THE ADVOCATE

SPECIAL INSIDE: THE SENTENCING TASK FORCE

The Magazine of the Kentucky Department of Public Advocacy

Advocacy Rooting Out Injustice **Volume 13, #5 August, 1991**

THE RIGHT TO COUNSEL

ACCESS TO OUR *BILL OF RIGHTS*

Rights of accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense.

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: Pat A. *Bill of Rights* Patriot on the Back

The *right to counsel* may be this country's most important individual liberty. In an adversary criminal justice system, counsel for the accused is essential if there is to be a fair fight if there is to be an advocate for all of the other constitutionally guaranteed individual liberties. Do we appreciate the fundamental importance of the right to counsel, or do we take it for granted? Do we view those women and men who are criminal defense attorneys and public defenders as critical to the viability of our *Bill of Rights*? They are our true PATRIOTS!

Pat a patriot on the back, for fighting to make our Kentucky and United States *Bill of Rights* real guarantees for those facing the loss of the most precious commodity on the market today- our liberty. Judge Johnstone does just that in his 6th Amendment article. -ECM

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.

Department of Public Advocacy
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006
(800) 582-1671
FAX # (502) 564-3949

Printed with State Funds KRS 57.375

IN THIS ISSUE

FEATURES

REGULAR COLUMNS

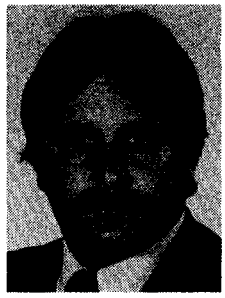
TRIAL TIPS

ADVERTISEMENTS

ANNOUNCEMENTS AND INFORMATION

THE ADVOCATE FEATURES

VINCE APRILE: A Liberty Litigator



VINCE APRILE

J. Vincent Aprile II, is a public defender's public defender. Currently the General Counsel for DPA, Vince has been with the agency for over 17 years. During his tenure with the Department, Vince has served as the Department's initial Director of the Appellate Branch and its first Director of Professional Development.

Vince was born and raised in a middle class family in Louisville, Kentucky. His father, who once aspired to be a lawyer, managed retail shoe stores. Aprile knew he wanted to be a lawyer as far back as elementary school. He had as a role model an uncle, his non-Italian godfather, who practiced law in Louisville. Vince was elected to serve in the 8th grade as the school-wide prosecutor whose task was to try grade school defendants for minor school infractions before jurors of their peers. His adversaries were court-appointed counsel (and classmates) who volunteered their services to hapless defendants. Vince has spent his entire professional life trying to undo this early mistake.

Vince's involvement with advocacy and oral argument colored his entire educational experience. Vince, who debated for 4 years in high school, attended Bellarmine College on a debating scholarship and earned extra income by coaching high school and college debate teams. His skill as an intercollegiate debater was one factor that enabled him to earn a scholarship to the U of L's Law School, from which he graduated in 1968.

This was the height of the Vietnam conflict and the military draft awaited those who completed graduate school. Vince entered the Army as an enlisted man and, 9 months later, was granted a commission in the Judge Advocate General's Corps, the military's legal branch.

Captain Aprile spent 13 months in South Korea in the Army's largest general court-martial jurisdiction, primarily as a trial defense counsel in serious felony cases. It was in this milieu that he learned how a criminal defense lawyer, "even one paid by the same employer who paid the prosecutor, could make a difference for a client who was without resources and community support, simply by out-preparing, out-thinking, and out-working opposing counsel."

With his stint in Korea completed, Vince requested and obtained transfer to the Defense Appellate Division in Falls Church, Virginia where he served for almost three years as appellate defense counsel for persons convicted by Army courts-martial all over the world. As an appellate advocate, Vince practiced before both the Army Court of Military Review (a military intermediate court) and the Court of Military Appeals (a civilian high court). From his vantage point as appellate counsel, Vince learned quickly that a trial lawyer had to address "three separate audiences - the judge, the jury, and the appellate courts" - to provide "quality representation and to enhance the client's opportunity for relief at every juncture" in the criminal justice system. While serving there, Vince obtained a Masters of Law Degree in Criminal Law, Psychiatry, and Criminology from the George Washington University National Law Center in 1973.

At this point Aprile returned to Kentucky to work for the newly created Department of Public Advocacy, which had only five full-time lawyers at the time. Seventeen and one-half years later, Aprile, who describes the Department as "a full service bank" because it provides trial, appellate, and post-conviction services in state and federal courts to indigent defendants in Kentucky, has made public defender work his career.

Vince has argued four cases in the United States Supreme Court - *Hayes v. Bordenkircher* (1978), *Taylor v. Kentucky* (1978), *Rawlings v. Kentucky* (1980), and *Griffin v. Kentucky* (1987), winning two - *Taylor* and *Griffin*.

As a public defender, Vince has represented hundreds of indigent persons charged with serious crimes at trial or appeal, and in post-conviction actions in both state and federal courts including a number of death penalty cases. In 1989 Aprile negotiated "life or less" sentences for capital defendants in two separate cases after pre-trialing the cases for three years and two years respectively. In discussing his death penalty work, Aprile says, "I don't represent capital clients because I am an abolitionist; I represent them because I am a criminal defense lawyer." Although personally opposed to the death penalty on a variety of grounds, Vince views "society's ultimate punishment as the criminal justice system's ultimate injustice which, by its presence in a jurisdiction, both offends and challenges a criminal defense lawyer to employ her or his skills and experience to abort in individual cases the government's resort to the most perverse, arbitrary and uncivilized form of justice, which allows factors not relevant to the crime or the defendant to decide whether an accused lives or dies."

Vince believes that criminal defense lawyers "represent people, not causes," and they "should fight for relief for each client, not to make good law for future clients." According to Vince, "if you want to make law as a criminal defense lawyer, participate in local and national organizations that are seeking systemic changes through legislation, rule changes, and *amicus* briefs." In this spirit, Vince has been active in criminal defense organizations at both the state and national level. He was a charter board member of the KACDL; and is serving his second stint as a Director of the National Legal Aid and Defender Association (NLADA). He also was on the Board of Directors of NACDL.

The best way I can describe Vince Aprile is "an advocate." First and foremost, Vince is always the agressive "voice" for his clients and his causes, not just as a spokesperson, but as an advisor. The Department of Public Advocacy and his clients have been fortunate to have Vince committed to their cases for nearly 18 years. I am glad to have the opportunity to have him as my colleague.

PAUL F. ISAACS,
PUBLIC ADVOCATE

Besides being an active practitioner, Vince has devoted a considerable portion of his career to teaching and counselling both lawyers and law students. From 1975 - 1983 he was an adjunct professor of law at the U of L's Law School, teaching courses on written advocacy and the theory and practice of criminal defense. Since 1982 he has been on the faculty of the National Criminal Defense College in Macon, Georgia. He is a frequent speaker at continuing legal education programs both in Kentucky and across the country.

Not only has Vince taught from the podium, but also by example. Many present and former Kentucky public defenders have benefitted from his model of representing indigents with creative, aggressive advocacy. For at least 10 years Vince has served as an informal ethics advisor to criminal defense lawyers in his own jurisdiction and throughout the nation. As a result of his ethics lectures, he is frequently called by criminal law practitioners, both public and private, for advice on ethical problems they are encountering. Vince is a member of the NACDL Ethics Advisory Committee.

In 1988 Aprile was appointed by Chief Justice William H. Rehnquist as the only practicing criminal defense lawyer to serve on the 15-member Federal Courts Study Committee. This prestigious group included 4 members of Congress, 5 federal judges, 1 state supreme court judge, and a former ABA president.

Vince believes "this noble experiment we call democracy is endangered by the public's lack of understanding of the *Constitution* and the *Bill of Rights*. People simply don't know or appreciate the function or importance of the criminal defense lawyer in bringing the protections of the *Constitution* to life." Vince attributes this ignorance to "a failure of our education system which for years has neglected the values of freedom enshrined in the *Constitution*." "Instead these constitutional guarantees are viewed by the public at large as loopholes through which the guilty escape," Vince comments.

"As criminal defense lawyers, our greatest challenge may be the education of the public to our role in ensuring fairness and justice between the government and those it chooses to accuse and punish. We must take the time to speak to students, to civic organizations, and to any citizens who will listen. Through education, we can change people's misconceptions." "In the climate of public opinion and community fear in which today's criminal defense lawyer must operate," Vince suggests that "even Clarence Darrow would have a tough time, but Darrow would be striving both in and out of court to vindicate both his client and the *Constitution*, despite the odds."

It is appropriate during this 200th Anniversary of our *Bill of Rights* to hold Vince out as a model liberty litigator.

Giving the Client All You Have

Vince's powers of persuasion, the inexorable, and often inevitable weight of his reasoning and his measured presentations, undoubtably are the first hallmarks that come to mind when I think of who and what Vince is. Attorneys from all across the country consult Vince for precisely that. His at once intutitive and finely honed sense of the essence of defense representation, in tandem with his ever growing experience and knowledge, not only make him a national treasure and explain his unflagging commitment to our work, but account for the endurance of his opinions on ethical behavior for criminal defense attorneys.

I perhaps heard this passion most clearly when I conducted an oral history interview of Vince for the National Equal Justice Library in July of this year. In commenting on what gave him the most joy in this work, Vince said it was not the extreme high of winning even the most important cases— rather it was in your client knowing you gave it everything you had— everything else takes care of itself.

Frequently we are not aware of the value of a treasure when it's our own, I hope this affirms to all of you, the value the national defense community places in Vince. Intelligence, reason and passion rolled into a measured cadence can be lethal. I'm glad he's with me and not agin' me.

JAMES R. NEUHARD, Director
Michigan Appellate Defender Office
1200 6th Ave.
Detroit, Michigan 48226-2419
(313) 256-2814

THE LITIGATOR'S TOAST

May the jury always find for you and the appellate courts always grant you relief - except when you are litigating against me.

Vince Aprile
circa 1991

Aprile Appointed to the Federal Defender Study Committee

By letter dated July 5, 1991 the Chief Justice of the United States Supreme Court, **William H. Rehnquist**, appointed **J. Vincent Aprile II**, General Counsel, Department of Public Advocacy, as a member of the nine-person Committee to study the Federal Defender program - a committee of the Judicial Conference of the United States. This special Committee is mandated by Congress to study, assess, and report on the Federal Defender Program under the Criminal Justice Act of 1964 as amended.

The special committee has 9 members. Federal Judge Edward C. Prado of the Western District of Texas has agreed to chair the committee. In addition to Chairperson Prado and Mr. Aprile, Committee members include one other federal district court judge, a federal magistrate judge, 2 federal public defenders, 2 private practitioners, and a law professor.

In addition to Chairperson Prado and Mr. Aprile, members of the Committee include Federal District Court Judge George H. Revercomb from Washington, D.C.; Federal Magistrate Judge Ronald N. Boyce from Salt Lake City, Utah; two federal public defenders, Judy Clarke from San Diego, California and Thomas W. Hillier, II, from Seattle, Washington; Professor Robinson O. Everett, Duke University, Durham, N.C.; two private practitioners, Robert Altman of Atlanta, George, and Edward Dennis of Philadelphia, Pennsylvania.

According to the federal legislation creating the special committee, the Judicial Conference is required to transmit to the Committees on the Judiciary of both the Senate and the House of Representatives a report on the results of the study no later than March 31, 1992.

The Criminal Justice Act provides for two kinds of public defender offices to serve the federal courts. A federal district is not obliged to have either. Neither of the federal district courts in Kentucky now have a federal public defender program. Federal district courts may provide in their criminal justice act plans for a federal public defender organization. In that system the federal court of appeals selects the federal public defender, who, along with the office's other staff, are federal government employees, supported by the federal judicial budget. Alternatively, federal districts may be served by a community defender organization. In this model the head of the office is typically selected by the governing board or commission of the group authorized by the plan to provide representation.

SOME BICENTENNIAL OBSERVATIONS ON THE SIXTH AMENDMENT RIGHT TO COUNSEL

A bill of rights is what the people are entitled to against every government on earth....

Thomas Jefferson

Politicizing criminal issues in the name of "law and order" is a fact of modern American life. A dangerous side effect of this "law and order" movement is a corresponding decline in the importance society places on the *Bill of Rights* and on the lawyers who protect those rights.

As we celebrate the 200th anniversary of our *Bill of Rights* on December 15, 1991, it is important to consider the risk that the *Bill of Rights* may become empty rhetoric subordinate to the task of fighting crime. Open and frank discussions of the *Bill of Rights* during this bicentennial year will raise complex and controversial issues and hopefully elevate its importance in our nation. While each Amendment is significant, this article is limited to the Sixth Amendment right to counsel in the belief that it is the conduit for preservation of other guarantees afforded by the *Bill of Rights*.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . and to be informed of the nature and causes 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.

The rights to equal justice, judicial fairness and protection from arbitrary governmental actions which serve as the foundation for the Sixth Amendment have stood, at least in theory, for over 700 years. [1] The right to counsel arose as a component of the concept of equal justice. At common law, those charged with misdemeanors were provided counsel while those accused of felonies, treason or other serious crimes had no right to legal representation.[2] This procedure was based on the premise that a judge would insure a fair and impartial trial and the assumption that the Crown would not charge an individual with a serious crime if he had a defense.[3] The American colonists rejected these limitations [4] and thus the Sixth Amendment was adopted to provide the right of counsel to all criminal defendants.

Today, the law recognizes that the Constitutional right of counsel attaches in both state and federal criminal proceedings.[5] While the Sixth Amendment has always attached to federal criminal cases, the history of its extension to state actions reveals a laborious course.

The application of the right to counsel in state criminal proceedings was initially addressed in *Powell v. Alabama.* [6] In *Powell*, nine minority defendants were charged with the rape of two white girls in rural Alabama. This was a capital offense. Although the trial court appointed all 18 members of the Scottsville bar to appear for the defendants at arraignment, on the morning of trial, no specific defense attorneys had been assigned. At the beginning of trial, the judge requested legal assistance for the defendants but stated that no lawyer would be required to appear. With this "appointment," the trial was conducted and each of the nine black men sentenced to death.

The convictions were appealed to the United States Supreme Court. The Court, over 140 years after ratification of the Bill of Rights, held that due process of law under the Fourteenth Amendment necessarily includes the right to counsel at each and every stage of a capital case. Speaking for the Court, Justice Sutherland, stated:

> [W]e are under the opinion that . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment . . . in a capital case... it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. [7]

For seven years following *Powell*, the right to counsel in state court cases, other than those involving the death penalty, continued to plow in a row of uncertainty. In *Betts v. Brady*, [8] the Court adopted a "fundamental fairness" test to determine whether a state court's failure to appoint counsel for indigent defendants in non-capital cases was violative of due process. The uncertainty lingered.

Public defenders are the modern patriots carrying the torch which the founders ignited 200 years ago.

During the next twenty years, hundreds of non-capital cases against indigent defendants passed through the state courts. In some cases lawyers were appointed, in others they were not. Finally, in 1963, the Court again considered the applicability of the Sixth Amendment right to counsel in state court proceedings. In *Gideon v. Wainwright*, [9] the Court examined the *pro se habeas* petition of Clarence Earl Gideon. Gideon was a small time gambler who had been tried and convicted for theft. In his hand written petition, Gideon argued that the *Constitution* guaranteed an attorney to all criminal defendants. The Court agreed with him holding that due process requires the appointment of counsel for criminal defendants in all state and federal felony cases. As Justice Hugo Black so eloquently said:

> [R]eason and reflection require us to recognize that in our system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of

> crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. [10]

Gideon settled the uncertainty by recognizing that the criminally accused have a Constitutional right to legal representation in state court felony proceedings.

While the original Amendment mandated the right to counsel in criminal proceedings, it took 180 years to etch this principle into mainstream Constitutional thought. This sluggish development is attributable to the lack of concern from those in our society who control the pace at which ideological, procedural and to some extent legal concepts develop. For the affluent, liberty, dignity and the right of legal representation is less dependent upon a Constitutional guarantee. Unfortunately, the result is a system which has fostered ambivalence toward legal representation for the accused. Provided an attorney is physically present, the public presumes the attorney is competent and adequately prepared to represent the interests of the accused. However, those intimately concerned with the criminal justice system know the importance of providing experienced, motivated and adequately compensated trial attorneys to forcefully protect such rights. [11]

Recent decisions and trends have increased the burden upon those who represent and protect the rights of the accused. For example in *County of Riverside v. McLaughlin*, [12] the Court held that an individual arrested on a minor offense may be imprisoned up to 48 hours without seeing a judicial officer.

Later, in *McNeil v. Wisconsin* ,[13] the Court eased limitations on police interrogation. Although a jailed suspect is represented by counsel on a criminal charge, he may now be questioned on unrelated matters in the absence of his attorney. The Court reasoned that the Sixth Amendment right to counsel is offense specific. In a dissenting opinion, Justice John Paul Stevens opined:

> As a symbolic matter, today's decision is ominous because it reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice.

As government moves more deeply into areas of our lives once considered private and with the judicial pendulum swinging towards the government and away from individual rights, it is critical that the Constitutional rights of the accused be fully protected by capable and motivated lawyers. The capability and motivation of lawyers retained by the affluent is a matter within the control of the individual. Yet for the indigent, the burden of insuring capability and motivation rests in large part upon society's willingness to support and fund public defender programs.

While candidates and elected officials promise and deliver increased budgets for prosecutorial and law enforcement efforts, support for public defenders is waning. Salaries for full and part time public defenders in Kentucky are low. Defense attorneys who contract with the public advocacy department and those appointed in federal cases are similarly under compensated.[14] For capital cases in Kentucky, the maximum fee the Department of Public Advocacy is able to pay a private attorney is $2,500 [15]- an amount below that commonly billed for a misdemeanor trial or a relatively simply real estate matter.

While society has yet to fully understand the need for competent representation, in the judicial system, positive signs are on the horizon. For example, the 1990 Federal Anti-Drug Abuse Act, 21 U.S.C. 848 (q)(4)(B) and (q)(9) provides increased counsel resources in federal habeas cases. Further, members of the private bar, recognizing the inadequacies of state-provided representation for death row inmates have, on occasion, donated their services to these individuals. For the most part, however, these volunteers do not regularly engage in criminal law practice and are not equipped to undertake public defender responsibilities.

We recognize the importance of prosecutors, law enforcement officials and others in furthering the cause of justice. However, in the final analysis, the task of protecting the accused usually falls upon appointed defense counsel. They shoulder the burden of seeing that, in the criminal justice system, individual liberties and dignity are not side-stepped or cheapened. This burden has often been shouldered in the face of overwhelming caseloads, public abuse and meager pay.[16]

So as we celebrate and reflect upon the Bill of Rights, we salute the lawyers who in the face of adversity dedicate themselves to its preservation. Yet we must be watchful that the right of counsel is not diluted as a victim of inconvenience. Should that happen, the remaining provisions of the *Bill of Rights* may likewise fall. *Public defenders are the modern patriots carrying the torch which the founders ignited 200 years ago.*

EDWARD H. JOHNSTONE
Judge
United States District Court
Louisville, KY

Judge Johnstone was appointed United States District Judge for the Western District of Kentucky on October 11, 1977, and entered on duty October 13, 1977. He served as Chief Judge, October 1, 1985-September 17, 1990, retaining active status as district judge. He serves as a member of the Judicial Conference Committee on the Administration of the Bankruptcy System, and as Chair of the Kentucky Task Force on Death Penalty Cases since 1987.

He is a graduate of the University of Kentucky, receiving a J.D. degree in 1949. Prior to his appointment to the federal bench, he served as Judge of the 56th Judicial Circuit of Kentucky, and was a practicing attorney in Princeton, Kentucky for over 25 years with the law firm: Johnstone, Eldred & Paxton.

FOOTNOTES

[1] As early as 1215, the *Magna Carta* provided to no one will we sell, to no one will we "refuse or delay, right or justice."

[2] Prior to 1836, those accused of felonies and other serious crimes were entitled to representation by counsel only with respect to questions of law. 6&7 Wm. IV, c. 114, sec. 1 (1836).

[3] J. Chitty, *A Practical Treatise on the Common Law* I:406 (Philadelphia 1819) cited in D. Feldman, *The Defendant's Rights Today* 209-10 (1976); E. Coke, The Third Part of the Insitutes of the Laws of England 29 (London 1797). Although conceding that the rule was well settled at common law, Blackstone denounced it stating:

> For upon what face of reason can that assistance be denied to save a life of a man, which yet is allowed him in prosecutions for every petty trespass?

[4] W. Blackstone *355 cited in *Powell v. Alabama*, 287 US 45 (1931).

[4] *Powell v. Alabama*, 287 U.S. 45, 63-65 (1932). Prior to the adoption of the Federal Constitution, twelve of the thirteen colonies guaranteed all criminal defendants the right to counsel.

[5] See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (application of Sixth Amendment to misdemeanors); *see also In re Gault*, 387 U.S. 1 (1967) (application of Sixth Amendment to juvenile defendants).

[6] 287 U.S. 45 (1935).

[7] *Id.* at 71.

[8] 316 U.S. 455 (1942).

[9] 372 U.S. 335 (1963).

[10] *Id.*; Nine years later in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) the Court extended the Sixth

Amendment right to counsel to criminal misdemeanor proceedings.

[11] See Lawson, *Presuming Lawyers Competent to Protect Fundamental Rights: Is it an Affordable Fiction?*, 66 KY. L. J. 459 (1977-78) (stressing the necessity for experienced and competent counsel in the defense of indigents).

[12] 111 S.Ct. 1661 (May 13, 1991).

[13] 111 S.Ct. 2204 (June 13, 1991).

[14] *THE ADVOCATE*, Aug. 1990, at 7.

[15] KRS 31.170(4) provides a $1,250 fee cap "unless the court concerned finds that special circumstances warrant a higher total fee." When the court makes such a finding, the fiscal court must pay the ordered fee. KRS 31.240(3).

[16] *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978) (attempts by public defenders to secure death penalty statistics for use in ongoing death penalty cases was described by the Supreme Court of Kentucky as "asinine litigation.")

RIDDLE ON CONSERVATIVE JUDGES' AGENDA

When is a strict constructionist judge really a judicial activist judge with a conservative agenda?

a) When a criminal defendant is entitled to the guarantees of our *Bill of Rights*.

b) When his name is Justice Rehnquist.

c) When the judge was appointed by Ronald Reagan or George Bush.

d) When property, government or the police vs. the individual citizen.

e) All of the above.

Many Poor Kentucky Citizens Accused Are Unrepresented

Only 25% Represented

In fiscal year 1990 Kentucky public defenders represented 25% of the 255,000 persons charged in district court with committing a crime.

75% are Indigent

Nationally, the median figure for the percent of those accused of crime who are indigent is 75, according to a 1990 survey by the National Institute of Justice. See "The Criminal Caseload in Kentucky Trial Courts" *The Advocate* Vol. 13, No. 3 at 10.

Who Represented the Rest?

Who represented those many other indigent Kentucky citizens?

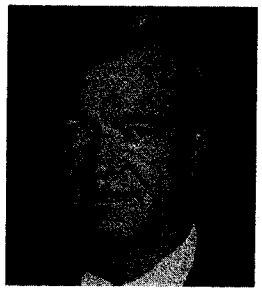
Counsel is critical to the proper working of our Kentucky criminal justice system. The criminal justice' s adversary process is built on the concept of counsel representing the state and the criminal accused.

We would not put up for long if the state had no counsel present when a criminal prosecution was called for consideration by the Court. Why do we tolerate the lack of counsel for Kentucky's poor when their cases is called and their liberty is in jeopardy?

Commitment to Counsel

When will we commit ourselves to providing counsel for all poor Kentucky citizens charged with a crime? The 200th Anniversary of the 6th Amendment to the United States *Constitution* and the 100th Anniversary of Section 11 of Kentucky's *Constitution* would be a fitting time.

ED MONAHAN
Assistant Public Advocate
Director, Training Section
Frankfort



Bill Johnson

There is no doubt in my mind that many of Kentucky's financially depressed citizens accused of committing small crimes do not secure adequate representation. This often leads to individuals being placed in jail who should not be there.

Further because they are inadequately represented they frequently find themselves being treated somewhat as second rate citizens by the courts. Other persons have their cases disposed of more speedily. This causes the poor, inadequately represented client to have to appear more frequently in court, miss work and sometimes lose his employment.

In addition, great stress is placed on the family and this frequently causes family friction to occur and in some instances violence results.

WILLIAM E. JOHNSON
Stoll, Keenon & Park
326 W. Main Street
Frankfort, Kentucky 40601
(502) 875-6000

WEST'S REVIEW

Donna 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

DUI - BREATHALYZER
Humphries v. Commonwealth
38 K.L.S. 5 at 13
(May 3, 1991)

Humphries' driver's license was revoked for a period of six months when he refused to take a breathalyzer test.

Humphries argued on appeal that he had in fact submitted to the breathalyzer. The Court found that although Humphries ultimately gave a breath sample, he did so only after twice refusing. "[T]he prior refusals constituted a violation of the statute since Humphries refused to submit to the test upon the request of the law enforcement officer...and again refused to submit to the test after the law enforcement officer warned him of the effect of his refusal...." KRS 186.565(3). Subsequent testing cannot cure a violation of the statute; if it could, then delays in testing would increase so bloodstream alcohol levels could deteriorate..."

The Court also rejected argument that the officer did not make it clear that Humphries was required to submit to the test or risk loss of his driver's license. The Court found that "[t]he language used to ascertain Humphries' willingness to take the breathalyzer test was a positive, unequivocal directive that he provide the breath sample, or lose his license."

KENTUCKY SUPREME COURT

PEREMPTORY CHALLENGES/CHALLENGES FOR CAUSE/*BATSON*/OTHER CRIMES/ DISQUALIFICATION OF PROSECUTOR
Dunbar v. Commonwealth
Gardner v. Commonwealth
38 K.L.S. 5 at 17
(May 9, 1991)

Dunbar and Gardner were convicted of murder and robbery. The Kentucky Supreme Court affirmed.

The Court held that the appellants were not compelled to use their peremptory strikes to remove jurors who should have been struck for cause. "There is no convincing evidence that any juror who heard the case was incompetent and should have been struck for cause." The Court additionally held that "[a] defendant's right to be tried by an impartial jury is infringed only if an unqualified juror participates in the decision."

The Court held that the trial court did not err in excusing for cause a black juror who indicated that due to job and family matters he was "distracted at this point in his life and would not be able to listen objectively to the evidence." The Court additionally held that the prosecutor articulated a racially neutral explanation as required by *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) for its use of peremptory strikes against black jurors.

Evidence of how the appellants acquired the guns used in the robbery was admissible even though it constituted evidence of other crimes. The Court stated, without explanation of how the evidence in the case before it was probative, that: "evidence of another crime is admissible if it tends to prove the crime charged..."

Finally, the Court held that the trial court properly refused to disqualify the prosecutors under KRS 15.733(3) when they became "involved" in a civil suit arising from the murders. The Court held

NOTICE TO OF-COUNSEL ATTORNEYS

Department of Public Advocacy Appellate Attorney, Julie Namkin is available to answer your legal questions. You may contact Julie at (502) 564-8006 ext. 167.

that appellants had not met the statute's requirement of "a showing of actual prejudice." Moreover, the possible conflict of interest did not arise until final sentencing when "the substantive duties of the Commonwealth Attorney had effectively ended." Justices Leibson and Combs dissented and would have reversed based on the admission of evidence of other crimes and on the seating of jurors who should have been struck for cause. The dissenting opinion additionally criticized the majority's position that there is no prejudice when a trial court denies a challenge for cause so long as the juror is peremptorily struck. The dissenters would have held that "[s]uch a denial or impairment of a right to peremptory challenges is reversible error without a further showing of prejudice."

HEARSAY/DEPOSITION TESTIMONY/PFO PRESERVATION OF ERROR
Ruppee v. Commonwealth
38 K.L.S. 5 at 32
(May 9, 1991)

In this case, the Court held that hearsay evidence regarding the serial numbers of money taken in a robbery and regarding the exchange of the bills by Ruppee's sister at a local bank was properly admitted under *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988). The evidence "tends to explain the action that was taken by the police officer as a result of this information...." Justice Combs, Justice Leibson and Chief Justice Stephens dissented from this portion of the opinion on the grounds that the hearsay was clearly offered to prove Ruppee's guilt.

CRUEL AND UNUSUAL PUNISHMENT
Brown v. Commonwealth
38 K.L.S. 6 at 13
(June 6, 1991)

The Court upheld Brown's sentence to ten years as a first degree persistent felony offender where the enhanced sentence was based on an underlying offense of theft by deception and two prior, nonviolent property offenses. Consistent with the holdings in *Collett v. Commonwealth*, 686 S.W.2d 822 (Ky.App. 1984) and *Commonwealth v. Messer*, 736 S.W.2d 341 (Ky. 1987), the Court held that Brown's penalty did not constitute cruel and unusual punishment.

CHARACTER EVIDENCE/INSTRUCTIONS-EEDAND SELF-PROTECTION
Holbrook v. Commonwealth
38 K.L.S. 6 at 18
(June 6, 1991)

The Court reversed Holbrook's conviction of intentional murder. The Court held that reversible error occurred when the commonwealth introduced testimony that people feared Holbrook because he "will lay the lead to them." "The rule in Kentucky is that character evidence cannot be admitted until the defendant has opened the door, or placed his character in issue." A question directed by the prosecutor to Holbrook's mother whether she had "good reason" to fear her son was also improper.

Additional error occurred in the instructions given to the jury. Holbrook was refused a self-protection instruction that would have permitted the jury to convict him of either second degree manslaughter or reckless homicide if they believed his decision to use force or the degree of force used was wanton or reckless. Such an instruction is provided for in *Shannon v. Commonwealth*, 767 S.W.2d 548 (Ky. 1989). Holbrook was also entitled to "a separate instruction on extreme emotional disturbance so that the jury could understand how to apply extreme emotional disturbance to differentiate the two intentional homicide crimes: intentional murder and manslaughter in the first degree." It was not sufficient that extreme emotional disturbance be mentioned merely as a negative element in the murder instruction. Under *Holbrook*, Kentucky's courts will now be required to separately instruct on the effect of a finding of extreme emotional disturbance. The Court also reaffirmed its definition of extreme emotional disturbance as set out in *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky. 1986). Justice Combs dissented.

JUROR MISCONDUCT
Paenitz v. Commonwealth
38 K.L.S. 6 at 22
(June 6, 1991)

On a motion for new trial following Paenitz' conviction of rape, a doctor who testified for the prosecution stated that three days prior to trial, she had discussed the case with one of the jurors and had advised the juror that this was an "awful" case involving the "rape" of an infant. During voir dire, the juror failed to disclose this conversation with the doctor. The Court, reversing, described the juror's lack of truthfulness as "a complete failure to observe minimum standards of juror responsibility," and stated: "This is a case which strikes at the very bedrock foundations of the constitutional right to a trial by an impartial jury."

TRUTH IN SENTENCING
Shields v. Commonwealth
38 K.L.S. 6 at 24
(June 6, 1991)

The issue in this case was whether it was error for the trial court to prevent the defense from discussing penalty range during the voir dire. The Court held that, despite the Truth in Sentencing provisions of KRS 532.055, jurors may be given sentencing information "incidental to a proper voir dire examination." "In order to be qualified to sit as a juror in a criminal case, a member of the venire must be able to consider any permissible punishment." However, Shields was correctly prevented from telling the jury that the range of punishment was ten to twenty years when it was in fact twenty years to life due to a PFO count. Justice Combs dissented and would have reversed.

CHANGE OF VENUE
Whitler v. Commonwealth
38 K.L.S. 6 at 25
(June 6, 1991)

Whitler contended that he was entitled to a change of venue where his motion and affidavits in support of the motion were uncontroverted. The Court rejected his argument and held that it was within the trial court's discretion to deny the motion. The Court initially noted that Whitler's affidavits were deficient in that they omitted any statement that the affiants "verily believed the statements of the petition for the change of venue were true." The Court additionally held that where an examination of the voir dire reveals no difficulty in seating an impartial jury, the denial of the change of venue is not prejudicial. The defendant is, however, entitled under KRS 452.220(3) to a "hearing in open court" on his motion. Since a hearing was conducted on Whitler's motion, Whitler's rights under the statute were not violated. Justices Leibson and Combs dissented and would have required contravening evidence from the commonwealth before the defense motion could be denied.

MUG SHOTS AND FINGERPRINT CARD/TRUTH IN SENTENCING
Williams v. Commonwealth
38 K.L.S. 6 at 26
(June 6, 1991)

At Williams' trial, the victim did not make an in-court identification but identified a mug shot of Williams as one that she had previously picked from a book of mug shots. Williams took the stand and on cross-examination identified the photograph as his. Williams similarly identified his signature on a fingerprint card from which a match to a fingerprint at the scene had been obtained. The mug shot and fingerprint card were then introduced into evidence. The Court held that both items were properly introduced in that the prosecution demonstrated a need to introduce the evidence, the mug shot

was masked to conceal all identifying information, and the trial court admonished the jury that the evidence was relevant only to prove identification. The introduction of both the mug shot and the fingerprint card met the tests for admissibility stated in *Redd v. Commonwealth*, 591 S.W.2d 704 (Ky.App. 1979).

Williams also alleged error in the sentencing portion of his trial. Williams sought to introduce his prior criminal history which consisted entirely of misdemeanors. The trial court excluded the evidence on the grounds that the commonwealth is vested with the exclusive rights to prove prior criminal history. The Kentucky Supreme Court reversed, holding that the Truth in Sentencing statute, by authorizing the commonwealth to introduce a defendant's prior criminal record, does not divest the defendant of that same right.

EMPLOYMENT OPPORTUNITIES WITH DPA

There can be no persuasion without commitment.

-Joe Guastaferro, actor and teacher

Our primary responsibility here at DPA involves commitment to our clients. Being a state agency, we must be ever-mindful of the need to hire employees who are more committed than they are connected. Political influence is obviously a reality we must contend with at DPA but our first concern is to hire those who by the quality of their work reveal a commitment to our clients.

What then are we specifically looking for in our applicants? Psychologist Charles Garfield, Ph.D., in his book *Peak Performers: The New Heroes of American Business* shares his thoughts about how to identify individuals who are — or are in the process of becoming — "peak performers" or consistently high achievers. In his book, Garfield lists the following sixteen characteristics of a "peak performer":

1) A sense of mission;
2) Ability to plan strategically, both for their own careers and for projects;
3) Courage to take risks in the pursuit of excellence;
4) High self-confidence and self-worth;
5) Need for responsibility and control;
6) Ownership of their own ideas;
7) Ability to prepare for key situations mentally;
8) Good time-management skills;
9) Ability to learn from past mistakes;
10) Faith in their own creativity, even when other people don't understand their contribution;
11) Positive work environment, even if they have to make it this way themselves;
12) Concern for other people, allowing them to work well with them;
13) Decisiveness in the face of opportunity;
14) Foresight to anticipate difficulties and opportunities;
15) Need to check on themselves frequently to see whether they're on course;
16) A thirst for new knowledge and experiences.

These characteristics can easily be adapted or further defined in light of our work at DPA. Clearly, we are seeking those employees whose sense of mission includes a commitment to equal justice for all, a belief in the *Bill of Rights*, and a desire to assist poor Kentucky citizens accused of crimes.

If you or someone you know shares in our sense of mission and would like to pursue a challenging career with DPA, please call our office or refer the individual to me.

REBECCA BALLARD DILORETO
Assistant Public Advocate
Recruitment Coordinator
Frankfort

OPPORTUNITIES WITH DPA

The Department is seeking qualified applicants for the positions listed below:

Assistant Public Advocate — Hopkinsville, Northpoint, Paducah, Pikeville field offices have vacancies for qualified lawyers to provide zealous representation to poor citizens facing criminal charges.

Paralegal — Our Eddyville and LaGrange offices are seeking qualified paralegals to do research, interview inmates, and perform as integral members of our post-conviction defense team.

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

UNITED STATES SUPREME COURT

CONFRONTATION-RAPE SHIELD LAWS
Michigan v. Lucas
49 CrL 2156
(June 20, 1991)

Michigan's rape shield law provides an exception to its exclusion of evidence of the victim's past sexual conduct when the past conduct is with the defendant. However, to invoke the exception, a defendant must given notice within 10 days of arraignment of his intent to do so. Lucas failed to comply with this notice provision and the trial court excluded the evidence. The Michigan Court of Appeals reversed, adopting a *per se* rule that a denial of confrontation results whenever the failure to meet a notice of requirement is sanctioned by the exclusion of evidence.

The Supreme Court found that the state's notice requirement advanced the legitimate purpose of allowing the prosecution to "interview the parties and otherwise investigate whether such a prior relationship actually existed." The Court then held, without articulating specific standards, that "[f]ailure to comply with [a notice] requirement may in some cases justify even the severe sanction of preclusion." Justices Stevens and Marshall dissented.

JURIES - *BATSON*
Hernandez v. New York
49 CrL 2192
(May 28, 1991)

At Hernandez's trial the prosecutor peremptorily struck two Latino jurors. When the strikes were challenged under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) as racially motivated, the prosecutor offered the racially neutral explanation that he had struck the jurors because he feared their demeanor and responses that they would ignore the official English translation of Spanish testimony. The trial court accepted this explanation.

A majority of the Supreme Court held that review of the trial court's ruling was limited to a review for "clear error." "Deference to trial court findings on the issue of discriminating intent makes particular sense in this context because, as we noted in *Batson*, the finding will 'largely turn on evaluation of credibility.' Because the best evidence will usually be the prosecutor's demeanor, resolution of this question is peculiarly within the trial judge's province." The fact that in the case before it the explanation offered by the prosecutor was one which, even if not racially motivated, would nevertheless have application only to members of a racial minority, was viewed by a plurality of the Court as only one factor to be weighed. Justices O'Connor and Scalia, concurring, viewed the fact of disparate impact as irrelevant so long as the prosecution's subjective *intent* was racially neutral. Justices Stevens, Marshall and Blackmun dissented.

HARMLESS ERROR
Yates v. Evatt
49 CrL 2200
(May 28, 1991)

The petitioner in this case was convicted of murder at a trial in which the jury was instructed that the jury could presume the essential element of malice based on an accomplice's killing of the victim. The state appellate court held that this instruction unconstitutionally shifted the burden of proof to the petitioner in violation of *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). The state nevertheless found the error to be harmless after considering "whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice."

A majority of the Supreme Court held that this was the wrong standard. The Court specified a two step analysis. First, the reviewing court must determine what evidence the jury actually considered. Then the court must ask "whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the instruction." Applying this standard, the erroneous burden-shifting could not be said to be harmless beyond a reasonable doubt.

VOIR DIRE - PUBLICITY
Mu'Min v. Virginia
49 CrL 2220
(May 30, 1991)

In this case, the Court held that the Sixth Amendment right to an impartial jury does not require a judy to ask veniremembers to disclose the specific content of pretrial publicity or information to which they have been exposed. In the Court's view, a defendant's rights are sufficiently protected when the trial judge simply inquires whether jurors have such fixed opinions that they cannot judge the case impartially. Justices Marshall, Blackmun, Stevens and Kennedy dissented.

INTERROGATION-RIGHT TO COUNSEL
McNeil v. Wisconsin
49 CrL 2249
(June 13, 1991)

McNeil appeared with counsel at a bail hearing on a robbery charge. Later, while still in custody, police questioned McNeil without counsel present concerning an unrelated murder. McNeil incriminated himself.

The majority held that McNeil's appearance with counsel at the bail hearing was not an invocation of his right to counsel under *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) for purposes of the unrelated murder. Rather, the Fifth Amendment-based right to counsel is triggered by "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police."

Justices Stevens, Blackmun, and Marshall dissented but predicted that the defense bar could blunt the effect of the majority's ruling by having their clients expressly invoke their Fifth Amendment-based right to counsel at preliminary judicial proceedings.

HABEAS CORPUS - ADEQUATE AND INDEPENDENT STATE GROUNDS
Coleman v. Thompson
49 CrL 2303
(June 24, 1991)

In *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), the Court held that the decision of a state court to which a federal claim was presented will be presumed to rest on federal grounds absent a "plain statement" that the state court's holding rests on an adequate and independent state grounds. *Coleman* dispenses with the plain statement rule. Under *Coleman*, a state court's holdings will be treated as resting on federal constitutional grounds only if they can be "fairly considered" to have done so. The decision has the effect of further restricting the availability of federal habeas corpus by eliminating the assumption that a state court opinion that does not specify the basis for its denial of relief reached the merits of the federal claim. Justices Blackmun, Marshall and Stevens dissented.

HABEAS CORPUS-
PROCEDURAL DEFAULT
Ylst v. Nunnemaker
49 CrL 2317
(June 24, 1991)

Nunnemaker raised a *Miranda* violation for the first time on appeal. The California Court of Appeals held that the error was unpreserved and the California Supreme Court denied review. Nunnemaker then filed a petition for state collateral relief which was denied without comment at each level of the state court system. In subsequent federal habeas proceedings, Nunnemaker argued that the state court's unexplained denial of collateral relief constituted a determination on the merits under *Harris v. Reed, supra,* that superseded the California Supreme Court's previous denial of relief on procedural default grounds.

The U.S. Supreme Court disagreed, instead adopting an analysis that "looked through" the highest state court's unexplained denial of relief to the "last reasoned opinion" of a state court addressing the issue. That "last reasoned opinion" is to be treated as the state's disposition of the issue unless rebutted by the habeas petitioner. Justices Blackmun, Marshall and Stevens dissented.

CRUEL AND UNUSUAL
PUNISHMENT
Harmelin v. Michigan
49 CrL 2350
(June 27, 1991)

A majority of the Court held in this case that a mandatory sentence of life without parole for possession of more than 650 grams of cocaine was not cruel and unusual punishment. The Court held that an individualized consideration of the defendant's circumstances is constitutionally required only in capital cases. Thus, the mandatory nature of the sentence was constitutionally permissible. Rehnquist and Scalia would have gone further and held that even the narrow proportionality review of *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), is not constitutionally required. Kennedy, O'Connor, and Souter, applying the proportionality review of *Solem,* found that the sentence was not disproportionate. Justices White, Blackmun, Stevens and Marshall dissented, stating "[t]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt."

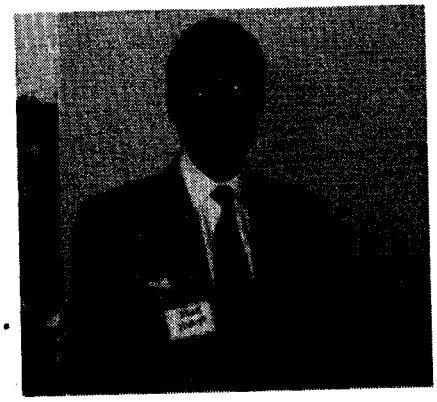
LINDA K. WEST
Assistant Public Advocate
Post-Conviction Branch
Frankfort

1991 ANNUAL SEMINAR COMPLETED

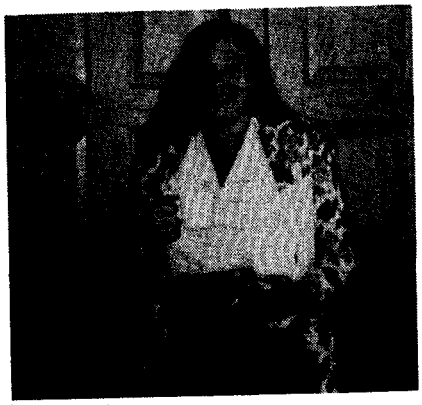
Marty Pinales and Roger Dodd

Bob Lotz

April VanDer Venter and Dee Dee Smither



Burr Travis



Andrea Lyon

ANNIVERSARIES OF OUR INDIVIDUAL FREEDOMS

The 200th Anniversary of the United States *Bill of Rights* occurs December 15, 1991. The 100th Anniversary of the Kentucky *Bill of Rights* is September 28, 1991.

OUR UNIQUENESS

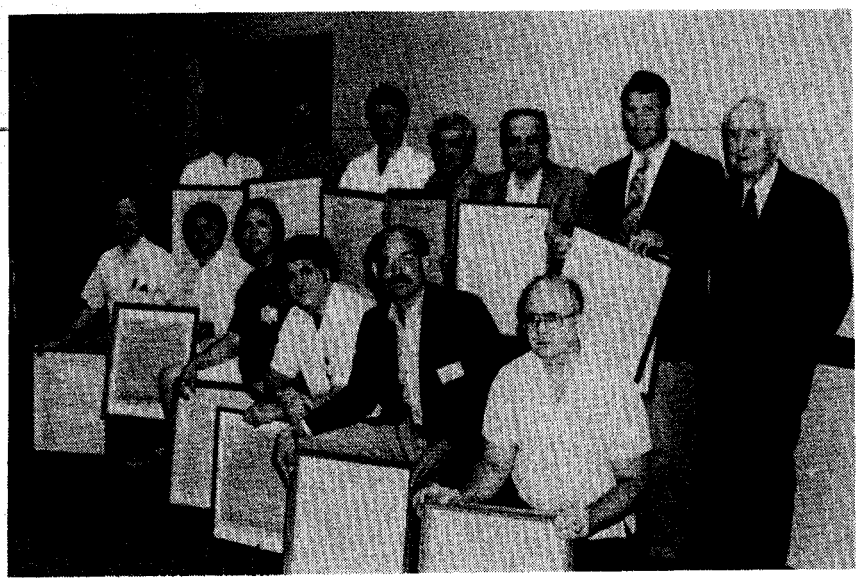
The individual rights guaranteed by these documents sets this country apart from all other nations in the world. They limit our government's authority over our life and our freedom.

DEFENDERS ARE *BILL OF RIGHTS* ENFORCERS

Kentucky public defenders daily bring to life these individual liberties in the representation each year of 70,000 indigent citizens charged with a crime.

DEFENDERS AND *BILL OF RIGHTS* HONORED

To honor these core values of freedom and the public defenders who are the state's *Bill of Rights* officers, each public defender office was presented by Judy Clabes, Editor of the *Kentucky Post*, and Dr. Tom Clark, University of Kentucky Professor *Emeritus*, a framed copy of the Kentucky and United States *Bill of Rights* at the Department of Public Advocacy's 19th Annual Public Defender Conference in Covington, Kentucky on June 2, 1991.



JUDY CLABES reminded us that the fight in the Persian Gulf War for democracy and that democracy stands up for the rights of the underdog. She remarked, "Just 200 years ago in the fall and winter of 1790 and 91, a different kind of rally was going on in America for a kind of self-government never before seen. The topic of those times was the *Bill of Rights* - important Amendments to the new *Constitution* that would guarantee certain individual rights that government could never take away. The *Bill of Rights* is restraint upon government, it places certain rights above and beyond the reach of majorities and officials, and establishes them as fundamental legal principles. The divine right of kings or crown princes born of royalty was set aside in the New American order."

"200 years is not a very long time, a grain of sand in that Saudi desert, yet democracy and the republic on which it is built has brought America into its adolescence a strong rich and powerful country."

"The test of democracy was not passed in that Saudi desert, it continues today, every day very close to home. The *Constitution* is not a self-executing document, but it empowers people like you and me to do what is necessary to help democracy alive. What we are about today is both the celebration of the *Bill of Rights* and an affirmation of our responsibilities to it."

TOM CLARK, dean of Kentucky Historians, reflected on the importance of Kentucky's *Bill of Rights*: "Though not engraved in stone, the Kentucky *Bill of Rights* over two centuries had taken on a sanctity which has given a heart and soul foundation to the entire democratic process in the Commonwealth, even though a vast percentage of the population is ignorant of its actual provisions."

CHARLES OGLETREE, a Harvard Law School Professor and moderator of the PBS series on Ethics, observed "Public defenders and public advocates have been leaders in the fight, not only to constantly reaffirm the critical importance of the *Bill of Rights*, but also in the vanguard of those attempting to preserve those precious rights. This battle had become increasingly difficult over the last century and regrettably in the last term of the United States court."

"Every day that you stand before judges and defend the *Constitution* you make a difference. Every time you insist that a prosecutor's office offer a sensible plea to the client, you're fighting for the *Constitution*. Every time you stand before a jury and demand that they recognize that your client is cloaked in gowns proclaiming that the *Constitution* guarantees her the presumption of innocence you're enforcing the *Bill of Rights*. Every time you stand and hear the trier of facts shout, or at least, state, or in some cases, whisper, the 2 greatest words in the English language, "Not Guilty," you're keeping the *Bill of Rights* vital and alive."

1991 INVESTIGATOR, PARALEGAL, SENTENCING SPECIALIST TRAINING

TEAMWORK

An innovative training was undertaken for sentencing specialists, investigators and paralegals at the 19th Annual Public Defender Conference in Covington, Kentucky. 30 people attended the training. The 20 investigators, 7 paralegals, and 3 sentencing specialists who participated in this program were asked to set out the values that are critical to successful teamwork and those were identified as:

1. Common Goals
2. Cooperation
3. Communication
4. Trust

The training was structured to increase these components through successful teamwork.

WHY TEAMWORK TRAINING?

Prior to the training, DPA's sentencing specialists, paralegals and investigators were surveyed on what they needed in their job, and their feelings about areas of need. The results indicated a need for work on fundamental aspects of work: how, as important support staff, they felt they were viewed, used and undervalued; feelings of lack of power and worth.

ALLENA & CLARK LEAD DPA DEFENSE TEAM

Thom Allena, an organizational developer and former New Jersey public defender investigator, and **Jim Clark**, a professor of clinical social work at the University of Kentucky led the participants as they discussed what they did not like at DPA, what their dreams at DPA are, what are the most important values to them as the DPA defense team, and how they could implement these back at their work.

Seated, L. to R. : **Laurie Grigsby**, Paralegal; **Lynn Toy**, Paralegal; **Jennifer Word**, Paralegal; **Julia Pearson**, Paralegal; **Randy Edwards**, Investigator; **Rosie Nunn**, Investigator; **Jerry Smothers**, Investigator; **Tena Francis**, Investigator; **Dave Stewart**, Investigator Director.

Standing, L. to R.: **Jim Clark**, Speaker; **Joe Howard**, Investigator; **Geneivive Campbell**, Investigator; **Mike Zaidan**, Investigator; **Edward Hume**, Investigator; **Larry Rapp**, Investigator; **H.D. Britt**, Investigator; **Bob Rehberg**, Investigator; **Bob Hubbard**, Paralegal; **Kathy Power**, Investigator; **Steve Heffley**, Investigator; **Gary Sparks**, Investigator; **Thomas Smith**, Investigator; **Bob Harp**, Investigator; **Jim Deshazer**, Sentencing Specialist; **Danny Dees**, Investigator; **Thom Allena**, Speaker.

OUTDOOR EXERCISES

In order to experience the values of teamwork at a foundational human level, and reinforce the classroom teaching, the training went beyond the classroom to Goebel Park in Covington.

Effective team building was practiced. DPA staff learned to work better as a team not just by *talking* about teams or working as a team but by *actually* working as a team to achieve a real goal. The exercises focused on creative group problem solving through trusting and communicating with others on the team, and through cooperation toward the finish line.

PRACTICAL APPLICATION

Participants spent time thinking together how to bring what was experienced at the training program to life when they went back to their work place.

POST-SCRIPT

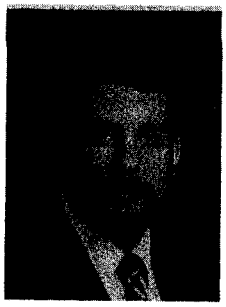
Reflecting on what needs to be done now, Thom Allena said that the team members need to put the values learned into effect with the help of coaching by their supervisor, fellow team members, and Dave Stewart.

Dave Stewart said of the training : "I was impressed with the attitude and work habits of most of the participants. For us to reach the goals intended, it will be essential that we all work with the same objectives in mind."

Thanks to all those who attended and participated, you made it a success!

THE DEATH PENALTY

More Ritual Death Incantations from the Supreme Court



S. Nib

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 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 Supreme Court's 1990-91 term is winding down as this is written, and the smoke from the charred wreckage of the *Bill of Rights* is filling the air. With Souter replacing Brennan to give the Reagan-Bush forces a working majority, the slash-and-burn assault on the Constitution has reached an unprecedented intensity, which promises only to get worse. Those whose taste runs to horror movies might enjoy the stomping of the First Amendment,[1] the gutting of the Fourth,[2] the trashing of the Fifth,[3] the pillaging of the Eighth,[4] and the slow torture of due process.[5] But we'll limit ourselves here to the most recent death penalty pronouncements.

LANKFORD V. IDAHO:[6] SMOKE 'EM OUT EARLY

Here's one of those increasingly rare instances where the Court rights an injustice. Idaho law does not require the prosecution to provide advance notice of intent to seek the death penalty. But defense counsel moved, and the trial court ordered, that the prosecutor give specific notice of his intention by a certain date. In response, the prosecutor filed a notice plainly stating that he would *not* be seeking death as to either of the two charges of murder against Lankford. At the sentencing hearing before the judge (without a jury), the prosecutor and defense counsel recommended different terms of years, and defense counsel introduced some evidence in mitigation of sentence. The trial court then, finding the existence of five statutory aggravators,[7] sentenced Lankford to death. No evidence or arguments had been presented by the parties to address these factors.

With Justices O'Connor and Kennedy joining the Gang of Three, the Supreme Court reversed. Hearkening back to *Gardner v. Florida*,[8] the Court reiterated its "death is different" interpretation of the due process clause and Eighth Amendment, and concluded that "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure....Petitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned in this case."[9]

Kentucky Death Facts

As of July 15, 1991

Number of people executed since statehood	470
Number of people executed in the electric chair	162
Number of people who applied for the position of executioner in 1984	150
Number of people now on death row	28
Number of Vietnam Veterans on death row	1
Number of women on death row	1
Number on death row who were under age 21 at time of offense	5
Number of inmates on death row who have committed suicide	1
Number on death row whose trial lawyers have been disbarred or had their license suspended	5
Number who can afford private lawyer on appeal	0
Percentage of KY homicide victims who were black, 1985-90	18%
Number sentenced to death for killing a black person	0
Percentage of death row inmates who are black	17%
Percentage of Kentucky population that is black	7%
Number of black prisoners who were sentenced by all white juries	2
Number of persons sentenced to death in Kentucky and later proved innocent	1

Given Kentucky's fairly flabby notice requirement,[10] counsel should consider making *Lankford* motions early in potential capital cases. Such an order will serve to lock in the prosecution and may serve to narrow the issues before the Court, then giving rise to a *Watson*[11] hearing at which the evidence in aggravation can be tested and the death penalty excluded.

Counsel must be careful, of course, not to lose track of what notice is given. In a recent Western Kentucky case, defense counsel was denied a last-minute continuance when he "remembered" that a notice of intent to seek death had been filed over a year earlier. His client is now on death row.

MU'MIN V. VIRGINIA:[12] HEAR NO EVIL, SPEAK NO EVIL

Dawud Majid Mu'Min, a black man of the Islamic faith, was a work-release inmate when he was charged with escaping from a work detail and raping and murdering a white woman at a nearby shopping center. Coming as it did in the midst of George Bush's 1988 "Willie Horton" campaign offensive, the case created a major community, media and political uproar in Northern Virginia. By the time of trial, media stories had described in detail Mu'Min's confession, his prior murder conviction, his history of trouble in the prison, the outrage of the local Congressman and his opponent, and reactions by the State and the community to the conditions of work-release programs. One newspaper story reported that, but for the Supreme Court's 1972 *Furman*[13] decision, Mu'Min would have been sentenced to death for his 1973 murder conviction.

When 12 jurors were seated, it was no surprise that eight of them acknowledged having read or heard about the case. Mu'Min's motion for a change of venue was denied, as was his motion to voir dire the jurors as to the specific content of what they had heard. Instead, the trial court asked the jurors, first as a group and then in panels of four, whether they could "enter the jury box with an open mind and wait until the entire case is presented before reaching a ...conclusion as to the guilt or innocence of the accused."[14] The trial court accepted the jurors' silence as an affirmative statement of objectivity. By a 5-4 vote (Justice Kennedy dissenting separately), The Supreme Court affirmed Mu'Min's conviction and death sentence.

Remarkably, the Court acknowledged that it might reach a different result if Mu'Min had been tried in a federal court, subject to the Supreme Court's supervisory power.[15] But the Court would not go so far as to require "content" questioning as to jurors' exposure to publicity under either the Sixth Amendment's guarantee of an impartial jury or the Fourteenth Amendment's due process clause, choosing instead to defer to the discretion of the state trial courts to conduct voir dire as they see fit. The possibility that two-thirds of Mu'Min's jury may have known from the outset of his prior murder conviction, his institutional history, or the political furor surrounding his case was of no consequence to the Court, so long as they were unwilling to acknowledge any bias in front of their fellow jurors.

Even more absurdly, the Court expressed a belief that individual content questioning would unduly burden the trial courts. But as Marshall's dissent points out, five Federal Circuits and eight states now require individual sequestered voir dire and content questioning in capital cases.[16] Included among these, of course, is Kentucky. RCr 9.38 and *Morris v. Commonwealth*[17] must be invoked, preserved, and treasured, to ensure that our capital jury selection procedures do not descend to the level of superficiality endorsed by *Mu'Min*.

COLEMAN V. THOMPSON:[18] IT'S NOT OUR JOB, MAN

Continuing on the theme of deferral to the state courts (known in some quarters as "ducking the heavy lifting"), the Court decided in *Coleman* that, when federal constitutional claims are procedurally defaulted in state court, they are defaulted in federal court too. After Coleman's death sentence was affirmed on direct appeal, he filed a habeas petition in state court, raising several federal constitutional claims, which was denied after a hearing. Coleman's notice of appeal to the Virginia Supreme Court was filed *three days late*. The State moved to dismiss, but briefs were filed on the merits of Coleman's claims as well as the dismissal issue. The Virginia Supreme Court then issued a short, ambiguous order dismissing the appeal. Coleman then turned to the Federal District Court, which concluded that he had procedurally defaulted his federal claims by blowing the state court deadline. The Fourth Circuit affirmed, as did the Supreme Court.

O'Connor's majority opinion begins as follows:

> This is a case about federalism. It concerns the respect that federal courts owe the States and the State's procedural rules when reviewing the claims of state prisoners in federal habeas corpus.

This, of course, is like saying that "Moby Dick" was about fishing. The Court relied on its rule of not reviewing a question of federal law decided by a state court, if the State court's decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. It held the Virginia Supreme Court's order to be a sufficiently clear "state law" judgment to foreclose federal review under *Harris v. Reed*,[19] then dismissed Coleman's claim of ineffective assistance of counsel. Since, of course, there is no constitutional right to counsel in post-conviction in a capital case,[20] then it follows that counsel cannot be constitutionally ineffective.

So let me get this straight, O Justices. Coleman filed a habeas, raising seven federal constitutional issues. He raised it in state court, lost, and appealed to the state Supreme Court. His lawyer got the notice of appeal in three days late. So now he'll be executed, without any appellate review of his state or federal constitutional claims?[21] Quoth the brethren, "This case is at an end."[22]

Justice Blackmun, writing for the Gang of Three, goes right to the point:

> One searches the majority's opinion in vain for any mention of Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death....The Court's [ruling] defies both settled understandings and compassionate reason.

So, Coleman's lawyer blows a deadline by three days. Out of respect for the Virginia Supreme Court, Coleman dies. It really is a kinder, gentler America.

SCHAD V. ARIZONA:[23] THREE-CHARGE MONTE

The pressures of deadline, and my apparent unfamiliarity with the English language as practiced by Justice Souter prevent me from engaging in an in-depth analysis of *Schad v. Arizona*. Boiled down to its essentials, the opinion's two holdings amount to:

a) Where the jury was instructed on two theories of first-degree murder—premeditated and felony-murder—due process does not require that they be unanimous as to either theory in order to convict.

b) Although *Beck v. Alabama*[24] precludes a trial court from withholding a lesser-included instruction so as to force the jury to choose between capital murder and acquittal, *Beck* was satisfied in this case because the jury was in-

structed on second-degree (non-capital) murder under the premeditated count. But no lesser was given under the felony-murder count, thus leaving the jury with no "third option" if they decided Schad had been guilty only under the felony/murder theory. There was no mechanism for the jury to accept Schad's defense, that he had stolen the victim's car but not killed him, without acquitting him outright.

In order to reach those results, Justice Souter lays on layer after layer of dense, impenetrable prose, constructing Byzantine analogies before concluding that the case is close enough to go to the government. This is the style that made Souter legendary in New Hampshire. [25] Try this sentence out:

> The use here of due process as a measurement of the sense of appropriate specificity assumes the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require. [26]

There will be a quiz on this in our next issue.

The dissent was written by Justice White, who has been doing more of that lately. Perhaps the Court has passed him by in its headlong rush to execution.

RETRIBUTION REACHES BOBBY FRANCIS

In 1975, Bobby Francis killed a man in Florida who had informed the police as to Francis' drug dealing, and had sexually assaulted and shot at Francis' girlfriend. Francis tortured the victim by tying him up, threatening for two hours to inject him with Drano, and finally shooting him twice. Francis' jury recommended a life sentence, but the trial judge found the crime "heinous, atrocious and cruel," and sentenced him to death. A death warrant was issued in 1987, but stayed while Francis pursued direct and collateral appeals. [27]

In the third week of June, 1991, Francis was four hours from death when the Eleventh Circuit issued an indefinite stay of execution to consider a new petition. On Monday, June 24, the Supreme Court decided *Coleman v. Thompson*. That same day the Eleventh Circuit lifted the stay, and within 24 hours Bobby Francis was dead in Florida's electric chair.

Bobby Marion Francis, 46, was the 27th person in Florida, and 148th in the United States, to be executed since 1976. According to the Associated Press his last words, spoken in Arabic, were "there is no God but Allah, and Mohammed is his prophet."

PAYNE V. TENNESSEE: LET'S GO OUT ON A LIMB HERE

As this is written, the decision in *Payne* has not yet been released. By the time you read this, I fearlessly predict that the Court, by a 6-3 margin, will have overruled *Booth v. Maryland* [28] and *South Carolina v. Gathers* [29] will have passed into history. *Stare decisis, vita brevis.* We'll be back to dealing with victim impact statements. It ain't how you kill, now it's who you kill. Maybe I'll be wrong.

STEVE MIRKIN
Assistant Public Advocate
Capital Trial Unit
Frankfort

FOOTNOTES

[1] *Rust v. Sullivan*, 111 S.Ct. 1759; *Barnes v. Glen Theatre, Inc.*, 49 CrL 2289

[2] *Florida v. Jimeno*, 111 S.Ct. 1801; *California v. Acevedo*, 111 S.Ct. 1982; *Florida v. Bostick*, 49 CrL 2270; California v. Hodari D., 111 S.Ct. 1547.

[3] *McNeil v. Wisconsin*, 49 CrL 2249; *Arizona v. Fulminante*, 111 S.Ct. 1246

[4] *Wilson v. Seiter*, 49 CrL 2264

[5] *McCleskey v. Zant*, 111 S.Ct. 1454; *See* the June 1990 *Advocate*

[6] 111 S.Ct. 1723 (May 20, 1991).

[7] Multiple killings; heinous, atrocious and cruel; utter disregard for human life; intentional killing; and future dangerousness. *Id.* at 1730, n. 15.

[8] 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)

[9] 111 S.Ct. at 1732-33.

[10] KRS 532.025(1)(a); *Francis v. Commonwealth*, Ky., 752 S.W.2d 309 (1988).

[11] *State v. Watson*, 312 S.E.2d 448 (N.C. 1984); *See* also *Smith v. Commonwealth*, Ky., 634 S.W.2d 411 (1982); *Perry County Fiscal Court v. Commonwealth*, Ky., 674 S.W.2d 954 (1984).

[12] 111 S.Ct. 1899 (May 30, 1991).

[13] *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[14] 111 S.Ct. at 1902.

[15] 111 S.Ct. at 1903.

[16] 111 S.Ct. at 1916, Marshall, J., dissenting

[17] 766 S.W.2d 58 (Ky. 1989).

[18] 49 CrL 2279 (6-24-91)

[19] 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

[20] *Murray v. Giarrantano*, 492 U.S. 1, 109 S.Ct.

[21] In its review of this term of Court, an increasingly horrified TIME magazine points out that 40% of federal habeas petitioners in capital cases have obtained relief.

[22] Slip Op., Sec. V-A

[23] 49 CrL 2279 (June 21, 1991)

[24] 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)

[25] For an example, *see State v. Elbert*, 512 A.2d 1114 (N.H. 1986)

[26] 49CrL at 2283.

[27] *Francis v. State*, 529 So.2d 670 (Fla. 1988); *Francis v. Dugger*, 908 F.2d 696 (11th Cir. 1990)

[28] 482 U.S. 496, 107 S.Ct. 1529, 96 L.Ed.2d 440 (1987)

[29] 490 U.S. ____, 109 S.Ct. 2207, 104 L.Ed.2d 8776 (1989)

Mitigation Presented to the Jury that voted Death on the Retrial of Johnny Paul Penry, (Texas)

Written records, two sisters, a brother, three aunts, a next-door neighbor and a former baby sitter provided the jury with a picture of incredible torture.

When Penry was eight months old, his mother returned from a mental hospital and began at least five years of vicious attacks—with fists, fingernails, boards, mop sticks, belt buckles, extension cords, burning cigarettes. A neighbor reported how on summer afternoons she heard Penry at age 2 screaming "terrible, terrible screams," begging his mother to stop. The mother addressed him as "the little bastard," "the little nut," "Blackie Carbon." (Unlike the rest of the family, Penry's hair is coal black and relatives admitted he had been conceived by a man other than the family father.)

When he was four, his mother scalded him in the kitchen sink. He still has the scars. She burned his skin with cigarettes. She kept him locked in a room—often without food—for long periods. When he couldn't get out to the toilet, he defecated on the floor. His mother sometimes made him eat it.

At other times, after he had urinated in the toilet, she dipped some into a cup and made him drink it. Once she tried to drown Penry in the bathtub.

Another time she took a butcher knife and threatened to cut his penis off for wetting his bed.

Relatives claimed they knew Penry had been singled out as a special target, but they were afraid to do anything because they feared the mother, too.

From the newsletter produced by ROBERT PERSKE on mentally retarded citizens in the criminal justice system. Johnny Paul Penry has a full-scale I.Q. of 63. Reprinted by permission.

DISTRICT COURT PRACTICE

The following finding was rendered by Judge Thomas B. Merrill declaring pretrial suspension of driver's licenses of those accused of Operating a Motor Vehivcle Under the Influence of Impairing Substances to be unconstitutuional in the case of COMMONWEALTH OF KENTUCKY v. WANDA RAINS. Donald Armstrong, Attorney General and David Stengel Counsel for Ms. Rains.

This case raises the facial constitutionality of those provisions of KRS 189A (effective July 1, 1991) authorizing a pretrial suspension by the court at arraignment of driving licensing privileges of those charged with operating a motor vehicle under the influence of impairing substances under the following conditions.

1. A refusal to take alcohol or concentration substance test—taking of the test with a reading of .10 or more; those defendants, age 18 - 21; those who are deemed to be repeat offenders.

2. Those who take the current test, and had a prior suspension within a preceding five year period (even if they pass the test).

The Court recognizes the use of a operators license is a privilege, however, once issued, the continued possession, use and reliance on it by the holder in today's society becomes essential in the everyday citizen's life including activities of pursuit of a livelihood, medical emergencies, obtaining necessary provisions for themselves and their dependents. The provisions in the statute authorizing a hardship license is a legislative recognition of its necessity. KRS 189A.400. As such, the license becomes an entitlement cloaked with procedural and substantive due process requirements of the 14th Amendment, U.S. Constitution; Sections 10 and 11, Kentucky Constitution, before state action may terminate its use by the holder except in emergency circumstances, which is not the present situation. *Bell v. Burson*, 402 U.S. 535 (1971); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Holland v. Parker*, D.S.D. 332 F.Supp. 341 (1971).

Fundamental fairness or fair play is an indispensable element of minimal due process requiring notice and a fair opportunity to be heard prior to suspension. It must be a meaningful opportunity, one that affords a reasonable chance to obtain and produce evidence; consult with counsel; cross examine and impeach witnesses including the government's evidence and basically to avoid the taint of arbitrary action. *Sherrill v. Nicholson*, 545 F.Supp. 573; *Bell v. Burson, supra*; *Sloane v. Kentucky, D.O.T.*, 379 F.Supp. 672 (1974); *Parsons, et al. v. Kentucky D.O.T.*(W-D.Ky)-C-75-0184 (1976) establish it is the government's duty to provide this hearing (prior to suspension) and not the defendant's responsibility to demand a post suspension review hearing. The latter cannot supply due process when the license has already been taken because a summary pretrial suspension at arraignment [1] is action that is prejudicial to the defendant thus requires due process be afforded the defendant. *Yates v. Commonwealth*, 386 S.W.2d 450, Kentucky Constitution, Section 11.

The Court perceives constitutional vulnerability in the area of substantive due process because fundamental fairness mandates there be some evidence of probative value to support a court's action, *Thompson v. City of Louisville*, 362 U.S. 199; however, the statutory scheme of suspension requiring the court to act upon "...relevant information...." upon the charge itself, upon records compiled by a separate branch of the government and forwarded to the court without establishing their chain of custody or authenticity; upon conduct for which the defendant has previously been punished and is now being punished again and upon age alone, [2] does not furnish an adequate constitutional evidentiary basis to support the suspension under due process.

Even the prior Administrative Suspension Procedure required a "...sworn report...." from a law enforcement officer-KRS 186.565 and authorized pretrial suspension only after a hearing and proof establishing probable cause. KRS 189A.060.

The Court holds the conditions of issuance, possession and use of a drivers license is exclusively an administrative function of the Executive Branch of government and the constitutional principles of separation of powers prohibits the Judicial Branch from exercising this power. Yet, this is precisely what the statute does by placing the judiciary directly in the activity and process of suspending driving privileges. Kentucky Constitution, Sections 27, 28, 77; *Commonwealth v. Cornelius*, 606 S.W.2d 172.

JUDGMENT

The Court finds the provisions of KRS 189A authorizing a pretrial suspension of the drivers licenses of those accused of operating a motor vehicle under the influence of impairing substances to be fatally flawed constitutionally because it fails to provide procedural or substantive due process protection as required by the Fourteenth Amendment of the U.S. Constitution and Sections 10 and 11 of the Kentucky Constitution, constitute a violation of the separation of powers doctrine and are hereby declared to be unconstitutional. This holding applies to the instance case and all other cases subsequently heard by the Court since July 1, 1991.

This opinion is not to be construed to mean the State may not suspend, pretrial, the drivers licenses of those accused of operating a motor vehicle under the influence of impairing substances, nor as an expression by the Court on the appropriateness of the expressed legislative intent to afford maximum protection to the general public's use of the highways. Quite to the contrary, this Judge as a practicing attorney has represented those whose injuries were caused by the impaired drive and it is indeed a valid objective to address this problem. However, the cure cannot be administered by a suspension of the constitutional principles that have adequately served to insure fair play to the citizen—that is only done in Communist China and Russia.

This is a final and appealable Judgment as to the pretrial drivers license suspension section of KRS 189A *et. seq.* enacted July 1, 1991, and as to those defendants wherein the Court has overruled the Commonwealth's motion for pretrial suspension since July 1, 1991. There is no just reason for delay.

THOMAS B. MERRILL
Judge
Jefferson District Court
Jefferson Hall of Justice
Louisville, Kentucky 40202
(502) 588-4643

[1] RCr 8.02 defines "arraignment" as being a reading of the charge aaaand a plea thereto. *Carson v. Commonwealth*, 382 S.W.2d 85 (1964). Since criminal rules can only be promulgated by the Supreme Court, it is questionable whether the legislature can impose this authority on a trial court *at arraignment*.

[2] To suspend based solely on the adult age of the defendant (18-21) bears no reasonable relationship to the state's interest in safe highways— What is the difference between the impaired driver 18-21 and over 21? How is the 18-21 driver who passes the alcohol concentration test at a zero reading or any reading under .10 a more dangerous or more safe driver than the over 21 driver? This is discrimination based only upon age which violates the equal protection clause of the U.S. and the Kentucky Constitutions.

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.

HEARSAY
***SHERLEY v. SEABOLT*,**
929 F.2d. 272
(6th Cir., 1991)

The Sixth Circuit upheld the District court's granting habeas relief to a Kentucky defendant whose Sixth Amendment right to confrontation had been violated in *Sherley v. Seabold*, 929 F.2d 272 (6th Cir. 1991).

Sherley was tried for the attempted burglary of an 89 year old woman and the robbery - burglary of 82 year old Pauline Lang. Sherley was convicted and PFO'd and received a sentence of 134 years.

Lang had been robbed and beaten, and had to be hospitalized and later placed in a nursing home. She had made statements about the attack to her neighbor, the responding police officers, the emergency room nurse, the investigating detective and her son-in-law. Lang had suffered some memory loss before the attack and her condition worsened afterwards. Her treating physician testified that she had been severely injured and suffered impairment. Lang's family decided she should not testify. Instead, the prosecutor introduced the hearsay testimony of Lang's statements concerning her attack.

Under *Ohio v. Roberts*, 448 U.S. 56 (1980), a two part test must be satisfied before hearsay testimony can be constitutionally admissible. The prosecution must demonstrate the "unavailability" of a witness before admission of hearsay testimony can be considered, and then the testimony must bear some "*indicia* of reliability" to be admitted.

The Sixth Circuit found that Kentucky failed to satisfy either of the required parts. The prosecution did not subpoena Lang or attempt to depose her. It simply deferred to the family's and treating physician's wishes. The Court stated that a demonstration rather than an assumption of "unavailability" is required. Kentucky's argued that Lang's death during the pendency of habeas proceedings cured any constitutional error because she now has become legitimately "unavailable." The Court side-stepped this conundrum by holding that Lang's statements failed to meet the constitutional standard required to demonstrate "reliability." Lang's statements did not offer the requisite "particularized guarantees of trustworthiness." She suffered from memory loss and was not always coherent or reliable even before the attack.

The Court also rejected Kentucky's argument that overwhelming evidence rendered the error harmless. Although Kentucky had circumstantial evidence in the form of hair and fiber samples, a button found at Lang's house that had the same chemical composition as buttons on Sherley's jacket, as well as two jailhouse informants, the sole witness to the attack was Lang herself. The prosecution substituted the hearsay testimony of respectable individuals within the local community in place of the sometimes inconsistent and confused recollections of an 82 year old woman. The Court held that it could not say beyond a reasonable doubt that her uncross-examined hearsay had no effect on the verdict or sentence.

PROPOSED AMENDMENTS TO RULES 1, 14,21, 23, 25, and 28

Pursuant to the provision of 6th Circuit Rule 31, notice is hereby given of the proposed amendment of 6th Circuit Rules 1, 14, 21, 23,25, and 28; and the elimination of Rule 21.

Any interested party may obtain a copy of the full text of the proposed amendments by written request to: Leonard Green, Clerk, 6th Circuit, U.S. Court of Appeals, 538 USPO & Courthouse Building, Cincinnati, OH 45202-3988

Comments on the proposed rule changes shall be made in writing and sent to the clerk of the court at the above address, not later than October 31, 1991.

CONSENT DECREE
***KENDRICK v. BLAND*,**
931 F.2d 421
(6th Cir., 1991)

In *Kendrick v. Bland*, 931 F.2d 421 (6th Cir. 1991), the Sixth Circuit addressed the issue of what type of violations must be alleged under the prison-inmate consent decree in order for the case to be reinstated to the active docket.

The suit arose out of a consent decree entered into by Kentucky and a class of inmates at Kentucky State Reformatory and Kentucky State Penitentiary in 1980. After monitoring the prison conditions for six years the District Court concluded in 1986 that Kentucky was in substantial compliance. It placed the case on its inactive docket and ordered that it would reinstate the case to its active docket only in the event that serious violations of the consent decree occurred.

Subsequently, members of the plaintiff class sought a contempt finding against the defendants for violations of the consent decree in twenty different areas. The District Court held that to reactivate the case the plaintiffs must show there was an institution-wide failure to abide by the consent decree. The District Court found evidence of only isolated instances of misconduct and dismissed the case.

The Sixth Circuit held that the District Court's interpretation of its own order was reasonable and served the purpose of the order by reducing the court's involvement in the case except where the prison system as a whole fails to abide by the consent decree. The Court acknowledged that there will often be individual violations of prison policy, but those do not constitute contempt on the part of the prison system and are better addressed through the prison grievance system or individual civil rights cases.

DONNA BOYCE
Assistant Public Advocate
Frankfort

BARBARA HOLTHAUS APPOINTED TO CHILDREN'S RIGHTS STUDY COMMITTEE

Barbara Holthaus

By letter dated May 13, 1991, Barbara Holthaus was appointed by David L. Yewell, to the KBA Children's Rights Study Committee. The appointment was made at the request of the Chair, Harry Rothgerber of the Louisville District Public Defender's office.

WILLIAM H. FORTUNE TAKING A SABBATICAL FROM UK TO JOIN DPA

The Department of Public Advocacy is extremely fortunate to announce that William H. Fortune, a Professor of Law at the University of Kentucky College of Law and most recently Associate Dean for Academic Affairs, is taking a one year leave of absence to work for the Department.

Paul Isaacs, the State Public Advocate, in making this announcement said: "The Department is very excited to have working for us a lawyer with Bill's experience, both as a litigator and as a teacher. He is a recognized expert in the areas of criminal law, evidence, and professional ethics, all of which he has taught. He has written extensively on these areas, including a book on ethics with Professor Richard Underwood entitled *Trial Ethics* and, with Professor Robert Lawson, was one of the principal authors of the new proposed Evidence Code. He currently serves on the Task Force on Sentencing and Sentencing Practices.

Bill's broad range of experience and commitment to providing legal services to all will be a tremendous asset to the Department. He has been in private practice and has served as a federal public defender in Lexington, Kentucky and Los Angeles, California, up until his appointment as Associate Dean two years ago, he was also a member of the Kentucky Public Advocacy Commission; he was incorporator and the first President of Central Kentucky Legal Services.

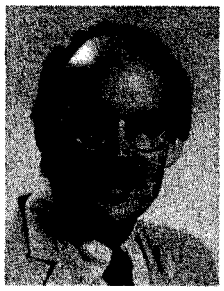
In discussing his plans to come with the Department, Bill stated that he would like as broad of range as experience as possible and was interested in working on cases from the trial level through the appellate process. He believes that by putting himself in the trenches he will have an opportunity "to charge [his] batteries." In order to allow him to get the broad range of experience he desires, Bill will be assigned trials and appellate cases in our full time offices, and assist our private part-time attorneys.

Mr. Isaacs, continued in his announcement: "All of our attorneys are looking forward to working with Bill. In fact, the word has leaked out that Bill will be a part of our staff and I have had Judges contact me and request that we assign him to their area because they are excited about having a lawyer of his caliber in their courts. I hope that Bill is the first of many law professors working with our program. I know that Bill's work with us will be very beneficial to our clients, to our staff and to the courts. I hope it will be a good experience for Bill. I am very grateful to Bill and the University of Kentucky College of Law for making this opportunity possible."

PAUL F. ISAACS

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.

THE PORRIDGE OF TEMPORARY SECURITY

The Fourth Amendment is in a rout. The appointments by Nixon, Reagan, and Bush have total control over the Court. While prosecutors and judges continue to believe that "technalities" based upon search and seizure are freeing murderers left and right in our nation's courts, the facts are far different. The reality is that we are becoming a nation whose constitutional ideals differ significantly from modern reality. We are a people who talk about privacy and freedom but who in reality are willing to give up our birthright of privacy and freedom for the porridge of temporary security. We are a people who are comfortable with ideals for ourselves and a harsh and cynical reality for the underclass, a reality where druggies are locked up without review by a court, where the police can board buses to confront suspicious looking people, where cars can be searched with virtual impunity, where prisoners and probationers belongings can be rifled for no reason . . . Exaggeration? Consider if you will the decisions of the Court recently.

Riverside v. McLaughlin

It has been sixteen years since the Supreme Court held that the warrantless arrest of a person implicated the Fourth Amendment. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court held that when a person is arrested without a warrant, he or she has a right to a probable cause determination prior to being held for any significant length of time. The Court declined to instruct states further about the meaning of *Gerstein*. Some states require probable cause hearings to be held immediately after booking. Other states have such hearings much later. And in Kentucky, one can argue that *Gerstein* has been of little use. Here, pursuant to Rcr 3.02, an officer is required to take a person before a magistrate and to file a post-arrest complaint. Presumably, the magistrate then takes the post-arrest complaint and determines whether there is probable cause to hold the defendant. Further, the judge also makes decisions regarding bail and appointment of counsel.

In the years following *Gerstein*, however, litigation regarding the meaning of the case has proliferated. The Supreme Court eventually granted *certiorari* to explain further the meaning of *Gerstein*. While many pundits have deplored *County of Riverside and Cois Byrd v. McLaughlin*, ___U.S.___, 111 S Ct. 1661, 114 LEd. 2d 49 (1991), the reality for Kentucky may be to extend privacy rights to pretrial detainees beyond RCr 3.02.

McLaughlin went to the Supreme Court as a class action brought pursuant to 42 U.S.C. Section 1983. He and his class challenged a Riverside policy in which pretrial detainees would be brought before the Court for bail, counsel, and probable cause determinations within 48 hours. The 48 hour rule did not include weekends or holidays. Thus some persons arrested late in the week near Thanksgiving, for example, could be held for as much as five days without appearing before a magistrate.

The Court, in an opinion by Justice O'Connor, overturned the opinion of the Ninth Circuit, which had held that 36 hours was the outside limit under *Gerstein*. Not so, said the majority of five. Rather, all *Gerstein* required is that states accord probable cause hearings within a reasonable period of time, not immediately after arrest.

The Court went further and established a virtual black letter rule of 48 hours as the outside limit in which a state has to hold a probable cause hearing for a pretrial detainee. Some litigants given a hearing of 48 hours can still challenge the holding as unreasonable under the circumstances of his or her case. Litigants held past 48 hours without a hearing will have the burden shifted to the state "to demonstrate the existence of a *bona fide* emergency or other extraordinary circumstance." The Court explicitly states that weekends, holidays, or the crush of paperwork will not justify the delay of probable cause hearings past 48 hours.

Justices Marshall, Blackmun, and Stevens joined in a short dissent saying that only an immediate determination of probable cause comported with *Gerstein*.

SCALIA DISSENT: VIOLATION OF A BEDROCK RIGHT

Justice Scalia wrote a more substantive dissent. All defense lawyers should read his passionate and personal opinion. Justice Scalia starts by noting that the right to be taken before a magistrate shortly after arrest is one of those bedrock rights which the *Bill of Rights* was passed to assure. While this right is not one of an "immediate" probable cause determination, it is a right to a prompt hearing which is violated by waiting 48 hours. Justice Scalia notes that the majority of federal courts considering the question, and 29 states have determined that the probable cause determination should occur within 24 hours of arrest. This time limit is consistent with ALI's Model Code.

The most remarkable part of the dissent, however, occurs at the end. There, Justice Scalia affirms the Fourth Amendment that many of us fear is disappearing. He says:

> While in recent years we have invented novel applications of the Fourth Amendment to release the unquestionably guilty, we today repudiate one of its core applications so that the presumptively innocent may be left in jail. Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.

Right on.

COMMENTATORS REACT

Reaction to this decision in the press has been swift. The *Lexington Herald Leader* called it "an invitation for the majority of states and localities to relax rules that require probable cause hearings within 24 hours or less."

Tom Wicker noted that last fall Boston Celtic first round draft choice Dee Brown was confronted at gunpoint by the police because he was in the neighborhood of a robbery and "looked like the perpetrator." This, says Wicker, tells all of us that this right to a probable cause determination is one that is absolutely vital. Indeed, it is those innocent persons who are improperly arrested who will be most effected by this decision. "It won't be criminals who'll suffer, though, because police will be able to show probable cause for the arrest of most real lawbreakers," according to Wicker.

The *Christian Science Monitor* looked at the case from a broader perspective. This case, according to the *Monitor*, "may indicate the tribunal's new direction under the domination of a larger conservative majority."

WHAT KENTUCKY MUST DO

While these observations are perhaps accurate, one wonders how significant the case is in Kentucky? Certainly, we are not one of the 29 states with a 24 hour rule. Thus our citizens will not be held longer as a result of this decision. Indeed, even in our cities there have been few provisions for arraignments to be held during weekends and holidays, other than perhaps a court held during Derby Day in Jefferson County, or a Saturday arraignment. Thus, *McLaughlin* cannot be used to restrict the privacy rights of our citizens.

In fact, it can be argued that the entire criminal justice system in Kentucky needs to make some changes in order to provide that which *Gerstein* implied and *McLaughlin* makes clear. Courts *must* provide a probable cause determination within forty-eight hours. Our courts are simply not doing that at present. Indeed, in some counties first appearance "jail docket" is sometimes done over the phone. People arrested on Friday night are not seeing a court until Monday. If Monday is Christmas Eve Day, often courts are not reviewing probable cause until Wednesday. Thus, our citizens are often being held without a probable cause determination for four and five days.

Courts must address this in order to comply with *McLaughlin*. Prosecutors will have to be available, and on occasion public defenders will also need to start being available during these times.

DEFENSE VIGILANCE NEEDED

Counsel for defendants need to be more aware of *Gerstein* and *McLaughlin*. When anything occurs during the time after which a defendant should have been arraigned, it should be argued that any confessions or evidence obtained is a product of an illegal holding and thus should be suppressed. We need to be more vigilant of this right.

Counsel also need to assert that probable cause is not present on the face of the post-arrest complaint more often. This needs to be brought to the courts' attention, and the remedy requested should be the dismissal of the case.

WHAT ARE COURTS DOING

It should not be assumed by counsel that their courts will make the necessary adjustments to *McLaughlin* without a little adversary prodding. In the days following *McLaughlin*, myself and a law clerk intern from Eastern Kentucky University, Lee Antle, contacted some of the courts in the cities to determine what changes were being made in compliance with *McLaughlin*. In Fayette County, the Court Administrator, Donald Taylor, indicated that "as of right now nothing has come down from the Kentucky Supreme Court...it will be up to the judges." Unfortunately, one district judge in Fayette County has been heard to say that there will be no changes as a result of *McLaughlin*. In Campbell County, Head Clerk Thomas Calme also stated that no changes were contemplated. If someone is picked up on Friday, they will go to court on Monday; if a holiday intervenes, "they will be seen on the next working day if they have not bonded out." Court Administrator Tim Vize in Jefferson County indicated on June 13, 1991 that he had talked to the Chief Judge, and "he is not going to do anything until he sees case law...at this point we are not doing anything in that regard." Thus, counsel can see that our courts, at least initially, are doing nothing to provide the "bedrock constitutional right" established in *Gerstein* and *McLaughlin*.

Finally, courts in our Commonwealth need to take more seriously their roles as guardians of the Fourth Amendment and Section Ten. Often, the probable cause determination is made during a "jail docket," and sometimes even with the defendant being present only on a video monitor. Arraignments are too often *pro forma*. Review of the post-arrest complaint is too often cursory and shallow. We all need to be reminded as Tom Wicker put it so well, that if "you're arrested and thrown into jail for no good reason—and it's happened to plenty of law-abiding Americans—you can be kept for two days and two nights in the same holding tank with drunks, prostitutes, hit men, thieves, drug addicts, drug peddlers and worse, with no official chance to protest your innocence—which the Constitution says you're not supposed to have to prove anyway."

Florida v. Jimeno

Here, the Court had the opportunity to revisit some of its past cases involving

cars, containers, and consent. The police overheard Jimeno arranging a drug transaction over the telephone and decided to follow him. When he committed a minor traffic violation, they stopped him. Jimeno was told that he was being stopped for a traffic violation, but he was also told that he was suspected of dealing in drugs. Jimeno agreed to let the police search his car. The search included a brown paper bag which contained a kilogram of cocaine.

The trial court granted the defendant's motion to suppress, finding that a consent to search a car does not necessarily include a consent to search all containers in the car. The Florida appellate courts agreed with the trial court and certiorari was granted.

In a 7-2 opinion written by Justice Rehnquist, the Court reversed. The Court simply held that the "Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile." The Court found it to be objectively reasonable that the police officer concluded he had consent to search not only the car but also the paper bag found therein.

Interestingly, the Court distinguished this case from *State v. Wells*, 539 So. 2d 464 (Fla. 1989). There, the police had consent to search a trunk of a car, and pried open a locked briefcase found in the trunk. "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag."

Justice Marshall dissented, joined by Justice Stevens. The dissenters disagreed with the assertion that a consent to search a car should include necessarily a search of a paper bag found therein. This disagreement hinged upon the differing expectations of privacy that individuals have in cars as opposed to containers. The dissent particularly condemned the differing treatment the majority would accord to different containers. "[T]his Court has soundly rejected any distinction between 'worthy' containers, like locked briefcases, and 'unworthy' containers, like paper bags."

California v. Acevedo

In 1987, the police in Santa Ana, California obtained information that marijuana would be coming into their city. An officer arranged for the package to be delivered to him, intending on arresting whomever picked up the package. As a result, the police were able to follow the package to a house in the city. Later, one Charles Acevedo went to the house, which was under observation, stayed for ten minutes, and left carrying a brown paper bag the size of one of the wrapped marijuana packages which had been in the original package. He placed the bag in the trunk of his car, and began to leave. He was stopped, and the police took the paper bag out of the trunk, opened it, and found marijuana.

The California Court of Appeals held that the marijuana should have been suppressed under the rule of *United States v. Chadwick*, 433 U.S. 1 (1977). After the California Supreme Court denied review, the United States Supreme Court granted certiorari, and reversed.

Justice Blackmun wrote the opinion, joined by O'Connor, Kennedy, Souter, and Rehnquist. He demonstrated the tortured history followed by the Court this century in automobile search cases, from *Carroll v. United States*, 267 U.S. 132 (1925), through *Chambers v. Maroney*, 399 U.S. 42 (1970), and ending in the dichotomy developed in *United States v. Ross*, 456 U.S. 798 (1982) and *United States v. Chadwick, supra.*

United States v. Chadwick had held that a foot locker placed into the trunk of a car could not be searched without a warrant despite probable cause to believe that the foot locker contained marijuana.

United States v. Ross, on the other hand, had held that the warrantless search of a car occurring with probable cause to believe the car contained contraband could include any packages that could contain the contraband.

Chadwick was extended somewhat by *Arkansas v. Sanders*, 442 U.S. 753 (1979). In *Sanders*, the Court held that a suitcase being transported in the trunk of a car could not be searched without a warrant despite probable cause to believe that the trunk had marijuana in it.

The majority believed that the contradictions between *Ross* on the one hand and *Chadwick* on the other served no purpose. The Court decided to abandon *Chadwick*, and reaffirm and extend the bright line of *Ross*. Henceforth, where there is probable cause to believe that contraband is in a car, whether it is in a container in the trunk, or in the passenger floorboard, the police may search the car without a warrant.

The Court took pains to state what it was not deciding. *Carroll* and *Ross* are not being broadened to allow for searches beyond what is covered by probable cause. Quoting from *Ross*, the Court reaffirms that "'Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.'"

Justice Scalia concurred in the majority opinion. However, he would go much further than that majority. The majority paid homage to the cardinal Fourth Amendment rule, which is that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"Justice Scalia, however, is now willing to abandon that shibboleth. In his view, there has traditionally been a pull in Fourth Amendment jurisprudence between those who require a warrant prior to any search, and those who view the Fourth Amendment as requiring only reasonableness. In his view, "the path out of this confusion should be sought by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded."

Justice Stevens dissented, joined by Justice Marshall. Justice White also dissented, agreeing "with most" of the dissent of Justice Stevens. The dissenters reaffirmed the importance of the warrant requirement, in contradistinction to the opinion of Justice Scalia. *Chadwick* and *Sanders* were both viewed as cases reaffirming the warrant requirement, and thus as cases that should have controlled the decision in this case. And the abandonment of this warrant requirement in container cases was harshly condemned. It "is anomalous to prohibit a search of a briefcase while the owner is carrying it exposed on a public street yet to permit a search once the owner has placed the briefcase in the locked trunk of his car." Finally, the dissent accuses the Court of becoming too receptive to the arguments of law enforcement. "[D]ecisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime."

Acevedo is a significant decision. It is a not unexpected one, however. The Court has for a decade been attempting to clear up the scope of the car search. The Court has been trying to find a clear, bright line rule that would cover all situations. Now, it may have closed the last loophole. A car may be searched if there is probable cause to believe that contraband is in it, under *Carroll* and *Ross*. A container in that car may be searched under *Acevedo* if there is probable cause to believe either the car or the container contains contraband. *New York v. Belton*,

453 U.S. 454 (1981), of course, allows for the search of car, and any containers found therein, incident to a lawful arrest. And cars may be searched as part of an inventory conducted pursuant to written guidelines. The decade long effort, at least in Fourth Amendment jurisprudence, to put the car virtually outside the warrant requirement, is at an end. Counsel in Kentucky should be aware increasingly of the need to cite Section Ten in any car cases in which they are involved.

Burns v. Reed

This is a 42 U.S.C. Section 1983 case filed by one Cathy Burns against an Indiana prosecutor for his role in her arrest and the proceedings following her arrest. Burns' two sons had been shot one evening, and Burns had called the police to report that fact. She soon became a prime suspect, however. While under hypnosis, she used the name "Katie" in describing the assailant of her sons, and also referred to herself by the same name. The police concluded that she had a multiple personality and was the killer. They consulted the prosecutor, Reed, and asked him whether they had probable cause. Upon his assurance that they "probably" did, they arrested Burns. The next day, at a probable cause hearing, Reed elicited from the police that Burns had "confessed" to shooting her sons, without revealing that this "confession" had been obtained under hypnosis. Later, her statements were suppressed, and all charges were dismissed.

Burns then sued Reed and the police. The District Court found that the prosecutor Reed was absolutely immune, as did the Seventh Circuit.

In a decision by Justice White, joined by Rehnquist, Stevens, O'Connor, Kennedy, and Souter, the Court affirmed in part and reversed in part. First, the Court held that the prosecutor was absolutely immune when he appeared as the lawyer for the state at the probable cause hearing. This holding was based upon the common law, and upon policy concerns which had been earlier explained in *Imbler v. Pachtman*, 424 U.S. 409 (1976).

The Court diverged from the courts below in its holding on the question of the prosecutor's advice given to the police. The Court decided that qualified immunity on the issue of prosecutorial advice would suffice. "Although the absence of absolute immunity for the act of giving legal advice may cause prosecutors to consider their advice more carefully, '"[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate."'" Henceforth prosecutors will be extended only qualified immunity when they give legal advice to the police.

Justice Scalia was joined by Justice Blackmun and in part by Justice Marshall in concurring in part and dissenting in part. They would also have reached the issue of the nature of the prosecutor's immunity in initiating the search warrant proceeding. He further would have found that a prosecutor has no absolute immunity in seeking a search warrant. "I think it entirely plain that, in 1871 when Section 1983 was enacted, there was no absolute immunity for procuring a search warrant."

Florida v. Bostick

Perhaps it is best to review this case by first looking at the press reaction. The headline on the editorial in the June 22, 1991 *Herald Leader* read "Lost Liberty: High court is turning America into a police state." Pretty strong language. The editorial itself minced no words. The latest decision of the Court is among a "series of rulings that tip the balance between effective law enforcement and an individual's right to be secure from unreasonable searches and seizures. This particular set of justices weighs in on the side of the police." The author went on to characterize the past few years of Court Fourth Amendment decisions. "Thanks to the court, police can stop and question travelers in airports, even if the travelers have done nothing to arouse suspicion. They can stop motorists if they fit a drug courier profile. Now, they can peek inside baggage on buses without probable cause. And that's just the police. Once prosecutors get into the act, the court has said it's OK to use illegally obtained evidence and coerced confessions to win convictions. Look around; you'll see a police state in the making."

The object of the editorial's outrage is the Supreme Court's decision in *Florida v. Bostick*. There the Court was considering the arrest and conviction of Terrance Bostick on cocaine charges. He had been arrested after the police boarded a bus in Broward County, Florida. Two armed officers picked out Bostick seated at the rear of the bus, asked him for identification, and further asked to search his luggage. It is disputed whether Bostick consented to this search or not, but the Court accepted the Florida Supreme Court's decision that he did. Cocaine was found in his luggage, and he was convicted. His conviction was reversed by the Florida Supreme Court, however, which held that the search was illegal because a reasonable passenger on a bus would never feel free to leave under similar circumstances, and because the police had no articulable suspicion that Terrance Bostick had engaged in criminal activity. *Bostick v. State*, 554 So. 2d. 1153 (Fla. 1989).

The United States Supreme Court granted *certiorari* to consider the question of "whether a police encounter on a bus...necessarily constitutes a 'seizure' within the meaning of the Fourth Amendment." In a 6-3 decision written by Justice O'Connor, the Court held that such an encounter does not necessarily mean that an individual has been seized.

The Court begins its analysis by reiterating that police encounters with individuals on the streets, airports, *etc.* do not necessarily implicate the Fourth Amendment. Such encounters are "consensual and no reasonable suspicion is required" so long as a reasonable person would feel free "'to disregard the police and go about his business,' *California v. Hodari D.*, 499 U.S.___(1991)."

Next, the Court rejected the Florida Supreme Court's view that a police encounter in a bus is different from other such encounters. The Court acknowledged that a person seated in a crowded bus would not "feel free to leave" a moving bus. That is legally irrelevant to the Court, however, which states that the feeling comes from being on the bus and would occur irrespective of police conduct. Utilizing the case of *INS v. Delgado*, 466 U.S. 210 (1984), which involved the immigration service talking to workers in factories, the Court defines the test as "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"

While the Court therefore rejected the Florida Supreme Court's finding that bus encounters between the police and riders are *per se* unconstitutional, the Court further declined to engage in fact finding on its own. Rather, the Court remanded to the Florida Supreme Court for a finding on whether a seizure of Bostick had occurred and whether Bostick "chose to permit the search of his luggage." The Court ended with its holding: "in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus."

Justice Marshall, Blackmun, and Stevens dissented. Their condemnation of the majority opinion is based upon the majority's reasoning and policy concerns. The dissent agrees that the proper test for determining whether suspicionless bus sweeps are constitutional is that of the "reasonable passenger" and whether passengers would under the circumstances "feel free to decline the officers' requests or otherwise terminate the encounter." The dissent, however, cannot fathom that the majority could answer that question in the affirmative. The dissent focuses on the fact that two officers boarded the bus dressed in "bright green 'raid' jackets," that they were visibly armed, that they blocked the narrow aisle when they questioned Bostick, and that they did not advise him that he was free to break off the interview with them. Under these circumstances, the dissent would hold that a reasonable passenger would not have felt free to break off the encounter with the police prior to their even asking him to consent to a search of the luggage. "[T]he Fourth Amendment clearly condemns the suspicionless, dragnet-style sweep of intrastate or interstate buses."

The passion in the dissent comes when discussing what the majority opinion says about us as people. Justice Marshall attributes the majority opinion to the "war on drugs," pointing out that whether something is an effective law enforcement technique is irrelevant to the Fourth Amendment. "The general warrant, for example, was certainly an effective means of law enforcement." However, the Fourth Amendment was written "to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion *notwithstanding* the effectiveness of this method." A bus sweep, which is equally suspicionless, "bears all of the *indicia* of coercion and unjustified intrusion associated with the general warrant."

The dissenters quote with approval the Florida Supreme Court's opinion in *State v. Kerwick*, 512 So. 2d. 347 (Fla. App. 1987): "The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers...is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa." They further quote the following from the D.C. District Court: "It seems rather incongruous at this point in the world's history that we find totalitarian states becoming more like our free society while we in this nation are taking on their former trappings of suppressed liberties and freedoms."

The news is not good. As the dissenters age into their late seventies and eighties or as they retire as did Justice Marshall, it is unlikely to change anytime soon. What is left for us is to acquaint ourselves with Section Ten, and at a minimum begin to assert that the precious privacy rights of Kentuckians cannot be touched by the high court in Washington.

Raglin v. Commonwealth

Police in Lexington received an anonymous tip that a black male in a white Corvette had been "observed snorting cocaine at a certain hotel parking lot" around a brown Oldsmobile. The police checked and obtained the names of the owners of the two cars. Raglin himself was "known to the police in the context of prior incidents involving cocaine." Rather than obtain a warrant, the police went to the address and saw the Oldsmobile. Later, when the Corvette drove into the parking lot, the defendant got out of the car and went up to the Oldsmobile. The police approached the defendant. They also took a police dog to the Corvette, who alerted at the car. The Corvette was searched and cocaine was found. The trial court declined the defendant's motion to suppress.

In a 6-1 opinion of the Court, the Kentucky Supreme Court affirmed the propriety of the warrantless search. *Raglin v. Commonwealth*, Ky., __ S. W. 2d __ (May 9, 1991). The Court held that the initial investigatory stop was proper under *Alabama v. White*, 496 U.S.___, 110 S.Ct. 2412, 110 Ed. 2d 301(1990). This occurred because the anonymous tip had been corroborated by what the officers had found at the scene. Probable cause occurred only when the dog alerted at the Corvette; thus, the warrantless search of the car which followed was legal as a probable cause car search pursuant to *Estep v. Commonwealth*, Ky., 663 S.W.2d 213(1983).

Justice Combs wrote a passionate dissent. He first found that nothing was corroborated by the police of any import, and thus would find that the initial stopping was a privacy violation. Justice Combs further distinguished *Alabama v. White* by saying that White was a Fourth Amendment case, while Section Ten provides more protection than the Fourth Amendment. Justice Combs further stated that the dog alerting did not provide probable cause for a complete car search. Significantly, Justice Combs would require a warrant in all automobile cases, irrespective of probable cause. "To hold that a search may proceed without a warrant 'given probable cause' is to avoid the warrant process, and to eviscerate the warrant clause." He concludes with these words: "By our holding today we take one more step toward an Orwellian society wherein no citizen is secure in her/his person or possessions, and the right to privacy and freedom from unreasonable searches are but haunting bygones." No one can say it better.

Jeffers v. Heavrin, Jefferson County, Kentucky, 932 F.2d 1160 (6th Cir., 1991)

In 1983, Tony Jeffers went to the Derby with some friends. He intended to be in the infield and took with him some food, blankets, *etc.*, to make his day more enjoyable. Upon entry to Churchill Downs, he was confronted by Officer Heavrin of the Jefferson County Police Department. She searched Jeffers' things pursuant to a sign warning everyone that by entering that subjected themselves to a search. She found a Pringles can, looked into it finding a pill bottle and an unattached label. Jeffers stated that the bottle contained his allergy medicine. Heavrin went back and asked other officers what the pills were, and they told her they were "probably valium." Heavrin arrested Jeffers, and charged him with "pills in improper container."

Officer Heavrin did not show up for the first two court appearances, to which Jeffers drove from Ft. Wayne, Indiana. Once, Heavrin did not show because the lab report on the pills was incomplete. She later found the pills were allergy pills, but told no one. Subsequently, she did not show in court due to a doctor's appointment. Ultimately, the case was dismissed against Jeffers. He filed suit under Section 1983 against Heavrin, Jefferson County, and Churchill Downs. The district court found for the defendants, but this decision was reversed by the Sixth Circuit.

The Court held that the gate search by Heavrin was consensual. However, the Court further found that there was no probable cause to arrest Jeffers. The Court suggested, however, that upon remand the officer might have qualified immunity. The Court further dismissed the case against Churchill Downs.

The panel split significantly. Judge Guy wrote the opinion, and was joined by Judge Boggs on all but the probable cause issue. Judge Boggs disagreed with the majority, stating that there was probable cause to believe that Jeffers had pills in an improper container based upon Heavrin's testimony. On the other hand, Judge Edwards dissented based upon his believe that the initial search by Heavrin was beyond the scope of the proper search. The police should not be allowed to search containers when they are merely looking for items that are inappropriate

in public places. Nor could Jeffers have consented to the police going beyond the limits of a proper search.

***Hall v. Shipley*, 932 F.2d 1147 (6th Cir., 1991)**

The Sixth Circuit decided another 1983 case on May 8, 1991. Here, the police had received information that Hall was selling marijuana from his apartment. A warrant was secured. Three officers went to the apartment on a January night, knocked on the door, and ultimately broke into the apartment. Whether they announced their presence, and how long they waited outside was in dispute. Hall and a girlfriend were inside having sex. Once inside, the officers required Hall to remain naked while a search was conducted. It was alleged the officers tried to get Hall to put on a dress, and berated his nudity. Ultimately, a small amount of marijuana and paraphernalia were found, but not the large amount of marijuana expected. Due to the quantity, the case was dismissed. Hall filed suit in federal court, alleging a violation of his privacy rights. The district judge denied the defendant officers' motion for summary judgments on grounds of qualified immunity, and they appealed.

The Sixth Circuit, in a decision by Judge Jones, held that the officers did have a right to qualified immunity. The Court found that an objectively reasonable officer "confronted with these circumstances could have believed that an unannounced, forced entry was necessary and consistent with Hall's fourth amendment rights. The right asserted by Hall was not so clearly established in this circuit as to defeat the officers' claim of qualified immunity. Thus, the officers could claim qualified immunity on Hall's claim that they violated his rights when they broke into his apartment in the night pursuant to a warrant.

The officers did not fare as well in regards to Hall's second claim. Hall had also sued based upon his being required to stand nude while the warrant was being executed. A "reasonable officer in appellant officers' position would have known that requiring an individual to sit naked while exposed to the cold January air would violate such individuals 'clearly established' rights," and thus the summary judgment motion on this second ground was properly denied.

THE SHORT VIEW

1. ***Ford v. Dowd***, 931 F.2d 1286 (8th Cir. 1991). The Eighth Circuit has decided that a police officer may not be required to submit to a random drug screen based merely upon an unsubstantiated rumor that he had been associating with a drug dealer. Where uniform or systematically random testing is not done, the Fourth Amendment requires at a minimum reasonable suspicion.

2. ***Jones v. Murray***, 763 F.Supp. 842 (D.C. W.D. Va., 1991). Speaking of Orwellian, this federal district court has approved of a Virginia statute requiring all newly convicted felons to provide blood for the purpose of establishing a DNA data bank. The Court justifies this upon the "special needs" of the law enforcement community.

3. ***Marriott v. Smith***, 931 F.2d 517 (8th Cir. 5.1/91). While visitors of inmates may be searched prior to visiting the inmate, a search after the visit violates the privacy rights of the visitor, according to the Eighth Circuit. The search of a visitor prior to the visit involves the clear need to keep the prison drug free, a fact not apparent in a post-visit case.

4. ***Owens v. State***, 589 A.2d 59, 322 Md 616 (Md. Ct. App. 1991). One Owens came to an apartment with other men and left a piece of luggage there, saying he was going to look for a place to stay. The police showed up, saying they believed there were drugs in the luggage. The person living in the apartment gave consent to search the apartment. A search of the defendant's luggage revealed crack cocaine. This search, however, was illegal, according to the Maryland Court of Appeals. While the consent to search the apartment was valid, the defendant maintained an expectation of privacy in the luggage which was not reduced by the consent to search.

5. ***State v. Williams***, Texas Ct. App., 13th Dist., 49 CrL 1147, 1991 WL 114029 (4/11/91). Reasonable suspicion dissipates unless acted upon immediately. Here, a tip came to the police that the defendant was selling drugs from his truck. Surveillance one day revealed nothing. The next day the police approached the defendant and a confrontation ensued. The Court held that while there was reasonable suspicion the first day, it had dissipated by the second day, and the *Terry* stop had been improper.

6. ***State v. Dickerson***, 469 N.W.2d 462 (Minn. Ct. App., 1991). The Minnesota Courts of Appeals has rejected the "plain feel" exception to the warrant requirement. A frisk of an individual can proceed into a full blown search only where there is probable cause, or where the officer feels a weapon during the frisk. Feeling what is believed to be drugs does not allow the officer to thereupon reach into the clothing and seize the item as to do so would be to improperly extend the rationale of a *Terry* frisk.

7. ***Galberth v. United States***, 590 A.2d 990, 59 U.S.L.W. 2715 (D.C. Ct. App, 1991). First, the defendant's first name is not Gatewood. Secondly, the D.C. Court of Appeals has decided that a roadblock checkpoint for the purpose of discovering drugs is unconstitutional. Roadblocks for the purpose of law enforcement, as opposed to deterring drunk driving, are not within the meaning of the *Sitz* case.

8. ***Brown v. United States***, 590 A.2d 1008, 59 U.S.L.W. 2758 (DC Ct. App., 1991). This case demonstrates that *Aguilar/Spinelli* still lives. An anonymous informant called the police and told them that a black man, 5'6", wearing a shirt with writing and blue jeans was selling drugs from a particular street corner. However, when the officer arrived, there were fifty people there, including Brown, who was 5'8", black, wearing a shirt and shorts. When the officer tried to talk to Brown, he began to walk away. The officer then detained Brown, and seized a film canister from his person, discovering PCP and marijuana. The DC Court of Appeals reversed the trial court's order overruling the motion to suppress. The factors under *Aguilar/Spinelli*, basis of knowledge and reliability of the informant were an important part of the Court's decision that there was not an articulable suspicion at the time of Brown's seizure. Further, nothing at the scene corroborated the tip by the informant.

9. ***State v. Shepherd***, 798 S.W. 2d 45 (Ark. 1990). The prosecutor issued a subpoena of the defendant's property so the police could look around to see whether there was evidence there of a drug lab. During the execution of the subpoena, the police saw evidence through the open garage door. Rejecting the state's "plain view" argument, the Arkansas Supreme Court held that the police were where they had no right to be, that the subpoena was illegal, and the evidence had been suppressed properly.

ERNIE LEWIS
Assistant Public Advocate
Director DPA
Clark/Jackson/Madison County Office
201 Water Street
Richmond, KY
(606) 623-8413

JUVENILE LAW

Barbara Hotthaus

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.

JUVENILE LAW'S GREATEST HITS

The Jefferson County Public Defender's office has a separate Juvenile Division dedicated exclusively to the representation of children before the juvenile court. The Court employs seven full-time attorneys who receive specialized training in juvenile law. This reading list was prepared as part of their training program. Compiled by Pete Schuler, Chief, Juvenile Division, Jefferson County Public Defender's Office.

PUBLIC DEFENDER READING LIST FOR ATTORNEYS ASSIGNED TO THE JUVENILE DIVISION AS OF JUNE 1991

1. *In re Gault*, 87 S.Ct. 1428 (1967).

2. *Kent v. United States*, 86 S.Ct. 1045 (1966).

3. *In re Winship*, 90 S.Ct. 1068 (1970).

4. *Breed v. Jones*, 95 S.Ct. 1779 (1975).

5. *Santosky v. Kramer*, 102 S.Ct. 1388 (1982).

6. *Schall v. Martin*, 104 S.Ct. 2403 (1984).

7. *McKeiver v. Pennsylvania*, 91 S.Ct. 1976 (1971).

8. *Stanley v. Illinois*, 92 S.Ct. 1208 (1972).

9. *Wisconsin v. Yoder*, 92 S.Ct. 1526 (1972).

10. *Davis v. Alaska*, 94 S.Ct. 1105 (1974).

11. *Ingraham v. Wright*, 97 S.Ct. 1401 (1977).

12. *Parham v. J.R.*, 99 S.Ct. 2493 (1979).

13. *New Jersey v. T.L.O.*, 105 S.Ct. 733 (1985).

14. *Eddings v. Oklahoma*, 102 S.Ct. 869 (1982).

15. *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988).

16. *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989).

17. *F.T.P. v. Courier-Journal*, 774 S.W.2d 444 (1989).

18. *Commonwealth v. Gordon*, 621 S.W.2d 27 (1981).

19. *Lee v. Porter*, 598 S.W.2d 465 (1980).

20. *Commonwealth v. Partin*, 702 S.W.2d 51 (1986).

21. *Wilson v. West*, 709 S.W.2d 468 (1986).

22. *Watson v. Commonwealth*, 57 S.W.2d 39 (1933).

23. *Elmore v. Commonwealth*, 138 S.W.2d 956 (1940).

24. *Thomas v. Commonwealth*, 189 S.W.2d 686 (1945).

25. *Spurlock v. Commonwealth*, 223 S.W.2d 910 (1940).

26. *C.E.H. v. Commonwealth*, 619 S.W.2d 725 (1981).

27. *Buchanan v. Commonwealth*, 652 S.W.2d 87 (1983).

28. *Davidson v. Commonwealth*, 613 S.W.2d 431 (1981).

29. *Crick v. Smith*, 650 F.2d 860 (1981).

30. *Johnson v. Bishop*, 587 S.W.2d 284 (1979).

31. *Benge v. Commonwealth*, 346 S.W.2d 311 (1961).

33. *Elmore v. Commonwealth*, 138 S.W.2d 956 (1990).

34. *Young v. Knight*, 329 S.W.2d 195 (1960), 77 A.L.R.2d 994.

35. *Heustis v. Sanders*, 320 S.W.2d 602 (1959).

36. *Childers v. Commonwealth*, 239 S.W.2d 255 (1951).

37. *Stanford v. Commonwealth*, 734 S.W.2d 781 (1987).

38. *Jeff. Co. Dept. for Human Services v. Carter*, 795 S.W.2d 59 (1990).

39. *Dennison v. Commonwealth*, 767 S.W.2d 327 (1988).

40. Kentucky Juvenile Code - all chapters.

41. Domestic Violence statutes and child support enforcement laws and procedures.

42. District Judge's Juvenile Benchbook.

43. Judicial Review of Children in Placement Benchbook.

44. Reasonable Efforts Protocol.

45. CHR's Social Services Policy Manual, particularly in regard to probation services, foster care placement, formation of case plans, administrative reviews and case review timelines. Also working knowledge of drug and alcohol services.

46. CHR regulations and policies pertaining to residential placement, treatment plans, and administrative revocation proceedings.

47. A basic working knowledge of social service institutions that provide both hard and soft services for families in crisis including but not limited to existing programs for intervention in family violence, mental health counseling centers and private agencies which provide services for abused, neglected or dependent children, and status offenders.

48. Basic working knowledge of private child care institutions utilized by CHR for placement of children who are dependent, neglected or abused or status offenders.

49. Materials pertaining to all current CHR residential facilities and juvenile mental health facilities.

50. Materials pertaining to the DHS restitution program.

51. *Juvenile Justice and Delinquency Prevention Act* ("Bayh Act"), 42 U.S.C., Sec. 5633 (1983).

52. *James v. Wilkinson*, (currently pending in U.S. District Court, Western District of Kentucky, before Judge Simpson - obtain materials from Pete Schuler).

53. *Kentucky Association for Retarded Citizens v. Conn.*, 510 F. Supp. 1233 (1980).

54. *Transfer of Jurisdiction in Juvenile Court*, 62 *Ky. Law Journal*, 122 (1973).

55. *A.B.A. Standards Relating to Interim Placement.*

56. *A.B.A. Standards Pertaining to Transfer Between Courts.*

57. *Competency to Stand Trial Among Adolescents* by Jeffrey C. Savitsky and Deborah Karras, *Adolescence*, Vol. XIX No. 74, Summer 1984, Libra Publishers, Inc., 391 Willets Rd., Roslyn Hts., N.Y. 11577.

58. *Juveniles' Capacities to Waive Miranda Rights: an Empirical Analysis* by Thomas Grisso, *California Law Review*, Vol. 60 No. 6, Dec. 1980.

59. *Competency to Stand Trial in Juvenile Court* by Thomas Grisso *International Journal of Law and Psychiatry*, Vol. 10, 1-20, 1987.

60. *The Role of Legal Counsel in Juveniles' Understanding of Their Rights* by Richard A. Lawrence, *Juvenile and Family Court Journal*, Winter 1983 - 1984.

61. *Psychosocial Concepts in Juvenile Law* by Thomas Grisso, *Law and Human Behavior*, Vol. 12 No. 4, 1988.

62. *Improving Practice to Avoid Unnecessary Placements* by Gary T. Wienerman (Calif. Continuing Education of the Bar 1981).

63. *Competency of Child Witnesses* by Ross Eatman, Monograph, February, 1987. Published by National Center for the Prosecution of Child Abuse.

64. *Child Abuse and Neglect* by Robert W. ten Bensel, Lindsay G. Arthur, Larry Brown, Jules Riley, *Juvenile and Family Court Journal*, Winter 1984.

65. *Child Psychiatry and the Law, Residual Parental Rights, Legal Trends and Clinical Evaluation* by Pamela Langelier, Ph.D., Barry Nurcombe, M.D., 1985.

66. *Significant Interventions: Coordinated Strategies to Deter Family Violence* by Meredith Hoford, Project Director, Family Violence Project, National Council of Juvenile and Family Court Judges; Richard Gable, Director of Applied Research, National Center for Juvenile Justice 1984.

67. *Observation of Spouse Abuse: What Happens to the Children?* by Laine v. Davis and Bonnie E. Carlson, *Journal of Interpersonal Violence*, Vol. 2 No. 3, September 1987.

68. *The Child Witness to Family Violence: Clinical and Legal Considerations* by Gail S. Goodman and Mindy S. Rosenberg, *Domestic Violence on Trial: Psychological and Legal Dimension of Family Violence*, New York: Springer Publishing Co. 1987.

69. *The Identification of Family Dysfunction*, Baxter, A., *Techniques for Dealing with Family Violence*, Springfield: Charles C. Thomas, Publisher, 1987.

70. *Making History: Social Workers Guide to Life Books.*

71. Goldstein, J. Freud, A., and Solnit, A., *Beyond the Best Interests of the Child* (The Free Press, New York, 1973).

72. Goldstein, J. Freud, A., and Solnit, A., *Before the Best Interests of the Child* (The Free Press, New York, 1979).

73. Guggenheim, M., and Sussman, A., *The Rights of Young People* (Bantam, New York, 1985).

74. Hardin, M., ed., *Foster Children in the Courts* (Butterworth, Boston, 1983).

75. Harris, Anne, ed., *California Juvenile Court Practice Dependent Minors and Status Offenders.* Vol. 2 (CEB, Berkeley, 1981 and supplements).

76. Horowitz, R., and Davidson, H., *Legal Rights of Children* (Shepard's/McGrawhill, Colorado Springs, 1984).

77. Mnookin, R., *Child, Family and State: Problems and Materials on Children and the Law* (Little, Brown and Company, Boston, 1978).

78. Soler, M., *et al., Representing the Child Client* (Matthew Bender, New York, 1988).

79. Youth Law Center, "Legal Rights of Children in the United States of America," *Columbia Human Rights Law Review*, Vol. 13, No. 2, Fall-Winter, 1981-82.

F.Y.I.

Procedures, Practice, & Issues of Interest

Michael L. Williams

CAPITAL CLIENTS DESERVE BETTER THAN LAWYERS WHO PASS THE BAR AND THE MIRROR TEST

For those of you who have handled death penalty cases, it will be interesting for you to know that there is no shortage of lawyers to do death penalty cases and that death penalty cases do not require any additional time or effort.

Such is the opinion expressed by McCracken Circuit Court Judge Graves, and the prosecutor, Tom Osborne, during proceedings which eventually found Paul Isaacs in contempt. DPA, and, therefore Paul Isaacs, was to have found attorneys willing to take three death penalty cases for trial dates within 2 months. The Court and prosecutor couldn't seem to understand why some of DPA's "bright, eager young lawyers" couldn't just be assigned these cases. After all, why do you need felony experience to represent a person merely on trial for his life? Wouldn't doing such a case be just a great way to be initiated into the field of criminal jury practice?

Not taking anything away from new lawyers, we were all new once, but imagine a world where in a large civil plaintiff's action, the civil firms, hired by insurance carriers, would send someone to handle the case through trial who was inexperienced, and on short notice!!! Of course no law firm would put a new, inexperienced lawyer into the courtroom in major litigation when the new attorney had not been trained for the job, not had the requisite experience, or had inadequate time to prepare. After all, there is a lot of money at stake in a personal injury action. In certain circuits, however, DPA is expected to do *just that* when a person's life is at stake. Is there something wrong with this picture?

It should anger all of us that a human life, regardless of what that life is alleged to have done, is held in such little regard that a court would suggest using a man on trial for his life as a "training exercise" for a new lawyer.

The *Courier Journal* said in a Nov. 18, 1990 editorial that "It's unthinkable that any justice would accept such an attorney. But if the shoe is on another fellow's foot, the script changes." Please see the February, 1991 issue of the *Advocate*, page 35, for a reprint of that editorial and a discussion of the quality of representation and of the need for standards in capital cases.

THE POLICE CAN CONTACT YOUR CLIENT
MCNEIL v. WISCONSIN
____U.S.____, 111 S.Ct. 2204 (1991)

Attorneys now have a reason to be even more guarded against police contacts with their clients, even after counsel has been appointed on the record. On June 13, 1991, the U.S. Supreme Court decided *McNeil v. Wisconsin*, ___ U.S. ___, 111 S.Ct. 2204 (1991). Although McNeil was appointed counsel at his first court appearance, this was for an armed robbery charge only. The police, without counsel present, then interviewed him about an unrelated murder charge for which he was later convicted and this appeal followed. The Court distinguished between purely 6th Amendment rights to counsel and the "different right to counsel found not in the text of the Sixth Amendment," but in "[the Supreme Court's] jurisprudence relating to the Fifth Amendment's guarantees that no person shall be compelled in any criminal proceeding to be a witness against himself." *Id.*, at 2208.

The Court held that the 6th Amendment right to counsel is "offense specific," and while the police may not necessarily discuss the "current offense" with a client after counsel has been appointed, they are free to investigate "other offenses" for which he might be a suspect.

The Court held, however, that a suspect's 5th Amendment right applied to any and all offenses because the client, by invoking this right, indicates his desire *not* to speak with police *about any offense* unless counsel is present. Citing *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093. 100 L.Ed. 2d 704 (1988); *McNeil, supra.*, at 2208. In doing this, the Court reaffirmed its earlier positions found in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *Minnick v. Mississippi*, 498 U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), *Michigan v. Harvey*, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) and *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

Not that police officers would ever do such a thing, but consider this scenario: your client might be a suspect in a murder charge or other serious offense, and the police are somehow able to have him arrested on some charge, however minor, thus getting him into jail. Once in custody, and in spite of your appearance with him at an arraignment, he is then, under *McNeil*, available for the police to approach in jail, and he is vulnerable to jailhouse snitches, *etc.* So, what can defense lawyers do about it?

A suggestion would be to routinely file a motion and tender an order *immediately* upon assignment to the case that the Court order *no police contact* whatsoever with your client for any purpose, and that this order should include "agents of the police," prosecutor, and the like. *Illinois v. Perkins*, 110 S.Ct. 2394 (1990); *Commonwealth v. Vanover*, Ky., 689 S.W.2d 11 (1985)(a strong dissent by J. Liebson)

Another suggestion: I recently watched a hearing where a defense attorney subpoenaed the chief investigating officer in court for the sole purpose of asking him whether he had interviewed anyone in the jail with the client, and he intended to sniff out possible snitches in the future.

The ultimate legal effect of such a motion may be unknown now, but *McNeil* and the other cases cited above tells us the consequences of doing absolutely nothing.

CHEAP HELP REQUIRED: DEATH PENALTY LAWYERS WANTED

Contrary to what McCracken County may believe about availability of death penalty lawyers, we do have a "crisis" relative to finding people willing to do death penalty work. Although some prosecutors and judges would prefer that we are unprepared and less than diligent about advocating for our clients, we still have a duty to do so. If there is anyone reading this column who would be interested in undertaking a death penalty case, please let me know. We currently have a situation in Harlan County in which a contract for the administration of indigent representation was executed by the local bar association as administrator of the plan, but when a death penalty case arose, the entire bar association decided there was a conflict of interest among all of them. This conflict had not been documented. The local public defender and the client got into a dispute, and the judge allowed the local public defender out of the case.

DPA advocated that the fiscal court (also an executing party to the plan) and the Harlan County Bar Association develop some arrangements for the representation of this client, pursuant to its contract with the Public Advocate. The judge simply ordered this writer and DPA to find a lawyer, in spite of the plans's contractual provisions. He further ordered that no payment would be considered until *after* the trial was over. A couple of lawyers indicated their willingness to represent this defendant, but only if some compensation was assured.

There seems to be a popular belief around this state that the Department of Public Advocacy has a roster of attorneys who are eager to work over 400 hours, neglect their practice, and work for free. Unfortunately, that is not the case. On the other hand, if some of you out there are interested in getting involved in the Harlan County matter, or any other death penalty case, please get in touch with me. [Mike Williams, 502-564-8006]. Please hurry because the Judge ordered me to appear and show cause because I can't find a lawyer wanting to work for free!

PAYNE V. TENNESSEE: IT'S *WHO* YOU KILL

Payne v. Tennessee was recently decided on the last day of the Supreme Court's term. This is the so called "victim impact" case reportedly overruled *Booth* and *Gaithers*. The specific holding was that victim impact evidence generally is not a violation of the 8th Amendment if presented to the trier of fact, sentencing jury, or the like.

Attorneys who handle these cases may need to consider, or reconsider, discovery requested up to this point. If the prosecutor is going to consider using "victim impact" evidence, then we need to discover what that evidence is going to be. Is the victim's "shady past," or "bad character" then exculpatory? Is it impeachment evidence? Is it discoverable?

If the family is going to testify about the terrible impact the murder has caused, then is it relevant that the deceased and his family were on bad terms with each other? Is it relevant that a deceased husband had been considering divorce from the testifying, bereaved spouse? That they were fighting on a regular basis? That the victim was an alcoholic who beat her/ him?

Just how far prosecutor and defense attorneys will be able to go into this type of evidence is unknown. At the same time, we cannot sit there powerless and let the prosecutor emotionally charge a jury to the extent they will put our client in the electric chair because of the flood of emotions from the witness stand. The victim's families who have already suffered significant trauma may have to undergo their personal lives being exposed in a courtroom, although *the wisdom of cross-examining a bereaved relative may be open to question in many cases.*

The full impact of *Payne* is not yet known, but just as sure as the next Supreme Court Justice will not be a liberal, defense attorneys must begin rethinking their theory of the case as it might pertain to a penalty phase in a death penalty proceeding. The matter must be considered in discovery as we must know whether or not this evidence is going to be admitted *before* we begin voir dire of the jury.

JUVENILE FACILITIES: An Unexpected Source For Mitigation

A very fertile area to explore for mitigation of a capital offense comes from a source one might not expect. If your client was in a state approved juvenile treatment/correctional center, particulary 10 years or more back, there was possibly abuse and other questionable treatments used to try to correct your client's delinquency.

One client disclosed things such as being slammed to the ground repeatedly, being made by camp personnel to hurt other camp members, being forced to stand naked in front of a group and counselors, being restrained and his mouth held so that he couldn't breathe, working in a frozen pond at temperatures of 35 degrees, among other things. This client was a runaway and chose to be placed in jail, rather than released to his home, to get away from abuse. His anger at being placed in a facility with, as he termed it, "state-sanctioned abuse" is palpable.

MITIGATION OUTLINE AVAILABLE: A mitigation outline is available from Cris Brown of our unit. The outline can be used as a springboard for investigation in preparation for the penalty phase.

CAPITAL TRIAL OUTLINE AVAILABLE: The Trial Outline that appeared in Tab 12 of the 1991 DPA Annual Seminar Notebook is available to be placed on 3 1/2 or 5 1/4 disk. Please send me a formatted disk, and I'll copy it for you.

If you failed to get a copy of the outline, just contact me and one will be mailed to you.

MIKE WILLIAMS
Assistant Public Advocate
Chief, CTU
Frankfort

PLEASE NOTE:

The **NATIONAL SHORTHAND REPORTERS ASSOCIATION** has changed its name, address and fax #: It is now: NATIONAL COURT REPORTERS ASSOCIATION, 8224 Old Courthouse Road, Vienna, Virginia 22182-3808 Tel. # (703) 556-6272 FAX # 703-556-6291

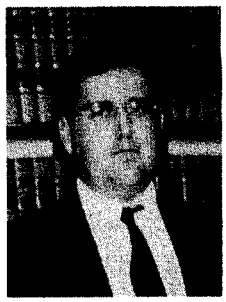
The **KENTUCKY SHORTHAND REPORTERS ASSOCIATION** has changed its name to: KENTUCKY COURT REPORTERS ASSOCIATION. Their address is unchanged: 179 E. Maxwell Street, Lexington, KY 40508, (606) 254-0568.

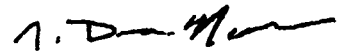
The **SOUTHERN PRISONERS' DEFENSE COMMITTEE** has changed its name to THE SOUTHERN CENTER FOR HUMAN RIGHTS. Their address is 83 Poplar Street, N.W., Atlanta, GA 30303-2122 Tel. # (404) 688-1202 FAX # 404-688-9440

CORRECTION: In the JUNE 1991 issue of *The Advocate*, page 56 the creditline was inadvertently left off on the article *"Young Black Men and the Criminal Justice System."* The creditline should have read "reprinted with permission from *Overcrowded Times*, Volume 2, Number 1, January 1991."

EVIDENCE LAW

Review of Recent Court Decisions





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.

Because of a scheduling change, this issue's column is devoted to a review of evidence cases decided in the last ten months or so. The following case discussion is organized under subject matter groupings that roughly parallel the subject headings of the new evidence code. This year I am including a few Sixth Circuit cases to show how the new evidence rules might (or might not) require a result different from the one obtained under Kentucky common law.

Many of the usual suspects, *other crimes evidence* (5 cases), *hearsay* (11 cases), and *sentencing* (8 cases) received significant attention by the courts while some other stand-bys like *preservation* (2 cases) were at least relegated to the sidelines. A new subject, *authentication of physical evidence*, primarily audio and videotapes of various types, was the topic of six cases. The Supreme Court of Kentucky has hardened its position on the initial burden of proof in *Gadd*-PFO hearings, leaving the question of whether to put your client on, or not, up in the air.

There are not many new cases this year. A lot of the cases were applications of well-established principles in novel circumstances or more complete explanations of cases and principles that the courts have been talking about for the last few years. However, in the area of discovery and hearsay, the courts have made significant statements of what the law is and how courts should conduct criminal proceedings, and these are worth particular attention.

(A) Discovery and Suppression

Milburn v. Commonwealth, Ky., 788 S.W.2d 253 (1989) - Under *Barnett*, exclusion is justified when non-disclosure of evidence by the Commonwealth prevents the defendant from developing his own evidence.

Barnes v. Commonwealth, Ky., 794 S.W.2d 165 (1990) - Under *Barnett*, the malicious or intentional violation of discovery orders, or inadvertent violation are not crucial to the right disposition of a defendant's motion to exclude.

Mounce v. Commonwealth, Ky., 795 S.W.2d 375 (1990) - In a criminal case the defendant may discover information and evidence that might not be admissible at trial if it might lead to the discovery of admissible evidence. The Commonwealth must object to an order to produce evidence at the time the order is entered, or the objection is waived. Evidence to impeach prosecution witnesses is discoverable as exculpatory evidence.

Hicks v. Commonwealth, Ky.App., 805 S.W.2d 144 (1990) - RCr 7.26 was enacted to allow a defendant reasonable opportunity to inspect previous statements of witnesses in order to engage in full cross-examination. When the prosecutor agrees to open file discovery, he is disclosing his evidence and theories to the defense, and is obligated to adhere to the agreement. Violation of open file is subject to the harmless error rule.

U.S. v. Todd, 920 F.2d 399 (6th Cir. 1990) - The *Brady* rule requiring disclosure of exculpatory evidence is not a discovery rule but is a requirement of the due process clause. Relief from the prosecutor's failure to disclose is justified only if failure results in an unfair trial.

Milburn v. Commonwealth, Ky., 788 S.W.2d 253 (1989) - The voluntariness of a statement is determined by the totality of the circumstances. Even though defendant was in a serious accident and his senses were deadened by alcohol the statement under the circumstances was voluntary.

(B) Character & Relevance

Campbell v. Commonwealth, Ky., 788 S.W.2d 260 (1990) - Under *Sanborn*, a certain amount of background information about the deceased is relevant to understanding the nature of the crime in homicide cases.

Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990) - Any reference to a polygraph by anyone at trial is error.

U.S. v. Barger, 931 F.2d 359 (6th Cir., 1991) - Evidence concerning polygraph tests is not inadmissible if it is relevant to an issue in the case and the probative value outweighs the prejudicial potential.

Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990) - Evidence concerning remorse is irrelevant to guilt or innocence in most cases. However, in this case it was relevant to the psychiatrist's determination that defendant was a manipulative person. The consequences of an insanity or mental illness verdict have no legitimate bearing on the issue of guilt or innocence in a criminal case.

(C) Other Crimes Evidence

Howard v. Commonwealth, Ky.App., 787 S.W.2d 264 (1989) - In a drug trafficking cases, another marijuana selling incident occurring four months after the incident on trial is admissible.

Stanford v. Commonwealth, Ky., 793 S.W.2d 112 (1990) - Evidence that the gun used to kill decedent was one of 160 defendant had stolen and evidence that car defendant was driving was stolen was so interwoven with the murder at issue that it was admissible.

Woods v. Commonwealth, Ky., 793 S.W.2d 809 (1990) - Introduction of an invalid prior conviction in a subsequent offender case was collateral evidence of unrelated criminal activity and was prejudicial to the accused.

Barnes v. Commonwealth, Ky., 794 S.W.2d 165 (1990) - The general rule is that uncharged criminal misconduct evidence is inadmissible. Acts of physical violence remote in time prove little in regard to intent, motive, plan or scheme in a homicide case.

U.S. v. Feinman, 903 F.2d 495 (6th Cir., 1991) - For other crimes evidence the court must employ a two step analysis. The first question is whether the other conduct is relevant and admissible for a proper purpose. To do this the court must determine whether the conduct relates to a matter at issue and is substantially similar and reasonably near in time to the current offense, and must determine whether it is probative of a material issue other than character. The second part of the test is whether the probative value substantially outweighs the danger of unfair prejudice.

(D) Impeachment

Stanford v. Commonwealth, Ky., 793 S.W.2d 112 (1990) - The psychiatric problems of a witness are not the proper subject of impeachment unless the proponent can show that the problem relates to credibility.

Mounce v. Commonwealth, Ky., 795 S.W.2d 375 (1990) - The right to cross-examine to impeach a witness is fundamental to a fair trial.

Bussey v. Commonwealth, Ky., 797 S.W.2d 483 (1990) - Rehabilitation of witnesses is permitted only when the witness is attacked on inconsistent statements, recent fabrication, improper influence, or any other circumstance that calls ability to recall into question. Merely challenging the truthfulness of the witness is not enough to justify rehabilitation.

Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990) - Once the defendant takes the stand and testifies his credibility is subject to impeachment by cross-examination.

U.S. v. Sloman, 909 F.2d 176 (6th Cir. 1990) - When the defendant testifies he is subject to cross-examination and impeachment. If a prior conviction used for impeachment involves dishonesty and is less than 10 years old it is admissible without any balancing of prejudice under FRE 609(a).

(E) Hearsay, Confrontation and *Jett*

Smith v. Commonwealth, Ky., 788 S.W.2d 266 (1990) - The court cites Lawson's *Handbook*, Section 8.60(b) for guidelines for determining when a spontaneous utterance is admissible.

Barnes v. Commonwealth, Ky., 794 S.W.2d 165 (1990) - Hearsay is not admissible unless it falls within a recognized exception. The hearsay rule forbids use of an assertion made out of court as testimony to the truth of the fact asserted. The essence of the rule prohibiting hearsay is absence of an opportunity to cross-examine.

In this case, defendant was denied the right to cross-examine and confront by use of the affidavit of his deceased wife made for a divorce proceeding 2 years earlier. The fact that it was an affidavit was not significant in determining admissibility. Hearsay evidence must be excluded unless proponent can show that possibility of mistake is substantially eliminated.

The *Jett* rule provides that when the person who made the out of court statement and the person who says it was made appear as witnesses under oath there is no reason to deny the jury the opportunity to hear all that both have to say on the subject. However, unless evidence fits under a hearsay exception or under *Jett*, it must be excluded.

Mounce v. Commonwealth, Ky., 795 S.W.2d 375 (1990) - The trial judge erred when he did not let the defendant recall a witness to lay a *Jett* foundation. Defendant had no reason to establish a foundation earlier in the trial.

The main concern of the spontaneous statement exception is determination of whether, under the circumstances presented, the speaker can be considered to be speaking under the stress of nervous excitement.

Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990) - The two most important requirements of *Jett* are that it deal with an issue material to the merits of the cause and that the CR 43.08 foundation be laid.

Bussey v. Commonwealth, Ky., 797 S.W.2d 483 (1990) - The Supreme Court in this case reminds counsel that it has "firmly" rejected the so-called investigative hearsay exception to the hearsay rule.

Sherley v. Seabold, 929 F.2d 272 (6th Cir. 1991) - The Sixth Amendment requires confrontation at criminal trials, and U.S. Supreme Court opinions require the proponent of hearsay to show the unavailability of the witness and indicia of reliability of the statement. Where the Commonwealth does not subpoena or attempt to depose a witness, these standards are not met. However, any error in this regard is subject to *Chapman* harmless error analysis.

Baylis v. Lourdes Hospital, Ky., 805 S.W.2d 122 (1991) - Medical records are an exception to the hearsay rule under the business records theory. Necessity of using the records is not a requirement. As to matters properly included in the records, they are entitled to the same dignity and acceptance as any other evidence. Relying on *Barnes*, the court stated that hearsay evidence admitted under the exceptions to the rule must substantially eliminate the possibility of error and that medical records satisfy this test.

Hardy v. Wigginton, 922 F.2d 294 (6th Cir. 1990) - There are some exceptions

to the general rule that testimony must occur in the presence of the jury in court. This general rule must give way to public policy and the necessities of the case. In this case, counsel for both sides and the child sexual abuse witness went to another room while the judge, the defendant and the jury watched the examination by closed circuit TV. The court held that this satisfied the individualized determination requirement of *Maryland v. Craig*, and therefore was permissible. The court also noted that where a child's fear is a "generalized fear of court proceedings" a more stringent examination must be made.

U.S. v. Morrow, 923 F.2d 427 (6th Cir., 1991) - In this *Bruton* case, the 6th Circuit held that redaction of all plural pronouns in the co-defendant's statement that might be construed to refer to the defendant was sufficient to meet due process requirements.

Idaho v. Wright, U.S. , 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) - Incriminating statements admissible under an exception to the hearsay rule are not admissible under the confrontation clause unless the state either produces or shows the unavailability of the declarant and the statement bears adequate *indicia* of reliability, either by being a firmly rooted hearsay exception or by demonstration of particularized guarantees of trustworthiness. The guarantees of trustworthiness must be determined by all circumstances surrounding the making of the statement that render the declarant particularly worthy of belief. Under either the firmly rooted exception or particularized guarantees test, the evidence must be so trustworthy that adversarial testing would add little to its reliability. The court in this case rejected a claim the child's statement should be deemed presumptively unreliable.

Maryland v. Craig, U.S. , 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) - This is another child hearsay case. The court held that the central concern of the confrontation clause of the Sixth Amendment is to ensure reliability of evidence against the defendant by subjecting it to rigorous adversary testing before the trier of fact. Face to face confrontation enhances this purpose by reducing the risk that the witness will wrongfully implicate the defendant. However, in narrow circumstances, the confrontation clause permits hearsay despite the inability to confront, therefore face to face confrontation is not indispensable under the federal constitution.

A state's interest in protecting a child from further trauma at court can be a sufficient justification for denial of face to face confrontation if, on a case specific determination, the trial judge decides that the child should not testify because it is necessary to protect the child's welfare, that the child could be traumatized by the defendant's presence, although not by the courtroom generally, and that the child's distress is more than mere nervousness or excitement or reluctance to testify. The court suggested that less restrictive alternatives on confrontation be tried, but said that they were not necessary.

(F) Expert Witnesses

Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990) - An expert may rely on information supplied by third parties if the expert customarily relies on such information in the day to day decisions of his practice.

Citizens State Bank v. Seaboard Railroad, Ky.App., 803 S.W.2d 585 (1991) - Expert opinion must be based on facts in evidence, not on assumptions. On another issue, the court held that a police officer with experience in estimating speed and who had an opportunity to observe a train could give an opinion concerning the speed of the train.

Black v. Ryder-P.I.E. Nationwide, Inc., 930 F.2d 505 (6th Cir., 1991) - Under the federal rules an opinion is not excludable because it reaches the ultimate issue of fact, but the court may exclude it if it is not helpful to the jury or is a waste of time.

U.S. v. Pearce, 912 F.2d 159 (6th Cir., 1990) - Law enforcement officers may testify concerning methods and techniques in an area of criminal activity and to establish a *modus operandi* of particular crimes, giving the example of the presence of guns at crack houses. The court said that this is generally beyond the knowledge of the average lay juror and therefore a proper subject of expert testimony.

Waters v. Kassulke, 916 F.2 329 (6th Cir., 1990) - The 6th Circuit says that Kentucky law prohibits expert testimony that purports to resolve the ultimate issue of a case.

(G) Authentication

Howard v. Commonwealth, Ky.App., 787 S.W.2d 264 (1989) - This case may adopt FRE 901(b)(5) for authentication. The court held that an expert was not needed to identify voices on tape.

Milburn v. Commonwealth, Ky., 788 S.W.2d 253 (1989) - A videotape is admissible under the same "liberal" standards established for photographs in *Gall v. Commonwealth.*

Campbell v. Commonwealth, Ky., 788 S.W.2d 260 (1990) - The correct foundation for introduction of a tape from a phone answering machine is the foundation for introducing other audio tapes. Any witness with personal knowledge of the voice on the tape can identify it and the proponent must show that the tapes are what they purport to be.

Smith v. Commonwealth, Ky., 788 S.W.2d 266 (1990) - Failure to meet the notice requirements of KRS 422.305 justifies a court in excluding those records from evidence.

Woods v. Commonwealth, Ky., 793 S.W.2d 809 (1990) - An audio tape that has been electronically "cleaned" may be admitted where the police officer testified to the accuracy of the tape and the expert testified to facts showing how the tape was cleaned.

Hicks v. Commonwealth, Ky.App, 805 S.W.2d 144 (1990) - For demonstrative evidence the proponent must establish that the evidence is linked by time, place and circumstance with the commission of a criminal offense. The proponent must show when and where the evidence was found and in whose possession.

(H) Sentencing

Commonwealth v. Crawford, Ky., 789 S.W.2d 779 (1990) - A signed AOC plea form shown to defendant by the judge, plus judge questions of whether the defendant signed and understood the form are sufficient to show a knowing and valid plea. The court says prior pleas must be determined from the record as a whole.

Woods v. Commonwealth, Ky., 793 S.W.2d 809 (1990) - *Rudolph v. Commonwealth* is overruled. The court ruled that the prosecution cannot use a possession of marijuana conviction to enhance subsequent trafficking charges under KRS 218A.990.

Grenke v. Commonwealth, Ky., 796 S.W.2d 858 (1990) - In truth-in-sentencing cases, remoteness of the prior conviction affects the weight of the prior conviction but not its admissibility. The court refuses to establish a bright line rule.

U.S. v. Sammons, 918 F.2d 592 (6th Cir., 1990) - Fundamental principles of due process prohibit a judge at sentenc-

ing from considering unconstitutionally obtained prior convictions. A defendant must be given an opportunity to rebut these prior convictions at sentencing.

Centers v. Commonwealth, Ky.App., 799 S.W.2d 51 (1990) - The validity of a guilty plea is based on the totality of the circumstances including defendant's demeanor, background, experience and other circumstances. Court follows the rule of *Blackledge v. Allison*, in holding that solemn declarations made at the time of the plea was entered are entitled to a strong presumption of "verity".

Conklin v. Commonwealth, Ky., 799 S.W.2d 582 (1990) - In this case the Supreme Court said that its test in *Dunn v. Commonwealth* does not violate the rule in *Boykin v. Alabama*. In a footnote, the court specifically refused to follow *Dunn v. Simmons*, the 6th Circuit Court of Appeals case that held that the Kentucky rule violated federal standards. The court specifically noted that the U.S. Supreme Court had not spoken on the issue. The court held that *Boykin* merely held that a silent record is not sufficient to establish that the defendant understood his rights. However, *Boykin* did not hold that the defendant was entitled to have a plea vacated solely because the record fails to disclose a proper colloquy. Rather, under the Kentucky rule, a silent record is merely the reason why the Commonwealth cannot affirmatively establish a knowing and voluntary plea after the defendant has introduced testimony or other affirmative evidence that he did not know his rights.

Also, in truth-in-sentencing cases, misdemeanors committed subsequent to the date of the present offense may be admitted if the defendant is convicted of the misdemeanors by time of trial.

Topass v. Commonwealth, Ky. App., 799 S.W.2d 587 (1990) - A prior plea to a suspended license because of DUI constitutes a judicial admission of the prior conviction for purposes of a subsequent offender trial. Also, the court ruled that Department of Transportation records may show the length of the suspension of the license, but cannot be used to establish the fact of prior convictions.

U.S. v. Walter, 908 F.2d 1289 (6th Cir. 1990) - The Supreme Court has specifically rejected the claim that any time a state links the severity of sentence to a fact that the state must prove the fact beyond a reasonable doubt. The 6th Circuit observes that usually proof by a preponderance is enough.

(I) Privilege

Smith v. Commonwealth, Ky., 788 S.W.2d 266 (1990) - A wife at trial asserted her privilege not to testify. She was not married at the time of the offense and therefore the court said that statement made by her at the time of the offense was admissible as an excited utterance.

Bank One of Cleveland v. Abbe, 916 F.2d 1067 (1990) - The 5th Amendment protects a person against any disclosures that the person reasonably believes could be used to incriminate, or could lead to evidence that could be used to incriminate her. A convicted but unsentenced defendant retains the privilege to some extent, and a defendant claiming the privilege is required to cooperate at the hearing on the privilege to the extent consistent with preservation of the privilege.

Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991) - The attorney-client privilege protects communications or acts done within the scope of professional employment. The privilege under KRS 421.210(4) does not apply to cases where the attorney acts merely as a business agent. The privilege is absolute as to past transactions or offenses, but is not absolute where the person is seeking advice in contemplation of a fraud. In this case, the court held that the attorney's deposition could be taken.

Pennsylvania v. Muniz, __U.S. __, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) - The 5th Amendment does not protect a suspect from being compelled to produce real of physical evidence. The privilege only protect testimonial evidence, that is, a communication that of itself explicitly or implicitly relates a factual assertion or discloses information.

Matter of Grand Jury Investigation, 922 F.2d 1266 (6th Cir., 1991) - In federal law, the informant's privilege for the government is a creature of common law which provides qualified immunity to the government to refuse to disclose the identity of the informant. The privilege is not absolute and must give way when the confidential informant has information that is helpful to the defendant.

(J) Preservation

Stanford v. Commonwealth, Ky., 793 S.W.2d 112 (1990) - The trial court is not bound to rule on a motion *in limine* before the evidence is introduced. The defendant was not denied the right to testify because the judge refused to rule on the admissibility of rebuttal evidence that the Commonwealth might introduce. The judge could not tell at the time the motion was made whether the rebuttal evidence concerning stolen guns would be relevant.

Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990) - Generally, once a judgment is final, allegations of unpreserved errors are collateral attacks which must be raised under RCr 11.42. The exception is in death penalty cases which follow a different statutory rule.

Failure to file a timely notice under KRS 504.070(1) justifies exclusion of evidence at sentencing.

(K) Miscellaneous

Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990) - The allowance of rebuttal testimony is reviewed by appellate courts under the abuse of discretion standard.

Ball v. E.W. Scripps Co., Ky., 801 S.W.2d 684 (1990) - Clear and convincing evidence is evidence that persuades the trier of fact that the truth of the contention is highly probable. This definition is useful in conjunction with *Dunn v. Simmons*, which imposes a clear and convincing standard on the Commonwealth when the record does not meet *Boykin* standards.

U.S. v. Levy, 904 F.2d 1026 (6th Cir., 1990) - The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the adversary's evidence.

U.S. v. Radka, 904 F.2d 357 (6th Cir., 1990) - The 6th Circuit does not follow other circuits in noticing the tendency of narcotics traffickers to dispose of narcotics and flee when confronted by police.

U.S. v. Frost, 914 F.2d 756 (6th Cir., 1990), - A party is entitled to a missing witness instruction when the witness is peculiarly within the opposing party's power to produce and the testimony of the witness would elucidate the transaction at issue.

Walden v. Commonwealth, Ky., 805 S.W.2d 102 (1991) - It is error to give the blood-alcohol level presumption in a homicide case, but it was harmless in this case. The court directs that in the future if the Commonwealth wants to try DUI and homicide cases together it may not mention the presumption.

Howard v. Commonwealth, Ky. App, 787 S.W.2d 264 (1989) - Wiretap evidence lawfully gathered by the federal authorities may be used in Kentucky courts in the absence of a showing of collusion between the federal and state authorities.

DAVID NIEHAUS
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800

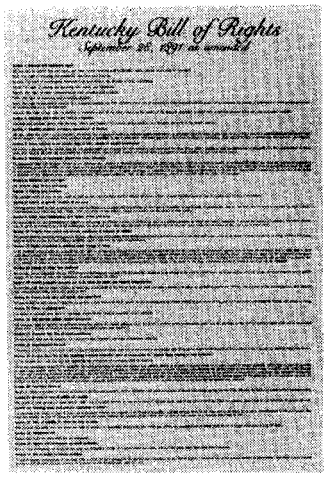
HANDOUTS FOR SALE

AOC Pretrial Release Materials	$10
DPA Recusal of Judges Manual	$20
DPA Obtaining Funds Manual	$10

If you would be interested in receiving these handouts, please write:

HANDOUTS
Department of Public Advocacy
1264 Louisville Road
Frankfort, KY 40601

FOR SALE



Tee-Shirts

Adult	$4.50
Child	$3.50

Please specify Color:
Red with DPA logo
Navy with DPA logo
Green "Hug a Public Defender for a Life Saving Experience"

Rights Cards

Rights Cards	$5.50 per 100

Poster

McCleskey Poster	$2.50

Hats

Hats	$6.50
Navy only	lettered "*Bill of Rights* Enforcer"

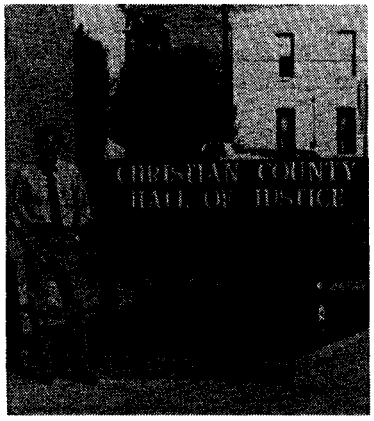
Ky. *Bill of Rights*

Framed	$20
Unframed	$ 5.50

Sweatshirts

Sweatshirts	(DPA Logo)
Medium Only	$10
Specify Color:	Red or Navy

STAFF CHANGES



ROB SODER formerly Regional manager of DPA's full-time offices in the Western part of Kentucky resigned on 7/4/91. He had been with the Department since 7/16/84 at our Madisonville office, and was promoted to Regional Manager on 12/1/90. He resigned to become District Judge in the 4th Judicial District. He was appointed to that position by the Governor.

RESIGNATIONS

KEVIN BISHOP formerly an Assistant Public Advocate with the Paducah office resigned on 7/15/91 to work with the law offices of Dennis Null, 223 N. 7th Street, Mayfield, KY (502) 247-5737. FAX # 502-247-0926. He joined the Department 11/16/88.

TRANSFERS

LAURIE GRIGSBY Paralegal formerly with the LaGrange Post-Conviction Office at the Kentucky State Reformatory transferred to Northpoint on 6/1/91.

JOE MYERS Assistant Public Advocate transferred to Kentucky State Reformatory on 7/15/91. He joined the office 8/16/83.

MARGARET CASE-FOLEY Assistant Public Advocate transferred to the Frankfort Appellate Branch on 7/1/91.

APPOINTMENTS

FRANK RILEY Assistant Public Advocate joinedf the Hazard office on 6/1/91. He had previously been employed with the Department 8/89 to 12/89. He is a 1987 graduate of the Tulsa School of Law.

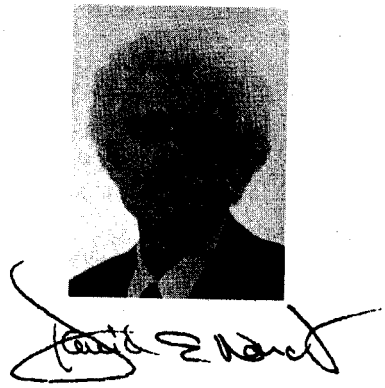
KIM CHANNELL joined the Paducah office as a part-time secretary on 5/1/91.

TURN-OVER

Since August 1, 1988, 28 attorneys have left DPA. That represents a combined total of 119 years of service and experience. DPA averaged 83% filled attorney positions during this period. The turn-over rate was 12% during this period.

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.

ALTERNATIVE SENTENCING PROGRAM HAS OPPORTUNITY TO PROVE EFFECTIVENESS IN "WAR ON DRUGS."

The Department of Public Advocacy was notified on June 20, 1991, by Judge Ray Corns, Secretary, Kentucky Justice Cabinet that its grant application for funds from the Narcotics Control Assistance Program has been approved. Funding the Department of Public Advocacy's Alternative Drug Punishment and Treatment Project is a recognition that innovative programs which demonstrate new and different approaches in the adjudication of drug offenses is a responsibility of state government when developing an effective criminal justice program.

The Department's Alternative Drug Punishment and Treatment Project involves two sentencing specialists working in the Jefferson County Public Defender's Office. These sentencing specialists will work with defense attorneys to develop community based alternative sentencing plans which emphasize treatment to achieve the goal of reducing drug offender recidivism. The result will be the movement of prison bound candidates out of the very expensive penal system and into the less expensive and more effective treatment based alternative punishments. Part of the grant's funding is to provide dollars to make treatment available for drug offenders. These dollars will be maximized by having drug offenders as part of their treatment program become employed and pay for the remaining costs of their drug treatment after they have become stabilized in a drug treatment after they have become stabilized in a drug treatment program.

The Alternative Drug Punishment and Treatment Project addresses the problem facing Kentucky as the number of persons arrested for narcotic drug offenses has more than doubled since 1987. According to official State Police data, 9,213 people were arrested on drug charges in 1987. In 1988, drug arrests rose to 12,051 — a 31% increase compared to 1987. In 1989 drug arrests went up again, to 16, 809 — a 40% increase compared with 1988. Drug arrests increased again in fiscal year 1990 to 19,724 — a 17% increase over 1989.

In Kentucky, the total increase in drug arrests from 1987 through 1990 has been 10,511. The data indicate that the number of arrests for drug offenses has increased by 114% in only a three year period. With continued emphasis by the police on drug offenses this trend is expected to continue. The problem is particularly acute in Jefferson County where from 1987 to 1989 drug arrests increased from 1,462 to 4,826. This translates into a 238% increase in two years. In order for the state's drug control strategy to be effective judges must be presented with meaningful options to deter and treat drug offenders.

More arrests and convictions alone will not solve Kentucky's drug problem. There must be a balanced response between the rapid court process which achieves the conviction and existing sentencing programs which now contribute to Kentucky's prison overcrowding crisis. The DPA's Drug Punishment and Treatment Project looks to achieve that balance initially in Jefferson County by providing punishment for drug offenders which uses non-prison resources plus a specific treatment plan that should reduce recidivism for drug offenders.

The Kentucky Corrections Cabinet reports that 37% of all institutional inmates were convicted of a property or drug offense. These figures demonstrate the need to address the drug problem with a balanced approach, punishment and treatment.

The Alternative Drug Punishment and Treatment Project is funded for only one year and has as its goal for that year of operation to divert 24 prison bound persons convicted of drug offenses and/or drug related offenses to more effective and less expensive alternative punishment and drug treatment plans. The grant award of $134,800.00 will not only assist

the Corrections Cabinet in relieving its jail and prison overcrowding crisis by having 24 beds made available but will save the Commonwealth $146,220.00 in prison incarceration costs over and above the amount of the grant. For each convicted felon sentenced to an alternative sentencing plan under the grant, the Commonwealth saves annually $11,709.20 in the costs for keeping a convicted felon locked up in prison. ($12,581.55 [1] projected annual prison costs less $872.35 annual probation costs).

The $134,800.00 grant covers two sentencing specialists, support staff, operating expenses and treatment dollars. With two sentencing specialists placing 24 defendants in a punishment other than prison the Commonwealth realizes an incarceration savings of $146,220 ($11,709.20 x 24 less the $134,800.00 grant costs).

To reach the goal of 24 alternative punishment and drug treatment plans accepted by the courts in Jefferson County, sentencing specialists will interview and process 90 persons accused of drug offenses or drug related offenses for whom defense attorneys have determined that a prison sentence is likely. Of the 90 persons interviewed, 57 alternative punishment and drug treatment plans will be presented to the courts in Jefferson County. These plans may include any or all of the following: drug treatment, employment, housing, education, counseling, punishment and restitution.

A successful and possible expansion of the DPA Alternative Drug Punishment and Treatment Project could very well win the "War on Drugs" as the cycle of drug addiction and crime is broken. For further information on the DPA Alternative Punishment and Treatment program contact Dave Norat.

[1] *See: The Advocate*, Dec., 1989; Corrections' Population and Trends, p. 46.

DAVE NORAT
Director Defense Services
Frankfort

THE PARABLE OF THE BUCKET

AKRON, Pa. — Prison statistics made national news again recently. The United States is now the world's leader in imprisonment of its citizens. A decade ago, the Soviet Union and South Africa had more people imprisoned per capita than the United States. But now we are number one!

Why, in the "land of the free,"do we lock up so many people? Communities throughout the country are asking this as they struggle to cope with demands for new prisons.

The answer can hardly be that we just have more criminals. True, our crime rates are some of the highest in the world, but the rise in imprisonment rates has far outstripped the rise in crime rates over the past decade or so.

Part of the answer has to do with the purposes of the criminal justice system. A variety of purposes are usually cited, although participants in the criminal justice system rarely agree on which is more important. Yet a basic agreement has emerged in the past 20 years: the underlying goal of the criminal justice system is so punish wrongdoers. Rehabilitation of wrongdoers, once an important guiding goal, is no longer considered a central aim in most criminal codes or by most participants.

Our reliance on prisons stems largely from this emphasis on punishment. If our main purpose is to punish, imprisonment seems the most direct, understandable way to do it. Since imprisonment has become the standard, we have to make a special care for other options such as restitution or treatment programs, even though these options may help victims and cost less than prison. Imprisonment is the normal punishment; other responses to crime are seen as "second best."

A second answer to the question has to do with the criminal justice process. Criminal justice is fragmented into a series of sub-units — police, prosecutor, judge, probation, defense attorney. Each sub-unit operates fairly independently of the others; each has its own internal "game rules" and self-interests. Responsibility and accountability for decisions is diffused. The following analogy may help.

Think of crime as a lake. Think of your local jail as a pail. The criminal justice system is like a pipe coming out of the lake. The pipe goes in and out of a series of small windowless huts. Inside of each hut is a valve. The pipe ends in your bucket. There are other outlets along the way, but very few are used except the bucket toward the end.

Inside each hut is a person representing a criminal justice actor — police, prosecutor, judge, probation officer, sheriff — who operates the valve. But there is no agreement on why they turn the valve. Some think they are filling the bucket. Some are trying to regulate the lake. Some like the feeling of power or the sound of the water. Some just like to turn valves.

Nor is there any way to know what the others are doing, or what the outcome is, until the bucket runs over and feet get wet. When a flood occurs, each can blame the other but they are not able to cooperate enough to prevent disaster.

Building a bigger bucket will not help. Nothing is likely to change until windows are put in the huts, valve-turners are made responsible for their actions, actors agree on what they are trying to do and other outlets besides the bucket are added to the pipeline.

Building more prisons has not and will not solve our over-use of prisons. Prison populations will not decrease until our purpose becomes less punitive, non-prison options become accepted and decision-makers are made accountable for their actions.

HOWARD ZEHR
MCC, U.S. Office of Criminal Justice
21 South 12th Street
Box M
Akron, Pennsylvania 17501
(717) 859-1151

Howard Zehr is director of the Mennonite Central Committee U.S. Office of Criminal Justice that provides resources and information on issues such as alternatives to prison. Reprinted here by permission of the author.

STUDY OF KENTUCKY'S CRIMINAL JUSTICE SYSTEM

The Sentencing Task Force

The Sentencing Task Force is a major undertaking. It has the potential for large changes of significant parts of our Kentucky Criminal Justice System.

As a service to the Kentucky Criminal Justice System, The Advocate reprints extensive information on the work of the Task Force. The information has been taken primarily from the Task Force's minutes with the vast majority being a reprint of those minutes.

I. SENTENCING TASK FORCE CREATED IN 1990

The 1990 Regular Session of the Kentucky General Assembly enacted House Joint Resolution No. 123 creating a two year "legislative task force on sentences and sentencing practices." The Resolution became effective when the Governor signed it on March 30, 1990. Its first meeting was 5 months later on August 29, 1990.

II. MEMBERSHIP

The task force consists of 16 members with membership from:

1. Attorney General's Office
2. Parole Board
3. Corrections Cabinet
4. Commonwealth Attorneys' Association
5. County Attorneys' Association
6. Jailers Association
7. Department of Public Advocacy
8. Law enforcement agency
9. Circuit court judge, active or retired
10. House Appropriations & Revenue Committee
11. House Judiciary Committee
12. Senate Appropriations & Revenue Committee
13. Senate Judiciary Criminal Committee
14. Statewide Victim's group
15. Criminal justice or law school faculty members
16. General public.

There are 4 legislative representatives on the task force. Corrections, prosecution, and law enforcement have 7 members. The judiciary has 1 representative.

The 16 members have 3 prosecutors and 1 public defender among them. There are no private criminal defense attorney members. While both the Commonwealth Attorneys' Association and County Attorneys' Association have a member, the Kentucky Association of Criminal Defense Lawyers has no representative.

The persons originally appointed to this task force were:

Senator Ed O'Daniel

Senator Kelsey Friend

Representative Bill Lear

Representative Ernesto Scorsone

Representative Lawson Walker

Mr. Mark Bubenzer

Hon. Jim Boyd

Mr. Joe Childs

Mr. William Fortune

• "Mr. John Gillig

Judge L. T. Grant

Ms. Libby Harvey

Mr. Paul F. Isaacs

Mr. Dana C. Jones, Jr.

Hon. Ray Larson

Mr. John Runda

Mr. Doug Sapp

Senator Ed O'Daniel is no longer in the General Assembly, and he has not been replaced.

Libby Harvey has left the Attorney General's office, and she has not been replaced.

Doug Sapp left the Corrections Cabinet, and he has been replaced by Barbara Jones.

III. CURRENT MEMBERSHIP OF TASK FORCE

Current Membership on the Task Force is as follows:

Rep. Ernesto Scorsone
167 W. Main
804 First National Building
Lexington, KY 40507
606/254-5766

Rep. Lawson Walker
7300 Turfway Road
Florence, KY 41042
606/283-0515

Rep. Bill Lear
732 Lakeshore Drive
Lexington, KY 40502

Sen. Kelsey Friend
P.O. Box 512
Pikeville, KY 41501
606/437-4026

John Gillig
Criminal Appellate Division Director
Attorney General's Office
Capitol, Room 120
Frankfort, KY 40601
564-7600

Dr. John Runda
Kentucky Parole Board Chair
State Office Building
Fifth Floor
Frankfort, KY 40601
564-3620

Hon. Ray Larson
Fayette Commonwealth Attorney
116 N. Upper Street
Lexington, KY 40507
606/252-3571

Hon. Jim Boyd
Franklin County Attorney
P.O. Box 290
Frankfort, KY 40602
875-8745

Mr. Joe Childs
609 Clark Street
Paducah, KY 42001
444-4738
(Jailers Assn.)

Paul F. Isaacs
Public Advocate
Department of Public Advocacy
1264 Louisville Road
Frankfort, KY 40601
564-8006

Mark Bubenzer
Justice Cabinet
Bush Building
403 Wapping Street
Frankfort, KY 40601
564-3251

Judge L.T. Grant
275 Farmington Road
Lexington, KY 40502
606/277-2520
564-5550
(Retired Circuit Court Judge)

William H. Fortune
College of Law
University of Kentucky
Lexington, KY 40506
606/257-1880
(Law school faculty member)

Dana C. Jones, Jr.
3109 Lamar Drive
Lexington, KY 40502
606/255-1074
(General Public appointment)

Mr. Bill Monk, Chaplain
Kentucky State Reformatory
LaGrange, KY 40032
564-4980

Mr. Mike Townsend
Cabinet for Human Resources
275 East Main Street
1st Floor, East Wing
Frankfort, KY 40601
564-2880

Barbara Jones
Kentucky Corrections Cabinet
State Office Building
2nd Floor, Room 200
Frankfort, KY 40601
564-2024

PURPOSES

The Joint Resolution requires the task force to do 8 tasks:

(1) Review the structure of punishments prescribed by the Kentucky Revised Statutes for appropriateness and consistency;

(2) Investigate sentencing, probation and parole trends in Kentucky;

(3) Investigate the impact of various sentence requirements and sentencing practices upon Kentucky's prison population;

(4) Investigate disparities in sentences between different jurisdictions in Kentucky and in the treatment of men, women and racial and ethnic minorities;

(5) Investigate the use of and determine the effectiveness of alternatives to incarceration including, but not limited to, intensive and advanced supervision programs and parole for probation, home-incarceration, rehabilitation treatment and counseling, work-release, and community service;

(6) Make recommendations concerning sentencing and parole options to the Governor, secretary of the Corrections Cabinet, Attorney General and the Court of Justice;

(7) Provide the Corrections Commission with an interim report on its findings;

(8) Propose legislation based on its findings during the 1992 General Assembly.

IV. FIRST MEETING

The task force first met on August 29,1990 for 1 hour. At that first meeting, Judge L.T. Grant moved and Doug Sapp seconded a motion to nominate Representative Lear as Chair, and, without any other nominations being made, Representative Lear was elected by unanimous consent.

A. ORIGINS OF TASK FORCE

Chairman Lear gave a short history of the origins of the task force. He described the previous work of the Special Committee on Corrections and the Governor's Task Force on Corrections which had resulted in the passage of HB 603 at the 1990 regular session of the General Assembly but whose work left additional matters to be resolved. Representative Lear observed that prisons do little but warehouse convicted felons at a cost of $10,000 to $15,000 per prisoner per year and that the cost of construction of new facilities ranges from $25,000 to $80,000 per cell. Representative Lear stated that while the penal code originally had a unified plan for dealing with crime, changes to the code and other statutes have resulted in inconsistent treatment of criminal offenses. Blue and white collar crime are not dealt with uniformly.

Representative Lear observed that there are innovative programs that have been shown to work in appropriate cases. Programs include the STOP program in Lexington, community service, mandatory drug testing, and others. He indicated that the commission was specifically designed as a blue ribbon panel representing all interests in the criminal justice system—prosecutors, defense attorneys, parole administrators, corrections experts, judges, legislators and citizens whose duty it would be to formulate proposals (both substantive and funding) and advocate those proposals before the public and the General Assembly. Representative Lear detailed a need to have subcommittees and outside meetings. The subcommittees identified were:

1) Penal Code,

2) Non Penal Code Offenses,

3) Alternatives to Incarceration and

4) Disparate Sentencing Practices.

B. SUGGESTIONS BY MEMBERS

The suggestions made at this meeting were:

1. Senator Friend suggested that the task force should discuss issues first then decide what direction to go. He urged the task force not to act in haste.

2. Mark Bubenzer suggested a need to further define the problems. He cited overcrowding and recidivism as candidates. He indicated that the Crime Commission had studied sentencing and sentencing guidelines and recommended abolition of the parole board in a recent report.

3. Ray Larson suggested that a representative of the Cabinet for Human Resources be placed upon the task force. He indicated that CHR programs are an integral part of any alternative sentencing and treatment program. He further urged that bad consequences should go with bad conduct and that the Penal Code's favoring of probation should be changed to a philosophy favoring incarceration. He also suggested looking at life imprisonment without parole.

4. Representative Lear asked staff if they could arrange for the appointment of a Cabinet for Human Resources representative to the task force.

5. Mr. Larson urged that the Cabinet for Human Resources representative be a full member of the task force if possible. Mike Townsend of CHR was subsequently added as a member of the Task Force

Maria Ransdell, President of the Kentucky Association of Criminal Defense Lawyers (KACDL), wrote Representative Lear on December 21, 1990 and asked that the Task Force add two members to represent the private criminal defense bar. In a January 15, 1991 response, Rep. Lear indicated that he was in no position to modify the makeup of the Task Force. Rep. Lear did offer to meet with Ms. Ransdell and offered the opportunity to appear before the Task Force.

6. John Runda suggested a need to access Corrections Cabinet data base information and asked if the Cabinet could provide such access. Mr. Sapp indicated that the Cabinet would do so to the best of its ability.

7. Judge Grant replied in response to a comment about Administrative Office of the Courts data that the courts had very little data which might be of use to the task force.

8. Mr. Bubenzer volunteered that the Kentucky State Police crime report and arrest data will also be available to the task force.

9. Mr. Paul Isaacs suggested that the Penal Code and Non-Penal Code subcommittees should cooperate in their efforts.

10. Judge L.T. Grant observed that the public doesn't know the official sentencing policy of the Commonwealth. He indicated that the policy favors probation over incarceration and that we need to look at the policy. He indicated that the policy favors rehabilitation in the community but that when judges order probation in accordance with the policy, they are subject to criticism.

11. Mr. Isaacs observed that the penal code's history since its adoption is one of exceptions to the probation policy.

12. Mr. Larson suggested increasing the $100 felony theft threshold to $500 and indicated that inflation has raised the minimum to about $375.

13. Dr. Runda indicated that the parole board is seeing a number of prisoners with Persistent Felony Offender I convictions which consist of cold checks and other nonviolent offenses and suggested that perhaps we should shift to a persistent violent offender statute.

14. Mr. Larson suggested that "violent offender" would need to be carefully defined and suggested the passage of persistent misdemeanor legislation.

15. Ms. Libby Harvey suggested that the task force look into how we deal with juvenile offenders because there is a good opportunity to interdict criminal behavior at that time.

16. Dr. Runda observed that while the parole board has jurisdiction over the release of youthful offenders, they see very few youthful offenders.

17. Mr. Larson asked if the Juvenile Code was subject to the scrutiny of the task force. Chairman Lear indicated that it was.

18. Senator Ed O'Daniel suggested that the task force study the handling of people with mental deficiencies at all phases from trial to incarceration and facilities.

19. Mr. Sapp suggested a need for referral resources for sex offenders, drugs, alcohol abusers, and others but that few such resources are available in the community.

20. Chairman Lear suggested looking at determinate sentencing.

21. Senator Friend urged the task force to look at and develop a philosophy relating to crime and corrections and not just what publicity from various groups says should be done.

22. Professor William Fortune suggested a close look at the extent of restitution and what can be done in restitution now that the Supreme Court of the United States has ruled that restitution orders can be discharged in bankruptcy.

V. SECOND MEETING

The second meeting of the Task Force on Sentences and Sentencing Practices was held on Thursday, October 18, 1990.

Chairman Lear announced the proposed subcommittees, the jurisdiction, and membership of each subcommittee.

Chairman Lear cautioned that he did not want to open up the entire juvenile code before this task force but only those portions necessary to the accomplishment of the goals of the task force.

He also urged that committees coordinate with each other on matters of proportionality of sentences.

Representative Scorsone asked what the timeframe for committee reports was. Chairman Lear responded that while the entire task force has a year to complete its work that he expects each subcommittee to work on a topic, report to the task force at a monthly meeting and at the next monthly meeting the task force will make a decisions thereon. Chairman Lear indicated that the penal code subcommittee should report first on the proposed sentencing philosophy for the penal code and other criminal laws. Chairman Lear added that subcommittees were free to add or to delete topics from the list proposed. The meeting then recessed for meetings of prospective subcommittees.

A. SUBCOMMITTEES' JURISDICTION

The list of prospective subcommittees and the jurisdiction and the original membership of each is as follows:

Penal Code Review.

1. Basic philosophy/policy of Penal Code

2. Life without parole as alternative to capital punishment

3. Exceptions to probation since Code adoption

4. Changes/additions/deletions to Code since adoption

5. $100 felony theft provisions

6. Persistent offenders

—PFO 1 with no violent offenses
—Persistent violent offender
—Persistent misdemeanor offender

7. Statutes of Limitations for certain felony offenses

8. Vehicular homicide

9. Proportionality of penalties within the Penal Code

10. Recent Supreme Court decision regarding Truth-in-Sentencing application to capital offenses

11. Relationship of juvenile code to Penal Code

Non-Penal Code Offenses.

1. Conversion to Penal Code offense classifications

2. Review for proportionality

3. Restructuring within the Penal Code (*e.g.*, drug offenses)

Sentencing Practices and Standards.

1. Disparate sentencing practices—race, sex, jurisdiction, *etc.*

2. Sentencing guidelines

3. Determinate sentencing

4. Judge sentencing

Alternatives to Incarceration at Both Ends of the Corrections System (Probation and Parole).

1. Restitution

2. Alternative sentences, including community service

3. S.T.O.P. - type programs-probation

4. S.T.O.P. - type programs-parole

5. CHR support for alternative sentences/support programs

6. Youthful offender parole

7. Referral sources in the community for offenders—support for probation, parole, halfway houses

8. Handling of persons with mental illness/mental retardation by justice and corrections systems

B. SUBCOMMITTEE MEMBERSHIP

PENAL CODE REVIEW

Hon. Ray Larson, Chairman

Senator Kelsey Friend

Mr. Jim Boyd

Mr. William Fortune

Mr. John Gillig

Judge L. T. Grant

NON-PENAL CODE OFFENSES

Senator Kelsey Friend, Chairman

Representative Bill Lear

Mr. Mark Bubenzer

Mr. Joe Childs

Mr. Mike Townsend

SENTENCING PRACTICES AND STANDARDS

Rep. Lawson Walker, Chairman

Ms. Libby Harvey

Mr. Paul Isaacs

Mr. Dana Jones

Hon. Ray Larson

Mr. Bill Monk

ALTERNATIVES TO INCARCERATION AT BOTH ENDS OF THE CORRECTIONS SYSTEM (PROBATION AND PAROLE)

Senator Ed O'Daniel, Chairman

Representative Ernesto Scorsone

Mr. Mark Bubenzer

Mr. Paul Isaacs

Mr. Bill Monk

Mr. John Runda

Mr. Doug Sapp

Mr. Mike Townsend

C. REPORTS OF SUBCOMMITTEE

SENTENCING PRACTICES SUBCOMMITTEE

Representative Walker, chairman of the Sentencing Practices and Standards subcommittee, reported that his subcommittee desired to add the sentencing process itself to the deliberations of the committee and at the next meeting to look at sentencing disparities with the help of testimony from the AOC, KBA, and other interested parties.

ALTERNATIVE SUBCOMMITTEE

Representative Scorsone, acting chairman of the Alternatives to Incarceration Subcommittee, indicated that the subcommittee wished to add pretrial diversion and intermediate sanctions for probation and parole to the subjects to the considered. He indicated that the focus of the subcommittee was to be (1) reduction of recidivism; (2) LEAST RESTRICTION, LEAST COST WITH GREATEST POSSIBLE CONCERN FOR PUBLIC SAFETY; (3) USE OF FINES AS AN ALTERNATIVE; (4) restitution; (5) proportionate sentences; and (6) institutional and community service linkages. He indicated that the subcommittee wished to look at these matters at pretrial, sentencing, parole, juvenile, mental health, and institutional levels.

NON-PENAL CODE SUBCOMMITTEE

Chairman Lear, acting chairman of the Non-Penal Code Offenses Subcommittee, indicated that his subcommittee wished to go through all non-penal code offenses and match the penalties for these offenses to the offense ranges within the penal code. Drug offenses would be handled separately from the other offenses. Mr. Sapp commented to the task force that in deciding whether or not an offense should be a Class D felony or a Class A misdemeanor that the misdemeanant frequently ends up spending more time incarcerated than the felon.

PENAL CODE SUBCOMMITTEE

Norman Lawson made the report for the Penal Code Subcommittee. He indicated that the subcommittee had assigned the various topics for which the subcommittee was responsible to the following persons: Judge Grant, topics relating to sentencing philosophy, exceptions to the philosophy and recent Supreme Court decisions relating to truth in sentencing; Jim Boyd, topic relating to felony theft monetary levels; Professor Fortune and Mr. Gillig, topics relating to changes to the Penal Code since its adoption, persistent felony offenders, and the proportionality of penalties within the Penal Code; Mr. Ray Larson, topics relating to vehicular homicide and life imprisonment without parole. Mr. Lawson, of the LRC staff, was assigned research relating to the statute of limitations' definition of felony, and presentation of a bill draft on the recent Supreme Court case relating to capital offense sentencing.

VI. THIRD MEETING

The third meeting of the Task Force on Sentences and Sentencing Practices was held on Thursday, November 15, 1990, and the subcommittee acted as follows:

Penal Code Subcommittee

Judge Grant, acting chair of the subcommittee, handed out a paper entitled "Sentencing of Convicted Felons" in which he summarized the current philosophy of the penal code as favoring an indeterminate sentence, probation, and rehabilitation. The paper detailed exceptions to this procedure enacted over the years.

Judge Grant then handed out a paper detailing the exceptions to probation which are contained in the penal code which include persistent felony offenders, crimes committed with firearms, child sex abusers, and selected others.

Judge Grant suggested and Professor Fortune agreed that the statutes relating to sex offenders and use of firearms be amended to clarify them and that staff draft a bill to make the needed clarifications.

Professor Fortune suggested and Judge Grant agreed, that staff prepare a bill relating to a statute of limitations in criminal cases as follows: Homicide, no limitations; felonies other than those relating to homicide, 5 years; misdemeanors (in penal code and without the code) 2 years; traffic offenses and violations, 1 year.

Judge Grant observed, and Professor Fortune agreed, that there would be serious problems if the penal code was changed to eliminate indeterminate sentencing, eliminate parole, and that determinate sentencing and sentencing guidelines not be adopted.

Professor Fortune asked that staff prepare a detailed listing of amendments to the penal code since its adoption.

NON-PENAL CODE SUBCOMMITTEE

Representative Lear, acting chairman of the Non-Penal Code Offense Subcommittee, reported that he and staff had placed penal code penalties within the first 200 chapters of the KRS. Substantial changes suggested by the subcommittee will be highlighted. The subcommittee may recommend that fines for misdemeanors be increased to $1,000. The subcommittee estimates that it will review the rest of the KRS for all non-penal code offenses except for drug offenses, during its next two meetings. Thereafter, the subcommittee will begin to review non-penal code offenses relating to drugs.

SENTENCING PRACTICES SUBCOMMITTEE

Representative Walker, chairman of the Sentencing Practices and Standards Subcommittee, reported that the subcommittee had met with three employees of the Information/Statistics division of the AOC. The AOC presented some preliminary statistics relating to sentencing practices in Kentucky and will provide, for certain selected categories of crime, more information relating to sentencing by various factors such as age, sex and race of defendants. Information was also requested pertaining to the number of defendants arrested and percentage of those sentenced by county and court of disposition.

Information will also be sought from the Kentucky State Police Department and the Corrections Cabinet. The subcommittee will be hearing from other persons involved with and interested in the sentencing process.

Representative Walker suggested that there may be a need to adjust membership of the subcommittees at some time, to provide that each committee member is officially a member of only one subcommittee. This measure may be necessary in order to ensure the presence of a *quorum* at each subcommittee meeting. Representative Lear said that he might find it necessary to ask those members who are officially assigned to more than one subcommittee to agree to serve upon only one. Mr. Isaacs asked if he might designate a (non-voting) representative to appear at those meetings which he is unable to attend. Chairman Lear said that he had no objection to this plan. Mr. Sapp and Mr. Bubenzer volunteered the services of their agencies in data collection and analysis. Mr. Bubenzer commented that the preliminary treatment of felonies is different in different parts of the state, in that some are handled by the county attorney and some by the commonwealth attorney. Different methods of handling these initial phases may result in disparities.

Representative Lear suggested tracking sample felony cases in selected locations. He suggested a sample of between 300-500 felony cases broken down by sex, age, charge, socio-economic status, etc. Mr. Sapp and Mr. Isaacs suggested finding out what information is available from the Attorney General's Statistical Analysis Center. Fain and Bollinger's sentencing study done through Western Kentucky University was mentioned as a possible source of information.

ALTERNATIVES SUBCOMMITTEE

Senator O'Daniel, chairman of the Alternatives to Incarceration Subcommittee, reported that the subcommittee had received an excellent presentation by two speakers: Sonny Hartzog, the Director of Community Corrections of the Department of Corrections in Tennessee, and Mr. George Keiser, of the National Institute of Correction in Washington, D.C. Mr. Hartzog had told the subcommittee about Tennessee's extensive community service program, which relies on local options, differing from one community to another around the state. At present, Tennessee has approximately 8,000 prisoners incarcerated, and 1,600 in the community programs. An additional 3,500 beds are being built. Mr. Keiser recommended that states should not implement community corrections programs merely because of prison overcrowding - the alternative programs should be carefully tailored to meet the needs of the particular person being dealt with. Also, close definition of program eligibility is needed.

Mr. Keiser gave his presentation to the committee next. Mr. Keiser worked in 5 Iowa corrections institutes in various capacities and left that state early in the 1980's. He wrote Iowa's Community Corrections Legislation; and at the time he left the state, 18% of the prisoners were in institutions and 82% in community corrections programs with local ownership and direction. The National Institute of Corrections is a consulting firm providing aid to state corrections institutions, and the State Justice Institute provides help to state courts.

Mr. Keiser enumerated the following points and pieces of advice to state legislatures considering alternative sanctions:

(1) Clarify purpose and philosophy of sanctioning. Many efforts are unclear and are not prioritized.

(2) Focus on range of sanctions, ranging from the least control and supervision to "lock up." Articulate clean, distinct sanctions under the program, don't just create more sanctions.

(3) Target offenders and offender profiles and work with prosecutors, to target "lock-up" space. Mr. Keiser was surprised to find that often very conservative prosecutors would agree that some other alternative was preferable to prison.

(4) Pay attention to system impact - Touching any part of the system touches it all. Deal with issues "on top of the table."

(5) Limit the application of sanctions within the range, and fit the sanction to the person.

(6) Insure that there are consequences built into the system - anticipate this and deal with it.

(7) Litigation and overcrowding make intermediate sanctions more attractive.

(8) Sanctions must have sufficient legitimacy - don't create a sanction merely because jails are overcrowded.

(9) Lock up those who need it, but realize that some prisoners can survive

in the normal population.

(10) Answer the questions: "Are we widening the net?" "Should we have had more options all along?"

(11) It is wrong to assume that only the old options (such as probation and parole) are available.

Mr. Hartzog gave his presentation to the committee next. He said that Kentucky and Tennessee are similar both geographically and demographically. Each has a long history of neglect of corrections issues. Before the special session of the Tennessee Legislature in 1985, the state had experienced riots resulting in deaths in some of its prisons. Very few new beds were being built, and parole officers had case loads of up to 170 people per officer. The corrections system in Tennessee is still supervised by a federal special master who makes correctional decisions.

In the 1985 Tennessee special session:

(1) The legislature passed the most massive act in its history, a new penal code, including a complete statutory codification of sentencing guidelines.

(2) Authorized 3,500 new prison beds, but, "couldn't build its way out of problems."

(3) Passed a community corrections act. Mr. Hartzog thinks this is a "first-step decision."

Mr. Hartzog concluded by advising Kentucky do the following before undertaking a community corrections program:

(1) Prepare professionally: devote money to professional input and gather public support, (Tennessee Corrections personnel spoke to as many clubs, groups and interested citizens as they could about the new act).

(2) Allow flexibility. There must be a large element of local control - what works in Louisville may not work in Paducah, or Benton or northern Kentucky.

(3) Define turf. Decide which offenders are eligible for community corrections. Decide what will be done with people currently working with probation; and reassure them that there will be plenty of work for all under knew system. Define success - this helps the bureaucrat to know how his performance will be measured. Define exit route out of community corrections program. Give the program some time - it won't justify its costs for the first 2 or 3 years. (In Tennessee the current cost of the community corrections program is $8.06 per prisoner a day - by the end of this fiscal year it will be $6.50 per prisoner a day.)

Mr. Hartzog concluded by advising Kentucky not to be afraid to undertake a community corrections program. Tennessee, Indiana and Virginia have had similar programs for years. If done well, there is no political downside. Of the approximately 3,000 prisoners who have participated in community corrections programs over the past 4 1/2 years, only 3 violent offenders have been written about in the press. Although the system is not perfect, and recidivism does occur, the state is avoiding some corrections costs it would otherwise have born. Since implementing the program, Tennessee has avoided the costs of building and operating two large prisons, a savings of approximately $70 million. Tennessee believes that 85% of the people now in its community corrections program would have been prison-bound. The key phrase of a community corrections program is "costs avoidance."

Chairman Lear asked the committee if it had any question or comments. Mr. Sapp asked a question about the local authority aspect of Tennessee's program and the treatment of first offenders. Mr. Hartzog gave as an example two cities in Tennessee which have very different approaches to the program - Chattanooga's program imposes a very strenuous work schedule upon its participants, while Nashville is very "treatment oriented." Prior to the implementation of the program, Tennessee's first offenders were granted probation, and first offenders now do not participate in community corrections programs.

In answer to a question by Mr. Isaacs, Mr. Hartzog said that Tennessee's community corrections act and its sentencing act were part of one package presented to the legislature but not dependent upon one another. The Sentencing Commission had an original mandate to report back to the legislature by January, 1987, but its work was not finally completed until 1989. Penalties relating to sale and possession of cocaine were increased significantly. Tennessee's sentencing act does not relate to the community corrections act. The community corrections programs in Minnesota and Oregon have direct ties to sentencing. Oregon is now studying expanding its sentencing commission to include a community corrections act.

Mr. Bubenzer remarked that Kentucky has trouble in regionalizing criminal justice. The whole corrections program is run by judicial districts, and large cities have their own programs. Tennessee uses human resources agencies, county government and mayors.

Mr. Keiser said that the role of state versus local government must be dealt with. Seventeen states have passed some form of community corrections, each utilizing either a board of directors or an advisory committee or board. He advised states to take existing structures and programs and tailor them for use by the new community corrections program.

Representative Lear asked Mr. Hartzog to recommend successful community corrections programs which could be observed by Kentucky. He recommended: Cookville, Tennessee, a rural community; as well as Knoxville, Chattanooga and Nashville. Mr. Keiser suggested observing Iowa and Minnesota, whose programs were created at about the same time. These two programs have stood the test of time, but are very different in terms of governance and financing: one is mandatory, one voluntary; one run by a state board of directors, one by a local board; each uses a different formula for the allocation of funds. Texas has just passed community corrections legislation, but the program is not operational yet. Rochester, Minnesota would be a more useful place to observe than Minneapolis. Mr. Keiser recommended a book published by the National Institute of Corrections, called *Development of Programming in Community Corrections.*

Mr. Hartzog said that marketing of a community corrections program should include input from the state's judges. He recommended asking the judges to sign an annual endorsement of the program to Corrections before they receive funds for the program from the state. Chairman Lear asked Mr. Hartzog to supply the committee with a copy of Tennessee's relevant statutes, administrative regulations and guidelines, and to supply the names of people in Minnesota and Iowa to contact about their respective programs.

VII. FOURTH MEETING

The fourth meeting of the Task Force on Sentences and Sentencing Practices was held on Thursday, December 13, 1990.

PENAL CODE SUBCOMMITTEE

The Penal Code Subcommittee met but did not have a quorum. Draft statutes were presented on (1) the philosophy of the penal code as favoring punishment and that the sanctions in the code were

viewed as punishment; (2) limits on the prosecution of felony cases other than homicide at 5 years, misdemeanors 2 years, and violations and traffic offenses at 1 year. Homicide prosecutions would continue to have no time limit; (3) calculating parole eligibility at 50% of remaining life expectancy for violent offenders sentenced to life terms; (4) placing exceptions to probation and parole found in various chapters of the penal code in one section. The members generally agreed that the draft of the time limit on prosecutions was acceptable. They discussed extension of the limit in cases of sexual offenses and in cases of white collar crimes such as embezzlement, but it was decided to retain the draft as presented.

With regard to the draft on exceptions to probation, Professor Fortune and Judge Grant asked that the draft be redone to simplify the language of the sex offender portion of the draft which had been taken from the current law. They also asked that further information be presented on how other states are handling pretrial diversion.

With regard to the draft on calculating parole times for life sentences, Judge Grant asked that the statute be expanded to include all violent offenses and that the provision in KRS 439.3401 regarding sentencing violent offenders to serve 50% of a term of years be subject to the parole calculations if the term of years given presented a "life imprisonment."

NON-PENAL CODE SUBCOMMITTEE

The Non-penal Code Offenses Subcommittee did not meet due to the lack of a quorum.

SENTENCING PRACTICES SUBCOMMITTEE

Representative Walker called the meeting to order and introduced the three speakers: Earl Pruitt, Executive Director, Kentucky Voice for Crime Victims; Kathy Black-Dennis, Branch Manager, Planning and Evaluation, Corrections Cabinet; and Ms. Sherry Currens, Executive Director, Kentucky Domestic Violence Association. Ms. Paula Freeman of the Mothers Against Drunk Driving (MADD), who was also scheduled to speak, was unable to attend.

Mr. Pruitt thanked the subcommittee for the opportunity to speak. The Kentucky Voice for Crime Victims believes that there are widespread disparities in sentencing practices in Kentucky. He believes that factors which lead to these disparities include the race, political influence and socio-economic class of defendants, as well as the county and court of sentencing. Mr. Pruitt discussed several examples of inequitable sentencing practices in different parts of the state. After studying the problem, the Kentucky Voice for Crime Victims recommends the implementation of determinate sentencing and sentencing guidelines. In response to a question by Mr. Isaacs, Mr. Pruitt said that his group's definition of determinate sentencing included sentencing guidelines, elimination of the parole board, and curtailing of judicial discretion.

In response to a question from Ms. Harvey, Mr. Pruitt said that he possesses "clear data" for D.U.I. cases in one county for the period between September, 1989 and September, 1990. In response to a question from Chairman Walker, Mr. Pruitt said he would forward to the LRC staff any of the statistics he discussed, as well as his group's recommendations for determinate sentencing.

Ms. Black-Dennis discussed with the subcommittee the type of statistical information available from the Corrections Cabinet. The cabinet knows the number of prisoners incarcerated in the corrections system and the county from which each was sentenced. The cabinet can provide information about the sex, age and race of each prisoner (by state and by individual courts), but cannot provide information about the sentencing practices of any particular judge or court. The cabinet can provide a "snapshot" of inmate profiles within the entire corrections system and for each institution for each of the years 1988, 1989, and 1990. On June 30, 1988, the corrections system housed 1,859 Persistent Felony Offenders I and II (PFO's) within the system; on June 30, 1989, the number of PFO's was 2,018, and on June 30, 1990, it was 2,217. The cabinet's analysts can track information by race and age in each county, but the cabinet does not have information pertaining to those receiving probation. The cabinet can provide statistics upon those incarcerated or given shock probation, as well as more detailed information upon the eight (8) counties which supply the greatest number of inmates to the system.

In response to questions by Chairman Walker, Mr. Jones, Ms. Harvey and Mr. Isaacs, as to why information regarding the court the judge of sentencing is not available from the cabinet, Ms. Black-Dennis replied that this information is kept in the Cabinet's paper files. The information is not available from any of the current software programs and would have to be retrieved manually from the cabinet's paper files, presently estimated at numbering more than 20,000.

In response to a question by Mr. Jones, Ms. Black-Dennis said that the cabinet's computer does not "flag" any particular cases which appear to possess unusual characteristics. Ms. Harvey asked if the Administrative Office of the Courts kept a record of charges and particular offenses up to the time of indictment.

The subcommittee decided to ask a representative of the Justice Cabinet to speak to the subcommittee soon, and, at some time, to consider inviting representatives of all three agencies involved (the A.O.C., the Corrections Cabinet and the Justice Cabinet) to appear before the subcommittee at one meeting. Chairman Walker expressed the subcommittee's wish that the three agencies work together as closely as possible to provide needed information. Chairman Walker and Mr. Isaacs discussed the fact that the state police retain records from other local police forces, as well as their own records.

In response to a question from Mr. Isaacs, Ms. Black-Dennis said that the Corrections Cabinet could provide some information upon the caseload of parolees and probationers by district. The Cabinet can provide the *numbers* of those paroled or probated by district, although it cannot identify the parolees or probationers by age, sex, or race.

Ms. Currens then spoke on behalf of the Kentucky Domestic Violence Association (KDVA). Ms. Currens said that her organization found that although the state police are capable of providing some information on every offense committed in the state (including some sentencing information) there is a problem in coordinating sentencing information because the various county systems are not integrated. The KDVA works with battered women, offering shelters and other help to victims of domestic violence. The KDVA believes that sentences in Kentucky are not severe enough for battering spouses and, moreover, are disproportionately harsh for those found guilty of killing their abusive spouses. Studies from other states also support the association's view that domestic violence is not taken seriously, Ms. Currens said. She presented several examples of particular situations in Kentucky which, she said, bear out the association's beliefs. However, because of the confidential nature of the information received by KDVA, the association often cannot provide other than anecdotal information. Ms. Currens said that the state must take responsibility for collecting data in order to get a clear picture of the way Kentucky deals with domestic violence. Mr. Isaacs remarked upon the difficulty of obtaining reliable information regarding domestic violence, as well

as the scarcity or absence of spouse abuse centers in some parts of the state.

Ms. Harvey gave a preliminary report upon the Kentucky Bar Association's gender bias study. Those conducting the study say that the study is made more difficult because the state police do not track information all the way through to and including the sentencing process. Ms. Harvey concluded that the Task Force on Sentences and Sentencing Practices will have to find its gender-based information elsewhere.

Representative Lear joined the meeting, and after listening to some of the discussion, suggested that it may be necessary for the subcommittee to seek outside assistance in analyzing the statistical information offered by the state agencies. Representative Lear mentioned the possibility of requesting the assistance of the University of Kentucky's Statistical Analysis Center. The subcommittee discussed the necessity of determining what "raw data" is available, and of pinpointing the information which the subcommittee hopes to glean.

Ms. Black-Dennis pointed out that one difficulty with coordinating statistics from different agencies is a difference in the manner in which the statistics are kept. Representative Lear mentioned the study of Kentucky's parole system, which the LRC Program Review Committee is presently conducting, and recommended that the subcommittee get in touch with the staff members working upon that study to find out if any of its information could be useful to our subcommittee's work.

ALTERNATIVES SUBCOMMITTEE

Senator O'Daniel of the Sentencing Alternatives subcommittee indicated that they had received information from Mr. Dave Norat of the Public Advocacy Department and Doug Sapp of the Corrections Cabinet with regard to alternatives to sentencing and existing community based programs and probation and parole.

The Task Force then heard from Mr. Doug Sapp of the Corrections Cabinet and Mr. Dave Norat of the Department of Public Advocacy. Mr. Sapp indicated that the Corrections Cabinet currently operates three community based programs, probation, parole and local facilities. The current probation and parole caseload is 12,300 and has been experiencing a 7 to 8% rise per year. Three thousand (3,000) persons are parolees while the remainder are felony probationers and misdemeanor probationers. Levels of supervision vary according to need. Intensive supervision has 25 clients per officer and involves curfews, curfew checks, record checks, employer checks, and home visits. Advanced supervision has 50 clients per officer while regular probation and parole officers have 60 cases. As the level of supervision decreases, fewer restrictions are placed on the client.

Mr. Sapp indicated that the cost of incarceration varies from $26 to $48 per day while the cost of probation supervision varies from $3.91 per day to $2.87. Upon questioning from Representative Lear, Mr. Sapp indicated that the incarceration costs presented did not include costs of construction, debt service, or prison industry costs. Mr. Sapp indicated that the cabinet has collected $541,000 in supervision fees from the probationers and parolees and that work programs have resulted in $1 million worth of restitution. In the community programs, the cabinet contracts with halfway houses, local jails and other facilities and offenders are involved in academic and vocational training. Mr. Sapp indicated that there are 800 to 900 technical parole violations per year and that the average parole deferment for a parole violator is 17 months.

Mr. Dave Norat of the DPA described the department's alternative sentencing program. Under this program, community corrections facilities, local agencies, and others would ask for corrections grants to supervise prisoners who are sent to the programs. In these programs, defense counsel recommends that the offender be placed in the program after consultation with a sentencing specialist with the Department of Public Advocacy. The program worked out is presented to the judge who decides whether to place persons on the program or send them to jail.

Mr. Norat indicated that the program is cheaper than incarceration and can include work programs, counseling, vocational and academic training and other aspects. Mr. Norat indicated that incarceration is not the answer for all offenders and that persons who go to prison can serve out their sentence without doing much of anything. They do not have to be counseled, retrained or participate in programs. In the Public Advocacy program, the prosecutor and the victim are involved and restitution is frequently included as an element of the program. Approximately 50% of the persons applying for the program are accepted.

Under the program, the defense attorney makes an examination of the facts and if guilt is probable and prison may be likely, then the defendant may be eligible for the program. The program is then worked out and the information presented to the court. When asked if the defense attorneys breach client confidentiality, the answer was, yes, but with the client's consent. When asked who looks out for the interests of the Commonwealth in such cases, Mr. Gillig indicated that this would be the job of the Commonwealth's attorney. Judge Grant indicated that many judges don't want the responsibility of such programs without specific statutory authority and guidelines for their operation.

Questioning then turned to drug and alcohol testing. Mr. Townsend indicated that testing for alcohol and drugs is not effective for the chemically dependent person. It was generally agreed that such testing during the period of probation or alternative sentencing was more important for surveillance than for treatment. Mr. Townsend indicated that while a high percentage of inmates are in prison because of involvement with alcohol and drugs, 70% of the inmates are not chemically dependent. It was agreed that statewide chemical dependency programs in the community are essential for utmost safety and for the success of residential programs and that clients should pay their proportionate share of the cost of treatment.

Mr. Bubenzer suggested that for a future meeting Mr. Gary Bush of the State Police discuss crime statistics and that representatives of the S.T.O.P. program in Lexington be invited to the meeting.

VIII. FIFTH MEETING

The fifth meeting of the Task Force on Sentences and Sentencing Practices was held on Friday, March 22, 1991.

SUBCOMMITTEE ON SENTENCING PRACTICES

The morning meeting was held at La-Grange State Reformatory for the purposes of hearing testimony from inmates and touring the institution. The meeting was called to order by Chairman Bill Lear who explained the function of the task force to the two inmates appearing before the group. Representative Lear then handled the meeting over to subcommittee chairman Representative Lawson Walker.

The two inmate interviewees were Fred Harris of Louisville (who is NAACP president, member of Prisoners For Better Society, and who has been a legal aide for 5 years) and Charles Broaddus (who described himself as a product of the 1960's culture, a school teacher with a master's degree in education, is a mem-

ber of Narcotics Anonymous, AA, and who is active in inmate education programs).

When asked if the sentencing system was unfair, Mr. Harris indicated that there is a lack of information sharing during trial and during the penalty phase but not unfairness. Economics play a major factor, he indicated, and he felt that defendants with private attorneys generally get better sentences than those defended by the Department of Public Advocacy. He also indicated that geography, crime rates, and community views have a bearing and that rural areas are more compassionate than urban areas. He also indicated that the type of crime was important and that there was more chance of a high penalty with a theft of $50 than for $1 million and that a blue collar person is more likely to end up in prison than a white collar person. He also indicated that plea bargaining creates sentencing disparity because it is expedient rather than just.

Mr. Broaddus then presented the disparate sentences he alleged were given several recent sex offenders:

1. Rural area, professional, several offenses, good attorney -10 years.

2. Young man, 1st offense, date rape, public defender major city - 20 years.

3. Military man, 1 case sodomy, no prior history, shaky case - 15 years.

4. 8 counts unlawful transaction with minor, white, paid attorney - 20 years concurrent.

5. 7 counts unlawful transaction with minor, white, paid attorney (same minor as in #4) - 20 years consecutive.

Mr. Harris urged that standards should be set for penalties, and for the reliability and type of information in the presentence investigation. He indicated that a good attorney will coach the defendant before the PSI, get letters from community leaders, etc. Mr. Harris indicated that PSI information is never verified. Mr. Broaddus indicated that he had asked a probation officer to check information for his PSI which the officer did not do. He indicated that an average of 30-45 minutes is spent on the PSI and that most lawyers do not adequately represent clients at sentencing.

Mr. Broaddus then presented information on alleged disparities in child abuse sentencing.

1. Previous robbery record - 6 years; child abuse - 7 years.

2. Cracked ribs of 6 month old baby - 2 years' probation.

3. Poked out daughter's eye with sword - 3 years' probation.

4. Beat child - 5 years' probation.

Mr. Harris then presented the cases of three persons sentenced as persistent felony offenders:

1. Second degree escape - 10 years PFO I.

2. Second degree burglary after 3 years on parole - 20 years PFO II.

3. Murder, DUI Accessory - 30 years.

Mr. Harris felt that there should be guidelines similar to the current classification system for inmates for sentencing. He indicated that prosecution should be the same "across the board," and alleged that under the current system, Jefferson, Fayette, and McCracken counties send 98% of the persistent felony offenders to prison. He indicated that there is a about a 70% success rate with new offenders in alternative to incarceration programs, particularly with a controlled living environment such as a halfway house but that there is very little of a support system on the street to help offenders. He indicated that a psychological exam and PSI should also be done before the granting of shock probation.

When asked about the parole system, Mr. Broaddus indicated that he felt that the present system was unfair, that there was no consistency to parole decisions, and that frequently the board would not consider a person with a good institutional record until they had engaged in some institutional violation and been punished for it. Otherwise, the inmate was viewed as playing to the board. Mr. Broaddus favored "contract parole" in which the inmate is given a series of programs to complete, and various other things to do, educationally and otherwise, and if he successfully completes them, he is eligible for parole.

Following the interviews with the inmates, the committee members were taken on a tour of the institution which included areas such as disciplinary segregation, the geriatric unit, the mental health unit, a new honor dormitory, the chapel, recreation area, and the dining hall. Chaplain Monk headed the tour.

With no further business to come before the Subcommittee, the meeting adjourned.

Chairman Lear asked the members to share their views about the interviews and the tour of the prison during the morning. Various members indicated a need for looking at the presentence investigation process, gaining more information on persistent felony offender sentencing patterns, and looking at alternatives to incarceration. There was a general reluctance to take up the issue of sentencing guidelines.

Professor Fortune asked if more information could be developed on the geriatric inmates, their crimes, the reasons for their incarceration and alternatives which may be available to these persons. Mr. Dave Norat indicated that the task force should interview Judge Daughaday and Judge Venters with regard to sentencing disparity and means of dealing with the problem.

IX. SIXTH MEETING

The sixth meeting of the Task Force on Sentences and Sentencing Practices was held on Tuesday, April 16, 1991.

At the request of Chairman Lear, the Subcommittees on Non-Penal Code Offenses, Alternatives to Incarceration, and Penal Code Review met jointly to hear Judge John Daughaday. Representative Scorsone introduced Judge John Daughaday, Circuit Judge from Mayfield in Graves County.

Judge Daughaday indicated that for more than two years now he has been participating in a Department of Public Advocacy sponsored alternate sentencing program. The program was initiated by a training program at Western Kentucky University which included the Judge, the Commonwealth's Attorney, the public defender, and the probation and parole officer. At this training program, sentencing practices and philosophy were discussed as were alternatives to incarceration for felons who otherwise would have been sent to prison. The judge indicated that his views on sentencing, particularly for nonviolent offenders, changed somewhat during the program.

Judge Daughaday described the program as providing community based alternatives for the sentencing of nonviolent property offenders who are not involved in drug offenses. During the course of the trial or thereafter, a sentencing specialist from the Department of Public Advocacy interviews the defendant and assesses his crime, victim views about his crime, his social or educational problems, any problems with drug or alcohol addiction, family background and other factors and then devises a comprehensive alternate sentencing plan

which considers the above listed factors and such other factors as restitution, available community resources and the defendant's willingness to participate in the program.

During the two years of the program so far, 18 cases were referred to the sentencing specialist, 7 alternate sentencing plans were submitted to court, the court granted probation in 5 cases, and of the five cases in which alternative probation was granted, two resulted in probation revocation hearings, one of which resulted in probation revocation and imprisonment and the other continuation of probation. The judge indicated that all of these persons would have been incarcerated for felony offenses had the alternative program not be available.

Judge Daughaday indicated that he was "shocked" by the passage of 1990 H B 603 which makes consideration of alternative sentencing mandatory in all cases. The judge indicated that while the program in which he participated was a good one, that the judges, prosecutors, public defenders, and probation officers in the remainder of the state did not have the advantage of the training afforded to those who participated in the experimental program. He also indicated that sentencing specialists and alternative programs are not available statewide.

The judge suggested that perhaps we could follow the model of Minnesota, a state slightly larger in population than Kentucky, which has only 3,000 in prison compared with 9,000 in prison in Kentucky but which has an extensive alternative community based corrections program.

The judge indicated that while his experiences with the program have been positive, that most judges were unaware of the alternate sentencing program a year ago. He indicated that to have a viable program, the task force needed to look at all of the factors including sentencing guidelines, revision of the penal statutes which now mandate imprisonment for a wide variety of offenses, and the availability of alternative programs. He warned that adequate funding is necessary. The judge indicated that while the history and nature of the offense are important, there must be a program plus adequate supervision.

Representative Lear indicated that the program should be expanded systemwide for it to have significant impact and that training before program implementation is essential. Violent offenders should still go to prison. Nonviolent offenders with factors indicating a possibility of success in an alternative program would be sentenced to the alternative program.

Judge Daughaday indicated that there is no magic formula to predict success in an alternative program and that each case should be viewed on its own merit. He indicated that the judge must walk a delicate line between protecting the rights of the defendant and the need of the public for protection when sentencing persons to an alternative program. Otherwise, the public may ask "what were you thinking about when you probated _____?" The program itself cannot turn the tide, public opinion needs to be modified to support idea of the program. It is important to identify issues that will not have a negative public impact. The judge further cautioned that you need to prepare the general public for the change and then take the current system apart block by block and change the entire system and that the cooperation of all three branches of government is necessary. He indicated that there may be a hard time convincing judges of the need for sentencing guidelines to support the program.

Other cautions suggested by the judge were flexibility of programs, persons in the program should be closely monitored, availability of vocational job training, payment plans, lining up of employment for offenders, and drug and alcohol abuse program availability. Of the two persons in his program that had probation revocation hearings, one thought that he could "short cut" the program but completed the program after the judge indicated to him at the hearing that the only "short cut" was ten years in the penitentiary.

Mr. Bubenzer asked if the presence of a victim advocate would help or hurt the program. The judge indicated that victim advocates had been particularly helpful in sexual assault and child abuse cases. The judge indicated that present statutes impede the use of the program. He cited the case of a 61 year old who fondled a child who had been in treatment for a year prior to the trial, who could have benefited from continuing in alternative programs, and whom the counselors indicated would be harmed by prison, but who had to be sent to prison because the statute mandated it. Mr. Norat asked if the judge felt that presentence investigation and alternatives to incarceration reports should be combined. The judge indicated that they should not, and that two of the alternative plans presented to him were rejected because they were unrealistic and that he felt that the defendant would not be able to successfully complete them. Mr. Bubenzer asked if drug screens should be routinely conducted as part of a presentence investigation. The judge indicated that this would be acceptable only if drugs or alcohol were a primary contributing factor to the defendant's behavior.

The members then discussed the possibility of visiting Minnesota in July to look at the state's alternatives to incarceration programs and discuss their operation with Minnesota officials. The staff was asked to secure LRC permission for the trip.

Dave Norat indicated that there are particular problems with the use of alternatives to incarceration because there are no long term residential programs (1 to 2 years) for persons with drug or alcohol abuse programs. He indicated that the Cabinet for Human Resources was interested in providing the programs but did not have the money to do so.

The staff was asked to obtain copies of the Minnesota Community Corrections Act and distribute it to the members of the Task Force.

Chairman Lear called the committee meeting to order and introduced Ms. Kathy Black-Dennis who explained various statistical information which the Corrections Cabinet had developed at the request of the Committee. She indicated that there were 814 inmates eligible for parole in 1977 and after, that 2,893 inmates had a sentence of 20 years or more, that 29 inmates were on death row, and that there were 71 inmates 64 years of age or older and 58 inmates sentenced under the guilty but mentally ill statute. Ms. Black-Dennis then discussed the numbers of persons convicted under the persistent felony offender and previous habitual criminal statutes and the counties from which these persons were being sentenced. Ms. Black-Dennis indicated that out of a total prison and controlled intake population that 2,061 prisoners were sentenced for being persistent felony offenders.

Mr. Jones asked if the statistics could be broken down further as to sex, race, and other information to better aid the committee in its deliberations. Ms. Black-Dennis agreed.

Mr. Isaacs observed that guilty but mentally ill inmates were in various institutions and asked why. The explanation was that security level concerns and programs relating to inmates sometimes dictated where they were assigned and that all institutions had counseling programs. Mr. Isaacs asked for a review of the programs and services available at each institution.

Representative Lear observed that 10% of the prison population is not eligible for parole for the next six years but that 90%

of the population was. He indicated that this is contrary to the popular view that most inmates will not be releasable in the near future.

The next speakers were Mr. Ernie Lewis of the Kentucky Association for Criminal Defense Lawyers and Mr. Steve Durham who is a criminal defense attorney.

During their joint presentation, Mr. Lewis and Mr. Durham indicated that consistency, fairness, flexibility, and simplicity should be the end results of a sentencing program but that this was being thwarted by the amendments to the penal code mandating sentences of incarceration for crimes related to the use of firearms, crimes committed while on probation, awaiting trial, or while on parole, and sex related crimes. This was compounded by the passage of the truth-in-sentencing legislation which introduces the defendant's past record at the sentencing phase of the trial as well as telling the jury what sentence the defendant will get if convicted. They also pointed out inequities in the application of the persistent felony offender (PFO) statute and objected to its use to secure a plea of guilty in other cases. They cited specific case instances to support each of their points.

Professor Fortune asked whether or not it was fair to use the persistent felony offender statute as a "hammer" to get a person to plead guilty to another criminal offense. Discussion then centered on which counties would "deal away" the persistent felony offender charge in exchange for a guilty plea. It was agreed that even in many large counties including Jefferson County that such deals could be made. Mr. Gillig asked if the defense attorneys could have a choice between the persistent felony offender statute or the truth-in-sentencing statute, which should be eliminated. The answer was that criminal defense attorneys want to see the persistent felony offender statute eliminated because defendants already get longer sentences under truth-in-sentencing if they have long records. The defense attorneys, however, agreed that both truth-in-sentencing and persistent felony offender statutes produced longer trials than the one day trial they had been used to.

Mr. Gillig asked if the entire persistent felony offender statute could not be eliminated, which portions should be. The attorneys agreed that PFO should not apply to class D felonies. Mr. Paul Isaacs observed that the $100 theft provisions in current law are too low and that many offenders are caught up in the persistent felony offender statute over relatively small amounts of money.

The next speaker was Mr. James Wolf, Survey Research Coordinator at the University of Kentucky. He spoke of the differences between surveys for opinions and for statistics and spoke in general of services the University of Kentucky could provide to the committee. Examples included taking "dirty" data and making it more useful, clarifying definitions, analyzing and coordinating data from different sources, describing who is currently doing research in this area at the University, and similar services. Chairman Lear indicated that one of the areas of committee interest was that of different sentencing practices in varying parts of the state, as they relate to sex, race, crime committed, economic factors, etc. This could result in disparate sentencing for the same offense. The chairman indicated that there was anecdotal information to show this, but no solid statistics existed at the present. Mr. Jones asked if a survey could be run to see what data might be "out there" which is being missed. Mr. Wolf indicated that this could be done. He also described opinion information which could be gained by the fall telephone poll in October. Mr. Wolf agreed to provide the committee with additional information on capabilities.

Mr. Bubenzer informed the committee of a provision of the 1990 federal crime control act which states that by fiscal year 1994, states are required to have a statute requiring defendants in sex cases to submit to mandatory HIV (AIDS) testing upon the request of the victim of the crime. Mr. Bubenzer also informed the task force of a provision of the proposed 1991 federal crime control act of a mandatory drug testing program for persons subject to confinement. Federal funding, or a percentage thereof, would be withheld under both programs in the event of noncompliance by a state.

X. SEVENTH MEETING

The chairman set the date for the next meeting as Friday, May 24, 1991. These minutes were not available from LRC to *The Advocate* at the time this issue went press.

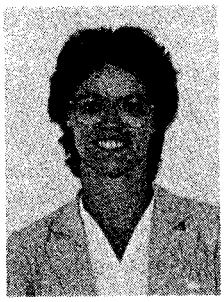
WANTED

Pat, the Policeman
for violating the *Bill of Rights*

Joe Judge
for violating the *Bill of Rights*

Smith Public Defender
for violating the *Bill of Rights* as an ineffective public defender

KENTUCKY FORFEITURE LAW



LYNDA CAMPBELL

The law of forfeiture is basically statutory, and few cases have been decided in this area. This article discusses

1) the right to counsel in forfeiture proceedings,

2) the property subject to forfeiture,

3) procedures, and

4) defenses to a forfeiture action.

Drug forfeiture will be addressed in a later article.

Criminal forfeiture law has several purposes. Traditional forfeiture doctrine is founded on the fiction that the inanimate object itself is guilty of wrongdoing. Seizure obviously prevents further illegal use of the property. More recently, forfeiture of private property by the state is sought to punish a person for the violation of certain laws. The goal of this economic penalty is to render illegal behavior unprofitable. The sale of the forfeited assets compensates the government in its law enforcement efforts.

1. RIGHT TO COUNSEL

Does the right to counsel apply to forfeiture proceedings? The question whether a forfeiture action is civil or criminal is debatable.

The United States Supreme Court has held that a forfeiture preceding is a quasi-criminal proceeding, and that like a criminal proceeding, "its object is to penalize for the commission of an offense against the law." *Boyd v. United States*, 116 U.S. 616, 6 S.Ct 524, 29 L.Ed. 746 (1886).

Kentucky Courts have held, "a forfeiture proceeding is, though civil in form, in the nature of a criminal proceeding." *Barnes v. Commonwealth*, 236 S.W.2d 454, 455 (Ky. 1951).

There can be little doubt that an indigent person is entitled to be represented by a public defender in a forfeiture action. In Kentucky an indigent person qualifies for a public defender when facing a fine of $500 or more or any offense for which the penalty includes the possibility of confinement. KRS 31.100(4)(a-c). Once a person is entitled to be represented by a public defender on the underlying charge, the assigned public defender is obviously required to represent that individual in the forfeiture proceedings. "A needy person who is entitled to be represented by an attorney" on the basis of pending charges or a criminal conviction "is entitled... [t]o be counselled and defended at all stages of the matter... when a person providing his own counsel would be entitled to be represented by an attorney." KRS 31.110(2)(a); (emphasis added). Similarly, once eligible for public defender representation the needy defendant is entitled "[t]o be represented in any other post-conviction proceeding that the attorney and the needy person consider appropriate." KRS 31.110-(2)(c). In most instances under Kentucky law, forfeiture is a post-conviction proceeding. Because a needy individual is entitled to public defender representation when facing a fine of $500 or more, an argument can be made that an indigent person qualifies for a public defender in a forfeiture proceeding if the value of the property subject to forfeiture is $500 or more.

2. PROPERTY SUBJECT TO FORFEITURE

Kentucky law provides for the forfeiture of property used or possessed in violation of certain laws. With only a few exceptions a criminal conviction is a prerequisite to forfeiture. Even if the conviction is for a misdemeanor offense, forfeiture is permitted.

Property subject to forfeiture includes money obtained in violation of the penal code, deadly weapons used in the commission of a crime, and any personal property, including vehicles, used in the commission of or the furtherance of the offenses of theft, receiving stolen property, obscuring the identity of a machine, or trafficking in stolen car parts. KRS 500.090, 527.060, 514.130. Vehicles used to illegally transport alcoholic beverages can also be forfeited. KRS 242.360.

A criminal conviction for an offense associated with the property seized is necessary in order to support forfeiture of the property listed above.

There are three exceptions to the requirement that a criminal conviction must be obtained prior to forfeiture. Forgery devices, eavesdropping equipment, and gambling devices that are illegally possessed can be ordered forfeited without the necessity of a criminal conviction. KRS 516.100, 526.080, 528.100.

3. PROCEDURES

KRS 500.090 specifies the procedures to be followed in a forfeiture action.

1) The forfeiture action is brought by the Commonwealth Attorney against a named defendant.

2) Notice must be given to the owner or lien holder of record before property can be forfeited.

3) After entering a judgment of forfeiture, the trial court has many options for disposition of the property. The property can be retained for official use, destroyed, or sold at public auction. If the property is sold, all *bona fide* lien holders who timely asserted their claims can recover the amount of their liens. The balance is to be paid to the city, county, or state, depending on who seized the property.

Pretrial seizure of personal property is not authorized by statute but has been upheld by the courts. In *Batchelor v. Commonwealth*, 714 S.W.2d 158 (Ky. App. 1986), the trial court ordered the return of cash and a van loaded with stolen property to a defendant charged with receiving stolen property. The Court of Appeals reasoned that forfeiture

statutes would be thwarted if a defendant were allowed to regain control over the property subject to forfeiture pending the outcome of the criminal charges. Holding that the Commonwealth established a sufficient nexus between the property seized and the criminal activity, the Court allowed the Commonwealth to retain the van and cash. Thus the Commonwealth may retain control over property subject to forfeiture until the criminal charge is resolved.

4. DEFENSES

Acquittal

If forfeiture proceedings are initiated, a property owner has many possible defenses. Acquittal of the criminal charges is a bar to the forfeiture proceeding because a criminal conviction is a prerequisite to forfeiture. The only exception is for forgery devices, eavesdropping equipment, and gambling devices. See *Smith v. Commonwealth*, 707 S.W.2d 342 (Ky. 1986).

Illegal Seizure

The illegal seizure of property is a defense to forfeiture. The exclusionary rule is applicable to forfeiture proceedings. Recall that courts consider forfeiture a penalty for a criminal offense. *In Re One 1965 Ford Mustang*, 463 P.2d 827 (Ariz. 1970), the defendant faced a fine of $100 to $500 in a criminal proceeding and was subject to the loss of his $1000 car in the forfeiture proceeding. The court recognized that forfeiture is a penalty for a criminal offense and can result in even greater punishment than the criminal prosecution. Excluding illegally seized evidence from the forfeiture proceeding was necessary to avoid an anomalous result. Consequently, courts apply the exclusionary rule and will not permit forfeiture of property that has been illegally seized.

Innocent Owner

Statutory provisions forbid the forfeiture of the property of an innocent owner. An innocent owner is an owner of property without knowledge of the illegal use of his property. It is unclear who has the burden of proving whether the owner has knowledge of the illegal use of his property. Kentucky statutes place the burden of proof on the owner. However, in applying this statute, Kentucky's highest Court reached a contrary result. In *Chaney v. Commonwealth*, 234 S.W.2d 960 (Ky. 1950) the Court required the Commonwealth to prove that the owner knew his property was being used for an unlawful purpose. The Court declared forfeiture a "drastic measure." *Chaney v. Commonwealth*, 234 S.W.2d at 961. This ruling accords with the Kentucky courts' policy construing forfeiture statutes strictly against forfeiture and liberally in favor of the person whose property rights are to be affected. *Bratcher v. Ashly*, 243 S.W.2d 1011 (Ky. 1951).

Reasonable Doubt Standard of Proof

The Kentucky forfeiture statute does not specify the standard of proof required. Clear and convincing evidence was the standard of proof applied in *Chaney, supra*. The reasonable doubt standard applies in forfeiture proceedings in the Eleventh Circuit. *U.S. v. Elgersma*, 929 F.2d 1538 (11th Cir. 1991). A preponderance-of-evidence test has been endorsed in three other federal circuits. *U.S. v. Herrero*, 893 F.2d 1512 (7th Cir. 1990); *U.S. v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989); *U.S. v. Sandini*, 816 F.2d 869 (3rd Cir. 1987). Because the Kentucky forfeiture statute is silent on the issue of the standard of proof, the Commonwealth is required to meet the highest standard, proof beyond a reasonable doubt, in a forfeiture proceeding. "The Commonwealth has the burden of proving every element of the case beyond a reasonable doubt." KRS 500.070(1). By its very language this burden-of-proof statute is not limited to only substantive crimes. Kentucky has recognized that even *quasi*-criminal proceedings require proof beyond a reasonable doubt. *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964); see KRS 202A.076(2).

Taking of Property

The argument that forfeiture of property is a taking of property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution is difficult to establish. The case of *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974) demonstrates the extent to which the United States Supreme Court sustains forfeiture. In this case one marijuana cigarette was found on a yacht. The owner of the yacht, Pearson Yacht Leasing Company, had no knowledge that the leasee was using the vessel illegally and had even included in the lease a prohibition against using the yacht for an unlawful project. The court held that forfeiture of the yacht "served a legitmate purpose and was not unduly oppresive." *Id.* at 690. To avoid forfeiture, the court ruled than an owner must prove "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all he reasonably could be expected to prevent the proscribed use of his property." *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974).

CONCLUSION

Criminal defense attorneys must be aware of forfeiture proceedings. When the Commonwealth attempts to forfeit property, recall that the type of property determines whether a conviction is a prerequisite to forfeiture. Defense attorneys can serve their clients by representing them in forfeiture proceedings and using the Kentucky policy of strict construction against forfeiture to argue that the Commonwealth has the burden of proof and that the standard of proof should be beyond a reasonable doubt.

LYNDA CAMPBELL
Assistant Public Advocate
DPA/Madison/Jackson/Clark County Office
201 Water Street
Richmond, Kentucky 40475
(606) 623-8413

MOTION FILE/ INSTRUCTIONS MANUAL

The Department of Public Advocacy has collected many motions and instructions filed in criminal cases in Kentucky, and has compiled indices of the categories of the various motions and instructions and a listing of each motion/instruction. Each is a copy of a defense motion/instruction filed in an actual Kentucky criminal case. The motion file was updated in April 1991. The instructions mnual was updated in 1989.

COPIES AVAILABLE

A copy of the motion file /instruction manual index is available upon request. Copies of any motion/instruction are free to public defenders in Kentucky, whether full-time, part-time, contract, or conflict. Criminal defense advocates can obtain copies of any of the motions/instructions for the cost of copying and postage. Each field office has an entire set of the motions/instructions.

If you are interested in receiving a copy of the indexes or copies of the motion/instructions, please contact:

Barbara Sutherland
DPA Librarian
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006

Two New Video Tapes On...

"THE ART AND SCIENCE OF CROSS EXAMINATION"

Whether the case is civil or criminal, the winning lawyer knows how to perform incisive cross examinations. Here are the newest methods for creating and delivering meticulously prepared, dynamic and memorable crosses. These two new tapes display the revolutionary techniques of Roger Dodd and Larry Pozner, whose lectures on cross examinations have stolen the show at seminars from Alaska to Florida. Each tape contains numerous visual aids to assist in the mastery of these new techniques.

What Trial Lawyers Are Saying About These Techniques

"A whole new dimension in the theory and tactics of cross examination."

"Revolutionary"

"The two most important tapes on cross since **Younger's Ten Commandments.**"

"I have been trying cases 14 years but watch the tapes before every trial."

"After these tapes, it is more science than art."

—Tapes You Will Watch Before Every Trial—

TAPE ONE: CREATING CROSS EXAMINATIONS

Proven Preparation and Presentation Techniques including:

- 3 Simple, Incredibly-Effective Preparation Systems
- The only three rules of cross examination
- Establishing control one fact at a time
- Persuasive Order for Cross
- Creating dependably solid cross examinations
- Words that make cross dangerous
- Voice and silence: The Advocate's Weapon
- Techniques to Emphasize Key Facts

TAPE TWO: POWER CROSS

Advanced Techniques for Civil and Criminal Cases:

FEATURING THE CLASSIC LECTURE:

- 10 Methods of Controlling the Runaway Witness

LOOPS:

- Making Hostile Witnesses Adopt Your Words
- Examples from Civil and Criminal Cases

TRILOGIES:

- Organizing Facts to Overwhelm Witnesses
- Make Your Best Facts More Memorable

SPONTANEOUS LOOPS:

- Beating Witnesses With Their Own Words
- Punishing the Non-Responsive Answer

TRILOGY PYRAMIDS:

- Tying Key Phrases from Cross to Your Closing
- Turn Crosses into Literature

ROGER DODD is a noted civil and criminal trial lawyer and a Past-President of the Georgia Association of Criminal Defense Lawyers. He is a faculty member of the National Criminal Defense College and the Georgia Insititute of Trial Advocacy. He is Board Certified in both civil and criminal trial law by the National Board of Trial Advocacy, and is also a Fellow of the American Academy of Matrimonial Lawyers.

LARRY POZNER is the senior member of a three-lawyer criminal defense firm in Denver. He is a Past-President of the Colo. Crim. Defense Bar and is an Adjunct Professor of Law at the University of Denver. His humor, insight, and creative trial tactics make him one of the most sought after speakers in the nation. Mr. Pozner is on the faculty of the National Criminal Defense College and has lectured in more than 30 states.

(Each tape runs approximately one hour)

Tape One ($135.00)	_____
Tape Two ($135.00)	_____
or	
Both Tapes ($235.00)	_____
3% Sales Tax (Colorado Residents Only)	_____
Shipping and Handling ($6.95)	_____
TOTAL	_____

Name: _____

Address: _____

City: _____ State: _____

Zip: _____ Phone: _____

_____ MasterCard

_____ Visa

_____ Check to A.T.S. Inc.

Card Number: _____

Expiration Date: _____

Signature: _____

CALL or FAX order to (303) 388-6868 or mail to:
American Trial Skills, Inc.
2121 N. Frontage Road West, Suite 200 • Vail, Colorado 81657

THE CRIMINAL DEFENDANT AND COOPERATION

If Defendants Want to Taste the Fruit, Get it in Writing

MARCIA SHEIN

Early in English history there arose a sense of duty upon the part of each citizen concerning the moral obligation to cooperate with law enforcement agencies in the pursuit of criminals. Thusly, the duty of the free citizen to respond to the "hue and cry" and pursue wanted criminals goes back to the Assizes of Clarendon (1166) and the Statute of Winchester (1285)[1]. Even in those early days the failure to reveal a felony to the authorities was a crime at common law, misprision of a felony,[2] and is still a misdemeanor in England.[3] In the United States, misprision of a felony has been on the statute books since the first Congress. The statute, as amended, punishes with up to three years imprisonment "Whoever, having knowledge of the actual commission of a felony ... conceals and does not as soon as possible make know the same to some judge or other person in civil or military authority under the United States ...." Act of Apr. 30, 1979 S6, 1 Stat. 113.[4] While the term "misprision of a felony" now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.[5] Cooperation with authorities in the prosecution of a crime has long been a tool of the law enforcement branch, sanctioned and openly approved by the judiciary system.[6]

Therefore, with the condemnation of concealing crimes as being a "badge of irresponsible citizenship," being so deeply rooted in the social obligations of a citizen, the Supreme Court in *Roberts v. United States*, expanded that moral obligation a step further by stating that the "social obligation is not diminished when the witness to the crime is involved in illicit activities himself." With the *Roberts* decision, "the criminal defendant no less than any other citizen is obligated to assist the authorities."[7] While this situation presents an open paradox, in that criminal defendants convicted of felonies are often disenfranchised of the rights of an honest citizen, *i.e.*, the right to vote, hold public office and the various aspects of employment when the employer is aware of the felony status of an offender, nevertheless, society expects, and more often than not, demands that they cooperate with the prosecuting authorities against other persons involved in criminal activities.[8]

Since a criminal defendant is asked, expected and often placed under certain pressures to cooperate with authorities in providing information concerning others involved in criminal activities, the defendant is faced with two choices. Either cooperate or decline to do so. Either way this situation presents a number of problems to the defendant faced with such a choice.

For the criminal defendant to decline, it is the viewpoint that by declining to cooperate the defendant has rejected his obligations of community life that should be recognized before rehabilitation can begin.[9] Thusly, the failure to cooperate, it seems dims the likelihood that the defendant will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, and the degree to which he does or does not deem himself at war with his society.[10]

While cooperation, based upon the foregoing, is of course of noble foundation, the criminal defendant that is asked to cooperate should realize that cooperation is a multifaceted situation which can lead to far different results under the various circumstances of the individual criminal case.

The first, if not foremost concern, among criminal defendants who are willing to cooperate with the government, is the fact that those people whom the criminal defendant is going to cooperate about may not take too kindly to such cooperation. This is especially so with organized crime. The potential for danger to the defendant, as well as their families often accounts for the refusal of a criminal defendant to cooperate with the authorities.[11] With so many individuals being connected with the drug activities, and the number of individuals in the drug rings at the various stages, does nothing but increase the risk to the potential criminal defendant if he decides to cooperate with the prosecuting authorities.[12] If the initial refusal to cooperate is based upon fear, it will be the position of the prosecutor, and the court that a duress defense is not available once the government has offered, and the defendant turns down protection, *i.e.*, the Witness Protection Program.[13]

With this reasoning in the same light, the Supreme Court has indicated in dictum that fear is not a legal excuse from testifying and the government is able to gain through various means that testimony wanted by the offer of placement in the Witness Protection Program with that limited protection that program offers, together with those members of their family, that would be endangered by providing the requested cooperation with the prosecuting authorities.[14]

The viewpoint of this discussion is toward the criminal defendant who, through counsel, has decided to cooperate with the prosecuting authorities. *Cooperation without counsel, at any stage of the criminal proceedings can result in the criminal defendant failing to obtain the expected fruits of those endeavors.* An excellent example of such a failure is found in *United States v. John Doe*, who upon being arrested decided to cooperate with authorities, waived counsel at that point and did in fact cooperate under certain expectations.[15]

Doe came to find out that cooperation without having the exact parameters set out in writing or other form of an agreement is merely whispered words in the wind and nothing more. While the instant decision in *Doe*, where the district court openly stated "... I don't care what your cooperation was. It makes no difference to me. I don't believe you," leaves a reversal at the appellate level, had Doe had a written agreement duly stating the exact parameters expected upon the part

of the government, as well as upon the part of Doe, Doe would not have been placed at the appellate level seeking to have that situation corrected.[16]

Even with counsel, at all stages of a proceeding, *cooperation should be reduced to a specific performance document outlining the expectations upon the part of both sides.* In *Barbara v. Smith*, had Barbara's counsel gained such a document, there would be a good chance that Barbara would not have been killed for her cooperation.[17] Because there was only an oral agreement between Barbara and the Assistant United States Attorney, when Barbara's counsel requested protection, not once, but twice, the government would have been compelled to provide her with that protection, but the result is that Barbara and three CBS Inc. employees were killed when they tried to intervene in her murder.[18] In the *Barbara* case, the second, unfruitful request, came after the disappearance of another person in that case. Likewise, in *Abbott v. Petrovsky*, the failure of Abbott to obtain such a written, specific performance agreement, left him without the results that he expected when he cooperated with the government.[19]

In *Callas v. United States*, Robert Callas sought specific concessions upon the part of the government in exchange for his cooperation:

(1) that other counts for armed bank robbery then pending against him would be dropped;
(2) that he would not be prosecuted concerning other crimes discussed at such meetings as well as other crimes he may have committed as a Black Liberation Army Member; and
(3) that all information that he provided to the federal authorities, as well as his cooperation would be kept absolutely confidential.

When the government failed to provide the fruits for Callas's cooperation, he was left seeking relief in the appellate waters and the ensuing years of litigation that such a course entails. Had Callas obtained a written, specific performance agreement, the results could, and in all likely events, would have been different.[20]

In the case of *Jane Doe v. Civiletti*, where the government sought her cooperation, as well as her husband's, the offer of the Witness Protection Program, made without specific written promises, is a clear example of what can happen when the failure to gain such written agreements are lacking.[21] While the government, upon the part of the Federal Drug Enforcement Administration (DEA) and the Assistant United States Attorney, made promises to them, the United States Marshal Service, whose authority for the Witness Protection Program rests, was not obligated to provide the benefits, as promised by the U.S. Attorney and the DEA. While the Second Circuit Court of Appeals expressed sympathy for Doe and her children, nevertheless the Court found that it was required to deny the relief sought in that proceedings. The opinion rested upon the fact that Doe had not spelled out, in specific terms, the agreement entered into between herself and the government when she signed the Memorandum of Understanding.[22]

Once an agreement to cooperate with the government has been entered into, to attempt to withdraw can have disastrous consequences to a defendant. Take the case of Albertose Mesa, as revealed in *United States v. Garaldo*.[23] Mesa attempted to invoke his Fifth Amendment privileges and the district court granted him use immunity pursuant to 18 U.S.C. Section 6001-6003 (1982) and ordered him to testify. When, in the middle of that testimony, Mesa refused to answer a question, the district court immediately imposed a forty-year prison sentence without parole, to be served at Marion, Illinois, the maximum security facility in the federal prison system. While Mesa eventually had the forty-year sentence reduced because he testified, it clearly shows the extent that the judicial system will go to support the cooperation agreements between the government and testifying defendants. This same line of reasoning surfaced in *United States v. Stratton*[24] and *United States v. Garcia*.[25]

Here the individual district courts imposed sentences because Stratton and Garcia refused to cooperate and provide assistance to law enforcement authorities. Both cases were reversed at the appellate level pursuant to violations of Fifth Amendment privileges of self-incrimination. The *Stratton* Court "has drawn a distinction between increasing the severity of a sentence for a defendant's failure to cooperate and refusing to grant leniency." "'It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is another think to administer additional punishment to a defendant who by his silence has committed no additional offense.'"[26]

The Ninth Circuit in *United States v. Safirstein*[27] reversed the sentences of Safirstein because he refused to cooperate with the government and provide the details concerning the source of the money he was attempting to take out of the country. The district court, without justification or knowledge stated that it duly assumed that Safirstein was involved in drug trafficking. The government used the pre-sentence report to accuse Safirstein of "stonewalling" the efforts upon the part of the government to gain the background details surrounding the money that Safirstein was attempting to carry out of the country.[28]

While it has been shown that misuse and abuse of a cooperating defendant has occurred in *Doe v. Civiletti*,[29] *Callas*,[30] *Barbara*,[31] *John Doe*,[32] most of the instant cases could have been avoided had the individuals obtained written agreements from the prosecuting authorities.

In obtaining a written agreement by a defendant from the government prior to the defendant cooperating, the government loses nothing. In the case of *United States v. Giltner*,[33] the government raised the issue of Giltner's failure to cooperate at his sentencing. In fact the *Giltner* court clearly stated that Giltner's "... plea agreement included a promise of cooperation, and the government had every right to address at sentencing his failure to cooperate by continued denial of knowledge of drug transactions."[34]

United States v. MacCloskey,[35] is a sterling example of abuse of a defendant in that the Assistant United States Attorney called counsel for Patsy Elaine Edwards to inform him that his client "be advised of what the Fifth Amendment is and that she'd best be advised that if she made any statements that she was subject to being reindicted." This instant situation occurred after the indictment against Edwards was dropped by the government.

The cases, as stated, show that a cooperating criminal defendant must rely on the "good faith" of the prosecuting attorney in order to receive due consideration in exchange for the cooperation given. Needless to say, the criminal defendant did not always receive what he or she though they would when they agreed to cooperate.

A cooperating defendant could always seek a reduction of his or her sentence via a motion for reduction of sentence pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure.[36] When the Comprehensive Crime Control Act of 1984 became law, a criminal defendant could no longer move for a reduction of his or her sentence once the court imposed it upon them. The remedial measure of Rule 35(b) has shifted to the discretion of the prosecution.[37]

COOPERATING DEFENDANTS AND THE FEDERAL SENTENCING GUIDELINES

Having previously shown that there exists abuse and misuse of cooperating

defendants, then one must logically look toward the Federal Sentencing Guidelines to see if the heretofore mentioned abuses and misuses can be avoided.

Before the Federal Sentencing Guidelines became effective, a federal judge's discretion in sentencing seemed almost infinite, so long as the sentence imposed by the court did not exceed the statutory limits.[38] Yet, while the sentencing judge may sentence a defendant within the statutory limits, using a vast array of information available to the court, in *Williams v. New York*, the Supreme Court expressly disapproved of rigid and mechanical concepts in sentencing that unnecessarily restrict judicial exercise of discretion.[39] The Court duly affirmed the prevailing view that the past life or particularities of a criminal offender should be taken into due consideration as to a particular sentence applicable to individual defendants.

In 1984, under the Comprehensive Crime Control Act (1984), the Sentencing Reform Act of 1984 [40] established the United States Sentencing Commission as "an independent commission in the judicial branch."[41] The purpose of the Commission was to draft the necessary guidelines that would effectively narrow the disparity in sentences imposed by the federal courts upon similarly situated offenders for comparable criminal conduct.[42]

The Sentencing Reform Act thusly requires the individual federal courts to impose sentences "which reflect the seriousness of the offense," "provide just punishment for the offense," "promote respect for the law," "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[43] Congress, to implement these goals, gave the Commission the responsibility to determine under the appropriate circumstances what an individual would be subject to as to punishment, a term of probation, a fine, or some combination of all the above.[44]

In addition to the above, Congress moved for a grading scheme to be duly employed by the Commission to rank each offense according to its seriousness.[45] The Sentencing Commission was expected to draft their guidelines with a light to developing policy statements that would effectively eliminate any sentence disparities, and yet develop policy statements that would allow a federal judge sufficient flexibility to impose individual sentences warranted by mitigating or aggravating factors not taken into consideration in the general guidelines.[46] Congress also mandated that the Commission take numerous factors and circumstances into due consideration, to the specific extent that the same are relevant in establishing the categories of offenses. The factors included the grade and nature of the offense, the mitigating and aggravating circumstances, the public concern generated by the offense, the deterrent effect a sentence might have on others, and the incidence of the particular offense in the community and in the nation.[47] Congress authorized the Commission to consider, in establishing the categories of defendants, the relevance of an offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment records, family and community ties, role in the offense, criminal history, and dependence on criminal activity for a livelihood.[48]

ACCEPTANCE OF RESPONSIBILITY

While the Supreme Court in *Roberts v. United States*[49] placed a great deal of emphasis upon the willingness of a criminal defendant to cooperate, the United States Sentencing Commission, in the original, as well as the revised Federal Sentencing Guidelines accords a criminal defendant only two points for "Acceptance of Responsibility" upon the part of a defendant, and this is not automatic either.[50] How the same consideration can be given to a defendant who takes the government to trial and is found guilty seems a bit contradictory in scope, but such consideration can be given nevertheless. This "optional" plan, dependent upon the sentencing court forces the counsel of each defendant to specifically move for such a reduction of the individual defendant's total severity score.

SUBSTANTIAL ASSISTANCE/COOPERATION

As with the original guidelines, the revised guidelines only allow the government to move for a reduction of sentence, "[U]pon motion of the government, a criminal defendant can no longer move for a reduction of sentence pursuant to Title 18 U.S.C. Section 35, which was allowed prior to the institution of the Sentencing Reform Act of 1984. Thusly, a criminal defendant is left to the absolute mercy of the government to gain any type of sentence reduction via that absolute discretion. While there exists a specific section of the guidelines for downward departure upon the part of the sentencing court the instant section alludes to an upward departure for offenses.[51]

The original, as well as the revised guidelines by the Commission concludes that only the defendant's criminal history,[52] his dependence upon criminal activity for a livelihood,[53] and his acceptance of responsibility for his wrongdoing are relevant.[54] This present situation fails to properly accord a defendant with the ability, within the present sentencing guidelines, to move for a downward departure of the sentencing guidelines other than to do so under Section 5K2.0, which is totally discretionary upon the part of the sentencing court *in toto*.

The cooperating defendant has only Section 5K1.1 to receive consideration of a downward sentence departure, and that being with the expressed approval of the government. Otherwise, Section 3E1.1 is the only discretionary option open to the instant defendant for his cooperation. In the case of *United States v. Campbell*,[55] the defendant received an 83-month reduction of his possible sentence pursuant to Section 5K1.1, and that was with the specific approval and request on the part of the government.

For all intents and purposes, a cooperating criminal defendant, under the present Sentencing Guidelines, is left at the total mercy of the government to duly receive any benefits of his or her cooperation.[56]

This issue of cooperation upon the part of a criminal defendant and whether they received the expected benefits has surfaced in the courts with varied results. The Fifth Circuit in *United States v. Taylor*[57] has taken the position any departure for substantial assistant must be made, if at all, pursuant to Section 5K1.1. It was the position of the *Taylor* court that Taylor "received his bargain on the charging end of (his) case in exchange for his cooperation."[58] Thusly, while Taylor evidently entered into an agreement to cooperate, the fruits of that agreement were not what he expected or believed he would receive and because the agreement was not in writing, he lost in appellate review for that failure.

The Eleventh Circuit in *United States v. Musser*[59] stated, in response to the challenge that the substantial assistance provisions were unconstitutional, "because (they) delegate to prosecutors unbridled discretion to decide who is entitled to a sentence reduction." The Eleventh Circuit rejected this argument noting that "the only authority 'delegated' by the rule is the authority to move the district court for a reduction of sentence in cases in which the defendant has rendered substantial assistance. The authority to actually reduce a sentence remains vested in the district court . . . ."[60]

While this decision is factually correct, nevertheless the *Musser* Court did not factually address the issue that it is the government who decides who is entitled a sentence reduction, whether the district court grants it or not. With this idea in mind, the criminal defendant within the Eleventh Circuit had best obtain a written agreement unless he or she would wish to find themselves upon the barren shores of the appellate plateau seeking non-existent relief.

While the Eleventh Circuit in *Musser* has created a barren field toward the 5K1.1 section of the Federal Sentencing Guidelines, other circuits have taken a bit of a different view of the instant section. The Fifth Circuit, in the face of its decision in *Taylor*, stated in *United States v. White*[61] that the "policy statement (5K1.1) obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance." Thusly, the *White* Court suggested, without further elaboration, that there may be a remedy if the government refuses to recognize a defendant's substantial assistance. It is with the rationale of *White* that the district court in *United States v. Coleman*[62] granted the requests of the defendants for reductions and/or departures from the required sentences as would have been required under the Guidelines. The *Coleman* Court based part of its decision upon the fact that the plea agreement was ambiguous upon the part of the government and that ambiguity entitled the defendants, pursuant to Section 5K1.1, to due consideration by the court and it was granted.

The Eighth Circuit in *United States v. Justice*[63] recognized and approved the actions upon the part of the *Coleman* Court, but declined to grant Rogers relief, stating that if "Justice *desired* further leniency for his cooperation during his sentencing he should have at least made it clear that the plea did not affect his entitlement to have the sentencing court consider a departure under Section 5K1.1, or alternatively, he should have *negotiated* for the government's promise to file a Section 5K1.1 motion during the sentencing hearing."

The *Justice* Court noted the "good faith" effort upon the part of the Justice, but refused to accord Justice any relief because his "plea agreement" did not spell out provisions for such consideration.[64] The *Justice* Court labeled Justice the way the *Taylor* Court did Taylor, *i.e.*, that each defendant received the benefits from the front end of the agreements, that additional charges would not be prosecuted.[65]

CONCLUSION

The decisions, within the different circuits clearly indicates that if a criminal defendant desires a departure of his or her sentence, that he or she must obtain such consideration as part of the plea agreement, with specifics stated so that there can be no ambiguity whatsoever. If a defendant enters into the cooperation arena without such, they do so at their own peril.

Under the present Federal Sentencing Guidelines, for a defendant to enter into an agreement with the government, there exists no assurances under the existing guidelines that he or she will receive due consideration for that cooperation, presently only a hope based upon the sincerity of the applicable United States Attorney. Until applicable guidelines are established by the Sentencing Commission, the best possible course upon the part of the criminal defendant, who is willing to cooperate with the government in return for applicable consideration in a sentence, is to have such an agreement made in writing, specifically detailing the expectations upon the part of the defendant, as well as the government. Such an agreement properly protects the defendant from unexpected misunderstandings that have been shown to have occurred in the preceding pages. While the applicable United States Attorneys may initially decline such a written agreement, it is the only vehicle to adequately protect the defendant from unkept promises while the defendant cooperates and incurs inherent problems of such cooperation.

MARCIA G. SHEIN
Sentencing/Post-Conviction Consultant
National Legal Services, Inc.
710 Lake View Ave., N.E.
Atlanta, GA 30308
(404) 874-9553
Fax (404) 872-3104

Marcia G. Shein, M.S., J.D. is President of National Legal Services, Inc., a sentencing and post-conviction consulting firm. The national headquarters are based in Atlanta, Georgia. Marcia is a member of the National Association of Criminal Defense Lawyer's Sentencing Committee, and has testified before the Sentencing Commission. She is the author of the Sentencing Defense Manual for Clark Boardman, Ltd., New York, New York.

FOOTNOTES

[1]W. Holdsworth, *A History of English Laws*, 292 (3d ed. 1922).

[2]W. Holdsworth, *A History of English Laws*, 389 (3d ed. 1923).

[3]G. Williams, *Criminal Law*, 423-27 (2d ed. 1961).

[4]*Roberts v. United States*, 445 U.S. 552, 558 (1980).

[5]*People v. United States*, 445 U.S. 552, 558 (1980).

[6]*People v. Carradine*, 52 Ill.2d 231, 234, 287 N.E.2d 670, 672 (1972). (Crime will not be rooted out unless citizens who witness it cooperate before the bar of justice); *People v. Clinton*, 42 A.D.2d 815, 346 N.Y.S.2d 345, 346 ("it may be compelled to do so").

[7]445 U.S. at 558.

[8]The Disenfranchisement of Ex-felons, *Harvard Law Review*, Vol. 102, 1300 (1990).

[9]445 U.S. 558.

[10]*Ibid.*

[11]The Dilemma of the Intimidated Witness in Federally Organized Crime Prosecutions, *Fordham Law Review*, Vol. 50, 582.

[12]*Ibid.*

[13]*Piemonte v. United States*, 367 U.S. 556 (1961).

[14]*Ibid.*

[15]*United States v. John Doe*, 655 F.2d 920 (9th Cir. 1981).

[16]*United States v. John Doe*, 655 F.2d at 928 n. 13.

[17]*Barbara v. Smith*, 836 F.2d 96 (2d Cir. 1987).

[18]*Barbara v. Smith*, 836 F.2d at 98.

[19]*Abbot v. Petrovsky*, 717 F.2d 1191 (8th Cir. 1983).

[20]*Callas v. United States*, 578 F.Supp 1390 (D.C. N.Y. 1984).

[21]*Doe v. Civiletti*, 635 F.2d 88 (2d Cir. 1980).

[22]*Doe v. Civiletti*, 635 F.2d at 95.

[23]*United States v. Garaldo*, 822 F.2d 205 (2d Cir. 1987).

[24]*United States v. Stratton*, 820 F.2d 562 (2d Cir. 1987).

[25]*United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976).

[26]*United States v. Stratton*, 820 F.2d at 564.

[27]*United States v. Safirstein*, 827 F.2d 1380 (9th Cir. 1987).

[28]*United States v. Safirstein*, 827 F.2d at 1381.

[29]See Note 21.

[30]See Note 20.

[31]See Note 17.

[32]See Note 15.

[33]*United States v. Giltner*, 889 F.2d 1004 (11th Cir. 1989).

[34]*United States v. Giltner*, 889 F.2d at 1009.

[35]*United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982).

[36]*United States v. Baylin*, 696 F.2d 1030 (2d Cir. 1982).

[37]*United States v. Baylin*, 696 F.2d at 1042.

[38]*United States v. Tucker*, 404 U.S. 443, 446 (1972).

[39]337 U.S. 241 (1949).

[40]Pub. L. No. 98-473.

[41]29 U.S.C. Section 991(a).

[42]28 U.S.C. Section 991(b)(1)(B).

[43]18 U.S.C. Section 3553(a)(2).

[44]18 U.S.C. Section 3551(b)(1)-(3).

[45]18 U.S.C. Section 3559(a)(1).

[46]18 U.S.C. Section 3553(b).

[47]28 U.S.C. Section 994(c)(1)-(7).

[48]28 U.S.C. Section 994(d)(d)-(11).

[49]445 U.S. 552 (1980) at 558.

[50]Original and revised Federal Sentencing Guidelines, Section 3E1.1.

[51]Original and revised Federal Sentencing Guidelines, Section 5K2.0.

[52]See page 1953. The Death of Discretion? Reflections on the Federal Sentencing Guidelines, *Harvard Law Review*, Notes 88, 89, and 90.

[53]*Ibid.*

[54]*Ibid.*

[55]*United States v. Campbell*, 704 F.Supp 661 (D.C. E.D. Va. 1989).

[56] *Ibid.*

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

[56] Rule 35(b) of the Federal Rules of Criminal Procedures— see also 18 U.S.C. Section 3553(e)).

[57] 868 F.2d 125.

[58] 868 F.2d at 127.

[59] 856 F.2d 1484.

[60] *Ibid.*

[61] 869 F.2d 822, 829 (5th Cir., 1989).

[62] 707 F. Supp. ___, 1989.

[63] 877 F.2d 664, 669 (8th Cir., 1989).

[64] 877 F.2d at 667.

[65] 887 F. 2d at 669 and 868 F.2d 125; *Taylor.*

INFORMANTS TRADE FALSE FOR PRISON

In the seamy world of jailhouse informers, treachery has long been their credo and favors from jailers their reward. Now lawyers and prosecutors must ponder whether fiction was often their method.

That is the unhappy implication behind the crisis in law enforcement that has been unfolding in Southern California since an inmate, Leslie Vernon White, who has testified in numerous highly publicized cases, demonstrated in October how he could fabricate the confessions of other inmates without ever having talked with them. He said later he had lied in a number of criminal cases.

Defense lawyers have compiled a list of 225 people convicted of murder and other felonies, some of them sentenced to death, in cases in which White and other jailhouse informers testified during the last 10 years in Los Angeles County.

They are calling for the appointment of a special counsel to lead a grand jury investigation into whether deputy district attorneys in the county and local police officials knew about or encouraged perjured testimony to win cases they thought would be difficult to prove.

"When you dangle extra rewards, furloughs, money, their own clothes, stereos in front of people in overcrowded jails, then you have an unacceptable temptation to commit perjury," said Robert Berke, the attorney for California Attorneys for Criminal Justice, an organization of defense lawyers.

The group released internal memorandums from the district attorney's office this month indicating that high-level prosecutors ignored warnings from members of their own staff about White's unreliability.

While denying wrongdoing by prosecutors, the office of District Attorney Ira Reiner has mounted an investigation into 114 closed and pending cases involving 140 defendants in which jailhouse informers played a role.

Among the convictions under review are those of William Bonin, who was convicted in the killing of 16 men and the dumping of their bodies along California freeways, and Angelo Buono, who was convicted in the killing of 10 young Los Angeles women whose bodies were found on hillsides.

The State Bar of California is also investigating whether any lawyers in the district attorney's office committed unethical acts regarding informers.

Though the cases are limited to Los Angeles County, the largest local prosecution district in the world and the scene of many notorious crimes through the years, defense lawyers suspect they represent only the tip of the iceberg nationally. The county district attorney's office has more than 800 lawyers who handle 38,000 felony cases a year.

On Feb. 9, California Attorneys for Criminal Justice and the Criminal Courts Bar Association renewed a request to Richard P. Byrne, presiding judge of the Los Angeles Superior Court, and the county grand jury foreman for a special investigation into the use of jailhouse informers. The original request was filed Dec. 15, and Byrne has yet to act on either request.

In the latest court papers, the groups charged that the district attorney's office, the Los Angeles Police Department and the county sheriff continued to use the longtime jailhouse informer, White, despite indications going back to 1980 that his information was unreliable. White has been in state and local jails much of the last 10 years on a variety of charges.

He testified or offered to testify in at least a dozen major cases. In return, White received numerous favors, including a letter recommending parole by Curt Livesay, the assistant district attorney who is the No. 3 official in the office. White also received money and furloughs.

On his last furlough, he beat his wife, pulled a knife on his landlady and snatched a purse. The 31-year-old inmate, an articulate man of considerable charm, remains in county jail awaiting sentencing Feb. 23 for the purse snatching.

Last October, White showed sheriff's deputies how easily he could obtain information about cases from a jail telephone; the process was taped.

Given only the name of a suspect in a murder case, White identified himself on the telephone as a bail bondsman, a prosecutor and a police officer to elicit from official sources the date of the crime, name and age of the victim and the suspect, the jail cell number and other information pertinent to the case.

CONFESSIONS

FAVORS

With that, he called the prosecutor, Mary Ganahl, posing as "Sergeant Williams with the Los Angeles Police Department." Ganahl told him, "I can tell you anything you want to know about the case." She described the death in detail. The victim, one of a group of gay men who were friends, was depressed about not having a lover, Ganahl said, adding that he swallowed a large dose of amphetamines and "flamed out." To control him, she said that the group handcuffed him and that the suspect gagged him and stuffed him into a steamer trunk, where he died. The evidence was the suspect's own admission that he put him in the trunk, Ganahl said. The defense in the case, which is awaiting trial, is that the victim died from the drug overdose.

After the call, White explained to deputies how he could concoct a confession: "At this point, I've got the victim's name, date of arrest, date of occurrence, method of murder, facts in the case, down to detailed specific information. I would need no more at this time than I was somewhere near the suspect.

"And I could easily say this suspect had in fact made a jailhouse admission to me concerning the crime and explained to me he had done it this way with the facts I have at this point. I don't think there's any homicide detective in the county who would not believe what I've got to say." Then, identifying himself as a deputy district attorney, White called the bailiff at the jail where he was a prisoner and ordered himself and the suspect transferred to a court for an interview. This would have enabled him to say that he was with the suspect on the bus when he confessed. Later, White said he had lied in a number of cases, once with the knowledge of a prosecutor. He has refused to identify those cases unless granted immunity from prosecution.

"The shocking thing is that we always thought he was being fed information by the police," said Gigi Gordon, a Santa Monica lawyer who is compiling data on possibly tainted cases for the Criminal Courts Bar Association. "We did not realize he did not need the cops to do this."

ROBERT REINHOLD
New York Times
229 West 43rd Street
New York, New York 10036-3913
(212) 556-1234

Criminal Informants

An Administrator's Dream or Nightmare

Informants expose crimes that otherwise may go undetected. When properly used and controlled, they provide information that improves police efficiency, assists in the apprehension and prosecution of criminals, and sometimes even prevents crimes from taking place.

However, to use informants effectively, agencies must establish and maintain strict, written departmental policies on handling informants. Even when operating under tight controls, informants can go bad quickly. When they do, they create significant legal and public relations problems.

Law enforcement agencies that intend to use informants extensively must also be willing to defend publicly this decision. Fortunately, this is not difficult because the use of informants to solve or prevent crime is on solid legal ground. Judge Learned Hand, one of America's most famous jurists, observed:

> Courts have countenanced the use of informants from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely on them or upon accomplices because the criminals will almost certainly proceed covertly.[1]

As early as 1650, British Chief Justice Hale encouraged criminals to cooperate with the law by rewarding them for giving evidence against their accomplices. Hale established an arrangement that he called a "Plea of Approvement," which offered arrested criminals immunity from prosecution, or at least a reduced sentence, if they provided information on crimes that they knew about.[2]

More than 300 years later, law enforcement's use of informants is accepted by Americans, who have become familiar with the practice. The media constantly run stories about sting operations, protected witnesses, and paid sources. They know that the mystery associated with these individuals ensures audience interest and widespread attention.

In fact, Americans are sensitized to informant use by the entertainment media. Covert meeting sites, the danger, and the air of anonymity portrayed on television and in movies all add an element of suspense that engenders public understanding and acceptance of informant use by both fictional and real detectives.

JUSTIFYING AN INFORMANT PROGRAM

Yet, how does a law enforcement agency justify paying for information? Don't taxpayers already pay for police protection?

Legislators and ordinary citizens frequently pose these questions, and there is but one answer. Simply stated, using informants is cost-effective. Informants provide intelligence, insight, and information that lead to arrests and convictions. Informants allow a law enforcement agency to expend its personnel on activities that have a high likelihood of success.

For example, because of information provided by informants, arrest teams can determine where suspects can be found, how heavily armed they are, and who they are with. Some informants help investigators to obtain evidence of criminal wrongdoing, or through the use of informants, investigators can record actual criminal conspiracies on tape through court-ordered electronic surveillance.

Good informants keep people from being harmed, evidence from being destroyed, and potentially explosive and dangerous crimes from taking place. As an important byproduct, proactive investigations often increase the efficiency and morale of sworn investigative personnel.

ESTABLISHING AN INFORMANT PROGRAM

A law enforcement agency that wants to have an effective, controlled informant program must encourage its sworn personnel to develop and maintain a professional attitude toward informants. One of the first steps that an agency must take in establishing a professional informant

program is to convince its investigators that informants are not of questionable character, unworthy of respect. In reality, many informants who provide assistance to law enforcement are not criminals. Many hold responsible positions in public agencies and private businesses. Many are citizens motivated by personal antipathy to criminal conduct that they see around them. A few cooperate because they enjoy the cops-and-robbers excitement that goes along with solving crimes. Some are seeking revenge for professional or personal affronts, while others just trade information for money.

Citizens have an obligation to report crime. However, no officer seriously expects citizens to live up to that obligation on a routine basis.[3] Fear of being killed, embarrassed, badgered, losing time from work, or of being inconvenienced work against citizens volunteering information about a crime. Therefore, law enforcement agencies must use informants to take the place of ordinary citizens who refuse to get involved.

In fiction, as in real life, investigators often refer to informants in less than polite terms. Officers must understand that the attitude behind such terminology stands in the way of a healthy relationship between an investigator and a source. These personal feelings alienate people who could provide positive information that would solve crimes. Use of derogatory terms even turns off the "professional" paid informant. Consequently, departments should consciously discourage the practice of using derogatory terms, both on and off the job.

A professional attitude toward informants does not just evolve. Law enforcement officers must be trained to cultivate a nonjudgmental frame of mind. Agencies must design both basic and advanced schooling that helps each officer to overcome the simple, but deeply ingrained, prejudice that is associated with informing.

There is no doubt that Americans believe that telling tales on others is wrong. From childhood, they are taught not to tattle on brothers and sisters, classmates, or friends. Parents, teachers and clergymen constantly reinforce the concept. Even some law enforcement professionals believe that it is wrong to "tell on" another person, although they realize they need the information provided by informants to develop cases and apprehend criminals. Frequently, they even admire those who refuse to talk.

Consequently, when law enforcement personnel work to develop informants, they are going against ingrained habits. The only way around the conflict is to train personnel, formally and informally, to view the use of informants as a critically important law enforcement technique.

Once investigators overcome their reluctance to nurture this kind of confidential alliance, they find that developing informants is not too difficult and soon realize that using informants means controlling informants. However, the alert agency must recognize that administrative controls are necessary to run an effective informant program.

ADMINISTRATIVE PROCEDURES

Law enforcement administrators must establish and maintain several areas of strict control. Generally, they must:

1) Provide an informant's identify
2) Ensure information is recorded in files
3) Disseminate information to appropriate personnel, while simultaneously guarding the information from general perusal
4) Involve mid-level managers as overseers of informant operations
5) Employ alternate informant handlers
6) Develop a payment system that calls for accurate accounting of all monies paid to informants.

Protect the Informant's Identity

Only those with a need to know should be advised of an informant's identity. In practical terms, this means investigators and their alternates who work closely with the source. The squad supervisor or first-line manager should be encouraged to meet the informant so that the source knows that there are people in authority who support the program and so that the manager has a general "feel" for the informant. The person who controls the informant file room must also know the identify of an informant in order to handle the filing and other paperwork. These employees should be the only people who routinely handle informant information and who need to know the informant's identity.

To ensure secrecy, informants should have code numbers and code names assigned to them. These take the place of the source's real name on all documents and reports, and also in personal conversations. Any information provided by the source must be documented and recorded using code numbers and code names.

The files created must be maintained in secure rooms and access to them must be strictly controlled by an employee specifically assigned to control access. Only the informant's handler or alternate handler and the immediate supervisor should be allowed to examine those files routinely. Top management should have access to them, but only when necessary. A daily record that lists everyone who enters the secure file room should also be maintained. This control is not implemented to create a bureaucratic roadblock, but to protect sources by limiting the number of people who know their identities. Institutionally, it also reenforces the importance of protecting informants' identifies.

Record Information

Ultimately, the intent of every investigation is prosecution, which requires maintaining records and files. Information may be the informant's stock-in-trade, but that is only the starting point for law enforcement officers. Paperwork allows prosecutors to obtain warrants or to put together cases that will be tried in court.

Refusing to identify sources except by their code names frequently causes resentment, both inside and outside the department. Regardless, unless sources are scheduled to testify in open court, there is no reason for anyone to know informant identities.[4] Agencies should try to establish how reliable its sources are, while at the same time legally resisting any exposure of the their identities.

Disseminate Information

Dissemination is the key to making informant operations successful. Files full of facts are worthless unless someone uses them to focus an investigation on specific people, obtain search and arrest warrants, or support an affidavit for electronic surveillance. Informant handlers must be taught to believe that information without action is worthless. Too often, informant handlers believe that they have done their jobs by developing knowledgeable sources who keep them individually abreast of the latest inside criminal information. Unfortunately, handlers may become afraid of revealing their sources, and so, they keep the information to themselves.

Computers with megabytes of criminal data sit in many squad rooms. However, these computer systems are equally useless unless someone takes the information and uses it, drawing the equations that link person to person, incident to incident, and crime to crime. Facts must be shared and opinions solicited. Only then does an informant program pay off.

Therefore, the agency that uses informants productively develops standard report forms and disseminates information to those authorized to use it. Specific paperwork and dissemination procedures must be adopted, and officers must un-

derstand that information cannot be shared outside standard channels. The department must depend on the code names of the sources to shield informant identities from the casual or uninitiated reader. A good informant handler uses judgment and discretion to disseminate only those facts that will advance an investigation without identifying the source.

Involve Mid-Level Managers

Each department or agency should have mid-level managers directly overseeing informant operations. This is necessary because all too often, a close, symbiotic relationship develops between an informant and informant handler. This type of relationship leads to a corresponding loss of objectivity on the part of the informant handler. A mid-level manager who has no immediate personal stake in the operation can step in to enforce departmental procedures impartially, when necessary.

Alternate Informant Handlers

To assist in maintaining objectivity, each department or agency also should assign two investigators to each informant. One is the primary informant handler, while the second acts as an alternate. The alternate handler should witness every payment for services and expenses, attend most debriefing sessions, and contact the source any time the primary contact is unavailable.

Often, there is resistance to this policy because investigators object to another person being involved. Many believe the alternate causes friction and depersonalizes the affiliation. However, the alternate can both sympathize with the informant and remain objective and slightly detached. This relationship helps to maintain a balance and perspective that fosters control.

Develop Strict Payment Procedures

In the past, investigators paid informants nominal amounts of money. This is no longer the case. Many police agencies disburse substantial amounts of money to sources, and consequently, expect to be able to direct their activities. This requires accountability. Payments must be witnessed, receipts obtained, and cumulative records maintained.

Generally, informants should be paid on a C.O.D. basis, not on a regular schedule. Also, only when informants provide valuable information should they be paid. There should be no standard pay scale for information. The informant handler must consider the value of each item and then recommend a specific payment.

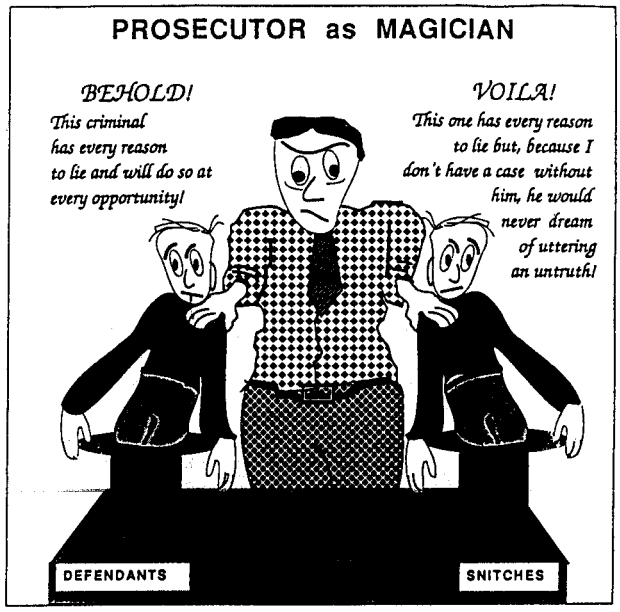
Many factors affect the amount of a payment. What kind of information is provided? Is the source placed in any real danger? What is the status of the case? How long has the source provided information? How reliable is the source? Normally, the informant's handler should suggest an appropriate payment and an immediate supervisor should authorize it.

CONCLUSION

Working informants is fulfilling. Investigators who use informants effectively can be reasonably sure that they are going to develop cases against key criminals. Having someone report on the daily successes of frustrations of criminals helps investigators to gather and maintain evidence that leads to apprehensions and prosecutions.

U.S. District Court Judge Stephen Trott once addressed U.S. Government prosecutors on using informants to try cases. In a supplement to that lecture, he noted, "Notwithstanding all the problems that accompany using criminals as witnesses...the fact of the matter is that police and prosecutors cannot do without them - period."

HARRY A MOUNT, JR.
Federal Bureau of Investigation
100 Pennsylvania Ave. NW
Washington, D.C. 20535



Reprinted from *Capital Reports*, a publication of the National Legal Aid and Defender Association by permission.

Reprinted from *F.B.I. Law Enforcement Bulletin*, Dec. 1990. by permission.

FOOTNOTES

[1] *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

[2] E. Cherry and C. Molton, "Police and the Criminal Informant," unpublished dissertation for the Advanced Course 3/80 Project, Metropolitan Police Detective Training School.

[3] James Reese, "Motivations of Criminal Informants," *FBI Law Enforcement Bulletin*, May 1980, p.24.

[4] There may be occasional exceptions to this rule. For example, a judge may require an *ex parte, in camera* hearing to determine the source's reliability and accuracy of the information provided. Prosecutors may want to talk to a source before they seek warrants or subpoenas.

"Necessity is the Mother...."

A July 1987 article by Forrest M. Kavanaugh, Chief Polygraphist for the Louisiana State Police, in *The Journal of Polygraph Science* Vol. 22#1 stated: "The 1986 statistics compiled by the Louisiana State Police established that 42 out of 47 (over 89%) of the examined informants gave significant erroneous information."

INTERVIEWING AND INTERROGATION

Have you ever been sitting in a room and realize that someone is looking at you? Did you ever go to a shopping mall and watch people sit on the benches, walk through the shopping center and attempt to know what they are thinking or how they are feeling? Being a college teacher, I get an opportunity to observe students' demeanor, not only during regular class, but during their leisure time, "pop" quizzes, term paper presentation, and regular exams. Call it intuition or "sixth sense" if you will, but I can tell which of those students have prepared from their classes based on their verbal/non-verbal communications. The words used, complemented with the tone of voice and the way the person carries the body, tells much about the state in which the individual exists. The positions that I have held have given me an opportunity to conduct many interviews/interrogations. As a teacher, guidance counselor, probation and parole officer, probation and parole supervisor, Deputy Commissioner in Kentucky Corrections, student advisor, candidate for a statewide office, and college teacher, I have conducted thousands of interviews/interrogations or at least I thought I had. But, in most cases, I had nothing more than conversations with the individuals: interviewing and interrogating is hard work.

One's first thought is that interviewing and interrogation is an easy task. You see Bryant Gumbel and Barbara Walters interview celebrity figures and you think how interesting this is. Seldom considered is the amount of time that goes into the preparation of each of the dialogues; the questions that are asked and the directions that are taken to make the session meaningful to the listeners. But let it be known that these interviews did not come off as an extemporaneous act.

First, the questions selected to ask had to be prepared. Second, they had to be organized to be presented in an order to achieve the purposes of the interview. Should additional questions come up in the interview, these have to be noted and placed in their proper place to allow the interview to evolve in a sequential pattern.

There has been some work that assists persons responsible for interviewing and interrogating to complete their task in a systematic, proficient, and productive fashion. Webster's dictionary has a word called **kinesiology** defined as "the study of the principles of mechanics and anatomy in relations to human movement." Frederick C. Link and D. Glenn Foster, being experienced interrogators, established in 1985 the concept which they refer to as the **Kinesic Interview Technique**. Based on their own research and the accumulated wisdom of the centuries, the Kinesic Interview Technique uses both verbal and nonverbal behavioral activities to gain information.

Link and Foster state that one could use the "subtle unconscious verbal and nonverbal behaviors of an interviewee to diagnose his or her emotional states, thereby providing the critical information necessary to get the interviewee to tell the truth and to enable the interviewer to reach his goals more quickly and thoroughly." It has been learned that with few exceptions the person being interviewed will "exhibit behaviors that indicate whether the person is being open and honest or evasive and untruthful." There is also a behavior that reveals a person's readiness to tell the truth.

The authors state that the Kinesic Technique is used basically to gain information from people who are either unwillingly or unintentionally disclosing it. Individuals have what is referred to as an "equilibrium" state, the body and mind working in a harmonious balance. This is the position in which they feel confident and comfortable. When this state is challenged, be it good or bad, it may be defined as stress or eustress. This, consequently, provides forces that push the body and the mind out of its physical or psychological equilibrium. When this imbalance occurs, certain reactions, chemical or otherwise, happen within the body in an attempt to regain its balance from these "stress" forces.

An important assessment before each interview or interrogation is the process of "norming." When we say norming we are referring to taking some time before beginning discussion of the critical areas to determining how the person reacts merely to the fact of being in an interview situation and the kinds of gestures that you get as part of their normal habit pattern of gestures.

As an overview to the process I will discuss the areas that Link and Foster believe relevant to a successful examination. In an interrogation, the suspect will have "slip of the tongue" expressions. These are known as **Self-Initiated Verbal Behaviors**. The interrogator learns to recognize verbal expressions and speech patterns which appear to be purely random and meaningless as signs of deception and/or guilt. Examples of this are: being overly polite or flattering; self-revealing statements regarding internal feelings, attitudes, or states; sudden changes in attitude; in form of indirect questions, answers, and statements; in questioning the interview procedure; in making excuses; through honesty and piety; and through the attempt to introduce character testimony from relatives, neighbors, or the Almighty.

Structured Questions have to be constructed in such a way to insure accurate acquisition of valid information. Research has demonstrated that a guilty or lying interviewee will answer specific questions in a very typical way. Samples of these questions are: Who do you think had the best chance to do this? What do you think should happen to a person who committed this offense? Do you think the person who did this offense told anyone about it? Is jail or incarceration the place for the person who committed this offense? Do you think it was for revenge, money, or sex that this crime was committed? Has anything like this ever happened to you before? Would you be willing to take truth serum regarding this event?

When a person being interrogated is experiencing stress, **Non-Verbal Behavior (Body Language)**, the interrogator can assess physical position, postures, and body shifts as aids to diagnose the internal body state. Remember, the concept of "norming" is important in this area. Watch for the 3 physiological signs: blushing, the carotid pulse, and the larynx or Adam's apple. When you see

these react differently from what you have observed in the "norming" process, be aware that you are in an area of concern for the interviewee. Other nonverbal behaviors are: breaking in eye contact, which can come in form of covering the eyes, looking at their watch, fingernails, and fingertips, or looking at the ceiling; rapid eye movement; raising of the eyebrow; the dominating state; rubbing the nose; tilt head to one side or another; flow of speech; tight lips; licking the lips; pulling of the ear; positions of the hands; going to the back of the legs, neck, or head; hands and arms crossed; leaning toward the door; and moving toward the fetal position.

There are recommendations for the interview room as well as decor. Research has shown that certain colors are physiologically restful and psychologically non-threatening. The color which was found to be most productive for reducing the amount of confrontation, suspicion, and hostility in an interrogation situation is the color blue. The authors suggest that if you put the subject at rest in a relaxed frame of mind, the probability that he is going to tell what he knows is greatly enhanced. However, the impression that an interview makes upon the interviewee frequently determines the success or failure of that interview. The **Image of the Interviewer** is important in avoiding commonly made mistakes so that optimum results may be appreciated. There is an adage in interrogation that "a person will not confess to someone that they do not either like, or respect, or both." The particulars of the interview are: physical behavior - the interviewer shows the same physical mannerisms and verbal behaviors as the interviewee and even though the interviewee has not had the training, he had the capability of assessing the situation to a degree; grooming - basic hygiene, clean shaved or neat beard, hair cut, skin should be clean, fingernails must be clean, body odor controlled, shoes shined; finally, burn this thought in your mind: **Politeness is the mark of a gentleman.**

The **Kinesic Control of the Interviewee** is very important to the interrogation. The interviewee is placed in a certain section of the room so as to explore the effect of posture, spacing, and positioning of the interviewer to maximize the information gained.

The first principle of kinesic control is that of **forcing the interviewee into a position where he is essentially vulnerable.** We want to be close enough to evoke the territorial stress principle.

The second principle is **mimicking or mirroring**. The interviewer will make certain movements such as moving the head from side to side or raising the hand and leaning forward. Once the interviewee is tending to mimic the actions, it can be assumed the interviewer has basic control of the interview situation. Utilizing the please orientation is another highly effective tool used to get the interviewee doing what you wish. When the interviewee does something that the interviewer does not like, the interviewer looks away. When something is said that the interviewer likes, the interviewee is rewarded with a smile.

There comes a time when the suspect will begin to "break." This is an opportunity for the interrogator to reach closure. Under the **Kinesically Enhanced Confession**, the interviewer will recognize the pre-confession signals. Most noted of these are: palms turned up; first sigh in the interview; rounding and/or drooping of shoulders; chin dropping to the throat; eyes slowly blinking while looking at the ceiling; first crying - be cautious of a bluff; body will blossom open; holding/rubbing of chin and smiling; overall submissive look; "What could happen to someone who did something like this?"; stop talking and start listening; and lower his/her voice.

Nothing is more frustrating than to know that you have your guilty suspect, yet unable to "crack" the case and nothing is more exhilarating than to get a hard sought-after confession and close the file. It takes training and long hours of preparation on the part of the interrogator to efficiently conduct interrogations. Interviews and interrogations are hard work!

BRETT D. SCOTT, Ed.D.
Associate Professor
Eastern Kentucky University
College of Law Enforcement
Richmond, Kentucky 40475
(606) 622-1155
(502) 695-4988

BRETT D. SCOTT received his Ed.D. in Education and Criminal Justice from the University of Kentucky. He has an M.Ed. from the University of Louisville in Guidance and Counseling and his B.S. from Pikeville College. Dr. Scott has extensive experience in training in the criminal justice field with special emphasis in curriculum development and training coordination. He was part of the original team that started the College of Law Enforcement at Eastern Kentucky University. He has served in the criminal justice field for more than 20 years.

Reprinted from *OnGuard*, May-June 1990 issue and by permission of the author.

Footnote: Information for this article was secured from promotional materials prepared by Frederick C. Link and D. Glenn Foster. Eastern Kentucky University, College of Law Enforcement, through Dr. Brett D. Scott who coordinates training workshops, utilizes the Kinesic Technique. The program is "pay incentive", approved by the Kentucky Law Enforcement Council. The instructor is Stan B. Walters, representing the Link and Foster organization. For further information, contact Brett D. Scott.

KINESIC COURSES

Brett Scott offers the Kinesic Course in three levels: Level I: Basic Interrogation and Interview, Level II: Intermediate Kinesic Interrogation Techniques, Level III: Kinesic Interview and Interrogation Techniques Practical

Level I deals with:

Self-Initiated Verbal Behaviors
Structured Questioning
Non-verbal Behavior
Image of the Interviewer
Kinesic Control of the Interviewee
Kinesically Enhanced Confession

Level II deals with:

Interrogation
Personality Classification
Ego Defense Mechanisms
Kinesic Control Techniques
Systematic Approach for the Interrogation from Start to Finish
Interrogational Arguments (with supervised practice)

Level III deal with:

Kinesic Interview and Interrogation
Statement Analysis
Personality Classification
Kinesic Interview Techniques Formula
Kinesic "look" Profiling
Practical Interview and Interrogation Exercises with inmates from a correctional institution.

Objectives:

Become more effective interviewers and interrogators
Increase case solution rates
Maintain control of interviewing and interrogating sessions
Improve communication skills
Handle investigations more effectively
Reduce costs and time involved in lengthy investigations
Gain extensive, hands-on practice of newly acquired skills

Please contact Brett Scott for a listing of dates and prices.

State Study Says Courts are Rife with Sex Bias

A special committee of the state Judicial Council, ending a landmark three-year inquiry, reported that it had found widespread sex discrimination in the California courts and proposed dozens of reforms aimed at improving the status of women in the system.

The group urged, among other things, the adoption of new ethical codes requiring judges to act against bias in the courtroom and barring them from belonging to discriminatory clubs, expansion of legal protections for victims of domestic violence and changes in the law to enlarge child-support awards. While not formally recommending such action, it said that appointment of more women to the judiciary would substantially curb sex discrimination in the judicial process.

The committee cited instances of "openly hostile" behavior and demeaning remarks by judges against female lawyers, litigants, witnesses and other participants in court proceedings.

The panel, while emphasizing that such incidents may occur only rarely, said it had received complaints that unnamed judges had engaged in unwanted sexual advances, erected pin-up pictures in chambers, told dirty jokes and read sexually explicit magazines on the bench. One judge, it said, reportedly described women lawyers as "menopausal dabblers" who entered the profession only after completing the duties of motherhood.

The inquiry, one of the first in the nation, was launched under former Chief Justice Rose Elizabeth Bird and continued by Chief Justice Malcolm M. Lucas, the current chairman of the 22-member Judicial Council, the policymaking arm of the state judiciary. At present, 29 states have undertaken similar investigations.

The investigating panel, known as the Advisory Committee on Gender Bias in the Courts, was chaired by Los Angeles Superior Court Judge David M. Rothman and state Sen. Diane E. Watson of Los Angeles. The 34-member committee - made up of judges, lawyers, legislators and court administrators - held public hearings throughout the state, conducted surveys of judges and attorneys and visited jails where women are in custody.

Rothman stressed that sex bias did not originate in the courts, but rather was a reflection of "society as a whole." But he noted that committee members "did not realize the extent" of the problem throughout the state. Watson declared: "The system is wrought with gender bias and didn't even realize it."

Lucas, presiding over a council meeting here Friday, welcomed the 680-page report and its 65 recommendations as a "comprehensive review" of the issue. While conceding that "there will be some who will emphasize the negatives in the report," Lucas said he saw the wide-ranging investigation as evidence of the "vitality and accountability" of the state judiciary. "Has any other profession been so willing to take on this important inquiry?" he asked.

The exhaustively detailed report examined complaints of bias throughout the system and offered a multitude of proposals to curb discrimination. It concluded that sex bias "influences the decisionmaking and courtroom environment" of the California justice system. The judiciary, it said, "must respond with clear, decisive and immediate action" to ensure fairness in decisions and practices.

"Across the board, we see one common thread - and that is the lack of credibility that women receive, whether they are lawyers or other participants in the process," Los Angeles Supreme Court Judge Judith C. Chirlin, vice-chair of the committee, told reporters. "When women are considered less credible, that's inevitably going to affect the substance of a case."

The recommendations, if adopted, would require action by an array of governmental and legal entities, including the Legislature, the State Bar, the California Judges Assn., the state's law schools and the Judicial Council itself. The report will undergo further study by a council subcommittee led by state appellate Justice Ronald M. George of Los Angeles, with final action on its findings and recommendations expected this fall.

Among other things, the report:

-Concluded that there would be "substantial amelioration" of sex bias in the courts if more women were appointed to the bench. At present, 196 of the 1,481 judicial positions in California - or 13% - are occupied by women. In a survey of the current judiciary, 64% of the women judges agreed that sex bias was "widespread;" by contrast, 23% of the male judges saw such discrimination.

-Asked that judicial ethical canons be revised to provide specifically that judges should not belong to clubs that practice "invidious discrimination" and to impose the obligation on judges to refrain - and prevent others - from exhibiting prejudice in court proceedings.

-Urged that time limits be expanded on emergency protective orders issued to prevent the recurrence of domestic violence-the victims of which are 95% female. New rules should provide that temporary restraining orders are available at all court hours and that law enforcement officers can issue such orders at all other times.

-Found that child support awards are too low and inadequately enforced. New legislation should be enacted to assure that children, after their parents are divorced, share in the increased earnings of the wealthier parent. The duration of child support should be extended to age 21.

-Concluded that "stereotypes and prejudices" too often influence the outcome in child-custody disputes. There is a tendency to "doubt the credibility" of female parents and characterize them as "hysterical or vindictive" when they make a claim of child abuse by their spouse.

Reported that instances "abound" of biased conduct by attorneys. Female lawyers report "they have been sexually propositioned by male attorneys, [been] the object of their offensive jokes or sexual innuendoes, and the subject of their discussions of sexual attributes."

Recommended that court authorities give higher priority to establishing waiting rooms for children of court participants. The lack of child care "limits a woman's access to court," the committee said, and represents a form of "institutionalized gender bias."

PHILIP HAGER
Times Staff Writer
Reprinted by permission, *Los Angeles Times*, Saturday, March 24, 1990.

DIAGNOSTIC ASSESSMENT OF INDIVIDUALS WITH MISLEADING BEHAVIORS

Malingering behavior complicates attempts to render fair and accurate descriptions of clinical disorders. Confirming findings and myths are identified. Situational-specific settings determine likelihood and significance of shamming. Evaluating clinicians should entertain suspended judgment in entitlement and legal-administrative examinations.

INTRODUCTION

Feigned illness behavior arouses a sense of betrayal, curiosity, and anger in many physicians. When we were medical students, we were taught that the use of the term "malingerer" reflects poorly on the physician-evaluator and may betray an incomplete understanding and appreciation of an individual's presenting signs and symptoms. One author has even suggested that it is better to diagnose and treat in error than to fail to diagnose and to fail to treat in error.[1] Malingering behavior has no meaning in the traditional physician-patient relationship and only becomes an issue when the physician represents some social body and plays a role analogous to that of an umpire in a competitive sport.[2]

Four concepts need to be defined and distinguished:

(1) Malingering,
(2) Factitious Disorder,
(3) Conversion Disorders, and
(4) Compensation Neurosis.

MALINGERING

Malingering is a description of behavior. The essential feature is the voluntary production of false or grossly exaggerated physical or psychological symptoms. Such findings are produced in pursuit of a goal that is obviously recognizable when an individual's circumstances are understood.[3]

Malingering can be further subdivided in terms of content:

(a) Pure simulation involves the feigning of symptoms that don't exist. This deliberate and fraudulent type of behavior with the accompanying blatant evidence to psychopathology is not often encountered. Individuals who do present in this way are usually males between the ages of 25 and 37 with a history of frequent job changes. Characteristically, these men have a history of few or no binding personal ties such as families and lack material responsibilities such as home ownership.[4]

(b) Dissimulation describes the concealment or minimization of existing symptoms. A coverup, decoy malingerer has had a severe injury which the individual believes has resulted in a serious disorder. The discovery must be avoided at whatever cost. The symptoms presented are consequently remote from the real problem.[4]

(c) False imputation depicts a situation in which an individual ascribes actual symptoms to causes consciously recognized to have no relationship to the onset of symptoms.[4]

(d) Partial malingering connotes the conscious exaggeration of symptoms.[5]

FACTITIOUS DISORDER

The diagnostic picture of a factitious disorder is characterized by physical/psychological symptoms that are produced by an individual and under voluntary control to pursue goals that are involuntarily adopted. Such a concept presumes the existence of an unconscious aspect of mental functioning. The sense of voluntary control is subjective and can only be inferred by an outside observer. Factitious disorder behavior is distinguishable from malingering behavior because there is no apparent goal other than to assume the role of patient. Such behavior is usually indicative of a severe personality disturbance.[6]

CONVERSION DISORDERS

The diagnosis of (hysterical) conversion disorder describes a clinical picture in which the predominant disturbance involves a loss or alteration of physical functioning that suggests a physical disorder but which instead is better understood as an expression of psychological conflict or need. This concept has its roots in psychodynamic rather than descriptive psychiatry. The disturbance is not under voluntary control and after appropriate investigation cannot be explained by known pathophysiological mechanisms.

COMPENSATION NEUROSIS

"Compensation neurosis is a state of mind born out of fear, kept alive by adversity, stimulated by attorneys, and cured by a verdict." This biting assessment was rendered by Foster Kennedy, MD, who was a prominent Harvard University neurologist.[8] This syndrome is described as a collection of psychological reactions which occur after an accident and are thought to be produced or maintained by a compensation claim. This diagnostic concept lacks support among academic nosologists, owes its creation to professionals who participate in medical-legal exercises, and expresses a moral judgment as much as a clinical understanding.

Characteristically, this syndrome follows an injury when the patient believes there is reasonable hope of financial compensation and the clinical picture shows a mixture of organic and psychological complaints.[9] The disability often lacks an obvious casual connection with the psychopathology described and is usually out of proportion to the clinical findings. *International Classification of Diseases* - 9 includes "compensation neurosis" under the disease category of "hysteria"; however, there is no entity of "compensation neurosis" as a recognized disease *per se*. Patients who are described as having a compensation neurosis usual-

ly lack motivation, are passive in seeking medical treatment, and seldom return to gainful employment. There is a reluctance to be explicit about symptom complaints and, curiously, there are expressions of satisfaction with previous physicians whose treatments have not worked. [10] Such individuals seldom involve themselves in psychological treatments designed to change disability status.

IDENTIFYING MALINGERING BEHAVIORS

This article focuses on some of the characteristic ways malingered behavior can be identified. The caveat is offered that even the best clinician cannot be sure of the judgment of malingering. The official *Diagnostic and Statistical Manual - III* of the American Psychiatric Association specifically states that malingering is not a psychiatric disorder but an act, and, thus, it is not so much a matter of diagnosis as it is a matter for judicial finding based on the facts of an individual case. [11] The only indisputable observations to prove malingering are made out of the medical examination room, *i.e.*, the patient must be closely observed doing something he claims to be quite unable to do when he believes he is not being observed—*e.g.*, walking without a limp or lifting. [9]

The settings in which malingered behaviors are most likely to occur include the hospital emergency room and in a jail or prison. Physicians are often challenged to consider this explanation during a clinical evaluation for a Workers' Compensation claim; while in the process of a Social Security disability evaluation; and in the course of an assessment for personal injury litigation. In general, when there is a medical-legal aspect to a clinical issue, the phenomenon of malingering behavior needs to be considered.

SYMPTOMOLOGY

Individuals who engage in malingering behaviors often present with symptom complaints of extreme severity and often include infrequent manifestations of a syndrome. They are consistent in their self report of their problems with different examiners, but the sequence of symptom development is often inconsistent with the diagnostic possibilities considered by the clinician. A malingerer is often careful with his word choice. There is usually a marked discrepancy between the person's claimed distress and the objective findings. A history of sudden onset and an increase in the more obvious rather than subtle symptoms predominate. Clinicians can easily elicit symptoms but are often unsuccessful in attempts to pursue successfully extensive diagnostic workups or trial treatment regimens. Such individuals have a heightened memory about the details of their injury which are offered during the diagnostic process and an overly inclusive list of symptoms. [12] Often individuals engaged in malingering behavior are experienced by the examiner as both demanding and lacking in sincerity.

Typical of malingering individuals is the report of an inability to accept any kind of work and yet the tenacious pursuit of compensation benefits and the continued involvement in recreational activities, auto maintenance, and household chores. Such individuals are usually unwilling to make definite statements about returning to work or other personal expectations and are expansively complimentary in their descriptions of themselves prior to injury despite a possible history of drifting and the inability to stick with any one job for very long. The pattern of malingering behaviors most often seen in outpatient settings involve neurotic concerns, including expressions of worry, inability to function, and hopelessness. These subjective symptoms are common in fake-sick interviews because they don't lead to hospitalization.

FACTS ABOUT LYING

Plainly stated, individuals who are malingering are engaged in lying, *i.e.*, engaging in behaviors meant to deceive or give the wrong impression. [13] Much research has been done about lying and the following have been substantiated:

(1) Individuals who lie characteristically show hesitation and pauses in their speech. [14,15]
(2) Lying answers are longer than truthful answers.
(3) Unpremeditated lies are easier to detect.
(4) People who exaggerate false sentiments ("hamming") are much less likely to be caught in their lies than those who are not histrionic.
(5) Individuals who pretend to like someone they actually dislike express more liking than when describing someone they actually do like.
(6) The face is especially well equipped to tell lies and provides the least reliable clues for someone trying to detect deception.
(7) Often, deceivers cannot eliminate tension in their lower bodies; therefore, there is an incongruity between a calm facial expression and active movement of arms, legs, hands and feet. Listeners and readers are significantly better judges of deception than watchers (face-to-face).
(8) Pay attention to changes in pitch and intensity of voice. The voice is much leakier than the face.
(9) The inability to express one's emotions accurately appears quite distinct from the ability to interpret the emotions of others accurately whether the emotion is real or feigned.
(10) The most reliable leak in the detection of lying is the discrepancy between two channels of communication—*e.g.*, a smiling face and an angry voice. Such a discrepancy is called leakage because it involves two modes of communication that are hard to control simultaneously and the result is dissonance. [15]
(11) If you are going to tell a lie, you are better off face-to-face. If you suspect a lie, you will do a better job of detection by listening over the phone.
(12) People presume that one can readily control the tone of voice and use it to mislead. Because of the acoustics of the skull, the voice we hear as we speak does not sound the same to us as to our listeners. [15]
(13) Overall demeanor seems to count more than the message that is told. A malingerer who makes an overall good impression is less likely to be perceived as deceptive and dishonest even when the message is deceptive. [12]
(14) Our implicit or intuitive assumptions regarding an individual's truthfulness may influence us to see certain individuals as honest or dishonest regardless of statement veracity. [12]

PSYCHOLOGICAL TESTS

Psychological testing is often used as an aid to determine whether an individual is malingering. The most widely used psychological test is the Minnesota Multiphasic Personality Inventory (MMPI) with particular focus on the validity scales. The MMPI is used in the evaluation of neurotic and psychotic individuals. When the difference between the F and K validity scales is greater than 11 and when the F scale T value is greater than 80, one has evidence of an invalid profile and the possibility of malingering behavior should be considered. [12] Ways do exist to help detect the possibility of faking on the Halstead-Reitan Battery which is a sophisticated neuropsychological test widely used to quantify degrees of brain injury. When the Halstead-Reitan test results for volunteer malingerers were compared with nonlitigating head injury patients by a blind rating panel of neuropsychologists, correct designations ranged from 44% to 81% of head injured subjects and from 25% to 81% of malingerers. Overall, the experts correctly classified between 60% and 69% of patients. Malingerers try to stimulate what they think would be obvious problems such as memory loss or gross motor deficits. [18]

MYTHS ABOUT LYING

Certain myths about the detection of lying prevail:

(1) Lying can be detected regularly with the use of a lie detector. The polygraph has an accuracy of between 64% and 71% against the chance expectancy of 50% when polygraph charts are scored blindly and are, thus, not influenced by clinical impressions of the subject or of the evidence. A polygraph protocol is biased against truthful subjects. At least half of the subjects may be erroneously classified as deceptive. The polygraph method more often detects lying than it does truthful responding and considerable subjectivity may influence the polygraph interpreter in the evaluation of the autonomic disturbances associated with a particular question. [19,20]

(2) One can usually figure out how an individual is really feeling. Accuracy of detecting that some deception has occurred is far greater than the accuracy in detecting the true underlying feeling state. [5] People good at detecting that deception is occurring are not particularly skilled at reading the speaker's underlying affect. [16]

(3) "It takes one to know one." Skill at lying does not necessarily correlate with catching other people lying. [15]

(4) Look the subject in the eye. The face, by itself, involves expressions that are easiest to control. [15] It is the least reliable body part to monitor.

(5) It is always harder to fool someone who is on guard. Surprisingly, suspicion may make a person more easily mislead—particularly if he relies on looking the liar in the eye and focuses on the liar's demeanor. Such overattentiveness to the face can interfere with noticing more leaky clues such as tone of voice. [15]

(6) Ability to identify lying is generalizable. Those who prove clever at defecting sugarcoated lies are not particularly adept at recognizing vinegar-coated lies and vice-versa. [15]

(7) Psychiatrists and psychologists are good at detecting malingering behavior. Current literature offers little support that psychiatrists and psychologists are good at detecting malingerers who have given false information on psychological tests. [12]

(8) Hypnosis and sodium amytal can help get at the truth. Wrong. [21] Although sodium amytal and hypnosis are useful in uncovering repressed memories, they are not reliable in ascertaining truth. [4]

TACTS TO DEAL WITH LYING

Lying provokes in the discoverer an intense reaction on the grounds that the liar has gained undeserved advantage in monetary benefit, social position, or enhancement of power. [21] Research also suggests that lying is more tolerated in someone we like or in high social position than in people of lower socioeconomic achievement. [21] In attempting to discern malingering, tact and consideration are usually more effective than bulldozing and ridiculing. Check old records and get collateral interviews from other involved persons. Distraction can be used to discern movements and the capabilities which a person reports as beyond current ability—for example, an individual who complains of a bad tremor which interferes with writing may give himself away when he successfully lifts and drinks from a soda can without spilling the beverage. A malingering individual may try to be vague about his or her background and may react to close questioning with anger and hostility. Testing tolerance for self incrimination often suggests another clue—someone trying to deceive often denies even common human foibles. Since the "unconscious" doesn't recognize the negative, be suspicious of someone who spontaneously raises the issue of his own truthfulness, *e.g.*, "to be honest with you."

POST-INJURY EVALUATIONS

In most studies of malingering individuals, such behaviors were not part of the pre-injury personality. [21] In post-injury evaluations, malingered behavior often arises after the objective threatening injury has altered a person who: (a) loses hope of return to pre-injury functioning; (b) begins to perceive himself with new identifications; (c) is aware that sustenance now depends not on the ability to work (lost) but by the obligation the effects of injury and incapacity have imposed upon society. Thus, self concept becomes attracted to and equated with the state of invalidism. [21]

WHEN YOU SUSPECT MALINGERING

When an examiner suspects malingering behavior, questions during an examination should be open-ended so that the examinee does not know what is expected of him. Extending the length and thoroughness of an examination combined with repeated examinations by the same clinician provides circumstances in which it is more difficult for the individual to recall feigned responses both verbal and behavioral. Factors that need to be considered in a fair and complete biopsychosocial assessment of a person with a prolonged disability after an accident include evaluation of the psychological effect of the accident/injury

including alteration of self concept and body image along with evidence of personality disorganization and regression in level of adaptation. Interpersonal dynamics involving family members and social support groups need to be investigated for evidence of change. Cultural explanations of illness behavior and folk beliefs concerning health and disease must be appreciated and, finally, work factors involving level of pre-injury job satisfaction are germane.

CONCLUSION

Each individual deserves a fair, complete, and considerate medical examination from a physician when presenting with signs and symptoms of illness behavior. In our clinical work, we presume on the truthfulness of our patients. As examiners in medical-legal settings, we must suspend such assumptions and all matter of explanations for what we see, hear, and learn should be entertained. We best preserve the integrity of our profession and further the delivery of entitlement benefits to those who truly qualify with such a perspective.

WILLIAM D. WEITZEL, MD
Associate Clinical Professor of Psychiatry
University of Kentucky College of Medicine
Suite A-580
1401 Harrodsburg Road
Lexington, KY 40504

REFERENCES

[1] Ziskin J: Malingering of psychological disorders: *Behavioral Sciences and the Law* 2:39-49, 1984.

[2] Szasz TS: Malingering: Diagnosis of social condemnation: *Archives of Neurology and Psychiatry* 76:432-443, 1956.

[3] *Diagnostic and Statistical Manual of Mental Disorders*. Third Edition (DSM-III): APA Press, 1980, Washington, D.C. Pg 331.

[4] Resnick PJ: Detection of malingered mental illness: *Behavioral Sciences and the Law* 2:21-38, 1984.

[5] Garner H: Malingering: *Illinois Medical Journal* 128:318-319, 1965.

[6] *DSM-III*, p. 285.

[7] *DSM-III*, p. 244.

[8] Kennedy F: The mind of the injured worker: its effects on disability: *Compensation Medicine* 1:19-24, 1946.

[9] Woodyard JE: Diagnosis and prognosis of compensation claims: *Ann R Coll Surg* Engl 64:191-194, 1982.

[10] Weighill VE: Compensation neurosis: a review of the literature: *J Psychosom Res* 27:97-104, 1983.

[11] Mendelson G: Compensation neurosis: an invalid diagnosis: *Med J* Aust 142:561-564, 1985.

[12] Rogers R: Toward an empirical model of malingering and deception: *Behavior Science and the Law* 2:93-111, 1984.

[13] *Webster's New Collegiate Dictionary*: G. & C. Merriam Company, Springfield, Massachusetts, 1980 p680.

[14] Harrison AA, Kwalek M, Raney DF, Fritz JC: Clues to deception in an interview situation: *Social Psychology*: 41:156-161, 1978.

[15] Goleman D: Can you tell when someone is lying to you: *Psychology Today* 16:14-23, 1982.

[16] DePaulo BM and Rosenthal R: Telling lies: *J Pers Soc Psychol* 37:1713-1722, 1979.

[17] Goebel RA: Detection of faking on the Halstead-Reitan Neuropsychological test battery: *J Clin Psychol* 39:731-742, 1983.

[18] Heaton R, Smith H, Lehman R and Vogt A: Prospects for faking believable deficits on neuropsychological testing: *J Consult Clin Psychol* 16:892-900, 1978.

[19] Keninmuntz B: Lie detectors fail the truth test: *Harvard Business Review*: 63(4):36-42, 1985.

[20] Lykken D: The detection of deception *Psychol Bull* 86:47-53, 1979.

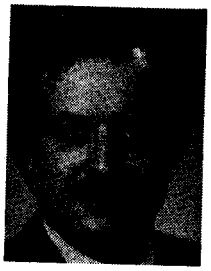
[21] Braverman M: Malingering *Occup Health Saf* March-April, 1978, p 36-48.

Reprinted by permission of the author and the Kentucky Medical Association.

MONAHAN CHAIRS KBA CRIMINAL LAW SECTION; GOYETTE OUTGOING CHAIR

At the 1991 Annual Kentucky Bar Association Convention in Louisville, Kentucky, all sections of the KBA held an Annual Business Meeting and elected new officers.

Ed Monahan became chair of the KBA Criminal Law Section. Monahan is an Assistant Public Advocate with the Department of Public Advocacy.



ED MONAHAN

The outgoing chair, Dan Goyette, Jefferson County Public Defender, reported on the activities of the section for the last year. Two KBA CLE Convention programs on conflicts and the mentally ill were developed by the Section, and a third CLE program on sexism and racism was developed and co-sponsored by the section. These programs received broad media coverage as they addressed vital issues within the criminal justice system.

The Mentally Ill program featured Dr. Saleem A. Shah of the National Institute of Mental Health in Washington, D.C. with the following panelists: Justice Joe Lambert; Senator David Karem; Psychologist Curtis Barrett; Psychiatrist T. Finton Burke; Commonwealth Attorney; Ernest Jasmine; and, Ed Monahan.

The Conflicts of Interest program featured Dean John Jay Douglass of Houston's National College of District Attorneys. Panel members were: Chief Justice Robert F. Stephens; Judge Edmund Karem; Assistant Attorney General Paul Richwalsky; Bar Counsel Ray Clooney; and, Ed Monahan.

These programs were moderated by Dan Goyette and Vince Aprile.

Roger Perry of Benton, Kentucky was elected as the business meeting as the chair-elect of the Criminal Law Section, and Jerry Cox of Somerset, Kentucky was elected as the Vice-Chair.

A standing committee on CLE and Convention Planning was created with Dan Goyette and Vince Aprile agreeing to be co-chairs of that Committee.

At Roger Perry's suggestion, the Criminal Law Section is going to explore producing a quarterly newsletter which will present a pro and con viewpoint on a criminal justice matter that was not currently being covered by criminal justice information sources in the state. Paul Isaacs agreed to draft three persons to coordinate one of the quarterly issues of the newsletter.

CHILD ABUSE CALLED STRONG FACTOR IN LATER AGGRESSIVENESS

By Paul Recer- Associated Press. Reprinted by permission of Ed Staats.

Washington - A study of young children finds that physical abuse at home is more strongly linked to later aggressive behavior than are such factors as poverty, divorce or marital violence.

John E. Bates, a psychology professor at Indiana University and study co-author, said yesterday that a study that followed 309 4-year-olds for a year showed that those who were physically abused by an adult at home were more likely to be aggressive - or even violent- in difficult social situations.

Abuse, he said, is more powerful by far than any other home influence on how a child learns to cope.

The study, to be published today in the journal *Science*, attempted to eliminate from consideration all factors other than abuse the child might have been exposed to at home.

Included in the study were children from rural and urban areas, from different social and economic levels.

Boys and girls were about equal in the group and 83 percent were white, 16 percent black and 1 percent of other races.

Levels of aggression were determined by a number of tests, including evaluations by kindergarten teachers, who did not know whether the children had been abused, and by interviews with classmates.

Additionally, the studied children were shown videotapes of social situations and asked to describe how they would respond if the situations happened to them.

The study has continued; some of the children are in the third grade.

Although data from beyond kindergarten have not been processed. Bates and Pettit, an Auburn University associate professor and study co-author, said they have seen nothing so far that would cause them to change their conclusions from the kindergarten year.

WHY OUR DYSLEXIC APPROACH TO THE CRIME PROBLEM?

PATRICIA MARTIN

One woman's opinion: *we (legislators, the voting public, governmental officials, the media, the judiciary) have attempted to solve the problems caused by crime and criminals by concentrating on the wrong end of the continuum.* This statements tars our entire society with a wide brush of condemnation, because we persist on ignoring the plain facts. In the long view, simply locking up criminals does not prevent crime.

Ten years ago, when I was responsible for disseminating information for the Corrections Cabinet, which we hoped would ameliorate the problem of rapidly escalating prison populations, my favorite quotable statistic was that the United States incarcerated more people per capita than any industrialized country in the world, except the USSR and the Union of South Africa. A decade later, the United States has outstripped even those repressive societies in our incarceration rate. I have, simply stated, lost patience with the increasingly pervasive public attitude that crime prevention will best be accomplished by locking up every person who breaks the law and throwing away the key. Society will do whatever it takes to keep offenders out of their sight, even if that requires the construction of a hundred new prisons each year. The public demands that we incarcerate more people, for longer terms; then, because the prisons are full, we become convinced that crime has risen dramatically, so we conclude that the increase in crime demands that more cells be built. Elected officials, submissive to the mood of the electorate, mutely comply with demands for greater retribution. Unwilling to invest the resources needed to prevent the potential criminal from sliding into crime, or to ensure that the offender gets out of the system quickly and stays out, we are driving ever forward to the past, ever further from the solution.

There are, of course, notable exceptions to this pessimistic portrayal. I sat in a circuit courtroom and heard a judge probate a young mother, on the condition that she enroll in classes and earn a GED diploma. Years ago, the Corrections Cabinet instituted a multitude of innovative programs aimed at diverting felons from prison and preventing their return to the criminal justice system. The state government interagency task force which was charged with developing goals for the newly-created JTPA, unanimously determined that all the funds be used for school drop-out prevention programs. Dedicated, concerned, knowledgeable people in government, on the bench, in the Congress and legislatures, and in volunteer programs have made progress toward educating the public, developing alternatives to incarceration, and in crime prevention. These voices of reason, however, continue to be shouted down by hysterical screams: "crime in the streets—drugs in the schoolyards—violent parolees," and on and on. Out of fear, we persist in the belief that if we get tougher, the criminals will learn their lessons. We refuse to admit that it simply isn't working; if being locked up were a deterrent, implementation of the persistent felony statutes would have caused a decrease in the crime rate. Instead, our prison populations continue to swell with newly-convicted persistent felons.

The news media must accept a large share of responsibility for the public's perception that crime is so rampant that it is unsafe to venture out onto a city street at high noon. Almost a decade ago, a booklet entitled, *Overcrowding Times* analyzed the causes and effects of burgeoning prison populations. Among other data was the fact that the crime rate had not increased significantly in years. The statistics cited by the media and the criminal justice system were compiled by the FBI, which included only reported crimes. These statistics were not as valid as those compiled by the Census Bureau, which interviewed sample populations and included unreported crimes. The latter revealed that the perception of a significant increase in crime was unfounded.

Overcrowding Times pointed out that the misconceptions was caused by the media's sensationalizing the problem. During a slow news week, it is not uncommon for the TV evening news to run a series on crimes against the elderly, for instance, or devote a segment to gang warfare in a large city. As a result, elderly persons die every summer from heat exhaustion, caused by keeping their doors and windows closed and locked, because they were living in terror of being victimized.

One of Paul Harvey's commentaries during June of this year consisted entirely of his bemoaning the "fact" that the average violent criminal only spends a few minutes in jail or prison, and calling for our commitment to greatly accelerated prison construction. How irresponsible! Harvey stated that crime had become a highly profitable business in this country, with criminals having virtually no chance of serving, on the average, more than a few days in jail. He related one state's decrease in the crime rate to the fact that more people had been incarcerated. Never mind that the former percentage was extremely small and the latter percentage was enormous. Harvey gave no explanation for his statistics—whether he had included persons merely arrested rather than convicted, or for the source of his information. This type of journalism is propaganda, rather than information. It inflames, rather than educates, the public.

Undoubtedly, though, largely because tougher legislation has created additional crimes, and because traffic in illegal drugs has become so lucrative, crime has increased since the publication of *Overcrowding Times*. Greater resources allocated to law enforcement agencies have increased arrests, and new cells are being built continuously, while inmates' bunks are jammed into dayrooms and hallways. Prison and jail overcrowding exacerbates mental illness, disease, and violence. It places the staff and public in danger. It creates a criminal who, when released, is more antisocial and desperate. Yet, we race on, ever more efficient in our unexamined determination to lock up more and more, for longer and longer.

According to an article in *The Advocate*,[1] drug arrests in Kentucky in 1988, in-

creased 31% over the previous year, another 40% in 1989, and are expected to have increased by an even greater percentage in 1990. Kentucky has had an increase of 114% in drug arrests in the three years prior to 1991. Out of $6 million in federal anti-drug grant money during the past four years, only one-sixth was spent on prevention and treatment programs. [2] In addition, this article reported that when the 1991 grant is received, Kentucky will have $14.5 million in federal grant money as yet unspent. Something is out of kilter.

We have long known that adult child abusers were themselves abused children; that the majority of felonies are alcohol—or other drug-related; that the typical offender has been unemployed for more than a year prior to his offense, is unskilled, and is functionally illiterate. In spite of the bad rap which the term "rehabilitation" has gotten, we have known for years that a combination of education, job training, and counseling is effective in preventing recidivism. We know that incarceration alone is not a deterrent to crime; otherwise, our prisons would be filled with only first-offenders. We know that poverty breeds crime, yet during the last decade, the poverty rate for Kentucky children rose, so that this state now has 260,000 poor children.

Twenty years ago, I had no difficulty in predicting which of my junior high school students would eventually be in trouble with the law. In fact, the boy who consistently caused the most problems for every teacher in the school was shot to death before he was old enough to legally buy liquor. Two other troublemakers who dropped out during their early high school years, reappeared in my life as wards of the Corrections Cabinet. Had there been a counselor at that school in 1971, I would have referred all three boys to him. Admittedly, he would have had an uphill battle, as all three came from dysfunctional families. Maybe, though, he could have initiated a process which would have prevented the eventual waste and tragedy. Since a counselor wasn't available, I did my best to teach English to a roomful of thirty adolescents, trying to maintain a semblance of order, while the principal stalked the halls swinging a paddle. It was a relief to work in a prison the next year.

Another favorite bromide in my speeches about corrections was the statement that felons had already been failed by every group in the community—the family, church, public schools, and every social service. After twenty or thirty years of failures by all those groups, society expected that two or three years in prison would effect a "cure" for the offender's antisocial behavior. Wouldn't it have made more sense to have used the majority of our resources for crime prevention programs those twenty or thirty years, rather than spending $15,000 a year to lock up the offender? That figure does not even include the costs of prison construction (more than $50,000 per cell), or the salaries of central office administrators.

Last semester, I interned at the Federal Correctional Institution in Lexington. Almost all of the women on my caseload had sentences of at least ten years. Since the federal system no longer allows parole, these women will be incarcerated at least eight years, assuming that they earn all of the good time for which they are eligible. In the meantime, their children (and most of them had minor children) were scattered across the country with relatives, and were receiving AFDC payments. The mothers were usually hundreds, even thousands of miles from their children, and siblings were often separated from each other. Not only do we, the taxpayers, foot the bill for incarcerating these women for years, we are also supporting their children, and the economy is denied the benefits it would have received had the women been working, purchasing goods and services, and paying taxes.

The monetary expense is the easiest to calculate, but does not represent the greatest cost. What effect will separation from their mothers have on the children, especially for so long? None of these women was serving a sentence for a violent crime, and few had prior convictions. Wouldn't we all be better served by an alternative to incarceration, such a probation with requirements of restitution, drug rehabilitation programs, parenting classes, academic or vocational education? Why do we persist in pursuing a course which has failed, and insisting that if we just follow that course longer and more rigidly, it will eventually work? Abolishment of parole, sentence enhancements, determinate sentencing, drug czars—all are popular with the public. Eventually, our prison-building frenzy must reach a saturation point, where the public will no longer be able to support more construction. Potential criminals will realize that every cell is occupied and the possibility of their being incarcerated is very slight. This could actually cause an increase in crime, and accelerate our moving forward to the past.

We have examples in other areas of public concern of small miracles wrought by those with the courage to buck the tide of popular prejudice. Floyd County's *David School* is one. With few resources and very little funding, the *David School* has turned 1,000 school drop-outs into success. All that was needed was an appreciation of the students' needs and innovative, flexible approaches to meeting those needs. We cannot afford to deal with our young people any other way.

John Ed Pearce [3] has opined that the war on drugs has been lost, and suggests that we use our resources on treatment, rather than punishment. I would go further. Let us teach the public that the only real impact on crime will be made in prevention programs, aimed at the child who is at high risk of becoming one of society's cast-offs. We know who these children are and we know what it will take to offer them the opportunity to become the nation's wellspring, rather than the dispossessed.

We must be willing to commit resources to school drop-out prevention programs and to provide additional counselors and remedial academic and social education programs; to day care centers which make it possible for single parents to work; to programs and facilities which keep young people off the streets; to more programs and services which identify children who have the potential to get into trouble; and to treatment for those already exhibiting antisocial behavior. Schools in inner-cities sit empty from 3:00 p.m. until 8:00 a.m., and all summer. What a terrible waste of resources! Let us employ recreation leaders and counselors to teach children how to spend leisure time in positive ways, and to inculcate the values which will channel their energy and aggressiveness constructively.

We have done a miserable job in educating the public to the fact that prevention and diversion programs are both cost-effective and, more importantly, imperative in terms of social costs. Where is the research to prove that a main cause of increased crime is tougher statutes which label more behavior as criminal? Where are the evaluation studies demonstrating that one sample group, as a result of participation in a program, is less likely to engage in criminal activity than another group? Where is the public education program—the denunciation of the Paul Harveys who warp statistics? Unless the taxpayers understand that building more prisons is merely throwing money down the same old rathole, they will continue to cry, "Lock them all up!" Unless we can show them valid statistics proving that specific programs are successful in preventing their participants from committing crimes, the public will not be willing to support such programs. The justice system must become accountable to those who fund it.

Elected officials must be willing to tell the public the truth, rather than merely

parroting the "get tough on crime" litany. No candidate relishes the prospect of espousing an opinion which is unpopular with voters.

There will always be a need for prisons, because there will always be those who refuse, or are unable, to follow the most basic dictates of society. However, the sooner we determine that we are willing to invest (not just spend) resources in preventing criminal behavior, the sooner we can stop building cells. Continuing the dyslexic approach of increasing punishment can only bankrupt us, both financially and morally.

PATRICIA WARD MARTIN
603 Vanarsdall Road
Harrodsburg, KY

Pat Martin has a Masters in Educational Psychology and Counseling. From 1975 until 1988, she served in many capacities in Kentucky's Corrections Cabinet. From 1984-88 she was the Warden at the Frankfort Career Development Center.

FOOTNOTES

[1] "Kentucky Drug Arrest Skyrocket Since 1987," *The Advocate*, Vol. 13, No. 2 (Feb. 1991) p. 60, 62.

[2] Ed Monahan, "Available Drug Money," *The Advocate*, Vol. 13, No. 2, (Feb. 1991) p. 61.

[3] Pearce, *Lexington Herald-Leader*, June 23, 1991.

WHAT ROLE DOES RACE STILL PLAY?

	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%
SIXTH CIRCUIT JUDGES		
WHITE	19	90%
BLACK	2	10%
KENTUCKY JUDGES		
WHITE	235	99%
BLACK	2	1%

ASK CORRECTIONS

Sentencing in Kentucky

Karen S. DeFew

TO CORRECTIONS:

Are all minimum security inmates being considered for Community Center or Jail Release?

TO READER:

No. However, a new level of custody has been implemented. The lowest custody level is now community custody. If you have questions regarding placement in a Community Center, please refer inquiries to Mrs. Maribeth Schmitt, Program Manager, Community Center Program, Department of Community Services and Facilities, Corrections Cabinet, State Office Building, Frankfort, Kentucky 40601.

TO CORRECTIONS:

My client is scheduled to meet the Parole Board and would like to know the different levels of parole supervision.

TO READER:

The five levels of parole supervision are:

1. Intensive
2. Advanced
3. Maximum
4. Medium
5. Specialized

If you would like clarification as to the requirements for each level, you should contact Ms. Hazel Combs, Assistant Director, Division of Probation and Parole, Corrections Cabinet, State Office Building, Frankfort, Kentucky 40601.

TO CORRECTIONS:

What institutional programs fall under the new educational good time, and how would my client apply for same?

TO READER:

KRS 197.045(1), effective July 13, 1990, authorizes the Corrections Cabinet to provide an educational good time credit of sixty (60) days to any prisoner that successfully completes: a graduate equivalency diploma, a two (2) or four (4) year college degree, or who passes state certification for any vocational program provided by the cabinet. Inmates may earn aditional credit for each program completed. Programs such as Alcoholics Anonymous, drug abuse treatment programs, and other "self help" programs do not fall within the guidelines of KRS 197.045 nor Corrections Policies and Procedures.

The procedure used when applying for meritorious good time is also used for educational good time. Your client should contact the classification and treatment officer who will assist him in this matter.

TO CORRECTIONS:

Have all eligible inmates had their parole eligibility dates revised pursuant to the *Offutt* decision? Have they been advised about their review?

TO READER:

To our knowledge all eligible inmates have had their parole eligibility date recalculated. Each individual whose sentence was revised pursuant to the *Offutt* decision has been advised of this revision.

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.

NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN

125 S. 9th Street Suite 302 Philadelphia, PA 19107 215/351-0010

ANNOTATED BIBLIOGRAPHY

This bibliography is an invaluable tool for all advocates, attorneys and expert witnesses working with, or planning to work with, battered women charged with crimes. This computerized Bibliography has grown to 216 pages and includes over 2100 entries relevant to the legal, emotional and practical needs of battered women defendants. It includes cases, articles, books, briefs, affidavits and sample voir dire questions. Below you will find a sampling of the topics covered in the listing.

Accident/Death By Misadventure
Amicus Briefs
Bail Information
Battered Woman Syndrome
Battered Women And Substance Abuse
Battered Women Defendants
Children And Battering
Children Defendants
Clemency, Commutations, Parole,
Defense Committees/Bail Funds, Etc.
Defense Of Impaired Mental State
Domestic Violence
Duress/Coercion
Duty To Retreat
Expert Testimony
Failure To Protect
Hire To Kill/Third Party Killing
Imminence
Ineffectiveness Of Counsel
Jury Information And Battered Women
Jury Instructions/Requests For Charge
Litigation Material
Mitigating Circumstances
Post-traumatic Stress Disorder
Prior Bad Acts
Psychological Abuse
Reasonableness
Reputation Of Deceased For Violence
Self-defense
Sentencing
Sleeping Men Cases/Information
Termination Of Parental Rights
Voir Dire
Women And Crime
Women And Prison
Wrongful Death

STATISTICS PACKET

The Statistics Packet is a compilation of statistics from government crime reports, sociological, psychological and criminological studies, as well as other research relating to domestic violence and battered women charged with crimes. Each statistic has a complete bibliographic citation to aid in obtaining further information. Last up-dated during the Summer of 1990, the complete Packet (98 pages for $20.00) includes information on topics such as:

Domestic Violence
Men Who Batter
History of Violence
When Battered Women Seek Help
Suicide & Depression Among Battered Women
Battered Women Who Kill in Self-Defense
Other Abuse in Battering Relationships
Sentencing Disparity Based on Gender
Battered Women in Prison
Spousal/Partner Homicide
Women in Prison
Recidivism

THE WORKING PAPERS

The "Working Papers" are a compilation of articles, papers, letters, poems and announcements relevant to formerly and currently incarcerated and/or battered women, those working with battered women who are facing trial or are incarcerated, and others in the field. The "Working Papers" provide a forum where advocates can share their own experiences -- what they've learned, what they would encourage others to do, and what they would do differently if they could do it over again. Set #1 was first distributed in July of 1990 and is available for $10. Set #2 (May 1991) is available for $20 -- this set is focussed on Support Groups for Incarcerated Battered Women. If you are interested in learning more about the practical, ethical, legal, legislative, and personal issues and questions that come up doing this work, the "Working Papers" are a must!

ORDER FORM FOR NCDBW PUBLICATIONS

ANNOTATED BIBLIOGRAPHY ($45) _____
FULL STATISTICS PACKET ($20) _____
WORKING PAPERS - SET#1-July 1990 ($10) _____
WORKING PAPERS - SET#2-May 1991 ($20) _____
(Special $15 discount price for Supporting Members*)

Write the number of copies you are requesting next to each publication price

*_____ I'm interested in becoming a Supporting Member of the National Clearinghouse, please send more information

I have enclosed a check for $_____ made out to: National Clearinghouse for the Defense of Battered Women

Name: _____

Address: _____

Telephone: _____ Date of request: _____

Battered women's advocate, woman in prison, attorney, expert, other _____

5/91

September 1991

SUN	MON	TUE	WED	THUR	FRI	SAT
1	2 Labor Day	3	4	5	6	7
8	9	10	11	12	13	14
15	16	Citzenship Day 17 *Constitution.* signed, 1787	18	19	20	21
22	23	U.S. Supreme Court Established 24	Congress approves 12 amendments. 25	26	27	100th Anniversary of KY *Bill of Rights* 28
29	30					

AOC DISTRICT JUDGE'S JUDICIAL COLLEGE September 22-26, 1991

October 1991

SUN	MON	TUE	WED	THUR	FRI	SAT
		1	2	3	4	5
6	7	8	*Crane v. Kentucky* decided, 1986. 9	*Powell v. Alabama* argued, 1932 10	11	Columbus Day 12
13	Columbus Day observed 14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

NLADA ANNUAL CONFERENCE, Portland, Oregon
October 28- Nov. 2,1991

FUTURE SEMINARS

1991

DPA ALTERNATE SENTENCING TRAINING
August 26-28, 1991
Holiday Inn Greater Cincinnati
Contact Ed Monahan at (502) 564-8006

AOC DISTRICT JUDGE'S JUDICIAL COLLEGE
September 22-26, 1991
Lake Cumberland

DPA DEATH PENALTY TRIAL PRACTICE INSTITUTE
Featuring Steve Bright, Cessie Alfonso, Mike Stout, Joe Guasteferro, Neal Walker
November 3-8, 1991
KY Leadership Center
Faubush, KY
Contact: Ed Monahan at (502) 564-8006

NLADA ANNUAL CONFERENCE
October 28-November 2, 1991
Portland, Oregon
Contact: Bill Bitely at (202) 452-0620

KACDL ANNUAL CRIMINAL LAW CONFERENCE
December 6-7, 19911
Covington
Variety of criminal defense topics with a focus on defending sex abuse cases and featuring Annabelle Whiting Hall of Reno, Nevada.
Contact: Linda DeBord at (502) 244-3770

1992

AOC CIRCUIT JUDGE COLLEGE
January 12-16, 1992
Lexington

DPA ANNUAL CONFERENCE
May 31-June 2, 1992
Lake Cumberland State Park

KBA ANNUAL CONVENTION
June 3-6,1992
Lexington

DPA TRIAL PRACTICE INSTITUTE
October 11-16,1992
Kentucky Leadership Center

DEPARTMENT OF PUBLIC ADVOCACY
Perimeter Park West
1264 Louisville Road
Frankfort, KY 40601

BULK RATE
US POSTAGE PAID
FRANKFORT, KY 40601
PERMIT #1