THE ADVOCATE

The Kentucky Department of Public Advocacy's Journal of Criminal Justice Education and Research

Representing 101,000 Poor Kentucky Citizens

Volume 14, #5 OCTOBER, 1992

GO, GO, GO SAID THE BIRD: HUMANKIND CANNOT BEAR VERY MUCH REALITY.

T.S. Eliot, FOUR QUARTERS

SEXUAL ABUSE- WHY?

20th Anniversary

Department of Public Advocacy

1972-1992

Our Specialty is Criminal Defense Litigation

The Kentucky Department of Public Advocacy (DPA) is a state-wide public defender program that was established at the recommendation of Governor Wendell Ford by the 1972 Kentucky General Assembly. There are over 100 full-time public defenders in 16 offices across the state covering 40 counties. Another 250 attorneys do part-time public defender work in 80 of Kentucky's 120 counties. DPA is an independent agency located within the state's Protection and Regulation Cabinet for administrative purposes. A Public Advocacy Commission oversees the Department. Yearly, DPA represents in excess of 101,000 poor citizens accused of crimes for offenses ranging from DUI to capital murder. Day in and day out our attorneys and staff bring life to the individual liberties guaranteed by our United States and Kentucky Constitutions.

A Special Issue of *The Advocate* Focusing on Sexual Abuse

IN THIS ISSUE

FROM THE EDITOR: WHY ARE WE NOT INTERESTED IN WHY?

In our 15th year of publishing *The Advocate*, our journal of legal education and research, DPA produces a special issue on sex abuse cases in the Kentucky criminal justice system to better meet the complexity and dilemmas of sex abuse cases. This is a difficult area for all of us.

Inexorably, it seems, that most people in society focus on the horror and harm of sexual abuse, and punishment...and only that. Our decisions, policies and our laws increasingly seem to reflect only that part of the reality. But it takes courage and insight to face the reality that to end child sexual abuse we must look at more than the end behavior of the offender.

No one can deny the harm of a sexual act. But, if we are interested in the best solutions to this very large problem, we best not deny the *entire* reality. We must become interested in the etiology of the behavior, *why* the sexual abuse occurred or reoccurred, **and explore** what consequences are best for the victim, the offender, the family, and the future of society.

ABUSING CONSTITUTION NO SOLUTION: If we are interested in long-term solutions, we best be interested in *why* the behavior occurs. We'd better be interested in the other values which compete with protection of the victim and society. Impulsive solutions which abuse our major values, especially our constitutional freedoms, are solutions that are bound to quickly smack us in the face with great force and harm and undermine the end which we seek, like stepping on the tines of a rake and having the rake's handle, as a consequence, do damage to ourselves.

THE LEXINGTON *HERALD LEADER*'S GENEROSITY: The Lexington *Herald Leader* has performed remarkable work on behalf of all of us in recent times by confronting what most perceive as difficult, complex, and untouchable issues which face us as a people in Kentucky- most recently in a 16-part series, *Twice Abused*, focusing on sexual abuse cases in Kentucky. The *Herald Leader* again distinguishes itself through its generosity by its in-kind donation of the printing of this *Advocate* issue, a value of $3300.00 Without that donation, this issue would not have been possible as the regular funds for *The Advocate* have been severely restricted due to the budget difficulties of DPA.

GENEROSITY OF AUTHORS AND DIVERSITY OF VIEWS: Just as important as the *Herald Leader*'s printing donation are the donations by each of the authors in this issue of the wealth of their knowledge, skills, and beliefs as expressed in their articles. Their scholarship is immense.

We present in this issue a variety of views from many disciplines. Each presents views and values important to them from their perspectives, world views, and roles in the criminal justice system. The expression of the diversity of perspectives is of great benefit to all of us as we try to understand differing opinions and as we try to educate others on the importance and rightness of our own beliefs.

LET'S TAKE THE NEXT STEP: I would like to write that despite the diversity of perspectives that we all share one common goal, one set of overriding values; however, I fear that would not be accurate. Rather than a variety of views focused on one end, I believe we operate out of values which are either different or, if the same, they have a very different hierarchy for us than for the other person.

Before we can be open to different views, we must understand not only the views of the other but also the rationale for the viewpoints and the values which propel them. This issue is but a step on our journey to a better societal effort to resolve sex abuse problems without abusing other values critical to our dignity. So often legal representatives of citizens who are accused of committing a crime are not invited to the table of discussion and decision-making in Kentucky. This issue is therefore also a small step to mitigate the indifference to who public defenders and criminal defense attorneys represent - the accused, the poor, the powerless.

WE NEED YOUR HELP!: *The Advocate* continues to struggle to have sufficient funds to be printed and mailed. We need more money or in-kind donations to continue. No other publication in Kentucky is bringing the amount and wealth of information, education, and research to the criminal justice system in Kentucky, especially issues relevant to the public defenders who are representing over 100,000 people each year who are accused of a crime but who are too poor to purchase legal help. **-Edward C. Monahan**

LETTERS TO THE EDITOR

The June Bill Of Rights Issue:

Dear Editor,

Congratulations on your June issue of *The Advocate*. It's packed with interesting articles and information, and we have enjoyed reading it here at the LBA.

I can imagine the hours of work you and your staff put into the project! You did a great job.

Sincerely, /s Elizabeth Bruendasman, Communications Director, Louisville Bar Association

Dear Editor:

The copies of *The Advocate* came while I was down in South Carolina sweltering in the heat of the pine woods. This is an impressive issue, and I am so glad that you were able to produce it. I hope you get the response to it that it deserves. I am flattered to have been asked to contribute to the publication.

I hope that everything goes well with you. This has been one of the strangest summers I have ever experienced. Maybe sometime it will dry up.

I am, with every good wish, Most cordially yours, /s Thomas D. Clark

Gracious Reply To Our Letter of Apology

Dear Editor:

I have your letter of July 29 concerning the fact that Judge Martin Johnstone's photo was switched with mine in a recent issue of *The Advocate*.

We have had many calls to compliment my change in appearance, but none to praise the content of my article. I'm not sorry for the mistake ... but I am sorry so many people were compelled to bring to your attention that the young, handsome man was not me.

Although I would like to still have all the glory for being asked to submit an article for your excellent publication, maybe you can get Judge Martin Johnstone to agree to say the names were switched so that I retain the admiration from secret admirers inspired by his photograph.

Sincerely, don't worry about it. For me it was fun at my colleague's expense.

Very truly yours, /s Edward H. Johnstone, District Judge ,United States District Court For The Western District of Kentucky, Paducah, KY 42001

Dear Editor:

Thank you for your letter of July 30, 1992, concerning the June issue of *The Advocate*. Your "inadvertent mistake" was as close as I'll ever get to becoming a Federal Judge and I thank you for it!

The photograph that you used was apparently obtained from the Kentucky Judicial Directory and was taken by the AOC in 1978. Even I wish that I still looked that young.

I always feel flattered when I am mistaken for the most Honorable Edward H. Johnstone and you have my permission to make such an "inadvertent mistake" again.

With warm regards, I am,

Sincerely yours, /s Martin E. Johnstone, Judge, Third Division, Jefferson Circuit Court, Room 318, Hall of Justice, Louisville, KY 40202

CONTRIBUTORS TO *THE ADVOCATE*

The following people gave donations to continue production of *The Advocate*: NLADA, Bill Jones, John C. Runda, Allison Connelly, Ernie Lewis, Lambert Hehl, Rebecca DiLoreto, Roger Gibbs, Jodie English, IND, Bob Carran, Ed Monahan, Donna Hale, Bill Fortune, Dave Norat, Virginia Meagher, Barbara Holthaus, Joe Myers, Kelly Gleason, Ed Gaffford, Harry Rothgerber, Rob Riley, Debbie Garrison, Steve Mirkin, Biggam, Christensen & Minsloff, Therene Powell, CAL, Barbara Lewis, Bill Spicer, Dan Goyette, Joe Myers, Rodney McDaniel, Melissa Bellew, Bryant Peavler, Austin Price, Bill Curtis, Brent Bloom, NEB and Joseph Barbieri. We thank the contributors for making *the Advocate* possible.

Donations are welcome!

SEXUAL ABUSE- WHY?

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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GOVERNOR JONES APPOINTS CONNELLY PUBLIC ADVOCATE

CHIEF JUSTICE SWEARS HER INTO OFFICE

GOVERNOR JONES: RIGHT TO COUNSEL IMPORTANT FOR THE POOR AND FOR PERSONS WITH DEVELOPMENTAL DISABILITIES

On July 2, 1992 **Governor Brereton Jones** appointed **Allison Connelly** Public Advocate for the Commonwealth of Kentucky.

In appointing Allison, the first woman to serve as Public Advocate in Kentucky, Governor Jones said Connelly will be a courageous advocate for the Kentuckians who are represented by the Department. "I know that Allison will fight to see that every Kentuckian receives the constitutional protection and fair treatment each is assured by the justice system," Governor Jones said.

In this position, Allison will direct Kentucky's public defender efforts and its protection and advocacy work on behalf of persons with developmental disabilities and the mentally ill.

She was sworn into office in the Kentucky Supreme Court Courtroom on August 13, 1992 by Chief Justice Robert F. Stephens of the Kentucky Supreme Court.

Allison, a native of Ashland, Kentucky, is a 1980 graduate of the University of Kentucky and a 1983 graduate of the University of Kentucky Law School. She has been with DPA since 1984 as a trial and post-conviction attorney at the Department's Northpoint Training Center office and as Director of that office. In 1989, she became head of the Department's Post-Conviction Division, which has 6 offices, 16 attorneys and serves the legal needs of Kentucky's 9,000+ inmates. Since 1986 she has taught at the University of Kentucky Law School as both a professor and an adjunct professor.

In accepting the appointment as public advocate, she remarked, "As a career public defender trained by the Kentucky Public Defender system, I believe we can change the world by the power of an idea: *that all people, rich or poor, have an absolute right to justice and equality before the law.* In the next four challenging years, I will work tirelessly to make equal justice a reality by insuring that the Kentucky public defender system is adequately funded and staffed by well trained lawyers. Our Constitution demands nothing less."

SECRETARY HOLMES: CONNELLY IS KY'S CHIEF *BILL OF RIGHTS* OFFICER

The Department of Public Advocacy, an independent agency of state government, is one of 10 agencies within the Public Protection & Regulation Cabinet which is headed by Cabinet **Secretary Edward J. Holmes**. "The Department of Public Advocacy has duties critical to the quality of life for the poor," observed Secretary Holmes. Holmes said, "It is essential that the indigent accused receive quality legal representation and that persons with a developmental disability or a mental illness are served with competence and devotion. Allison Connelly is Kentucky's advocate for those clients. The public advocate's role is seldom popular, but the voice of the public advocate is indispensable to the integrity of this country's criminal courts and law. With Allison at the helm, the Department will continue to keep the *Bill of Rights* alive and well and the people of Kentucky whether rich or poor will be better off because of the work of public advocates across Kentucky's 120 counties. Allison is now officially Kentucky's Chief *Bill of Rights Officer.*"

NATIONAL COMMENT

The Director of the National Legal Aid and Defender Association (NLADA) Defender Division, **Mary Broderick**, offered her congratulations,

> "The Governor's appointment of Allison Connelly will guarantee that the Department of Public Advocacy will continue its excellent representation to poor people in Kentucky. Allison's experience in the Department and commitment to her clients will insure the entire Department continues to operate in the same fashion. She joins the increasing ranks of women who are chief defender. Her appointment is especially important because the increasing caseloads and decreasing resources of defender programs make it imperative that poor people continue to have strong advocates."

NLADA is a national membership organization of defenders, assigned counsel, contract counsel and legal services programs. Seeking high quality legal representation and equal justice for persons in civil and criminal cases.

LOCAL COMMENT

A former law school student of Allison's and now assistant public advocate in the Stanton DPA Office, Donna Hale, offered her views on Allison being appointed DPA's new leader,

> "It is the best thing that ever happened to our Department because of Allison's dedication to the clients and to public interest law, especially criminal defense. Allison will be as dedicated to us as she is to her clients."

Another former student of Allison's and a DPA attorney doing capital trial work, Kelly Gleason, stated,

> "As a teacher and mentor, Allison has had a tremendous impact on my life. I would not be a public defender if not for her inspirational courage, dedication, and fierce advocacy. Even more important, I have learned from Allison a sheer joy and pride in the work she, and I in turn, have chosen. Her humor, compassion and commitment to the defense of indigents will help lead our Department through very tough times. I do not doubt that Allison will have as positive an effect on our Department and those we serve as she has had on me."

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

Hugo Black, Justice of the United States Supreme Court in *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)

WOMEN PUBLIC DEFENDERS

Mary Ann Tally - September 1974 - present *North Carolina Public Defender of 12th Judicial District*

Susan Carpenter - October 1981 - present *Public Defender of Indiana*

Kim Taylor - July 1988 - July 1991 *Public Defender Service for District of Columbia*

Nancy Daniels - November 1990 - present *Florida Public Defender Office of the 2nd Judicial Circuit*

Angela Jordan Davis - July 1991 - present *Public Defender Service for District of Columbia*

Allison Connelly - July 2, 1992 - present Kentucky *Department of Public Advocacy*

Suzanne Elliott - *Washington State Appellate Defender*

Patty Palmer - *Oklahoma Public Defender System*

Pam Latham - *California State Public Defender*

Rita Fry - 1992 - present *Cook County (Chicago) Public Defender Office*

COMMISSION RECOMMENDS 3 CAREER PUBLIC DEFENDERS

The Public Advocacy Commission which has the statutory responsibility under KRS 31.015(6) to "receive applications, interview and recommend to the Governor three (3) attorneys as nominees for appointment as the public advocate," recommended 3 career public defenders to the Governor: Allison Connelly, Assistant Public Advocate, Frankfort; J. Vincent Aprile, II, Assistant Public Advocate, Frankfort, and Erwin W. Lewis, Assistant Public Advocate, Richmond.

Vince Aprile has been with DPA for 19 years serving as appellate director, training director, and general counsel. Vince, a nationally recognized public defender, serving on national committees representing the interests of indigent defendants, has worked in virtually ever aspect of the Department. "Always a zealous advocate on behalf of her individual clients, Allison will bring that same knowledge, commitment and vigor to her new tasks of directing the Department of Public Advocacy," observed Aprile.

Ernie Lewis, has been with DPA since 1977. In his 15 years of serving poor Kentuckians, he has been an appellate attorney, head of DPA Trial Services statewide, and regional director for DPA's trial offices in Central Kentucky. He is directing attorney of the Richmond trial office. In reflecting on the Governor's selection, Ernie said, "The Governor has made an excellent decision. By choosing Allison Connelly he has selected a woman who is committed to delivering justice to poor citizens accused of crimes, a woman who understands what it is like to be a public defender, and a woman who will fight for adequate funding for public defenders."

William Jones, Chair of the Public Advocacy Commission, stated, "Kentucky's Public Advocacy Commission was very fortunate to have had an outstanding group of applicants for the position of Public Advocate. We are extremely pleased to have been able to recommend three professional public defenders to Governor Jones for his consideration."

Allison Connelly will provide progressive leadership for the delivery of quality public defender and protection and advocacy services in Kentucky."

THE CABINET'S ROLE AS ADVOCATE FOR THE DEPARTMENT OF PUBLIC ADVOCACY

These remarks of Secretary of the Public Protection and Regulation Cabinet, Edward Holmes, were made at DPA's 20th Annual Public Defender Conference in June, 1992. They appear here in an edited format.

Interest has been expressed in learning of my personal philosophy toward your work as public advocates. I can tell you that it would be very difficult to stand before you if I did not believe in what you stand for professionally or if I did not have a sensitivity for who it is you are called upon to represent. Perhaps briefly sharing my professional background will provide insight as to why I identify with what you do — and my understanding and admiration for the passion with which you serve.

MY BACKGROUND AND COMMITMENT TO THOSE IN NEED

Having come to state government from a career as the Director of Planning and Housing at the Bluegrass Area Development District, I was called to advocate for safe and decent housing for indigent persons - individuals who were often judged as undeserving by some in their community. I have not been in the position of being so directly involved in the life or death of an individual as many of you are each and every day but I understand your desire to work in a profession which provides an opportunity to enhance the quality of life for those less fortunate.

OUR ADVOCACY ROLE

Having been Secretary for only a few short months, there is still much to learn. But I can only hope that there are persons here tonight whom I have had the opportunity to work with that trust in my commitment to the mission of Public Advocacy. Also, please know how grateful I and my staff are for your willingness to further educate us to your work as well as to your concerns. Thank you for your patience and I ask for your continued support.

In the time we have shared I assure you your concerns have been heard - and I am here to work with you. As Secretary, I feel a critical role of the Cabinet is to advocate for each of the agencies for which I am accountable. In order to do so effectively, I must have an understanding of not only the internal working of the agency, but also the external entities with which you interact, and how they directly or indirectly effect the work of the Department. Many of you have been a real asset to me in this respect. But from where I stand and with the responsibilities I have been given — perhaps most important is for me to gain an in-depth understanding of how to most effectively work within the system of state government — in an effort to advance the needs of the Department of Public Advocacy.

COOPERATION AND PERSISTENCE

I strongly believe, even with the shortcomings and frustrations that the system presents — it is our most effective avenue for change. I realize some of you here tonight may not agree with me and I can respect your difference of opinion. But it is critical that we not lose sight of the mission of Public Advocacy and therefore we must:

- work together to align and build upon our support,

- be patient yet persistent in educating our opponents, and we cannot be successful at either unless —

- we work cooperatively internally.

Nothing is more destructive to our cause than a divided team!

A VISION OF COOPERATION AND SUPPORT TO INSURE QUALITY LEGAL SERVICES FOR THE POOR

I recognize additional funding is necessary to deliver full quality services in all 120 counties in the Commonwealth. But in addition to funding, we must be visionaries — having faith that ultimately we are all striving to best serve our clients — acknowledging and accepting that there may be more than one avenue in which to do so. What often appears to be the best approach or answer when considered in isolation, may not be the most effective one when all points are fully considered. We must have global vision — we must work with one another, the District and Circuit Judges, the Bar Associations, with our contract attorneys, with the legislators and the Governor.

SUPPORT FOR DPA AND ITS MISSION IS IMMENSE

I assure you that we have the support of Governor Brereton Jones. We have the support of Senator Mike Moloney. We have the support of Representative Joe Barrows and Chief Justice Stephens - just to name a few. That is not to say each of them agrees with you and/or I on every issue involving Public Advocacy...but in my eyes that is not what is most important. What matters is that *each of them believes in indigent persons receiving quality legal representation* just as you and I do.

In midst of the struggles the Department is currently experiencing I continue to be encouraged. It is through our common ground that I foresee us building alliances throughout the state new found advocates for your work as public defenders.

APPRECIATION FOR JUDGE CORNS

With change comes new opportunities. I am sure you will all join me in expressing appreciation and gratitude to Judge Ray Corns for his service and commitment to Public Advocacy neither of which comes to an end with his resignation as Deputy Public Advocate and Acting Public Advocate. We thank you Judge Corns for the spirit in which you so graciously serve.

THANKS TO VINCE, ERNIE & ALLISON

I want to commend all of you who came forward and interviewed for the position of Public Advocate. Your desire to serve in this capacity is most admirable. And to your colleagues Vince Aprile, Allison Connelly, and Ernie Lewis — congratulations are due for their recommendation to the Governor by the Public Advocacy Commission. No doubt each of them have the credentials and commitment to serve as Public Advocate. The Governor has selected Allison Connelly and she will need the support of Vince and Ernie — as well as the support of each of you. Exciting times are in store for this Department but these exciting times will not be void of some very challenging decisions.

TASK FORCE

I am pleased to tell you the *Gubernatorial Task Force on Indigent Defense in Kentucky* will be a reality. The proposal which has been shared with Secretary Kevin Hable requested that the Task Force members be appointed soon after the special session to insure that Secretary Hable has ample time to devote to its work.

WE MAKE A DIFFERENCE FOR POOR PEOPLE

As I reflected on what I wanted to address and all that I wanted to share with you, my desire was to leave you with renewed trust and faith that together we can meet the challenges facing the Department of Public Advocacy and together we can seize the opportunities which lie ahead. I sincerely hope that I have done so.

DANA COLLIER

As tempting as it is to end here — I would feel remise in doing so. As you all know, the Department suffered a personal loss recently with the tragic death of Dana Collier. Having had the chance to meet Dana and actually see her at work in the courtroom in Somerset, her commitment was evident. As her professional colleagues this must have been a difficult time for all of you, especially those of you that knew her personally.

I ask that we honor and remember Dana with our daily work.

CONCLUSION

In closing I would like to share with you an African Proverb: *It is the calm and silent water that drowns a man.* Again I thank you for this opportunity.

EDWARD HOLMES
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A criminal justice system which has the responsibility to decide whether to take a citizen's life or liberty must perform reliably if it is to have the support of the people. Without the confidence of the people, the criminal justice system is not viable. For an adversarial system to produce reliable results, each of its components must be competently performing with adequate, balanced funding.

IS FUNDING ADEQUATE FOR THE SYSTEM?

In this regard, Kentucky is in trouble. The adequacy of the funding for the criminal justice system is in question. The system receives 8.4% or $410 million of the 4.9 billion total general fund dollars of the state. As a result, Kentucky ranks 42d in *per capita* justice expenditures. (See Chart 1)

FUNDING IS IMBALANCED: DPA HAS THE LEAST

DPA, which each year defends over 100,000 indigent Kentucky citizens accused of a crime, has 2.6% of Kentucky's $410 million criminal justice funds. (See Chart 2) The prosecutors have 7.8% of the resource pie, and the judiciary has 25%. State police has 17.6% and Corrections weighs in at 46.5%.

Our adversarial system is a 3 legged stool: prosecutors, defenders and judges. If one leg is a significantly different length than the others, dare we rely on using the stool? Can we rely on a system that funds the defense at 1/3 the level of the next leg of the system?

THE IMBALANCE IS INCREASING

A look at a 13 year history of increases in funding for Kentucky criminal justice agencies reveals that the imbalance is increasing. From FY 82 - FY 94 Corrections funding increased $145 million, the Judiciary rose $50 million, the police rose $15 million, prosecutors rose $15 million and DPA increased $5 million. (See Chart 3).

DIMENSIONS OF THE IMBALANCE

Salaries

Assistant public defenders in the Louisville office start at $17,500.00 Those in Lexington start at $18,000.

ARE THE RESULTS RELIABLE?

State public defenders start at $21,600. Assistant Attorney Generals start at $22,272.

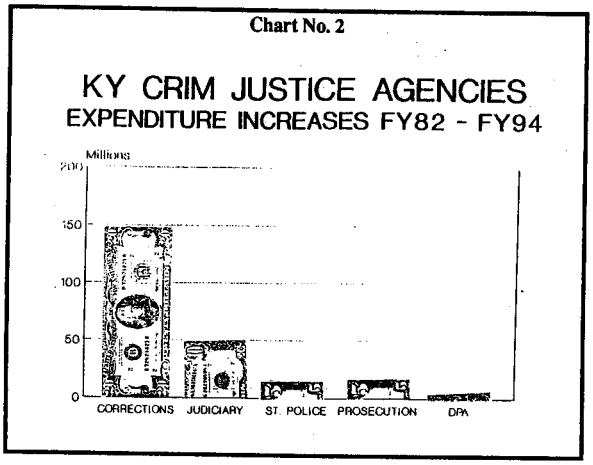
A 1991 Kentucky Bar Association Economic Survey, *Bench & Bar*, Vol. 56, No. 3 (Summer 1992), demonstrated how far the economics of private lawyering outstrips the economics of public defense.

Under KRS 31.170 the public defense hourly maximums are $25 per hour out of court and $35 in court. The KBA survey revealed that the typical hourly rate for criminal cases was $90 per hour with average fees for cases as follows:

DUI	$ 508
Misdemeanor	$ 400
Felony	$2,967

According to the KBA Economic Survey, the mean starting salary for attorneys in Kentucky is $26,770. The mean salary of all Kentucky lawyers is $87,861.

Chart No. 2



NUMBERS EMPLOYED

The number of persons employed in each area of Kentucky's justice system further reveals the imbalance. According to the U.S. Department of Justice's *Justice Expenditure and Employment in the U.S., 1988*, the Justice employment and the percent of the total Kentucky Justice employment in Kentucky is:

Justice Agency	# Employed	%
Police	7,578	45.1%
Corrections	5,340	32.5%
Judicial	2,492	14.8%
Legal Services & Prosecution	1234	6.3%
Public Defense	183	1.1%
Total	16,855	

CASE FUNDING

The funding for indigent criminal cases in Kentucky is an average of $103 per case...for misdemeanors, DUIs, felonies, sex abuse cases, homicides and capital cases. This places Kentucky at the bottom nationally.

At the same time we are spending an average of $12,601.64 per year to imprison an inmate, and $90,000 to build a prison cell.

INADEQUACY OF CRITICAL RESOURCES CREATES UNFAIR PROCESS & UNRELIABLE RESULTS

1) **Counsel.** The Commonwealth Attorneys, County Attorneys and Attorney General's offices are funded at $31 million while DPA is funded at $10.2 million. Even recognizing that DPA does not represent all those who are prosecuted, the imbalance is significant. At a 3-1 disadvantage, do we expect the reliability of the results to be affected?

2) **Expert services.** Medical and mental health expert services, and experts in serology, DNA, hair, fiber, fingerprinting, firearms, *etc.* are regularly available to the prosecution and seldom available to the indigent Kentucky citizen accused of a crime. Although there are statutory mechanisms for obtaining defense experts for indigent defendants, inadequate funding and the unpopularity of providing governmental funds to an accused result in little or no expert services for the accused indigent. In FY 92 funds for experts given to DPA attorneys was a meager $59,886 for our 100,000 cases, or an average of 59 cents per case! The reliability of the results are affected.

3) **Education** of public defenders is limited and shrinking while resources for judges and prosecutors continue at existing levels or are expending. Such trends will eventually cause the quality of advocacy to be skewed with the result that the public and the courts will doubt the reliability of guilty pleas and convictions in indigent criminal cases.

4) **Investigation** resources of law enforcement are very substantial. The Department of Public Advocacy programs in the 120 counties have 21 investigators for all types of capital, felony and misdemeanor cases which number over 100,000 cases each year. There are 7578 law enforcement officers in Kentucky.

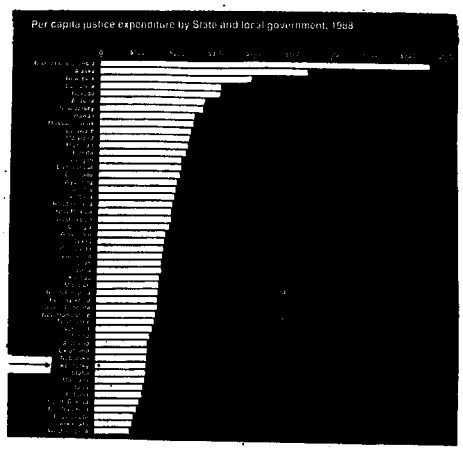
5) **Social workers** are critical to criminal defense work in capital cases, sex abuse cases and many others. The distribution of social workers in Kentucky is: Cabinet for Human Resources: **1481 social workers.** The Dept. of Public Advocacy: **0 social workers**

Does the inadequacy of defense social worker resources promote a reliable process?

BELEAGUERED DEFENDERS

The criminal defense attorney's role in the adversary process is to provide effective, quality representation with zeal. Absent this level of performance, the adversary process' presumptions are undermined. The above funding, caseload and resource facts reduce the public defenders in Kentucky to either *double agents* as Abraham Blumberg postulated in *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 Law & Soc'y Rev 15 (1967) or *beleaguered dealers* as Rodney Uphoff says in *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?* Criminal Law Bulletin 419 (1992). Excessive workloads and lack of resources, which are a direct product of underfunding, prohibit the over 100,000 Kentucky indigents from receiving the effective, quality representation not only they deserve but we as a society seek in order to insure that our government's taking of liberty or life of a fellow citizen is reliably done.

Chart No. 1



FUNDING IN CONTEXT

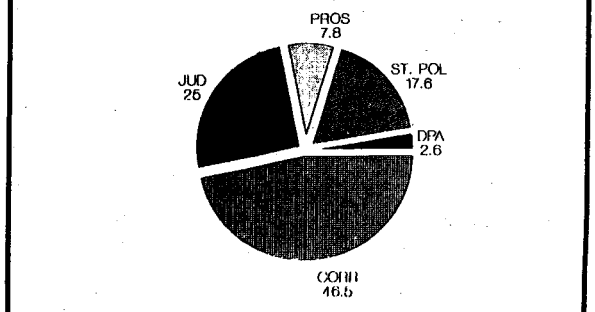
1) $175.9 million FY 93 General Fund Money for Corrections
2) $99.5 million FY 93 General Fund Money for Judiciary
3) $78.4 million Cumulative gross Keeneland 1992 September Sales (for 2,760 yearlings; $28, 438 avg. per horse)
4) $70.3 million FY 93 General Fund Money for State Police
5) $58 million New UK Library
6) $31.1 million FY 93 General Fund Money for Prosecutors
7) $29.6 million 1992 payroll for Cincinnati Reds
8) $20 million LexMarx's yearly advertising budget
9) $18.6 million UK Athletic Budget
10) $10.3 million FY 93 General Fund Money for DPA
11) $10.2 million Cost to build 4 miles of Kentucky two-lane road

Other state salaries provide a context to consider defenders salaries:

1) Assistant Public Advocate	$21,600
2) Right-of-Way Agent Principal	$22,272
3) Toll Facilities Operations Officer	$22,272
4) Latent Fingerprint Analyst	$22,272
5) Dental Hygienist	$23,328
6) Fishery Research Biologist	$24,552
7) Racing Veterinary Intern	$24,552
8) Data Base Analyst	$27,072
9) Parks Turf Grass Management Specialist	$27,072
10) Psychological Associate	$28,980
11) Pharmacist	$34,800
12) Psychologist Licensed	$38,832
13) Physician	$66,948

ED MONAHAN
Assistant Public Advocate
Director, Training Section
Frankfort

Chart No. 3



BALL V. BRADSHAW [1]: TWENTY YEARS LATER

In August, 1970, I was notified that I had passed the Kentucky bar examination. This, I thought, assured me that the road to success and riches had just become a four lane expressway. I became associated with a law firm that had a reputation of doing more than its fair share of *pro bono* work. I was encouraged to continue this tradition. After having made the pilgrimage to Frankfort to be administered Kentucky's dueling oath, I became the Campbell Circuit Court's newest practitioner. With no idea of what would eventually occur, immediately I advised the court of my availability for appointment.

Shortly thereafter, on a Sunday evening, I received a phone call from my circuit judge and was *ordered* to appear in his court the next morning to represent a defendant who was charged with arson. To say the least, I did not sleep much that night. The judge and I met when he arrived for work early the next morning. After summarily dismissing all my protestations about my "midnight" appointment, I was again directed to be in Court at 9:00 a.m. The case was called and my client, who I did not know and had never met, did not answer. I breathed a sigh of relief, thinking surely the case would be continued. How wrong I was!

The judge called the jury into the courtroom and advised the panel there would be a short delay. He then directed the sheriff to bring the defendant forthwith before the Court. My client was brought before the Court within the hour and advised the judge he did not have a lawyer. To the defendant's amazement, he was then introduced to me and was directed to take a seat. Jury selection began immediately.

During the first recess, I hurriedly discussed all the developments with my client, had a brief conference with the prosecutor and worked out a plea agreement that was satisfactory to my client. Within one hour of the time I had met my client, he had pled guilty and was sentenced. The foregoing scenario would not likely have occurred in this day and age because Campbell County now has an accomplished public defender system.

After my first experience, I quickly became aware that the normal practice in Campbell County courts was for newly licensed lawyers to be appointed to represent the indigent criminal defendants. Unfortunately, in the early 1970's there was not a plethora of young lawyers; therefore these duties were bestowed on only three or four inexperienced lawyers. Appointments by the courts were increasing in number and were requiring a majority of the new lawyers' time. This created a serious problem. All the young lawyers so affected could not make a living from their private practice while putting in the necessary time to give their indigent clients complete and thorough representation.

The young lawyers asked Carl Ebert[2], an elder statesman and highly respected member of the local bar, to approach the circuit judges and explain our plight to them. At his insistence and after their own research in the matter, the judges agreed that whenever a lawyer was appointed to an indigent case, they would order that the lawyer be paid for their services from the Kentucky State Treasury. This order was issued by them in four instances and the four lawyers involved presented the court's orders to the state treasurer for payment.

To no one's surprise, payment of the court ordered fees was refused by officials in Frankfort. Suit was filed in the Franklin Circuit Court, and Carl Ebert represented the lawyers from Campbell County. Shortly thereafter a lawsuit was filed on behalf of John Tim McCall, a Louisville lawyer, in a related case by Allen Schmidt [2], his attorney. The two cases were consolidated in the Franklin Circuit Court. Circuit Judge Henry Meigs, after overruling the Commonwealth's motion to dismiss, ruled that the Commissioner of Finance and State Treasurer must pay all the plaintiffs. The young lawyers throughout Kentucky were ecstatic about the result, but there was one more hurdle we had to jump.

Counsel in the Attorney General's office immediately appealed Judge Meigs' ruling to the Kentucky Court of Appeals which is now our Supreme Court. After voluminous briefs were submitted by the parties, the Court in an unanimous opinion[1] on September 22, 1972, written by Justice Scott Reed substantially ruled in favor of the plaintiffs. The ruling in essence mandated the creation of the public defender system in Kentucky.

The following is a very brief chronology of what led to the high court's history-making decision. I would be remiss if I did not add a few points from my own perspective on the case. Although I am sure that the creation of the Public Defender System was inevitable, it would never have been created twenty years ago in Kentucky had it not been for Carl H. Ebert. Mr. Ebert, who passed away in 1980, was the senior partner in the law firm of Ebert, Moebus, Cook, Kirchoff and Neisch of Newport, Kentucky. He was well known for his philanthropy and undertaking of unpopular causes. He was in the twilight of his career when he voluntarily undertook the representation of four young Campbell County lawyers. He worked tirelessly in successfully accomplishing his tasks. "Thank you's" and handshakes were his only recompense. Through his volunteer efforts he did away with *pro bono* representation by giving *pro bono* representation.

Consideration should also be given to the two circuit judges who courageously decided that in the interest of justice, they would order that attorneys representing indigent defendants be paid a reasonable fee for their services. Campbell Circuit Judges Frederick M. Warren and Paul J. Stapleton stood up to the criticism and discharged their constitutionally mandated responsibilities; they were subsequently upheld. Both judges have since passed away, but every public defender owes them a debt of gratitude for their thoroughly researched and foresighted decisions.

Of the four Campbell County lawyers who were plaintiffs in the case, Raymond E. Lape and John A. Diskin, went on to become successful circuit judges in Kenton and Campbell Counties respectively. Kevin Quill became an Assistant Commonwealth's Attorney. I was most fortunate in becoming an Assistant Commonwealth's Attorney in 1972 and since 1975 have been the Commonwealth's Attorney in Campbell County. None of the four plaintiffs ever benefited monetarily from their actions which precipitated the case, but in talking to all of them we agree that the citizens of Kentucky have benefited from the creation of the Public Defender System.

Indigent defendants now receive better, more thorough, professional representation because those appointed now can give the time necessary for adequate representation and can furthermore benefit from the expertise of all their fellow public defenders. As a prosecutor, with 20 years of experience I can see a positive difference from public defender representation of twenty years ago.

In 1970 approximately 20% of those charged with felonies in Campbell County were considered indigent and were eligible for appointed counsel. In 1990, more than 50% of those charged had appointed counsel. I do not believe the defendants or their resources have changed that much to warrant an increase of 150%. From talking to lawyers across the Commonwealth, this appears to be the trend. I do believe that the system has been abused and overused. It often appears that in the interest of expediency, judges automatically appoint and public defenders accept appointments without an in-depth examination of the defendant's finances; thus time that should be dedicated to the truly indigent defendants by the public defender system is often diluted by the unjustified representation of others.

In my position as a prosecutor, I have noticed a tremendous increase in the number of criminal cases that are appealed. In almost every case where a jury convicts and sentences the defendant, there is an automatic appeal. This trend more and more includes cases where defendants have entered guilty pleas acknowledging their guilt on the record. Many of these defendants are represented by attorneys from the Department of Public Advocacy. The Appeals Courts have indicated in their decisions that these appeals are frequently frivolous and without any merit. Every conviction does not warrant an RCr 11.42 motion or appeal alleging incompetent counsel. A concern of mine is that too many frivolous appeals detract from cases that have been appealed on truly valid issues. I hope that these valid issues do not get lost in the shuffle.

Occasionally when I get a lengthy brief in the mail from the Department of Public Advocacy I think back to the past and ask myself, "Why did I help create the Public Defender System?" The answer is all too obvious. "Because we needed the Public Defender System to protect the rights of the accused!" In 1970 it was a shame that the representation of the accused often fell to naive and inexperienced lawyers. Unfortunately, by the time experience and expertise was acquired, the lawyers moved on and the situation repeated itself. We will never have to worry about that situation happening again.

LOUIS A. BALL
Campbell County
Commonwealth's Attorney
17th Judicial District
Courthouse
Newport, KY 41071
(606) 292-6490

[1] 487 S.W.2d 294 (Ky. 1972).

[2] Carl Ebert served for many years on the Board of Governors of the Kentucky Bar Association and was subsequently honored as an outstanding lawyer by the Association. Allen Schmidt is a past president of the Kentucky Bar Association and was honored by the Association in 1991 for having practiced in the Commonwealth for 50 years. Both of these fine gentlemen dedicated much of their legal careers to public service, the result of which has been for all of our best interests.

RESIGNATION OF GARY HUDSON

Dear Allison, This letter is to formally notify you of my resignation from the Department of Public Advocacy effective October 31st, 1992. I am in my tenth year with the department and have always found the work to be challenging and gratifying. My decision comes after several months of soul searching. Regretfully, with the cutbacks facing the public defenders and the increasing need for services in the London office, I am leaving you at a bad time.

The London office has a dedicated staff that will do their best, I am sure, but will need immediate help. Please try to avoid the short term savings offered by delaying replacement help. I believe we end up spending more in the long run correcting our mistakes. Another move that would be helpful would be to remove any 11.42 cases from the load, at least temporarily. London should have another attorney position, but I know that is not likely with the budget in its present condition. Still, if caseloads continue to increase, an increase in staff is unavoidable and inescapable ethically.

I have had a rewarding tenure as an assistant public advocate. The excellent training offered by the department has enriched my professional life. I have made many friends. I wish I could thank all the people who have given me inspiration and the desire to keep doing public defender work. Please know, I appreciate the opportunity I have had to work for the department of public advocacy. Thank you. Gary Hudson, Assistant Public Advocate

KENTUCKY PUBLIC DEFENDER SERIES
WKYT - TV, CHANNEL 27
FEBRUARY 27, 28 AND MARCH 1, 1991

The following is a transcription of a 3-Part - Kentucky Public Defender series that airied on Wednesday, February 27, Thursday, February 28, & Friday, March 1, 1991 on WKYT-TV.

February 2, 1991, Part 1

THEMES: U.S. Constitution as basis for right to counsel; State's obligation to provide counsel to those without means; Overworked and underpaid public defenders; Client's perspective on public defender representation.

CHANNEL 27 NARRATOR: In all criminal prosecutions, the accused shall enjoy the right to a speedy and fair trial, to be informed of the charges against him, and to have the assistance of counsel for his defense.

EMILY MATHES, Channel 27 Reporter: We've heard it before - but what exactly does it mean? It means you're entitled to a fair and speedy trial. And it means you are entitled to a lawyer if you want one. And that means that the state is required to provide you with a lawyer at little or no cost if you can't afford to hire a private attorney.

ED MONAHAN, Asst. Public Advocate Frankfort, KY: Our main mission is to represent poor people, poor fellow citizens.

JOE BARBIERI, Chief Public Defender Lexington, KY: A defense lawyer is the final line between constitutional rights and not having constitutional rights.

MS. MATHES: Barbieri says that most full-time public defense lawyers are fresh out of law school. He says they know they are signing up to be overworked and underpaid. But that's part of the game.

There's a kind of toughness that goes along with being a public defender. A feeling of pride in being the underdog and a challenge to overcome the odds.

MR. BARBIERI: To go in there, just you and your client, facing the entire system, the prosecutor, the police department, their resources...and it's just you and your client. That's a challenge. And when you walk away with a "not guilty" verdict, there's nothing more satisfying.

RUSS BALDANI, Former Lexington Public Defender: Other people in my law school class started out making three or four times the money that I did, but very few of them, if any, were in court as much, got as much practical, hands-on experience, got as much opportunity to try cases in front of juries.

MS. MATHES: People like Tamara Farris use public defenders. When she was assigned a legal aid attorney last fall, both she and her husband were unemployed. Farris admits she was a little worried about the quality of legal work she was going to get.

MS. FARRIS, Former Lexington Public Defender Client: At first, I decided to talk to her and see if she was going to give me the time and everything. Because, I had heard that sometimes they don't give you the time that you need. And she was, right off the bat, real good.

MS. MATHES: Tomorrow, we'll look at some of the problems within the public advocacy system.

February 28, 1991 Part 2

THEMES: Underrepresentation of public defender clients because of inadequate funding; Inability to recruit and retain the best to be public defenders due to inadequate funding; Franklin County public defenders resign due to gross underfunding; Imbalance of salaries, number of attorneys, and funding between public defenders and prosecutors; Unfair match due to inequitable resources.

MS. MATHES: The public advocacy system in Kentucky works three ways. In some cities, the state runs its own office. In larger cities, the state contracts with independent agencies such as Fayette County Legal Aid. And most rural counties enter into contracts with private attorneys to serve as part-time public defenders. But even those who run the rather piece-meal system say it's flawed.

MR. MONAHAN: Everyday in Kentucky, fellow poor citizens are denied the right to their full measure of justice because of their poverty, because we don't have the ability to represent them at the level they deserve under the Constitution.

MS. MATHES: Public defenders say their biggest problem is a lack of money and resources, including money for salaries. Both public defenders and prosecutors would make at least two or three times as much in private practice.

MR. BALDANI: When I was at Legal Aid, there were situations or certain times when a defendant would be having his arraignment. And a judge would be deciding whether to give that person a public defender, and that person would be making more than I was making at Legal Aid at the time. And the judge would say "yes, you're indigent and qualify for a public defender."

MS. MATHES: Franklin County public defenders resigned "en masse" last summer over money. The issue was resolved when the state and the City of Frankfort compromised on paying the bill to keep the office open.

Fayette County pays pretty well compared to the rest of the state. Assistant Public Defenders start at $17,000 a year. That compares with Assistant Commonwealth's Attorneys who begin at $20,0000, and Assistant County Attorneys who make $21,500 to start.

MS. MATHES: In Fayette County there are thirteen full-time public defenders, nine full-time attorneys in the Commonwealth's Attorneys office and nineteen in the County Attorney's offices.

Public defenders handle indigent cases in circuit and district courts. For the prosecution, the County Attorneys handle district court and the Commonwealth's Attorneys take the circuit court cases.

This year the state general fund allocated about $10 million to Public Advocacy and about $22 million to Kentucky prosecutors.

MR. BARBIERI: We've got the responsibility, the burden, of defending the Constitution, and we're not being given the tools.

MR. MONAHAN: We don't have the ability to recruit and retain the very best, and we should.

MS. MATHES: Prosecutors say they're also overworked. They handle all state and local cases, not just the ones the private attorneys don't get. And they have more to prove in Court.

MIKE MALONE, Lexington Asst. Prosecutor: We have some advantages in terms of resources. But we also have more of a, more work to do. In other words, whereas all a defense attorney has to do is defend against a charge, we have to prove a charge.

MS. MATHES: Prosecutors do have more money and more outside help, including local police department detectives. Another important influence on public defenders is public opinion.

VICKI HORN, Lexington Asst. Public Defender: I have had people who thought that legal aid attorneys were student interns, or somehow were here on a lesser license, that we weren't actually licensed attorneys.

MS. MATHES: Those preconceived notions may affect those people who make money decisions. Mike Malone began his career as an Assistant Commonwealth's Attorney. Now, he's a private defense lawyer and Chairman of the Senate Budget Committee.

MICHAEL R. MOLONEY, State Senator Chair, Senate Appropriations Committee: It's very easy for the General Assembly, and I'm a member of it, to respond to the cry for more money to stop crime. The public defender has got themselves. They don't have an investigator. They don't have the staff that they need. They've got to rely upon their own feet, so to speak, to investigate the case, or rely upon what the Commonwealth Attorney's Office or the County Attorney's Office gives them in the course of discovery. It's not a fair match.

MS. MATHES: Moloney says he wants the Legislature to increase funding for the Public Advocacy system. It has closed the gap somewhat during the past few sessions, but he says not enough. Tomorrow, we'll take a look at just what it would take to bring the system more up to par.

March 1, 1991, Part 3

THEMES: Inability to do its constitutional job due to funding; Underrepresentation of clients in misdemeanor court.; Poor Kentuckians don't have anything close to equal access to our judicial system; Public opinion's role in public defender problems.; Need for more informed public opinion on importance of protecting poor people's rights.

MS. MATHES: The State Department of Public Advocacy admits it's not doing the job it should be.

MR. MONAHAN: There aren't enough full and part-time public defenders to represent every person charged with a crime. So what happens is, those people who have committed misdemeanors, whose judges decide they aren't going to jail, wind up, in many counties, without a lawyer, without a public defender. And, they wind up convicted. And this is in the year of the 200th Anniversary of our Bill of Rights.

SENATOR MOLONEY: The poor people in the state don't have anything close to equal access to our judicial system.

MS. MATHES: Monahan and Malone say more money would help public defenders recruit and retain good attorneys, devote the necessary time to their clients, and hire more support staff. But the solutions aren't so simple as they seem. Everyone wants more money. And more money would certainly help the system, but the essence of the inferiority complex within the Public Advocacy system lies mainly in public opinion.

MR. BALDANI: Public defenders are looked upon by people that aren't in the system - by victims, the public - as sometimes condoning what their clients are charged with, which isn't true. They're looked upon by the victims of the crime as not being much different than the defendant. And that's something that hurts.

MS. FARRIS: You've got to prove yourself in most people's eyes before, you know, some people believe you. If they hear your side of the story and everything, but, you know, there's a lot of people - "you're going to the grand jury?" "Yeah, right, you're innocent", you know?

MS. MATHES: Greater respect and highest public opinion would probably lead to increased funding, and to what public defenders say, would be a more equitable system.

MS. HORN: It would be nice if the public seemed to be as interested in protecting people's rights as it is in putting people behind bars.

EMILY MATHES - 27-NEWS-FIRST.

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WEST'S REVIEW

KENTUCKY COURT OF APPEALS

PFO—APPLICATION TO CONTROLLED SUBSTANCE ACT

Harrison v. Commonwealth
Smith v. Commonwealth
39 K.L.S. 7 at 1
(June 5, 1992)

At issue in this case was whether the PFO statute may be utilized to enhance sentences imposed for convictions under KRS 218A, the Controlled Substance Act. Appellants argued that it cannot, citing *Offut v. Commonwealth*, 799 S.W. 2d 815 (Ky. 1990), and *Berry v. Commonwealth*, 782 S.W. 2d 625 (Ky. 1990). In *Offut* and *Berry*, the Kentucky Supreme Court held that inasmuch as the sentence for murder is fixed not by KRS 532.060, but by KRS 532.030, and since the PFO statute by its terms permits the imposition of an enhanced sentence only in lieu of "the sentence assessed under KRS 532.060..." that a murder conviction is not subject to the PFO statute. Despite the fact that, like the sentence for murder, sentences under the Controlled Substances Act are assessed outside 532.060, the Court of Appeals refused to extend the reasoning of *Berry* and *Offut* to drug convictions.

PFO—GUILTY PLEA/ WAIVER OF PRESENTENCE REPORT

Hulett v. Commonwealth
39 K.L.S. 7 at 3
(June 5, 1992)

Following a jury verdict of guilty on a cocaine trafficking charge, Hulett agreed to plead guilty to PFO, first degree, in exchange for the minimum enhanced sentence. The trial court accepted Hulett's plea without first requiring the jury to fix a sentence on the underlying drug charge. Hulett argued on appeal that this was error. The Court of Appeals acknowledged that the "better practice" would have been to first fix sentence on the underlying charge, but refused to reverse since any error was harmless.

Hulett also argued that he was entitled to reversal of his PFO conviction because a "Waiver of Further Proceedings with Petition to Enter a Plea of Guilty" was not made a part of the record. The Court rejected this argument, saying "[n]owhere in his appeal does Hulett intimate that he did not understand his constitutional rights: he does not contend that he failed to understand his waiver statement and plea agreement, only that the document does not appear of record; nor does he contend that he failed to enter a knowing and voluntary plea...." The Court distinguished *Dunn v. Simmons*, 877 F. 2d 1275 (6th Cir. 1989) which granted habeas relief where the record was silent as to the *Boykin* colloquy and the defendant testified that he did not knowingly waive his right to trial.

The trial court also permitted Hulett to waive a presentence report. Without examining the applicability of KRS 532.050(1), which states that "[t]he presentence investigation report shall not be waived," the Court held that any error was harmless since Hulett was given the minimum sentence and as a first degree persistent felony offender was ineligible for probation, shock probation, or conditional discharge.

KRS 210.360-PSYCHIATRIC EVALUATION/ COMPETENCY/TRUTH IN SENTENCING-PAROLE STATISTICS

Messer v. Commonwealth
39 K.L.S. 7 at 5
(June 5, 1992)

KRS 210.360 provides that when a person is indicted as a first degree PFO "the circuit clerk of the court in which he is indicted shall give notice of the indictment to the secretary of the cabinet for human resources...." who "shall cause such person to be examined by a psychiatrist or licensed clinical psychologist... to determine his mental condition and the existence of any mental illness or retardation which would affect his criminal responsibility." In Messer's case, the clerk complied with the statute, however no other steps to comply with the statute were taken, nor was the lack of compliance noted until the day of trial when defense counsel moved for a continuance based on the statute. At the hearing on this motion, Messer testified that in 1987, following a suicide attempt, he underwent a six-month psychiatric evaluation at KCPC.

The Court of Appeals refused to view non-compliance with the statute as reversible error. However, the Court did hold that the trial court had "reasonable grounds" under RCr 8.06 to postpone the proceedings until the issue of Messer's competency could be determined, and reasonable grounds under KRS 504.100 to believe that Messer was incompetent to stand trial. The trial court was thus required to order a psychiatric or psychological evaluation of Messer. The trial court's failure to do so was reversible error.

Finally, the Court held that the Truth in Sentencing Act did not entitle Messer to introduce statistics showing the percentage of inmates denied parole on their first meeting with the Parole Board. The Court cited as controlling the Kentucky Supreme Court decision in *Abbot v. Commonwealth*, 822 S.W.2d 417 (Ky. 1992).

DUI-OFFICER'S "SWORN REPORT"

Commonwealth v. Williams
39 K.L.S. 7 at 12
(June 12, 1992)

KRS 186.565(3) provides that upon receipt of a "sworn report of the law enforcement officer" stating that a driver has refused a breathalyzer test, the Cabinet is authorized to serve notice upon the driver to appear before it to show cause why his or her operator's license should not be revoked. A state trooper completed and signed a form entitled 'Affidavit of Refusal to Take Chemical Test' after Williams refused a breathalyzer. However, the form was then left with a notary who only signed it afterwards and outside the trooper's presence. The Morgan Circuit Court reversed the Cabinet's subsequent order revoking William's license and the Court of Appeals affirmed.

The Court held that by including the word "sworn" in the statute, the legislature intended to require that the report be essentially made under oath. The requirement was essential because, in the event the licensee failed to appear or otherwise show cause, the report alone could then serve as the basis for revocation. In order for the "sworn" requirement to be met, the Court held that the officer must "appear before the notary and sign the document in the notary's presence while being aware that the affidavit is to be accepted and processed as a sworn document." Judge Huddleston dissented.

RIGHT TO AVOWAL

Perkins v. Commonwealth
39 K.L.S. 8 at 3
(June 26, 1992)

At Perkins' trial on drug trafficking charges, the commonwealth introduced testimony by an informant who had engaged in a drug transaction with Perkins while wired for sound. The recording device carried by the informant, however, failed to work, and the commonwealth called a detective who testified to the audio surveillance method used. When Perkins attempted to cross-examine the detective regarding the tape recorder's operation, the commonwealth's objection was sustained. The trial court additionally refused to permit the defense to make an avowal.

The Court of Appeals reversed, citing CR 43.10 and holding that in a jury trial "there is no discretion available to prevent counsel from making an avowal."

DOUBLE JEOPARDY-MULTIPLE OFFENSES/CHAIN OF CUSTODY-DRUGS

Grubb v. Commonwealth
39 K.L.S. 8 at 19
(July 3, 1992)

Grubb was convicted of multiple drug offenses based on the inclusion in a single drug sale of two different Schedule II controlled substances—dilaudid and percodan. The Court of Appeals held that carving two convictions from Grubb's single act violated the prohibition against double jeopardy. The Court relied on the Kentucky Supreme Court's holding in *Ingram v. Commonwealth*, 801 S.W.2d 321 (Ky. 1990). In *Ingram*, the Court adopted a broader test for double jeopardy under Section 13 of the Kentucky Constitution than that used by the U.S. Supreme in applying the Fifth Amendment. Specifically, the Kentucky Supreme Court held that when there is "a single impulse and a single act, having no compound consequences," only one offense exists. Applying this test to Grubb's case, the Court of Appeals concluded that her act of selling two drugs—both Schedule II substances—in one sale, did not have compound consequences. The gravamen of the offense was the act of trafficking in a Schedule II drug, an act criminalized by a single statute, and the number of offenses did not multiply with the number of pills conveyed in the single transaction or with the number of different Schedule II substances conveyed.

Conflicting testimony was given by commonwealth witnesses at Grubb's trial regarding the chain of custody of the drugs. The conflict centered on when the drugs were delivered for laboratory testing. The Court quoted *Reneer v. Commonwealth*, 784 S.W.2d 182, 185 (Ky. 1990) to hold that this discrepancy did not rob the evidence of its integrity absent a showing that "anyone could have a reason or opportunity to tamper with the evidence."

RCr 11.42-TIMELINESS

Reynolds v. Commonwealth
39 K.L.S. 8 at 15
(July 3, 1992)

Twelve years after his conviction and after the death of trial counsel, Reynolds filed an RCr 11.42 motion alleging ineffective assistance of counsel. The commonwealth responded that due to the lapse of time and the intervening death, it was denied the ability to adequately respond. The Court of Appeals affirmed the trial court's denial of relief, referring, in so doing, to the common law doctrine of laches: "We know all too well that laches is an equitable doctrine thus far peculiar to the civil law, but it cannot be doubted that failure to avail oneself of remedies of the law for disproportionate periods of time should have a detrimental effect regardless of civil or criminal jurisprudence. * * * [S]ince in the case at bench, appellant, either intentionally or unintentionally, waited some twelve years after the death of one individual who could refute the claim of ineffective assistance of counsel[,] which prejudiced the appellee's ability to respond [,] we must sustain the trial court."

BURGLARY I- "IMMEDIATE FLIGHT"

Baker v. Commonwealth
39 K.L.S. 8 at 14
(July 3, 1992)

Baker argued that the commonwealth failed to prove as an element of first degree burglary, that "in effecting entry or while in the building or in the immediate flight therefrom, he... was armed with a deadly weapon..." Baker was in possession of a gun when he was apprehended by a neighbor three tenths of a mile away and within twenty minutes of leaving the scene. There was also evidence that Baker had the gun not long before entering the house. The Court held that this circumstantial evidence was sufficient to support a finding that Baker possessed the gun "while in the building," and that in any event, he was in immediate flight when apprehended.

RCr 11.42-TIMELINESS
Hayes v. Commonwealth
39 K.L.S. 8 at 18
(July 3, 1992)

This is yet another case where, as in *Reynolds, supra*, the Court held that the appellant had waited too long (in this case twenty-three years) to collaterally attack his conviction where the grounds asserted were available to him immediately following his conviction.

PROBATION-INCREASE IN SENTENCE AS CONDITION
Galusha v. Commonwealth
39 K.L.S. 8 at 27
(July 10, 1992)

Galusha was convicted of numerous theft offenses and sentenced to terms totalling eight years. He subsequently moved for shock probation. The motion was granted on the condition that his total sentence be increased to twenty years.

The Court of Appeals held that the trial court could not, as a condition of probation, enhance the sentence already imposed. The Court cited *Hord v. Commonwealth*, 450 S.W.2d 530 (Ky. 1970)(a previously imposed sentence may not be increased upon revocation of probation); *McMurray v. Commonwealth*, 682 S.W.2d 794 (Ky. 1985)("...a trial court loses control of its judgment 10 days after its entry"); and *Commonwealth v. Tiryung*, 709 S.W.2d 454 (Ky. 1986)(a sentence must be imposed "without unreasonable delay and before sentencing to probation"). The Court emphasized that "when one is tried for an offense, upon a finding of guilt, he is entitled to have his sentence fixed with certainty and finality."

CONFRONTATION/LEGAL INTOXICATION/DOUBLE JEOPARDY-DUI AND HOMICIDE
DeWolfe v. Commonwealth
39 K.L.S. 8 at 33
(July 17, 1992)

At his trial for DUI and second degree manslaughter, DeWolfe attempted to cross-examine a commonwealth witness about drug charges then pending against the witness. The witness had testified that he approached DeWolfe's vehicle immediately following the accident and smelled a strong smell of alcohol on DeWolfe. DeWolfe sought to introduce evidence of the drug charges to show that the witness' perception at the time of the collision might have been inaccurate.

The Court held that this evidence was properly excluded. The Court cited the holding of *Shirley v. Commonwealth*, 378 S.W.2d 816 (Ky. 1964) that "a witness may not be impeached by showing particular wrongful acts, except felonies of which the witness had been convicted." The Court also noted that DeWolfe *was* permitted to ask the witness whether he was under the influence of any drug which might have affected his perceptions at the time of the accident.

DeWolfe also contended that it was error to permit the prosecutor to inform the jury of the "legal limit of the presumption of intoxication." The Court reaffirmed its holding in *Overstreet v. Commonwealth*, 522 S.W. 2d 178 (Ky. 1975), that it is error to inform the jury of the provisions of KRS 189.520 in a combined prosecution for DUI and a resulting vehicular homicide. The Court nevertheless declined to reverse since there was substantial other evidence of DeWolfe's intoxication.

Finally, DeWolfe complained, and the Kentucky Supreme Court agreed, that his convictions of both second degree manslaughter and DUI constituted double jeopardy where the act of driving while intoxicated was used to prove the wanton element of the second degree manslaughter. The Court vacated the DUI conviction.

TRAFFICKINGSUFFICIENCY OF EVIDENCE/ ENTRAPMENT/LESSER INCLUDEDS/JURORS-IMPLIED BIAS
Farris v. Commonwealth
39 K.L.S. 8 at 38
(July 17, 1992)

Farris was approached by an undercover detective (Young) and informant (Scales) who sought to buy cocaine. An unidentified male also joined in the discussion. Ultimately, Farris accepted payment and left with the male to fetch the drug. When they returned, Farris handed the drug to the detective. Farris testified in regard to this transaction that his role was limited to preventing the unidentified male from absconding with the money. A week later, a second transaction occurred involving Farris alone. Farris again accepted money and returned with the drug. Farris testified in regards to this incident that he merely acted as a purchaser for Young and Scales and obtained the drug from an unidentified third party. Farris additionally testified that he and Scales had a romantic relationship and that he only agreed to aid in the drug purchases in order to please her.

The Court held that this evidence was sufficient to take the trafficking charges to the jury; however, the Court reversed based on the refusal of the trial court to instruct the jury on the defense of entrapment. Farris' testimony entitled him to such an instruction because it supported a finding that "[he] was induced or encouraged to engage in (the transfer of the cocaine)... by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and [a]t the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct." KRS 505.010 (1)(a) and (b). The Court of Appeals also held that Farris was entitled to instructions on the lesser included offenses of possession and criminal facilitation.

The Court next examined the issue of whether the trial court erred in refusing to strike for cause a prospective juror who was an Assistant County Attorney at the time of the offense and at trial, who admitted to working professionally with the Commonwealth Attorney, and who was a personal friend of the trial judge. The Court held that, notwithstanding his claim of impartiality, this juror was subject to an implied bias challenge. However, the Court declined to find reversible error since Farris made no showing that his use of a peremptory to remove the juror resulted in a subsequent inability to remove other unacceptable panel members.

"PROBATION" INCLUDES SHOCK PROBATION
Wilson v. Commonwealth
39 K.L.S. 8 at 40
(July 17, 1992)

Wilson pled guilty to second degree assault in exchange for the commonwealth's agreement to recommend the minimum sentence and take no position on probation. At sentencing, the commonwealth, while announcing that it had no position on probation, informed the court that the victim was present and willing to answer questions. The judge ultimately denied probation.

Wilson subsequently filed a motion for shock probation. At the hearing on his motion, the commonwealth stated its opposition and again presented the victim. Wilson objected that the commonwealth's action was in violation of the plea agreement, while the commonwealth argued that shock probation was not included in the agreement. The sentencing court agreed with the commonwealth and denied probation.

The Court of Appeals held that "shock probation is a form of probation, and [the commonwealth's] argument to the contrary is not compelling." Because of the commonwealth's noncompliance with the plea agreement, the Court remanded the case for a new hearing on the issue of shock probation. The Court also held, however, that the victim was not bound by the commonwealth's agreement to which she was not a party, and was free to oppose probation.

THIRD DEGREE ASSAULT-INTENT/KRS 508.025 NOT OVERBROAD OR VAGUE
Money v. Commonwealth
39 K.L.S. 9 at __
(July 31, 1992)

Money challenged the constitutionality of KRS 508.025(1)(b), which provides that a person is guilty of third degree assault when "[b]eing a person confined in a detention facility, he inflicts physical injury upon... an employee of the detention facility." Money first argued that the statute was invalid because it failed to include a culpable mental state. The Court of Appeals, however, held that the statute must be read in conjunction with KRS 501.040, which states that: "Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense... if the prescribed conduct necessarily involves such culpable mental state."

Money next argued that the statute was overbroad in that it could be interpreted as prohibiting the infliction of accidental injury. The Court rejected such a construction, saying "The only conduct which is impermissible under the facts of this case is that a prison inmate may not intentionally inflict physical injury upon a prison employee." The Court similarly rejected Money's claim that the statute was unconstitutionally vague.

KENTUCKY SUPREME COURT

INSTRUCTION ON LESSER OFFENSE WITHOUT DEFENSE CONSENT
Commonwealth v. Elmore
39 K.L.S. 6 at 22
(June 4, 1992)

At Elmore's trial on assault, the commonwealth requested a jury instruction on assault under extreme emotional disturbance. Elmore objected on the grounds that it was the defense's strategy to force the jury to an all or nothing verdict—guilty of assault or not guilty by reason of self protection. The Kentucky Supreme Court rejected Elmore's argument that the defense was entitled to waive the e.e.d. instruction, citing *Vick v. Commonwealth*, 236 Ky. 436, 33 S.W.2d 297 (1930) for the rule that "...it is the duty of the trial court to instruct on such defense whether it be supported by evidence presented by the accused or introduced on behalf of the commonwealth." Justice Combs and Chief Justice Stephens dissented on the grounds that the following language in KRS 508.040(1) permits the defense alone to raise e.e.d. as a mitigating circumstance: "In any prosecution... in which intentionally causing physical injury or serious physical injury is an element of the offense, the defendant may establish in mitigation that he acted under the influence of extreme emotional disturbance...."

DOUBLE JEOPARDY -MULTIPLE OFFENSES /CONFRONTATION /INEFFECTIVE ASSISTANCE -CONFLICT /IMPROPER REBUTTAL/CONSPIRACY
Humphrey v. Commonwealth
39 K.L.S. 6 at 24
(June 4, 1992)

Humphrey was tried with Greg Wilson (see Death Penalty) and convicted of kidnapping, first degree robbery, conspiracy to commit first degree robbery, criminal facilitation of rape, and criminal facilitation of murder.

The first issue addressed in any depth by the Court was whether Humphrey was subjected to double jeopardy when she was convicted of robbery and then of kidnapping under the theory that the victim was restrained in order "[t]o accomplish or to advance the commission of a felony" *ie.* robbery. The robbery was again relied on as an aggravating factor at the penalty phase in support of a sentence of life without parole for twenty-five years. The Court disposed of the double jeopardy argument with respect to robbery and kidnapping by holding that the exemption statute did not apply. The Court likewise rejected Humphrey's claim that the robbery could not be again used as an aggravator.

The Court held that Humphrey was not denied her right to confrontation when her codefendant, Wilson, while making his own closing argument, stated that Humphrey had told her sister that she killed the victim. Wilson did not take the stand and no evidence supported his statement. The Court nevertheless deemed his statement harmless since Humphrey was convicted only of facilitation to

CHILD SEXUAL ABUSE-HEARSAY STATEMENTS OF CHILD
Edwards v. Commonwealth
39 K.L.S. 7 at 22
(June 25, 1992)

The child victim in this case was found incompetent to testify by the trial judge. However, various hearsay statements of the child identifying Edwards as having abused him were admitted into evidence.

The first statement introduced was spontaneously made by the child to his foster mother following a family visitation during which Edwards was present. Without prior questioning, the child stated "Paul hurt my butt." The Supreme Court held that the spontaneous nature of the statement, made immediately following and under the stress of the injury, qualified the statement for admissibility under the "spontaneous statement exception" to the hearsay rule.

The Court also upheld the admission of the child's response to a question by a treating physician as to who had injured him. The Court noted that the hearsay exception for statements made for the purpose of seeking medical diagnosis or treatment does not usually extend to statements regarding the identity of an assailant since this information is not pertinent to treatment. However, the Court held that the exception did apply where the physician testifies that the information was needed for treatment. The Court specifically pointed to testimony by the doctor that he needed to know the identity of the abuser in order to prevent the spread of a sexually transmitted disease for which the victim tested positive and in order to prevent future harm to the child. The Court likewise held that statements as to the identity of the abuser made by the child to a psychologist were obtained for the purpose of treatment and thus admissible. Chief Justice Stephens dissented and would have reversed because the statement made to the foster mother was not made immediately following the injury but only after a lapse of three weeks, and because the identity of the abuser was not legitimately sought by the treating doctor for purposes of treatment. Justice Leibson joined in the Chief Justice's dissent and would have additionally reversed based on the hearsay testimony by the psychologist.

murder.

Humphrey's trial counsel had previously represented a prosecution witness on an unrelated charge. Humphrey argued that this gave rise to a conflict on the part of counsel because he failed to use privileged information in his cross-examination of the witness. The Court rejected this argument on the grounds that Humphrey had failed to demonstrate an actual conflict.

The Court held that Humphrey was not prejudiced when the prosecution called, as a rebuttal witness, a jail inmate who testified to incriminating admissions that Humphrey had made in her presence. The Court distinguished *Wager v. Commonwealth*, 751 S.W.2d 28 (Ky. 1988) and *Gilbert v. Commonwealth*, 633 S.W.2d 69 (Ky. 1981) on the grounds that Humphrey's confession to another witness was introduced during the commonwealth's case in chief, and on the grounds that Humphrey was not surprised by the testimony since she had obtained it during discovery.

Finally, the Court held that Humphrey's conviction of both robbery and conspiracy to commit robbery was permissible under KRS 506.110(2) which provides that "[a] person may be convicted on the basis of the same course of conduct of both the actual commission of a crime and a conspiracy to commit that crime when the conspiracy from which the consummated crime resulted had as an objective of the conspiratorial relationship the commission of more than one crime." The Court found that the evidence indicated that the conspiracy encompassed both the robbery and kidnapping, thereby triggering the statute. Justices Leibson and Combs dissented.

PRESERVATION-AVOWAL /HEARSAY/EVIDENCE OF PENETRATION/ CONSECUTIVE SENTENCES
Jones v. Commonwealth
39 K.L.S. 7 at 27
(June 25, 1992)

At his trial for rape and sodomy of his three year old daughter, Jones sought to cross-examine a witness regarding the reputation and bad acts of a third party whom Jones claimed could have been responsible for the abuse. However, Jones failed to request an avowal when the commonwealth's objection was sustained. The Court held that this omission rendered the claimed error unreviewable.

Jones additionally argued that statements made by the victim to a doctor who treated her at a hospital emergency room should not have been admitted into evidence without first conducting a hearing to determine their admissibility. The Court held that a hearing was not required. All that was necessary was for the offering party to lay a sufficient foundation showing that the statements were made in order for the child to receive medical treatment.

Jones also argued that there was insufficient evidence of penetration. The Court disagreed, holding that the physical evidence that the victim's vaginal area was reddened and dilated, combined with the victim's statements, gave rise to a jury issue on the question of penetration.

Lastly, the Court reaffirmed its holding in *Dotson v. Commonwealth*, 740 S.W. 2d 930 (Ky. 1987) that a sentencing court is not bound by the jury's recommendation that sentences be concurrent, but may instead choose to impose consecutive sentences. Justices Lambert, Leibson, and Combs dissented.

FORCIBLE COMPULSION/ INSTRUCTIONS-SEXUAL MISCONDUCT/AMENDMENT OF INDICTMENT/ SENTENCES
Yarnell v. Commonwealth
39 K.L.S. 7 at 33
(June 25, 1992)

Yarnell argued that his convictions of first degree rape, first degree sodomy, and first degree sexual abuse of his stepchildren must be reversed because the commonwealth failed to prove the element of forcible compulsion. The Court, disagreeing, stated: "Actual physical force is not needed to prove forcible compulsion." Forcible compulsion was established by the children's testimony that they submitted to the sexual abuse only because they feared what Yarnell would do to them or their mother. There was also testimony by one child that on at least one occasion Yarnell had struck her and thrown her against a wall. Based on its view that the evidence "clearly established that Yarnell used forcible compulsion," the Court additionally held that Yarnell was not entitled to an instruction on the lesser included offense of sexual misconduct.

The Court also held that Yarnell was not prejudiced by the amendment of Count One of the indictment from sodomy to rape. The bill of particulars gave notice that the commonwealth's evidence showed rape, not sodomy, and Yarnell's defense—a denial of all charges—was unaffected by the amendment.

The Court did vacate Yarnell's sentence to the extent that the judgment ordered his life sentence and sentence to 290 years imprisonment to run consecutively. Under KRS 532.110(1)(c) a term of years may not run consecutively with a life sentence.

LINDA WEST
Appellate Branch
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WIFE CHARGES FATHER WITH SEXUAL ABUSE TO GAIN CUSTODY

WASHINGTON - The Supreme Court on Tuesday agreed that a Lexington man accused of raping his 4-year-old daughter did not get a fair trial because a gynecologist chosen by him and his lawyer was not allowed to examine the girl.

Wesley Turner III had been sentenced to 20 years for rape and five years for sexual abuse.

He had testified that the criminal charges lodged against him in 1987 grew out of an attempt by his former wife to gain complete custody of their daughter.

The Kentucky Supreme Court overruled Turner's conviction last Dec. 15. The Kentucky court ruled that Turner "was entitled at least to have the alleged victim examined by an independent gynecologist in preparation for trial."

The state court said such an examination could have been used to challenge the testimony of a government-appointed gynecologist who said she thought the girl's injuries were caused by sexual intercourse.

"We just be vigilant not to open the door to the opportunity for a defendant in a criminal case to invade the privacy of a prosecuting witness or to harass the witness," the state court said.

But it added that a second gynecological exam "might have disclosed evidence to completely refute the charge, and at the very least would have been of enormous benefit to (Turner) in the conduct of the trial."

The state Supreme Court concluded, "In our view, this outweighs the potential for harm" to the alleged victim.

The state court threw out the sexual abuse conviction on other grounds, ruling that the abuse charge should have been merged into the rape charge.

In seeking to have Turner's rape conviction reinstated, Kentucky prosecutors argued that the state court ruling "grants a criminal defendant a right to compel the child victim of sexual abuse to undergo a second gynecological examination at the whim of the defendant."

They said the Kentucky court's ruling will "increase trauma and intimidation" of alleged victims of child abuse, "with no positive impact on the fairness of trial."

ASSOCIATED PRESS *Cincinnati Post*, October 11, 1989

SIXTH CIRCUIT HIGHLIGHTS

This column covers some of the cases issued by the Sixth Circuit over the past year that may be of interest to defense attorneys.

Improper Closing Argument

In *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991), the Sixth Circuit Court of Appeals reversed a drug trafficking conviction due to the prosecutor's closing argument which urged the jury "to tell the defendant and all of the other drug dealers like her... [t]hat we don't want that stuff in Northern Kentucky..." Despite a strong admonition from the trial court, the Court of Appeals found the defendant's constitutional right to a fair trial was violated because of the prosecutor's appeal to the community conscience in the context of the War on Drugs diverted the jury's attention for its task. In reversing, the Court adopted the view of the D. C. Court of Appeals in *U.S. v. Monaghan*, 741 F.2d 1434, 1441 (CA D.C. 1984):

> "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear."

Right To Confrontation

The Court found that the introduction of uncross-examined grand jury testimony of two alleged co-conspirators pursuant to a residual exception to the hearsay rule violated the Confrontation Clause in *U.S. v. Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991). The strong presumption against the trust-worthiness of co-conspirators' statements made after the conspiracy has ended in arrest can only be overcome by "particularized guarantees of trustworthiness." The Court concluded by noting that "co-conspirators who have entered into a plea agreement or those who have been given use immunity by the government still often possess the motivation to lie" and that the government still possesses influence over the future of co-conspirators who already have been sentenced. The Court also noted that even when advised to testify truthfully, such witnesses "sometimes ignore the government's instructions, believing the government's primary goal to be the securing of a conviction regardless of culpability...."

In *Vincent v. Parke*, 942 F.2d 989 (6th Cir. 1991), the Court held that Vincent's right of confrontation was violated by a police officer's testimony concerning an out of court statement made by a co-defendant to his sister. The statement was, in effect, a confession of guilt by the co-defendant which implicated Vincent. The Court held this *Bruton* error not to be harmless, noting that "[a]lthought we recognize that there was a substantial amount of circumstantial evidence introduced at trial against Vincent, we cannot say that the introduction of Kinser's statement did not render the prosecution's case significantly more persuasive."

Prosecutorial Vindictiveness

Following a remand for consideration in light of *Alabama v Smith*, 490 U.S. 794 (1989) after the Supreme Court granted *certiorari* in this case, the Sixth Circuit held to its previous finding that due process requires that the state may rescind its original plea offer of two years at the first trial of a defendant, whose conviction was later reversed due to unconstitutionally ineffective advice of counsel to reject that offer, only upon overcoming a presumption of prosecutorial vindictiveness. *Turner v. Tennessee*, 940 F.2d 1000 (6th Cir. 1991).

Defense Closing Argument

In *U.S. Poindexter*, 942 F.2d 354 (6th Cir. 1991), the Sixth Circuit held that the trial courts' limits on defense closing argument regarding the lack of fingerprint evidence and the courts' sharp chastisement of counsel required reversal. Defense counsel wished to argue that the government's failure to introduce its findings, if any, concerning the presence or absence of fingerprints on a can that had been dusted for prints raised a reasonable doubt as to whether the defendant handled the can and, consequently, as to his guilt. The Court stated that "[i]n every criminal case, the mosaic of evidence that comprises the record before a jury includes both the evidence and the lack of evidence upon such matters that may provide the reasonable doubt that moves a jury to acquit." The Court also believed Poindexter was prejudicial by the trial court's sharp chastisement of counsel at the bench conference concerning his closing argument. The Court noted that when such conferences occur in the jury's presence, it will presume that the conference is within the jury hearing unless the record shows otherwise.

Miranda, Involuntary Statements

The Sixth Circuit rejected the state court's determination that Williams was not in custody when officers told him "you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up," thus entitling him to *Miranda* rights in *Williams v. Withrow*, 944 F.2d 284 (6th Cir. 1991). The Court further held that Williams' inculpatory statements made after he was given *Miranda* rights but following on the heels of the unwarned statements were inadmissible because they were coerced and involuntary. Williams' statements were conditioned on his belief that he would be released if he talked and the Court found that the officers promises of leniency were intended to induce Williams' admissions.

In *U.S. v. Soto*, 953 F.2d 263 (6th Cir. 1992), the Court found comments by a police officer to the accused, who had invoked his right to counsel, to be the functional equivalent of interrogation and reversed conviction for possession of cocaine with intent to distribute. After Soto invoked his right to counsel, the officer inventoried his belongings. Upon seeing a photograph of Soto's wife and child, the officer gestured to a bag, the contents of which were not visible and had not been identified to Soto: "What are you doing with crap like that when you have these two waiting for you at home?" Soto responded, "That's not my coke." This was the first reference to the contents of the bag as cocaine and to Soto as the owner of the bag. The Court rejected the government's contention that the officer's statement was a spontaneous comment rather than intentional interrogation. The Court noted that "[n]either absence of intent to interrogate nor exclamation of surprise is determinative of whether interrogation was conduced... While [the officer's] remark was not couched in formal question and answer form, in substance it was a direct inquiry into Soto's reasons for committing the offense he appeared to have committed, and it elicited an inculpatory response.

In *U.S. v. Tillman*, 963 F.2d 137 (6th Cir. 1992), the Sixth Circuit found that statements made to the police by Tillman after his arrest were given in violation of the fifth amendment because he received a shortened version of the *Miranda* warnings. The condensed *Miranda* rights read to Tillman failed to mention that any statements he might make could be used against him or that he was entitled to counsel during questioning as well as before questioning. The Court, in particular, found the failure to inform Tillman that any statements he made could be used against him to be a very troublesome deviation from the traditional *Miranda* warnings:

> "Of all of the elements provide for in *Miranda*, this element is perhaps the most critical because it lies at the heart of the need to protect a citizen's Fifth Amendment rights. The underlying rationale for the *Miranda* warnings is to protect people from being coerced or forced into making self-incriminating statements by the government. By omitting this essential element from the *Miranda* warnings a person may not realize why the right to remain silent is so critical."

The Court declined to mandate the use of "magic words" but recommended the police practice of reading *Miranda* rights from a prepared card.

Knowing, Intelligent Guilty Pleas

A battle of wills continues between the Kentucky Supreme Court and the Sixth Circuit over the proper procedure for determining whether a

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guilty plea was knowingly and intelligently made. *Raley v. Parke*, 945 F.2d 137 (6th Cir. 1991). In *Dunn v. Simmons*, 877 F.2d 1275 (6th Cir. 1989), the Sixth Circuit held unconstitutional Kentucky's procedure for determining the validity of earlier guilty pleas where there was no record of the plea proceedings. The Kentucky Supreme Court has adhered to the procedure disapproved of in *Dunn*. See *Conklin v. Commonwealth*, 799 S.W.2d 582 (Ky. 1990). In reversing and remanding Raley's case challenging a 1981 plea, the Sixth Circuit noted, "We do not believe that we possess the authority to order Kentucky courts to hold a new hearing pursuant to our standards in *Dunn*. However, we certainly have the power to issue the writ of habeas corpus conditioned on the state not holding such a hearing."

Costs

In *Weaver v. Toombs*, 948 F.2d 1004 (6th Cir. 1991), the Sixth Circuit reaffirmed its view that reasonable costs may be assessed by federal courts against unsuccessful *in forma pauperis* litigants whether or not the claim was frivolous or simply unmerited. The Court perceived no chilling effect and no basis for a first amendment claim.

Witness' Right to Remain Silent

In *U.S. v. Arthur*, 949 F.2d 211 (6th Cir. 1991), the Sixth Circuit reversed a bank robbery conviction because the trial court induced a material witness to exercise his fifth amendment right to remain silent and erroneously excluded introduction of that witness' confession to the FBI. The witness took the stand and testified that he and the defendant's brother had been looking for a bank to rob. As he was about to testify concerning the actual robbery, the prosecution asked the court to inform the witness of his rights. The witness stated that he wanted to testify but the court continued to warn him of the consequences and advised him that "I think it's not in your best interest to testify...." The witness finally refused to testify. A court has the discretion to warn a witness about the possibility of incriminating himself. However, the Sixth Circuit held that an abuse of discretion occurs when the court actively encourages a witness not to testify or badgers a witness into remaining silent. The Sixth Circuit also found it an abuse of discretion for the court to bar the defense, after the witness refused to testify further, from admitting his confession to the FBI.

Involuntary Commitment

The Sixth Circuit, in *Doe v. Cowherd*, ___ F.2d ___ (6th Cir. 1992), held equal protection requires that the reasonable doubt standard of proof must apply in proceedings to involuntarily commit mentally retarded adults just as it applies to the commitments of mentally ill adults. Both classes of people lose their liberty by involuntary institutionalization. The Court further held that Kentucky's practice of allowing third parties to participate in involuntary commitment proceedings against mentally retarded adults violates due process and equal protection. The interests of the parents or guardians may be adverse to the person facing commitment. Thus, the Court found, "the inclusion of third persons as parties to the action (including the right to appeal decisions which they find adverse) imposes a greater burden than is imposed on similarly situated mentally ill adults."

Juveniles

In *John L. v. Adams*, ___ F.2d ___ (6th Cir. 1992), No. 91-6241, the Sixth Circuit held that "incarcerated juveniles do have a constitutional right of access to the courts, and that in order to make this right meaningful the State must provide the juveniles with access to an attorney." The Court found that merely providing juveniles with access to a law library, for example, would fail to assure meaningful access. With respect to the scope of the juvenile's right to access, the Court held that states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration. In all other types of civil actions, states may not erect barriers that impede right of access. The Court, however, rejected the contention that states must provide affirmative assistance to juveniles on civil matters arising under state law, specifically on treatment and education issues.

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GEORGE SORNBERGER RESIGNS DUE TO ILL HEALTH

My Dear Friends, : It is with a heavy heart that I announce my resignation from DPA. Although I have made some progress during my period of recovery, unfortunately my health does not permit me to withstand the rigors of defending criminal cases, and I wish to make way for a healthier individual to take my place and continue the cause.

It has been almost 10 years since I joined DPA, and nearly 20 years since I defended my first criminal case in the old police station at 11th and Dodge streets in Omaha. For these 2 decades, the criminal law has been my life. It has been my one true love. After much reflection I have come to understand what being a criminal defense attorney has meant to me. It has been about 2 things: 1)First and foremost it has been about my clients, and the determination to embrace each of those individuals as a fellow human being, and to protect them from the forces of injustice. 2)Secondly, it has been about those wonderful and dedicated people that it has been my privilege to work beside in the defense of my clients. This letter concerns those people.

By this letter I hope to thank each and every one of you, and acknowledge in some way your priceless efforts in helping my clients over the last decade during my service with DPA. Some are named and some remain unnamed but are still appreciated and not forgotten. I only hope you will each allow me to say: "Thank you. You have helped strengthen my efforts at defending my clients. You have shed your blood with me in the courtrooms and in the jails, in the police stations and in the sheriff's offices all across Kentucky. You have made me proud to know you. You have made a difference."

Because so much of my tenure with DPA was in Somerset, I begin by thanking the people who recommended that I be hired for that job (Donna Boyce and Dave Norat) and by thanking the person who hired me (Jack Farley). But for the rest of my life I shall be forever indebted to all of the good people at the Somerset office who made possible every success that was had on behalf of my clients. These include, Jim Cox, Vicky Phillippee, John Halstead, Kathy Bishop, Joe Howard, Kelly Durham, Phil Chaney, Mary Obermeyer, Henley McIntosh, Rob Sexton, John West, and Teresa Grey. Without each of you it would have been impossible to accomplish so much for so many clients. And the incredible extra effort you each made on behalf of Eugene Troxell and other of my capital clients, will never be forgotten. And a special bit of praise for Jim Cox. Make no mistake about it - Jim Cox is one of the finest criminal defense attorneys that ever lived.

Many individuals helped build and strengthen the Somerset office, and our whole region during my tenure including Donna Boyce, Dave Norat, Ernie Lewis, Bette Niemi, and Bill Curtis, giving us more of the precious resources we needed to wage war on behalf of our clients.

Special thanks go to several outstanding private practitioners who provided so generously of their time and talents in assisting so many of my client's causes, including Dan Taylor, Richard Hay, Phil Chaney, Chuck King, Tom Carroll and Lee Tobbe.

I must single out 3 other distinguished individuals with whom I had much contact with on behalf of my clients during my years in Somerset: 1) Jerry Winchester - Circuit Judge of Whitley and McCreary counties and former Commonwealth's Attorney for that district; 2) Benny Ham - Commonwealth's Attorney for Pulaski and Rockcastle counties; and 3) Bon L. Bybee - Jailer of McCreary County. All 3 are honorable people, filled with personal integrity and understanding. Each of these individuals have always treated my clients with fairness and with respect. Each of these men bring a professionalism to their work to a degree not often found in our criminal justice system. I also want to thank the following individuals, all fine journalists, who each "told it like it was" in their reporting of my clients cases. Each gave my clients a fair shake in the press: Philip Winslow, Dave Baker, Bill Estep, Bill Mardis, and Ken Shmidheiser.

During my years with DPA, so many people from other field offices helped so much. When it was my privilege to co-counsel with such fine attorneys as Jay Barrett, Bill Spicer, Pat McNally and Nancy Bowman-Denton, the staff in Stanton, London and Hazard offices rolled up their sleeves and pitched in to help our clients, just as if they weren't already overloaded. Special thanks must go to Lowell Humphrey for his tireless efforts on behalf of so many of my clients during those years.

I must single out another individual who helped so much during my tenure in Somerset - Vince Aprile. When we were threatened with criminal prosecution, when we were threatened with contempt of court and when we were threatened with bar complaints - all because we stood up for our client's right - Vince was there for us. Armed with the additional strength he provided, we could better weather the stormy seas of trial advocacy.

Later in my career with DPA it became my privilege to assist in the re-building of the Franklin County public defender system. So many individuals from DPA Frankfort came forward to help that it will be impossible to list them all but they include Kathy Collins, Gary Johnson, Paul Isaacs, Rebecca Diloreto, Neal Walker, Ed Monahan, Rodney McDaniel, Marie Allison, Allison Connelly, Bill Curtis, Barb Holthaus and former DPA attorneys Gail Robinson and Kevin McNally. And many many others.

I will need to extend special thanks to each and every member of CTU for taking over my cases at the time I became ill. You folks are the best. Thank you Mike, Randy, Steve, Patsy, Cris, Donna, Tena, and Kelly. A special thanks to Patsy who has "bridged the gap" and helped my clients in countless ways during my extended sick leave.

Lastly, a special thanks to our Director of Training, Ed Monahan, and to all those individuals who assisted with those myriad training events that it was my privilege to attend and to participate in over the past 10 years. There is no way to gauge how much better of a criminal defense attorney I became as a result of Ed's visions. But in constantly challenging me to become a better advocate, my client's have been helped immeasurably. Ed - you were a part of every dismissal; you were a part of every "Not Guilty" verdict.

So, for myself and on behalf of my clients, let me thank all of you, named and unnamed, for the help you gave my clients and for the impact you each made on my career and on my life. I shall miss you all. May God bless you. Very truly yours, /S George R. Sornberger

BALANCING THE RIGHTS OF THE CHILD VICTIM-WITNESS WITH THE RIGHTS OF THE ACCUSED

Legitimate concern about the proper way to present the testimony of the child victim in a sex abuse case is not new. The rights of the defendant must be carefully balanced with the legitimate concern for victims of the crime. The right to be present at trial and the right of confrontation must be applied in such a way as to produce a fair result and enhance the truth-determining process of any trial. However, it must be recognized that the right of confrontation does not automatically include the right to intimidate any witness.

It is my opinion that there is adequate technology now available to protect the constitutional rights of a defendant to confrontation while keeping the accused out of the sight and hearing of the child witness while the child testifies.

The majority of sex abuse victims are young females, although there is an increasing number of young males who have been sexually abused by a person in a pseudo-family setting over a long period of time. In most cases, the victim has conflicting reactions to the relationship with the perpetrator and their cry for help. Sex abuse is often only discovered indirectly when other problems draw attention to the child victim. One of the first reactions of authorities is to remove the victim from the home setting which is very traumatic to the young child in itself, and then to begin a subject of repeated interviews by strangers discussing a very intimate and personal subject.

Although the situation is improving as our general sensitivity to the problem develops, frequently the social worker is very busy, the prosecutor, generally an assistant, does not have a great deal of experience in interviewing child witnesses under the circumstances, and the whole thrust of the information gathering process is legal rather than directed to the emotional well-being of the victim. In some cases the child witness is subjected to a polygraph examination. Clearly these are difficult and bewildering experiences for a young child and they culminate in the testimony in open court before the very person they are accusing of the act.

Tragically, many of the current legal procedures which are devised to protect the child and punish or rehabilitate the perpetrator only serve to emotionally traumatize the child. In any sex abuse case, the victim's testimony is crucial. It is unlikely that there is any other evidence of the accused's guilt. The acts in question are committed in secrecy and the child is the only witness generally. The credibility of the child is of paramount importance. In the entire investigative process leading to the court appearance, the victim is often met with understandable disbelief. Consequently, every effort that reduces the trauma to the child and builds credibility, must be employed.

It is particularly important in cases involving minor children that the accused be afforded all constitutional rights. It is equally important that the victim witnesses are assured their constitutional rights which in my view includes a right to be free of any intimidation, either in the courtroom setting or later. Clearly, the accused has rights but the child victim-witness also has equal rights. Any thoughtful consideration of the phrase Equal Protection of the Law includes recognition of the fact that this concept be applied to all citizens whether they are accused of the crime or otherwise.

Kentucky has long recognized various exceptions to the general right of confrontation. Business records, dying declarations, *res gestae* statements and excited utterances are admissible despite the inability of the defendant to cross-examine. Written depositions may be introduced at trial. RCr 7.12; *Noe v. Commonwealth*, Ky., 396 S.W.2d 808 (1965). In addition a defendant may be excluded from the courtroom because of misconduct, and consequently be denied the right of physical confrontation. RCr 8.28; *Scott v. Commonwealth*, Ky., 616 S.W.2d 39 (1981).

In a general context, an early review of this problem can be found in Libai *The Protection of Child Victims of a Sexual Offense in the Criminal Justice System*, 15 Wayne Law Review 977 (1969) and *Ordway, D.P. Proving Parent-Child Incest*, 15 University of Michigan Journal of Law Reform 131 (1981).

Some jurisdictions are expanding the hearsay exceptions to accommodate the special problems involved in child sex abuse matters. *See, Comprehensive Approach in Child Sex Abuse Cases*, 83 Dickinson Law Review III (Spring 1985).

Kentucky has recognized for years that there must be special treatment for child witnesses by authorizing leading questions on direct examination. *Meredith v. Commonwealth*, 265 Ky. 380, 96 S.W.2d 1049 (1936); *Peters v. Commonwealth*, Ky., 477 S.W.2d 154 (1972).

K.R.S. 421.350 (3) and (4) do not unduly inhibit the right of cross-examination. The statutory provisions are not automatic but instead rest in the sound discretion of the trial judge. The prosecution must be able to show necessity for the employment of the statute. Trial judges must be careful in weighing the possibilities for bias or prejudice and in certain circumstances, it could be an abuse of discretion to grant a motion over a defense objection.

In any event the accused still has the right to hear and observe the child witness testify and the jury has a full opportunity to view the video and evaluate the demeanor and credibility of the child witness.

The Kentucky statutes apply only to a narrow class of witnesses, children twelve years old or young, who are victims of sex offenses. The statutes impose no restrictions on cross-examination; allow the finder of fact to observe the demeanor of the witness and require that the defendant be present to see and hear the taped testimony. In my view, appropriate balancing of the competing interest of the right of confrontation and the right of a witness to be free of intimidation favors the constitutionality of the statute. *Cf. Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).

The statute requires that the defendant be present so that he may see and hear the witness but he is not to be seen by the child. The same procedure permits the victim's testimony to be taken prior to trial and preserved by video tape. These procedures allow the defendant to fully participate in cross-examination and see and hear the child witness. The reproduced testimony must be of adequate quality for the jurors to assess the demeanor of the witness and to evaluate credibility.

It has long been held in the Federal system that the right to confront and cross-examine is not absolute and may in an appropriate case be compromised to accommodate other legitimate interests in the criminal trial process. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973).

Live testimony is always to be preferred, but other techniques can be used when they are needed and permitted in the sound discretion of the trial judge. *Roberts v. Ohio*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) recognizes that competing interests may warrant dispensing with the preference for face-to-face confrontation at trial.

Video taped testimony pursuant to Sections 3 or 4 of the Kentucky statute is not hearsay. It is the equivalent of testimony in court. The testimony is taken with the trial judge, counsel and the defendant present in person. The accused is not prevented from developing his own evidence of hostility, bias or other motive for testifying or from otherwise attacking the credibility of the child. *Cf. Barnett v. Commonwealth*, Ky., 608 S.W.2d 374 (1980).

There is no validity to the argument that the right of confrontation guaranteed by the Kentucky Constitution should be construed more stringently than the similar right in the U.S. Constitution. The debates on the Kentucky Constitution in 1890 include references to "face-to-face" language, but these discussions neither support nor contradict the proposition for greater rights to be

accorded to the defendant rather than to the victim-witness who is testifying. Construction of the Sixth Amendment by the Federal courts has consistently included identical language. *See Snyder v. Massachusetts*, 201 U.S. 102, 54 S.Ct. 330, 78 L.Ed.2d 674 (1933); *Roberts, supra*.

New Jersey in *State v. Sheppard*, 197 NJ.Super. 411, 484 A.2d 1330 (1984), allows the use of closed-circuit television testimony taken under similar circumstances to those described in the Kentucky law. *Sheppard, supra*, held that the video-taped procedure did not deny the defendant the right to confrontation or due process.

It is the responsibility of the judicial system to balance the competing rights of individuals. In the case of child sex abuse, the exceptions to the confrontation principle is outweighed by the inability to effectively prosecute child abusers where the evidence against them cannot be presented without a severe intimidation factor.

Frequently, in child sex abuse cases, the child witness is far too frightened or inarticulate to allow any thoughtful examination, even at a competency hearing. Subjecting the child witness to the ordeal of testifying in an open court may seriously destroy the reliability of the testimony. Such considerations must be left to the sound discretion of the trial judge.

There is no fundamental constitutional right to eyeball confrontation. The choice of the words "face-to-face" in the Kentucky constitution may have been a result of the inability of the 1890 drafters to foresee the technological developments permitting cross-examination and confrontation without actual physical presence in every case. In the 18th to 19th centuries, live testimony was the only way that a jury could observe the demeanor of the witness. The advances in quality of video tape in our current generation does not represent a significant departure from the tradition of confrontation and it coincides with the goal of providing the jury with the opportunity to view the demeanor of the witness.

The child witness, as well as any other witness has never been required to look at the face of the defendant, observe body language or listen to comments from the accused. There has never been any authority under traditional courtroom practice which requires a witness to look at the defendant. A witness has never been disqualified by merely refusing to look at the defendant. The testimony of blind victims is not invalid and the same is true of the testimony of a witness who refuses to look at the accused.

The courtroom setting is frequently intimidating to any witness, not just the young. Few, if any, citizens, including many trial and appellate lawyers are completely comfortable in the interrogation provided by the courtroom. The legal profession, in particular defense and prosecuting counsel, must be careful not to be overbearing or to overreach. It is the responsibility of the trial judge to police the behavior of trial counsel in the courtroom. Nevertheless, the child witness is introduced to an arena totally foreign to the young life of the victim-witness. Everyone is much taller. Most people are formally dressed, and the person in the center of the room is garbed for the most part in black robes. Police and bailiffs are everywhere. In many cases, the media afford a chilling entrance and departure from the courtroom. Although adults absorb this kind of psychological punishment, it is monstrous to require the legitimate victim of child sex abuse to endure it.

The historic right to confrontation never contemplated the appearance of child witnesses in such situation. Confrontation by historical definition requires an equality between those who are confrontational.

Although the defenders of balanced liberty must be ever vigilant against the overreaching of the state in either the criminal or civil arena, statutes permitting the testimony of a child sex abuse victim to be presented by video tape, monitored by the sound discretion of the trial judge is not a serious threat or interference with the orderly administration of justice and is not unduly prejudicial to the rights of the accused. We are fortunate that we live in a state and nation where the rights of all people are zealously guarded and eloquently articulated by both the defense and prosecution. However, if we lose the right to question, we lose everything.

DONALD C. WINTERSHEIMER
Justice Kentucky Supreme Court

Justice Wintersheimer has been a member of the Kentucky Supreme Court since 1983. Previously, he was a Judge on the Court of Appeals for seven years. A resident of Covington, Kentucky, he is a graduate of Thomas More College, has a Masters degree from Xavier University and is a law graduate of the University of Cincinnati. He is the author of the majority opinion in Commonwealth v. Willis, Ky., 716 S.W.2d 224 (1986).

EFFECTIVE PRETRIAL CONFERENCE AND PREPARATION ESSENTIAL IN CHILD SEX ABUSE CASES:
Judges Can Manage Delay and Manipulation

Pretend that you are nine years old. Take a small child's chair, set it in the hallway of any courthouse in Kentucky and wait....wait for hours. Take the chair into the courtroom and sit in the back of the stately cherry panelled room. Watch the grownup in the black robe sitting at the tall wooden desk take notes and scowl. Fidget. Look at the pictures of the old guys handing on the walls. Watch the twelve adults sitting toward the front as they look you over. Wear your best clothes and dress shoes and wait...Listen to a trial tape with every fifth word unintelligible - words like "dysfunction," "molestation,:" "sustained," "penetration," and wait...Listen to strangers say your name over and over again.

Rules, procedure and custom designed to insure fairness for the accuser and accused in our criminal justice system typically do not serve to seek the truth in the context of child sexual abuse prosecutions.

In no other kind of case is pre-trial preparation more critical and yet more damaging to our ultimate search for justice. By the time well-intended lawyers, judges, social workers, and law enforcement officers complete the pre-trial array of psychosocial evaluations, medical examinations, family interventions, multiple interviews, polygraphs, treatment - the issue of guilt or innocence is tainted by delay. Delay, in and of itself, can determine the quality of the proceedings and the ultimate outcome. If the prosecution's primary witness is a child of elementary school age, a six month delay can significantly affect the child's ability to recall and relay specific events and incidents.

This very simple understanding should serve to compel the courts to prioritize child sexual abuse cases in terms of docket management. Any effort to delay should be viewed with great suspicion by the trial judge.

The pre-trial conference is the single most effective way to manage, control, and prepare the trial process. Without extraordinary circumstances, the trial should be scheduled no more than 120 days from the date of the arraignment with the pre-trial conference scheduled no more than 90 days from the date of the arraignment.

At the pre-trial conference, the prosecutor should submit his/her case in summary; to include the names, qualifications, and statements of witnesses together with exhibits and proffered instructions. The defense should submit his/her case in summary to the court for in camera review, along with names of anticipated witnesses, qualifications, and statements of witnesses, together with exhibits and proffered instructions.

The pre-trial conference should compel appropriate disciplined preparation on the part of the professionals; should enable the court to effectively schedule witnesses, adequately supervise the needs of the jury panel, and manager the day-to-day concerns regarding courtroom security, separation of witnesses, docket control, and even the press. Certainly, the pre-trial conference should serve to put the judge on notice as to the specific subject matter before the court so that the judge might anticipate and prepare in advance as to particular procedural conflicts, issues with respect to rules of evidence, witness qualification, or witness privilege. Standard motions need to be raised and heard at the pre-trial conference.

A separate hearing to qualify expert witnesses, child witnesses, or admissability of demonstrative evidence should be conducted within 48 hours of the pre-trial conference with particular attention to the schedules, professional demands, and concerns of those witnesses subject to inquiry.

If children are prospective witnesses, the judge and advocates must settle upon issues relative to courtroom layout, conduct and confine of inquiry by the attorneys, as well as those limitations to be imposed for each witness with consideration given to the child's age, level of maturity, verbal and listening skills.

This extensive pre-trial preparation on the part of the court and the lawyers is calculated to stimulate reasonable rational and informed negotiation with respect to a plea of guilty or a dismissal based essentially upon the merits of the case.

If pre-trial resolution is not effected, then the final preliminary responsibility lies squarely upon the shoulders of the judge to render a specific pre-trial order detailing the conduct of the trial to include a tentative schedule of the proceedings, expectations with respect to voir dire, assignment of witness rooms and conference facilities, reasonable time restraints for opening statements and final arguments, instructions for the press and any restrictions imposed on counsel with respect to public comments or interviews. Such a pre-trial order should detail a physical arrangement of the courtroom calculated to provide the jury with full observation and hearing, to protect the child witness from intimidation, and to protect the defendant's right to confront his/her accuser. For instance, the judge (without benefit of robe and on floor level) might conduct initial inquiry of the child and advise the child that the lawyers will want to ask questions. The judge may order the lawyers to remain in their assigned seats, not to raise the volume of their voices or to refrain from using a sophisticated vocabulary. The judge may order that a particular child witness may not be subject to inquiry for longer than 20 minutes in any one setting to be followed, on each occasion, with a 30 minute recess.

Thus, the effective pre-trial conference permits the court, the attorneys, the defendant, and the participants to focus on the facts, to eliminate delay, and discourage manipulation - even as it seeks to balance the interests of the accused and the accuser.

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Judge Adams, District Judge for Madison and Clark counties, is President of the Kentucky District Judges Association and was recently appointed a Mentor Judge by the Chief Justice.

CHILD ABUSE: INTERVENTION/PREVENTION

INDICATORS OF SEXUAL ABUSE

Physical Indicators

— Difficulty walking or sitting

— Bruises or bleeding from external genitalia, vagina, or anal regions

— Swollen or red cervix, vulva, or perineum

— Presence of semen, positive tests for gonococcus or sexually transmitted diseases

— Torn, stained or bloody underclothes

— Pain or itching in the genital area

— Hymen stretched at very young age

— Pregnancy

Behavioral Indicators

— Poor peer relationships, lack of friends

— Regression

— Sexual promiscuity

— Aggressiveness or delinquency

— Prostitution

— Truancy

— Drug usage

— Seductive behavior

— Reluctance to participate in recreational activity

— Preoccupation in young children with sexual organs of self, parents or other children

— Confiding in friend or teacher

— Reporting to authorities

— Anxiety, irritability, constant inattentiveness

— Compulsive behaviors

Environmental Indicators

— Prolonged absence of one parent

— Overcrowding

— Alcoholism

— Social and/or geographic isolation

— Intergenerational pattern of incest

— Parental characteristics such as being extremely protective of child, jealous of child or refusing to allow child any social contact, distrust of child, accusing child of sexual promiscuity.

Adapted from Child Abuse Neglect and Dependency: A Guide for People Who Work with Children in Kentucky, Published by the Kentucky Cabinet for Human Resources. May, 1987.

In 1990, 47,385 abuse/neglect reports were made to the Kentucky State Department of Social Services. 20,989 of these reports were substantiated, or 44.3% of the total reports. "Sexual abuse for fiscal year 1983-1990 reflects an overall increase of over 159% in number of reports received." (Child Abuse Neglect and Dependency Trend Charts, 1990) Substantiation of abuse/neglect more often calls for actual observable physical signs of abuse or neglect. Emotional and/or psychological abuse is rarely substantiated and yet by all accounts is equally damaging in the child as is long term physical or sexual abuse. (Deprived Children: 1986.)

> "The child protection program is mandated by statute, which means there are State laws which declare a child's right to be free from abuse and neglect. These laws are called Kentucky Unified Juvenile Code and are contained in KRS Chapters 600-645." (Child Abuse Neglect and Dependency.)

The Kentucky Unified Juvenile Code requires reporting of abuse, neglect, physical, sexual, or emotional abuse and dependency of children, no matter where it occurs. It also requires that all reports be investigated, and that full social services be made available to children where reports are substantiated. The Code recognizes the child's fundamental right of safety and to remain with their own parent(s) whenever possible.

KRS 600.020(1) defines abuse and/or neglect perpetrated upon a child and sets the parameters for determining if a situation is appropriate for an investigation. Other statutes are written to enforce KRS 600.020(1) and seek to protect the child. The statutes are clear in the definition; reporting requirements of child abuse; investigation; and services available to the child. Unfortunately, the system is woefully inadequate in providing enough service providers to help the child. We have not carried through with a proportionate number of staff (*i.e.*, State Case Workers and investigatory teams, medical personnel, counselors, psychologists, foster care homes, crisis day care, *etc.*), to meet the increasing number of reports of child abuse.

KRS 620.030 mandates *anyone* who has reasonable cause to suspect abuse/neglect has a duty to report this information *except* for attorney-client and clergy-penitent privilege (KRS 620.050(2). (Child Abuse Neglect and Dependency.) Reports can be made anonymously, yet the "American Human Association estimated that for each child abuse or neglect report, two or three abuse cases are not reported." (Children and Dollars, 1981-1989 Update, 1989.)

Physical and sexual abuse signs generally disappear over time — unless the abuse is so severe whereby telltale scarring results. Emotional or psychological abuse leaves no outward physical signs. However, behavioral indicators of child abuse may consist of one or more of the following examples, "generalized fear and anxiety; depression; aggressive play and aggressive behavior; sexualized behavior (beyond a child's normal knowledge of sexual activities); school difficulties, learning disabilities; neurological and verbal expressive delays; running away; delinquent behavior; sleep disorders; regressed behavior; somatic complaints; eating disorders; drug and alcohol abuse; suicide gestures/attempts; self-injury; and/or phobias." (Gil, E. 1991).

In younger children some of these behaviors may be "manageable" by an adult, albeit frustrating and time consuming.

In adolescents and teenagers, the behaviors may turn into more aggressive, threatening, and dangerous behaviors whereupon the child may be labeled a juvenile delinquent, low functioning, truant, *etc.*

The child then matures into an adult who may possibly inflict their internal anger and outrage onto their own children, spouse, or others — and the cycle is complete once again, with the ultimate outcome the child evolves into an adult known well to our legal system, or mental health system or becomes dependent upon the State for their survival, or is imprisoned for extended periods of time.

I believe we have adequate statutes, and an appropriately designed system to work in conjunction with State law. Why then are more than half of the abuse reports going unsubstantiated, and where in the system of checks and balances are we failing to protect our children? Judge John M. Yeaman, President of the National Council of Juvenile and Family Court Judges 1985 - 1986 states the following:

> "Lack of treatment resources and workable risk assessment criteria for the removal of abuse and neglected children from their parents, or for their return home, creates problems for the community and revictimizes children. Preventative, family-based services must be utilized to eliminate unnecessary out-of-home placement. Resources must be re-allocated and courts provided appropriate authority and resources to assure necessary protection, treatment and services for deprived children. The lack of coordination between service agencies, the insensitivity of the legal system to the child victim, and the apathy, and inability of the system to intervene with children who need help — are all problems calling for judicial leadership in every community." (Deprived Children: 1986.)

Judge Yeaman's statement is extreme and stark in its definition of areas of failure to protect. A child has numerous ways of telling us they are abused or in trouble and need protection. The child doesn't have to verbalize his/her cry for help — as in most cases won't or can't — at least the way the legal system wants and expects. Our legal system, as fine as it is, is written and directed to the adult who is considered to be capable of understanding what is expected from them with respect to right and wrong. The child, however, has not yet learned that the laws are there to protect, and the child is not always cognizant of the events which occur in a courtroom.

> "It is sad to hear children attacked by attorneys and discredited by juries because they claimed to be molested yet admitted they had made no protest nor outcry. Children are easily ashamed and intimidated both by their helplessness and by their inability to communicate their feelings to uncomprehending adults." (Summit, R.C., 1983)

Our system expects the child, in many cases, to testify under oath that someone did something bad to them. We fail to grasp the very basic understanding that the child is not necessarily aware that what has happened to them is bad or illegal. We fail to understand that this child may know no other form of love or affection. More often we fail to understand that, at times, the child initiates an abusive act towards themselves by an adult because, "The child cannot safely conceptualize that a parent might be ruthless and self-serving...and to hope that by learning to be good she can earn love and acceptance." (Summit, R.C., 1983.)

> "We have to be alert to the possibility that our child is not safe even when the child doesn't complain and even when he's in an environment that we have endowed with absolute trust." "...What I think we missed in deferring to the role of justice is that we haven't given children a comfortable place where they can start the wheels of justice turning. And we have continued to hold children totally responsible through their own testimony for imposing criminal sanctions. The emphasis on penalty competes with compassion for the victim, creating sophisticated attacks on children's credibility and humiliation of the clinicians who elicit complaints." (Summit, R.C., 1991)

Child abuse is a learned behavior, and if the behavior is not interrupted and altered, continues to manifest itself in different ways throughout the child's life with the most disastrous outcome resulting in the child becoming a perpetrator themselves. What then can we do to make the system work to protect Kentucky's children? The following are certainly not the ultimate solutions, but would greatly enhance our ability to intervene, prevent, protect and provide for the future of our children.

1. Establish "family courts" and assure that judges in these courts express a professed interest and competency in juvenile and family matters and that they are assigned to the family courts for a substantial period of time to insure adequate training and experience. "Where possible, the same judge should be assigned continuing review over an individual child and his family, foster care, and treatment progress to assure continuity. ...The need for judicial continuity is nowhere greater than in this complex and specialized court." (Deprived Children: 1986.)

2. Assure adequate treatment resources are available to meet the needs of the child victim.

"Treatment of an abused and neglected child must be immediate, thorough and coordinated among responsible agencies. ...Treatment, therapy or counseling for the child victim should begin as soon as the assessment process has determined it necessary. Interim therapy and treatment should not be delayed pending adjudication. The lack of mental health resources for deprived children and their families is a national disgrace. Adequate treatment for the mentally ill or emotionally disturbed can be expensive but must not be avoided. ...Moreover, it must be recognized that emotional abuse is as rampant and lethal as physical abuse and also requires intensive treatment." (Deprived Children: 1986.)

3. Assure adequate numbers of trained State Case Workers to deal with child abuse, and perform investigatory and follow-up procedures. Additional training in this area should be mandatory prior to placing a Case Worker, or a police officer, in the role of investigating alleged child abuse cases.

4. Expand available resources throughout the State by increasing the number of allowable Medicaid providers of services which may include certain child care agencies already providing Medicaid allowable services to children, but are not being reimbursed for these services as current State Medicaid regulations limit the eligible providers of services.

5. Allow competitive bidding by service providers for the delivery of services to children which may be funded through various State and Federal grants and/or contracts.

6. Establish parent education classes as part of the mandatory classroom curriculum beginning with the middle schools.

7. Reallocate monies to provide for the payment or partial payment of parent education training for adults who have this requirement placed on them as part of their treatment plan developed by DSS.

8. Assure adequate and appropriate crisis child care services are developed and available in each community through the reallocation of monies by the State Legislature.

Economically, the cost of child abuse is staggering. A conservative estimate of the nation-wide costs in the mid 1980's was $10 billion, or an average of $15,000 per case opened. The long range costs of failure to prevent, intervene and treat child abuse are at this point in time beyond calculation, and have not received adequate attention. (Deprived Children: 1986.) However, we cannot economically, morally, or ethically turn our heads away any longer from the ramifications on our society of the effects of child abuse. We have an opportunity to intercede and prevent child abuse from recurring - if we can be farsighted enough to acknowledge that the outcomes and results will not occur overnight and may take possibly a generation or more to see the positive outcomes and the cost effectiveness of our efforts today.

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INDICATORS OF PHYSICAL, ABUSE AND NEGLECT

Physical Indicators

— Bruises on the posterior side of body, in unusual patterns, in clusters, in various stages of healing, or on an infant

— Burns - immersion, cigarette, rope, dry (caused by an iron or other electrical appliances)

— Lacerations and abrasions - on lips, eye, any portion of an infant's face, on gum tissues (from forced feeding), on external genitals

— Missing or loosened teeth

— Skeletal injuries

Behavioral Indicators

A child who is abused frequently and severely at an early age may be likely to exhibit these low profile behavioral characteristics:

— Overly compliant to avoid confrontation
— Lacking in curiosity
— Fearful of physical contact
— Excessively self-controlled
— Cries little
— Enjoys little or nothing
— May appear autistic

A child who is less severely or less frequently abused, and is a little older at onset, may exhibit some of these behavioral characteristics:

— Timid, easily frightened
— Psychosomatic complaints, such as enuresis and vomiting
— Craves affection
— Continues to affirm love for abusing parent
— Experiences language delay
— Has difficulty with school in spite of normal ability (energy is misdirected)
— Exhibits sporadic temper tantrums
— Shows indiscriminate attachment to strangers
— Assumes the role of parent in the parent-child relationship or is extremely immature in parent-child interactions

A child who is mildly, infrequently or inconsistently abused at an older age may be likely to exhibit these characteristics:

— Hurts other children
— May try to "make happen" what he/she expects in order to gain feeling of control
— Shows extreme aggressiveness
— Has rageful temper tantrums
— Is hyperactive
— Has short attention span
— Is demanding
— Shows lag in development
— May seem accident-prone or clumsy

Environmental Indicators

— Family crisis of unemployment, death, desertion, ill health
— Severe personal problems in the family such as drug addiction, alcoholism, mental illness
— Geographic and/or social isolation of family
— Child seen as, or actually is, different or difficult
— Parents unaware of appropriate behavior for child at given age

[The list of abuse indicators is adapted from: Child Abuse, Neglect and Dependency: A Guide for People Who Work with Children in Kentucky, Cabinet for Human Resources, Department for Social Services (January, 1989); Handbook for Investigating Abuse and Neglect in Out of Home Child Care Settings, Cabinet for Human Resources, Department for Social Services (May, 1987).]

SOMETIMES MOTHERS LET ABUSE GO UNPUNISHED

A mother's natural instinct is to protect her young, but you wouldn't know it from looking at some child sexual abuse cases in Kentucky. Among the cases the *Herald-Leader* reviewed for this series, reporters found at least seven in which mothers fought prosecution and actively supported the alleged abuser. One mother pressured her daughter to recant. Two took their daughters out of state to keep them from testifying. Even when the abusers confessed to intercourse and oral sex, mothers stood by them.

Prosecutors say the phenomenon is not uncommon. Mothers oppose prosecution for many reasons, some more obvious than others. While they may want an abuser punished, they also want to hold their families together. Mothers frequently report sexual abuse without considering the legal implications. Many are unfamiliar with the criminal justice system and think they can halt the process if they don't like what happens. In some cases, it comes down to economics, said Bruce Reynolds, a former Anderson County assistant commonwealth's attorney. Dependent on their husband's or boyfriend's income, some women face a dilemma. "Sometimes, you have a mother that has to choose between supporting her daughter and losing her house," Reynolds said.

The problem frustrates prosecutors and derails otherwise strong cases. Prosecutors agree that a mother's support of a victim is essential. Without a willing witness, convictions are much harder to come by. Prosecutors are left with few options. By law, they cannot ask the court to take a child from a mother's custody simply on suspicion. However, some counties have taken the offense and prosecuted mothers on charges of tampering with a witness.

The McCracken commonwealth's attorney's office has initiated two cases in the last two years that resulted in convictions, including a 12-month sentence. But they weren't easy. One case relied on a witness who overheard a telephone conversation in which a woman threatened her daughter. McCracken Assistant Commonwealth's Attorney Timothy Kaltenbach says he uses these cases as examples to warn other mothers. In October, he said he threatened a woman who he suspected might try to intimidate her daughter." If the child changes he story, I'll know why," Kaltenbach told her. "If I find evidence that you've tampered with this child ...I'll prosecute you."

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UNDERSTANDING THE DYNAMICS OF CHILD SEXUAL ABUSE

The incidence of child sexual abuse has reached epidemic proportions in the last decade, coinciding with a surge of interest in and attention to child abuse in general, and child sexual abuse in particular. High numbers coupled with celebrity disclosures, national commission reports, the self-help movement's emphasis on childhood, and political advocacy for children have put child sexual abuse in the forefront of the American public mind. This increased attention to child sexual abuse has also resulted in a tremendous increase in litigation nationwide involving the criminal and civil court systems as well as increasing referrals to the juvenile court system. While this growing awareness has resulted in a better understanding of the problem among professionals and the public alike, misconceptions about child sexual abuse remain: there are still many who refuse to accept the gravity of the problem and its impact on American society as a whole.

WHAT IS MEANT BY CHILD SEXUAL ABUSE?

There is often confusion as to what constitutes child sexual abuse. The National Center on Child Abuse and Neglect defines child sexual abuse as follows:

> The use, employment, persuasion, inducement, enticement or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) for the purpose of producing any visual depiction of such conduct, or
>
> rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children. (1992)

It is important to note that this definition makes no mention of the use of physical force: neither force nor violence is required to delineate the sexual engagement of children as abuse. Also, there is no reference to consent: it is not the absence of consent which distinguishes abusive behavior with children since children are not competent, for a variety of reasons, to give consent. Finally, penetration is not required for sexual abuse to occur: sexual abuse may occur without genital contact. Thus, all sexual and sexualized behavior involving children at the instigation of a juvenile who is significantly older, or someone who has more power, is considered sexual abuse.

Incest refers to sexual abuse of children by a relative and is not limited to parent-child abuse, but in this paper does not apply to intrafamilial relationships between adults. For the purposes of this paper the terms *child* and *children* will refer to infants, children and adolescents up to the age of eighteen. *Pedophilia* will be used to refer to any sexual abuse of a minor, and pedophilia and child sexual abuse will be used interchangeably. Pedophilia will include what is a referred to as hebephilia without distinctions of victim age being made.

BARRIERS TO UNDERSTANDING CHILD SEXUAL ABUSE

There are and have been numerous obstacles to the general understanding of, acceptance of and research into child sexual abuse for many years, even centuries. Such barriers have influenced both clinical and policy decisions around all aspects of pedophilia including treatment services for victims, law enforcement, rehabilitation for offenders, criminal prosecution, prevention programs and strategies, professional training, and public and private financial allocations. These barriers influence both the individual and social responses to child sexual abuse, and shape the responses of both victims and perpetrators as well.

Obstacle #1: Incomplete statistical data

The passage of mandatory reporting laws throughout the country, and the inclusion of child sexual abuse as part of the child abuse and neglect spectrum, resulted in a tremendous surge in the number of cases reported over the last two decades. Between 1982 and 1989 alone the Kentucky Cabinet for Human Resources reported a 279% increase in child sexual abuse incidents reported with a 231% increase in substantiated cases for the same time period (Commonwealth of Kentucky 1990). However, there is ongoing debate about the significance of these numbers. Skeptics claim this increase represents nothing more than mass hysteria about a much less severe problem. In fact, the increased numbers do not represent an actual increase in incidence, simply an increase in awareness and reporting. In the end, those who dismiss the increase in cases of child sexual abuse as overzealousness and mass hysteria are simply wrong: child sexual abuse is a significant problem in the United States today.

Child experts in all fields all agree that even these dramatic increases are probably lower than the actual incidence of child sexual abuse. Random sample surveys have found the incidence of sexual abuse in childhood to be as high as 27% in women and 16% in men (Finkelhor *et al* 1989). This is consistent with other general population studies have demonstrated that as many as 25% of women and 10% of men were sexually abused as children. A study of college freshmen revealed 11% of the entering females and 4% of the entering males had suffered sexual molestation before the age of twelve (Finkelhor *et al* 1989). One of the leading experts in working with adult survivors of child sexual abuse has placed the rate at 30% (Briere 1989). Another general population study in 1983 reported 38% of the women sampled acknowledged sexual abuse during childhood, with 18% being incestuous abuse (Russell 1983).

Comparisons among studies indicate wide variations. These must be expected because child sexual abuse always occurs in private, isolated settings so data cannot be collected through objective observation; despite the increased attention over the last few years, child sexual abuse remains one of the most taboo subjects in our culture (Summit 1988); the nature of the trauma itself causes memories to be deeply repressed for months, years and even decades

CASE STUDY #1

When Debbie H. was almost eleven her mother began working nights at a nursing home leaving Debbie and her younger brother in the care of their stepfather of six years. She got along well with the stepfather, a foreman at a small company who was sixteen years older than their mother and had a son by a previous marriage. Debbie also had frequent contact with her biological father, also remarried, who lived nearby. He was a sheriff for the county and often had to work long hours.

Soon after her mother began working nights the stepfather began granting Debbie special privileges: staying up late, watching more television, talking on the phone more, etc. During this time the relationship between her mother and stepfather was suffering under the stress of different work schedules and Debbie often sided with the step-father when they would argue.

Several weeks later the stepfather began spending more time with Debbie in her room at night: he would frequently sit on the side of the bed and scratch her back or stroke her hair as they talked for a few minutes before she went to sleep. At the time Debbie did not notice anything unusual about this, but by the next month the abuse had begun.

At first she believed it was an accident but as it happened repeatedly she realized this was no coincidence. Very gradually the physical contact increased: the touching at night was extended to all over her body, and apparently accidental contact became more frequent during the day. One night Debbie woke in the middle of the night to find the stepfather standing naked beside her bed and caressing her all over. She feigned sleep and rolled away, causing him to stop. From then on Debbie experienced difficulty sleeping, nightmares and loss of appetite. The nighttime episodes continued and became longer and more specifically sexual, and within several weeks Debbie could no longer feign sleep. Digital penetration and oral genital contact ensued and the abuse happened on all nights the mother worked. Debbie's sleep problems eased somewhat although she continued to experience frequent nightmares. Her appetite resumed, but her mother noticed Debbie appearing pale and drawn and took her to the family physician who found her to be anemic.

Debbie also began having more frequent conflict with peers. Seven months later the mother was laid off and was once again present in the home at night. For three weeks Debbie had no symptoms, sleeping well, getting along better with friends and not arguing with her mother as much. The mother promised Debbie she would not return to work since it was obvious the children "needed" her at home. Shortly thereafter the mother and stepfather resumed arguing, Debbie's symptoms returned and the mother returned to working nights.

A week before the mother was scheduled to begin working Debbie began experiencing sleep and appetite problems again. She was caught smoking in the basement and was grounded. She asked to go to her father's but he supported the mother's decision and stated she could not go to his home until the grounding was up. Debbie's mother returned to working the night shift, the arguments between the mother and stepfather diminished, and the sexual abuse resumed immediately. The sexual abuse continued steadily for the next two years whenever her mother was at work. Debbie continued to suffer from sleep problems, loss of appetite and anemia, and her academic performance declined from A's and B's to C's when she entered High School several years later. At that time she requested to live with her father and stepfather the majority of the time, and the mother reluctantly agreed.

The stepfather then accused the mother of infidelity and he suddenly moved out. The mother became very depressed, saying that she was being "abandoned" and Debbie's mood improved quickly arousing suspicion in the stepmother and father. After extensive questioning and numerous denials, Debbie disclosed the sexual abuse to her stepmother.

The stepfather has been indicted by the grand jury; no trial date has been set. Debbie's mother has filed for divorce from the stepfather although she continues to wear her wedding band. She reports feeling extremely depressed and has taken a leave of absence from her work. The stepfather maintains contact with numerous extended family members including Debbie's maternal grandparents. The stepfather attends church weekly, continues to bowl in his league, and remains active in civic groups.

Debbie is experiencing nightmares regularly, and has great difficulty sleeping. She has lost seven pounds and her grades have dropped again. She has only one friend she talks to outside of school, and seems very concerned about what the boys think of her. There is increasing conflict with both her mother and stepmother. She reports missing her stepbrother who wrote her a "hate letter" after the indictment was handed down. Debbie states that she wishes she had never told about the abuse, and sometimes she even wishes she were dead.

(Briere 1989, Courtois 1988); child sexual abuse is shameful and stigmatizing (Berliner & Wheeler 1987); and, definitions of sexual abuse itself, as well as different subcategories may differ from state to state and study to study.

The scientific validity of the data is further hampered by an inconsistent and vague system of classification, with no uniform national system. This is exacerbated by varying interpretations between offices, and the very subjective process of investigation. And, broad, nebulous, catch-all categories are often used including "unsubstantiated," "unconfirmed," "inconclusive" or "some indication." These categories include a broad range of cases: those which were unable to be thoroughly evaluated, those in which the victims or witnesses refuse to divulge details, those in which the perpetrator posed a significant threat to the victim or worker, those in which the alleged perpetrator passed a polygraph test, those in which the victim retracted the allegations, those where the findings were simply inconclusive, and those which "fell through the cracks." The reasons for these dispositions are equally numerous: overburdened caseloads of workers; concerns for the physical safety and well-being of workers, witnesses and victims; limited support or follow-up by law enforcement or judicial systems; and fear and intimidation of witnesses and victims. Thus, the assumption that categories such as "unsubstantiated" or "inconclusive" indicate false or fabricated allegations is erroneous.

Finally, like all data for criminal activity, accurate data to determine the incidence of child sexual abuse is impossible to secure due to the very hidden nature of the abuse while it is occurring and long after it has occurred. Neither victims nor perpetrators tend to reveal the abuse voluntarily: perpetrators take great caution to avoid discovery and arrest; victims develop coping strategies which often repress the abuse, seek to avoid all reminders of the abuse, remain fearful of the repercussions of disclosure and do not think they will be believed (Berliner & Wheeler 1987, Finkelhor & Browne 1985, Friedrich 1990, Summit 1983, 1988). The secrecy around child sexual abuse is reinforced by cultural and national ideas of the sanctimony of privacy of the family. State intrusion into the private dynamics of families only occurs under the most abhorrent of circumstances, and when the utmost degree of certainty exists. Thus, the nature of child sexual abuse itself has resulted in tremendous problems assessing its true incidence and prevalence.

Obstacle #2: Societal inhibitors

Western civilization has strong taboos against incest and child sexuality but the underground sexual exploitation of children has always occurred (Ames & Houston 1990). Child sexual abuse and adult-child sexual interaction provoke shame, fear and discomfort and there is tremendous reluctance to acknowledge the pervasiveness of the pedophilia among either professional communities or the general public (Berliner & Wheeler 1987, Summit 1988). Further, to acknowledge how many children are sexually abused is, as Berliner writes, "a devastating indictment of the adult world" (1989). This cultural avoidance of child sexual abuse has been called a "shared negative hallucination" (Summit 1988), actually a much more damaging indictment of the adult world.

The reluctance to acknowledge the extent of child sexual abuse in the United States has a very pragmatic cultural explanation as well: money. The tremendous costs of comprehensive treatment, investigation, prosecution, and rehabilitation are overwhelming to politicians and policy makers. Children wield neither economic not political clout and while the costs of treating the long-term impact of child sexual abuse in adults later are actually much higher, expenditures for children are rare (Children's Defense Fund 1991). Rationalization of this decision depends on avoiding the recognition of the true severity of the problem in the first place: child sexual abuse evokes a political as well as a cultural avoidance.

The sociocultural taboos also obstruct understanding of child sexual abuse by intimidating victims from reporting these incidents (Summit 1988). The intolerance for child sexual abuse is manifested by the outright denial, minimization and disbelief of allegations by society in general (Courtois 1988). The extension of stigma to include victims as well as perpetrators shifts the burdens of blame and of proof primarily onto the victims, another factor in reducing the likelihood of disclosure (Berliner 1989). Reporting victims force the issues everyone wants to deny.

Obstacle #3: Historical misinterpretations of child sexual abuse

Historically, attempts to understand deviance and abnormality of any kind have relied on simple frameworks of good and evil. Physical and mental illness, criminal behavior and other unacceptable behaviors were lumped together as evil and attributed to the inherent character of the individuals involved. Such pernicious traits were thought to be immutable and revealed themselves through abnormal or immoral appearance, behavior or thinking. The mystery of causality and etiology were dismissed with simple explanations of intrinsic depravity. Child sexual abuse as deviance was no exception, and both victims and perpetrators were identified with the evil it represented. The early theories of the causes of child sexual abuse reveal this simple construct of deviance:focusing primarily on the psychological dynamics of the perpetrator, they viewed offenders as freaks, closer to monsters than humans, base and immoral in every way. These descriptions produced images of "dirty old men," dishevelled, mentally unstable, and easily identifiable by their unusual appearance and behavior. Mental illness, mental retardation or social deprivation were assumed to be the cause of the deviant sexual abuse and the perpetrator was always classified according to some precipitating factor other than a specific sexual disorder. The emphasis on chronic and irreversible mental illness in turn emphasized the idea of the problem as evil.

Even when the sexual aspect of child sexual abuse was recognized it was within the context of inherent evil: pedophilia was lumped in with all other sexual deviance of the time including homosexuality, bisexuality, promiscuity, prostitution and voyeurism among others. Child sexual abuse was even believed to be the result of those other deviant behaviors, and anyone with sexual desires beyond the rigid social mores, including homosexuals, was considered a potential child molester. This association between homosexuality and child sexual abuse persisted for many years, but it is now known that the two are not related in any way (Groth & Birnbaum 1978).

The emphasis on the uncontrollability of evil causing the sexual abuse also led to the conception of pedophilia as a compulsive behavior. The conception of the perpetrator as a victim of his own compulsive behavior is consistent with the tendency to medicalize abnormal behavior and psychological illness. Like the distinction between good and evil, the distinction between healthy and sick attributes the cause to some greater force, uncontrollable by either the individual or society. All of these constructs, good and evil, moral and immoral, healthy and sick widen the gap between normal segment of the population and the offenders. This "us" and "them" mentality correlates with the sociocultural avoidance noted above, and each reinforces the other.

Perhaps the most significant historical event in the evolution of theories and attitudes about child sexual abuse was the development of Freudian psychoanalysis. Freud's abandonment of his original clinical formulation that many of his patients had been sexually molested reflected and contributed to the unwillingness of post-Victorian society to recognize the reality of child sexual abuse. The resulting theory rejected the idea of molestation, ignored any characteristics of offenders, and the allegations were dismissed as fantasy or hysteria. This again shifted the attention away from the behavior of the offender to that of the victim, and again placed the total burden of proof on the victim. The wide acceptance of Freudian theory, while beginning to dismantle the rigid taboos about sexuality in general, promoted a misconception of child sexual abuse which persisted for decades (Sulloway 1979).

Obstacle #4: Heterogeneity of sexual offenses

Another barrier to the understanding of child sexual abuse, particularly among professionals, is the complexity and multiple types of child sexual abuse cases. The explosion of information rom legal, mental health, criminal justice and medical fields reveals the vast heterogeneity of perpetrators and victims. For years clinicians and researchers have been investigating common themes and patterns in child sexual abuse to provide clues to understanding the causal factors, managing treatment of victims and offenders, trying cases and preventing more abuse. Yet, as the number of cases increases, so, it seems do the number of possibilities: no two cases are just alike. There is a far broader spectrum of child sexual abuse offenders, victims and families than were previously believed (Knight & Prentky 1990).

In the past child abuse in general has been stereotyped as happening only among poor, uneducated, socially deprived populations. While there is evidence that other types of abuse and neglect may be more prevalent among certain socioeconomic groups, perpetrators of child sexual abuse are non-discriminatory. Sexual abuse happens in middle and upper class families, although these cases may be harder to investigate and harder to confirm (due primarily to the disbelief of the investigators and general societal avoidance). Nor is child sexual abuse limited to particular geographic regions as some stereotypes purport: child sexual abuse happens in rural and urban areas, all over the country and all over the globe; child sexual abuse occurs in the Bluegrass as often as in the coal camps of this state. This diversity also extends to victims. Although statistically there are more girls than boys abused, this is likely the result of self-selected reporting rather than actual differences in incidence (Finkelhor 1984). Children of all ages, of all nationalities, races and religions, and from all types of family backgrounds may be the victims of child sexual abuse.

There is also heterogeneity among the types of perpetrators: very few, it seems, are "dirty old men" suffering from chronic mental illnesses. Instead, there is a dizzying assortment of characteristics: married, unmarried, employed, unemployed, educated, illiterate, passive, and dominant. These polarized characteristics imply that a dichotomous typology might be applicable to perpetrators and, indeed such classification systems have been proposed.

Perhaps the most well known of these psychodynamic classifications are those of Groth who distinguished between fixed and regressed sexual offenders (1978). The dichotomy here relates to the pervasiveness of the sexual attraction to and abuse of children across time and circumstance. The different types of abusers are the result of critical experiences in childhood, adolescence and adulthood, resulting in dysfunctional adult coping and sociosexual interactions. However, to simply designate two distinct types of offenders as Groth did is now impossible; a better conceptualization is to place these typologies along a continuum. Others have suggested various classification schemes for perpetrators based on a broad range of attributes: biological characteristics, childhood histories, age preference of victims, relationship to victims, degree of force during assault, social adaptation and cognitive assessment. While all relate to some perpetrators, no system of classification yet incorporates all of the variables into a single framework. Rather, it appears that perpetrators must be described in terms of tendencies and placed along various continuums rather than in distinct categories (Knight & Prentky 1990).

This presents a significant dilemma for all professions involved in child sexual abuse: if there is no easily identifiable sequence of events leading to the causes of child sexual abuse, developing policy for and structure to the investigation, prosecution and treatment of child sexual abuse appears to be virtually impos-

sible. But that is not necessarily so: while there is no single, linear sequence to examine when it comes to individual cases or general problems of child sexual abuse, we do know the areas which must be considered and included in any policies and protocols regarding child sexual abuse. Simple constructs will not work, but a dynamic, flexible, multi-factorial framework can be applied. The successful understanding of, prosecution of and prevention of child sexual abuse requires a multidisciplinary and cooperative effort by the mental health, child protective, medical and legal professions.

Obstacle #5: The paradox of childhood

The last obstacle to understanding child sexual abuse is the fact that it involves children. Children have always had an unusually ambiguous status in our culture. On the one hand, children are revered as wondrous innocents, angelic in their natural being, uncorrupted and honest (Aries 1962). Childhood is a time of magic, free of worry and anxiety, and children are accorded all sorts of special privileges and accommodations. Yet, simultaneously children are maligned for not being able to behave as adults do. We want them to be responsible, rational and realistic despite professing to value their innocence and freedom. This paradox has particular implications for child sexual abuse: children are thought to be absolutely reliable and concrete in their thinking and expression, yet they are also viewed as irresponsible, immature and manipulative, seeking immediate gratification and attention. These mixed messages to children and to adults about children seem to echo the mixed message inherent in the abusive act: on one hand adults are to be trusted and respected, yet they can inflict pain and suffering. This attitude towards children also presents special issues for the investigation and prosecution of child sexual abuse: we are unsure whether children can and should be believed; we deny the impact of the power differential between adults and children; we respond emotionally but not always pratically to the intrusion of evil into childhood innocence; and we expect children to be able to respond and protect themselves in uperhuman ways. These conflicting expectations and emotions creates dilemmas in assessing the reliability of evidence, the interpretation of behaviors, and ultimately the thorough investigation of individual cases and the protection of children in general.

THE CONTEMPORARY UNDERSTANDING OF CHILD SEXUAL ABUSE

The increased attention to child sexual abuse over the last twenty years led to important gains in clinical knowledge and research throughout the field. Despite the barriers and obstacles detailed above, this information is critical to the appropriate evaluation, assessment and treatment of both victims and perpetrators, as well as the prosecution of child sexual abuse cases. While much of this knowledge is known only to mental health professionals in the field it may also prove helpful to other professionals and to the general public in dispelling myths and fears regarding pedophilia. Contributions from the clinical and research arenas are equally important and it is imperative to consider both to ensure a thorough understanding of the issues. In addition, the individual components of child sexual abuse must be looked at in context, as part of a larger pattern of behaviors and events.

CASE STUDY #2

Mr. L. was a well-known businessman in his small town, known for assisting the elderly, the poor and the disabled. From humble roots he had worked hard to achieve success, and professed to always "know what it was like" to have to struggle. As one of his community projects he worked with the local junior high school to develop an after-school work program where students would be mentored by local shopkeepers, business owners and professionals to increase exposure to different careers. The students generally loved working with Mr. L. the best since he often took them to dinner, paid them to do odd jobs around his home and later helped them with college applications. This program had received numerous awards from the county and state and served as the model for other programs in the region.

Mr. L. had been orphaned before the age of five and was raised in a state-run orphanage. He was divorced following a brief marriage and had no children. In his late fifties he was described as a "workaholic" preferring to devote time to the community than to leisure activities. While he was well known around town he rarely socialized, belonged to no adult organizations and never invited anyone but children to his home.

Seven years after launching the work program Mr. L. was charged with sexually abusing two girl and one boy student, all age 12. He plead guilty and agreed to participate in a therapeutic rehabilitation program.

WHAT WE KNOW ABOUT PERPETRATORS

It is only recently that we have been able to study perpetrators in a systematic manner, in either clinical or research environments. However, caution must still be used in evaluating this data: while there are more perpetrators than ever before entering rehabilitative treatment programs and correctional facilities, these offenders may not be representative of the general perpetrator population and they may have their own agendas and not report information accurately. In addition, research is hampered by small sample sizes, difficulty finding control groups and the impossibility of assuring control groups are perpetrator-free. As a result, research conclusions are often contradictory and difficult to replicate. What does seem certain as more clinical and research data are collected is the broad diversity of perpetrators: they are a heterogeneous group in all respects and it is more and more obvious that a single causal factor for sexual abuse does not exist (Knight & Prentky 1990, Williams & Finkelhor 1990). Rather, a combination of emotional, psychological, cognitive, social and environmental factors are present to varying degrees and accumulate until a certain critical mass has developed. Understanding child sexual abuse demands a thorough examination of perpetrators not only as individuals, but also within their family and social environments and in terms of the characteristics of their offenses. It is also important to examine the past development as well as the present functioning of the perpetrators in all of these arenas.

General characteristics of perpetrators

There are some general traits commonly observed in pedophiles which shed some light on the process leading to sexual abuse. Both incestuous and non-familial offenders have been described as having antisocial behaviors in general, low impulse control, a lack of guilt, a tendency to depersonalize and objectify others, transitory and shallow relationships, a history of irresponsible behavior, and a strong aptitude for denying, minimizing or rationalizing their sexual offending (Mayer 1988). It is important to recognize that these characteristics may not be easily recognized by the general public, especially among perpetrators who appear to be functioning, even if marginally, in most ways.

There have been increasing attempts to identify distinguishing factors between intrafamilial and non-familial offenders. One proposed difference has to do with primary sexual orientation: incest offenders have been found to be primarily attracted to agemates while extrafamilial offenders have been described as having their primary attraction to children (Mayer 1988, Groth & Birnbaum 1978). However, this distinction has been challenged by both research testing arousability to stimuli and through self-report studies (Williams & Finkelhor 1990). Other characterizations of incestuous offenders have focused on their psychodynamic traits: a desire for immediate gratification, low tolerance for frustration, low self-esteem, strong dependency on others and passive-aggressive coping skills (Mayer 1988). They are often reported to be dominant and rigid within the family structure (Finkelhor 1984). Nonincestuous pedophiles have been characterized primarily in terms of their social traits: they are described as immature, lonely, socially isolated and inept, shy, passive and able to relate better to children than to adults (Mayer 1988). In addition, studies of non-incestuous offenders have revealed high rates (80%) of child sexual abuse and exploitation in their personal histories (Groth & Birnbaum 1978). In contrast, more incestuous offenders report histories of physical abuse than of sexual abuse (Williams & Finkelhor 1990).

However enlightening these descriptions may be, they do not provide much information about the etiology of pedophilia, and the traits noted as common to perpetrators may result from a number of factors. Attempts to identify these factors and explain the origin of the maladaptive traits leading to sexual abuse are the focus of research on child sexual abuse offenders.

Emotional factors: Data on the emotional characteristics of perpetrators is primarily through clinical studies and presents a complex picture. Perpetrators, especially incest fathers, often display and report feelings of depression and anxiety (Williams & Finkelhor 1990), but it is difficult to determine if these are contributing factors to the abusive behavior, results of the behavior, results of exposure of the pedophilia or results of treatment. Perhaps the most significant and common trait is an impaired capacity for empathy, the inability to imagine the feelings of others. This has been notable in studies of incest fathers (Williams & Finkelhor 1990) and of nonfamilial perpetrators (Marshall 1989). Lack of empathy results in the objectification of others and diminishes the capacity for intimacy. The absence of intimacy may be interpreted as loneliness or isolation and may in fact lead to anxiety or depression for the perpetrator. Or, the absence of intimacy may not be recognized, and superficial relationships may be substituted in attempts to create bonds with others. Or, the lack of empathy may lead to the development of personality disorders, specifically narcissistic and antisocial disorders.

The impairment of empathy is usually indicative of trauma in the history of the perpetrator, although not necessarily sexual trauma: lack of bonding with parents or caregivers during infancy or early childhood; absence of mothers due to illness, death or separation; frequent moving from caretaker to caretaker including numerous foster home placements; physical neglect; emotional or physical abuse; and ongoing social or emotional rejection by peers and others (Marshall 1989). This lack of empathy, and the failure of intimate attachment to others is the one characteristic which seems common to almost all perpetrators.

Another important emotional feature is anger. Anger has been identified as a significant factor in rape in general, and sexual assault has been described as an expression of rage, retaliation, hostility and contempt, a desire to inflict harm on others (Groth 1979). Pedophilia may be an expression of anger as well. Offenders with histories of sexual or other victimizations may be attempting to resolve those experiences through identifying with the aggressor, the powerful and controlling aspect of the previously uncontrollable event (Mayer 1988, Groth 1979b, van der Kolk 1989). The commission of child sexual abuse may also be the displacement of anger stemming from present social and sexual insecurities (Groth 1979a, Mayer 1988).

Finally, anger has been cited as a social factor contributing to sexual abuse against children and women by feminist theorists (Brownmiller 1975). Here, anger is an emotional given for men, something they are naturally socialized to feel and react to, and child sexual abuse represents one of many potential expressions of such anger (Brownmiller, 1975).

Biological factors: It has been theorized that sex offenders are biologically distinct from non-offenders, regarding hormone levels, capacity for physiological sexual arousal, and sexual response to various types of appropriate and deviant stimuli (Money 1990). While some studies indicate certain biological characteristics distinguishing incestuous offenders from extra-familial offenders others show no significant differences between the two groups (Murphy & Peters 1992). And, while one study finds evidence of temporal lobe abnormalities among child sex abusers further research is indicated (Langevin 1990). At this time, there is a lack of correlation between a consistent pattern of hormonal abnormality and sexual offending against children (Hucker & Bain 1990). It is extremely important to place all data in context: the subjects may not be truly representative of child sexual abusers; the control groups may not be truly representative of the general population; the procedure for assessing sexual arousal may contaminate the results and is often not consistent from study to study, or even subject to subject; self-reports may not be reliable (Freund et al 1990); and, it has been shown that subjects are able to repress and suppress physiological arousal responses (Murphy & Peters 1992).

This last point is especially important, as it reminds us that it is virtually impossible to view one aspect of behavior in isolation, especially physiological processes, and even more especially sexuality: clearly sexuality is influenced by emotional and cognitive factors, as well as environmental influences. And, it is important to recognize that biological tendencies are frequently modified by cognitive behavior: addictions are now successfully treated primarily through mind-body control; anxiety disorders are treated through relaxation techniques; cancer may be slowed by emotional and cognitive techniques; even the very idea of the social contract represents the deliberate suppression of biological instincts by the intellect.

Biological responses should also be considered in the context of conditioning and learned behavior. Normally biochemical patterns of arousal and pleasure are stimulated by positive, pleasurable events. Stress and trauma in childhood may cause maladaptive patterns of biochemical responses: arousal occurs in response to abusive events and becomes associated with aggression (van der Kolk 1989, Marshall & Christie 1981). The association of arousal and negative events may therefore have a biochemical foundation in conjunction with the cognitive components.

Psychological Factors: While the myths of the "dirty old man" may no longer be widely believed, there is still a desire to identify a particular psychological profile of the child sexual abuser. However, most child sexual abusers do not display evidence of chronic psychopathology, and sexual offenses are not the result of schizophrenia, psychosis or other mental illness (Williams & Finkelhor 1990).

Numerous studies have attempted to detect particular personality traits through the use of the Minnesota Multiphasic Personality Inventory (MMPI) (Kalichman & Henderson 1991, Duthie & McIvor 1990). Elevated scales measuring psychopathic deviance and gender identification, but at least six different cluster profiles have been identified with only a few demonstrating frequencies greater than 10% in perpetrator populations studied. Thus, more study is clearly indicated, and conclusions about the psychopathological tendencies of pedophiles cannot be determined.

In more recent years the role of substance abuse in sexual abuse has also been examined in conjunction with psychopathology. It has been noted that most offenders are not chemically dependent, and most are not intoxicated at the time of offenses. However, alcohol and drugs may affect sexual offending in two ways: chemicals may increase arousal levels and may serve to disinhibit the perpetrator with regard to social standards and norms (Marshall & Christie 1981).

Cognitive factors: There is no evidence of low intellectual functioning or mental retardation among sexual abusers of children. There are, however, significant cognitive distortions noted among sexual offenders. These cognitive distortions are the result of a complex and ongoing pattern of rationalization, reinforcement and maintenance of maladaptive thinking and behavior (Marshall & Christie 1981, Laws & Marshall 1990). Misappraisals of the behavior of others and of themselves contribute strongly to the perpetration of sexual offenses against children (Laws & Marshall 1990).

Some of these distortions relate to the failure of attachment and lack of empathy noted above. This may lead to inappropriate assessment of social interactions and responses by others, inappropriate expectations of others, and inappropriate attempts to express affection (Marshall & Christie 1981) or anger (Mayer 1988) or to meet emotional needs (Williams & Finkelhor 1990). In addition, the perpetrator may misinterpret the behaviors of children as seductive or sexual, and may confuse sexual contact in a relationship with intimacy (Marshall 1989). It has been proposed that sexual abuse is an effort to achieve intimacy and support (Marshall & Christie 1981).

Cognitive distortions may also be the result of social learning by oberving parents' aggressive behavior during childhood (Bandura 1977, Marshall & Christie 1981). This modelling results in confusing perceptions of aggression and arousal, associating them together through cognition and the biochemical responses discussed above (Marshall & Christie 1981). In abusive and chaotic families aggression is utilized to achieve not only dominance and control but also conflict resolution, status and authority, respect, love and intimacy, and children are conditioned to such methods as being normal. The repetition of aggression is, in fact, an apparently logical attempt to exert control, achieve intimacy and earn respect, based on the impact experience has on the appraisal of the situation (Lazarus & Folkman 1984). These cognitive distortions and misappraisals are further reinforced by the conditioned biochemical responses described above (van der Kolk 1989).

Cognition with regard to dominance and submission has also been examined and found to be distorted in many pedophiles. Some research indicates that pedophiles are more likely to have rigid constructs of dominance and submission in social relationships, especially adult-child and male-female relationships (Howells 1979). Other studies have found not only issues of dominance, power, authority and control to be prominent, but also aggression and sadism as factors in the motivational intent of child sex abusers (Groth & Burgess 1977). Feminist theory also cites cognitive distortions about dominance as a major cause of child sexual abuse not only on an individual level but on a societal level as well (Brownmiller 1975).

All of these cognitive distortions continue to function to provide rationalizations for the behavior to the perpetrator through a series of disengaging steps outlined as part of social learning by Bandura (1977). These steps are: 1.) making reprehensible conduct socially acceptable, 2.) misconstruing the consequences of behavior and 3.) attributing the blame to someone or something else, in this case blaming the victim.

However, it is important to recognize that the identification of cognitive distortions and misappraisals by sexual abusers of children does not absolve them of responsibility or awareness of their behavior. In fact, the self-reports of offenders challenges the idea of pedophilia as biologically or cognitively compulsive or uncontrollable. Child sex offenders almost uniformly reveal a deliberate and premeditated process of committing their offenses: they identify their child victims, befriend and develop trust and rapport with them, entice them into vulnerable situations, and even test their reaction to inappropriate behaviors before engaging in the sexualized behaviors and abuse (Conte et al 1989). Most perpetrators pick out target children, and then actively groom and lure these children into premeditated situations created specifically for the purpose of enabling the sexual abuse to occur undetected by others. It is no coincidence that most child sexual abuse occurs after a period of time during which the perpetrator gains the trust of, or masters control over the child. Nor is it a coincidence that most sexual abuse occurs in the most opportune situations: ones that are private, controllable, and well known to the offender. Thus, it is clear that there are deliberate and conscious choices being made by the perpetrator at every juncture along the route to abusing a child, choices which result in a measured and careful progression towards sexualized, abusive behavior over time, and choices which challenge the idea that the sexual behavior is compulsive, impulsive or beyond control.

Interpersonal functioning: In addition to examining the individual characteristics of the perpetrator in his emotional, physiological and cognitive arenas, it is important to examine how the perpetrator functions within his environment. The social and sexual interpersonal behaviors of the offender in the present as well as in the past are important to consider. Again, the impact of the failure of attachment during early childhood is a crucial component in the interpersonal functioning of offenders. Offenders have generally been found to be uncomfortable in social and sexual relationships: this may the long term impact of sexual abuse or exploitation causing them to be socially stuck at the age of victimization (Groth 1978). They generally avoid numerous social relationships with peers and are often described as loners or introverts. Interpersonal functioning within the

Case Study #3:

Lynn was rushed to the emergency room on New Year's Eve after swallowing nearly 20 Tylenol #3 earlier in the evening. She was 13 and stated she didn't know if she could go on living any longer. A pretty, popular girl Lynn had been under a lot of stress the previous six months following the near fatal injury of her mother in a car accident: the mother had remained hospitalized for several months, required extensive reconstructive surgery and was in constant pain. Lynn had assumed some management of the household, including her younger sister and stepfather. The stepfather was disabled following a motorcycle accident several years earlier and had suffered a head injury leaving his memory and concentration poor. Both the mother and stepfather were alcoholic, although the mother had stopped drinking after the accident. The night of the overdose she stated she had been sexually abused by her biological father since the age of seven. Lynn was transferred to an adolescent psychiatric unit where she disclosed a two year history of alcohol and marijuana abuse and a sixth month history of taking "pills." She also admitted to smoking cigarettes, being sexually active, and cutting school regularly. Lynn was initially cooperative but after two weeks retracted her sexual abuse history and asked to be released. Upon denial of the request she then restated the abuse but alleged the perpetrator was her stepfather not her biological father.

Eventually the abuse was confirmed and the perpetrator was confirmed as her biological father. Nearly twenty years older than Lynn's mother the father had been extremely abusive to her throughout the marriage, physically and sexually. She had finally succeeded in divorcing him only after staying in a spouse abuse shelter over 100 miles away for nearly four months.

Lynn reported sexual abuse including rape, sodomy and object penetration, since age seven. She reported being prostituted by him on three occasions. Lynn reported being afraid to tell her mother for fear her father would kill the mother. Lynn and her mother received counseling services, and the mother subsequently revealed a history of childhood sexual abuse also. No charges were filed in the case due to the perpetrator living in another state, Lynn's fears, and the concern for further traumatization by the court process.

family is also lacking, and is generally characterized by either extreme dominance and an authoritative style or by extreme passivity. Families headed by incest perpetrators are found to be conflictual, disorganized, antagonistic and isolated (Williams & Finkelhor 1990). For many years it has been posited that incestuous families are also characterized by poor marital relationships but this may not be a distinctive characteristic (Williams & Finkelhor 1990).

Satisfying sexual relationships with agemates are generally not found among perpetrators of child sexual abuse. Sexual dysfunction is often the result of a history of sexual victimization, causing the person to be uncomfortable with or unable to achieve satisfactory sexual relationships in general. In sexual offenders it causes children to be sought out to satisfy sexual desires, as well as to fulfill social and emotional needs since none are satisfactorily achieved with agemates. This is often related to the frequent and intense feelings of shame and disgrace experienced by many victims which causes them to lose self-esteem and feel unworthy of love or respect. Prior victimization may also cause the reverse type of reaction, anger and a desire for dominance. This is often referred to as "identification with the aggressor," where the victim seeks to overcome his own humiliation by dominating others in a similar manner, thus proving he is strong. Groth has described sexual assault as a "maladaptive effort to solve unresolved early sexual trauma or series of traumas" (1979b).

Childhood history: Childhood sexual abuse in the personal history of offenders themselves is often cited as the most significant factor in causing their own offending behavior. While some studies have shown high rates of past sexual abuse among perpetrators, caution must be used in interpreting this information. Again, the convicted offenders most likely to be studied may not be representative of the general population of offenders; other studies have shown lower rates; and it the reliability of the self-reports of offenders has been questioned. Thus, although a history of child sexual abuse may contribute to causing pedophilia among some perpetrators, it is not the most powerful factor.

The characteristic which does appear to be common among childhood histories of perpetrators is the degree of involvement of caretakers. Perpetrators more often come from families that were chaotic and families where the mother is absent for long periods (Williams & Finkelhor 1990). The degree of maternal support and the effect of this support on the development of intimacy and the capacity for attachment seem particularly crucial (Marshall 1989).

WHAT WE KNOW ABOUT VICTIMS

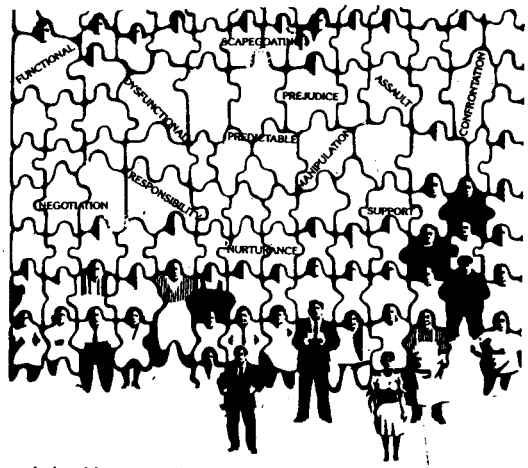
There is no absolute litmus test to determine whether sexual abuse has been inflicted on a child: the diversity of victims and circumstances results in a heterogeneity of responses as well (Berliner & Wheeler 1987, Friedrich 1990). However, as more and more victims are studied a constellation of common symptoms has emerged. These symptoms are descriptive and will be present to varying degrees and severity in each victim. Broadly, they can be categorized into emotional, behavioral, social, sexual and cognitive reactions to sexual exploitation.

Emotional impact: Emotional reactions are varied, and sometimes appear to be contradictory to one another. Emotional responses may include feelings of shame, feelings of guilt; loss of self-esteem and a sense of worthlessness, the "damaged goods syndrome;" fear and anxiety; and depression (Finkelhor & Browne 1985, Berliner & Wheeler 1987, Friedrich 1990, Porter, Blick & Sgroi 1982). Many of these emotional responses are attempts to manage and control the profound anxiety caused by child sexual abuse (Adams-Tucker 1985, Berliner 1990).

Victims may also experience anger but generally will not express it as such: instead the angry feelings are displaced into other emotions or behaviors. Anger turned outwards may be displayed as aggression; anger turned inwards will manifest emotionally in depression and behaviorally in self-destructive behavior and even self-mutilation (Vargo *et al* 1988, Courtois 1988, Briere 1989). Although it may seem that anxiety and depression are dichotomous, it is possible for child victims to experience both (Berliner & Wheeler 1987). Anger is also closely related to feelings of shame, and it is important to recognize shame not only as a cognitive reaction to child sexual abuse (to be discussed later) but also as an emotional response (Nathanson 1989).

Behavioral reactions: Behavioral responses are both reactions to and expressions of the abuse and also the emotional impact described above. These behavioral reactions will vary with each individual child, and with the age of the child. Children of all ages commonly experience sleep disturbance and frequent nightmares, appetite disturbance, hypervigilance and extreme sensory awareness, tearfulness, and increased somatic complaints including stomach aches, headaches, vague pains and lethargy (Adams-Tucker 1985). Children of all ages may also exhibit regressed behavior: in more severe reactions, incontinence, thumbsucking, and baby talk; in more mild reactions increased dependence, caution and clinging to others. For younger children behavioral reactions to child sexual abuse may also include tantrums, separation anxiety, social withdrawal, and hyperactivity. School age children often experience a decline in academic performance, increased distractability, and difficulty participating in group activities (Adams-Tucker 1985). In addition, non-academic school problems may occur including fighting, stealing, cheating, etc. Adolescents may also exhibit academic problems, and frequently engage in more acting out behaviors. This acting out may include truancy, running away, substance abuse, sexual activity, pregnancy and petty crime. There may be a general rebelliousness which occurs within the family, school and social environments: the adolescent is often more argumentative and demanding, or conversely may simply ignore people, expectations and rules.

Social responses: Sexual abuse generally impacts the social behavior of child victims as well. For very young children the symptoms may include fearfulness of new people, lack of trust, social withdrawal, or increasing aggressiveness in social interactions. School age children also display increased aggression, verbal and physical, towards peers, siblings and adults, especially authority figures. They may withdraw from peers, or, conversely, seek out only certain types of agemates: same sex or opposite sex; older or younger; popular or shy; well-behaved or delinquent. The fear of intimacy can be tremendous for sexually abused children, certain that if others know about the abuse they will be ostracized; both the withdrawal and the association with "tough" kids are attempts to manage that anxiety (Berliner 1990). In addition, children may fear discovery of the abuse will result in threats being carried out. Adolescents may also engage in physical aggression with peers and siblings, and often are verbally assaultive towards others as well. Social withdrawal is common: the gradual or abrupt cessation of previously enjoyed activities such as sports and school clubs may occur; long friendships may suddenly be broken off; opposite-



sex relationships may change dramatically. Adolescent and pre-adolescent girls also appear to be susceptible to developing eating disorders including anorexia nervosa and bulimia nervosa in response to child sexual abuse (Hambridge 1988).

Sexual behavior: Sexual behavior is also effected by sexual abuse. Sexual reactions occur in younger children as well and may be manifested in behavior, language and drawings (Gale *et al* 1989). Sexualized behavior including self-stimulation even in very young and preverbal children, sexualized play with other children and sexual assault of other children may occur but are not universal (Adams-Tucker 1985). Sexual knowledge beyond the normal developmental level is more common for young and latency age children, and is a good indicator of sexual abuse. This must be evaluated carefully, with particular attention to the type of language, the degree of detailed knowledge of explicit sexual acts, and the ability to describe a sequence of events involved in sexual activity. While it has been argued that increased access to adult oriented media could be the source of information to children about sexuality, children are unable to provide such detailed, sequential information simply from pornographic television or magazines.

In adolescents the response is generally at one extreme or another: either sexual relationships are absolutely avoided or sexual relationships are actively sought. Promiscuity is not uncommon but not universal, as are teen pregnancy and sexually assaultive experiences. These responses are reactions to sexual abuse; they are not evidence of a pattern of seduction or solicitation of the alleged perpetrator by the child victim. The extent of the sexual impact of child sexual abuse can be seen by the high numbers of teenage and adult prostitutes with sexual abuse histories (Briere 1989) and the high rates of child sexual abuse among adolescent mothers (60%, Briere 1989). These sexual reactions to child sexual abuse have been summarized by Finkelhor and Browne (1985) as traumatic sexualization, the change in sexual feelings and attitudes as a result of the abuse.

WAYS OF ORGANIZING THESE SYMPTOMS AND REACTIONS

Post Traumatic Stress Disorder: Many of these emotional, behavioral, social and sexual reactions are characteristic of post traumatic stress disorder (PTSD) (Briere 1989). This stress reaction may appear during abuse, shortly after the abuse occurs or may be delayed until much later; it may last for months or years; and it may change in severity according to the stresses and life events experienced at different times. In addition to the presence of the above noted symptoms, PTSD includes intrusive thoughts of and preoccupation with the abuse and the reactions to it (DSM III-R). In children this may be manifested by dreams and nightmares, sexualized play, explicit drawings or avoidance of certain places and people. PTSD also involves the stressful reaction to events which remind the victim of the original trauma: these reminders may be visual, auditory, tactile or olfactory, and may be consciously understood, or not, by the victim. Reactions vary from total numbing of the senses and cognition, to dissociation, to extreme fear, to panic attacks. Children often experience these reactions during interviews about the abuse, while testifying in court, in the presence of the abuser or non- supportive people, when near where the abuse occurred, and even at times of day or times of the year when the trauma took place

(Briere 1989, Friedrich 1990).

Cognitive Reappraisals and Distortions: Reactions to the trauma of child sexual abuse can be examined in another way as well: not only are there visceral emotional and behavioral responses to the abuse, and to any reminders of and associations with the abuse, but there are also profound cognitive reactions. The trauma of sexual abuse causes tremendous anxiety and terrible conflicts emotionally and cognitively for the child victim: betrayal by a trusted caretaker, fear and intimidation replacing love and security, physiological sensations of pleasure and pain simultaneously, feelings of specialness and feelings of stigmatization, and bad feelings about the abuse experience yet good feelings about the perpetrator generally. In an effort to cope with the anxiety and conflict children develop a pattern of appraising the world to minimize each (Berliner 1990, Finkelhor & Browne 1985, Berliner & Wheeler 1987). The challenge to the developing intellect of the child is to make sense out of the betrayal of child sexual abuse: a betrayal so intense it can undermine every belief the child has created. Rather than abandon and be abandoned by the world, the child adjusts their perceptions and cognitions, and anger and distrust are directed inward rather than outward. What begins as adaptive coping specific to the abuse scenario is generalized and integrated through social learning processes (Bandura 1977) into cognitively distorted views of the self, others and the world (Berliner & Wheeler 1987, Finkelhor & Browne 1985, Friedrich 1990). These distortions regarding the self may include self-blame, stigmatization, powerlessness, generalized distrust of self, loss of self-worth and feelings of deserving bad things (Adams-Tucker 1985, Berliner & Wheeler 1987, Finkelhor & Browne 1985).

The cognitive reactions to child sexual abuse are still not completely understood, but they are known to be extremely damaging over the long term. While children are extremely adaptable, and learn to cope with even the most adverse of situations, the persistence of these coping strategies, and their generalization to other situations is often inappropriate (Berliner & Wheeler 1987). Over time, they may increase in severity: learned numbness may develop into dissociation, eventually resulting in a multiple personality disorder (Courtois 1988, Bowman *et al* 1985); self-blame and self-hate may lead to a persistent pattern of erratic and self-destructive behavior including suicide attempts, substance abuse, and repeat victimization, often characteristic of borderline personality disorder (Briere 1989, Westen *et al* 1990).

It is here that the negative impact of child sexual abuse is undeniable: studies of clinical populations of adults show clearly that child sexual abuse has persistent, long-term negative effects on the victim (Briere 1989, Courtois 1988, Gelinas 1983). Clinical studies have found histories of child sexual abuse in 44% of walk-in patients at community mental health centers (Briere 1989). On an individual level this is devastating; on a social level it is equally devastating: survivors of child sexual abuse are at much higher risk for substance abuse problems, medical problems, and psycho-emotional problems; they are at higher risk for abusive social and sexual relationships; they are at higher risk for not completing high school, unemployment and poverty; and they may be at higher risk for criminal behavior (Logan, 1992).

The cognitive reaction also impacts memory and the conscious integration of experience for the child victim while the abuse is occurring, and long after it has ceased. This type of coping often leads to repression of feelings, thoughts and memories through a process of dissociation (Berliner 1990, Courtois 1988). While temporary dissociation may be an adaptive strategy during the abusive episodes and even later with regard to memories, if it becomes a pervasive response to all unpleasantness, to self-damaging situations or to all memory it is obviously problematic.

Dissociation may also be problematic for child advocates when attempting to elicit information and evidence about the abuse experience from a child who professes to have no memory or knowledge of such events. Another manifestation of this type of coping is the resistance to or delay of disclosure of the abuse by the child.

Child Sexual Abuse Accommodation Syndrome: Delayed disclosure, far from uncommon, is actually the norm for child victims of sexual abuse. The very nature of the abuse minimizes the likelihood of disclosure: the emphasis on secrecy, the perceived helplessness of the child, the challenges to the fundamental beliefs and trust the child holds, and the ambivalence of society to accept the severity of the problem. This has been described by Roland Summit as the Child Sexual Abuse Accommodation Syndrome (1983, Clark, Veltkamp & Silman 1992).

The very nature of PTSD and cognitive distortions also minimize the likelihood of disclosure of the abuse: PTSD causes the child to avoid all reminders of the trauma, and cognitive distortions often result in the child feeling deserving of the abuse, bad or evil in some way. The child victim may feel responsible for the outcome of the disclosure which is likely to be traumatic for the entire family (Conte & Berliner 1981). The traumatic impact of disclosure is evident by the tendency of child victims to experience an increase in symptoms following disclosure (Sauzier 1989a, 1989b). Thus, disclosure is actually antithetical to coping. But, there is another reason disclosure is generally avoided or delayed: fear.

THE POWER DYNAMICS OF CHILD SEXUAL ABUSE

On the most obvious level, the child fears the perpetrator's wrath if the abuse is discovered. Threats by the perpetrator are frequent and may include graphic violence to the victim or loved ones. Or, they may be nonviolent but equally threatening: break-up of the family, loss of financial stability, removal to foster care, institutionalization, ostracization or loss of love from others. It is also important to recognize that the perpetrator in all other ways may have been a valued and adored person by the child: a caretaker, provider, friend, even protector. Disclosure severs the positive aspects of the relationship irrevocably; suffering the abuse, painful as it may be, enables a pretext and illusion of a more positive relationship to still exist. Avoidance of disclosure may be further reinforced by the unresponsiveness, denial or disbelief exhibited by other adults: children often test the reactivity of adults to perceived unpleasantness, and if the child senses or projects self-blame, disclosure will be inhibited.

Thus, the sexually abused child feels, and in fact is, powerless: powerless while the abuse is occurring, powerless to disclose the abuse, powerless to be able to understand in ways that are not self-damaging, and powerless to integrate it into a larger context. Sexually abused children are rendered powerless by isolation, shame, secrecy, coercion, force and intimidation; they are also powerless by a society which does not want to believe them. This delay is therefore entirely understandable and, in fact, logical, when considering the myriad of obstacles faced by the child in disclosing: the tendency to repress and avoid the abuse; the fear of reprisal after disclosure; anxiety about loss of family, support and stability; reluctance of adults to believe children; societal denial; and shame, guilt and feelings of worthlessness.

The above discussions provide a glimpse into the complexity of understanding what causes child sexual abuse and what makes preventing child sexual abuse so difficult. It is impossible to identify a single causal characteristic which creates pedophiles: a univariate model of either the causes or the impact of child sexual abuse is impossible. It is not enough to simply consider the characteristics, responses and behavior of victims and perpetrators separately, however. Child sexual abuse is a sequence of events involving complex dynamics and interactions which also must be examined.

Inherent to pedophilia is the power imbalance between the child victim and the adult perpetrator. The successful comission of the abuse and the maintenance of secrecy are both contingent upon the degree of power the perpetrator wields over the victim. There are certain obvious exhibits of power: adults are physically larger and stronger, they are more knowledgeable, they are accepted as reliable, they have more legal rights, and they often have control of the keys to success and survival for the child victims. Power in pedophilia is not always exerted or maintained overtly: while threats and physical abuse are utilized in some instances, often more insidious coercion is employed. This may be in the form of denial of privileges, or extra privileges; it may be an unspoken condition for love when no other possible love exists; it may be the only way to escape the perpetrator at all. The cognitive distortions that result from repeated victimization are also a form of power and coercion: social isolation of the victim or family in general, repeated belittlement and criticism, and any other attacks on the self-esteem of the victim serve to maintain the power of the perpetrator over the victim, and thus to maintain the cooperation in and secrecy about the sexual abuse (Berliner 1990, Berliner & Conte 1990).

The power imbalance inherent to child sexual abuse is reflected in the paradoxical manner in which we treat children, the ambiguous individual and social responses to child sexual abuse, the reluctance to acknowledge individual cases or the pervasiveness of pedophilia in general, and the response of the legal system to child sexual abuse.

CURRENT LEGAL RESPONSES

The legal arena presents unique concerns regarding child sexual abuse. It is important to separate decisions about prosecution from decisions about investigation, placement and treatment. Known and suspected child victims always need adequate protection and support regardless of the status of legal prosecution. Failure to secure evidence and testimony to prosecute is not confirmation of the falsification or fabrication of the sexual abuse allegation; nor is failure to achieve indictment by a grand jury, nor failure of conviction in the courtroom confirmation the abuse did not occur. Thorough evaluation and assessment by an expert in the area of child sexual abuse is crucial from the very beginning: to assist in substantiating the charges, in assessing the degree of danger facing the child and in making the decisions around prosecution.

Factors which are likely to influence the decision to prosecute are both process- and content-oriented: the amount and nature of the evidence, the credibility of the witnesses, and the manner and circumstances in which the evidence was discovered or uncovered. The likelihood of the child being able to testify in the courtroom, the credibility of the child as a witness, the believability of the child's testimony, and the presence of other evidence and witnesses must be thoroughly evaluated. While the ability of the child to testify is often considered, the impact of the court process on the child victim is rarely a fundamental part of the decision about prosecution or not. It is clear that for most sexually abused children this process is another form of victimization, another trauma, another negative outcome.

The fundamental problem for the prosecution and the defense in child sexual abuse cases is the involvement of and the dependence on the child victim. Our legal system was not designed with children in mind, and is generally not accommodating to the child as a central figure. This is especially true in child sexual abuse cases where societal resistance, denial and disbelief make the courtroom and proceedings even more hostile. Thus, while decisions whether or not to prosecute are separate from decisions about investigation, placement and treatment, once the prosecution has been launched, neither the Commonwealth nor the defense can proceed without a thorough understanding of the complexity of child abuse and neglect. The questions of physical accommodations for child witnesses, use of expert testimony, admissability of hearsay testimony and admissability of testimony intended to educate the jury are currently being debated in Kentucky and around the nation.

Courts must recognize the need to protect child witnesses from intimidation and fear, from social denial and disbelief, and from misinterpretations and misuse of what are known to be common responses to the sexual victimization of children. Courts must recognize the ambiguities children face regarding love and loyalty towards the perpetrator and the family at large, the implications of conviction for families and victims, and the confusion regarding responsibility and blame. Courts must recognize the pervasive social attitudes of denial, disbelief and dismissal of child sexual abuse, and recognize the need to inform juries about the realities of the problem in order to ensure a fair and just trial. Perhaps most importantly, courts must recognize the devastating impact child sexual abuse has on victims, their families and society at large, and seek to minimize the negative retraumatization and to reduce the incidence of child sexual abuse through efficient, appropriate, consistent and fair handling of these cases.

Adequate understanding of the complexity of child sexual abuse is equally important for defense attorneys. While perpetrators must be held accountable for their behavior, this does not imply the institution of cruel and unusual punishment. Rather, it must be recognized that they are in as much need of sound clinical treatment services, and rehabilitative sentencing options should be invoked as often as possible (Witt and Allena, 1991).

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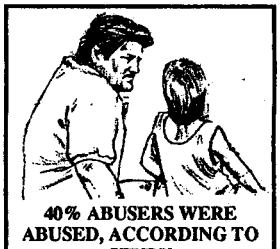

40% ABUSERS WERE ABUSED, ACCORDING TO STUDY

Some victims go on to become abusers. Seventy percent of the incestuous fathers in the Finkelhor study admitted that they were abused during their own childhood. Judith V. Becker, Ph.D., a professor of psychiatry and psychology at the University or Arizona College of Medicine who has supervised or been involved in the assessment and/or treatment of more than 1,000 abusers, reports that some 40 percent said they had been sexually abused as children. Ruth Mathews, a psychologist who practices with Midway Family Services - a branch of Family Services of Greater St. Paul - has seen a similar number of adolescent offenders, male and female, and has arrived at a similar conclusion.

"Incest: A Chilling Report," Lear's, February, 1992.

DEFENDING CHILD SEX CASES IN KENTUCKY

"The rules of evidence cannot be overlooked, set aside, or circumvented in our zeal to convict: the ends never justify the means." Justice Leibson, from Crawford v. Commonwealth

There is no more difficult case to try in today's environment than the child sexual abuse case. In some ways, these trials, particularly those involving the Class A offenses, are similar to the trials of capital cases. The stakes are almost as high, with the equivalent of life without parole being available for the most serious of cases. The Commonwealth often will take on the stance of crusader, much like in a capital case. The medical evidence is often complex. Psychologists and social workers are often part of the prosecutorial team. Publicity has often saturated the venire. Statewide newspapers are whipping the sentiment up in order to change the laws to make it easier to convict persons in these cases. Task Forces are operating which are preparing to propose draconian legislation which will threaten the rights of persons accused of these crimes, often with no input from the criminal defense bar or others who do not agree with the "children don't lie" mantra. Because of these circumstances, defense counsel should start now to share information, expertise, and resources in order to help each other to defend these cases.

I hope the following thoughts will be helpful to those having to defend one or more of these cases. They are taken from outlines prepared both for the KACDL December 1991 seminar and the DPA June 1992 seminar. This is not intended to be comprehensive, but more an effort to share some thoughts on what I believe is important in these cases.

MINIMIZE HEARSAY

Hearsay testimony is never more important than it is in the trial of a child sex abuse allegation. We need to analyze our cases thoroughly to see what hearsay may come in, what the objections should be, and where the pitfalls are.

Our goal in most cases is to try to eliminate all the hearsay. Then we can focus on the cross examination of the child, establishing a motive for her testimony, and attacking any physical evidence. We can also focus on reliable evidence, rather than the highly unreliable, often unprincipled and biased attempts by adults to put their spin on what children may or may not have said.

It is important to understand that one of the goals of the Commonwealth will be to have the story of the child told by adults, who can shade the testimony, who can explain recantation, who can explain inconsistencies, who can cover up problems, and who can withstand cross examination. These witnesses are "proxy" witnesses. The best approach to the proxy witness is to keep them off the stand by objecting to the hearsay.

That does not mean that you will always be successful. The hearsay rule is rife with exceptions, and the Commonwealth will make every attempt to jam its unreliable hearsay into one of them. What will follow is a compilation of the common exceptions that are used, and the recent case law which has developed.

1. The Excited Utterance or Spontaneous Declaration.

a. *Souder v. Commonwealth*, Ky., 719 S.W. 2d 730 (1986). Here the Court found inadmissible statements made by a 2 year old child to the mother, the grandmother, two doctors, and a social worker. The statement to the grandmother was made within 24 hours of the incident, and was in response to persistent questioning. The statement to the mother was made two to three days later, and was found to be too remote to be an excited utterance. The statements made to the social worker were clearly hearsay and not admissible under this exception.

b. *Mounce v. Commonwealth*, Ky., 795 S.W. 2d 375 (1990). Statements made to mother 9-23 days after the alleged incident are not admissible as spontaneous declarations. The Court will look at the following factors in reaching the decision on admissibility:

1. The lapse of time.
2. Opportunity or likelihood of fabrication.
3. Inducement to fabrication.
4. Actual excitement of the declarant.
5. Place of the declaration.
6. Presence of visible results of the act to which the utterance relates.
7. Whether the utterance was in response to a question.
8. Whether the declaration was against interest or not.

OBTAINING CHR RECORDS

One of the most important starting points in the defense of these cases is to obtain CHR records, tapes, investigations, statements, etc. in addition to other discovery.

Why is this important? One question we must answer in many of these cases is why would the child, and the other parent or other family members, make and support the abuse allegation? Often the answer, whether it be in prior abuse, prior allegations made by the child, dysfunctional family, custody dispute, psychological problems, will be contained in the CHR records. In order to answer the fundamental question, we must obtain those records.

Do not assume that the Commonwealth will give you everything that is involved in your case. The involvement of the Cabinet introduces a new player, a player not often used to discovery, who is more accustomed to protection of children and confidentiality of files than they are to rules of due process and fair play. They will often see your efforts to obtain the records in the defense of your client as a hostile affront to the child (or to them).

In a recent case, open file discovery produced a short CHR report, which consisted of a document reporting the allegation, and nothing more. That purported to be the entire CHR file. In reality, there was a lengthy report written by the social worker, which revealed many things, part of which was that the child had alleged abuse previously against her grandfather, who had raped mom when she was thirteen, and who had since kept the child with grandma virtually every weekend of her life.

More importantly, open file discovery from the Commonwealth gave us copies of transcripts of statements made by the child to CHR and the police, which were short and quite inculpatory. What we discovered by obtaining the full CHR records was that the interviews with the child had been tape recorded. We obtained those tapes with the same court order. What was a three page transcript became a 57 page transcript, and what was mostly an inculpatory statement turned into a highly exculpatory statement.

What I learned from this case was that leading of children by CHR workers and police does occur, and that CHR and the police will try to hide their leading and the exculpatory information contained in their files. As a result, you have got to get everything done by the police and by CHR.

How do you get the records? One method is through the use of the juvenile code. KRS 620.050(e) allows the noncustodial parent to obtain CHR records in an abuse, neglect, or dependency case. These are obtained through a CHR Open Records procedure. KRS 620.050(f) also allows these records to be obtained pursuant to a court order.

Another method for obtaining the records is to make a motion in district or circuit court. This motion should be made using the right to discovery under the rules of criminal procedure, and the rights to confrontation, to effective assistance of counsel, to present a defense, and to a fair trial, with the Kentucky constitutional analogues.

Ballard v. Commonwealth, Ky., 743 S.W. 2d 21 (1988) held that CHR reports can constitute *Brady* material, and thus where exculpatory must be turned over to the defense as part of discovery. This, of course, was based upon the due process clause.

Mounce v. Commonwealth, Ky., 795 S.W. 2d 375 (1990) followed *Ballard* by holding that impeachment evidence in CHR reports is also *Brady* material. CHR records are chocked full of exculpatory impeachment material. It is full of prior investigations, prior reports of sexual abuse, dysfunctional families, problems with the child, lying by the child, *etc.*

If for some reason the court does not grant your motion pursuant to *Ballard* and *Mounce*, at a minimum the court should look at the records **in camera** in order to determine whether they contain information that is valuable to the defense. This is constitutionally based. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) holds that an accused has at a minimum a due process right to have the child abuse agency records turned over to the trial court for *in camera* review.

It is submitted that the *Ritchie* procedure is not adequate to protect the rights of the accused. A circuit judge is in no position to know what CHR records contain information that is exculpatory in nature, not being privy to the details of the accusation and the defense. *Commonwealth v. Lloyd*, 567 A. 2d 1357 (Pa. 1989) recognized as much when it held that medical records generated by psychotherapeutic treatment of a complaining witness must be turned over to the defense under the confrontation and compulsory process clauses. The Court specifically rejected Ritchie's *in camera* review by the trial court as insufficient to protect the defendant's rights.

This right to exculpatory information has been extended even to therapy sessions between the victim and mental health experts. In *Commonwealth v. Stockhammer*, 570 N.E. 2d 992 (Mass. 1991) records of therapy sessions between the victim and psychotherapists and social workers had to be disclosed to the defense, under the Massachusetts Constitution.

There are other ways counsel can obtain these records. Some attorneys have been successful at subpoenaing these records to the preliminary hearing. Another often successful method is to simply ask for the records from the CHR worker. Another method is to look in the police file, which will often have in it the CHR file, or references from the file that indicate its importance and exculpatory nature.

What counsel must understand is that in child sexual abuse cases, the CHR worker is often the only investigator, or at least the primary investigator. They take on the role normally assumed by the police. There is no justification for their records, therefore, to be privileged in any way. CHR cannot have it both ways, they cannot investigate and pursue criminal activity, and then attempt to shield information helpful to the defense of that crime by asserting that their information is not discoverable.

c. *McClure v. Commonwealth*, Ky. App., 686 S.W. 2d 469 (1985). Here statements made 30-50 minutes after the alleged incident were ruled admissible.

d. *White v. Illinois*, 502 U.S. ___, 112 S. Ct. ___, 116 L. Ed. 2d 848 (1992). The Court held that the use of the spontaneous declaration and statements for medical treatment hearsay exceptions in a child abuse case did not violate the confrontation clause of the U.S. Constitution. "A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom." *Id.* 116 L. Ed. 2d at 859. The prosecutor does not have to prove unavailability nor necessity to have these out-of-court statements admitted.

e. *Edwards v. Commonwealth*, Ky., 6/25/92. The above consistent line of cases seems to have been abandoned in this recent case. The court allowed a statement made to a foster parent some three weeks after the incident to be admitted as an excited utterance. However, the statement was made as soon as the child returned to the foster parent, "no doubt, with the expectation that the foster parent would 'make it well'", which may distinguish it from previous cases.

2. The Business Record

a. *Drumm v. Commonwealth*, Ky., 783 S.W. 2d 38 (1990). The business record exception, here records of the Home of the Innocents, cannot be used to bootstrap opinions in conclusions of social workers. However, factual observations recorded by social workers in those records may be admissible, which may include the child's statements, depending upon the circumstances of the recording of the statements. *Drumm*'s comments on social workers being allowed to tell what others told them should be confined to business records, and not to their testifying regarding those statements.

3. Statements Made to a Treating or Diagnosing Physician.

a. *Drumm v. Commonwealth*, Ky., 783 S.W. 2d 38 (1990). The Court adopted FRE 803(4), which blurs the previous distinction between treating and diagnosing physicians.

1. However, the hearsay statement still must be more probative than prejudicial.

2. The Court explicitly finds that hearsay statements made for the purpose of testifying are inherently more unreliable than those given to a treating physician.

b. *Brown v. Commonwealth*, Ky., 812 S. W. 2d 502 (1991). The Court reaffirmed *Drumm*, further clarifying in a footnote that "Statements by a patient are admissible so long as the physician (treating or testifying) relied on them in forming his opinion." *Id.*, 812 S.W. 2d at 504.

c. *Souder v. Commonwealth*, Ky., 719 S. W. 2d 730 (1986). The status of this case is unclear after *Drumm*. However, it may still stand for the proposition that information obtained by doctors identifying a perpetrator is not admissible as a hearsay exception where that information comes to the physician's attention as part of a criminal investigation rather than as a statement essential to treatment. After *Edwards* (see below), however, this holding is questionable.

d. *Idaho v. Wright*, 497 U.S.___, 110 S. Ct. ___, 111 L.Ed. 2d 638 (1990). The Court ruled that under the confrontation clause, a child's statements made to a pediatrician were not admissible under Idaho's residual hearsay exception. The Court based this holding on the fact that the residual hearsay exception was not firmly rooted, and because there were insufficient, particularized guarantees of trustworthiness in the statement. The Court will in the future look at "whether the child declarant was particularly likely to be telling the truth when the statement was made." *Id.*, 111 L. Ed. 2d at 656. This casts some doubt on part of *Drumm*, because the nontreating physician exception to the hearsay rule is not a firmly rooted exception in Kentucky.

e. *White v. Illinois*, 502 U.S. ___, 112 S. Ct. ___, 116 L. Ed. 2d 848 (1992). The Court recently held that the medical treatment hearsay exception in Illinois did not violate the confrontation clause. "[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony." *Id.*, 116 L. Ed. 2d at 859. When combined with *Wright*, this case demonstrates the importance the Court will place upon the "firmly rooted" nature of the hearsay exception when making a confrontation clause analysis.

f. *Edwards v. Commonwealth*, Ky., ___S.W.2d ___ (6/25/92). The Court held that a statement made by the child to the doctor examining her, with the statement including the identity of the offender, was admissible under this exception. Here the child was incompetent, and thus the admissibility of this statement was almost outcome determinative. Further, there was no analysis of whether the identity of the offender was necessary for the diagnosis or treatment.

g. *Jones v. Commonwealth*, Ky., ___S.W.2d___ (6/25/92). There is no requirement that a preliminary hearing be held to determine the admissibility of statements made to a physician. All that is required is that the party offering the evidence lay a foundation to show the relevance and reliability of the hearsay statements.

4. Prior Consistent Statements.

a. *Bussey v. Commonwealth*, Ky., 797 S.W. 2d 483 (1990). Police officers could not testify to what the victim had told them after the victim had been impeached. The fact that one is impeached does not allow previous consistent statements to be brought out, unless the previous statement occurred prior to the motive for fabrication.

5. Prior Inconsistent Statements.

a. *Bussey v. Commonwealth*, Ky., 697 S.W. 2d 139 (1985). Even where there is a prior inconsistent statement by the child, the prosecution still must lay the proper foundation pursuant to CR 43.08.

b. *Muse v. Commonwealth*, Ky. App., 779 S.W. 2d 229 (1989). A prior inconsistent statement in the form of a videotaped statement made to a social worker is admissible under *Jett* after the child recants her allegations during her testimony. This is so irrespective of *Gaines* and *Ballard*, which held KRS 421.350(2) unconstitutional. Further, *Muse* interprets *Jett* liberally in the context of child abuse cases, saying that "when a witness has testified as to some facts regarding the case, the jury is entitled to know all that the witness has said on the subject", *Id.*, at 230.

6. There is no investigative hearsay exception. *Sanborn v. Commonwealth*, Ky., 754 S.W. 2d 534 (1988). In the context of a child sex abuse case, this means that the social worker/police officer should be stopped when they attempt to relate statements made to them which led them to take certain other steps in their investigation.

a. *Bussey v. Commonwealth*, Ky., 797 S. W. 2d 483 (1990). It was reversible error for a police officer to testify that "I came to the conclusion that there had to have been some type of misconduct or I would not have received a complaint." This was characterized by the Court as a declaration that the officer believed the victim's story, which in turn was little more than "investigative hearsay".

7 The prosecution cannot put on hearsay where the child refuses to testify, unless there is another applicable hearsay exception. In *Bussey v. Commonwealth*, Ky., 697 S.W. 2d 139 (1985), the child testified that her dad did nothing, after which the social worker testified to that which she had previously told her. This was inadmissible hearsay.

8. KRS 421.350 and 421.355 were legislative devices to enhance the ability of the prosecutor to have hearsay testimony admitted which did not meet any of the traditional exceptions.

a. *Commonwealth v. Willis*, Ky., 716 S.W. 2d 224 (1986). KRS 421.350(3) and (4) were declared constitutional, allowing for both videotaped trial testimony and closed circuit trial testimony of children, out of the presence of the accused.

This was consistent with *Kentucky v. Stincer*, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987), which held that excluding a defendant from a competency hearing did not violate the confrontation nor the due process clauses.

b. *Gaines v. Commonwealth*, Ky., 728 S.W. 2d 525 (1987). This case held KRS 421.350(1) and (2) to be unconstitutional under Sections 27 and 28 of the Kentucky Constitution.

c. *Drumm v. Commonwealth*, Ky., 783 S.W. 2d 38 (1990). Held KRS 421.355 to be unconstitutional as also violative of Sections 27 and 28 in addition to established procedures relating to the competency of children as witnesses. This eliminated the hearsay testimony of the police, foster parents, psychologist, psychiatrist, and social worker in this case.

d. *Ballard v. Commonwealth*, Ky.,

743 S.W. 2d 21 (1988). Under *Gaines*, introducing a videotape of the child giving a statement, as opposed to testimony, is reversible error even when thereafter the child is sworn in and is found competent.

Until the June 25, 1992 cases of *Edwards* and *Jones*, the Kentucky Supreme Court was carefully scrutinizing each instance in which hearsay had resulted in a conviction of one charged with child sexual abuse. Unfortunately, the Court likely reads the *Herald Leader*. Counsel must continue to require the Commonwealth to prove these cases with reliable evidence, and strive to repel any encroachment on the notion that people, even in child sexual abuse cases, should only be convicted by the use of competent and reliable evidence.

SCRUTINIZE PHYSICAL EVIDENCE

It is beyond the scope of this article to address the subject matter of physical evidence in child sexual abuse cases. This evidence is often the most important evidence that will be admitted. Thus, we need to analyze this evidence carefully, and seek ways to minimize its effect in our trials.

Counsel must not assume that when there is physical evidence corroborative of child sexual abuse that the case is finished. Far from it. Where the physician is acting as a true scientist, this evidence can be devastating. However, we are finding that many doctors have crossed the line, and have taken the mantel of child sexual abuse expert and advocate. It is in cases where these doctors are involved that much is left to be done.

In cases in which the medical evidence is not objective and scientific, counsel should remember the following:

1. "Sexual abuse" is not a medical diagnosis. If "sex abuse" is the diagnosis, you have got a good idea that you have an advocate rather than a scientist on your hands.

2. The "history" commonly used by medical doctors is quite dangerous in the setting of a child abuse case. Doctors typically rely upon the truthfulness of the history taken. After all, why would a "patient" present for "treatment" lie to a doctor? It would only hurt the course of their treatment. This assumption, however, is not necessarily the case in child sexual abuse cases, particularly where the estranged wife brings in the child, or there is some other motive for fabrication present. Doctors are ill equipped to "investigate" whether the history is true or not, and in fact seldom if ever conduct any investigation beyond talking to the child and the mother. It is remarkable that many doctors feel qualified to state that the child is telling the truth after talking only with the child and the mother, and never having talked with the accused or investigating any of the other facts.

3. Many of the physical findings used upon which to base an allegation of sexual abuse are non-specific findings, or open to subjective interpretation by the physician: these are such things as "perihymenal erythema(redness), tightness (too much or too little) of pubic or anal muscles, tense rectal sphincter, anal fissures, and hymenal irregularities interpreted as either 'transsections' or evidence of scarring." Coleman, "Medical Examination for Sexual Abuse: Have We Been Misled?", Nov. 1989 The Champion. Other "symptoms" include "rounded scars called synechiae which when magnified may show neovascularization", and lax rectal sphincter.

a. A 1989 study by McCann, Voris, and Simon, cited in the Coleman article, looking at 300 pre-pubertal children screened for non-abuse, concluded that many "normal" children have the same symptoms:

1. 50% had bands around the urethra.

2. 50% had small labial adhesions when examined with a colposcope.

3. Only 25% of hymens are smooth in contour.

4. 50% had clefts in the hymen.

5. 35% had perianal pigmentation.

6. 40% had perianal redness.

7. 2/3rds had intermittent dilation.

4. *Brown v. Commonwealth*, Ky., 812 S.W. 2d 502 (1991). The Court reversed the conviction partly based upon the physician testifying to what amounted to an ultimate fact opinion, that is that the physical injury was more likely to have occurred in a ten year old, when the allegation was to have occurred, than in a 14 year old.

In cases where the physical evidence is important, counsel should serious consider a request for a second physical examination. The Kentucky Supreme Court has ruled that in appropriate circumstances, a second physical examination is warranted. The case is *Turner v. Commonwealth*, Ky., 767 S.W. 2d 557 (1989). This was a Dr. Tackett "clock" case. She testified that the scar tissue was caused by penile penetration due to the location on the hymenal ring. The Court held that under these circumstances, the defendant had a right to a second physical examination because the physician could contradict the injuries, and could further contradict the opinion that the injuries indicated penile penetration.

The test established in *Turner* is whether "the evidence sought by the appellant is of such importance to his defense that it outweighs the potential for harm caused by the invasion of the alleged victim's privacy and the probability that the prospect of undergoing a physical examination might be used for harassment of a prosecuting witness." (p. 559).

Turner has been modified by *Crawford v. Commonwealth*, Ky., 824 S.W. 2d. 847 (1992). Where the judge has a second physician examine the findings of the first physician in order to state whether a second evaluation would be necessary, and where the second physician states that such an evaluation would not be beneficial, that this was a "proper approach to this issue and the requirements stated in *Turner*...". Obviously, after *Crawford*, this new defense right is not absolute, and it is still developing.

Another important issue in these cases is how much evidence of penetration will be required. The case law varies. In *Gregory v. Commonwealth*, Ky., 610 S.W. 2d 598 (1980),the Court held that "circumstantial evidence may ...be used to establish the element of penetration for a sodomy conviction." Here, evidence that the defendant took his two under three year old sons into the bedroom where they would cry, and after which they had red or purple rectal areas, and that they were "passive" during the medical examination, was sufficient proof to get to the jury.

In *Souder v. Commonwealth*, Ky., 719 S.W. 2d 730 (1986) the medical evidence demonstrated that rectal tears were made by something other than a male's sex organ, and thus a directed verdict should have been given.

In *Stoker and Davis v. Commonwealth*, Ky., ___S.W. 2d ___(3/12/92), physical corroboration of penetration was not required where the child's testimony was that the penetration was slight.

Finally, in *Jones v. Commonwealth*, Ky., 830 S.W. 2d 877 (6/25/92), the Court held that a directed verdict was not required where doctors testified the victim's labia was red and the vaginal opening dilated, after the victim had told the doctor that the defendant had "played with her frog".

Often, a physician will find a sexually transmitted disease present in the child, and the assumption by counsel will be that sexual abuse has occurred. Counsel should not make that assumption without further exploration. In the Coleman article, he states that findings of gonorrhea of the throat, or even genital gonorrhea, and venereal warts do not necessarily lead to a conclusion of sexual molestation.

Chlamydia is often assumed to be a sexually transmitted disease, and an important marker of child sexual abuse. Chlamydia is primarily a sexually transmitted disease. However, further exploration in the literature will demonstrate that it is not always transmitted sexually. Studies have shown that a mom can give it to her child perinatally, and the disease can then exist for up to 3 years after birth. Recent studies have shown that 26-48% of given pediatric populations have tested seropositive to chlamydia. Obviously, no researcher would assert that 48% of our children have been sexually abused. Other studies have shown that entire families have had chlamydia where sexual abuse is only a slim possibility. Literature supports the fact that fomites can spread chlamydia, such as can bathing in contaminated water. Chlamydia can be present in the middle ear, lungs, and eyes, all places where sexual abuse is not present. Children sleeping with one another, or with infected parents, may be able to spread the disease without the presence of sexual abuse.

A child with chlamydia is often asymptomatic, and thus we do not know when a child gets it. That can be crucial in a child sexual abuse case.

Information is developing rapidly regarding this disease. If chlamydia is present in one of your cases, do not assume that sexual abuse has occurred. Rather, go to the literature, and dig deeper.

An even less reliable marker is gardnerella and clue cells. Gardnerella has appeared in control groups, and is thus not a great marker for sexual abuse.

One healthy development in this area is that the colposcope has been reduced in its importance. For a time, some doctors were using the colposcope to identify places on the hymen where scarring was occurring, and concluding that certain configurations meant that penile penetration, or digital penetration had occurred. In *Onwan v. Commonwealth*, Ky. App., 728 S. W. 2d 536 (1987), the Court held that a gynecologist could testify to her conclusions following her use of the colposcope. The Court held further that the "colposcopic visualization need not pass the *Frye* test."

The colposcope is just a magnifying/picture taking device with few problems unless the theory or opinion accompanies the use of the colposcope. *Onwan* is a good example of the opinion based upon the colposcope that was in that and many other cases quite prejudicial.

It appears that the "clock" theory posed by Texeira and adopted by Dr. Tackett has been rejected by the present UK child sexual abuse physicians, and thus the colposcope is being used as magnification and nothing more.

A colposcope can be helpful if you are getting a second physical examination due to the fact that the instrument has a camera attached, and the pictures can be submitted to your physician for his/her analysis.

MINIMIZE SYNDROME

THE RAPE SHIELD ACT

While the rape shield act has not been of a great deal of importance in child sexual abuse cases, particular factual scenarios can make the act significant.

Two cases recently have demonstrated how the rape shield act will be used in child sexual abuse cases. In *Gilbert v. Commonwealth*, Ky., ___S.W. 2d ___ (10/24/91) (still not yet final), the court held that evidence the girl was on birth control, and evidence of prior sexual activity, were appropriately excluded under the rape shield act. On the other hand, in *Barnett v. Commonwealth*, Ky., ___S.W. 2d ___(4/9/92), the rape shield statute did not prohibit the introduction of relevant evidence of the child's frequent sexual activity with her brother where that evidence demonstrated who the perpetrator might be. The lesson of *Gilbert* and *Barnett* is that you must make the evidence truly relevant, and more probative than prejudicial.

EVIDENCE

The most harmful evidence in child sexual abuse cases is testimony regarding the child sexual abuse accommodation syndrome. It is as a result of this evidence that innocent people can be accused, and convicted if this evidence is used.

At present, the case law in Kentucky is good. However, counsel should not rest confidently. The *Herald Leader*'s "Twice Abused" series focused a good bit on the "unfairness" of the inadmissibility of this syndrome. The Attorney General's Child Abuse Task Force has already heard testimony urging the admissibility of the syndrome. Counsel must be vigilant in continuing to litigate this issue. It is a powerful and unfair tool in the hands of the prosecutor. It provides a ready explanation for recantation. It explains the failure to come forward. It explains whatever emotional incongruence exists.

It explains the child's failure to perceive. It explains inconsistent statements. It can never be used for the defendant. That is, if the child does not exhibit signs of the sexual abuse accommodation syndrome, an expert who believes in it will not say that that is positive evidence that abuse did not occur.

Counsel needs to know the case law, and to continue to fight the admissibility of the syndrome in whatever form it is offered. A selective review of this case law follows:

1. In *Hampton v. Commonwealth*, Ky., 666 S. W. 2d 737 (1984), the Court held that evidence by a social worker that based upon the defendant's psychological development he "would not have become involved" with a child was not admissible because the witness was not qualified to state that opinion, and because the opinion invaded the province of the jury. By holding that the defendant has no right to put on a mental state expert to say that the defendant's psychological profile did not fit that of a sex offender, the Court set up its later holdings finding the sexual abuse accommodation syndrome inadmissible.

a. *Pendleton v. Commonwealth*, Ky., 685 S. W. 2d 549 (1985). This case was consistent with *Hampton*.

b. *Dyer v. Commonwealth*, Ky., 816 S.W. 2d 647 (1991). The Court held that evidence that an accused had the profile of a pedophile was inadmissible. Here the testimony was given by a police officer. "Profile evidence and argument to establish the accused as a pedophile, as a person with a propensity to sexually molest children, is but the opposite side of a coin stamped on the other side 'child sexual abuse accommodation syndrome.'" (653).

2. *Bussey v. Commonwealth*, Ky., 697 S. W. 2d 139 (1985). The Court held that the prosector failed to establish that the child abuse accommodation syndrome was "a generally accepted medical concept", and thus its admission was error.

8. *Lantrip v. Commonwealth*, Ky., 713 S. W. 2d 816 (1986). Held that under the circumstances of this case, it was error to allow a masters level social worker to testify that a child exhibited symptoms of the child abuse accommodation syndrome. The case states that there was no evidence that the syndrome "has attained a scientific acceptance or credibility among clinical psychologists or psychiatrists", and goes on to state that there is a question regarding whether nonabused children also exhibit the symptoms of the syndrome.

4. *Onwan v. Commonwealth*, Ky. App., 728 S. W. 2d 536 (1987). The Court allowed a social worker to testify that "the victim's upset behavior during her questioning of the victim was consistent with that of a sexually abused child". No specific mention was made of the child abuse accommodation syndrome.

5. *Hardy v. Commonwealth*, Ky., 719 S. W. 2d 727 (1986). Here the Court allowed two psychologists to describe the victim as bright, as having an IQ of 126, and to say the prognosis was good if the victim were treated in an accepting and supportive way. This is a good example of creative methods for getting in syndrome evidence without calling it a syndrome.

6. *Hester v. Commonwealth*, Ky., 734 S.W. 2d 457 (1987). Here the Court rejected a family sociologist's testimony which tried to evade *Bussey* and *Lantrip* and *Mitchell*.

7. *Mitchell v. Commonwealth*, Ky., 777 S. W. 2d 930 (1989). The Court expressed frustration over the continuation of attempts by prosecutors to have this evidence admitted. "We hold that the testimony concerning the so-called child sexual abuse accommodation syndrome was erroneously admitted into evidence because: (1) there was no medical testimony that the syndrome is a generally accepted medical concept, and (2) the testimony had no substantial relevance to the issue of the appellant's guilt or innocence." *Id.*, at 933.

8. *Brown v. Commonwealth*, Ky., 812 S.W. 2d 502 (1991). Here, a social worker testified that the victim's behavior was "consistent with abuse". The Court held that this testimony was an attempt to admit evidence of the sexual abuse accommodation syndrome, and that it was reversible error. To make it quite clear, the Court overruled *Onwan v. Commonwealth*, Ky. App., 728 S.W. 2d 536 (1987).

9. The most recent word: *Hellstrom v. Commonwealth*, Ky., ___S. W. 2d.___(1/16/92). The Court would not allow an expert to testify regarding the different facets of the child abuse accommodation syndrome without labeling it to be a syndrome. The testimony was ruled inadmissible. The Court stated that a social worker is not qualified to state an opinion on this, and further held that she invaded the province of the jury by testifying to the ultimate fact.

10. *Hall v. State*, 692 S.W. 2d 769 (Ark. 1985). Here an expert's testimony regarding the "dynamics" of child sex abuse cases was held to be inadmissible. Here the expert stated that in these cases the perpetrator is often known to the child, the child is told not to tell the truth, it often occurs at home, and the defendant is often drunk.

PRIOR BAD ACTS

In *Pendleton v. Commonwealth*, Ky., 685 S. W. 2d 549 (1985), the Court held that prior bad acts cannot be admitted to prove a "lustful inclination". To be admitted, the acts must be "similar to that charged and not too remote in time provided the acts are relevant to prove intent, motive or a common plan or pattern of activity. This was followed in *Lantrip v. Commonwealth*, Ky., 713 S. W. 2d 816 (1986).

However, prior bad acts can still come in under other theories. In *Anastasi v. Commonwealth*, Ky., 754 S.W. 2d 860 (1988), the Court approved the admission of an anal sodomy of a fourteen year old boy eight years prior to trial, rejecting a remoteness claim. The sodomy, and other similar acts, "establish such similarity between the charged and uncharged crimes as to show a pattern of conduct which renders evidence of the occurrence of the uncharged crimes admissible.

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THE CHILD ABUSE FAD

Child abuse is one of the most despicable of all crimes. But if anything can make it worse, it is having it become a fad issue among deep thinkers.

Many tragedies revolve around child abuse - tragedies in the very real sense of agonizing situations with no real solution, but only trade-offs that can salvage something from the wreckage.

If authorities don't act quickly and decisively, there can be irreparable damage. But if they act too hastily, without really knowing what is going on, they can disrupt innocent families, smear the reputations of decent individuals, or needlessly destroy the trust on which the child's own well-being depends.

Deep thinkers aren't into tragedies and trade-offs. Deep thinkers are going to find "solutions" - whether they exist or not.

Even when the child has clearly been abused - bruises, broken bones, cigarette burns, etc. - deep thinkers have a solution: Put the parents in therapy. This is a faith which passeth all understanding. There is no hard evidence that it works. Meanwhile, children and infants are put back into the hands of rotten people who belong in jail.

California is one of the states mesmerized by rhetoric into letting people off the hook after they have done horrible and disgusting things to children and even babies.

Through the magic of psychotherapy and social workers visiting the house occasionally, families are "kept together." How does the reality compare with the rhetoric?

As so often happens, one of the leading exponents of this experimental program has been given the job of evaluating whether it is a success. After more than a million dollars worth of research money was spent, Professor Michael Wald of the Stanford Law School produced his report. The bottom line was: We don't know.

Professor Wald was more honest than many others in a similar position. He said the research "raises some questions about the desirability of the current approach."

Too late now, Mike. The experimental program, which began in a little San Mateo county, has spread like wildfire across the state of California. It has been made a model for federal legislation.

At the other extreme, when there is only a suspicion of child abuse, without any real evidence, there is the same headlong rush to judgment.

Deep thinkers have set up the dogma that little children don't lie about such things. In one case, however, the child not only lied but faked the evidence - which chemical analysis showed to be ink from a red marking pen instead of blood.

Parents in bitter divorce cases have been known to accuse each other of child abuse - and to either pressure or mislead the child into false statements.

But the biggest tragedy comes when politics hypes the pressure for authorities to find child abuse, and puts big bucks in the hands of the social work establishment for dealing with it.

Once the authorities get your child in their clutches, however flimsy the reason, they've got you in their clutches. You've got to play along with the therapy if you want to have your own flesh and blood back in your home again. You may be pressured to "admit" things that never happened, just so the authorities' records look good.

How flimsy can the evidence be? One Colorado couple had their daughter held for months because she was so unusually small for her age that neglect was suspected. Her mother and her grandfather were less than 5 feet tall when fully grown.

In a Minnesota case, a couple lost custody of their children for several months on the testimony of a man arrested for child molestation. He had made a deal with the prosecutor to implicate others. The fact that such deals have been a great source of perjury down through history apparently did not bother the prosecutor. Neither did the children's steadfast denials, nor a doctor's report that failed to corroborate the charges.

The problem is that once the authorities get into one of these cases, they cannot simply admit they were wrong and back off. That would open them up to lawsuits and political backlash.

The bigger problem, which reaches well beyond child abuse, is that we are too easily stampeded by loud, self-righteous groups with a vested interest in problems and "solutions." Many of the estimates so gullibly trumpeted as statistical facts by the media originate in such groups.

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KENTUCKY CASE LAW REVIEW
SEX AND OTHER THINGS

Today's news is sex and claimed sexual abuse. Death from AIDS, often sexually transmitted, "Victoria C" and the Cincinnati Bengals, or sex imposed on children at nursery school are the high visibility crimes covered by news agencies.

Much of this type of coverage has to do with people accused of living the lie. That is, they are reputable individuals of standing in the commune of society whose "dirty little secret" is now public knowledge. The public has a voracious appetite for titillation. How else do you explain the displays at the checkout of the local supermarket?

The Attorney-General has a Sexual Abuse Task Force cruising the Bluegrass with an agressive stance on prosecution. While there are guilty persons committing these depradations, I have had the occasion by experience in representing clients accused of these horrible offenses to come face to face with the truth of the following warning:

> "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."
> —Justice Louis D. Brandeis in *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, 573, 72 L. Ed. 944, 957 (1928).

A substantial way to protect your client, whether he or she be innocent or overcharged, is to know the case law applicable to the facts so that a just determination is obtained. That is the spirit of this effort.

You will notice that some of the cases are not sex crime charges. But they are cases that can be of use. They are important for other reasons which apply in all cases including sex abuse cases.

The Child Sexual Abuse Accommodation Syndrome has been the hot issue in Kentucky over the past five years. The prosecutorial preoccupation with the Child Sexual Abuse Accommodation Syndrome is matched only by the fervor of the child advocates attempting to sell a bag of goods that has serious probative deficiencies. To date our Supreme Court has wisely resisted the advances of the Commonwealth.

The behavioral characteristics cited as part of the so-called syndrome are not solely identifiable with sexual abuse to a child. The conduct or pattern of conduct can correlate to other mental conditions which do not suggest any sexual abuse and thus, so based, represent ambivalent probative value.

The cases which our Supreme Court have decided on this issue in the most recent years are assembled.

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME: (A/K/A Profile Evidence of the Child?)

The Child Sexual Abuse Accommodation Syndrome (CSAAS) as a prosecution theory has not yet been successful in Kentucky, but not for lack of effort. Most recently the testimony was given without putting the label on it. The ploy was to get the symptomatology before the jury and then have the social worker express an opinon about the presence of sexual abuse. It got by the trial court.(*See Brown, infra* and *Hellstrom, infra.)*

The recent cases dealing with the CSAAS are assembled here:

Hellstrom v. Commonwealth, KY., 825 S.W.2d 612 (1992)

Bussey v. Commonwealth, KY., 697 S.W.2d 139 (1985)

Lantrip v. Commonwealth, KY., 713 S.W.2d 816 (1986)

Mitchell v. Commonwealth, KY., 777 S.W.2d 930 (1989)

Hester v. Commonwealth, KY., 734 S.W.2d 457 (1987)

Brown v Commonwealth, KY., 812 S.W.2d 502 (1991)

HELLSTROM V. COMMONWEALTH, Ky., 825 S.W.2d 612 (1992)

The accused was convicted of First Degree Sodomy and First Degree Sexual Abuse of his adopted stepdaughter. During the trial, Lane Veltkamp, the "Have Social Worker, Will Travel" prosecution expert, testified to conclusions that the child had been traumatized and had a number of symptoms and was very much in need of treatment. She was having bad dreams, a great deal of anxiety and anger. She was distrusting of men, had a nervous stomach and nervous symptoms. He also said delayed disclosure is common in these kind of cases. He said, " [A] child who's been victimized in this way by a member of her family is afraid obviously to tell anybody about it..."The prosecutor then asked, " Did you find that to be true with respect to [C.H.'s] case? Veltkamp answered in the affirmative.

The court held Veltkamp's testimony to be hearsay and not admissible. It also held that Veltkamp is not qualified to express an opinion suggesting the child was suffering from a psychological disorder or other abnormal mental condition. (Possibly this is the end for Mr. Veltkamp but someone else will show up with the same poor quality goods).

Veltkamp's testimony served only as bolstering of the credibility of the child as to her out-of-court statements. This infringed on the province of the jury as the decider of the credibility of the witnesses.

The lessons are here: Don't let a social worker express opinions about your client's or someone else's mental health. This case says they can't.

Justice Leibson gives a lecture in the remainder of his written opinion which represents the minority view of the remaining issues in the case.

THE HEARSAY LECTURE:

FRE 803(4)

DRUMM V. COMMONWEALTH, Ky., 783 S.W.2d 380 (1990)

Dr. Kearl was a referral physician and not a treating one. Justice Liebson indicated that the trial court ought to hold a threshold hearing to determine if the medical history received and as reported by the examining physician was obtained under the conditions of the more reliable circumstances which exist in the physician-patient relationship. If that is established then the doctor can present the history received but not otherwise.

Here they did not and Justice Liebson would not have allowed Dr. Kearl to relate the hearsay furnished to him under the disguise of "medical history".

CHILD'S PICTURES AND DRAWINGS

The child had made written drawings during the investigation of the charges. The drawings portrayed various sexual acts between a man and an young child. She had put labels on parts of the anatomy depicted on the sketches and some captions explaining the pictures. The majority conceded that the admission of the evidence was error but decided it was harmless beyond a reasonable doubt.(And we trial lawyers wonder why jurors have trouble with the concept of "beyond a reasonable doubt". You needn't wonder now!)

Justice Liebson stated that the error was not cured by the child identifying the statements and explaining them while on the stand.

The evidence remains objectionable because the declarant was not subject to cross-examination at the time she made the drawings. The conditions are necessary to prevent improper influence and suggestion and to give the jury the opportunity to observe the demeanor of the witness at the time the statements or pictures are prepared. Sometimes the dangers of hearsay can only be prevented by not allowing its introduction.

BUSSEY V. COMMONWEALTH, Ky., 697 S.W.2d 139 (1985)

The court held that the CSAAS was inadmissible. Proof that the alleged characteristics of the "so-called" syndrome were possibly caused by an uncle's prior abuse made the evidence of the characteristics immaterial to Bussey. The identified characteristics identified in this case were the 1. tendency to be secretive; 2. frightened; 3. feelings of guilt.

Lustful inclination instructions are error.

LANTRIP V. COMMONWEALTH, Ky., 713 S.W.2d 816 (1986)

CSAAS has not attained scientific acceptance or credibility among clinical psychologists or psychiatrists. Even if it eventually does, the evidence of the presence of the traits would not alone suffice if the traits exist in others who are not sexually abused.

Along with that holding the court said that prior acts of improper sexual advances are not admissible to show lustful inclination and you can ask for an instruction to that effect. *See Pendleton v. Commonwealth*, KY., 685 S.W.2d 549 (1985).

HESTER V. COMMONWEALTH, Ky., 734 S.W.2d 457 (1987)

The Commonwealth called an expert (family sociologist) to testify to the jury that they should believe the "story" the children told before the trial and disbelieve the "recantation" told at trial. This boils down to the rule in Kentucky that No expert testimony can be used to resolve the ultimate issue before the jury. The court gives no insight as to how to reconcile this case with *Kroth v. Commonwealth*, KY., 737 S.W.2d 680 (1987).

I believe the difference is that *Kroth* was a drug case and thus it was politically correct (War on Drugs) to bur *Kroth* on evidence that would not otherwise measure up. That decision could have been better justified on the harmless error rule considering the amount of evidence against *Kroth*. The court would then not have had to do excessive violence to the "Ultimate Fact Rule" in *Kroth*.

MITCHELL V. COMMONWEALTH, Ky., 777 S.W.2d 930 (1989)

Social workers are not experts for purposes of directing proof relating to the CSAAS.

BROWN V. COMMONWEALTH, Ky., 812 S.W.2d 502 (1991)

Defendant was convicted of Rape First Degree and Incest with his ten year old daughter. The Supreme Court did not at this time adopt FRE 609 (Now see KRE 609 Effective July 1, 1992 which codifies *Commonwealth v. Richardson*, KY., 674 S.W.2d 517 (1984) limiting impeachment to prior felony convictions but permits the witness, if they wish, to identify the conviction).

Any prior conviction greater than ten years old would be presumed to be remote and therefore not admissible for purposes of impeachment.

Testimony by the social worker about CSAAS was not admissible even where the Commonwealth was trying to sneak it in by leaving it unnamed. The Commonwealth asked question about whether the child's behavior was consistent with abuse.

Coming down to the consideration of CSAAS the Court has not nor could it be expected to completely foreclose that the "syndrome" will never reach scientific acceptability. See *Dyer, infra*. But if it does the

inquiry will be on at least two fronts. The symptomatology will have to have precise characteristics. Secondly it will have to have some identification specifically to the accused.

You can also note that anytime the Commonwealth calls a social worker to testify, they are more likely laying the foundation for reversible error. There are few areas, if any are left, about which they can testify that is appropriate in a trial. Additionally *see Souder v. Commonwealth*, KY., 719 S.W.2d 730 (1986), *Drumm v. Commonwealth*, KY., 783 S.W.2d 380 (1990).The opinions of social workers contained in the business records do not qualify as expert testimony and are not admissible in the records and must be purged. However the children's out of court statements of child abuse were admissible under the business entries exception.

PROFILES IN COURT (NOT IN COURAGE)

Sorry to say but we defense lawyers fired the first shot in this battle and the prosecutors have been trying to ram it down the throats of our clients ever since. If you don't believe me see *Pendleton v.Commonwealth*, KY., 685 S.W.2d 549 (1985). *Pendleton* demonstrates the old Baptist adage, " Be careful for what you pray for. You may get it!".

Prosecutors recently tried to introduce the "Pedophile Profile" (Mason County *Dyer v.Commonwealth*, *infra*,) as evidence.

DYER V. COMMONWEALTH,
Ky., 816 S.W.2d 647
(1991)

Dyer was indicted and convicted for Sodomy First Degree on a male child under 12 years of age and sentenced by a Mason County jury to 20 years. The Commonwealth managed to introduce "Pedophile Profile" evidence.

The Supreme Court held that such evidence is inadmissible (consistent with *Pendleton v. Commonwealth*, supra,) in Kentucky unless:

1. the evidence bears on the mental state of the accused, and

2. there is expert testimony that the condition is a recognized scientific entity and

3. that it can be tied to the accused's mental state.

Watch out for this one. Bad things are happening federally in the area of profile evidence.

SENTENCING

SMITH V. COMMONWEALTH,
Ky., 806 S.W.2d 647
(1991)

Sentencing Issue. The accused was convicted of First Degree Rape, First Degree Sodomy, both Class A Felonies. The accused received two consecutive life sentences at the hand of the jury. The court imposed two consecutive 25 year sentences for a total of fifty years. Justice Combs said it best if you can understand it, "the statute reveals no legislative intent to create a means by which the court may impose a more onerous penalty in benignant guise".

What he really means is that the court in its excess of knowledge and zeal cannot give the accused more than the jury in its ignorance did.*Smith v. Commonwealth*, appears to me to be indicative that the trial court was protective of its own discretion and interpreted the statute most broadly. It is somewhat refreshing that the Supreme Court breathed some life into the jury system curbing the trial court's discretion in favor of the jury. This bucks the current of the General Assembly which has been doing its best to limit jury participation in court cases(ex. 1992 General Assembly bills to eliminate jury sentencing).

WILLIAMS V. COMMONWEALTH,
Ky., 810 S.W.2d 511
(1991)

The defendant may also introduce prior misdemeanor convictions at the sentencing stage, this not being the exclusive province of the prosecutor. Also *see Boone v. Commonwealth*, Ky. 780 S.W.2d 615 (1989) regarding minimum parole eligibility. Convictions were affirmed but sentence was vacated and matter remanded for sentencing.

WILLIAMS V. COMMONWEALTH,
Ky. App., 829 S.W.2d 942
(1992),

Williams sought consideration by the court under KRS 500.095 for alternative sentencing and community service.

I note in passing that when the court gets the opportunity to put a defendant in jail for a long time over letting him have the legislatively provided opportunity of rehabilitation in the community they go for the penitentiary every time. Good argument for appointing judges rather than electing them.

Here the benignant appellate court got malignant by stating that KRS 533.060(1) overrides KRS 500.095 and 533.010 to prevent the defendant from receiving alternative sentencing by virtue of the use of a firearm in the commission of an homicide where the jury probably believed that the defendant had some, but not quite enough ground to defend himself from the deceased with use of deadly force.

COMMONWEALTH V. MIXON,
Ky., 827 S.W.2d 689
(1992)

About two years ago we thought this question of how to prove prior convictions had been laid to rest in some DUI cases. Then the Supreme Court in a 5-2 decision muddies the waters again. This is a PFO prosecution and it sure would be nice if we could have some consistent rules. Apparently the court feels the prosecution is so slow witted that it needs help in holding this defendant's nose underwater.

Well! If you know its there you can be aware of it. It is apparently not required to prove the PFO that the prosecutor place certified copies (or for that matter any copies) of the prior judgments in the record. Oral testimony by the clerk is sufficient. Happy Thought! Maybe soon we will be told that we don't need a written judgment or any kind of record. It will be sufficient if someone remembered that the accused was convicted sometime in the past.

As the result of this sloppy thinking one is concerned about the consistency with KRE 410. If the burden of proof is on the Commonwealth it must lay the foundation for introduction of the conviction. The Commonwealth must also excuse noncompliance with KRE 1002 and no exception applies under KRE 1004. There seems to be a requirement to produce the certified copy under KRE 1005. The certified copy is admissible as an exception to the hearsay rule [KRE 803(22)] but still no excuse for nonproduction of the document.

If this is the law where does that leave the defendant who has no access to the NCIC computer. Since the Commonwealth is not going to introduce copies of the convictions you have no way to know whether to challenge the convictions pre-trial in a PFO proceeding. Looks like the court has just kicked you while you were down.

TRIAL OF THE CASE:

SNODGRASS V. COMMONWEALTH,
Ky., 814 S.W.2d 579
(1991)

Not an abuse of discretion to deny defendant's fifth request for a continuance (Some people like bears; some people like bulls; but... nobody likes a pig.). My first reaction when I read this case was, does the judge have some serious golfing committments, or what? This is patience to a fault.

The jury may be informed of the potential for punishment in voir dire. Also *see Shields v. Commonwealth*, Ky., 812 S.W.2d 152 (1991) and *Iles v. Commonwealth*, Ky., 455 S.W.2d 533 (1970).

WILLIAMS V. COMMONWEALTH,
Ky., 810 S.W.2d 511
(1991)

Accused was convicted of First Degree Rape, First Degree Robbery and First Degree Burglary in an attack upon an elderly woman. Mug shots are introducible for identification purposes a.) where the Commonwealth demonstrates a need for it; b.) the photos do not imply criminal record and c.) the manner of introduction does not draw particular attention to the source or implications of the photographs.

TURNER V.COMMONWEALTH,
Ky., 767 S.W.2d 557
(1989)

Accused convicted of First Degree Rape, First Degree Sexual Abuse and sentenced consecutively to twenty five years.

The victim was the appellant's four year old daughter and the evidence indicated only one incident. Based on double jeopardy, the accused could not be convicted of both First Degree Rape and Sexual Abuse in the First Degree. The conviction of Sexual Abuse First Degree was reversed. The physical contact was incidental to the accomplishment of the rape. The entire case was reversed and remanded because the trial court in its zeal refused to allow the accused an independent examination by a gynecologist in preparation for trial.

WILLIAMS V. COMMONWEALTH,
Ky. App., 829 S.W.2d 942
(1992),

Discretionary Review Denied (but should not have been) 6/17/92

Williams was convicted of Second Degree Manslaughter after making a self protection plea to the jury. During the proceedings the defendant sought the psychiatric records of the deceased but objection and a motion to quash the subpoena by Comprehensive Care were sustained based on privilege KRS 421.215. (KRE 507)

As to privilege, our Court of Appeals does not adequately deliver the goods on this brand of privilege.

There is nothing in the statute that suggests that the deceased's personal representative may assert this Psychiatrist-Patient privilege. There is likewise a significant difference in the Kentucky Rules of Evidence between this particular privilege and the other privileges which specifically state that the personal representative may interpose them.

Ironically if the deceased had lived his mental health and state of mind would have been very relevant in an assault prosecution where self defense was at issue. Those records would have been available or his doctor would have been on the stand with a few hypotheticals.

It is less than due process to allow the deceased to take to the silence of the grave the persuasive character evidence of his violent reputation under the cover of the psychotherapist-patient privilege which is of no present benefit to him. As in wills, the court allows the "dead hand to rule".

RENEER V. COMMONWEALTH,
Ky., 784 S.W.2d 182
(1990)

Accused was convicted of Sodomy First Degree and Persistent Felony Offender First Degree in one case and received a life sentence. In the other case he was convicted of possession of a controlled substance ie. morphine and marijuana and convicted as a Persistent Felony Offender in the First Degree and received twenty years. Application of the Rape Shield Law. The defendant attempting to prove consent in the face of two contrary witnesses did not get the opportunity to introduce prior sexual contact with the victim. This case also demonstrates the principle that if you keep morphine in your medicine cabinet you don't want to ask the police if you can go to the bathroom before you leave the house to go to the police station. The police had a search warrant for the morphine as well as an arrest warrant. It appears that the search warrant was defective but because the defendant asked to go to the bathroom before he left the house the police had a legitimate reason to search incident to arrest. That is when they found, so they said, the morphine. Naturally, the court justified the search as incident to arrest.

DRUMM V. COMMONWEALTH,
Ky. 783 S.W.2d 380

(1990)

The father was convicted of First Degree Rape and First Degree Sodomy of his daughter and First Degree Sodomy of his son, both infants. Mother was convicted of complicity. Convictions reversed.

1. KRS 421.355 declared unconstitutional;

2. The case initiated the departure from the distinction between treating and testifying physicians. The Court adopted FRE 803(4)[KRE 803(4)] in that statements made by the individual examined by the physician upon which he relies to make his/her diagnosis are admissible. However remember that the statements made to the doctor for purposes of his testifying still have inherent credibility questions as pointed out by former Justice Powell in *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988)

3. The opinions of social workers contained in the business records do not qualify as expert testimony and are not admissible in the records and must be purged. However the children's out of court statements of child abuse were admissible under the business entries exception.

DEAN V. COMMONWEALTH,
Ky., 777 S.W.2d 900
(1989)

This case is a blessing but contains a curse with regard to disputes between counsel and client over the defense[in this case, insanity].

The accused was convicted of Murder, First Degree Rape and First Degree Sodomy so it is a given that this is truly a capital case.

1. The accused's right to be present and to confront witnesses is personal to the accused and the defendant alone can waive it. Therefore depositions taken in the defendants absence even with his counsel's consent are ineffectual.

2. Based on the court's opinion it appears that the defendant's absence in this circumstance, if not attributable to his own misconduct, is not the subject of harmless error analysis.

3. The Commonwealth's Attorney was the example of what not to do:

a. In Cross-Examining the defendant;

b. In Final Argument; and

c. Glorification of the victim.

4. The court instructs the prosecutor on the recommended procedure for dealing with a witness at the Grand Jury who is or may be asserting a privilege.

Step 1. Bring matter to attention of Foreperson.

Step 2. The foreperson present it to the court.

Where an uncounseled witness is present who intends to assert the spousal immunity privilege, it is clearly overreaching to expect the witness to match wits with the prosecutor.

5. The use of the word recommend to the jury in regard to punishment is reversible error in a capital case.

6. The court outlines (what I believe to be an unsatisfactory) procedure where the client and counsel have a substantial disagreement over the presentation of a defense (in this case "insanity).

7. Additional definition for "extreme emotional disturbance" and "mental illness".

MUSE V. COMMONWEALTH,
Ky. App., 779 S.W.2d 229
(1989)

The unsworn pre-trial videotape statement of a twelve year old special education student implicating her step-father on two counts of Second Degree Rape was admissible under *Jett v. Commonwealth*, KY., 436 S.W.2d 788 (1969) after her sworn testimony at the trial exonerated him.

CANNON V. COMMONWEALTH,
Ky. 777 S.W.2d 591
(1989)

Defendant convicted of First Degree Rape, First Degree Sodomy, Kidnapping and Theft by Unlawful Taking and First Degree Persistent Felony Offender. Psychiatrist testified that accused suffered from an organic mental disorder despite the fact that he was unable to say with a reasonable degree of medical certainty that the defendant was insane at the time of commission of the charged crimes.

The court held that the jury should have been instructed on insanity. Apparently the court believed that Dr. Schremly's testimony overall was sufficient to submit the question of appellant's sanity or insanity to the jury despite the fact that he couldn't say yes or no to the specific opinion question asked.

SANBORN V. COMMONWEALTH,
Ky., 754 S.W.2d 534
(1988)

The case shows how bad a prosecutor can get. Later the activities surrounding the representations made to the court about erased voice recording tapes got the prosecutor a suspension from practice for 59 days. *Kentucky Bar Association v. Bruce Hamilton*, KY., 819 S.W.2d 726 (1991). But if you as a defense lawyer had done the same acts you would have been disbarred.

The crime itself was heinous. The prosecution's pursuit of conviction followed in the same vein.

The case was reversed and remanded for a new trial on the charges of Murder, Rape in the First Degree, Sodomy in the First Degree and Kidnapping.

Some days before the trial the judge gave the jurors a list of questions that he would use in voir dire. The court held that this was error.

It is error for the prosecutor to intentionally erase tape recorded statements of witnesses. There is no investigative hearsay exception to the hearsay rule in Kentucky (nor under the new rules).

Hereafter follows the list of prosecutorial indiscretions in the case:

1. The prosecutor said he erased tape recorded statements of four witnesses(much later and after this appeal, it was found that the tapes were not erased) in anticipation of the court's ruling because he was aware that the court routinely ordered disclosure some ten to twelve days before trial.

2. The Commonwealth's Attorney furnished his own written version of the tape recorded statement of the defendant to the jury contemporaneously with the tape being played back for the jury.

3. Extensive use of testimony by three police officers recounting what witnesses who did not testify told them(termed investigative hearsay).

4. Excessive parade of family members to elicit sympathy for the victim;

5. Intentional and malicious effort to ridicule and demean defense counsel.

6. Attempts to intimidate defense counsel.

7. When cross-examining a defense expert the prosecutor asked " And that's what you want the court to direct Henry County to pay you."

8. The prosecutor improperly defined reasonable doubt to the jury;

9. The "you can turn him loose" argument;

10. Prosecutor argued the defendant was hiding behind "secret defenses" because the defense had successfully prevented the introduction of certain prosecution exhibits.

11. Defendant called " black dog of night ", "monster", "coyote that roamed the road at night hunting women to use this knife on", "wolf".

12. Many prosecutorial misstatements of the evidence and the law.

13. Introduction of excessive rebuttal to a comment that the defendant was a "peace lover" where the comment was brief and not responsive to the question put.

WAGER V. COMMONWEALTH,
Ky., 751 S.W.2d 28
(1988)

Subtitle: The Commonwealth Can't Sandbag You.

Another Rebuttal Evidence case. The defendant was convicted of Rape First Degree, Assault Second Degree, Burglary First Degree and Persistent Felony Offender. The Commonwealth in rebuttal introduced a witness regarding the accused's confessions alleged to have been made to the witness while both were in jail.

The witness was placed onto the stand after the defendant put on his case. The nature of the witness' testimony was that the accused made a statement which was corroborative of the offense charged.

The witness had not been listed by the prosecution nor did he testify in the case in chief.

The court held that the witness' testimony was improper rebuttal. Prosecutors cannot withhold important evidence of a probative nature in the case and then introduce it in the guise of rebuttal evidence.

The detective also testified about the victim's identification of the accused because the victim died two days later in the hospital. The court declined to adopt the residual hearsay exception (differs from the investigative hearsay exception).

It was error to admit an unsworn copy of a blood test into evidence as a hospital record.

It was not double jeopardy to convict the defendant of First Degree Rape and Second Degree Assault.

DISCOVERY:

MOUNCE V. COMMONWEALTH,
Ky., 795 S.W.2d 375
(1991)

Accused was convicted of First Degree Sodomy and Sex Abuse in the First Degree of his two thirteen year old step daughters. He received 15 years and 5 years consecutively for a total of twenty years. The Commonwealth did not object to a discovery request and order, continuing in nature, requiring the production of reports from CHR and social workers. On the morning of trial a report was disclosed which indicated that the complaining witnesses had made inconsistent assertions. The court held that the report fell within the discovery order. When the defense counsel attempted to recall witnesses to provide a foundation for impeachment the trial court refused and the Supreme Court said this was error. The court did not care whether the report was not discoverable since in this case the Commonwealth first of all had already agreed to produce and furthermore the court held in this case that IMPEACHMENT EVIDENCE MUST BE DISCLOSED AS BRADY MATERIAL and cited *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). The court also held that the mother's testimony about what her daughters told her some one to twenty-three days later is inadmissible. In effect, recent case law including *Mounce* seem to indicate that the kids have got to testify in Kentucky.

POST CONVICTION RELIEF:

BROWN V. COMMONWEALTH,
Ky., 788 S.W.2d 500
(1990)

Accused convicted of Rape First Degree. All of his appeals affirm the conviction. This is an appeal from a denial of post-conviction relief. The court held that issues decided on direct appeal are not the proper subject of post conviction relief motions.

COMMONWEALTH V. BASNIGHT,
Ky. App., 770 S.W.2d 231
(1989)

Post Trial and Post - Conviction relief.

Basnight was convicted of Sodomy, Sexual Abuse and Distribution of Obscene Matter to a minor. The related civil action was dismissed because of lack of affirmative proof of penetration. This was a different version from the evidence introduced in the criminal trial. The court

held that the directed verdict in the civil case afforded no basis for relief from the judgment in the criminal matter under R.Cr. 11.42. See the Governor.

APPEALS:

COMMONWEALTH V. WASSON,
Ky. App., 785 S.W.2d 67
(1990)

The County Attorney may pursue an appeal of the District Court determination that a statute is unconstitutional without prior approval of the Attorney General.

PRESERVATION OF ERROR FOR APPELLATE REVIEW:

CAUDILL V. COMMONWEALTH,
Ky. 777 S.W.2d 924
(1989)

Accused convicted of First Degree Sodomy claimed that his attorney should have been permitted to more deeply inquire into his wife's motivations in suddenly reporting a crime after a year of on-going abuse. The defendant failed to make the necessary avowal containing any questions and answers between the witness and the counsel for the accused and the Supreme Court said that without this necessary information they could not make a determination as to whether or not you were abused. Furthermore the court held that if there was an error it was harmless because the defendant did not deny the act nor assert any defense of consent and the victim testified. (Whatever happened to the Privilege against Self Incrimination and the Presumption of Innocence ?)

Note: What do you do if the judge doesn't let you make an avowal? Just make sure that the refusal is on the record. It's reversible error for the court to refuse the avowal.

PENAL CODE CONSTRUCTION:

PIERCE V. COMMONWEALTH,
Ky. 777 S.W.2d 926
(1989)

The City Home Rule Law does not permit the cities to rewrite the Penal Code.

WOMBLES V. COMMONWEALTH,
Ky.,831 S.W.2d 172
(1992)

Incest is not a lesser included offense of Rape First Degree nor is it an offense included in Rape since incest includes elements of offense not included in Rape.

What might be interesting is the argument that the legislature had created the crime of incest so that family members are not prosecuted for the more serious offense but rather for the crime of Incest (Rule of Lenity or more specifically that the more specifically defined crime controls the more general?)

PLEAS:

COMMONWEALTH V. COREY,
Ky., 826 S.W.2d 319
(1992)

IMPORTANT CASE IF IT MEANS WHAT IT SAYS

Plea bargaining and the roles of the Judge, Prosecutor and defense counsel are discussed. The underlying case is a capital murder case. The matter is before the Supreme Court on transfer from the Court of Appeals. The issue revolves around the interlocutory order of Judge Ken Corey relating to guilty pleas by the defendants in this case at the Jefferson Circuit Court.

The judge noted the following problems in the case which led him to enter the order:

1.Complexity of case;

2. Thoroughness and tenacity of defense team(nice compliment).

3. Possibility of recusal due to relationship of judge to a witness in the case;

4. Lengthy trial.

With all these problems, the judge entered the following order:

> "[T]he defendants [should] be allowed to enter pleas pursuant to *Alford v. North Carolina* to all counts. By pleading pursuant to *Alford*, no loss of Fifth Amendment rights would result. The Court has further proposed that if death or life without parole for 25 years should be required at the sentencing phase, the defendants would be allowed to withdraw their pleas of guilty and proceed to trial by jury."

The Commonwealth objected to the procedure, preferring rather to take funds, desperately needed for indigent criminal defense, and use them rather for a useless and wasteful show trial where little more is accomplished. The judge will still do the sentencing anyway.

Several rules came out of this case:

1. The defendant has an unconditional right to plead to the crime charged in the indictment including use of the widely utilized procedural device called an *Alford* Plea if he believes it to be in his interest.(*ie.* The court can't say you can't plead *Alford*).

You may have a judge that disagrees with this premise based on RCr. 8.08 which provides as follows:

> "A defendant may plead not guilty, guilty or guilty but mentally ill. The court may refuse to accept a plea of guilty or guilty but mentally ill, and shall not accept the plea without first determining that the plea is made volntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or guilty but mentally ill or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Your judge is not totally without ammunition. In *Keller v. Commonwealth*, Ky. App., 719 S.W.2d 5 (1986) the defendant was initially indicted for Wanton Murder and later in the year for DUI in Count Two of the indictment. The defendant attempted during the proceedings to enter a guilty plea on Count Two. The reason for that guilty plea was the belief that it would foreclose by Former Jeopardy the prosecution for murder.

The court refused the plea and the Court of Appeals upheld that refusal. *Cobb v. Commonwealth*, Ky. App., 821 S.W.2d 817 (1992) is a case in a similar vein.

These cases can all be reconciled without any requirement that the Supreme Court overrule *Keller* and *Cobb*.

Both *Keller* and *Cobb* involve attempts by the defendant to plead guilty to less than all of the charges contained in the entire indictment. Contrariwise, the indictees that were the subject matter about which Judge Corey was taken to task in the *Corey* case were entering a plea to allcharges in the entire indictment as it had been returned. This is a significant difference. Furthermore the Supreme Court in *Corey* said they may use the *Alford* plea. This may force the Commonwealth to be more amenable to reasonable plea bargaining since under the Kentucky Rules of Evidence, an *Alford* plea is inadmisible in civil or criminal proceedings against your client.

2.If the guilty plea has limitations to it regarding limitations on the sentence, the Commonwealth must be a party to that agreement.

3.The order in this case improperly limits the court's power to punish (the court doesn't explain why a trial court cannot limit itself within a narrower range of authorized punishments)

4.It is an invalid guilty plea under RCr. 8.08 due to its conditional nature.

As an aside the court held that the trial court might not be legally competent to make a sentencing decision based on the authority of KRS 532.050. If not, the court's rule at RCr 11.02(1) are in need of repair since the cited rule permits waiver of the Pre-sentence Investigation Report. Or do I hear echoes of a *Reneer* unconstitutional statute being another "comity of error".

The dissents in this case are quite vigorous and worth reading.

STOKER V. COMMONWEALTH,
Ky., 828 S.W.2d 619
(1992)

Sheila Davis and Ron Stoker were tried together. She was convicted of 3 counts of Sodomy First Degree, 8 counts of First Degree Criminal Abuse and 2 counts of First Degree Sexual Abuse. He was convicted of 3 counts of First Degree Rape, 3 counts of First Degree Sodomy, 3 counts of First Degree Sexual Abuse and 8 counts of First Degree Criminal Abuse and 1 count of Terroristic Threatening.

The victims were 3 daughters and a neighbor girl aged respectively 7,6,2 and 7. All of the children but the 2 year old and Ron Stoker testified. Sheila may not have testified because of the possibility of impeachment because of her murder conviction for the death of her husband even though at the time of trial it was on appeal.

During the course of the prosecution and prior to trial the Commonwealth gave to the defense the medical report on Amber (the 12 year old) which was negative on medical findings of sexual abuse. The court framed Stoker's argument to it that the Commonwealth breached its duty to provide exculpatory evidence because it had no other medical examinations performed on the other children after Amber's medical examination came back negative.

From appearances there is no indication that the defense asked for a physical examination as in *Turner v. Commonwealth*, KY., 767 S.W.2d 557 (1989).

On the facts it is unlikely that a medical examination would have revealed much and at worst only that the children were sexually abused. Certainly it would not identify the perpetrator.

The result in this case is that the Commowealth is not obligated to look for defenses for the accused (and that result is no surprise to veterans of the Criminal Injustice System).

But this crime is often a swearing contest and most often where people of age claim nonconsensual sex. If one sacrifices at the altar of consistency, the result could not be otherwise on this issue.

I do take issue with the court which said on page 626 that "The premise is both unreasonable and unworkable." If the court had a case where a burglar was caught inside the building by a K-9 team and required hospital treatment for bites and at the same time was obviously under the influence of intoxicants of some type, where is the Commonwealth's excuse not to preserve evidence by having a drug-alcohol screen performed (in the interests of justice)?

The police already know what the courts refuse to see. The constabulary can hide behind the rules to preclude the accused from preserving evidence on his own behalf when he is in custody. The hypocrisy of the rule is obvious, if applied across the board.

Stoker discusses the use of when hearsay is not hearsay evidence.

This case shows that the Supreme Court can be a sentencing court. The Supreme Court extricated the local judge from the political hotseat in his jurisdiction. The trial judge was stripped of his discretion to do the right thing (although the Supreme Court may have suspected that he still couldn't and didn't wish to see this case again) by telling the trial judge what he will do on remand.

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The following quote was left out of the April, 1992 Advocate featuring Paul F. Isaacs' resignation, due to its arrival after the Advocate was sent to the printers.

ON PAUL ISAACS' RESIGNATION

Paul's tenure with the Department was marked by his dedication and continued efforts to work within the system to reconstruct an office which was in disarray upon his arrival and to restore professionalism and a sense of pride in the Department.

SUSAN STOKLEY CLARY
Supreme Court Administrator
General Counsel
Supreme Court of Kentucky

CHILD SEX ABUSE CASES OUTSIDE KENTUCKY - A SMATTERING OF GOOD OPINIONS

Convictions Reversed Where Trial Court Erroneously Excluded Evidence And/Or Limited Cross Examination

The first two cases discussed below deal with the use of a defense expert while the latter two are concerned with limitations on cross-examination of the state's witness.

Right To Defense Expert

People v. Jones

In *People v. Jones*, 42 Cal.2d 219, 266 P.2d 38 (1954), defense counsel, arguing that what is good for the goose is good for the gander, won a victory in the California appellate courts.

By statute, California required psychiatric counseling for convicted sex offenders. The law was premised on the assumption that convicted sex offenders were sexual psychopaths in need of psychiatric treatment. Jones' counsel argued that the opposite had to also be recognized as true: *i.e.* the absence of such a disposition or diagnosis would mean an accused did not commit the charged "sex" offense.

Jones' attempt to introduce psychological evidence that he did not fit the profile of a sex offender met with resistance at trial and the evidence was excluded. The appellate court agreed with Jones' logic and reversed his conviction holding that such evidence was admissible.

Following *Jones, supra*, the California legislature enacted a statute codifying a defendant's right to introduce expert opinion evidence of "good character" to show non-commission of the charged crimes.

People v. Stoll

With the new statute in place, the California courts revisited this issue in *People v. Stoll*, 49 Cal. 3d 1136, 783 P.2d 698 (1989). In *Stoll, supra*, defense counsel attempted to introduce expert opinion evidence that the defendant showed "no possibility of deviance in her personality profile." The defendant, Grafton, was one of four co-defendants charged with numerous, varied sexual crimes with children. The expert, a clinical psychologist, evaluated Grafton using the MMPI, the MCMI (Million Clinical Multiaxial Inventory), and a clinical interview. On avowal, the psychologist stated that he was "of the professional opinion that Grafton has a normal personality function, likely has [had] throughout her lifetime, and ...is falsely charged in this matter." The psychologist clarified the last statement to mean that Grafton "has [not] engaged in the past in sexual deviancy of any kind...[and] shows no indications of deviancy in any other personality function...especially [in light of] a low indication for antisocial or aggressive behavior, I must conclude that it is unlikely...she would be involved in the events she's been charged with." *Stoll, supra*, at 705.

The appellate court reversed Grafton's conviction holding that "[s]ince the jury could not otherwise have been aware of personality traits inconsistent with such misconduct [the psychologist's] testimony had potential to assist the jury on a pertinent point." *Stoll, supra*, at 708. The court noted that the exclusion of this evidence was especially prejudicial where there was no physical evidence to corroborate the children's allegations of abuse. The appellate court noted that one child had claimed that photographs were taken of sexual activity between he and Grafton, yet no photographs were produced at trial. In addition, no medical examinations were conducted on the children.

It might be interesting to see if the same sort of assumption, *i.e.* that sex offenders are sexual psychopaths, can be proven to be the motivating force behind our sex abuse offender program run by the Kentucky Corrections Cabinet. We, too, should be entitled to the use of expert opinion evidence to convince the jury that our clients show "no possibility of deviance" in their personality profiles.

Right to Cross-Examination

Rape shield laws are generally thought to protect mature females from embarrassing and unnecessary exposure of their consensual sexual liaisons. In child sex abuse cases the prosecution relies on such statutes to prevent the defense from cross-examining children about their prior sexual experience.

In Interest of K.C.

In Interest of K.C., 582 So.2d 741 (Fla.Dist.App. 1991), the defendant, a juvenile, was charged with indecent assault upon a girl. The defendant wanted to cross-examine the girl and her seven year old brother about the victim's prior sexual experience with another boy. The medical examination of the victim revealed hymenal tears that occurred weeks to months prior to the time K.C. allegedly assaulted the girl. This previous sexual encounter that K.C. was attempting to prove through cross-examination also occurred within that time frame.

Cross-examination about the prior sexual encounter was not permitted by the juvenile court. The appellate court held that this line of questioning was not being offered to rebut chastity, but was instead relevant to K.C.'s defense and gave an explanation for the injuries that fit "within the time parameters of the medical evidence." K.C.'s conviction was reversed.

State v. Budis

In *State v. Budis*, 593 A.2d 784 (N.J. 1991), the defendant was convicted of aggravated sexual abuse of a nine year old. The nine year old's stepfather had been convicted of the same acts on his stepdaughter. These acts occurred prior to the charges being lodged against defendant.

The defendant claimed that the girl came on to him and he immediately rebuffed her. The prosecution argued in closing that there was no way the victim had knowledge of such acts to be able to "come on" to the defendant, and thus his story was not to be believed.

The defendant was not permitted to cross-examine the victim about the prior abuse by her step-father. Holding that a limited cross-examination should have been permitted the appellate court reversed Budis' conviction,

The New Jersey court directed that on retrial the defendant should first seek to elicit information about the prior abuse on cross-examination of the investigating officer. Apparently, if that proved inadequate, then the defense would have the opportunity to cross-examine the girl. Any cross-examination of the nine year old was to be limited to her recollection of the prior abuse. Finally, the jury was to be given limiting instructions that it may not consider the evidence as an attack on the girl's character. "The sole purpose of the evidence is to rebut any inference about the source of T.D.'s knowledge of sexual practices and her ability to describe or initiate sexual acts." *Budis, supra*, at 794. The opinion, itself, is a resource to the defense practitioner, packed with cites to caselaw and treatises on the issue of child sex abuse.

Convictions Reversed Where State Introduced Inadmissible Evidence

The defense of child sex abuse cases often involves an uphill battle to challenge the admissibility of hearsay, circumstantial evidence, other crimes, or plain bad character evidence. Trial and appellate courts may stretch their imaginations to find some way to make such inadmissible evidence admissible. Yet, there are occasions where appellate courts have recognized the unfairness of the resulting conviction.

State v. Ellis

In *State v. Ellis*, 820 S.W.2d 699 (Mo.App. 1991), Ellis was convicted of sexual abuse in the first degree. The alleged victim was a fifteen year old, described as illiterate, with some learning impairment.

The victim testified that he visited Ellis' Pet Store on three occasions. On the second occasion the alleged victim asked Ellis if he wanted his "thing sucked." Ellis said no. The 15 year old claimed that on the third visit, Ellis took him up to his apartment, right next to the pet store, forced the 15 year old to engage in oral sodomy and gave the boy a dollar.

Ellis testified that he was already in his apartment when the boy walked in on him. He told the boy to leave because he was afraid the teenager would steal something.

The prosecution also put on a witness who testified that he was in the pet store when the victim and the defendant returned from the apartment. This same witness told the jury that Ellis was a homosexual and that 13 to 14 years earlier, Ellis had performed oral sodomy on the witness. At the time of trial, the witness was coincidentally incarcerated for similar charges against the same 15 year old accuser.

The Missouri appellate court wrote a strident opinion rejecting the admissibility of the testimony of this witness. The court held that the issue of a defendant's homosexuality is irrelevant. The court went on to find that the prior sexual contact with a "post-pubescent" child was irrelevant. A lapse of 14 years is not "by any definition near in time." The court found that there was no common scheme, no plan, no "handprint" of the defendant.

At trial the prosecution had gone even further and introduced the victim's recorded statements to the investigating officer. The statements contained "extensive, vivid and graphic" descriptions of the victim's sodomitic activities with various men other than the defendant. The statements even described other men's attempts to have sex with the 15 year old boy's 13 year old sister!

The appellate court chastised the prosecutor's use of these statements as such evidence caused the jury to focus on the plight of the victim versus the participation of the defendant. Needless to say, the conviction was overturned.

State v. Peters

In *State v. Peters*, 479 N.W.2d 198 (Wis.App. 1991), the prosecution essentially claimed that the defense opened the door to inadmissible hearsay with defense counsel's opening statement. Peters was indicted several years after the fact for alleged sexual assault on a girl who at the time of indictment was a teenager.

In opening statement at trial, counsel told the jury that his client was not guilty. He urged the jury to listen to his client's testimony and vote accordingly.

During trial, the prosecution was permitted to admit the testimony of the alleged victim's girlfriends. The victim told her teenage classmates that she had been abused years earlier. The state claimed that the testimony was admissible as a prior consistent statement, offered to rebut an express or implied charge of recent fabrication or improper influence or motive. The trial court ruled that counsel's opening statement, essentially urging the jury to believe his client, amounted to a charge of recent fabrication.

On appeal the court held "we doubt that Peter's mere request to the jury to believe his story is necessarily a charge that J.P. is lying. However, even if it can be so construed, an allegation that a person is lying

standing alone, is not sufficient to render admissible the prior consistent statement."

On appeal the state argued in the alternative that the testimony was admissible under the residual hearsay exception. The appellate court responded that the girl's testimony was not sufficiently trustworthy for that exception to apply.

Idaho v. Wright

In *Idaho v. Wright*, __ U.S. __, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) the Supreme Court addressed this need for "particularized guarantees of trustworthiness" when incriminating statements are admitted under an exception the hearsay rule. The *Wright* Court held that evidence may be admissible under a hearsay exception that is not *firmly rooted if it possesses sufficient indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. The child's statements in Wright, supra, though made to a physician, were admitted at trial under Idaho's residual hearsay exception, not as statements made for purposes of medical diagnosis or treatment.*

Rolader v. State

The Georgia appellate court relied upon *Idaho v. Wright*, __ U.S. __, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) to reverse the convictions of the appellant in *Rolader v. State*, 413 S.E.2d 752 (Ga.App. 1991) because of hearsay evidence that lacked trustworthiness. Rolader was convicted of aggravated sodomy, aggravated child molestation and simple child molestation, all involving his four-and-one-half-year-old daughter.

At trial the prosecution introduced two videotaped interviews of the child that were conducted prior to trial. The statements were introduced pursuant to OCGA §24-3-16, "[a] statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient *indicia* of reliability." The child was "available to testify" during trial, but was not called by either party.

The first of the two taped interviews took place nine days after the alleged occurrence under investigation. During that period, the child had been questioned about the incident by several adults, including the police officer who conducted the interview.

The second interview took place three months after the alleged incident. The interviewer was a social worker employed by a private nonprofit organization. The social worker described herself as a "child therapist" specializing in child abuse and testified that the mission of the center where she worked was to assist the police in their investigation of child sexual abuse, to help prepare children for court testimony, and to provide free psychotherapy to sexually abused children and their families. "*Rolader, supra, at 755.*

The *Rolader* court quoted *Wright, supra*, 110 S.Ct. at 3152. "It is possible that '(i)f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness. '"The appellate court went on to hold:

> Considering the totality of the circumstances surrounding these two interviews, we are simply unable to discern such "particularized guarantees of trustworthiness" as would obviate the appellant's Confrontation Clause objection. Accordingly, we are constrained to hold that the trial court erred in admitting this evidence. *Rolader, supra*, at 758.

Wright, supra, was followed by *White v. Illinois*, 502 U.S. ___, 112 S.Ct. 736, 116 L.Ed.2d 848. In *White*, the Supreme Court decided that an unavailability showing is not required before admitting statements that satisfy hearsay exceptions for spontaneous declarations and statements made for medical diagnosis and treatment, which the Court indicated are firmly rooted hearsay exceptions. The Georgia statute referred to in *Rolader, supra*, did not require a finding of unavailability. See OCGA §24-3-16.(1)

After *White, supra*, it is not clear whether the unavailability requirement is applicable to exceptions that are not firmly rooted. The narrow holding of *White* applied only to spontaneous declarations and statements made for medical treatment or diagnosis, although the Supreme Court further indicated that if a statement satisfies a firmly rooted exception, it satisfies the Confrontation Clause.

Martin v. State

The Texas Court of Appeals in *Martin v. State*, 819 S.W.2d 552 (Tx.Ct.App. 1991) rendered an opinion that is reminiscent of some cases out of our own jurisdiction. The supervisor of the Texas Department of Human Services interviewed the child victim in this case. During the course of her testimony at trial, the supervisor was asked, "How did you characterize the particular case of abuse?" She responded, "Well, she gave me a lot of information. I felt she was telling the truth and that she was a victim." At the conclusion of her testimony the supervisor stated, "I believe the child was a victim of abuse." *Martin, supra at 555.*

The state argued on appeal that even if the testimony constituted bolstering it did so only with respect to the complainant's statement that she was abused, not with respect to the statement that the defendant did the abuse. The appellate court disagreed, "It is illogical to conclude that the jury would somehow limit this message to the fact that the complainant was abused and yet, not determine that that complainant was being truthful with respect to her identification of the defendant." *Martin, supra at 556.*

State v. Reeder

Finally in *State v. Reeder*, 413 S.E.2d 580 (N.C.App. 1992) the defendant was convicted of first degree sexual abuse and indecent liberties with children. The prosecution introduced a written medical report under the business records exception to the hearsay rule. The medical report was based on the medical examination conducted a year after the alleged abuse. The report indicated that the victim told the doctor, "[Defendant] messed with my bottom but I cannot remember what he did." The doctor noted in the report of a scar on the child's rectum, and "no history of pinworms or constipation." In conclusion, the doctor wrote "This could be definitely post-sodomy." He proceeded with written orders to have the lab do testing for, "Serology and AIDS." All of this writing came into evidence. The North Carolina appellate court held that this testimony, in addition to being hearsay on hearsay, contained irrelevant, and highly prejudicial material which should never have gone to the jury. Reeder's conviction was reversed.

Though most of us find it difficult to contend with child sex abuse cases, they provide us with the opportunity to use our skills as advocates. In this highly volatile and emotional arena, appellate courts have demonstrated incredible professionalism and restraint by evaluating the proof in a critical and professional manner.

In every case discussed in this smattering of opinions from other states, trial counsel fought vigorously for his or her client. The errors were preserved. Trial counsel placed excluded evidence in the record by avowal. This type of preservation and attention to detail is essential if we are to give our clients the kind of representation to which they are entitled under our state and federal constitutions.

(1) Courts that have required a showing of unavailability in child abuse cases include: *State v. Allen*, 755 P.2d 1153 (Ariz. 1988); *People v. Diefender*, Fer., 784 P.2d 741 (Col. 1989) (*en banc*); *En Re Tina K.*, 568 A.2d 2310 (Pa.Super.Ct. 1989); *State v. Sorenson*, 449 N.W.2d 280 (Wis.Ct.App. 1989). Though many statutory child abuse exceptions require a finding of unavailability if the child does not testify, several statutes do not. See *D. Whitcomb*, When the Victim is a Child: Issues for Judges and Prosecutors, National Institute of Justice (2d.ed).

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GARY JOHNSON RETIRES DUE TO ILL HEALTH

On October 17, 1992, forty-two friends, co-workers, and fellow attorneys gathered in Lexington to honor Gary Johnson on the occasion of his October 9, 1992 retirement from the Department of Public Advocacy due to continued health problems. Gary has a deteriorating heredity cardiovascular disease.

Neal Walker, Gary's closest friend, formerly a lawyer with the Department of Public Advocacy, now a lawyer with the Loyola Death Penalty Resource Center, New Orleans, Louisiana, was the master of ceremonies.

From generous donations Gary was presented with a walnut clock, with the inscription: "Working as a public defender requires a unique commitment— a commitment to advocate in the face of mundane inhumanity, a commitment to working for the benefit of the faceless and often the nameless, a deep and abiding concern for those who are the least among us, and a commitment to breathe new life into a system of constitutional guarantees dead as platitudes, about to be overcome by numbers, neglect and numbness."- Gary Johnson, 1989 —We at the Department of Public Advocacy honor Gary Johnson, Assistant Public Advocate, for his service, dedication and unrelenting advocacy for indigent defendants in the State of Kentucky this 17th day of October, 1992. —"He would not be silenced"- Neal Walker.

Speakers at the events included **Larry Webster**, A Floyd Co. Lawyer, **Kevin McNally , Gail Robinson**, both formerly with the Department of Public Advocacy, now Frankfort lawyers **David Murrell**, fomerly with the Department, now a Louisville Lawyer, and **Ned Pillersdorf**, a former Assistant Public Advocate, now private Floyd County lawyer.

Sending their well-wishes by the miracle of fax were former Kentuckians, and nationally known capital defense lawyers, **Steve Bright**, with the Southern Center for Human Rights,: "Gary— You remain the only lawyer I know who litigated so vigorously that you occasionally found yourself looking down the barrel of a gun held by the opposing party— some people just don't appreciate a good cross-examination."

Dick Burr with the NAACP Legal Defense and Educational Fund, Inc., New York: "Gary represents the finest that we can be as lawyers— people whose warmth, whose charity, whose sensitivity, and whose heart inform and drive their passionate and compassionate defense of the poor and forgotten people of this nation." and

Steve Mirkin, with the Louisville office, the lucky recipient of World Series tickets: "Gary— we're all better advocates for having been exposed to you, and for having learned from and been inspired by you."

Gary worked as an administrative intern for the Department in 1973. He continued to work at the Department during law school. He left the office briefly, but returned to the office after his 1984 heart attack. He decided if he was lucky enough to have some time left, he was going to use it to work on something he believed in- public defender work. He worked as a trial lawyer in Hazard and Morehead. Upon his doctor's advice, he worked in the Frankfort office as an appellate lawyer.

Gary said in a 1991 interview that a good public defender "is sensitive to the fallibility of human nature, has a healthy mistrust of the power of government to be fair, and is willing to take personal and professional risks on the behalf of others." He advised young lawyers to be unconventional in their approach to cases.

On November 1, 1992, Gary and his wife, Judy Lucas, moved to Mud Creek in Floyd County.

THE MEDICAL EVALUATION OF POSSIBLE SEXUAL ABUSE

The evaluation of child sexual abuse requires a multi-disciplinary approach. The physical examination with special attention to the ano-genital area is an important component of the evaluation process. Such an examination should be conducted by a physician who has a clear understanding of normal prepubertal and pubertal ano-genital anatomy.

One purpose of the examination is to determine if there is evidence of injury to the child or evidence of a sexually transmitted disease. When cases in which the examination is accomplished within 48 hours of an abusive contact, it may be possible to collect forensic evidence (*e.g.*, blood or semen). Another important purpose of the physical exam is to reassure children. Sexually abused children often worry that they have been damaged and/or disfigured by the abuse. Medical personnel can often be very reassuring as they let the child know the exam is normal or explain the nature and significance of any lesions or injuries present.

MEDICAL HISTORY

As in all physician-patient interactions, a history should be taken from the child, if possible. This is usually done prior to the physical exam and also serves as a time that the physician can thoroughly explain the examination process to the child. Whenever possible this interview should be conducted in private, without the parent or guardian present. The physician should try to obtain information from the child as to any symptoms or problems they may have had, especially as it relates to the ano-genital area. Information as to the nature of any abuse or injury should be sought, asking questions in a non-leading fashion. Physicians should be careful to avoid demonstrations of shock or disbelief, as this may discourage a child from continuing in his or her description of abuse.

Children should be encourage to use their own words to describe what happened. Physicians may need to clarify with the child what certain words actually mean. (For example, if a child uses the word "toot-toot" for a part of her body, the physician should ask the child to point to where her "toot-toot" is.) When recording the history into the medical record, physicians are advised to use the child's terminology whenever possible.

A history should also be taken from the parent or guardian. This should include a thorough review of systems for the child, including questions as to behavioral symptoms. It is our routine to take the history from the parent after the physical examination has been completed.

Physical Examination

The physical examination should be done in as gentle a way as possible. The ano-genital exam is not painful and can generally be accomplished with minimal or no discomfort to the child. Nevertheless, some children will be apprehensive about the exam and fearful that they will be hurt. A thorough explanation by the physician, allowing the child to see any instruments that will be used, usually serves to reassure the child that the exam is not traumatic. In addition it is helpful to allow the child to have a supportive adult in the room with her during the exam.

No child should be forcibly examined against his or her will. The desire to document medical evidence of abuse must never override sound medical judgement or compassionate care giving. When there is a clear need to examine an uncooperative child, the physician should consider an exam under anesthesia (EUA). The indications for an EUA are virtually always medical (*e.g.*, presence of an injury which requires a careful assessment or repair).

The genital exam is always part of a complete physical examination. First, the general physical exam is done. Then, the examiner proceeds to a careful inspection of the genital area.

GENITAL EXAMINATION TECHNIQUES

Prior to the examination, the examiner should be comfortably seated and arrange for a bright source of lighting to be available in the exam room.

Positioning. Younger children are best examined while lying supine either on the exam table or in their mother's lap. Such patients are usually placed in the *"frog-leg"* position as illustrated in **figure 1**. Older children (particularly adolescents) may prefer to be examined in the conventional lithotomy position with their feet in stirrups. Both examination positions afford the examiner an excellent view of the external genitalia.

The ***prone knee-chest*** position (**figure 2**) can help clarify the anatomy of the hymen and vagina in prepubertal females. This examination position affords the examiner a clearer view into the vaginal canal. Vaginal foreign bodies, missed in the supine (frog-leg) position, are more easily found when the child is placed in the prone-knee chest position. The examiner should allow the child to relax in the prone knee-chest position for a few seconds and then apply gentle upward and lateral tension on the buttocks in order to adequately expose the hymen and vagina. It is important to remember that some children have been abused while in the knee-chest position. Accordingly, ***if a child becomes unusually distraught at being placed in this position, he or she should not be forced to continue with this part of the examination.***

Draping. In general, preadolescent girls usually do not like to be draped; however, older girls may feel more comfortable when draped. In either case, it is important to respect the child's modesty at all times.

Exposure of the female genitalia. Two standard examination techniques: ***Labial Separation and Traction*** are used to expose the female genitalia during the physical examination. Labial Separation is initially obtained by placing thumbs on the labia majora and applying gentle pressure laterally and downward (**figure 3**). Labial Traction is produced by gently grasping the labia majora and pulling them simultaneously downward and toward the examiner.

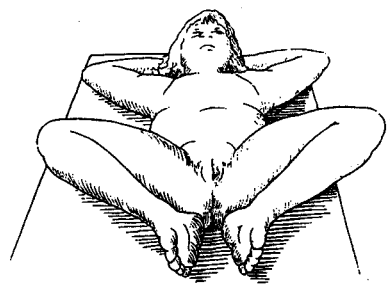
It is important to avoid creating **examination artifacts** (from distortion of the genital structures due to "heavy-handed" examination techniques) at this stage of the examination.

Examination of the external female genitalia. The examiner should document the Tanner stage of sexual development (**figure 4**) and then carefully inspect each portion of the external genitalia including the labia majora, labia minora, clitoris, fossa navicularis, posterior fourchette, and periurethral and peri-hymenal mucosal surfaces (**figure 5**); for signs of fresh or healed injury. Although the external genitalia of prepubertal children are normally quite pale and delicate in appearance, the periurethral and peri-hymenal tissues are frequently very erythematous. The presence of any genital discharge, hyperpigmentation, bruising, laceration, or scarring is abnormal and should be fully described in the medical record.

Examination of the Hymen. The hymen should be inspected closely and measurements of the vertical and horizontal dimensions of the hymenal opening should be recorded in millimeters (see **Figure 3** above). A recent study of a population of non-abused girls suggests that there is considerable variation in the configuration and dimensions of the hymenal opening. Moreover, these characteristics appear to vary substantially depending on the examination position used and the degree of relaxation achieved during the examination. Accordingly, the examiner should record the exam position and estimate the level of pelvic relaxation achieved during the examination of the hymen.

Use of Magnification during the Exam. Although the external genitalia can be examined quite well without the use of a magnification device, magnified views of the surface anatomy of the genitalia may occasionally reveal signs of physical injury which were missed during the

Figure No. 1



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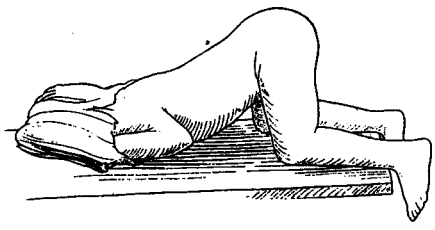

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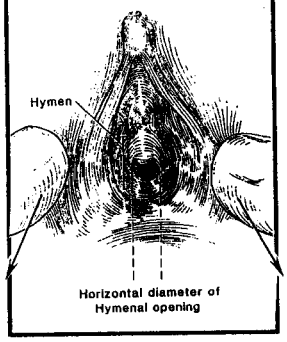


unaided examination. An *otoscope lens* or a *magnifying loop* (**Figure 6**) can be used to provide an inexpensive source of magnification for this purpose.

The *colposcope* (**Figure 7**) is a binocular magnification device used by physicians to evaluate abnormal skin growths. This instrument is also being used with increasing frequency during child sexual abuse evaluations and is particularly helpful because it provides excellent lighting as well as magnification and may be used to take high quality photographs during the examination.

During this portion of the examination, the examiner should describe both in writing and with a sketch any hymenal abnormalities such as: rounding/thickening of the hymenal edges, tears, transections, scars, adhesions, abrasions, bruises, or abnormal vascular patterns.

Vaginal Speculum Examination. Pubertal females who give a history of sexual abuse should receive a speculum examination (including a Papanicolaou smear) to look for vaginal and cervical pathology.

Examination of the Male Genitalia. Both the penis and the scrotum are potential targets of sexual abuse. A complete description of the appearance of the penis including the location of any erythema, bruising, suction marks, excoriations, burns, or skin lacerations should be noted. Tenderness of the testicles or epididymis and urethral discharge are additional physical signs which may reflect evidence of traumatic injury and/or the presence of a sexually transmitted infection.

Examination of the Anus. Anal penetration may occur without leaving any sign of physical injury. As a result, it is not unusual for the anus to have a *"normal"* appearance despite a history of anal abuse. The anal examination should be conducted with the child in the prone, knee-chest, position. Older children may be placed in the lateral decubitus or the supine position (with the knees curled up toward the chest). The examiner should first inspect the buttocks and the perianal skin for bruising, hematomas, deep fissures (off the midline), abrasions, lacerations, inflammation, thickening, and pigmentation changes. The anal sphincter of patients who have been sodomized may dilate abnormally during the course of the anal examination. Anal sphincter dilatation may be quantified by measuring the diameter of the anal opening after the child has been in the prone knee-chest position for two minutes or longer. Dilation greater than 20 millimeters in the midline anteroposterior diameter with gentle buttock traction, (while the patient is in the prone knee-chest position) and without the presence of stool in the rectum, is considered abnormal.[7] The tone of the anal sphincter may be assessed by eliciting the "anal wink" reflex. If there is any sign of significant anal sphincter injury, referral to an appropriate specialist may be required.

Sexually Transmitted Diseases

Although relatively few victims of child sexual abuse acquire sexually transmitted diseases (STDs), the presence of an STD in a child is strongly indicative of sexual abuse. Many sexually transmitted pathogens can also be transmitted non-sexually from mother to infant at birth. Nevertheless, transmission via sexual abuse should be considered whenever a child is found to have an STD. The American Academy of Pediatrics' recommendations regarding the diagnosis of an STD and reporting of child sexual abuse are shown in Table 1.

We routinely screened all suspected victims of child sexual abuse for both gonorrhea and chlamydia during a two year period. We found that none tested positive for gonorrhea, while 9% tested positive for chlamydia. As a result, we continue to collect routine cultures for chlamydia from the throat, rectum and genital tract. (Cultures are collected with a saline-soaked sterile calgi-swab. The tip of this swab is much smaller than a standard cotton swab and therefore causes less discomfort to the child.) However, we now obtain gonorrhea cultures only from those children presenting with symptoms (such as a vaginal or urethral discharge) or with a history which places him or her at higher risk (*e.g.*, the suspected perpetrator is known to have gonorrhea or another victim has been found to have the disease).

It is important also to note that rapid antigen tests are not reliable for use in child abuse evaluations. Accordingly, cultures are the preferred method of screening for ano-genital chlamydia infections.

Due to the low prevalence of AIDS in our area, we do not routinely test suspected victims of child sexual abuse for HIV antibodies. We obtain a serologic test for syphilis when the victim has either been assaulted by a stranger or has been found to have another STD. Tests for other STDs are performed when the physical findings suggest a specific diagnosis.

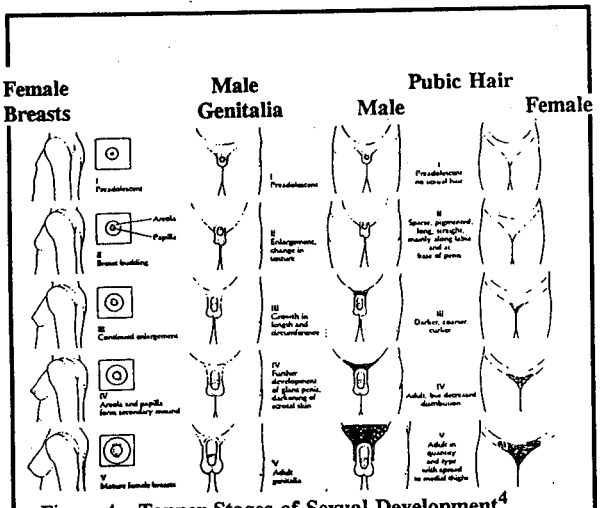
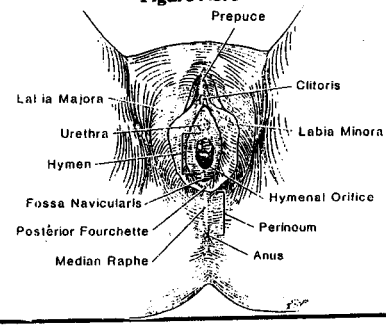


Figure 4 - **Tanner Stages of Sexual Development**[4]

Figure No. 5



As we stated at the outset, the medical examination is but one part of the evaluation of child for suspected sexual abuse, albeit an important one. The medical evaluation can provide information as to the presence of abnormal genital findings. Some of those abnormalities may be specific to traumatic injury (hymenal transection), others may be quite nonspecific (erythema of the area). There are instances in which the physical examination or laboratory results reveal abnormalities that are virtually diagnostic of sexual abuse in a child who has give no clear disclosure. However, in a majority of cases, the determination of child sexual abuse rests primarily on the child's history. Studies from clinics that medically evaluate such children report that 16-85% of the children seen have normal or nonspecific examination results[2]. A recent report on the value of a multi-disciplinary approach to the evaluation found that 44% of children assessed as moderately or highly likely to have been abused had normal exam results. As the authors of that report stated: "The value of the child's disclosure in the evaluation of alleged abuse underscores the need for professionals involved in this field to recognize the importance of the child's account, regardless of the medical evidence."

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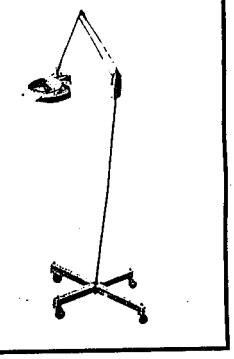
Gary W. Kearl, M.D. is a 1982 graduate of Chicago's Rush Medical College. He completed a Family Practice residency at the University of Rochester, Rochester, NY in 1985 and is Board Certified in Family Practice. Dr. Kearl came to UK as an Assistant Professor in Family Practice in 1987. He has an interest in the are of child sexual abuse. He and his colleague, Dr. Katherine Bright have co-authored "Interdisciplinary Treatment of Abused Families in Kentucky" in the Journal of the Kentucky Medical Association and a chapter in Veltkamp & Miller's Manual of Child Sexual Abuse on "The Medical Evaluation of Child Sexual Abuse" as well as a Child Sexual Abuse Manual for residency

Figure No. 6



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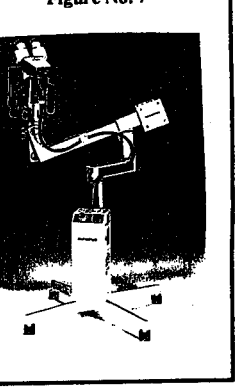

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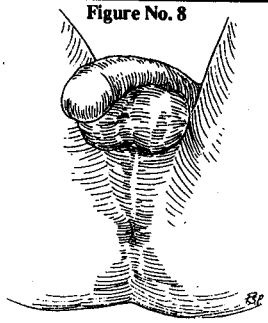

training.

Katherine L. Bright, M.D. is a 1976 graduate of the University of Kentucky College of Medicine. She completed a Pediatric residency at the University of Kentucky in 1979 and is Board Certified in Pediatrics. Dr. Bright initially practiced in Danville, KY. There, she developed an interest in the area of child abuse and neglect. She left her private practice in 1989 and rejoined the University of Kentucky as an Assistant Professor of Pediatrics and Family Practice. She and her colleague, Dr. Gary Kearl have co-authored a report "Interdisciplinary Treatment of Abused Families in Kentucky" (which was recently published in the Kentucky Medical Association Journal) and a chapter in Veltkamp and Miller's Manual of Child Sexual Abuse on the "Medical Evaluation of Sexual Abuse" as well as a Child Sexual Abuse Manual for Residency Training. She has served on a statewide committee to develop a uniform protocol for the evaluation of suspected victims of sexual abuse. She is currently serving on the Attorney General's Task Force on Child Sexual Abuse.

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STATE OF NORTH CAROLINA, Plaintiff, -vs- Defendant.) AFFIDAVIT OF T.F. NAUMANN, Ph.D. IN SUPPORT OF MOTION IN LIMINE RE: "ANATOMICALLY CORRECT" DOLLS AND EXPERT WITNESS

AFFIDAVIT

DR. T.F. NAUMANN, being first duly sworn upon oath, deposes and says:

I.

Affiant is a diplomate of the American Board of Professional Psychology, possesses a Ph.D. in psychology, is a professor of psychology at Central Washington University, and is licensed to practice psychology in the State of Washington. For over thirty years affiant has worked as a researcher and professional with children and youth.

II.

It is affiant's opinion that the so-called "anatomically correct dolls," widely used by social agencies and police, are devices which lack validity, for a number of reasons.

III.

The dolls usually used are *not* "anatomically correct" because certain aspects are disproportionately large.

IV.

The dolls totally lack scientific validity, for years, all attempts by psychologists to make dolls a reliable assessment tool have failed.

V.

Reported uses of the "anatomically correct dolls" show a disturbing ignorance of child psychology since it should be known that:

(a) young children are naturally curious, especially about new things,
(b) young children will normally touch, manipulate, and even mouth things,
(c) young children are incapable of understanding a "lie" in the adult sense,
(d) Young children's concept of justice is oriented toward satisfying adults who are "in command,"
(e) young children behave on the basis of *their* perception, rahter than by logical reasoning.

VI.

The procedure often violates basic human rights of the child by, e.g., removing all familiar psychological support.

VII.

Because there is no research to support the use of these dolls; because they are misleading caricatures of the human body; because of the innate curiosity of children and because the use of any device can be dangerous in untrained hands, these dolls have not been generally accepted in the scientific community. Opinions derived from their use are not based upon a generally accepted theory in the psychological community.

T.F. NAUMANN

SUBSCRIBED AND SWORN to before me this 19th day of February, 1986.

NOTARY PUBLIC in and for the State of Washington, residing at Yakima

the CHAMPION/Jan./Feb. 1987

Table No. 1

TABLE 1. Implications of Commonly Encountered Sexually Transmitted Diseases (STDs) for the Diagnosis and Reporting of Sexual Abuse of Prepubertal Infants and Children

STD Confirmed	Sexual Abuse	Suggested Action
Gonorrhea*	Certain	Report†
Syphilis*	Certain	Report
*Chlamydia**	Probable‡	Report
Condylomata acuminatum*	Probable	Report
Trichomonas vaginalis	Probable	Report
Herpes 1 (genital)	Possible	Report§
Herpes 2	Probable	Report
Bacterial vaginosis	Uncertain	Medical follow-up
Candida albicans	Unlikely	Medical follow-up

* If not perinatally acquired.
† To agency mandated in community to receive reports of suspected sexual abuse.
‡ Culture only reliable diagnostic method.
§ Unless there is a clear history of autoinoculation.
Prepared by the American Academy of Pediatrics Committee on Child Abuse and Neglect (November 1990).

Not all incest is intergenerational, committed by adult against child. ... [I]n Sibling Abuse: Hidden Physical, Emotional, and Sexual Trauma, Vernon R. Wiehe, Ph.D., professor of social work at the University of Kentucky, writes: "There is evidence ... that brother-sister sexual relationships may be five times as common as father-daughter incest."

...

Certainly, sibling sexual abuse is no different from other sexual abuse in that it is self-perpetrating. According to the Finkelhor study: "The role of physical and emotional abuse in childhood should not be overlooked.... Arousal to very young children may be the result of early sexual victimization."

"Incest: A Chilling Report, Lear's, February, 1992.

INDEPENDENT PHYSICAL EXAMINATION OF COMPLAINING WITNESS IN SEX ABUSE CASES; LEGAL COUNSEL FOR THE CHILD

The Independent Physical Examination of Complaining Witnesses:

The alleged victim (complaining witness) in a sexual abuse case is the single most import piece of physical evidence. Control over and access to their bodies through physical examination will often be determinative of a case's outcome. As lawyers we are not accustomed to think of living persons as objects of physical evidence, after all children aren't marked as exhibits and taken into the jury room. But where tender years and immaturity place competency, memory, language, consistency and other traditional "witness" skills of their complaining witness in doubt, the prosecution is forced to focus on the physical examination to meet it's burden of proof of showing: 1). That the abuse occurred and 2). The identity of the perpetrator.

The Juvenile Justice Code reflects the state's power to secure and keep control over this evidence (person). The Cabinet For Human Resources (CHR) and/or police may obtain search warrants to seize a child under KRS 620.040(4) when they" cannot get admission to the location of the child". The CHR may also seize the child pursuant to an emergency custody order under 620.060. Under KRS 620.050 "medical diagnostic procedures may be taken or caused to be taken, without the consent of the parent or other person exercising custodial control or supervision of the child as part of the medical evaluation or investigation of such reports". Consequently the usual case scenario presented to the defense attorney is one in which the physical examination of the child, including the taking of history, has been completed before the attorney's entry into the case.

In *Turner vs. Commonwealth*, Ky (1988) 767 S. W 2d 557 U.S. Cert Den - US -, 110 S. Ct. 260 the Kentucky Supreme Court held that a Defendant, as a matter of due process and fairness, was entitled to have an alleged four year old rape victim examined by an independent gynecologist in preparation for trial. Turner's conviction had been based primarily upon the testimony of Reva Tackett, gynecologist, as to her alleged observations with a colposcope of healed injuries to the hymenal ring at the 3, 5, 7, 9, and 11 o'clock positions and her opinion that the child had been penetrated by objects that in all likelihood were both a penis and a finger. The Supreme Court applied a balancing test utilizing the following relevant factors:

a. Age of the complainant.

b. Sexual activity of the complainant.

c. Remoteness in time.

d. Whether the State Expert's conclusion based upon a finding of physical evidence was a significant incriminating factor in the case.

e. That the physical evidence found by the State Expert was a "significant circumstance".

f. That examination by an independent expert was needed to confirm or rebut findings of injuries to the hymenal ring.

g. That examination by an independent expert was needed to confirm or rebut the conclusion of the expert that penile penetration took place.

h. That examination by an independent expert and consultation with that expert as to results would have materially assisted the defendant in his cross examination.

Although the *Turner* decision has been subject to expert criticism from prosecutors,[1] close analysis of the factual situation in that case supports the Court's conclusions. The gynecological examination did not involve treatment of recent trauma or injury to the body or any medical condition requiring immediate attention. Rather, this search with a magnifying device (colposcope) for minute healed scar tissue in the child's hymenal ring more closely approximated a ballistic examination or forensic examination. It's primary purpose was to assist the Commonwealth in it's investigation and to provide the Commonwealth with evidence in the form of an expert opinion. Those practitioners familiar with sexual abuse investigations by the Cabinet for Human Resources know that the CHR investigators currently function as quasi-police, working directly with law enforcement in multi-disciplinary teams, working for the State, and obligated to share their information with local prosecutors and police under KRS 620.030, KRS 620.040, and KRS 620.050(4). The examining gynecologists "findings", although couched as "diagnosis", were critical two the ultimate issues in the prosecution; occurrence, and causation. Moreover, the scientific basis for the State expert's conclusions and the theories supporting it are currently subject to great medical debate, in part, because of the chances of misidentification of hymenal lines as scarring, and the lack of normative comparative data based upon physical examinations of hymens of children with no history of abuse.

The major criticism against the *Turner* decision is that a second physical examination increases the child's trauma. It is argued that such examinations can be frightening, embarrassing, as traumatic as the abuse, and may pose physical risk. Why then is the state permitted unilateral power to perform such examinations to begin with? Where is the benefit to the child as opposed to the State's interest in prosecution? The issue of a second examination only arises where the State has chosen to try to seize sole control of the evidence and access to it by sending the child to their chosen expert. If the State's primary interest was in prevention of trauma to the child from such examinations, they should be avoided in the first place or delayed until after a charging decision has been made. At that point

INDEPENDENT COUNSEL FOR A CHILD IN A SEXUAL ABUSE CASE

Children who are alleged to be dependent, neglected or abused in Kentucky have the same right to in independent attorney as children alleged to have committed crimes. This is entirely appropriate. An allegedly abused child faces removal from home and family, change of school, one or more physical and mental examinations, prolonged court proceedings and testimony, and loss of rights to confidentiality and privilege in their communications, all at the hands of the State. Whether the child facing such prospects is labeled "victim" or "delinquent" the trauma and loss of freedoms may be no less severe to the child.

When the State's interest also focuses on prosecution of a perpetrator that interest can be in direct contradiction to the desires or interests of the child. It is the intervention of the criminal justice machinery into alleged abuse situations which usually transforms the child's persona, physical and mental, into a piece of evidence. The result is to have both prosecution and defense fighting over access to and control over that persona.

Under KRS 620.100(1), if a Petition of Dependency, Neglect or Abuse has been filed and is proceeding past a temporary removal hearing, the Court must inform the child of the right to appointment of private counsel. This right to have appointedcounsel and to be informed of that right by a juvenile Court also is mandated in KRS 610.060(1). There is nothing, however that prevents a child from having an attorney as soon as possible, or that prevents a parent from hiring an independent attorney for a child at first allegation or the inception of investigation. I would recommend to any parent, even one who is charged with the abuse, the hiring of such separate counsel for the child as soon as possible.

It is important to remember that any attorney filling this role as a child's attorney is not a guardian ad litem. The lawyer is the advocate and, as with any other client, must fulfill his or her ethical obligation to investigate the case, protect the client's confidences, advise the client, and present any lawful position the child desires, even if the child's wishes do not reflect what the State, the parents, or even the attorney may consider to be in the child's "best interest". An independent lawyer should be free to resist removal from the home, physical and medical examination, interrogation and questioning, or testimony in grand jury or in Court, if that is what the child, after advice, desires. An independent attorney can advise the child that consent to one physical examination may mean two physical examinations, and that certain types of counseling and questioning are not privileged. An independent attorney can help empower a child to say "no" to being used by either the defense or the State as a piece of evidence, thereby reducing or eliminating trauma inherent in a criminal prosecution.

This attorney has had the opportunity to represent children in such situations. Often the child's desires are simple: an intact family and home, an end to the abuse, security in one's living situation, privacy in one's thoughts and body, freedom to play, keeping one's friends, avoiding controversy, and financial support. Often the State's goals of finding and punishing an offender or insuring the child's physical protection are directly contradictory to these desires. The independent attorney for a child can work to put the child's agenda first; often negotiating for such things as temporary removal of the perpetrator from the home, counseling under terms of privilege for the child and the perpetrator services supporting and strengthening the family unit and aimed towards reunification, and guaranteed funds for future tuition or treatment, Court Ordered participation in treatment under KRS 610.160, child support, and/or an apology with acknowledgement of wrongdoing by the perpetrator within the family unit. In so advocating for a child I have clearly advised children of their legal rights to refuse or resist testimony or unprivileged counseling if appropriate. I have been threatened with Contempt. I have had a Judge appoint a Guardian *Ad Litem* to try to intervene into my relationship with a child client refusing to testify before a Grand Jury. I have also tried to protect children from the trauma inherent to them in a criminal prosecution. This protection can be accomplished even when the child's desire is to assist in and pursue such a prosecution. My experience is that independent counsel, particularly in intrafamily situations, can reduce adversarial conflict and promote healing in the child and the family.

When representing alleged perpetrators or non offending parents in intrafamily abuse situations I routinely recommend the immediate hiring of an independent attorney for the child, by the non-charged parent whenever possible and voluntary removal of the charged parent from the home. Although the risk always exists that the child's independent attorney will oppose me as defense counsel and assist the prosecution, that risk is one worth taking. The important result for all parties is to be pushed to recognize the child as a player with wishes to be expressed independent from the influence of involved adults off upon their own agendas.

V. Cross-Examination of the State Expert Witness.

1) Try to know the subject as well or better than their "expert" before you begin. Be thoroughly familiar with the medical reports and records *and have them indexed beforehand.*

2) You are not going to get their expert to change their opinion - so don't try. If that is the goal of your cross you will fail and the jury will perceive the failure.

3) Don't let the expert repeat direct testimony. If that's your only cross, it is better to sit down.

4) Use your cross of their expert to set up the direct of your own expert. Don't ever ask their expert to explain their answers. Rather *your* expert can explain *their* expert's answers later in a more favorable way.

5) Bring out all tests or procedures that could have been done but were not. Jurors will hold the failure to conduct a thorough investigation against the State.

6) Bring out all the things that could have been evidence of sexual abuse but *were not* found. This communicates a lack of proof to the jury.

7) Clarify terms used in the expert's direct that may have been confusing to the jury. For example some jurors might think that a negative pregnancy test means that the girl is pregnant.

8) Ask questions calling only for a "yes" or "no" answer, and preferably a "yes" answer. This communicates to the jury that their expert is agreeing with you. *Be Careful to* back up every question you ask with impeachment material (prior testimony, published articles) so that you can effectively negate an answer that is contrary to your understanding of the scientific data immediately. Don't ever ask their witness to explain a yes or no answer.

9) Consider using their expert to "open the door" for evidence you want to present on defense. For example, their expert's "yes" to the question of whether a sexually stressful incident with a peer is sometimes "traumatic" may allow you to put on evidence of the complaining witnesses sexual history.

10) If the expert is relying on medical records or hospital records use the expert to bring out everything negative about the complaining witness and/or the government's case which is contained in those records.

11) If the expert ever shows a lack of knowledge of the facts in the case or the literature, do something for emphasis (pause, repeat their answer, "you don't know that ——", instruct the witness as to the facts). If jurors believe that defense counsel or they themselves know more about the case then the state's "expert", they will discount that witness' testimony.

12) Don't be afraid to use visual aids (blackboard, overhead projector) to emphasize material favorable to you.

13) Call parts of the anatomy and sexual acts by their proper names without the slightest hesitation or embarrassment (*i.e.* hymen, labia, fellatio, cunnilingus, vaginal sexual intercourse). Practice before-hand if you need to.

14) Never refer to the complaining witness as "the victim" or "the child." Pick a descriptive term that best fits the perception of the complaining witness you wish to communicate without casting unnecessary opprobrium, *i.e.* "the complaining adolescent" or "the youth (young woman) who has brought these charges," and then repeat it over and over and over.

15) If their expert opinion is that the symptoms observed are "consisent" with the child's story, consider using the expert to admit that they are "consistent" with other possible explanations. (Be careful to have backup authority available). Also, consider the possibility of getting an admission that their opinion is not to a "certainty." (Be careful here also - hopefully you have interviewed in advance).

16) Never hesitate to stop the cross at a high point where you have gotten a valuable admission on an important point. Remember, the overall impression of the cross is more important to the jury then making one more minor point.

only one examination could be jointly performed by both prosecution and defense experts. Only in cases proceeding to trial would the child be examined and in many cases the examination would be unnecessary.

Care must be taken not to assume that *Turner* applies broadly to all situations in which the State is attempting to introduce expert testimony based upon a physical examination in a sexual abuse case. Although no specific statutory or case law authority is cited *Turner*, the facts of *Turner* would arguably bring it close to the purview of some case law from other jurisdictions. The majority rule on the issue of independent examination holds it to be within a trial court's discretion to require a witness in a criminal case to undergo an involuntary examination whenever a defendant has made a showing of a "need or reason" for the exam which is "most compelling or extreme and is substantial." This need of the defendant is balanced against the complainant's privacy interest (emotional trauma, intrusiveness or even embarrassment, intimidation, harassment, pain or discomfort). [2]

Turner would clearly be in opposition to the minority view which holds that, in absence of specific statutory authority, a trial court may not order an unwilling witness to submit to a physical examination. [3]

Counsel for the defense should therefore take great care in preparing for and presenting motions for an independent physical examination. Counsel should have a qualified and trained expert retained and should attach his/her resume to the Motion. Counsel should be prepared through deposition or testimony to put in proof supporting the necessity and value of the second examination to the defense. Under the factors cited in *Turner* the motion and hearing can be used to educate the Court as to the issues surrounding "opinions" by state experts who claim to have objective evidence of sexual abuse on physical examinations and as to the medical debate in this area.

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ENDNOTES

[1] "Requiring the Child Victim of Sexual Abuse to submit to additional gynecological Examination: A Legal and Social Analysis" Gillig, John S. (Asst. Ky. Attorney General) Kentucky Children's Rights Journal Vol II. No. 1.

[2] **MAJORITY VIEW:**

It is within a trial court's discretion to require a witness in a criminal case to undergo an involuntary physical examination but defendant must make a showing of a "need or reason" for the exam which is "most compelling or extreme": and is substantial and whether is balanced against complainant's privacy interest (emotional trauma, intrusiveness, or even then embarrassment, intimidation, harassment, pain or discomfort). Trial court's refusal will not be disturbed an appeal unless so arbitrary and capricious that no reasonable court would make such a finding.

a. California: *People v. Nokes* 183 Cal. App. 3d 468, 288 Cal Rptr 119 (1986).

b. Colorado: *People v. Chard.* Dec'd March 11, 1991, No. 89 SC 547, not released for publication, to be published if not revised or withdrawn at 808 P. 2d 351.

c. Rhode Island: *State v. Ramos* 553 A 2d 1059 (1989).

d. Alabama: *Lanton v. State* 456 So. 2d 873 (1984).

e. Florida: *State v. Farr* 558 SW. 2d 437 (1989).

f. Illinois: *State v. Glover* 49 Ill. 2d 78, 273 NE. 2d 367 (1971).

g. Louisiana: *S.J. vs. S.M.* 550 So. 2d, 918 (1989) denying further request for colposcopic examination in custody dispute.

[3] **MINORITY VIEW:**

In the absence of specific statutory authority, a trial court may not order an unwilling witness to submit to a physical examination.

A. North Carolina:

1). *State v. Joyce*, 97 N.C. App 464, 389 S.W. 2d 136 (1990).

2). *State v. Hewett*, 93 N.C. App 1, 376 S.E. 2d 467 (1988).

B. Texas:

1). *State ex rel Stephens*, 724 S.W.2d 141 (Tex. App. 1987).

HANDLING EXPERT TESTIMONY IN SEXUAL ABUSE CASES

I. Obtain full copies of all physical or mental examination reports of complaining witness or other lab test results as soon as possible:

A) Don't hesitate to call on assistance of pathologist, psychologist, physician, *etc.*, to interpret any and every part of those results.

B) Make a list *exactly* setting forth the objective evidence or symptoms *found* by the expert, for example:

a) Physically mature female (Tanner V)
b) Menstrual blood in vagina
c) Multiple hymenal tears
d) Distrustful of Adults
e) Depression
f) Aggressive Behavior
g) Manipulative Behavior

C) Make a list exactly setting forth all objective evidence or symptoms not found by the expert, for example: (using attached list of objective findings):

a) No recent trauma
b) No V.D.
c) No sperm or acid phosphatase

D) Make a list of all conclusions or diagnosis drawn from the evidence by the examiner for example:

a) "Consistent with repeated sexual intercourse"or
b) "Child sexual abuse syndrome."

E) Make a list of all further tests or examinations which could have been done but were not.

F) Research and collect literature and publications on the subject:

a) Are the conclusions of the expert suggested by the literature and/or research data?
b) Are the conclusions of the expert generally accepted by the scientific community (*Frye* test)?
c) What research exists to back up the expert's hypothesis?
d) Is there debate in the field or is there contradictory matter or theories in other publications?

G) Investigate and make a list of all other possible explanations for the objective evidence or symptoms, for example:

a) Tampon use.
b) Blow or injury to vaginal area
c) Physical abuse from mother or
d) Traumatic sexual experimentation with peers.

II. Get all possible previous recorded testimony of the prospective State's expert witnesses in your case *i.e.*: Juvenile Court hearing, Grand Jury, and *in other sex abuse cases*. It is crucial you be aware of and stop (motion *in limine*) unsolicited opinions or popular psychological generalities "children don't lie about sexual abuse," "children often don't tell about sexual abuse right away."

III. Make a list of all potential state expert witnesses and file discovery requests for information on them and so as to pin their identify down in advance.

IV. Interview the state's expert witnesses. Most state experts are quite willing to be interviewed by attorneys on both sides.

A) Refusal to be interviewed by the defense attorney can be used in cross-examination as evidence of bias, especially if the prosecutor has been allowed more than one interview.

B) Get a curriculum vitae (resume') of the State's expert. Use it to:

i) Obtain all the expert's publications for review for

(a) statements that contradict or express reservations about the opinions being expressed in your case. For example: many

studies contain caveats admitting that the author's hypothesis are preliminary and calling for further, more detailed or controlled studies in the future.

(b) Obtain lists of publications by other authors relied upon by the expert in forming their opinion in your case. Many times such other authors may write opinions, or statements that are offensive or contradictory. For example: a so-called expert, social worker once revealed to me that her opinions on adolescents' absolute "truthfulness" regarding sexual abuse were influenced, in part, by a book, "The Trouble with Rape," Carolyn Hursch, P.H.D. Nelson Hall, 1977.

Review of the book indicated that the author had personally documented 14 false rape or attempted rape reports among women over 16 and 16 false reports of rape or sexual molestation made by children under 16 (p. 84) and had concluded that the "typical" false rape reporter of this era's the early teenager (p. 86). This is important information to have on cross-examination.

(c) Learn any statement of fact or theory in what may seem offensive or ridiculous to a jury. (for example: Breast feeding fits many experts' definition of sexual abuse "because mothers experience a form of erotic pleasure.")

ii) Check the "experts" credentials or background. Has the expert raised children? How long has the expert been out of school? Is the expert licensed in their field? At what level? Does the expert belong to any associations or organizations unpopular or offensive to prospective jurors? (*i.e.* Radical Feminists, Planned Parenthood, etc.) Does the expert require supervision in his or her job? What type of practical experience does the expert claim? Has the expert done any research or published any articles or books on the subject?

C) Ask the State's expert for any information not on the curriculum vitae. Get a list of publications or authors favored or relied upon. Most "experts" will willingly direct you to literature to support their position (or that they think does so).

D) Copy any and all material in the expert's file that you can get your hands on. Find out if the expert is relying on interview notes, hospitalization records, school records, C.H.R. notes or documents, videotapes, *etc.* You may then file for discovery of these materials before trial. Be specific in discovering every source or fact to be relied upon in Court by that expert.

E) Ask the expert about any other professionals who have appeared in other trials or have published material expressing opinions contradictory to their opinion or of any research data which does not support their hypothesis.

F) Find out about other cases that the expert has appeared in (for follow-up investigation). You may be able to obtain recordings or transcripts of the expert's previous testimony in those other cases.

G) Find out the expert's agenda for the coming months. If their expert is about to take a 6 month sabbatical you may want to push for speedy trial in their absence.

V. Preparation and Examination of Defense Expert Witness

1) *Choosing an Expert*

A) Choose an expert who possesses qualities that the State's experts lack. Ideally you want an expert that:

a) Is older and presents themselves well (self assured).

b) Is used to reviewing medical records and supervising diagnosis of younger experts.

c) Is experienced and knowledgeable in the subject area and in research.

d) Has practical experience in the field.

e) Has published articles in the subject area.

f) Is associated with an institution familiar to and respected by the jury.

B) Usually this means you look first to the chair or higher ranking faculty member of a teaching hospital (University Medical Program).

C) This also means that the expert will usually be conservative in the opinions they feel can be expressed. In other words, they will be suspicious of the attempts of experts to draw scientific conclusions from observed data. They are usually the most honest witnesses as to the limitations of the abilities of gynecologists, psychiatrists, pediatrician, psychologists, *etc.* and the most demanding of supportive research data. In other words, they are not, for example, going to render an opinion that the complaining witness is lying but they will admit that the State's experts can't honestly render opinions on truthfulness. It is my opinion that this intellectual honesty is appreciated and is most effective to a jury.

D) Ask other lawyers and professionals in your area for referrals or opinions on all prospective experts. Oftentimes, your best psychological or psychiatric expert may be one that has previously testified for the prosecution in insanity cases as to the limitations of their science to evaluate past events and states of mind. If the jury knows that your opponent has previously used your expert as his expert in other cases, that expert's competence and integrity are established in their mind.

E) Also look to the authors of published articles or books supporting your position as potential witnesses. Such persons already have an interest in the subject matter.

2) *Communicating with the Expert*:

A) From first contact be absolutely honest and upfront with your potential expert about who you are, who you represent, and why you are calling.

B) Make it clear in the beginning that you are speaking to them under an attorney-client privilege and that what you say, what their opinions may be, *and the very fact that you have contacted them* is privileged information.

C) The best expert's initial response will almost always be against getting involved. That is because (choose one or more of the following):

a) Experts dislike court appearances;

b) Many experts are afraid of being identified as apologists for rapists or molesters, particularly in highly publicized trials;

c) Experts dislike testifying against their peers;

d) Experts don't understand why legal conclusions and the process leading to them differ so markedly from the scientific method of thinking;

e) Experts are busy and don't have the time;

f) Experts are wary of how they will get paid.

D) You must be prepared to address and overcome every one of these very legitimate concerns immediately in order to woo the witness. Consider the following steps to be essential:

a) Make it clear that you understand that the expert's opinions might or might not support the defense position and that you are not contacting them just to have them present an opinion that you desire. The expert will appreciate your respect for their independence and the nature of the understanding will be helpful to your case as part of your direct examination.

b) Make it clear that you and your client are not apologists for sexual abuse, that you personally condemn it (hopefully that's true), and you do not want them to serve in any such role. Rather, explain that the prosecution is planning on using so-called "experts" who are expressing questionable opinions based upon soft data or insufficient research, thereby already interjecting their field into the legal process and that their help is necessary to insure that the legal results are intellectually and scientifically honest and so that justice is served.

c) Be familiar with the subject matter beforehand and offer to provide the expert with your bibliography of publications on the subject and copies of the important articles in the field you have already accumulated. You should be doing the research anyway and it is important to instruct your expert and save them time and trouble wherever possible. Moreover you can direct your expert's attention to articles supportive of your position.

d) Indicate that their testimony can be taken if necessary, by video deposition at their convenience or that you will take steps to insure that their court appearance is scheduled so as to take as little time as possible. It has been my experience that a well done video deposition of the best expert is as or more effective than live testimony of somebody less qualified.

e) Ask them what their fees are and tell them how they will be paid and by whom. If there is insurance or any other problem with payment be honest about it. Make clear that payment is not contingent upon outcome or the opinions rendered.

f) Let them know you are prepared to go to meet with them where they work.

g) If they ask be honest in estimating the time involved.

E) If the expert turns you down you should:

a) Thank the expert and tell them that, since you have talked to them in a privileged situation, your understanding is that they would not participate in this case *for either side*. Sometimes you can reduce or eliminate the potential pool of experts for the other side this way.

b) Ask the expert for referrals.

c) Try again later and beg if necessary based upon your having tried and been unable to get anyone else or anyone else of their caliber.

3) *Preparing the Expert*:

A) Provide the expert with all the material relevant to their opinion and testimony along with a factual summary containing both the facts favorable to your case and to the prosecution.

B) Provide the expert with all your research.

C) Make an appointment to sit down with the expert to review the case after he or she has reviewed the material.

D) Check your experts basic credentials. Don't get caught with an expert who has lied about a degree.

E) Ask the witness how they will be dressed. Normally it will be just fine or, if not, they will ask for your advice. It's better to ask than be surprised at trial.

F) If they are preparing a report be clear as to what should be in it and that it should be sent to you - not to the Court.

G) Discuss trial testimony, where they will be seated, where they should look when answering questions. How to handle cross-examination and objections.

H) Outline the areas you will cover just before their testimony so that the witness is clued to your questions.

THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME: A RESPONSE TO THE CRITICS

The Child Sexual Abuse Accommodation Syndrome has become a flashpoint of controversy for those debating the problem of sexual abuse. All too often it is used by commentators to demonstrate the apparent irrationality of professionals who work with children making such allegations. The picture developed by these writers is of irrational clinicians considering every report of sexual abuse as necessarily valid despite children's inconsistencies, retractions, and denials. Furthermore, in cases where the evidence may appear weak, these writers claim that clinicians are willing to exploit the cognitive weaknesses of children by "rigging" the interview through the use of leading questions and specious non-verbal assessment techniques that compel the child to describe events that never happened, and then "advocate" for children by urging them to testify against the adults who have been targeted for prosecution. These writers suggest that since mental health professionals do not hesitate to abrogate the Constitution, they have few qualms about pushing their conclusions on the witness stand. They assert that the "accommodation syndrome" provides such clinicians the opportunity to testify in a conclusory manner by covering their prejudice with a weak theoretical construct that does not meet *Frye* standards.

The purpose of this paper is to consider the merits of the Child Sexual Abuse Accommodation Syndrome (CSAAS). In order to do so we will not try to make unreasonable claims for the CSAAS.

Neither will we dismiss it as mere prosecutorial sham. (In fact, we will argue that defense attorneys have as much to lose as prosecutors if the CSAAS is barred from the courtroom.) We will argue that the CSAAS *does* provide a valid explanation for the contradictory, post-disclosure behaviors of children who have been sexually abused. This explanation will be important for understanding children who are the Commonwealth's chief witnesses in sexual molestation cases, or adolescents and "adult children" who are tried for rape and capital murder (see Miller and Veltkamp, 1989; Seghorn *et al.*, 1987).

Definitions

In order to carefully consider the Child Sexual Abuse Accommodation Syndrome we need to understand exactly what it is and what it is not. To do this we must define several mental health terms, especially 1.) syndrome, 2.) sexually abused child syndrome, and 3.) child sexual abuse accommodation syndrome.

SYNDROME

A **syndrome** refers to a constellation of signs and symptoms (Akiskal, 1989:585). In other words, it does not describe an unbroken, etiological chain that connects organic or psychological processes with specific behavioral presentations. It is essentially a state-of-the-art working model which allows clinicians to describe events that are *probably* linked. Processes that can be traced to a proven and specific etiology and course are known as **diseases.**

SEXUALLY ABUSED CHILD SYNDROME

Some commentators have described a **sexually abused child syndrome,** which is a constellation of symptoms often found in children who have been sexually abused (Berliner and Wheeler, 1987; Whitcomb, 1992). While it is clear there is no pattern of behavioral and psychological symptoms that *automatically* prove that child sexual abuse has occurred, the sexual abuse syndrome is a clinical delineation between "low-confidence" and "high-confidence" symptoms.

For example, some of the post-traumatic signs of being sexually abused (nightmares, flashbacks, withdrawal, anxiety) may also be the sequelae of other kinds of childhood trauma (Levine and Battistoni, 1991). These symptoms are considered "low-confidence" symptoms. Because of the many permutations of post-traumatic signs that can result from different traumatic events, only a careful diagnostic work-up can help specify what kind of trauma a particular child has suffered. This kind of work-up usually verifies the presence or absence of "high-confidence" symptoms. These high-confidence symptoms include: child possesses sexual knowledge beyond developmental stage and age; child engages in highly sexualized play; child "comes on" sexually to other children and adults; child inserts objects into own genital and anal orifices; child compulsively masturbates; child sexually molests another child.

Children do not react uniformly to sexual abuse. The responses children may have to this trauma vary, because sexual abuse is a heterogenous phenomenon. Specifically, abuse can vary as to its violence, duration, and frequency. Victims vary also: Clinicians must examine how the characteristics of the molestation interact with the biopsychosocial constitution of the child, especially the child's family background (Hartman and Burgess, 1989). Rather than relying solely on a sexual abuse syndrome, clinicians use the results of a thorough, multidisciplinary diagnostic work-up as their primary data base. While the sexual abuse syndrome can help inform the clinician's inquiry, only a thorough diagnostic work-up can help the clinician make a valid assessment.

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

Unfortunately, some observers continue to confuse the CSAAS with the 'sexually abused child syndrome.' This is an extremely dangerous mistake. The CSAAS is not a diagnostic category. Summit (1983) developed the CSAAS to describe the general reactions of child sexual abuse victims. It is especially useful for helping observers understand why children may delay disclosure, provide inconsistent details, and sometimes retract. Furthermore, Summit has not described a **medical** syndrome, because he does not consider these reactions to be signs or symptoms in the usual sense. Rather, we contend that he has developed a **psychosocial** syndrome which constellates "categories" of post-disclosure reaction to sexual abuse.

Five categories constitute the CSAAS. The first three draw on the study of the dynamics of sexual abuse itself using clinical studies of perpetrators and victims. The last two describe the contradictory, post-disclosure behaviors which are predicated on the first three categories.

First, **secrecy** is the most universal and significant reaction of children to being sexually abused. Children keep sexual abuse secret because perpetrators often explicitly or implicitly threaten that any disclosure will lead to violent consequences for the child and the child's loved ones. Additionally, many children who test the waters by partial or symbolic disclosure often find themselves enduring the disbelief and anger of trusted adults. It is important to remember that in most societies secrecy is the cultural norm where sexuality— especially sexual perversion— is concerned (Herdt and Stoller, 1990).

Second, **helplessness,** characterized by feelings of betrayal and abandonment, is a common experience of sexually abused children. Powerlessness is intensified when the perpetrator is a parent, family member, or friend. After all, children are taught to accept and love relatives and friends, but to beware of strangers. When a trusted person violates these "safe" boundaries, children become extremely confused. They have been given no "map" to chart the savage, contradictory experience of being sexually molested by a beloved person. Moreover, this confusion is set in the context of the global helplessness of childhood. Violation of the expected safety zone of the family and neighborhood may force the child to radically adjust her/his understanding of self and the world. In order to gain some level of psychological coherence, the child (consciously and unconsciously) attempts to cognitively "fit" the molestation into the other dimensions of her/his life. For example, the meaning of being a "good kid" may become linked with keeping the abuse a secret and protecting the family by silently submitting to the sexual demands of the abuser— a painfully contradictory set of self-definitions for any child. For these children sexual traumatization becomes an intrinsic dimension of the self.

Third, **entrapment and accommodation** describe the process of being overpowered by an abuser with superior cognitive and physical capacities. The child feels isolated, trapped, and with little choice but to endure the abuse. Children employ many conscious and unconscious strategies to deal with the abuse in order to survive. For example, some children develop "magical" strategies, like being extremely well-behaved, in order to win adult approval which might somehow lead to the end of the abuse. Some children transform the meaning of the abuse into something that is not "bad" but "good." For example, an older child or adolescent may begin to defend against her/his experience of trauma by using The Secret to get concrete favors from the perpetrator. Other victims respond differently— they are flooded with shame and withdraw into a position of sadness and over-compliance. Again, such reactions are in response to being sexually exploited. These "coping" strategies lay the groundwork for much of the dysfunctional thinking and behavior sexual abuse survivors employ as adults.

Fourth, **delayed, conflicted, and unconvincing disclosure refers** to the uneven and segmented nature of the child's story. For many children disclosure is yet another event that is not in their control— it often occurs when the activity is uncovered by a third party. In some cases, it is disclosed when a professional intervenes after a child or teenager experiments with drug-taking, running away from home, truancy, promiscuity, and other forms of rebellion. Unfortunately, the untrained observer is likely to see any allegation emerging from these contexts as a delinquent's strategy to hurt her parents. At the other extreme, it may be discovered when a child is referred for evaluation after incidents of self-mutilation and suicidal behavior.

Many children are terrified by the consequences of disclosure and may actively work to protect the secret. As a result, the child may present as confused and ambivalent when relating the experience and the story may come out in bits and pieces across many interviews. Much also depends on the knowledge and abilities of interviewers who try to elicit the forbidden story: many children will simply not talk candidly with professionals whom they perceive as incompetent, unlikable, or untrustworthy.

Fifth, **retraction of the initial report** is common, especially when the child perceives she/he is being punished. This punishment may take many forms, including, disruption of a "stable" family situation; removal of the child to foster care away from friends and trusted family; and blame and threats from the perpetrator and those advocating for the perpetrator. Fear and guilt may push the child to retract previous statements in order to "undo" the damaging consequences unleashed by disclosure. Paradoxically, the child may choose or agree to retract and thereby suffer further abuse because it seems to be less risky than what disclosure brings.

The contemporary debate

Some defense attorneys, judges, and legal analysts in the Commonwealth of Kentucky and elsewhere protest that the CSAAS is an inadequate theory used by prosecutors and their expert witnesses to speak to the ultimate legal question of whether the child witness was sexually abused. Patton (1988:17) claims that the CSAAS "was never designed to have forensic application" and that such application produces evidence that is "unreliable and has no place in the courtroom."

These analyses tend to ground themselves in several basic premises about child sexual abuse and the clinicians who work with sexually abused children: First, sexual abuse is over-reported; second, mental health professionals believe all allegations made by children; third, the CSAAS is a theory that attempts to prove that abuse took place and an opportunity for mental health experts to testify to ultimate issues; fourth and last, the CSAAS should be forced to meet the *Frye* test, and the presence of disagreement in the medical and mental health communities indicates that it does not.

We shall address these arguments individually:

First, is child sexual abuse an over-reported phenomenon? If we want to be absolute and rigorous, we must claim that the prevalence of child sexual abuse is unknown. In order to demonstrate that sexual abuse is over-reported, we would have to know the valid rate of prevalence in the population and prove that the rate of reported abuse was higher. No one has that data. However, most researchers interested in this question concur that child sexual abuse is under-reported; specifically, the rate of reports is lower than the true rate of prevalence of sexual abuse in the population. The preponderance of epidemiological evidence drawn from clinical and general population studies indicates that this is indeed the case (Briere, 1989; Green, 1991; Hartman and Burgess, 1989; Silman, Veltkamp, and Clark, 1992).

A representative example may be helpful. Mental health investigators have found that many persons accused of serious crimes or labeled as "antisocial personalities" have never reported their history of abuse until interviewed about that possibility. Even when specifically queried about sexual and physical abuse in the context of mitigation, most defendants will minimize its occurrence, severity, and consequences: "It would seem that in many cases a combination of fear, loyalty, and shame prevents delinquent youngsters from revealing the nature and extent of abuse suffered at the hands of family members" (Lewis, *et al.*, 1989:709).

Second, do mental health professionals believe all allegations made by children? To the contrary, the contemporary clinical literature discusses strategies for distinguishing bona fide allegations from false allegations. This is often not an easy endeavor because, as we previously described, children's reactions are complex and often inconsistent. Clinicians understand that children are sometimes led into sexual abuse reports to fulfill the agenda of one of the parents, especially in malignant child-custody battles. Most clinicians are aware of this problem and work to delineate authentic from unauthentic claims. For example, Elterman and Ehrenberg (1991) document the efforts of clinicians to delineate the characteristics of probable and improbable cases of child sexual abuse; their schema has enormous clinical and heuristic value (also see Goodwin, 1989).

Statewide efforts have also emerged to meet this difficult challenge. For example, New Jersey has assembled an Advisory Board that is collaborating on a series of ranking, reliability, and validity studies to develop standards for assessing reports of sexual abuse. The working groups include mental health professionals and attorneys (Brooks and Milchman 1991). These are only two examples that demonstrate the falsity of the picture sometimes drawn of child psychotherapists.

Third, what about the claim that the CSAAS was designed to prove that abuse has occurred, or that the child in question was abused, or that the defendant was the perpetrator? We hope that we have sufficiently explained that this is not the function of the CSAAS. However, to argue that it is used in such a manner in certain courtrooms is an indictment of officers of the court, child protective service workers, and therapists unfamiliar with these important concepts. It is not a sufficient critique of the CSAAS itself.

Fourth the CSAAS explains what appears to the untrained eye as behavior associated with lying. As the Oregon Supreme Court stated in *Middleton:*

> If a complaining witness in a burglary trial, after making the initial report, denied several times before testifying at trial that the crime had happened, the jury would have good reason to doubt seriously her credibility at any time. However, in this instance we are concerned with a child who states she has been a victim of sexual abuse by a member of her family. The experts testified that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. **Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility** (294 Or. 427, P.2d 1215 [1983] at 1219-120; cited

ANATOMICALLY CORRECT DOLLS: SHOULD THEY BE USED AS A BASIS FOR EXPERT OPINION?

Two decisions by the California Supreme Court of Appeal in the spring of 1987 have made it difficult to admit evidence based on anatomically correct doll interviews with children. Here, Dr. Yates and Dr. Terr discuss arguments raised.

DR. ALAYNE YATES, M.D.: Dr. Terr and I agree on a number of issues: that information from observing the child's free play with dolls is most likely to be accurate; that trained examiners are essential; that the anatomically correct dolls should be used in conjunction with other techniques; that safeguards and a standardized approach to doll usage must be developed; and that more studies are needed to define and predict the occurrent of falsely positive and falsely negative responses. In addition, I heartily concur with Dr. Terr in her assessment of the doll's sexual apparatus. The representations range from the idiosyncratic to the absurd. When the dolls first appeared, the male genitals were diminutive and the female genitals consisted of a single, all purpose, minuscule orifice as if the manufacturer were embarrassed and afraid of offending childish sensibilities. Now the genitals have become prodigous pronouncements of a social movement in which sex is accorded a central position. However, children need not be immediately exposed to the genitalia, as the dolls do come clothed and probably should be left clad so that the child may discover at his or her own pace.

The main point of contention between Dr. Terr and myself is whether the dolls should continue to be employed, as their value has not been established. Certainly it is in the process of being established, judging by the number of child psychiatrists who employ the dolls and the studies that have been published. If we did not continue to use the dolls, this would indicate to the court that anatomical doll play was not generally accepted by the profession and therefore it could not be admissible as evidence in the court. The issue can only be resolved through the continued use, examination, and (if indicated) acceptance of the dolls. For the time being, evaluators may use the dolls but most not base their conclusions on the doll play alone. If the dolls are properly applied, they can help us to better advise the court.

DR. LENORE TERR, M.D.: Dr. Yates assumes such a balanced position on anatomically correct dolls in the courtroom that one wonders how strongly she takes the affirmative side. I will, however, dispute with her enthusiastic advocacy having these dolls in our offices. Dr. Yates says we indicate a willingness when we put these dolls in our toy cabinets to talk "sex" with children. I believe that the dolls indicate not so much a willingness as a demand.

A few years ago, the eminent psychiatrists Bernard Diamond and Martin Orne combatted the practice then prevalent in police departments to hypnotize potential witnesses. Diamond (1980) and Orne *et al.* (1985) argued that, once hypnotized, an individual could not be counted upon to tell the truth in court. The witness might instead relay suggestions that had been innocently or not-so-innocently planted during the hypnotic session. American courts eventually adopted, at least in the main, the Diamond and Orne positions to keep hypnotized witness out of the courtroom. What at first had been widely accepted as an investigative short cut eventually posed far too many shortcomings.

Today, because of the anatomically correct doll, we are learning that another sort of short cut is coming into widespread use. The demand inherent in asking a child to play with these explicit toys makes the technique, like hypnosis, far too vulnerable to suggestion to be regularly used in the court. Changes of memory in storage, "plantings" of new information into the memory system, and exposures to new visual cures may occur while the children play with anatomically correct dolls. The child, by playing, may be ruined as a witness.

Last week, I received a transcript of an anatomically correct doll interview with a 4-year-old, Viola, her mother, a protective service worker, and a policeman were present. Viola had originally alarmed her mother by telling her that Uncle Roger, the day-care director, had played "Dumbo's Trunk" with her.

> **Protective Service Worker** (showing Viola an adult male naked doll): Do you know - did you read - the story of Dumbo? Remember the long trunk? Do you see anything down here that reminds you of Dumbo's trunk? **Viola:** (coughs)
>
> **Protective Service Worker:** Do you see anything here that reminds you of Uncle Roger? **Viola:** No. That's not my blankie. **Mother:** Oh, you want your blanket?
>
> **Protective Service Worker:** Does this look like Uncle Roger? Humm? Does it look like Uncle Roger? **Viola:** (Tries to look at the doll's face). **Protective Service Worker:** Oh - *let's don't look at the face.* Do you see anything that looks like Uncle Roger *here*? (she points low on the doll's trunk). Hummmm? It's all right sweet-heart. It's all right. **Viola:** Yeah. That's mine. (She grabs her blanket.)

Several months after Viola's doll interview was taped, the child testified. She was asked to describe Uncle Roger. Her description matched the anatomically correct doll. It did not correspond to Uncle Roger.

The imagery inspired by anatomically correct dolls may be as vivid and as long-lasting as the imagery inspired by the hypnotic experience. I would rather take the chance of barring anatomically correct doll-inspired evidence from the courtroom - as hypnosis is barred - and perhaps, of losing a criminal by doing so, than the chance of allowing a "Viola" into court. Once children's testimony is spoiled by the ignorant, and perhaps unconscionable, use of the anatomically correct dolls, the testimony may not only be useless, it may be dangerous.

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in Myers, 1987:163-164; emphasis added).

The CSAAS helps the finders of fact to understand the complexity of children's responses to abuse and disclosure. Without this kind of evidence, most adults are unable to empathize with the child's perspective and see the child's account as minimally plausible. Adults have often psychologically distanced themselves from the powerlessness of their childhood; they may have never experienced the kind of childhood the victim has endured; furthermore, they may have not experienced traumatization either as a child or as an adult. These barriers need to be vigorously addressed in order to allow the finders of fact to make a fully-informed decision regarding the credibility of the child.

Fifth, if it is true that the CSAAS is not universally accepted as a meaningful construct by the entire mental health community, does it mean that it is not proper to use in the courtroom? Many laypersons are unaware that no particular theory or construct is accepted by the entire mental health community. The key dimension of *Frye* is to ferret out expert conclusions based on theories that are considered freakish by the scientific community (Hoge and Grisso 1992). Even if not all academics and clinicians accept that the CSAAS is the only way to describe the sequelae of disclosure, the majority of experts who work in the area of human abuse fully accept the components making up the CSAAS. Specifically, there is wide scientific consensus that abused children keep secrets because they are afraid; that they are groomed for and entrapped into sexual acts; that they are often threatened that disclosure will lead to harmful consequences; that they are therefore conflicted about reporting especially if the abuser is a loved one; and that they may deny and retract earlier disclosures when faced with the raw power of adult retribution and the criminal justice system (for a summary of this literature see: Briere, 1989; Carmen and Reiker, 1989; Green, 1991; Hartman and Burgess, 1989; Silman, Veltkamp, and Clark, this volume).

Even when we turn to the scientific literature investigating the propensity of children toward secret-keeping and truthfulness, we find consensus that supports the categories of the CSAAS. A recent review of experimental and clinical psychology studies on children's secret-keeping suggests that while the picture is not wholly definitive we can safely say that:

> The evidence to date suggests that children are very likely to omit incidents from their reports, at least under some circumstances. Even children old enough to be reliable in their reports, in that errors of commission are rare and they are not easily misled by misleading questioning, may well omit significant events from their reports. Inconsistencies in children's reports across interviews or interviewers, do not therefore, necessarily signal unreliability of the child's testimony. Rather, they may well indicate the child's sensitivity not only to the perceived consequences of the disclosure, but also the commitment to another not to disclose (Pipe and Goodman 1991:40).

If *Frye* demands that the conclusions of mental health experts meet the level of validity achievable by the engineering sciences, then the CSAAS fails this test. However, ...*Frye* does not mention accuracy, validity, or even 'general acceptance' of the opinion or the conclusion that the expert reaches on the basis of these theories and methods. It accepts individual, potentially idiosyncratic, conclusions by the expert who is applying generally accepted theory or method to an area of investigation or to an individual case (Hoge and Grisso, 1992:69)

Even if not every mental health professional accepts the CSAAS as the only or the best explanatory model for explaining children's responses to abuse, there is *widespread* ratification of the phenomenological picture of the sexually abused child which agrees with the categories of the CSAAS.

Unfortunately, the strategy of some commentators (*e.g.* Patton, 1988) has been to isolate the CSAAS from this larger body of mental health research and to cite controversial medical and mental health witnesses who play no viable role in the current scientific effort to study and understand human abuse. Another strategy has been to take the recognition of the existence of false allegations studied by clinicians like Green (1984, 1989) and suggest that this is proof that most reports of child sexual abuse are false. In fact, a careful reading of the clinical and research literatures reveals that in non-custody cases the base rate of accurate disclosures is 92%-94% (Elterman and Ehrenberg, 1992:273).

We find it ironic that "experts" who are often produced to exclude the CSAAS by laying the groundwork for *Frye*, do so with testimony that is not based on scientific research which could reasonably meet *Frye* standards.

THE USE AND ABUSE OF THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

We have argued that the CSAAS is an extremely useful model for explaining the perplexing behavior of many child victims and is based on mainstream clinical and scientific research. It provides the forensic clinician a concise and clear way to describe the complex responses of children to disclosure of sexual abuse. It provides the finders of fact a comprehensible model for understanding the behavior of children after disclosure of sexual abuse. When its limitations are ignored and it used as evidence that abuse has occurred or that the defendant abused a particular child, it is being misused (Levine and Battistoni, 1991; Sagatun, 1991). Such abuses have contributed to the some of the unfortunate mischaracterizations of the CSAAS.

However, we contend that the misuse of the CSAAS in some cases should not mean that it should be barred from evidence in cases where it could be properly employed. If all mental health constructs misused by prosecutors and defense attorneys were to be eliminated, what would remain? For example, the long-standing abuses of mental health testimony necessary for the insanity (non-responsibility) defense does not abrogate the utility and importance of mental health constructs like delusions, hallucinations, and disassociation (ABA, 1986:336).

Finally, we recommend that defense attorneys need to think long and hard before dismissing the importance of the CSAAS. Many persons charged with violent, felony offenses have been shaped by their traumatic response to childhood sexual abuse (Lewis, *et-al.*, 1989; Logan, 1992). In many cases the possibility of abuse histories are never explored; all too often the client's or family's reports of childhood disclosures followed by retractions are mistakenly determined to be damaging indications of the client's childhood or adolescent predisposition to criminal dissimulation. In these situations, the defense's theory of the case is weakened by not fully considering and exploring the possibility that the defendant was sexually abused. In other words, defense counsel's consistent refusal to acknowledge the phenomenological picture of post-disclosure sequelae leads to the loss of potentially important evidence. As significant as its use in child sexual abuse cases, the Child Sexual Abuse Accommodation Syndrome has an equally important role to play in explaining these complex behaviors to a jury considering the fate of defense clients— clients whose offenses may be connected to the trauma of sexual molestation.

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EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT THE PROGRAM BUT WERE AFRAID TO ASK

KENTUCKY'S SEX OFFENDER TREATMENT PROGRAM

In 1986, the Kentucky Legislature passed a bill that established the Sex Offender Treatment Program for persons who had been convicted of sexual offenses. The program began operation in 1987, and will probably affect the lives of many of our clients. This article will describe the program briefly, and reveal the pitfalls it presents for our clients and ourselves as their counsel.

THE PROGRAM

The legislation establishing the program can be found at KRS 197.400 through 197.440. The definition of a sexual offender, as set out in KRS 197.410, is extremely broad, including a person who is convicted of a sexual misdemeanor and a non-sexual felony. However, it excludes persons convicted only of misdemeanors. The offender becomes eligible for the program upon conviction, unless he or she is mentally retarded or actively psychotic. The offender loses eligibility if, after repeated attempts by the program counselor to get him or her to admit the commission of the offense claimed by the prosecuting witness, he or she continues to deny the commission of the offense. Entry into the program and completion of it becomes important for release on parole. The parole board will not consider an "eligible sex offender" (as defined by statute) for release on parole until he or she completes the program. A separate statute, KRS 439.340(10), prohibits such a release.

GROUP THERAPY

The main component of the program is weekly group therapy. The managers and counselors for the program put great emphasis on full disclosure of illegal sexual acts that have ever been committed by the offender, with the exception of any acts that are the subject of an ongoing criminal investigation. The counselors instruct the participants not to make any statements about pending cases that have not been adjudicated yet. The participants are taught to relate their offenses to the group in a way that they take full responsibility for their acts and to accept the full extent of the injury inflicted upon the victim. The participant must demonstrate empathy for the victim and remorse for the emotional and physical trauma inflicted. The program does not try to cure anyone; it merely tries to teach enough control to keep the participant's future actions within the law.

OTHER THERAPIES

Besides the group therapy, the offender is encouraged to participate in other programs that are offered on a voluntary basis, such as Sex Addicts Anonymous sessions, use of the plethysmograph (an instrument that gives biofeedback to the participant on the sources of sexual arousal for him), individual therapy conferences (if allowed by the counselor), Alcoholics Anonymous sessions, and work toward a Graduate Equivalency Degree.

WHERE OFFERRED

The program is offered at the Kentucky State Reformatory, the Kentucky State Prison, Luther Luckett Correctional Center, Kentucky Correctional Institute for Women, and Western Correctional Complex. The Department of Corrections also operates the program outside of any institution, for those offenders who have been released on parole or probation.

PROBATION

Although KRS 439.340 prohibits probation for sex offenders, the statute is ambiguous as to whether or not this prohibition is limited to sex offenses in which the victim is a minor child. There is no reported Kentucky case on point. *See Owsley v. Commonwealth*, 743 S.W.2d 408 (Ky. App. 1988). Also, *see* a favorable unreported decision, *Clarence Carter v. Commonwealth*, Court of Appeals No. 88-CA-787-MR (from Graves Circuit Court) (1989).

LENGTH AND PAROLE

It takes the average program participant two years to get a progress report that will satisfy the Parole Board. If the offender does get paroled, he or she is usually required to continue participation in a similar program outside of the institution for approximately two years. The program directors strongly believe that, without treatment, the offender will most likely offend again, but with treatment, recidivism is unlikely. The Parole Board shares that belief.

CRITICISMS OF PROGRAM

CONFIDENTIALITY

Several attorneys have questioned the methods used by the program. Complete self-disclosure certainly goes against the grain of most criminal defense attorneys, since they have a duty to educate the clients concerning their Fifth Amendment right against self-incrimination. Does the program violate the Fifth Amendment by its strong emphasis on telling all, including uncharged offenses?

In response to this problem, the Program Administrator, William A. Kraft, stated that there are many internal controls to prevent any information from leaking out to the police or prosecutors. In addition, KRS 197.440 provides that any communication made between an offender and a counselor in the program is privileged. However, it does not take a great leap of the imagination to envision a leak from a fellow participant in group therapy to a prosecutor after the fellow participant has been discharged. The participants have recently been required to sign a contract that they will not disclose anything learned by them in group therapy about another participant. However, there are no criminal or civil sanctions that could apply to a fellow participant who testifies under subpoena.

In a related scenario, what would prevent a prosecutor who has gotten a conviction in a jury trial from indicting the defendant for perjury, after the defendant testified to complete innocence at trial and then was admitted into the program? Another opportunity for a leak of information is presented when the Parole Board receives a very detailed report from the program at the time of the participant's appearance before the Board. Dr. John Runda, Chairman of the Parole Board, maintains that this is confidential for the Board, and does not go into the prisoner's central file, and, therefore, is safe from disclosure.

Still another legal nightmare presented by full self-disclosure is the scenario of the client who is convicted, appeals, gets into the treatment program, wins on appeal, and is retried. It may present an ethical dilemma for the client's attorney if the client insisted on testifying again to his complete innocence, since the attorney would know that in the program the client admitted guilt. The prosecutor would probably bring into evidence the fact that the defendant had to admit guilt to get into the program.

The directors of the program have insisted this scenario presents no problem to them, as they consider anything that happens in court irrelevant to their program or to successful treatment of the client. Neither are they bothered by a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), in which the defendant denies guilt.

INNOCENCE

Attorneys have also criticized the fact that a person who is convicted of a sexual offense and who is truly innocent is denied all possibility of parole. No one denies this possibility.

MENTALLY RETARDED/ PSYCHOTIC

There is also criticism that offenders who are mentally retarded or actively psychotic have no access to treatment other than the usual professional treatment available to all inmates, which appears to be minimal. According to the Parole Board statistics, there is very little chance that these retarded or psychotic offenders will be paroled. This may be largely due to the fact that they are not admitted into the program.

THE WAIT TO ENTER THE PROGRAM

A prisoner may have a long wait to get into the program. Occasionally state prisoners are held in county jails after sentencing for weeks or even months. Since they are ineligible for the Sex Offender Treatment Program until after they have been transferred to LaGrange for classification, this delay could translate into delay in appearing before the Parole Board.

There may also be a long delay in getting into the program, if the prisoner has a long sentence. The prisoner is usually not considered for the program until he or she is two years away from meeting with the Parole Board. Thus, if a violent offender has a sentence of twenty years, he or she is not eligible for parole until ten years have been served, and so the program will not even consider him or her for admission until eight years have been served. This is a long time to go untreated, during which time the inmate will be subject to many negative influences. It is questionable whether treatment will do much good at that point.

CONCLUSION

Regardless of the defense attorney's attitude toward the Sex Offender Treatment Program, it is here and it is affecting our clients. The attorney has a duty to consider this program when working out a plea agreement for the client.

ADVISE YOUR CLIENT

If your client wants to avoid the program, you may try to get all felonies reduced to a misdemeanor. If a felony conviction cannot be avoided, you may be able to get probation, if the victim was not a minor. To enhance the possibility of getting probation, the client may enroll in the Sex Offender Treatment Program on an outpatient basis. Call Jack R. Allen, M.A., Treatment Supervisor, 502-588-4035, or check with your local Probation and Parole Officer, to find out more about this.

If your client must go to prison, advise him or her that he or she will probably get a serve-out for any sentence under three (3) years.

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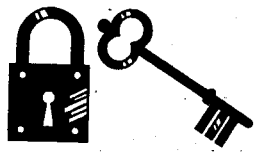


SEX OFFENDER TREATMENT: AN OVERVIEW

Incidence and Prevalence of Child Sexual Abuse

It has long been recognized that the secrecy and isolation which surround the taboo topic of sexual abuse have resulted in a lack of acknowledgement on the part of clinicians and under-reporting on the part of victims. Salter (1988) conducted an exhaustive review of the literature on the prevalence of child sexual abuse and clearly documents a stable and alarmingly high percentage of the general population who have been sexually abused as children. Nevertheless, incidence rates continue to be at odds with the reported prevalence rates in such research, giving rise to the need to recognize the distinction between incidence and prevalence. The former represents the number of sexual abuse cases that are actually reported to authorities in some fashion. Research consistently demonstrates that sexual abuse is under- reported. For example, Russell (1984) found that only five percent of sexual abuse cases in a given time period were actually reported to the police. Similarly, Finkelhor (1984) found that only twenty percent of sexual abuse cases were reported to any agency whether it was police or social services agencies. A 1983 study documented that 70 percent of an adults molested as children sample indicated that they told absolutely no one about their sexual abuse (Donaldson, 1983). Finally, a highly praised survey conducted by the Los Angeles Times indicated that 22 percent of the individuals surveyed had been sexually abused, while a full third of those individuals had never told anyone about their abusive experience (Timnick, 1985). The discrepancy between incidence and prevalence in child sexual abuse is generally attributed to the embarrassment surrounding the making of such a report, the fear of not being believed, and/or the fear of retribution by the perpetrator.

Obviously then, the contribution of prevalence studies of child sexual abuse is their random sampling of large populations to statistically determine the parameters of child sexual abuse. Studies on prevalence of sexual abuse are often confounded by methodological problems centering around issues of definition. For example, points of contention between researchers include the age differential between the offender and the victim, the type of behavior perpetrated, the age of the perpetrator and victim, *etc.* Despite these considerations, the preponderance of literature on child sexual abuse points to similar percentages of the general population affected by this trauma. Russell (1984) found one of the highest rates of child sexual abuse despite the utilization of the most narrow research definitions to date. Her data revealed that 28 percent of the sample of females had been sexually abused before the age of 14, and 38 percent of the female sample had been sexually abused by the age of 18. In an equally sound study, Badgley (1984) reported that 15 percent of the females in his sample had been sexually abused before the age of 16, and 22 percent of the females in the sample had been sexually abused by the age of 18. The Badgley study also generated data on the prevalence for child sexual abuse among male children, revealing that six percent had been sexually abused by the age of 16 and nine percent by the age of 18. Thus, the best research available indicates that twenty-two to twenty-eight percent of the female population has experienced childhood sexual abuse, and that six to nine percent of the male population have experienced childhood sexual abuse.

Researchers and clinicians are often faced with the recurring question, *"why is there so much more sexual abuse now than in the past"*. A historical review of studies spanning 1929 to 1965 reveal a range of reported abuse between twenty-four and thirty-seven percent. Even if one takes into account the less sophisticated research methodology available at the time, the similarity of the prevalence in the early decades of this century with current prevalence rates is striking.

CHARACTERISTICS OF SEXUAL OFFENDING

Research in the area of child sexual abuse has revealed two alarming issues in the cycle of sexual violence; namely, the large number of victims per sex offender and the high rate of recidivism among untreated sex offenders. Studies have shown that, on average, the individual sex offender has an astoundingly large number of victims whether he perpetrates against adults or children. The most definitive study to date was conducted by Abel, Becker, Mittleman, Cunningham-Rathner, Rouleau and Murphy in 1987. This unusually well designed study has received considerable praise both because of the large number of subjects (561 sex offenders) as well as the extraordinary lengths the researchers went to assure anonymity and protection from prosecution. Toward the latter end the researchers obtained a Federal Certificate of Confidentiality which in effect guaranteed that their research data would not be subpoenaed in an attempt to identify individual perpetrators. Further, no identifying information was recorded on any of the subjects, thus insuring complete anonymity and confidentiality. The average age of the sex offender in the Abel, *et. al.* study was thirty-one. Offenders classified as fixated pedophiles who targeted female victims had an average of 20 victims, while those fixated pedophiles who targeted male victims had an average of 150 victims per offender. Incest perpetrators, regardless of the gender of the victim, had an average of slightly less than two victims per offender, with an average of eighty-one completed acts against females and sixty-two acts against males.

Another widely respected study by Abel and other colleagues reported that each fixated pedophilic offender perpetrated an average of 238 attempted sexual molestations of victims under the age of 14 and an average of 167 completed molestations targeted at victims under the age of 14 (Abel, Mittleman, and Becker, 1985). The average number of victims per sex offender in this study was seventy-five. Additionally, 42 percent of the sample identified the onset of their deviant arousal pattern by the age of 15 (this includes exhibitionism, voyeurism, frottage as well as hands-on sexual abuse).

Of additional note, the question is frequently asked if sex offenders themselves are victims of sexual abuse. In many cases, the answer is yes. However, studies attempting to ascertain this information have generated data that are so divergent as to be unhelpful. Nevertheless, it is clear and it is the accepted common wisdom that the rate of sex offenders abused as children exceeds by a wide margin that found in the general population (Salter, 1988).

Finally, in spite of considerable methodological problems in recidivism research, it is clear that an unacceptably high percentage of untreated sex offenders reoffend. Some data indicate that as many as forty to eighty percent of untreated sex offenders reoffend (Freeman-Longo and Wall, 1986). Conversely, treated sex offenders have shown a dramatic decrease in sexual reoffending behavior.

THE SEX OFFENDER TREATMENT STATUTE MUST BE CHANGED TO INCLUDE SEX OFFENDERS WHO ARE MENTALLY RETARDED.

Sex offenders who are mentally retarded are specifically excluded from the Corrections Cabinet's specialized treatment program for sexual offenders pursuant to KRS 197.410. "[A]n eligible sexual offender" is defined as one who is determined by the sentencing court or cabinet officials, or both, to be an offender who "(a) Has demonstrated evidence of a mental, emotional, or behavioral disorder, but **not** active psychosis or **mental retardation**; and (b) Is likely to benefit from the program."

KRS 197.410(2).

The exclusion from treatment of offenders who are mentally retarded results in two unacceptable consequences: longer sentences for sex offenders who are mentally retarded, and release back into the community of persons who have been denied participation in a sex offender treatment program.

The fact that the prisoners with retardation cannot participate in the sex offender treatment program prevents them, in practice, from being considered for parole when they otherwise would be scheduled to appear before the parole board. In contrast, non-retarded "eligible" offenders must successfully complete the sex offender treatment program in order to be considered for parole pursuant to KRS 439.340 (10). This means that persons with mental retardation who are convicted of sex offenses as defined in KRS 197 spend more time in prison than their non-retarded counterparts- simply because they are retarded. This would seem to be a direct violation of the Equal Protection Clause of the United States Constitution. It would also appear to be a direct violation of the Americans with Disabilities Act of 1990, P.L. 101-336, which prohibits state governments from discriminating in programs against people based on their handicap.

The exclusion of those with mental retardation from appropriate treatment results in their release back into local communities upon the serve out of their sentences without the benefit of the specially designed treatment programs. The exclusionary statute thereby hurts the public because offenders who have not been provided sex offender treatment may not be any better prepared to refrain from sexually illegal behavior upon their release than they were when they were incarcerated. Since one goal of incarceration is rehabilitation, it is unexcusable to deny a suitable treatment program due to the status of mental retardation. The public policy considerations mentioned above were recognized during the 1992 legislative session by Rep. Bob Heleringer, who introduced House Bill 709 which would have amended KRS 197.410 to mandate special programs for offenders who are mentally retarded. This bill passed the House, but did not get voted upon in the Senate. No group opposed the proposed legislation.

When officials of the Cabinet for Human Resources, Division of Mental Retardation were told of the problem in the legislation, they expressed interest in proposing corrective legislation in their legislative package for next year.

Since it is obviously in the best interests of both the public and the sex offenders who are mentally retarded for the state to provide appropriate treatment in the corrections system to sex offenders who are mentally retarded, hopefully, the next legislative session will cure the unjustified discriminatory law.

MARIE ALLISON
Assistant Public Advocate
Appellate Branch
Frankfort

CLINICAL PHILOSOPHY, GOALS, AND TREATMENT MODEL

The Sex Offender Treatment Program presumes that sexual offending is a biopsychosocial problem with multiple levels of etiology. To date, no literature posits an acceptable explanation of the genesis of sex offending behavior. Likewise, the literature does not support the assumption of a traditional "cure" model in treating sex offenders. Rather, the prevailing national strategy is the use of a relapse prevention model especially tailored for the sex offender population. That is the model currently employed in the Kentucky Sex Offender Treatment Program.

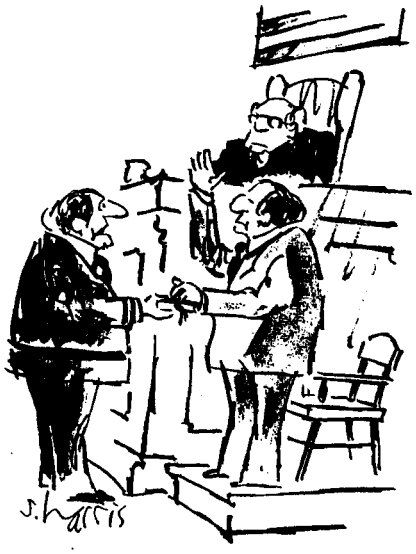
Institutionally-based sex offender treatment in the Department of Corrections requires a minimum of two years to complete, with the average client spending approximately three years to successfully complete the minimum requirements. They are involved in a minimum of one and one half hours of group therapy per week. This is augmented by both short-term and long-term individual therapy, expressive therapy and various short-term group experiences with adult rape victims and/or adults molested as children.

The Kentucky Sex Offender Treatment Program (SOTP) utilizes a Relapse Prevention Model in a group therapy format. After a psychological screening and orientation group, clients accepted into the program complete two psychoeducational modules, Human Sexuality and Family Patterns/Social Skills. These two psychoeducational modules serve both a purely academic purpose, *i.e.* acquainting clients with appropriate terminology and patterns of behavior, as well as a strategic purpose, *i.e.* readiness for counseling and teaching them to begin to think psychologically. After the successful completion of these two psychoeducational modules, the client is placed into a pre-existing and ongoing treatment group. In this treatment group he must complete several therapeutic tasks which include:

1. Offense story demonstrating ownership
2. Autobiography with attention to sexual history
3. Advanced ownership detailing pre-assault cycle, deviant arousal statement, history of deviant behavior and deviant fantasies
4. Victim personalization
5. Relapse prevention plan
6. Restitution phase

Ancillary therapies include work on individual needs like compulsive/addictive behavior, anger, social skills *etc.*

CRITERIA: INCLUSION EXCLUSION



"Do you swear to tell your version of the truth as you perceive it, clouded perhaps by the passage of time and preconceived notions?"

Participation in the SOTP is voluntary. However, KRS 439.340 requires that anyone convicted of a sexual crime after July 15, 1986, must successfully complete the program in order to be eligible to see the Parole Board. There are a number of exceptions to this law, including failure to admit guilt, mental retardation, psychosis and unlikely to benefit from treatment. Thus, while this program is technically voluntary, there is a systemic incentive for participation. Like most established programs nationwide, we do not accept people who ultimately deny their guilt. Thus, criteria for inclusion include at least partial admission of a sexually abusive behavior problem and some sexually abusive behavior, absence of psychosis/thought disorder processes, and lack of mental retardation. Additionally, other clinical conditions are taken into account to insure that this type of treatment is not contra-indicated.

AVAILABILITY AND UTILIZATION OF PROGRAM.

As of this writing, there were 1,114 convicted incarcerated sex offenders, which represents about one tenth of all currently incarcerated individuals in the Commonwealth. About one third are not eligible because their parole eligibility date is too far in the future, another one third are in treatment, while the remaining one third choose not to participate or do not meet criteria (see above). The bulk of institutional treatment is rendered at Kentucky State Reformatory and Luther Luckett Correctional Complex with very small programs at Kentucky State Penitentiary, Western Kentucky Correctional Complex and Kentucky Correctional Institute for Women. The treatment program is also available in four community Probation & Parole sites: Louisville, Lexington, Covington and Paducah. Currently there are approximately 200 individuals (probated or paroled) who are utilizing the community treatment services.

LEGAL VERSUS TREATMENT NEEDS

One of the unfortunate artifacts of Western thinking is its dichotomous nature which reduces every event or fact into mutually exclusive, discreet categories. Matters are made worse by the rigid conceptualization of causality in a linear fashion, *i.e.* "A causes B." These two problems (enhanced by the adversarial underpinnings of the legal system) account for no small part of the misunderstanding, tension and conflict which surround the issue of sexual abuse. The states which have the most successful mechanisms in place to care for the victim and deal with the perpetrator fairly, addressing the issue of punishment and treatment, have embraced a systemic approach to this highly complex problem. In other words, every person and agency which will participate in the sex offense case are informed about the dynamics of the sexual abuse cycle, have established lines of communication, and have similar goals and philosophy about how to reach them. This includes the defense community which also has moral and professional responsibilities to respond to the larger problem, namely the cycle of child sexual abuse.

What can defense counsel do to best prepare his or her client? Clearly the nature of the fiduciary relationship between client and lawyer requires the lawyer to keep the best interest of his/her client in mind at all times. However, in the case of a sexual offender client, defense attorneys may need to broaden the scope of "best interest." At the plea bargain or presentencing stage defense counsel should consider the following in how to best prepare their client to go before the bench: has the defendant admitted he has a problem, does he accept responsibility for his sexually abusive behavior, is he willing to seek and receive expert treatment for sexually abusive behavior, and is he willing to fully participate in said expert treatment.

Not every sex offender can begin treatment in a community setting, but *some* can. An expert in the area of sex offender treatment can make an assessment, based on nationally utilized criteria, about suitability for community versus institutional treatment. Based on the current state of knowledge about sexual abusers, there is *no* meaningful alternative to treatment. Given the recidivism rates for untreated sexual abusers it is always in the best interest of future victims *and* the abuser to become actively involved in appropriate treatment. Failing to make this clear to a client may be an abdication of the fundamental responsibility to act in the best interest of the client and ***may*** set him up to reoffend. This situation is reminiscent of the old saying "the surgery was a success, but the patient died."

The unhappy marriage between the legal arena and the treatment needs of an offender may precipitate insurmountable conflicts. At the outset, one must clearly acknowledge that the goals and purposes of legal defense are separate and uniquely different from the goals and purpose of providing treatment to the sexual abuser. Perhaps the most profound non sequitur of the century is "sex offender treatment for the non-admitting sex offender." What does the clinician treat? Obviously, defense counsel would always have great trepidation about encouraging and/or allowing a client to admit any degree of guilt. Admitting responsibility might jeopardize the client's opportunity for post-judgement reliefs like RCr 11.42 actions and appeals, as well as having serious implications for potential civil actions filed by the plaintiffs. No doubt if the creative capacities of the defense community are brought to bear on these issues, resolution in the best clinical and legal interest of the offender can be achieved.

It is the experience of the author that a great many individuals in treatment have entered into a plea bargain, thus there is a *de facto* admission of some degree of guilt (with the exception of the *Alford* Plea). In the scenario of a plea bargain, defense counsel could best prepare the client by informing him of the availability of expert treatment, the need for treatment and aiding the client in making arrangements to secure and participate in appropriate sex offender treatment. Encouraging and helping the defendant secure appropriate treatment aid in placing him in the strongest possible position as he comes before the bench for sentencing. Without in any way compromising the responsibilities of the fiduciary relationship, this also allows the lawyer to exercise a moral duty to protect innocent children and interfere in the traumatic and insidious problem of the cycle of sexual abuse.

From a clinician's perspective, it would be helpful if defense counsel, after thoroughly exploring post-judgement relief options, encouraged the client to be aware of the differences between the legal proceedings and clinical treatment. That is, an admission of guilt in the confidential setting of treatment serves but one purpose, namely, to enable the offender to begin the arduous task of owning his sexually abusive behavior problem and developing appropriate controls to minimize future abusive behavior.

CURRENT AVAILABILITY OF ASSESSMENT AND TREATMENT

The unfortunate reality is that there are very few trained treatment providers with the appropriate expertise in treating sexual abusers.

As one might expect, treatment is most readily available in the larger metropolitan areas of Louisville and Lexington. Only a handful of private providers or individual clinicians at Comprehensive Care Centers have sought sufficient training to provide this kind of treatment. As previously noted, the Department of Corrections offers sex offender treatment programs in four communities. Additionally, there is one private treatment organization in Louisville, which provides treatment for sexual abusers. Attorneys desiring help in identifying appropriate individuals to perform sex offender assessments and/or treatment, may contact the author or Carol Jordan, Program Administrator, Domestic Violence Unit, Cabinet for Human Resources, (502) 564-4448.

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A native of Alabama, Mr. Purvis has been a resident of the Commonwealth for the past decade. He received his undergraduate degree in psychology from Vanderbilt University in 1981. He also holds the Master of Divinity degree from Southern Theological Seminary, the Master of Arts degree in clinical psychology from Spalding University and is currently a candidate for the Doctor of Psychology at Spalding University. Certified by the State Board of Psychology as a Certified Psychological Associate in clinical psychology, Mr. Purvis has worked in the area of victim and offender treatment for the past four years. He has received extensive training from nationally recognized experts in the field of treating sexual offenders, and was recently invited to attend training at the National Institute of Corrections in this field. Currently the treatment supervisor and psychologist for the Sex Offender Treatment Program at the Kentucky State Reformatory, Mr. Purvis serves on the Attorney General's Task Force on Child Sexual Abuse.

ATTN: PROFESSIONALS WORKING WITH MENTALLY ILL CLIENTS:

A mental health professional is conducting research into the experiences of prison inmates with mental illness (schizophrenia) who are incarcerated for violent felony offenses in Kentucky. Researcher will do full case study of your client from mental health standpoint. Attorneys will have access to all data and conclusions. If interested in more information contact: Jim Clark, Assistant Professor, College of Social Work, University of Kentucky, Lexington, KY 40506-0027; (606) 257-2929. Or contact Ed Monahan at DPA.

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DR. JOHN RUNDA, CHAIRMAN OF THE KENTUCKY PAROLE BOARD,
Speaking to Sex Offenders upon their parole.

My name is Dr. John Runda. I am Chairman of the Kentucky Parole Board. The very fact that you are viewing this tape today means that you have been paroled and you are a convicted sex offender. Those two facts will remain with you indefinitely. You will always be a sex offender, and hopefully some day, you will be released from the terms and conditions of your parole.

The fact again that you are paroled indicates that you have successfully completed the sex offender's treatment program in the institution. Your conduct while on parole and the special condition that you continue the sex offender's treatment program in the community should be ample evidence of our commitment to treatment of sex offenders in the state of Kentucky.

You were not paroled because the offense was not serious. You were not paroled because you convinced the parole board that you did not commit the crime. We are aware that you did commit the crime. You are a sex offender. You have been convicted. This fact will remain with you forever. You will always be a convicted sex offender.

Now, we were willing to place you in the community for you to continue to serve your sentence if you agreed to attend the sex offender's treatment program and to other conditions of parole. The parole board is extremely serious about your cooperation in this entire process. When we say that you must attend and successfully complete the sex offender's treatment program in the community, we mean exactly that. We don't want you to attend the program and not participate. We don't want you to miss meetings.

We don't want you to come with an "I don't care" attitude. We consider this type of behavior a violation of your parole. And if we are aware of this and you will be brought back to prison. There are very few individuals that are convicted sex offenders who are paroled. Those who violate their parole, are unlikely to be paroled again.

We paroled you because we believe that you can live under these conditions. If we didn't, you would still be in prison. But I just want to remind you how serious we are about your cooperation. If you show up to your sex offender's treatment program and you decide, all of a sudden, that you did not commit the crime, you will be back in prison.

We know that in order for you to be admitted to the program in the institution you had to admit to the crime. We will not tolerate any games with your counselor while on parole. What we want and what we demand and what we expect is that you will confront your problem fully.

We know while in the institution, you developed a relapse prevention plan. While on parole we expect you to execute that plan. We know that at times it may be difficult. But we know also that if you don't execute the plan, you are likely to re-offend. And if we believe that you are about to re-offend, we will restrict your freedom, we will revoke your parole, and we will place you back in prison. To be accepted into this program you will need to continue to discuss all the details of your crime. You will need to continue to develop a risk assessment program, a relapse prevention plan, because we are not interested in you creating additional victims. As you have been probably told in the past, our primary interest is in preventing future victims. Secondarily, we are interested in you. And insofar as you having the capability of re-offending, we need to limit that capability. You need to limit that capability, and you can only do that with the full participation and cooperation in the sex offender's treatment program.

You are going to continuously need to develop a sense of empathy of feeling and understanding of what effect your crime had on a very innocent victim. The program, as you are aware, is not interested in you diminishing the importance or impact of your crime, what you did was very serious, is very serious, and it is a true privilege for you to return to your community, perhaps even to your family, to continue to serve your sentence.

In many areas of the state, we now have specialized parole officers. These parole officers have sex offenders as their total caseloads. The parole officers work very closely with the sex offender's treatment program. There is a sharing of information. You need to know that. This information will not be used against you unless it is very probable that you are about to commit an additional crime. What we need is your full cooperation with your parole officer and with your treatment officer. They will be in communication with the parole board and we will take appropriate action as necessary.

Now, we know that there are many sex offenders who are able to control their problem, and we believe that certainly you are one of those. If we did not believe that you could control your problem in the community, we would not have paroled you. But in order to do that, you need to participate very fully in this program.

Some of you have already experienced certain special conditions of parole, others have yet to have those imposed. Now, some of the conditions affect, or may affect, the type of living arrangements that you are permitted to have. We may not permit you to be in a home where there are young children. We may not permit you to have certain types of jobs. We may not permit you to drive at night. We may not permit you to drive at all. We may restrict, and probably will restrict, the use of alcohol and the use of any unprescribed controlled substances. Your relapse prevention plan will include a variety of these conditions. It will also include certain signs that you must take notice of as you continue on your parole supervision. These early warning signs will help you identify certain situations, and will help you identify apparently irrelevant decision that could lead to re-offense.

In the program, as in the institution, you will be required to discuss your offense in great detail. You will be required to discuss other offenses that perhaps you have not been convicted of but that is not important at this point. The important factor to realize is you are on parole, you have a degree of freedom. In order to protect that degree of freedom, you must fully participate and cooperate in the sex offender's treatment program. Again, if you decide, in the middle of your counseling sessions, or even prior to the beginning of the counseling sessions, that you not want to admit to your crime, then you change your mind, you will find yourself back in prison. We do not penalize any individual for being fully open with their counselors. In fact the opposite is true. If we believe that you are holding back, then we consider you a threat to the community and we will revoke your parole.

One thing I think is always important to remember, and that is since you are a convicted sex offender, you must continually work with your counselor. You must continually confront your problem. Continually re-assess your plans and be on guard to identify apparently irrelevant decisions and to identify any factors in your behavior that may lead you to re-offend.

You have a variety of resources that are available, from your counselor, to your parole officer, to other people in the community. We expect you to take advantage of these resources, to utilize them, and it will truly be a privilege for me to sign your final discharge from parole. That will be the ultimate sign that you have dealt with your problem.

Good luck.

THE CONSTITUTION VS. SEX OFFENDER TREATMENT IN PRISON

FRANKLIN CIRCUIT COURT CASE #88-CI-658 - A CLASS ACTION (THE PRISON IS FORCING YOUR CLIENT TO SAY WHAT ??!!?)

If you are like many Kentucky defense lawyers in the last few years, you have been shocked and appalled at what is happening to your sex offense clients after they leave your protection and arrive in prison. In some cases, your clients may have interrogated you from prison about why you failed to advise them of what Corrections would do to them once they got inside.

The scariest thing is this: even counsel who are well-versed in the intricacies of KRS 439.340(10), and its interplay with KRS 197.400 *et seq.*, would have a hard time knowing how these abstract pieces of legislation work (or fail to work!) in the real prison world, where the Department of Corrections reigns.

When it comes to Kentucky's sex offender treatment program, there are nightmares aplenty for clients and defense lawyers alike. Just consider:

NIGHTMARE #1: Your client entered a conditional *Alford* plea to a single reduced charge of sexual abuse, in order to avoid the possibility of sodomy and PFO convictions. She maintained her innocence and reserved the right to appeal an adverse ruling on a suppression issue. The case is on direct appeal. Now she's arrived in prison and she's written to you, saying that they won't let her see the parole board until she confesses to having *sodomized* the complainant. She explains that parole for her is going to be dependent upon completion of a treatment program, and she can't even get an interview about a possible *referral* to the program unless she first admits guilt in writing. She wants to know what she should do.

NIGHTMARE #2: Your client admits that he has a serious problem with deviant sexual behavior; in fact, he desperately wants to get professional help. He's now serving a 60-year sentence in prison, with a parole eligibility of 30 years. But they've told him that, due to a lack of counselors, he cannot be guaranteed a place in a treatment group until he's within 3 years of his parole eligibility. He can do simple subtraction, and he knows he could go 27 years in prison with absolutely no treatment at all.

NIGHTMARE #3: Your client was convicted of rape on a complaint by his 14 year-old neighbor. In prison, he is admitted into the sex offender treatment program. After he has been in several sessions, his counselor tells him that she has determined he fits the profile of someone who has had sex with his mother. She demands that your client admit to having had sex with his mother. When he adamantly refuses to "admit" to something he did not do, (*i.e.*, a Class C felony), the counselor decides he's being uncooperative. So, your client is terminated involuntarily from the treatment program, with the result that he will never be eligible for parole.

These are just a few of the nightmares. There are many others. For example, the parole board routinely and systematically denies parole for sex offenders who have not completed the treatment program, even if their offenses occurred well before enactment of the law which denies parole eligibility to people who do not complete it.

Defense lawyers cannot simply feel complacent that this is some esoteric matter which will rarely affect any of their own clients. Corrections' statistics tell the story: since the inception of the sex offender treatment program, *350* sex offenders have been denied admission or have been terminated from participation in the program because of they would not succumb to the pressure to admit guilt.

What happened to the privilege against having to incriminate oneself? What happened to the prohibition against *ex post facto* laws? What can defense counsel say to their aggrieved clients? Is there any remedy?

Well, we hope so. At least someone is *trying* to achieve a remedy.

FRANKLIN CIRCUIT COURT CASE #88-CI-658

In 1988, one very creative inmate filed a comprehensive *pro se* declaratory judgment action in Franklin Circuit Court concerning the sex offender treatment program. He alleged *inter alia* that the Corrections Cabinet was operating this sex offender treatment program unconstitutionally.

DPA later supplied legal counsel for this plaintiff. Also, more than twenty additional individual *pro se* inmates from all over the state joined the suit as plaintiffs, one after another, until, earlier this year, the Franklin Circuit Judge ordered that the case be litigated as a class action.

Certainly not *all* of the problems related to Kentucky's sex offender treatment program will be litigated in this one action. Each inmate has his or her particular fact situation, which gives rise to his or her particular gripes. And, as of this month, there are 1,490 sex offenders incarcerated in the custody of the Kentucky Department of Corrections.

In summary, the class action asks for a declaratory judgment that:

(a) The Department of Corrections is unconstitutionally compelling sex offenders to give up their right to be free from compulsory self-incrimination, in order to be considered for parole;

(b) The parole board is applying KRS 439.340(10) in an *ex post facto* manner by requiring that offenders, whose offenses occurred before the effective date of the sex offender legislation, complete the program before being considered for parole;

(c) "Non-admitters" are being denied the equal protection of the laws, because they are not permitted into the program and are, consequently, shut out from treatment, parole consideration, and more favorable placements within the prison system;

(d) The requirement that a sex offender admit guilt is null, void, and unenforceable, because it eliminates a large class of sex offenders from the program and thereby "modifies or vitiates", KRS 13A.120(2), the General Assembly's mandate that sex offenders be given treatment; and

(e) Program participation (and, therefore, parole consideration) impermissibly requires disclosure of matters covered by the spousal privilege in KRS 421.210, to the detriment of spouses facing prosecution.

The Department of Corrections' position is that the General Assembly granted the Department sole authority for designing the treatment program and that a person who does not admit guilt is not amenable to any treatment. It maintains that the program requires admission of only the crime(s) for which the inmate was convicted, not any other criminal conduct. And, the Department contends that nobody "compels" inmates to admit guilt, that there is a statutory privilege which prevents their voluntary admissions from being used against them, and that the prohibition against parole is not being applied to offenders whose crimes pre-dated the effective date of the prohibition, (because these persons *do* get to see the parole board at the time of their regular eligibility).

Much of the controversy surrounds the lack of confidentiality to protect inmates who are urged to make incriminating statements in seeking admission to the program as well as in the treatment itself, the bulk of which is done in group therapy sessions attended by 10-12 inmates at a time. There are no offers of immunity. And the applicable "privilege" statute, KRS 197.440, is astonishingly full of holes:

> Communications made in the application for or in the course of a sexual offender's diagnosis and treatment in the program, between a sexual offender or member of the offender's family and any employee of the cabinet who is assigned to work in the program, shall be privileged from disclosure in any civil or criminal proceeding, unless the offender consents in writing to the disclosure or the communication is related to an ongoing criminal investigation.

This privilege, by its very terms, covers only statements made to program *employees*. It does not apply to the admissions which a potential participant must make to Corrections officials outside the treatment program in order to meet with program employees about making an application. Nor does it apply in the case of incriminating disclosures which participants must make to other inmates.

And who knows what it means for communications to be non-privileged if they are "related to an ongoing criminal investigation"? This would seem to be the very situation in which protection from self-incrimination would be the most crucial!

Inmates realize all too well that known sex offenders find themselves dumped at the dangerous bottom of the prison's violent pecking order. In that environment, they are expected to declare the nature of their crimes, and even uncharged behavior, to a group of other inmates, all of whom then leave the weekly group sessions, to go back out into the general population with all this interesting new information.

Defense lawyers know all too well the extent of damage which can so easily be inflicted by jailhouse snitches. They also know how inmates *live* for that day when they will have their cherished right to try for parole. These attorneys cringe to think of their clients being compelled, on pain of never getting to see the parole board, to incriminate themselves and/or their spouses, as to both charged and uncharged conduct, in the presence of a *dozen* potential informants!

Co-counsel for the plaintiff class in the Franklin Circuit Court action are Assistant Public Advocates Margaret Case (of the Appellate Branch in Frankfort) and Joe Myers (of Post-Conviction Office at the Kentucky State Reformatory, LaGrange). Counsel for the Corrections Department is Deputy General Counsel Connie Malone.

A final resolution of the action is not expected until well into next year. In the meantime, defense lawyers and their clients are between a rock and a hard place: should clients incriminate themselves or should they forego any hope of treatment and parole?

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HEARSAY EVIDENCE IN CHILD SEX ABUSE CASES

In any case involving a child victim, the prosecutor will attempt to introduce the child's out-of-court statements — to a parent, sibling, friend, social worker, police officer, pediatrician, or psychologist. This brief article describes the hearsay exceptions, under the new Kentucky Rules of Evidence, that may provide rationales for the introduction of such statements. It also describes the rationales for characterizing certain statements as non-hearsay. The article is based on the following hypothetical:

> Mom and Dad are divorced and Mom has custody of Suzy, their 6 year old daughter. Suzy visits Dad every other weekend. Dad has now been indicted for first degree sexual abuse, specifically that he fondled Suzy's private parts and penetrated her with his finger during a weekend visitation. Dad denies this.

The child's statements as non-hearsay.

Assume that when Suzy returned from the visitation she was crying, but wouldn't tell her mother what had happened. When Dad came to pick her up for the next visitation, she cried, "No, don't make me go with him! He'll hurt me again." At Dad's trial, the mother will, if permitted, testify to this statement. The prosecutor should argue that the child's statement is non-hearsay, being offered to prove the child's state of mind which in turn tends to prove that something evil happened on the previous visitation.

The definition of hearsay in KRE 801 is identical to the federal definition and works no substantive change in Kentucky law: an out of court statement offered to prove the truth of the matter asserted therein. The prosecutor should argue that the statement does not fit this definition of hearsay, because the first sentence is not an assertion but a request ("Don't make me go"), and the second statement is a prediction of what will happen ("He'll hurt me again") rather than an assertion of past fact. In short the prosecutor should say that the child's statements are not offered for the truth of what (if anything) is asserted therein. By this rationale the child's statements would be non-hearsay evidence of the child's state of mind.

The defense attorney's response to this argument might well be that the statement, "He'll hurt me again" looks backward as well as forward and contains an implied, if not express, assertion of past activity. Furthermore the attorney should argue that limiting instructions to consider the statement only as reflecting the child's state of mind would be ineffective, for the jury would certainly consider the statement as evidence that Dad did something on the previous visitation. In *People v. Green*, 164 Ca.Rptr. 1, 609 P.2d 468 (1980), the California Supreme Court held that testimony that a victim (now deceased) had reported a threat by the defendant could not be received to show the victim's state of mind (relevant on the issue of whether she was kidnapped or went willingly with the defendant) because a jury could not be expected to comply with limiting instructions — the jury would inevitably consider the reported threat as evidence of the *defendant's* state of mind. The famous case of *Sheppard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933) is similar. In *Sheppard* the victim said, before she died, "Dr. Sheppard has poisoned me." In argument before the U.S. Supreme Court the prosecutor advanced the rationale that the statement was received to rebut the defense argument that the victim had committed suicide. Writing for the Court, Justice Cardozo rejected this rationale with language that may be cited whenever a prosecutor argues that hearsay may properly be received for a limited purpose:

> "It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience of practical expediency and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage the evidence goes out."

Another example of the use of out of court statements to show the declarant's state of mind.

Suzy's vocabulary includes all the familiar four letter words, and Suzy's use of the words indicates some knowledge of their meaning. The mother will testify that she didn't teach bad things to Suzy, and the prosecutor may argue that Suzy's statements are relevant to show Suzy's involvement in sexual matters. If Suzy draws her father with an erect penis, the prosecutor may argue that this shows that she has seen him in an aroused state, and, by a leap of logic, that seeing tends to prove doing. In *Souder v. Commonwealth*, Ky., 719 S.W.2d 730 (1986), the Court held that a child's manipulation of anatomically correct dolls was hearsay and improperly admitted; it is not clear, however, whether the Court considered the argument that manipulation of the dolls showed knowledge. The classic case admitting evidence of this kind is *Bridges v. State*, 19 N.W.2d 529 (Wis. 1945) in which the child's ability to describe a hotel room was admitted as evidence that he had been in the room; the prosecutor was able to negate other possible ways in which the boy might have learned about the room. *United States. v. Anello*, 765 F.2d 253 (1st. Cir. 1985) provides another example; in *Anello* a note reading, "The Cubans called," was received, not to show the Cubans called but to show that the occupants knew Cubans.

The response to this kind of reasoning is that the child may have acquired her knowledge of sexual matters other than by playing naughty games with her father. In *Bridges*, there was no apparent way in which the boy could have know the layout of the hotel room other than by being there. In a sex abuse case, on the other hand, the child's ability to fit anatomically correct dolls together may be nothing more than mechanical aptitude; the child's familiarity with four letter words may be attributable to rented movies or playmates. The argument, in short, is that the child's apparent knowledge of sexual matters does not prove the child was sexually abused.

Admissibility under Jett.

KRE 801-A(1)(A) codifies the rule of *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969) — a prior inconsistent statement may be received for the truth of what is contained therein, if the person who made the statement is "subject to cross-examination concerning the statement." Assume that Suzy told the social worker that her father fondled her genitals. The prosecutor calls Suzy as a witness, but Suzy changes her story and denies her father fondled her. If the prosecutor intends to introduce the statement to the social worker under the *Jett* doctrine, the prosecutor must first "lay the foundation" under KRE 613(b) by inquiring of Suzy as to the time, manner and place of the statement and confronting her with it. *Drumm v. Commonwealth*, Ky., 783 S.W.2d 380 (1990). At this point a number of things may occur: 1) Suzy may acknowledge having made the statement and its truthfulness; 2) Suzy may admit having made the statement but claim that it is false — perhaps say that she told the social worker what the social worker wanted to hear; 3) Suzy may deny having made the statement and deny the truth of its contents; 4) Suzy may equivocate about the statement or its contents; 5) Suzy may claim a loss of memory as to the statement, the events, or both; or 6) Suzy may refuse to answer questions about the statement and/or its contents. There are two concerns: 1) whether the statement is inconsistent with Suzy's testimony under *Jett*; and 2) whether Suzy is "subject to cross examination" about the statement and its contents so that the prosecutor can introduce the statement to prove the fondling?

United States v. Owens, 108 S.Ct. 838 (1988) sets out the test under the Confrontation Clause of the Sixth Amendment: from the questioning on the witness stand, is there "an adequate basis upon which to evaluate the reliability and trustworthiness of the out-of-court statement?" In *Owens* the victim identified his assailant after the assault; as a result of the blow, however, the victim lost most of his memory, and the prosecutor introduced the statement to prove the identify of the assailant. The Supreme Court held that the victim was "subject to cross-examination," within the meaning of the evidence rules and that the defendant was not denied his right to confront the witness (the victim) under the Sixth Amendment. In *Owens* the witness responded willingly to questions and the jury had an opportunity to measure the accuracy of his prior statement in light of his inability to fully recollect what had occurred. The Court felt that the cross-examination was effective *because* of the witness's memory loss.

When a witness refuses to answer questions the witness is not "subject to cross-examination" and the witness's statement is not admissible under *Jett* (*Commonwealth v. Brown*, Ky., 619 S.W.2d 699 (1981)). When a witness answers, "I don't remember," the likelihood is that the prior statement will be admitted under *Jett*, even though a lack of present memory is not necessarily inconsistent with the previous statement and even though such a witness is scarcely "subject to cross-examination." The reason statements are admitted in this situation is that courts do not want to provide a refuge for the turncoat witness who would defeat the fact-finding process by falsely claiming a lack of memory. *Wise v. Commonwealth*, Ky.App, 600 S.W.2d 470 (1978) is a court of appeals opinion specifically so holding. There is a line of Fifth Circuit cases to the contrary — *United States v. Devine*, 934 F.2d 1325 (5th Cir. 1991); *United States v. Grubbs*, 776 F.2d 1281 (5th Cir. 1985); *United States v. Ballivero*, 708 F.2d 934 (5th Cir. 1983) — but it can be expected that the Kentucky Supreme Court will deem statements offered in such instances as admissible under *Jett*. In the federal cases referred to above the prior statements were not under oath and hence would not have been admissible substantively; the federal courts therefore looked at the statements only as impeachment evidence. Since Kentucky receives inconsistent statements not under oath both as substantive and impeachment

evidence, the federal cases can easily be distinguished.

If the witness equivocates when confronted with the statement, the likelihood is that the statement will be regarded as inconsistent and admissible under *Jett*. In *Schambon v. Commonwealth*, Ky., 821 S.W.2d 804 (1991), when confronted with his taped statement, the child initially recanted his denial and adopted the statement. He continued, however, to be evasive and at times denied the veracity of the statement. The Court held it was not an abuse of discretion for the trial court to allow the statement to be played to the jury.

When a witness denies having made the previous statement it is clear that *Jett* allows the statement to be introduced. In *Jett* the witness (the wife of the defendant) denied both the substance of the statement (that the defendant molested her sister) and the making of the statement (as reported by the officer). In such cases the jury should theoretically first determine whether the statement was made; if the answer is yes, then decide where the truth lies — in the statement or in the testimony from the witness stand. It is doubtful that many jurors conscientiously decide that the statement was made before considering its contents. Recently, the Kentucky Supreme Court held that a statement which is disavowed by *two* witness cannot be introduced. In *Askew v. Commonwealth*, Ky., 768 S.W.2d 51 (1989), the prosecutor called witness one to testify to a damaging admission by the defendant. Witness one denied the admission and denied telling witness two about the admission. Witness two was then called. Witness two denied witness one told her of the admission and further denied telling witness three of the admission. Witness three then introduced a tape in which witness two said witness one told her that the defendant had admitted the crime. In reversing the conviction the court seems to have adopted a "one witness disavowal" rule: you can use *Jett* to hurdle one disavowal (or claim of memory loss) but not two.

Prior consistent statements.

Like the Federal Rule, KRE 801-A(1)(B) allows for the receipt of a prior consistent statement of a witness, subject to cross-examination, if the statement is offered to rebut an inference of recent fabrication or undue influence. The key is whether the statement was made prior to the undue influence or motive for fabrication. *Schambon v. Commonwealth*, Ky., 821 S.W.2d 804 (1991); *Bussey v. Commonwealth*, Ky., 797 S.W.2d 818 (1990); *Lowery v. Commonwealth*, Ky., 566 S.W.2d 750 (1978) and *Eubank v. Commonwealth*, 210 Ky. 150, 275 S.W. 630 (1925) stand for this proposition. *Reed v. Commonwealth, Ky.*, 738 S.W.2d 818 (1987) is interesting because the statement was introduced before there had been a suggestion of undue influence or improper motive. Error, said the Court, but error that was cured when the defendant testified that the witness was lying. *Hellstrom v. Commonwealth*, Ky., 825 S.W.2d 612 (1992), is not in accord with 801-A(1)(B). In that case the Court upheld the admission of the child's out-of-court drawings through the testimony of the child. These drawings should have been regarded as prior consistent statements and hence inadmissible unless offered to rebut an inference of undue influence or recent fabrication. Justice Lambert dissented on this point.

Statements of identification:

Like the federal rule, KRE 801-A(1)(C) allows for prior statements of identification of persons to be introduced, provided, as in the other sections of Rule 801-A, that the identifier is subject to cross-examination. *Colbert v. Commonwealth*, Ky., 306 S.W.2d 825 (1957) is in accord. The rationale of this rule seems to be that the prior identification is often more trustworthy than a courtroom identification; it is closer in time and often involves picking a person out of a group.

Hearsay statements which do not depend on the witness testifying are being subject to cross-examination.

Kentucky has held, as have other states, that a finding that a child is not competent as a witness does not preclude the use of hearsay statements of the child. *Souder v. Commonwealth*, Ky., 719 S.W.2d 730 (1986). The rationale for this position is that the child may well tell the truth in certain situations (to a doctor for example) but not be able to demonstrate testimonial competency in a courtroom setting. Whether the child testifies or not it is almost certain that the prosecutor will try to introduce the child's out-of-court statements under one of the following exceptions:

1) **Excited utterances.** KRE 803(2). Assume that after being returned home by her father, Suzy runs crying to her mother and says her father molested her. The prosecutor will call Mom to testify to Suzy's statement, even if Suzy is a competent witness and testifies fully about the event. Why? Because the prosecutor knows that the contemporaneous statement, made to her mother at the first opportunity, has a ring of truth that testimony from the stand may lack. The excited utterance exception requires: 1) a startling event or condition; 2) which causes "stress of excitement" in the declarant; 3) followed by a statement by the declarant while under the "stress of excitement," which describes or explains the startling event or condition. The rationale of this exception is that excited utterances are truthful because close in time to the event and, more importantly, because made before there is a chance for reflection and fabrication.

In child abuse cases the leading Kentucky authority is *Souder v. Commonwealth, Ky.*, 719 S.W.2d 730 (1986) in which the Court held that it was an abuse of discretion for the trial court to admit statements made to a grandmother 24 hours after the event under this rationale. In *Souder* the Court emphasized that the excited utterance exception (sometimes called "spontaneous declaration" exception) is fact sensitive and dependent on the trial court's assessment of a number of variables (at p. 733): 1) the lapse of time between the act and the declaration; 2) the opportunity to fabricate; 3) the inducement to fabricate; 4) the excitement of the declarant; 5) the place of the declaration; 6) evidence of trauma to the declarant; 7) whether the declaration was made in response to a question; and 8) whether the declaration was against interest or self-serving. Statements made at the "first opportunity" are more likely to be held admissible than repetitions of those statements at a later time. *Cook v. Commonwealth*, Ky., 351 S.W.2d 187, 189 (1961) — statement to the victim's husband an hour after the event held admissible; statement to the police six hours later not admissible.

In *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988), which the Kentucky Court relied on in dealing with the hearsay exception for medical history, the mother's diary showed that on four occasions the daughter told her mother she had been abused after being returned by her father from weekend visitations. The statements were made some time after the events and, on at least one occasion, some three hours after the child was returned. The federal court of appeals held that the trial court erred in rejecting these statements as excited utterances. Noteworthy is the court's emphasis on the first "real opportunity to report," and the court's acceptance of reporting delays as reflecting "confusion, guilt and fear," on the part of the child. *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) and *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) are also leading excited utterance cases.

2) **Present sense impression.** KRE 803(1). This is a new hearsay exception in Kentucky, adopted in the attempt to bring Kentucky evidence law generally in line with the Federal Rules. The requirements are: 1) that the statement describe an event or condition; 2) made by the declarant on the basis of personal observation of the event; and 3) while observing the event or immediately thereafter. It is unlikely that statements relaxing sex abuse will meet the requirements of this exception because the time element will be missing. The advisory committee notes to the Federal Rule indicate that the statement must immediately follow the event — before there is time for reflection — and cases support the exclusion of later-made statements. *United States v. Cruz*, 765 F.2d 1020 (11th Cir. 1985).

3) **Statements relating to "then existing mental, emotional or physical condition.** KRE 803(3). This is one of the oldest, most firmly rooted, hearsay exceptions. Suppose that Suzy tells her mother on returning from the weekend visit, "Daddy stuck his finger in me and it hurts." To prove the condition — that Suzy's vaginal area is painful — the mother can testify to the part of the statement in which Suzy said, "it hurts." The mother cannot testify to the rest of Suzy's statement (under this exception) because it relates to the cause of the condition, rather than the condition itself. Note that anyone who hears Suzy's statement can testify to it — the statement does not have to be made to a parent or physician.

Suppose that Suzy also said, "I hate Daddy." This is a statement of Suzy's feelings and seems to fit within 803(3). But this is not a case in which Suzy's feelings about Daddy are relevant. Daddy would be guilty of the crime of sexual abuse if he committed the act and Suzy loves him anyway. He is not guilty of the crime if he didn't commit the act and Suzy hates him. The argument against admissibility therefore is that Suzy's feelings about Daddy are not relevant to prove that he sexually abused her (KRE 401); the fallback position is that any relevance is substantially outweighed by the danger of confusing the jury and prejudicing the defendant (KRE 403). "Prejudice" in this context is created by evidence which makes it easier for a jury to convict for a legally irrelevant reason — the enmity the daughter bears her father.

4) **Statements made for the purpose of diagnosis or treatment.** KRE 803(4). To quality under this hearsay exception the statements must be: 1) made for the purpose of medical diagnosis or treatment; 2) describe the medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof; 3) insofar as reasonably pertinent to diagnosis or treatment. Suppose Suzy tells the family pediatrician, "It hurts where Daddy stuck his finger in me," and later repeats this statement to a psychologist and to a psychiatrist. Prior to the case of *Drumm v. Commonwealth*, Ky., 783 S.W.2d 380 (1990), the law in Kentucky was that statements made to a *treating* physician were admissible if relevant to diagnosis or treatment, but statements made to an *evaluating* physician were not. The rationale for the distinction is the assumption that people will tell the truth to doctors who they believe will rely on the statements in prescribing a course of treatment, whereas people will exaggerate or fabricate when talking to physicians evaluating them for the purpose of litigation. In *Drumm* the Kentucky court rejected this distinction and adopted FRE 803(4) as the standard. In so doing, however, the Court qualified its adoption of the federal rule. The Court put a twist on 803(4) by specifically adopting the reasoning of Retired Justice Powell, sitting by designation in the case of *Morgan v. Foretich*, 836 F.2d 941 (4th Cir. 1988). In Justice Powell's concurring opinion in that case he wrote that statements made to evaluating physicians do not have the reliability of statements made to treating physicians and admissibility should be determined on a case by case basis, balancing prejudicial effect against probative value.

The facts in *Morgan* troubled Justice Powell because it was not clear that the child believed her statements to the doctor would be used by him "to help her;" the same point seems to have concerned the Kentucky court in *Drumm*. It is not clear, however, how a judge is to weigh "probative value" against "prejudicial effect" in determining admissibility of such statements. Presumably the trial judge is to look for indicia that the child was telling the truth. In the first post-*Drumm* case, only the dissenting opinion engaged in the analysis mandated by *Drumm*. In *Hellstom v. Commonwealth*, Ky., 825 S.W.2d 612 (1992), at issue was the receipt of the testimony of Dr. Kearl, who examined the child a month after the alleged abuse. He testified that he found a thin vaginal scar which was consistent with the sexual abuse de-

scribed by the child. In the majority opinion, authored by Justice Spain, this testimony is described merely as a medical opinion that physical findings are consistent with complaints of abuse. In dissent, however, Justice Lambert pointed out that Dr. Kearl was not a treating physician but was rather a part of the "evaluation team," calling into play the need for a determination that [the] medical history . . . was given in circumstances with reliability similar to those which exist in a physician-patient relationship."

There are other important points to be made about KRE 803(4). First, the defense lawyer should insist that the child's statement to the physician be produced pre-trial for line-by-line editing to excise the parts which are *not* relevant to diagnosis or treatment. For example, the identity of the assailant may not be relevant to diagnosis or treatment. *Souder v. Commonwealth*, Ky., 719 S.W.2d 730 (1986) and *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) held that statements of identity should not have been received. The courts will rule otherwise, however, when the alleged assailant is a member of the child's household. *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985). In *Edwards v. Commonwealth*, Ky., ___ S.W.2d ___ (1992) the child told Dr. Kearl that "Paul hurt my butt." The child tested positive for a sexually transmitted disease and it was held that Dr. Kearl's identification of Paul was admissible under 803(4) because Dr. Kearl needed to know who the perpetrator was in order to warn those who might have been exposed to the disease.

Secondly, statements by family members about the child may be received under this exception. The pediatrician may be allowed to tell what Suzy's mother told him about Suzy's condition when the child came back from the weekend visitation. In *Miller v. Watts*, Ky., 436 S.W.2d 515 (1969) the Court held that history as related by a child's mother was admissible. The test is whether the statement is relevant to the diagnosis or treatment of the child. If the pediatrician would testify to what Suzy's mother told him Suzy said, it will be necessary to qualify Suzy's statement to her mother under a hearsay exception.

Finally, it does not appear that the child's statement to police or social workers qualify under this exception. *Souder v. Commonwealth*, Ky., 719 S.W.2d 730 (1986). *Drumm* reflects the Court's apparent belief that social workers manipulate children into falsely claiming sexual abuse. *CHR v. E.S.& H.S.*, Ky., 730 S.W.2d 929 (1987). What if the interview is conducted by the social worker at the request of a doctor? In such a situation it is possible that the Court will look at the social worker as a "physician's helper" of sorts, and hold the child's statements admissible under this exception. *United States v. DeNoyer*, 811 F.2d 436 (8th Cir. 1987).

Business Records.

KRE 803(6). The familiar "business records" exception (which in Kentucky is a combination of the "shopbook" rule and the "regular business entries" rule) is codified in KRE 803(6). Records, including data compilations, may be received if:

a) made by one with personal knowledge or on the basis of information transmitted by one with knowledge;

b) said persons having a business duty to be accurate (or some other hearsay exception);

c) reasonably close in time to the events;

d) kept in the regular course of business;

e) unless the "source of the information or the method or circumstances of preparation show lack of trustworthiness.

The rule allows for the receipt of opinions contained in records if the records would be admissible under Chapter VII of the Evidence Rules (the chapter governing opinions). Records must be introduced through a custodian or other qualified witness unless:

a) the records are hospital records and the hospital certifies the records under KRS 422.300 to 422.330;

b) the offering party has the custodian certify the records under KRE 902(11) and gives advance notice of the intent to introduce the document; or

c) the parties stipulate to admissibility.

Suppose the prosecutor attempts to introduce the report of Dr. Smith, a private pediatrician who examined Suzy. The report states in part, "Anterior tearing of the hymen, consistent with statement of patient that her father had penetrated her with his finger." There are a number of objections that might be made to this report. First, has the prosecutor satisfied the foundation requirements — is the custodian present; if not, has KRE 902(11) been complied with? Secondly, the report contains Suzy's statement that her father penetrated her with his finger. Suzy's statement must qualify as a statement of medical history under KRE 803(4), and should be analyzed as set out in above. Thirdly, objection should be made to the conclusion of the doctor about the cause of the tearing, on the ground that this opinion violates the Kentucky Supreme Court's some time rule against the receipt of opinions on "ultimate issues." *Sargent v. Commonwealth*, Ky., 813 S.W.2d 801 (1991). It might also be argued that the report indicates a lack of trustworthiness in that Suzy was examined and the report prepared with an eye on litigation. *CHR v. E.S.*, Ky., 730 S.W.2d 929 (1987).

Official records

KRE 803(8). This exception makes admissible data compilations, records, etc. of public agencies:

a) regularly conducted and recorded activity;

b) records of matters observed pursuant to a duty imposed by law; and

c) factual findings resulting from an investigation.

This exception also contains the caveat, "unless the sources of information or other circumstances indicate lack of trustworthiness," and specifically EXCLUDES;

a) investigative reports by police and other law enforcement personnel;

b) investigative reports prepared by or for a government, public office or agency when offered by it in a case in which it is a party;

c) factual findings offered by the state in criminal cases.

There is no stated "foundation" requirement, and public records which are duly authenticated under KRE 902(4) may be admitted without a custodian.

What will almost certainly be litigated in Kentucky is the receipt of CHR records in light of the specific exclusions in KRE 803(8). The defense will argue that CHR records should be excluded under one or more of the exclusions in 803(8): as "investigative reports by law enforcement personnel," or as investigative reports prepared by or for a government in a case in which it is a party," or as "factual findings offered by the government in a criminal case." The defense will argue that CHR records cannot be received into evidence since they fit one or more of these grounds of non-admissibility.

The argument on the other side will be two fold: 1) that the exclusions in KRE 803(8) should be interpreted narrowly; and 2) that CHR records can be introduced as business records under KRE 803(6). In cases predating the Kentucky rules, CHR records have been introduced as business records. *CHR v. E.S.*, Ky., 730 S.W.2d 929 (1987). See also *Garner v. Commonwealth*, Ky., 645 S.W.2d 705 (1983), a case involving records of the Bureau of Corrections.

It can be expected that the defense will counter that the specific (KRE 803(8)) controls over the general (803(6)) and that CHR records cannot be introduced through the general rule. There are federal cases going both ways: *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) supports the defense position; *United States v. Hayes*, 861 F.2d 1225 (10th Cir. 1988) and *United States v. King*, 613 F.2d 670 (7th Cir. 1980) support the prosecution position. The probable resolution of this issue is that routine reports will be admitted, but government reports in a criminal investigation, whether prepared by CHR or a law enforcement unit, will be excluded. The rationale will be that the exclusions of 803(8) are intended to bar investigative reports, but not intended to bar routine reports.

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P.D. BLUES by JIM THOMAS

PERSPECTIVES ON THE APPROACH TAKEN IN CHILD SEXUAL ABUSE CASES

BACKGROUND

In July 1978, I was hired to be an Assistant County Attorney in Campbell County assigned to juvenile cases. I was self-taught, as law school hadn't prepared me to deal with child sexual abuse issues. I went to seminars, read books, magazines, articles, and watched video presentations.

I rode with juvenile officers several times on child removal cases because I wanted to see the police work up a case first hand. I believe that kind of an insight enhances an attorney's performance at trial. I passed on what we found in those homes to the jury.

FAMILIES BROKEN UP NEEDLESSLY

Children were being removed from their homes and placed into foster care for reasons that I thought were insufficient to say the least.

As a prosecutor, coming up against poor people unrepresented or inadequately represented it was easy to do whatever CHR wanted. It wasn't until some local workers, who were not employed by the state Cabinet for Human Resources, began telling me that I needed to question what the Cabinet was doing, that I saw that the Cabinet was breaking up families needlessly in a lot of cases. From that point on, there was an ongoing conflict between me and CHR about how to handle these cases, and their failure to follow them up.

DISCRIMINATORY PROCESS

If a working class person was confronted with allegations of physical or sexual abuse, by virtue of their being able to pay their own attorneys, and that attorney's relationship with the client, those cases were much harder fought and there was much more pressure to arrive at a compromise than for a poor person who came into the system.

SHORTFALLS OF THE SYSTEM/CHR

One of the biggest shortfalls in the system even today is the lack of follow-up. Now the people who have the responsibility of the follow up will tell you that what I am saying is incorrect, and they will show you statistics, facts and figures that would seem to imply that there's some level of success.

But I've seen little girls, who were raped at age 6 or 7and come back before the juvenile court at age 13 or 14 on various criminal charges, not the least of which may be prostitution, and the same Cabinet for Human Resources or the same courts that were *so protective* years ago, want to send them away to an institution and want to call them bad kids.

THE CYCLE OF ABUSE

In many cases the alleged perpetrator had been abused. I could easily say most cases. That's why it was important to get treatment for the whole family, not just the child, not just the perpetrators.

APATHY

I found instances where people believe this is a "family problem" and that the state has no right to interfere.

I've even found lawyers, very educated lawyers, who would say that sexual contact between parents or parental figures and young children is not physically harmful in that it could be pleasurable and that there's no reason to intervene, because that causes the child more problems.

ALL ABUSERS ARE NOT MALE

We had a lot of cases in Campbell County where females would participate, if not in the specific act, would facilitate, either by ignoring, or by failing to take any protective action.

I remember one case early on in my prosecutorial career where the mother actually held the bathroom door shut as the child scratched and clawed to get away from the man inside the bathroom with her. I need to tell you that didn't do that little girl a whole lot of good emotionally.

FALSE ACCUSATIONS

There were cases we said no to, but those cases were investigated fully before a decision was ever made to turn them away. I think you owe that to the kids.

People trump up these charges because of domestic relation cases, for changes of custody or visitation, but they're easy to poke through.

If the process is handled by people skilled in talking to children and interpreting their behaviors, not only what they verbalize, but their non-verbal communication, I think you'll find out that there's a very small likelihood that false accusations are going to happen.

The innocent person will usually give an alibi or the child will not be able to describe physical characteristics of a person. The children's stories will change dramatically from one session to the next.

INTERVIEWING

You're not investigating criminal charges at the first point of contact. You're trying to keep a child from being hurt further. Criminal charges do absolutely nothing to help the child in most cases. Prosecutors, police and workers often lose sight of the fact that we're in the business of protecting children, not running up a win/lose record in circuit court.

In an emergency, you might only have one chance to interview the child and get the facts. What I consider most important is the physical sensations the child describes. You don't want to hear about all the various things adults, and their imaginations can do sexually to a child. But most of them will carry physical sensations. If a child is able to describe that in very colorful detail and if during the interview process you've got your team of people who are also out there interviewing the daycare workers, the school people who see this child every day, and if the signs keep coming back consistent that something's going on, then an emergency custody order might be sought.

I prefer to presume that it didn't happen, and make the facts demonstrate that it did. If you go into a situation believing that it happened, and you interview the child with that mind-set, I guarantee you will get that child to say what you want the child to say. Not necessarily intentionally, but it will happen. I've seen it happen too many times. I've probably done it myself.

The disclosure usually comes out through relatives, family, but more often than not through the school, daycare workers, or kindergarten teachers. The farthest thing from their mind is to put a thought into the head of a child that they've been raped or molested by a parent figure. Most of these people don't want to deal with this.

The kids come up with their own words. I've heard just about every word imaginable for the female and

LONG-TERM EFFECTS OF SEXUAL ABUSE: DISAPPEAR AT AGE 18 OR WHEN A CAPITAL CRIME IS COMMITTED??!

Defense attorneys feel as much or more for victims than prosecutors and police do. They feel because they have hearts, and loved ones. They grieve because they have insight. Many lives are destroyed by murders: the client's, and his family and loved ones and the victim's and his family and loved ones.

Society focuses on the horror of the crime and punishment. It takes courage and insight to face the reality that **to end killing we must look at more than the act, and focus on why the killing has occurred.**

The F.B.I. and the work they've done on profiling offenders of sexual homicides merely reaffirms my belief that untreated physical or sexual abuse over the long haul will have an adverse effect upon a person's behavior. The baggage that they've been forced to carry with them since early childhood goes right on into adulthood and these kids are just walking timebombs. All they need are the right combination of factors and there's ignition. And that ignition may ultimately result in somebody being killed. That kind of anger, hurt and frustration all those years doesn't leave simply because they've reached the 18th birthday.

In 7 1/2 to 8 years of prosecuting juvenile court cases, I never saw a teenage repeat offender that did not have an adjudication of abuse or neglect early on in their childhood. That is not necessarily a scientific survey, but a man doesn't need a tree to fall on him to figure out there's a correlation there, but we ignore it. And the kids that became juvenile delinquents, once they become adults, society is quick to want to lock them up forever.

Most of the death penalty clients we represent have suffered the trauma of sexual abuse as children. Many of the crimes committed have a sexual element to them. The Attorney General's Office, and I might add, the very same Attorney General's Office with whom I served on the Child Sexual Abuse and Exploitation Prevention Board, and the same office who believes that this trauma has got to be prevented because of the long term effects it has on a child, has taken the position that the sexual abuse of our clients has no effect, and it does not serve to mitigate or otherwise lessen the culpability of the defendants. I've never been able to understand that inconsistency, but politics being what they are, it doesn't surprise me.

CHR workers state that after they turn 18 adults who were abused as children are then totally responsible for their actions and the fact that they came from a terrible abusive hell-hole of a home had no effect on their behavior, and could not serve to justify it.

Now I can think of nothing that justifies murder. And I object when I have it thrown in my face, that we're seeking to justify killing. I've been in this Department for three years, I've gone to all of the training, I've heard the lectures, I've read the articles, I have yet to see anyone imply that we are trying to justify killing, that is simply not the case.

No one who is knowledgeable in this field could ever with a straight face say that untreated physical/sexual abuse does not have adverse consequences upon the behavior of a person as they grow older. Anyone who denies that is true is either ignorant, which makes them uninformed, or if informed and says differently is a liar.

Until there is a recognition that the cycle of abuse must be stopped at an early age to prevent permanent damage, death penalty lawyers will continue to collect sexual abuse data on clients, to document the inconsistency of the State's , and the Cabinet of Human Resources' position and to remind communities through penalty phase trials that **these capital clients were the children that the police, social workers, and the system were aware of, but chose to ignore.**

Persons who work in the sexual abuse field, prosecutors and CHR workers must not be allowed to ignore the corrrelation. To say that the sexual abuse years prior is not important is to ignore the fact that the defendant and the sexually abused child they once were are one and the same person. Intervention is urged by prosecutors and the Attorney General's office because of sexual abuse's long-term effects, but if those effects are temporary, why expend the time energy and money to intervene?

It's about punishment- if the ends justifies the means, the inconsistencies aren't as important as punishing the wrong doer. And society can deceive itself in to believing that it did justice. A terrible injustice is being done to adult survivors of child sexual abuse, who haven't been able to overcome the effects of that abuse.

male genitalia. It's important for the attorney to find out what the child means by certain names. I remember several cases actually, where the term "finger," which one would assume would be digits of the hand was being used by the child to refer to the male genitalia.

When I did the interviews myself, the interview would go like this:

"Do you know why I'm here?" If the answer is yes, I ask them to tell me why.

"Why am I here?" "Because I've been hurt," they might say, or "because of what somebody did to me."

"What did somebody do to you?" And they'd tell me.

I always used open-ended questions.

I don't know that children don't lie. I believe, that children have this perception of adults that the adult knows when a child is telling a fib.

It's very possible for an advocate to lead a child to say whatever he or she wants them to say. People that aren't skilled interviewers can conduct interviews and get the child to say what the child believes the interviewer wants him or her to say.

There's probably not 1 lawyer in 10 that really knows how to interview a child without influencing the child's testimony.

These kids wanted very much to please me, because by the time we went to court I was their friend. That's why I always insisted on having somebody present with me whenever I did interviews with them. Very often I would not even be questioning the child during these interview sessions, it would be another person.

The best thing a lawyer could do is to establish a relationship with the child prior to court where the child believes that all you want out of him or her is the truth with no idea coming from the lawyer of what that truth ought to be. It's important that the child believes that all these people want from them is their real recollections, not what they think somebody wants them to say.

CRIMINAL CHARGES

I don't even agree with prosecuting a person in criminal court until the juvenile proceedings are completed. Protect the child first.

Other than stopping the abuse because somebody's in jail, criminal sanctions don't do a lot of good. If it has to be done to make change and stop the cycle, then do it. But only as a last resort.

If the decision is made to proceed full bore with criminal charges, once that decision is made, and once you go forward with them, I don't think probation ought to be an option.

However, if the decision is made, based upon the best interest of the child not to pursue felony criminal charges, but a treatment plan, then by all means do that.

I'm not so sure that retribution doesn't play a role somewhere in the process when a child has been raped. But the role it plays should depend upon the needs of the child.

The fact that there might be different grades of felonies is of no consequence to that child. He or she doesn't care whether it's a Class C felony or Class A felony. The fact of the matter is that somebody they trusted has hurt them.

These kids love these people that do it to them. I have run across countless situations where the prosecutor won't settle a case, because they want to do what the victim wants. Well there aren't a lot of child victims who want their parents in jail, but you have prosecutors that will persist in seeking to put parents of the child victim in jail.

These same prosecutors never think about what that child's life is like after that trial is over: foster care, living with strangers, always wondering about the day when they are going to see their mom and dad again. These people are in jail where they can sit and think for several years about why they're there. There isn't a lot of counseling and treatment that goes on in the prison system.

BENEFITS OF PLEAS

The adversary system gives few benefits to people who admit guilt. When I prosecuted, if you admitted it to me, you'd probably avoid a criminal charge as long as you knew that you were going to go to treatment, and if you violated the treatment plan, you were going to go to jail for contempt.

The police tell defendants that it will be better on them if they confess, then with the help of their statement, the State hits them with a 20-year or life charge. It doesn't do kids any good to make it that disadvantageous for a parent to admit what they've done. It's very helpful for the child to have the parent admit they were wrong and accept some punishment or some treatment for it. That sends the kid a message that they did the right thing by disclosing. It tells the kid that their father and/or mother still love them and care for them.

ALL MEMBERS OF THE HOUSEHOLD ARE INTERVIEWED

Over the years, we've recognized that it is likely that more than one child in the family, and that's both males and females, has been abused, that the other children in the family are at risk if abuse is occurring, and the existence of the abuse, in particular sexual abuse, if the other kids know it's going on, has a terrible impact upon their psyches.

AREAS THAT DEFENSE ATTORNEYS SHOULD PURSUE

Discovery: You've got to trace the disclosure, the time that disclosure took place, the interview process, and become aware of all the opportunities the social workers, police officers, relatives had to distort the child's original memory of what really occurred. And then you have to separate out what the child perceives himself or herself as being expected to say by people that they love and respect. Discovery is the single most important thing.

Voir Dire: A defense attorney should be more prepared for the voir dire process than in a normal felony case, because if statistics mean anything, as you look at that prospective jury panel of 25 or 30 people, you can pretty well assume that one-third or one-fourth of them have experienced this themselves.

I would always move to have individual voir dire because no one is going to stand up in the middle of a courtroom in their local community and admit that somebody in their family has had sex with them as a child.

Jurors don't want to believe the pillars of the community commit these acts. They want to believe those kinds of things happen in only certain parts of society. They don't want to accept that Salvation Army ministers, Boy Scout leaders, or softball coaches commit these acts.

Settle the Case: If you've done your homework and discovery the way it should be done, and actively engaged in pretrial motion practice, you know whether your client did it or not. I'm of the belief that we as lawyers should try to settle cases rather than pursue litigation.

Most prosecutors I've met feel if they can settle the case and see justice done, they might not necessarily be as adamant about maximum sentences.

Now I'm not saying plead somebody guilty that isn't guilty, and I'm not saying roll over on a case. I am saying that sometimes you have a duty to make your client aware of the law, of the facts, of what might happen if the case is taken to a jury, and that client should have an opportunity to agree to plead guilty and avoid maximum penalties in exchange for something a lot less.

THE CHILD WITNESS

You can't brutalize a child on the witness stand. If you're going to win the case, it's going to be because of the many inconsistencies spoken by the child during the various interviewing processes that take place.

If you're going to deal with a child in the courtroom, you've got to treat them like a child. The danger you often encounter is that if you try to play lawyer with them, it's going to be so obvious to the jury that you're leading the child that you're going to defeat yourself.

I'm kind of ambivalent about the use of video. I don't know that it is as effective to a jury, from the prospective of a prosecutor. From the prospective of the defense, I would want that child to have to confront my client, because then that child may recant or be afraid to testify. I have real mixed feelings about that.

I don't think you can ever prepare a kid for confronting the accused. I've done it the best I could. But I also know what those children were like when they walked off that witness stand. I've seen the looks on their faces when they glance over and see that person.

THE TAINT OF A SEXUAL ABUSE ALLEGATION

Does anybody, other than lawyers in voir dire, actually believe in the presumption of innocence when there's a child involved? I've never seen any evidence of that. "They're guilty and the best thing they could do for their kids is to plead guilty."

There's no way to unring that bell. That's why these things ought to be dealt with in juvenile court until you are absolutely sure beyond any shadow of a doubt that it occurred.

There was a perception among many attorneys and some judges that these parents did not deserve legal representation. They deserved "anything they got."

Of course no one is going to come out and say it publicly, but lawyers were discouraged from actively pursuing representation of parents in these cases. They were discouraged from undertaking aggressive motion practices.

MAKING THE SYSTEM WORK

It takes more work to work out a treatment plan and to follow up. It takes more work to take a case to the juvenile court process to make sure the child's protected. It's much easier to bring the indictment and go to trial.

We still don't have the intensive organized education on child abuse and neglect in our school systems like we ought to have it. If this is going to change at all, unless you can require people to pass minimum competency tests before they have children, which ought to make the civil libertarians just cringe when I say it, then you've got to teach kids about children, because as they grow up and have kids of their own, the ignorance that often results in physical and sexual abuse may not exist in that cycle, and that ever-continuing cycle will be stopped.

County attorneys should take a more active role in how the cases are investigated and pursued within their own counties. Options are much more plentiful in the juvenile court system than they are in the criminal courts. If your intent is to protect the child and try to preserve the family, it's got to be done in the juvenile court.

PROFILE OF ABUSERS

I didn't see a lot of "stranger" child abuse. The key that makes the child accessible is trust. Children are taught very well not to trust strangers. It's usually somebody close. Boy scout leaders, softball coaches. It doesn't have to be a family member, just somebody that's trusted.

I don't know of one sexually abused child where at some point during that relationship the child didn't try to tell the parents they didn't want to go with that person, or on the team anymore, or be in that boy scout or girl scout troop anymore, or go to that babysitter. The parents forced the child to continue to go around the individual.

MICHAEL L. WILLIAMS
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Chief, Capital Trial Unit
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Mike Williams has acted as Guardian Ad Litem for abused and neglected children, Prosecutor of Sexual Abuse Cases, Public Defender of Persons Charged with Sexual Abuse, or Juveniles, who were sexually abused and are acting out their abuse stereotypically by prostitution and other offenses. Mike currently represents Capital Clients most of whom were physically and/or sexually abused as children.

ATTORNEY GENERAL, CHRIS GORMAN, ON CHILD SEXUAL ABUSE

With all the current talk about "family values," it is important to remember that there is nothing more vital than the safety and well-being of our children. Above all, we need to be vigilant in the prevention and punishment of crimes against them.

As the state's chief law enforcement officer, and as a parent, it is difficult for me to imagine a more horrible crime than sexual abuse. As hard as it might be to believe, this crime has reached epidemic proportions, as shown by an October 1991 poll conducted by the *Lexington Herald-Leader* which concluded that 500,000 Kentuckians had been sexually abused as children.

These crimes violate the most basic principles of trust upon which our society depends, and are an affront to the most fundamental standards of moral conduct. That is why I convened a special task force earlier this year to:

(1) examine prevention, service delivery and the current civil and criminal system response to child sexual abuse,

(2) identify inadequacies that may exist, and

(3) recommend changes in police, practices, regulations, budgets and statutes to eliminate those inadequacies.

The task force includes the talents of judges and prosecutors, health care workers and mental health practitioners, leading legislatures, victim advocates and, very importantly, those whose lives have been directly affected by this tragic abuse. Together we are taking the first comprehensive look at how we can better meet the special needs of victims and survivors of child abuse.

At a recent meeting, the task force heard compelling testimony from both victims and offenders. We heard from an offender who was chillingly methodical in the selection of his victims, and we heard from victims who have spent their lives coping with the abuses that they suffered as children. In discussing the aftermath of child sexual abuse, one male survivor recalled that "Part of me stopped growing at age twelve." Task force members heard adult survivors ask..."Why didn't someone do something?..." and refer to child sexual abuse as the "best kept secret in the world." Members also heard a perpetrator acknowledge responsibility for the offense in stating "My victims said 'no' many times, but I didn't hear them." Task force members walked away from that meeting with no doubt that child sexual abuse can shatter entire lives and that its human cost nearly defies calculation.

We have learned that while there are many myths about this crime, child sexual abuse occurs without regard to race, gender, family income or geographic location. Offenders are almost always in a position of authority or trust, making this one of the most unforgivable crimes that our society must confront. We have learned that child sexual abuse and victimization is a large and underreported problem and that offenders, without treatment, have a high likelihood of reoffending. Finally, we have learned that in too many instances our system only serves to "revictimize" the victims.

As a task force, our examination of the entire scope of the problem is well underway. With the knowledge that few perpetrators are apprehended and fewer still seriously punished, we have broadened our focus beyond the criminal justice system to include public education and awareness, training of professionals and development of an expanded array of intervention and treatment services for both the victim and the offender. We will find out what does not work, we will recommend solutions and we will find new ways to protect our children. As we strive to improve the system, our guiding principle is accountability. We need to make the system more accountable to the victims, and we need to make the offenders more accountable for their actions.

Without a doubt, this is the beginning of positive change in the way we approach these cases. As Attorney General, I ask for your support as we continue to work toward the prevention and punishment of child sexual abuse in our Commonwealth. The fate of Kentucky's children is in our hands.

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On November 5, 1991, Chris Gorman was elected as the 46th Attorney General of the Commonwealth of Kentucky. Mr. Gorman, who took office on January 6, 1992, has based his administration on environmental and consumer protect, and new ways to protect Kentucky's women and children from abuse and violence. Already during his term he has successfully lobbied for new laws against domestic violence, expanded new laws and policies aimed at the prevention of child sexual abuse. He has also decided not to raise money for himself or any other elected official during his term, allowing him to remain a focused and independent Attorney General. Mr. Gorman is a graduate of the University of Kentucky, and was admitted to the Kentucky Bar in 1967.

REGISTERING SEX OFFENDERS

Attorney General Chris Gorman plans to again seek a law requiring registration of sex offenders. "I'm not at all convinced right now that treatment (of sex offenders) is effective. That's why we need a registry," Gorman said. If treatment programs don't work, he said, "our backup system is that they know that we know where they are." He wanted a tracking and record-keeping system that would issue an alert when a convicted sex offender tried to get a job involving children.

A sexual abuse task force has found that the crime cuts across age, race, social and economic lines. "The only common denominator is the offenders are almost always in a position of...trust and authority," he said. Gorman said the task force is likely to ask the legislature for: 1) Stricter sentencing, including some guarantee that an offender won't be paroled before completing treatment. Experts generally agree that treatment takes at least three years, Gorman said, but parole eligibility typically comes sooner. Sex offenders have "an incredible rate" of repeat offenses, he said. 2) Authorization of testimony in court on what is called "child sexual abuse accommodation syndrome" — the tendency of victims to suffer in silence. The Kentucky Supreme Court has so far refused to permit such testimony. Shelby Circuit Judge William Stewart, chairman of Gorman's task force, conceded the syndrome is not scientifically provable. But Stewart said he believed the court would allow juries to consider "a sanitized version of the syndrome" if presented by an expert witness, perhaps a physician. 3) Training about the sexual abuse of children for judges, prosecutors, law-enforcement officers, law students and medical students, among others. 4) The use of closed-circuit-television testimony by child witnesses. 5) Victim advocates in each county and regional child-advocacy centers. 6) A system for documenting all abuse reports.

CHARLES WOLFE, Associated Press, *Courier Journal*, August 17, 1992.

CHILD SEXUAL ABUSE: A HISTORICAL PERSPECTIVE

by Kim Allen

HISTORICAL PERSPECTIVE

Although the December 1991 release of the series "Twice Abused" by the *Lexington Herald-Leader* and the subsequent appointment of the Attorney General's Task Force on Child Sexual Abuse has once again placed the crime of child sexual abuse before the public, this does not represent Kentucky's first efforts to address the sexual victimization of children. Initial efforts to address this insidious crime, both nationally and on the state level, can be traced back to the late 1970's and early 1980's.

In a research report entitled, "Summary of Findings from the Sexual Abuse Allegations Project (1987)," Thoennes and Pearson report that "although reports of incest and child sexual abuse can be found throughout history, it was not until the late 1960's that sexual abuse was specifically and explicitly recognized by statute as a reportable offense (p.1)." Though recognized as an offense at that time, it was not until the late 1970's that the dramatic increase in public awareness occurred.

In his book, *The Battle and the Backlash: The Child Sexual Abuse War*, David Hechler (1988) identifies the child sexual abuse movement as an outgrowth of the women's and victims' rights movements and concerns raised by advocates of both groups regarding the treatment of victims of rape and sexual assault. According to Hechler, these movements, along with increasing openness in discussions of sex, a by-product of the sexual revolution, set the scene for public dialogue about child sexual abuse.

The resulting public advocacy for child victims gained added momentum following the disclosures of prominent Americans who themselves had been child victims. In Washington, D.C. in 1984 at the Third Annual Conference on the Sexual Exploitation of Children, a U.S. Senator from Florida, the Honorable Paula Hawkins, disclosed her childhood victimization and by gaining the attention of national lawmakers, set the scene for significant legislative reform in the area of child victims and children's rights.

Most recently, public disclosures of childhood victimization by a former Miss America, Marilyn Van Derbur, and award winning actress and talk show host, Oprah Winfrey, have once again gained the attention of the public and sent the message that child sexual abuse knows no cultural, racial, gender or socio-economic boundaries. In an unprecedented event, "Scared Silent," a compelling program on child victimization hosted by Oprah Winfrey, aired simultaneously in September 1992 on the CBS and NBC Television Networks, and on the Public Broadcasting Service ... the first time in the history of television that a non-news event was carried in primetime by three different networks at the same time.

KENTUCKY'S RESPONSE TO CHILD SEXUAL ABUSE

In late 1979, following a reference in a midwestern newspaper that Louisville was a recruiting point for child prostitution in Chicago, efforts were initiated in Jefferson County to investigate growing concerns regarding the sexual exploitation of children. As it became evident that sexual victimization of children was not isolated to urban areas, a Kentucky Task Force on Exploited and Missing Children was named and public hearings were held across the state to gather information on child sexual abuse and exploitation and to generate recommendations for action.

When the Kentucky Task Force filed its final report in September 1983, the Kentucky Alliance for Exploited and Missing Children was formed to carry out the recommendations set forth in the Task Force Report. Many of these recommendations became elements of the first comprehensive piece of legislation addressing child victims to be passed in the Commonwealth. At that time, H.B. 486 also became a national model for other states to follow in addressing the plight of child victims. Among its numerous provisions, the enactment of H.B. 486 on July 13, 1984 resulted in:

* Creation of the Child Victims Trust Fund
* Availability of criminal record checks for employees/volunteers of child-serving organizations
* Creation of the Kentucky Missing Child Information Center under the Kentucky State Police

KENTUCKY'S RESPONSE TO CHILD SEXUAL ABUSE

* Ability of child victims to claim compensation from the Kentucky Crime Victims Compensation Board.

* Provisions for videotaped testimony of child witnesses.

Over the years, groups like the Kentucky Alliance, the Victims' Advocacy Division of the Office of the Attorney General, the Exploited Children's Help Organization, and the Kentucky Coalition Against Rape and Sexual Assault have been actively involved in legislative efforts as well as efforts in education, prevention, and intervention for victims. The institution of police/social work investigative teams, provisions for acceptance of a child's out-of-court statements regarding physical or sexual abuse, the institution of a speedy trial provision for child victims, and passage of sex offender treatment legislation for adults and juveniles all represent significant accomplishments in Kentucky's response to child victims during the 1980's.

BACKLASH DEFINED

Despite the positive accomplishments of the child sexual abuse movement in the 1980's, a phenomenon occurred which has had lasting impact on efforts at the local, state and national level to address child sexual abuse...that phenomenon is known by professionals in the field as "backlash." According to Patricia Toth (1989), Director of the National Center for the Prosecution of Child Abuse, backlash describes the "turnabout in media focus and public opinion regarding child sexual abuse reports resulting in questions regarding the legitimacy and actual extent of the child sexual abuse problem." Although the backlash is an understandable reaction in the wake of the overwhelming discovery that child sexual abuse had reached epidemic proportions, it can unfortunately result in the reluctance to fund programs at the level required to meet reporting needs.

Both Hechler (1988) and Toth (1989) identified a number of factors that contributed to the backlash phenomenon. These included:

* Tremendous increases in the reporting of child sexual abuse.

* The frightening awareness that "folks like us" molest kids...not just "dirty old men."

* Reluctance on the part of the public to believe that child sexual abuse is so widespread.

* Media attention to sensational cases like the McMartin case in California that included claims of children being "brainwashed" and "programmed."

* Claims by advocates that "children never lie" and use of unsubstantiated statistics.

The impact of the McMartin case alone as a significant contributor to the backlash is understandable when one considers that this case, involving hundreds of charges of sexual abuse and participation in satanic rituals, represents the longest, costliest criminal case in the United States (*Courier Journal*, July 28, 1990). What was characterized as a "modern day witchhunt" (*Courier Journal*, November 3, 1989) ended in a mistrial for the second time in 1990.

Most recently, the media attention on allegations of child sexual abuse during divorce and custody disputes has the public asking questions regarding the credibility of child witnesses. An article in the *Oakland Tribune*, (cited in Meyers, 1989) entitled "Therapists are the Real Culprits in Many Child Sexual Abuse Cases," warned of a "wave of false allegations." Although a recent review of extensive studies published by the Kentucky Youth Advocates (1992) found that "while a very few children do lie, the overwhelming majority do not (p. i)." The study further concluded that "although much has been made of child sexual abuse allegations in child custody cases, research indicates that only two to ten percent of the cases in which custody is in dispute involve sexual abuse allegations (p.ii)." Of that small number in which allegations arise, it has been estimated that false allegations occur in 33-50% of cases.

Ultimately, after reviewing what he describes as a war between those who believe child sexual abuse is an epidemic and those who believe the epidemic is "sex accuse" rather than sex abuse, Hechler (1988) reaches the following conclusion:

> When you blow away all the smoke, most people say they want two things: objectivity and responsibility. Boosters and critics of the system alike say they want objective investigations conducted by responsible investigators. They want professionals to approach their tasks without bias and to perform them in a manner than elicits truth without influencing the result (p. 239).

With estimates that only one to ten percent of child molestation cases are ever disclosed Goldstein (1984), it is apparent that reported cases only reflect the tip of a very large iceberg. As so aptly described by a former Louisville Police Department Captain during the early efforts to address child victimization in Jefferson County, "the only way not to find it...is not to look for it."

THE ROLE OF THE ATTORNEY GENERAL'S TASK FORCE

Although the field of child sexual abuse remains in its infancy, many lessons have been learned since the onset of efforts to address child sexual abuse in Kentucky. These include the following:

* Elimination of the "stranger danger" message following recognition that children are most frequently victimized by someone they know.

* Improved understanding of sex offender typologies and treatment issues.

* Avoidance of sole reliance on fingerprinting, child identification programs, and one-time body safety training in the wake of research findings that outline necessary elements for effective prevention programs.

* Knowledge to explain why children delay disclosure of child sexual abuse and recant under pressure.

* Need to explore new directions in courtroom procedures following recent Supreme Court decisions on videotaping and out-of-court statements.

* Need for *ongoing* training of key professionals in light of staff turnover and the number of new professionals entering the field on a regular basis.

Although many positive steps have been taken, we can never allow ourselves to become complacent in responding to the crime of child sexual abuse and must continue to build upon existing knowledge through research. One has only to listen to the experiences of child victims and their families to know in many instances that the system response is painfully inadequate.

The challenge before the Task Force is a monumental one...one that differs significantly from the challenges that faced previous Attorney General Task Forces on Driving Under the Influence and Domestic Violence. In the child sexual abuse arena, the Task Force must address a crime in which evidence is scarce and the primary witness is a child who must testify in a criminal justice system that is geared toward adults rather than children. The Task Force must explore substantive legislative changes involving a wide range of statutes and develop a comprehensive response that goes far beyond enforcement to address public education, prevention, multidisciplinary team approaches, and a range of intervention services for victims and offenders.

With the recognition that the Task Force must find answers to complex problems and requisite funding in a time of limited resources, it is clear that the task at hand will require a long-term process and a strong commitment on the part of Task Force members, the Citizen's Advocacy Advisory Committee, and the citizenry as a whole if we are to be successful. But with every challenge, comes an opportunity...and for Kentuckians, that opportunity represents a time for reawakening...an opportunity to look at the current system response to child sexual abuse with a critical eye and provide not only the impetus for change, but a source of hope and empowerment for child victims and adult survivors.

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SEXUAL ABUSE AND THE BATTERED WOMAN

A woman who is physically abused by her husband or partner is very likely also sexually abused. This disturbing conclusion is supported by studies which regularly show that one-third to one-half of all battered women are also victims of sexual assault in their violent relationships.[1] Although sexual abuse of wives and girlfriends is not limited to physically abusive relationships, it does appear that physically battered women run an especially high risk of sexual assault by their batterers. Acknowledging the fact that spouse abuse often includes sexual abuse is the first step in developing an effective response within the criminal justice system.

In recent years, public awareness of spouse abuse as a significant social problem has increased dramatically. Television programs, books and articles have educated us about all forms of domestic violence, and specifically, about battered women. We know that battered women are found in all ages, races, ethnic and religious groups, educational and socioeconomic levels. Battered women typically suffer from low self-esteem. Most battered women accept a very traditional sex-role structure in which the man is the head of the household and the woman is subservient to him. A battered woman usually believes that the marital union must be maintained at all costs and she accepts responsibility for the emotional health of the relationship. She accepts responsibility for the batterer's actions and feels guilt and shame while denying her fear and anger. She believes no one can help her but herself. She may have suffered sexual abuse as a child.[2]

A batterer also generally suffers from low self-esteem. He also accepts a traditional sex-role, believing that the male is supreme. He often presents a Dr. Jekel-Mr. Hyde dual personality, loving and charming on one occasion, changing on a moment's notice to angry, cruel, and physically dangerous. He blames others for his actions and suffers severe stress reactions, using alcohol and violence to cope. Batterers are most uniformly extremely jealous. These men do not believe their violent behavior should have negative consequences. A man who batters frequently uses sex as an act of aggression. He probably grew up in a physically abusive environment.[3]

A man who physically abuses his spouse or partner is asserting his power and control over her. He will use a variety of coercive techniques, in addition to actual physical assault, to accomplish this control. A batterer's controlling behavior may include isolating his partner by limiting what she does, who she sees, and where she goes. Often there is psychological abuse such as threatening to hurt his partner financially or emotionally. Intimidation, such as using looks, actions or a loud voice to physically intimidate his partner and smashing things, destroying property or pets is not unusual. Batterers use emotional abuse, such as attempts to put the woman down or make her feel bad about herself. Economic abuse includes attempts to make the woman dependent on him for money and survival by taking her money or making her ask for anything she needs. Sexual abuse, any attempt to have his partner have sex or do sexual things against her wishes is another controlling behavior.[4]

Psychologist Sara Young counsels many women who are referred to her by the Spouse Abuse Center in Fayette County. She counsels batterers as well as battered women. Ms. Young states that the sexual abuse which occurs within violent relationships has the same goals as the physical abuse. In the case of sexual assault, the man is using sex to assert his power and control over his partner.[5]

What kind of acts constitute sexual abuse within a violent relationship? It is important to realize that the sexual abuse that occurs within a violent relationship is not a conflict over sex, nor a bedroom quarrel. The sexual violence is another aspect of the general abuse, an extension of the other violence. Often the sexual abuse is continuation of a beating. The beating may continue throughout the sex, or the batterer may be "making up" with sex following a beating. Battered wives may experience forced vaginal intercourse, forced anal and oral sex, rape with objects, forced sex with another man, genital mutilation and forced sex in the presence of their children.[6] In these relationships, it is unlikely that such rape incidents are isolated episodes. Physical violence may be used to force compliance or simply the omnipresent threat of violence may be enough. Among batterers, those who rape have been found to be the most brutal and violent.[7] Just as physical violence, if left unchecked, will worsen and become more dangerous, it is likely that the violence and brutality in the sexual relationship between assaultive couples will escalate with time.

Many people do not consider rape within marriage or an intimate relationship to be as serious as the stranger-rape situation. However, the impact on a victim of marital rape is significant. A woman who has been raped by her husband suffers in the same way as do victims of rape by a stranger. She feels anger, humiliation, guilt. She may have physical injuries. She may suffer long-term effects such as the inability to trust men, aversion to intimacy and sex, and a lingering, acute fear of being assaulted again. Marital rape is especially damaging to a woman's self-esteem. She suffers an additional trauma of being violated by someone she loves. She may feel betrayal, entrapment, and isolation. A marital rape victim has difficulty sharing her pain. No one asks her about it, not even doctors, police, or prosecutors.[8]

Another impact created by sexual assault upon one's spouse is the traumatic effect upon the couple's children. Children may witness the assault, either by seeing it or hearing it. There is no question that such incidents would be disturbing to children. There is also evidence that there is some connection between abuse of a spouse and sexual abuse of female children in the home. As prosecutors, we need to be aware of this possibility.

Not long ago in Kentucky it was not legally considered a crime for a man to rape his wife or the woman with whom he was living. Prosecution for any offense which involved sexual intercourse, deviate sexual intercourse or sexual contact was limited to persons not married to each other.[9] Any persons living together as man and wife regardless of the legal status of their relationship were considered to be married for purposes of KRS Chapter 510, which establishes all sexual offenses. Therefore, not only could a man rape his wife without fear of legal consequences, any unmarried man who lived with a woman "as man and wife" could safely rape her. Acts which would otherwise be prosecuted as rape, sodomy and sexual abuse went unpunished if the persons were married or lived together. Only if the woman was living apart from her spouse under a decree of legal separation would she be protected by law from rape, sodomy, or sexual abuse by her husband. An entire segment of our population was denied protection from forcible, even brutal, sexual acts. A woman could not prosecute the man who terrorized her, humiliated her, and sexually violated her, if she had the misfortune to be married to him.

Certainly Kentucky was not alone in limiting its prosecution of sexual offenses to those persons not married to each other. Many states had, and some still have, similar laws. This denial of protection to married women has its roots in the theory that when a woman married she gave her irrevocable consent to sex with her husband.[10] It is true that when a man and woman marry, sexual intimacy is an expected, and hopefully pleasurable, part of that union. However, simply because a woman agrees to a sexually intimate relationship, the conclusion does not follow that she agrees to sex at all times and in any manner. Surely she has not consented to being psychologically degraded and physically hurt. In the case of the battered woman, when the sexual act is accomplished through violence or the threat of violence, and is in itself another way of punishing and dominating her, to view this sexual assault as a "consensual" act is a legal contradiction and a moral injustice.

Another argument sometimes used to prevent criminalizing sexual assault by a husband is the objection that the government should not interject itself into the couple's bedroom. A man's home is his castle, so to speak. What happens within the home is private and not a proper arena for the criminal law. However, if a criminal act is committed by family members against one another within the home, then it does become the business of criminal law. An act is no less a crime simply because it occurs in the family home. Just as the cloak of secrecy is being removed from the fact of physical assault of wives by their husbands, so it must also be removed from the fact of sexual assault.

As public awareness of domestic violence including sexual assault has changed and grown, so has our law. In 1986, protection for wives against sexual assault by their husbands was extended to those women who were living apart from their husbands if one or both spouses had either filed for divorce or for a protective order.[11] Finally, in 1990, the Kentucky Legislature removed from the legal definitions of sexual intercourse, deviate sexual intercourse, and sexual contact the limiting words, "between persons not married to each other."[12] With this action, our Legislature extended equal protection of the law to married women. As of 1990, forcible sexual intercourse may be prosecuted as rape even if the perpetrator is married to his victim. A wife subjected to forcible sodomy by her husband can look to the criminal justice system for protection. A man who sexually abuses his wife no longer does so with the protection of the law.

Further changes resulted from our most recent legislative session. The definition of sexual intercourse was expanded to include "penetration of the sex organs or anus of one person by a foreign object manipulated by another person."[13] It is not unusual for a battered woman to be sexually abused in this manner. Many battered women report that their husbands have inserted objects in their vagina or anus. If this act is done by forcible compulsion, it may be prosecuted as rape.

The existence of sexual abuse as a real part of domestic violence was directly acknowledged by our legislature in the amendments to KRS Chapter 403. KRS 403.720 was amended to read as follows:

> As used in KRS 403.715 to 403.785: (1) "Domestic violence and abuse" means physical injury, serious physical injury, *sexual abuse*, assault, or the infliction of fear of imminent physical injury, serious physical injury, *sexual abuse*, or assault between family members or *members of an unmarried couple.*

Now, a woman who is being sexually abused by her partner may apply for a Domestic Violence Protective Order based on the sexual abuse.

The Legislature also acknowledged the potential traumatic effect upon the children who have lived in a family where the father abuses the mother. In families where domestic violence exists, a court considering matters of child custody and visitation must consider the extent to which the domestic violence and abuse had affected the child and the child's relationship to both parents.[14]

Now that the law establishes sexual abuse between partners as a crime, how do we prosecutors proceed? The first requirement is education.

We must all educate ourselves about spouse abuse and sexual assault. There is considerable literature on the subject. If we educate ourselves about battered women in general and sexual abuse in particular, we will be able to prosecute cases involving these women and issues more effectively. Increased understanding in this area will dispel false misapprehensions about prosecution. We will be able to pass along our understanding to jurors in the voir dire process. And, we can encourage victims to cooperate in the prosecutions process, by referring them to services, by actively listening to them, and by informing *them* that the abuse they are suffering is against the law.

One fear sometimes mentioned is the possibility of false charges. A wife might charge her husband with rape just out of vindictiveness, it is argued. I believe this fear is greatly exaggerated. Sexual offenses are generally underreported. A victim who reports such a crime must be prepared to go through a difficult, unpleasant, and all too often, humiliating court process. For a wife, the prospect of making such a charge is emotionally difficult. Also, she is not likely to view herself as a rape victim unless the force used against her is substantial. There are many barriers to her coming forward - economic, social, personal. That she does come forward with a complaint of sexual assault in the face of these barriers indicates the credibility of her account.

A person may wonder whether these cases are impossible to prove. Sexual assault cases are often challenging cases to a prosecutor. This is true with all types of sexual offenses, including child sexual abuse and rape by a stranger. Sometimes we have to put our egos aside, and simply work hard to present the facts and to persuade the jury. Our willingness to prosecute these cases will in itself help educate and enlighten the public. *And*, a victim may begin to believe that she does *not* have to accept an abusive relationship, that society *will* support her attempt to protect herself. It is also important that the abuser see that there are consequences for his abuse.

In the Fayette County Attorney's Office, we prosecute Spouse Abuse with the benefit of a multi-disciplinary team. The police, Bluegrass Comprehensive Care and the YWCA Spouse Abuse Shelter work closely with our office to promote the most effective prosecution of spouse abuse cases. One prosecutor concentrates entirely on domestic violence crimes, following every spouse abuse case from the initial complaint throughout the court process. Our Victim's Advocates help victims of spouse abuse understand the court process. They provide encouragement and emotional support, including referral to services.

The Lexington Police Department formed a Family Abuse Unit five years ago which concentrates entirely on *adult* domestic violence. Detective Gay Tincher, who works in this unit states that her unit will investigate every complaint of domestic violence sexual abuse. The attitude of the police is that sexual assault between partners is a crime and that the proper police response to such abuse is to arrest the offender.

The YWCA Spouse Abuse Center provides services to women suffering from abusive relationships. The Spouse Abuse Center provides safe shelter where a woman and her children can stay temporarily. The Spouse Abuse Center has been in existence since 1979 and serves women from 17 Kentucky counties. From June 1991, to July 1992, the Fayette County Spouse Abuse Center handled 2,554 crisis calls and housed 612 women and children. Beverly Fenigstein, Director of the Spouse Abuse Center reports that a survey of all women in shelters statewide conducted in 1989 by the Kentucky Domestic Violence Association found that 50 percent of the women were sexually abused by their partners. Women who contact the Spouse Abuse Center are provided with counseling. Services from a therapist trained in this area can help a woman believe that she has the right to be safe from abuse, especially in her own home. Counseling services are provided whether or not the woman is a resident at the center. A worker from the Spouse Abuse Center works closely with the domestic violence prosecutor.

Women who are victims of sexual abuse may also contact the Lexington Rape Crisis Center in Fayette County. Diane Lawless, Director of the Rape Crisis Center, says that of the approximate 750 crisis calls her center receives each year from women who have been sexually assaulted, some of those women have been assaulted by their partners. Rape Crisis workers accompany women to the hospital for exams and provide moral support. Confidential crisis counseling is provided, as well as on-going therapy. If a woman is currently in a relationship with the man who has sexually assaulted her, she is referred to the Spouse Abuse Center. The Rape Crisis Center sees many women who have been raped by their former partners after separation or divorce. In fact, the danger of rape by an abusive husband escalates during separation or divorce. Many women who seek counseling at the Rape Crisis Center are dealing with the long-term affects of marital rape, says Diane Lawless, Director of the Rape Crisis Center. Her experience also reveals that a connection between childhood sexual abuse and rape as an adult does exist.

Our prosecution approach in the Fayette County Attorney's Office includes the utilization of the Domestic Violence Program at Bluegrass Comprehensive Care. Comprehensive Care provides a 16 week group counseling program for abusive men. The goal of the program is to enable the batterer to accept responsibility for his actions and to stop his violent behavior. Reed Ruchman, who has a Master Degree in Counseling Psychology, is one of the group counselors. He acknowledges that sexual abuse is often one of the abusive behaviors used in a violent relationship. The program at Comprehensive Care addresses the issue of sexual abuse. Although no formal studies have yet been done to determine if the program successfully helps men stop abuse of their partners, Mr.Ruchman believes that 80% of the men who complete the program will not reoffend in two years. The prosecutor may recommend mandatory completion of the Comprehensive Care program in lieu of jail time for a domestic violence offender. Certain offenders who successfully complete the program may even have the opportunity to have the charge against him dismissed and removed from his record.

Our attitude at the Fayette County Attorney's Office is to prosecute domestic violence cases aggressively and make a contribution to ending violence within the home. I believe working with agencies that provide support to the victim, and requiring treatment whenever possible, as well as punishment, for the offender will help to accomplish this goal. Other factors such as a police attitude that sexual assault upon a wife is a crime, support for the woman including counseling and a safe place to stay, and treatment for offenders are all important components for successful approach to domestic violence including sexual abuse. Most importantly, we as prosecutors must be aware that sexual abuse of battered women is much more prevalent than we might like to think and we must be ready to prosecute such crimes aggressively, using all resources available.

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Mr. Wake was recognized as the outstanding Kentucky County Attorney in 1988 and received the Special Prosecutor Service Award in 1989. He has also been awarded Distinguished Service Recognition by the Child Support Enforcement Commission and a Certificate of Recognition for outstanding victim advocacy by the Lexington-Fayette Urban County Government.

Norrie is involved in civic activities, including Boy Scouts of America, the CASA Program for juveniles, and Opera of Central Kentucky. Norrie is an active member of Central Christian Church. His wife, Nancy, is a graduate of the University of Kentucky and teaches in the Fayette County Public Schools. Norrie and Nancy have two daughters who are currently attending college.

Jennifer Fletcher is an Assistant Fayette County Attorney. Ms. Fletcher received her Juris Doctor from the University of Kentucky College of Law in 1984. She also holds a Masters Degree in Philosophy from the University of Kentucky. Ms. Fletcher worked as a Public Defender for Fayette County Legal Aid and practiced law privately before joining the Fayette County Attorney's Office in 1989.

Jennifer is a Board Member of Chrysalis House, a halfway house and treatment program for women recovering from alcoholism and drug addiction. Jennifer spends her free time riding her horse.

FOOTNOTES

[1] See Lenore E. Walker, *The Battered Woman*, 1979, p. 108; and David Finkelhor and Kersti Yllo, *License to Rape*, 1985, p. 108.

A 1989 survey by the Kentucky Domestic Violence Association found that 50% of women in Kentucky spouse abuse shelters were sexually as well as physically abused by their partners. Detective Gay Tincher with the Lexington-Fayette Urban County Police Family Abuse Unit also estimated that 50% of physically abused women are also sexually abused.

[2] Lenore E. Walker, *The Battered Woman*, 1979, p. 31-35.

[3] Lenore E. Walker, *The Battered Woman*, 1979, p. 36-42.

[4] Michael Paymar and Ellen Pence, "Phase One: The Curriculum", In Criminal Justice Response to Domestic Assault Cases: A guide for Policy Development, Duluth, Minnesota: Domestic Abuse Intervention Project, p. 31.

[5] Sara Young is a certified psychologist with M.A. and M.S. in psychology. She is currently a doctoral candidate in clinical psychology at the University of Kentucky and is writing a thesis on the topic of Battered Women and their Perceptions of Control.

[6] Walker, *The Battered Woman*, chapter 5. Finkelhor and Yllo, *License to Rape*, especially chapter 2.

[7] Finkelhor and Yllo, *License to Rape*, p. 29.

[8] Finkelhor and Yllo, *License to Rape*, chapter 7.

[9] See KRS Chapter 510, prior to 1986.

[10] In the seventeenth century, British jurist Matthew Hale made his pronouncement exempting husbands from prosecution for marital rape. *Matthew Hale, History of the Pleas of the Crown*, Vol. 1, 1680 (Emlyn ed., 1847). Hale argued that marriage implies a consent to sex. See Finkelhor and Yllo, *License to Rape*, p. 163-168.

[11] KRS Chapter 510, Sexual Offense. KRS 510.010(1) "'Deviate sexual intercourse' means any act of sexual gratification between persons not married to each other involving the sex organs of one (1) person and the mouth or anus of another."

The definitions of sexual contact, KRS 510.010(8) and sexual intercourse, KRS 510.010(9) also include the limiting words "between persons not married to each other."

KRS 510.010(3) "'Marriage' means persons living together as man and wife regardless of the legal status of their relationship. Spouse are not married to one another for purposes of this chapter if either or both spouses have filed a petition under KRS Chapter 403 and they are living apart.

[12] See KRS 510.010 definitions of deviate sexual intercourse, sexual contact and sexual intercourse. No longer is there any mention of marriage in these definitions. The subsection (3) defining Marriage was eliminated.

[13] Senate Bill No. 160 amends KRS 510.010(8): "'Sexual Intercourse' means intercourse in its ordinary sense *and includes penetration or the sex organs or anus of one person by a foreign object manipulated by another person.* Sexual intercourse occurs upon any penetration, however slight; emission is not required. 'Sexual intercourse' *does not include penetration of the sex organ or anus by a foreign object in the course of the performance of generally recognized health care practices.*"

[14] Senate Bill No. 103 amends KRS 403.340 to include: "(3) In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including but not limited to: (d) If domestic violence and abuse, as defined in KRS 403.720, is found by the court to exist, the extent to which the domestic violence and abuse has affected the child and child's relationship to both parents."

The Incompetent Child Witness

Everyone knows how, in the first years of his life, a child loves to repeat the words he hears, to imitate symbols and sounds, even those of which he hardly understands the meaning. JEAN PIAGET, THE LANGUAGE AND THOUGHT OF THE CHILD. [1]

During the past decade, we have witnessed a tremendous increase in the reporting and prosecution of crimes of child sexual abuse. The media, politicians, law enforcement agencies and various child advocates have contributed to the growth of a child abuse hysteria. Accompanying this hysteria is the myth that children are truthful when they testify regarding sexual abuse. Juries often have only to hear the accusation to be ready to convict, leading some commentators to compare these cases with the Salem witch hunts and the McCarthy anti-communist hysteria. [2] State legislatures cannot act fast enough to pass statutes that exempt a child's words from the evidentiary protections surrounding the historical lack of trustworthiness attributed to testimony not subjected to the rigors of cross-examination. [3] Pressure to report child sex abuse cases has also resulted in a dramatic rise in truly false allegations. Unfortunately, police agencies and child therapists are frequently unskilled in interviewing techniques. After a child is carelessly interviewed it is often impossible to differentiate between true and false allegations. The child no longer knows what, if anything, happened to him and, therefore, is no longer a competent witness.

The defense attorney who represents an accused in a child sexual abuse case must make every effort to exclude the untrustworthy testimony of a child.

PREPARING FOR THE COMPETENCY HEARING

This article focuses on ways to avoid trial in those cases where the prosecution is relying on the allegation itself, without substantial medical evidence or other corroboration. The defense attorney's job in these cases is to convince the prosecutor or the court that the child is not a competent witness. This is not the competency issue in its traditional form, that is, whether the witness understands the oath to tell the truth or is capable of understanding the questions, but rather, whether the witness's view of reality has been forever changed or distorted so that he or she no longer knows what happened.

Courts have typically found child witnesses to be competent when the judge is convinced that a child witness can intelligently relate the facts, distinguish between what is true and what is false, and understand the importance of an oath or the consequences of lying. [4] The United States Supreme Court stated this principle in ***United States v. Wheeler***, 159 U.S. 523, 524-5 (1895), when the Court found a 5½ year old witness competent to testify, reasoning: "[T]he boy was intelligent, understood the differences between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken." Under the modern viewpoint reflected in the Federal Rules of Evidence, a child is competent to testify, "unless it [sic] is so bereft of the powers of observation, recordation, recollection, and narration, that the testimony is untrustworthy and thus lacks relevancy." [5] The trend, then, has been to find children competent to testify.

This tendency to find children competent as witnesses overlooks a major problem in sex abuse cases which all too often result in convictions based almost entirely on the words of a child. It does not take into account the possibility that the child's view of reality may have been forever changed or distorted, so that he may no longer know what occurred. This is due in large part to the increased susceptibility of children to suggestion. Thus defense attorneys should consider arguing that the child is not a competent witness and move to exclude the child's testimony from any trial. Such a motion is based on the child's inability to know what actually occurred as a result of suggestive interviews by police, prosecutors, social workers and parents. A defense attorney's goal under these circumstances should be to convince the court or prosecutor that the case should not to go to trial, not necessarily because the client did not commit the acts alleged, but because no one can ever know whether he committed the acts. This is an appeal to fairness. If such an appeal is successful, a defense attorney may convince the prosecutor that he cannot win. While attempting these tactics, counsel should also pursue the necessary discovery, and prepare arguments and testimony for a hearing on a motion to exclude the child witness as incompetent.

Literally hundreds of articles and several books are devoted to this subject matter. The material is so extensive that counsel may feel it is overwhelming. In this article we have attempted to synthesize much of the available information, point to that which we think is worth further reading, and provide a practical approach to preventing conviction in child sexual abuse cases through incompetent and untrustworthy evidence.

WHAT EVERY LAWYER SHOULD KNOW ABOUT PSYCHOLOGY

The crux of the incompetency argument is that children — and to a lesser extent adults also — incorporate what they hear or see into what they remember. Once a post-event image is created, it is impossible to return to the original or "correct" image. In other words, what the child hears or sees, and in what context he hears or sees it, will forever taint the child's view of reality. If sufficiently tainted by later images, the child no longer knows what happened.

The power of suggestion can be demonstrated easily through a classic psychological test that involves showing a group of people a photograph of two cars with their front bumpers touching. (*See* figure 1.). The group of people is then divided into sections. Each section hears the same sentence with only the verb varied: "Draw the two cars that [hit or smashed or collided or bumped or touched] each other." The more violent the verb a given group hears, the more damage that group will draw on the resulting picture, even though the photograph contained no damage. [6] The variation of one word in the question radically changed the answer. This tendency toward suggestibility is even stronger in children. [7]

Relating this to the sexual abuse context, "What happened?" is a far different question from "Did Daddy touch you?" Once "Daddy" is in the question, the answer may include a "fact" about Daddy that did not actually occur. "[M]emory may be comprised of information gleaned in the initial perception of events coupled with suggestions supplied after the fact." [8]Courts have long recognized that a child's power to recollect can be lost through an interviewing process that is suggestive.

> The force of suggestion, always strong, is particularly potent with the impressional and plastic mind of childhood. . . . But, without intending any such result, the repetition of supposed facts in the presence of a child often creates a mental impression or conception that has no objective reality in an existing fact.

People v. Delaney, 52 Cal. App. 765, 769, 199 P. 896, 900 (Cal. App. 1921). [9]

Any psychologist can testify to these basic concepts. Recently, however, in the wake of the sexual abuse hysteria and the tendency of the majority of therapists in this field to claim that children do not fabricate stories of abuse, some psychologists have begun to embark on an area of expertise used for many years in Germany, and known as Statement Validity Assessment. [10]

Statement Validity Assessment involves a psychological assessment based on analyses of the witness, the possible motives for the witness to make a false allegation, and the content of the statements. After reviewing all of the statements the child has made, within the context in which they were made, to whom they were made, in response to what questions or stimuli and in light of that particular child's knowledge learned though television, older children, school sex abuse programs, *etc.*, the psychologist makes an assessment of the validity of the statements. If the information provided to the child through the interview process or other outside influences has tainted the child's ability to accurately remember an event, the psychologist may be able to testify in support of a motion to exclude the child's testimony as incompetent. The psychologist may never need to interview the child himself. The psychologist is basing his testimony on the content of the statements, on the information available to the child witness, and what the interviewers said to or showed to the child. This is important because the child is not always available during the very early stages of discovery before the criminal charges are actually filed. If in fact the child is no longer a competent witness, it will do no good for your psychologist or anyone else to interview the child again because the information is forever loss or distorted.

DISCOVERY — WHAT YOU NEED, WHERE TO FIND IT, AND HOW TO PROTECT YOUR CLIENT

Although the authors found no statistics, the authors believe that false allegations are most likely to occur during a divorce or custody battle. [11] Dr. Richard Gardner points out that allegations of child sexual abuse have become a very effective method of gaining quick attention and action by the courts. [12] Although false allegations can arise in any situation, a custody battle should serve as the first warning that the climate for a false allegation is present.

Any divorce or custody battle or human services investigation can ripen into a criminal child abuse case. If you receive a referral from a family practice attorney regarding an allegation of sexual abuse, do not wait. **Get involved immediately**. The basic goal in this situation is to avoid criminal charges. Most states have mandatory reporting requirements; therefore, the district attorney's office is very likely to receive a report during the civil case. In some cases, the allegation first leads to a petition in the state human services or child protective division. Far too often, criminal practitioners also leave this area to the domestic relations attorneys. If you have a client with an incipient sex abuse allegation, you **must** begin your representation in the divorce, custody or child enforcement arena.

1. **Limiting Contact**: At the outset, consider limiting your client's contact with the child involved or agreeing to supervised visits. This serves two purposes. First, it prevents any additional allegations. Second, it allows the prosecutor to feel more comfortable about moving slowly, which provides additional time for necessary discovery.

2. **Use Immunity**: Regardless of where the civil case begins, attempt to protect your client through whatever use immunity or broader immunity is available by statute in your state. If none exist, draft a pleading requesting at least use immunity for any statements your client makes during any psychological evaluations and during any therapy. The therapists will support this motion because it will allow for more open communication.

3. **Depositions**: Divorce cases and human services cases are usually fruitful sources of discovery. If any hint of an allegation begins to surface, attend all depositions, even if your client also has a domestic relations attorney. Your first responsibility, of course, is to protect your client from questions that would lead to admissions. Take the deposition of the person to whom the child first made the allegations and ask about any history of sexual abuse of that person. If the child is in therapy, take the deposition of the therapist and ask about sex abuse in his or her past. Some evidence does exists that people who choose this specialty have been themselves abused as children and are more

likely to find "evidence" of sex abuse. [13]

4. **Tape Record Evaluations**: Request that all evaluations of the parents and children be at least audio taped and, if possible, video taped. The therapists will usually support this motion also, because it makes the note taking process easier for them.

5. **Sources of the Allegations**: Find out every possible source of the allegation. Before the 1980's, the foremost argument made in support of the myth that children could not possibly fabricate detailed accusations of sexual abuse was that children had no direct access to the details of a sexual encounter. This simply is no longer true:

A. **The Media**: Sex generally, and sex abuse more specifically, have become common topics on television programs and throughout the media as a whole. Moreover, television programs have become increasingly explicit with regard to sexual issues. Try to find out what programs the child watches on television. It is also important to obtain a list of recent television programs, or other media coverage, which bear on the topic of sex or sex abuse.

B. **The Schools**: Sex abuse prevention programs, in which children are given specific information about sexual activities, have been introduced in most schools, even at the nursery school level. These programs typically use sex abuse prevention audiotapes, coloring books and games, many of which compel children to engage in discussions about proper or improper "touching" or other aspects of sexual abuse situations. Find out what courses are taught at the child's school and, through the appropriate subpoenas *duces tecum* to the school or police authorities, seek copies of the written material. [15]

C. **Other Sex Abuse Cases**: Very well publicized cases of alleged child sexual abuse often involve children giving testimony in explicit detail. Other children have an opportunity to view these testimonials, engendering a certain amount of envy for the widespread attention and notoriety the testifying children enjoy. [16] It is therefore essential to determine whether the child knows anyone else who has made similar allegations. If so, it is essential to determine the result of the allegation. Did a friend or sibling get to go to court? To a doctor? To be videotaped?

Simply stated, children are bombarded with information about the details of sexual abuse. These circumstances have all contributed to the fabrication of allegations of sexual abuse. A particularly egregious example occurred in Europe. In a small village in the Netherlands, two young boys aged four and five, apparently slightly injured themselves after some exploratory sex. The parents of one of the children contacted a doctor who suspected child abuse. Ultimately, the doctor called a town meeting to warn parents of child abusers loose in their community. "Over the next few months streams of reports came in. At first children told of being given candy and taken for rides. This developed into fecal and urinary games, sexual abuse, anal and vaginal rape, sadomasochistic performances, manufacture of pornography, burning with cigarettes, drug administration, bizarre rites, and the sacrificial torture and murder of infants." [17] The police finally closed the cases calling them the result of mass hysteria. Discovery, therefore, must include every source of information available to the child.

6. **The Chronology**: Absolutely crucial is a chronology of everyone with whom the child has spoken about the sex abuse and details of everywhere the child has been where the allegation was the topic of conversation, even if the child was not directly questioned. This includes parents, social workers, medical doctors, school counselors and anyone else who may have taken a history from the child or from an adult while the child was present and listening. Detail is essential here. Try to find out the exact words that the interviewer used during the interview.

7. **The Dolls**: Much has been written recently about the use of the "anatomically correct dolls." [18] The dolls are neither life-like nor correct anatomically. [19] It is beyond the scope of this article to discuss the lack of scientific basis for any validity to the dolls. Their importance within the context of this article is that they are yet another factor that can taint the child's ability to remember what actually happened to him, as opposed to what he may do, or see being done with the dolls. "The use of the dolls can provide a modeling effect. The social learning literature shows that one of the most powerful ways of teaching children is modeling." Counsel should subpoena any dolls used during an interview with the child to the competency hearing so that the judge can see what they look like.

HOW TO SPOT A FALSE ALLEGATION

The existing literature addressing child sexual abuse indicates some common trends among the children who fabricate allegations of sexual abuse. [21] Researchers have found that children who fabricate stories of sexual abuse are most often eager and willing to talk about the abuse to lawyers, judges, mental heath professionals, *etc.* In contrast, studies have shown that children who are actually abused are more often very hesitant to discuss the details of the encounters. Further, children who have actually been abused typically have a fairly clear visual image of the experience and can recall details of the event when asked to do so. The child making a false allegation, on the other hand, will generally have difficulty in providing specific details of the event. For example, the fabricator may respond to a question about the event with a statement such as, "I was sexually abused." [22] When asked to provide details, the child either is unable to do so, or creates a scenario that changes in later interviews. In addition, the child who is fabricating sex abuse might describe a setting for the event where it is highly unlikely that it could have taken place. Gardner has an excellent discussion of this phenomenon and states that examples include, "He did it to me while my friend was in the bathroom" or, "It happened while my mommy was in the kitchen." [23] Such examples illustrate that the story the fabricator provides is often naive and simplistic.

Obviously, a psychologist must guide the attorney in determining whether the child exhibits the traits of one who is fabricating a story. We have tried here to give a few examples so that attorneys will have some idea of what to look for in these cases. Unfortunately, if the interview process or the outside stimuli has been extremely suggestive, the child may now "remember" the "details" that make it appear as though the allegations are true when they are not. It is defense counsel's obligation to understand this problem and be prepared to defend against it. We hope we have helped begin that process.

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FOOTNOTES

[1] Piaget, J., ***The Essential Piaget*** 71 (H. Gruber & J. Voneche ed. 1977).

[2] *See* Feher, "The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?" 14 Am. J. Crim. Law 227, 228-29 (1988).

[3] *See generally* Annotation, "Uniform Evidence Rule 803(24): The Residual Hearsay Exception," 51 ALR 4th 999 (1987); Note, "Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception," 34 Cath. U.L. Rev. 1021 (1985).

[4] Comment, "Minnesota Developments - Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases," 60 Minn. L. Rev. 1377, 1381-82 (1985).

[5] Comment, "The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?," 40 U. Miami L. Rev. 246, 251-52 (1985).

[6] The original study involved a film of a traffic accident and then asking some subjects "About how fast were the cars going when they *smashed* into each other?" Others were asked, "About how fast were the cars going when they hit each other?" Subjects answered the question using the word "smashed" with a much higher estimate of speed. A week later, and without an opportunity to view the film again, the subjects were asked the critical question, "Did you see any broken glass?" The original film contained *no* broken glass. However, of the 50 subjects who were asked originally about the smashing cars, 16 answered "yes" to the critical question compared with 7 "yes" answers among the 50 subjects originally asked about the hitting cars. Loftus, ***Eyewitness Testimony*** 77-78 (1979); *See also* Cohen & Harnick, "The Susceptibility of Child Witnesses to Suggestion," 4 Law and Human Behavior 201 (1980); Wakefield & Underwager, "Interrogation of Children," 1 Issues in Child Abuse Accusations 14, 21 (1989).

[7] Wakefield & Underwager, ***Accusations of Child Sexual Abuse*** 67-119 (1988); Cohen & Harnick, "The Susceptibility of Child Witnesses to Suggestion," 4 Law & Human Behavior 201 (1980); *See also* Wakefield & Underwager, "Interrogation of Children," 1 Issues in Child Abuse Accusations 14 (1989); de Young, "A Conceptual Model for Judging the Truthfulness of a Young Child's Allegation of Sexual Abuse," 56(4) Amer. J. Orthopsychiat. 550 (1986).

[8] Chohen & Harnick, "The Susceptibility of Child Witnesses to Suggestion," 4 Law and Human Behavior 201, 209 (1980).

[9] The American Bar Association National Legal Resource Center for Child Advocacy and Protection in Washington, D.C. cited this case in its publication entitled, ***Child Sexual Abuse and the Law*** 130 (3rd ed. 1983).

[10] For a detailed description and analysis of the criteria used in this assessment, *see* M. Steller & G. Koehnker, "Criteria - Based Statement Analysis," in ***Psychological Methods in Criminal Investigation and Evidence*** 217 (D. Raskin, ed. 1989).

[11] "A growing number of false accusations coming from discordant parental relationships are being documented, specifically when the custody of a child is in dispute," Haugaard & Reppucci, ***The Sexual Abuse of Children*** 150 (1988). *See also*, Green, "True and False Allegations of Sexual Abuse in Child Custody Disputes," 25 Journal of the American Academy of Child Psychiatry, 4:449 (1986).

[12] R. Gardner, ***The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Sex Abuse*** 100-101 (1987).

[13] R. Garner, *supra*, note 15, at 104-105.

[14] *Id.* at 101-02.

[15] The author was involved in a case in which the allegation occurred the very day the child attended a course where a policewoman told the children to report any "bad" touch. When the child went home to her mother that evening, after spending a few days with her father, her mother asked about her time with her father in an accusatory way and the child responded with an allegation of "bad" touch. The parents were in the middle of a custody battle. The father was arrested on the basis of this allegation. Litigation in the custody case included a hearing on the child's competency based on the sex abuse program the child had attended and the nature of the interviews with the mother and the therapist. Ultimately, the court granted the father full custody of the child; then the prosecutor dismissed the criminal charges.

[16] R. Gardner, *supra*, note 15, at 101.

[17] Rossen, "Mass Hysteria in Oude Pekela," 1 Issues in Child Abuse Accusations 49 (1989).

[18] *See, e.g.*, Herzog, "Child Sexual Abuse Defense: Pre-Trial Investigation, Experts, and Proxy Testimony," Champion, Jan/Feb 1987, at 11-12; McIver, Wakefield & Underwager, "Behavior of Abused and Non-Abused Children in Interviews with Anatomically Correct Dolls," 1 Issues in Child Abuse Accusations 39 (1989).

[19] These dolls should more appropriately be called anatomically incorrect.

[20] Underwager & Wakefield, "Interviewing the Alleged Victim in Cases of Child Sex Abuse: The Role of the Psychologist," Champion, Jan/Feb. 1987, at 17.

[21] *See generally* Gardner, *supra*, note 15, at 109-117; de Young, "A Conceptual Model for Judging the Truthfulness of a Young Child's Allegation of Sexual Abuse," 56(4) Amer. J. Orthopsychiat. 550 (1986).

[22] Gardner, *supra*, note 15, at 110-111.

[23] *Id.* at 111.

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TEACHERS AT RISK: Crisis in the Classroom

Mr. Doe, a teacher, encountered a fight involving two eighth grade students in the school hallway. Tim, the larger student, was beating another student, Sam, to the extent that Mr. Doe was concerned with Sam's safety. In attempting to physically separate the students, Mr. Doe met with strong resistance. He grabbed Tim and threw him to the ground in order to subdue him. Tim was cut and bruised as the result of this action by Mr. Doe and Tim threatened to sue him. Tim reported to the assistant principal, Mr. Smith, that Mr. Doe beat him up for no reason, causing cuts and bruises.

Mr. Smith called Mr. Doe into his office to get his version of the incident. After hearing Mr. Doe's version, Mr. Smith called the school lawyers, who instructed him to call the police and suspend Mr. Doe with pay.

Eventually Mr. Doe was charged with Fifth Degree Assault and was reinstated in his job. He was also reported to the state licensing board and sued by Tim and his parents.

Do teachers really face the potential of a crisis such as this? The answer is yes. Teachers risk allegations of sexual or physical abuse every time they enter the classroom. The question is: What can be done to address the problem and to protect the rights of teachers?

How Great is the Danger?

In the last six years, our firm has represented over 300 teachers, primarily in the state of Minnesota in cases involving allegations of employment related misconduct including allegations of sexual and physical abuse of students. Of the 300 cases, 25% involve allegations of sexual abuse and 75% involve allegations of "corporal punishment" or physical abuse.

The sexual misconduct allegations seem to focus on the touching of the students' intimate parts of the body (breasts, inner thighs, buttocks, genital area) by the teacher and for the most part, the claim is that the touching was done above the clothing.

The "corporal punishment" allegations include the hitting, striking or "use of excessive force" in disciplining or restraining students. These cases are usually investigated and prosecuted as a misdemeanor assault and/or disorderly conduct.

Since 1990, our firm has been involved in representing the educator from the initial stages of the law enforcement investigation. This early intervention approach has resulted in approximately 96% of these cases resulting in no criminal charges being brought against the educator.

There seems to be a steady increase in misdemeanor assault charges against teachers. These allegations include charges for grabbing a student's arm while removing him from class to restraining a student involved in an altercation with another student.

Of the cases that have been charged, many should never have been charged. In the majority of the cases, the teacher was either found not guilty or the charges were dismissed or eventually will be dismissed.

All teachers must be made aware of the risk of being the target of an allegation of abuse. Unfortunately, by touching students in a positive, nurturing, and reinforcing manner, a teacher exposes himself/herself to allegations of abuse. Even if you hug students or give a ballplayer a pat on the bottom, you put yourself at great risk. Also, teachers face great risk in "physically" removing students from class or breaking up a fight. Simply put, times have changed. The general rule now is "hands off." Whether acknowledged or not, all touch is suspect. Teachers' hands have become tied by public sentiment that is mistrustful of all touching of students by teachers. Primarily due to adverse media exposure, many parents believe that teachers regularly use their position of authority to touch students in inappropriate ways. Teachers today often are not respected by students. The insolent and rebellious nature that some students display toward authority is becoming an increasing problem in today's secondary schools.

Laws on Corporal Punishment...and More

Some jurisdictions have enacted laws that prohibit an "employee or agent" of a public school district from using corporal punishment. Corporal punishment, as defined by one such law, is hitting, spanking, or using unreasonable physical force that causes bodily harm or substantial emotional harm in order to correct or penalize unacceptable conduct. The law is a warning that teacher conduct is being scrutinized and will continue to be carefully monitored. If such a statute is violated, a teacher could not only be charged with a criminal assault, but also might face employment discharge proceedings and possible license revocation. Consequently, all teachers must respond with great caution and concern when coming in physical contact with students.

Although these laws are limited to corporal punishment, it is a sign of things to come. I envision legislation aimed at making it a crime for educators to inappropriately touch students. Some states currently carry criminal penalties directed at physicians, psychotherapists, counselors and related professionals who engage in physical misconduct with patients. Legislation on the horizon will surely criminalize teacher misconduct in this area.

We live in a society where many families do not hug or touch their children and prohibit touch by outsiders. While some of these prohibitions are wise safety precautions to instill in children, paranoia about all touch creates significant problems.

Good Touch/Bad Touch

Some students are aware that touch is a vulnerable area for teachers and some use touch as a weapon against teachers. Students learn about perceptions of touch in educational programs focusing on "good touch/bad touch." While these programs are based on the well-meaning philosophy of educating children about the difference between positive touching and abuse, they also can teach students a way to retaliate against a teacher and use touch as a weapon.

While many experts believe that false allegations are becoming more common, no one knows for sure how extensive the problem of false or exaggerated accusations of abuse against teachers is true. Many child protection professionals argue "false allegations" are rare, while advocates for those who claim to be "falsely accused" say the problem is wide spread and reached "epidemic" proportions. The truth is likely somewhere in between. Despite the considerable controversy regarding the issue of false allegations of sexual abuse, there have been relatively few studies that have addressed this issue. One study by Jones and McGraw (1987) found that 8% of the 576 case studies analyzed were deliberate falsifications, misperceptions and confused interpretations of non-sexual events.

Common sense tells us that all people, including children, have the capacity to lie. Students have admitted to lying to authorities about teachers in criminal cases in which I have been involved as legal counsel for the educator. In one case involving a physical education teacher, all charges were dismissed when it was discovered that students had not only given false statements to the police about an alleged "attack" on a student, but also engaged in a "conspiracy of silence" against the teacher. In dismissing the charges the court acknowledged that students lied about the teacher misconduct and, in fact, conspired to get the teacher. Although this type of fabrication occurs more often than not, its discovery and acknowledgement is uncommon.

A leading teachers' rights case where some of the students admitted under oath that some of the students were lying about the alleged abuse occurred in Minnesota in 1986 when a teacher was charged with twenty counts of Second Degree Criminal Sexual Conduct. The indictment alleged the teacher touched fifteen middle-school boys on their inner thighs in the open classroom in front of other students, classroom aides, and volunteers. After being fired in the fall of 1986, he was found not guilty of all criminal charges following a lengthy trial. This case represented a major victory for all teachers.

In many cases, students either exaggerate the extent of the actual touch or misinterpret the intent of the touch. It is not unusual for a student to say one thing initially to the police and, in subsequent interviews, embellish the story. A hand on the shoulder may become a touch on the breast. A touch on the knee suddenly becomes a rub of the inner thigh. A pat on the back winds up as a touch on the buttocks.

How does this exaggeration occur? Often peer influence or pressure plays a role. The initial story changes when discussed with classmates after it is reported. These cases often involve some type of well-intended physical contact by the teacher that is twisted by the students into a sinister touch.

Misinterpretations of the intent of a touch are based on the student's perception of the teacher's demeanor, speech, body language and physical contact with other students. A well intended touch can easily be perceived as a sexual touch when accompanied by body language or speech that is questionable. Teachers must be extremely cautious about all aspects of their conduct in the classroom so as not to create an atmosphere of mistrust and suspicion among students.

The increase in reports of abuse by teachers can primarily be attributed to Mandatory Reporting Statutes, in force in many jurisdictions, which require school officials and caretakers of children to report even unsubstantiated abuse charges. The same law sometimes makes a teacher liable for failure to report suspected child abuse as well. Some of these statutes have recently been challenged as being unconstitutionally vague and broad. In one case, a school principal argued that the statute failed to sufficiently define what conduct was prohibited by the statute. The principal allegedly failed to report suspected child abuse by a teacher and argued that he didn't realize the statute required him to do so because he didn't believe the allegations.

The Minnesota Supreme Court, for example, ruled that a teacher can violate the statute by failure to report alleged child abuse. That decision put all Minnesota educators on notice that teachers must take special precautions and report any possible child abuse whether the allegations ar believed or not. The Supreme Court did state that the reporter may include in the report that he/she does not hold a personal belief that the child has been physically or sexually abused. The bottom line is if a teacher has any question as to whether to report, a report should be made. Don't take any chances! Always err on the side of reporting.

Guilty, Until Proven Innocent

If accused of abuse, teachers often operate under the assumption that their rights will be trampled upon and thus not respected or protected. Unfortunately, when teachers are the subject of allegations, they are not presumed innocent by law enforcement, school officials, and the

general public. Teachers are presumed guilty, regardless of the outcome of the investigation and criminal or civil proceedings. The teacher's perception is that they are not afforded the same rights as other citizens because they are held to a higher standard of conduct. It is important that educators realize that they are accorded the same rights and protection that other citizens accused are in the criminal justice system and process. With the assistance of legal counsel, they do not stand alone!

School authorities are primarily concerned with protecting other children from the perceived "abusing teachers," as well as minimizing the possibility of civil lawsuits.

However, some administrators do align themselves with the teacher based on facts of a perceived injustice. Unfortunately, this is rare. In most cases, except for peer and professional association support, the teacher appears to stand alone. It is despairing for teachers when, after numerous years in the educational system, these allegations arise and school authorities seem to be the first to abandon them.

The Right to Face Your Accuser? No!

The privacy of a teacher will not be respected; the allegations will be subject to discussion among law enforcement officials, teachers, school authorities, parents, students and the community at large. Word travels fast, particularly in a public forum such as a school. Gossip runs rampant, rumors spread quickly, fact becomes fiction, and it all contributes to the erosion of the "presumption of innocence." Embarrassing questions will be asked and the teacher will be subject to media exposure if charges are filed.

Some teachers feel confident that a judge will see the unfairness of the accusations. Teachers should not expect such automatic justice. Expectations should be adjusted to prepare for the case to weave throughout the criminal justice system and result in trial.

More and more teachers are facing employment discharge proceedings and licensing revocation in conjunction with criminal allegations. As unbelievable as it may sound, a teacher may be found not guilty of criminal charges, yet lose his or her job and license. There appears to be a direct correlation between the severity of the crime charged and other sanctions; the more severe the criminal charge, the more likely the teacher will be sanctioned in terms of job status and license.

Teachers are the subject of civil suits with increasing regularity over allegations of abuse. There have been many instances where the teacher is charged criminally, sued by the student and parents, and faced discharge proceedings along with license revocation, all at the same time.

Unless the teacher exercises his/her right to a jury trial or an employment discharge hearing, the teacher will most likely not get the chance to confront the student. Although the teacher's natural reaction is to want to talk with a student and clear up a perceived misunderstanding, the accused teacher should not do so even if given the opportunity. A teacher's best protection is absolute silence; a confrontation with the accuser during the course of pending criminal or employment proceedings would only compromise the teacher's position of silence and a favorable disposition of pending legal matters.

Teachers throughout the country have been the subject of extensive criminal prosecutions over the last six years. Defending a teacher charged with sexual or physical abuse of a student is a complex matter where the potential consequences are immense. If teachers are to prevail in these cases, the best defense is a good offense, including a thorough fact investigation, rigid plea bargaining policy, and extensive and detailed trial preparation. Their cases certainly can be won and have been won, but to do so, one has to overcome all of the public sentiment about child abuse and "get to the truth". This can be accomplished only by a zealous approach to the defense of the charges.

Teachers will continue to prevail when they learn to stand together, support each other, and educate themselves about the law and problems surrounding the issue of child abuse.

PHILIP G. VILLAUME

Philip G. Villaume is an attorney in Minnesota and has been practicing for the past thirteen years. His primary practice is the defense of of white collar professionals including eductors, physicians, and lawyers charged with employment related misconduct. He has defended over three hundred teachers in the State of Minnesota since 1986. He has written the Criminal Law and Procedure Handbook for the Minnesota Education Association and is a frequent speaker and lecturer on teacher rights and child abuse.

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NATIONAL CHILD ABUSE DEFENSE AND RESOURCE CENTER
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NCADRC has consolidated materials for defense of the falsely accused. They offer consultation, Seminars, a Manual, Library Services and a Newsletter [Subscription fee: $25.]. Their goals are:

1. To provide informational assistance to professionals, organizations and government units dealing with child abuse.

2. To ensure that due process, state and federal Constitutional rights, human rights, and family concerns are accorded the importance they warrant when people are reported for or charged with child abuse.

3. To clear public hysteria about accusations of child abuse by full information to protect the rights of the innocent and to preserve limited resources of overloaded protective services agencies

4. To ensure those implementing child abuse law and ploicy are properly trained and qualified. To ensure that written policy is provided to agents responsible to follow it.

5. To aid in formulating laws and policies which define child abuse, specify investigation procedures, and prevent future child abuse.

6. To provide informational support and sources of emotional support for all accused falsely of child abuse allegations.

The NCADRC has put together a packet of articles that cover a spectrum of issues involved with false allegations of child abuse. For those persons who choose to make a supporting donation of $75 or more, they will forward this pack at no charge, whatsoever. This pack is just a small sampling of the printed resources that are available. In addition, your Supporting Donation is tax-deductible as NCADRC are an IRS-recognized 501(c)3 organization.

The following lists articles that are in the above mentioned pack:

1. SAID Syndrome (Sexual Allegations in Divorce by Dr.s Blush and Ross

2. The Case for a Therapeutic Interview in Situations of Alleged Sexual Molestation by Dr. William McIver,

3. Behavior of Abused and Non-Abused Children in Interviews with Anatomically-Correct Dolls by Dr. Wm. McIver, Wakefield and Underwager

4. Effective Use of a Menial Health Expert in Child Abuse Cases by Hollida Wakefield and Dr. R. Underwager

5. Child Sex Abuse: The Innocent Accused by Attorney William Slicker

6. Psychology's Responsibilities in the False Accusations of Child Abuse by Dr. Robert Emans

7. Presumed Guilty by author Harry Stein

8. Has a Child Been Molested? Getting at the Truth by Dr. Lee Coleman

9. The "Validators" and Other Examiners by Dr. Richard Gardner

10. Allegations of Sexual Abuse II: Case Example of a Criminal Defense by Dr. Terence Campbell

GUILTY UNTIL PROVEN INNOCENT

Kim Hart recently authored "Guilty Until Proven Innocent: A Manual For Surviving False Allegations of Child Abuse." This invaluable manual is for anyone enmeshed in the social servies or court systems as a result of child abuse charges. This manual is essential for every attorney who has clients facing these charges, whether in a civil or criminal context.

This manual will help you and your clients deal with this type of case. It has been prepared from the experience which Kim Hart and the NCADRC have had in helping with this type of case throughout the nation. The manual contains realistic advice on dealing with the courts and social service systems.

Your clients will benefit from reading the manual as it will familiarize them with the procedures that they will be going through. You will find that the information contained in the manual answers many of your clients questions—from procedures to the terminology that they will be exposed to. Knowing this and having a ready source of information will help your clients deal with emotional distress that they will be experiencing because of the accusations against them.

You will benefit from having a ready reference source of material on this subject. You will also benefit from having clients who are more emotionally prepared and informed about the legal situation in which they are involved—saving you time that would otherwise have to be spent "hand holding" with your clients.

All profits from the manual will go to the NCADRC to cover expenses—helping fund the Centers' continuing battle for justice throughout the country. You can order the manual directly from the publisher by using the enclosed order form. There is a quantity discount available. For more information on ordering the manual, call 1-800-452-9873 and ask for "Hank." Or mail a check for $35 payable to the Winchester Group, 7720 B El Camino Real #241, Carlsbad, California 92009.

Information Resources on Child Sexual Abuse

INTRODUCTION

Attorneys handling child sexual abuse cases will quickly find that legal knowledge is simply not enough: to represent your clients effectively you need access to information — often highly specific, current information — about many fields including medicine, child development, and psychology. The selected bibliography below emphasizes those non-legal fields, although it gives references to a few legal resources as well.

Child sexual abuse has emerged as a significant legal and public issue in recent years, and a great deal is being published. From all the materials available, I chose to emphasize books because they tend to be good sources for information of lasting value. Articles in professional or scholarly journals, on the other hand, are usually the best source for the most specific, up-to-date information. Rather than list all or even most of the articles currently available, I have included a section, "Finding More Information," which suggests methods for identifying and locating recent journal articles on specific topics.

Several knowledgeable people were kind enough to offer references and suggestions. To distinguish the items I reviewed personally, each such item is followed by a brief annotation; non-annotated citations are those suggested by someone else. Items marked with * are found in the DPA library collection; all other items are available from at least one Kentucky library and can be obtained through inter-library loan.

CHILD SEXUAL ABUSE GENERALLY

Finkelhor, David. *A Source Book on Child Sexual Abuse*. Beverly Hills: Sage Publications, 1986.

Schetky, Diane H. and Arthur H. Green. *Child Sexual Abuse: A Handbook for Health Care and Legal Professionals*. New York: Brunner/Mazel, 1988.

Wakefield, Hollida and Ralph Underwager. *Accusations of Child Sexual Abuse*. Springfield, Ill.: Thomas, 1988. *

Provides general information on child sexual abuse; also addresses child witnesses, clinical assessment of sexual abuse, false accusations, and effects and treatment of sexual abuse. As the title implies, this is written from a pro-defense perspective.

Numerous other books are currently available. To find additional materials in your local public, community college, or university library, look in the online or card catalog under "child molesting" or "sexually abused children."

CHILD DEVELOPMENT

The materials listed below are written for lay people — which of course includes attorneys!

Faw, Terry and Gary S. Belkin. *Child Psychology*. New York: McGraw-Hill, 1989.

Schickedanz, Judith A., David I. Schickedanz, and Peggy D. Forsyth. *Toward Understanding Children*. Boston: Little, Brown, 1982.

Lansdown, Richard and Marjorie Walker. *Your Child's Development: From Birth through Adolescence: A Complete Guide for Parents*. New York: Knopf, 1991.

Smith, Peter K. and Helen Cowie. *Understanding Children's Development*. 2d ed. Cambridge, Mass.: Basil Blackwell, 1991.

McClinton, Barbara Sweany and Blanche Garner Meier. *Beginnings: Psychology of Early Childhood*. St. Louis: Mosby, 1978.

Many other books written for the layperson are likely to be found in your local library. Check the online or card catalog under "child development" for works on the physical, psychological and social growth of normal children, and under "child psychology" for works on the psychological growth and characteristics of children.

INTERVIEWING CHILDREN, AND CHILDREN AS WITNESSES

Garbarino, James, Frances M. Stott, and the Faculty of the Erikson Institute. *What Children Can Tell Us: Eliciting, Interpreting, and Evaluating Information from Children*. San Francisco: Jossey-Bass, 1989. *

Readable and informative. Highly recommended for any attorney who hopes to communicate effectively with children in or out of the courtroom.

Hall, Annabelle Whiting. *Demonstration with Young Child: The Child Is Not Lying But She Isn't Telling the Truth, Either*. 50 min. Department of Public Advocacy, 1992. Videocassette. *

A demonstration from the 1992 DPA Annual Seminar.

Meyers, John E.B. *Child Witness Law and Practice*. New York: Wiley, 1987. *

This book, supplemented in 1990, addresses evidentiary and trial practice issues pertinent to child witnesses, and information on recent developments such as video testimony and use of anatomically correct dolls. Includes a 65-page chapter entitled "Child and Adolescent Development: A Psycholegal Perspective."

Soler, Mark I. *Representing the Child Client*. New York: Matthew Bender, 1989-. *

A looseleaf treatise which includes a lengthy chapter on children as witnesses.

Doris, John, ed. *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony*. Washington, D.C.: American Psychological Association, 1991. *

The nine papers included in this volume address development of memory in children; effects of stress on the child witness; and suggestibility of children's testimony, especially in sexual abuse cases. Comments in response to each paper present alternative views.

Underwager, Ralph and Hollida Wakefield. *Interrogation of Children as a Learning Process*. 3 hr. Department of Public Advocacy, 1988. Videocassette. *

Presentation at the 1988 DPA Annual Seminar.

Underwager, Ralph and Hollida Wakefield. *The Real World of Child Interrogations*. Springfield, Ill.: Thomas, 1990.

Gives many examples of ways in which children have been misled or confused by inexperienced or overzealous interviewers. Recommended by Ernie Lewis.

Walker, Anne Graffam. *The Child Witness: Linguistic Concerns in Communication*. Frankfort, Ky., Kentucky Bar Association, 1992. *

This brief but useful handout from a presentation at the 1992 Kentucky Bar Association convention gives suggestions, with examples, for interviewing children without confusing them.

TRIAL AND PRETRIAL PRACTICE IN CHILD SEXUAL ABUSE CASES

A. Works on sex crimes generally

Bailey, F. Lee and Henry B. Rothblatt. *Crimes of Violence: Rape and Other Sex Crimes*. Rochester, N.Y.: Lawyers Co-operative, 1973. *

Kept up to date by supplements from Clark Boardman Callaghan.

Morosco, Anthony B. *The Prosecution and Defense of Sex Crimes*. New York: Matthew Bender, 1977-. *

This looseleaf and the Bailey work address sex crimes generally, but much of the content is of value in child sexual abuse cases. Each work devotes a chapter to child sexual abuse; the Morosco chapter is more comprehensive and detailed than the Bailey chapter.

B. Works on child sexual abuse

Fortune, William. *Hearsay and Hearsay Exceptions, Especially in Sex Abuse Cases Under the New Code of Evidence*. 50 min. Department of Public Advocacy, 1992. Videocassette. *

Videotaped presentation at the 1992 DPA Public Defender Conference. Accompanied by handout, "Hearsay in Child Sex Abuse Cases."

Grant, Carol. *Defending in Child Sex Abuse Cases*. 3 hr. 30 min. Department of Public Advocacy, 1987. Videocassette. *

Hall, Annabelle Whiting. *The Nuts and Bolts of Defending Child Sexual Abuse Cases*. 60 min. Department of Public Advocacy, 1992. Videocassette. *

Hall, Annabelle Whiting, Ernie Lewis and Bill Spicer. *Sex Abuse Workshop*. 60 min. Department of Public Advocacy, 1992. Videocassette. *

Two handouts accompany this tape: "Defending Sex Cases in Kentucky: Partial Outline" by Ernie Lewis, and "Leveling the Playing Field: The Importance of Getting Off to a Good Start in the Trial of a Child Sex Case" by Bill Spicer.

Underwager, Ralph and Hollida Wakefield. *Jury Selection in a Sexual Abuse Trial*. 60 min. Department of Public Advocacy, 1988. Videocassette. *

Videotape of presentation at 1988 DPA Annual Seminar. Accompanied by handout, "Jury Selection and Jurors' Perceptions of the Child Witness in a Sexual Abuse Trial."

MEDICAL INFORMATION

A. General Medical Information

Dorland's Illustrated Medical Dictionary. 27th ed. Philadelphia: W.B. Saunders, 1988. *

To understand medical experts and medical articles, a medical dictionary is often essential. *Dorland's* is just one of several excellent medical dictionaries available; most public, university, and community college libraries will have at least one.

Berkow, Robert, ed. *The Merck Manual of Diagnosis and Therapy*. 15th ed. Rahway, N.J.: Merck Sharp & Dohme Research Laboratories, 1987. *

Offers concise descriptions of the symptoms, diagnostic methods, and treatment of various conditions and diseases. Chapters of particular interest in child sexual abuse cases are those on genitourinary disorders, sexually transmitted diseases, gynecology and obstetrics, and pediatrics and genetics.

B. Medical Evaluation of Suspected Child Sexual Abuse

Bright, Katherine and Gary W. Kearl. *Medical Evaluations of Sexually Abused Children*. 1 hr. 15 min. Department of Public Advocacy, 1992. Videocassette. *Physicians from the University of Kentucky College of Medicine describe medical examination techniques.

Chadwick, David L. *Color Atlas of Child Sexual Abuse*. Chicago: Year Book Medical Publishers, 1989.

Child Sexual Abuse Manual. Lexington, Ky.: University of Kentucky College of Medicine, 1991. *

Sets out the intake, interviewing, and medical examination procedures to be used by personnel of the UK College of Medicine Department of Family Practice.

Emans, S. Jean Herriot and Donald Peter Goldstein. *Pediatric and Adolescent Gynecology*. 3d ed. Boston: Little, Brown, 1990.

Includes a 29-page chapter on sexual abuse.

Lotz, W. Robert. *Challenging Physical Evidence of Sexual Assault or Abuse*. 90 min. Department of Public Advocacy, 1991. Videocassette.*

McCann, John. "Use of the Colposcope in Childhood Sexual Abuse Examinations." *Pediatric Clinics of*

North America 37 (August 1990): 863-80.

McCann, John, Joan Voris, Mary Simon, and Robert Wells. "Perianal Findings in Prepubertal Children Selected for Nonabuse: A Descriptive Study." *Child Abuse and Neglect* 13 (1989): 179-193.

McCann, John, Joan Voris, Mary Simon, and Robert Wells. "Comparison of Genital Examination Techniques in Prepubertal Girls." *Pediatrics* 85 (February 1990): 182-7.

McCann, John, Robert Wells, Mary Simon, and Joan Voris. "Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study." *Pediatrics* 86 (September 1990): 428-39.

PSYCHOLOGICAL ASSESSMENT METHODS

Friedemann Virginia M. and Marcia K. Morgan. *Interviewing Sexual Abuse Victims Using Anatomical Dolls: The Professional's Guidebook.* Eugene, Ore.: Migima Designs, 1985. *

This pamphlet, written by the people who designed the first set of anatomically correct dolls, appears on several bibliographies and thus appears to be used by many psychologists and social workers. For ideas about how to find more recent materials on anatomical dolls, see the section, "Finding More Information" below.

Gardner, Richard A. *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse.* Cresskill, N.J.: Creative Therapeutics, 1987.

Hoorwitz, Aaron Noah. *The Clinical Detective: Techniques in the Evaluation of Sexual Abuse.* New York: W. W. Norton, 1992.

MacFarlane, Kee and Jill Waterman. *Sexual Abuse of Young Children: Evaluation and Treatment.* New York: Guilford Press, 1986.

Melton, Gary B., John Petrila, Norman G. Poythress, and Christopher Slobogin. *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers.* New York: Guilford Press, 1987.

In addition to a 19-page chapter on evaluation in child abuse and neglect cases, includes brief sections on competency of children as witnesses, sentencing and treatment of sex offenders, and much useful information to help attorneys and mental health professionals better communicate with one another.

Sgroi, Suzanne M. *Handbook of Clinical Intervention in Child Sexual Abuse.* Lexington, Mass.: Lexington Books, 1982.

Although the emphasis is on therapy and treatment, this book does includes chapters on a conceptual framework for understanding child sexual abuse, and validation methods.

Walker, Lenore E., ed. *Handbook on Sexual Abuse of Children: Assessment and Treatment Issues.* New York: Springer, 1988.

SENTENCING AND TREATMENT OF CONVICTED SEX OFFENDERS

Laws, D. Richard, ed. *Relapse Prevention with Sex Offenders.* New York: Guilford Press, 1989.

Runda, John. *Parole Board Response to Sex Offenders.* 25 min. Frankfort, Ky.: Department of Public Advocacy, 1991. Videocassette. *

Presentation by Parole Board chairman at 1991 DPA Annual Seminar.

Runda, John. *Parole Information for Sex Offenders.* 16 min. Frankfort, Ky.: Kentucky Parole Board, 1990. *

This tape is shown to sex offenders prior to their appearance before the Parole Board. It explains the sex offender treatment program and Parole Board expectations; defense attorneys and their clients need to be aware of this information long before the parole board appearance.

Sex Offender Treatment Program. Frankfort, Ky.: Corrections Cabinet, Commonwealth of Kentucky, 1990. *

Brochure describing the state's treatment program.

Witt, Phillip and Thom Allena. "Developing Sentencing Plans For Child Molesters." *The Champion* 15 (May 1991): 30-32.

FINDING MORE INFORMATION

A.Computer Databases: A Good Source of Citations to Current Information on Specific Topics

The attorney handling child sex abuse cases will often need up-to-the-moment information on highly specific topics. For example:

If a child has been diagnosed as having chlamydia (genital warts), does that mean sexual contact has occurred, or can chlamydia be contracted in another way?

In using anatomical dolls in his interview with the child, did the psychologist use methods that are currently accepted by professionals in the field?

Journal articles are likely to be the best sources of information on these and the hundreds of other questions that can arise in child sex abuse cases. A computer database is usually the fastest, most up-to-date means of identifying journal articles as well as books, conference proceedings, and other information sources.

If you are familiar with Westlaw, Lexis, or printed indexes like the *Index to Legal Periodicals*, you should have no difficulty in understanding computer databases. These databases are similar to printed indexes in the type of information they offer, but they are faster to use, can be searched with greater specificity, and are usually more current than printed indexes. They are similar to Westlaw and Lexis in the speed with which they can be searched, but they usually provide bibliographic *citations* rather than the full text of articles. This means you have to use slightly different search strategies.

Some computer databases are accessed online (like Westlaw and Lexis), some are available on compact disks, and some are available through both methods. Online database vendors usually charge by the hour, often with an additional charge per citation retrieved. On-disk databases are usually paid for on a yearly basis, so there is no per-search charge.

Some of the databases likely to be useful in the area of child sexual abuse are:

Medline. This database, developed by the National Library of Medicine, indexes more than 3000 journals published in more than 70 countries, and is the best source of citations to up-to-date articles on medical topics. Abstracts are available for many of the entries.

PsycINFO. Developed by the American Psychological Association, this database provides citations to sources in psychology and related fields, and is a good source for child development information. There is also a CD version called *PsycLit.*

Social Work Abstracts and *Sociofile* are good sources for information on child abuse generally, and social aspects of child abuse.

Child Abuse and Neglect and Family Violence. An excellent source of citations to articles, book reviews, and conference papers. Includes citations on very specific topics, including many medical topics.

Family Resources, produced by the National Council on Family Relations, indexes about 800 journals and books relating to family studies.

ERIC (Educational Resources Information Center) is a particularly good resource for information on child development issues.

B.How to Gain Access to Computer Databases

The DPA library performs database searches for DPA staff attorneys from the central office and all field offices. To avail yourself of this service, simply give me a call.

Non-DPA staff can get access to computer databases in a variety of ways:

1) Most of the databases listed above, and many more, are available through commercial database vendors such as Dialog or BRS. For information, call Dialog at 800/334-2564, or BRS at 800/955-0906.

2) Many databases are accessible through Westlaw. At this writing, all of the databases listed above, except *Sociofile* and *Social Work Abstracts*, are available on Westlaw, and new databases are added frequently. Prices vary and can be high; ask your representative for a copy of the billing structure. Lexis also offers some non-legal databases; for information, call your Lexis representative.

3) Many libraries, especially large academic libraries, provide access to computer databases, either on-line or on disk. A few of the community college libraries — Paducah, Henderson, and Owensboro — perform online searches, at cost, for community patrons.

The University of Kentucky main library reference department performs online searches at cost, ranging from $20 to $180 per hour; there is sometimes an additional charge for each citation. This library also offers some databases on disk, including *Medline, ERIC, PsycLit,* and *Social Work Abstracts.* For assistance, call the reference department at 606/257-1631.

The UK Medical Center library performs online searches at cost, and CD-ROM searches at $5 per 50 references. For assistance call 606/233-6567.

Searching online databases can be expensive. Efficient searching takes practice, so if you do not do it often enough to become proficient, it may be a good idea to have an experienced searcher do it for you. Searching CD's, on the other hand, is usually free. Whether you conduct your own search or ask a library for assistance, be sure to write out your question, and think of alternate terminology for some of the key words in your search.

4) Anyone with a Macintosh or IBM PC-compatible computer, and a modem, can purchase *Grateful Med,* an inexpensive (about $30), easy-to-use software package which allows direct access to *Medline* at hourly rates significantly lower than those charged through Westlaw. For more information, call Jane Bryant at the UK Medical Center Library: 606/233-5715.

B.How to Obtain the Book or Article Once You Have the Citation

The citation to an useful-sounding book or article is not of much help unless you can obtain a copy of the item itself. Here are some suggestions for doing that:

Ask your public library to order the book or article for you through interlibrary loan. Every public library in Kentucky offers this service. You may be charged for the cost of mailing a book or copying an article. To make sure you get the exact item you are looking for, be prepared to give the librarian as much information as you can: correct title, publisher, author, date of publication, volume and issue number for journal articles.

Some databases are available in full text; you can print the citation or the full article. Some databases also provide abstracts — brief summaries of the articles — which can help you decide whether it is worth the trouble of getting the full article.

If you use a database vendor such as Dialog or BRS, ask about document delivery services. *Grateful Med* also offers a document delivery service through the UK Medical Center library; each copy of an article is $4.50.

Barbara Sutherland is Law Librarian for the Department of Public Advocacy. She received her J.D. from the University of Kentucky College of Law in 1976 and her Master of Library and Information Science degree from the University of Texas at Austin in 1990.

Kentucky Association of Criminal Defense Lawyers

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February 1, 1992

The Kentucky Association of Criminal Defense Lawyers is deeply concerned about the coverage of the issue of child sexual abuse in the Lexington Herald Leader usually under the name "Twice Abused." Overall, the coverage of this issue has been one-sided and distorted, raising the following concerns:

1. The problem of the false accusation has yet to be mentioned. In an AP story published a few years ago in the Louisville *Courier Journal*, Douglas Besharov, director of the American Enterprise Institute's Social Invention Project estimated in a paper published in the *Harvard Journal of Law and Public Policy* that 65% of abuse reports eventually are deemed unfounded, up from 35% in 1975. Interestingly, he cautions that the media are partly responsible for this increase, saying that graphic stories of abuse make people too eager to "do something" about the problem. He recommends that the media "cool" the rhetoric. Behind each of these false accusations is the horror of having the name of the accused in the paper, having one's reputation ruined, losing one's job, having one's family life shattered. Balanced journalism requires that the horror of child sexual abuse be balanced with the horror of the false accusation of a crime.

2. The suggestion that the law needs to be changed in sexual abuse cases would enable the false accusation to result in the conviction of innocent persons, in at least two specific ways.

First of all, admitting into evidence the "child abuse accommodation syndrome" would result in the conviction of innocent persons. How? Simply put, the "child abuse accommodation syndrome" enables an expert witness to clear up all the problems with the child's testimony. For example, if the child waited four years to reveal abuse, the "syndrome" answers why that occurred. On the other hand, if the child reports the incident immediately, then that too is evidence the abuse occurred. If the child tells no one, the syndrome cures that. If the child tells a friend, then that is evidence the abuse occurred.

The child abuse accommodation syndrome is useful in therapy of abused children. However, it has no place in a court of law. It is nothing more than "weird science" when it is removed from the therapeutic and thrust into a courtroom. The Kentucky Supreme Court is trying to keep weird science out of court. The Court also prohibits evidence by an expert that a person does not have the profile of a child abuser. Together, this demonstrates the Court's balanced approach whose purpose is to allow only solid evidence in our courts.

The *Herald Leader* articles also call for a relaxing of the historic rules of hearsay in order for persons to testify to what a child said to third parties in order to make a conviction easier. In these case, there are people, often social workers, pediatricians, and others, who are taught or believe that "children do not lie" about these matters. They are prepared to come into court and repeat that which a child has told them, and to cast that story in the best light possible. They are professional witnesses, and always do a better job of telling the story than does the child. By so doing, they enhance what may be shaky testimony by the child, which again can result in a false conviction.

3. The misimpression has been created that people are abusing children, being convicted, and being given little pats on the hand. The reality that has not been mentioned is that our laws are already quite punitive. Rape or sodomy of a child under 12 requires a penalty of 20 years to life in prison, plus service of one-half of the term of years given prior to being eligible for parole. This is the same penalty we give to one convicted of murder. Probation is prohibited in most cases of child sexual abuse. These are very significant penalties which do not need to be longer.

4. Sadly, the articles have told stories that unjustly maligned many persons in the criminal justice system. These articles have painted with such a broad brush that the misimpression has been created that many Commonwealth's Attorneys, Circuit Judges, and even the Kentucky Supreme Court somehow favor child sexual abuse, or at a minimum are indifferent to the problem. Prosecutors, trial judges, and appellate judges are all required to enforce the law against wrongdoers while at the same time protecting the rights of all citizens including ones accused of crime.

5. The people who sexually abuse children have been mostly ignored in the articles. Many of them were once abused as children. The problem of child abuse is generational and incredibly complex, and cannot be solved by a "throw away the key" mentality.

Interestingly, persons on our nation's death rows were often abused, physically and sexually, as children. Rage is created in these children, rage which often finds an outlet later in horrible acts of violence when those children become adults. The Fayette Commonwealth's Attorney's Office sought and obtained the death penalty against one such child turned adult, Lafonda Faye Foster, and obtained the death penalty against her. It seems our compassion for abused children soon turns to vengeance when those children react to abuse in expected ways.

All issues involving children, and not just child sexual abuse, should be our first priority as a culture. We need to ensure that our children are educated, nurtured, and protected. In our zeal to protect children, however, we must ensure that we do not change our rules so much that innocent people's lives are ruined.

ERNIE LEWIS
KACDL Board Member

MARIA RANSDELL
Past President - KACDL

SURVEY OF PROSECUTORS 'SHOCKING,' EXPERT SAYS

When asked how they handle child sexual abuse cases, Kentucky prosecutors often say, "I'm doing everything I can."

But when the American Bar Association surveyed Kentucky prosecutors recently, their responses made it clear that many of them could do a lot more.

"It was sort of shocking," said Josephine Bulkley, an ABA child sexual abuse expert who analyzed the results.

About a third of the state's prosecutors responded to the survey by the ABA's Center on Children and the Law. Of the 50 county and commonwealth's attorneys who did respond:

- Eight said they try to make child victims familiar with the courtroom process, which can be extremely intimidating. A major challenge prosecutors face is helping sexually abused children overcome their fear of testifying.
- More than half said they did not have a policy in which the same prosecutor stays with the case until completion - which the ABA says reduces the number of victim interviews and increases the likelihood that the child will be able to testify. Children can become discouraged or upset by having to repeat their story many times.
- About a third said they had received special training or educational materials about how to interview child victims.
- Four said they had special programs to assist child sexual abuse victims and witnesses.
- About a third said they participate with other agencies in multidisciplinary teams for child sexual abuse cases - a practice the ABA says is so important that it should be required by law.
- Nearly a third said their offices had no child sexual abuse specialist or unit, which the ABA says can greatly improve prosecution outcomes.
- Three said they maintained statistics about the case processing or outcomes in child sexual abuse cases.

The report, which also includes 21 recommendations about how child sexual abuse prosecutions might be improved, was intended to be distributed statewide. But the report remains undistributed because the Victim's Advocacy Division of the state attorney general's office, busy with other projects, said it ran out of time and had to return the remainder of the federal grant that had financed the study.

ATTORNEY GENERAL PLAYS LIMITED ROLE

The state attorney general's office accepts complaints about prosecutors' handling of a child sexual abuse cases, but the agency has limited authority to resolve them.

Prosecutors are independently elected and nobody- not even the attorney general - can tell them what to do.

"We act as an ombudsman," said John Patterson, chief advocate in the attorney general's Division of Victims Advocacy.

"We'll contact prosecutors or social workers or law enforcement people, first of all to try to get answers to the questions. Second, to try to find out what is going on. And third, just to demonstrate that there is some interest in the case."

The office can also give advice to prosecutors.

The toll-free Crime Victims Information Line is (800) 372-2551.

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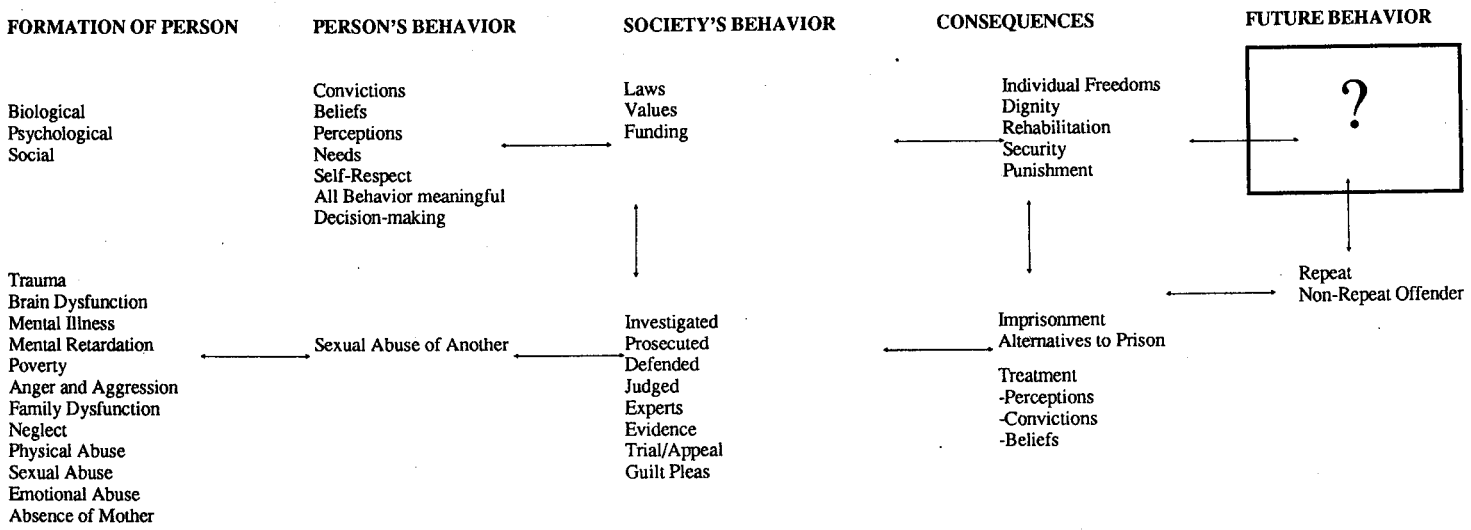
UNDERSTANDING SEXUAL ABUSE



Are we Abusing both Victims and Perpetrators by Being Indifferent to or in Denial of the Entirity of this Process?

DEPARTMENT OF PUBLIC ADVOCACY
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UPCOMING DPA EDUCATION PROGRAMS

21st Annual Public Defender Conference
June 13 - June 15, 1993
Downtown Holiday Inn, Louisville

A 2-1/2 day program offered for the last 2 decades to insure our 350+ full and part-time public defenders learn about or become updated on critical topic areas. This remains the largest yearly gathering of public defenders and criminal defense attorneys in Kentucky. It presents a unique opportunity to meet others doing this work and share helpful information.

Spring 1993 Capital Post-Conviction Conference

A program to educate attorneys on litigating the increasingly complex and difficult capital post-conviction cases.

9th DPA Trial Practice Persuasion Institute
Kentucky Leadership Center
Faubush, KY (1/2 hour west of Somerset)
October 24-29, 1993

Intensive practice on trial skills, knowledge and attitudes with a focus on persuasion through a *learn by doing* format. Practice with feedback is the heart of this formation. Advanced, intermediate and beginning tracks are offered. Perhaps the most effective education available for learning successful litigation.

We previously announced this as a Death Penalty Practice Institute. Further planning has led us to focus on non-capital litigation in 1993 and to conduct a Death Penalty Trial Practice Institute in the Fall, 1994.