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

THE ADVOCATE

The Means of Defense for Those Without

Volume 15, No. 4, August 1993

Governor Creates Task Force to Address Underfunding of Public Defense

Governor Brereton C. Jones created Gubernatorial Defender Task Force on June 16, 1993 with **Edward Holmes**, Secretary of Public Protection and Regulation Cabinet and **Allison Connelly**, Public Advocate looking on.

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

FROM THE EDITOR:

The last two decades have seen inexorable change. Twenty-one years ago in 1972 President Richard Nixon travelled to Beijing and met with Chairman Mao Zedong and Premier Zhou En-lai ending the U.S. - China hostilities dating to 1949; the United States Supreme Court declared this nation's administration of the death penalty unconstitutional; the Dow Jones Industrial Average closed at above the 1,000 mark for the first time ever; Nike Inc. was founded, and New York's World Trade Center opened its first office in one of the twin 110-story towers.

Twenty-one years ago under the leadership of then Governor Wendell H. Ford the Department of Public Advocacy was created under the name Office of Public Defender. On October 17, 1972, in announcing the creation of the Office and appointment of Tony Wilhoit as the first defender leader, Governor Ford said, *"there can be no civilized enforcement of criminal law without full legal assistance to the accused. This we shall have!"*

In this 21st year of Kentucky's state-wide, state-run indigent defense system Governor Brereton C. Jones has created an 18 person Task Force to insure quality defender services into the future.

We focus this issue on Kentucky's defender system. We invite your comments on the creation of Kentucky's defender system, the 21 years of defender service, and Governor Jones' creation of the Defender Task Force.

Edward C. Monahan, Editor

ADVOCATE DONATIONS

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

Jean Curley Sherry Wright

To date 93 persons and the Kentucky Bar Foundation have contributed to *The Advocate* with a total of $15,557.25 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.

Jones Appoints Indigent Defense Task Force To Study Public Defender System

Frankfort, KY (June 16, 1993) – Governor Brereton Jones announced the creation of a task force to address the problems facing the representation of Kentucky's poor who are accused of committing a crime or who are unable to hire an attorney.

The task force is charged with determining the extent of the current and long-range needs for public defender services; investigate and make recommendations as to the most effective and efficient means to deliver the mandated legal services; and evaluate funding mechanisms and feasible funding options that would ensure a quality public defender program.

"We need a group of Kentucky leaders to study our state's public defender system and to make recommendations to insure the Commonwealth's delivery of indigent legal representation is of the highest quality and efficiency and is supported with adequate long term funding," said Governor Jones.

Kentucky Public Advocate Allison Connelly stated that, "from two perspectives, public defenders serve an essential purpose for our state. They make sure the state can efficiently prosecute and imprison those persons who have forfeited their right to their freedom because of their criminal act. Without competent public defenders efficiently representing these person, the state would be unable to incarcerate them because our state and federal constitutional guarantees appropriately prohibit the state from taking a person's liberty without due process."

Connelly praised Governor Jones and Secretary Ed Holmes, chairman of the task force, for recognizing the crisis facing Kentucky's public defender system. "In recognizing the need for this Task Force, the Governor gives expression to two of this county's deepest ideals and aspirations - a fair trial and just treatment of the poor and disadvantaged. At $117.40 per case, the Department of Public Advocacy has the second lowest per case funding in the nation. Consequently, dollar for dollar the state is obtaining the most for its indigent defense investment. However, with a 56% increase in caseload since 1989, the defender system has reached the breaking point. We are in dire need of help."

The Kentucky Department of Public Advocacy, the state-wide public defender program, was established by the 1972 Kentucky General Assembly. The Department annually represents more than 100,000 indigent citizens for charges ranging from driving under the influence of alcohol to capital murder. Public Advocacy includes more than 100 full-time public defenders in 19 offices throughout the state and 250 attorneys who do part-time work in 77 counties.

The Executive Order creating the Task Force reads as follows:

BRERETON C. JONES
GOVERNOR

EXECUTIVE ORDER
93 - 554
June 14, 1993

WHEREAS, pursuant to the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution, the accused in a criminal trial shall have the assistance of counsel; and

WHEREAS, the United Supreme Court ruled that the state is legally obligated to provide for indigent criminal defendants' constitutional right to counsel; and

WHEREAS, the objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel; and

WHEREAS, KRS Chapter 31, provides for an independent state agency charged with the responsibility of establishing, maintaining and operating a state system for representing indigent persons accused of crimes or facing an involuntary commitment to a mental health facility (KRS 31.010); and

WHEREAS, there is a need to evaluate the effectiveness of and funding for this statutory framework for providing such representation:

NOW, THEREFORE, I, BRERETON C. JONES, Governor of the Commonwealth of Kentucky, pursuant to the authority vested in me by KRS 12.029, do hereby order the following:

1. There is hereby established a Task Force on the Delivery and Funding of Quality Public Defender Services, which shall be a separate admin-istrative body within the meaning of KRS Chapter 12 and report directly to the Governor.

2. The Task Force shall:

   a. Determine the extent of the current and long-range needs for mandated legal services.

   b. Investigate and make recommendations as to the most effective and efficient delivery system(s) to deliver mandated legal services.

   c. Investigate and evaluate funding mechanisms which ensure access to quality public defender services.

   d. Make recommendations as to the most feasible funding options.

   e. Develop procedures which ensure that the impact of proposed legislation upon the public defender system is considered.

   f. Report its recommendations and findings to the Governor and General Assembly within nine (9) months from the date of commission.

3. I hereby appoint the following individuals to the Task Force who shall personally serve:

Janice Martin
District Judge, 19th Division
Hall of Justice
600 West Jefferson Street
Louisville, Kentucky 40202

Michael Moloney
State Senator
Chairman, Senate Appropriations and Revenue Committee
259 West Short Street
Lexington, Kentucky 40507

James Keller
Circuit Judge, Division 1
22nd Judicial Circuit
215 West Main Street
Lexington, Kentucky 40507

Joe Bill Campbell, Esq.
Campbell, Kerrick & Grise
1025 State Street
Post Office Box 9547
Bowling Green, Kentucky 42102

John Rosenberg
Director, Appalachian Research and Defense Fund, Inc.
205 Front Street
Prestonsburg, Kentucky 41653

Margo Grubbs, Esq.
Hoffman, Hoffman & Grubbs, P.S.C.
98 Garvey Avenue
Elsmere, Kentucky 41018

Anthony Wilhoit
Judge, Court of Appeals
5th Appellate District, 2nd Division
151 South Main Street
Versailles, Kentucky 40383

Steven M. Shewmaker
Circuit Judge
50th Judicial Circuit
Post Office Box 1255
Danville, Kentucky 40423-1266

Richard L. Bottoms, Esq.
Post Office Box 635
Harrodsburg, Kentucky 40330

Thomas G. Turner
LaRue County Judge/Executive
LaRue County Courthouse
Hodgenville, Kentucky 42748

Ellen B. Ewing
Circuit Judge, 16th Division
30th Judicial Circuit
Hall of Justice
600 West Jefferson Street
Louisville, Kentucky 40202

Julia Adams, President
District Judges Association
Clark County Courthouse
Winchester, Kentucky 40391

Robert Carran, Esq.
Attorney at Law
314 Greenup Street
Covington, Kentucky 41011

Robert Lotz, Esq.
120 West Fifth Street
Covington, Kentucky 41011

Kevin Hable, Esq., Secretary
Governor's Executive Cabinet
Capitol
Frankfort, Kentucky 40601

Edward Holmes
Secretary, Cabinet for Public Protection and Regulation Cabinet
80 Airport Road, Suite 1
Frankfort, Kentucky 40601

Patrick Mulloy, Secretary
Finance and Administration Cabinet
Capitol Annex, Room 383
Frankfort, KY 40601

Allison Connelly, Esq. - Ex Officio
Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane
Frankfort, Kentucky 40601

Please issue to them commissions.

4. The Task Force shall be guided by a methodologically sound research design developed in conjunction with professionals with expertise in research and public defender delivery systems theory and practice.

5. Department of Public Advocacy staff shall provide support and assistance as required by the Task Force. The Task Force shall coordinate and schedule all meetings and prepare written reports as needed.

6. The Secretary of the Cabinet of Public Protection and Regulation shall take all actions necessary to effectuate the provisions of this Order including the transfer of funds, records and equipment, and all other action inferred herein in order to carry the provisions of this order.

BRERETON C. JONES, Governor
Commonwealth of Kentucky

BOB BABBAGE
Secretary of State

♣ ♣ ♣ ♣

PUBLIC ADVOCATES AND THEIR TERMS

1) Anthony M. Wilhoit, 1972-1974
2) A. Stephen Reeder,* December 27, 1974
3) Jack E. Farley, March, 1975 - October 1, 1983
4) Paul F. Isaacs, October 1, 1983 - December 31, 1991
5) Judge Ray Corns, January 1, 1992 - June 16, 1992
6) Allison Connelly, July 2, 1992 - present

* Appointed but did not serve.

COMMONWEALTH OF KENTUCKY

CABINET FOR PUBLIC PROTECTION AND REGULATION

EDWARD J. HOLMES
SECRETARY

FRANKFORT

BRERETON C. JONES
GOVERNOR

June 8, 1993

Dear Public Defender Staff:

During my first eighteen months as Cabinet Secretary some of my most difficult challenges, as well as some of my most rewarding moments, have involved the Department of Public Advocacy. Thanks to the shared commitment and perseverance of so many individuals we have made progress in addressing the issues and concerns facing the Department.

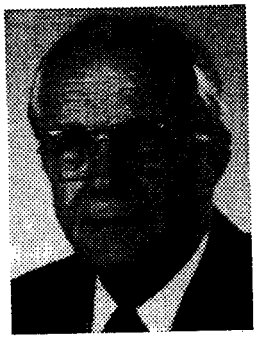
But as we all know progress toward the resolution of such complex issues comes slowly, especially in the government arena. Having experienced the challenges of state government first hand, I continue to advocate that working within the system is our most effective avenue for change. This belief was reaffirmed with Governor Brereton Jones' appointment of a Public Advocacy Task Force to study the various issues and make recommendations as to the most effective and efficient way to provide quality public defender services throughout the Commonwealth of Kentucky. The Task Force provides the Department an unprecedented opportunity to benefit from the expertise of leaders throughout the state in the development of long-term strategies and solutions.

With renewed hope, and in commemoration of the 20th Anniversary of the Department's establishment, and the 30th Anniversary of *Gideon*, I would like to take this opportunity to personally thank each of you for your work, and the personal sacrifices you make, to assure that the indigent in Kentucky receive legal counsel and equal justice. I pledge my continued support to work with you toward this end.

Sincerely,

Edward J. Holmes, Secretary
Cabinet for Public Protection and Regulation

Quality Implementation of the Right to Counsel



Senator Wendell H. Ford

{The following remarks were made by then Governor Wendell H. Ford in Louisville, Kentucky on October 17, 1972. They are reprinted with permission of United States Senator Ford.}

Since the third century, governments have wrestled with the problem of providing representation for persons charged with a crime, but who could not afford it.[1] The Sixth Amendment to the Constitution of the United States assures that, "In all criminal prosecution the accused shall... have the assistance of counsel for his defense." The very essence of democracy is the concept of equal justice under law. Yet for most of our country's history, this right to counsel was applied only in federal prosecution. Only nine years ago did the highest court in the land rule that this applied in state criminal trials.[2]

We know the unhappy result of the law's failure to meet the just expectations of those governed by it. Law loses its stabilizing influence; at best the result is alienation and lack of trust in the legal system. At worst, there is unrest and violence. In America today four systems are used to provide counsel to indigent defendants: assigned counsel, public defender, private defender, and a mixed public-private defender. The oldest of these - and that which has been used in Kentucky - is assigned counsel. When a defendant in this state appeared before a judge without counsel and said he could not afford counsel, the judge appointed a lawyer to represent him. The selection was frequently limited to those lawyers present in the courtroom at the time. The lawyer was not paid a fee, nor was he reimbursed for any money he might have spent in preparing a defense. The result was too often inadequate preparation and as inexpensive a defense as possible. The system of assigned counsel was designed to fit a rural society. For many years it worked well in Kentucky. At a time when criminal justice was comparatively uncomplicated, and criminal caseloads much lighter, counsel could afford to take the then rare assignments, at no fee.

This is no longer practical or proper. It has been increasingly difficult to assure just process of law with our growing population and crowded courts. Now Kentucky becomes one of the few states in the Union to meet realistically the intent of the Sixth Amendment and of Section II of our own state constitution. It has been said that the quality of a nation's civilization depends on the way it enforces its criminal laws. And there can be no civilized enforcement of criminal law without full legal assistance to the accused. This we shall have! I am today announcing a public defender program for the Commonwealth of Kentucky. I am also announcing the procedure to quickly implement the program.

Here is where the challenge lies. We have fifty-three judicial districts in Kentucky which will have to establish local public defender offices to carry out the intent of the new law. this must be done and approved before the $2.6 million appropriated for the program can be released. I am requesting this be done in ninety days!

In order to accomplish this challenging task, our Office of Public Defender will have to coordinate with each circuit court judge, the presidents of the respective bar associations, local fiscal court judges, and other concerned parties. These local groups will determine how this public defender program will be carried out. It will be the task of our public defender, his deputy, and assistants to make sure the letter and intent of the law is followed. The interest in our public defender program out in the state is considerable and we think we have the man to meet the challenge.

With this introduction and assuming he still wants the job, it gives me great pleasure to announce my appointment of Kentucky's first public defender: Mr. Anthony (Tony) M. Wilhoit. Mr. Wilhoit is a 1963 graduate from the University of Kentucky Law School. While a student at UK, he served as a legal aide in the Attorney General's Office. He has practiced law in Versailles since passing the State Law Board and served one year as police court judge. He has also served three years as city attorney. Mr. Wilhoit is presently serving in his fifth year as county attorney for Woodford County. We believe we have the right type of person in Tony Wilhoit to get the job done, and get it done right. Shortly, his deputy and assistant will be announced.

I want to publicly express my respect and appreciation for the service rendered in this important endeavor - the Kentucky Bar Association, the Circuit Judges Association, the County Judges Association, Skip Grafton of Louisville who worked diligently on the enabling legislation, and to my chief legal counsel, Larry Greathouse, who has been a vital link from my office with the groups mentioned.

[1]Press Conference.
[2]*Gideon v. Wainwright*, 372 U.S. 335 (1963).

Wendell H. Ford, Kentucky's senior United States Senator, has served in the Senate since December 28, 1974. Now in his fourth Senate term, Ford holds the position of assistant majority leader, commonly referred to as "majority whip." First elected to the post in 1990, he was re-elected without opposition to serve in that capacity for the current 103rd Congress. Ford's career spans over a quarter of a century in elective office. He began as a Kentucky state senator in 1965 and was elected lieutenant governor in 1967. Four years later, he became the Commonwealth's 49th Governor. Now in his 19th year in the Senate, Ford has risen to 18th out of 100 members in overall seniority and ranks 10th among Democrats in the 103rd Congress. In 1992, he received the largest number of votes ever recorded by a candidate for elected office in the Commonwealth.

Ford is a believer in community service and was named one of the three Outstanding Young Men in Kentucky in 1955. He served as state president of the Kentucky Jaycees and later as national Jaycees president and international vice president. He has received the highest service awards from both the March of Dimes and the Boy Scouts. He has been honored by the U.S. National Guard Association, and has also received special commendations from the Veterans of Foreign Wars and the American Legion for his continuing service to veterans and their dependents. In addition, he has received special recognition for his continuing support of Kentucky Educational Television, the Kentucky Housing Corporation, the Kentucky Council of Area Development Districts, the national Association of Regional Councils.

Ford was born in Thruston, Kentucky on September 8, 1924. He graduated from Daviess County High School in Owensboro and later attended the University of Kentucky. He served in the U.S. Army in 1945-46 and in the Kentucky Army National Guard for 13 years.

He is married to the former Jean Neel of Owensboro, and they have two children and five grandchildren.

♣ ♣ ♣ ♣

"You may be 38 years old, as I happen to be. And one day, some great opportunity stands before you and calls you to stand up for some great principle, some great issue, some great cause. And you refuse to do it because you are afraid... You refuse to do it because you want to live longer.... You're afraid that you will lose your job, or you are afraid that you will be criticized for that you will lose your popularity, and you're afraid that somebody will stab you, or shoot at you or bomb your house; so you refuse to take the stand. Well you may go on and live until you are 90, but you're just as dead at 38 as you would be at 90. And the cessation of breathing in your life is but the belated announcement of an earlier death of the spirit."

- Martin Luther King, Jr.
"But If Not." Sermon, Ebeneezer Baptist Church, November 5, 1968, Copyright © Martin Luther King, Jr., Estate, 1968.

421 Madison Avenue, Covington, Kentucky 41011 606-292-2600

"Give light and the people will find their own way."

Judith G. Clabes, Editor
Mike Farrell, Managing Editor
Shirl Short, Editorial Page Editor

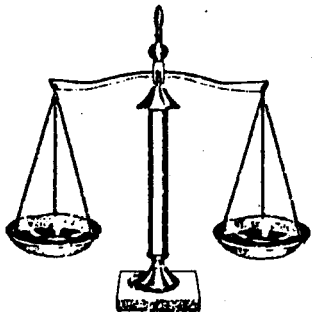
SCRIPPS HOWARD

Opinion: Legal services for the poor

A state task force charged with finding ways to fund quality representation for the poor must explore all possible ways of addressing this issue, including requiring all licensed attorneys in Kentucky to provide pro bono work.

Find funds, ensure quality

When December 1995 rolls around and journalists and historians start analyzing the accomplishments of Brereton Jones in his term as Kentucky governor, election reform, constitutional amendments and the still unfinished business of health care reform likely will steal the large type.



But somewhere down in the fine print may be a footnote about an act he took last week.

Gov. Jones appointed a task force and charged it with finding long-term solutions to legal representation for those criminal defendants who cannot otherwise afford it.

The task force is to develop answers to the questions of funding and quality representation.

Now to the average taxpayer, forking out more dough to represent those who are accused of a crime would be greeted with the same kind of response Eric Davis received last weekend when he came to town wearing a Dodger uniform.

But being poor and indicted doesn't automatically mean one is guilty.

"One innocent person who doesn't have someone safeguarding their rights means we are all potentially at risk," is how Margo Grubbs, an attorney with an office in Elsmere, put it.

One of the bedrock principles of this experiment in democracy is that we are all equal under the law. The justice system is not supposed to work any better for the rich than it does for the poor. But the poor cannot afford the hot-shot lawyers while the rich can. And when the poor are accused of murder, they haven't the money to come up with a novel defense that will keep them from a cell on Death Row. It has happened in our community enough to prove the point beyond any whisper of a doubt.

The question, then, is not whether we must fund legal defense for the poor but how.

Perhaps court fees charged all defendants should be increased, and a portion reserved for the public defender system.

Perhaps lawyer's fees should be taxed for that purpose.

Perhaps some of the money collected as a result of drug raids should be diverted from police departments to pay for the defense of the impoverished.

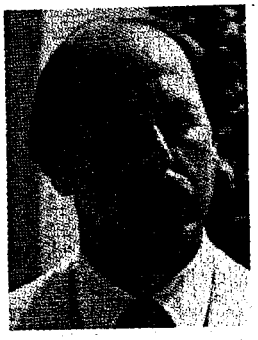
Perhaps a sliding scale should be developed — and made mandatory — that only the poorest of the poor get absolutely free representation.

In any event, one proposal should be at the top of the list. Everyone who has a license to practice law in the commonwealth should be required, as a condition of that license, of annually providing so many hours of pro bono representation for indigent criminal defendants.

The burden being shared by a few attorneys should be shared by them all. The right to practice law — and make a living — as a tax lawyer, real estate lawyer, corporate lawyer, or a litigator should carry with it the responsibility to make sure the rights of all Kentuckians are protected.

[Wednesday, June 23, 1993; KY POST]

DPA Public Advocacy Commission
Jones Resigns; Ewald Elected



William R. Jones

JONES RESIGNS

William R. Jones was appointed to the DPA Public Advocacy Commission July 15, 1982 and reappointed March 4, 1985 and September 13, 1988. He was the Dean of Chase Law School from 1980 - 1985. He is a 1968 graduate of the University of Kentucky Law School, and he received his LLM from the University of Michigan in 1970. Since 1985 he has been a Professor of Law at Chase.

At the meeting of the Public Advocacy Commission on June 15, 1993 Jones resigned from the Commission. Public Advocate Allison Connelly presented Dean Jones with a plaque honoring his 11 years of service to insuring a quality Kentucky indigent defense system.

Robert C. Ewald

EWALD ELECTED

At the same meeting Robert C. Ewald of Louisville's Wyatt, Tarrant & Combs was elected Chair of DPA's Public Advocacy Commission. Ewald was appointed to the Commission by Governor Wallace Wilkinson on October 2, 1990. Accompanying this article, we reprint a February 1991 interview with Mr. Ewald upon his appointment to the Commission.

THE PUBLIC ADVOCACY COMMISSION

The 12 person Commission consists of a representative from each of the law schools, and members recommended to the Governor by the Speaker of the House of Representative, the President Pro Tem of the Senate, the KBA, and members appointed by the Kentucky Supreme Court and the Governor.

The Commission assists the Department in insuring its independence through public education about the purposes of the public advocacy system, and has budgetary and general supervision responsibilities.

The Commission Chair from 1986 - 1993 was William R. Jones. Previous Commission chairs have been Anthony M. Wilhoit, Kentucky Court of Appeals Judge; Max Smith, Frankfort criminal defense attorney; and Paula M. Raines, Lexington criminal defense attorney.

Current members of the Commission are: Robert W. Carran, Susan Stokley-Clary, Robert C. Ewald, Mike Heeley, Lambert Hehl, Jr., Denise Keene, Barbara Lewis, Currie Milliken, Paul E. Porter, Martha A. Rosenberg.

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"I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education."

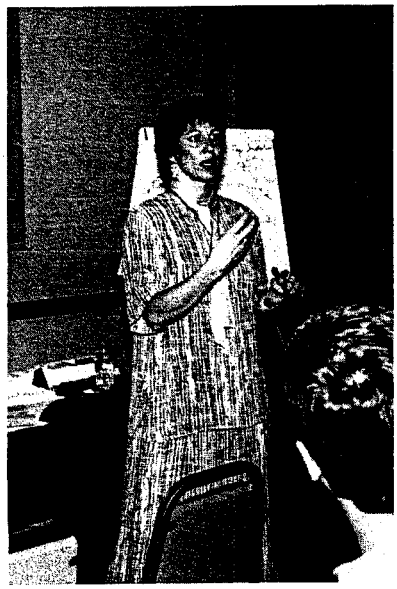
- Thomas Jefferson

21st Annual Public Defender Conference

The beginning of the 3rd decade of the Department of Public Advocacy saw its 21st Annual Conference attract 250, the largest attendance in 21 years. Many events and lots of learning took place under Allison Connelly's first Annual Conference as leader of Kentucky's public defense. A few highlights follow:

FRED WARREN BENNETT is an Associate Professor of Law at the Columbus School of Law, the Catholic University of America, in Washington, D.C., where he teaches Evidence, Trial Practice and Criminal Law. A 1966 graduate of the George Washington University Law School, Mr. Bennett was a trial attorney for 26 years before he started a "second" career in teaching. He spent 12 years in private practice in the District of Columbia and Maryland (1966-78) and then served as the Chief Public Defender for Prince George's County, Maryland from 1978-80. Mr. Bennett then served 12 years as the Federal Public Defender for the District of Maryland (1980-92). During this 12 years he represented John Walker and Ronald Pelton in the two most publicized espionage cases of the 80's. In 1986 he was named criminal defense lawyer of the year in Maryland by the Maryland Criminal Defense Attorneys Association. He has first chaired over 200 jury trials and currently accepts post-conviction death penalty cases from the Capital Defense Division of the Maryland State Public Defender Office. He spoke on *The Rules of Evidence Beguiled Me & I Did Eat: How to Use Evidence Rules to Your Advantage as a Defense Attorney.*

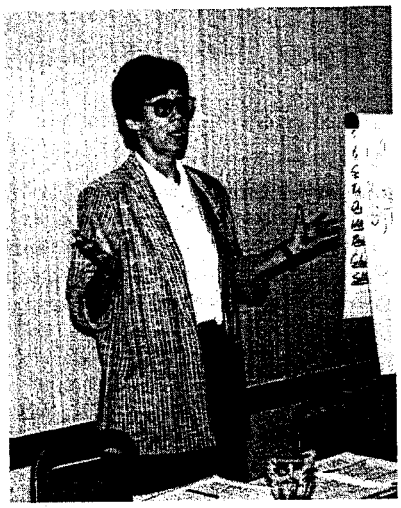
RAYMOND M. BROWN spoke to us on *Theories of Defense in Child Abuse Cases: The Need to Bring out Your Theory in Voir Dire, Opening, Cross-Examination and Closing* and on *Batson Litigation in the 1990's.* Raymond practices in Newark, New Jersey with his father who has represented Rubin "Hurricane" Carter among other high profile cases. "My father has taught me black consciousness, compassion, strength, and courage - and most of all, commitment to the underdog, at all times, at all places, and at all costs." Brown was arrested in 1968 for criminal trespass for his involvement in the 1968 student strike at Columbia University. He was the 1989-90 President of the New Jersey Association of Criminal Defense Lawyers, and is a National Association of Criminal Defense Lawyers' Board of Directors member. He represented the chief engineer of the Schiavone Construction Company where Reagan's Labor Secretary Ray Donovan was a co-defendant. His client was acquitted with applause from the jury.



PAULA RAINES educated defenders on the power of the Enneagram. Paula is a talented inspired teacher who has taught and lectured nationally. She is a lawyer, psychologist and former law professor who has a Master's Degree in Counseling Psychology and a Ph.D. in Transpersonal Psychology. She has a wide variety of publishing experiences ranging from law journal articles to poetry. She currently has a private legal practice in Lexington, Kentucky, and is on the clinical faculty at the U.K. Medical School. Paula does not generally like systems or categories, however, she was introduced to the Enneagram while working on her Ph.D. and found it to be such a powerful tool for understanding the self and others that she began teaching it. Paula served on the Kentucky Public Advocacy Commission for 3 years as a member and as its Chairperson.

Dr. Eric Drogin of Norton Psychiatric Clinic, and DPA's **Kelly Gleason, Vince Aprile, & Ed Monahan** conduct a workshop on *Components of the Forensic Psychological Evaluation & Report.*

DPA Training 'Director' Tina Meadows directs her 'Assistant' Ed Monahan on his duties



Ava Crow of DPA's Protection & Advocacy presents on *The Americans with Disabilities Act: What you Should Know in Providing Representation to Clients*

Allison Connelly at the DPA 21st Annual Public Defender Conference with the Public Protection & Regulation Leadership

(From left to right)
Carol Czirr, Public Information Officer,
Secretary Edward Holmes,
Allison Connelly, Public Advocate,
Shelley McConkey, Principal Assistant

Past Public Advocates Address Defenders

{Editor's Note: The following are the remarks of DPA's Past Public Advocates at DPA's 21st Annual Public Defender Training Conference in June.}

Kentucky's First Public Advocate

I guess, today, the thing I feel most like is a proud papa. Seeing my child mature; get wiser; get more skilled.

I look out over this room, I see some old faces, who where actually here in the beginning. Not many of them, one or two. I see fresh new faces, and it gives me a lot of confidence for the future. I've been able to work with a lot of you folks. I know how skilled you are. I know how dedicated you are.

There's no, no profession that is more demanding than that of a criminal defense lawyer. There is no profession that is more frustrating than that of a criminal defense lawyer. You're going to lose most of your cases. Face it. But you've got to have that dedication, which all of you have exhibited over the years, that dedication that there will be equal justice, under law.

I could stand up here and I could mouth a lot of platitudes, and on these occasions, you tend to get a lot of that. I'm not going to do that. And I'm not going to mouth much, because Judge Ray Corns is here and I'm not going to cut into his time. And besides that Vince has moved to add ten pages to his talk later. I saw the motion.

But I do want to say this from the bottom of my heart. You've got a rough time, we know you've got a rough time. But you have managed to answer the call, each and every one of you. Don't ever forget that you're Kentucky lawyers. That you're professionals. I know sometime you get frustrated, and you get this attitude, it's them versus us. We're all us. We're all in this thing together. You are lawyers, don't forget it. I know the temptations, and I've seen public defender systems come to their knees because you get so frustrated that you think you have to politicize things. Be lawyers first, last and always. When you begin to politicize and represent causes instead of people, you're going to lose every time. Remember, you represent people. And those people rely on you.

Good luck. And when you come back in another twenty years, I hope you'll ask me back. You're just great.

ANTHONY WILHOIT
Justice, Court of Appeals
Versailles, Kentucky

♠ ♠ ♠

Kentucky's Second Public Advocate

Good morning to you all! I bring you greetings from Florida. The other day I learned about a Southern comedian who writes books and makes public appearances talking about "You Know You're a Redneck if...." Perhaps some of you all are familiar with him but I've forgotten his name. Anyway, I'll go one step further than him, since I've now graduated from Kentucky "redneck" to a Florida "redneck." You know you're a true Floridian if you no longer care about your neck being red, but you want your whole body to be red, too. You're trying to get a tan all over. And you know you're a true Floridian if you insist that your swimming pool be 90 degrees. We always look for jokes

Former Public Advocates *(from left to right)* **Jack Emory Farley, Tony Wilhoit, Judge Ray Corns,** and **Paul F. Isaacs** were honored at the 21st Annual Public Defender Conference in Louisville by current Public Advocate, **Allison Connelly**

to tell about people who come to Florida and actually go swimming in April or May. We know they must be from up north someplace. Florida is the land of hot sands, ordinances banning T-back bathing suits, and *Gideon.*

In my youth I identified with Paul Newman, he was my idol, but now I'm more like Wilford Brimley. You know, of Quaker Oats fame. But I know for sure Wilford's right about one thing... YOU ALL DO IT BECAUSE IT'S THE RIGHT THING TO DO! That's why you're public defenders and public advocates, because it's the right thing to do!

When I tried my first and only murder for hire case before Judge Ed Venters in Pike County many years ago, I imitated an argument I had once seen used by John Paul Runyon, the prosecutor, when he said, "Your Honor, I don't like to put a label on a case," and then he proceeded to do just that. I'll do it too. My labels or themes today are persistence, perversity and progress.

In the seminar materials you've handed out there's an article by Larry Landis that is tremendous. He talks about public advocates being "change agents." You really need to study his article, you need to lift it up, you need to begin to think about being change agents, about being persistent in your quest for truth, righteousness and justice. It may not happen in this lifetime, but you need to be persistently looking to achieve these goals.

And the perversity of this life is that things always seem to get worse before they get better. I think about our experience in Florida. I wish I could lift Florida up to you as a paragon of full funding for public defenders, and the true Valhalla of public defenderism, but it is not! The budget for the public defenders in Florida is exactly half what it is for the prosecutors. And there are twice as many prosecutors as there are public defenders.

Judge Venters used to say, in Pike County, that the public defenders should be elected. That's the way it's done in Florida. Judge Wilhoit, I understand your note of caution about not politicizing matters, but perhaps you all should think about seeking to have public defenders elected. At least you would be, as I always like to say, part of the 'warp and woof' of society's fabric. And this might improve your funding situation.

Besides the perversities of your funding problems (which I keep reading about in *The Advocate*) and the perversities of your day-to-day work and the difficulty in doing it. And besides the persistence that you must have to fight the good fight, defend your individual clients, identify with their plight, and sometimes say to yourselves, "There, but for the Grace of God, go I."

Besides all these things there is progress here in Kentucky in the world of public advocacy. I know you don't see it, you're in the microcosism, you're in the process here. But I see it. I've been gone ten years, and I see PROGRESS. As Tony Wilhoit was saying, I too see new faces. And I'm also glad I see some of the same faces that were here when I was here. That shows your persistence, but I also see progress.

Most of you have made this a true *voco*, a vocation, a calling in the literal sense. You are dedicated to the job because you know it needs to be done and you love doing it. And you'd probably be doing it whether they paid you or not. That's the kind of people we always used to look for -- the kind of people we avidly recruited -- the kind of people you all are.

There is progress here. You have better training materials, better publications, and there are more and better seminars. I looked at the seminar schedule and I counted thirty or so subjects, and I asked myself, as I always used to ask Vince Aprile, "When is there time to even stop and have a drink?" What an intense and stimulating opportunity you have before you! Take advantage of every session you can possibly attend. Don't be like those folks who used to slip out in the middle of the movie we usually began our seminars with on Sunda night.

Maybe you shouldn't politicize your concerns, but that does not mean you should shrink from becoming deeply involved in the political process. As you go back and forth between public service and private practice, even some of you who are heart, mind, soul and body public defenders to the core, some of you should continue to run for public office. Bill Nixon, wherever you are, I encourage you to run again for judge.

You all should continue to become part of all parts of the criminal justice system. Become prosecutors! Yes, some of you can and should become prosecutors. Thoroughly immerse yourself in the criminal justice system and the political process. Others might say, "It's no longer us and them." But I think instead of it being all "us," I think we need more of us to be "them. "

We must never forget that we're public advocates. Even though I now work much like a prosecutor handling employee merit system disciplinary hearings for Florida's social services agency, *under my skin there beats the heart, always, of a PUBLIC ADVOCATE.*

JACK EMORY FARLEY
Attorney at Law
Tampa, Florida

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Kentucky's Third Public Advocate

It's a very nice honor to be here, and to see a lot of new faces, familiar faces. I enjoyed working with and being a part of your professional career the eight plus years I was here the second time, and some of you even when I was here the first time I was here. As everybody has said, anybody who ever worked in this office at any point in time never really gives up their dedication. The dedication of serving people in trouble, serving them in a very difficult time, and trying to preserve their liberty and their rights. You never quite forget that experience, no matter what. I enjoyed that experience, it is one of the highlights of my life.

In thinking about this meeting today, and the fact that we're talking about the Department, where it started from, where it has come, and the growth and tremendous enthusiasm that we see in these meetings today, I couldn't help but think about a something that not too many people know about. That is the discussions in the first floor of the University of Kentucky Law School when I was a law student there, with another lawyer and who is not here today, Larry Greathouse. The question, "Why don't we have Public Defender system in the state of Kentucky?" And as law students, wondering what can we do about this? And, what are we going to do when we get out? Then a few months later, after we graduated and I ran into Larry. He said, "You know, I've decided to get involved in politics." And he told me who he was supporting. And I gave him one of my

great little pieces of political wisdom that I'm famous for. I said, "Larry he doesn't have a shot." I quit giving political advice after that. Larry went on to become General Counsel for Governor Wendell Ford, but he never forgot that dream we had in law school. He was very much apart of why we are all here today. And it's that kind of dream, that kind of vision that we have to keep in our minds.

I was reminded again of that type of vision the other day, when I heard Janet Reno, the new Attorney General, talking about what are we going to do with second time drug offenders, other than putting them in prison, I thought about how this office created an alternative sentencing program, and the opportunity to build on that, and how that idea, that David Norat and many of the others in this office shaped, has now become a part of public policy of the United States. These are very difficult times, and they are going to get harder. The funding crisis will get worse. That means all of us, as state employees have to take on more and sacrifice more. We must also never forget, that this is a time of opportunity. A time that we can build on our past success. And look to the future so we can make this system even better.

Thank you for having me here and for the opportunity to be a part of this anniversary. And for the wonderful eight plus years I had working with each and every one of you.

PAUL F. ISAACS
General Counsel, Justice Cabinet
Frankfort, Kentucky

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Kentucky's Fourth Public Advocate

I was almost overwhelmed by the introduction, until I remembered there's a Kentucky trial judge who has willed his brain to Harvard Medical School. Harvard is contesting the will.

I'm sure you're going to get CLE credits for this time, acknowledging cruel and unusual punishment.

I came to Frankfort in 1959 - I know this sounds like Neanderthal Man speaking to most of you - to stay 12 months to be legal advisor to Governor Combs. I stayed eight years as legal advisor to Combs and Breathitt. And have been in Frankfort until now.

One of the strange paradoxes of today is that we pay men and women millions of dollars to play games while the most valuable services are oftentime provided by volunteers or grossly underpaid people; such as those in this room. The contribution you make will not be in that balance sheet you find on a financial ledger, but in what you have done for people. Don't expect to get all of the appreciation and gratitude in this life, to which you might be entitled.

There's an old story, Vince, about Clyde laying on his death bed. He and Sarah had been married for almost 63 years. Clyde was about to ready to pass over the river. He could hardly whisper. He said, "Sarah, I've been thinking. You remember when we first got married? Floods came and washed out all of our crops. But it was O.K. Because you were right there by my side." Clyde continued, "You remember when I got drafted into the armed services. I almost got killed in France. But you being a nurse, you joined the Red Cross. And when they wheeled me into the hospital in Paris, there you were. And you stayed with me those four months. I didn't know whether I'd live or die. But it was O.K. You were there by my side." Clyde said, "You remember, not many years ago, our oldest boy, Henry, got sent to the penitentiary. But it was O.K., you were there by my side." Clyde took a deep breath; sort of raised up on one arm; and said, "You know, Sarah, as I reflect on all of these things, I've come to one conclusion. You haven't been anything but **trouble** to me all of my life."

So don't worry if you don't get the appreciation and gratitude you think you should have.

I know most of you are aware of this, but if you should ever forget maybe this reminder will help. Don't let titles deter you in your representation; do your very best for every person; no matter the charge.

Don't let the word "governor" deter you. Will Rogers was right when he said, "There are two kinds of people in a governor's office: those who write letters they never sign; and those who sign letters they never write." I was in there eight years. I know a little bit about how it works. This is not to detract from the office, or the office holder; they both are entitled to respect.

You have a message to tell about the needs of this agency. The governor, no matter who he or she may be, knows so little about your agency, even though their interest may be genuine.

Don't let the word "judge" deter you. I was Judge in Franklin Circuit Court for seven years. I averaged 2600 cases. I never had a hearing in those seven years that I did not read the entire file before that hearing was held. I felt I owed that to lawyers; the Bar; and the people they represent. Even when you do that, the judge knows so little about the case. You know it from the ground up. You're in there on a mission. You have to educate the judge; you have to educate the governor; you have to educate the legislators. Sell your message, day after day, and don't be deterred by titles. They're not that significant. Show respect, but not fear.

I think Theodore Roosevelt had people like you and in mind, when during his famous address at the Sorborne, on April 23, 1910, he made that classic statement: **"It's not the critic who counts; not the man who points out how the strong man stumbles, or where the door of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, and comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows the great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement; and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be, with those cold and timid souls, who know neither victory nor defeat."**

Hopefully you're looking at a new day. I hope adequate funding will come. I even hope it'll come during my lifetime; but that's not likely. But remember there's so much you can do in spite of the lack of resources. With only 26 letters, Shakespeare is a literary giant for the ages. With only 7 basic notes, Beethoven has composed music acclaimed by critics today. With only 3 basic colors, Rembrandt's paintings bring in the millions. And with only 10 simple numbers, Einstein is a household word around the world. So can it be with each of you!

JUDGE RAY CORNS
Frankfort, Kentucky

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Kentucky Case Review

This is a subject index for cases reported in the S.W.2d advance sheets since January 5, 1993 to July 13, 1993. [840 S.W.2d No. 2 - 853 S.W.2d No. 2]. There is one 6th Circuit case noted in the appeal section but the remainder are all Kentucky cases. In order to save space a uniform system of abbreviation, which is explained in the next paragraphs has been adopted.

In the index, each case is cited by name and an abbreviated citation. If the case is a Supreme Court case the name, the volume number, the page number and the date are given as follows. [Commonwealth v. Preece, 844 X 385 - 1992]. If a case is a court of Appeals case, the letter "A" is simply added between the page number and the date. [Hogg v. Commonwealth, 848 X 449 - A - 1992].

The Commonwealth or the Commonwealth's Attorneys are referred to with the abbreviations CW, CAO, AG or ACA. References to the defendant are made D.

The subject headings and the pages on which they begin are:

SUBJECT **Page**

1) APPEAL/PRESERVATION OF ERROR

Silverburg v. Evitts,
993 F.2d 124 (6th Cir., 1993)
6th Circuit holds that a motion for discretionary review in the Kentucky Supreme Court is required to exhaust state remedies in federal habeas action.

Lucas v. CW,
840 X 212 - A - 1992
Cumulative error noted as ground for reversal.

Worker's Comp Board v. Siler,
840 X 812 - 1992
Substantial compliance rule does not apply to failure to file timely notice of appeal.

CW v. Nelson,
841 X 628 - 1992
Exception to mootness doctrine for "capable of repetition" cases established.

Funk v. CW,
842 X 476 - 1992
Cumulative error recognized as grounds for reversal. Court holds that *Grooms* error in closing argument will not be considered unless preserved for review. Court also noted that was a case where proof was not overwhelming and therefore reversed.

KBA v. Shewmaker,
842 X 520 - 1992
Original action case limits relief to extraordinary situations to prevent miscarriage of justice.

Prewitt v. Wilkinson,
843 X 335 - A - 1992
Person on appeal bond not in custody, relying on KRS 520.010(2).

Duerson v. EK Power Coop,
843 X 340 - A - 1992
Court will not address constitutionality argument unless CR 24.03 complied with.

Sommers v. CW,
843 X 879 - 1992
Unless party requests further relief court will not review error resulting from sustained objection.

Powell v. CW,
843 X 908 - A - 1992
Defendant did not object to failure to prove *Miranda* complied with - court does not review.

Estep v. BF Saul,
843 X 911 - A - 1992
Court of Appeals bound to follow Supreme Court cases unless distinguishable - but can ask Supreme Court to review precedent.

CW v. Preece,
844 X 385 - 1992
Failure to object after first objection sustained and notes of grand jury tape reviewed meant error unpreserved. Court refused further review absent showing that substantial rights of defendant were affected, *i.e.*, that a different result would occur. Also, court followed rule that where some inadmissible evidence required reversal, would look at remaining evidence to determine sufficiency.

Sizemore v. CW,
844 X 397 - 1992
Defendant must object to prosecutor's closing argument during argument and must seek relief. It is too late after the jury retires. Also, failure to object to statements of witnesses outside that provided by RCr 7.26 and cross-examination led to finding of lack of prejudice.

Dean v. CW,
845 X 417 - 1992
Party can't assign one ground at trial and rely on another on appeal.

Smith v. Smith,
845 X 25 - A - 1992
Appellate court cannot set aside findings of fact unless clearly erroneous.

Newberg v. Sloane,
846 X 694 - 1992
Court relied on authority cited only at oral argument.

CW v. Wilcoxson,
846 X 719 - A - 1992
Court refuses to consider issue that CW did not preserve.

Vunetich v. CW,
847 X 51 - 1992
Restated rule that there is no claim for ineffective assistance of counsel on appeal unless appeal was dismissed due to neglect of counsel. Court also held that appellate counsel is not required to raise every non-frivolous issue in a case.

Fischer v. State Board of Elections,
847 X 718 - 1993
Standards for writ of prohibition stated.

State Board Elem. Educ. v. Ball,
847 X 743 - 1993
Court says it is text book law that appellate court cannot overturn findings of fact unless clearly erroneous, that is, not sustained by sufficient evidence.

Hogg v. CW,
848 X 449 - A - 1992
78 page appendix case, court holds attorney in contempt for refusing to reduce brief to acceptable level.

Karahalios v. Karahalios,
848 X 457 - A - 1993
Subject matter jurisdiction cannot be waived and may be challenged at anytime even on appeal.

First Kentucky Trust v. Christian,
849 X 534 - 1993
Court decides to consider issue to resolve case and to guide legal profession.

CW v. Karnes,
849 X 539 - 1993
Defendant did not file cross-motion for discretionary review and therefore issue would not be properly before court.

Sharp v. CW,
849 X 542 - 1993
Court declines to rule on issue because case was reversed on other grounds.

Robbins v. Robbins,
849 X 571 - A - 1993
Court will not search videotapes to find complained of proceedings if parties do not cite to the record. Court chooses not to dismiss but says could do so under CR 76.12(8).

Altman v. Allen,
850 X 44 - 1992
Court says will give trial judge's disposition of juror challenge for cause great weight.

Cann v. Howard,
850 X 57 - A - 1993
Court takes sua sponte notice of subject matter jurisdiction problem.

Goldman v. Eichenholz,
851 X 463 - 1993
States requirements for mandamus and limits grant of writ to situations where there is no remedy that will prevent irreparable harm or great injustice.

Bills v. CW,
851 X 466 - 1993
Court holds that where defendant is acquitted on charge contained in defective instruction error is of no consequence. Court noted that defendant failed to preserve objection to instruction as required by RCr 9.54(2).

Edwards v. Land,
851 X 484 - A - 1992
Where a party fails to cross-appeal court will not address issue that should have been raised by that means. Court also notes that it is improper to rely on Am Jur citations if there are Kentucky cases dealing with the situation.

2) ARREST/SEARCH AND SEIZURE

Churchwell v. CW,
843 X 336 - A - 1992
Kentucky park police not in hot pursuit cannot stop and arrest person outside of park. Evidence obtained directly or indirectly from illegal police actions must be suppressed unless the CW shows an independent source. The voluntary act of accused is insufficient to cure otherwise unlawful police acquisition of evidence.

Crayton v. CW,
846 X 684 - 1992
Adopts *Leon* good faith analysis which permits court to admit evidence based on improper warrant that was not the fault of police officer. Court finds important that federal and state constitutional language almost the same and that neither contains mention of suppression of evidence as a remedy. Court holds that admission of illegally obtained evidence does not result in second constitutional injury and that cost of excluding this otherwise trustworthy tangible evidence outweighs deterrent effect on police. Court holds that officer must have objectively reasonable belief in sufficiency of the warrant and probable cause determination and that suppression is authorized where the judicial function required by Section 10 has not been discharged.

Holbrook v. Knopf,
847 X 52 - 1992
Holds that Section 10 does not prohibit pretrial blood samples of person accused of crime.

3) CONFESSIONS

Dean v. CW,
844 X 417 - 1992
Reviews law concerning defendant's assertion of right to counsel in custodial questioning. Court adopts Virginia standard saying request must be unambiguous and unequivocal. If it is, no statement made afterward can be admitted unless CW proves that suspect initiated further discussion and knowingly waived rights.

Harris v. CW,
846 X 678 - 1992
Admissibility of confession based on totality of circumstances and is reviewed under clearly erroneous standard.

CW v. Karnes,
849 X 539 - 1993
Under RCr 9.60, proof corroborating confession need not show that defendant committed crime.

Mace v. Morris,
851 X 457 - 1993
Section 11 protection against being witness against self not involved in pretrial blood test in criminal case.

4) CRIMINAL OFFENSES/DEFENSES

Lucas v. CW,
840 X 212 - A - 1992
In battered women defense case usual self-defense instruction is sufficient.

Key v. CW,
840 X 827 - A - 1992
Physical injury (KRS 500.080 (13)) is shown by evidence proving defendant hit other in head with bat and knocked to ground and hit in head with gun which

required stitches. Also, court held that wanton endangerment is shown by evidence that defendant pointed gun, loaded, or unloaded if reason to believe loaded, at another.

Funk v. CW,
842 X 476 - 1992
Burglary I - abandoned condemned and uninhabited building where decedent was found is building within this statute.

CW v. Wasson,
842 X 487 - 1992
Fourth degree sodomy statute held unconstitutional.

Churchwell v. CW,
843 X 336 - A - 1992
If person loans car to another knowing other intends to use for a crime, person is guilty of facilitation.

Powell v. CW,
843 X 908 - A - 1992
Court instructs use of KRS 500.080(14) definition of possession in Chapter 218A cases.

Sizemore v. CW,
844 X 397 - 1992
Trial judge correctly refused a separate self-defense instruction in wanton murder case.

Dean v. CW,
845 X 417 - 1992
Complicity is shown by defendant driving car during commission of offenses.

Downey v. Rogers,
847 X 63 - A - 1993
Support of children is a fundamental commitment that takes precedence over debts to creditors, particularly consumer debt.

Fulton v. CW,
849 X 553 - A - 1992
Holds that booking area in detention facility was detention facility for contraband case. Also, explains that if person conspires with another who completes an offense, the first person is guilty of complicity rather than conspiracy alone.

Covington v. CW,
849 X 560 - A - 1992
Court uses KRS 501.040 to incorporate the intentional mental state in assault third case.

Bills v. CW,
851 X 466 - 1993
Holds that in first degree sex abuse case a leg is an intimate part. Also held that person not entitled to intoxication defense unless evidence shows that person did not know what he was doing.

5) DISCOVERY

Funk v. CW,
842 X 476 - 1992
Found a Brady violation where CW withheld report that contradicted its theory of the case.

Skaggs v. Redford,
844 X 389 - 1992
Held that capital defendant was not entitled to see prosecutor's file under open records law. Purpose of request was to see if CW had Brady exculpatory evidence that was not turned over. Defendant wanted information to prepare federal habeas corpus. Court held that the entire prosecutor file was protected from disclosure until the prosecution was complete which would be when the sentence was carried out. Court held work product did not apply in this case.

Sizemore v. CW,
844 X 397 - 1992
Failure to object at trial to statements not revealed under RCr 7.26 is not error where defendant cross-examines on those statements.

Holbrook v. Knopf,
847 X 52 - 1992
Court holds that a trial judge may order a defendant to submit a blood sample as a form of discovery in criminal case.

6) DOUBLE JEOPARDY

Crayton v. CW,
846 X 684 - 1992
Court held that three hour time lapse between incidents justified convictions for wanton endangerment and second degree arson.

7) DUI

Bridges v. CW,
845 X 541 - 1993
Instruction defining under the influence which equated it with consumption rewrites the statute which cannot be done.

CW v. Raines,
847 X 724 - 1993
KRS 189A.200 is unconstitutional with respect to the age of the person whose license is suspended. Due process is required in any suspension meaning at least a prima facie showing that the requirements are met.

8) EVIDENCE

Key v. CW,
840 X 827 - A - 1992
In injury cases medical proof not necessary to show either physical or serious physical injury. The injured person is competent to testify about his own injuries.

Funk v. CW,
842 X 476 - 1992
A photo otherwise admissible is not excluded because it is gruesome. But it must be relevant in the first place. KRE 404(b) makes an exception for other acts that are inextricably involved with the charged act. This is determined by seeing if it is necessary to suppress facts relevant to the offense charged in order to exclude the evidence of the prior act.

KRE 404(b) does not permit common plan or scheme evidence. However, evidence of another crime, close in time with a common scheme is probative to identify the defendant.

In balancing evidence, court should determine how much is enough. Here court held that defendant's admission to cellmate and his plea of guilty was sufficient to show other act and it was not necessary to call two other witnesses.

Sommers v. CW,
843 X 879 - 1992
Explained that the probative value of a prior felony decreases with its remoteness and held that a 17 year old prior conviction was too old to be admitted for impeachment. Also, court held that testimony concerning a game of "choke the baby" was irrelevant in case where medical examiner said person not strangled. Court also ruled that co-defendant should not have raised trafficking charge of defendant at trial.

Billings v. CW,
843 X 890 - 1992
Major other crimes evidence case. Court held that evidence of criminal conduct other than that being tried is admissible

only if probative on issue independent of character or propensity and only if probative value outweighs unfair prejudice with respect to character inference. Court noted that as similarities increase, inferences are more likely to be drawn from common facts than from common criminality. Court also reaffirmed that the "lustful inclination" exception has been overruled and that the CW's evidence must satisfy the modus operandi standard set out in Adcock, that is, it must be unique tending to show identity. Court finally held under old rape shield law that defendant had right to explain motive to lie by saying he threw prosecuting witness out of house for engaging in sexual intercourse with others, but held that details should not be given.

Gray v. CW,
843 X 895 - 1992
Court held that where there were no striking similarities between incidents of sexual abuse any probative value is diminished and is diminished by significant temporal remoteness. Court also cited KRE 404(c) and held that integrity of trial is jeopardized when previously unknown witness appeared at 11th hour with evidence of uncharged collateral crime. Court held this affects fundamental fairness of proceeding.

Powell v. CW,
843 X 908 - A - 1992
Court held that other drug transactions should have been excluded except the one that possibly could have shown how defendant had possession of dope.

CW v. Preece,
844 X 385 - 1992
Court held that presence of check in defendant's kitchen did not meet test of logical relevance and went to a collateral matter.

Sanders v. CW,
844 X 391 - 1992
Eyewitness identification case citing most important federal constitutional cases. Held that where lineup is so impermissibly suggestive as to give rise to likelihood of irreparable misidentification, can be suppressed.

Hanson v. American Bank & Trust,
844 X 408 - 1992
Court adheres to rule which gives great deference to discretion of judge in balancing probative value and prejudicial potential.

Harris v. CW,
846 X 678 - 1992
DNA case. Court requires *Frye* hearing and announces case-by-case approach. Footnote 3 lists other cases where a *Frye* hearing is required.

CW v. Raines,
847 X 724 - 1993
Pretrial suspension of license requires *prima facie* showing that factors for suspension exist.

Sharp v. CW,
849 X 542 - 1993
Court states that O'Bryan has stated general rule of other crimes for long period. Does note exceptions. With child hearsay through doctor, court holds that child can say what acts were performed and who did them. Court specifically excludes social workers from this hearsay exception.

Bills v. CW,
851 X 466 - 1993
Court held that defendant's shout to wife at police station not to talk was not privileged. Court also held that evidence regarding circumstances under which defendant is arrested is admissible to give "background".

9) FAIR TRIAL/ ETHICS/MISCONDUCT

Lucas v. CW,
840 X 212 - A - 1992
Prosecutor's argument that "thou shall not kill" and that there was no exception for spouse abusers was response to defendant's evidence and did not exceed the reasonable latitude given to prosecutors in argument.

Smith v. McMillan,
841 X 172 - 1992
By way of contrast, the court will presume prejudice in a civil case from egregious argument of counsel.

Pelfrey v. CW,
842 X 524 - 1992
Trial judge's ruling on continuance will not be disturbed in absence of showing of abuse of discretion.

Churchwell v. CW,
843 X 336 - A - 1992
In reviewing issue of prosecutor's improper comment on post-arrest silence the question is whether there is substantial possibility of different result.

Sommers v. CW,
843 X 879 - 1992
Judge learned of defendant's background while district judge. There were also statements in press and because of upcoming election judge's impartiality might reasonably be questioned and recusal was justified.

Powell v. CW,
843 X 908 - A - 1992
Prosecutor must conduct himself with due regard to duties and see to it that the rights of the defendant as well as of the CW are protected.

Skaggs v. Redford,
844 X 389 - 1992
CW Atty and AG represent state's prosecutorial function. CW Atty does not prosecute on behalf of himself. Rather, he represents the state's interest.

Sizemore v. CW,
844 X 397 - 1992
Defendant must object and seek relief at time ACA makes objectionable closing - not after jury retires.

Dean v. CW,
844 X 417 - 1992
Pretrial publicity case. Individual voir dire is best way to determine if prejudice requiring change of venue exists. Also, prosecutorial misconduct claims require court to focus on overall fairness of the trial.

Loid v. Kell,
844 X 428 - A - 1992
Estoppel is defined as an equitable principle to prevent one who has failed to act when he should have acted from reaping a benefit to the detriment of the adversary.

Smith v. CW,
845 X 534 - 1993
CAO has duty to see that everyone gets a fair trial.

In Re Advisory Opinion,
847 X 723 - 1993
In criminal defense case, a city attorney may not defend a defendant where the city police are involved even if that attorney does not advise police. Court also notes that there is a public demand for professional independence in criminal defense work.

KBA v. Thewues,
849 X 549 - 1993
Court explains *Lovelace* rule. Rejects notion that any allegation of criminal

conduct against a civil client of a county attorney, regardless of evidence, requires withdrawal of the county attorney.

Sharp v. CW,
849 X 542 - 1993
Trial judge has broad power to decide whether violation of proper courtroom conduct requires mistrial.

Storer Communications v. Oldham Cnty. Bd. Educ.,
850 X 340 - A - 1993
Even though judge had expressed opinion on merits of case when dismissing civil action on own motion, court held that action not motivated by animosity and therefore recusal not required.

Bills v. CW,
851 X 466 - 1993
ACA may draw all reasonable inferences from evidence, announce theory of case, and explain why evidence supports defendant's guilt.

10) HARMLESS ERROR

Sizemore v. CW,
844 X 397 - 1992
Defendant objected to exclusion of hearsay statement. Court held that because substance of statement came to attention of the jury by other means, error was not prejudicial.

11) INSTRUCTIONS/ LESSERS/SUFFICIENCY

Funk v. CW,
842 X 476 - 1992
Court states will not reverse any case for Grooms argument error unless preserved under RCr 9.22.

Churchwell v. CW,
843 X 336 - A - 1992
Court must instruct on lessers only when evidence would warrant finding on the lesser.

Billings v. CW,
843 X 890 - 1992
Lesser instructions should be given when there is a doubt as to the higher offense and there is evidence of the lesser. In this case there was evidence of oral/ sexual contact and the defense was non-occurrence. Court held no reasonable juror could find the less serious offense of sex abuse.

Sizemore v. CW,
844 X 397 - 1992
Trial judge correctly refused a separate self-defense instruction on wanton murder.

Smith v. CW,
845 X 534 - 1993
Statute requires judge to instruct on mitigation in death case where instruction is supported by evidence, introduced at trial or sentencing.

Bridges v. CW,
845 X 541 - 1993
An instruction framed in terms of the statute is sufficient to tell the jury what the CW must prove. It is unnecessary to elaborate on what CW need not prove.

Sharp v. CW,
849 X 542 - 1993
Mere touching in ordinary experience would not have produced pain in even a small child in sex case.

Covington v. CW,
849 X 560 - A - 1992
Trial court has duty to instruct on every state of the case deducible from or supported to any extent by the evidence.

Bills v. CW,
851 X 466 - 1993
It is not necessary to instruct on CW's burden to negate voluntary intoxication where instructions, read as a whole, allow jury to find act was not intentional. Elements of unlawful imprisonment stated and contrasted to elements of kidnapping. Court states that penetration is not required to prove sodomy.

12) JURY/GRAND JURY/INDICTMENT

Lucas v. CW,
840 X 212 - A - 1992
Despite wide notoriety of the case, adequate voir dire on publicity, admonition not to read paper or watch TV and questioning each day on whether jurors had violated admonition was sufficient to determine whether publicity influenced the jury or the verdict.

Key v. CW,
840 X 827 - A - 1992
Due process includes right to unbiased decision by impartial jury. If partial juror participates in verdict, there is a due process violation. Doubts must be resolved in favor of defendant. Defendant has incidental right to voir dire information that is truthful. A juror is qualified unless the party claiming bias meets the burden of showing actual bias.

CW v. Nelson,
841 X 628 - 1992
Jury selection procedures are not mandatory but substantial deviation from statutes or rules will result in reversal of conviction. Delegation of disqualification and excusal duties to non-judge is not permitted. Defendant has right to grand and petit juries selected at random from fair cross section of population. Once illegally selected, jury error cannot be cured by *nunc pro tunc* review by judge. If objections not made as required by Rule 9, objection waived.

Pelfrey v. CW,
842 X 524 - 1992
Challenges to jury must be made before trial. Purpose of examination under RCr 9.30 is to determine bias or impartiality. When information obtained gives reasonable ground to believe juror not -impartial juror should be excused as not qualified.

Dean v. CW,
844 X 417 - 1992
In closing argument ACA may call on jury to do its duty. Calling defendant a crazed animal is questionable.

Fulton v. CW,
849 X 553 - A - 1992
Criminal rules employ notice pleading. Indictment is sufficient if it fairly notifies the defendant of the nature of the crime without detailing the essential factual elements of it.

Altman v. Allen,
850 X 44 - 1992
Court holds that there is no basis for presumed bias in medical malpractice cases where members of venire were treated by defendant OB/GYN. Court states rule of presumed bias.

13) KENTUCKY CONSTITUTIONAL LAW

CW v. Wasson,
842 X 487 - 1992
Michigan v. Long rule of state constitutional review is stated. Court holds that Sections 2, 3, 59 and 60 are constitutional provisions that require equality of treatment under Kentucky law. Court holds that federal constitution is not the maximum guarantee of rights and that

Kentucky court is not bound by federal decisions and should not follow them where there are valid reasons leading to different conclusions. Court holds that immorality in private is beyond the reach of government. Court also lists the four instances to date in which the court has held that the Kentucky Constitution affords greater protection than the federal. Court also notes that Pennsylvania decisions on constitutional language are "uniquely persuasive".

KBA v. Shewmaker,
842 X 520 - 1992
Since 1918 court has claimed sole right to discipline and admit attorneys. This authority supersedes any inherent power of the circuit court.

City of Louisville v. Stock Yards Bank,
843 X 327 - 1992
Standing is defined as determination of whether party has judicially recognizable interest in subject matter of suit.

Crayton v. CW,
846 X 684 - 1992
Kentucky Supreme Court at liberty to interpret state constitution to provide greater rights than federal constitution. Even though court is not obliged to follow U.S. Supreme Court decisions, court should not ignore their logic and scholarship. Only the Kentucky Supreme Court has the power to say finally what the Kentucky Constitution means. Court has duty to re-examine prior decisions continually to prevent perpetration of error.

Waggoner v. Waggoner,
846 X 704 - 1992
Court defines general and special laws under Section 59. Court has duty when constitutionality of statute is challenged to make all reasonable inferences and implications from act as a whole to sustain validity of enactment. Court states test for equal protection violation and retrospective law in this opinion.

Holbrook v. Knopf,
847 X 52 - 1992
Court rejects claim that Sections 1, 10 and 11 of Kentucky Constitution prohibit pretrial discovery by means of taking blood sample from defendant.

Fischer v. St. Bd. Elections,
847 X 718 - 1993
Under Section 111 circuit court has jurisdiction to hear constitutional attacks on statutes. Plaintiff's cause of action does not ripen until plaintiff is harmed defined as when statute directly affects by denying a right or imposing an obligation. Proper venue for constitutional action is where injury or part of it arose.

CW v. Raines,
847 X 724 - 1993
Legislature may by statute confer a duty on court to administer certain functions. Legislature cannot delegate determination of what law is, but may establish standards and delegate authority to enforce law.

St. Bd. Elem. Educ. v. Ball,
847 X 743 - 1993
Court cannot delegate power to make laws. Can delegate power to exercise administrative discretion in applying laws enacted by legislature.

Covington v. CW,
849 X 560 - A - 1992
Court explains application of overbroad and void for vagueness principles.

Cann v. Howard,
850 X 57 - A - 1993
The Kentucky Constitution does not allow review of decisions of courts of other states. It is bound by the supremacy clause to honor those determinations.

Profitt v. MSD,
850 X 852 - 1993
Sections 27 and 28 involved. Court may not impose requirements if General Assembly has not done so.

Mace v. Morris,
851 X 457 - 1993
Court determines that giving of blood is not violation of Section 11 prohibition against making defendant witness against self.

In Re Overstreet,
851 X 458 - 1993
Section 114 allows Supreme Court to remove circuit court clerk for cause.

Goldman v. Eichenholz,
851 X 463 - 1993
Under Section 115 legislature may prohibit appeal of finding of irretrievable break in marriage. Court refuses to circumvent legislature's determination by means of original action.

Edwards v. Land,
851 X 484 - A - 1992
Special legislation and court's power over the practice of law under Section 116 are explained.

14) PRISONS/PRISONERS

Prewitt v. Wilkinson,
843 X 335 - A - 1992
A person on appeal bond is not in custody and therefore time on appeal bond is not credited against a sentence.

Stanfield v. Hay,
849 X 551 - A - 1992
There is no constitutional right to smoke in jail or prison. Therefore smoking prisoner's due process and equal protection rights (14th Amendment) were not violated.

15) RIGHT TO COUNSEL/ ATTORNEY-CLIENT

Smith v. CW,
845 X 534 - 1993
The right to counsel has always included the right to reasonable time and opportunity to prepare. If this is not granted, the adversarial system has malfunctioned.

Vunetich v. CW,
847 X 51 - 1992
There is no ineffective assistance of counsel claim on appeal except where counsel's negligence has caused the appeal to be dismissed or not started.

Hogg v. CW,
848 X 449 - A - 1992
Court recognizes and respects vigorous and innovative argument of counsel within limitations of rules of practice.

Edwards v. Land,
851 X 484 - A - 1992
The contractual nature of attorney-client relationship is explained and court holds that attorney is more than a normal agent for the client.

16) SENTENCING

Porter v. CW,
841 X 166 - 1992
Because specific statute prevails over general, KRS 532.045 precludes community service under KRS 500.095.

Harrison v. CW,
842 X 531 - A - 1992
Holds that the CW can seek PFO enhancement on a drug charge but that the CW must choose between subsequent offender and PFO enhancement.

CW v. Brasher,
842 X 535 - A - 1992
Defendant pleaded guilty and was awaiting sentencing when was indicted for another offense. Court held that KRS 533.060 did not apply because legislature had left gaps in the sentencing for the period between trial and sentencing and arrest and indictment.

Canter v. CW,
843 X 330 - 1992
In a juvenile youthful offender case, the nature of the original charge did not determine the appropriate disposition under KRS 640.040 and 640.030.

Sommers v. CW,
843 X 879 - 1992
Court refused to consider an unconstitutionality claim against the TIS statute and also refused to consider the illegality of a 1,000 year sentence.

Sanders v. CW,
844 X 391 - 1992
Court holds that life sentence is equal to or greater than any sentence to a term of years. The aggregate of consecutive sentences may not exceed the longest extended term authorized for the most serious offense convicted on. Juvenile "convictions" are admissible in TIS proceedings. Court holds that regardless of the number of years in sentence, 12 years is the maximum parole disability under VOS statute.

Dean v. CW,
844 X 417 - 1992
Evidence of the CW's bargaining of similar case was not admissible at TIS. Defendant only may introduce parole eligibility and, if CW doesn't, his misdemeanor record.

Smith v. CW,
845 X 534 - 1993
In death case, defendant had right to rely on representations that CW not seeking death. Court based argument on CW's duty to see that everyone gets a fair trial and Workman. Court reversed only the penalty phase because the CW's action did not affect the guilt-innocence phase.

CW v. Wilcoxson,
846 X 719 - A - 1992
At the time of the offense for which defendant was sentenced, he was awaiting indictment. Court held that the General Assembly has not mandated consecutive terms under these circumstances.

CW v. Lundergan,
847 X 729 - 1993
Court distinguishes felonies and misdemeanors and adopts rule that determination of felony or misdemeanor status will be based on the lower punishment in the range.

Bills v. CW,
851 X 466 - 1993
Court holds that PFO and VOS statutes do not conflict. Upshot is that PFO first degree will have 12 year parole eligibility.

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The Kentucky Department for Mental Health & Mental Retardation Services is pleased to announce

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Plainview

Minnesota v. Dickerson

It appears to be Justice White's last hurrah, a powerful gift to the law enforcement community. In this case, the United States Supreme Court has created a "plain feel" exception to the warrant requirement, an analogy to the "plain view" exception.

The facts are familiar ones. In 1989, two Minneapolis police officers saw Timothy Dickerson leave an apartment building known to be a crack house. When Dickerson saw the officers, he stopped and walked the other way. Based upon these two facts, the officers stopped Dickerson and patted him down. During the frisk, no weapons were found. However, the searching officer found a small lump in Dickerson's jacket. He manipulated it, and thought it was a "lump of crack cocaine in cellophane." He seized the lump, which turned out to be cocaine. After being charged, Dickerson's motion to suppress was denied, and he was found guilty at trial.

However, the Minnesota appellate courts both reversed Dickerson's conviction. Both found that while the stop and frisk of Dickerson was valid under *Terry*, the search exceeded the bounds of *Terry*. Both courts declined to adopt a *plain feel* exception to the warrant requirement.

Justice White wrote for a unanimous Court in most of the opinion, affirming the Minnesota Supreme Court. Significantly, he begins the opinion restating that "searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment...'" This is significant due to the Court's recent proclivity for evaluating the propriety of searches from the standpoint of *reasonableness* alone. This may be the most important portion of this opinion, at least in terms of predicting where the Court is going.

The Court then states the question and holding in succinct fashion: "The question presented today is whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry*. We think the answer is clearly that they may, so long as the officer's search stays within the bounds marked by *Terry*."

The Court relies upon *Michigan v. Long*, 463 U.S. 1032 (1983), which held that if the police while conducting a *Terry* search of a car come upon contraband other than weapons, it is reasonable for them to seize the contraband. Justice White states that this "plain view during a *Terry* stop" doctrine could be used to evaluate the facts of this case. "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context."

Justice White reminds us that for the seizure to take place, there must be probable cause to believe that the item is contraband. Because of that, the search in this case was held to be unreasonable. "Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to '[t]he sole justification of the search.... It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize...."

Justice Scalia wrote a brief but interesting concurrence. He joins the opinion because he agrees that evidence uncovered during a lawful search is admissible. However, he implies that he views the *Terry* decision as erroneous. Specifically, because of his view that his role is to uncover the meaning of the Bill of Rights in 1789, he would go along with the stopping portion of *Terry*, which he views as historically justifiable, while disagreeing with the frisking part. "I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning."

Chief Justice Rehnquist, joined by Justices Blackmun and Thomas, concurred and dissented in part. They joined the opinion, but would have sent the case back to the Minnesota Supreme Court to make more precise factual determinations.

This case will have enormous and immediate impact. It will reach into thousands of police/citizen encounters, and will result in many more affirmations of warrantless searches during these encounters.

United States v. Xavier V. Padilla

Luis Arciniega was driving in Arizona in a Cadillac when Officer Russel Fifer spotted him and thought that he "acted suspiciously as he passed the patrol car." Officer Fifer stopped Arciniega, received consent to search his Cadillac, and found 560 pounds of cocaine. Arciniega then agreed to cooperate, an agreement that eventually led to the arrest of Xavier V. Padilla. Padilla challenged the reasonableness of the stop of Arciniega, but the Federal District Court rejected it based upon standing.

The Ninth Circuit reversed, however, relying upon their "coconspirator exception." Alone among the circuits, the Ninth Circuit allowed co-conspirators to have standing in the property of others where they had joint control and supervision of the place searched. No longer.

In a per curiam decision, the U.S. Supreme Court dispatched quickly and unanimously with the Ninth Circuit's exception. The Court held that there was no such exception, and Padilla's rights, along with his co-conspirators, had to be determined according to classic standing law laid down previously by the Court. Specifically, the Court held that *Alderman v. United States*, 394 U.S. 165 (1969), *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980) controlled this case.

Short View

1. ***United States v. Erickson***, 53 Cr. L. 1073 (9th Cir. 4/12/93). A police officer has no right to go into a house during his investigation of a burglary, without either a warrant or exigent circumstances. The Ninth Circuit rejected a "community caretaking" justification for the search here, which is based upon the search of a car in *Cady v. Dombrowski*, 413 U.S. 433 (1973), saying that "Quite unlike the automobile search performed in *Cady*, the warrantless search of Erickson's home constituted a severe invasion of privacy. The fact that Officer Justice may have been performing a community caretaking function at the time cannot alone justify this intrusion." The Court affirmed the lower court's suppression of drugs found during the search.

2. ***Hallstrom v. Garden City***, 53 Cr. L. 1077 (9th Cir. 4/12/93). The fact that someone does not cooperate during booking does not in any sense take away her right to have a probable cause determination within 48 hours. In this civil rights case, the state had refused to take her before a magistrate until she complied with routine booking procedures. Under *Riverside County, Calif. v. McLaughlin*, 49 Cr. L. 2103 (1992), a person has an absolute 4th Amendment right to a probable cause determination within 48 hours. Here, "the district court allowed a constitutional right to be held hostage for four days to a routine booking practice or policy."

3. ***Alfredo A. v. Superior Court of Los Angeles County***, Calif. Sup. Ct., 53 Cr. L. 1169 (5/5/93). The 48 hour rule as required in *Riverside County, Calif. v. McLaughlin*, 49 Cr. L. 2104 (1991), which mandates a probable cause review by a magistrate within 48 hours of arrest, does not apply to juveniles in California. The California Supreme Court held that their 72 hour rule for juveniles did not violate *McLaughlin*. Interestingly, in Kentucky it is apparent that in many jurisdictions, particularly rural ones, the 48 hour rule for adults is virtually ignored. On the other hand, KRS 610.265 requires a detention hearing to be held, "exclusive of weekends and holidays" within 24 hours of the start of detention.

4. ***State v. Ackerman***, N.D. Sup. Ct., 53 Cr. L. 1172 (5/11/93). A casual visitor has standing to challenge the warrantless entry of a residence he is visiting, according to the North Dakota Supreme Court. Using *Minnesota v. Olson*, 495 U.S. 91 (1990), the court held that a person visiting a trailer to listen to music and smoke marijuana has standing to object to the warrantless entry of the trailer by the police. *Olson* had given standing to an overnight guest in a home. This case pushes *Olson* a bit further.

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Sixth Circuit Highlights

Waiver of Counsel

In *United States v. Herrera-Martinez*, 985 F.2d 298 (6th Cir. 1993), the Sixth Circuit found that the fact that the trial court found the defendant competent to stand trial was not conclusive as to whether she was competent to waive her right to counsel. As in *United States v. McDowell*, 814 F.2d 245 (6th Cir. 1987), the Court stated that "the degree of competency required to waive the right to counsel is 'vaguely higher' than the competency required to stand for trial." Factors the trial court should consider in determining if a defendant is competent to waive counsel include education, literacy, fluency in the English language, physical or psychological disabilities, suggestions by counsel that the defendant may be incompetent to stand trial and behavior in court. To permit a defendant to proceed *pro se*, the trial court must make a specific finding that he or she knowingly and voluntarily waived the right to counsel.

Ineffective Assistance of Counsel

The Sixth Circuit held that the trial court erred when, unable to decide whether defense counsel's performance was ineffective, it presented the issue to the nineteen year old defendant and his father. *Ward v. United States*, ___ F.2d ___, 22 SCR 10, 7 (6th Cir. 1993). The Sixth Circuit maintained that there must be a judicial evaluation of counsel's performance with an objective standard of reasonableness.

Moving on to the ultimate issue, the Sixth Circuit found that the defendant was denied effective assistance of counsel. The Court noted that the record reflected that jurors snickered at defense counsel, the judge often could not follow his arguments, counsel opened the door to damaging character evidence against the defendant, counsel was inappropriately hostile and paranoid, and made confusing, rambling, illogical comments.

Exhaustion of State Remedies

In *Silverburg v. Evitts*, ___ F.2d ___, 22 SCR 11, 8 (6th Cir. 1993), the Sixth Circuit made it clear that a defendant seeking federal habeas relief from an affirmance by the Kentucky Court of Appeals must have presented a motion for discretionary review to the Kentucky Supreme Court in order to exhaust state remedies. The Court interpreted *Freeman v. Commonwealth*, Ky., 697 S.W.2d 133 (1985)["decision of the Court of Appeals denying the RCr 11.42 was final state action, without a useless motion for discretionary review"], to "stand[] only for the principle that Rule 11.42 motions that lack any basis should not be pursued in any court."

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Contempt No Excuse for Locking Up Status Offenders, Says Florida Supreme Court

Editor's Note: We reintroduce the Juvenile Law Column with this issue. It will appear every other issue with Harry Rothgerber and Peter Schuler as the Column's Associate Editors.

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Prefatory remarks by Harry Rothgerber & Peter Schuler:
"Bootstrapping" is the process whereby a juvenile court, either through its contempt power or by means of an escape petition, elevates a status offender to a public offender for the same non-criminal misbehavior which brought the child before the court in the first place. This unconscionable technique violates not only public policy but also the intent underlying the Kentucky Unified Juvenile Code; and, it is not in the child's best interests. Bootstrapping has been condemned by courts in other jurisdictions, including the one in the article below.

Huckleberry came and went, at his own free will. He slept on doorsteps in fine weather and in empty hogsheds in wet; he did not have to go to school or to church, or call any being master or obey anybody; he could go fishing or swimming when and where he chose, and stay as long as it suited him; nobody forbade him to fight; he could sit up as long as he pleased; he was always the first boy to go barefoot in the spring and the last to resume leather in the fall; he never had to wash, nor put on clean clothes; he could swear wonderfully. In a word, everything that goes to make life precious, that boy had.[1]

The problem posed by status offenders[2] are not new, nor have we made progress toward consensus about what to do with young people who persist in doing what we think they shouldn't. Laws encourage us to categorize and label, to put children into neat and tidy boxes, in the apparent belief that if we can name it we can fix it. Thus, we say "he's a 601," or "she's a 602"; "he's a delinquent" (the kid's to blame for the problem) or "she's a dependent" (the parents are to blame for the problem). Every state also has euphemisms for children who just like to flaunt authority, but the truth is that status offenders - known in various states by various labels, including CINS, CHINS, CINAs, and PINS[3]-have never fit snugly into any category.

This has caused great consternation. These children rattle around in the "miscellaneous" box and we don't know who's at fault or who should be responsible for fixing the problem. They haven't broken the law, so we can't dump them into the juvenile justice or criminal justice system, but they certainly are not sweet, innocent, abused or neglected children. They are TROUBLE - they refuse to come home at a decent hour, refuse to go to school, refuse to mind, often hang out with the wrong element, and persist in running away from every place they are put. They tie our laws up into a nice big knot.

Although no one really knows what to do with them, everyone seems to have an opinion, ranging from "lock them up and throw away the key"[4] to "the government has no business exerting authority over them."[5] The conflict is between freedom and paternalistic coercion-doing what's best for the child regardless of what the child wants. In theory, of course, government is not allowed to intrude because of what someone is, rather than what someone has done.[6] Juvenile court judges, however, operate in the real world and are often sincerely worried about the direction in which the youth before them appear to be headed. They sometimes find a way around this hurdle by using their powers of contempt. A judge may, for example, order a status offender to attend school. If the child disobeys, he or she has committed the act necessary to allow the government to impose punishment in the form of incarceration. This roundabout approach-creating a way to detain youth who could not otherwise be locked up-is called bootstrapping.

Too often, the power to "bootstrap" juveniles into secure detention has been abused by juvenile court judges. *A.A v. Rolle*,[7] a recent case decided by the Florida Supreme Court, addresses this issue. The *A.A.* decision, overruling ten-year-old precedent and forbidding the incarceration of status offenders in secure detention, was a major victory for advocates. It was also a bold move for a Court, led by long-time child advocate and new Chief Justice Rosemary Barkett, that now seems willing to uphold the rights of children.

BACKGROUND

The issue if incarcerating status offenders has had a national profile at east since Congress passed the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA).[8] That legislation, representing the first significant federal involvement with juvenile justice issues, offered states federal funding to address juvenile justice issues while severely restricting their ability to detain status offenders in secure facilities. This effort to deinstitutionalize non-delinquent youth was, to a large extent, successful; the number confined fell dramatically between the late 1970s and early 1980s.

The JJDPA did not, however, resolve the issue.[9] In the mid-eighties, the Act was amended[10] to allow status offenders to be incarcerated for violations of "valid court orders." This amendment provided support for those who argued that secure confinement of these youth was a constitutionally acceptable practice. The tide turned further when many state courts, including Florida,[11] began to rule that state statutes allowed secure detention for status offenders as a response to contempt of court. When the California Supreme Court, which had previously found the practice unacceptable,[12] reversed itself in *In re Michael G.*,[13] the issue appeared to be resolved. The national debate virtually ended.[14]

In Florida, however, serious advocacy was underway in the legislature throughout the late 1980s. The juvenile code was comprehensively reviewed and revamped. A new state Juvenile Justice Act[15] became law in 1988, with amendments adopted in 1990. Both the revised code and the amendments contained new, stronger language to protect status

offenders from placement in secure detention. The 1988 Act addressed secure detention of delinquent children, providing that a "child alleged to have committed a delinquent act shall not be placed in secure detention...to punish, treat or rehabilitate the child."[16] Moreover, secure detention of a child charged with delinquency *was* allowed only based on guidelines assessing the risk of the child failing to appear, being a danger to himself or the community, or being likely to commit a subsequent violation of law prior to disposition. The 1990 amendments made explicit that status offenders could not be incarcerated for purposes of punishment either: "A child alleged to be dependent or in need of services shall not, under any circumstances, be placed into secure detention care solely for these reasons."

Despite the new legislation, judges continued to order truants, runaways, and other status offenders into secure detention for contempt of their orders. In 1991,over 350 of these children spent time in secure detention, though the had committed no violation of law. As a practical matter, the situation was now even more dangerous because the new statute had also severely restricted the detention criteria for delinquent youth, so that only the most violent, chronic offenders could be held. The result was that overcrowded, understaffed centers now held status offenders alongside youth charged with the most violent delinquent acts.

THE EVOLUTION OF *A.A.*

Public defenders representing these youths, in a joint effort, challenged the contempt of court practice in each of Florida's five appellate districts. Four appellate courts ruled that the practice could continue, while one said the new statute prohibited the use of secure detention for youth contemnor. In the fall of 1991 the issue went back to the Florida Supreme Court.

The court heard six consolidated cases: five from Jacksonville and one from Key West. Four involved dependent children and were pure status offender cases. The other two involved delinquent children who had committed contemptuous acts in the courtroom: one throwing paper on the floor after his sentence was pronounced, and the other by threatening a witness.

Challenges to contempt citations are generally difficult to litigate. There is virtually no record. The cases pursued through writs of habeas corpus immediately after the event occurs. There is no opportunity to prepare and present evidence or expert testimony on policy issues such as whether it is appropriate to incarcerate status offenders. A single case, reviewed by appellate judges in isolation from the myriad other cases statewide, may be less than compelling.

With the six consolidated cases in *A.A.*, however, the court had a wider range of facts to consider. Moreover, the court allowed other fact situations to be raised in the amicus brief and during oral argument, and the state did not object to these references to other youth who had been cited for contempt. It was also clear from the questions asked at the oral argument that the court had conducted a good deal of investigation on its own and had learned how numerous children, beyond the six whose cases were before it, had been affected. Among the cases that came to the court's attention through these various means: a child from Panama City who had spent a year in detention for truancy: a girl who had been incarcerated for failing to keep up with her pre-natal medical care appointments; a child who had been ordered into a into a mental institution for failing to attend counselling sessions; and a child who had been locked up for wearing shorts to court.

The Department of Health and Rehabilitative Services, the social welfare agency for the state, played an important role as well. The amicus brief on behalf of the children included an affidavit in which the Department described the difficulty of trying to protect status offenders in secure detention facilities and the futility of trying to provide treatment in that setting. Another affidavit was filed by Paul DeMuro, a nationally-recognized expert in juvenile justice and federal court monitor in ongoing de-institutionalization litigation in Florida, *Bobby M. v. Chiles.*[17] He described the severe conditions in Florida's detention centers and the dangers to children who are confined there. His national perspective on the extent and severity of the problem undoubtedly contributed to the outcome of the case.

THE *A.A.* DECISION

The state supreme court ruled in *A.A.* that, "under Chapter 39, juveniles may not be incarcerated for contempt of court by being placed in secure detention facilities."[18] The court thus overruled its previous decisions in both *R.M.P. v. Jones* and *A.O. v. State,*[19] under which, even though status offenders could not be transformed into delinquents by bootstrapping, they could be placed in secure detention for contempt of court. The court in *A.A.* noted that, although courts have inherent power to make findings of contempt, "the *sanctions* to be used by the courts in punishing contempt may properly be limited by the statute."

The rejection of *R.M.P.* and *A.O.* is bother critically important and highly controversial. These cases were based on the premise that a judge exercising powers of contempt was operating outside the boundaries of the juvenile code, and therefore was not subject to its restrictions. If the *A.A.* Court had decided to follow that logic, then the recent amendments to the code would have been immaterial. Yet, it was the idealistic language in the new juvenile code on which the court relied.

Nothing in the legislative history of Chapter 39 indicates that the lawmakers intended to deprive the powerful judicial constituency of one of its most zealously guarded possessions: the unlimited inherent power of contempt. Certainly the record is meager concerning legislators purposefully confronting the judges on any issue, and it is unlikely that they intended to commit political suicide on behalf of unpopular, disenfranchised youngsters. The ruling in *A.A.* was as much a surprise to the politicians as it was to everyone else.

In truth, the ruling in *A.A.*, which included rejecting *R.M.P.* and *A.O.* was a courageous act by a court that apparently had had enough of the abuses perpetrated by juvenile court judges.[20] Over the years the problem of what to do with Florida's status offenders had been passed from the courts to the legislature to the administration and back again without solution. The political power of local trial court judges has always been so great that the legislature has been more concerned about not making enemies of the judges than about good social policy regarding children. Too many judges were abusing their power, however, and thus the supreme court stepped in to discipline the lower courts as well as to implement the policy expressed by the legislature.

Time will tell whether the ruling will stand. Activist lower court judges are furious, and several legislators have already announced that their first priority for the 1993 session will be to give judges back the power to detain children for contempt. The pot is boiling.

Unfortunately, the procedural uproar over whether the courts have the fundamental power to lock youth up diverts attention from the basic problem of what else to do with status offenders who defy court orders. Florida has never adequately funded programs for youth and has always been more interested in secure institutions than alternatives. In *A.A.*, the Court literally begs the legislature to provide good programs to meet the needs of children in distress. Advocates are working hard to persuade the lawmakers not to return to a punitive approach but to move ahead, listen to the good advice handed down by the court, and address the problem at hand.

One of the most heartening aspects of the *A.A.* case is the clear message that the Court understands the need for effective programming for youth before they get into trouble with the law, and urges the legislature to respond to this need. In a concurrence that expresses deep concern and frustration, Justice Harding says:

> I do not quarrel with prohibiting the use of detention facilities for contempt...Yet, the court needs other programs or resources which can be used to exercise the court's contempt power. Group homes, marine institutes, and confidence building programs such as Outward Bound have been effective resources for the treatment of delinquents. Similar resources should be provided for children who are not yet delinquent but who have not been able to comply with supervision requirements either because their conduct is ungovernable or because they have refused to attend school.

Florida's Juvenile justice system has never been given the opportunity to succeed because adequate funds have never been appropriated to achieve the dual goals of rehabilitating delinquents and protecting dependents.[21]

It is not difficult to imagine our modern day Huck Finns responding to a program like Marine Institute or Outward Bound. If they can absorb an education while working hard and having fun, so much the better. In reality, they are going to do it their way regardless of the demands of authoritarian figures. We simply need to protect them as well as we can while they do it. Perhaps this recent pronouncement by an influential court will move us toward that goal.

CLAUDIA WRIGHT

Ms. Wright is a Clinical Professor at Florida State University Law School, the Children's Advocacy Center. She wrote the amicus brief in A.A. v. Rolle. For more information about the case, contact her at the Children's Advocacy Center, Florida State University College of Law, P.O. Box 10287, Tallahassee, Florida 32302; (904) 644-9928.

FOOTNOTES

[1] *Mark Twain*, Adventures of Tom Sawyer.
[2] *"Status offenders" are youth over whom courts may assume jurisdiction solely because of their "status" as minors, because they commit acts such as truancy or running away that would not be grounds for taking adults into custody.*
[3] *Children in Need of Supervision, Children in Need of Services, Children in Need of Assistance, and Persons in Need of Supervision.*
[4] See, *e.g.*, *A.A. v. Rolle*, 604 So.2d 813, 820 (Fla. 1992) *dissent.*
[5] *Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards, Standards Relating to Noncriminal Misbehavior* (1982).
[6] See, *e.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962), *"Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."*
[7] 604 So.2d 813 (Fla. 1992).
[8] 42 U.S.C. § 5601 *et seq.*
[9] See, *e.g.*, *Costello and Worthington, "Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act,"* 16 Harv.C.R. - C.L. Rev. 41 (1981).
[10] 42 U.S.C.A. §§5601-5751 (1983) & Supp. 1987).
[11] *R.M.P. v. Jones*, 419 So.2d 618 (Fla. 1982).
[12] *In re Ronald S.*, 69 Cal.App.3d 866, 138 Cal.Rptr. 387 (1977).
[13] 44 Cal.3d 283, 747 P.2d 1152; 243 Cal.Rptr. 224 (1988). *See Burrell, "Truants May Be Locked Up, Says California High Court,"* Youth Law News (March-April, 1988).
[14] *In the Interest of J.E.S.*, 817 P.2d 508 (Colo. 1991), in which the court found that the statute which prohibited secure detention for contempt of court in a truancy case violated the separation of powers doctrine, is one of the few cases recently litigated.
[15] Chapter 39, Florida Statutes.
[16] *The statute also listed four other reasons for which detention was prohibited, including allowing a parent to avoid legal responsibility, permitting more convenient administrative access to the juvenile, facilitating further interrogation, and due to lack of more appropriate facilities.*
[17] *Bobby M. v. Chiles*, No. TCA 83-7003-MMP (N.D.Fla. filed Jan. 5, 1983).
[18] *Supra*, note 4, at 819.
[19] 419 S.2d 618 (Fla. 1982); 456 So.2d 1173 (Fla. 1984).
[20] *The arrogance of lower court judges was displayed during the litigation of A.A. After the ruling came down in July, the State moved for rehearing. Several judges, some of the worst offenders in terms of inappropriately locking up dependent children, wrote directly to the Court requesting that the rehearing be granted and the ruling reversed. One even threatened to leave the bench (a prospect delightful beyond words to child advocates) if the ruling should stand. The public defender from Jacksonville, Ward Metzger, who was counsel for the children in five of the six cases, immediately filed a "Motion to Exclude Correspondence DeHors the Record." That motion was granted and the motion for rehearing denied.*
[21] *Supra*, note 4, at 820.

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Pete Schuler is a graduate of Vanderbilt University and the U of L School of Law. He has been with the Office of the Jefferson District Public Defender since 1976, and has served as Chief Juvenile Defender since 1982. He is a member of the Jefferson County Juvenile Justice Commission and several other local committees established to improve the quality of juvenile justice.

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ESTABLISHING AND MAINTAINING A RELATIONSHIP WITH YOUR CLIENT & HIS FAMILY

The following article is an exerpt from a post-conviction manual which will be published this fall by the Department of Public Advocacy in conjunction with the Capital Litigation Resource Center. Although the article focuses on capital post-conviction litigation, many of the principles can be applied to all types of cases.

WHY A GOOD RELATIONSHIP IS ESSENTIAL

A common misconception many people who do not provide post-conviction representation in capital cases have is that a post-conviction action is the equivalent of the direct appeal - the record is reviewed and if a meritorious issue was not preserved at trial or raised on appeal, an allegation of ineffective assistance is made. Although this must be one aspect of post-conviction review, considering the post-conviction proceeding to be simply appellate review from a different angle could prove fatal to your client.

Actually, *a post-conviction action in a capital case is much more like the trial of a death penalty case.* It is imperative for those providing assistance to remember this.

DON'T EVER ASSUME THAT THE RECORD FROM THE TRIAL AND APPEAL YOU HAVE BEFORE YOU PRESENTS THE WHOLE PICTURE OF THE CASE - IT MAY NOT EVEN COME CLOSE!

You must start from scratch with the goal of determining how trial counsel's approach to the case was incorrect or inadequately developed (due to mistakes, misconduct of the prosecutor, a lack of resources, etc.) or how a completely different approach could have been successful. You also need to evaluate with a fine tooth comb the state's case and the actions of the judge and jury.

Comfort should not be taken in the existence of a record. Indeed, it is likely that the bigger the record, the bigger the problems scrutinizing it will present. Picture yourself not as building a post-conviction "house", but, rather, as tearing down an existing "skyscraper" with the assignment of starting the "skyscraper" all over again with the ability to use only some of the construction materials the previous builder used. And to make matters worse, most of the new materials you will need are hidden from you in numerous unknown places.

This is particularly true when it comes to mitigation. Few are the cases in which all of the significant mitigating evidence has been presented at the trial. Inevitably, some mitigation has not been presented to the jury for one reason or another. It is sad to say this can sometimes be due to a previous attorney's inability to establish a relationship of trust with the defendant and/or his family.

Certainly there will always be clients and family members who are unreachable no matter how hard we try, but there are some general approaches to establishing and maintaining a relationship of trust that should always be tried. If a good relationship can be fostered, a wealth of information, likely to have been shared with no one before, and likely to give you a whole new approach to the case, may be discovered; not just about mitigation, but about a lot of things that may have occurred in relation to the case about which the significance has never been realized.

YOUR CLIENT'S LIFE MAY MITIGATE AGAINST DEATH

Since mitigation can be anything about the defendant's character that might persuade the jury to give a sentence less than death, it is necessary to explore, quite literally, the defendant's entire life history (and even the history of his ancestors).

Basically, you are attempting to determine what it is in your client's life that led him to be who he is today, or at least at the time the crime for which he has been convicted and sentenced to die was committed. To get a feel for how daunting this task is, think of your own life and all the events and incidents that have contributed to who you are. The odds are that you will recall numerous significant experiences, but you will also probably conclude that, in reality, every day of your life has had some affect.

So, where do you get the information to reconstruct your client's entire life? Certainly from records, teachers, employers, friends, relatives, acquaintances, etc. But the best source of information, including the identities and locations of the sources above, is your client himself and his immediate family.

Unfortunately, getting this information is not as easy as it sounds, because it is not just the good experiences of your client and his family that you are seeking; it is the bad ones as well. Indeed, while good things that have happened to your client and the good things he has done may be useful, it is, typically, the negative experiences that will probably make your best case for mitigation.

You need to be searching for sexual, physical or mental abuse; mental illness; mental retardation; attention deficit disorder; fetal alcohol syndrome; etc. And these may be some of the most difficult things for your client and family to talk about with you. The client or family may have secrets they have resolved never to let anyone know about. Or, perhaps presenting an even more difficult situation, the client or family has problems they have never even recognized themselves.

INTERVIEWING IS NOT DIRECT EXAMINATION

Under these circumstances, any person who visits the client or his family one or only a couple of times with a list of prepared questions hoping to get all the information needed to proceed further with the case will get very little. There is not much of a possibility that upon the first meeting with a client, who knows nothing about you, you can ask him directly whether he has ever been sexually abused by a parent with any hope of

eliciting an affirmative response. And, certainly, such a direct question to the parents upon the first meeting will probably, likewise, get you no useful information and may even destroy any hope of establishing a meaningful relationship with them for the future.

SEE YOUR CLIENT EARLY, OFTEN AND IN PERSON

Although any post-conviction attorney will unquestionably need to read and study the entire record of every proceeding that has occurred in the case before discussing the specifics of the case with the client and determining the best course on which to proceed, the attorney assigned or appointed to the post-conviction action should not wait until the usually massive record has been read before establishing contact with the client.

Keep in mind that many persons on death row will already feel hopeless and perhaps even betrayed by the attorneys who have come before, if for no other reason than simply because their case has been lost at trial and on appeal. And it is likely that they have had few, if any, meetings with their appellate attorneys. You may be the first person to discuss the details of the case with your client for a long time.

Contact with the client should be made at the earliest time possible, if only to let him know what the post-conviction process is all about and to tell him how you plan to proceed. Your client may also be bursting to tell you about something not reflected in the record which will elucidate your review. Most importantly, you simply need to get to know your client and let him get to know you. This contact should be face to face, and fairly soon; every member of the team that will be working on the client's case should have a personal meeting with him.

Although you may feel comfortable with your client after the first visit and believe he feels the same about you, it is probably still unwise to ask any, or at least too many, direct questions even on the second visit. Ultimately, it is probably best to continue your relationship with your client (after having read the record) with broad inquiries and, as time passes and trust develops, with more specific and pointed questions. Broad inquiries will also allow your client to tell you about things you might not have thought to ask about. This may be some of the most significant information you will find!

I can't emphasize enough the need to visit your client numerous times over the course of your relationship. You will inevitably learn new and pertinent information from your clients months and sometimes years after you began to represent them. And often these are facts that your clients haven't told you about no matter how probing your questions have been, simply because they didn't understand the importance of those facts to the case, even for issues you may have already discussed extensively.

YOU AND YOUR CLIENT ARE FROM DIFFERENT WORLDS

It is extremely important to recognize that you and your client may be (and probably are) from two different worlds. In other words, asking your client if he was ever physically abused by his parents may elicit a negative response, even though he was severely and unreasonably beaten day after day for years; he may "see" this as "deserved" and, therefore, not abuse. He may also believe that this is the treatment that all children receive and is normal.

If there is one thing you learn after doing this work for a long time, it is that perspectives and perceptions of normality can differ drastically. Accordingly, your inquiries must be framed in a way to get past these differing outlooks on life in order to obtain the facts to support your claims. Learn as much as you can about the culture in which your client has lived.

YOUR CLIENT IS A PART OF THE TEAM - FORGET YOUR EGO

You should make it clear that your client can communicate with you as often as he wishes and should share with you <u>any</u> thoughts or ideas he has about his case. This not only makes him a part of the team and furthers his trust, but also it means that you might just receive an idea or fact you would not otherwise think of or elicit. Don't ever sell your client short and think that since you are the attorney you know more than he does about what has gone before in his case; after all, he was there!

OBSERVE YOUR CLIENT'S APPEARANCE AND ACTIONS

Face to face meetings with your client will also help you to identify any problems with competency, mental illness or retardation, physical disabilities, difficulties in communication, etc. Without personal meetings, some of these might be overlooked entirely. Nevertheless, don't just rely on your meetings to alert you to these issues.

Remember that you are an attorney, not a psychologist or psychiatrist; you are probably qualified only to suspect that there might be a problem. Also, a client's appearances and actions may be deceiving; he may appear and act quite normal and still be laboring under some sort of disability. Delving into your client's background and utilizing experts to interpret the data you obtain and test your client are necessities.

TRUST COMES FROM TRUTH

Trust will also be fostered if you take a realistic approach to your conversations about the prospects for relief. You should never be overly optimistic, promising relief on even a strong issue. Courts are too unpredictable. Dashed hopes and expectations will breed discontent if your client believes he has been misled. Conversely, acute pessimism has its own obvious dangers. The best approach is probably to be straight about the prospects for relief. Discuss the upside <u>and</u> downside to the issues and the case in general. Open, frank, in-depth conversations about the case should be the rule, not the exception.

GET TO KNOW YOUR CLIENT'S FAMILY

Many of the above considerations concerning dealings with the client will also apply to your relationship with his family. But you should also recognize that the dynamics of the family will affect the nature of the information you receive. Some members may care what happens to your client; some may not. Some may blame themselves for your client's predicament while others blame him for theirs. Some may want you to succeed; others won't. Obviously, your client can give you some feel for the family and their attitudes toward him.

To get a good picture of the family, though, you should consider interviewing not just individuals, but the members of the family in different combinations - the whole family, the parents, the siblings, just the brothers, just the sisters, the youngest, the oldest, etc. - depending on the case. The depictions of the family and your client's role in it may be startlingly different. For example, if your client has been abused by a domineering father, it is unlikely that this will come out at a meeting of the whole family, with the father present. But it may be revealed at a meeting with just the siblings or the siblings you suspect were abused. The combinations you choose will necessarily depend on the nature of the case and the information you wish to obtain.

Don't neglect the relatives outside the immediate family. They may know a great deal about the family and your client and will have a somewhat more objective and critical view.

Interviewing enough family members in differing combinations will eventually give you a pretty good portrait of what your client's life within the family has been like, even if you get differing versions. Indeed, the differing accounts themselves may tell you a lot about the family dynamics and how your client fits in.

DON'T FOCUS ONLY ON MITIGATION

Your client and his family may also be in the best position to help enlighten you about a lot more than just your client's life. They have been involved in the case since it began and can likely give you information about many things outside the record, including the local politics, the atmosphere of the trial, the attitudes and actions of the prosecutor and judge, any off-the-record prejudicial comments, facts about the jurors, defense counsel's performance (especially during investigation), etc.

In fact, exploring these non-family matters and allowing relatives to vent their views of how your client may have been treated unfairly, may also facilitate your gathering of information about your client's past by preventing the family from feeling as if your sole mission may be to blame them for what occurred.

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Death Sentence of Retarded Man was 'Fundamentally Unfair'

A recent Missouri case involving a mentally retarded death row inmate will force the nation's judicial system to seek more just treatment for the developmentally disabled, said George Hecker, the president of the Missouri Coalition of Alliances for the Mentally Ill.

Hecker was referring to Missouri Gov. Mel Carnahan's decision earlier this month to commute the death sentence of Bobby Lewis Shaw to life in prison without parole.

Carnahan said the death sentence was "fundamentally unfair" because the jury was not told about Shaw's mental impairments before they sentenced him. Although psychiatrists had determined that Shaw was mentally retarded and suffered from brain damage and schizophrenia, the question of his competency to stand trial had never before been raised, Hecker said. "These three factors made this man virtually incapable of thinking.... This case was an example of the judicial system gone amok on the handling of mentally ill and retarded problems in America," he said.

DPA Law Operations

"The New Kids on the Block": Who We Are, What We Do, and How We Got Here

In 1991, the Public Advocate, the Department's Defense Services staff and Kentucky's Governmental Services Center began an organizational development effort to respond in a more effective and efficient manner to the many problems facing the Department. Problems which were not within our power to control. To do so we had to rethink our current delivery system. This was necessary if we hoped to be able to meet our mandated constitutional and statutory responsibilities.

In this organizational development process there was an emphasis placed on function, quality and delivery of services. To meet this organizational emphasis it was imperative that the Department's support entity be restructured. In doing so there was a recognition that in many respects the Department of Public Advocacy is analogous to a law office advocating for a multiple legal and non-legal needs.

With those things in mind the existing Administrative Services Division was reorganized as the Law Operations Division. In addition to assuming all the then current responsibilities of the existing Administrative Services Division, the Law Operations Division was expanded to include the Department's existing Alternative Sentencing Program, Investigative Section and expanded Training Section. The Training Section with its expanded responsibilities was renamed the Training, Recruiting and Strategic Planning Section. Those expanded responsibilities include: grants development; strategic planning; public affairs; legislation and rules; recruitment; and, professional standards and evalu-ation.

By expanding and restructuring the Administrative Services Division to the Law Operations Division, the Department recognizes the critical support that must be provided in order to meet the legal and non-legal responsibilities of the entire Department.

The Department of Public Advocacy now has all its support functions located in one entity, the Law Operations Division.

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Front row left to right: Rebecca DiLoreto, Joy Brown, Jerry Redmon, Chris Craig, Doris Terrell, Dave Norat
Middle row: Carl Garrett, Bill Curtis, Dave Stewart, Stan Cope, Luther Barney, Tina Meadows
Back row: Ed Monahan, Keith Moore, Cheree Goodrich, Roy Collins, Frank Clay
(Not pictured: Lisa Fenner, Mike Zaiden, Larry Rapp, and Jack Carder)

DPA LAW OPERATIONS STAFF

Dave Norat is the Division Director of Law Operations. He has been with the Department since July 1974. He is responsible for payroll, personnel, fiscal and physical operations, training and investigation coordination. He also maintains an alternative sentencing caseload and oversees that program.

Joy Brown is an Administrative Assistant who has been with the Department since February 1982. She is responsible for data entry, property insurance and inventory.

Roy Collins is the Department's Personnel Administrator who has been with the office since May 1988. He is responsible for processing personnel actions, maintaining the personnel budget, assisting in the recruiting program and coordinating the Department's EEO and ADA efforts.

Stan Cope is our Computer Operations Analyst. He has been with the Department since April 1993. Stan has the responsibility of maintaining DPA's computer system, solving system related problems, writing programs and conducting training.

Chris Craig is an Accountant Principal and has been with the Department since December 1985. Chris is responsible for account maintenance, inventory and many other duties too numerous to mention.

Bill Curtis is an Administrative Specialist Principal who has been with the Department since October 1980. Bill conducts various types of statistical analysis for DPA on caseloads, workloads. He also conducts system surveys for Department use, including venue surveys, and does focused criminal justice research.

Rebecca DiLoreto is an Assistant Public Advocate Chief who has been with the Department since September 1984. Rebecca serves as DPA's Recruiter and is responsible for finding many of the attorneys employed by DPA. She also maintains an appellate caseload.

Lisa Fenner is a Legal Secretary Senior who has been with the Department since April 1981. Lisa serves in several capacities in DPA. She is the secretary to the investigation program, works in the recruiting program and types appellate motions and briefs.

Carl Garrett is DPA's Fiscal Officer and has been with the Department since September 1980. Carl is responsible for processing bills, travel checks, contracts, allotments and maintaining the Department's budget.

Cheree Goodrich is DPA's Accountant Supervisor and has been with the Department since January 1987. Cheree is the person who sees that DPA employees are paid. She is also responsible for coordinating health and life insurance coverage and bill processing.

Tina Meadows is a Legal Secretary Senior who has been with the Department since April 1977. Tina is the glue and then some that keeps the Training Section operating. She sees that the seminars run smoothly, assists in publishing *The Advocate* and types briefs and motions.

Ed Monahan is an Assistant Public Advocate Chief who has been with the Department since May 1977. Ed supervises the Training Section that provides training seminars for staff, publishes *The Advocate*, conducts long-range strategic planning and oversees the Recruiter while maintaining a caseload.

Larry Rapp is an Investigator Senior who has been with the Department since January 1975. Larry provides investigative services in Western Kentucky.

Jerry Redmon is DPA's Messenger and has been with the Department since March 1989. Jerry is responsible for the delivery and distribution of the mail, briefs, motions and other documents. He also maintains the supply room and oversees the cleaning of the office.

Dave Stewart is an Investigator Manager and has been with the Department since July 1974. Dave coordinates DPA's investigation program and provides investigative services for the Frankfort trial unit, Post-Conviction and P & A.

Doris Terrell is DPA's Receptionist and has been with the Department since April 1979. Doris is the voice that greets all DPA callers and visitors. She is also responsible for archiving case records.

Mike Zaiden is an Investigator Senior who has been with the Department since January 1975. Mike provides investigative services in Northern Kentucky.

Resident Assistants:
The Department is fortunate to have some residents from the Frankfort Career & Development Center working with us. These men are eager to assist any DPA employee in any task. Without the assistance of these individuals many of the services provided by the Law Operations Division could not be offered in a timely manner.

Luther Barney makes sure the central office is as clean as possible. He also helps prepare the daily mail and assists in any area he is asked.

Jack Carder is responsible for copying the briefs, motions, information booklets and other documents that are produced by DPA on a daily basis. Without Jack, DPA would not be as efficient when filing motions or disseminating information.

Frank Clay assists in the Training Section performing data input and programming duties. He helps put training materials together and getting *The Advocate* newsletter and brochures for seminars ready for mailing.

Keith Moore currently services as the DPA librarian. He readily assists employees in locating any resource that is requested.

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Ask Corrections

Question: In the June 1993 issue of *The Advocate* the *Ask Corrections* article indicated that before an application for restoration to civil rights is considered ten years must have passed since: 1) expiration of parole or probation; 2) receipt of a final discharge from parole; 3) or the date of serve-out from a state or federal institution. I have recently been informed that this has changed. Is this information correct, and if so what are the requirements for restoration to civil rights?

Answer: The Kentucky Division of Probation and Parole has been notified by the office of the Governor that a change is being made in the procedures for application for restoration of civil rights. The ten year rule is no longer in effect.

Pursuant to executive policy, applications for restoration of civil rights will be processed if one of the following prerequisites exist.

1) The applicant has received a final discharge from parole.

2) The applicant's probationary period has expired.

3) The applicant has served out his sentence from a state or federal institution.

The applicant must not be under indictment.

Each application received that meets one of the above conditions will be forwarded to the Governor's Office for consideration. Applications will be reviewed on a case by case basis. If the application is denied, the applicant cannot reapply for a period of one year.

These procedures are in effect immediately.

Applications for restoration of civil rights are available at any probation and parole office. Applications may also be obtained by writing: Department of Corrections, Division of Probation and Parole, Attention: Marian Young, 514 State Office Building, Frankfort, KY 40601.

Once completed, the application, along with a check or money order in the amount of $2 made payable to the Kentucky State Treasurer, should be forwarded to Ms. Young at the above mentioned address. The application must be notarized or signed by a probation and parole officer.

Once this office receives the application we will verify all information prior to forwarding to the Governor's Office for review and action.

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Frankfort, KY 40601
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THE *GIDEON* AWARD

Allison Connelly presents DPA's first *Gideon* Award
to **J. Vincent Aprile II** on June 13, 1993
Simultaneous to receiving the Award, Vince hit the 1/2 century mark!

Recognizing those whose helped 'bring to life the dream of Gideon v. Wainwright -- the dream of a vast, diverse country in which every person charged with crime will be capably defended, no matter what the economic circumstances, and in which the lawyer reprsenting him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.'

From Gideon's Trumpet
by Anthony Lewis.

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 with a workshop format addressing the following topics: Brainstorming, Client Interviewing, Expert Process: Practicing the 8-Step Process, The Consulting Expert.

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.*

22nd Annual Public Defender Training Conference

The largest yearly gathering of criminal defense advocates offering the greatest number and variety of education on both bread & butter and cutting edge issues facing defenders. **Chief Justice Stephens** will be a featured presenter.

June 19 - June 21, 1994
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