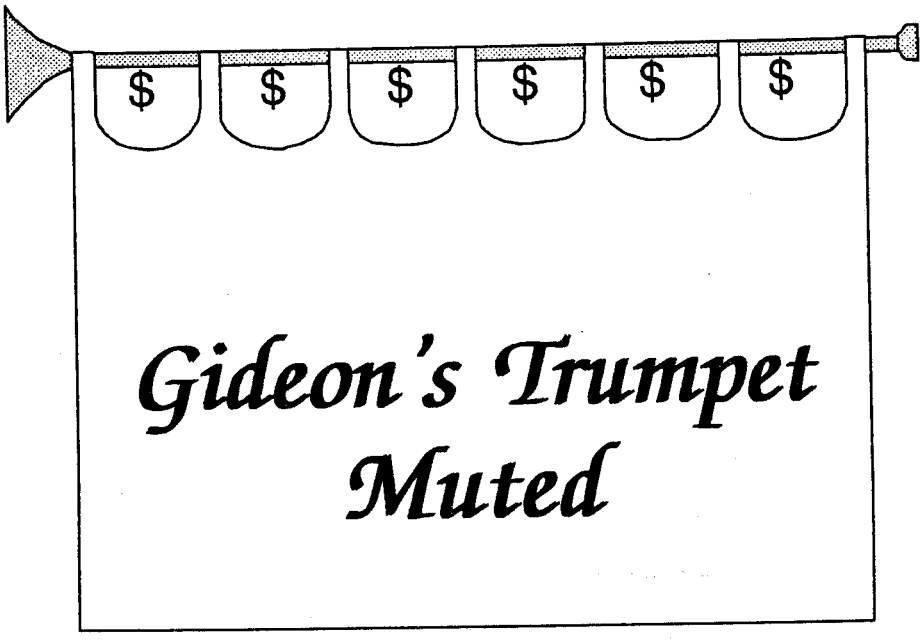
The Kentucky Department of Public Advocacy's Journal of Criminal Justice Education and Research

THE ADVOCATE

Representing 101,000 Poor Kentucky Citizens Yearly

Volume 15, #2, April 1993



Gideon's Trumpet Muted

The Dawn of The Third Decade

The Kentucky Department of Public Advocacy

1972-1993

Also in this Issue:

Prof. James J. Clark, MSW
on
Child Abuse Links with Violence

Ernie Lewis
on
No More Harm for Adult-Survivors

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.

All people, rich or poor, have an absolute right to justice and equality before the law.

From the Editor:

Things are Changing. Kentucky's statewide indigent defense system is undergoing change. The Public Advocate has appointed a head of Trial Services, a head of Post-Trial Services, and a Field Director for Trial Services. We feature them in this issue.

Parole. *Sanders* has changed parole eligibility in significant ways. We profile the changes.

Sex Abuse. The focus on sex abuse in Kentucky continues with the Governor promising a special legislative session to consider the Attorney General's Sex Abuse Task Force legislative proposals. It is essential that the criminal defense bar educate Kentucky's leaders on the realities of indigent criminal defendants accused of a sex crime in Kentucky's criminal justice system, including *why* perpetrators abuse and how Kentucky law should reflect the knowledge that comes from understanding why. Two articles address these increasingly important concerns.

Justice for Some. The criminal justice system is under siege, not from an outside enemy but from our underfunding of it. The underfunding is most prevalent in Kentucky's indigent criminal defense system. Can we work cooperatively to assure counsel for the poor citizens accused in Kentucky is funded adequately?

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. We continue to list those who generously have contributed to this effort.

EDWARD C. MONAHAN

ADDITIONAL *ADVOCATE* DONATIONS

Donations to support the work of *The Advocate* have been received from:

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To date 83 persons have contributed to *The Advocate* with a total of $15,237.25 collected. THANKS!

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IN THIS ISSUE

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.

GIDEON'S TRUMPET MUTED: FUNDING COUNSEL FOR THE POOR

THE ABA REPORT: JUSTICE FOR SOME DUE TO INADEQUATE RESOURCES

Justice for all is this country's promise. Justice for some is too often the daily reality.

The American Bar Association's Special Committee on Funding the Justice System report, *Funding the Justice System: A Call to Action* (Aug. 1992) found American's justice system under attack from significant underfunding: "...the American justice system is under siege and its very existence is threatened as never before. This threat arises not from a foreign power, not through an authoritarian domestic regime, nor from lingering racial intolerance in our society. The justice system in 1992, and the very notion of justice in the United States, is threatened by a lack of adequate resources to operate the very system which has protected and extended our rights for more than two centuries.

"Some may ask why we should raise an alarm about this situation. After all, in the late 1980s and into the 1990s many states and the federal government have been forced to make budget cuts that have eliminated or reduced services provided by various government programs. Others have criticized the justice system for political purposes and denigrated the professionals who work within this system. These critics see no undue burden or threat created by failing to adequately fund the justice system. But such an argument ignores the large threat posed to our democracy by failing to support the very system intended to protect the average citizen.

"To begin, 'justice' is not a program or entitlement to be delivered to citizens only when convenient. As California Chief Justice Malcolm Lucas, a member of the Special Committee, observed this Spring, the justice system is 'a separate branch of government charged with essential and mandatory responsibilities for all citizens.'

"Long-term neglect and underfunding of the justice system facilitates other dangerous attitudes. The recent violence in Los Angeles following the acquittal of our police officers charged in the beating of motorist Rodney King reminds us painfully that many in our society do not have faith in the justice system. Some do not believe that justice and fairness are available in our society. Other citizens do not understand the justice system, and expect the system to be able to address deep-rooted social issues that our policymakers seem incapable of examining. For these reasons, it is not an overstatement to say that the justice system today is not a friend for most Americans' rather it is a labyrinth that they do not understand, and cannot use nor afford. We only heighten this problem by failing to fund the system at an adequate level....

"The denial of access to justice produces disillusionment with, and disrespect for, a system designed to protect and defend fundamental rights and liberties. If this erosion continues without interruption, the ability to defend basic human rights will be decreased and the very underpinnings of our democracy weakened.

"For these reasons, the ABA Special Committee on Funding the Justice System believes it is essential that all Americans join in a concerted effort to save the justice system. Furthermore, the Committee believes that lawyers and judges through the organized bar have a special obligation to lead this effort."

Justice for only some is the increasing reality in Kentucky due to inadequate and unbalanced funding for Kentucky's criminal justice system.

FUNDING FOR COUNSEL FOR KENTUCKY'S POOR-ACCUSED

Kentucky Funding Resources

The Department of Public Advocacy's funding comes from four sources: 1) the state's General Fund, 2) those county fiscal courts which *choose* to enter into a fiscal obligation for public defense, 3) recoupment of money from indigent defendants, and 4) grants and donations.

State General Fund. Money from the General Fund for public defense has never been sufficient; the increases over the last 20 years for public defense has been less for public defense than for other Kentucky criminal justice agencies, and cutbacks during shortfalls have usually taken a greater percentage from public defense than from prosecutors. The most recent reductions which exempted DPA have been a significant exception to this past practice.

Fiscal Court Contributors. About 25%, 33 of the 120, of Kentucky fiscal courts have agreed to enter into a contract to voluntarily assume financial responsibility for the legal representation for poor criminal defendants. The statute *requires* only one fiscal court (Jefferson County) to participate. The other 119 county fiscal courts are not statutorily required to assume financial obligations for attorney costs. They remain responsible for expert witness costs.

Recoupment for Indigent Defendants. The statute requires defendants who can partially pay for their public representation to contribute money back to DPA. Judges are responsible for determining if an indigent can pay any money. Judges have increased recoupment from indigent defendants over the last 4 years at a rate three times the increase of the General Fund increases.

The practical limits on the ability to obtain funds from indigents are very real: 1) the clients are poor, 2) Kentucky ranks at the bottom nationally in poverty rate, 3) many of the clients are incarcerated and have no ability to work to generate any money, 4) public advocates are ethically prohibited from advocating for recoupment from their individual clients,[1] 5) it costs money to collect the ordered recoupment from indigents who do not pay as ordered.

THE STATE IS REQUIRED TO FUND COUNSEL FOR INDIGENT CRIMINAL DEFENDANTS IT PROSECUTES

The **DEPARTMENT OF PUBLIC ADVOCACY** was created by the General Assembly in 1972[2] because:

1) the state cannot prosecute a person accused of a crime if that person does not have an attorney since the Kentucky[3] and United States[4] Constitutions guarantee every person regardless of their means the right to counsel when their liberty or their life is sought by the state;

2) the Kentucky and United States Supreme Courts have so held[5];

3) Kentucky attorneys cannot be forced to represent indigents without being compensated since this violates the attorney's constitutional right to not have their property, their professional services, taken from them without adequate compensation[6];

4) the state of Kentucky has the obligation to fund the public defense of indigent criminal defendants[7];

5) the 1960s and 1970s saw a series of lawsuits by Kentucky attorneys[8] who sued the state for compensation when coerced into representing indigent criminal defendants. This series of lawsuits culminated in *Bradshaw's* holding that attorneys could not be forced to donate their services to fund a state financial obligation.

The United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 346 (1963) explained why it is obvious that counsel is necessary for those accused by the state:

in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. *Id.* at 344.

HARSH REALITIES ARE UNDERMINING THE ADEQUACY OF FUNDING FOR INDIGENT CRIMINAL DEFENSE IN KENTUCKY

✓ DPA has been underfunded since it was created in 1972.

✓ Over the last 4 fiscal years DPA caseload has increased 53.19% while funding from all sources, General Fund, county contributions & allotments, has increased 18%.

✓ The funding increases over the last 4 fiscal years have been as follows:

✓ General Fund	16% increase
✓ Fiscal Courts	27% increase
✓ Recoupment from Indigents	23% increase

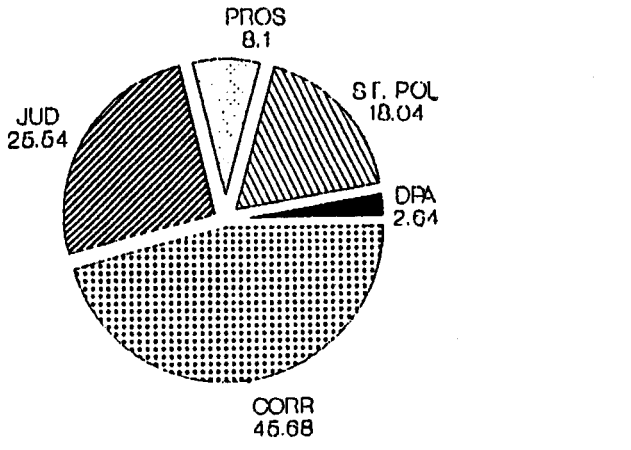
✓ DPA has but 2.64% of the Kentucky criminal justice General Fund dollars while prosecutors have 8.1% of the funding. (See Chart No. 1).

✓ Average per case funding for indigent cases in FY 92 was $117.40, which is next to last in the country.

✓ The likelihood of raising substantially more money from county fiscal courts is low since only 1 of the 120 are required to contribute money, and since, with the exception of jails, the entire criminal justice system is a state not a local fiscal obligation.

✓ The likelihood of raising substantially more money from indigent convicted criminals is low since they are poor to start with, many are incarcerated, and Kentucky has some of the greatest poverty in the nation.

✓ Caseloads of Kentucky public advocates are too high for adequate representation. Kentucky trial public advocates routinely have 300-600 cases per year effectively violating their ethical duty to represent their clients competently as defined in all its complex dimensions by



Funded Budget Less 2% Deferral

the Kentucky Supreme Court's *Rules of Professional Conduct* (SCR 3.130).

✓ Capital cases which DPA must contract out due to conflicts are funded at an obscenely inadequate $2,500 per case, one of the nation's lowest figures.

✓ In contract counties with high caseloads, the situation is dire. Some contractors do not make their overhead. Pleas are encouraged, while preparation and trials are discouraged. Capital trials, Class A child cases and murders can turn the contract into an economic nightmare. Clients and attorneys are hurt.

CONCLUSION

March 18, 1993 in the 30th Anniversary of the United States Supreme Court's principled decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963) that a poor person facing loss of his liberty is entitled to counsel. The underfunding does not honor *Gideon*. The trumpet is muted. How can we change that reality? Can a coalition for change be born? Can counsel for the poor be trumpeted...to honor *Gideon*? Indeed, it must.

FOOTNOTES

[1]*Indiana State Bar Association Opinion No. 2* (1990).

[2]KRS Chapter 31. In the 1972 General Assembly House Bill 461, with Representatives Kenton, R. Graves, Swinford as sponsors, passed the House 60-18 and passed the Senate 26-5.

[3]Section Eleven of the Kentucky Constitution states, "In all criminal prosecutions the accused has a right to be heard by himself and counsel..."

[4]The Sixth Amendment to the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

[5]In *Gholson v. Commonwealth*, 212 S.W.2d 537 (Ky. 1948), the Kentucky Supreme Court held that a person who was charged with a felony and who did not have the money to hire an attorney was entitled to have an attorney appointed for him.

[6]In *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972), the Court stated, "it appear elemental that the public interest in the enforcement of criminal laws and the constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive *him* of *his* property without just compensation." *Id.* at 298. The Court held that "the system of court-appointed uncompensated counsel does not meet the constitutional standards of either the Constitution of the United States or the Constitution of this State." *Id.* at 299.

[7]*Bradshaw, supra*, at 297 stated, the "duty to appropriate money for the adequate enforcement of the criminal laws rests upon the legislative department."

[8]*Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972); *Slavens v. Commonwealth*, 481 S.W.2d 650 (Ky. 1972); *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970); *Commonwealth, Department of Corrections v. Burke*, 426 S.W.2d 449 (Ky. 1968); *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky. 1967); *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966).

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AN IMPERFECT SYSTEM

Has our judicial system evolved into one in which those who receive justice, are people or companies able to afford the best lawyer for the longest span of time?

[Chief Justice Robert F.] Stephens admits that such a "penetrating" question is relevant, but not an easy one to answer. He does not proclaim that the American or Kentucky system of justice is perfect. he admits that "A lot of people slip through the cracks... We do make mistakes... Hopefully there are ways and methods to correct them."

To help correct the errors, for example, under U.S. Sen. Wendell Ford's gubernatorial administration, Stephens noted the development of the public advocacy system for criminal cases. In Kentucky, "We have a good system of public advocacy, but we need more help and better pay to attract young people (to serve as lawyers)," he said.

While more money needs to be spent on public defenders, Stephens said that it is not politically popular in Kentucky, or in any state, for legislators to provide funds for the defense of accused criminals. but not all people who need a lawyer are accused of committing a crime.

The U.S. Constitution, under the Sixth Amendment, ensures that the accused in a criminal case be provided with legal counsel. However, in civil suits, an area in which most business lawsuits fall, plaintiffs or defendants are not guaranteed counsel under the state or federal constitutions.

Stephens added, "My personal belief is that every person who appears before a court, even in civil matters, ought to have some type of legal representation." Yet many cannot afford counsel, and the cost for the state or federal government to provide such a service, he said, would be staggering.

Too often, civil cases are won by the side with the most money. The well-financed side in a lawsuit can prevail by "wearing out" the underfinanced opposition with delays. Is this justice?....

CAPITAL LITIGATION IN THE 1990s

Recently I had the opportunity to attend the NLADA [National Legal Aid and Defender Association] "LIFE IN THE BALANCE" seminar in New Orleans. [**NOTE**: this was funded personally – we are still unable to attend out of state seminars due to the funding shortage.]. Instead of addressing any one specific issue relative to death penalty and related issues, we thought it would be a good idea to pass on some of the many good points discussed at the seminar.

MITIGATION SPECIALIST'S TRAINING

The sessions focused upon the uses and role of mitigation investigation. It proceeded from the assumption that the audience knew what mitigation evidence was, and it was brought out that all of the investigators present had previously worked on a death penalty case.

NEED TO PREPARE EARLY ON:

There was a re-emphasis on the early establishment of a "team" who is going to work on the case, and that the "team" should be set up early. A competent mitigation investigation which will survive RCr 11.42 and Federal Habeas Corpus will take at least 200 hours or more, probably more. This "team" should include a mitigation investigator. Contrary to what some judges and prosecutors might believe, this type of investigation is well beyond the scope of most attorneys' training and work experience.

The penalty phase investigator is a person who has the training and background in the social sciences such as sociology, social work, psychology, and the like. They are persons whose training and experience allow them to have the necessary insights into the client's mental and emotional makeup, and what circumstances in the client's life may have led to that current "makeup".

Attorneys simply don't have the training and expertise to do the social history investigations and workups needed to provide the client with effective assistance of counsel. The records alone, if they are accumulated, will take dozens of hours, and these are hours which the typical public defender do not have.

KENTUCKY PRACTICE NOTE

If you happen to be a Kentucky public defender whose client is older than 18 years of age and has probably lived in many different areas, attended more than one school, has numerous relatives in various locations, has a juvenile history, some mental health background, or the like, then you simply will not have the time or money to do the travel required for thorough mitigation investigation. Finally, DPA simply will not fund extensive out-of-state investigations such as this so long as it is the statutory duty of the county's fiscal courts. ***KRS Chapter 31.***

Virtually all records are going to be researched in a competent mitigation investigation. This includes everthing from birth records to institutional records, medical records to school records, and they have to be read and interpreted. Mitigation investigators tend to have the background training and experience to recognize the signs of mental illnesses, can identify the nature of the expertise needed to effectively present this to a judge and/or jury, and, in some cases, this investigator, because of her training and experience, can act as a person upon whom an expert could rely in the practice of the expert's profession.

NECESSITY OF MITIGATION INVESTIGATION IN DEATH CASES:

This work has a purpose. The client's conduct may be explainable in some fashion. This may not mean there is a "defense" in the true sense, but to rebut the prosecutor's suggestions that your client is a mere "animal" who acted in "cold blood" to take a human life, it is important to discover why your client exercised the judgment he did under the circumstances, and try to explain why that judgement was exercised in that fashion.

Many people who commit seemingly senseless, cold-blooded acts are, in fact, mentally impaired. Just how mentally impaired is often a function of the length of time the client has been suffering from the problem. Further, the client's history which may appear in those records from school, the family doctor, etc., may give the mitigation investigator some insight into the type of impairment from which the client may be suffering and the reasons for it.

For instance, persons who have been raised in a severely abusive environment tend to suffer residuals from that early treatment. True, most never resort to violent crimes, but some do. The reasons why may be an explaination why your client acted the way he did. The early abusive environment, combined with the mother's lack of proper nutrition during the pregnancy and alcohol ingestion during pregnancy, possibly even drug use, can create a person with serious mental impairments. There are many other possibilities.

The mitigation investigator is a person who can research, review, and organize this information into useful form. Attorneys simply don't have the average of 200 - 500 hours to devote to record and information gathering. The investigator's job is to do just that. In doing so, the investigator will find details in the client's life which will assist the expert in making a diagnosis which is much more intense than the so-called evaluations the defendants often get from state-ordered evaluations upon which "anti-social personality disorder" seems to be "red stamped" upon them.

The fact is that your client's life experiences shape his behavior, his cognitive abilities, and his responses to social situations and stressors. How he responds is more often than not a function of these experiences, and the attorney must have this information available to give the client the effective representation he needs. The fact that many attorneys do not remains why the failure to perform an adeqate mitigation investigation is one of the leading causes of death penalty reversals and remands.

ADDITIONAL IDEAS:

If a death case comes into the office, and if there are any questions about the above, please contact someone here at CTU. Much of the detailed discussions at the seminar cannot be put into this article due to time and space limitations.

In any event, here are some additional suggestions stated in a brief way:

- Have the attorneys and investigators meet regularly and often during pretrial preparation. Brainstorm, map out assignments, strategize, develop and re-evaluate your "theory of the case," and the like, but **MEET, AND MEET OFTEN!**

- Use additional attorneys in the office or from "central office" to assist as consultants during pretrial. The perspective such persons bring to the case is helpful.

- **Ky. Practice Note:** If the prosecutor or judge is hesitant to agree that this investigation is needed, simply file a Motion In Limine asking that the general nature of certain mitigation evidence [*e.g.* physical abuse, sexual abuse, parental abandonment, mental illness, etc.] be the subject of a ruling on its admissibility. Cite the popular U.S. Supreme Court opinions and Kentucky Opinions in which this mitigation evidence has been held to be within the defendant's constitutional right to present. Let the prosecutor come in with authority to the contrary. If the evidence is held to be admissible generally, then how can resources be denied to investigate and accumulate it?

- Define clearly the role of the mitigation investigator. Provide them with any and all information available to the attorney.

- Encourage the investigator to remain in constant contact with the client in order to insure, in the eyes of the client, that the investigator is a "team member."

- Make the performance of a detailed social history interview and investigation a "must" before the hiring of experts. Until the whole picture has begun to take shape about the client's life, there is no good reason to choose an expert. For that matter, before a good social history has been done, what can you tell the judge in the exparte session?

- Become more knowledgeable about client's drug use, and be mindful of "polysubstance abuse" by the client. Whereas specific drug may not be something to get excited about during the development of a defense or for the penalty phase of the case, drugs used in combination can account for some very volatile behavior on the part of some people.

- Begin to educate yourself on exactly what "impairment" is or is not. Learn basic information about the various parts of the brain and how they interract with each other. Learn something about the brain's "emotional centers" and the effects that defects in these centers might adversely affect the client's behavior.

- **LEARN** something about child abuse! Abuse does not cause criminal behavior, or at least there are no studies which identify a "direct link." On the other hand, abuse plus other circumstances almost surely have an impact upon the growing child, the full effects of which may not occur until a triggering incident occurs and the client reacts in a way which could have been predictable.

- Begin to explore the prenatal the client's mother received prior to the birth of your client. Fetal alcohol syndrome must be considered whenever the defendant's mother was a drug or alcohol abuser. Explore more fully with the client's mother the extent to which smoking and drinking were done during pregnancy. There is some excellent research on this. CTU has some literature on this syndrome.

- Become familiar with the condition known as *Attention Deficit Disorder*, or as it is known currently, *Attention Deficit Hyperactivity Disorder*. This condition commonly accounts for anti-social behavior, its condition can account for serious congnitive difficulties, and a substantial percentage [70%] of violent. CTU has literature on this.

Practice Note

Authority in Ky: The case of ***Commonwealth v Sommers***, Ky., 843 S.W.2d 879 (1992) sets out the "how to" in securing investigative assistance. CTU has pleadings with legal support for this assistance. **CAUTION**: If this assistance is needed, and if the courts ignore the mandates of ***KRS Chapter 31*** and deprive you of it, announcing "Ready" for trial may waive any errors in the denial of funding.

Effective assistance of counsel is your client's right, and even minimum assistance means the lawyer has the tools to prepare a defense to the charges or to the death penalty. This right is easily disregarded by many prosecutors and some judges who believe people charged with heinous crimes deserve fewer constitutional protections than the civil litigant who seeks mere money damages. This right must be jealously guarded.

Funding Issues

This is a popular topic at all NLADA seminars. This issue is revisited so often because of its importance to indigent clients who are overwhelmed by the resources of the prosecution. Unfortunately, it is not an issue that is being litigated as often as it should be.

The leading case is ***Ake v Oklahoma***, 470 U.S. 68 (1976). In Kentucky refer to ***Sommers v Commonwealth*** which became final on 12/23/92. This is a "non-death case", although at the time the funding issues were litigated it was a death penalty case.

Ake stands for the proposition that an indigent defendant has the right to the tools necessary to make a defense. This was a "due process" case, but that is not the only legal basis for relief.

Kentucky Practitioners: Do not ignore ***KRS Chapter 31***. It was this Chapter of the KRS upon which ***Sommers*** was reversed and remanded for a new trial. This section of the code supports the statutory right to assistance for indigent defendants, and it provides for the source of the funding assistance -- the Fiscal Courts of each county. Do not allow the county attorneys to mislead anyone, there is no need for a "contract" or a "plan" to be in effect for the counties to be financially responsible. This only applies in instances in which attorney fees are requested.

- One of the speakers, Ms. Deana Dorman Logan, Esq., presented an outline of various signs of impairment which the attorney could recognize. She suggests during this outline that attorneys begin a file on various observations made about the client, his speech, attention, moods, reality confusion, etc. It could be helpful to an expert later, and it may serve to support your request for funding assistance.

In any event, many authorities in support of funding assistance at both state and federal levels were provided to the participants of the seminar. I have these in Frankfort along with sample motions.

It should be emphasized that the obtaining of funds is not easy. Although no rational attorney would ever suggest that investigative assistance is not necessary in a criminal case, unless the record contains the detailed, specific showings

why this assistance is needed and how it will be utilized, the appellate courts will turn deaf ears on direct appeal. The appellate courts will deny relief, claiming that the attorney's failure to make the proper record must have meant the evidence did not exist in the first place and the lawyer was engaging in a "fishing expedition." Or, as the Supreme Court did in ***Strickland v Washington***, presume the failure of trial counsel to admit mitigation evidence of various kinds was "trial strategy."

You must take the time to learn something about the subject matter for which you seek expert assistance. If the subject is child abuse, then learn something about it. You must convey to the Court why it is necessary to present testimony on this subject and why an expert is needed. If you seek an investigator, then specify exactly what you will have the investigator do and why you cannot, as attorney, do it yourself.

In your motions be careful to argue that the failure to place mitigation evidence before the trial court is the result of lack of petitioned for resources and not trial strategy.

The funding requests should be *ex parte*; however, there is some authority which would hold the funding source can at least submit memoranda or otherwise be heard on the general law relating to the governmental unit's legal responsibility. There was no authority in support of the prosecutor or anyone else's right to be present during the *ex parte* proceedings. [I have addressed this issue on at least a dozen occasions, and I have yet to find any authority in support of a "third person's presence" during the "reasonable necessity showing" before trial court].

Prejudice to the client must be demonstrated. For a complete record, counsel must be specific about how the client's case will be adversely affected. This prejudice might be in the guilt/innocence phase of trial; however, in capital cases the prejudice from funding denials usually occurs in the defendant's right to investigate and present mitigation evidence. You can't presume that the appellate courts will find prejudice automatically. It must be shown. You must put into the record all of the evidence which you have reason to believe is available, and that your client, because of his indigency and his attorney's lack of resources, will be deprived of the right to have the jury consider this evidence which the majority of all courts, state and federal, have held your client has the right to place before the jury.

State "experts" or personnel are unavailable or inappropriate to do this work for the defendant. Not only is using state experts jeopardizing any confidentiality that might otherwise have existed, state agencies and their personnel simply don't have the time or resources available to provide those services contemplated in ***Ake***.

Practice Not In Kentucky

*Prosecutors and some judges incessantly claim that agencies in Kentucky can provide assitance to defendants in the preparation of their cases. If yours does, contact CTU personnel. Also, simply file a Motion requesting an Order that the Cabinet For Human Resources provide you with the necessary funding and/or personnel to give you the assistance which **Ake** has stated you should have. Please don't wait until the last minute to notify CHR Office of Counsel. They deserve the professional courtesy to prepare ahead of time for your Motion. CHR will inform the court quite eloquently about that agency's lack of resources to assist defendants' attorneys in the fashion in which due process demands.*

Funding assistance doesn't only apply in capital cases. In Kentucky, you need only refer to the ***Sommers*** opinion and Chapter 31. Nowhere in either the opinion or in ***Chapter 31*** are there limitations on funding assitance only to capital cases.

Investigative funding assistance goes further than mere expert assistance. The typical public defender is probably carrying a felony caseload which far exceeds NLADA or ABA recommendations of 150 cases per year. This number does not include capital cases, and it presumes the existence of sufficient "support services", including a sufficient number of investigator services.

[**KENTUCKY NOTE:** ***Chapter 31*** includes "investigative" assistance as within the rights an indigent has to pretrial assistance.]

If the caseload being carried is excessive, then are you adequately preparing for your cases? If not, then appropriate motions are in order seeking relief from the trial judge, and before anyone speaks up, it is generally recognized that prosecutors and judges will get "mad" about defense counsel seeking relief. This is a given; however, there are judges sensitive enough to the plight of indigents that they might grant the necessary time and resources to prepare your cases. For those who are not so sensitive to the plight of indigents and their attorneys, you nevertheless must make the necessary record demonstrating why investigative assistance is necessary and why you must have time to do the investigation. Further, don't forget to show the prejudice. Demonstrate that which you won't be able to do for the client, why you can't announce ready for trial, and why this case will be retried.

In speaking with others at the seminar, and in hearing a few of the speakers on this point, the point was crystal clear that if public defenders are to achieve justice for clients, to achieve manageable caseloads, and to achieve having the courts provide the necessary resources for us to do our jobs, then the lawyer must be more aggressive in litigating against being forced to trials and hearings before being prepared. It does no good to speak about it among ourselves if we have trial records silent on the problem.

Some instances were discussed in which attorneys actually filed motions seeking to limit their caseloads. The consensus was that we should litigate to the courts the fact that we are being "ineffective assistance of counsel" whenever we are forced to engage in a mockery of justice or to create the mere facade of representation.

Courts around the country do not hesitate to discipline their attorneys for neglect of a client's case. Malpractice carriers are mindful of the necessity of preparation and diligence, and ethics rules universally address the need for attorneys to manage their caseloads enough to be diligent about clients' matters. None of these ethical rules distinguish between criminal indigents and civil cases. Maintaining a caseload which precludes effective representation is an ethical violation and one of which the attorney has a duty to inform the trial court. After all, ultimately it is the trial court who has the responsibility to see to it that the client receives a fair trial.

If you hesitate to attack unreasonable caseload demands to the detriment of

your clients merely because you don't wish to get judges or prosecutors upset, you simply are not representing your clients. You are part of the problem. You are not contributing to a solution.

VICTIM IMPACT EVIDENCE - DISCOVERY OF VICTIM'S CHARACTER AND BACKGROUND

The case of ***Payne v Tennessee***, the so-called "Victim Impact" case from the U.S. Supreme Court has resulted in much uncharted territory in the litigation of death cases.

Although exploring the character and background of victims is always a sensitive area, if prosecutors are going to continue to use this evidence to arouse passions and sympathy, then defense counsel must explore whether there is any evidence of an "impeachment" nature about the victim.

The notion of trials being used to litigate the worth of a human being is repugnant enough; however, if the state insists upon putting the grieving, weeping widow on the stand, then you have the right to also have her inform the jury how the deceased used to drink away the food money and beat her and the children routinely, sometimes to the extent of breaking bones.

One of the seminar speakers discussed pointing this out as an additional reason why investigative assistance will be needed.

There is much more material; however, time and space concerns require that additional information be provided in later articles. If there are any questions, please contact CTU members RIGHT AWAY!

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NATIONAL ASSOCIATION OF SENTENCING ADVOCATES 1ST ANNUAL CONFERENCE - JUNE 18-19, 1993 Omni Severin Hotel, Indianapolis, Indiana

The Conference is co-sponsored by The Sentencing Project. Featured speakers for the Conference are:

Raymond Brown, Jr. of Brown & Brown P.C., Newark, New Jersey; founding member, NACDL; Fellow, American College of Trial Lawyers; frequent lecturer and noted author; profiled in *The Champion*, Jan./Feb. 1992.

Paul Mones, nationally known criminal defense attorney; specialist and developer of battered child syndrome; recently worked on a successful battered person syndrome defense; author of *When a Child Kills*.

Malcolm Young, Executive Director, The Sentencing Project based in Washington, D.C., which is a national non-profit organization promoting sentencing reform and alternative sentencing.

Marc Mauer, Assistant Director, The Sentencing Project; author of *Americans Behind Bars: One Year Later* and *Young Black Men and the Criminal Justice System: A Growing National Problem.*

J. Vincent Aprile, II, General Counsel, Department of Public Advocacy, Kentucky for 17 years; argued 4 cases in the U.S. Supreme Court; faculty member NCDC, Macon, Georgia; currently handles death penalty trials, appeals and post-conviction in state and federal courts.

Marsha Shein, President, Sentencing and Parole Alternative Planning, Atlanta, Georgia; author of *Sentencing Defense Manual: Advocacy, Practice and Procedure.*

CLE Credits will be available for attorneys. Registration fee for the Conference is $120 for NASA members and $180 for non-members. Hotel rates are $60 per night, plus taxes.

For more information, contact Gayle Hebron, NASA, 918 F Street, N.W., Suite 501, Washington, D.C. 20004; (202) 628-0871.

PLAIN VIEW

THE ROUT CONTINUES

It was just a few short months ago that we had Section Ten of the Kentucky Constitution, standing proudly as a guarantee of the rights of privacy and security separately and apart from the diminishing and weakened federal Fourth Amendment. Then, along came ***Crayton v. Commonwealth***, Ky., ___ S.W. 2d ___ (November 19, 1992), in which the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984) was incorporated into Section Ten. Now drops this other shoe.

The case is ***Holbrook and Petty v. Knopf***, Ky., ___ S.W.2d ___ (12/17/92). It arose on a writ of prohibition filed by the Jefferson County District Public Defender's Office, following the granting of a motion by the prosecution to obtain body samples following an indictment alleging rape, sodomy, and sexual abuse. The writ alleged that under Section One of the Kentucky Constitution that the defendants had a separate right of personal security, and that Section Ten of the Kentucky Constitution allowed only for searches of places and not persons. The Court of Appeals denied the writ. The Kentucky Supreme Court affirmed the denial in a unanimous opinion written by Justice Leibson.

The court first reaffirms that the Federal Constitution allows for the taking of body samples under the Fourth Amendment, citing ***Schmerber v. California***, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966). "[T]he fact of indictment, coupled with the prosecutor's motion and affidavit, and the decision of a judicial officer that the scope of the examination is reasonable and should be so ordered, taken together are the equivalent of a legally obtained search warrant procedure."

The court dispatched the Section Ten argument quickly. The court saw no difference between the language of Section Ten and the Fourth Amendment. The court did not end there, and hence the damage that was done to our state constitution. The court noted that in ***Estep v. Commonwealth***, Ky., 663 S.W. 2d 213 (1984), the court had held that "state protection should be interpreted coextensively with federal guarantees." I believe that reads ***Estep***, which brought the ***Illinois v. Gates*** case under Section Ten, much too broadly. ***Estep*** did not say that Section Ten would always be coextensive with the Fourth Amendment. Indeed, many observers believe the Fourth Amendment has shrunk considerably since 1984. Does this case mean that Section Ten is tied to the national interpretation of the Fourth Amendment, no matter how stingy that interpretation? Or does Section Ten mean what it meant at the time of ***Estep***?

Let us hope that the court is finished for the time with their diminishment of Section Ten. Counsel should continue to assert that our constitution should be read separately, and that where appropriate the rights established there extend beyond that of the ever-diminishing Fourth Amendment.

IS RACE A FACTOR?

Statistics regarding the disproportionate impact of the criminal justice system on minorities are readily available. Indeed, recently the National Center on Institutions and Alternatives reported that a whopping 56% of "Baltimore, Maryland's young African American males were under some form of criminal justice sanction on any given day in 1991."

Given this context, it was heartening to read in the January 5, 1993 *Kentucky Post* that Federal District Judge William O. Bertelsman had expressed his concerns regarding "possible racial imbalance in the number of people being stopped as drug sus-pects." "'What's bothering me for some time now is almost everybody you bring in here is black'", stated the judge to a narcotics officer testifying during a motions hearing.

According to Cincinnati Police Officer James McKiernan, race "'is not **the** factor. It can be one of many factors.'" Yet, under questioning, McKiernan could not recall stopping one white woman in 1992.

Interestingly, in the case where this question was raised involving a suspicionless stopping of a 48 year old black woman, another officer testified that Los Angeles gangs have attempted to travel "inconspicuously by dressing conservatively."

Given the high profile that this subject is now receiving in the federal courts in this area, counsel should not hesitate to explore in a suppression hearing the role race is playing in the stopping and searching of individuals.

The Short View

1. ***Davis v. State***, 422 S.E.2d 546 (Ga. 1992). The Georgia Supreme Court held that a ten year old boy could not consent to a search of his parents' bedroom. The boy had called 911 after "anti-drug" classes at school, in an effort to get his parents some "help". Thus, evidence the police found in the bedroom after they entered the home and searched it had to be suppressed.

2. ***U.S. v. Gilmer***, D.C. Colo., 52 Cr. L. 1368 (1/19/93). The evidence obtained as a result of an illegal search cannot be used under some circumstances in sentencing in the federal system. Here, the police already had a solid case against the defendant when they used a purported protective sweep outside of the apartment to search the defendant's apartment. Because the exclusionary rule is meaningless in some cases under the federal guidelines if it is not to apply at sentencing, and as a result of the officers' indifference to the legality of their search, the court ordered the defendant sentenced without regard to the suppressed evidence.

3. ***State v. Silvestri***, N.H. Sup. Ct., 52 Cr. L. 1384 (12/29/92). A search warrant to search a house for marijuana is defective where the informant does not state that he purchased or saw marijuana at the defendant's house. The problem with such an affidavit is that there is no nexus between the illegality and the house, and thus the evidence seized as a result should have been suppressed.

4. ***State v. Quino***, Hawaii, (10/28/92). Under Article I, Section 7 of the Hawaii

Constitution, a person on an airplane is seized when the police ask for permission to search luggage, contrary to the recent federal seizure standard established in ***California v. Hodari D.***,499 U.S. ___, 111 S.Ct. ___, 113 L.Ed. 2d 690 (1991).

5. ***People v. Henry***, NY Sup. Ct., App. Div., 1st Dept., 52 Cr. L. 1327 (12/29/92). The police suspected Henry of trafficking in heroin after hearing a wired telephone conversation in code. When he put a box into a car and left, the police followed, pulled him over on the highway, and with machine guns drawn removed him by force, handcuffed him, and forced him to lie face down on the ground. The court reversed due to the manner in which the search was conducted. "The requirement that searches and seizures be reasonable limits the police use of unnecessarily frightening or offensive methods of investigation... The manner in which the stop and search were carried out is as much a part of that search as any other element. The overly intrusive nature of this law enforcement action requires us to suppress all the evidence so acquired."

6. ***Commonwealth v. Parker***, Pa. Super. Ct., 52 Cr. L. 1406 (1/4/93). A common scenario along our interstates has been condemned by the Pennsylvania Superior Court. According to the court, when a person is lawfully stopped for a motor vehicle violation, the police detain him for Fourth Amendment purposes when they request to search his car for drugs. Thus, where the police do so without probable cause or an articulable suspicion, any evidence seized cannot be used against the accused.

7. ***Cochran v. Commonwealth***, Va. Ct. App., 52 Cr. L. 1419 (1/26/93). It is an unreasonable seizure for a police officer to tell a passenger in a parked vehicle to stay in the vehicle without an articulable suspicion of any kind. Thus, PCP thrown away during the illegal detention should have been suppressed.

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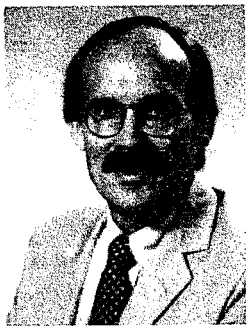

16 YEAR PUBLIC DEFENDER VETERAN APPOINTED TO HEAD OF DPA TRIAL SERVICES

"On March 8, 1993, Public Advocate **Allison Connelly** announced the appointment of **Ernie Lewis** to be the Manager of the newly created Trial Services Branch. Ernie has been a full-time public defender with the Department of Public Advocacy since November of 1977, first as an appellate attorney from 1977-1980, and then as a manager with the Trial Services Branch in Frankfort. In 1983, he moved to Richmond, Kentucky, where he began the Madison County Public Defender's Office. Since 1985, he has been a DPA regional manager in charge of supervising the Somerset and London Public Defender Offices as well as continuing to direct the Richmond Office. Ernie is a faculty member of NCDC's Trial Practice Institutes, the preeminent criminal defense training in the nation.

The Trial Services Branch joins the Post-Trial Branch, the Capital Branch, and the Law Services and Law Operations Branch as the replacement for the Defense Services Division of DPA. Each of the managers of the branches will be directly under the Public Advocate. This new structure will result in greater attention being given to trial level services in Kentucky's 120 counties. Ernie will supervise a Contract Administrator, who will be administering the contracts in DPA's 77 contract counties, and a Field Director who will supervise DPA's full-time trial offices. He will also continue to direct the Richmond Public Defender's Office, as well as maintain a caseload there, including capital cases. He currently is representing 3 capital clients: Gene Gall, Jr., Martin Mendoza, and Randy Haight.

In appointing Ernie, Allison Connelly said, "Ernie has been a role model for criminal defense attorneys for many years. He has also been a vocal leader among the DPA field attorneys. He has persuasively pressed for trial level training, fair pay and fair caseload levels. We are fortunate to have such an incredibly fine lawyer and true believer as the new leader for all our trial operations."

LET'S HAVE THAT LICENSE - MAYBE!

Commonwealth of Kentucky v. Wanda Raines

In a decision that creates as many questions as it answers, the Supreme Court, on February 18, 1993, addressed the appropriate procedure for pretrial license suspension pursuant to KRS 189A.200.

FACTUAL BACKGROUND

At 12.01 a.m., July 1, 1991, KRS 189A.200, a statutory procedure purporting to allow the pretrial suspension of the driving privilege for certain classes of drivers charged with DUI took effect. One hour and 30 minutes later the Jefferson County Police arrested Wanda Raines in Prospect, Kentucky, and charged her with DUI. No designation appeared on the citation as to the level of offense.

The next morning, Ms. Raines and her attorney, the Hon. David Stengle, appeared in the Jefferson District Court to answer the charge of First Offense DUI. At the arraignment, without alleging the source or reliability of his information, the prosecutor moved to amend the citation to charge Second Offense and to suspend pursuant to KRS 189A.200.

This prompted an objection from defense counsel, and, eventually, a written order and opinion from District Judge Thomas Merrill that the statutory suspension scheme failed to adequately protect the citizens interest in having a license and violated the separation of powers doctrine. As such, the entire scheme, as a whole, was struck down by Judge Merrill's order, at least in Jefferson County.

From that order, the Commonwealth sought to certify the law. In other areas of the state, various courts wrestled with the apparent unfairness of the statutory scheme and devised various alternatives, ranging from strict adherence to the statute, to granting a full blown hearing prior to suspension.

THE STATUTE INVOLVED

KRS 189A.200(1) purports to allow, in a DUI case, that "at arraignment or as soon as such relevant information becomes available," the pretrial suspension of the driving privilege for any person who:

(a) Has refused the test as reflected on the citation;

or

(b) Is under 21;

or

(c) Has a prior conviction or prior refusal in the last 5 years.

The statute contains no guidance as to the level or quality of proof required as to these factors, nor does it assign the burden. It is silent as to rebuttal offered by the defendant and the amount of discretion, if any, left to the Court. KRS 189A.200(2) does provide for judicial review, upon a request by the affected party, however not without certain cost. In refusal cases, pursuant to KRS 189A.200(2), a request for review triggers a potentially longer post-trial suspension period.[1] Finally, pursuant to KRS 189A.200(6), day for day credit is given towards any eventual post-trial suspension for the pretrial suspension period.

SUPREME COURT STRIKES DOWN PRETRIAL SUSPENSIONS FOR UNDER 21 OFFENDERS

Despite the fact that 1) the Jefferson District Court treated the statute as a whole; 2) the case itself involved a multiple offender suspension; and 3) there was some previous, although questionable, authority seemingly supporting the discrimination involved in age only based suspension,[2] the Court, at oral argument, revealed a deep concern for the under 21 section of the statute.[3] The bulk of debate between the parties and the Court centered on the rationality of such a classification, despite the fact that both parties briefed the issue as if the statute was either wholly valid or wholly invalid.

In ***Massachusetts Board of Retirement v. Murgia***,[4] the United States Supreme Court established that in cases of alleged age discrimination the classification at issue must be rationally related to a legitimate state interest. In ***Murgia***, the Court upheld a statute that required all uniform police officers to retire at age 50. The Court found that the requirement rationally furthered the State's legitimate interest in physically fit police officers.

In ***Praete v. Commonwealth***,[5] the Kentucky Court of Appeals applied the ***Murgia*** rationale to the KRS 189A.070 (2) post-conviction suspen-sion statute involving offenders between 16 and 18 years old. Despite the statutory suspension period for *adult* offenders, which at the time was as little as 30 days for a first offender, the Court upheld suspension for 16 to 18-year-olds as lasting until 18 or the length of the adult suspension, whichever was longer. The sparsely reasoned decision apparently found that the State's interest in public safety was rationally furthered by carving out from the class of *all* "minor" citizens[6] a subclass of those who by being convicted of DUI had demonstrated their lack of maturity. The Court did not address those offenders under 16 years of age, who would not be subject to the 189A.070(2) punishment, despite their even greater lack of maturity, and only paid lip service to the fact that post-18, pre-21-year-old drivers evidenced the same lack of maturity and were equally ineligible to purchase alcohol. No discretionary review was sought from this opinion, and the Commonwealth did not raise this case in its original brief or at oral argument in support of the statute.

In ***Raines***, the Court wrote as if on a virtually clean slate. Without citation to authority, the Court flatly held that:

"[N]o rational argument is shown to exist for this [under 21] classification. Such a classification, based on this age, is manifestly unreasonable and arbitrary."

As such, KRS 189A.200(1)(b) violates both the federal and state constitutions. As there were no dissenters from this decision, and based on the tenor of the oral argument, the Court's position in this area seems unlikely to change. Of curious note is the Court's failure to

adequately address the apparent conflict with ***Praete.***[7] The Court, stated only that "***Praete v. Commonwealth*** [citation omitted] is clearly distinguished." The eventual clarity of this distinction remains to be seen. At oral argument, the division among the Court on this issue dealt with the rational basis. Some members of the Court seemed swayed by the fact that under 21-year-olds were not permitted to purchase alcohol, while another block perceived the appropriate factor to be that no law precluded under 21-year-olds from consuming alcohol. Clearly, it was some combination of these 2 positions that was used to decide ***Praete.***[8] Equally clear, by the above holding, is the position that was victorious in the eventual ***Raines*** opinion. Despite the Court's attempt to distinguish ***Praete,***[9] it's continued vitality must be viewed as logically questionable. While public safety is clearly a legitimate state interest, the rationality of the 2 schemes do not seem to be legally distinguishable. Only a perfected appeal on this issue will tell.

THE COURT CLARIFIES THE APPROPRIATE PROCEDURE FOR PRETRIAL SUSPENSION IN THE REMAINING 2 CLASSIFICATIONS

Given the *facts* of ***Raines,***[10] clearly the Commonwealth's position that such a procedure passed constitutional muster was, from the outset, difficult to square with the existing constitutional case law. In prior cases involving license deprivation, the United States Supreme Court had followed a balancing test first derived from ***Matthews v. Eldridge.***[11] The Kentucky Supreme Court adopted that test in ***Division of Drivers License v. Bergman.***[12] The over-riding principle in the decided cases was, apparently, that the United States Supreme Court had allowed license suspension without a presuspension hearing. Despite the argument that by attaching the relative weights to the various factors drawn from the precedents, the Kentucky scheme clearly failed to balance, the ***Raines*** court remained unimpressed. Additionally, in spite of Kentucky jurisprudence clearly outlining that the Court would not legislate from the bench by supplying clarifying language to an unambiguous but insufficient statute,[13] the Court upheld the statute *and* delineated the appropriate hearing procedures.

Anticipating this possibility, the brief for ***Raines*** argued alternatively that KRS 189A.200 was unconstitutional under the balancing test of ***Matthews***, as well as arbitrary under Article 2 of the Kentucky Constitution *or* that if not unconstitutional, the statute was clearly lacking in sufficient guidance for the trial courts. The Court, although appearing at oral argument inclined to strike the entire scheme, adopted, instead, the guidance position, acknowledging its apparent conflict with prior authority.[14] In upholding the pretrial suspensions on the remaining 2 classifications,[15] the Court left open several questions for future litigation. The Court held:

> Any prior offenses, as described in KRS 189A.200(1)(c), or any refusal to submit to a test as described in KRS 189A.200 (1)(a), may be fairly determined by prima facie evidence produced by the prosecution. While KRS 189A.200 does not state a standard by which the trier of fact must determine that one of the factors exists warranting a pretrial suspension, the prosecution must present some evidence of the factor in order to satisfy minimal due process requirements. Merely stating that the defendant has prior offenses under this section is insufficient. Inherent in the statute, the trier of fact must find prima facie evidence that the factor exists. A judge, in other words, goes beyond a ministerial act and, at least, adjudicates that there is a sufficient evidentiary basis.

As such, the District Court's opinion, at least as to Wanda Raines, and those similarly situated, was upheld.

NO VIOLATION OF SEPARATION OF POWERS

The ***Raines*** court, in deciding to require the trial court to have prima facie proof prior to suspension, had decided the separation of powers issue. It was the mere rubber stamp procedure employed in the original district court action, for which the Commonwealth sought the Court's approval, that would have violated the separation doctrine. Having guaranteed, by its decision on the due process issue, that the trial court would have something to decide, the result became obvious on this point.

ISSUES LEFT UNDECIDED

As such, pretrial suspension remains possible, but the procedure struck down by Judge Merrill remains far from a closed issue. Clearly, some level of proof must now be presented prior to the court ordering pretrial suspension. To the extent that this was neither obvious from the statute itself nor the procedure employed in Judge Merrill's court, the ***Raines*** court gave new protections to suspected offenders facing potential pretrial suspension. Not answered by the Court were the everyday issues faced by DUI practitioners. To what extent may a license be suspended based upon a citation marked refusal[16] where in reality the suspect merely failed to blow hard enough to register? To what extent is a prior refusal, occurring at a time prior to the enactment of KRS 189A.005(2),[17] a valid trigger for pretrial suspension now? To what extent is a D.O.T. printout prima facia evidence in light of the ***Willis/Goins***[18] decision casting doubt on the evidentiary validity thereof. If it is the status of having a prior offense that passes muster under the ***Matthews*** test approved in ***Raines***, to what extent may a sub-class of those eligible for pretrial suspension be dependent upon a new arrest for which the individual is constitutionally entitled to be presumed innocent? What weight, if any, must be given to the defendant's protestations as to the alleged qualifying suspension factor? May the Commonwealth exact a price, lengthened suspension, from those offenders who avail themselves of the very post-suspension judicial review that validates the pretrial suspension scheme.[19] Clearly, the Supreme Court, in deciding to guide the trial courts rather than require that the Legislature adequately perform that function, has jumped head long into this continuing controversy. As advocates for those effected by this statutory scheme, it is up to all of us to help the Court further define the protections and limitations on those alleged DUI offenders who are, after all, presumed innocent.

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[Rob Riley along with Ed Monahan represented Wanda Raines on appeal before the Kentucky Supreme Court.]

FOOTNOTES

1) See OAG 92-158

2) *Praete v. Commonwealth*, 722 S.W.2d 602 (Ky.App. 1987)

3) KRS 189A.200(1)(b)

4) 427 U.S. 307 (1976)

5) 722 S.W.2d 602 (Ky.App. 1987)

6) Defined as those under 18 years of age.

7) See Note 5

8) *Id.*

9) *Id.*

10) An oral motion to amend not clearly supported by any evidence.

11) 424 U.S. 319 (1976). The factors involved were 1) the nature and weight of the private interest effected; 2) the risk of erroneous deprivation from the procedures involved; and 3) the state's interest including the burden from additional safeguards.

12) 740 S.W.2d 948 (Ky. 1987)

13) See *Mussleman v. Commonwealth*, 705 S.W.2d 476 (Ky. 1976); *Commonwealth v. Foley*, 798 S.W.2d 947 (Ky. 1990).

14) *Id.*

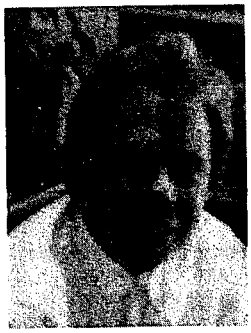
15) The prior refusals or convictions and the current refusals.

16) Now clearly defined by KRS 189A.005(2) so as to not include a mere failure to blow hard enough to register a sample.

17) Routinely being a failure to blow hard enough to register a sample.

18) 719 S.W.2d 440 (Ky. 1986). See also *Commonwealth v. Dean*, 732 S.W.2d 887 (Ky. 1987), holding that DOT records do not constitute evidence of suspension.

19) KRS 189A.220(2)



ROB RILEY APPOINTED FIELD DIRECTOR

On March 11, 1993, Public Advocate **Allison Connelly** appointed **Rob Riley** to be the newly created Trial Services Field Director.

For 10 years Rob has been a full-time public defender at the LaGrange Field Office, serving as Directing Attorney for the past 2-1/2 years. During 1992 he served as acting Western Regional Manager overseeing the LaGrange, Hopkinsville and Paducah field trial offices.

The Field Director's responsibilities will effectively encompass those duties formerly provided by the three regional managers. These duties will include supervision of the directing attorneys, planning for appropriate staffing, facilitating the flow of information within the Trial Services Branch, identifying problems, and assisting the Director of Trial Services and the Public Advocate where necessary to improve the delivery of services through the field office system.

In appointing Rob, Allison Connelly said, "Rob brings energy, experience, creativity, and enthusiasm to this new position. He is a fierce advocate who passionately believes in equal justice. As field director, I have complete confidence that the same skills that have made Rob such a successful defender will be used to benefit all the field offices and the many clients they serve."

SIXTH CIRCUIT HIGHLIGHTS

Third-Party Communication with Jury

In *White v. Smith*, 984 F.2d 163, 22 SCR 3, 14 (1993), the Sixth Circuit Court of Appeals concluded that the Constitution did not require a trial court to *sua sponte* conduct a full-blown evidentiary hearing every time a courtroom spectator makes a comment within the jury's hearing.

At White's trial, as the jury was preparing to leave the courtroom to deliberate, his mother told jurors "I will pray for you." This relatively innocuous remark was followed by the trial court's careful admonition which included glowing comments about Mrs. White's character.

Although the defense moved twice for a mistrial, a hearing was never requested to assess the impact of the comment on the jurors. The Court found that counsel's failure to request a hearing and his waiver of the opportunity to poll the jurors greatly undercut any claim that the comment presumptively affected the jury's impartiality.

The Sixth Circuit stated that it is ordinarily advisable for a trial judge to conduct a hearing when there is a third-party communication with the jury. However, where the communication is innocuous and initiated by a spectator in the form of an outburst, a hearing is not necessarily required when none is requested and the court admonishes the jury.

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"Justice forms the cornerstone of each nation's law"
Alexis De Tocqueville

ASK CORRECTIONS:

Parole Eligibility after Sanders

As you are aware the Department of Public Advocacy has had to reduce the size and publication schedule of *The Advocate.*

As a result, the "Ask Corrections" column has taken a vacation during the last several issues. A vacation which we, the authors feel was needed having exhausted numerous questions covering sentence calculation, parole eligibility, and resident record cards.

Well, it is time to come off that vacation due to a recent Supreme Court decision. On November 19, 1992, the Kentucky Supreme Court rendered a decision which affected how parole eligibility is calculated under the provisions of KRS 439.3401 (Parole for Violent Offenders), ***William Edward Sanders v. Commonwealth of Kentucky***, ___ S.W.2d ___ (1993). This decision became final February 18, 1993.

The Supreme Court in that decision concluded that it was the intention of the legislature to require service of fifty percent (50%) of a term of years or twelve (12) years, **whichever is less** before parole eligibility. Thus setting a cap or ceiling of twelve (12) years.

As a result of this ruling a person convicted of a violent offense would serve fifty percent (50%) of the sentence imposed or twelve years, which ever is less for parole review.

The Corrections Cabinet, Offender Records, is presently reviewing cases which fall under the provisions of KRS 439.3401 to ascertain what effect, if any, this decision will have on the resident's parole eligibility date.

As a result of the ***Sanders*** decision, the following revised *Certification on the Calculation of Parole Eligibility* has been prepared by Karen Defew Cronen in her capacity as Administrator of Offender Records for the Corrections Department.

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COMMONWEALTH OF KENTUCKY
DEPARTMENT OF CORRECTIONS

CERTIFICATION ON THE CALCULATION OF PAROLE ELIGIBILITY

I, Karen DeFew Cronen, certify that I am Administrator of Offender Records, Department of Corrections, Commonwealth of Kentucky, and that in my official capacity all offender records of the Department of Corrections are maintained and in my custody and that the following are true and accurate methods of the calculation of parole eligibility under parole regulations which use the twenty percent (20%) of time served criteria, and true and accurate methods of the calculation of parole eligibility under KRS 439.3401 (Parole for Violent Offenders) for crimes identified by the Department of Corrections, Office of General Counsel.

/s/Karen DeFew Cronen, Administrator of Offender Records.

CALCULATION OF PAROLE ELIGIBILITY UNDER PAROLE REGULATIONS WHICH USE THE TWENTY PERCENT (20%) OF TIME SERVED CRITERIA, FOR CRIMES COMMITTED AFTER DECEMBER 3, 1980, LENGTH OF TIME TO SERVE FOR PAROLE ELIGIBILITY:

LENGTH OF SENTENCE	TIME SERVICE FOR ORIGINAL ELIGIBILITY --MINUS JAIL TIME
1 YEAR UP TO BUT NOT INCLUDING 2 YEARS	4 MONTHS
2 YEARS	5 MONTHS
2 YEARS & 6 MONTHS	6 MONTHS
3 YEARS	7 MONTHS
3 YEARS & 6 MONTHS	8 MONTHS
4 YEARS	10 MONTHS
4 YEARS & 6 MONTHS	11 MONTHS
5 YEARS	1 YEAR
5 YEARS & 6 MONTHS	1 YEAR & 1 MONTH
6 YEARS	1 YEAR & 2 MONTHS
7 YEARS	1 YEAR & 5 MONTHS
8 YEARS	1 YEAR & 7 MONTHS
9 YEARS	1 YEAR & 10 MONTHS
10 YEARS	2 YEARS
11 YEARS	2 YEARS & 2 MONTHS
12 YEARS	2 YEARS & 5 MONTHS
13 YEARS	2 YEARS & 7 MONTHS
14 YEARS	2 YEARS & 10 MONTHS
15 YEARS	3 YEARS
16 YEARS	3 YEARS & 2 MONTHS
17 YEARS	3 YEARS & 5 MONTHS
18 YEARS	3 YEARS & 7 MONTHS
19 YEARS	3 YEARS & 10 MONTHS

LENGTH OF SENTENCE	TIME SERVICE FOR ORIGINAL ELIGIBILITY --MINUS JAIL TIME
20 YEARS	4 YEARS
21 YEARS	4 YEARS & 2 MONTHS
22 YEARS	4 YEARS & 5 MONTHS
23 YEARS	4 YEARS & 7 MONTHS
24 YEARS	4 YEARS & 10 MONTHS
25 YEARS	5 YEARS
26 YEARS	5 YEARS & 2 MONTHS
27 YEARS	5 YEARS & 5 MONTHS
28 YEARS	5 YEARS & 7 MONTHS
29 YEARS	5 YEARS & 10 MONTHS
30 YEARS	6 YEARS
31 YEARS	6 YEARS & 2 MONTHS
32 YEARS	6 YEARS & 5 MONTHS
33 YEARS	6 YEARS & 7 MONTHS
34 YEARS	6 YEARS & 10 MONTHS
35 YEARS	7 YEARS
36 YEARS	7 YEARS & 2 MONTHS
37 YEARS	7 YEARS & 5 MONTHS
38 YEARS	7 YEARS & 7 MONTHS
39 YEARS	7 YEARS & 10 MONTHS
MORE THAN 39 YEARS, UP TO AND INCLUDING LIFE	8 YEARS
PERSISTENT FELONY OFFENDER 1ST DEGREE	10 YEARS

CALCULATION OF PAROLE ELIGIBILITY UNDER KRS 439.3401 (PAROLE FOR VIOLENT OFFENDERS) FOR CRIMES IDENTIFIED BY THE DEPARTMENT OF CORRECTIONS, OFFICE OF GENERAL COUNSEL:

I. FOR CRIMES COMMITTED AFTER JULY 15, 1986, TIME SERVICE FOR ORIGINAL ELIGIBILITY -- MINUS JAIL TIME:

CAPITAL OFFENSES:
FOR THE CRIMES OF MURDER, OR KIDNAPPING (WHICH INVOLVES THE DEATH OF THE VICTIM), OR COMPLICITY TO MURDER, OR KIDNAPPING (WHICH INVOLVES THE DEATH OF THE VICTIM).

SENTENCES OF A NUMBER OF YEARS	50% OF SENTENCE IMPOSED OR 12 YEARS - WHICHEVER IS LESS
SENTENCES OF LIFE	12 YEARS

CLASS A & B FELONIES:
FOR THE CRIMES OF MANSLAUGHTER I, RAPE I, SODOMY I, ASSAULT I, KIDNAPPING (WHERE THERE IS SERIOUS PHYSICAL INJURY OF THE VICTIM), ARSON I (WHERE THERE IS SERIOUS PHYSICAL INJURY OR DEATH), OR COMPLICITY TO MANSLAUGHTER I, RAPE I, SODOMY I, ASSAULT I, KIDNAPPING (WHERE THERE IS SERIOUS PHYSICAL INJURY OF THE VICTIM), ARSON I (WHERE THERE IS SERIOUS PHYSICAL INJURY OR DEATH).

SENTENCES OF A NUMBER OF YEARS	50% OF SENTENCE IMPOSED OR 12 YEARS - WHICHEVER IS LESS
SENTENCES OF LIFE	12 YEARS

EXEMPTIONS FROM KRS 439.3401 FOR VICTIMS OF DOMESTIC VIOLENCE AND ABUSE. PER KRS 439.3401(4), THIS SECTION SHALL NOT APPLY T A PERSON WHO HAS BEEN DETERMINED BY A COURT TO HAVE BEEN A VICTIM OF DOMESTIC VIOLENCE OR ABUSE PURSUANT TO KRS 533.060 WITH REGARD TO THE OFFENSES INVOLVING THE DEATH OF THE VICTIM OR SERIOUS PHYSICAL INJURY TO THE VICTIM (EXEMPTION DOES NOT EXTEND TO RAPE 1ST DEGREE OR SODOMY 1ST DEGREE BY THE DEFENDANT).
THE FINDING OF THE COURT SHALL BE NOTED IN THE FINAL JUDGMENT.

CALCULATION OF PAROLE ELIGIBILITY FOR SENTENCES OF DEATH, OR LIFE WITHOUT BENEFIT OF PAROLE FOR 25 YEARS, TIME SERVICE FOR ORIGINAL ELIGIBILITY -- MINUS JAIL TIME:

DEATH SENTENCE	NONE
LIFE WITHOUT BENEFIT OF PAROLE FOR 25 YEARS	25 YEARS

I, a Notary Public in and for the State of Kentucky do certify that the foregoing instrument was produced before me by Karen DeFew Cronen, Administrator of Offender Records, Department of Corrections, Commonwealth of Kentucky, on this 22nd day of February, 1993 and signed by her in my presence.
/s/Camille Stewart, Notary Public, State of Kentucky, My Commission expires: 1-24-96

MARGARET CASE NAMED HEAD OF POST-TRIAL SERVICES

Public Advocate **Allison Connelly** announced the appointment of **Margaret Case** to the position of Post-Trial Services Branch Manager. The Post-Trial Services Branch is a new creation, a combination of the former Appellate and Post-Conviction Branches.

Margaret was a law clerk for the DPA Appellate Branch during 1980-81. She then took a year-long appointment as law clerk to the Hon. G. Wix Unthank, U.S. District Judge for the Eastern District of Kentucky. For the next 7 years, she engaged in the private practice of law. During this time, she was an "Of Counsel" attorney for the DPA Appellate Branch.

In 1989, Margaret returned to DPA, as a full-time staff attorney for the mixed trial/post-conviction office at Northpoint Training Center. In 1991, she transferred to the DPA Appellate Branch in Frankfort.

As manager of the new DPA Post-Trial Services Branch, Margaret will be responsible for seeing that quality legal representation is afforded indigent persons in proceedings subsequent to their trials, whether those services are provided by our full-time public defenders or by "Of-counsel" program participants.

In appointing the new branch manager, Ms. Connelly noted, "We are extremely fortunate in finding someone with Margaret's exceptionally broad range of DPA experience for this unique position. She brings a high level of energy, commitment, dedication, and organization to the work of this new branch."

HONORING A DECADE OF *ADVOCATE* SERVICE

This issue of *The Advocate* is the first in a decade without **Cris Brown** as Managing Editor. She leaves her role with *The Advocate* under the Department's recent restructuring, which will devote more resources to the capital trial effort, to meet the seemingly infinite demand for assistance in those life and death cases. Cris had been working for both the Capital Trial Unit and the Training Unit. She will now work exclusively in support of the defense of capital trials, where she specializes in mitigation work.

Through these years Cris has hurdled mountains to insure *The Advocate* was produced. She has implemented vast improvements, including moving the format to Ventura Desktop Publishing. Her years of work are characterized by fierce dedication and commitment to the education of defenders of those in need of competent assistance. Her efforts and self-sacrifice have been monumental. Under a huge volume of work, demanding circumstances and significant competing duties her devotion to *The Advocate* remained preeminent.

"Cris has distinguished herself," said Ed Monahan, *Advocate* Editor, "with her passion to produce the highest quality defender magazine to help our many defenders who fight under immense difficulties. She has provided all our indigent clients with an enormous service. We all have benefitted from her continuous personal sacrifice over these many years. Kentucky's capital litigation, which is so underresourced, is fortunate to have her undivided talents."

AN R FOR V/D OR: HOW TO PROTECT YOUR CLIENT'S RIGHTS TO (1) A FAIR JURY AND (2) DUE PROCESS IN JURY SELECTION

NATURE OF RIGHTS TO FAIR JURY AND DUE PROCESS IN JURY SELECTION

As trial counsel, you have the duty to protect each defendant's right to be tried by a fair and impartial jury, as well as the right to receive due process in the jury selection proceedings. This article is written to help you secure these rights, ideally, at the trial level; and alternatively at the appellate level. Due to length requirements, this article will not specifically address the Commonwealth's improper use of its peremptory challenges under ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The right to a fair and impartial jury is guaranteed by the 6th Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. This right encompasses not only the substantive right under the 6th Amendment, but it also encompasses the substantive due process right to fairness under the 14th Amendment to the United States Constitution. The harm which occurs from a violation of this right is that the accused is tried by a jury which includes at least one juror who is biased, partial, unfair, and/or not neutral.

The right to procedural due process in the course of jury selection is guaranteed by the 14th Amendment to the United States Constitution and Section 2 of the Kentucky Constitution. The harm which occurs from a violation of this right is that there is an interference, or denial, of your client's right to utilize the **procedures** established to ensure that a fair and impartial jury is empaneled. The harm which results from a violation of this right usually comes in the form of a denial of your client's right to freely exercise his peremptory challenges.

TWO TYPES OF CHALLENGES: CAUSE AND PEREMPTORY

In Kentucky the method for assuring that your client is tried by a fair and impartial jury includes the provision of **two types of challenges** that can be made of potential jurors:

1. **Challenges for Cause:** RCr 9.36 (1) provides:

"...[W]here there is **reasonable ground to believe that a juror cannot render a fair and impartial verdict on the evidence, he shall be excused as not qualified to serve.**

The number of challenges for cause is limitless.

2. **Peremptory Challenges:** RCr 9.36(2) provides:

"After the parties have been given the opportunity of challenging jurors for cause, each side or party having the right to exercise peremptory challenges shall be handed a list of qualified jurors drawn from the box equal to the peremptory challenges for all parties. Peremptory challenges shall be exercised simultaneously by striking names from the list and returning it to the trial judge.

RCr 9.40 sets forth the number of challenges allotted to each side in a criminal case. For a felony, the defendant or defendants jointly get 8. For a misdemeanor, the defendant or defendants jointly get 3. If 1 or 2 additional jurors are called, the number of peremptory challenges allowed each defendant shall be increased by 1.

If more than 1 defendant is being tried, each defendant shall be entitled to at least 1 additional peremptory challenge to be exercised independently of any other defendant.

TIMING OF CHALLENGES

The timing of the exercise of these two types of challenges is also set forth in the criminal rules.

Pursuant to RCr 9.36(1), "Challenges for cause shall be made first by the Commonwealth and then by the defense," and (3) "All challenges must be made before the jury is sworn. No prospective juror may be challenged after being accepted unless the court for good cause permits it."

BLACK LETTER PRINCIPLES RELATING TO CHALLENGES FOR CAUSE

1. The trial court must determine the existence of bias based on the particular facts of each case. ***Taylor v. Commonwealth***, Ky., 335 S.W.2d 556 (1960).

2. "A potential juror may be disqualified from service because of **connection to the case, parties, or attorneys** and **that is a bias that will be implied as a matter of law.** ***Randolph v. Commonwealth***, Ky., 716 S.W.2d 253 (1986).

3. "Irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such **a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses.**" ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713 (1992).

4. "Once that close relationship is established, without regard to protestations of lack of bias, the court should sustain a challenge for cause and excuse the juror." ***Ward v. Commonwealth***, Ky., 695 S.W.2d 404 (1985).

HOW COURT SHOULD RESOLVE DOUBT AS TO FOR-CAUSE CHALLENGES

"Even where jurors disclaim any bias and state they can give the defendant a fair trial, conditions may be such that their connection would probably subconsciously affect their connection would probably subconsciously affect their decision in the case. **It is always vital to**

the defendant in a criminal prosecution that doubt of unfairness be resolved in his favor. *Randolph v. Commonwealth*, Ky., 716 S.W.2d 253 (1986).

EXAMPLES OF ABOVE PRINCIPLES AS APPLIED TO FACTS WHERE FOR-CAUSE CHALLENGES SHOULD HAVE BEEN GRANTED

1. Juror who **Fails to Meet Statutory Qualifications** for jury service as set forth in KRS 29A.080.

2. Juror Who Has **Formed Opinion Regarding Guilt.**

Neace v. Commonwealth, 313 Ky. 225, 230 S.W.2d 915 (1950).

Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1992).

3. Juror Who Has A **Close Relationship With a Party, Attorney or Witness.** ***Ward v. Commonwealth***, Ky., 695 S/W.2d 404, 407 (1985).

A. Juror Who Has **A Close Relationship With a Party:**

a. **Married to a person who was a second or third cousin of the victim.** ***Marsch v. Commonwealth***, Ky., 743 S.W.2d 830 (1987).

b. **First cousin to victim.** ***Pennington v. Commonwealth***, Ky., 316 S.W.2d 221 (1958).

c. **Mother was first cousin to victim's mother.** ***Leadingham v. Commonwealth***, 180 Ky. 38, 201 S.W. 500 (1918).

d. **Wife was second cousin of defendant.** ***Smith v. Commonwealth***, Ky., 734 S.W.2d 437 (1987).

B. Juror Who Has A **Close Relationship With a Witness:**

a. **First cousin to key prosecution witness.** ***Sanborn v. Commonwealth***, Ky., 754 S.W.2d 534 (1988).

b. **Wife of arresting police officer.** ***Calvert v. Commonwealth***, Ky.App., 708 S.W.2d 121 (1986).

C. Juror Who Has A **Close Relationship With Attorney:**

a. **Uncle of Commonwealth Attorney.** ***Ward v. Commonwealth***, Ky., 695 S.W.2d 404, 407 (1985).

b. **Secretary to Commonwealth Attorney.** Position gave rise to a loyalty to employer that would imply bias. ***Randolph v. Commonwealth***, Ky., 716 S.W.2d 3 (1986).

c. **Manager of ambulance service,** which had a contract with the Ambulance Board **for which the prosecutor was the attorney,** and who had been asked as manager of the Ambulance Board to participate in the search for the defendants (who were charged with escape) and who had been held hostage in a previous escape. ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713 (1992).

d. **County attorney at the time of the defendant's preliminary hearing.** ***Godsey v. Commonwealth***, Ky.App., 661 S.W.2d 2 (1983).

e. Juror was **being represented by the prosecutor on a legal matter at the time of trial.** ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713 (1992).

f. **Cousin's son-in-law was the prosecutor.** ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713 (1992).

D. Miscellaneous

a. **Former police officer and present deputy sheriff.** ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713 (1992).

b. **Employee of the prison from which defendants escaped and who acknowledged he would give more credibility to a law enforcement officer's testimony and would feel "bad" about acquitting defendants if proof was not sufficient to show guilt.** ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713 (1992).

c. Outside patrolman and guard for prison who acknowledged he had spoken with persons in the prison regarding the escape. ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713 (1992).

UNSUCCESSFUL CHALLENGES WHICH SHOULD CONTINUE TO BE ASSERTED

The following are examples of challenges for cause that have been denied by the trial court and the denial upheld by the Kentucky Supreme Court. Although Kentucky law is not favorable on these grounds it is recommended that you continue to make challenges on these grounds.

1. Juror Was Victim of Similar Offense

Where defendant was on trial for robbery, fact that two prospective jurors had been robbery victims was not sufficient to render prospective jurors unqualified. ***Stark v. Commonwealth***, Ky., 828 S.W. 603, 608 (1991).

2. Juror Was Friend of Victim of Similar Offense

Where defendants were on trial for having engaged in sexual acts with young children, trial court's failure to excuse for cause a juror whose best friend's granddaughter had been abused and killed 14 years previously and about which juror had strong feelings was held not an abuse of discretion. However, the Kentucky Supreme Court indicated it would not have been an abuse of discretion if this juror had been excused for cause as unqualified. ***Stoker v. Commonwealth***, Ky., 828 S.W.2d 619, 625 (1992).

HOW TO PRESERVE FOR-CAUSE CHALLENGES AND PROTECT YOUR CLIENT'S RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY AS WELL AS HER RIGHT TO SUBSTANTIVE DUE PROCESS

1. Conduct a thorough job of questioning

the prospective juror to establish the actual or implied partiality. General questions of fairness and impartiality are not sufficient. Specific questions related to the facts of the case and your theory of defense must be asked. Attempt to elicit facts known by the juror or opinions held by the juror which reasonably could be expected to influence her decision. ***Miracle v. Commonwealth***, Ky., 646 S.W.2d 720, 723 (1983) (Leibson, J., concurring). "It often takes detailed questioning to uncover deep-seated biases of which the juror may not be aware. The cursory examination typically conducted y the trial court is often inadequate for this purpose." ***Trial Practice Series, Jury Selection, The Law, Art, and Science of Selecting a Jury***, Second Edition, James J. Gobert, Walter E. Jordon (1992 Cumulative Supplement, p. 23).

2. Timely move to strike the juror for cause, listing every reason which would require removal of the juror. In some appellate opinions the courts have described the jurors by listing several areas of bias which, when combined, required removal for cause. *See* ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713 (1992).

3. You have the option of using your peremptory challenges on any prospective jurors whom you believe should have been excused for cause. Theoretically, you should **not have** to use your peremptory challenges on such persons since the purpose of a peremptory challenge is to eliminate those individuals whose disqualifications do not rise to the level of a for-cause challenge, but whom you have some reason or gut feeling about that makes you believe they will not be able to be fair and impartial. However, to assure your client's right to be tried by a fair and impartial jury, you may have to use your peremptory challenges on these individuals.

If you use your peremptory challenges on the persons whom you challenged for cause, and you still believe there is a juror for whom you have a reason to use a peremptory challenge, and whom you believe will not be fair and impartial, you should do the following. State to the trial court that you used your peremptory strike to eliminate the specific juror(s) whom you challenged for cause. State that as a result a different juror whom you would have used your peremptory on is still on the jury. You should state you believe this juror is not fair and impartial and that your client's right to be tried by a fair and impartial jury has been denied, even though the juror's bias does not rise to a level of a for-cause challenge.

For example, your client is on trial for sex abuse of a minor. You determine through voir dire that prospective Juror A is related to the victim, and prospective Juror B is the grandmother of a victim of child abuse. You move to strike both Juror A and Juror B for cause. Under ***Marsch v. Commonwealth***, Ky., 743 S.W.2d 830 (1987), the trial court should strike Juror A. The law is not settled on whether Juror B must be stricken for cause. ***Stoker v. Commonwealth***, Ky., 828 S.W.2d 619 (1992). However, the trial court denies both your for-cause challenges. You use all your peremptory strikes on other for-cause challenges, including Juror A, and have none left to strike Juror B. You should then assert your position that Juror B cannot be fair and impartial and your client's right to a fair and impartial jury has been denied because you had no peremptories left to strike Juror B since you had to use a peremptory on Juror A who should have been stricken for cause.

You should also ask the trial court for an additional peremptory to use on Juror B.

4. There are some states that have adopted a rule requiring the defendant to first use his peremptory challenges on those unsuccessful for-cause challenges to ensure the actual jury has no tainted jurors. However, there is no such rule in Kentucky. Accordingly, ***Ross v. Oklahoma***, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) does not apply to Kentucky since this opinion was based on an Oklahoma rule requiring use of peremptory challenges to cure for-cause challenge errors. You may prefer to use your peremptory challenges as they are intended and then place into the record that you have chosen to use all your peremptories on those persons whose characteristics or circumstances do not rise to a for-cause challenge. You should then ask for extra peremptory challenges to remove those persons who should have been stricken for cause.

5. If you choose to use your peremptory challenges to cure a for-cause error, you should put into the record that you are doing so, and state you would have used each peremptory on a specifically named juror had you not felt constrained to use it on an unsuccessful for-cause challenge.

6. You must demonstrate, by stating in the record, that you used all your peremptory challenges and there are still unfair, biased juror(s) on the panel that actually served on the case. In addition, **be sure you make the jury strike sheet part of the record for appeal.**

In ***Sanders v. Commonwealth***, Ky., 801 S.W.2d 665, 669 (1991), it was observed that "[i]t is elementary logic and sound law that a defendant's right to be tried by an impartial jury is infringed if and only if an unqualified juror participates in the decision of the case." *See* also ***Williams v. Commonwealth***, Ky.App., 829 S.W.2d 942 (1992) where it was noted that to prevail on appeal and a defendant must demonstrate he used all his peremptories and an incompetent juror was allowed to sit who should have been stricken for cause.

How To Preserve A Denial Of Your Client's Right To Procedural Due Process

To establish that your client's right to freely exercise his peremptory challenges has been violated you must do the following:

1. Challenge for cause all persons you believe the law requires to be stricken.

2. Establish on the record that all of your client's peremptory challenges have been exhausted. **Be sure to make the jury strike sheet part of the record for appeal.**

3. If the trial court overruled any **one** of your for-cause challenges and you used a peremptory challenge to remove that person, your client's right to challenge peremptorily has been infringed and your client is entitled to a reversal of his conviction. ***Marsch v. Commonwealth***, Ky., 743 S.W.2d 830, 831 (1988).

4. To make your record for appeal, you should also indicate which persons you would have removed with a peremptory challenge, if you had not been forced to use them on for-cause jurors. While you do not need to articulate *why* you would have exercised a peremptory on the persons, it is more impressive to the appellate court if you have reasons, even if they do not rise to the level of for-cause reasons. Ask to introduce this

information by an avowal if you want to avoid revealing your thought processes to the Commonwealth. In ***Foster v. Commonwealth***, Ky., 827 S.W.2d 670, 676 (1992), the Kentucky Supreme Court stated that for there to be error, the defendant must use all of her peremptories and show that "her use of a peremptory to strike each venireman 'resulted in a subsequent inability to challenge additional unacceptable venireman.'"

In ***Swain v. Alabama***, 380 U.S. 202, 85 S.Ct. 824, 825, 13 L.Ed.2d 759 (1965) it was found that "[s]uch a denial or impairment of a right to peremptory challenges is reversible error without a further showing of prejudice."

Can Jurors Be Rehabilitated?

There is no "magic question" such as, "Can you set aside what you have heard, your connection, your religious beliefs, etc., and make a decision based only on the evidence and instructions given by the Court?" ***Montgomery v. Commonwealth***, Ky., 819 S.W.2d 713, 717-718 (1992). In ***Montgomery***, the Kentucky Supreme Court "declared the concept of 'rehabilitation' is a misnomer in the context of choosing qualified jurors and direct[d] trial judges to remove it from their thinking and strike it from their lexicon." *Id.* at 718.

The Kentucky Supreme Court has also held that prospective jurors' answers "to leading questions, that they would disregard all previous information, opinions and relationships **should not be taken at face value.**" ***Marsch v. Commonwealth***, Ky., 743 S.W.2d 830, 834 (1988). (Emphasis added). "Mere agreement to a leading question that the jurors will be able to disregard what they have previously read or heard, without further inquiry, is not enough...to discharge the court's obligation to determine whether the jury [can] be impartial." ***Miracle v. Commonwealth***, Ky., 646 S.W.2d 720, 722 (1983).

Be sure to object to the trial court's or the Commonwealth's use of leading questions in an attempt to rehabilitate an unqualified juror.

"Even where jurors disclaim any bias and state that they can give the defendant a fair trial, conditions may be such that their connection [to the case or the parties] would probably subconsciously affect their decision in the case." ***Randolph***, *supra*, at 255.

"It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty [or alcoholism or homosexuality or law enforcement personnel or other subject relevant to your case] would prevent him or her from doing so." ***Morgan v. Illinois***, ____ U.S. ____, 112 S.Ct. 2222, 2233, 119 L.Ed.2d 492 (1992).

How To Preserve Your Challenge To A Tainted Jury Pool

Often times you are faced with a jury pool containing persons from which a co-defendant's jury was selected or who were victims of the charged offense. Two recent cases have addressed the procedure for obtaining a different jury pool.

In ***Hellard v. Commonwealth***, Ky. App., 829 S.W.2d 427 (1992), the defendant was charged with theft by deception and forgery based on a forged rental agreement with a video store. The owner of the video store was a member of the jury pool from which the jurors were selected to hear the defendant's case. The defendant moved for a continuance of her trial until a new jury pool was called. The continuance motion was denied, but the trial court stated its ruling was subject to change if the defendant could show bias or prejudice during voir dire. The Kentucky Court of Appeals did "not feel that Hellard was required to show bias or prejudice under these circumstances." *Id.* at 429.

On appeal, the Commonwealth argued the defendant had waived the issue by failing to renew her continuance motion at the end of voir dire. However, reversing the defendant's convictions, the Kentucky Court of Appeals, relying on RCr 10.26, held the trial court erred in denying the original continuance motion because the "possibility of a jury according the testimony of a witness greater weight than it otherwise would have received is just too great when the witness is a member of the same jury pool."

Pelfrey v. Commonwealth, Ky., 842 S.W.2d 524 (1993), involves a situation similar to ***Hellard***, *supra*, but reaches the opposite result because the issue was not properly preserved for review. In ***Pelfrey*** the defendant moved for a continuance until a new jury pool could be empaneled because the jury that had convicted the defendant's companion one month earlier had been selected from this same jury pool. The trial court denied the continuance motion.

On appeal, the Kentucky Supreme Court held the trial court had not abused its discretion in denying the continuance motion because "there were adequate safeguards in place to assure an unbiased jury." These safeguards were for-cause and peremptory challenges. In addition, the defendant had conducted a thorough voir dire examination and had not challenged any prospective jurors for cause, and the trial court had admonished the jurors to consider against the defendant only what they heard from the witness stand.

The Kentucky Supreme Court further held that because the defendant had not challenged any of the prospective jurors for cause "we can only assume that he was satisfied with the jury." Also, "a continuance motion for a new panel is not the equivalent of individually challenging jurors for cause. Once trial counsel's general [continuance] motion was denied, his method for reviewing the bias issue was to specifically challenge jurors. Without doing so, counsel clearly waived his jury challenge."

Although Hellard was able to obtain relief on appeal despite failure to properly preserve the issue for review, you should not rely on the "manifest injustice" principle of RCr 10.26 to protect your client's rights to a fair and impartial jury. The lesson to be gleaned from ***Pelfrey***, *supra*, is that to properly preserve this issue for review you must do two things: 1) Move for a continuance, pursuant to RCr 9.04, until a new jury can be empaneled; 2) Challenge for cause, as biased and prejudiced, each and every juror on the tainted panel. You may also want to move to dismiss the entire jury panel pursuant to RCr 9.34.

Conclusion

With the above information in mind, you should be able to protect each of your clients' rights to a fair and impartial jury and to due process in the jury selection proceedings, either at the trial level, or at the appellate level.

RESOURCES:

Kentucky Practice Library, Trial Handbook for Kentucky Lawyers, Second Edition, Thomas L. Osborne, Lawyers Cooperative Publishing Company (1992).

Trial Practice Series, The Law, Art, and Science of Selecting a Jury, Second Edition, James J. Gobert, Walter E. Jordan, McGraw Hill (1990).

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DPA MOTION FILE AND INSTRUCTIONS MANUAL: The Department of Public Advocacy has collected many motions and instructions filed in actual criminal cases in Kentucky, and has compiled indices of those motions and instructions. Instructions are categorized by offense and statute number. Many motions include memorandums of law.

CAPITAL CASES: The motion file contains many motions which are applicable to capital cases, and that includes many motions filed in capital cases on non-capital issues.

COPIES AVAILABLE: Copies of the instructions and motion file indices are free to any public defender in Kentucky and any of the actual instructions or motions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Each DPA field office has an entire set of the instructions and motions. Criminal defense advocates can obtain copies of the indices, instructions, or motions for the cost of copying and postage.

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CHECKLIST

Here is a checklist with the necessary steps to preserve error due to the trial court's denial of a defense challenge for cause to a prospective juror:

- ✓ The voir dire of the prospective jurors must be recorded and transcribed or videotaped and designated as part of the record on appeal.
- ✓ The defense attorney must assert a clear and specific challenge for cause to the prospective juror and must clearly articulate the grounds for the challenge. State the name of the person you are challenging especially if your trial record will be on videotape.
- ✓ After a challenge for cause is denied by the trial court, you must decide whether to use a peremptory on the prospective juror.
- ✓ You must use all your peremptory challenges.
- ✓ You should ask the trial court for additional peremptory challenges.
- ✓ Be sure the juror strike sheets are made part of the record on appeal.
- ✓ State clearly for the record that you had to use a peremptory on a specific juror who should have been stricken for cause. Make this statement for each prospective juror you challenged for cause and then removed with a peremptory. Clearly state that you used all your peremptories. Then clearly state the names of the prospective jurors you would have used a peremptory on if you had not had to use your peremptories to remove persons who should have been removed for cause.
- ✓ State clearly for the record the names of those jurors who are actually selected to sit on the jury that are objectionable to you. This statement should be made at the time the trial court identifies the final twelve jurors (plus any alternates) but prior to their being sworn.

PUBLIC ADVOCATE ANNOUNCES NEW POLICY ON CANDIDACY FOR ELECTIVE OFFICE

In a memorandum distributed to all full-time public advocates and public defender contract administrators, Public Advocate **Allison Connelly** and contract administrator **Steve Mirkin** have announced a new policy, effective July 1, 1993, applicable to public defenders who file as candidates for elective office. The policy was stated as follows:

Department of Public Advocacy contract administrators in at least 12 counties have filed to run for judge or prosecutor this fall. There are undoubtedly more such situations of which the Department is unaware. In view of the scope of this situation the Department has reconsidered this matter and announces a policy change.

Apparently in the past DPA has condoned, at least through inaction, the candidacy of its local public defenders until those candidates were elected and assumed office. Fiscal Year 1993 contracts are silent on this issue. Consequently, the Department will not take any action on this matter during this fiscal year.

Nevertheless, it is the position of the Department that selection by the court for the position of trial commissioner or announced candidacy for any elected office, particularly that of judge, prosecutor or legislator, is inherently in conflict with services as a public defender. Indeed, DPA contract administrators and roster attorneys who have filed or announced for public office would be wise to disclose this fact to all their clients and to seek an informed written waiver of this conflict of interest from each client. *See* SCR 3.130, Kentucky Rule of Professional Conduct 1.7(b).

Despite the Department's inability to act on this matter during the remainder of FY 1993 under completed contracts, there will be a new policy effective July 1, 1993, which will be written into all contracts for fiscal year 1994 and thereafter. The policy requires that any public defender, including full-time state public advocates, contract administrators and roster attorneys, upon being selected for trial commissioner or publicly announcing, establishing a campaign finance committee, or filing as a candidate for any state elective office, including but not limited to circuit or district judge, commonwealth attorney, county attorney, or state senator or representative, shall be immediately disqualified from further service under the contract or as a full time public defender, except to the extent necessary to ensure a proper transition and to protect the rights of his or her clients. Whenever such an exception is necessary, the lawyer in question must secure a written waiver, after full disclosure of the conflict, from each client affected.

A public defender whose law partner or associate has announced his or her candidacy for one of the offices in question does not face even a potential conflict of interest and is not disqualified by this policy.

We appreciate that state public defender contracts do not pay as well as they should, and that by enacting this requirement the system may lose some good people. However, from the client's point of view, being assigned an attorney who is actively campaigning for the office of judge, prosecutor or legislator certainly will invoke suspicions of once again being victimized by "the system." As such, this is a necessary step that must be taken to improve the functioning of public defenders statewide.

Please let Steve Mirkin know immediately if you or any attorneys on your roster have filed for elective office this year, or if enactment of this policy will cause you not to seek renewal of your contract in the future. Once again, we thank all of you for your service to the poor people of Kentucky.

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P.D. BLUES by JIM THOMAS

PERSUASION

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The fully influenced persuadee likes what you promise, fears what you say is imminent, hates what you censure, embraces what you command, regrets whatever you build up as regrettable, rejoices at whatever you say is cause for rejoicing, sympathizes with those whose wretchedness your words bring before his very eyes, shuns those whom you admonish him to shun and in whatever other ways your high eloquence can affect the minds of your hearers, bringing them not merely to know what should be done, but to do what they know should be done.

- St. Augustine
DeDoctrina Christiana
500 A.D.

That's pretty much what I'd like to be doing when I talk to jurors in trial. Scholars have spent 1500 years since that time trying to figure out just how to get there.

Persuasion is not an attempt to impose on the audience, but rather is a form of influence that predisposes them.

TEACHING JURORS THE ART OF MISTRUST

It would help us as criminal defense attorneys if jurors understood what their real job is. Their real job is to examine the prosecutor's evidence with a view toward highlighting the improbabilities, the inconsistencies, the incredibility of the case. In order to get them trained for their real job, we need to teach them the Art of Mistrust.

Jury selection, when adequate in time, is a great opportunity to do this. When unconstitutionally abbreviated, consider taking your 10 or 15 minutes and just teaching the jurors this. In some cases, that's all you need.

The following principles need to be accepted and taught persuasively:

1. Theories, philosophies and opinions are never true or false, but simply more or less useful to the jury. (Objectivity is useful, but is never achievable in any absolute sense.) [This is an educated take-off on the old: "Are we really here at all, or is it all done with mirrors?" The concept empowers the jury to judge evidence by how useful it is to them and reminds them that truth can never be achieved.]

2. "Truths," whether presented as scientific facts, logic or testimony, are themselves reflective of someone's subjective point of view. [All facts imply someone's theory or point of view. Give the jurors some examples and have them explain to each other how these "facts" as reported all have opinions or points of view within them: He was speeding. She is tall. It was dark. He was a white man. She was young. He forced her. The report was complete.]

3. "Truths" are necessarily carried by people to people. In the carrying they will take on the character of the language or method of expression used to communicate them. [Talk with the jurors about how messages get carried from one person to another, how the language changes and how each person who passes it on effects the message. Jurors can give wonderful examples from their own lives. Add into the equation the fact that police also distort messages they are given. It's not conscious, but it always happens.]

4. The way "truths" are expressed always reflects the interests, values and frames of reference of the speaker, including their interest in adapting their ideas to gain acceptance. [Get jurors to share experiences they have had observing someone adapt a message to gain (approval/acceptance/attention, benefits). Kids are great examples.]

5. The way "truths" are received depends upon the individual biases, needs, and ability of the various listeners to interpret the message accurately. [Ever been misunderstood? How did that happen? You know what you said, but they didn't hear that. Why could that happen? It is common, isn't it? Does it happen even more often when the person listening doesn't know you?]

6. What we call "facts" are reconstructions. They don't really exist "out there." [Talk with the jurors about having been in a situation where later everyone tells it a little differently. Family stories are great. Is everyone wrong? How could that happen? Do we all experience things differently? Why?]

7. It is never possible to say everything about anything.

8. Since it is never possible to say everything about anything, every report of the "facts" is necessarily a selection of some facts, leaving out others. [Things are always left out. What's left out might not have been important to the person reporting, but could end up being very important to someone else. Have jurors give examples where they've seen people "leave things out." Why would someone do that? Can it be unconscious? Are some things really not noticed? Why would that happen? Just because a fact isn't noticed, does it mean it didn't happen? Our minds cannot retain every single detail can they? That would be an overload. Our minds have to filter - the experiences we've had in life help us do that filtering. Things we are sensitive to get noticed, others don't.]

9. Evenhanded reports are not necessarily accurate reports. [This is important for those "neutral" witnesses, such as police officers, passersby, lay witnesses. A person doesn't have to have a "motive" to filter things, do they? Talk with the jurors about this. It has the advantage of taking away the closing argument by the prosecution that a certain witness must be believed because they have no motive to tell it that way. Continue the discussion from points 7 and 8.]

10. Consensus opinion is not necessarily accurate. [Mere number of witnesses doesn't prove the point. Ever been in a situation where most people felt one way, but you felt differently? Were they right just because there were more of them? Can you think of times, even in our country, where it later turned out that the majority was wrong? Do most people find it easier to be a part of the group or to be in the minority? Why? What makes it hard? Does it necessarily mean these people are intentionally being dishonest? Do other people influence us even when we aren't aware of it?]

11. Reports are bound to reflect institutional interests in giving descriptions. [Use for police officers, lab personnel, members of lofty institutions, experts.]

12. The language used to report any given fact is necessarily selective. [Talk with the jurors about why this is true. Do we all have different uses of words? Even within the same family? Do the same words mean different things to many of us? Why? Ever see two different people use the same word, but they meant different things? Do men and women always mean the same thing by the same word? (A lively discussion.) If we assume we know what someone means by a certain word, what problems can result? Why? Share stores!]

Having the jurors develop this Don't-Take-Anything-At-Face-Value state of mind at the beginning of the trial, before they have heard opening statements or evidence, is great.

Reframing the Issues

1. MORE OR LESS ARGUMENTS. Is it more or less fair to do a complete investigation on a case? Will it benefit the jury more or less to look at the prior statements a witness has made? Will witness A be more or less trustworthy than witness B? Are eyewitnesses more or less reliable than hard physical evidence? Is consistency more or less important than just getting a conviction?

2. POSSIBILITY OR IMPOSSIBILITY ARGUMENTS. Is it possible or impossible for the police to interview all the witnesses they know about? Is it possible or impossible for the prosecution to make a mistake in filing a case? Is it possible or impossible for an expert to be in error in his opinion? Is it possible or impossible for a child to be influenced by authoritative adults? Is it possible or impossible for there to be some evidence against a person and he is still innocent?

3. PAST FACT ARGUMENTS. Did the witness get a clear view or did he not? Did the police officer see weaving or did the police officer see what he wanted to see? Did the witness give a detailed description which only fits the defendant, or did the witness give only a general description which fits may people? Was a tape recorder available to the police detective or was it not? Did the witness have many chances to report the claims before or did he not?

4. FUTURE FACT ARGUMENTS. Will this witness tell still another version of what happened if we have the trial next week? Will the police officers have no motivation to do complete investigations when other minority people get accused? Will the woman feel free to use the criminal justice system for her own motives again? Will mistakes like this happen again? Will the expert realize that tests must be carefully done? Will the police learn to take accurate statements?

5. MAGNIFYING OR MINIMIZING ARGUMENTS. Is doing a complete investigation by police a minor problem or a major problem for you? Is truthfulness under oath a major problem or a minor problem for you? Is convicting an innocent man, even if he's had problems in the past, a major problem or a minor problem for you?

These are new ways to present defense issues to the jury, especially in closing arguments. The questions can be left unanswered because the jurors will answer them correctly without your help.

Good Old-Fashioned American Labeling

Although words have specific meanings and uses we are all familiar with, the persuasive potential of certain words comes from their ability to evoke automatically a feeling or generate a mood.

One effective system of persuasion involves the creative use of "God" terms and "Devil" terms. These words are linked in the listener's mind with other concepts. God terms, for example, are words that are basically unchallenged. They may demand sacrifice or obedience or acceptance (liberty, equality, freedom, motherhood). Devil terms automatically bring forth evil, things to be overcome or avoided or dissociated (dictatorship, godless, selfish, materialistic).

One only has to use a little imagination to come up with words we can use, by attaching them to facts we want the jury to accept or to facts we want the jury to reject. Remember, though, that as time passes, many former God words have become Devil words ("liberal" was once a great thing to be).

Old Fashioned	Contagious
Tried and True	Disease
American	Sin
Loyal	Poverty
Fair	Debt-ridden

These words have an innate persuasive force - adding them to people or concepts gives them the chance to bleed into the adopted word (An old-fashioned thorough investigation was needed. The old-fashioned way of just telling the truth. His lies were contagious. The sin of omis-sion. A poverty of morals. He steals your trust. That witness is a good teacher; he teaches you...)

Right now the economic situation is hot. (The prosecutor's case is stamped "insufficient funds." The inflated story the witness wants you to buy. Their mistakes are too expensive. We can't afford this kind of justice. Bankrupt credibility.)

"Buy American" is so popular now that the word American is the perfect adjective, an automatic God word. (Cross-examination: Don't you believe, officer, in the American way of fairness?)

Characterizing the prosecution as a "machine" has fruitful possibilities: machines are powerful, but break down, are impersonal, need repair, become out-of-date, need to be junked.

Newspapers, magazines and television advertising are replete with words waiting to be harvested (and our cases are starving for a little assistance from charismatic language).

References

Persuasion, Understanding, Practice and Analysis, 2d Edition, HERBERT W. SIMONS.

Persuasion, Reception and Responsibility, Charles U. Larson, Fifth Edition.

Persuasion and Social Movements, Charles J. Stewart, Craig Allen Smith, Robert E. Deaton, Jr., 2nd Edition

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THE LINK BETWEEN CHILD ABUSE AND VIOLENCE: RECOGNIZING IT BEFORE IT RUINS US

EDITOR'S NOTE: The following remarks are the testimony of James J. Clark before the Attorney General's Task Force on Child Sexual Abuse at its December 8, 1992 meeting in the Capital Annex at Frankfort, Kentucky.

I want to thank the Task Force for the opportunity to testify today. The work of this Task Force is extremely important to the future of the Commonwealth, and the opportunity to participate in your work is an honor.

Along with my teaching duties at the University of Kentucky I see clients in a private practice. Many of them come with complaints of depression, anxiety, marital problems, parent-child problems, etc. It will surprise no one in this room that a number of these clients also report (when asked directly by a clinician interested in full understanding) the experience of childhood physical and sexual abuse. What is extremely impressive about child sexual abuse is its pernicious effect across the entire life cycle. Persons who have grown up, moved away, embarked on prestigious professional careers, and begun families of their own still deal with the effects of being traumatized decades before. They have problems relating in sexually and emotionally meaningful ways with their spouses, they fear, distrust, or unreasonably despise persons in authority, they have difficulty separating their unresolved childhood experiences from their own children's present-day needs. In short, the basic demands of being an adult -- to love, to parent, to work-- are exponentially more difficult for these persons.

As researcher and clinician John Briere (1989) would say, they have developed coping approaches to life that were adaptive when living with persistent traumatization, but that these coping strategies have now become sorely maladaptive when brought into adulthood. As serious as these problems in coping effectively are-- they can lead to martial discord, chemical dependency, family violence, divorce, the inability to make friendships, or to hold a job, etc.-- these issues are often amenable to intervention. One of the best indicators of hope for these so-called "survivors" of child sexual abuse, is that they seek treatment for their problems. The fact that they have all too often been met by mental health professionals who do not recognize the traumatic genesis of these problems is not *their* fault. They *are* survivors, and as a clinician, I am often moved and bewildered that they have survived as well as they have. I am often humbled by their determination to not only endure but to prevail. It is a privilege to work with them.

However, I am here today to talk about a different group of persons--persons who Tom Miller and Lane Veltkamp (1989) would call the "non-survivors" of child sexual abuse. These people are non-survivors--not in the sense that they have died physically at the hands of their abusers, but that they have been unable to survive as social beings in our society. Because of their violent acts toward *themselves* (through self-mutilation, drug-taking, suicide attempts) and their violent acts toward *others* (including assault, murder, and rape) they have cut themselves off from society. They are, in effect, *socially* dead--and some of them await literal, physical death through execution in the twilight world of death row.

It would be a very serious error to claim that child sexual abuse *inevitably* leads to committing violent crimes in adulthood. A little earlier I described the kind of clinical complaints that many *survivors* have--these are serious and not always easy to treat--but they are of a different character than the violent symptoms of the *non-survivors*. Researchers, most notably, Cathy Spatz Widom (1992), have demonstrated that violence is not *automatically* transmitted to the next generation with the survivor of physical and child sexual abuse inevitably becoming violent. This idea of intergenerational transmission employs a virus metaphor or genetic-disease metaphor of the effects of childhood abuse, and suggests a necessary, causal connection that the research simply cannot confirm. In order to better understand what might be happening, it is probably advisable to jettison these metaphors and to look at the problem in a different way.

One way to go about this is to ask a different question: *How does the symptom of violence develop?* If we want to understand those who have committed profoundly violent acts, then we need to study how people become violent. [While I do not have the space to review all of the pertinent research on this question,] I can summarize the major points. The development of violence is the result of a number of personal and situational factors that interact through the life cycle (Lewis, 1991). These factors include:

1. Biochemical, neuroanatomical, and genetic events that occur as the fetus and neonatal human develops--*e.g.* the effects of fetal alcohol syndrome and other teratogenic events shape the development of the human brain--especially in the area of intelligence, impulse control, cognitive functioning, and problemsolving capacities;

2. The experiences of disrupted or inconsistent attachment to caregivers--phenomena which shape the development of basic emotional capacities (including the development of empathy for other people);

3. The lack of childhood socialization to prosocial values, attitudes, and styles of interpersonal relating; or moreover the early childhood socialization to antisocial values and relating styles. These interpersonal styles are characterized by mistrust and even paranoia--in these environments violence is the approach for dealing with difficult emotions (sadness, fear, anger, rage). The child has few models for verbalizing feelings and problem-solving;

4. Childhood and adolescent immersion in family violence, sexual trauma, accidental injuries, and poverty;

5. Profound failure and humiliation during the primary school years which influence the future possibilities of social and financial success;

6. The introduction to the use of alcohol and drugs in early childhood and adolescence and the development of addictive behaviors; as well as the secondary effects of substance abuse including damage to the CNS, especially the brain.

In summary, the development of violence is the result of a multiplicity of biopsychosocial factors and processes which shape a person's response to him or herself and the environment. This phenomenon is only beginning to be understood by the mental health and scientific communities.

Another way to approach understanding violence is to look at the psychological, and intrapersonal prerequisites for violent behavior. This is well-argued by Dorothy Lewis (1991) who develops the following profile of various "triggers" of violent behavior:

> Anything that increases irritability, discomfort, fearfulness, suspiciousness, and impulsivity lowers the threshold for aggression and increases the likelihood of violent behavior. Anything that impairs reality testing, judgement, self-esteem, self-control, and the ability to verbalize feelings rather than act on them will also lower the threshold and enhance aggression.

I will not elaborate on the catalogue of traumatic effects of child sexual abuse--which this Task Force has already heard from other witnesses. I think the connection of the development of violent behavior--even extreme violence--with the experience of child sexual abuse is apparent. Rather than simply causing violent behavior, the experience of child sexual abuse for some persons is a very significant factor interacting with the factors discussed above. No single factor leads to the development of violent symptomatology. For example, if you read the Kentucky cases described by Miller and Veltkamp (1989) in their paper, "The Adult Non-Survivor of Child Sexual Abuse," you will note that not one of the persons they describe had to deal *only* with child sexual abuse. The same is true of the Kentucky inmates that I have evaluated in my work as a consultant and researcher.

Specifically, these non-survivors of child sexual abuse also have experienced multiple forms of victimization including neglect of basic physical and emotional childhood needs; psychological abuse in the form of witnessing domestic and neighborhood violence; physical abuse leaving psychic and somatic injury (including CNS injuries); multiple abandonments by caregivers, ineffectual and sometimes abusive child welfare placements; grinding childhood and adolescent poverty; early introduction to drugs and alcohol, and secondary sexual victimization by adults including recruitment into prostitution.

The fact that *this* is the developmental context of severe and persistent child sexual abuse loads these particular experiences of child sexual abuse in a different way than for the child who experiences sexual trauma in a family and neighborhood context that is otherwise not traumogenic.

Additionally, researchers indicate that certain persons' experiences of child sexual abuse may have been particularly brutal. Those child sexual abuse experiences that are characterized by extreme betrayal and powerlessness can create heightened responses of anxiety, fear, impulsiveness, low self-esteem, and identification with the aggressor (Silman, Veltkamp & Clark 1992). Note the correlation of this profile with the profile for violent behavior that I described earlier.

What makes violent persons so difficult to treat is that many of them carry their chaotic, self-destructive and interpersonally violent childhood experiences into adulthood, specifically through the maintenance and escalation of the physical and psychological responses they used to cope when they were children. Paradoxically, for them, this is the psychologically "safest" approach to living because it is predictable and congruent with their subjective experience of being alive--this was their consistent socialization into the world. This is their cognitive map of the world.

Unfortunately, what *seems* psychologically safe to these persons is in reality extremely dangerous to themselves and to other people.

Another reason why these psychological and behavior patterns are extremely difficult to change is that the traumatic effects of childhood abuse are often repressed and blocked by the use of alcohol, prescription medications, and illegal drugs to anesthetize the painful consequences of a destructive lifestyle. And we must note here that practically all the contemporary research shows that this kind of substance abuse is highly correlated with treatment failure and recurrent violent behavior, especially for persons with existing CNS damage, impulse control problems, paranoid thinking, thought disorders, and other cognitive deficits (Walker 1992).

We must do a better job of dealing with such persons--especially when they enter our criminal justice and mental health systems as child victims and later as juvenile offenders. Robin and Price (1991) of the University of Washington have analyzed data from the recent NIMH ECA Study--a national study with a sample size of 19,482. They reported that childhood conduct disorder is a significant predictor of future antisocial behavior. It seems obvious that *at the least* we must study more carefully and work more effectively with juvenile offenders. We need to take a more careful look at the evaluation and treatment of children and adolescents who suffer child sexual abuse in the kind of traumogenic backgrounds I have described. And we must vigorously address the problems of child sexual abuse and other factors that can lead to adult violence through preventative programs and macro-level reform.

Clearly, we need to develop a better understanding of the experiences of these non-survivors in order to develop public policy, criminal justice, social service, and mental health responses for these persons. I applaud the work of this Task Force which is dedicated to these kinds of efforts. However, I fully expect

that there will be much public *and professional* resistance to understanding and treating such non-survivors because of the heinous acts they have committed. For example, a number of us have found in the process of analyzing forensic evaluations that even seasoned professionals fail to evaluate for child sexual abuse as these persons go to trial. Not only court-appointed and prosecution clinicians but *clinicians hired by the defense team* often neglect to do this. As a result, the finders of fact often have only *truncated* impressions of these defendants.

I am afraid that in the near future at least the desire for retribution probably will continue to prevail over scientific, investigatory and therapeutic responses. Certainly the current spate of media sensationalism--interviews with cannibal killers and the like--reinforce the public's perceptions of these people as subhumans.

The primitive responses of revenge and ultimate punishment tend to be our primary and most consistent responses as a society. This is quite understandable but irrational, and in the long-run, it's ruinous because these responses do not address the fact that most violent offenders are eventually released. Part of the challenge of combatting the escalation of child sexual abuse and other forms of violence in our society demands that we take a different path. Thank you.

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REFERENCES

Briere, J. (1989). *Therapy for Adults Molested as Children: Beyond Survi-val.* NY: Springer.

Lewis, D.O. (1991). The development of the symptom of violence. In M. Lewis (ed.). *Child and Adolescent Psychiatry: A Comprehensive Textbook.* Baltimore: Williams and Wilkins.

Logan, D.D. (1992). *From Abused Child to Killer: Positing Links in the Chain.* The Champion. (January/February) 36-39.

Miller, T.W. and Veltkamp, L.J. (1989). *The Adult Non-Survivor of Child Abuse.* Journal of the Kentucky Medical Association. 87 (3) 120-124.

Robins, L.N. and Price, R.K. (1991). *Adult Disorders Predicted by Childhood Conduct Problems: Results From the NIMH Epidemiological Catchment Area Project.* Psychiatry. 54 (May) 116-132.

Silman, M., Veltkamp, L.J. and Clark, J.J. (1992). *Understanding the Dynamics of Child Sexual Abuse.* The Advocate. 15 (5) 17-23.

Walker, R. (1992). *Substance Abuse and B-Cluster Disorders I.: Understanding the Dual-Diagnosis Patient.* Journal of Psychoactive Drugs. 24 (3) 223-232.

Widom, C.S. (1989). *Child Abuse, Neglect, and Adult Behavior: Research Design and Findings on Criminality, Violence and Child Abuse.* American Journal of Orthopsychiatry. 59 (3) 355-367.

ABANDONMENT OF CHILDREN WHEN THEY BECOME ADULTS IS NOT CONSISTENT

These comments were made before the Attorney General's Sex Abuse Task Force by Ernie Lewis on December 8, 1992.

The Department of Public Advocacy applauds the Attorney General's Task Force for devoting so much time and energy to the societal problem of child sexual abuse. I have watched your efforts to understand the problem in its full dimension. I respect the expertise of many people on the Task Force. We stand ready to support many of the proposals that are before you. However, we want to caution you to be careful that you not damage the criminal justice system in the process, nor do additional harm to adult survivors of child sexual abuse.

DO NOT MAKE IT EASIER TO CONVICT

We first urge the Task Force not to make it any easier to convict persons accused of child sexual abuse. While most of your proposals have nothing to do with jury trials, some of the proposals, particularly those urged throughout the meetings of the Task Force by prosecutors, would have the effect of making it easier to convict those persons accused of these crimes. Broadening the hearsay exceptions, watering down the rights of confrontation, and particularly allowing into evidence the child abuse accommodation syndrome in any form would have a serious impact on the rights of those accused of these crimes.

What makes these proposals unwise is that a large percentage of reports of child sexual abuse turn out to be false, or at least unsubstantiated. Further, most persons who are accused of crimes ultimately plead guilty. Only a small percentage of those accused assert their right to a jury trial. Ironically, however, it is upon those few that the prosecutors' proposals making it easier to convict would fall. Yet, those who assert their right to a jury trial may be the ones who are falsely accused.

Because of this, it is vital that the fact finding devices present in our criminal rules which enable juries to differentiate the false allegation not be altered. Those who are falsely accused rely upon the jury trial, upon cross examination, upon the rules of evidence, and upon the burden of proof, to assert their innocence. We urge you not to tamper with these historical rules that would cause innocent people to be convicted of these crimes.

ALLOW EVIDENCE THAT THE ACCUSED WAS ABUSED.

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.

KRS 532.055, part of Kentucky's Truth in Sentencing Statute, has as one of its major purposes informing jurors of pertinent information about the defendant in order to enable them to make a better, that is more informed, sentencing recommendation.

In a child sexual abuse case, a jury hears evidence in the guilt phase of the victimization of a child by the accused. During the penalty phase, they hear evidence of parole eligibility. However, the jury hears no evidence that sex offenders are paroled less often than other offenders. Worse, they hear no information regarding why this particular accused sexually abused this child. That is, they hear no information that this victimizer was and is a victim himself. The jury, then, is left only to believe that the man before them must be given the greatest possible sentence. Their sentencing recommendation is one that is informed by a one-sided statute that is anything but "truth in sentencing". The

end result is that the child victim turned adult abuser is revictimized by a harsh penalty.

Those who care about the issue of child sexual abuse must be consistent when they urge the system to be more sensitive to victims. If they care only about the child who is presently being victimized, and then turn their back on that child when they become adult victimizers, then they have turned their backs upon victims of child abuse.

ABUSE SHOULD BE A MITIGATOR IN DEATH CASES

There is another setting where adults who were abused as children may be revictimized by the criminal justice system. Often, child sexual abuse produces inexplicable rage in adult survivors, rage that may pour out into heinous murders. This outpouring of rage can only be understood in the context of the previous abuse.

This was revealed in a study by Dr. Dorothy Lewis. She studied 14 of the 37 juveniles then on death rows across the nation. Of those 14, 12 had been physically abused, and 5 had been sodomized. Nothing would indicate that these statistics would differ with adults now on death rows across the country.

Yet, in death penalty cases, previous physical or sexual abuse is not one of the statutory mitigating circumstances listed in KRS 532.025. While certainly evidence of being abused as a child is admissible in the penalty phase of a capital trial, a jury does not know what to do with that evidence without an explicit instruction that such evidence is mitigating. As it stands now, no explicit instruction is given because being abused as a child is not one of the eight mitigating circumstances listed in the statute.

Kentuckians do not broadly support executing murderers who were severely abused as children. This was revealed in a 1989 state-wide poll 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.

We encourage the Task Force to support an amendment to KRS 532.025 that would make previous sexual and physical abuse a statutory mitigating circumstance. Without this amendment, those adult survivors of child sexual and physical abuse once again become victims.

BE CONSISTENT

A society that ignores their children is destroying the fiber of the future. A criminal justice system that only supports children when they are young, and then abandons them when they grow up and react predictably to the abuse they suffered as children, is one that is one sided and inconsistent. We urge the Task Force to be consistent, to support the children, yes, but also to be fair to citizens accused, and to continue to support adult victims of child abuse when they are accused of crimes.

Are the Allegations Ever False?

A few thoughts on the difficulties with child abuse allegations.

False allegations of child sexual abuse are a reality. Even the most ardent advocates for stricter sexual abuse laws and fewer procedural protections in criminal cases recognize this reality, and recognize that false allegations occur most often in divorce and custody battles. Thoennes & Tjaden, *The Extent, Nature & Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, Child Abuse & Neglect, Vol. 14 at 151 (1990).

While Chandler & Smith, in *Can We Believe Them?*, Kentucky Youth Advocates (September 1992), a document developed for the Attorney General's Sexual Abuse Task Force, conclude that "it is uncommon for children to make false allegations of sexual abuse." *Id.* at 5. Despite this conclusion, they detail that between 1/3-1/2 of the claims in custody cases are false! "**Custody disputes.** Another possible motivation behind false allegations is parental vindictiveness in child custody disputes. **The overall incidence, however, of child sexual abuse allegations in custody cases is very low.** Only two to ten percent of all family court cases where custody is in dispute involve any charge of sexual abuse (Whitcomb, 1992). Within that two to ten percent of child custody cases, between one-third and one-half are judged to be false (Benedek and Schetky in Green, 1984). In this Benedek and Schetky study, all false reports originated with adults rather than children (Farr and Yuille, 1988)." *Id.* at 8.

Richard Gardner, M.D. in his book *The Parental Alienation Syndrome & the Differentiation Between Fabricated & Genuine Child Sex Abuse* (1987) termed fabricated allegations of child sex abuse in custody disputes as a new weapon of custodial warfare. *Id.* at 100-101.

The younger the child, the higher percentage of untrue claims of abuse. Berliner & Loftus, *Sexual Abuse Accusations*, Journal of Interpersonal Violence, Vol. 7 (Dec. 1992) at 570.

What are your experiences with child abuse allegations in Kentucky criminal cases?

STATE POLICE ARREST DATA ON SEX CASES IN KENTUCKY

	FORCIBLE RAPE	PROSTITUTION & VICE	ALL OTHER SEX OFFENSES	TOTAL SEX OFFENSES	% CHANGE
1991	1301	599	2745	4645	18%
1990	616	595	2728	3939	-4%
1989	444	597	3073	4114	68%
1988	532	409	1503	2444	64%
1987	265	463	762	1491	-33%
1986	489	563	1176	2228	7%
1985	433	641	1004	2078	6%
1984	478	640	851	1969	2%
1983	447	708	781	1936	25%
1982	332	591	624	1547	-1%
1981	430	483	646	1559	

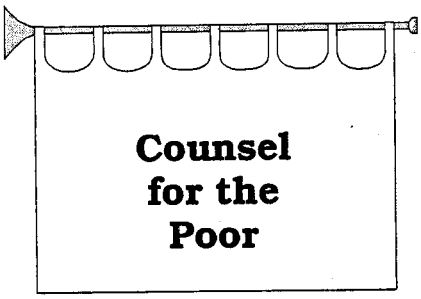
NOTE: IN 1991 640 COUNTS OF RAPE WERE PLACED AGAINST ONE DEFENDANT WHICH ACCOUNTS FOR THE HUGE INCREASE IN RAPES

	TOTAL ARRESTS	% CHANGE	TOTAL SEX OFFENSES	SEX OFFENSES AS % TOTAL ARRESTS
1991	279658	3%	4645	1.66%
1990	272667	9%	3939	1.44%
1989	249161	11%	4114	1.65%
1988	223638	30%	2444	1.09%
1987	172492	-19%	1491	.86%
1986	211651	6%	2228	1.05%
1985	199911	-7%	2078	1.04%
1984	214563	8%	1969	.92%
1983	199143	10%	1936	.97%
1982	181637	-8%	1547	.85%
1981	198158		1559	.79%

CHR DATA - NUMBER OF CHILD INCIDENCES REPORTED FOR SEXUAL ABUSE BY STATUS/PERCENTAGE 1982-1992

	SUBSTANTIATED SEXUAL ABUSE REPORTS	% OF TOTAL	UNSUBSTANTIATED SEXUAL ABUSE REPORTS	% OF TOTAL	TOTAL SEXUAL ABUSE REPORTS
1992	2449	42.7%	3281	57.3%	5730
1991	2133	46.2%	2482	53.8%	4615
1990	2167	49.9%	2177	50.1%	4344
1989	2113	49.7%	2140	50.3%	4253
1988	2115	51.6%	1981	48.4%	4096
1987	2297	55.8%	1818	44.2%	4115
1986	2094	54.3%	1762	45.7%	3856
1985	1940	56.1%	1516	43.9%	3456
1984	1272	58.6%	900	41.4%	2172
1983	993	59.2%	683	40.8%	1676
1982	916	60.0%	611	40.0%	1527

NOMINATIONS SOUGHT



KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY'S *GIDEON* AWARD: CELEBRATING COUNSEL FOR KENTUCKY'S POOR

In celebration of the 30th Anniversary of the United States Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Department of Public Advocacy announces the establishment of a yearly award. The *Gideon* Award will be presented at the 21st Annual DPA Public Defender Conference in Louisville, Kentucky, June 13-15, 1993 to the person who has demonstrated extraordinary commitment to equal justice and courageously advanced the *right to counsel* for the poor in Kentucky. Written nominations should be sent to the Public Advocate by May 15, 1993 indicating the following:

1) Name of the person nominated;
2) Explanation of how in the last year the person has advanced the right to counsel for Kentucky's poor as guaranteed by the Section 11 of the Kentucky Constitution and the 6th Amendment of the United States Constitution; and,
3) A resume of the person or other background information.

> Like the Gideon of old who was summoned by an angel of the Lord to lead Israel and overcome the Midiantites, Clarence Earl Gideon of Panama City, Florida, championed the cause of justice for all indigent defendants.... It is intolerable in a nation which proclaims equal justice under law as one of its ideals that anyone should be handicapped in defending himself simply because he happens to be poor.
>
> - *The Washington Post* (1963)

> Since Fortas had been appointed to represent Gideon, his personal belief about the rightness or wrongness of *Betts v. Brady* could not affect his duty, but in fact he strongly believed that representation by a lawyer was an absolute essential of fairness at any criminal trial. His own experience had so persuaded him, and he wished there were some way he could convey to the justices first-hand the atmosphere of the criminal courts. "What I'd like to have said," he remarked later, "was, 'Let's not talk, let's go down and watch one of these fellows try to defend himself.'"
>
> - Anthony Lewis, *Gideon's Trumpet* (1964)

> ***Gideon's* Plea**
>
> The Defendant: Your Honor, I said: I request this Court to appoint counsel to represent me in this trial.
> The Court: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a Defendant is when that person is charged with a capital offense, I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.
> The Defendant: The United States Supreme Court says I am entitled to be represented by counsel.
> The Court: Let the record show that the defendant has asked the court to appoint counsel to represent him in this trial and the court denied the request and informed the defendant that the only time the court could appoint counsel to represent a defendant was in cases where the defendant was charged with a capital offense. The defendant stated to the court that the United States Supreme Court said he was entitled to it.

> But the Spirit of the Lord came upon Gideon, and he blew a trumpet....
>
> - Judges 6:34

21st Annual DPA Public Defender Conference

June 13 - June 15, 1993
Holiday Inn/Downtown, Louisville, KY

A 2-1/2 day program offered for the last 2 decades to insure our 350+ full and part-time public defenders and other criminal justice practitioners learn about or become updated on critical criminal defense litigation areas. This is the largest yearly gathering of public defenders and criminal defense attorneys in Kentucky. It presents a unique opportunity to meet others doing criminal defense work and share helpful information.

1993 DPA Capital Post-Conviction Practice Institute

September 9 - September 12, 1993
Holiday Inn, Frankfort, KY

A practice program to educate attorneys on litigating the increasingly complex and difficult capital post-conviction cases featuring **Mark Olive** of Florida and **Scharlotte Holdman** of California.

9th DPA Trial Practice Persuasion Institute

October 24 - October 29, 1993
Kentucky Leadership Center, Faubush, KY
(1/2 hour west of Somerset)

Intensive practice on trial skills, knowledge and attitudes with a focus on persuasion through a *learn by doing* format. Practice with feedback is the heart of this formation. Advanced, intermediate and beginning tracks are offered. The Trial Institute is the most effective education available for learning successful criminal defense litigation. *We previously announced this as a Death Penalty Practice Institute. Further planning has led us to focus on non-capital litigation in 1993 and to conduct a Death Penalty Trial Practice Institute in the Fall, 1994.*

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