THE ADVOCATE

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

Representing 101,000 Poor Kentucky Citizens Yearly

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Links in the Chain from Child Maltreatment to Homicidal Behavior

1. Vulnerabilities of the Child

Age of Child | Mental Abilities | Physical Limitaitons | Health of Caretaker | Other Social Supports

2. Child Maltreatment

Physical Abuse | Physical Neglect | Sexual Abuse | Witness to Violence | Psychological Maltreatment

← Treated →

Untreated

↓

3. Consequences of Child Maltreatment

Central Nervous System Damage | Mental Disorders | Behavioral Disabilities

← Treated →

Untreated

↓

4. Homicidal Behavior Risk Factors

Paranoid Ideation | Increased Aggression | Devastating Inability to Solve Problems

← Treated →

Untreated

↓

Homicidal Tragedy

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FROM THE EDITOR:

CAPITAL COLUMN: We reintroduce our regular death penalty column this issue. We have not had the space to carry it due to the reduced size of our magazine caused by our funding problems. As a result, our over 400 full and part-time public defenders have not received this critical educational resource which diminishes the direct representation of clients facing death as a possible punishment.

This information is too essential to any longer deny to our defenders who are doing the most complicated litigation known to the justice system. It will appear in each future issue.

CONTRACT COUNTY HELP: Steve Mirkin joins DPA to focus on our 80 contract counties. His help will upgrade these many systems and enable them to provide more effective representation to clients. An article details the service Steve will be providing.

SEX ABUSE: The Attorney General's Task Force heard from DPA and the Kentucky Association of Criminal Defense Lawyers at two of its meetings. We share that critical effort with you in this issue, and some significant scholarship in the sex offender area in two articles from prominent national thinkers.

SEND $: We need more money or printing donations to keep *The Advocate* alive and return it to full coverage of all the areas necessary to insure our clients receive competent representation. Call us with your suggestions, or send your money.

EDWARD C. MONAHAN

The Dawn of The Third Decade

Department of Public Advocacy

1972-1993

30th Anniversary

***Gideon v. Wainwright*, 372 U.S. 335 (March 18, 1963)**

As we celebrate the 30th Anniversary of *Gideon*, send your ideas on how we can honor its principled rule of law.

THE DEATH PENALTY

Case Review

CALL US, *JUST DON'T CALL US AT THE LAST MINUTE*

The DPA Capial Trial Unit is available to help you with issues that arise in your capital cases. However, call us well in advance of your trial date, as our ability to provide meaningful help lessens as you get closer to trial.

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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UNITED STATES SUPREME COURT

UNCONSTITUTIONALLY VAGUE AGGRAVATOR - HEINOUS, VICIOUS, ATROCIOUS AND CRUEL *[HVAC]*

Richmond v. Lewis, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (52 Cr.L. 2016; 12-2-92) - In an 8 to 1 decision, [Justice Thomas wrote a concurring opinion. Justice Scalia was the lone dissenter.] Richmond's death penalty sentence, previously upheld by the Arizona Supreme Court, was reversed by the United States Supreme Court because it violated the 8th Amendment as it was given based on an unconstitutionally vague aggravator. Arizona is a "weighing state,"which means that if the mitigating factors outweigh the aggravating factors, a person may not be sentenced to death. The unconstitutionally vague aggravator, HVAC, was given weight by the sentencing judge. Mitigating factors presented included that a participant involved in the offense was never charged with any crime; and that the defendant's family would suffer considerable grief as a result of any death penalty imposed.

Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992): a Florida trial judge's improper weighing in a capital sentencing proceeding an aggravating factor which was not supported by the evidence, all in violation of the 8th Amendment to the United States Constitution, was not "cured" by review of his decision in the state's appellate court. The appellate court neither explained nor declared any belief that the trial judge's error was harmless beyond a reasonable doubt; therefore, the matter was vacated and remand to the Florida court.

This decision is not discussed any further because the issues on appeal included aggravating factors not contained within Kentucky jurisprudence.

Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

Defendant was found guilty of a capital offense and sentenced by a Florida trial court to death consistent with the trial jury's rendering of an advisory verdict recommending death. One of the aggravating factors considered was Florida's "wicked, evil, atrocious, or cruel" aggravator, and the Supreme Court held this was unconstitutionally vague and violative of 8th Amendment prohibitions. The case was reversed and remanded.

MEMBER OF ARYAN BROTHERHOOD /BELIEFS HELD BY DEFENDANT - ADMISSIBILITY

Dawson v. Delaware, 503 U.S. ___, 117 L.Ed.2d 309, 112 S.Ct. 1093 (1992) (3-9-92)

In an 8-1 decision (Thomas dissent) the Supreme Court held that abstract beliefs held by a capital defendant may not be introduced by the prosecution when these beliefs have no relevance to the issues at hand. Defendant Dawson was convicted of murder and sentenced to death. The prosecution intended to introduce expert evidence on the nature and origin of the Aryan Brotherhood as well as the fact that Dawson had "Aryan Brotherhood" tattooed on his hand, that Dawson referred to himself as "Abaddon," also having the word tattooed in red letters across his stomach, and testimony that "Abaddon" means "one of satan's disciples."

Before trial, the defense agreed to a stipulation being read to the jury stating that the defendant belonged to the Aryan Brotherhood, which is a white racist prison gang which began in the early 1960s in response to other gangs of racial minorities. Nothing more was stated in the stipulation. The admission of the stipulation as to the Aryan Brotherhood and "Abaddon" evidence was error and the Supreme Court reversed. West Key Numbers: Constitutional Law 91; Homicide 343, 358 (1). The Supreme Court held that this "evidence" violated 1st and 14th Amendments. The 1st Amendment protects an individual's right to associate with other persons holding similar beliefs, *Id.* at 1096, and the stipulation's admission was constitutional error.

Caveat - The Supreme Court was careful to point out that the Aryan Brotherhood is an organization which promotes drugs and violent escape attempts of prisoners, including advocating the murder of fellow prisoners, and that in a different case, where it was directly relevant it could have been presented. *Id.* at 1097. The "narrowness of the stipulation left the Aryan Brotherhood evidence totally without relevance to Dawson's sentencing proceeding."*Id.* at 1097. The Supreme Court also held that the evidence as admitted was not relevant to rebut any mitigating evidence offered by Dawson because it cannot be viewed as "relevant bad character evidence in its own right." *Id.* at 1099.

The Court cautioned that the Constitution "does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and association at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 1097. The Court previously held in *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) that Aryan Brotherhood membership is admissible to impeach a defense witness by

showing the defendant and witnesses were members of that organization and they were "sworn to lie on behalf of each other." *Id.* at 1097. Although *Abel* wasn't a capital case, the Supreme Court held its "logic is perfectly applicable" to Dawson's case. *Id.* at 1097.

NOTE: In light of *Dawson, Flanagan v. Nevada,* 112 S.Ct 1464 (1992) was remanded to the Supreme Court of Nevada which had held that satanaic worship evidence was relevant character evidence, even though not casually connected to the crime.

VOIR DIRE - AUTOMATIC DEATH VOTES

Derrick Morgan v. Illinois, 504 U.S. ___, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) - petitioner's death verdict was reversed by the Supreme Court in a 6 to 3 decision due to errors committed during jury selection.

In judicially conducted voir dire, the court inquired whether jurors would automatically vote against the death penalty regardless of the facts of the case, but refused to voir dire on whether jurors would automatically vote for death regardless of the facts of the case and the mitigation available. The Illinois Supreme Court held nothing required judges to question jurors so as to identify and exclude anyone who would vote for the death penalty in every case after conviction for a capital offense, and since the judge had determined from the prospective juror that they would "follow (his) instructions on the law, even though (they) may not agree," *Id.* at 499, the Illinois courts were convinced of the verdict's fairness. Fortunately for petitioner, the United States Supreme Court disagreed.

The Court provides the reader with a historical perspective on the right to a jury trial. The due process clause of the 14th Amendment and the application of the 6th Amendment right to a fair trial were the constitutional issues addressed.

The Court held: jurors who would automatically vote for death in every capital case fail in good faith to consider the aggravation and mitigation evidence as the law requires. Such a juror already has formed an opinion on these issues, and the presence or absence of aggravating or mitigating circumstances becomes "entirely irrelevant." *Id.* at 503. Seating such a juror violates the defendant's 14th Amendment due process rights. Jurors maintaining these views may be challenged for cause, and "if even one such juror is empaneled and death is imposed, the state is disentitled to execute the sentence." *Id.* at 503.

Illinois argued the judge can refuse to inquire in this manner so long as "other questioning purports to assure the defendant a fair and impartial jury able to follow the law." *Id.* at 503. The Supreme Court was unwilling to "dictate a catechism for voir dire" (p. 503), but was also concerned that defendants be afforded an impartial jury, and part and parcel of defendant's guarantee to an impartial jury is an adequate voir dire to identify unqualified jurors. Voir dire plays a critical function in providing defendants with this constitutional right, and without an adequate voir dire the trial judge's responsibility to remove unqualified jurors cannot be fulfilled (p. 503).

The Supreme Court provided a detailed analysis of *Wainwright v. Witt* and *Witherspoon v. Illinois* cases. In doing so, it reaffirmed that "the state must be given the opportunity to identify such prospective jurors by questioning them at voir dire about their views of the death penalty," *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986). This quote from *Lockhart* summed up what the Supreme Court indicated was recognized in *Witt*, that "...where an adversary wishes to exclude a juror because of bias, then it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. It is then the trial judge's duty to determine whether the challenge is proper." (p.505).

The Supreme Court described the defendant's interest here as "complementary" challenges for cause against jurors who would "unwaveringly impose death after a finding of guilt. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered... meaningless as the State's right, in the absence of questioning, to strike those who would *never do so*." (emphasis added) (p. 506).

After recognizing that an inquiry must be made to insure defendant's rights to an impartial jury, "the only issue remaining" was whether the Illinois court's inquiry was sufficient. The Illinois courts found that "general fairness" and "follow the law" questions typically asked by courts were enough to detect those jurors who would automatically vote for death or otherwise not follow the law. (p. 506). The Supreme Court, interestingly enough, pointed out that the prosecutor's demand for questioning under *Witherspoon* and *Witt* "belies this argument. *Witherspoon* and its succeeding cases would be in large measure superfluous were this court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." (p. 506). This type of juror, whether he or she be in favor of or opposed to the death penalty in every case, "by definition" are jurors who cannot perform their duties in accordance with the law "their protestations to the contrary notwithstanding." (p. 506).

The Supreme Court finally stated something which trial lawyers have known for decades that jurors can "in all truth and candor respond affirmatively that they can be fair and impartial," when in fact they won't be in many cases. Unless the specific concerns expressed by petitioner in this case were addressed to the jurors to determine those who would impose death regardless of the facts and circumstances of the case, such a juror may never be exposed, so "...a defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception...." Even though jurors, in good conscience, swear to follow the judge's instructions and swear they can uphold the law, putting aside their personal beliefs, the absence of this inquiry creates an unjustified risk that such jurors could be empaneled and "infect" petitioner's capital sentencing in a fashion unacceptable "in light of the ease with which that risk could have been minimized. (cases cited)." (p. 507).

The majority opinion directly responded to Justice Scalia's dissent that a state is entitled to try death penalty cases if jurors, upon inquiry, state they would automatically vote for death if the defendant is found guilty, no matter what mitigating factors, whether statutory or nonstatutory, might exist. The majority believed that such jurors "obviously deemed mitigating evidence to be irrelevant to their decision to impose the death penalty: they not only refused to give such evidence any weight, but are also plainly saying that mitigating evidence is not worth their consideration in that they will not consider it." This is a view "long rejected by this court." (p. 507).

Since the defendant has the constitutional right to present mitigation evidence and the juror seated to determine his fate must give consideration to mitigation evidence, a juror who would, disregard such evidence and vote for death must be excused for cause. The case was remanded because the "inadequacy of voir dire" led the Supreme Court to "doubt that petitioner was sentenced to death by a jury empaneled in compliance with the 14th Amendment." (p. 509).

An interesting paragraph near the end of the majority opinion is worth noting here. The court considered an analogous situation of whether a judge would be recused if he or she announced that mitigation evidence is "beside the point" and that he or she "intends to impose the death penalty without regard to the nature or extent of mitigation evidence if the defendant is found guilty...." The Supreme Court observed that such a judge in "refusing in advance to follow the statutory direction to consider that evidence... should disqualify himself or herself."

PRACTICE NOTE: "After the fact" is too late to learn a judge has this opinion of your mitigation evidence. The readers should be aware that in the recent cases being litigated by the Capital Trial Unit in which the Attorney General's Office is acting as "special prosecutor," motions were filed by defense counsel specifically listing pages upon pages of mitigation evidence which they intended to introduce at trial, and, pursuant to the new rules of evidence, a motion *in limine* was made to determine the "admissibility" of this evidence ahead of time. This is a practical measure because if the evidence is going to be determined as "inadmissible," then it is a shame to spend fiscal court money to procure this evidence merely to have it put on by avowal only. There are other ways to do this. Such a motion puts the prosecutor in a position of admitting the relevancy and propriety of this evidence in your penalty phase prior to trial. Furthermore, the court is in the position of dealing with these evidentiary issues prior to the empaneling of a jury rather than enduring numerous bench conferences and voir dire hearings outside the jury's presence. If the prosecutor makes the mistake of convincing the court that your mitigation evidence is irrelevant or otherwise inadmissible, then you have your good appellate record.

The other side of this coin is that by revealing the general nature of your mitigation evidence ahead of time, this defeats some of the purposes behind the original *ex parte* presentation. Personally, the author of this article has

reconciled that apparent conflict by believing it is better to make these determinations ahead of time, and demonstrate to the court that the funds sought for investigative assistance in order to secure and present evidence is recognized by *both the prosecutor and defense counsel* as relevant mitigation evidence. You can be general enough not to reveal too much.

Further, if the judge determines that he will not consider the mitigation evidence contained in the motion, and this is often revealed to you during the *ex parte* presentation, then you may have a basis for disqualifying the judge according to the *dicta* in *Morgan.*

The dissenting opinion in this case was written by Justice Scalia, with whom the Chief Justice and Justice Thomas joined. It is a good idea to copy 119 L.Ed.2d 492 at 512-514 because it lists most of the Supreme Court cases addressing the requirement that states must allow mitigating evidence.

The dissent found fault with the majority's findings that these specific inquiries must be made during the voir dire. Justice Scalia demeans the fact that "not only must mercy be allowed, but now only the merciful may be permitted to set in judgment," citing the Book of Exodus.

KENTUCKY SUPREME COURT

FARETTA/RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

***Wilson v. Commonwealth*, Ky., 836 S.W.2d 872 (1992).**

Defendant Wilson was convicted of murder and sentenced to death on murder, kidnapping, and other felonies. The imposition of the death sentence for both kidnapping and murder was improper, and the case was remanded for resentencing on the kidnapping.

The details of the crime are not as important for our purposes other than to mention they were heinous enough to arouse the local community, and defendant Wilson was black, and his victim was a white woman.

Issues on appeal in the case included the admission of "unnecessary and inflammatory photographs," lack of experts on Wilson's behalf, admission of scientific evidence on hair samples, the use of an "unqualified juror," who did not participate in the decision, the use of peremptory challenges by a prosecutor to remove "death scrupled jurors," double jeopardy due to the imposition of "multiple punishments," and, the most significant issue in the case, whether he was deprived of effective assistance of counsel. Appellate counsel also addressed Wilson's right to a fair trial and reliable sentencing, in accordance with the 6th, 8th, and 14th Amendments to the United States Constitution, and Sections 2, 11, and 17 of the Kentucky Constitution.

Briefly the issues which surrounded the "attorney issues": When the local public defender system could not produce lawyers to represent Mr. Wilson, Circuit Judge Raymond Lape posted a "notice" in the courthouse for attorneys to volunteer to represent Wilson. Ultimately, two attorneys came forward: Bill Hagedorn and John Foote. Mr. Hagedorn had significant experience in homicide and other criminal cases. Mr. Foote, at the time he represented Mr. Wilson, had little, if any, experience in criminal trials.

Wilson attempted to discharge his "court appointed attorneys" arguing that he was being deprived of his right to counsel, his right to effective assistance of counsel, and his rights to equal protection by the trial court's refusal to discharge these attorneys who he claimed were "not competent" to represent capital defendants due to Mr. Foote's inexperience and Mr.Hagedorn's limited practice and alcoholism.

The Kentucky Supreme Court blamed Mr. Wilson for any shortcomings in his counsels' representation observing that the defendant's own actions "severely hampered the efforts of counsel to assist him." Wilson, before the beginning of voir dire, made it known to the trial court that he was rejecting the advice and assistance of his court appointed counsel.

Although the Supreme Court believed that the "consequences of adopting the intensive pretrial scrutiny of counsel" could have an adverse effect on attorneys' willingness to get involved in assigned cases, the Court did analyze counsels' performance at trial and pointed out several areas in which appointed counsel did assist Mr. Wilson.

To have obtained a substitution of counsel during trial, Mr. Wilson must have shown "good cause" such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which led to an unjust verdict, thus demonstrating prejudice by the attorneys' performance. The court found that Wilson failed to "demonstrate in any way that he was prejudiced by (counsels') performance,"and doubted that the verdict would have been any different even if he had been supplied with the best criminal defense attorney in the nation." [Another lawyer might have presented a penalty phase, whereas Wilson's counsel did not, and have achieved a better result. The information collected by DPA and not utilized by Wilson's counsel, showed that a defense based on evidence of mental disease and defect could have been constructed, and that there was very strong mitigating evidence that would have explained why the crime occurred. This same type of evidence has meant the difference between a death sentence and a lesser sentence in Kentucky.]

The Supreme Court noted that neither statutory law, nor constitutional law prevents a judge from appointing a volunteer *pro bono* member of the Bar to represent capital defendants. The court decided that Mr. Wilson had placed the judge "between a rock and a hard place" by refusing to accept appointed counsel, but acknowledging at the same time that he was unable to represent himself. The Supreme Court held that "we believe the trial court's decision to allow Wilson to proceed with standby counsel was under the circumstances fair and reasonable."

Severance from the Co-Defendant- Wilson argued that his trial should have been severed from the trial of his accomplice, Brenda Humphrey. Unfortunately, Wilson failed to demonstrate how joinder of the trials "unduly prejudiced" him. The Court ruled that the trial judge did not abuse his discretion in trying these cases together. NOTE: What impact, if any, joint trials had on the sentencing phase is not set out. The discussion of the joinder issues in this case should not be read without also reading the discussion of joinder in the *Foster v. Commonwealth* case discussed herein.

Expert Assistance- Wilson's prior lawyers had obtained court authorization for expert assistance in the preparation of trial; however, the money authorized was never made available. Defendant Wilson never showed how his own experts might have affected the outcome of the case or his own defense, and he refused to allow his "standby counsel" to call any witnesses, expert or lay. The Court ruled Wilson lacked basis to complain now.

SEPARATE TRIALS - ANTAGONISTIC DEFENSES DURING PENALTY PHASE

***Foster v. Commonwealth*, Ky., 827 S.W.2d 670 (1992).**

Ms. Faye Foster and her co-defendant, Ms. Tina Powell, were tried for a "killing spree" resulting in the deaths of five victims. The trial court's failure to sever the defendants' penalty phases resulted in a remand of Ms. Foster for penalty phase "retrial" only.

Issues addressed in the written opinion included venue, denial of strikes for cause during voir dire, denial of instructions for second degree manslaughter and wanton murder, denial of instructions on extreme emotional disturbance, issues relating to examination and cross-examination of experts, use of bad acts evidence, and the denial of severance.

Instructions - Intoxication/Drug Abuse- The discussions relating to denial of lesser-included instructions on manslaughter and wanton murder are useful to attorneys in any litigation in which counsel uses the defense of eed, intoxication, and drug or alcohol abuse. In this case, the denial of these instructions was ruled to be not an abuse of discretion. The denial was "fact based" based on this case.

Extreme Emotional Disturbance Instruction - Defense counsel were denied an instruction on first degree manslaughter on Foster's " defense of extreme emotional disturbance" *Id.* at 678. Although an instruction on extreme emotional disturbance was given as a "mitigating circumstance" in the penalty phase, the court held Foster's evidence that she was raised in a "dysfunctional family in which she was physically and emotionally abused... evidence of her past drug and alcohol abuse... evidence of her rage towards people around her... (and evidence of her being) an extremely emotionally disturbed child, an extremely emotionally disturbed adolescent, and an extremely emotionally disturbed and drug dependent adult..." insufficient to justify an extreme emotional disturbance instruction because no "triggering event" was demonstrated by Ms. Foster. *Id.* at 678. The court again stated as in *McClellan v. Commonwealth*, 715 S.W.2d 469, that extreme emotional disturbance is not a mental disease or illness, and not equivalent to "duress." Such "triggering event" must be "sudden and interrupted" rather than "based on a gradual victimization from his or her environment" which triggered an explosion of violence on the part of the criminal defendant. *Id.* at 678.

Experts: Prior Bad Acts- The use of "uncharged misconduct evidence" or "prior bad acts" brought into evidence through defendant's experts bears close scrutiny by trial lawyers. In the penalty phase, Foster admitted mitigation evidence through Lane Veltkamp, a clinical social worker and expert in dysfunctional families. Co-defendant Powell was able to not only cross-examine Mr. Veltkamp about "specific acts of violence" known to him through his investigation, the trial court stated defense counsel had even "flung the gates wide open" for Powell to cross examine about "any information on which [Mr. Veltkamp] had based his opinion." *Id.* at 681. No error was found by the admission of these bad acts in the cross-examination by Powell's attorney of Mr. Veltkamp.

In the guilt phase, the evidence of Foster's having committed certain "bad acts" of a criminal nature was generally considered by defendant's expert in the formulation of his opinions, and "...the Commonwealth, in nearly all cases and with the proper foundation, has the right to question an expert on any matter which the expert has used in formulating his opinion...." The Supreme Court, however, held that "...the admission of evidence of bad acts in a capital murder trial is highly prejudicial and ordinarily outweighs any probative value the evidence may present in support of the Commonwealth's case in chief... the admission of these statements was error, but nevertheless harmless beyond a reasonable doubt as to the guilt of Foster. RCr. 9.24...."

PRACTICE NOTE: This is too important an issue to litigate during a bench conferences in the middle of a trial. Under the new rules of evidence, prosecutors must give "reasonable pretrial notice" of intent to use other crimes or bad acts evidence. The Department's "experts" on this issue are Steve Mirkin and Tom Ransdell.

PRACTICE NOTE: These examples should serve as reminders to attorneys of the "double edged sword" nature of expert testimony. It should be the subject of a pretrial motion *in limine*, and be part of the briefing of ones own expert. Anticipating the prosecutor's use of this evidence well ahead of time, and dealing with it yourself, rather than allowing the prosecutor to do so, can go far to offset the negative impact this type of testimony might have upon the jurors.

Penalty Phase Issues - At the penalty phase of the case, the prosecutor presented only a minimum amount of evidence, primarily relating to the defendant's prior felony offenses, none of which were capital. Since the penalty phases were not severed, Powell's attorney, through his attacks upon Ms Foster's case in the penalty phase, in effect, became a "second prosecutor" as Powell alleged that she was in fear of Ms. Foster when the murders were committed, and committed them under duress.

Not only was Powell able to cross-examine Mr. Veltkamp as discussed above, but she was able to present independent testimony from witnesses about Foster's alleged dangerous or violent tendencies, including arguing that she [Powell] suffered from the "battered spouse syndrome" due to a lesbian relationship between herself and Ms. Foster.

Foster serves as a reminder to all trial attorneys that clients should be warned against letter writing between co-defendants, Powell was also able to introduce in support of her "duress defense" letters written by Foster to her after the murders.

Trying these penalty phases together resulted in "...accumulated errors in the admission of prior acts of misconduct, contents of letters written by Foster to Powell, and evidence regarding the battered wife syndrome by Powell's expert all stem(ming) from the improvident decision of the trial court to hold a joint penalty phase. Individually, these errors might (have been) considered by this Court to be harmless, but viewed together or cumulatively, their commission requires reversal of Foster's sentence. The respective evidence in mitigation offered by the appellants to the jury was antagonistic as to each other. The penalty phase as to Foster was unfairly tainted by the appearance of Powell's counsel acting as a second prosecutor." *Id.* at 683.

OBSERVATIONS: It is readily apparent that defense lawyers need to file, as defense counsel did in *Foster* the necessary pretrial motions for severance of co-defendnats. General form motions for severance are not advised. Request an *ex parte* hearing with the Court so you can outline for the court *exactly* the nature of your defense, the nature of the witnesses, the type of evidence anticipated, and, *how* these witnesses and this evidence will be antagonistic to each of the co-defendants, and how your co-defendant's counsel will, in effect, be a second prosecutor against your client. If trial counsel has properly prepared, formulated a "theory of the case", and adequately and competently pursued discovery, then counsel is probably aware of what's coming during trial. Remember to always state as a basis Amendments 5, 6, 8, and 14 of the United States Constitution, and Sections 2, 7, 11, and 17 of the Kentucky Constitution, as well as your client's right to a full and fair hearing under both state and federal constitutions as additional grounds for the Motion.

BAD ACTS - GRUESOME PHOTOS - VICTIM IMPACT TESTIMONY - MINIMIZATION OF JURY'S ROLE BY PROSECUTOR

Clark v. Commonwealth, Ky., 833 S.W.2d 793 (1992) (as modified on denial of rehearing).

Michael Dean Clark received a death sentence for a murder and robbery from 1986. The murder was committed with a handgun, the victim's body was packed into a freezer and stored until found some time later. Defendant was arrested approximately 7 months after the shooting.

The case was reversed on "numerous errors" and remanded for a new trial. The issues included: admission of gruesome color slides and video tape, evidence of prior acts unrelated to crime, prosecutor's minimizing role of jury being arguments, and the admission of victim impact testimony which inflammatory effect outweighed any probative value.

Gruesome Photos - the prosecutor used a witness, for 8 minutes, to show autopsy and other photos of the victim's decomposing face and body to demonstrate the location of bullet wounds, and the path of the bullet. X-rays were also used to show where the bullet was lodged. The videotape showed the victim's body in the freezer, being pulled from the freezer, and being placed upon a stretcher while wrapped in black plastic. Decomposition fluids and other "red fluid" were also shown on the video. The Commonwealth argued this evidence was necessary to show the bullet wound, the paths of the bullet, where the bullets were lodged, the condition of the crime scene, and to show evidence of defendant's attempts to conceal the crime. The Court disagreed.

The proof illustrated by the gruesome slides and video was "amply available" through x-rays and the oral testimony of the pathologist. "Imprinting a lasting inflammatory image in the minds of the jurors far outweighs any relevant value the slides may have [had]." *Id.* at 795. The video was irrelevant because the discovery and removal of the body had no relevance to the crime scene and only served to "arouse passion and shock at the sight of a gory event." *Id.* at 795.

Prior Acts/Uncharged Criminal Activity - Acknowledging the general rule that "evidence of crimes committed other than the one that is the subject of a charge" may be introduced as an exception "to the rule, to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...."*Id.* at 795 (Federal Rule of Evidence 404(b)) , the Court held the probative value of the collateral criminal or wrongful acts admitted in Mr. Clark's case had "little bearing on the charges for which Clark was being tried, yet they (tended to) present him as a violent person with a criminal disposition." *Id.* at 795. Introduction of the prior acts or uncharged criminal activity was more prejudicial than probative in this case. The Court set out the three factors to consider in the admission of prior bad acts or uncharged conduct: (1) the evidence must be relevant for some purpose other than to prove criminal disposition; (2) the evidence must be sufficiently probative to warrant introduction; and (3) the probative value of the evidence must outweigh the potential for prejudice to the accused.

Prosecutor's Use Of The Word "Recommend" - The prosecutor was persistent in advising the jury to "recommend the death sentence to the trial judge." In reviewing the history of the prohibition against minimizing a juror's responsibility in death penalty cases beginning with ***Caldwell v. Mississippi***, 472 U.S. 320, 105 S.Ct. 2633, 80 L.Ed.2d 231 (1985), the Court concluded that "comments by the prosecutor in this case leaves broad doubt whether the death penalty was imposed because ...the prosecutor determined to seek it, ...the legislature decreed it, ...the jury thought it only a recommendation, ...or, the jury determined it to be the appropriate punishment.

Victim Impact Testimony - In addition to the prosecutor's emotionally charged closing argument during the guilt phase that included "emotional statements engendering sympathy for the victim and his family," *Id.* at 796, he argued the severe impact of the crime on the victim's family and friends. He told the jury to imagine the victim's family at the scene begging for the victim's life, and other similar,

emotional pleas. He called witnesses, both family and friends, to prove how the victim's mother was to have had eye surgery after the victim's disappearance, the fact that the victim made weekly phone calls and visits with his elderly parents, and that he had many friends who were alarmed over his disappearance. The court described this as an "exploitation" of the victim's disappearance, and reemphasized its general disapproval of "sensationalizing tactics which tend to pressure the jury to a verdict on considerations apart from evidence of the defendant's culpability." *Id.* at 797.

NOTE: Donna Boyce and Barbara Holthaus were the Assistant Public Advocates who wrote and argued this appeal.

GUILTY PLEAS

***Commonwealth v. Judge Corey*, Ky., 826 S.W.2d 319 (1992).**

Jefferson Circuit Judge Corey made a valiant attempt in a death case to conserve judicial time and economy, not to mention the extraordinary costs associated with death penalty litigation borne by taxpayers, and gave two defendants a chance to enter a guilty plea, but with the understanding that if the judge decided to impose death or life without parole for 25 years, the pleas be withdrawn.

A writ was sought by the Commonwealth to preclude Judge Corey's acting in this fashion. Unfortunately, the Commonwealth prevailed. The Supreme Court expressed a concern regarding a commitment to the preclusion of a penalty *before* Judge Corey had all the information he should have had prior to sentencing, etc.

Most taxpayers and legislators don't know that the costs of death penalty litigation are borne by the individual counties; therefore, the fiscal courts in each county pay all or a substantial part of the costs of this litigation. The Commonwealth's Attorney pays nothing of these costs. They are paid by people who are given no input into the charging decisions. Although these costs may not impact necessarily upon Jefferson County or Fayette County as much as they might on Perry County, Harlan County, or Leslie County, just to name a few, Judge Corey (apparently) believed that the time and resources of the prosecutor's office, the attorney general's office, the court, and the citizens of Jefferson County would be better spent if the defendants in this case were brought to justice in a way that didn't necessarily include burning them alive, but still served the goals of punishment and protection of society.

The restriction of the circuit judge's discretion in this case serves as a reminder of what a very colorful law school professor once told one of his classes several years ago: "If it is logical, if it makes good sense, then, probably, it is not the law."

NON DEATH CASES WITH DEATH CASE APPLICATIONS

BATSON ISSUES

***Georgia v. McCollum*, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 33**

In a 7-2 decision, the Court held that the 14th Amendment's equal protection clause prohibits criminal defendants from engaging in purposeful racial discrimination in the exercise of peremptory challenges. The case arose out of a prosecutor's motion to prohibit racially motivated peremptories on the part of the defendant. ***Batson v. Kentucky*** is discussed.

PROSECUTOR'S DISCOVERY - GRUESOME PHOTOS - BAD ACTS/EVIDENCE - EXCULPATORY EVIDENCE

***Funk v. Commonwealth*, Ky., ___ S.W.2d ___ (39 K.L.S. 10, 9/30/92):**

The decomposed body of a young child was found in a condemned house within the city of Covington, Kenton County, Kentucky. She had been missing for some time. Michael Funk was ultimately charged and convicted of killing the child; however, the verdict was for manslaughter rather than capital murder. (Mr. Funk's representation was a heroic effort by Ron Rigg of Maysville, Kentucky and Deanna Dennison, Covington, Kentucky. Ms. Dennison also represented Mr. Funk in the appeal which followed the conviction).

Gruesome Photos - The photos, according to the Kentucky Supreme Court, should not have been used because they did not show the cause of death or the condition of the body at the time of death. Nothing which could have assisted the jury appeared in the disputed photographs, and even the experts found no use for them in the rendering of their opinions. The photos were of the decomposing body of the child, complete with post-mortem insect and animal damage to the body.

Other Offenses were brought in from the state of Ohio to inform the jury that Mr. Funk had plead guilty to sexual molestation of a child in Ohio. This was unduly prejudicial, "overkill" by the Commonwealth Attorney, and the use of this evidence was not otherwise available to the prosecutor to show any type of "common scheme" (not included in KRE 404). It did nothing to prove the identity of the perpetrator.

Exculpatory Evidence Withheld - There was also an issue relating to the prosecutorial misconduct of withholding exculpatory evidence. Citing *Brady* and *Commonwealth v. Carter*, Ky., 782 S.W.2d 597 (1990), the court held that withholding the evidence at issue qualified as reversible error. The court specifically pointed out that the defendant properly preserved the record by moving for a mistrial.

A Reasonable Doubt Instruction was in dispute, although not preserved, and the Supreme Court recommended using the same instruction found in *Commonwealth v. Grooms*, Ky., 756 S.W.2d 131 (1988), upon retrial.

DNA EVIDENCE

***Harris v. Commonwealth*, Ky., ___ S.W.2d ___ (39 K.L.S. 10, 9/30/92).**

This was the much publicized case involving DNA evidence before the Kentucky Supreme Court. Attorneys working homicide and/or rape cases ought to read this decision because the use of DNA evidence is far from settled in the Commonwealth of Kentucky. Although the *procedures* used to obtain DNA results may be generally accepted within the scientific community, the *use* of these results, especially the use and meaning of statistics and probabilities, is still very much open to question. A defense expert must be retained to analyze, consult on a DNA case.

FUNDING FOR INDIGENTS - INVESTIGATORS/CONSULTANTS

***Sommers v. Commonwealth*, Ky., ___ S.W.2d ___ (39 K.L.S. 10, 9/30/92) finality endorsement at 39 K.L.S. 13, 12/23/92.**

This case presents to the trial lawyer a "cookbook" outline of what the Kentucky Supreme Court will look for in records on funding issues brought to it on appeal.

Two adolescent female children were killed in a McCracken County fire. Defendant Sommers was charged with the arson offense and murders of the children. The alleged "motive" was to "silence" the victims of his sexual abuse. Sommers contested whether an arson, in fact, was committed, he denied any involvement whatsoever in the deaths of the children, and he adamantly denied any sexual misconduct with the children.

Although death was originally sought in this case, the prosecutor's office avoided the extraordinary costs associated with death penalty litigation, by withdrawing the "notice of aggravators," and proceeding "non-death."

There were several issues in the case, including judicial recusal. This decision is mandatory reading for attorneys who may need expert or consultant assistance from the trial courts.

Consultants in arson and pathology were sought by defense counsel. The motion for assistance was based on KRS Chapter 31, as well as state and federal constitutional issues (Mr. Sommers' right to a "full and fair hearing under both state and federal constitutions" was not specifically raised. It should have been included as an additional ground for relief.)

The trial judge denied all expert assistance as well as any assistance in the form of consultants in the mistaken belief that these services are available to public defenders "through the state."

The opinion gives a brief history of Kentucky Supreme Court case law on expert funding issues, the Kentucky Supreme Court held the assistance for Mr. Sommers should have been provided. This case was contrasted with prior Kentucky Supreme Court cases in which assistance was denied.

In this case the Court observed that:

(1) defense counsel demonstrated how ex-

pert or consultant assistance would have helped in the preparation of Sommers' defense or trial preparation;

(2) counsel explained to the trial court that there were no state facilities or personnel available to use in trial preparation;

(3) defense counsel related the type of experts or consultants sought to his probable defenses;

(4) through affidavits and testimony defense counsel showed the trial court that state experts would not work with defense counsel so that independent personnel were needed;

(5) instead of asking for assistance in "general terms" defense counsel was specific about help needed and why it was needed;

(6) to the extent that he could, defense counsel suggested names of experts or organizations providing expert or consulting assistance;

(7) defense counsel provided to the trial court an estimation of the potential costs;

(8) counsel showed that defense consultants or experts would address issues that were *in dispute*. (It is unlikely that a "reasonable necessity" for this assistance will be found if one is seeking expert assistance on a matter that is not in dispute, for instance, seeking a DNA expert to analyze semen samples in a rape case when the defense is "consent". The act is admitted, the identity of the samples are admitted, so there would be no "necessity" for independent experts);

(9) Sommers' counsel demonstrated how other experts might examine the same facts and reach different results;

(10) defense counsel alleged and demonstrated how, without the investigative assistance he sought, the case would be investigated in a fashion inconsistent with Sommers' right to effective assistance of counsel;

(11) defense counsel made an appropriate record showing how this expertise was needed to explore and present exculpatory facts related to the defense or punishment of Mr. Sommers;

(12) that the science and its language involved was of such a technical nature, that consultants were needed in order that defense counsel understand the language and prepare direct and cross-examinations.

[The attorney who represented Mr. Sommers on appeal was Marie Allison, Department of Public Advocacy.]

PRACTICE NOTE: It is still commonly believed by judges and prosecutors that state mental health facilities and other organizations (*e.g.*, fire marshall's office, state police, and the Cabinet for Human Resources) are available to act as consultants and/or to assist defense counsel in case preparation. It is further believed that the Department of Public Advocacy has an "army" of investigators and attorneys available to do this work in preparation for trial, or to go out into the field and assist attorneys in the preparation of these cases. Nothing could be further from the truth.

The simple fact of the matter is that DPA does not have these types of resources. The Cabinet for Human Resources, KCPC, etc. do not have the personnel and resources to act as defense consultants and experts either. Using state investigative agencies for this purpose will cause irreconcilable conflicts among their personnel. The Kentucky Medical Examiner's Office, the Fire Marshall's office, and the Kentucky State Police all rightfully oppose being used for such purposes.

Unfortunately for our clients when prosecutors make the popular argument that these resources are available, many judges are quick to adopt this argument as fact and order the Department to pay for these resources and make them available to defense counsel.

As a result, defense counsel never see these resources, a speedy trial is denied, and, ultimately, the victims, the court, and the community is condemned to retrials. It is not popular to order local fiscal courts to pay money the General Assembly has dictated they must in KRS Chapter 31. The Court of Appeals and Supreme Court are extremely reluctant to order this money paid unless a "reasonable necessity" exists to do so. It has been recently brought to this author's attention that defense attorneys are still making these motions for investigative and other assistance in a general, boilerplate fashion with little or no testimony, affidavit type evidence, exhibits, etc., and such general motions are being denied. Of course, the person who suffers is the client because the appellate record is nil.

Putting together an expert or investigator funding motion takes a bit of work. It requires more than merely presenting an oral argument to the trial judge, and it involves more than general allegations of need. If these issues arise in cases, a phone call to the Department's Capital Trial Unit and the scheduling of an appointment to sit down and discuss your case will be time and effort well spent.

PROSECUTORIAL MISCONDUCT

For a good "Golden Rule" argument see the case of ***Woodruff v. Commonwealth***, 39 K.L.S. 1, 1/22/92, Court of Appeals. Prosecutorial misconduct in closing arguments. Good case for motions *in limine*. Not a death case, but any good case law on prosecutorial misconduct is important in death cases because the impact of prosecutor misconduct is often greater on these cases.

FUNDING/DEFENSE SECOND ROUND OF TESTING

Crawford v. Commonwealth, Ky., 39 K.L.S. 2, 2/19/92. This case addressed issues of funding assistance for psychological examination under ***Ake v. Oklahoma***, principles; however, counsel was unable to make the "necessary" showing.

The Supreme Court also approved a procedure in its consideration of whether to order a second gynecological examination of the five year old sex abuse victim. The trial court had a second physician evaluate medical findings of the initial examining physician to express an opinion whether it would be beneficial to the defense to have a second examination. The court held this could be a "proper approach" to this issue and the requirements of ***Turner v. Commonwealth***, Ky., 767 S.W.2d 557 (1968).

BATSON ISSUE

Commonwealth v. Snodgrass, Ky., 39 K.L.S. 5, 5/20/92 (non-death). This was a ***Batson*** issue case. The issues included whether the prosecutor exercised good faith in striking a juror upon "outside information" that the juror lived near the defendant, although the juror had not responded when the venire was asked whether anyone knew the defendant. The Court found that the locality of the juror's residence is a "race neutral" explanation.

WAIVING RIGHT TO APPEAL

The statutory right to appeal may be waived as part of a plea bargain just as constitutional rights may be waived as part of a plea arrangement. ***United States v. Melancon***, ___ F.2d ___, 9/3/92; 5th Cir.; 91-4627; 52 Cr.L. 1008; 10/7/92

PROSECUTORS - GRAND JURY - CANDOR RELATIVE TO EXCULPATORY EVIDENCE

United States v. John H. Williams, Jr., 504 U.S. ___, 112 S.Ct. ___, 118 L.Ed.2d 352 (1992) - This is the case which decided whether a federal court exceeded its authority by imposing or enforcing rules upon prosecutors by requiring presentation of "substantial exculpatory evidence" which is in the prosecutor's possession to Grand Juries. This is a non-death case. It is included here because of the significance it might have in a death penalty motion practice.

The majority of the Supreme Court in this five to four decision provided an historical outline of case law addressing grand jury practices, misuses of grand jury, and, to some extent, prosecutorial misconduct before grand juries. It is noteworthy that (1) the decision addressed *federal constitutional law* - not state law, and, (2) that the prosecutor had the exculpatory evidence available in boxes of financial statements *before the grand jury*, but the grand jury simply chose not to hear this evidence. Arguably the prosecutor could have been more emphatic, but he was not.

It must also be recalled that the evidence, although having a "substantial exculpatory value" was not of a nature that it could be considered "evidence which would directly negate the guilt of a subject of the (grand jury) investigation...". ***Id.*** at 352. Nor was the Grand Jury deceived by false evidence.

The author found no Kentucky Supreme Court decision addressing this specific issue. Recall that attorneys, all attorneys, even prosecutors, have a duty of "candor" toward tribunals (courts), and "tribunal" includes ex parte proceedings before grand juries. See **Kentucky Rules of Professional Conduct 3.3 and 3.8 and the COMMENTS thereto.**

In their zeal to obtain capital indictments

prosecutors may not "tell all" to grand juries, and, in one recent incident, a prosecutor failed to advise the grand jury that an *eyewitness* to killers leaving the scene carrying weapons identified a perpetrator other than the current defendants. Police also discovered that said perpetrator had weapons and ammunition consistent with those which killed the victims, and he flunked the prosecutor's polygraph tests. In addition, perpetrator's stories were inconsistent and were contradicted by objective witnesses. Finally, the Commonwealth's current chief "witness" and supporting witnesses also flunked polygraphs. In fact, the state polygraphed all individuals in the case that could have been involved *except* the current defendants who are facing the death penalty, on the word of a person who flunked two polygraphs. None of this was told to the grand jury.

In another case, the chief investigating police officer failed to advise the grand jury that the defendant had explained his belief of need for self defense even though grand jurors had asked whether the defendant had given an explanation.

So, there are opportunities to raise this issue in our cases, and, in a death penalty case, this issue should not only be raised, but counsel should read this decision, consider it, and be prepared to distinguish the reasoning in *Williams* from principles of Kentucky jurisprudence. Don't let the prosecutors argue that such a requirement to present exculpatory evidence would be "unconstitutional" or that the Supreme Court disapproved of it. The final paragraphs of the majority opinion recognize that if such a requirement has advantages, then "Congress is free to prescribe it." In addition, counsel should not view the trend in the Kentucky Supreme Court to afford greater protections to citizens under the State Constitution than are found in the "bottom floor" protections of the United States Constitution.

FORCED DRUG THERAPY DURING TRIAL

Riggins v. Nevada, 504 U.S. ___, 112 S.Ct. ___, 118 L.Ed.2d 479. Petitioner Riggins litigated against his being forced to be medicated by drugs during trial. His objections were overruled. Forced medication was ordered during his trial. The trial court's rationale was not sufficiently disclosed. The Court believed a "strong possibility existed that the drug's side affects may have impacted on (Petitioner's) outward appearance, the content of his testimony, his ability to communicate with counsel and follow the proceedings, all thereby impairing his defense. Although some 'prejudice' can be 'justified' by compelling state interests, (e.g., binding and/or gagging disruptive defendants during trial), the record in this case afforded no findings to support such a conclusion that the administration of this anti-psychotic medication was necessary to accomplish an essential state policy."

PROSECUTORIAL MISCONDUCT - PRIVILEGES

Bush v. Commonwealth, ___ S.W.2d ___, (39 K.L.S. 10, 9/30/92).

Wanton murder case involving killing of another human being while driving drunk. Issues in the case involved prosecutorial misconduct in the calling of a defendant's wife when the prosecutor knew ahead of time she was going to assert her privileges and the use of arguments before the jury that were unfairly prejudicial. Further, the prosecutor furnished information to local news organizations just prior to trial, and defendant's motion for venue should have been granted upon request. **KRPC 3.6(a)(b)(4)(5)(6).**

The case listed several arguments which should not be utilized by prosecutors. They provide appropriate subject matter for motions in limine.

KENTUCKY CONSTITUTION AS BASIS FOR RELIEF

Commonwealth v. Wasson, Ky., ___ S.W.2d ___ (39 K.L.S. 10, 9/30/92) - This was the famous anti-sodomy case out of Fayette County. The Kentucky Constitution, Sections 2, 7, 11, and 17 ought to be cited in *every* motion. Specifically, Section 2 of the Kentucky Constitution must be cited because it protects against the arbitrary actions of government against our clients. The *Wasson* opinion addresses Section 2 of the Kentucky Constitution as well as Sections 3, 59, and 60. The Court discusses concepts of equal protection under state constitution, and it explains how Kentucky's Constitution may provide more protections than the federal constitution for Kentucky citizens. The assertion of state constitutional grounds for relief is not used as much as it should be. State constitutional grounds should not be overlooked.

CASES ACCEPTED FOR ARGUMENT BEFORE SUPREME COURT

Zafiro v. United States, 945 F.2d 881 (7th Cir. 1991) - whether in light of Rule 14 of the Federal Rules of Criminal Procedure a co-defendant would be prejudiced at a joint trial by denying motions of 3 of 4 co-defendants for severance of the trial notwithstanding that the co-defendants presented mutually antagonistic defenses.

Gomez v. U.S. District Court, 503 U.S. ___, 112 S.Ct. ___; 118 L.Ed.2d 293 (1992) - Mr. Gomez was convicted of murder and sentenced to death in California. He filed an action under **42 U.S.C.S. 1983** to stay his execution on the ground that execution by cyanide gas constitutes cruel and unusual punishment prohibited by the United States Constitution's 8th Amendment. Whereas this issue was not raised in prior petitions or motions, the Supreme Court vacated the stays granted by the United States District Court and the United States Court of Appeals for the 9th Circuit.

In a *per curiam* opinion written by the Chief Justice and 6 other Associate Justices, it was held the Petitioner made no convincing showing for his failure to raise this claim earlier.

Justices Stevens and Blackman filed dissenting opinions detailing how cyanide gas is "asphyxiation by suffocation or strangulation", p. 297. The dissent discussed the cruelty of this killing method, and that a sense of morality or "moral progress" in many states have caused them to adopt new methods of execution since the Supreme Court's ruling in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Robert Harris was executed.

This opinion bears careful reading, and death penalty defense advocates ought to consider a motion specifically addressing the method of execution here in Kentucky in addition to the motion typically filed alleging that death in and of itself is cruel and unusual punishment using any form of execution. The authors of this article knows of no Kentucky decision specifically addressing whether, currently, electrocution as a form of punishment is "cruel and unusual" under state or federal constitutions. Anyone considering this motion is free to call the Capital Trial Unit to discuss it. Do not believe your record is preserved unless appropriate exhibits are attached. Possible exhibits were discussed by the *Gomez* dissent. Filing a motion with no accompanying affidavits or other exhibits demonstrating why execution by electrocution is cruel and unusual may be worthless. Courts must have something to read and consider in ruling upon this motion.

IS INNOCENCE A DEFENSE TO THE DEATH PENALTY?

Herrera v. Collins, 91-73-28 (954 F.2d 1029 (5th Cir. 1992) Does an innocent person enjoy protections under the 8th and 14th Amendments from being executed? The Supreme Court will consider whether states must provide meaningful mechanisms for claims of "actual innocence" in death cases, and what procedures might be necessary in federal jurisdictions to adjudicate claims of actual innocence when the petitioner is confronted with the death penalty.

Graham v. Collins, 950 F.2d 1009, 50 Cr.L. 1385 (5th Cir. 1992) - the Supreme Court is going to consider whether the state of Texas could limit consideration of a 17 year old defendant's youth only to answer the question whether he acted "deliberately" and may be dangerous in the future, thus affording no other basis for youth to be considered as a mitigating factor. Further, the Court will decide whether Texas could limit petitioner's mitigation evidence only to the question of whether he would present a "continuing threat into the future." For anyone wishing to read a concise review of Supreme Court case law on what constitutes mitigation evidence in death penalty cases, this case presents an excellent summary of that law.

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PLAIN VIEW

Search and Seizure Law

KENTUCKY SUPREME COURT ADOPTS GOOD FAITH EXCEPTION

Crayton v. Commonwealth

I must admit that I had expected something different. After all, *U.S. v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) had been on the books for over eight years. The Kentucky Supreme Court had ample opportunity to adopt the good faith exception to the exclusionary rule under Section Ten had it so desired. In case after case, the Kentucky Supreme Court had started breathing new life into the Kentucky Constitution. And then came *Wasson*, putting substantial flesh onto the bones of the right to privacy in Kentucky. I was excited. I began to expect that our Court would join a growing number of states who had rejected the good faith exception, and would hold that the long-standing exclusionary rule of Section Ten could not be suppressed by a judicially created "exception" relying upon the good faith of the police. I was terribly wrong.

In an opinion announced on November 19, 1992, Kentucky fell in line with the U.S. Supreme Court's radically conservative notion of the Fourth Amendment. The case is *Crayton v. Commonwealth*, Ky., ___ S.W.2d___ (11/19/92). Here, a fire occurred in the Club Cabana and arson was suspected. The police obtained a warrant to search David Crayton's house. The affidavit, prepared by a Paducah Fire Department officer, was presented to Hon. Ron Daniels, who was a McCracken District Judge at the time. Judge Daniels signed the warrant which produced evidence that helped convict Crayton.

Judge Daniels then became the circuit judge. When presented with the motion to suppress he held the affidavit upon which he had previously issued a warrant "failed to provide sufficient information to support a finding of probable cause." However, Judge Daniels further held that the evidence could come in, relying upon the good faith exception of *Leon*.

When the case arrived at the Kentucky Supreme Court, Justice Lambert wrote the opinion, joined by Justice Leibson, Spain, and Wintersheimer. That Lambert and Leibson joined the majority opinion adopting the good faith exception is one of the surprises of this case.

PURPOSE OF RULE IS NOT SOLELY TO DETER THE POLICE

It is disappointing to see that the Court bases its opinion upon their belief that the purpose of the exclusionary rule under Section Ten is that of deterring the police. It is even more disappointing that the Court assumes that the exclusionary rule is "judicially created." The landmark case of *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920) defeats any such notion. There the Court clearly states that one purpose of the exclusionary rule is to ensure the integrity of the administration of justice. The tenet is simple: *if the state procures a criminal conviction by the use of evidence obtained by the violation of the Constitution, then that conviction has no value, no integrity. It is itself lawless.*

Youman recognizes that the value of the exclusionary rule to the administration of justice is constitutionally based. *Crayton*, which gives lip service to *Youman*, abandons that foundation, and joins *Leon* is holding that the exclusionary rule is a judicially based remedy whose only purpose is to deter the police.

Do not judges need to be deterred? *Leon* has at is core the trust in the ability of the magistrate to make a proper probable cause determination. Here, the judge reviewing the warrant application signed the warrant. Otherwise no search could have taken place. Note that when he became circuit judge, reviewing his own actions, after the evidence had been obtained, he held that no probable cause existed. Yet, by then relying upon good faith, he again insured that the evidence would come in. Same judge. Same result. Is *Leon*'s reliance upon the magistrate appropriate? You be the judge! Does this case, where the same judge allowed the evidence to be procured, knowing probable cause did not exist, demonstrate the necessity of the exclusionary rule irrespective of the good faith of the police?

Be that as it may, once the Court decided that the exclusionary rule had a de minimus purpose, it was a short step to say that the police would not be deterred where they had relied in good faith upon the decision of a district judge.

LEON'S FOUR EXCEPTIONS ADOPTED

The court went on to adopt loosely the familiar four exceptions that were first articulated in *Leon*. Thus, under Section Ten, the good faith exception does not apply in four situations:

(1) where the affidavit "contains false or misleading information";

(2) where the judge abandons his/her "detached and neutral" role;

(3) where the "officer's belief in the existence of probable cause is entirely unreasonable"; and

(4) "where the warrant is facially deficient by failing to describe the place to be searched or the thing to be seized."

WARRANT PRESENTATION SHOULD BE RECORDED

Another issue arose in the case. The Court notes that they "are troubled that the judge to whom the affidavit was presented may have been provided information which did not appear on the face of the affidavit. It is the duty of the judicial officer to issue or deny the warrant based solely on the facts contained within the four corners of the affidavit. Here we must assume that the warrant was issued solely on that basis." What troubles me about this is that police officers' telling the district judge additional matters is common practice. It is not on the record. If the warrant is issued, the police officer is not deterred from giving off-the-record information to the district judge. The district judge is not deterred, because whatever he/she decides is outside the scope of the exclusionary rule. Where then is the incentive to prohibit off-the-record information being given to the district judge? I hope that a rule will be promulgated requiring the warrant presentation to be recorded for later review by the circuit judge on a motion to suppress.

WHERE IS THE REMEDY?

Perhaps the saddest part of the opinion occurs when the court reminds us all that "suppression of the evidence is not a remedy for judicial error as there is no constitutional right to suppression." But there is/was a right to be free from unreasonable searches and seizures that now has no remedy. What kind of a constitutional right is that? A once proud Section Ten, with an exclusionary rule acknowledged by the giants of an earlier court, has been gutted, to be replaced by an empty shell which looks by all appearance like the increasingly vapid Fourth Amendment.

THE DISSENTERS

Justice Stephens dissented, joined by Justices Combs and Reynolds. Justice Stephens called the majority opinion a "step toward cracking the very foundation of the Constitution of Kentucky. Such a decision as set forth today only serves to further minimize the basic rights of the people of our great Commonwealth." He points out that Section Ten says nothing of the good faith of the police. "The clear and unequivocal language of Section 10 creates an absolute right. The majority creates an exception where no exception was ever intended to exist."

Justice Stephens further recognizes the main flaw of the majority opinion. He faults them for stating that deterrence of police misconduct is the only purpose of the exclusionary rule. "Another major function is to ensure compliance with the Fourth Amendment and with Section Ten. With the majority's decision, any incentive on behalf of the police to devote great care and attention to providing

sufficient information to establish probable cause is lost."

Justice Combs wrote a dissenting opinion that was joined by Stephens and Reynolds. As only Justice Combs can, he cuts to the heart of the question. "I believe the issue is more accurately stated as whether the government may violate the Constitution, and then compound the wrong by using ill-gotten evidence to incriminate the very victim of its trespass."

Justice Combs takes on the logic of *Leon* itself. The Fourth Amendment and Section 10 are there to protect specific people, not the "general" rights of a society. "The Constitution unquestionably aims to guarantee the personal rights of every individual. What better way to safeguard rights generally? The Bill of Rights is less concerned with 'punishing' the police than with guaranteeing an individual's security from unlawful intrusion. The focus of the Constitution is upon the right of the citizen; that right is absolute, and is not diminished because violated in 'good faith'." Admission of evidence seized unconstitutionally is "an extenuation of the initial violation, further invading the right to be secure from unreasonable searches and seizures."

PENNSYLVANIA CONSTITUTION

There is another reason that adopting the good faith exception made little sense. According to David Neihaus, Section 10 came out of the 1790 Pennsylvania Bill of Rights. (See *The Advocate*, June, 1992, Vol. 14, Number 4, pg. 49). Pennsylvania is one of seven of the 13 original colonies that has rejected the good faith exception of *Leon*. Indeed, only two of the original 13 has gone along with the exception. In *Commonwealth v. Edmunds*, 586 A. 2d 887 (Pa. 1991), the Pennsylvania Supreme Court held that "the purpose underlying the exclusionary rule in this Commonwealth is quite distinct from the purpose underlying the exclusionary rule under the Fourth Amendment, as articulated by the majority in *Leon*." The best argument for the meaning of Section Ten is how the Pennsylvania Supreme Court interprets Article 1, Section 8 of the Pennsylvania Constitution. Because Pennsylvania has rejected good faith, because Section Ten grew out of that Constitution, and because our exclusionary rule has existed apart from the federal exclusionary rule, the good faith exception has no place in our jurisprudence.

Soldal v. Cook County, Illinois

The Supreme Court has written an opinion that has Fourth Amendment implications in the context of a civil rights action. In this case, the manager of a trailer park used a deputy sheriff to evict unlawfully a mobile home from the trailer park while a civil action was pending. A civil rights action ensued, alleging a Fourth Amendment violation. The district court granted a summary judgment, which was affirmed by the Seventh Circuit.

The Supreme Court, in a unanimous decision written by Justice White, reversed the Seventh Circuit. He rejected the Seventh Circuit's notion that the Fourth Amendment safeguards "only privacy and liberty interests while leaving unprotected possessory interests where neither privacy nor liberty was at stake." Thus, a seizure of property, where no privacy rights are at stake, still implicate the Fourth Amendment. "What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all."

Many, but not all, of the cases that follow were reviewed in the last column of Plain View, which appeared in the last issue of *The Kentucky Criminal Defense Lawyer*, the newsletter of the KACDL.

Hazel v. Commonwealth

The nexus between the laws of search and seizure and defending persons charged with child sexual abuse was explored in this case from the Kentucky Supreme Court. Here, the police had gained knowledge that Mr. Hazel was abusing his step-daughter. He and his wife fled, only to come back to Kentucky later. Thereafter, the police obtained an unrelated warrant allowing for a search of the Hazel's house for drugs. During the execution of the search warrant, the police found a photo in a drawer of a nude adult male. The officer lifted up other photos, and found a picture of "an adult female performing cunnilingus on a young female." The officer looked at other photos, and found ones which showed both Hazels committing sexual acts with children.

After being convicted, the Hazels appealed, raising the search and seizure issue. In a unanimous opinion written by Justice Spain, the Supreme Court affirmed. *Hazel v. Commonwealth*, Ky., 833 S. W. 2d. 831 (6/25/92). The Court held that the evidence was seized in classic plain view fashion. First, the officers were where they had a right to be. Further, the officers were "'lawfully located in a place from which the object can be plainly seen'" and a "'right of access to the object itself.'" quoting from *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The Court gratuitously added that in *Horton v. California*, 495 U.S. ___, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) the Court had rejected the inadvertency requirement of *Coolidge*, and that "[w]e shall follow their lead," despite the fact that inadvertency was not at issue in the case. Because the officers had been searching for drugs at the time of seeing the photos, because their continued search after seeing the first "noncriminal" photo was for drugs, and because the criminal nature of the photo depicting oral sex with a young female was apparent, there was no violation of the Fourth Amendment when all of the photos were seized.

Simpson v. Commonwealth

Imagine if you will an attractive, well dressed young staff member of the Court of Appeals standing in a church parking lot in Frankfort, Kentucky. She is waiting for a ride to take her home. She has been waiting for awhile, and is getting restless, so she begins to pace around. When she hears a car approach, she looks up, but it is only a police car. She continues to pace. Fifteen minutes later, she hears another car. It is the same police officer. However, this time, the officer stops his car and comes up to the young woman and begins to ask her questions. A partner runs a computer check, which reveals an outstanding warrant for a traffic violation. The police officer pats down the staffer, and finds cocaine in her purse. She is charged with possession of cocaine.

Sound unlikely? Even preposterous? Well, to those of us who work as lawyers, it would be preposterous. The police are there to protect. They would not stop and detain us and run computer checks on us, well dressed as we are, for pacing back and forth in a church parking lot. Why, this is America.

Yet, in *Simpson v. Commonwealth*, Ky. App., 834 S.W. 2d 686 (6/19/92), that is precisely what happened. Substitute however a person of a lower socio-economic class for the well dressed staffer of a Court. Substitute Third and Race streets in Lexington, a "high crime area", for the church parking lot. Substitute "meandering back and forth on the sidewalk as well as into a grocery parking lot with no apparent purpose" for pacing back and forth. Otherwise, the facts are the same.

The trial court denied the defendant's motion to suppress in this case. And the Court of Appeals, in a decision by Judge Emberton, joined by Judge Lester, affirmed the lower court. Essentially, the Court states that the circumstances warranted a *Terry* stop, that the outstanding warrant for a traffic violation allowed for a search incident to arrest, and thus there was no Fourth Amendment violation. The Court relied, in particular, on the fact that Third and Race is a high crime area, and that "appellant was standing on a corner known to be frequented by drug traffickers and that he was meandering back and forth...." Further, the police "noticed the appellant looking at them as they passed." Judge Miller dissented.

This is an opinion that is quite distressing. It expresses a low view of the Fourth Amendment rights of people like Garcia Simpson. It expresses a belief that "high crime areas," read minority areas, poor areas, are places where inhabitants do not have a right to "meander," or look at police officers. It demonstrates what inhabitants of those areas know as reality—that they can be doing nothing and the police will stop, detain them, question them, and search them in hopes of finding something. And what is truly distressing is that they are right. And the Court of Appeals says that this is o.k.

Baker v. Commonwealth

In this case, the defendant asserted that when he was arrested, the police did not tell him he was being arrested, nor for what he was being arrested, all in contravention of KRS 431.025. The defendant reasoned that as a result, his arrest was illegal, and a gun seized on his person at the time of the arrest should have been suppressed by the trial court.

The Court of Appeals disagreed, however. They make the questionable assertion that "'the validity of a reasonable search based on probable cause does not necessarily depend upon an antecedent arrest or search warrant,'" citing *Irvin v. Commonwealth*, Ky., 446 S.W. 2d 570, 571 (1969), *cert. denied*, 400 U.S. 830 (1970). Further, the court asserts that even if a police officer has no probable cause, "he may make a reasonable search of the person of a suspect in order to disarm the suspect."

Thus, a violation of KRS 431.025 "has no bearing on this case."

Fugett v. Commonwealth

The Court of Appeals has modified *Fugett v. Commonwealth*, an opinion rendered on April 10, 1992, (and reviewed in a previous issue). The decision is the same, however, with slight differences. Counsel is referred to the previous article for a review of this case. The court continued to uphold a clearly "general" all-persons warrant in violation of *Ybarra v. Illinois*, 444 U.S. 85 (1979), saying that even if "constitutionally infirm, we are satisfied that Fugett's actions inside the house as the police arrived, the smell of recently burned marijuana and the discovery of two packets of marijuana under a bed toward which Fugett moved as the officers approached, together with the investigators' pre-search observations and the information which they had regarding the use to which the house was being put [it was an alleged crack house], gave them probable cause to seize Fugett without a warrant and to search him incident to his arrest."

Monson v. Commonwealth

Counsel should obtain a copy of this opinion of the Court of Appeals, not to be published, rendered on July 10, 1992. In this opinion penned by Judge Dyche, joined by Miller and Gudgel, the court held that a policeman from a fourth class city has no authority to arrest a drunk driver outside his jurisdiction. Where this happens, the results of the BA must be suppressed as the product of an illegal arrest.

Wilson v. Commonwealth

A very common scenario was addressed by the Court of Appeals in a published opinion rendered September 4, 1992. Mr. Wilson and his wife were driving toward a roadblock, braked "hard", and pulled into a driveway. Both got out of the car, went to the door of a house, and shortly thereafter returned to the car and switched drivers. A trooper at the roadblock stopped them, and discovered that Wilson's license had been suspended.

In an opinion by Judge Wilhoit and joined by Judges Howerton and Gudgel, the Court affirmed the conviction. The court held that the officer had a reasonable and articulable suspicion when he stopped Wilson under the above circumstances. It is questionable whether the mere act of turning around at a roadblock is sufficient in itself to justify a stopping. However, when other circumstances are present, such as changing drivers and braking hard, the stopping then becomes reasonable.

Churchwell v. Commonwealth, Ky. App., 10/23/92.

This case is of limited direct use, but may be of more use indirectly. Here, a state parks' ranger stopped a motorist four miles outside the limits of Kentucky Dam Village State Park and asked the driver for proof of identification. During the process, he also saw a radar detector on the dashboard. He made the stop because he had earlier seen the car "slowly cruising the marina," and not "looking for anything in particular." After the stop, the ranger let the motorist, Irvan, go free.

Later, the ranger learned that a radar detector had been stolen from a car in the park. In response, he went to Irvan's home. Irvan eventually admitted stealing the radar detector and was allowed to plead to a misdemeanor in return for his testifying against the passenger in the car, Churchwell, who was convicted of theft and sentenced to five years.

On appeal, Churchwell challenged the initial stopping on the grounds that the ranger had no articulable suspicion justifying the stop. The Court of Appeals, however, in an opinion by Judge Huddleston and joined by Hayes and Schroder did not reach that question. Instead, the court holds that the ranger violated KRS 148.056 when he left the park and stopped Irvan and Churchwell. The court found no exigent circumstances existed, nor was there a source independent of the illegality from which the evidence was obtained. Accordingly, the conviction was reversed.

Brooks v. Commonwealth

This is an unpublished decision of the Court of Appeals. However, it is one that is so well reasoned that I included it in this review. Here, narcotics officers with the Lexington Police Department were serving a warrant at B&B Auto Repair when Kenneth Brooks showed up. First the officers told him to put his hands up. When he did not do so, they asked again, and Brooks fled. The police caught Brooks, searched him, and found 158 milligrams of cocaine in a baggy in a watch pocket in his pants. The trial court overruled the motion to suppress.

The Court of Appeals reversed, in a decision written by Judge Howerton and joined by Judges Huddleston and Miller. The court relied upon *Johantgen v. Commonwealth*, Ky. App., 571 S.W. 2d 110 (1978) and *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) to hold that the officers had no legal right to stop Brooks and to search him, despite the existence of the warrant to search the place of business Brooks was visiting.

What is most significant about the opinion is that the court rejects Brooks' flight as a justification for stopping and searching him. This reenforces the citizen's right to be left alone, and draws the line clearly for the police and the courts. If the police do not have probable cause or an articulable suspicion, a person may walk, run, or somersault away from them without fear that a subsequent search of them can be used to place them in prison.

Turner v. Commonwealth

The Court of Appeals, in a published opinion written by Judge Hayes and joined by Judge Huddleston and McDonald, has extended privacy rights in a significant way to that most rural of structures in one of American's most rural states. In *Turner v. Commonwealth*, Ky. App., ___S.W. 2d. ___(11/6/92), the Court has held that the police violated the Fourth Amendment and Section Ten when he went into a barn outside of the curtilage, at which time he saw marijuana and ultimately arrested Turner, the owner.

The case began when the Sheriff of Monroe County was contacted by an anonymous person who stated that Turner was storing marijuana in his barn. Surveillance of the barn revealed little, so the police went onto the property, saw marijuana through the barn wall, smelled marijuana, and then entered the barn and arrested someone stripping marijuana. Turner challenged the search under both the federal and state constitutions.

The Court found that the barn, being far away from the house, was not part of the curtilage. Often, that ends the inquiry. This court, however, looked at *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) and the reasonable expectation of privacy test erected there. Under *Katz*, the Court held that Turner had exhibited an expectation of privacy in his closed up barn, and that that expectation was one that society could reasonably recognize.

The Court distinguished *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L. Ed. 2d 326 (1987), which at first blush would appear to be outcome determinative. The court here stated that their decision went beyond *Dunn* by holding that while in an "open field," a barn is entitled to independent Fourth Amendment protection irrespective of its being in an open field.

This is a very significant case for rural practitioners. No longer can the "open fields" talisman be waved over illegal entries to outbuildings of various kinds. No longer will *Dunn* be used to allow the police to roam willy-nilly around a person's farm.

United States v. French

The different issues that can occur in an automobile stopping case are featured in this decision of the Sixth Circuit decided on May 28, 1992. In an opinion by Judges Wellford, Keith, and Siler, the court found that the stopping of three vehicles on suspicion of drunk driving, and speeding, the detention of one of them awaiting a police dog, and the searches which ultimately occurred were all reasonable under the circumstances. The court also found that the drivers of two of the vehicles had no standing to challenge the stopping of the third vehicle under a "convoy" theory. The court gave no credence to the obvious pretextual nature of the stopping of the vehicles, all of which were suspected of being related to illegal drug transactions.

Minnesota v. Dickerson

Defense attorneys should be aware that the U.S. Supreme Court has granted *cert.* on a case involving "plain feel". The case below is at 481 N.W. 2d 840 (1992). The question presented is whether there is a "plain feel" exception to the warrant requirement where a police officer develops probable cause to believe a suspect possesses contraband or other evidence of crime. Since the Court decided no Fourth Amendment cases last term, this *cert.* grant could be significant.

U.S. v. Padilla

Another *cert.* grant is equally ominous. Here, the Ninth Circuit had held that one who is a co-conspirator, and here a "supervisor" in a narcotics conspiracy, had standing to challenge the stopping of the "mule's" vehicle. The question presented is whether "membership in joint venture to transport drugs give co-conspirators legitimate expectation of pri-

vacy entitling them to challenge investigatory stop of one of members of conspiracy, and subsequent search of vehicle he was driving?" (quoting from 52 Cr.L. 3061).

SHORT VIEW

1. *People v. Rooters*, Calif. Ct. App. 5th Dist. 51 Cr. L. 1374 (6/26/92). Here the court holds that where a probationer agrees to be searched without probable cause during the course of his probation, that agreement does not extend to being arrested without probable cause. Thus, the cocaine found during an in-custody search should have been suppressed.

2. *State v. Geisler*, Conn. Sup. Ct., 51 Cr. L. 1387 (6/18/92). Rejecting the U.S. Supreme Court's opinion in *New York v. Harris*, 495 U.S. 414 (1990), the Connecticut Supreme Court has held that when an arrest occurs, evidence seized thereafter must be suppressed unless it is sufficiently attenuated from the primary illegality. Thus, where the police went into the home of the defendant after a traffic accident without a warrant, arrested him, and took him to the station where they obtained statements and BA results, this evidence had to be suppressed under the state constitution.

3. *State v. Jones*, N.Mex. Ct. App., 51 Cr. L. 1447 (8/3/92). The police may not detain a person in an area frequented by gangs, who displays gang membership. What is most interesting about this case is the argument by the Attorney General of New Mexico. "The state argues a new theory of reasonable suspicion. In effect, the state argues that gangs have created a crisis situation in urban areas and that law enforcement officials, faced with this crisis, ought to be able to respond accordingly." The court did not buy it. "We will not make the final leap of faith the state urges upon us, *i.e.*, that the inference arising from gang membership and presence in a gang activity area is sufficient alone to support reasonable suspicion...The officers had no articulable facts that would set defendant apart from an innocent gang pedestrian in the same area. As a result, the officers' initial stop of defendant was illegal and the evidence obtained as a result was tainted."

4. *State ex rel. Juvenile Department of Multnomah County v. Rogers*, Ore Sup. Ct., 51 Cr. L. 1500 (8/20/92). The exclusionary rule guaranteed by the Oregon Constitution applies during probation revocation proceedings in juvenile court. According to the Oregon Supreme Court, even though the Fourth Amendment does not apply to probation revocation hearings, the Oregon exclusionary rule has a dual purpose, that of deterring police misconduct and protecting individual rights. The latter purpose can only be served in the context of this case if the exclusionary rule applies to probation revocation hearings.

5. *U.S. v. Rideau*, 51 Cr. L. 1533 (5th Cir. *en banc*, 8/14/92). Liberty took a beating in this *en banc* decision of the Fifth Circuit. Here, Beaumont, Texas police officers saw a man in a high crime area at night in the road. When he stumbled leaving the roadway, they stopped and detained him. When he backed up two steps, the officers searched him, finding a gun. This was all quite reasonable to the majority of the court, who held that the officers had a right to detain the defendant for being drunk on the road, and that the act of backing away gave them the articulable suspicion necessary to conduct a *Terry* frisk for the weapon they found. Five dissenters criticized this decision for relying upon the fact of a person's being in a high crime area to justify the police conducting a stop and frisk of that person. The dissenters did not believe that stepping back two steps supplied any further facts to justify the search. What ever happened to the right to "be left alone?"

6. *State v. Oquendo*, Conn. Sup. Ct., 51 Cr. L. 1545 (8/25/92). The Connecticut Supreme Court has relied upon its state constitution to decline to follow *California v. Hodari D.*, 49 Cr. L. 2050 (1991). Thus, in Connecticut the standard for when an arrest occurs will be that articulated in *U.S. v. Mendenhall*, 446 U.S. 544 (1980), in which the determination is whether in view "of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

7. *State v. Miller*, Conn. App. Ct.(*en banc*), 52 Cr. L 1026 (9/22/92). The Connecticut Constitution is alive and vibrant and meaningful, given not only the *Oquendo* case above, but this and other cases coming from that state. Previously, the Connecticut courts have rejected the good faith exception to the exclusionary rule, and the rule allowing confessions made following an illegal arrest in a home to be admissible. In *Miller*, the court reviews the case of *Chambers v. Maroney*, 399 U.S. 42 (1970), which had allowed a warrantless search under the automobile search exception of a car which had been securely impounded following an arrest of the owner. Unless exigencies are present, under the Connecticut Constitution, the search is illegal."If we take seriously our judicial preference for a warrant, we cannot excuse the failure to obtain a warrant where the police are not in danger, where the search is not a proper inventory search, and where exigent circumstances are entirely absent. Once a car is impounded in a secure area, the exigencies inherent in a roadside automobile search normally vanish. In such cases, there ordinarily will be no excuse for failing to seek out the authorization of a neutral and detached magistrate."

8. *Commonwealth v. Kohl*, Pa. Sup. Ct., 52 Cr. L 1047 (9/16/92). A Pennsylvania statute allowed for blood to be taken from a motorist involved in an accident in which someone was killed or hospitalized. The Pennsylvania Supreme Court held in this case that this portion of the implied consent statute violated both the Fourth Amendment and the state constitution. Dispensing with probable cause may make prosecution easier, but it also violates the constitution.

9. *U.S. v. LaSanta*, 52 Cr. L. 1097 (2nd Cir. 10/21/92). The Second Circuit has rejected the Government's assertion that there is a "forfeiture exception" to the warrant requirement. "We reject out of hand the government's argument that Congress can conclusively determine the reasonableness of these warrantless seizures, and thereby eliminate the judiciary's role in that task of constitutional construction." Thus, evidence found during a post-seizure inventory had to be suppressed.

10. *State v. Quino*, Hawaii Sup. Ct., 52 Cr. L. 1142 (10/28/92). The Hawaii Supreme Court has rejected *California v. Hodari D.*, 49 Cr. 2050 (1992) under their state constitution. The court determined that an arrest of Quino in an airport encounter occurred when the questioning turned from "general to inquisitive questioning." Thereafter, "a reasonable person in Quino's position would not have believed that he was free to ignore the officer's inquiries and walk away. Although no physical force was used, given the totality of the circumstances, we hold that a seizure took place within the meaning of...the Hawaii Constitution."

The concurring opinion is particularly interesting, praising the majority for departing from "the surreal and Orwellian world of *Royer, Hodari D.*, and *Bostick*, in which the Fourth Amendment seems to have atrophied to the condition of a vestigial organ...."

11. *U.S. v. Ramirez-Lujan*, 52 Cr. L. 1168 (Fifth Circuit, 10/23/92). The Fifth Circuit Court of Appeals has decided to extend the "good faith" doctrine to warrantless searches and seizures, despite no grounds for this extension, and despite repeated failed efforts to do the same thing in Congress. Here, a driver the police did not recognize made a u-turn at a border checkpoint. Because the officer did not recognize the truck, he stopped it, told the driver to follow him to the checkpoint, where a dog alerted to the truck. A search revealed 308 pounds of marijuana. The Fifth Circuit determined that because the officer had an objectively reasonable good faith belief that he had an articulable suspicion to stop the truck, that the evidence would come in despite the constitutionality of the stop. Can they just about stop anyone they want or what?

12. *State v. Guzman*, Idaho Sup. Ct., 52 Cr. L. 1177 (11/5/92). The Idaho Supreme Court, which had in 1989 adopted the good faith exception to the exclusionary rule announced in *U.S. v. Leon*, 468 U.S. 897 (1984), has now reversed itself. Condemning the good faith exception as based upon "revisionist history" by identifying deterrence as the only purpose of the exclusionary rule, the court held that Idaho's 65 year old exclusionary rule was broader than the federal exclusionary rule, than it was constitutionally based, and that it was based upon judicial integrity as well as deterrence of the police.

13. *U.S. v. DeLeon*, 52 Cr. L. 1191 (9th Cir. 11/10/92). The Ninth Circuit has held that where an affiant relies upon another officer for information placed into an affidavit in support of a search warrant, and the other officer omits to tell the affiant something important, that this omission can be the basis for suppression under *Franks v. Delaware*, 438 U.S. 154 (1978). "The Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants."

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WE MUST ELIMINATE ABUSE OF CHILDREN & TREAT THE CAUSES

Sexual abuse of children in Kentucky is a very serious problem. Physical abuse of children is likewise an immense difficulty in our state. We must cooperatively work for genuine solutions to the real causes of these abuses of children, and we must do this without abusing our individual liberties.

Treatment resources, especially for indigent offenders, which address the causes of the behavior, must be drastically increased in local communities.

PUBLIC COUNSEL FOR THE POOR INSURES FAIR PROCESS & RELIABLE RESULTS

Allison Connelly, Public Advocate for the Commonwealth and a newly appointed member of the Attorney General's Child Sexual Abuse Task Force, stated, "As public advocates we are charged with advocating on behalf of all Kentucky citizens too poor to hire their own attorney, even those who are charged with sexually abusing children. Public defenders seek to insure that all poor Kentuckians have equal access to their individual constitutional guarantees regardless of the accusation or the crime. Public advocates who represent our 100,000 individual Kentuckians each year insure that the state takes a person's life or liberty only through a fair process which is reliable and can withstand public scrutiny."

ATTORNEY GENERAL TASK FORCE

The Attorney General's child sexual abuse task force heard testimony from the Kentucky Association of Criminal Defense Lawyers and the Department of Public Advocacy at their December 8, 1992 meeting.

ADEQUATE FUNDING AND RESOURCES ARE NEEDED FOR KENTUCKY'S POOR

In testimony before the Task Force on December 8, 1992, **Vince Aprile**, DPA General Counsel who has been a Kentucky public advocate for 19 years, stated, "We abhor the wrongful conviction of the innocent, the excessive punishment of criminals, and quick-fix solutions which do not treat the causes of the problems. Public advocates are an essential component of the criminal justice system and are necessary for the system to render reliable results through a process that is fair. To insure the process is fair and the results reliable, Kentuckians must adequately fund the Department of Public Advocacy to provide qualified, competent attorneys who have adequate litigation resources to investigate and to present the accused's case."

CONSISTENTLY ACCOUNT FOR BEING ABUSED AS CHILD AND THE CYCLE OF VIOLENCE AND ABUSE

James J. Clark, MSW, LCSW, is an assistant professor at the College of Social Work at the University of Kentucky and a Ph.D. candidate at the University of Chicago. In his clinical work he has treated those sexually abused, and he is a mental health consultant on a variety of complex criminal cases involving abused offenders. In presenting before the Task Force the morning of December 8, he stated, "If we are to take seriously the gravity of child sexual abuse, then we cannot direct our efforts solely toward childhood victims. The adolescent offender and the adult offender are often profoundly shaped by their traumatic experiences as victims of childhood sexual abuse. Our efforts must be additionally directed toward research, evaluation, and treatment of these populations. Such a public policy approach may be unpopular in the short-term; however, it is crucial to stemming the tide of childhood victimization and the violent responses by some victims which occur later in the life cycle."

Following Professor Clark's testimony, **Ernie Lewis**, (606-623-8413), a Richmond, Kentucky public advocate who has represented abused capital clients and abused sexual clients for 16 years, stated to the Task Force, "Persons who are sexually or physically abused are victims. Their later criminal conduct is often understood by their previous abuse. When a perpetrator's criminal act is causally connected to being abused as a child, equal justice requires that the perpetrator's punishment be decided by jurors and judges who are aware of and consider the prior victimization. Kentucky's truth-in-sentencing law and capital statute must be changed to account for this recognized cycle of violence and abuse. We must focus on *why* people engage in criminal behavior if sentencing is to rationally fit the crime and the offender."

"Kentuckians do not broadly support executing murderers who were severely abused as a child," Lewis stated. He informed the Task Force of a 1989 state-wide poll (copy attached) conducted by the University of Louisville's Urban Research institute on criminal justice issues. Kentuckians expressed limited support (39%) for imposing the death penalty on a person convicted of murder who was severely physically or sexually abused as a child.

"It is archaic and self-defeating to insist upon punishment for the sake of punishment in dealing with perpetrators of child sexual abuse," Connelly remarked. "An educated judiciary, armed with adequate treatment resources and reasonable sentencing options, can break the cycle of violence and abuse. The guided sentencing discretion of an informed judiciary insures that understanding and justice are ingredients of every sexual offender's repayment to society and to the victim."

RECOMMENDATIONS BY DPA

At the January 8, 1993 meeting of the Attorney General's Task Force, Public Advocate Allison Connelly recommended the following be adopted by the Task Force. The results of the voting of this over 55 member Task Force which has but 2 public defenders are indicated.

1. Passage of a statute that would require, as a condition of admission of the testimony of a child at a legal proceeding involving child sexual abuse, a videotaped record of every investigative interview with the child conducted by a representative of the government investigating the case. In the event that a videotape is not available, an audiotape must be used. ($25,000/$10,000)

For 6 Against 43 Abstain 7

2. In conjunction with CASA, appoint an independent attorney to serve as guardian ad

Brutal physical and sexual abuse are characteristics of many defendants who have committed homicides and who have been sentenced to death. Lewis, Pincus, Bard, Richardson, Prichep, Feldman, Yeager, *Neuropsychiatry, Psycho-educational, & Family Characteristics of 14 Juveniles Condemned to Death in the U.S.*, 145 *American Journal of Psychiatry* 5 (1988).

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." Silman, Veltkamp, & Clark, *Understanding the Dynamics of Child Sexual Abuse, The Advocate*, Vol. 14, No. 5 (Oct. 1992) at 22.

The literature and significant experiences by Kentucky mental health professionls reveal that "there are clear indications of a high potential for adult nonsurvivors who have been victims of child abuse." Thomas W. Miller, Ph.D. and Lane J. Veltkamp, MSW, *The Adult Nonsurvivor of Child Abuse, Journal of the Kentucky Medical Association*, Vol. 87, No. 3 (1989).

litem for the child at the time the CHR 115 report is received. To be eligible for appointment to serve as an independent guardian ad litem for the child, the attorney shall not be affiliated with CHR, law enforcement, or the prosecution. The guardian should be responsible for representing the child in dealings with the defense, prosecution, CHR, police, doctors and other experts, regardless of whether defense or prosecution, and the court. There should be an increased monetary award if the guardian has completed specialized training in the area of child sex abuse. ($100,000)

For 19 Against 25 Abstain 12

3. Amend KRS 532.045 to remove the absolute prohibition on probation in the situations identified in the statute and substitute a presumption of incarceration rather than probation in those situations. The statute, as amended, would provide that the presumption of incarceration would be rebutted when the defense establishes probation with alternative punishment and treatment is the appropriate disposition in the case. This would return a limited amount of guided sentencing discretion to the sentencing judge. Although this amendment permits probation for all classes of felony child sexual abuse cases, revocation of probation under this amendment requires the individual to serve the sentence imposed for that class of felony. For example, a person sentenced to 20 years for a class B felony could be probated, but revocation of that probation would require the offender to serve the 20 year sentence in prison. (No additional funding required. Instead, cost savings could be generated by reduced incarceration expenses.)

For 14 Against 29 Abstain 13

4. Redefine "eligible sexual offender" by amending KRS 197.410(2)(a) to allow treatment of those who are mentally retarded and mentally ill. This expansion still permits treatment providers the option to exclude the mentally retarded and mentally ill if not otherwise qualified for the treatment. (Minimal expense, if any).

For 42 Against 8 Abstain 6

5. Amend KRS 532.055, the truth-in-sentencing statute, to permit admission as mitigating evidence previous abuse inflicted on the offender prior to adulthood. Such mitigation evidence does not exonerate the offender and does not require the jury to impose a reduced sentence. (No additional funding required.)

For 15 Against 31 Abstain 10

6. Amend KRS 532.055, the truth-in-sentencing statute, to permit either the prosecution or defense to admit as evidence accurate parole statistics for sex offenders in Kentucky. (No additional funding required).

For 22 Against 23 Abstain 11

7. Amend KRS 503.050(2), the use of deadly physical force in self-protection, and KRS 503.070(2)(a), the use of deadly physical force in protection of another, to authorize deadly physical force when the defendant believes that such force is necessary to protect himself or another, such as a child, against "deviate sexual intercourse [, oral or anal sodomy] compelled by force or threat." At present these statutes state that "the use of deadly physical force by a defendant upon another person is justifiable...only when the defendant believes that such force is necessary to protect himself" or "a third person" against "imminent death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat." (No additional funding required).

For 42 Against 7 Abstain 7

8. To provide full and fair consideration of the increasing findings of mental health studies on the cycle of violence, amend KRS 532.025(2)(b) to add as a ninth statutory mitigating circumstance in the sentencing phase of a capital case the fact that a person was sexually or physically abused prior to adulthood. The existence of a statutory mitigating factor neither exonerates the murderer nor does the existence of one or more mitigating factors prevent the jury from imposing the death sentence. (No additional funding required).

For 18 Against 30 Abstain 8

9. To convince the public and the actors in the criminal justice community of the validity of sex offender treatment programs, require, either through state funding or private grant funds, that the corrections sex offender treatment program be independently evaluated by outside mental health experts not employed by or affiliated with correctional organizations. ($20,000)

For 20 Against 26 Abstain 10

10. To insure fair and reliable results in child sexual abuse cases in which the public can place its confidence, provide funds to the Department of Public Advocacy in their representation of indigent defendants to employ necessary experts, such as medical and mental health experts, in sex abuse cases. ($50,000)

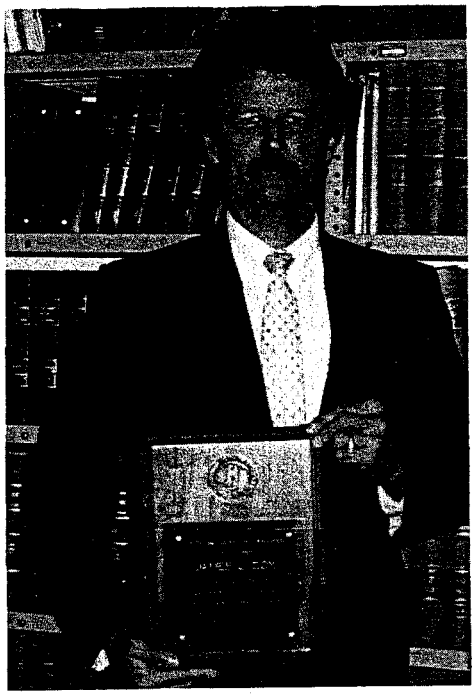
For 28 Against 20 Abstain 8

11. Amend Kentucky Rule of Criminal Procedure 5.08 to allow the accused the right to appear and present evidence before grand juries to insure the decision of the grand jury is based on relevant evidence and to prevent overcharging by prosecutors which impedes resolving cases and creates unnecessary delays and costs. (No additional funding required.)

12. Those who are actively involved in child sexual abuse investigations and prosecutions should be required to educate both the public and the media to understand that judicial, prosecutorial, and juridical accountability does not mean that probated sentences, decisions not to prosecute, and not guilty verdicts in child sexual abuse cases necessarily equate with dereliction of duty by judges, prosecutors, and juries. ($10,000)

For 14 Against 32 Abstain 10

COX HONORED



Jim Cox, supervising attorney of the Pulaski County Public Defender's Office, received a plaque at the Annual Pulaski County Bar Associaition's Christmas dinner December 10, 1992. Cox was recognized for over 10 years of dedicated and distinguished legal service to indigent citizens of Pulaski County. Cox has been a public defender since 1981

DEVELOPING SENTENCING PLANS FOR CHILD MOLESTERS

Although the most visible aspect of a criminal defense lawyer's role is attempting to make the state prove its case with regard to guilt, this is not necessarily the most frequent way a defense lawyer acts as advocate for his or her client. Most often, cases do not reach trial, but are settled through plea negotiations, and it is frequently as a plea negotiator that the defense lawyer can best advocate for the client. This aspect of a defense lawyer's work is not readily apparent to the public. But is critical, as any experienced defense lawyer knows. The plea may be the result of intensive labor by the defense attorney, including various conferences with the prosecution and the judge.

As we have noted elsewhere,[1] it is important that the plea be negotiated directly with the prosecution by the defense attorney. Both sides speak the same language and know the informal and formal rules of negotiating such agreements. However, a lawyer cannot be all things to all clients, and consultants can be valuable in devising sentencing plans.

Our experience is that some plea negotiations fail because the defense lawyer does not support his or her plea proposal with a detailed, concrete plan to retain the defendant should he be given a non-custodial sentence.

Although recent trends towards prescriptive and mandatory sentencing have restricted plea negotiations in some cases, there is frequently still room to bargain, and a concrete, supportable plan to manage the defendant in the community can sometimes make the difference between incarceration or probation. Prosecutors and judges have heard so many lawyers make impassioned pleas for their clients, indicating that their clients will go and sin no more, that they have come to view plea proposals with an understandably skeptical eye. They need (and we believe deserve) more than promises.

SENTENCING PLANS

One approach to buttressing a plea proposal is the use of defense-based sentencing consultants. In recent years, a new professional area - sentencing consultants - has emerged, drawing its members from a wide range of disciplines. Sentencing consultants can focus on developing a detailed, structured sentencing plan, freeing the defense attorney to focus more directly on the interpersonal aspects of advocacy, the meetings with the prosecution and judge. A sentencing consultant does the legwork, finding suitable community resources for the various components of the sentencing plan.

Sentencing plans are typically offered when there is a likelihood of incarceration if no intervention is made. If the defendant is likely to receive probation, then there may be no need for a sentencing plan. Sentencing plans usually involve sanctions and restrictions that are intermediate between prison and probation, allowing the judge and prosecution to feel assured that society is protected, the victim is repatriated (as much as may be possible in the circumstances), and that the offender is appropriately punished.

Above all, a sentencing plan must be realistic and credible. It must be tailored to the defendant and his offense. There will be little purpose served in drafting a sentencing plan for a defendant who is a repetitive offender unless some major factor in the defendant's life has changed and changed convincingly. If prior treatment attempts have failed, a persuasive case must be made that current circumstances and proposed treatment methods are different. Better yet, the defense attorney needs to present actual data to bolster his or her claims. Ideally, sentencing should be delayed long enough for the defendant to establish a favorable history in outpatient treatment. If possible, the defendant should be engaged in on-going community service long before the sentencing date.

CHILD MOLESTERS

Developing sentencing plans for child molesters presents special difficulties. Child molesters arouse strong, hostile emotions. Disgust, revulsion, and anger are the most typical feelings that professional and lay people alike express when reading about child molestation. Legal and mental health professions are no exception. Some legal and mental health professionals refuse to take such cases, because they readily acknowledge that their strong negative emotions towards the offender will affect their objectivity and effectiveness. The defense attorney must overcome these emotional reactions if he or she is to negotiate a favorable plea agreement.

RISK ASSESSMENT

Risk assessment is crucial with child molesters. No one wants to arrange for a non-custodial sentence only to have a child molester molest again. Intense community backlash can be the result, leading to difficulties in gaining cooperation with any future sentencing proposals. One way to quantify risk to the community is through use of formal risk assessment tools. Such tools are routinely used by probation and parole agencies in both federal and state jurisdictions. By using a tool that has intrinsic credibility with legal professionals, the sentencing plan rests on a firmer foundation.

The plan should also note what is known about child molesters specifically. For example, based solely on offense, some offenders are more likely to do it again than others. Among pedophiles, for example, incestuous (intrafamilial) pedophiles have the lowest recidivism rate, heterosexual extrafamilial pedophiles the next highest recidivism rate, and homosexual pedophiles the highest rate. Moreover, those pedophiles with varied pedophilic targets are more likely to do it again, all else being equal.[2]

Mental health professionals generally consider the following risk factors when assessing a child molester's risk to the community:

(1) number of prior offenses;

(2) number of prior illegal sexual acts (even if not arrested);

(3) presence of violence in the offense, such as physical coercion or a weapon;

(4) extensiveness of deviant sexual interest, such as the presence of a variety of paraphilias;

(5) motivation for treatment;

(6) whether the offender has an antisocial personality disorder, diagnosed either through psychological methods or by the presence of a variety of types of criminal offenses;

(7) external social support available, such as a concerned and involved family;

(8) presence of any severe psychological disturbance that might limit amenability to treatment, such as psychosis, severe retardation, or untreated substance dependence;

(9) presence of any sadism or ritualism in the offense;

(10) degree of deviant sexual arousal, assessed physiologically;

(11) involvement in high risk situations, such as those that bring him into frequent unsupervised contact with potential victims.

None of these risk factors is necessarily insurmountable, but each must be directly addressed if the plan is to be credible.

There is no formula that allows a mental health professional or sentencing consultant to provide a mathematical answer as to what level of risk the defendant presents. However, a thorough review of the above factors will at least provide some assurance to the court that major risk factors have indeed been considered. Consideration of these factors makes the sentencing plan more credible.

The sentencing plan must be tailored to meet any risk factors present. If the offender's physiologically assessed sexual arousal pattern is significantly deviant, as is frequently the case with extrafamilial pedophiles, then the plan should include focused procedures to alter this deviant pattern administered by a mental health professional with genuine expertise in this area. If prior treatment attempts have failed, the plan must be specific as to what aspects of the defendant's motivation,

circumstances, and treatment program are likely to insure treatment success in the present instance. If the offender lacks community support, the plan must address the issue of how a supportive environment will be created for the offender, such as involvement in a treatment or support group.

If an incest offender wishes to reunite with his family, thus placing him in contact with his victim, the plan must offer specific precautions and family education along the lines generally accepted in the field.[3] Above all, the family and home have to be made safe for the victim. The following guidelines are useful in educating incestuous families as to precautions to take in reuniting:

(1) The offender must limit physical contact with the victim. The victim, for instance, cannot sit on the offender's lap or cuddle with him.

(2) The offender is not to be left alone with the victim. All contact must be supervised by an appointed chaperon, typically the non-offending parent.

(3) The offender is not allowed in the victim's bedroom. The family should install a lock on the victim's bedroom door. Ideally the victim should have a lockable bathroom that the offender does not use. In this way, the family can create a physical zone of safety for the victim.

(4) The offender is not permitted to participate in child discipline or sex education. All such duties are performed by the non-offending parent.

(5) The offender is not permitted contact with the victim's friends.

(6) When the offender is allowed to stay overnight, if he gets up at night he must awaken the non-offending parent.

(7) In therapy, the family rehearses what to do if the rules are broken.

VICTIM REPARATION

In child molestation cases, it is sometimes possible to structure a credible and worthwhile victim reparation program. We have proposed trust funds for educational and medical expenses. Moreover, in incest cases, the offender can make a major impact in helping the victim heal, typically by participating in the victim's treatment. It is frequently helpful to the victim to question the offender as to why he or she was selected as a victim and to begin to understand why the offender betrayed his or her trust. Naturally, this involvement is contingent on the victim's readiness to re-establish some form of contact with the offender, and any form of contact should be both gradual and supervised. Typically, some for of family therapy is necessary in such cases.

Victim reparation is a delicate issue; yet we have seen many cases in which arranging a reasonable form of reparation that the victim endorses can mean the difference between prison and probation.

PUNISHMENT

Like it or not, the defense attorney must be realistic in assessing the prosecution's and the judge's wish for punishment of the child molester. Statutes are written with punishment in mind, and any plan that does not address this aspect of society's concern is likely to do the defendant little good. There are presently available a number of creative solutions to this issue.

If it is clear that given the nature of the offense and perhaps the victim's parents' stance, the court will not allow the defendant to receive a totally non-custodial sentence, there are a few options short of prison. First, a term of shock incarceration can be proposed. A sentence as brief as one month in the county jail may satisfy the court that the offender is being punished and serving at least some time.

Second, electronic house arrest may suffice. We have recently structured a sentencing plan for an incestuous stepfather in which he wore an ankle bracelet and had to be in his apartment every evening to place the bracelet into the telephone when the computer monitoring system called. Such electronic house arrest is gaining in popularity as an alternative to incarceration in some jurisdictions.

Third, in some cases inpatient treatment can suffice. In one recent case, we arranged for an offender to participate in an intensive, sex-offender-oriented inpatient program that typically retained its patients for over a year. The length of this treatment was less than the incarceration he might have received if sentenced to prison sentence, but more restrictive than a grant of probation, which the court was reluctant to allow. Moreover, by this arrangement, the defendant was assured of receiving the needed treatment.

TREATMENT

With child molesters, it is particularly important to include a treatment component to the sentencing plan. If the child molester's illegal deviant sexual acts can be construed as the result of a treatable psychological disorder, the court may be more lenient than it might be otherwise. Fortunately, effective treatment methods for child molesters currently exist.

Over the past 15 years, there has been considerable work done in developing and even empirically testing treatment approaches for child molesters. Most of the effective programs across the U.S. and Canada share similar elements.[4] These programs are generally structured, empirically based programs that include a variety of psychological/educational methods to help the child molesters acquire necessary skill or reduce deviant sexual interest. Common program elements include:

(1) social skills and assertiveness training;

(2) anger management training;

(3) victim empathy training to increase understanding of the impact of the abuse;

(4) sexual education and sexual therapy;

(5) sexual reconditioning techniques to reduce deviant sexual arousal;

(6) education as to potential risk factors;

(7) cognitive restructuring to help the offender alter maladaptive justifications;

(8) lifestyle interventions to assist the offender to develop a more satisfying, productive life;

(9) periodic physiological assessments of sexual arousal to assess the effectiveness of the reconditioning.

One emerging area of treatment is relapse prevention, a treatment approach originally developed in chemical dependency treatment.[5] In this approach, it is assumed that after the treatment program proper, the child molester will experience deviant urges and will encounter high risk factors, such as loneliness, stress, or unsupervised access to potential victims. Rather than taking the view that all these problems can be avoided, a relapse prevention approach takes the view that such problems will occur and should be anticipated.

The child molester is given advance training and rehearsals in how to deal with such situations when they do occur. For instance, the child molester is asked to write a list of all his potential risk factors. Then he is asked to write five effective ways of coping with each of these risk factors. Then he rehearses applying these coping methods, and he is quizzed on his knowledge of these methods. Moreover, perhaps equally important, those in the child molester's support system learn about the risk factors, warning signs, and coping methods so that they can assist the offender by recognizing problems when these they occur. Such relapse prevention and social support procedures have been found to be effective with any number of compulsive disorders.[6]

Child molesters have often been isolated in many important ways from their social support systems; at the least, they have been living double lives in which they hid their sexual deviations. Consequently, integrating them into a caring social support system of individuals who are aware of their sexual deviation is in itself partly curative.

Frequently, professional and lay persons alike state that the only appropriate treatment for sex offenders is group treatment. Although we do not go this far, we do believe that group involvement in part involves the child molester in a meaningful way with others who can help him with his problems and whom he may eventually be able to help with their problems.

CONCLUSION

Developing sentencing plans for child molesters is challenging: these offenders arouse such strong emotional reactions in both professional and lay persons alike that a plan must be airtight to persuade others to grant the offender a non-custodial sentence. Moreover, the risks of recidivism must be carefully assessed to ensure that the community is protected. However, it is possible to construct successful sentencing plans for child molesters. At times, victim reparation, such as a trust fund to defray therapy or education expenses, is helpful. Above all, the plan should include a credible treatment plan, otherwise in the long-run, the offender may find himself unable to adequately control his deviant sexual urges.

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NOTES

[1] Allena & Witt, "Using Consultants At Sentencing," 2 *National Trial Lawyer 86* (1990).

[2] See for instance, O'Connell, Reuniting Incest Offenders And Their Families," *I Journal of Interpersonal Violence 374* (1986).

[3] Abel, Mittelamn, Becker, Rathner & Rouleau. "Predicting Child Molesters' Response To Treatment," *Annals of the New York Academy of Sciences* (in press 1990).

[4] *See* Marshall & Barbaree, "Outcome of Comprehensive Cognitive-Behavioral Treatment Programs" in *Handbook of Sexual Assault* (Marshall, Laws & Barbaree eds., 1990); and Marshall & Barbaree, "The Long-Term Evaluation of Cognitive-Behavioral Treatment For Child Molesters, *Clinical Psychology Review* (in press 1991).

[5] Laws (ed.) Relapse Prevention with Sex Offenders (1989).

[6] See George & Marlatt, Introduction, *In Laws Supra* Note 5.

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6TH CIRCUIT HIGHLIGHTS

IN-COURT IDENTIFICATIONS

The Court of Appeals for the Sixth Circuit, in ***U.S. v. Hill,*** 967 F.2d 226 (6th Cir. 1992), held that the *Biggers* totality of the circumstances test to determine the reliability of an identification applies to in-court identifications.

In the more than five years between the bank robbery and trial, Hill had never been presented to the four eye witnesses in a lineup or photo spread. After a suppression hearing which the defendant and his co-defendant did not attend, the trial court permitted the prosecution to seek in-court identifications. One of the four eye witnesses positively identified Hill, who was sitting at the defense table, as one of the bank robbers.

The trial court conceded, and the Sixth Circuit assumed, that the eye witnesses' inherent knowledge that the person seated at counsel table was the defendant made the in-court identification impermissibly suggestive. Unfortunately for Hill, both courts agreed that the eye witness' testimony was sufficiently reliable under the *Biggers* test to overcome any likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The five *Biggers* factors are: 1) witness's opportunity to view the assailant at the time of the crime, 2) witness' degree of attention at the time of the crime, 3) accuracy of the witness' prior description of the assailant, 4) witness' level of certainty when identifying the defendant and 5) length of time that has elapsed between the crime and the identification.

8TH AMENDMENT AND SECONDHAND SMOKE

In ***Hunt v. Reynolds,*** 974 F.2d 734 (6th Cir. 1992), two Tennessee state prison inmates with medical conditions brought a §1983 action against prison officials, claiming deprivation of their 8th Amendment rights by virtue of their being compelled to share cells with smokers. The district court had dismissed the case for failure to establish an 8th Amendment violation. The Sixth Circuit stated that to be successful, such a claim by inmates must contain both an objective component — that their medical needs were sufficiently serious — and a subjective component — that the defendant state officials were deliberately indifferent to the plaintiff's needs. The Sixth Circuit adhered to the position that the 8th Amendment's objective component is violated by forcing a prisoner with serious medical needs for a smoke-free environment to share his cell with an inmate who smokes.

ACCESS TO THE COURTS

The Sixth Circuit, in ***Knop v. Johnson,*** 977 F.2d 996 (6th Cir. 1992), concluded that for adult state prisoners, access to the courts need not entail access to an attorney. Access to an adequate law library, or to paralegal personnel with access to such a library, is sufficient.

The Court noted that, standing alone, law libraries are not adequate for prisoners who cannot read or write English, or who lack the intelligence necessary to prepare coherent pleadings, or who, because of protracted confinement in administrative or punitive segregation or protective custody, may not be able to identify the books they need. To the extent that inmate writ - writers or jailhouse lawyers are not adequately filling the needs of prisoners claiming to be unconstitutionally held, the Court held that the state must furnish paralegals. The paralegals, however, do not have to be extensively trained or be insulated from supervision by the state.

The Court stated that inmates desiring to present civil rights claims or claims for post-conviction relief are not *ipso facto* entitled to legal *representation.* They are entitled, rather, to "access." Once access has been obtained, the court can decide if the case presented calls for appointment of counsel. The Court also found that access to the courts need only be provided for preparation of pleadings in habeas corpus proceedings and civil rights actions involving constitutional claims.

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Assistant Public Advocate
Frankfort

PAROLE IN KENTUCKY

PAROLE BOARD STATISTICS RELEASED

The Kentucky Parole Board has recently released statistics for fiscal year 1992 (July 1, 1991 - June 30, 1992). Reviewing these statistics with previously available parole board statistics back to FY 84 continues to reveal reliable trends in the decisionmaking of the Parole Board.

Criminal defense practitioners are keenly aware of the necessity to understand and communicate accurate parole information to their clients. These statistics provide reliable information for attorneys to use in advising their clients.

The Parole Board is requiring inmates who make their initial appearance before the Board and those that have been before the Board previously to spend substantial more time in prison compared to the early 80's.

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

A. parole at initial hearings,
B. parole rates for all hearings,
C. parole by security levels,
D. deferment lengths when not paroled,
E. parole for sex offenders,
F. parole by length of sentence.

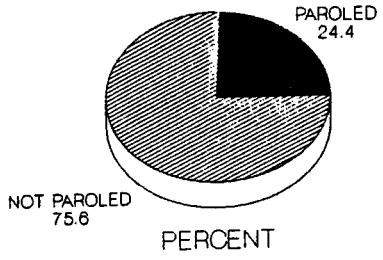
A. INITIAL PAROLE HEARINGS

1) FISCAL YEAR 92

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

In FY 92, there were 3,459 inmates appearing before the Parole Board for the first time. Only 24.4% received parole while 26.5% were required to serve out or complete the sentences given them. 49.1% were deferred parole meaning that they were told by the Board that they were denied parole and could not return to the Parole Board to be considered for parole for a certain period of time which is set by the Board.

TABLE 1
Parole Results When First Eligible-FY 92



Therefore, 24.4% were paroled at their initial hearing while 75.6% did not receive parole. (Table 1).

2) LAST 9 YEARS

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

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

In the last nine years, the percentage of inmates paroled when first eligible has declined 19% (see Table 2), and over the same time period those inmates being required to serve out their sentences rose 16.5%. (Table 3).

B. ALL PAROLE HEARINGS

1) FISCAL YEAR 92

The results of all parole hearings (regular, deferred, and others, excluding parole violation hearings and early parole hearings) indicate that of the 5,822 inmates considered for parole, parole was recommended for 39.6% of the inmates. However, 19.4% received serve outs.

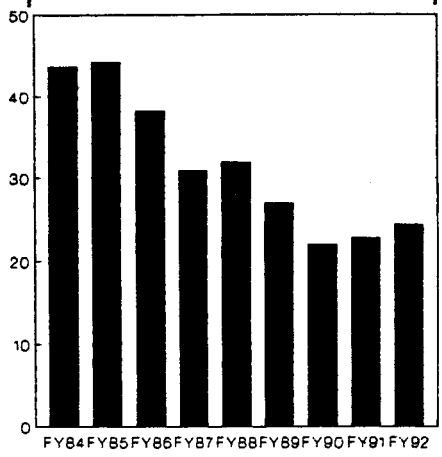
2) LAST 9 YEARS

Looking at all parole hearings over the last nine years, the Parole Board has significantly reduced the number of inmates who receive parole, and have more than doubled the number who serve out their sentences.

In FY 84, 55% of the 3, 845 inmates who had parole hearings were granted parole, and 7.6% were required to complete their sentence.

In the last nine years, the percentage of inmates paroled declined 15% from 55% to 39.6%. During the same period of time, the percentage of inmates receiving a serve out jumped nearly 12% from 7.6% to 19.4%.

TABLE 2
% Paroled When First Eligible FY 84-92



C. PAROLE BY SECURITY LEVEL - INITIAL HEARING

Significantly, in FY 92 the majority, 66%, of the **minimum** security inmates appearing for their initial parole hearing were deferred or received serve outs. In FY 92, only 34% of minimum security inmates received parole when first eligible.

26% of the **maximum** security inmates received parole the first time they appeared before the Board with 74% being deferred or receiving a serve out.

D. DEFERMENT LENGTHS BY SECURITY LEVEL

In FY 92, a **minimum** security inmate going before the Board for the first time who receives a deferment spends an average 15.8 more months in prison before he has another chance at parole. This is an increase from a FY 91 average of 13.9 months.

In FY 92, the Parole Board has effectively extended initial parole eligibility for the average **maximum** security inmate by nearly 5 years, 57.7 months. This is up substantially from FY 91's 41 months.

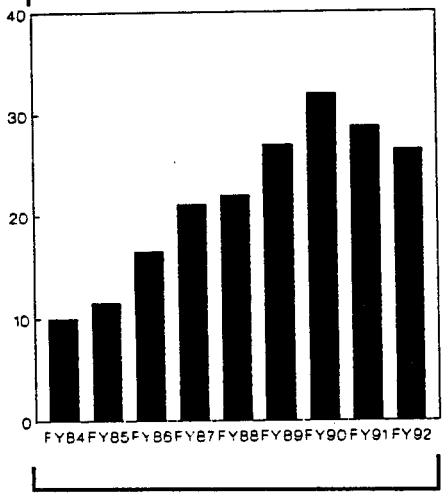
E. PAROLE BOARD DECISIONS BY MOST SERIOUS CRIME, SEX OFFENDER HEARINGS

The parole statistics for the category of parole by most serious crime are reported back to 1980.

1. INITIAL HEARINGS

In FY 1980, 60.6% of sex offenders were

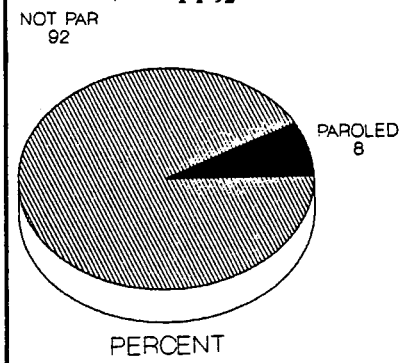
TABLE 3
1st Parole Date Inmates Received Serve Out



paroled at their initial hearing, and 2.8% received a serve out.

In FY 92 only 8% of sex offenders were paroled at their initial hearing and 53.6% were given serve outs. In FY 92, 92% of sex offenders were not paroled at their initial hearing. (Table 4).

TABLE 4
1st Parole Date Sex Offenders FY 92



2. ALL HEARINGS

In FY 80 for all hearings, 60.7% of sex offenders were paroled. In FY 92, 11.4% were paroled. In FY 80 for all hearings, 3.1% received serve outs. In FY 92 for all hearings, serve outs jumped to 46.3%.

F. PAROLE BOARD DECISIONS BY LENGTH SENTENCE

In FY 92, persons receiving sentences of 1-5 years were paroled 33.1% of the time.

Persons receiving life sentences were paroled 45.1% of the time in FY 80. In FY 92 only 7.9% were being paroled.

A FULL SET OF STATISTICS

A full set of statistics can be obtained by contacting the Parole Board at State Office Building, 5th Floor, Frankfort, KY 40601 (502) 564-3620.

CONSEQUENCES OF PAROLE

As criminal defense attorneys, we best take heed of these statistics when advising clients what is in store for them if sentenced. We also must communicate to them the clear, reliable trend these statistics afford us.

CONCLUSION

The above reveals a clear reality:

- 1/4 of all inmates receive a serve out at their 1st parole hearing;

- less than 1/4 of all inmates are paroled when first eligible;

- only 1/3 of minimum security inmates are paroled when 1st eligible;

- 94% of maximum security inmates are deferred or receive a serve out at their initial parole hearing;

- a minimum security inmate who receives a deferment at his 1st parole hearing is given on average a 15.8 month set back;

- 81% of the maximum security inmates receive on average a 4 years, 10 month set back when 1st appearing before the Board;

- serve outs have risen from 7.6% to 19.4% over the last 9 years;

- 9 out of 10 times sex offenders are not paroled;

- nearly 1/2 of sex offenders receive a serve out of their sentence; and,

- only 9% of persons with life sentences are being paroled.

ED MONAHAN
Assistant Public Advocate
Frankfort, KY

NEW ATTORNEY TRAINING

Shown here Left to Right: (Top Row) Jill Logan, Richmond Office, Greg Butrum, Paducah Office, Bill Pospishel, Pikeville Office, Melissa Bellew, Resource Center, Heather Buntin, Stanton Office;
(Bottom Row) Lori Crenshaw, Paducah Office, Wendy Craig, Frankfort Office. Not shown: Rob Owen, who has since returned to the Texas Resource Center, and Louisville Attorneys, Patricia Echsner, Elizabeth Curtin and Steve Canary.

DPA is committed to insuring that our new attorneys have the best possible litigation skills and legal knowledge. Training is a means of continuing to ensure we meet our duty of advocacy on behalf of indigent citizens accused of crimes. On September 8, 1992 - October 2, 1992 our attorneys received 4 weeks of focused education. The new attorneys were given feedback from veteran attorneys during practical application of the skills and information learned. The new attorney training was followed several weeks later with the 1992 DPA Trial Practice Institute, October 11-16 which is an intensive week of trial skills practice.

Starting Salaries

In 1974, beginning attorneys with DPA received a salary of $11,400. Today new Louisville public defenders start at $17,500. New Lexington public defenders start at $18,000. New DPA attorneys now make $21,600. Assistant Attorney Generals start at $22,272.

FROM ABUSED CHILD TO KILLER: POSITING LINKS IN THE CHAIN

Child abuse is often a central focus in death penalty cases. It arises because most capital clients have been abused as children by parents and other adults. This victimization of the defendant is frequently a primary theme presented in mitigation at a penalty phase. Yet far too often jurors and judges, although they may have some emotional reaction to evidence, fail to treat child abuse as a meaningful component in their decision. They report that they feel sad and are touched by accounts of the client's childhood but fail to see any connection between that evidence and his later "choices" to commit such "heinous crimes."

There is no one to one relationship between being abused as a child and becoming a killer. One does not inevitably lead to the other. Just as each abused child's life is different so is the path leading up to every homicide. However, the striking prevalence of child abuse in the backgrounds of our clients requires that we struggle to understand the connections. In fact, the debilitating effects of child abuse may range far beyond mitigation in a capital case to issues of *mens rea* as well as the many relevant mental competency issues (waivers, statements, cooperation and assistance in own defense, *etc.*)

This article is an attempt to explore the diverse and complex nature of those relationships between victimization of abuse as a child and later commission of homicide. It is not intended as an outline for a penalty phase but rather as a guide for capital attorneys. The article begins with a description of the wide spectrum of types of child abuse. Next there is an exploration of the variety of negative consequences of child abuse, which include neurological damage, psychiatric illnesses and behavioral disabilities. Finally, there is an examination of the research on killers which identifies several psychological risk factors linked to homicide. These include high levels of paranoia, increased aggression and inability to problem-solve. The links from abused child to killer seem to be forged between the devastating consequences of child abuse (neurological damage, psychiatric illnesses and developmental disabilities) and the identified homicide risks (paranoia, aggressiveness and problem-solving inability).

WHAT IS CHILD MALTREATMENT?

Child maltreatment is a generic term encompassing a wide variety of destructive behavior toward children, including physical abuse, physical neglect, sexual abuse, witnessing family violence and psychological maltreatment. To acknowledge the extensive range of damaging behaviors psychologists have suggested the term "child maltreatment" to replace the term "child abuse."[1] It is important to note that the first step in analyzing the background of a capital client is to broaden the scope of inquiry to include all the harmful behaviors psychologists call child maltreatment.

State laws also give some guidance to understanding the areas of child maltreatment. Unfortunately, rather than a uniform codification of terminology and illegal acts, the statutes vary widely in their specificity. They range from the very general outlines of Alaska, Georgia and Kansas to the elaborately specific lists found in Colorado and Hawaii.[2] California was selected as illustrative here because its laws represent a middle ground of definitional specificity.

Physical abuse is the first and most obvious type of child maltreatment. Under California law this includes non-accidental physical injury (Penal Code § 11165.6), "willful cruelty or unjustifiable punishment" (Penal Code § 11165.3), and "unlawful corporal punishment" (Penal Code § 11165.4). In the life of a victimized child, physical abuse can encompass a staggering array of brutal acts.

Physical neglect is the second major type of child maltreatment. Neglect includes both intentional and negligent "failure to provide adequate food, clothing, shelter or medical care."[3] Signals of possible neglect can be identified in the appearance and behavior of children.[4] These include signs of malnutrition; chronic hunger or listlessness; untreated medical or dental needs; and unkempt or inadequate clothing.

Sexual abuse is the third major type of child maltreatment. The California Penal Code divides child sexual abuse into two parts - sexual assault and sexual exploitation (Penal Code § 11165.1). Included in this legal definition are various sex crimes as well as sexual conduct and use of children in prostitution or portrayals of obscene sex.[5] Psychologists studying child sexual abuse restrict the definition in three ways. They require: (1) an age discrepancy of at least five years between abuser and abused; (2) use of some form of force or coercion by the abuser (including gifts, money and personal power); and (3) a care-giver role by the abuser (parent, teacher, relative, babysitter, *etc.*).[6]

The fourth major type of child maltreatment is witnessing of family violence. Children who witness their parents, siblings or other family members being physically or sexually abused are themselves traumatized by what they view.[7] Not only do the witnesses suffer from the horror of the brutality but they are terrorized by fear and helplessness for themselves as well. In addition, these child witnesses to violence are often physically endangered, particularly if they step in to try to protect the battered parent or sibling.[8]

Psychological maltreatment, the fifth type of child maltreatment, encompasses destructive behavior toward children that lacks a physical component. Earlier discussions of this type of harm used such terms as mental cruelty, emotional abuse and neglect, and emotional maltreatment.[9] Even in the absence of physical danger, psychological maltreatment can have pervasive negative effects on the well-being of a child. Psychological maltreatment includes a wide variety of harmful behaviors, which are terms spurning, terrorizing, isolating, exploiting/corrupting, and denying emotional responsiveness.[10]

Spurning refers to verbal battering including rejection, humiliation and degradation. Terrorizing entails threats of violence, exposure to violence and leaving a child unattended. Isolating is used to designate behavior that severely confines the child physically or socially. Exploiting/corrupting behavior exposes a child to, or involves him in, antisocial acts, deviant standards and criminal behavior. Denying emotional responsiveness entails ignoring a child's attempts at interaction, withholding warmth and affection, and responding in a mechanistic way.

CONSEQUENCES OF CHILD MALTREATMENT

The devastating effects of child maltreatment can range from (a) central nervous system or brain damage through (b) mental disorders or psychiatric illnesses to (c) behavioral disabilities. The variety in outcomes derives from several sources. First, there are differences in the extent of abuse - the numbers and types of abuse, the severity of abuse, and the duration of abuse. Secondly, there are differences in the personal characteristics of those being abused including age, mental abilities, physical limitations and social supports. Some psychologists have used a fever analogy to help explain the range of danger in abuse or neglect.[11] That is, the higher the fever, the more danger the child is in, and the more extreme the abuse or neglect, the more dire the consequences for the child. This analogy can be expanded to illustrate the impact of the personal characteristics as well. The younger the child, the more worrisome is the fever or the abuse. Also, a child who is already sickly is in more jeopardy of both a fever and abuse. Finally, the presence of a loving and capable caretaker can help while a hostile or impaired caretaker will likely exacerbate the problem.

CENTRAL NERVOUS SYSTEM DAMAGE

Central nervous system damage from child maltreatment includes brain damage which is identifiable in a particular site on a brain scan. It also includes neurological dysfunction which may be less anatomically dramatic yet can be persuasively documented through neuropsychological testing. The brain damage

caused by child maltreatment can come from direct trauma, such as blows to the head, or from indirect trauma, such as severe shaking.[12] Shaking, which may appear to be a minor form of punishment, can cause the brain to bounce wildly against the sides of the skull resulting in serious damage. The inside of the skull is irregular, not smooth. Thus, when the brain is jolted back and forth as a result of severe shaking, it not only hits the skull bone but suffers from scraping as well.

PSYCHIATRIC ILLNESSES ASSOCIATED WITH CHILD MALTREATMENT

Several psychiatric illnesses defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM III-R)[13] can develop from childhood maltreatment and neglect. Although it is impossible to review all of the DSM III-R diagnoses that have been linked to child maltreatment, it may be helpful to explore a few illustrations.

Two of the most common psychiatric illnesses associated with child maltreatment are Psychoactive Substance Dependence and Psychoactive Substance Abuse.[14] Abused children often reach toward alcohol or drugs to dull the pain of their lives. Some of them even begin their drinking or drug-taking with their corrupting parents or caretakers. Early use of drugs and alcohol can lead to the impaired control and negative consequences of these psychiatrically-defined disorders.

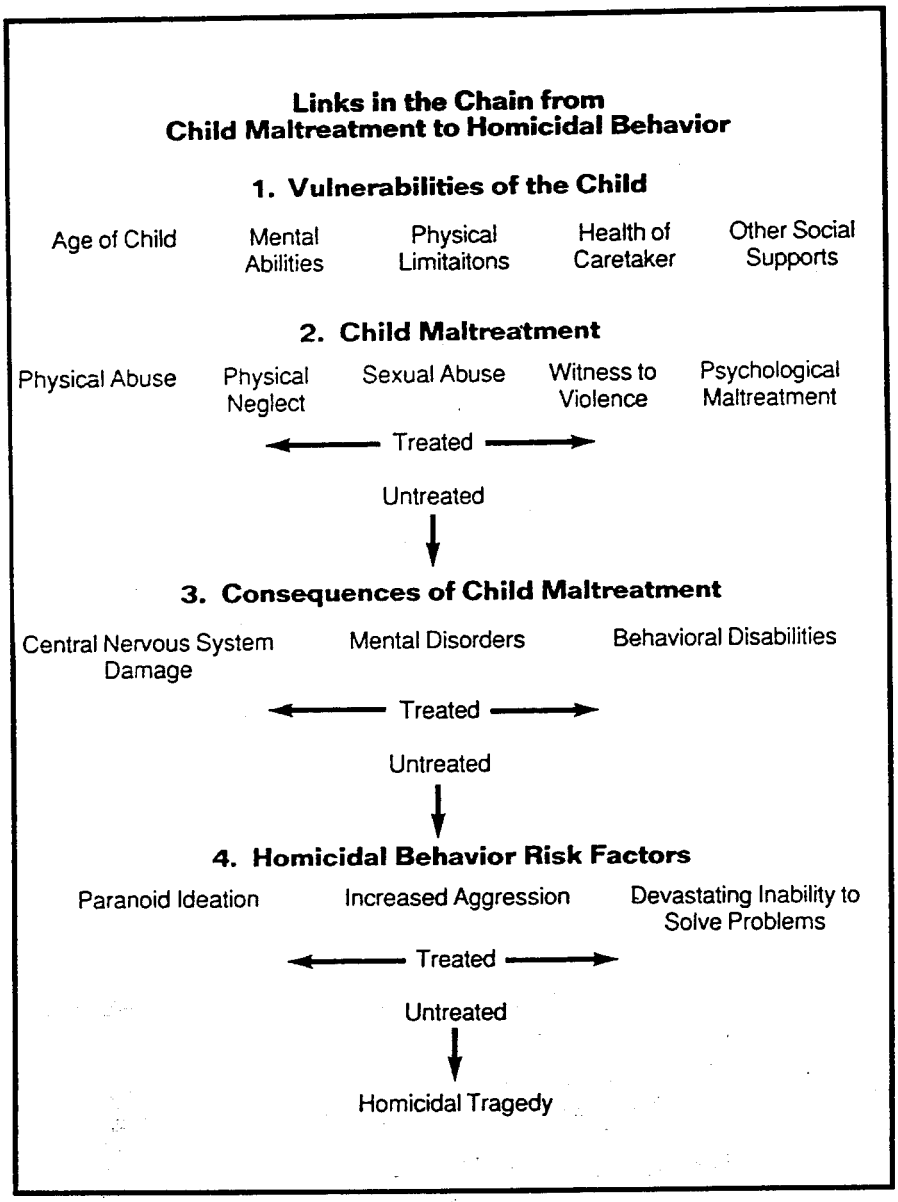
Two other psychiatric illnesses associated with child maltreatment are Organic Personality Syndrome and Organic Mental Disorder.[15] Head trauma which results from child abuse as well as drugs and alcohol used by abused children as a means of coping can be precipitants to these types of organic mental impairments.

Depression problems are also a common psychiatric sequelae in victims of abuse and neglect. When the abuse is long-term and the depressive reaction becomes chronic, the problem may advance into what is labeled Dysthymia. In some cases the mood disorder maybe so severe as to quality as a Major Depression.[16]

Post-Traumatic Stress Disorder (PTSD), originally associated with Vietnam veterans, is now linked to child maltreatment as well. The first requirement of the diagnosis is exposure to a trauma outside the normal range of experience that would cause stress in almost everyone.[17] Severe physical abuse as well as sexual abuse can qualify as the requisite stressor.[18] Major symptoms include feeling detached or estranged; irritability or outbursts of anger; trouble concentrating; and hypervigilance.

Multiple Personality Disorder is another psychiatric problem associated with severe and torturous forms of child physical and sexual abuse. The diagnosis is made when two or more distinct personalities can be identified in one individual.[19] It is believed that the splitting of the personality occurs as endangered children try to psychologically remove themselves from the abuse and the abuser.

Borderline Personality Disorder is also associated with child maltreatment, particularly sexual abuse[20] and psychological maltreatment.[21] The major feature of Borderline Disorder is instability in mood, personal relationships and self-image.[22] Major symptoms of Borderline Personality Disorder include self-damaging impulsiveness; emotional instability; intense and inappropriate anger; and recurrent suicidal behavior and self-mutilation.



BEHAVIORAL DISABILITIES IN ABUSED CHILDREN

In addition to possible central nervous system damage and certain psychiatric illnesses, abused children generally suffer from a wide range of developmental hindrances,[23] including emotional crippling, intellectual impairment, social skills deficits, and behavior disruptions. These impairments, including those in intellectual abilities, result even when there is no neurological damage.[24] Such problems are likely the outcome of the rejection inherent in all types of child maltreatment. Except in extreme cases, it is not the physical wound that causes the lasting trauma. A child can heal easily from a scar if received in a ball game. It is often the child's perception of the meaning behind the blow that causes the major trauma of abuse.[25]

Much of the research on consequences has been done by studying children who suffered from more than one type of child maltreatment. A small number of studies, however, have tried to use "pure" groups of abuse. One study comparing physically abused children with physically neglected children found that the abused children were more defiant, more noncompliant, and more aggressive. The neglected children were more withdrawn, had greater cognitive delays, and performed worse in school.[26]

Males who were sexually abused as children also show some damaging sequelae which are distinct from those who were neglected or abused in other ways. These problems include: sexual compulsiveness, masculine identity confusion, sexual dysfunction, guilt and shame.[27]

LINKS TO HOMICIDAL BEHAVIOR

The infliction of harm to a child is only the

starting point in a complex series of relationships between child maltreatment and homicide. Obviously, not all children who are abused become murderers. In fact, a great majority of abused children grow up to lead law-abiding, though psychologically scarred, lives. Obviously then, there is something distinct about our capital clients, almost all of who were abused as children. Researchers and clinicians studying the links between child maltreatment and murder have pointed to several connections.

Psychiatrist Dorothy O. Lewis and her colleagues have identified high levels of paranoid ideation in murderers.[28] Paranoid ideation is a psychiatric terms used to refer to unfounded beliefs that others mean to harm you. Obviously, if one walks around with the tendency to see others as threatening, one will be more likely to respond in a hostile manner. Homicides of a spontaneous nature may well spring from this handicap.

Paranoid ideation can be the result of several psychiatric problems, including some that flow from the consequences of child maltreatment. Neurological impairment to certain areas of the brain can cause paranoid ideation. Paranoid features can also arise in Organic Mental Disorder and Organic Personality Syndrome. Head trauma and psychoactive substance abuse are not only common consequences of child maltreatment but also are causal factors in each of these syndromes.

The hypervigilance of Post-Traumatic Stress Disorder is another source of paranoid thinking. In addition to these identified psychiatric disturbances, there is continued speculation among some researchers that the trauma of child maltreatment may alter the biochemical makeup of the child so that throughout life the afflicted person will overreact to aggression or perceived threat.[29] Finally, certain psychoactive drugs cause paranoid reactions. Since many who were abused as children turn to drugs as an escape, it is reasonable to assume they will acquire the paranoid side-effects of the illicit substances they ingest.

Overall high levels of physical aggression is another feature identified in murderers.[30] This heightened aggression is also prominent in several psychiatric conditions commonly found in those who were abused as children. These include types of neurological impairment, such as temporal lobe epilepsy. Other mental disorders associated with uncontrolled aggression include Organic Personality Syndrome, Organic Mental Disorder, and Post-Traumatic Stress Disorder. In multiple personalities as well, it is not uncommon to find at least one personality who is hostile and aggressive. Finally, certain psychoactive substances, often abused by battered children, are known to cause increased aggression.

A final link often postulated between child maltreatment and murder is the devastating inability to solve problems that flow from several of the consequences of child maltreatment. Certainly many kinds of brain damage, including retardation, seizures, chronic severe headaches and neurological impairment, are likely to affect some aspect of cognitive functioning. Each of the psychiatric illnesses already discussed has obvious features that also impede problem-solving. In addition, the mood disorders such as Major Depression and Dysthymia will interfere with thinking capacity, blocking attempts to appropriately assess a problem and seek a successful solution to it.[31]

Many psychoactive substances ingested by those abused as children will cause difficulties such as mental confusion, delayed reaction time and impaired judgment. This will adversely impact critical problem-solving as well. The aspects of behavioral disabilities such as the emotional crippling, intellectual impairment, and social skills deficits, will hinder problem-solving also.

A final element in the destruction of problem-solving abilities is the response pattern abused children learn from their violent parents. Just as children of healthy parents learn how to be patient, how to share, how to avoid their earlier mistakes, children of violent parents learn to react to stress with hostility and physical brutality. Psychologists call this type of ingrained lesson "modeling." The destructive effects of modeling are twofold. Not only do children acquire the knowledge that violence is the appropriate and expected reaction to stress, but they also fail to learn a necessary repertoire of positive alternative behaviors to try when faced with serious problems.

CONCLUSION

Although most abused children never become murderers, most murderers were abused children. It is likely that one difference between our clients and the noncriminal abused children is the number of and strength of these posited links in the chain. (**see accompanying chart**). Looking at the chart, we can follow the chain and conclude that the more vulnerable the child, the more severe the abuse, the greater the consequences of abuse, the more numerous the risk factors, the more likely the chain will end in homicidal tragedy. A key element in the posited chain is the presence or absence of effective treatment at critical points. Another logical difference between our capital clients and noncriminal abused children is effective intervention along the way.

Hopefully, this model can serve several purposes. It may help us understand and then portray our clients' development from abused child to killer. It may also guide us to necessary areas of investigation. Finally, it may help us answer the thorny question of why our clients' siblings never killed anyone. The answer to this question, often posed by prosecutors and jurors, is probably buried within the myriad of variabilities along the links in the chain. The siblings, though they no doubt suffered from the abuse, were likely less vulnerable, less severely abuse, suffered fewer consequences, developed fewer homicidal risk factors or received effective treatment somewhere along the line.

Author' note: This discussion of the development from abused child to killer should not be seen as an outline or template for a mitigation presentation in a penalty phase. It is intended as a theoretical orientation for the legal team, a guide to clues for investigation and strategic analysis. Obviously, choices about penalty phase presentations must be made in a much wider context. This should include analysis of the unique nature of the client, the particular facts of the case, the specific jurors who are seated and the availability of the many other types of mitigation.[32]

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Deana Dorman Logan is a lawyer and psychologist with the California Appellate Project in San Francisco. She wishes to acknowledge the admiration and affection she has for Dr. Mindy Rosenberg, a leader in the field of child maltreatment. Thanks also to Katherine Gall for her patience during the endless revisions of this article.

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FOOTNOTES

1. Garbarino and Gilliam, *Understanding Abusive Families*, Lexington Books, p. 5, (1980).

2. Clark, Homer H., Jr., *The Law of Domestic Relations in the United States*. St. Paul, Minn: West Publishing Co., 1987, p. 602.

3. California Penal Code § 11165.2.

4. Besharov, *Recognizing Child Abuse: A Guide for the Concerned*, The Free Press, p. 102, (1990).

5. California Penal Code § 11165.1.

6. Risin and Koss, *The Sexual Abuse of Boys*, Journal of Interpersonal Violence, 2:3, p. 311, (1987).

7. Hurley and Jaffe, *Children's Observations of Violence: II. Clinical Implications of Children's Mental Health Professionals*, Canadian Journal of Psychiatry, 35, 471-476 (1990).

8. Rosenberg, *Children of Battered Women: The Effects of Witnessing Violence on Their Social Problem-Solving Abilities*, Behavior Therapist, 4, p. 86, (1987).

9. Hart and Brassard, *A Major Threat to Children's Mental Health: Psychological Maltreatment, American Psychologist*, 42:2, p. 160 (1987).

10. Hart, Psychological Maltreatment Forms, *Office for the Study of the Psychological Rights of the Child*, 902 West New York Street, Indianapolis, IN 46202-5155.

11. Garbarino and Gilliam, *supra*, at p. 8-9.

12. Green, Children Traumatized by Physical Abuse, in Eth and Pynoos (Eds.), *Post-Traumatic Stress Disorder in Children, American Psychiatric Press (1985)*.

13. See *generally*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, *Third Edition (DSM III-R)*.

14. Psychoactive Substance Dependence and Psychoactive Substance Abuse are DSM III-R classifications related to impaired control over psychoactive substances and continued use despite negative consequences. The depend-

ence diagnosis is the more severe one. Nine classes of psychoactive substances are included in the DSM III-R diagnoses of dependence and abuse, including alcohol, amphetamines, cannabis, cocaine, hallucinogens, inhalants, opioids, PCP, as well as sedatives and hypnotics. Amchin, Psychiatric Diagnosis: A Biopsycho-social Approach Using DSM III-R, *American Psychiatric Press*, p. 91-92 (1991).

[15] Organic Personality Syndrome (OPS) is marked by a persistent personality disturbance which is accompanied by some evidence of a specific organic etiology. the personality disturbance must include at least one of the following:

*Affective (emotional) instability

*Recurrent outbursts of aggression

*Markedly impaired social judgment

*Marked apathy and indifference

*Suspicious or paranoid ideation.

Amchin, *supra*, at p. 82-83.

Organic Mental Disorder, less specific in criteria than OPS, is a broad category of mental impairment which can be linked to some organic origin. Obvious organic sources in abused children are head trauma and substance abuse.

[16] Dysthymia is a depressed mood that is manifest more days than not over a period of at least two years. It is more chronic and less severe than the diagnosis of Major Depression. Amchin, *supra*, at p. 108.

[17] In addition to the recognized stressor, a diagnosis of PTSD requires:

Re-experiencing the event, such as:

*intrusive recollections

*dreams

*sudden feelings;

Avoidance or numbing, such as:

*diminished interest in activities

*feeling detached or estranged

*restricted range of emotions; and

Persistent increased arousal, such as:

*difficulty sleeping

*irritability or outbursts of anger

*trouble concentrating

*hypervigilance

Amchin, *supra*, at p. 116.

[18] Finkelhor, Trauma of Child Sexual Abuse, *Journal of Interpersonal Violence*, 2:4, p. 48, 1988. *Green, supra*, at p. 148.

[19] Amchin, *supra*, at p. 126.

[20] Lines and Blum, Family Environment and Borderline Personality Disorder: Development of Etiologic Models, in Links (Ed.) Family Environment and Borderline Personality Disorder, *American Psychiatric Press*, p. 13 (1990).

[21] Ogata, Silk and Goodrich, The Childhood Experience of the Borderline Patient, in Links, *supra*, at p. 98-100.

[22] To quality for a diagnosis of Borderline Personality Disorder, one must exhibit at least five of the following symptoms.:

*A pattern of unstable and intense personal relationships (alternating overidealization and devaluation)

*Impulsiveness in at least two self-damaging ways (excluding suicidal acts)

*Emotional instability, shifting to depression, irritability or anxiety

*Intense and inappropriate anger (or inability to control anger)

*Recurrent suicidal behavior (threats, gestures, acts) or self-mutilating

*Identity disturbance

*Chronic feelings of emptiness and boredom

*Frantic efforts to avoid real or imagined abandonment

Amchin, *supra*, at p. 154.

[23] Emery, Family Violence, *American Psychologist*, 44:2, p. 324 (1989). Green, *supra*.

[24] Augustinos, Developmental Effects of Child Abuse: Recent Findings, *Child Abuse and Neglect*, 11, p. 17 (1987).

[25] Garbarino and Gilliam, *supra*.

[26] Lamphear, *The Psychosocial Adjustment of Maltreated Children*, Child Abuse and Neglect, 10, p. 64 (1986).

[27] Dimock, *Male Sexual Abuse: An Underreported Problem*, Journal of Interpersonal Violence, 3:2, p. 207 (1988). Finkelhor, *supra*, at p. 359.

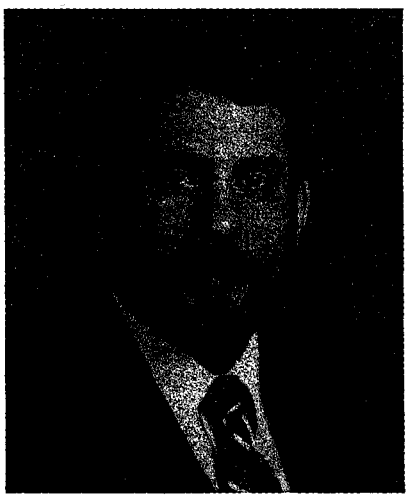
[28] Lewis, Mallouk and Webb, *Child Abuse, Delinquency and Violent Criminality in Cicchetti and Carlson* (Eds.), *Child Maltreatment*, Cambridge Press (1989).

[29] Van der Kolk and Greenberg, *The Psychobiology of the Trauma Response: Hyperarousal, Constriction, and Addiction to Traumatic Reexposure*, in Van Der Kolk (Ed.), Psychological Trauma, American Psychiatric Press, p. 64 (1987).

[30] Lewis, *et al.*, *supra*, p. 1164.

[31] Amchin, *supra*, p. 83.

[32] Logan, *Is it Mitigation or Aggravation?*, CACJ Forum, 16:5 (1989). *See also*, Thomson & Laurence, *Penalty Phase Mitigation* in California Death Penalty Defense Manual, CACJ (1991).



STEVE MIRKIN NAMED CONTRACT ADMINISTRATOR

Public Advocate Allison Connelly announced the appointment of Steve Mirkin to the position of Contract Administrator, effective December 1, 1992. Steve has been a full-time public defender for ten years, and has served in Jefferson County and in Concord, New Hampshire, as well as with the DPA's Capital Trial Unit.

The Contract Administrator's responsibilities include negotiating and reviewing contracts with public advocates in the 77 counties not covered by DPA field offices, and assisting contract public advocates with problems that may arise with contracts, funding, conflict counsel, etc. He will also be available to provide case consultations to contract defenders, including litigation assistance if necessary. He will also be responsible for fielding inquiries and complaints from clients in contract counties, and working toward resolutions.

In making the appointment, Ms. Connelly stated, "It is critical that Public Advocacy provide our contract defenders with as much backup and assistance as we can, to help them provide effective representation to their clients. The appointment of Steve as Contract Administrator will be a big step in that direction, and I urge all our contract defenders to take advantage of the assistance that he and the rest of our full-time staff can provide."

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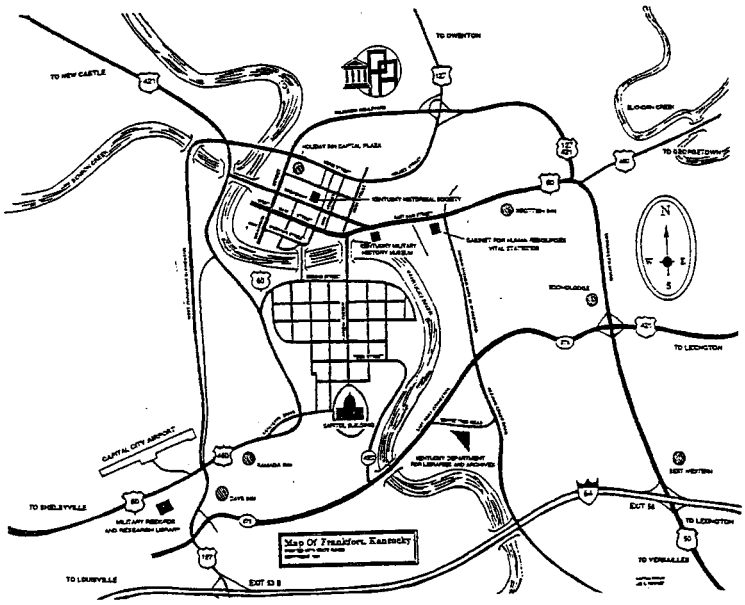

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