate* lately? This is due to Bill. He has been doing computer programming, graphics, layout and design for the last six years, and now is doing it for *The Advocate*.

Resignations

Gary Billingsley, formerly a Paducah investigator, resigned on Mar. 30, 1991.

The New Kentucky Evidence Rules

Provisions That Should Worry Criminal Defense Lawyers

ROBERT E. SANDERS

I. STATUS OF PROPOSED RULE CHANGES

An effort to reduce Kentucky evidence law to the form of a written code or collection of rules was concluded in November, 1989, by the Evidence Rules Study Committee of the Kentucky Bar Association. An espoused goal of the Committee, Chaired by Professor Robert G. Lawson, of the University of Kentucky College of Law, was "to strive for uniformity with the Federal Rules of Evidence and to propose a departure from the Federal Rules only for good reason."

The 1990 General Assembly, by passage of House Bill 214, adopted the Kentucky Rules of Evidence (KRE) as proposed by the Evidence Rules Study Committee. Although H.B. 214 was officially passed in the 1990 session, the rules will not go into effect until 1992. The delay in implementing H.B. 214 is intended to permit the Bench and Bar to study the new rules and suggest changes before they are actually put into use. The first public hearing to gather comments and criticisms on the proposed evidence code from Kentucky attorneys was held at the 1990 Annual Bar Convention in Lexington.

The Kentucky Supreme Court is now reviewing the comments made at the hearing and is processing the proposed evidence code through its Rules Committee in accordance with established practice. The Supreme Court will conduct another public hearing on the rules at the 1991 Annual Bar Convention prior to the effective date of H.B. 214. Any changes proposed by the Court will be taken back to the General Assembly in 1992. This unprecedented procedure is being utilized because of the enormous mix of substantive and procedural rights encompassed within the law of evidence. Concurrent adoption by the General Assembly in statutory form and by the Supreme Court through its rule-making power will avoid any separation of powers challenges.

At first blush, the adopt-now; implement-later plan sounds prudent. By adopting the rules in the 1990 session, the legislature is telling the Bench and Bar that they are serious about the proposition that we are going to have an evidence code. By delaying their implementation, we have a comfortable period of study and comment. If the plan works, we should avoid adoption of any bad rules.

Expectations that delaying implementation of the rules will assure review and revision before a final code is adopted and implemented may be unrealistic. Although the proposed rules have been available for study for over a year already, few lawyers have bothered to read the proposed rules, much less comment upon them. Even assuming the Bench and Bar study and comment on the rules, there is no real assurance that the legislature will make suggested revisions or that the Kentucky Supreme Court will approve or adopt suggested revisions. Next session, when the Bench and Bar return to Frankfort with a list of suggested amendments to H.B. 214, we stand a good chance of finding deaf ears and legislators saying, "We took care of that in the last session and have new business to attend to."

There is good reason, especially for criminal defense practitioners, to be concerned about some of the provisions of the Kentucky Rules of Evidence. Many of the proposed rules make very significant changes in the common law rules of evidence in Kentucky and a number of existing statutes that effect the admission of evidence in judicial proceedings. The present law of evidence in Kentucky is the result of the collective experience and wisdom of almost 200 years of practice and experience. Existing Kentucky evidence law, for the most part, was hammered out on the anvil of appellate litigation, fresh from the fire of a trial courtroom. Substituting existing law with the recommendations of a committee, even an elite committee headed by one of Kentucky's most respected law professors, should be an occasion for studied consideration and, perhaps, some healthy skepticism.

II. SIGNIFICANT SUBSTANTIVE LAW CHANGES

The following are a sampling of important provisions of the Kentucky Rules of Evidence that will dramatically change the way criminal cases are tried and which have the potential for dramatically changing the outcome of trials:

A. Elimination of the *Jett* Doctrine (Rule 801-A).

Under *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969), a witness who has testified in court may be confronted with any other statement he has made, whether in court or not and whether under oath or not, concerning the same subject matter. After establishing a foundation, identical to that required for the admission of a "prior inconsistent statement," the prior statement is admissible— not just for impeachment, but as substantive proof of the truth of the content of the statement. *Jett* is a good rule of evidence. It is a powerful tool in the search for the truth. All *Jett* says is that if someone comes to court and testifies about something, then everything that person has ever said about the same subject or event is admissible, and that the fact finder gets to take all the witness' statements into account in determining what the truth is.

Rule 801-A of the Kentucky Rules of Evidence would replace *Jett* with the following provision:

> (1) *Prior statements of witnesses.* A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, *and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition...*

In the official commentary to the rules, the Study Committee said:

> The decision to adopt the Federal Rule rather than *Jett* was carefully considered. The desire to be uniform with the Federal Rules was a factor in the decision but not the most important one. The drafters were concerned about the reliability of some statements made admissible by *Jett*, particularly oral and unsworn statements denied by those alleged to have made them. Additionally, they were concerned that such statements could constitute the sole basis for conviction of a serious offense; an oral statement made to a police officer and subsequently repudiated cannot be accepted as the basis for a conviction without serious risk of mistake. The Federal Rule reduces these concerns to a minimum and for that reason is superior to the approach authorized by *Jett*.

The Committee's espoused reasons for abandoning *Jett* are unpersuasive. Is there something particularly unreliable about "an oral statement made to a police officer and subsequently repudiated?" Should a witness be permitted to give sworn in-court testimony that is contrary to an oral statement made on the scene of, and at the time of, an event without allowing the jury to consider the earlier statement? There is one reported decision in Kentucky of a defendant who appears to have been convicted solely on the basis of an out-of-court statement, later repudiated, then admitted under *Jett*. In *Muse v. Commonwealth*, Ky. App., 779 S.W.2d. 229 (1989), the defendant was convicted of rape. The victim, a twelve year old special education student, repudiated her accusations against her stepfather's brother at trial. The Commonwealth was then permitted to introduce a video-taped statement that the child had given at the time of the initial complaint, in the presence of a social worker, a Kentucky State Police trooper, and the camera operator. The trial court admitted the prior video statement under *Jett* and Muse was found guilty by jury verdict. The conviction was upheld on appeal. Balanced against that lone reported case in which a conviction was had solely on the basis of a *Jett* - admitted statement, the author can recite from his own experience a substantial number of cases in which acquittals were won on the basis of *Jett* statements. Often, *Jett* - admitted statements have formed the sole evidentiary basis for self-defense jury instructions and other affirmative defense instructions.

Before any of you criminal lawyers begin to think that abrogation of *Jett* will have any effect upon the admission of confessions and other statements by defendants, reconsider. Rule 801-A(1) would actually do nothing to protect defendants from what the Evidence Rules Study Committee described as "an oral statement made to a police officer and subsequently repudiated" if the statement was the defendant's own. The Committee included a separate rule for your defendant who made a statement to the police. Defendants are "parties" to their criminal prosecutions. Thus, the admissibility of the defendant's statement is not governed by KRE 801-1(1), but by KRE 801-A(2):

> (2) *Admissions of parties.* A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth; or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Not only are the *defendant's* oral statements admissible, so are his servants' statements; those of people with whom the government claims the defendant is engaged in a conspiracy; and perhaps yours (as his attorney and, thus, his "authorized agent"). Against your defendant, the government could even admit something said by *Reader's Digest* if the defendant "manifested an adoption or belief in its truth."

Consider this, too. The prosecutor has access to and control of a Grand Jury. By convening a Grand Jury, the prosecutor can produce "statements taken under oath subject to the penalty of perjury at a . . . hearing or other proceeding. . ." Transcripts of interviews the prosecutor conducts before a Grand Jury are admissible as "substantive evidence." The sworn statements you take with a Notary Public or court reporter during your investigation and trial preparation are limited to "impeachment." Query: how does the proposed rule benefit the defendant about whom the Committee was purportedly concerned?

Repeal of the *Jett* doctrine would place a premium on perjury and allow people to make up a convenient lie whenever the truth would not serve the witness' private agenda or interests. Adoption of KRE 801-A would promote prosecutorial misconduct and detract from the ability to mount an effective defense in criminal cases. Consider the following hypothetical:

You represent a man who has been charged with murder. There is no doubt that the defendant shot and killed the decedent. That can be proven without any question through (1) Your client's admission at the time of his arrest, "You bet I shot the son-of-a-bitch!" In addition, there is ample scientific and forensic evidence that establishes that the bullet recovered from the body came from the gun, recovered at the scene, which purchase records of a retail store show was sold to your client just days before the shooting. Barium and antimony tests establish that your client fired a gun. In fact, the distribution of gunpowder residues and trace metals on your client's hands made a pattern that matches the weapon precisely.

Your client has such an extensive history of prior convictions for violent crimes and crimes of dishonesty, that you dare not put him on the witness stand to testify.

The good news is that immediately after the homicide, police detectives took a written and signed statement from the only other witness to the events that led up to the use of deadly force by your client. You have obtained a copy of the statement through expert discovery. It says that the witness saw the decedent attack your client with a deadly weapon in hand. Here are a few of the particularly poignant lines from the signed statement: "Just at the moment that he was about to be stabbed in the chest with a large hunting knife, Mr. Defendant drew a pistol and shot the fellow who had the knife. Mr. Defendant had no choice; it was his life or the other guy's. I have no doubt that he only did what he had to do, or he would have been killed himself."

Unfortunately, the witness has changed his story. At trial, he has just testified that the killing was without provocation of any kind. His testimony on direct has included no mention of a knife or any other aggressive behavior on the part of the decedent. As you rise to begin your cross examination, the room is spinning a little and feels claustrophobic. This is, after all, the witness through whom you planned to make your case for a self-defense instruction. You fear that your defense is slipping away and that your client may suffer an unjust conviction.

What a difference a rule makes! Under *Jett*, you lay the proper foundation, admit the prior statement, and get your self-defense instruction. Under Rule 801-A, you get the thrill of "impeaching" the witness, but, alas, no self-defense instruction!

The *Jett* doctrine promotes the effectiveness of a trial as a means for re-creation of events and revelation of the truth. It is a wise and good rule that has been fashioned by the Supreme Court of Kentucky based on the collective wisdom of 200 years of statehood and thousands of hotly litigated cases. Professor Lawson and the rest of the KBA Evidence Rules Study Committee were *wrong* when they recommended abrogation of *Jett*.

"Uniformity between the state and federal rules" is a desirable goal and would serve the purpose of minimizing the possibility of forum-shopping and would in time add to the efficiency of the judicial system," the committee reported. I agree. But in the case of the *Jett* rule, the Kentucky Supreme Court is right. Kentucky experience with *Jett* is a good reason "to propose a departure from the Federal Rules." *Jett* is the superior rule. Kentucky should retain the *Jett* doctrine. "Uniformity" can be promoted by suggesting that the federal rule be changed to conform to *Jett*.

At the Kentucky Bar Association Convention and Judicial Conference, held June 13 - 16, 1990, in Lexington, the Supreme Court held its first public hearing on the proposed rules. Rule 801-A was soundly rejected, after debate, by substantially every one of several hundred lawyers in attendance, in favor of retaining the *Jett* rule. Hopefully, the Supreme Court will write *Jett* back into the Kentucky Rules of Evidence, but the Trial Bar should remain vigilant and vocal in insisting that *Jett* remain part of the jurisprudence of Kentucky.

In remarks he made during discussion of the proposed Kentucky Rules of Evidence at the 4th Annual Criminal Defense Seminar of the Kentucky Association of Criminal Defense Lawyers, last December, Mr. Justice Vance of the Kentucky Supreme Court made a suggestion that is perhaps the best alternative to preserving the *Jett* rule, while preventing convictions based upon nothing more than a statement "*Jett*ed" into evidence. Justice Vance suggested that the *Jett* rule be retained, but that another rule be added, stating that a criminal conviction may not be had solely on the basis of an otherwise uncorroborated statement admitted under *Jett*. While this author considers the likelihood of such a convictions remote, *Muse v. Commonwealth, supra*, illustrates the fact that a defendant could be, and, in fact, has been convicted solely on the basis of a statement admitted under *Jett*. Justice Vance's solution would be a good one and, perhaps, should be the position advocated by the criminal defense bar.

B. Adoption of a Residual Hearsay Exception

A "residual hearsay exception" is a rule of evidence that permits judges the discretion to admit into evidence hearsay statements that are not within the ambit of any recognized exception to the general rule prohibiting the introduction of hearsay, where the trial judge is satisfied that the hearsay statement has sufficient equivalent circumstantial guarantees of trustworthiness. A residual hearsay exception vests broad powers with the trial judge to admit hearsay as proof.

The Kentucky Supreme Court has stated repeatedly in recent years that Kentucky does not recognize any "residual exception." Although given several opportunities to fashion a "residual hearsay exception," the Kentucky Supreme Court has declined to do so. *Estes v. Commonwealth*, Ky., 744 S.W.2d. 421, 423 (1988); *Wager v. Commonwealth*, Ky., 751 S.W.2d. 28, 29 (1988).

The Federal Rules of Evidence contain residual hearsay exceptions in two forms, one that does not require the declarant to be "unavailable" and one that does require a showing of unavailability. F.R.E. 803(24) and 804.

Proposed KRE 804(2)(e) would adopt a residual exception for Kentucky but limit its use to those situations in which the declarant is "unavailable," that is, dead, incompetent, or beyond the reach of judicial process. A witness is also "unavailable" under the proposed rule if the declarant "Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." Thus, if your client's wife chose not to testify, KRE 422A.0504, would, in the discretion of the trial judge, permit the lady next door to testify as to as to statements made by your client's spouse during conversations over the backyard fence.

The proposed rule may offend the rights of a criminal defendant to confront and cross examine his accusers (U.S. Const., Amendment VI; Kentucky Const., Section 11). Thus, assuming that the rule does not lead to the erosion of defendants' constitutionally protected right of confrontation, the rule could create a small advantage for criminal defendants; the confrontation clauses of the state and federal constitutions might prevent prosecutors from taking full advantage of a residual hearsay exception, while leaving the defense free to use the rule to admit otherwise inadmissible defense proof.

In practical effect, however, this rule makes any statement that the trial judge wants to admit admissible. Whether this is a good rule or not depends entirely upon what judge you are before and how courts interpret the right of confrontation in the future.

C. Expert Opinion Testimony

Proposed KRE 704 would permit expert opinion testimony on the "ultimate issue." Presumably, a properly qualified expert could give an opinion on guilt or innocence, the degree of offense committed, mental states, motivation for particular acts, and any other issue if the court finds, under KRE 702 that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. The argument that opinion testimony on an "ultimate issue" invades the province of the jury was rejected in favor of broader admissibility of opinion testimony.

In criminal cases involving sophisticated issues which are subject to expert opinion and analysis, this rule change could prove to be very useful for defenders. In "battered woman self defense cases," for example, one could ask the expert's opinion on the ultimate issue, "In your opinion, did Mrs. X shoot Mr. X because she reasonably believed that she had to do so to avoid being seriously injured or killed as a result of physical abuse at the hands of Mr. X?"

BASES OF OPINION TESTIMONY BY EXPERTS: KRE 703 defines what kind of information an expert may rely on as the basis for opinion testimony. The rule substitutes "reasonably" for "customarily" in determining whether an expert may rely on otherwise inadmissible evidence in the formulation of opinions. The standard under KRE 703 is evidence of the type "reasonably relied upon by experts in the field." An expert may rely on information which is not otherwise admissible in evidence.

D. Elimination and Restriction of Spousal Privileges

Existing statutory law (KRS 421.210) recognizes two distinct husband-wife privileges — the confidential communications privilege and the (adverse) testimony privilege. The "confidential communications" privilege, which may be asserted by the spouse against whom admission of the testimony is sought, protects against disclosure of any confidential communication between a husband and wife made during marriage. The "testimony privilege" simply provides that neither spouse may be compelled to testify for or against the other. The testimony privilege may be asserted by the spouse whose testimony is sought.

The privilege to decline to testify for or against one's spouse applies to subject matter arising during or before the parties' marriage.

Proposed KRE 504 would eliminate the confidential communications privilege altogether and limit the testimony privilege to criminal cases, with only the testifying spouse having the right to assert the privilege by refusing to testify. The party against whom admission of the testimony is sought would have no authority to claim the privilege under KRE 504. In addition, the privilege is limited to a privilege to refuse to testify against the accused spouse *as to events occurring after the date of their marriage.*

KRE 504 is a radical departure from existing Kentucky law. The reasons advanced in support of the change are that the privilege is unnecessary to foster open communications between husband and wife and thus serves no beneficial purpose while denying access to needed evidence. The reasons advanced for restricting the testimonial privilege are much the same with the retention of the one exception — a non-party spouse in a criminal case.

Adoption of KRE 504 should have the salutary effect of eliminating many "jail house marriages." Otherwise, it will have no positive value to defendants. The rule has obvious potential for abuse by ex-spouses seeking vengeance after a hostile divorce. KRE 504 will certainly have a destructive influence on spouses and families by forcing otherwise loyal husbands and wives into testifying against one another under threat of indictment for obstruction of justice or being jailed for contempt. KRE 504 represents the abandonment of traditional public policy favoring the preservation of the family as the basic organizational unit of society.

E. Other Testimonial Privileges

Article V of the proposed rules sets out several privileges that were heretofore statutory. KRE 503 - Attorney / Client Privilege [KRS 421.210(4)]; KRE 505 - Religious Privilege [KRS 421.210(4)]; KRE 506 - Counselor / Client Privilege (KRS 421.216); KRE 507 Psychotherapist / Patient Privilege(KRS 421.215). Many of these privileges change the existing law and should be looked at very carefully. The Kentucky Rules of Evidence do not recognize a Physician / Patient Privilege.

F. Impeachment of Witnesses

The proposed rules would change the existing law on impeachment of witnesses in three respects.

Traditionally, a witness could be impeached by showing that she has a "bad reputation for truth or veracity in the community." KRE 608 retains impeachment by reputation evidence, but *adds* impeachment by personal opinion— an obviously dangerous proposition for criminal defendants. KRE 608(a) will permit witnesses to express their own personal beliefs about the truthfulness or untruthfulness of other witnesses. One can easily imagine what a policeman's personal opinion of the credibility of most criminal defendants is going to be.

KRE 608(b) allows impeachment of a witness, on cross-examination, by proof of specific prior bad acts that relate to his propensity to tell the truth. For example, "Isn't it a fact that you lied on your application for an automobile loan in 1986?" This facet of the rule will likely add a lot of extrinsic issues to many trials and keep investigators busy throughout trials, looking for evidence to counter the harmful impact of introduction of evidence of all the bad acts that defendants and defense witnesses may have engaged in through the course of their lives.

The last change to impeachment rules broadens the type of criminal convictions which may be used to impeach a witness. Under present law, only felonies may be used. KRE 609 would expand impeachable offenses to include misdemeanors involving dishonesty or false statement. Thus, under the new rules, any felony and any other crime, including misdemeanors and violations implicating dishonesty or false statement will be admissible.

Although the Federal Rules allow impeachment by character, criminal convictions and prior statements, they make no provision whatsoever for impeachment by a showing of bias, prejudice or interest on the part of the witness. This omission created significant problems in Federal Courts until the U.S. Supreme Court's decision in *U.S. v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), wherein the Supreme Court held that impeachment to show bias, prejudice or interest is permissible under the general rules of admissibility set out at FRE 401 and 402.

The Kentucky Rules of Evidence should, but does not yet, cure this obvious oversight in the Federal Rules and eliminate obviously foreseeable appellate issues by inclusion of a specific provision authorizing impeachment by a showing of bias, prejudice, or interest.

G. Impeachment of Witness by Prior Conviction in Juvenile Criminal Cases

Proposed KRE 609(d) will allow impeachment of witnesses in criminal cases by evidence of prior *juvenile adjudications*. The prerequisites to admissibility in these situations are:

> 1) the offense would be admissible to attack the credibility of an adult and,
> 2) the court is satisfied that admission is necessary for the fair determination of guilt or innocence.

This is clearly a deviation from previous practice in the Commonwealth.

KRE 609(d) conflicts with KRS 610.340(1) and (2) which provide that all juvenile court records shall be held confidential except upon showing of good cause or to permit "public officers or employees engaged in the prosecution" of criminal cases to inspect and use these records to the extent "required in the investigation and prosecution of a case." As stated by David Niehaus in his April, 1990 *Advocate* Article on the New Evidence Code:

> In *FTP v. Courier-Journal*, Ky., 774 S.W.2d 444 (1989) the Supreme Court approved the purposes and theory that underlie the Unified Juvenile Code. An important element of UJC is the confidentiality of proceedings that assists the Juvenile Session of the district court in carrying out its function of treating and rehabilitating a juvenile. The juvenile court, under the Unified Juvenile Code, standing in the place of the parent and treats rather than punishes. This is the quid pro quo for the surrender of many of the child's constitutional rights and statutory rights.

H. Admissibility of Habit Evidence

Proposed KRE 406 will make evidence of the habits of a person or of the routine practice of an organization, whether corroborated or not, admissible to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Is your client in the habit of robbing liquor stores? We hope not. More importantly, we hope there is no police officer testifying in his trial who thinks he is.

I. Competency of Infant Witnesses

Under current Kentucky law, one must demonstrate the competence of a child to

> (a) understand the nature and consequences of taking an oath to tell the truth;
> (b) accurately observe and recall events; and

(c) accurately recount those events, before the child may give testimony.

Whitehead v. Stith, 268 Ky. 703, 105 S.W.2d. 834 (1937); *Hendricks v. Commonwealth*, Ky., 550 S.W.2d. 551 (1977). Under present law, the burden is on the proponent of the testimony to demonstrate a child's competence before offering his or her testimony. KRE 601 provides:

(a) *General.* Every person is competent to testify except as otherwise provided in these rules or by statute.

(b) *Minimal Qualifications.* A person is disqualified to testify as a witness if the trial court determines that he:

(1) lacked the capacity to perceive accurately the matters about which he proposes to testify,
(2) lacks the capacity to recollect facts,
(3) lacks the capacity to express himself so as to be understood, either directly or through an interpreter, or
(4) lacks the capacity to understand the obligation of a witness to tell the truth.

Although a subtle distinction, KRE 601 does change Kentucky law by creating a presumption of competence for all witnesses. Unless the trial judge grants a hearing on a motion to determine competence, or raises the issue *sua sponte*, a child, like any other witness, would be administered an oath and would commence testifying without a prior determination of competency. The provision contemplates that the trial judges will have wide discretion in making competency determinations and that their decisions will be overturned on appeal only upon a showing of abuse of discretion. The position of the new Kentucky Rules of Evidence is a middle ground between existing Kentucky law, whereby children of tender years are presumed incompetent until a showing of competence through voir dire examination, and the Federal Rules of Evidence, which contain no minimal standards of competency. Under the Federal Rules, the issue is treated as one of credibility rather than of competence, although some federal courts have continued to assume that trial courts have discretion to determine competency of witnesses. *See e.g., United States v. Lightly*, 677 F2d. 1027 (4th Cir. 1982).

II. PROCEDURAL PROVISIONS

A. Where Do The New Rules Apply?

KRE 101 states that the rules of evidence will govern proceedings in the courts of Kentucky. Limits to the applicability of this general rule are found in KRE 1101. Subsection (d) of KRE 1101 states that the rules will *not* apply where the judge is deciding a question of fact preliminary to the admission of evidence under KRE 104, to preliminary hearings, proceedings before grand juries, summary contempt proceedings, extradition, rendition, preliminary hearings, judge sentencing, granting or revoking probation, issuance of warrants for arrest, search warrants, and proceedings governing bail.

Does anyone think it accidental that the rules don't apply to most criminal proceedings? Query (as they say in the Eastern law schools): What rules did the people who wrote the proposed Kentucky Rules of Evidence think should apply at those vital steps in criminal procedure? The commentary to the Kentucky Rules of Evidence says, "To a large extent, the provision follows pre-existing rules or practice, with respect to grand juries and small claims, for example."

This new rule appears directly in conflict with *Peacock v. Commonwealth*, Ky., 701 S.W.2d 397 (1985) wherein the Supreme Court said that in all cases involving bail pending appeal "the court shall conduct an *adversary* hearing to determine the propriety of such request." *Id.* at 398. An "adversary hearing" is, by definition, one where due process guarantees are protected and only admissible evidence introduced. The wisdom and constitutionality of placing certain proceedings outside the Rules of Evidence is questionable and may forebode additional efforts to minimize precious Due Process rights of citizens accused of crimes.

B. Requirement to State Grounds for Objections

Proposed KRE 103(a)(1) would require that grounds be stated on the record at the time of making an objection to the introduction of evidence. This is an important change in Kentucky law of evidence and trial procedure. After many years of practicing under rules that do not require that grounds for objections be stated, many trial attorneys could overlook this requirement of the new rules, effectively waiving any claim of error and precluding appellate review.

CONCLUSION

Lawyers who represent citizens accused of crime had better pay close attention to the proposed Kentucky Rules of Evidence. The KRE has *already* been enacted into law by the General Assembly. Only the effective date of the bill keeps the KRE from being the rules you have to practice by right now! There is about one year left to read, analyze, comment, and work to assure that more rights of Kentucky citizens are not taken away by adoption of an evidence code that weighs the criminal justice process in favor of the state. That, in this writer's opinion, is exactly what the Kentucky Rules of Evidence, as currently *enacted* would do.

It is vital that the Bench and Bar take full advantage of the "review" period before the Kentucky Rules of Evidence go into effect. Make sure that your legislators, professional organizations, and the Justices of the Supreme Court of Kentucky are made aware of your objections to the new rules.

At the December, 1990, KACDL Criminal Defense Seminar, former Justice Vance of the Kentucky Supreme Court emphasized the importance of Bar communication with the Justices of the Court regarding the proposed Kentucky Rules of Evidence. Justice Vance made it clear that it *is* appropriate to write or, if the opportunity presents, to speak with the members of the Court about the rules. Those of us who defend citizens accused of crimes have a responsibility to represent our clients in the rule-making process as well as in court. Please accept the invitation to make your views known to the members of the Kentucky Supreme Court. Justice Joseph E. Lambert is the Chairperson of the Court's Committee to study the proposed rules. Comments on the rules should be sent to him and to the Justice from your own Judicial District.

Take the time to write alternatives and bring them to the attention of the Supreme Court and General Assembly. Do not make the mistake of being intimidated by the "big names" on the KBA Evidence Rules Study Committee. Your views and those of the Criminal Defense Bar *do* count and *can* make a difference— but only if you study the rules and make your objections known well in advance of the effective date of House Bill 214. Attend the 1991 KBA Annual Convention, where the Supreme Court will hold its final public hearing on the rules. Be there and speak up!

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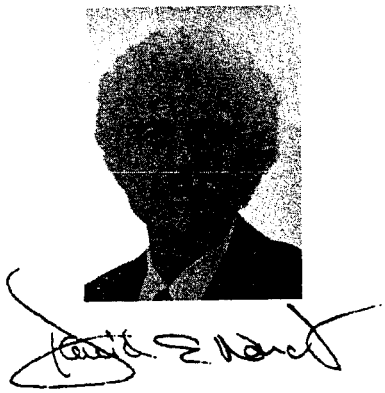
ALTERNATE SENTENCING

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.

House Bill 603
(Effective 7/13/90)
Created a new separate, and distinct alternative to full-term incarceration... Probation with an alternative sentencing plan... which all judges are required to consider before sentencing in all cases.

House Bill 603, which became effective July 13, 1990, creates a new and distinct alternative to full-term incarceration — *probation with an alternative sentencing plan.* KRS 533.020(2). The Legislature has now mandated that a trial judge *shall consider* this option in all cases. KRS 533.010(2).

While "sentencing to a term of community service" is one of the alternatives specifically given to a trial judge (KRS 500.095(1)), it is clear that a sentencing judge has almost unlimited discretion to place any other reasonable condition on this alternative to imprisonment in an institution. KRS 533.020(2).

Based upon the clear language of the statute and controlling case law, this option must be considered in *every* sentencing procedure even for those convicted persons who would otherwise, by statute, not be able to be considered for other alternatives to full-term imprisonment: probation; conditional discharge; and shock probation.

Examples of restrictions which apply to the consideration of these other distinct alternatives to full-term imprisonment are as follows:

KRS 532.045 - "Persons prohibited from probation or conditional discharge" in certain sex crimes against minors;

KRS 532.080(7) - A person found guilty of PFO first degree "shall not be eligible for probation, shock probation or conditional discharge."

KRS 533.060(1) - A person convicted of a Class A, B, or C felony which involved "the use of a weapon...shall not be eligible for probation, shock probation or conditional discharge";

KRS 533.060(2) - A person convicted of a crime committed while on parole, probation, shock probation or conditional discharge...shall not be eligible for parole, shock probation, or conditional discharge."

The applicability of the option found in KRS 533.020(2) to all cases is evident when it is realized that the Legislature did not place on this alternative any of the restrictions found above.

After all, the Legislature was "presumed to take cognizance of the existing statutes and condition of the law" restricting a trial court's consideration of these other alternatives when enacting this new and distinct alternative to full-term incarceration. *Commonwealth v. Hunt*, Ky.App., 619 S.W.2d 733, 734 (1981). In this light, an argument cannot be made that the earlier enacted statutory disqualifiers apply to this "subsequently enacted, purposeful statute," *Devore v. Commowealth*, Ky., 662 S.W.2d 829, 831 (1984). *See Riley v. Parke*, Ky., 740 S.W.2d 934 (1987).

Given the fact that this unique and newly enacted option is the most restrictive alternative to full-term imprisonment, (it is to be used when "probationary supervision alone is insufficient" (KRS 533.020(2)), it is understandable that the Legislature, in its discretion, mandated that trial judges "shall consider" probation with an alternative sentencing plan before imposing a sentence in all cases. KRS 533.010(2).

HB 603 has been incorporated in the following statutory provisions:

KRS 500.095
Alternative Sentence of Community Work

(1) In every case in which a person pleads guilty to or is convicted of a

crime punishable by imprisonment, the judge shall consider whether the person should be sentenced to a term of community service as an alternative to the prison term. The term of community service shall not be shorter than the length of the prison term nor longer than twice the length of the prison term. Failure to complete the prescribed term of community service shall be deemed a probation violation and shall subject the defendant to serve the prison service originally fixed by the court or jury.

(2) The clerk of the Circuit Court, under the direction of the Circuit Court judges of the circuit and in cooperation with the Administrative Office of the Courts and the governmental units within the jurisdiction of the Circuit Court, shall maintain a schedule of community service work and projects for use by judges in setting alternative sentences. Any city, county, urban-county, or other governmental unit desiring to participate in alternative sentence community service work and projects shall submit to the clerk, on or before January 1, 1991, and every six (6) months thereafter, a list of community service work and projects it proposes for inclusion in the schedule.

(3) The Administrative Office of the Courts, under the direction of the Supreme Court, shall prepare a schedule of approved categories of alternative sentences which shall be disseminated to all judges and circuit clerks.

KRS 533.010
Criteria for Utilizing Chapter

(1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation, probation with an alternative sentencing plan, or conditional discharge as provided in this chapter.

(2) Before imposition of a sentence of imprisonment, the court shall consider the possibility of probation, probation with an alternative sentencing plan, or conditional discharge. After due consideration of the nature and circumstances of the crime and the history, character, and condition of the defendant, probation, probation with an alternative sentencing plan, or conditional discharge should be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public because:

(a) There is a substantial risk that during a period of probation, probation with an alternative sentencing plan, or conditional discharge the defendant will commit another crime;

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime....

KRS 533.020
Probation and Conditional Discharge

... (2) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court may sentence him to probation with an alternative sentence if it is of the opinion that the defendant should conduct himself according to conditions determined by the court and that probationary supervision alone is insufficient. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the alternative sentence ....

(4) The period of probation, probation with an alternative sentence, or conditional discharge shall be fixed by the court and at any time may be extended or shortened by duly entered court order. Such period, with extensions thereof, shall not exceed five (5) years upon conviction of a felony nor two (2) years upon conviction of a misdemeanor. Upon completion of the probationary period, probation with an alternative sentence, or the period of conditional discharge, the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation, probation with an alternative sentence, or conditional discharge has not been revoked.

(5) Notwithstanding the fact that a sentence to probation, probation with an alternative sentence, or conditional discharge can subsequently be modified or revoked, a judgment which includes such a sentence shall constitute a final judgment for purposes of appeal.

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Fines Get Paid Off via Work

People in some Northern Kentucky counties are getting an opportunity to work off their court fines.

"We've had great success with the program," said Charles "Doc" Swinford, Harrison County judge-executive. "We always seem to have two or three who want to participate in the program and it is helping the county a lot.

Offenders who participate get credit for $4 an hour. "If they owe a $100 fine, they can work it off in 25 hours," Swinford said. "They never actually see the money."

"Not only does it help a person pay up his debt to the court, but it helps us. They do about anything that needs to be done, but we don't allow them to operate heavy equipment."

"That frees our regular road crew members to do jobs that require some experience." Swinford said two or three of those who participated have applied for permanent jobs with the county.

Judge Robert McGinnis said some prisoners housed in the Pendleton County Jail are able to work off their fines there. "That way Pendleton County gets the benefit of their work and it shortens their stay in jail, which saves Harrison County money," McGinnis said.

The state closed the Harrison County Jail in 1983.

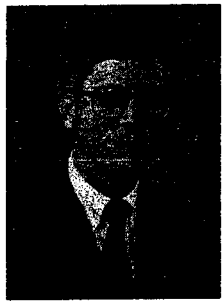
Juveniles in Harrison County often are sent to work for the recreation department, McGinnis said.

He said the other district judge, Wayne Fitzgerald, is starting to let prisoners in Pendleton County work off fines.

Similar programs have been in effect in Carroll, Owen and Grant counties, according to District Judge Stephen Bates.

OMER W. JOHNSON
Kentucky Post Staff Writer
July 15, 1986

DSM-IV: Gestation Report



WILLIAM D. WEITZEL, M.D.

A CHANGE TO THE DSM-IV IN 1993

How do you feel about change? When systems are reorganized, do you conclude that the agents of change are building a better mousetrap or just tinkering? Many of us feel nostalgic and resist change with the myth that the old ways are the best ways. Too bad. We live in times of accelerating change and a virtual avalanche of new and sophisticated data attract our attention every day.

Organized psychiatry has heard the clarion call and is responding with a new diagnostic system - a new way to diagnose and describe those people labeled patients. *Diagnostic and Statistical Manual of Mental Disorders-IV* is scheduled to see the light of day in 1993.

CLASSIFICATION OF DISORDERS

There has always been a need to organize medical information into a diagnostic scheme so that individuals with mental and physical disorders can be identified and treated. This is not peculiarly an American idea but is recognized around the world.

The first time the World Health Organization presented a classification of mental disorders was with the volume International Classification of Diseases-6 (ICD-6) which was published in 1948.

The first time the American Psychiatric Association published a *Diagnostic and Statistical Manual of Mental Disorders (DSM-1)* was in 1952. At that time, 106 different diagnostic categories were identified.

The United States has entered into a treaty obligation to make its diagnostic coding and descriptions for the various and many medical disorders coincide with those codes used in the *International Classification of Diseases* manual which is published periodically. ICD-8 was published in 1968 as was DSM-II. At that time, there were 182 different diagnostic categories described in this latter American Psychiatric Association publication. In 1980, ICD-9 and DSM-III were published simultaneously and in a fashion that permitted "cross walking" between each of these diagnostic manuals. DSM-III included 265 different diagnostic categories. DSM-III represented a radical shift in how psychiatric diagnoses were conceptualized. The paradigm shift included an emphasis on diagnostic criteria which were meant to be neutral with regard to etiology and usable across the many different theoretical orientations rampant in American psychiatry. The explicit diagnostic criteria and the multiaxial diagnostic system improved on the poor reliability of the previous systems and helped clinical communication and research.

Reliability connotes in nosology (classification of diseases) the consistency of results obtained by an approach over repeated administrations by the same or different examiners.

This concept needs to be distinguished from *validity* which refers to the extent to which an approach identifies what it purports to detect.

DSM-III (1980) was based on expert opinion rather than on systematic evidence. The clinical guidelines in the volume became rigid rules within the profession when they became used by clinicians and medical records staff.

DSM-III-R

In 1983, a new Task Force was developed to publish DSM-III-R in 1987. The mission was to correct inconsistencies found in DSM-III and to include new evidence. DSM-III-R now expanded the number of different diagnostic categories to 296. DSM-III-R defined diagnoses even more clearly but involved few exclusionary hierarchies - in other words, it was more difficult to render differential diagnoses and to describe an individual with only one or two psychiatric diagnoses.

Multiple diagnoses were encouraged for the same individual and the concepts of co-morbidity and dual diagnoses were encouraged.

An example of co-morbidity would be the frequently found association of depression and alcoholism in middle-aged males - two diagnoses describing the phenomena of illness experienced in one individual biological and behavioral approaches are best served by DSM-III and DSM-III-R; psychological and family systems approaches are poorly served.

The trend toward inclusion of less severely ill patients into the diagnostic nomenclature has become manifest and the diagnostic criteria have become more inclusive rather than exclusive.

THE DSM-IV PROCESS

The Task Force for DSM-IV was appointed in May, 1988 when it became clear that early drafts of the ICD-10, scheduled for publication in 1993, involved real differences from ICD-9 and DSM-III-R in the section on mental disorders. Since the USA must comply with the ICD criteria, something had to be done in terms of the dissonance between DSM-III-R and the evolving ICD-10. The answer was DSM-IV which is scheduled to be published in 1993 in synchrony with ICD-10.

The Task Force for DSM-IV was divided into thirteen different work groups involving 5 - 6 members. Each work group drew on the expertise of between 50 - 100 consultants. The development of DSM-IV involves three empirical steps:

1) an extensive literature review;

2) individuals of each work group then work on specific issues unanswered by the literature review and draw on resources of unpublished data sets which underwent subsequent re-analysis of data in an attempt to further understand issues;

3) field trials. The literature review was accomplished by the end of 1989. The data re-analysis (Step 2) was ac-

complished by mid-1990. Step 3 (field trials) is now taking place.

The field trials will take place in a multisite format involving at least five different centers and each site will involve at least 100 patients. The field trials will compare the performance characteristics and determine the definition of "caseness" and the nature of overlap among DSM-III, DSM-III-R, ICD-10, and the proposed DSM-IV sets.

"Caseness" is defined as how changing thresholds and boundaries in diagnostic parameters change how an individual is labeled and described as a patient, *i.e.*, who will be caught in the psychiatric net?

The major innovation of DSM-IV is less likely to be any specific content changes and more likely to be an emphasis on explicit documentation and review of evidence. The priorities being considered are the usefulness of this material to clinical practice, its use as an educational tool; and, hopefully, the ability to stimulate research. It is said that the threshold for change of DSM-IV will be higher than that which was followed in DSM-III and DSM-III-R. There will be an attempt to simplify criteria.

The major methodological innovation of DSM-IV will be its effort to move beyond expert consensus and place greater emphasis on the careful objective accumulation of empirical evidence. The spirit of DSM-IV will be conservative. ICD-10 has two sets of criteria; one for research and one for clinical use. The decision has been made that DSM-IV will have only one set of criteria, useful by both clinicians and researchers. It is understood that the DSM both defines a disorder and sets the criteria for its recognition and diagnosis. There will be a wide audience of users in a plethora of settings.

The Thirteen Topical Work Groups

1. *Anxiety Disorders.* An attempt will be made to better define a threshold for the diagnosis of panic attacks and to better isolate out the concepts of social phobia and agoraphobia. A real point of controversy is whether the severity of the stressors (Criteria A) for post traumatic stress disorder should be made less strict. You remember that this criterion requires "an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone." Many mental health clinicians feel that this is too exclusionary of a concept and should be made considerably less stringent and, thereby, include more people within the umbrella of this description. The researchers understand that this risks trivializing the concept.

2. *Child and Adolescent Disorders.* Two issues relevant to this work group include the concern that the definition of autism used in DSM-III-R is overly inclusive and the second concern has to do with making the criteria for child and adult anxiety disorders more compatible. There is also an attempt to integrate the concept of a gender identity disorder through the life span including child, adolescent, and adult categories.

3. *Eating Disorders.* This group's interest involves the concept of anorexia nervosa and subdivides this topic in terms of those who are bulemic and those who are restricters.

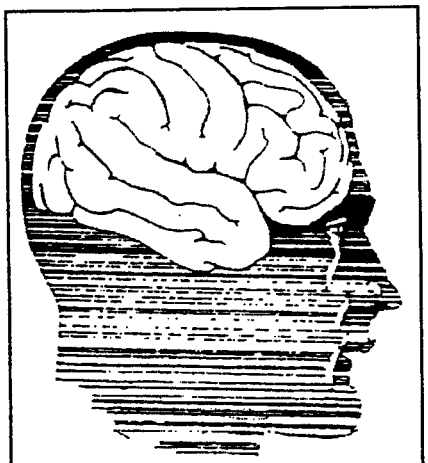


Illustration by Mike Reedy

4. *Late Luteal Dysphoric Disorder.* This is another way of saying premenstrual syndrome. This is a controversial and incompletely delineated category which has been included in the appendix of DSM-III-R. Attempts are being made to better understand symptom patterns, biological parameters, and response to treatment. This is one of those politically sensitive topics that is emotionally charged for women. It is feared that, at its worst, this diagnostic disorder would be used to discriminate against premenopausal women placed in positions of power because their judgment could be considered unreliable at times.

5. *Mood Disorders.* The recent evidence suggesting that there is such a thing as a seasonal affective disorder which is responsive to light therapy is being given greater scrutiny. Attention is also being focused on those individuals who are described as rapidly cycling manic depressives (bipolar disorders) and whether that group needs to be separated out because it may have implications for how treatment is managed.

6. *Multiaxial Issues.* This has to do with whether Axes IV and V offer anything useful in the way of information when we diagnose and describe patients. The possibility of creating new axes that might measure family functioning and ego-defense mechanisms is receiving vigorous discussion. One suggestion is that Axis V be made compatible with the Z-code of ICD-10 which involves "factors influencing health status and contact with health services."

7. *Organic Disorders.* The big issue here is an attempt to do away with the mind-body dichotomy and to do away with the terms "functional v. organic." "Organic" has been meant to construe a biological basis and "functional" has been meant to construe an unexplained etiology, albeit, psychological. The term "organic" would be replaced with the term "cognitive impairment disorder" and would describe dementias and delirium. The other "organic" disorders would be described as secondary syndromes, e.g., an individual who has an "organic mood disorder" because of a head injury would be described as having a "secondary depression" based on his head injury diagnosis.

8. *Personality Disorders.* The real emphasis here is on the concept of antisocial personality disorder. This terminology and its criteria are now based on follow up studies of conduct disordered children. The criteria are behaviorally explicit and reliable but there has been little emphasis on traditional personality traits that are emphasized in the ICD-10 criteria. The concept of a sadistic personality and a self-defeating personality, both of which are included in the appendix of DSM-III-R are being reviewed in terms of the data supporting reliability and validity.

9. *Psychiatric Interface Disorders.* This group is working on the sometimes vague concepts of "psychological factors affecting physical condition", "somatoform disorders", and "factitious disorders;" in addition, there is an attempt to deal with the concept of "subthreshold psychiatric disorders" which are seen in family practice situations. This terminology is meant to describe people who don't quite fit the criteria of the DSM but seem to have, for example, a mood disorder which would require the use of antidepressants.

10. *Psychotic Disorders.* The real emphasis here is on schizophrenia and whether the criteria have become too exclusive and the concept too narrowly defined.

11. *Sexual Disorders.* This group has divided its collection of disorders into desire disorders and pain disorders; male and female arousal disorders; male and

female orgasm disorders; and the paraphilias.

12. *Sleep Disorders.* There is an effort to coordinate the criteria for DSM-IV with the ICD-10 classification and those of the International Classification of Sleep Disorders criteria as developed by the American Sleep Disorders Association which are very specific. The real question is whether sleep lab data will be made part of the operational diagnostic criteria. This would be a dubious affirmative decision since laboratory criteria and usefulness are continually changing with advancing technology.

13. *Substance Abuse Disorders.* It was decided that the diagnostic criteria for dependence place greater emphasis on the patient's inability to control substance use and less emphasis on the aspects of physical dependence such as physical withdrawal and tolerance. DSM-III-R has broadened the boundaries of substance dependence and narrowed the boarders around substance abuse. Substance abuse has few specific defining features. This is important because research has found that patients defined as substance abusers, based on social impairments, do not necessarily progress toward dependence but rather tend to remit or remain stable in their use pattern.

Eleven projects have been funded for focused field trials dealing with some of these many topics. The major focus will be to increase the compatibility with ICD-10 and to resolve the differences between ICD-10 and DSM-III-R with respect to several specific disorders, *e.g.*, schizophrenia and antisocial personality disorder. It is understood that the DSM categories are prototypes. Patients diagnosed and treated in clinical practice are likely only to approximate prototypes. A prototype view of diagnosis depends more on pattern recognition and family resemblance than on pathognomonic decision tree logic.

CONCLUSION

DSM-I was used for 16 years; DSM-II was applied for 12 years; DSM-III served as the diagnostic standard for seven years; and DSM-III-R will have held sway for six years at the time of the arrival of DSM-IV.

How long with DSM-IV be the litmus test for identification and description of mental disorders in the USA? Nobody knows. The ICD texts are published with no particular schedule or regularity. It would be anticipated that DSM-V would be published if ICD-11 were markedly different from ICD-10. The other stimulus for a new DSM would be the development of significant new clinical and research data which make the current diagnostic nomenclature descriptions obsolete.

With all the research advances that are now taking place and with an evolving technology of brain study, my hunch is that there will develop more changes sooner rather than later.

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Additional Reading:

1) Frances A., Pincus, H.A., Widiger, T.A., David, W.W., and First, M.B: "DSM-IV: Work in Progress", *Am. J. Psychiatry*, 1990; 147: 1439-1448.

2) Loranger, A.W.: "The Impact of DSM-III on Diagnostic Practice in a University Hospital", *Arch. Gen. Psychiatry*, 1990; 47: 672-675.

Success Linked to a Positive Self-image

A University of Michigan psychologist says that your vision of the future affects whether you succeed or fail in the present. "Possible selves," as psychologist Hazel Markus calls them, dictate motivation and self-image.

Markus and colleague Ann Ruvolo divided 105 female students into four groups. One group was told to imagine, then write about dazzling success that resulted from their own hard work. The second group imagined and wrote about success achieved through luck. The third group thought about working hard but failing and the fourth group about failing through bad luck.

Students who thought of themselves as succeeding through their own efforts worked much longer and harder than those who didn't in trying to successfully complete difficult tasks, such as solving complicated arithmetic problems in their heads or writing for as long as they could with the hand they did not normally use.

Chicago Tribune.

The Disciplinary Process and Often Heard Complaints

The Kentucky Bar Association.

DISCIPLINARY PROCESS

The Kentucky procedural rules regulating the disciplinary process are found in Supreme Court Rule (SCR) 3. As of January 1, 1990 the substantive ethics rules are actually a part of SCR 3.130. The *Kentucky Rules of Professional Conduct* (RPC) replaced the *Code of Professional Responsibility* as the substantive law governing lawyers' conduct in Kentucky. This article attempts to identify the areas of misconduct most frequently claimed against lawyers, and who files complaints against lawyers who represent criminal defendants.

The disciplinary process is generally initiated by a sworn complaint against the lawyer.[1] There is no requirement that the sworn complaint be filed against the lawyer by his client. The Inquiry Tribunal may initiate and conduct an investigation into the conduct of an attorney based upon information from any source.[2] If there is sufficient evidence, the Tribunal may file a complaint against the attorney based upon its own investigation.

Once the complaint is filed, the attorney has 15 days to acknowledge receipt of the complaint or file a response to the merits.[3] At the expiration of 15 days the case stands submitted for the Tribunal's decision at its next regularly scheduled meeting.[4] The tribunal meets approximately once every six weeks.

Depending upon the nature of the information provided, the Tribunal has a number of options available to it. The Tribunal may:

1. Authorize the Chairman to file a petition for **temporary suspension** if it appears that the attorney has,

(a) misappropriated funds and danger exists to other members of the public that he will do the same with their money,
(b) the attorney has been convicted of a crime and the conviction puts into grave issue whether he has the moral fitness to continue to practice law, or
(c) it appears the attorney is mentally disabled or addicted to intoxicants or drugs and reasonable cause exists to believe that the attorney does not have the physical or mental fitness to continue to practice law.[5]

2. **Dismiss** the complaint.[6] This happened in about 86% of the cases in the past four years.

3. Issue a **formal charge** against the attorney.[7] Charges are issued in 8% of the cases.

4. Issue a **private admonition** to the attorney where the unprofessional conduct is of a minor or technical nature.[8] Private admonitions represent about 8% of the dispositions.

5. **Defer** the disciplinary proceedings while there is civil or criminal litigation pending involving substantially the same underlying facts.[9]

6. **Continue** the case and require further investigation.[10]

During fiscal year 1989 - 90 there were 619 complaints disposed of by the Inquiry Tribunal. The dispositions were as follows:

Dismissed after investigations	60%
Dismissed as frivolous	26%
Formal charge	8%
Private Admonition	6%

In the last fiscal year 86% of all complaints were dismissed by the Tribunal. The unfortunate 8% who were charged by the Tribunal entered the Byzantine world of lawyer discipline. A review of the rules will quickly confirm the characterization.

Without discussing the rules governing the mechanics of how things are accomplished, the first objective of the disciplinary process is to have an evidentiary hearing in which the Kentucky Bar Association has the burden of proving the Inquiry Tribunal's charge by substantial evidence.

The rules of evidence and the rules of civil procedure apply.[11] However, as in a criminal proceeding the respondent in a disciplinary action is afforded the full opportunity to remain silent.[12]

At the conclusion of the evidentiary hearing, the trial commissioner is required to file a written report with the Director within 30 days of the transcript being filed. The report of the trial commissioner is supposed to set forth the findings of fact relating to guilt or innocence which the commissioner believes were proven by substantial evidence.[13]

After the trial commissioner's report has been filed with the Director, the parties have 40 days to file briefs to be considered by the Board of Governors. Either party may request oral argument before the Board.[14] A respondent can only be found guilty by the Board of Governors if nine or three fourths of the members of the Board present and voting concur, whichever is less.[15] If the Respondent is found guilty, the Board, in a second vote, decides upon the degree of discipline the Board will recommend to the Court.

Once the decision of the Board of Governors is filed with the Clerk of the Court, the respondent has the opportunity to file a request for the Court to review the Board's decision along with a brief supporting his position on the merits.[16] If the respondent is satisfied with the Board's recommendation and decides to file no request for review, the Court may nevertheless review the decision and require the Director and Respondent to file briefs setting forth their respective positions.[17] If the Court finds the respondent guilty, it can issue a private reprimand, public reprimand, suspension or disbarment. Any attorney disbarred may apply for reinstatement within five years.[18]

STATISTICAL ANALYSIS OF MOST FREQUENT COMPLAINTS

It was suspected that most complaints against lawyers arose because of a failure by the lawyer to communicate with the client.

In an effort to empirically test this notion, all complaints requiring a response that were filed between October 29, 1990 and November 29, 1990 were reviewed to determine the nature of the complaint and the rule or rules implicated. While a one month survey does not constitute proof-positive, the results lend support to the notion that communication with the client will help prevent the filing of a bar complaint.

Thirty-nine complaints, alleging 66 separate areas of rule violations were filed during the month. Two areas of claimed misconduct tied for top honors. (See Chart No. 1 below.) Those areas are generally known as failure to communicate (RPC 1.4) and failure to act with reasonable diligence (RPC 1.3).

The next largest area of complaint was claimed violations of RPC 1.1 which requires a lawyer to provide competent representation to a client.

The fourth largest area of complaint dealt with alleged violations of RPC 8.3(c) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit and misrepresentation.

And the fifth largest area involved alleged violation of RCP 1.5 which requires a lawyer's fee to be reasonable, among other things.

Fourteen of the 39 complaints concerned a lawyer's handling of a criminal case. Three out of the 14 complaints were against lawyers serving as prosecutors. Nine of the 14 complaints were from clients who were in jail or prison.

During the same period of time 19 com-

CHART NO. 1

SUPREME COURT RULE (SCR) 3.130
KENTUCKY RULES OF PROFESSIONAL CONDUCT

This chart represents a statistical breakdown of the rules implicated in the 39 complaints filed between October 29, 1990 and November 29, 1990. Since some complaints alleged more than one rule violation, there were a total of 66 violations alleged in the 309 complaints.

RULE #	RULE	# OF COMPLAINTS
1.4	A lawyer should keep a client reasonably informed about status of case	12
1.3	A lawyer shall act with reasonable diligence and promptness in representing a client	12
1.1	A lawyer shall provide competent representation to a client	10
8.3(c)	It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation	7
1.5(a)	A lawyer's fee shall be reasonable. Eight factors to be considered set out in RPC 1.5(a)	6
1.16(d)	When terminating representation, lawyer shall protect client's interest, surrender papers and property and refund unearned fee.	5
8.3(d)	It is misconduct to state or imply an ability to improperly influence government official or agency	4
3.3(a)	A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.	3
8.3(b)	It is professional misconduct for lawyer to commit a criminal act that reflects adversel on honesty, etc.	3
1.6(a)	A lawyer shall not reveal information relating to representation of client unless client concents, except...	1
3.4(c)	A lawyer shall not knowingly or intentionally disobey an obligation under the rules of a tribunal, except...	1
3.6	A lawyer shall not make extrajudicial statement for public dissemination that will likely prejudice an adjudicative proceeding.	1
8.3(a)	It is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct.	1

plaints were dismissed by the Chairman of the Inquiry Tribunal as being frivolous and the lawyer was not required to file a response. Only two of the 19 complaints dismissed as frivolous related to a lawyer's handling of a criminal case. Overall, 32.7% of complaints reviewed were dismissed as frivolous. Complaints relating to the handling of a criminal case accounted for 27% of the total complaints but only 10.5% of those complaints were dismissed as frivolous.

Thirty-eight percent of the complaints which required a response related to the representation of a criminal defendant. During this same time period, 7 out of 46 pending charges involved a lawyer's handling of a criminal case or 15%. A review of just over 100 Kentucky Supreme Court decisions relating to lawyer discipline published between January 1980 and June 1990 shows that eight of those decisions involved a lawyer's handling of a criminal case.[19] In none of those cases was a lawyer specifically found guilty of incompetent representation of a criminal defendant.

In one case the Court found the attorney guilty of "inadequate" representation of a number of criminal defendants.[20] For

CHART NO. 2

STATE CASELOAD FOR FISCAL YEARS 1984 THRU 1990

CASE TYPE		6-YR TOTAL	1984-85	1985-86	1986-87	1987-88	1988-89	1989-90
Felony	Filed	218,316	30,305	33,480	35,540	35,636	40,065	43,290
	Disp.	206,545	29,098	31,214	35,430	33,717	36,388	40,698
	% D/F	94.6%	96.0%	93.25	99.7%	94.6%	90.8%	94.0%
Misdemeanor	Filed	958,810	174,018	175,858	145,677	142,731	152,125	168,401
	Disp.	913,554	177,021	169,063	143,100	135,180	135,670	153,520
	% D/F	95.3%	101.7%	96.1%	98.2%	94.7%	89.2%	91.2%
Traffic	Filed	1,705,391	255,103	279,498	297,754	280,690	274,804	317,542
	Disp.	1,683,758	252,501	280,405	288,176	279,268	272,224	311,184
	% D/F	98.7%	99.0%	100.3%	96.8%	99.5%	99.1%	98.0%
STATE TOTAL	Filed	3,887,761	611,355	653,224	651,050	617,136	639,126	715,870
	Disp.	3,737,628	598,582	646,099	623,223	594,551	598,904	676,269
	% D/F	97.9%	98.9%	95.7%	96.3%	93.7%	94.5%	94.5%

Of the 6-year state total of all caseloads filed (3,887,761)... 74% (2,882,517) were filed as felony, misdemeanor or traffic cases.

CHART NO. 3

CIRCUIT COURT ORIGINAL CASELOAD FOR YEARS 1982 THRU 1989

CASE TYPE	FY 82-83	FY 83-84	FY 84-85	FY 85-86	FY 86-87	FY 87-88	FY 88-89	7-Yr. Avg.
Criminal								
Filed	13,806	13,463	12,612	13,380	13,184	12,518	14,411	13,339
Disp.	12,966	12,586	12,839	12,906	12,827	12,366	12,481	12,710
Criminal Appeals								
Filed	453	364	352	339	365	294	269	348
Disp.	538	380	363	360	308	340	249	363
TOTAL ALL CASELOADS								
Filed	73,985	72,667	72,252	75,931	76,311	76,185	74,875	74,601
Disp.	77,749	75,345	74,880	72,608	74,953	74,741	68,869	74,164

Of the 7-year average of all caseloads filed (74,601)... 18% (13,687) were filed as criminal or criminal appeals cases.

many of the readers of *The Advocate* it may be interesting to note that based upon the published decisions the most active area in lawyer discipline *vis-a-vis* the handling of a criminal case involves whether the public defender accepted a fee in violation of KRS 31.250.[21]

According to statistics prepared by the Kentucky Administrative Office of the Courts, the total number of cases, including criminal, domestic relations, civil, probate and mental health, filed in the past six years in the district court of Kentucky is 3,887,761. (See Charts Nos. 2 and 3 on previous page.) Seventy-four percent of the total or 2,882,517 were criminal cases, if traffic cases are considered criminal cases. If traffic cases are excluded, criminal cases represent 30% of the total case filings. It is clear that a certain percentage of traffic cases definitely should be considered as criminal cases because some of the so called "traffic" offenses carry the possibility of jail sentences and fines if convicted. The defense of persons charged with the offense of driving while intoxicated is an extremely active area of practice right now. For the seven years between 1982 and 1989 there was an average of 74,601 cases filed in circuit court. Eighteen percent of those were criminal cases.

While 65% of all actions filed in the Commonwealth of Kentucky over the past six years involved criminal cases, it can not be said that lawyers represented defendants in all of those cases. Common sense and experience tells us that many defendants in traffic cases and misdemeanor cases represent themselves, particularly when there is no jail sentence attached to a conviction. Similarly, not all litigants in the other areas of practice are represented by counsel.

Therefore, while criminal filings represent 65% of all court actions filed each year and complaints against lawyer's representing defendants in criminal cases represent only 38% of all Bar complaints filed during November, 1990 one might jump to the conclusion that lawyers handling criminal cases are doing a better job of representing their clients than are lawyers practicing in other areas. But when you also observe that only 15% of the pending charges in November, 1990 involved lawyers who were representing a criminal defendant and further consider that only 8% of the published decisions in the last decade involved a lawyer's handling of a criminal case, one might also jump to the conclusion that a significant percentage of the complaints filed against lawyers engaged in criminal practice are without merit compared with those filed against lawyers engaged in other areas of practice.

Jumping to either of the above conclusions may be unwarranted. A satisfactory explanation for the apparent discrepancy between the number of complaints initiated against lawyers as a result of their handling a criminal case and the relatively low number of lawyers disciplined, as evidenced by the published decisions, does not appear to be susceptible to easy discovery.

FOOTNOTES:

[1] SCR 3.160(1)
[2] SCR 3.160(2)
[3] SCR 3.160(1)
[4] SCR 3.3.170
[5] SCR 3.165
[6] SCR 3.170
[7] SCR 3.170
[8] SCR 3.185
[9] SCR 3.180(2)
[10] SCR 3.180(1)
[11] SCR 3.340
[12] SCR 3.300
[13] SCR 3.360
[14] SCR 3.360(3)
[15] SCR 3.370(3)
[16] SCR 3.370(6)
[17] SCR 3.370(8)
[18] SCR 3.520
[19] The eight disciplinary cases which involved a lawyer's handling of a criminal case are:

KBA v. Kemper, Ky., 637 S.W.2d 637 (1982) - Involves payment of fee to attorney previously appointed under KRS 31.250.
KBA v. Williams, Ky., 682 S.W.2d 784 (1984) - Failed to appear in court for criminal trial.
KBA v. Lorenz, Ky., 752 S.W.2d 785 (1988) - Inadequate representation for five inmates following direct solication.
KBA v. Unnamed Attorney, Ky., 769 S.W.2d 45 (1989) - Public defender accepting a fee in violation of KRS 31.250.
Martin v. KBA, Ky., 775 S.W.2d 519 (1989) - Represented defendant in criminal case while temporarily suspended.
KBA v. Lovelace, Ky., 778 S.W.2d 651 (1989) - Public prosecutor undertook civil prosecutions of criminal defendant.
KBA v. White, Ky., 783 S.W.2d 883 (1990) - Soliciting money from clients to allegedly bribe a judge.
Hayes v. KBA, Ky., 790 S.W.2d 237 (1990) - Misappropriated client's money which was supposed to have been used to pay child support.

[20] *KBA v. Lorenz*, Ky., 752 S.W.2d 785 (1988)
[21] *KBA v. Kemper*, Ky., 637 S.W.2d 63 (1982) and *KBA v. Unnamed Attorney*, Ky., 769 S.W.2d 45 (1989)

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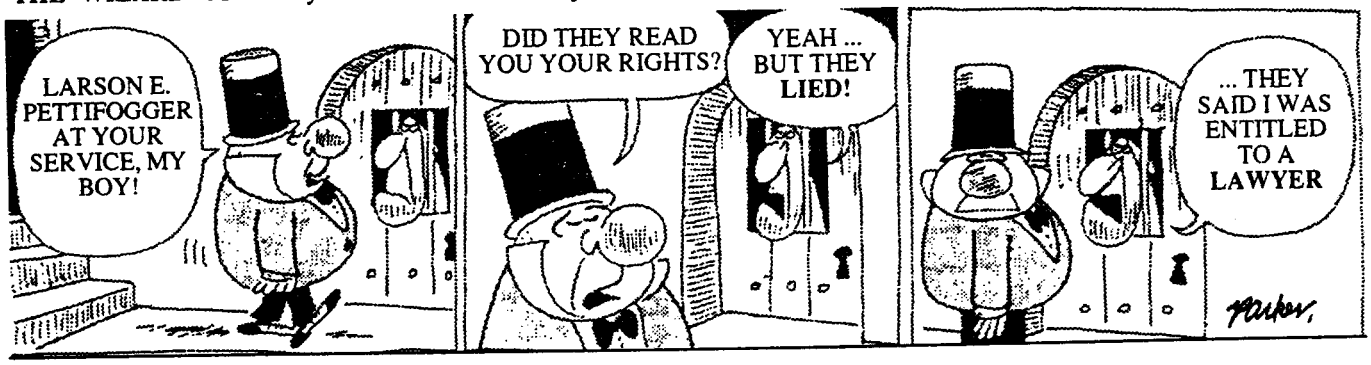
THE WIZARD OF ID by Brant Parker and Johnny Hart



Confiscation and Forfeiture

One Million Dollars given to State and Local Police since 1985

LOUIS DEFALAISE

INTRODUCTION

During the past ten years the United States has been engaged in an intense struggle for its future. Drugs affect not only individual lives, but have lead to unprecedented violence in the streets of our major urban areas. Many of the victims of drug-related violence are innocent bystanders, including young children. Also, drugs and drug money have corrupted parts of law enforcement and government itself.

President Bush in an unprecedented White House Conference with the nation's ninety-three U.S. Attorneys, called for an all out war on drugs and drug-related violence in America. Attorney General Dick Thornburg committed the entire resources of the Department of Justice to meeting this challenge.

Beginning under President Reagan, the Congress of the United States passed a series of measures broadening and expanding the penalties for drug-related offenses.

Everyone involved in the battle has recognized that the illegal drugs themselves are only half the problem. The engine that helps drive the drug distribution network in this country is money. Tens of billions of dollars taken from legitimate social needs are used to recruit new dealers to run the risk of the new, more severe sanctions. Worse, some of those same dollars are used to subvert those charged with combating drugs.

Greed in the form of expensive cars, yachts, planes, mansions and fat bank accounts has been one of the major challenges of the drug war. To combat this problem, Congress enacted new laws against money laundering and has focused and expanded the traditional concept of forfeiture statutes to take the profit out of drugs and through the Federal Forfeiture Asset Sharing Program to turn those profits to combating drugs and violence.

HISTORICALLY

Criminal forfeiture was recognized under English common law. In Old England all property of a convicted felon was forfeited to the King as a form of punishment. The proceedings were *in personam* and their success was entirely contingent upon obtaining a criminal conviction. *See, Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663 (1974).

Congress prohibited criminal forfeitures in 1790. In 1970, however, Congress once again provided for criminal forfeiture under the following statutes:

(1) RICO (Racketeer Influenced Corrupt Organizations, 18 U.S.C., Sections 1962 and 1963); and
(2) the Controlled Substances Act, Continuing Criminal Enterprise Offense, 21 U.S.C., Section 848.

In 1984, Congress added a third criminal forfeiture provision (21 U.S.C., Section 853) to reach the property of persons convicted of any felony involving controlled substances.

Modern federal forfeiture statutes have consistently been held not to be a violation of Article III, Section 3, clause 2 of the Constitution, which forbids corruption of blood and forfeiture of estate. See, *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir.), *cert. denied*, 449 U.S. 830; 449 U.S. 919 (1980).

Because existing federal forfeiture statutes address only the instruments and fruits of illegal activity and not entire estates, they are permissible. *Id.*; *United States v. L'Hoste*, 609 F.2d 796, 813 n.15 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); *United States v. Huber*, 603 F.2d 387, 397 (2nd Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). See generally, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974).

FEDERAL FORFEITURES

In the federal system, there are three types of forfeiture:

1) summary,
2) administrative, and
3) judicial.

Judicial forfeitures may be done either in civil proceedings or criminal proceedings.

1. Summary Forfeiture

Summary forfeiture can only be used for contraband *per se*; that is, items illegal in themselves.

Summary forfeiture is accomplished pursuant to 21 U.S.C. 881(f). Summary forfeiture proceedings are really no "proceedings" at all. No notice is given of the seizure. No forfeiture file is created. No hearing is conducted. Property subject to summary forfeiture is peremptorily forfeited and destroyed. The Federal Controlled Substances Act authorizes the summary forfeiture of Schedule I and II substances and plants from which these drugs can be derived.

2. Administrative Forfeiture

Administrative forfeiture may be used in cases where the seizure is personal property with an aggregate value of $500,000 or less. Prior to August 20, 1990, this figure was $100,000. Real property must always be judicially forfeited. Drug-related administrative forfeitures are done through either the FBI or the DEA.

21 U.S.C. 881(d) and 19 U.S.C. 1607-1609 include provisions authorizing administrative forfeiture. Written notice is provided to all parties of the proposed forfeiture. Notice is also published in the local newspaper. 19 U.S.C. 1607. "Claimants" are given the opportunity to contest the seizure. A DOJ attorney hears the case and makes a decision, based on the case file. He/she then provides a brief written statement stipulating the reasons for the decision (this is subject to judicial review).

This "quick release" procedure is meant to protect the property interest of innocent third parties, such as lien holders

or in some instances, spouses or other parties.

Once the property is seized, 19 U.S.C. 1606 and 21 C.F.R. 1316.74 direct the Government to have the value of the property appraised. If the property is valued at $500,000 or more or is real property, the case must be delivered to the U.S. Attorney for institution of judicial forfeiture proceedings. 19 U.S.C. 1610, 21 C.F.R. 1316.78. Property valued at less than $500,000 or conveyances of any value are subject to administrative forfeiture. 19 U.S.C. 1607, 1609, 1618, 21 C.F.R. 1316.75-77.

Administrative forfeiture begins with the giving of notice of the seizure and of the Government's intent to forfeit. 19 U.S.C. 1607, 21 C.F.R. 1316.75. At this point, a claimant has the choice of either filing a claim and cost bond of 10% of the appraised value of the property, forcing judicial proceedings (19 U.S.C. 1608) or allowing the administrative proceedings to continue, filing a petition for relief pursuant to 19 U.S.C. 1618.

If the claimant elects to pursue the matter judicially, bond must be posted within 20 days and a demand (claim) must be filed that judicial proceedings be initiated by the U.S. Attorney. 19 U.S.C. 1608, 21 C.F.R. 1316.76. Bond may be waived for an indigent. *Wiren v. Eide*, 542 F.2d 757 (9th Cir. 1976); *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976).

Sixth Circuit cases addressing the claim and bond process include *Epps v. ATF*, 375 F.Supp. 345 (E.D. Tenn.), *aff'd*, 495 F.2d 1373 (6th Cir. 1974); *United States v. Filing*, 410 F.2d 459 (6th Cir. 1969); *Rice v. Walls*, 213 F.2d 693 (1954).

To contest an administrative forfeiture, a claimant must file a petition with the executive official responsible for the seizure. 19 U.S.C. 1618. See, for example, 21 C.F.R. 1316.79-80 (where petitions involving administrative forfeitures under the Controlled Substances Act must be to the Administrator of DEA within 30 days of receiving notice of seizure).

19 U.S.C. 1618 (Customs laws) provides that a petition may be granted if the determining official "finds the existence of such mitigating circumstances as to justify ... remission ..." 19 C.F.R. 171.31 provides: "... if it is definitely determined that the act or omission forming the basis of a ... forfeiture claim did not in fact occur, the claim shall be canceled ..."

The standards for granting remission of administrative forfeiture is set out at 28 C.F.R. 9.5(b) and (c). Remission is also granted if the property is clearly not forfeitable under the law. See also, *United States v. Morris*, 23 U.S. 246 (1825).

Once a petition has been filed, the asserted claims are investigated pursuant to 19 U.S.C. 1618. Interviews of parties and preparation of reports are authorized by 28 C.F.R. 9.4(b), 21 C.F.R. 1317.81 (DEA).

In drug cases, the documents and reports are sent to the Office of Chief Counsel at DEA. 28 C.F.R. 9.4(c). Following a thorough review, a ruling (with reasons) is mailed to the claimant, 28 C.F.R. 9.4(d), who then has 10 days to request a reconsideration. 28 C.F.R. 9.4(e). Judicial review of these determinations is available pursuant to 28 U.S.C. 1346(a)(2) (Tucker Act).

3. Judicial Forfeiture

Federal judicial forfeitures can proceed either criminally or civilly. In civil forfeitures, the Government's burden of proof is preponderance of the evidence. In criminal forfeitures, the Government's burden of proof is beyond reasonable doubt. Besides the different standards of proof inherent and the procedures involved, the principal practical difference in choosing to proceed criminally or civilly is that criminal forfeiture has a broader statutory scope and can be, for instance, the basis of forfeiting operating businesses. The U.S. Marshals Service at times has operated horse farms, restaurants and even a golf course.

Another reason criminal forfeitures may be used is to avoid parallel criminal and civil proceedings. When the decision is to proceed civilly and a federal criminal action is also to be undertaken, the civil proceedings are usually stayed or not instituted until the conclusion of the criminal case. However, no criminal prosecution is required as a basis for civil forfeiture.

Criminal forfeiture, as in traditional criminal prosecutions, is an *in personam* action; that is, a proceeding against an individual or organization. All criminal forfeitures proceed judicially in federal district courts. Therefore, criminal forfeitures require:

(a) Indictment or information against an individual or organization;
(b) listing of the property to be forfeited in the indictment or information;
(c) no seizure of property prior to conviction, except property used as evidence, or as set out below;
(d) proof of violations beyond a reasonable doubt; and
(e) conviction of the violator.

Civil forfeiture, on the other hand, is an action *in rem*; that is, a proceeding against the property on the theory that the property has violated the statute. Consequently, a civil forfeiture proceeding is not dependent upon the success or even existence of a criminal prosecution. A civil forfeiture may proceed even when the violator is a fugitive or is not criminally prosecuted, or as a parallel proceeding to the criminal prosecution.

4. Criminal Forfeiture

Jurisdiction. Under 21 U.S.C. Sections 1961-1964 and 18 U.S.C. Section 982, the jurisdiction of a court in criminal forfeiture actions is without regard to the location of the property. Jurisdiction over property is dependent on jurisdiction over the person. The interest subject to forfeiture is the defendant's proprietary interest.

Seizure of the Property. In criminal forfeiture, property may be seized only after an entry of a special verdict of guilty is returned against the defendant on the substantive charge and an order of forfeiture is entered by the court. However, pursuant to 21 U.S.C. 853(f), 18 U.S.C. 1467, and 18 U.S.C. 982(b), a district court may issue a seizure warrant for property subject to criminal forfeiture (similar to issuance of a search warrant) if:

(1) The Government can demonstrate probable cause to believe the property would be subject to forfeiture on defendant's conviction; and
(2) A protective order to restrain the property is not adequate to insure that the property will remain available for forfeiture.

The district court is vested with authority to restrain the property to prevent dissipation of the property subject to criminal forfeiture prior to the entry of the special verdict or court order. 21 U.S.C. 853 and 18 U.S.C. 1963.

Pursuant to 21 U.S.C. 853, 18 U.S.C. 1647, and 18 U.S.C. 1963, a district court may enter a temporary restraining order, an injunction, require posting of a bond, or take "other" actions to restrain disposition of the property upon the filing of an indictment or information. Under special conditions the court may enter a temporary restraining order prior to the filing of an indictment.

Burden of Proof. In criminal forfeiture, the Government must prove beyond a reasonable doubt that

(1) The defendant is guilty of the substantive charge, and
(2) The property is subject to forfei-

ture. (However, the 9th Circuit holds that preponderance of the evidence is sufficient as to the property. *United States v. Hernandez-Escarsega,* 886 F.2d 1560 (9th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 327 (1990).

Criminal Forfeiture Provisions. The most commonly encountered federal criminal forfeiture procedures are in drug or drug-related money cases.

21 U.S.C. 853
(Controlled Substances)

Upon conviction under the Controlled Substances Act, the following types of property are forfeitable:

(1) Proceeds obtained from violations of the drug laws (property acquired during the violation period is deemed forfeitable if the Government can show no likely non-drug-related source for the property);

(2) Real and personal property used or intended to be used to facilitate the commission of a violation; and

(3) Any contractual or property interest in a criminal enterprise affording a source of control over the enterprise (21 U.S.C. 848).

The innocent owner exception also applies under Section 853. A *bona fide* purchaser for value who was reasonably without cause to believe the property was subject to forfeiture when acquired, or a legal owner of the property subject to forfeiture whose vested interest was superior to defendant is protected. 853(h). 21 U.S.C. 853(p) provides for substitution of assets in cases where the forfeitable property is unavailable upon conviction.

18 U.S.C. 982
(Money Laundering)

Property subject to forfeiture:

(1) Any real or personal property involved in an offense of

(a) 31 U.S.C. 5313(a): failure to report cash transaction $10,000 +;
(b) 31 U.S.C. 5324: structuring cash transactions;
(c) 18 U.S.C. 1956: monetary transactions in unlawful activity; and
(d) 18 U.S.C. 1957: laundering of monetary instruments.

(2) Proceeds (real or personal property) traceable to property involved in a prohibited transaction in violation of 31 U.S.C. 5313(a) or 5324, 18 U.S.C. 1956 or 1957; or

(3) Proceeds (real or personal property) obtained directly or indirectly from a violation of:

(a) 18 U.S.C. 215: receipt of commissions or gifts for procuring loans;
(b) 18 U.S.C. 656: theft, misapply, embezzlement of bank funds;
(c) 18 U.S.C. 657: credit insurance, lending institutions;
(d) 18 U.S.C. 1005: fraudulent bank entries;
(e) 18 U.S.C. 1006: Federal credit institution entries;
(f) 18 U.S.C. 1007: false statements to FDIC;
(g) 18 U.S.C. 1014: false statements on loan and credit application;
(h) 18 U.S.C. 1341: mail fraud;
(i) 18 U.S.C. 1343: wire fraud; and
(j) 18 U.S.C. 1344: defrauding a Federally insured financial institution.

Another forfeiture action you may see arises in RICO cases.

18 U.S.C. 1963
(RICO)

Upon a RICO conviction, the following types of property are subject to forfeiture:

(1) Any interest in property acquired or maintained in violation of RICO's substantive provisions;

(2) Any interest in an enterprise or rights of any kind affording a source of influence over the enterprise when the enterprise was established, operated controlled, conducted or participated in by the defendant in violation of the substantive RICO provisions; or

(3) Proceeds obtained from the racketeering activity.

However, a *bona fide* purchaser for value who was reasonably without cause to believe the property was subject to forfeiture when acquired and / or a legal owner who had a vested interest superior to the defendant at the time of the acts giving rise to the forfeiture is protected.

If the property subject to forfeiture is not available upon defendant's conviction, other assets may be substituted for forfeiture. 18 U.S.C. 1963(m).

There are many other Federal criminal forfeiture statutes. Some of the more commonly used include:

18 U.S.C. Section 1467 covering obscene material;
18 U.S.C. Section 2253 covering child pornography;
18 U.S.C. Section 1492 covering counterfeiting; and
18 U.S.C. Section 545 covering smuggled goods.

This is not an exhaustive list since there are many other federal statutes that provide for forfeiture.

5. Civil Forfeiture

If the United States does not proceed by a criminal forfeiture action, and the subject property is real property, or personal property valued over $500,000 ($100,000 pre-8/20/90) or a cost bond has been filed in an administrative action, a civil forfeiture case will be filed.

A preliminary showing of probable cause is all that is needed to institute a civil forfeiture action. 19 U.S.C. 1615; *One Lot of Emerald Cut Stones v. United States,* 409 U.S. 232 (1972); *Brinegar v. United States,* 338 U.S. 160 (1949); *United States v. One Mercedes 280S,* 590 F.2d 196 (6th Cir. 1978). Also, the burden of proof in a civil forfeiture action is the preponderance of the evidence. In such cases, hearsay is admissible to establish probable cause. *Id.*; *Dobbins Distillery v. United States,* 96 U.S. 395 (1878); *United States v. Harris,* 403 U.S. 573 (1971). However, the exclusionary rule does apply. Evidence obtained in violation of the Fourth Amendment right against unreasonable searches and seizures, or the Fifth Amendment right against self-incrimination, is not admissible to establish probable cause. *United States v. $5,372.85 in U.S. Coin & Currency,* 401 U.S. 715 (1971); *United States v. $22,287 in U.S. Currency,* 709 F.2d 442 (6th Cir. 1983); *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 700 (1965). Once probable cause is established, the burden of proof shifts to the party claiming the property to show that the property is not forfeitable. 19 U.S.C. 1615, 21 U.S.C. 885; *United States v. $83,320,* 682 F.2d 573 (6th Cir. 1982).

Jurisdiction. In civil cases, jurisdiction is *in rem,* "the thing in such cases is considered as the offender." *Dobbins Distillery v. United States,* 96 U.S. 395, 400 (1878). The U.S. District Court has original jurisdiction over a proceeding for the enforcement of forfeiture, 28 U.S.C. 1355, and in all civil actions commenced by the United States, 28 U.S.C. 1345.

Civil Forfeiture Provisions.

21 U.S.C. 881
(Controlled Substances Act)

Property subject to forfeiture:

(1) Controlled Substances [881(a)(1) and (b)]. Schedule I and II drugs and

plants are contraband *per se*. Derivative contraband, Schedules III and IV are also subject to forfeiture. See, *United States v. Kershman*, 555 F.2d 198 (8th Cir.), *cert. denied*, 434 U.S. 892 (1977).

(2) Equipment, raw materials, and products used or intended to be used to manufacture, compound, process, deliver, import, or export any controlled substance. Section 881(a)(2).

(3) Containers for items identified in (1) and (2) above. Sections 881(a)(3) and 881(a)(4).

(4) Conveyances (cars, boats, airplanes, *et al.*) used or intended to be used to transport or to facilitate the transportation of a controlled substance. *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663 (1974) (one marijuana cigarette); *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978) (four marijuana cigarette butts). Generally, a common carrier (commercial airplane, bus) is exempt from forfeiture, although this exemption is not absolute. *United States v. One Rockwell Intern. Commander*, 754 F.2d 284 (8th Cir. 1985). Stolen conveyances are also exempt. See, *One 1941 Ford 1/2 Ton Pickup A. Truck, Etc. v. United States*, 140 F.2d 255 (6th Cir. 1944). Also, if one can show he / she is an innocent owner, the property is exempt. Innocent means one who did not consent to, know about, or act willfully blind to the conduct which made the property forfeitable. See, *Pearson Yacht*.

(5) Books, records, and research used or intended to be used in violation of 21 U.S.C. - Section 881(a)(5). However, books of general distribution and drug related literature are constitutionally exempt from forfeiture. See, *Kane v. McDaniel*, 407 F.Supp. 1239 (W.D. Ky. 1975).

(6) Money, negotiable instruments, securities, and things of value furnished or intended to be furnished in exchange for a controlled substance. 21 U.S.C. Section 881(a)(6). Also, proceeds traceable to an illegal drug exchange. There is an innocent owner exception for these items. See, *United States v. Premises Known as 8584 Old Brownsville Rd.*, 736 F.2d 1129 (6th Cir. 1984).

(7) Real property (includes any interest, or appurtenances) used or intended to be used to commit or to facilitate the commission of a Title 21 felony. The innocent owner exception applies. Section 881(a)(7).

(8) Essential chemicals and machines, paraphernalia, and firearms with nexus to criminal activity are forfeitable. Sections 881(a)(1), (8), (9), (10), (11).

18 U.S.C. Section 981 (Money Laundering)

Subject to forfeiture:

(1) Any property involved in a transaction or attempted transaction in violation of:

(a) 31 U.S.C. Section 5313(a): cash transaction report 10K plus;
(b) 31 U.S.C. Section 5324: structuring;
(c) 18 U.S.C. Section 1956: laundering of monetary instruments;
(d) 18 U.S.C. Section 1957: property derived from specified unlawful activity.

(2) Proceeds traceable to any of the violations listed above.

As in criminal forfeiture, many different Federal statutes provide a basis for civil forfeiture. A few examples include:

18 U.S.C. Section 512 covering stolen motor vehicles;
18 U.S.C. Section 1955 covering illegal gambling;
18 U.S.C. Section 2254 covering child pornography;
18 U.S.C. Section 2593 covering electronic interceptions;
18 U.S.C. Section 509 covering copyrighted material;
15 U.S.C. Section 1177 covering illegal gambling devices;
22 U.S.C. Section 401 covering the exporting of war material.

Again, this is not an exhaustive list and as can readily be seen, criminal statutes are frequently the basis for a civil forfeiture.

DISPOSITION AND SHARING OF SEIZED ASSETS

The U.S. Marshals Service maintains and protects all seized property. They also sell forfeited property if it is not to be distributed in kind to investigative agencies. Certain types of forfeited property such as automobiles, boats, etc., that can be used for investigative purposes may be given directly to law enforcement agencies.

Cash, and the net proceeds of sale of other personal and real property after payment of lienholders and costs are distributed in one of three ways:

(1) In exclusive federal investigations, all proceeds pass to the Federal Asset Forfeiture Fund.

(2) In joint state / federal cases, proceeds are divided between state / local investigative agencies and the Federal Government in proportion to resources committed and efforts made by each agency. All property, including real property, buildings on real property and cash can be shared. Exception: Cash (currency), negotiable instruments and securities cannot be shared by federal agencies. The federal share of cash always passes to the Asset Forfeiture Fund and can never be less than the minimum provided for under "adoptive" forfeiture provisions. Also, certain restrictions attach to the use of funds and property given to state and local agencies. This will be discussed further below.

(3) Adoptive forfeitures are cases exclusively worked by state or local investigators but referred to the FBI or DEA for federal administrative forfeiture or accepted by the U.S. Attorney's Office for judicial forfeiture. In adoptive forfeitures, a portion of the forfeited funds is retained by the Federal Government to cover the effort made in obtaining the forfeiture.

Seizures that occurred after September 1, 1990, and are contested judicial proceedings require that 20% of the net proceeds shall be allocated for the Federal Asset Forfeiture Fund. Uncontested judicial proceedings require 15% to be allocated for the Asset Forfeiture Fund. The remaining 80 or 85% of the net proceeds may be equitably distributed, according to participation, to state or local law enforcement agencies.

Under Federal law, certain restrictions attach to the use of cash or property shared back to state and local police whether from joint investigations or from adopted cases:

First, such shared money and property can only be used for a law enforcement purpose.

Second, the value of shared funds and property cannot be used as an offset to reduce the regular operating budget of the police agency.

Thus, if the police department of city "x" receives $50,000 as proceeds from a federal forfeiture sharing, the city government can't reduce their regular appropriation by a similar amount, and any such sharing would have to be spent or used for law enforcement purposes.

The decision as to how to share forfeiture funds between state and federal agencies prior to June, 1990, was made by the United States Attorney if the amount involved was less than $200,000, and in

Washington at the U.S. Department of Justice if it exceeded that amount, pursuant to the factors previously set out, and subject to the minimum Federal share.

Since last June, decisions on state and local shares in cases involving less than $1,000,000 are made by the FBI or DEA if it is an administrative forfeiture and the United States Attorney in judicial forfeiture cases. When the proceeds exceed $1,000,000, the decision is made by the Deputy Attorney General of the United States.

State prosecutor offices have now also become eligible to share in proceeds.

EXAMPLES OF RECENT ASSET FORFEITURE - SHARING IN THE EASTERN DISTRICT OF KENTUCKY

The United States Attorney's Office for the Eastern District of Kentucky currently has forfeiture proceedings on property with value in excess of $2,300,000 and known outstanding liens on these properties are approximately $140,000. In addition, property that has been forfeited, through this district, and is currently for sale, is valued in excess of $772,000 with outstanding liens of approximately $296,000.

Detailed tracking of forfeiture cases has been active for about a year in this office. Since that time property with a value of approximately $479,000 with outstanding liens of approximately $304,000 has been declined by this office for forfeiture for reasons such as little or no equity in the property, claimant deceased, or other facts that defeat the three primary goals for the Department of Justice asset forfeiture program. Those goals are to punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities, enhance cooperation among foreign, federal, state and local law enforcement agencies through the equitable sharing of forfeited assets and, if the first two goals are accomplished, then the third goal, to produce revenues to be invested in expansion of the asset forfeiture program and other critical law enforcement programs, will be achieved.

As property is forfeited, currency or net proceeds from the sale of property is distributed to agencies involved in the case or conveyances are turned over to the agencies for official use. The United States Attorney is authorized to determine the equitable distribution of the property if the value of the forfeited asset is below $1 million.

Since tracking of forfeiture cases, this office has shared or is in the process of sharing 90% of money or conveyances valued at approximately $324,000. Some of the agencies that have been or are participants of sharing are Kentucky State Police, Nicholasville Police Department, Winchester Police Department, Erlanger Police Department, Northern Kentucky Narcotics Enforcement Unit, FIVCO Area Drug Enforcement Task Force, Huntington West Virginia Police Department, Cincinnati Police Department, Greater Cincinnati International Airport, Hamilton County Sheriff's Office and Kenton County Airport.

In a recent example of sharing, 45% of $24,000.00 was distributed to the Kenton County Airport Board and 22 1/2% each was distributed to the Hamilton County Sheriff's Office and Cincinnati Police. In addition, $195,000 has recently been distributed to Kentucky local and state agencies through administrative forfeitures done by the DEA and FBI.

The receipt of funds by out-of-state police agencies usually occurs when either they have contributed officers to federal task forces working in Kentucky, or have assisted in pursuing portions of investigations extending into neighboring states. Kentucky forces can similarly benefit from sharings from other states.

It should also be noted that the U.S. Attorney's Office for the Western District of Kentucky has similarly shared large amounts of money to state and local police since asset sharing began in 1985. In the Eastern District U.S. Attorney's Office prior to tracking, approximately $1,000,000 has been returned to Kentucky state and local police agencies since 1985.

STATE FORFEITURE

In the most recent regular session of the Kentucky General Assembly (1990), KRS.218A.405 *et seq.* was passed to bring Kentucky forfeiture law closer to federal provisions. There are, however, significant differences including a requirement that a criminal conviction occur prior to any forfeiture. Federal administrative and civil forfeiture procedures do not require this.

There are also greater restrictions on the seizure of real property and different provisions for distribution of the funds and proceeds forfeited. In each forfeiture case, amounts under $50,000 go directly to the seizing police department, 90% and the Commonwealth Attorney, 10%. Funds in excess of that are distributed by a statutory formula, 45% to the seizing agency and the balance to a state trust fund that from the remaining funds distributes 18% to the united prosecutorial system, 36% to the Cabinet for Human Resources, 36% to the Corrections Cabinet and 10% to the Kentucky Justice Cabinet.

This new state statute should lead to more direct state action in forfeiture and relieve some of the pressure on federal prosecutors and courts.

CONCLUSIONS

Expanded forfeiture powers granted to the federal and state governments represent a significant new weapon in combating the drug trade. In Kentucky, it has had a significant effect in reducing the production of marijuana on privately owned farms. While it is a power that must be used with great discretion, adequate safeguards for the interest of innocent third parties have been provided.

If we are to win the war on drugs, it is absolutely essential to remove the profit from drug production and trafficking.

[The author would like to thank several members of his staff who helped in preparation of this article and note that some of the information cited came from a variety of sources. Any errors, however, are his own and are due to a short lead time in preparation of this article.]

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Recently, he has served on the Sixth Circuit Pattern Jury Instructions Committee, as Chairman of the U.S. Attorney General's Advisory Committee's Legislative Working Group and as a member of the Public Corruption Sub-committee, and as a member of several state-federal law enforcement task forces and committees. A life-time Kentucky resident, he is a graduate of the University of Kentucky Law School.

Legal Rights of Deaf Defendants

This is the third and final installment of a series of articles on deaf defendants.

The first installment of this article (December 1990, pp. 48-51), discussed the use of interpreters for deaf persons "upon arrest and prior to court proceedings." This installment will address interpreters during attorney/client consultations and during court proceedings. Related factors will also be discussed.

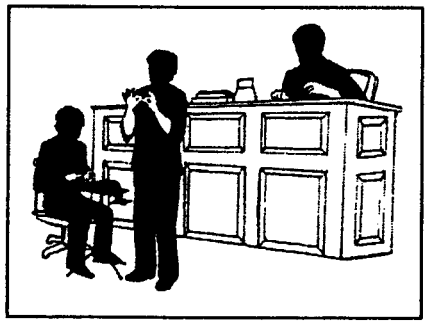
Perhaps you have never represented a deaf client before and you feel that you probably never will. Perhaps you have never had a deaf defendant come before your court. Chances are you will, since one out of sixteen Americans have some hearing impairment and one out of a hundred are deaf. It is hoped that this series of articles will better prepare you for that day.

LEGAL SERVICES CORPORATION REGULATIONS

The LSC's regulations prohibit discrimination against any qualified handicapped individual by any grantee legal services program. If the program has 15 or more employees, appropriate auxiliary aids must be provided for hearing impaired persons to enable them to benefit from its services. Auxiliary aids include interpreters and telecommunications devices for the deaf among other things. Programs which employ less than 15 persons may also be required to provide interpreters if it does not significantly impair the ability of the program to provide its services. Since rates for interpreter services, as discussed elsewhere in this article, are reasonable, all legal services programs should be able to provide interpreters to ensure the effective communication between attorney and client that is so vital to the provision of competent legal services.[1]

INTERPRETERS FOR INDIGENT DEAF CLIENTS / ATTORNEY CONSULTATIONS

The Ninth Circuit Court held in *DeRoche v. United States*, that effective assistance of counsel means adequate opportunity for consultation and preparation between the defendant and his attorney for arraignment and trial. Without a qualified interpreter for a deaf defendant, this constitutional guarantee is meaningless. The Department of Justice issued the following analysis with its regulation requiring the appointment of interpreters for indigent deaf defendants to assist with communication between client and attorney:



"In cases where the courts appoint counsel for indigents, the courts...are required to assign qualified interpreters (certified, where possible, by recognized certification agencies) in cases involving indigent defendants with hearing or speaking impairments to aid the communication between client and attorney. The availability of interpreter services to indigent defendant would be required for all phases of the preparation and presentation of the defendant's case." 45 Fed. Reg. 37630 (1980).[2]

BENEFICIAL RESOURCES

The National Center for the Law and the Deaf at Gallaudet University generally handles cases involving employment and consumer discrimination where the dispute centers on the disability itself. It does not handle cases where one person sues another. Even still, it cannot handle all deafness-related cases. However, they do offer advice by phone. Their address and phone are: 800 Florida Ave. N.E., Washington, D.C. 20002, (202) 651-5373 (V/TDD).

Steve Salant is a private attorney in Silver Spring, MD. He developed some tips for deaf persons in looking for the right lawyer. If you are interested in soliciting deaf and hard of hearing clients, following these tips could enable you to better attract these clients. They can be found in *Shhh*, September/October, 1989, pp. 7-8, "Hurdling the Barriers to the Legal System" by Nancy Kelm Koran.

The Kentucky Commission on the Deaf and Hearing Impaired has a fact sheet that offers suggestions on communication strategies and dispels common misconceptions many people have about deaf people. They also have a brochure written for deaf people that briefly discusses their legal rights to interpreters. They work closely with the Administrative Office of the Courts in providing interpreter services to deaf defendants.

INTERPRETERS IN THE COURTROOM

Nancy Frishberg, who has done a comprehensive study of state and federal laws pertaining to courtroom interpreting, discusses such interpreting in some detail in her book, *Interpreting: An Introduction.* According to Frishberg, interpreters "serve as officers of the court, generally are sworn in to 'faithfully interpret,' and are expected to follow the instructions of the judge", who makes the final determination about an interpreter's qualifications. If it is advisable for the interpreter to explain her appropriate role and function and to briefly summarize the RID Code of Ethics, Frishberg suggests that this be done before the trial or hearing is underway in order to "avoid misunderstandings and disruptions later on." It is our contention that a judge should not only allow but should *encourage* the interpreter to present such information, especially in situations where attorneys and others are unfamiliar with issues relating to deaf persons, hearing impairment, sign language, and/or the use of interpreters. According to Frishberg, if an interpreter is appointed without challenge but then finds that she cannot communicate well with the deaf individual, it is appropriate for her to interrupt and ask to approach the bench to discuss possible solutions to the prob-

lem. In such cases the interpreter may request the appointment of an intermediary interpreter or may ask that a different interpreter be appointed. In our view, judges and attorneys should be sensitive not only to the possibility but also to the *desirability* that an interpreter speak out in such a situation.

As we mentioned in the first installment of this article, it is the interpreter's job to interpret *everything* that is said in the courtroom, since the deaf person has the legal right to "hear" everything that is said in his/her presence. It is hoped that judges and attorneys alike will respect this right, and will not create a dilemma for the interpreter by asking her *not* to interpret some part of the talk. However, should such a request be made either deliberately or unwittingly, the interpreter should be allowed to address the court in order to remind all parties that everything that is said must be interpreted. If a judge insists that the interpreter not interpret a portion of the proceedings, Frishberg suggests that the wise interpreter might request to leave the courtroom, rather than stay and not interpret and risk being held in contempt of court. Ideally, however, all participants in the proceedings will work together to insure that the rights of everyone involved are respected and upheld.

DUTIES OF THE INTERPRETER

The first installment of this article discusses several pre-trial situations (*e.g.*, presentation of the *Miranda* Warning and pre-trial conferences between attorney and client) in which interpreters may be utilized. KRS 30A.425 provides a more complete picture of the range of interpreter duties, including the following:

(1) Interpreting during court and court-related proceedings, including any and all meetings and conferences between client and his attorney.
(2) Translating or interpreting documents.
(3) Assisting in taking depositions.
(4) Assisting in administering oaths.
(5) Such other duties as may be required by the judge of the court making the appointment.

KRS 30A.400 clearly states that "any statement made by a person who is entitled to the services of an interpreter...to a law enforcement officer may be used as evidence against that person only if the statement was made, offered or elicited in the presence of a qualified interpreter." For example, if a deaf defendant makes a confession of guilt to an arresting officer at the time of his arrest but no qualified interpreter is present, that confession cannot be admitted as evidence against the defendant during the trial. However, this subsection of the law "shall in no way deny a person the right to make a voluntary confession," provided the confession is made in the presence of a qualified interpreter.

SITUATIONS WHERE MORE THAN ONE INTERPRETER MAY BE NECESSARY

Often, more than one interpreter may be needed for a given situation. When the deaf person has minimal language skills, it would be appropriate for an RSC holder and a CSC holder (see description of certification levels in the second installment of this article, February 1991) to work as a team interpreting for this individual. Another case where more than one interpreter would be needed is when the assignment is a lengthy one. Of course, the endurance of an interpreter is a variable thing. Factors which influence this are the type of interpreting assignment, whether there will be relatively continuous discussion or "down" time such as when the deaf person is reading, the speed of the speaker, whether it is a subject in which the interpreter feels comfortable, and whether the interpreter is well rested, *etc.* Related to this, if an attorney, public defender, or judge asks the deaf person to read a document or paper and wishes to comment on it or explain it, it is important to make sure that the deaf person establishes eye contact with the interpreter before proceeding with the explanation. In addition, there have been cases where deaf persons have signed documents which they did not understand. It is imperative that the deaf person be urged not to sign anything without receiving an accurate explanation of its contents by his attorney through an interpreter if he benefits from interpreter services. To determine if the deaf person understands, not only these documents but at any point, ask him questions which require more than a yes-no response. Appropriate responses are an indicator of understanding.

INTERPRETER REFERRAL AGENCIES AND PAYING INTERPRETERS

Please refer to the first installment of this article to determine how to obtain the services of an interpreter. One thing that the Interpreter Directory, which the Kentucky Commission on the Deaf and Hearing Impaired maintains, does not mention is the use of interpreter referral agencies. These agencies will actually send an interpreter, given enough notice, and charge the contracting agency (the court, the public defenders office, *etc.*) for the services. They in turn, pay the interpreter who provided the service. This is one way to avoid the inconvenience of having to make several calls to determine which interpreter is available. We are aware of only one in-state interpreter referral agency. They serve their area of the state. There are three interpreter referral agencies of which we are familiar located in bordering states that handle interpreter requests in their area including parts of Kentucky. They generally either have hourly rates which cover the additional service or they charge a referral fee in addition to the hourly rate. The Interpreter Directory also has a suggested fee schedule for interpreters. Those rates range from $14-$18/hr. for certified interpreters. Those are the suggested fees for interpreters providing the service. The Directory does not have recommended fees for referral agencies.

INTERPRETERS IN FEDERAL COURT

Courts are required to appoint a qualified interpreter for any criminal or civil action initiated by the United States government due to the 1979 Congressional enactment of the Bilingual, Hearing and Speech Impaired Court Interpreter Act.[3] "The cost of the interpreter services is paid by the government in all criminal and civil actions initiated by the U.S., whether or not the defendant or party is indigent."[4]

ENTERING A PLEA

Sometimes lower courts do not provide interpreters when a plea of guilty or not guilty is entered. Appeals courts have held that the only plea that a court should enter, without the services of a qualified interpreter for a deaf defendant, is not guilty.[5]

SECTION 504 MAY STRENGTHEN STATE INTERPRETER LAWS

The regulations adopted by the U.S. Dept. of Justice implementing Section 504, 28 C.F.R Section 42, Subpart G, requires the Dept. of Justice recipients to ensure effective communications with hearing impaired individuals. Recipients include many state court systems and correctional facilities. The standards set are higher than many set by state law.[6]

OTHER AUXILIARY AIDS IN COURT FOR DEAF DEFENDANTS

For those hearing impaired persons who are skilled in English and who have become familiar with legal terminology and courtroom procedures in detail computer aided transcription, as illustrated in the movie "Suspect", may be beneficial. An article which fully explains this concept is, *Communication in the Courtroom: Technology is Helping to*

Provide Equal Access to the Law by Dorothy Smith in Gallaudet Today's Spring 1989 issue (pp. 19-21).

Assistive Listening Devices such as audio induction loops, wireless FM and infrared systems may be beneficial for hearing impaired persons who have some residual hearing. For more information about each of these, contact the Kentucky Commission on the Deaf and Hearing Impaired.

PSYCHOLOGICAL ASSESSMENTS

One needs to bear in mind that some psychological tests are not necessarily valid when administered on deaf persons. For example, tests such as the Minnesota Multi-phasic Personality Inventory (MMPI) and the verbal component of the Wechsler Adult Intelligence Scale (Revised) are very English-based. For a deaf person who has difficulties with English, these tests become tests of language. This clouds what they were developed to test and diminishes the likelihood of getting a true picture of emotional functioning. In fact, for those persons, these tests are most likely invalid.[7] It is vital that psychological assessments on deaf persons be administered by qualified mental health professionals knowledgeable about the experienced in working with deaf individuals and qualified interpreters where appropriate. Northern Illinois University's Institute on Deafness has a videotape entitled, "Issues in Obtaining Quality Psychological Assessments for Persons with Hearing Impairments." Ms. Cathy Mavrolas of the Siegel Institute at the Michael Reese Medical Center in Chicago is the presenter. NIU's Institute on Deafness also has other videotapes on mental health and deafness issues available on a loan basis to the public at no charge. There are also several books on the subject available from a variety of publishers. One such book is, *Mental Health Assessment of Deaf Clients, A Practical Manual*, edited by Holly Elliott, Laurel Glass, and J. William Evans. Of course, viewing videotapes or reading books alone would not be sufficient to qualify a mental health professional in providing quality mental health services to deaf persons but it is a beginning.

INSTITUTIONALIZATION OF DEAF PERSONS

The Supreme Court has ruled that a deaf individual who is not a danger to himself or others cannot be committed to permanent institutionalization because of incompetency to stand trial.[8]

CIVIL AND ADMINISTRATIVE PROCEEDINGS

Our state law (KRS 30A.415) gives the judge the authority to decide how the interpreter services will be paid for in civil proceedings. He/she can authorize payment out of the state treasury or tax the cost against the losing party. However, the analysis of the Dept. of Justice's Regulations specifically requires the appointment of interpreters in civil proceedings. "Court systems receiving Federal financial assistance shall provide for the availability of qualified interpreters for civil and criminal court proceedings involving persons with hearing or speaking impairments (where the recipient has an obligation to provide qualified interpreters under this subpart the recipient has the corresponding responsibility to pay for the services of the interpreters." (45 Fed. Reg. at 37630).

> An interpreter should be available at all stages of any judicial or administrative proceeding, since most state courts and administrative systems receive federal assistance from the Dept. of Justice and the Office of Revenue Sharing, Section 504 can provide a remedy when state laws are inadequate.
>
> Attorneys can make a preliminary motion for the court to provide a qualified interpreter. If that fails, they can file an administrative complaint with the Dept. of Justice or the Office of Revenue Sharing or initiate a court action. (National Center for the Law and the Deaf newsletter, Sept. 1981).

Not only do police departments, courts, and prisons have to provide hearing impaired persons with interpreters. KRS 344.500 requires the same for any proceeding before a board, commission, agency or licensing authority of the state or any of its political subdivisions. KRS 30A.410 provides for interpreters to be provided "at any stage of any criminal, juvenile, or mental inquest case, grand jury proceeding, including probation and parole proceedings to be paid for out of the state treasury..." This covers a lot of territory. When a deaf person requests interpreter services, a wise person will look closely at the state and federal laws governing this before he denies him this essential service.

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FOOTNOTES:

[1] 45 C.F.R. Section 1624.4(a, d, d(2)), See Chapter XI for a fuller discussion of LSC requirements, *Eliminating Communication Barriers for Hearing Impaired Clients* by Sy DuBow and Sarah Geer, Clearinghouse Review, May 1981, pg. 39.

[2] *Eliminating Communication Barriers for Hearing Impaired Clients* by Sy DuBow and Sarah Geer, Clearinghouse Review, May 1981, pg. 42.

[3] 28 U.S.C. Section 1827 (1978), *Eliminating Communication Barriers for Hearing Impaired Clients* by Sy DuBow and Sarah Geer, Clearinghouse Review, May 1981, pg. 41.

[4] *Eliminating Communication Barriers for Hearing Impaired Clients* by Sy DuBow and Sarah Geer, Clearinghouse Review, May 1981, pg. 41.

[5] *Goodman v. Alabama*, 226 So.2d 94 (Ala. Ct. App. 1969); *Gilliam v. South Carolina*, No. 83-CP-30-479 (S.C.Comm. Pls. July 23, 1984), *Deaf Victims and Defendants in the Criminal Justice System" by Elaine Gardner, Clearinghouse Review, November 1985, pg. 750.*

[6] *Eliminating Communication Barriers for Hearing Impaired Clients" by Sy DuBow and Sarah Geer, Clearinghouse Review, May 1981, pg. 41.*

[7] Doug Tyler, Psychological Examiner Clinical and School Associates, Knoxville, TN.

[8] *Jackson v. Indiana*, 406 U.S. 715 (1972), *Deaf Victims and Defendants in the Criminal Justice System" by Elaine Gardner, Clearinghouse Review, November 1985, pg. 751.*

Criminal Record Abstracts

Investigating the Criminal Defense Case

A criminal record abstract is a document listing the criminal history of individuals that have committed criminal acts. It is created by law enforcement agencies contributing information to the Kentucky-Central Repository, 1250 Louisville Road, Frankfort, Kentucky, of the Kentucky State Police. An abstract lists the following information:

1. Personal data information of the offender.

2. The contributing agency of the citation or charge.

3. The offender's name and date of charge.

4. The contributing agency's case or I.D. number.

5. The original charge and disposition.

A sample of what an abstract looks like and the nature of its information is illustrated below.

LIMITATION OF INFORMATION

One limitation of the abstract is that the information contained in the abstract is only as good as the contributing agencies. The criminal charges are found at times not to be complete. If the abstract is needed in reference to a possible PFO charge, it is advisable to contact the contributing agency or look at the actual court records to verify or determine if the information is correct and complete.

Also, there will be instances where you suspect or know of charges/convictions that are not listed on the abstract. If you require verification of these, you will need to contact state, county, or city police agencies, or court records in the area where the charge occurred and find out the charge and present status of the charge.

Upon request, you will be mailed a copy of the abstract. If the abstract is needed to be admitted as evidence in a trial, we will then send you the original certified abstract. The limitations of the accuracy of the abstract can present admissibility problems. Original documents from police, courts, and attorneys or their testimony may be requested for accuracy and to meet admissibility requirements.

The abstract, because of the confidential information contained in the abstract, is not to be made a part of any agency file. The abstract, by agreement, is to be destroyed after 90 days. If the abstract is needed after the 90-day limit, then we will request a second abstract for your use.

DATE

COMMONWEALTH OF KENTUCKY
KENTUCKY STATE POLICE
FRANKFORT 40601
COMPLETE
OFFENDER ABSTRACT

PAGE 01

OPERATOR GFJ

SID_____ FBI NO._____ SSN_____
RACE_____ SEX_____ HEIGHT_____ WEIGHT_____ HAIR_____ EYES_____ SKIN_____
SCARS, MARKS, TATTOOS
P.O.B._____ DATES OF BIRTH_____
F.P.C. _____ L.K.A. _____
COMMENTS
SEND TO : LISA CAMPBELL FENNER
1264 LOUISVILLE RD
FRANKFORT, KY 40601
ATT: DEPT FOR PUBLIC ADVOCACY

CERTIFIED
BY:_____
DATE:_____

CITATION OR CASE CONTRIBUTOR	CHARGED/ARR/REC OFFENDER NAME	CASE/LOCAL ID NUMBER	C=ORIG. CHARGE F=FINAL CHARGE D=DISPOSITION
Kentucky State Police	01/01/89		#1 C -Carrying conc deadly weapon
	John Smith		#1 C -Receiving stolen property - vehicle (over $100)
	05/03/89		D -30 day jail, 24 mo prb
			D -Amended
			D -RSP-Misdemeanor, 6 mos

INFORMATION NEEDED TO OBTAIN RECORD

To obtain the criminal history of a client, certain information is needed. A request for the criminal history of Kentucky requires the individuals full name, date of birth, sex and race. To request an out-of-state criminal history requires the individuals full name, date of birth, social security number, sex and race. The reason this information is required is to assure that the records requested are those of the offender in question.

To request a criminal abstract through the Department of Public Advocacy, you must be a full, part-time or conflict Public Defender.

To request an abstract call Lisa Fenner, secretary to DPA's Chief Investigator, Dave Stewart, 502-564-8006, ext. 279, or write her at 1264 Louisville Road, Perimeter Park West, Frankfort, Kentucky 40601 with the proper information.

It takes about 7-10 days to obtain a Kentucky or out-of-state abstract.

DAVE STEWART
Chief
Investigation Branch
Frankfort, KY

CRIMINAL RECORD ABSTRACT REQUEST

Full Name: _____

DOB:_____
Sex:_____
Race:_____
SS #:_____

Date you need Abstract by:_____

Memo from Kentucky's Attorney General

DUI Roadblocks

FREDERIC J. COWAN

The following is a memo from Kentucky's Attorney General to all law enforcement officers. We reproduce it here for the information of Kentucky's criminal justice community.

November 14, 1990

Dear Law Enforcement Officer:

In recent years, law enforcement agencies have made greater use of roadblocks as a method to combat drunken driving. The use of roadblocks as a strategy has been endorsed by Mothers Against Drunk Drivers and the National Highway Traffic Safety Administration. However, questions regarding the constitutionality of these roadblocks have posed a stumbling block for police who have sought to implement them as a technique.

My staff has reviewed several recent court rulings, including the U.S. Supreme Court case of *Sitz v. Michigan State Police*, and has prepared a summary of the criteria used by the courts when they evaluate the lawfulness of DUI roadblocks. If your law enforcement agency decides to use police roadblocks to detect drunk drivers, we recommend that you adhere to these criteria in order to help ensure that a reviewing court will find that the roadblock was lawfully conducted.

THE DEGREE OF THE INTRUSION

1. *The average length of time each motorist is detained.* This is an extremely important element which will be carefully scrutinized by the courts. In sum, the longer the detention, the more likely that a court will find it to be unduly intrusive. Traffic should not be left to back up to a significant degree. We believe that a stop averaging more than two minutes per vehicle will result in a constitutional challenge, although it is permissible to detain individual drivers found at the roadblock for a greater period of time for further investigation. We recommend that the police set aside an area at the roadblock where suspected drivers can be routed for more particularized investigation without holding up other drivers.

2. *Advance notice to the public at large.* It is not required that advance notice of DUI roadblocks be given to the public at large. Of course, the surprise of the location of a particular checkpoint may be of great importance to the effectiveness of the roadblock. However, the courts will favor roadblocks in which some form of advance notice is given to the public, such as notifying local media that the police will be conducting roadblocks at unspecified locations during a particular night or weekend.

3. *The availability of less intrusive methods for combating the problem.* This criterion is less important now than it was prior to the Supreme Court's decision in the *Sitz* case, which held that roadblocks are not *per se* unconstitutional. The court found that the measure of intrusion on motorists briefly stopped at a sobriety checkpoint is slight.

CONSIDERATIONS REGARDING ADMINISTRATIVE SUPERVISION

4. *The degree of discretion, if any, left to the officer in the field.* Stopping every vehicle passing through a given checkpoint is not unconstitutional. However, the selection of cars stopped must be based on objective, not arbitrary criteria. It appears that a random method of selection (*i.e.* every second car, every fifth car, or every tenth car) is constitutional. In no event should cars be stopped without a pre-determined method of selection because a court will find this to be arbitrary and unconstitutional. The scope of inquiry must be limited; it may not be so broad as to allow the police to look for any criminal violation whatever. We recommend that the purpose of the stop be limited to only three objectives, for example:

(1) determining the validity of each motorist's driver's license,
(2) determining proper registration, and
(3) observing the driver for signs of intoxication.

5. *The standards set by superior officers.* The courts favor roadblocks which are set up under the supervision of commanding officers and which are conducted in a highly methodical manner. Courts favor the use of carefully defined administrative procedures used to conduct the roadblock.

6. *The location designated for the roadblock.*

7. *The time and duration of the roadblock.* It is best that administrative authorities (police supervisors, in conjunction with the local prosecutor and the local executive authorities) determine the exact location, the time, and the duration of the roadblock. The courts favor roadblocks which are located in an area in which the checkpoint itself would not create a traffic hazard to oncoming motorists. In the event that the constitutionality of the roadblock is later challenged in court, this will also help establish that the officers in the field have exercised "unconstrained discretion." (Criterion 4). The courts also favor administrative control as to the specific time at which a roadblock will begin and when it will end.

SAFETY CONSIDERATIONS

8. *The maintenance of safety conditions.*

9. *The advance warning to the individual approaching motorist.*

10. *Physical factors surrounding the location, type, and method of duration.*

11. The degree of fear or anxiety generated by the mode of operation. A judicial determination as to whether safety was properly maintained is largely a subjective matter which will depend upon the individual facts and circumstances of the particular roadblock in question. Nonetheless, safety can best be accomplished with proper planning and by using various

safety devices. For example, using emergency vehicles with revolving lights, other types of flashing lights, traffic cones, traffic sawhorses, or lighted flares will help keep the checkpoint visible and safe. If the roadblock is conducted at night, it would be best that the checkpoint be located in a well-lighted area. Additionally, the courts will favor these precautions in evaluating whether unnecessary fear or anxiety has been generated by the mode of operation. Even the politeness of individual officers toward motorists during the conduct of the roadblock might be examined as it bears upon the fear caused by the stop.

OTHER FACTORS

12. *The degree of effectiveness of the procedure.* Although the effectiveness of a DUI roadblock must often be evaluated after the particular roadblock has been completed, the U.S. Supreme Court has held that a showing that 1.5% of all motorists who were stopped were arrested and charged with DUI was a sufficient showing that the roadblock was effective. The court deferred to "politically accountable officials" to determine "which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger."

13. *Any other relevant circumstances which might bear upon the test.* A court will look to the particular facts and circumstances describing the individual checkpoint. Extraneous factors will vary and are difficult to predict, but the courts will examine other circumstances or facts which might bear upon the criteria above.

I realize that this has been a lengthy summary; however, I believe it necessary to provide you with reasonably complete and specific information. I hope these criteria will be useful in your efforts to curb the threat of drunk drivers upon the highways of the Commonwealth. Should you desire more detailed information, please feel free to contact my office.

Sincerely,

FREDERIC J. COWAN
ATTORNEY GENERAL

LEXINGTON HERALD-LEADER

A Knight-Ridder Newspaper

Published every day by the Lexington Herald-Leader Co., 100 Midland Avenue, Lexington, Kentucky 40508

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Friday, June 22, 1990 A14

Anonymous tips, roadblocks erode protected freedoms

Millions of Americans follow a daily routine of getting into their car and leaving home at a certain time and driving to a certain destination. It's called going to work.

It is also, in the mind of six members of the Supreme Court, criminally suspicious behavior. Last week, the court ruled that police legally could stop and question a motorist based on nothing more than an anonymous tip that the person would leave home at a given time and drive to a particular destination.

In the case at hand, the tipster also told police that the woman driver would be in possession of illegal drugs; and it turned out that she was. But the validity of the tip and the nature of the offense should be irrelevant in relation to constitutional rights. Unfortunately, the court has other ideas.

To understand the practical consequences of what the court is doing, imagine that someone who is mad at you, and who knows your routine, makes an anonymous call, as the tipster did in this case. So what? you say. After all, you don't mess with drugs.

Well, at the very least, you will go through the hassle of being stopped and questioned by police on your way to work. At worst, the tip makes police suspicious of you even if they don't find drugs. And not even the most innocent citizen can be comfortable with being the object of police suspicions.

The other practical effect of this ruling is that imaginative law enforcement officers who suspect a particular person can find ways to manufacture an anonymous tip, either before or after the fact.

If the Fourth Amendment to the Constitution were alive and well, Americans would be protected from such pranks and police abuse. An anonymous phone call would not be considered reasonable cause for stopping and questioning anyone the police choose. But the Fourth Amendment, and the Fifth, are becoming mere words at the hands of the Supreme Court these days.

A few days after the tip decision, the court upheld the use of roadside checkpoints to catch drunken drivers. Even though only one in 100 persons going through these roadblocks is charged with drunken driving, the court said the greater good justified this "slight" intrusion on civil liberties.

It is more than a slight intrusion when 99 people out of 100 are pulled over without reason. The statistics show clearly that checkpoints are an ineffective way of addressing the very real problem of drunken driving. They serve only to make people fear the law that is supposed to be protecting them. There are better methods of catching drunken drivers, methods that are both more effective and less intrusive on the rights guaranteed by the Constitution.

Opposing Interstate Extradition

JOHN WEST

EXTRADITION AND ITS HEARINGS

Interstate extradition is often seen as a cloudy issue for attorneys and judges alike. Extradition matters are governed by the Federal Constitution, Article 4 section 2 and by statutory provision 18 U.S.C.S. section 3182. There are also state enactments such as the Uniform Rendition of Accused Persons Act, the Uniform Extradition and Rendition Act, and the Uniform Criminal Extradition Act. The Uniform Criminal Extradition Act is incorporated in Kentucky's Revised Statutes 440.150 to 440.420, as well as most other states' statutes.

The extradition process starts when an individual is arrested in the asylum state and charged with being a fugitive from justice[1] based on a request from the demanding state. The accused may have a detainer placed on him by the demanding state as well as charges in the asylum state. In such a situation, the attorney might attempt to resolve the demanding state's charge(s) through negotiation. If this fails, the accused may request, pursuant to Article III of the Interstate Agreement on Detainers Act, Kentucky Revised Statute 440.450, a trial on those charges. In such a situation, the accused would not be resisting extradition, rather he would be waiving it.[2] Extradition can be opposed, however, any time limitations, as set forth below, will be tolled by such opposition.

THE ARREST

According to Kentucky Revised Statutes (hereafter K.R.S.), the arrest may take THREE different forms: the first is by a warrant issued by the governor of the asylum state (KY) pursuant to K.R.S. 440.220, the second is by a warrant issued by a judge of the asylum state (KY) pursuant to K.R.S. 440.270; and the third is a warrantless arrest pursuant to K.R.S. 440.280. The statute/ordinance section of the uniform citation should indicate under which provision of K.R.S. the arrest was made.

THE COMMITMENT

If the arrest is made pursuant to K.R.S. 440.270 or 440.280, the accused must be taken before a judge who, shall issue a warrant for commitment to the county jail pending the issuance of the governor's warrant. The term of commitment must be set forth in the warrant and must not exceed 30 days as established by K.R.S. 440.290. During this time, bail is possible pursuant to K.R.S. 440.300.

If a governor's warrant is not obtained within the time period set forth by the warrant issued for commitment, the judge may discharge the accused or recommit him for a period not to exceed 60 additional days in accordance with K.R.S. 440.310. In no event may the accused or his bail be held for more than 90 days without a governor's warrant.[3] Even after the accused is released, he may be re-arrested. However, any re-arrest made after the 90 days can only be made with a governor's warrant.

THE GOVERNOR'S WARRANT

Once the governor's warrant is obtained the accused must be taken before a state circuit or district court judge for an extradition hearing. This hearing is not a trial on the merits to determine guilt or innocence, but serves as a means of insuring that probable cause exists to believe that the person whose surrender is sought has committed the crime for which his extradition is requested. *See Ex parte Noel*, 338 S.W.2d 903 (Ky. 1960).

The governor's warrant establishes a *prima facie* case that the accused is the individual requested by the demanding state. In order to overcome this, the accused must establish opposing evidence which will conclusively contradict the extradition papers. Alibi evidence alone is not enough. *See Galloway v. McCloud*, 316 S.W.2d 125 (Ky. 1958) and *Ex parte Grabel*, 248 S.W.2d 343 (Ky. 1952).

If the governor's warrant is not contested, the judge should sign a custody order releasing the accused to the agent of the demanding state. If the agent has not taken custody within 10 days, the court can release the accused or extend the custody order for another 10 days.[4]

The extradition proceeding is stayed if the accused requests leave to file for a petition for a writ of *habeas corpus* pursuant to K.R.S. 440.250. The judge shall fix a reasonable time to allow the accused to file a petition for a writ of *habeas corpus*.[5] As mentioned previously, once the accused contests the demand, any time limitation is tolled.[6]

THE PETITION FOR A WRIT OF *HABEAS CORPUS*

A petition for a writ of *habeas corpus* (hereafter the writ) is made up of three parts: the first is the petition, the second is the memorandum of law and argument in support of the petition and the third is the affidavit in support of the petition. The petition for the writ is a civil action filed in the state circuit court against the individual(s) who has actual custody of the accused. *See Eilers v. Carpenter*, 406 S.W.2d 830 (Ky. 1966) and *In re Winburn*, 320 S.W.2d 622 (Ky. 1959).[7]

The petition must be filed while the petitioner is in the asylum state. *See Lyons v. Thomas*, 378 S.W.2d 799 (Ky. 1964). The time for filing the petition depends on what the petitioner is testing. A petition testing a procedural defect in the detention of the accused[8] (not following the established procedure set forth above) or one based on initial apprehension[9] (the arrest), must be filed prior to the issuance of the governor's warrant.[10] A petition based on an inaccurate condition (proof the accused was not in the demanding state on the date the crime was committed and, therefore is not a fugitive, or that the extradition papers are not in order, *etc*...) K.R.S. 440.180, should be brought after the issuance of the governor's warrant, as the governor's warrant is a final rendition of those conditions.

The United States Supreme Court in *Michigan v. Doran*, 439 U.S. 282, 289, 99 S.Ct. 530, 58 L.Ed.2d 521 (1978) states:

Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide

(a) whether the extradition documents on their face are in order;

(b) whether the petitioner has been charged with a crime in the demanding state;

(c) whether the petitioner is the person named in the request for extradition; and

(d) whether the petitioner is a fugitive.

The court, however, can go beyond the rendition of the governor's warrant and extradition papers to make such decisions. *See Abernathy v. Smith*, 310 Ky. 170, 220 S.W.2d 383 (Ky. 1949). If the court grants the writ the petitioner may, under some circumstances, be re-arrested.

RE-ARREST

If the writ is granted, the petitioner must be released. This does not mean that the petitioner cannot be re-arrested. A re-arrest may be made so long as the principle of *res judicata* is not violated. A *habeas corpus* judgment is not *res judicata* as to issues and facts not decided or involved in that proceeding. Only a *habeas corpus* proceeding which is conclusive upon the merits, and not where the proceeding is preliminary and ancillary to a trial on the merits, is a bar to re-arrest. *See Morse v. United States*, 267 U.S. 80, 45 S.Ct. 209, 69 L.Ed. 522 (1925). Thus, a re-arrest following a release based on a procedural defect in the detention of the petitioner or initial apprehension would seldom be barred by the principle of *res judicata*. A re-arrest following a release based on an inaccurate condition may, on the other hand, be barred by the principle of *res judicata*.[11]

A petition for a writ, pursuant to K.R.S. 440.250, testing an inaccurate condition within the governor's warrant and extradition papers can be a determination of ultimate fact and law, and not merely preliminary and ancillary to a trial on the merits. Conclusive evidence establishing that the petitioner was not in the demanding state on the date of the offense or that he is not the individual identified in the extradition papers, *etc.* may bar a re-arrest.[12] A release due to a missing affidavit or other required piece of evidence mistakenly left out of the extradition papers would, on the other hand, not be a bar to a re-arrest. Such a release is not based on merit, but rather informality or mistake.[13]

STAY AND APPEAL

If the petition is denied, a stay pending the appeal should be filed so as to prevent the petitioner's extradition.[14] *See Brewster v. Bradley*, 379 S.W.2d 400 (Ky. 1964). The appeal must be filed within 30 days from the entry of the judgment, pursuant to K.R.S. 419.130. *See Hacker v. Commonwealth*, 288 Ky. 222, 155 S.W.2d 867 (1941) (discussing the right of appeal due to a denied petition.)

UNLAWFUL EXTRADITION

The result of an unlawful extradition of the accused has no effect on the demanding state's ability to prosecute the accused. See *Ker v. Illinois*, 119 U.S. 436, 30 L.Ed. 421, 7 S.Ct. 225 (1886). However, the arrest and transportation of a fugitive without the proper extradition proceeding may be a violation of the fugitive's civil rights actionable under 42 U.S.C.S. section 1983.[15] The filing of a petition for the writ may not only procure the release of the accused but help to secure a future action due to the infringement of his civil rights.

JOHN S. WEST
Assistant Public Advocate
Pulaski / Russell / Wayne / McCreary / Rockcastle Counties
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(606) 679-8323

John West of Somerset, Kentucky has been working with the Public Defender Office for about six months. John grew up in Maryland. He graduated from Purdue University in 1986 with a degree in Psychology, and from Catholic University's law school in Washington D.C. in 1989. John is licensed to practice law in Kentucky as well as Washington D.C.

FOOTNOTES

[1] Black's Law Dictionary, 6th Ed. defines a fugitive from justice as:

> *a person who, having committed a crime, flees from jurisdiction of court where crime was committed or departs from his usual place of abode and conceals himself within the district. A person who, having committed or been charged with crime in one state, has left its jurisdiction and is found within territory of another state when it is sought to subject him to criminal process of former state. King v. Noe*, 244 S.C. 344, 137 S.E.2d 102, 103 (1964). *See* 18 U.S.C.A. sections 1073 and 1074. *See* also *Oakley v. Franks*, 289 Ky. 605, 159 S.W.2d 415, (Ky. 1942) and *Gray v. Conners*, 285 Ky. 229, 147 S.W.2d 384, (Ky. 1941).

[2] *See* Wheeler, R. Interstate Agreement on Detainers (K.R.S. 440.450). *The Advocate* Vol. 2, No. 6, p. 8-9.

[3] The 90 days does not commence from the date of arrest, nor does it commence if there is a valid local charge in which bail was not made or a conviction; rather, it commences on the date the accused is first advised in court. *See* 31A Am Jur 2d section (62) and section (63) pg. 792.

[4] Although the Kentucky Uniform Criminal Extradition Act, K.R.S. 440.150 to 440.420 does not establish a set period of time for the agent of the demanding to take custody of the accused the Uniform Extradition and Rendition Act section (5-101(a)) sets forth this time period. *See* also 35 C.J.S. Extradition section (18) pg. 444.

[5] The accused cannot be released until the habeas corpus proceedings are complete including the right to appeal. *See* 31 A Am Jur 2d section (144) pg. 854, citing *People ex rel Tarranto v. Babb*, 412 Ill. 123, 105 N.E.2d 750 (1952), *cert. den.* 344 U.S. 833, 97 L.Ed. 648, 73 S.Ct. 41 (1952).

[6] 31A Am Jur section (60) pg. 791-792.

[7] The petition should be filed against the sheriff and the jailer of the county in which the accused is lodged.

[8] 31A Am Jur section (64) pg. 793 citing *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d. 1188 (1978), *cert. den.* and app. dismd. 439 U.S. 1123, 59 L.Ed.2d 84, 99 S.Ct. 1037 (1978) and (disapproved on other grounds by *Michigan v. Doran*, 439 U.S. 282, 58 L.Ed.2d 521, 99 S.Ct. 530 (1978)) as stated in *Proctor v. Shinner* (App.) 104 Idaho 426, 659 P.2d 779. *See* also 33 ALR 3d 1443, 1446 section 4.

[9] 31A Am Jur section (64) pg. 793.

[10] *Id.* citing *Cadle v. Cauthron*, 266 Ark. 419, 584 S.W.2d 6 (1979).

[11] 33 ALR 3d 1443, 1445 section 3 and 1446 section 4.

[12] *Id.*

[13] *Id.* at 1449 section 5.

[14] See footnote 4 *supra.*

[15] 45 ALR Fed. 871.

Your Client Needs You at Presentence Interviews!

THE PROBLEM: LOCKED OUT

It's not too difficult to imagine (or perhaps even recollect) the following scenario: *your client has been convicted of a drug possession charge. During the presentence investigation, the probation officer assigned to the case denies your client's request to have you with him during the presentence interview.*

What is to be done? One could advise the client to be interviewed without the benefit of counsel. Perhaps he should be advised to refuse to attend the interview. In the case that he is compelled to attend an interview, perhaps he should be advised not to speak with the probation officer. Another option would be to insist upon accompanying the client to his interview. This last alternative, while being the most demanding of attorneys, is truly the only way to effectively represent clients in this or like situations.

THE *HERRERA-FIGUEROA* SOLUTION

The situation described above occurred in *United States v. Herrera-Figueroa,* 918 F.2d 1430 (9th Cir. 1990). In this case, the Ninth Circuit held that when a defendant requests the presence of his attorney at a presentence interview, the probation officer must honor that request. In so holding, the court set out several practical and important reasons why lawyers should take advantage of this opportunity to fully represent their clients.

The *Herrera-Figueroa* case illustrates the necessity of an attorney's presence at the presentence interview. The defendant's prison sentence of 60 months in that case could have been less than 43 months had his attorney been allowed to attend the interview. Although he admitted his guilt to the district court, Mr. Herrera-Figueroa did not do so to the probation officer (because he would not be interviewed at all without his attorney present).

The district court decided not to "upset" the probation officer's recommendation of no sentence reduction, even though the Federal Sentencing Guidelines, Section 3E1.1(a) mandates a two-level reduction if there is a finding of acceptance of responsibility by the defendant. *Id.* at 1432.

Obviously, the importance of being there for one's client during this pivotal stage of the proceedings is made clear by such a case. The extra time put in by Herrera-Figueroa's lawyer to win this issue on appeal may mean over one and a half years off the defendant's original sentence. Additionally, because of this holding, attorneys in the ninth circuit will no longer have to struggle for the right to accompany their clients at the presentence interviews.

CONSTITUTIONAL PROTECTIONS

There are several constitutional reasons why a defendant is entitled to have his attorney accompany him to the interview. Some were addressed in the *Herrera-Figueroa* case directly, and others were certainly implied by the court.

The Supreme Court has already recognized constitutional applications to the presentence investigation. *See Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."). *See* also *Mempha v. Rhay,* 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) ([T]he necessity for the aid of counsel in . . . assisting the defendant to present his case as to sentence is apparent.")

Self-Incrimination

A court's acceptance of a probation report that is based in part on a defendant's refusal to attend a presentence interview is tantamount to punishing the defendant for not discussing incriminating facts of his case. Thus, it constitutes a violation of a defendant's fifth amendment rights.

Although it failed to persuade the Ninth Circuit Court of Appeals, this argument holds merit in practice, since in some cases an interview may cover not only criminal acts for which a defendant has already been convicted, but also acts for which he has not been convicted.

Right to Counsel

The *Herrera-Figueroa* Court did not reject sixth amendment arguments that the presentence interview has become a "critical stage" in an accused's proceedings, but passed on that issue. Instead, the court chose to exercise its "supervisory authority over the orderly administration of justice." *Id.* at 1433.

However, much language from the opinion indicates the court's awareness of how very important this stage has become, whether or not it has been deemed "critical" in many jurisdictions. But *see United States v. Woods,* 907 F.2d 1540 (5th Cir. 1990) (expressly holding that the interview is not a critical stage).

In addition to the right to the presence of counsel at the interview, the right to effective assistance of counsel becomes an issue in a case such as this. If the interview operates to prejudice the defendant in a manner that could have been avoided by the presence of counsel, a serious question of effectiveness of assistance presents itself. This problem is avoided in a relatively simple way: the attorney must attend his client's presentence interview.

Kentucky Constitution

When raising constitutional grounds arguing in favor of being allowed to fully represent her client at the presentence interview, a lawyer should make arguments based on our Kentucky Constitution. While a Kentucky court should find federal cases such as *Herrera-Figueroa* persuasive, the Kentucky Bill of Rights provides both courts and lawyers with an important "extra step" in resolving matters of constitutional import.

Section 11 of the Kentucky Constitution is a potentially powerful tool in precisely

this type of case, as well as in many other instances. This section encompasses most of the rights of an accused, including the right to counsel, the right not to be compelled to give evidence against oneself, the right to a speedy trial, the right to due process of law, and other important protections.

Also, Section 2 of our state constitution has been interpreted to act as a due process section, in addition to Section 11, including with respect to criminal matters. See *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky. 1989).

Due Process

The Ninth Circuit's final reason for using its supervisory authority in this case was that when each probation officer is allowed to decide whether or not to admit attorneys to their client's interviews, defendants are treated unequally. Since one of the objects of PSIs as a whole is uniformity in the dispensation of criminal justice, a much fairer approach is to leave that option with the defendants and their counsel.

While the Ninth Circuit did not specifically mention "due process" or "equal protection" when discussing this facet of its analysis, it seems apparent that Section 11 of the Kentucky Constitution and the fifth and fourteenth amendments of the U.S. Constitution provide those protections of liberty inherently.

PRAGMATIC CONCERNS

Weight of the PSI

Due to increasing caseloads throughout the country, courts must rely ever more heavily upon conclusions of the probation officer. Thus, "[a] single finding by the probation officer can significantly affect the ultimate sentencing range." *U.S. v. Herrera-Figueroa*, 918 F.2d at 1434. This is true for most state systems, including Kentucky, as well as for the federal system. When the court must entrust such extreme power to subordinates, safeguards such as presence of defense counsel should be allowed without exception.

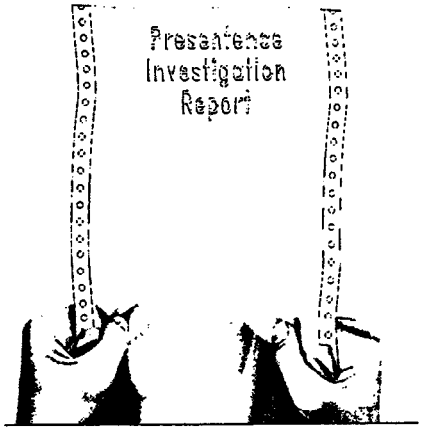
Parole Possibility

Although its name may imply otherwise, the presentence interview has a large effect on aspects beyond the length of a client's sentence. The presentence investigation (PSI) has been described as "the most important source concerning the facts of the crime itself," by Kentucky Parole Board chairman Dr. John Rhunda. Rhunda, "The Parole Board: Issues and Answers," *The Advocate*, Vol.11, No.3 (April 1989) at 39-41.

Former Parole Board chair Harry Rothgerber also recognized the vital role of the PSI in the parole process: "[The PSI] is the main body of information on which the [Parole] Board relies in getting . . . factors which the court might consider when deciding whether or not to probate your client." Harry Rothgerber, Jr., "Parole Board Chairman Speaks," *The Advocate*, Vol.6, No.6 (Oct. 1984) at 40.

Custody Status

The Corrections Cabinet also depends upon the presentence investigation report as "primary source" of information for determining a prisoner's custody level and classification score. "Corrections Policies and Procedures," 18.6, 501 KAR 6:020E. This in turn helps determine at which institution the prisoner will be located.



Given the large discrepancies in various health, educational, and rehabilitation programs among Kentucky penal institutions, your client's classification should be very important to you. Classification will certainly be important to your client, because it is fair to say that the privileges and opportunities available to prisoners in an institution are inversely proportional to its security level.

Thus, the presentence interview will have much to do with not only a client's "raw" sentence, but also the actual amount of time he or she will be incarcerated, and the client's quality of life during incarceration. Put more simply, the presentence interview has the high potential to shape every aspect of your client's life for many years.

BESIDES . . . WHY NOT?

Another very persuasive and logical rationale for honoring a defendant's request to have her attorney accompany her to the presentence interview is that there is no legitimate end served by excluding counsel.

The government's argument in *Herrera-Figueroa* was that "a lawyer's presence might adversely affect the ability of probation officers to obtain accurate information from defendants." *Herrera-Figueroa*, 918 F.2d at 1436.

If anything, the opposite is true. A lawyer is more likely than his client to know that much information about the defendant has been gathered from other sources during the PSI, and thus it is in the defendant's best interest to be fully honest at the interview. "Casual, ill-considered or inaccurate answers offered without a full understanding of the potential consequences may result in a substantial increase in the recommended period of incarceration." *Id.*

TAKE NO EXCUSES

An attorney's presence at the presentence interview is becoming increasingly indispensable. The weight given probation officers' conclusions by courts, the ability of relatively small factors to affect those conclusions, and the variety of potential subjects covered in an interview combine to make the defendant's interview an extremely pivotal, if not "critical," stage in his proceedings.

Basic fairness demands that a defendant be accompanied by her lawyer, so that the lawyer can assist her client in responding honestly, fully, and without prejudicing the defendant's constitutional rights. Evenhanded distribution of justice far outweighs any abstract or speculative arguments against allowing attorneys to be present at this stage in every case.

MAKE NO EXCUSES

"Given the importance of the presentence interview to the defendant, there is no justification for excluding defense counsel." *Id.* at 1435. Nor is there any excuse for the attorney not to attend these interviews, even if it means a fight.

With about 90% of all criminal cases being disposed of by way of pleas, the PSI may be the only place for an attorney to make a meaningful difference for the vast majority of his clients.

In order for our courts to adopt a uniform practice such as that adopted in *Herrera-Figueroa*, defense attorneys must strive at every opportunity to show that such a practice is a necessity for the effective representation of their clients.

HAP HOULIHAN
DPA Law Clerk
Frankfort, KY

The Importance of a Correct PSI

In July, 1990, KRS 532.050(1) was amended to read that the presentence report "shall not be waived." Even with this statutory mandate, most circuit court judges still are allowing the defendant to waive the PSI report. There are many valid reasons for waiving the PSI report. However, defense counsel in discussing the waiver with the defendant should take into consideration the collateral consequences of waiving the PSI and inform the defendant accordingly.

If the report is waived prior to sentencing, a PSI is still prepared in the defendant's absence and sent to the prison after the defendant arrives. This waiver could mean that the defendant gets no input in stating the facts of the crime, the attorney has no opportunity to attend a meeting with the client and probation officer, and the probation officer receives less than full and accurate information.

As a post-conviction attorney, working closely with Kentucky inmates, I have seen first hand the problems incurred by inmates with inaccurate or incomplete PSI reports. The preceding article by Edward Houlihan supports the idea that defense counsel should accompany clients to the preparation of the PSI report. Presently, I would estimate that less than 5% of the criminal defense bar has ever gone with the client to meet the probation officer when the PSI is being prepared. If it is impractical or impossible to meet with the probation officer, at a minimum, it is possible to review the contents of the PSI with the client at sentencing and correct erroneous information. The reason is obvious. Once incarcerated, the defendant soon learns that his classification and internal movement within prison, as well as parole consideration, rests predominantly on the contents of the PSI report.

If the PSI is waived for the advantage of the client, defense counsel should insure that the waiver is only for sentencing and not for the accuracy of the PSI prepared after sentencing. This can be accomplished by meeting with the probation officer and by having any disputes settled by the judge before the PSI is forwarded to Corrections.

When an inmate is received into the prison system, the first step is classification. In order to decide whether an inmate is eligible for minimum security placement, the PSI report is reviewed to determine prior offenses. If the PSI report inaccurately lists, for example, that the inmate has a prior assault charge, the resident will be denied minimum security for at least one year. When the inmate is confronted by the caseworker with this inaccurate information and decides to question the contents of the report, the resident is only allowed to learn the factual material, the resident cannot get a copy and review its entirety. *Bush v. Commonwealth*, Ky., 740 S.W.2d 943 (1987).

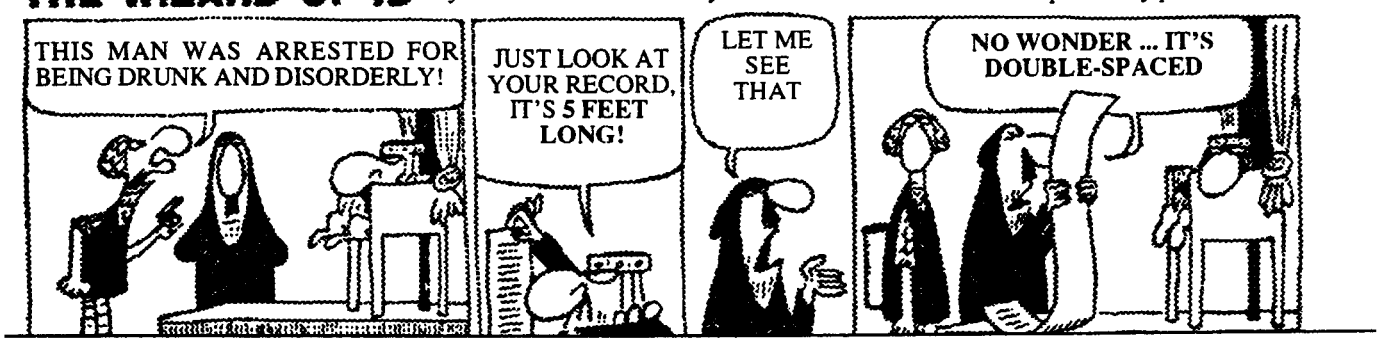
Assuming the incorrect information does not affect classification, the inmate may not know that a problem exists until he meets the parole board. The parole board relies on the PSI report as not only a source of providing facts of the crime, but a source for determining a prior record, juvenile and adult. If the PSI erroneously lists crimes the inmate did not commit, the only recourse at the time of meeting the board is to inform the board of the mistakes. This action is similar to an admonition at trial. The taint has occurred, the parole board still has the erroneous information in front of them and there is no way to determine what weight the inmate's insistence on correcting the report will be given. The board can rely on this incorrect information and require the inmate to serve additional time or even serve-out the remainder of the sentence. If this information had been corrected at trial, the parole board would have never seen it in the first place.

There obviously are advantages to waiving the presentence report, however, the client needs to be informed of the disadvantages as well. This document is heavily relied on once the defendant is incarcerated. Assuming the resident even learns of the mistake on the PSI report, it is an uphill battle to then have the information corrected.

In my experience, incorrect information on a PSI report is not just an isolated incidence, it happens with great frequency and it is something that never has to happen at all.

MARGUERITE NEILL THOMAS
Assistant Public Advocate
Post-Conviction Branch
Frankfort, KY

THE WIZARD OF ID By Brant Parker and Johnny Hart



Need Quick Answers or Advice?

The attorneys in the Department of Public Advocacy will provide quick answers and immediate advice about any legal issues which may arise in your criminal defense practice. Due to time restraints this will not be a research service. It is merely intended to allow you quick access to the wealth of knowledge that the DPA attorneys have acquired over the years. If your specific issue is not delineated below, please find the nearest relevant issue, then contact the attorney listed. An answer to almost any question is just a phone call away at (502) 564-8006.

A.

Alternative Sentencing - Dave N.
Appeals, video - Tim
Appellate procedure - Larry, Tim
Arrest, general - Ernie*
Arrest, at home - Ernie*
Arrest, probable cause - Linda, Ernie*
Arson - Mike
Attorney Fees in indigent cases - Ed

B.

Batson - Vince
Battered Women Syndrome - Gary, Steve
Belated appeals - Allison, Tim, Barbara

C.

Caselaw, recent KY/U.S. - Linda
Collateral attacks (11.42/60.02) - Allison Marguerite
Comment on silence (*Doyle*) - Larry, Donna
Competency to stand trial - Rodney
Confessions, Anti-Sweating Act - Marie
Confessions, involuntary - Tim
Confessions, juveniles - Kathleen, Rebecca
Confessions, *Miranda* - Tim
Confessions, right to counsel - Oleh
Conspiracy - Larry
Contempt of Court - Vince
Continuance - Mike, Steve, George
Controlled substances - Tim, Gary
Counsel, conflict of interest - Linda, Vince, Gary
Counsel, right to - Linda
Criminal Facilitation - Gary
Criminal Syndicate - Linda

D.

Death Penalty — Trial - Donna, Rodney, Oleh, Mike, Steve, George, Vince, Rebecca, Ernie*
Death Penalty — Federal Post-Conviction - Randy, Kathleen, Ed
Defense, right to present - Larry
Detainers/IAD - Dave, Allison
District Court - Gary, Rebecca, Rob*
Double Jeopardy - Larry
DUI - Gary, Mike, Rob*, George, Rebecca

E.

Entrapment - Gary
Ethics - Vince
Evidence, admissibility - Rodney, David
Evidence, character - Linda, David
Evidence, co-defendant's guilt - Larry, David
Evidence, flight/escape - Linda, David
Evidence, hearsay - Linda, David
Evidence, opinion - Larry, Rodney, David
Evidence, other crimes/prior misconduct - Marie, Steve, David
Evidence, prior sexual conduct - Marie, David
Evidence, sufficiency - Linda, Larry, David
Evidence, tampering with - Vince, David
Ex Post Facto - Linda
Expert witnesses, funds for - Ed, Donna, Oleh, Steve, George, Mike
Expert Witness Directory - Cris
Extradition - Allison
Extraordinary Writs - Tim, Allison, Vince
Extreme Emotional Disturbance - Rodney, Ed, Oleh
Eyewitness Identification - Rodney, Gary

F.

Federal Habeas Corpus - Randy, Kathleen
Federal Habeas Corpus, cause/prejudice - Randy, Linda
Federal Habeas Corpus, exhaustion - Tim, Randy
Federal Habeas Corpus, hearings - Tim
Fiber evidence - Forensic evidence - Oleh, Donna
Firearms Issues - George
Forensic pathology - Steve

G.

Grand Jury - George, Steve
Guilty pleas, constitutional validity - Allison, Gary
Guilty pleas, withdrawal - Ernie*

H.

Habeas corpus, state - Allison, Marguerite

I.

Impeachment-bias/interest/hostility - Ed
In forma pauperis, denial review - Tim
Informants, confidential - John H.*, Jim*
Instructions, capital - Donna, Mike, George
Informants, prison - Steve
Involuntary commitments - Marie, John

J.

Jail Credits - Marguerite, Allison
Jett testimony - Julie
Juror, challenges for cause - Oleh
Juror misconduct - Tim
Juror testimony re verdict - Donna, Ed
Juvenile rights and procedure - Rebecca, Paul, Barbara
Juvenile waivers - Barbara, Rebecca
Jury panel challenges - Donna, Oleh

K.

KCPC - Ernie*, George
Kidnapping exemption - Larry

L.

Lesser included offenses, instructions - Larry
Lineup/showup/photo display - Larry, Linda

M.

Mental retardation - Marie
Miranda - Tim
Motion File - Librarian

N.

Notice of Appeal - Tim

O.

Offenses, single vs. multiple - Marie

P.

Pardons and commutations - Dave
Parole - Dave, Allison, Gary, Rebecca
Peremptories, improper use of - Tim, Ed
PFO proceedings - Rodney, Ed
Possession, what constitutes - Marie, Dave
Post Traumatic Stress Disorders - Gary, Rebecca
Presumptions - Larry
Prior offenses/enhancement - Gary
Prisons - Dave, Allison
Private Prosecutor - Gary
Privilege, husband/wife - Tim
Privilege, psychiatrist/patient - Marie
Prosecutorial misconduct, arguments to jury - Oleh, Vince
Prosecutorial vindictiveness - Larry, Vince

R.

Rape Shield Law - Rodney, Allison
Records, lost - Julie
Recusal, judge - Ed, Vince
Recusal, prosecutor - Vince
Retroactivity - Randy, Vince
Records, obtaining - John M.

Advocate Survey Results

Only twenty-one people, 1% of our readers, responded to *The Advocate* survey. They overwhelmingly said *West's Review* was the most useful regular feature to them, followed by *Plain View* and *District Court Practice*. They liked serial articles on topics.

Complaints about *The Advocate* centered on no ethical guidance, lack of analytical and broader coverage of topical regular features like *Plain View* and *Sixth Circuit columns*.

Most of the surveys pretty consistently rated regular features great - fair.

If you missed the survey, but would like to provide input, please write to us.

CRIS BROWN

S.

Sanctions, Appellate - Tim, Larry, Vince
Sanctions, Trial - Ed, Ernie*, Vince
Search and Seizure - Ernie*, Tim, Linda
Self Protection - Tim, Gary, Kathleen, Rebecca
Sentencing alternatives - Dave Sentencing, delay in - Tim
Separate trials, co-defendants - Marie
Separate trials, counts - Tim, Linda
Sexual Abuse-legal defense & strategies - Vince, Gary, Mike
Sexual Abuse Syndrome - Larry, Mike
Sexual offenses, mistake as to age - Tim
Shock Probation - Gary, Allison, Barbara, Rebecca
Speedy trial - Linda, Rodney, Allison
State Constitution - Rebecca, Steve, Frank*
State Crime Lab, use of - George

T.

Trial tactics - Gary, Allison, George
Truth in Sentencing - Kathleen, Bill,cca, Rebecca

V.

Vehicular Homicide - Larry, Gary
Venue (change of) - Ed, Donna, Oleh
Vietnam Vets - Gary

W.

Waiver, counsel - Tim
Waiver, effect of mental retardation - Marie
Waiver, jury trial - Tim
Wiretap - Linda
Witness, bias - Randy
Witness, competency - Larry
Witnesses, obtaining (out-of-state) - Ed, Randy

Race in Kentucky

	Number	Percent
DPA Employees		
White	161	96.4%
Black	6	3.6%
DPA Attorneys		
White	68	97.1%
Black	2	2.9%
State Employees		
White	31,667	92.3%
Black	2,638	7.7%
Kentucky Population		
White	3,379,006	92.9%
Black	281,771	7.1%

Writs, mandamus/prohibition - Donna, Tim, Vince, Allison

Marie Allison
Donna Boyce
Jim Cox*
Rebecca Diloreto
John Halstead
Frank Heft
Barbara Holthaus
Paul Isaacs
Gary Johnson
Kathleen Kallaher
Ernie Lewis*
Larry Marshall
Rodney McDaniel
Steve Mirkin
Ed Monahan
John Murphy*
Julie Namkin
Dave Norat
Tim Riddell
Rob Riley*
George Sornberger
Marguerite Thomas
Oleh Tustaniwsky
Linda West
Randy Wheeler
Mike Williams

* See list below.

Rob Riley (502) 222-7712
John Halstead (606) 236-9012 (Ext. 219)
Jim Cox (606) 679-8323
Frank Heft (502) 625-3800
Ernie Lewis (606) 623-8413
David Nichaus (502) 625-3800
John Murphy (502) 564-3948
Bill Mizzell (606) 739-4161

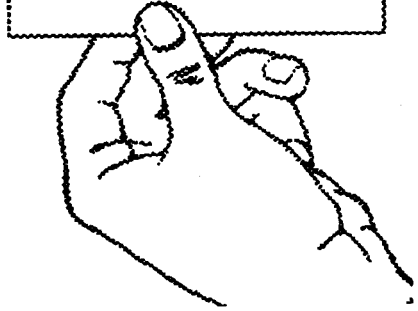
KY DPA TRAINING INFO:
Tina Meadows, Secretary
Ed Monahan, Director
(502) 564-8006

NCDC TRAINING INFO:
(912) 746-4151

NLADA TRAINING INFO:
(202) 452-0620

ICOPA V TRAINING INFO
(812) 855-9325

See calendar on inside back cover for dates, times and location of future training.



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 would like to be considered for early parole to the Intensive Supervision Program(ISP). What is the criteria for eligibility, and how does my client apply for this program?

TO READER:

The eligibility criteria for early parole consideration to the Intensive Supervision Program are as follows:

1) Candidates must have a home placement in a site location.
2) Candidates must be within eighteen months of their parole eligibility date. Persons who have been given a serve-out or deferment by the Parole Board are not eligible.
3) Candidates cannot have any outstanding statutory good time loss for major violations less than one year old.
4) Candidates must not have an outstanding detainer.
5) Candidates serving sentences for the following offenses shall not be considered for early parole to ISP:

a) Rape - Any Degree of Attempted Rape
b) Sodomy - Any Degree or Sexual Abuse I
c) Escape or Attempted Escape - within the last 12 months
d) Robbery 1st Degree
e) Assault 1st Degree
f) Murder
g) Persistent Felony Offender 1st Degree

Any inmate in the Kentucky system may apply for early parole to the Intensive Supervision Program by writing a letter to:

Ms. Hazel M. Combs
Room 514
State Office Building
Frankfort, Kentucky 40601

Any inmate that applies for ISP and is turned down by the Parole Board may re-apply in nine months by writing to the above address.

TO CORRECTIONS:

What would be expected from my client if accepted to the Intensive Supervision Program?

TO READER:

1) One office contact per week with officer.
2) One home visit each week with the parole officer. Two of these home visits per month will be during curfew hours which are between 10:00 p.m. and 6:00 a.m.
3) The officer will make two additional contacts per month which may include, contact in the home, community, or family. Also the officer may chose verification of attendance on community programs such as drug, alcohol, vocational education, or sex offender treatment.
4) Record checks will be conducted weekly.
5) Employment verification shall be weekly. Unemployed clients must provide documentation regarding employment search.

Travel permits are not considered within the first four months of intensive supervision unless conditions warrant such; then it must be approved by the District Supervisor.

TO CORRECTIONS:

How long will my client remain in this status?

TO READER:

No client shall be released to regular supervision prior to twelve months on Intensive Supervision who is unemployed.

No client shall exceed twelve months on Intensive Supervision without prior approval of the Supervisor and the Assistant Director.

Information for this article was provided by Ms. Hazel Combs, Assistant Director, Division of Probation & Parole, Department of Community Services and Facilities.

BOOK REVIEW

Your Child's Self-Esteem
Dorothy Corkille Briggs
A Doubleday Dolphin Book
$10.95 (softbound)

KATHLEEN KALLAHAR

This book was recommended by Brock Mehler of the Capital Case Resource Center of Tennessee as a tool to understanding on a basic level the behavior of people who commit capital crimes an dhow they got to be who they are. While I was slightly skeptical as to how a "baby book" could accomplish this, Dorothy Corkille Briggs' introduction makes her book's value to those in the criminal justice system clear.

Her premise is that neurosis and other psychological disorders are so rampant in our culture that it is likely that only a small minority of people are free from any symptoms of mental illness. Briggs' theory is that the "inner turmoil" and "unhealthy defenses" that burden people do not suddenly spring up in adulthood, but are the product of a glaring cultural oversight - not putting a concerted effort into training people to parent. While these concepts are not surprising, it is startling that Briggs first wrote this in 1970. The world certainly has become no more ordered, sane or secure in the last twenty years and while classes in preparation for giving birth and caring for the baby's needs proliferate, not many exist for how to care for his/her emotional needs. According to Briggs, no matter how well-intentioned and committed parents are, without a cohesive framework and specific knowledge to help achieve their goal of a happy, well adjusted child, they are liable to make unintentional yet damaging mistakes when faced with specific issues of parenting.

Briggs' prescription for how to raise children who are mentally and emotionally healthy is to concentrate on establishing high self-esteem. Briggs feels it is a lack of self-esteem that makes children vulnerable to delinquency and crime, substance abuse, dropping out of school, destructive personal relationships, etc., as adults.

High self-esteem, or a person's over-all judgment of herself, is based on two central convictions:

(1) "I am lovable - I matter and have value because I exist", and
(2) "I am worthwhile - I can handle myself and my environment with competence. I know I have something to offer others."

Part I, the Phenomenon of the Mirrors, established that children learn to see themselves as they are reflected by the words, body language, attitudes and judgments of the important people in their lives. They then judge themselves as they see themselves, and they match their behavior to their self-image. therefore, if the overall reflections a child receives are positive, the child will have high self-esteem. this high self-esteem will give her the confidence, courage and energy to master the tasks she faces in her life, because she expects to succeed. High self-esteem will also lead to successful relationships with others which will make personal happiness more likely. Children who feel inadequate often compensate by erecting unhealthy defenses, submitting or withdrawing. This results in negative behaviors as an adult which make it less likely they will be happy and fulfilled.

Briggs counsels parents on how to provide a positive mirror for their children. She cautions parents to realize that often they set up expectations for their children based on their own cultural value, unfinished business in their own upbringing, standards borrowed (generally from our own families) and qualities or things that we hunger for currently as adults. When expectations that may conflict with the child's nature are forced on him, instead of questioning the expectation, he questions his own adequacy. For example, parents who regret not being able to attend college may put a premium on education and expect their child to get all "A's", regardless of whether the child can reasonably attain that goal. To the child, he is a failure if he does not get all "A's", even if he is working as hard as he can.

Rather than doing away totally with expectations, Briggs suggests setting realistic expectations based on the stage of development the child is in, the child's unique personality and interests, alert observations of how that particular child is handling each stage of development and a sensitivity to past and present pressures. For instance, it is unrealistic to expect no regressive behavior from a toddler dealing with a new sibling.

In Part II, The Climate of Love, Briggs says that to feel loved, a child needs genuine encounter with parents and psychological safety. Genuine encounter is simply focusing attention on the child. While constant encounter is all but impossible because of hectic schedules, children need at least periodic focused attention so they can tolerate the times when parents cannot be "all there" for them.

Briggs sets out six basic ingredients for psychological safety, trust (the most important basic ingredient), non-judgment, being cherished, "owning" feelings, empathy and unique growing. A major practical theme of Briggs' book is separating judgments about a child's acts from her worth as a person. Briggs proposes trying to address negative behavior with "I" reactions rather than "you" judgments. For example, instead of saying, "You're impossible!", a parent could say, "I can't stand all of this bickering!" "You're thoughtless!" translates into "I don't want to pick up after you!" This allows a parent to be honest about strong feelings, yet does not destroy a child's self-esteem. Remembering "you" reactions provides a healthy and easy-to-remember way to deal with your child when things are tense.

One important aspect of her book is that although Briggs advises parents on a number of different ways of relating to their children, she is fairly realistic and non-judgmental herself, counseling that no one can practice all these methods all the time. The point is to create an environment where the child's self-esteem is generally fostered rather than diminished.

In order to feel worthwhile, a child must

[CONTINUED ON NEXT PAGE]

[BOOK REVIEW continued]

attain competence at each developmental task. Briggs takes parents on a "journey of self" so that knowledge of what each child is facing at each developmental stage can lead to greater understanding and realistic expectations. Briggs details that journeys of self of the first six years, the middle years and adolescence.

The rest of the book deals with negative feeling, such as anger and jealousy, mental growth and sex. She also advocates a system of discipline that rejects corporal punishment and encourages sharing power whenever possible, i.e., problem solving involving the whole family setting rules and consequences which meet the needs of all involved.

Apart from its interest to parents, this book does show the effect of different ways of parenting on a child's self-worth. It is enlightening to see, in a concrete way, how certain methods of parenting can destroy self-esteem and set up the kinds of destructive behaviors in which many of our clients have engaged. This book illustrates the link between how a child is raised and why he behaves a certain way as an unhappy adult. It also encourages parents and children alike that it is not too late to change the way they relate to each other if they want to put in the effort. In other words, there is hope for a different, better future based on self-respect and inner peace and happiness.

KATHLEEN KALLAHER
Assistant Director
Resource Center
Frankfort, KY
(502) 564-3948

Bill Mizell

Public defender has earned respect of peers by doing a tough job well

In many ways, serving as public defender is a thankless job. Your case load is heavy; all your clients are poor; many are poorly educated; some are uncooperative in helping you prepare a defense; if you are a good lawyer, you can earn much more money in private practice.

But none of these drawbacks has kept Bill Mizell from doing a superb job as Boyd County's public defender. In fact, Mizell is so good in the courtroom that in an informal poll of 20 local attorneys, Mizell was mentioned most often as the person other lawyers would like to have represent them if they were charged with a crime.

Bill Mizell

The poll's results should not be surprising to anyone who has seen Mizell in action. The public defender always comes to court well prepared, is unrelenting in his questioning of witnesses, and uses his knowledge of courtroom proceedings to his clients' advantage.

The U.S. Supreme Court decision that led to the creation of the position of public defender said everyone charged with a felony had the right to competent legal representation regardless of their ability to pay for those services. For indigent defendants in Boyd County, Mizell fulfills well the high court's directive.

The Ethics of Fee Reimbursement

An opinion issued by the Legal Ethics Committee of the Indiana State Bar Association. See caveat below.

The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

OPINION NO. 2 of 1990

The Committee has been requested to offer an opinion as to whether it is appropriate for a public defender to petition the court for fee reimbursement pursuant to P.L. 284-1989 (I.C. 33-9-11.5-6). This provision reads:

Payment of costs.

(a) If at any stage of a prosecution for a felony or a misdemeanor the Court makes a finding of ability to pay the costs of representation under Section 7 of this Chapter, the Court shall require payment of by the person or the person's parent, if the person is a child alleged to be a delinquent child, of the following costs in addition to other costs assessed against the person:

(1) Reasonable attorney's fees, if an attorney has been appointed for the person by the Court.
(2) Costs incurred by the county as a result of Court-appointed legal services rendered to the person.

(b) The clerk of the Court shall deposit costs collected under this Section into the supplemental Public Defender Service Fund established under Section 1 of this Chapter.

The simple answer to this inquiry would be that it appears that it would never be appropriate for the public defender to petition the court to make this finding.

Rule 1.6 provides that a lawyer "shall not reveal information relating to representation of a client unless the client consents after consultation".... Further, Rule 1.7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests.

While the request for opinion does not describe the particular context in which the public defender assigned to the case, or another staff public defender, might petition the court for reimbursement of fees, it seems likely that any information the public defender's office may have as to the financial ability of the defendant would have been obtained during the representation of the client. It is further presumed that the motivation for a public defender to make such a request is to provide funds for the operation of the public defenders office in subsequent, unrelated matters.

An attorney's request that a client make reimbursement is clearly detrimental to the client and is a breach of the loyalty owed by the attorney. That the attorney's office would benefit by the disclosure operates as an incentive for the breach and is an aggravating factor. (Emphasis added).

MAY 1991

SUN	MON	TUE	WED	THUR	FRI	SAT
			1	2	3	4
5	6	7	8	9	10	11
12 Mother's Day	13	14	15	16 NLADA Defender Management - San Francisco	17	18
19	20	21	22 1788 SC ratifies Constitution	23	24	1787 25 Constitutional Congress opens in Philadelphia
26 Memorial Day	27	28	29	30 *Taylor v. KY* Decided	31	

Congress of the United States

begun and held at the City of Washington on

Wednesday the Fourth of March, one thousand seven hundred and eighty nine

THE Conventions of a number of the States having at the

RESOLVED by the Senate and House of Representatives

ICOPA V. - Bloomington, Indiana

ARTICLES in addition to and amendment

JUNE 1991

SUN	MON	TUE	WED	THUR	FRI	SAT
						1
2	3 19th Annual DPA Public Defender Conference Quality Inn Riverview, Covington, KY	4	5 KBA Hearing on Criminal and Civil Rules Changes	6 KBA Convention - Galt House, Louisville, KY	7	8 Proposed Bill of Rights introduced to House
9 *Crane v. KY* Decided	10	11	12	13	14 Flag Day	15
16 Father's Day	17 NCDC Trial Practice Institute - Macon, GA June 19 - 29	18	19 *Batson v. KY* Decided	20 1788 NH ratifies Constitution	21	22
23 30	24 *Griffith v. KY* Decided	25 *Rawlings v. KY* Decided	26 *Olden v. KY* Decided	27	28	29

[JOHNSON, Continued from page 4.]

on the conventions of the profession as soon as they can and instead focus their professional life on how to be more effective communicators.

Gary believes in the "Abby Hoffman" style of off-the-wall advocacy. The more unconventional your thinking, the more you'll be of benefit to clients. His success has been due to his ability to look askance at the criminal justice system and have a "gonzo" perspective. He's had running battles with teams of prosecutors and judges for years that were eventually resolved by juries. He's been threatened with contempt and charges of obstructing justice, but, eventually, juries vote to acquit. You can go over the head of judges or prosecutors to the jury, and confront in a way that lets your client win.

CRIS BROWN
Frankfort, KY

There is a whole generation of criminal defense lawyers whose whole approach to jury selection was dramatically changed and tremendously improved thanks to Gary. No one picks a jury quite like he does, and few, if any, have so keen an insight into what motivates our fellow human beings. My clients have benefited time and again from my witnessing a decade ago Gary's voir dire on a marjuiana case. By engaging every juror in real conversation about how they truly felt about the important issues in his case, Gary was on his way to winning an acquittal for his client before the jury was sworn.

Also, Gary Johnson has taught so many of us what commitment to our clients is all about. Anyone seriously at risk in the criminal justice system whould be hard-pressed to find a better attorney to defend them.

GEORGE SORNBERGER
APA, CTU
Frankfort Office

Gary is living proof that not everyone has sold out his principles to the highest bidder. Rising from Mud Creek with his energy and talent, he could have done well as legal counsel to the powers that be. Instead, he remains true to his blue collar, working poor roots. In this battle to preserve and defend the Constitution, to give equal justice to all, I can't think of anyone I'd rather have next to me than Gary. He is an inspiration ... a truly great lawyer.

KEVIN MCNALLY
Attorney at Law
Frankfort, KY

It has been my pleasure to know and to love Gary since January of 1973 when we both started working for the DPA. At that time the Department was enscounced on the first floor of the Capitol Building. The formalness of the setting only intensified our anti-establishment fervor and actions. We walked the hallowed halls, hair down to and below our shoulders, clothes ripped and in Gary's case, patched appropriately for that rebellious time. We thought that it was our right to look that way. Shoes weren't necessary, even in walking past the Governor's Office to go to the Supreme Court Library.

In our own way we dared them to do something about it. In their own way they threw us and the Department out of the Capitol.

Gary has always done and will continue to do what he thinks is right and dare "them" to do something about it. This is especially true if what is right is defending a poor person's constitutional rights. As we all know, if anyone, no matter how lofty the person, dares to tread on any of Gary's client's sacred rights, he will come at that person in a light speed flash. Those rights will be protected no matter the consequences. Speed on Gary! Our clients and we need your brilliant light to show us the way.

TIM RIDDELL
Assistant Public Advocate
Manager Appellate Branch
Frankfort Office

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