The Advocate

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

The Means of Defense for Those Without — Volume 16, No. 5, October 1994

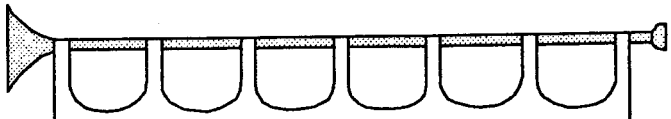
PUBLIC NOTICE

Your Comments are Wanted on
The Legal Representation of Poor People
Charged With or Convicted of A Crime
in Person at 1:00 p.m. at the Following Locations:

Somerset, Kentucky - October 17, 1994
(Fiscal Courtroom, 501 Main St., 2nd Floor)
Covington, Kentucky - November 7, 1994
(Fiscal Courtroom, Courthouse, 2nd Fl., Room 205)
Hopkinsville, Kentucky - November 21, 1994
(Fiscal Courtroom, 511 S. Main St., 1st Fl.)
Prestonsburg, Kentucky - December 5, 1994
(Prestonsburg Community College Auditorium, One Bert Combs Dr.)

Before the *Gubernatorial Task Force on the Delivery & Funding of Quality Public Defender Services*

or in writing to
Edward Holmes, Co-Chair, Gubernatorial Task Force
Public Protection & Regulation Cabinet
Capitol City Airport, Suite 1, Louisville Road
Frankfort, Kentucky 40601
Tel: (502) 564-7760; Fax: (502) 564-3969



Trumpeting *Gideon's* Promise of Equal Justice for the Poor-Accused and Convicted

In all criminal prosecutions, the accused has the right to be heard by himself and counsel.... Section 11, Kentucky Constitution (1891)

[441-0033]

FROM THE EDITOR:

KBA President, Stephen Dale Wolnitzek, addressed the 22nd Annual Public Defender Conference on the duty of society to fund our Sixth Amendment. His remarks remind us of society's need to insure quality legal representation for Kentucky's poor. We appreciate his leadership.

Civil Contempt. Clients facing jail under civil contempt are the public defender's responsibility under *Lewis*. Articles by Ann Oldfather, Chris Polk, Dan Goyette, and Dave Norat offer substantial information and resources to provide those clients with proper legal help. If you have experience in this area, please write an article for one of future issues.

***Gideon* Award.** DPA's annual award goes to the Louisville defenders and Dan Goyette.

Funds for Resources. New monies for experts and other resources are available. We continue our series on how to access them.

Solicitation. do you have an area you'd like to write on, or you'd like to see covered in *The Advocate*? If so, please let us know.

Edward C. Monahan, **Editor**

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DPA'S MISSION (1994)

To provide each individual client with quality legal services, efficiently and effectively, through a properly funded, independent delivery system which ensures well-trained and fairly compensated defender staff dedicated to the interests of their clients and the improvement of the criminal justice system.

DPA CORE VALUES & VISIONS:

Commitment to Clients. We are dedicated to the service of our clients through every aspect of our operation. We pledge that at no time and in no matter shall the government take advantage of our clients.

Quality. Using state-of-the-art technology, superior training, and fair and sensitive management, DPA continually strives to maintain the best possible delivery system to those economically disadvantaged persons of the Commonwealth in need of those services, at all times recalling the dignities and worth of not only the individual client, but also the legal and support staff of the organization itself.

Integrity. Each of us is governed by a steadfastness to achieving our agency's mission, fulfilling our individual responsibilities, and being trustworthy in all our dealings.

Staff Professionalism. Each employee is empowered to act creatively, innovatively, and responsibly by proper training, funding, and support in a work environment that values and respects each employee's contribution to the delivery of legal services.

Indepedence & Interdependence. Independence is essential to the effective functioning of the criminal justice system as well as the external forces that affect it. The DPA operates under a specific rule of professional conduct which requires independent representation of each of its clients. The Department cannot compromise that core value - to do so would undermine justice and thereby destroy the essential interdependence of the system.

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.

The mission of *The Advocate* is to provide education and research for persons serving indigent clients to improve client representation, fair process and reliable results for those whose life or liberty is at risk. *The Advocate* also is DPA's major way to educate criminal justice professionals and the public on its work and values.

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Edward C. Monahan, Editor: 1984 - Present
Erwin W. Lewis, Editor: 1978-1983
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Dave Norat - Ask Corrections
Steve Mirkin - Contract Counties
Pete Schuler &
Harry Rothgerber - Juvenile Law
Rebecca DiLoreto &
Roy Collins - Recruiting
Julia Pearson - Capital Case Review

☛ IN THIS ISSUE ☚

Things that matter most must never be at the mercy of things that matter least.

- Goethe

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Mandatory Pro Bono in Criminal Cases

Arguments Supporting Mandatory Pro Bono

Attorneys are employees of the court and therefore are under an obligation to provide pro bono services as an implied condition to practice law.

Professional responsibility argument: a lawyer has a professional responsibility to represent indigents to guarantee that their basic rights are not violated. (See Model Code of Professional Responsibility and Model Rules of Professional Conduct).

Lawyers have a "monopoly" on legal services and should be required to provide pro bono assistance to indigents. Some argue that without mandatory pro bono, the government would be forced to furnish legal services by non-lawyers or socialize the practice of law through government regulation.

Could improve the tarnished image of the legal profession; may expose lawyers to potential clients and financial benefits; may foster an attorney's personal growth, instill a more humanitarian attitude and provide valuable legal experience.

Arguments Opposing Mandatory Pro Bono

Why lawyers? No other profession is subject to similar requirements to perform free services.

The legal needs of the poor are one part of a broad-based social problem, and lawyers should not be singled out to provide the remedy. The answer to a social problem is a social solution. It is the public who should bear the expense of meeting the legal needs of the indigent defendant.

Imposing a pro bono requirement to resolve the problem of inadequate legal representation of the poor is ineffectual.

Mandatory service amounts to an "excise tax" on attorneys that is not imposed on other professionals.

Even if every lawyer were to satisfy a pro bono requirement, the demand for legal representation of the indigent Defendants would still not be met.

Requiring attorneys to provide pro bono services is the equivalent of compelling charity, and morals and generosity cannot be legislated.

5 Constitutional Arguments

1. **Violation of the Fifth and Fourteenth Amendments**

   Court-appointed representation may be viewed as a taking of private property for public use without compensation.

   Question becomes whether an attorney's services are considered property, the taking of which requires just compensation. Although the Supreme Court has not determined if an attorney's services are "property," lower court decisions seem to imply that the "time, experience, and skill of a professional...[are] 'property' that is 'taken when services are compelled.'"

   Forced representation constitutes a taking because it benefits the public at the expense of a private individual.

   Supporters of mandatory pro bono argue that enforcing an obligation already owed to the public cannot constitute a taking.

   Also, since the state controls the practice of law, forced representation does not interfere with a private property interest.

   Finally, because lawyers enjoy a monopoly on legal services, the pro-mandatory pro bono faction argues that they are expected to pay for that economic advantage by representing indigents without compensation.

2. **Denial of Equal Protection Under the Fourteenth Amendment**

   Forced representation singles out attorneys from other comparable professions, and may even create an unfair distribution of the burden within the legal profession.

   For example, rural attorneys may bear a heavier portion of the burden 8of indigent representation than those employed in the city.

   Also attorneys who specialize in areas such as patent, corporate, or tax law will be called less frequently to represent indigents than those who maintain a general practice.

   Finally, the burden might fall heavier on the younger attorneys than the older, more experienced attorneys who are rarely called, except in cases in which highly competent representation is needed.

   Strict scrutiny would not apply because attorneys are not a suspect class and the ability to practice law is not a fundamental right.

   Mandatory pro bono, however, survives a rational basis analysis because it is rationally related to a legitimate state interest -- protecting the welfare of the indigent defendant.

   However, one might argue that there is no rational relationship that justifies forcing one class of individuals (attorneys) to fulfill an obligation that is society's as a whole.

   Other professions are not required to take on comparable obligations.

   Also, the argument that attorneys are licensed - and thus have a monopoly - and can be compelled to provide services while other professions are not compelled to provide pro bono services ignores the fact that many other occupations - from beauticians to taxi drivers - are also often licensed and have a state-granted monopoly.

   However, professional groups historically have been forced to comply

with limitations or regulatory constraints on the manner in which they ply their trade.

3. **Violation of a Lawyer's Freedom of Association (Amendment I)**

   Mandatory pro bono service forces the attorney to support the idea or associate with causes to which the attorney may be opposed.

   However, a mandatory pro bono requirement that provides alternatives for fulfilling the obligation, would eliminate any First Amendment violation.

4. **Violation of an Individual's Right to Effective Counsel (Amendment VI)**

   Uncompensated service substantially reduces a lawyer's motivation to represent clients zealously and due to insufficient funding, sometimes hinders an adequate investigation.

   Also, many attorneys lack the experience to handle the legal problems of indigents in areas of the law in which the attorneys are unfamiliar.

5. **Violation of the Thirteenth Amendment**

   Generally the least persuasive arguments, these are that compulsory representation violates the Thirteenth Amendment and pro bono wrongfully compels the performance of charity.

   Under the "public service exception" the Supreme Court has mandated service to meet a public need. (*i.e.*, requiring witness to testify; deeming the military draft mandatory).

Functional Objections

Most lawyers lack the expertise or competence to handle the legal problems of the poor.

The focus on billable hours in the large firms and hectic pace of sole practitioner pose significant time constraints on attorneys attempting to meet pro bono requirements.

Forced representation may sacrifice the quality of the representation and lead to an increase in litigation.

Additionally, enforcement of the obligation is difficult to monitor, and entails enormous administrative burdens.

Finally, a mandatory pro bono rule may also provide the government with an excuse to reduce funding for legal aid programs.

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DPA'S COMINGS & GOINGS

APPOINTMENTS:

Carolyn Miller, Assistant Public Advocate joined the Paducah Trial Office in June 1994. She is a 1993 graduate of U.K. Law School and LLM from University of the Pacific in 1994. Carolyn is originally from New York City.

Ranae Railey, Assistant Public Advocate joined the Hopkinsville Trial Office in July 1994. She is a native of Edmonson County. She received her B.A. from Western Kentucky University in 1989 and graduated Chase Law School in 1993.

DEPARTURES:

Brenda Hughes announced her retirement from DPA effective October 1, 1994. Brenda was a legal secretary in the Department's Contract Administration Section. She's been with DPA since January 1975.

Bette Niemi resigned her position, effective August 31, 1994, as Manager of the Trial Services Branch to accept a position in the Major Litigation Division of the Jefferson County Public Defender's Office. She was employed with DPA from 1979-90. She is a 1976 graduate of the U of L Law School and a 1982 graduate of the National Criminal Defense College and a Charter Board member of the Kentucky Association of Criminal Defense Lawyers.

TRANSFERS:

Dave Norat has stepped down as the Director of the Law Operations Division. Dave will remain with the Division as a manager and will be responsible for administration of the Alternative Sentencing Program, grant acquisitions, developing and revising the Policy & Procedures Manual, assisting in the Department's recruitment effort and in the direction of the Division.

Stan Cope has been appointed Director of the Law Operations Division. In addition to his new duties, Stan will continue to be responsible for the operation and maintenance of the Department's information systems. Stan joined DPA in April 1993. He came to DPA from Governmental Services Center where he was a computer instructor.

Legal Issues for Indigents Charged with Contempt

HISTORICAL BACKGROUND OF THE CONTEMPT POWER

The court's inherent power to deal with contempts is established time and time again, see for example *Young* and *Gompers*. However, the United States Supreme Court has over the years placed procedural and substantive restrictions on what was historically the trial court's virtually unlimited power to impose the sentences it saw fit for contempts, including the right to sentence after a summary hearing where the contemnor might have no real opportunity to defend or to be represented by counsel. The fact that there was no right of appeal against a conviction for criminal contempt in England until 1960 best illustrates the extent of the judiciary's power, *Bloom* at 206, n.8. Although almost every analysis of the court's contempt power is couched in terms of criminal or civil contempt, it is not always entirely clear what the courts mean by these terms and the morass of case law has been characterized as "an almost incomprehensible maze of inconsistent theories, both procedural and substantive," *Levisa Stone v. Hayes*.

PURPOSE OF THE DIFFERENTIATION BETWEEN CIVIL AND CRIMINAL CONTEMPT

The Label. Many practitioners make the mistake of characterizing a contempt as civil or criminal depending upon a the quality of the contemnor's conduct. This is wrong. A contempt is civil or criminal depending upon the punishment given and/or the procedural aspects of the contempt hearing. Accordingly, the best use of the label is as a shorthand reference *after* determining what types of sentences are possible or desired and what type of hearing will be granted given the possible sanctions. Some rights afforded the contemnor turn on whether the sentence is determinate, and others turn on the fact or length of incarceration. The line between criminal and civil contempts is hopelessly confused in some cases, probably due to the fact that the effect of any sentencing for contempt will always have a component of both coercion and punishment:

> "Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes...'
>
> "It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to pre-vent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*."
> *Gompers*

The differentiation is, however, important because the determination that a sentence is civil (assuming in fact it truly is) gives the court much wider latitude:

> "The conditional nature of the imprisonment - based entirely upon the contemnor's continued defiance - justifies holding civil contempt proceedings absent the safeguards of indictment and jury....However, the justification for collusive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order."
> *Shillitani v. United States*

How to Make the Differentiation. The contempt is civil if its purpose is "to coerce, rather than to punish," if the purpose of the punishment, whether sanction, fine or imprisonment, is "remedial", or if the sentence "operates in a prospective manner", *Shillitani. Campbell v. Schroering* quotes heavily from *Shillitani* concluding that the "defining characteristic of civil contempt is the fact that contemnors 'carry "the keys of their prison in their own pockets [citing to *Shillitani*]."'" This same "carry the keys" test is, to many courts, the ultimate test on the nature of the contempt.

The contempt is criminal if it is meant to punish for past conduct as in the example given in *Campbell v. Schroering*, "if [the Court's] purpose was primarily to punish the petitioner for her tardiness, the sanction would more properly be characterized as criminal contempt - unconditional incarceration for punitive purposes," or where the act of disobedience consists solely of "doing what had been prohibited," *Shillitani*.

The current test for distinguishing between civil and criminal contempt is best summarized by *Hicks v. Feiock*:

> "The character of the relief imposed is thus ascertainable by applying a few straight-forward rules. If the relief provided is a sentence of imprisonment, it is remedial if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order,' and is punitive if 'the sentence is limited to imprisonment for a definite period.' *Id.* at 442, 55 L Ed 797, 31 S Ct 492. If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution

requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt." *Hicks v. Feiock.*

Hicks also established that use of a purge provision with a determinate sentence renders the contempt civil.

An outmoded method of differentiating between the two types of contempt focused on the intent of the court, rather than upon the remedy utilized. For example, a sentence which plainly seems to be punitive, and therefore criminal, is called "civil" in *Crook v. Schumann* because it was "intended to preserve and to enforce adjudged rights of private parties to suits." Similarly, the Supreme Court has discouraged appellate courts from psychoanalyzing the trial court's motive as a means of differentiating between civil and criminal contempt, *Hicks v. Feiock.*

The courts sometimes speak of the "character and purpose" test:

> "We believe that the character and purpose of these actions clearly render them civil rather than criminal contempt proceedings," *Shillitani v. United States*

> "It is not the fact of punishment but rather its character and purpose that often serves to distinguish [civil from criminal contempt]." *Gompers*

but this really brings nothing new to the analysis.

No Need For Differentiation. Speaking for the Kentucky Supreme Court in *Miller v. Vettiner*, Justice Palmore concluded that it is the end result that matters, not the label going in:

> "Unquestionably many contempts, under any definition, involve both civil and criminal aspects. This case is an example. The object of the subpoena was to aid a liti-gant, but a principal object of the punishment was to vindicate the authority of the court. The important distinction to be drawn, it seems to us, is between those contempts for which a person cannot be jailed or fined without a jury trial and those for which he can. When a person is fined or put in jail the end result is the same (except, perhaps, for the stigma that attends a criminal conviction) whether the offense be labeled a contempt or a crime and whether, if a contempt, it is 'civil' or 'criminal.'"

The breadth of this holding is somewhat problematic as it would seem to obviate any distinction between civil and criminal contempts based upon the conditional nature of the incarceration, a distinction explicitly recognized by other cases.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Federal Constitutional Provisions. The application of the due process clause of the Fourteenth Amendment of the United States Constitution to the States requires certain minimum safeguards, such as the right to examine witnesses, to offer testimony, to be represented by counsel and to have a public hearing, *In Re Oliver.*

Article 3, §2 of the Constitution and the Sixth Amendment to the Federal Constitution establishes a right to counsel.

Selected Federal Statutes and Rules. Numerous federal statutes, generally coincident to other legislation (such as the Clayton Act), bear on the federal courts' contempt power with regard to maximum lengths of sentences.

F.R.Civ.P. 42(a) and (b) provide as follows:

> "**(a) Summary disposition.** A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

> "**(b) Disposition upon notice and hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reason-able time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

It has been held that the procedural safeguards of F.R.Crim.P. 42(b) apply also to civil contempt proceedings, *Pennwalt Corp. v. Durand-Wayland, Inc.*, (9th Cir, 1983). But see *Re Howe*, (4th Cir, 1986).

F.R.Civ.P. 45(f) provides that failure to obey a subpoena may be deemed a contempt of court.

State Constitutional Provisions. Kentucky Constitution §11 grants defendants in "all criminal prosecutions" the right to counsel, a speedy public trial by an impartial jury in prosecutions by indictment or information, and no loss of liberty or property unless by judgment of his peers or the law of the land.

Kentucky Constitution §2 guarantees all citizens equal protection and prohibits governmental acts which are "essentially unjust and unequal", *Milk Marketing Comm. v. Kroger Co.*

Selected State Statutes and Rules. KRS 31.110 provides that a needy person who is detained, suspected, or charged regarding a "serious crime" is entitled to counsel.

KRS 31.100(4) defines a "serious crime" as a felony or a misdemeanor, offense or legal action that could result in "detainment" or "confinement" or a fine of $500 or more.

KRS 453.080 states that any motion or rule is con-sidered an "action".

KRS 421.110 states that contempt may be used for disobedience or evasion of subpoena and related matters.

KRS 421.140 allows imprisonment of a witness who refuses to testify for so long as the refusal continues. Disposition of the cause discharges the recalcitrant

witness from incarceration. *Hardin v. Summitt* determined that a cause is disposed of when the jury returns the verdict, not when all appeals are finished.

KRS 432.260 (now repealed) limited the fine and the incarceration that could be imposed without a jury. The limitations of this section were declared an unconstitutional limitation on the courts in *Taylor v. Hayes.*

KRS 432.230 provides for punishment by contempt for failure to obey, execute or return a subpoena or court order by witness, juror or court officer.

KRS 432.240 prohibits punishment for contempt for criticism of ("animadverts upon") the court outside of its presence.

KRS 432.250 provides for setting a bond upon a con-tempt charge.

KRS 432.270 disallows bail for contempt incarceration. *Levisa Stone* limited the application of this statute to "criminal" proceedings, although it is unclear what the court meant by "criminal."

KRS 432.280 allows a judge to proceed by indictment against anyone making slanderous remarks concerning the court, and allows punishing by contempt the resistance to any judicial order or process.

KRS 439.179 provides that a person committed to jail for contempt may leave during reasonable hours to work or look for work, attend school, care for family, or obtain medical treatment, to be granted at the court's discretion and revoked with or without notice.

KRS 432.290 provides:

> **"Evidence in contempt trial by jury.** In all trials by jury arising under KRS 432.230 to 432.280, the truth of the matter may be given in evidence."

KRS 403.240 allows for contempt to enforce domestic decrees and temporary orders and encompasses award of attorneys' fees.

KRS 403.760 provides that violation of EPOs may be punished by contempt, and further provides that civil and criminal proceedings are "mutually exclusive" and that the other may not be pursued once one has been initiated.

KRS 500.020 provides that the power of the court to punish by contempt is not abrogated by the Penal Code.

RCr 3.05 addresses a defendant's right to be charged and the requirement that the defendant be advised of the right to counsel and that one will be appointed for the defendant if indigent.

RCr 5.18 provides for contempt if unauthorized parties are present before the grand jury.

RCr 7.02(7) allows punishment by contempt for failure to honor a subpoena.

CR 45.06 provides that disobedience of a subpoena by a witness is punishable as contempt.

CR 65.06 provides that contempt may be used to compel compliance with, or punish disobedience of, injunctive relief.

PROCEDURAL AND SUBSTANTIVE RIGHTS AND SETTING SANCTIONS

Fine. A contemnor can be fined above or below $500 for civil or criminal contempt. Does the fine become punitive if it exceeds the actual loss to other party?

A fine in excess of $500 for criminal contempt is a "serious crime" for state purposes and entitles the accused to a trial by jury and by implication all other due process rights including assistance of counsel, *Miller v. Vettiner. Bloom* established that, for federal purposes, the actual punishment imposed must be "serious" and it did not establish what fine would be "serious".

For federal purposes, it has been determined that criminal contempt "in and of itself" and without regard to the punishment is not a serious crime.

A fine payable to the other litigant is regarded as civil contempt. The amount of the fine must be commensurate with the losses the other party sustained, and based upon evidence, *Frederick v. Sturgis.*

A fixed fine not related to the other party's expenses or loss is "criminal" whereas a fixed fine with a purge provision, or a conditional fine, is "civil."

Incarceration. Incarceration can be ordered for civil or criminal contempt.

Under prior law, contempt is a misdemeanor and therefore the maximum punishment would be twelve months in jail and/or a fine, *Gordon v. Commonwealth.* This issue has not been revisited since enactment of the Penal Code. *Miller v. Vettiner* suggested and *Woods* held that there is no effective statutory limit on the court's ability to set the punishment for true criminal contempt. Note that this conflicts with federal decision in *Bloom* which holds that the judiciary's power to sanction for contempt can and should be legislatively restrained.

An indigent contemnor cannot be incarcerated for any length of time, whether for civil or criminal contempt, without being afforded counsel. *Lewis.*

Any determinate sentence for contempt will run concurrently with any underlying felony conviction. *Woods.*

Jury Trial. For federal purposes, the right to jury trial exists only for criminal contempt. As to civil contempts, "the conditional nature of the imprisonment-based entirely upon the contemnor's continued defiance justifies holding civil contempt proceedings absent the safeguards of indictment and jury," *Shillitani.*

Bloom established the right to trial by jury under Article 3, §2 of the Federal Constitution for a "serious crime". In *Bloom* the actual sentence was 2 years and this was held to be "serious." Kentucky concluded that a sentence in excess of six months imprisonment and/or a $500 fine was considered "serious" and entitled the offender to a jury trial and proof beyond a reasonable doubt, *Miller v. Vettiner.*

Despite the statement in *Miller v. Vettiner* that courts customarily have had factual hearings on show-cause orders without the due process standards required for criminal contempt, the trial court in *Gordon* in 1911 appointed counsel for the indigent contemnor who admittedly had lied during previous testimony and impanelled a jury for the contempt hearing, which fixed the punishment at six months imprisonment.

Other Rights. In *Payne v. Commonwealth*, a witness who failed to honor a trial subpoena was found in contempt after a quasi-hearing in chambers and sentenced to a $250 fine and 90 days in jail. The Court of Appeals held that ("while we don't mean to imply that a jury trial is required") a person facing a fine and jail time is entitled to notice of the charge, opportunity to be heard, examine witnesses, present a defense, representation by counsel and a public tribunal. From the language, these rights could be argued to apply to both criminal and civil contempts.

For federal purposes, *Bloom*, *Young*, *Gompers* and *In Re Oliver* establish that the criminal contemnor is entitled to the presumption of innocence, proof beyond a reasonable doubt, the privilege against self incrimination, notice of the charges, an opportunity to respond, the assistance of counsel and the right to call witnesses; and proof of all elements of the offense by the prosecution and protection from statutory presumptions, *Hicks*. For those criminal contempts prosecuted purely as a crime, the court may not appoint the movant's attorney as the special prosecutor without derogating the contemnor's right to prosecution by an impartial prosecutor, *Young*.

Summary vs. Full Evidentiary Hearings. The contempt is "direct" if the contemnor took the allegedly contemptuous action in the trial court's "immediate presence" and indirect where committed outside the court's presence, *Fredericks v. Sturgis*. Direct contempt can be thought of as those instances where the court must take action to protect its dignity and power.

> "A direct contempt is committed in the presence of the court and is an affront to the dignity of the court. It may be punished summarily by the court and requires no fact finding functions as all of the elements of the offense are within the personal knowledge of the judge. Indirect criminal contempt is committed outside the presence of the court and requires a hearing and the presentation of evidence to establish the violation of the court's order. It may be punished only in proceedings satisfying due process safeguards [citing *Illinois v. Gray*, 344 N.E.2d 683 (1976), aff'd 370 N.E.2d 797 (1977)]."
> *Burge v. Commonwealth*

As the above quote indicates, Kentucky had historically recognized the power of its courts to summarily punish contemptuous actions, see for example *Long v. Commonwealth*. See also *U.S. v. Delahanty* (6th Cir, 1973) to the effect that tardiness is not committed in the court's presence.

In what was probably a veiled reference to the then pending *Taylor v. Hayes*, and one that eerily presaged the opinion many years later in *Leibson v. Taylor*, Justice Palmore in *Miller v. Vettiner* expressly declined comment on contempts committed in the immediate presence of the court other than to point out that the facts need to be shown by a proper record.

In Re Oliver foretold the demise of summary punishment by narrowly characterizing the type of conduct which "demoralizes" the court and therefore can be punished summarily.

Bloom recognized but rejected the historical position that courts need to be able to punish summarily in order to maintain their dignity. That opinion references the unavoidable involvement of the court's ego in that contemptuous conduct "often strikes at the most vulnerable and human qualities of a judge's temperament." As dicta, the Court held that the need to maintain order in the courtroom did not require a special exception to the right to jury trial established by that Opinion for "serious" criminal contempts.

The Opinion of the United States Supreme Court in *Taylor v. Hayes* starts from the premise that "summary punishment always, and rightly, is regarded with disfavor." When the final adjudication and sentence is postponed until after trial, there is none of the regular justification for the disfavored summary procedures. In either event, minimal due process considerations require notice and an opportunity to respond and be heard.

Taylor v. Hayes also established that the likelihood or appearance of bias precludes trial of the contempt charges by the original trial judge. This determination was said to be made on the "character of the [judge's] response to misbehavior during the course of the trial" *not* on the contemnor's actions. For a contrary conclusion, see *Sacher v. United States*.

Intent. The minimum *mens rea* for criminal contempt is recklessness, *U.S. v. Delahanty*.

Binding Nature of the Characterization. The characterization of the lower court of the contempt as civil/criminal is not binding on the appellate courts. *Hardin v. Summitt*, *Shillitani*.

The determination of the contempt as civil or criminal is a matter of federal law for purposes of applying federal constitutional principles. *Hicks*.

Extent of Power Utilized. It is emphasized throughout the federal decisions that the court should "exercise the least possible power adequate to the end proposed." *Shillitani*, *Spallone*. This language was quoted with approval in *Campbell v. Schroering*. Indeed this principle has served as the foundation for some decisions, *e.g.*, *Young*.

This consideration favors the imposition of civil contempt prior to resorting to criminal contempt sanctions.

DEFENSES TO THE CONTEMPT CHARGE

Ability to Comply. Since the hallmark of civil contempt is the ability of the accused to remove herself from the punishment by compliance, it follows that one must be **able** to comply for a contempt to be truly civil. In a footnote, *Hicks* stated:

> "Our precedents are clear, however, that punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order [citing cases]. At p.638 U.S., n.9.

This means that the accused must be *able* to pay the fine imposed as a condition, or *able* to meet the terms imposed to avoid the incarceration.

For Kentucky purposes, ability to comply is a defense, not an element of the crime. *Blakeman* expressly answered the question impliedly addressed in *Lewis* that the defendant has the burden of proof on the defense of inability to comply. See also *Campbell City v. Kentucky Correction Cabinet*, holding that inability to comply "must be shown clearly and categorically by the defendant," and that "defendants so claiming must prove they took all reasonable steps within their power to assure compliance" with the court order. Ability to comply is a factual finding by the trial judge which will not be disturbed unless clearly erroneous. *Blakeman*.

Ability to comply is not a defense if the contemnor has voluntarily produced his own "inability," *Blakeman*, *Tucker v. Commonwealth*. See also *Rudd v. Rudd*. In *Blakeman*, the contemnor who now made only $12,000 per year was found to be in civil contempt (imprisoned until paying $200,000) since he could have paid the divorce and maintenance judgment he had studiously avoided for a number of years. His alleged inability now (of which the trial court was not convinced) was no defense.

Although a civil contempt proceeding requires that the contemnor be able to satisfy the purge amount, inability to pay

which obviates a civil contempt sanction does not prevent a criminal contempt proceeding for "willful disobedience of an order of the court though the intentional divestiture of assets... with the attendant due process safeguards," *Perez v. Perez.*

Void or Voidable Underlying Order. The Supreme Court refused to address the issue of the propriety of the underlying order in holding that an attorney was in contempt of court in refusing to comply with a direct order, *Leibson v. Taylor.* In citing to U.S. Supreme Court precedents, the Court recognized that orders that are "transparently invalid" or "patently frivolous" need not be obeyed on the risk of contempt.

As stated in *Crook v. Schumann*:

> "...[R]ight or wrong, it was the duty of the parties to respect and obey the orders of the court.
>
> "Counsel should have sought relief and remedy from rulings deemed erroneous by appeal in an orderly manner."

It is interesting to note that this same case holds that the order compelling compliance was not suspended by the attempted supersedeas, a holding overruled by *Levisa Stone* as to fines for civil contempts.

Federal cases hold similarly to *Crook, Spallone v. U.S.*; *U.S. v. Laurins.*

The Court of Appeals in *Wilson v. West* held that on a writ of prohibition an invalid order requiring a parent to jointly pay restitution with a juvenile may not be enforced by contempt.

Court Lacks Personal or Subject Matter Jurisdiction. An attorney aiding the client in evading the orders of the court is "equally if not more guilty" than the client, *Crook v. Schumann.*

Election or Exhaustion of Less Onerous Remedies. *Clay v. Winn*, while limiting the civil contempt to the obligor's ability to pay, specifically stated that the normal remedies for satisfaction of a judgment including attachment and execution were not precluded.

THE DECISION IN *LEWIS V. LEWIS*

The consolidated cases of *Lewis v. Lewis* and *Price v. Price*, 875 S.W.2d 862 (Ky. 1993) were decided by the Supreme Court on May 27, 1993. At the request of the Department of Public Advocacy, the finality of the decision was stayed until the next legislative session. The decision is now final. A copy of the decision is attached. *Lewis* dealt with child support obligors held in contempt and incarcerated until all arrearages were paid. The trial court refused to consider or make findings on the obligors' ability to comply with the support orders in issue. The obligors were not represented by counsel. Without reaching any federal constitutional issues, the Court concluded that indigent obligors have a right to appointed counsel under the statutes of Kentucky when faced with the possibility of incarceration. Again without reaching federal constitutional issues, the Court concluded that the trial courts abused their discretion in failing to make specific findings of fact as to ability to pay. "Contempt cannot be used to compel the doing of an impossible act." While accumulated arrearage will not be excused, the purge amount must be related to the contemnor's ability to comply.

Justice Stephens appointed a Committee to recommend uniform procedures for contempt for the Court's consideration. Attached is the Report of the Committee.

THE DOUBLE JEOPARDY ISSUE

Burge, in consolidation with *Herriford v. Commonwealth*, is currently pending before the Supreme Court. It was argued on February 18, 1994 and an Opinion should be forthcoming soon. Burge was prosecuted and convicted on burglary, rape and sodomy charges. The burglary conviction was based on the same set of facts that served as the basis for his criminal contempt (90 days in jail) on a domestic action restraining order. The Court of Appeals quoted heavily from *Bloom* that "criminal contemptuous conduct [is] indistinguishable from ordinary criminal conviction, for their impact on the individual is the same." Relying on U. S. and Kentucky Supreme Court precedents and KRS 505.020(1), the Court of Appeals reversed [2-1, McDonald dissenting] the robbery conviction on the basis of double jeopardy:

> "...the Supreme Court held in *Grady* that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.*, 495 U.S. at ___, 109 L.Ed.2d at 564. This rule has been applied in Kentucky in *Walden v. Commonwealth*, Ky, 805 S.W.2d 102 (1991) and most recently in *Cooley v. Commonwealth, supra.*
>
> "Applying *Grady* to the present case, it is clear that the Commonwealth used the identical conduct to prove Burge's guilt on the burglary charge in the Jefferson Circuit Court criminal case that the same court, although presided over by a different judge, used as the basis for holding him in contempt.
>
> . . . .
>
> "The Commonwealth used the same conduct to prove Burge guilty of burglary that the trial court used to find him in contempt. Under the *Grady* test, the prosecution for burglary was barred by the Double Jeopardy Clause and it was error for the trial court to allow the second prosecution to occur."

In June, 1993, the U. S. Supreme Court in *U.S. v. Dixon*, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) overruled *Grady* without abandoning the principle that double jeopardy (Fifth Amendment) prohibits subsequent criminal prosecution after criminal contempt sanctions. The proper analysis of *Dixon* requires finding some common ground among the five separate opinions. *Burge* is presently pending before the Kentucky Supreme Court on its second round of Briefs as the impact of *Dixon* is debated.

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Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987)

SUMMARY OF PROCEDURES

CRIMINAL CONTEMPT	CIVIL CONTEMPT
The Hallmark: Determinate sentence	***The Hallmark:*** Indeterminate sentence Determinate sentence with purge
The Court May: Fine Incarcerate	***The Court May:*** Fine Incarcerate
The Court Shall Require: Jury if imprisonment > 6 months, fine > $500 Counsel for indigents if any incarceration Guilt beyond a reasonable doubt No preusmptions of guilt Movant/Prosecution must prove the elements of offense Notice of charge Public forum Accused may examine and present witnesses Sentence must run concurrently with felony Maximum sentence six months ***Questions:*** Are summary proceedings allowable?	***The Court Shall Require:*** No jury required (federal cases) Jury if imprisonment > 6 months, fine > $500 (*Miller v. Vettiner*) Counsel for indigents if any incarceration Standard of proof as set by State Presumptions, burden of going forward, burden of persuasions as set by State Notice of charge Public forum Accused may examine and present witneses Sentence need not run concurrently ***Questions:*** Are summary proceedings allowable? No maximum sentence?

Sixth Circuit Highlights

Donna Boyce

Expert Testimony

In ***Berry v. City of Detroit***, 25 F.3rd 42 (6th Cir. 1994), the Sixth Circuit analyzed a trial court's gatekeeper function in determining the admissibility of non-scientific expert testimony in a civil rights suit filed by the mother of a man shot in the back by a Detroit police officer.

The plaintiff's theory of liability was that the city's failure to adequately discipline its officers when deadly force was misused amounted to deliberate indifference to the rights of its citizens and was the proximate cause of Officer Hall shooting Berry. In support of this theory, the plaintiff presented the testimony of Postill, a former sheriff turned criminal justice consultant, who had reviewed the reports and some records on 636 "shots fired" by police incidents.

The Sixth Circuit alluded to the problems that "junk science" has caused in the courtrooms and found that the plaintiff's expert was not qualified to give this non-scientific expert testimony. The Court relied on *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993), which held that the *Frye* "general acceptance" test for determining the admissibility of novel scientific evidence was displaced by FRE 702 (which is identical to KRE 702). The Court noted that although *Daubert* dealt with scientific experts, its language relative to the "gatekeeper" function of the trial judges is applicable to all expert testimony offered under Rule 702.

The Sixth Circuit stated that under *Daubert*, one of the first inquiries should be whether the theory or technique can be and has been tested. A second consideration is whether the theory or technique has been subjected to peer review and publication. Under *Daubert*, the "general acceptance" of the theory or technique still has a bearing on the inquiry as to its admissibility. Finally, under *Daubert*, Rule 702 assigns to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.

The Court ruled Postill's testimony was not admissible under these guidelines and vacated the 6 million dollar judgment against the city.

Prosecutorial Misconduct

The Sixth Circuit clarified its test for determining whether improper remarks by a prosecutor during closing argument warrant a new trial in ***U.S. v. Carroll***, 26 F.3d 1380 (6th Cir. 1994). Since 1976, the Sixth Circuit has applied at least three different tests and all three are still in frequent use.

The first test was introduced in *U.S. v. Leon*, 534 F.2d 667, 678-83 (6th Cir. 1976), where the Court held a two-step approach was required. The court must first determine if the prosecutor's remarks are improper and then if they constitute harmless error. *Id.*

A second test was announced in *U.S. v. Bess*, 593 F.2d 749, 753-57 (6th Cir. 1979). *Bess* also required a two-step test. The Court held that once prosecutorial remarks were found to be improper, they would not amount to reversible error, particularly where the remarks were not flagrant, where proof of guilt was not overwhelming, counsel failed to object and the trial judge cured the error by admonishing the jury. *Id.*

A third test appeared in *U.S. v. Thomas*, 728 F.2d 313, 319-20 (6th Cir. 1984), where the Sixth Circuit held that to warrant a new trial, prosecutorial misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial.

The Sixth Circuit noted that *Thomas* was an unfortunate retreat from the *Leon* and *Bess* standards, which in the Court's view could be construed in a way that makes them mutually consistent. The Court held that the *Bess* standard should be used in all subsequent cases involving non-flagrant improper prosecutorial remarks. Using the *Bess* standard, the Court found the prosecutor's remarks -- implying that plea agreements with two witnesses ensured that their testimony was truthful and suggesting that if he or the court did not believe the witnesses were being truthful, the witness would be in jeopardy -- constituted reversible error. The Court went on to suggest that judges respond to this type of prosecutorial vouching for witnesses with a prompt, curative admonition to the jury that promises in plea agreements add little to the truth telling obligation, that the prosecutor has no way of knowing whether or not a witness is truthful, that the books are not filled with indictments of prosecution witnesses who have been untruthful and acquittal of the accused would not mean as a matter of course that the government would seek perjury indictments or even fail to make the promised recommendation of leniency.

Entrapment

In ***U.S. v. Tucker***, 28 F.3d 1420 (6th Cir. 1994), 55 CrL 1353, the Sixth Circuit concluded that the due process defense of outrageous governmental conduct used in some entrapment cases does not exist. The Court found no finding precedent for this defense which grew out of dicta in *U.S. v. Russell*, 411 U.S. 423 (1973).

FOOTNOTES

[1] *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

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Plain View

Howard v. Transportation Cabinet
878 S.W.2d 14

This opinion was much publicized in the media. In an opinion written by Chief Justice Stephens, the Court has held that a vehicle enforcement officer (VEO) has authority to stop someone suspected of driving under the influence of alcohol and arrest her.

This case arose in 1986 when a VEO drove onto an accident scene. He arrested the driver of the car involved and took him to jail. Because he acted outside of his department's manual, he was issued a letter of reprimand. Thereafter, he brought an action "seeking to compel enforcement of DUI laws by the Kentucky Transportation Cabinet and various Vehicle Enforcement Officers working area highways." After the trial court granted relief, the Court of Appeals reversed.

The Kentucky Supreme Court reversed, holding that the legislature had intended to "institute a policy whereby all peace officers with varying jurisdictions, both geographical and otherwise, are mandated to arrest offenders of DUI statutes. Such policy is certainly consistent with the seriousness of the offense and the general public's attitude toward abating the needless tragedy caused by intoxicated drivers of all classes of vehicles." Justice Leibson penned a sole dissent, stating that "KRS 281.765 and 281.770 should be given their common sense meaning rather than illogically expanded to create a new class of police officers with powers to stop and arrest private citizens not involved in the operation of motor carriers at will, and whenever the spirit shall move them, so long as they consider a traffic violation has occurred."

Dixon v. Commonwealth
1994 WL 287572

Two Sheriffs went to a trial commissioner in Hickman County requesting a search warrant for the Dixon's home. The trial commission transcribed the "statements of the sheriffs onto a printed affidavit for search warrant form." Based upon the affidavit and "other information supplied by the sheriffs," the trial commissioner issued the search warrant. The execution of the warrant resulted in an indictment and conviction.

There was just one problem: the trial commissioner practiced law with the Hickman County Attorney. The Dixons challenged the search, but had their motion overruled by the Circuit Court. The Court found the affidavit to be defective, but held under the good faith exception that the evidence would be admitted.

The Court of Appeals, in an opinion written by Judge Huddleston and joined by Judges Johnstone and Schroder, reversed. The Court noted that because a judge "determines whether probable cause exists to justify the issuance of a search warrant," that the "judgment of a neutral and detached magistrate helps to prevent law enforcement authorities from engaging in unlawful searches." As a result, the Court held "that the association of a trial commissioner and a county attorney in the practice of law presents an insurmountable conflict of interest and appearance of impropriety which destroys the district court trial commissioner's character as a neutral and detached magistrate."

As a result, the good faith exception to the warrant requirement did not apply. One of the exceptions to *United States v. Leon*, 468 U.S. 897 (1984), as adopted in *Crayton v. Commonwealth*, Ky., 846 S.W. 2d 684 (1992) is that when the warrant is not issued by a neutral and detached magistrate the good faith exception does not apply. "When the threshold requirement of neutrality has not been met by the issuing authority, the analysis of *Leon* and *Crayton* does not apply."

Congratulations to former public defenders Will Kautz and Charlotte Scott for this victory.

Hibbitt v. Commonwealth
1994 WL 235441

This decision of the Court of Appeals answers a carefully drawn question: do the police of a second class city have authority to execute search warrants outside the city limits in the county? Judge Howerton, joined by Judges Johnstone and McDonald, answered in the affirmative on June 3, 1994.

Here, the Bowling Green Police Department were told by an informant that Hibbitt had marijuana and cocaine at his residence. Hibbitt lived outside the city limits of Bowling Green. The Bowling Green Police obtained a search warrant and upon executing it found cocaine and marijuana.

Hibbitt moved to suppress based upon his contention that the Bowling Green Police had no authority to execute a search warrant outside the limits of their second class city. The trial judge rejected the motion, and Hibbitt entered a conditional guilty plea.

In a unanimous opinion, this panel of the Court of Appeals affirmed the trial judge. Despite KRS 95.515, which limits the extra-territorial power of the police in second class cities to making arrests, the court held that there was an implied authority to execute warrants. By "conferring the power to arrest on police in second class cities, the legislature meant to at least include those powers closely related to arrest, such as execution of a search warrant...The fact that specific powers were not spelled out in KRS 95.515 in a manner similar to the other empowering statutes does not change this result...We conclude that police in second class cities may make arrests and execute arrest and search warrants in the surrounding county."

United States v. Diaz
25 F.3d 392

Drug agents received information regarding a drug courier at the Detroit Airport. Diaz' car was located at a motel, and a "drug detection dog 'alerted'" on the car. Diaz thereafter consented to having his car searched, where 100 pounds of marijuana were found. A conditional plea was entered after Diaz' motion to suppress was denied.

In a decision written by Judge Boggs, and joined by Judges Milburn and Contie, the Sixth Circuit affirmed the district court. The Court states that a "positive indication by a properly-trained dog is

sufficient to establish probable cause for the presence of a controlled substance."

The question considered here was whether the dog was properly trained and reliable. The Court stressed that this consideration was within the trial court's discretion. "When the evidence presented, whether testimony from the dog's trainer or records of the dog's training, establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the 'credibility' of the dog." This standard was met in this case.

The Court also rejected Diaz' contention that he had a reasonable expectation of privacy in the parking lot at the motel, and that the officers had no probable cause upon entering the parking lot. While acknowledging a reasonable expectation of privacy in the motel room and in the car itself, the Court held that any expectation of privacy in the parking lot itself was unreasonable.

Short View

1. ***State v. Pierce***, 55 Cr. L. 1301 (N.J. Sup. Ct. 6/15/94). The New Jersey Supreme Court has again demonstrated its commitment to protecting the privacy rights of its citizens using their state constitution in two cases. In this case, the court rejects the bright line rule of *New York v. Belton*, 453 U.S. 454 (1981). Henceforth, the police in New Jersey will not be able to turn a routine traffic stop into a search of the passenger compartment of a vehicle. "We acknowledge the virtue of simple, straight-forward rules to guide police officers in applying Fourth Amendment doctrine. Nevertheless, we are convinced that automatic application of the *Belton* bright-line rule to authorize vehicular searches incident to all traffic arrests poses too great a threat to rights guaranteed to New Jersey's citizens by their State Constitution, and that that threat to fundamental rights outweighs any incidental benefit that might accrue to law enforcement because of the simplicity and predictability of the *Belton* rule."

2. ***New Jersey v. Tucker***, 55 Cr. L. 1338 (N.J. Sup. Ct. 6/22/94). On the same day as *Pierce*, the New Jersey Supreme Court also rejected the use of *California v. Hodari D.*, 499 U.S. 621 (1991) as the definition of when a seizure has occurred. Here, the defendant ran when he saw the police. He threw crack cocaine away immediately before being seized. The Court held that because the police did not have probable cause based upon Tucker's flight, that the drugs he threw away had to be suppressed.

2. ***State v. White***, 640 A.2d 572 (Conn. 1994). A person cannot be taken from a jail and put into a lineup without a warrant, according to the Connecticut Supreme Court. Relying upon their state constitution, the court held that a "removal order" entered by the trial court did not meet the requirements of a warrant, and thus the seizure of White's person and placing him in a lineup was a violation of his rights. The resulting identification of him should have been suppressed.

3. ***Ascher v. Commissioner of Public Safety***, 55 Cr. L. 1355 (7/24/94). The Minnesota Supreme Court has relied upon their state constitution in rejecting the DUI roadblock. Henceforth, in Minnesota, absent a reasonable suspicion, a motorist cannot be stopped at a roadblock to check for DUI.

4. ***United States v. Melendez-Garcia***, 55 Cr. L. 1356 (10th Cir. 6/30/94). The Tenth Circuit discusses the interplay between the amount of force used and the level of suspicion. Where more force than is necessary is used during a *Terry* stop, what would otherwise be a detention may turn into an arrest. Where there is not enough evidence to constitute probable cause, naming something an arrest can result in the suppression of evidence obtained during what would otherwise be a consensual search. In this case, the Court held that there was enough of a question regarding the amount of force to require a remand.

5. ***United States v. McSwain***, 55 Cr. L. 1388 (10th Cir. 7/11/94). The police cannot ask for a driver's license and registration, and ask about the driver's travel plans, once the purpose of the traffic stop has been achieved, according to the 10th Circuit. Here, an officer stopped McSwain to check on the expiration date of a temporary license tag. After determining that the tag had not expired, the police continued to question McSwain, checking his license, conducting a computer search, and asking about travel plans. By going beyond the scope of the original suspicion, the police turned an otherwise lawful traffic stop into an illegal detention. As a result of the illegal detention, evidence discovered thereafter, despite McSwain's consent, was obtained illegally, and thus the conviction for drugs and firearms violations had to be overturned.

6. ***Menuel v. Atlanta***, 55 Cr. L. 1405 (11th Cir. 7/13/94). In what sounds like it came from "News of the Weird", the Eleventh Circuit has stated that surrounding a person with guns drawn did not constitute a seizure; the seizure did not occur until the person was killed. To arrive at this absurdity, the court used the standard from *California v. Hodari D.*, 499 U.S. 621 (1991).

7. Professor of Law Tracey Maclin of the Boston University School of Law harshly criticized the Clinton Administration's new policies regarding public housing searches in the May 24, 1994 issue of *The Christian Science Monitor*. That policy initially supported the warrantless searches of public housing units, and has shifted more recently to placing warrantless search requirements into public housing leases. The policy was in direct response to the problems with drugs and weapons in this nation's public housing units. Professor Maclin observes that while the Fourth Amendment is a uniquely American right, it has never been very popular and has been routinely ignored by different governments. Recently, looking "for illegal drugs, a Boston police SWAT team using a no-knock warrant burst into the apartment of a 75-year-old minister, chased the minister through his home, and broke down a bedroom door to grab him. While being handcuffed, the minister died of what was later diagnosed as a heart attack. The police subsequently discovered they had raided the wrong apartment."

   Professor Maclin specifically criticizes the "consent clauses" which will be made part of future public housing leases. "People with limited choices about where to live should not be presented with 'take it or leave' leases that require the sacrifice of rights that the rest of us enjoy."

8. On June 15, 1994, Judge Hood suppressed evidence in the Eastern District of Kentucky arising out of a

traffic stop in Shelbyville. Judge Hood found that a police officer's suppression testimony that Johnson had white powder below his nose and above his mouth was questionable testimony. Further, the Court observed the white powder "could have been anything from shaving powders to...a doughnut." Ultimately the Judge found the stop to have been unreasonable, and the evidence seized to have been illegally taken. Congratulations to Kevin McNally on this victory.

9. What is "testilying?" According to a draft report of the New York mayoral commission, it is a practice by New York Police Officers of making false arrests, tampering with evidence, and committing perjury on the witness stand. In an April 22, 1994 New York Times article, the draft report calls perjury "perhaps the most widespread form of police wrongdoing facing today's criminal justice system."

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A Decent Search & Seizure Library

Knowledge of basic search and seizure law is fundamental to any public defender, private criminal defense lawyer, prosecutor (well, maybe not), and judge. While the following is not exhaustive, readers of The Advocate should consider some or all of the following for their own libraries.

1. The essential work in the field is ***Search and Seizure: A Treatise on the Fourth Amendment***, 2d Edition, by Professor Wayne R. LaFave (1987). Published by the West Publishing Company, this four volume set is exhaustive in its coverage of Fourth Amendment issues. The kaleidiscopic nature of Fourth Amendment law, where holdings can vary with a turn of the factual account, is explored thoroughly. This work is often cited by the United States Supreme Court, sometimes being treated as an authoritative precedent. When writing briefs, or getting into an issue for the first time, "LaFave" is the place to start.

2. Another fine resource is the three volume ***Searches and Seizures, Arrests and Confession*** by William E. Ringel. The second edition is prepared by Justin D. Franklin and Steven C. Bell, and is updated by Mark D. Pellis. It is published by Clark Boardman Callaghan, the publisher who has taken the most interest in this area of the law. While not as authoritative as LaFave, this is a massive work which can inform quickly and easily. The beauty of this work is the inclusion of volume 3, which explores the law of confessions, *Miranda*, and the Sixth Amendment generally. Another strength is that it is not hardbound and thus capable of responding to the ever-changing law of the Fourth Amendment.

3. A very useful resource, particularly for district judges and prosecutors, is the looseleaf ***Search Warrant Law Deskbook*** by John M. Burkoff. Also published by Clark Boardman Callaghan, this work is useful for that which it is intended: as an on the desk guide to very specific issues associated with search warrants. The black letter law surrounding probable cause, obtaining warrants, particularity requirements of warrants, issues of execution of warrants, third party warrants, the extent of the search, and motions to suppress is explained easily, with numerous current case citations. A unique and helpful portion of this one volume work is the review of search and seizure law in each state and the United States. This enables the practitioner to find out how each state differs in what must be contained in a warrant, whether nighttime searches are allowed, what each state requires in the return of a warrant, etc. Interestingly, an examination of Kentucky's requirements demonstrates the simple nature of most of our warrant requirements, with numerous "no express provision" for many significant areas.

4. ***The Search and Seizure Law Report*** is another Clark Boardman Callaghan publication. It is published monthly, and features a law review quality article on a very specific, and usually timely area of search and seizure law. Written by experts in the area, often including law professors but not excluding pracititioners, this is similar to an ongoing highly quality review of new areas of search and seizure law.

5. A very interesting work is the ***Search and Seizure Checklists***, published every year by Clark Boardman Callaghan and written by Michele G. Hermann. This is similar to Clark Boardman's *Criminal Procedure Checklists* and *Habeas Corpus Checklist*. This is a good resource for someone who wants to become educated quickly in the area generally or in a very specific topic. It is also an excellent resource for finding quick quotes for that motion or memorandum. There is no narrative. Rather, a simple outline is filled out with quotes from ancient and brand new caselaw, mostly from the United States Supreme Court. Lawyers, most of whom learned the law by reading caselaw, will find this a fascinating way to learn what the law is.

6. Clark Boardman Callaghan publishes one last resource material by John Wesley Hall, Jr. entitled ***Search and Seizure***. Now in its second edition, this is the only resource discussed here written by a prominent criminal defense lawyer. Mr. Hall is an NACDL Board member, has written for *The Champion*, and is an incisive thinker. I must confess to not having this resource in the Richmond Office, and thus I cannot speak to its usefulness. It is a two volume set which appears to be exhaustive. Being published by Clark Boardman, who seems to be at the forefront of search and seizure law, I would predict that this is an excellent resource. Being written by an NACDL Board member, I know that it will offer practice tips not available in any of the other works above.

22nd Annual Public Defender Conference
1994 Gideon Award

Remarks of Allison Connelly Presenting the Award:

"The selection for the second recipient of the *Gideon* Award is rather unique. This year the award recognizes an entire system; a system which has set the standard for excellence and quality in the rendering of public defender services.

Since 1972, the Jefferson County Public Defender Corporation has been the role model for the provision of criminal defense services for the poor. Despite overwhelming odds, chronic underfunding and excessive caseloads that exceed 850 cases per attorney, I can think of no other more deserving group of dedicated and committed individuals in this state who, year in and year out, advance the right to counsel for Kentucky's poor.

"It is only because of an extraordinary commitment to equal justice that the highest quality of representation has been delivered to the accused poor in Jefferson County. Indeed, each of these individuals, the public defenders, the investigators, the social workers, the sentencing specialists, the secretaries and other support staff possess a sense of advocacy that has no limits. The creativity and hard work of each individual is partially reflected by the six cases which Jefferson County has handled in the United States Supreme Court.

"However, a system is only as good as its leader, and certainly Dan Goyette must receive a great deal of credit for instilling in all of his staff members a sense of pride and professionalism which guarantees quality representation for all poor clients.

Dan's leadership is best explained by reading from a letter sent by members of his staff nominating him for this year's *Gideon* award. The letter states: 'The standard demanded by Dan insures that clients are effectively represented whether they are charged with traffic offenses or capital murder.... Thanks largely to Dan's inexhaustible efforts over the years, the right to counsel is a meaningful reality to indigent persons who are accused of criminal offenses in Jefferson County....

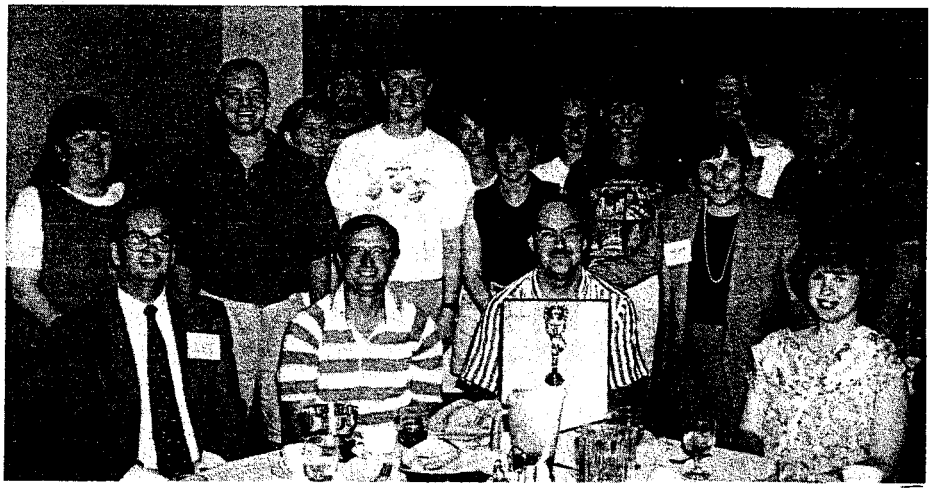
Through his leadership, Dan has instilled staff attorneys with the same high standards of commitment, competence, ethics and advocacy which he personally exhibits. He has steadfastly put clients before other personal and professional concerns. He acts in the best interests of our clients even if it is unpopular to do so.

Dan leads by example. He sets extraordinarily high standards for himself, and staff attorneys inevitably strive to emulate the same degree of competence and professionalism.'

"It is for all these reasons and the many others which have not been enumerated, that it is with great pleasure and even more pride that this year's *Gideon* award winner is the Jefferson County Public Defender Corporation and its leader, Daniel T. Goyette."

Acceptance Remarks by Dan Goyette:

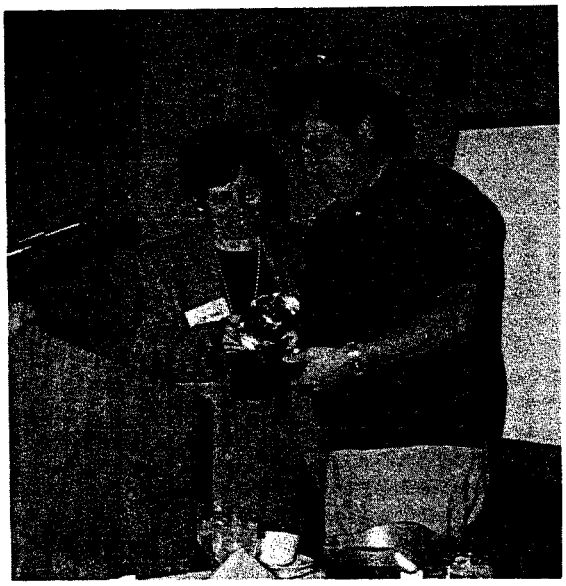
"Thank you, Allison...you've caught me somewhat off guard...I very much appreciate your kind words, and while I wish everything you said were true, you've certainly stated goals I continue to strive for... This award is appreciated especially in light of what it stands for in these days and times more than 30 years after the Supreme Court's decision in Clarence Earl Gideon's case. Additionally, I should also say that, if the quality of an award is measured by its recipients, then it's also a pleasure to join the ranks of our considerably elder colleague, Mr. Aprile, with whom I have personally enjoyed some memorable advocacy moments, both with him and against him. But what I most appreciate about this award is the fact that it recognizes the outstanding performance of the Jefferson County Public Defender's Office over the past 22 years and all those who have worked there and continue to work there under less than ideal circumstances. So,



Staff Members of the Louisville/Jefferson County Public Defender Office Present at the Annual Conference Dinner

if I am to stand up here, I'd ask all those past and present Jefferson County Defenders who are in attendance to stand up and take a bow.

"Apparently, we'll have to wait until sometime later this week before the state budget is finally passed, but if things go according to plan, we should be in better shape as a system than we ever have been before, thanks in large part to Allison Connelly's efforts with the Governor's Office and the legislature. That is not to say that we are where we should be, where we need to be, or where we deserve to be -- but in fact we will begin this biennium with more resources than we've ever had to get the job done. Allison faced certain political realities in achieving what she did, and she dealt with them as well as anyone could or has. However, that having been accomplished, our collective objective must be to continue to meet the challenge of *Gideon* in everyday practice, especially ensuring that the 6th Amendment is not diluted or compromised by those who would employ or utilize user fees, defender fees and the like to tax or inhibit the right to counsel. In that respect, Ed Monahan established a theme for this year's conference which is important, timely and professionally inspiring, namely, *The Quest for Quality: The Client Imperative*. I know we are all up to the task of protecting our clients' interests above all, and that we will continue that quest as our top priority.



Allison Connelly & Dan Goyette

"I suppose all that remains to be said is that I've always considered it an honor just to be a public defender, so this award is really frosting on the cake. Again, I appreciate the sentiments expressed and thank you for recognizing the work of our office. Many have contributed to our program over the years, both directly and indirectly, and they deserve our thanks as well. Congratulations to all who share in this award...."

Letters to DPA

Dear Allison,

Let me commend you and your staff for the presentation of an excellent annual seminar.

My only regrets are that having taken mostly the capital track I was unable to sit in on a number of the presentations on other items relating to nuts and bolts issues.

Some sacrifices have to be made when there's so much on the plate.

I still believe this to be the best criminal defense seminar given not only in this state but nationally.

David R. Steele
Spalding, Hanna, Rouse & Steele
Covington, KY

Dear Ed,

WOW! What a marvelous training conference.

The Twenty-Second Annual Public Defenders' Conference was the best I have been privileged to attend.

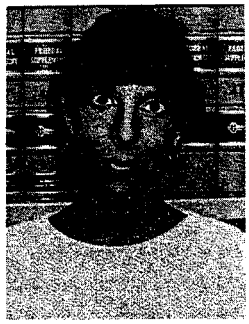
The topics were timely, diversified, and interesting. What more could an attendee desire? Nothing.

Having been a prosecutor, juvenile and circuit court judge, and public defender, I can, and do, appreciate both the quantity AND quality of work performed by the Department of Public Advocacy.

Best wishes and much continued success!

Ray Corns
Frankfort, KY

West's Review



Julie Namkin

Lewis v. Commonwealth
93-CA-00941-MR, 5/6/94

The defendant went to J. C. Penney's and purchased tennis shoes from the shoe department and clothes from the men's department with a stolen credit card. As a result he was charged and convicted of two counts of fraudulent use of a credit card pursuant to KRS 434.650. The defendant was sentenced to five years on each count to run consecutively.

Prior to trial and again at the close of all the evidence, the defendant argued he could only be charged with one count of fraudulent use of a credit card because KRS 434.650 and KRS 434.690 consolidate all fraudulent credit card transactions which occur during a six month period into one offense. The circuit court disagreed.

KRS 434.690(1) addresses the penalties for violating KRS 434.650(1)(a) and (b) and states that "if the value of all... goods...received in violation of this section...exceeds one hundred dollars ($100) in any six-month period" a person is guilty of a class D felony. Based on this statutory language and case law from other jurisdictions, the Court of Appeals concluded that "[t]he terms of KRS 434.650 and 434.690 clearly appear to prohibit and punish a course of conduct over a six-month period, rather than individual acts."

Stating the defendant "was incorretly indicted and convicted of two felony counts of fraudulently using a credit card and should only have been convicted of one count....[T]he legislature provided that if the value of all money or goods received exceeds $100 *in any six-month period*, a person is guilty of a Class D felony," (emphasis added), the Court of Appeals reversed the defendant's conviction for the second count of fraudulently using a credit card and remanded his case with directions to set aside the conviction on the second count and modify his sentence accordingly.

The defendant also argued on appeal that the circuit court erred when it struck for cause a prospective juror who stated he had a bad experience with the police twenty or thirty years ago without giving him an opportunity to question the juror and attempt to rehabilitate him.

The Court of Appeals found the trial court did not abuse its discretion in striking the prospective juror since the juror "made at least some statements that this past event would possibly affect his opinion of the police officer's testimony at trial."

Mercer v. Commonwealth
93-CA-001313-MR, 5/13/94

An officer of the Department of Fish and Wildlife Resources saw the defendant's car stop, saw a passenger exit the car and then reenter it a minute later and then saw the car continue down the road weaving back and forth. The officer arrested the defendant for DUI fourth and possession of marijuana under eight ounces.

The defendant was indicted for the above-mentioned offenses, and moved to dismiss the indictment, arguing the arresting officer lacked the proper authority. After a hearing, the court overruled the motion because Conservation Officers had been requested to assist in enforcing all laws of the Commonwealth pursuant to KRS 150.090 (1). The defendant entered a conditional guilty plea.

On appeal, the defendant argued that KRS 150.090(1) must be strictly construed to mean that the Commissioner has the ability to send out his officers in life threatening situations or upon requests from other enforcement agencies *only on a case-by-case basis*. The defendant also argued that the administrative agencies have unconstitutionally increased the scope of their authority without specific legislation.

The Commonwealth pointed out that an Attorney General's Opinion, OAG 90-3, had previously found that case-by-case requests for assistance would be impractical and that comprehensive requests from law enforcement agencies for the assistance of Conservation Officers in the enforcement of all laws of the Commonwealth were acceptable.

As a result of the Attorney General's Opinion, the Commissioner of the Kentucky State Police requested Fish and Wildlife Officers to enforce all laws of the Commonwealth. Thus, the Department of Fish and Wildlife developed a policy which ordered its officers to, among other things, arrest drunk drivers when they present a substantial risk of imminent danger to themselves or others.

The Court of Appeals concluded that since the Kentucky State Police requested the assistance of the Conservation Officers in the enforcement of all criminal laws of the Commonwealth, and the Commissioner issued specific regulations for the officers to follow, the conservation officer had the authority to stop and arrest the defendant for DUI. Furthermore, the enforcement agencies have not usurped the legislative power or acted beyond the scope of KRS 150.090(1).

The defendant's convictions were affirmed.

O'Dea v. Clark
93-CA-000133-141-MR, 5/20/94

Nine inmates had their administrative punishments for unauthorized use of drugs or intoxicants vacated, pursuant to *Byerly v. Ashley*, Ky.App., 825 S.W.2d 286 (1991), for the prison authorities to establish a sufficient chain of custody of the urine sample taken from the inmate. The Corrections Cabinet appealed and the Kentucky Court of Appeals reversed all but one of the vacation orders.

Of the nine inmates, one entered a guilty plea. The Court of Appeals held that by pleading guilty this inmate waived his right to challenge the administrative punishment. Seven other inmates failed to raise the chain of custody issue at their administrative hearing, and raised

the issue for the first time in circuit court. The Court of Appeals held this failure to timely raise the issue before the administrative body precluded judicial review. As to these eight inmates the Court of Appeals reversed the vacation orders.

The ninth inmate did raise "the issue of the chain of custody form that is to accompany the urine specimen at all stages" at the administrative hearing. The vacation of his administrative punishment was affirmed.

The Court of Appeals also noted that a petition for a writ of habeas corpus is not the appropriate proceeding for the restoration of "good time" or expunging inmate records.

Hash v. Commonwealth
93-CA-0491-MR, 5/27/94

The defendant was driving under the influence of alcohol in Knox County and nearly struck two police vehicles and a chase ensued. The defendant drove across the state line into Tennessee where he continued his speedy and erratic driving. After being apprehended by Tennessee troopers, the defendant was charged (in Tennessee) with felony reckless endangerment, driving under the influence, failure to yield to emergency equipment, speeding, improper turn and driving on the wrong side of the road. The defendant entered a guilty plea to the reckless endangerment and the DUI charges.

Subsequently the defendant was indicted in Kentucky on two counts of wanton endangerment. The defendant's motion to dismiss the indictment on double jeopardy grounds was denied. The defendant entered a conditional guilty plea reserving the right to appeal the denial of his motion to dismiss.

In his appeal, the defendant argued that KRS 505.050 prohibited his being prosecuted in Kentucky for the same conduct which he was convicted of in Tennessee. The Kentucky Court of Appeals held this statute was not applicable. The Court also held there was no evidence the defendant was prosecuted in Tennessee for conduct that occurred in Kentucky. The two wanton endangerment offenses were completed in Kentucky against two Kentucky victims **before the defendant ever entered Tennessee.** The two crimes to which the defendant pleaded guilty in Tennessee were for criminal conduct that took place solely in Tennessee. That the Tennessee officers gave some background information as to why they were pursuing the defendant does not mean that the defendant was tried in Tennessee for the Kentucky crimes.

The defendant also argued that both prosecutions "were the result of a single impulse and a single course of conduct" and thus violated double jeopardy principles. Relying on *Hennemeyer v. Commonwealth*, Ky., 580 S.W.2d 211, 215 (1979), the Court of Appeals stated that "wanton endangerment is not susceptible to the single impulse or act analysis." Simply because the defendant "started driving recklessly in Kentucky and continued on, putting several other drivers at risk in two states, does not require the conclusion that [the defendant] committed but one crime."

Finding no merit to the defendant's arguments, the trial court was affirmed.

Graham v. O'Dea, Ky.App.
876 S.W.2d 621 (1994)

The defendant filed a petition for writ of habeas corpus, pursuant to KRS 419.020, in the circuit court requesting restoration of good-time credits and the expunging of an incident report from his institutional record. The defendant did not allege that if his good-time credits were restored he would be entitled to immediate release from custody. The circuit court dismissed the petition without explanation.

The Court of Appeals stated that "[t]he sole purpose of the writ is to determine whether a person detained is entitled to release from that detention." Since the defendant did not assert or prove a right to immediate release from custody, the Court of Appeals affirmed the circuit court.

The Court of Appeals also noted the increasing number of instances in which inmates use the writ of habeas corpus to attempt to resolve disciplinary disputes with the Corrections Cabinet. The writ is not proper in such cases and there are other procedures available for the resolution of such disputes. For example, an inmate may file a motion for a declaratory judgment pursuant to KRS 418.040 asking for restoration of good-time credits. See *Polsgrove v. Kentucky Bur. of Corrections*, Ky., 559 S.W.2d 736 (1977). See also *O'Dea v. Clark*, Ky.App., ___ S.W.2d ___ (5/20/94), where the defendant filed a petition for declaratory judgment to vacate his administrative punishment since the prison authorites failed to establish a sufficient chain of custody of his urine sample which resulted in disciplinary action.

Hibbit v. Commonwealth
92-CA-2837-MR, 6/3/94

Three Bowling Green policemen served a search warrant at the defendant's home that was outside the city limits but within the confines of Warren County. Quantities of cocaine and marijuana were found.

The defendant entered a conditional guilty plea to trafficking in a schedule II narcotic controlled substance and trafficking in a schedule I non-narcotic controlled substance, reserving the right to challenge the police officers' authority to execute a search warrant outside the city limits.

Bowling Green is a city of the second class. Under KRS 95.515, the police in cities of the second class "may make arrests anywhere in the county in which the city is located." The Court of Appeals reasoned that by "conferring the power to arrest on police in second class cities, the legislature meant to at least include those powers closely related to arrest, such as execution of a search warrant." The Court concluded that police in second class cities may make arrests and execute arrest and search warrants in the surrounding county.

Thus, the order of the trial court was affirmed.

Harris v. Commonwealth
92-CA-002240-MR
6/15/94 final

The defendant was indicted for lottery ticket forgery in violation of KRS 154A.990(2) after he presented a "Pick 3" lottery ticket that was determined to have been altered.

The defendant moved to dismiss the indictment on two grounds. First, the grand jury that indicted him had been empaneled in violation of state law as set out in *Commonwealth v. Nelson*, Ky., 841 S.W.2d 628 (1992). Second, KRS 154A.990 (2) violates Section 59(4) of the Kentucky Constitution as it is special legislation aimed at a particular group of individuals.

After the trial court overruled the defendant's motions to dismiss, he entered a conditional guilty plea.

As to the defendant's first ground for dismissal, the Court of Appeals agreed

that *Commonwealth v. Nelson, supra*, is controlling.

As to the defendant's second ground, the Court of Appeals concluded the legislation was not special legislation. The Court reasoned that prior to the passage of KRS 154A.990(2) forgery was already a felony under KRS 516.020. When the Constitution was amended to allow for the creation of a lottery, KRS 516.020 could have been amended to include forgery of lottery tickets, and it would not have been special legislation to so amend the statute. Thus, KRS 154A.990 (2) is not special legislation. Moreover, "[c]reation of a separate statutory provision is in conformity with the constitutional amendment allowing the General Assembly to promulgate legislation regulating and protecting the integrity of the lottery."

As a result, the Court of Appeals vacated the circuit court's order and remanded the case for a new trial.

Hundley v. Commonwealth
92-CA-1269-MR, 6/15/94 final

Defendant Hundley was charged and convicted for use of a minor in sexual performance in violation of KRS 531.310, a Class B felony. Defendant Mattingly was charged with promoting a sexual performance by a minor in violation of KRS 531.320. At the sentencing phase of Mattingly's trial, and while the jury was still deliberating, he was permitted to plead guilty to the amended charge of criminal facilitation of the use of a minor in a sexual performance, a Class D felony.

The charges arose from a series of photographs that Hundley had Mattingly take of her eleven year old daughter depicting the girl in various stages of undress, including totally nude.

On appeal each defendant challenged the constitutionality of KRS 531.310 and 531.320 as vague and overbroad. The Court of Appeals rejected these arguments partially relying on *Payne v. Commonwealth*, Ky., 623 S.W.2d 867 (1981), and also pointing out that the jury was instructed "that the 'sexual conduct by a minor' insofar as exhibition of the genitals was concerned meant 'exhibition...in an obscene manner.'"

Defendant Hundley separately argued that KRS 531.310 is invalid because it does not require a mental state for its violation. However, the Court of Appeals held the culpable mental state for violation of this statute is intent because it prohibits conduct by a person whose "conscious objective is to bring about or facilitate by consent the sexual performance of a minor."

Hundley also argued she was denied due process and equal protection because the prosecutor refused to amend the charge against her to a Class D felony as it did for Mattingly. The Court of Appeals disagreed because she was not "equally situated with her co-defendant." Hundley was the mother of the child, charged with her custody and care, and in a position to exert compelling influence over her. There was evidence to show she was much more culpable in bringing about the child's performance than Mattingly.

Lastly, Hundley argued the prosecutor misstated the law on insanity during closing argument when he told the jury the test for insanity "is can she discriminate between right and wrong, not whether or not she thinks that posing for nude photographs is a crime." The prosecutor also told the jury "[t]he question is whether or not she had the ability to discern right from wrong."

The Court of Appeals agreed the prosecutor mistated the law and noted the misstatement was magnified by the prosecutor's reference to Hundley's law-abiding life which showed she knew "the difference between right and wrong." Because Hundley presented a very strong case to support her insanity defense, the prosecutor's misstatement of the law was not harmless beyond a reasonable doubt.

Defendant Mattingly's conviction was affirmed while Hundley's was reversed for a new trial. The Court of Appeals cautioned the parties that upon retrial "only those pictures which the jury could reasonably find to appeal as a whole to a prurient interest in sexual conduct by minors" should be used as evidence.

LaMastus v. Commonwealth
Ky.App., 878 S.W.2d 32 (1994)

Mrs. Taft let the defendant move into her home because he had no other place to live. She let the defendant use her bank debit card when he occasionally went grocery shopping for her. Taft testified the defendant refused to return the debit card upon her request, while the defendant testified he gave her the card back when she asked for it. $568.72 was charged to the card before Taft got it back from the defendant. The defendant was tried and found guilty of fraudulent use of a bank card.

A police officer testifying for the Commonwealth gave hearsay testimony as to what Mrs. Taft told him about the offense. The court sustained the defendant's first hearsay objection to the officer's testimony. When the officer continued to relate what Taft told him, the defendant again objected. The court overruled the objection so the officer could "relate the nature of the complaint" to the jury.

On appeal, the defendant argued for reversal due to the improper admission of "investigative hearsay" by the officer. The Court of Appeals, relying on *Bussey v. Commonwealth*, Ky., 797 S.W.2d 483 (1990), and *Sanborn v. Commonwealth*, Ky., 534 S.W.2d 754 (1988), stated that the officer's actions were not an issue in the case, and his testimony "improperly lent credence to Mrs. Taft's testimony and unfairly prejudiced the jury in her favor." The defendant's conviction was reversed on this ground.

The defendant also argued the trial court erred by allowing the Commonwealth to introduce impermissible character evidence of both the defendant and Taft.

The Commonwealth called several witnesses in rebuttal to testify to Taft's reputation for truthfulness and that the defendant was a known liar. Since Taft's reputation for truthfulness had not been attacked, and since the defendant had not placed his reputation for truthfulness in issue, the defendant argued the rebuttal testimony was improper.

Agreeing with the trial court, the Court of Appeals concluded that KRE 404(a)(3) controls rather than KRE 404(a)(1)-(2) because both Taft and the defendant testified as "witnesses." Thus, the introduction of general reputation evidence of each witness was admissible under KRE 608, which permits the credibility of all witnesses to be attacked or supported by general reputation or opinion evidence. The Court of Appeals did note that it may have been improper for the prosecutor to bolster Taft's credibility prior to the defendant's attack, but any error was rendered harmless once the credibility evidence became admissible to rebut the defendant's attack.

The case was remanded for a new trial.

Hogg v. Commonwealth
92-CA-1604-MR, 7/1/94

The defendant was charged with trafficking in marijuana over eight ounces. Prior to trial the defendant moved to dismiss the felony trafficking charge and reduce the charge to a misdemeanor because the crime lab report showed the weight of the "slightly damp" marijuana was 9.03 ounces, while the weight "after drying" was 7.98 ounces. By using the weight of the marijuana when dry, the charged offense would only be a misdemeanor. The defendant also moved for the appointment of an expert to reweigh the marijuana to ensure that all mature stalks, fiber, stems and sterilized seeds were excluded.

When the trial court overruled the defendant's motions, he entered a conditional guilty plea reserving the right to appeal the denial of his motions.

The question of when marijuana is to be weighed is one of first impression in Kentucky since KRS 218A.990(4) does not specify when the marijuana is to be weighed. Looking to other jurisdictions and KRS 218A.010(9), which defines marijuana, the Kentucky Court of Appeals concluded that "the state's decision to weigh the seized marijuana immediately upon receipt by the lab simply establishes a point in time to determine the weight of marijuana in all cases. An obvious rational purpose for this decision is to enable the Commonwealth to decide what charge should be filed against someone found in possession of marijuana." The Court further noted that "'weight' will always include some moisture." Thus, the trial court was correct in denying the motion to reduce the charge to a misdemeanor.

The Court of Appeals also held the defendant was not entitled to have the marijuana retested or reweighed or to the appointment of an expert.

The defendant's conviction was affirmed.

Dixon v. Commonwealth
91-CA-002998-MR, 7/1/94

The defendants were indicted for cultivating marijuana for sale, possession of drug paraaphanalia and possession of marijuana.

The charges were the result of a search of the defendants' (husband and wife) home pursuant to a search warrant. The warrant was issued by the Hickman County Trial Commissioner based on information received from the sheriffs of Hickman and Carlisle county and "transcribed" onto a printed affidavit for a search warrant form.

Prior to trial, the defendants moved to suppress the evidence obtained in the search because the trial commissioner was not a neutral and detached magistrate since she was the law partner of the Hickman County Attorney.

After a hearing the circuit court denied the defendants' supression motions, and the defendants entered conditional guilty pleas reserving the right to appeal the denial of their suppression motions.

The issue presented to the Court of Appeals was whether a district court trial commissioner can be a neutral and detached magistrate capable of issuing a search warrant when the commissioner practices law with the county attorney.

To answer this question, the Court of Appeals looked to SCR 5.050 which states that a trial commissioner is required to "disqualify himself in all matters in which he has an interest, relationship or bias that would disqualify a judge." Under Canon 2 of the Code of Judicial Conduct, a judge must avoid all impropriety or the appearance of impropriety. Thus, when a trial commissioner performs judicial functions, he must also avoid the appearance of impropriety. "The partnership of the trial commissioner and county attorney, who participates in the prosecution of criminal cases, does not give the appearance of impartiality."

Under Canon 3 § C(1)(b) of the Code of Judicial Conduct, a judge must "disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Under this canon, a trial commissioner must disqualify himself when his partner practices law before him. Judicial Ethics Opinion JE-44. The Ethics Committee has expressly stated "that when a trial commissioner and a county attorney are law partners, the trial commissioner must disqualify himself in all cases in which the county attorney appears, whether it be a civil or criminal matter." JE-47; JE-63.

Even though the Hickman County Attorney was not the individual who actually requested the search warrant from the trial commissioner, "their association gives rise to the appearance of impropriety." Thus, the trial commissioner, as law partner to the county attorney, was not acting as a neutral and detached magistrate when she issued the search warrant for the Dixons' residence.

Because the error in this case goes to the detached and neutral magistrate requirement, the good faith exception of *U.S. v. Leon*, 104 S.Ct. 3405 (1984), does not apply.

The defendants' convictions are reversed as well as the denial of their supression motions. The cases are remanded so the defendants may withdraw their guilty pleas.

Hunt v. Commonwealth
93-CA-000704, 7/8/94

The defendant's brother's wife brought a complaint against the defendant for first-degree sexual abuse of her eleven year old daughter. The complaint alleged the defendant touched the child around her shoulder and rubbed her buttocks and legs. After a preliminary hearing, the district court found the defendant did not touch the child's breasts or sexual organs and reduced the charge to the misdemeanor of first-degree criminal attempt to commit sexual abuse.

At a competency hearing held prior to trial, when the Commonwealth finished questioning the child, the trial court refused to let the defendant question the child, but did let counsel read her proposed questions into the record. The court found the child competent to testify.

The only witnesses for the Commonwealth were the child-victim and her mother. The child testified that while she was sleeping at her uncle's house, she was awakened by her uncle who was laying in bed with her rubbing her legs and arms. He asked her "Do you trust me?" The child's mother testified, absent an objection, that her daughter told her the defendant had also attempted to touch her buttocks.

The defendants motions for a directed verdict were overruled and the jury convicted him of criminal attempt to first-degree sexual abuse.

The defendant appealed to the circuit court arguing that the evidence was insufficient to sustain the verdict; the prosecutor made improper comments in his closing argument; and it was error for the trial court to refuse to allow him to question the child at the competency hearing. The circuit court affirmed the defendant's conviction and the Court of Appeals granted discretionary review.

The Court of Appeals found that it was not clearly unreasonable for the jury to find the defendant guilty of criminal attempt to commit first degree sexual abuse.

In his closing argument the prosecutor told the jury that the child did not have a reason to lie, but the defendant clearly did have a motive to lie because he did not want to go to jail. The Court of Appeals could not say the prosecutor's comments were improper.

As to the defendant's third argument, the questions the court refused to let the defendant ask the child-victim involved whether she understood the implications of lying under oath. The Court of Appeals stated that "[i]n order to determine [the child's] competency as a witness, the trial court did not need to ensure her understanding of the punishment she would receive for violating the oath, but rather only whether she understood her obligation to tell the truth and that she knew the distinction between the truth and a lie."

The defendant's conviction was affirmed.

Norton v. Commonwealth
92-CA-2658, 7/15/94

The defendant was charged with trafficking in a schedule I non-narcotice controlled substance after he sold LSD to an undercover police officer and an informant. Both the officer and the informant were wired with transmitting devices during the transaction and other police officers were able to listen to the transaction as it was occurring.

At the defendant's trial the undercover police officer testified about the transaction that occurred at the defendant's apartment. The tape recording made during the transaction was played for the jury and a typewritten transcript (prepared by the Commonwealth with the assistance of the officer who was present when the statemnts were made) was given to the jury to follow along. In addition to the discussion and sale of the LSD, the tape recording also contained a discussion of a possible sale of marijuana.

The jury fond the defendant guilty and sentenced him to the maximum of ten years.

On appeal the defendant argued it was error to play the tape recording for the jury and allow the jury to simultaneously read the transcript because the tapes and the transcript were hearsay; the tapes were of poor sound quality; and the transcript was the Commonwealth's interpretation of an inaudible and unintelligible recording.

The Court of Appeals concluded the tape recordings were not hearsay because "they were evidence of the event itself, introduced for a non-hearsay purpose.... The Commonwealth had no interest in proving whether such statements were true" but rather that the defendants were engaged in the transaction that the undercover officer testified occurred.

As to the defendant's argument regarding the poor sound quality of the tapes, the Court of Appeals listened to the tapes. Although it agreed that portions of the tapes are difficult to hear and understand, due to background noise and static in transmission, they are not wholly inaudible nor unintelligible. Moreover, "the inaudible portions are not so substantial as to render the [tape] recordings untrustworthy as a whole." It was not an abuse of discretion for the trial court to allow the tapes to be played for the jury.

As to the use of the transcript of the tape recordings, the Court of Appeals distinguished this case from *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988). First, the defendant did not allege the transcript contained specific inaccuracies or was the prosecutor's version or interpretation of the inaudible portions on the tape as was the case in *Sanborn, supra.* Second, the defendant did not offer a version different from that presented by the Commonwealth. Third, the jury was not permitted to take the transcript to the jury room during deliberations as was done in *Sanborn.* Thus, the trial court did not abuse its discretion in allowing the jury to follow along with the transcript while listening to the tapes.

Lastly, the Court of Appeals "conclude[d] that admission of the tapes of the undercover drug deal was proper. The discussion regarding the marijuana transaction was "inextricably intertwined with other evidence essential to the case." Although the tapes may have revealed uncharged collateral criminal activity, "the jury was entitled to know the setting of the case," and the time, place and circumstances of the acts forming the basis of the charge against the defendant so its decision would not be made in a vacuum. "[S]eparation of the evidence...if not impossible...would have seriously and adversely affected the Commonwealth's ability to present the case to the jury.

The defendant's conviction was affirmed.

Transportation Cab. v. Ross
93-CA-000505-MR, 7/29/94

The defendant, an attorney, was stopped for speeding, but the officer (Melton) smelled alcohol when he approached the defendant. The defendant was taken to the police station where they had to wait for another officer (Watson) to arrive because Melton was not certified to give a breathalyzer test. A third officer was also present.

At the administrative hearing to determine whether to revoke the defendant's license, Melton testified he gave the defendant two field sobriety tests, although in a sworn affidavit he stated he gave the defendant three field sobriety tests. Melton further testified the defendant attempted to blow into the machine but was unable to, and Melton never heard Watson tell the defendant he would lose his license for six months for refusing to take the test.

Watson did not testify at the hearing but did submit an affidavit in which he stated the defendant twice refused to take the breath test and he warned the defendant, pursuant to KRS 186.565(3), of the consequences of failing to take the test.

The defendant testified at the hearing that he was blowing on the little tube taking the test but he has bad adenoids and breathes real shallow and couldn't breathe deep enough to make the test work. The defendant testified Watson was annoyed because he had to come to work early to give the defendant the test. The defendant denied having refused to take the test and said he "was never, never verbally [given] any instructions about any law." Although the defendant was tried and acquitted of DUI in a bench trial in McCracken District Court, the hearing officer, relying on Watson's affidavit, suspended the defendant's license. On appeal, the McCracken Circuit Court reversed the hearing officer because the defendant was not properly warned pursuant to KRS 186.565(3). The Transportation Cabinet appealed to the Court of Appeals which found that Watson's affidavit did not have "either the substance or relative consequence upon which to revoke [the defendant's] license" because "it had insufficient probative value to induce conviction."

Although not raised by the parties in this case, the Court of Appeals pondered whether the Transportation Cabinet is within its rights to proceed with a revocation hearing when the defendant is found not guilty of violating KRS 189A.010(1) or

KRS 189.520(1), and thus there is no basis for taking the breathalyzer in the first place. The Court also wondered if there is an infringement by the executive branch of government upon the functions of the judicial branch.

The circuit's finding that the revocation of the defendant's license was arbitrary and capricious was affirmed.

Commonwealth v. Shields
92-CA-1485-MR and
92-CA-2748-MR, 7/27/94

The defendant and his wife had a "turbulent" marriage that lasted for one year. During that year, the defendant's wife made four reports to the local police alleging her husband had assaulted her. Only one report resulted in an arrest, and the wife ended up dropping the charges.

The defendant and his ex-wife remarried a year after their divorce. This remarriage had the same "turbulent" tenor as the first marriage. One evening, two months into the remarriage, the defendant and his wife argued in their bedroom. The defendant became angry and went into an adjoining room. When he returned, his wife was holding a gun and threatening to kill herself. (The defendant testified that on at least one occasion prior to this incident his wife had threatened to kill herself.). The defendant took the gun away from his wife and placed it on the bed. She lunged for the gun, and the defendant tried to stop her. During a struggle, the gun discharged and the wife was shot in the eye. She died at the hospital, and the defendant was indicted for murder.

Prior to trial the Commonwealth moved to introduce into evidence a videotape found in the defendant's home that showed a consenual sadomasochistice sexual relationship betweeen the defendant and his wife. The trial court ruled the Commonwealth could not introduce the video at trial because its prejudicial effect would outweigh its probative value. The Commonwealth brought an interlocutory appeal, but agreed to go to trial without the video and to have the ruling considered on direct appeal.

At trial, the Commonwealth's theory was the killing was intentional, while the defense was accident. The defendant was convicted of first degree manslaughter and sentenced to fourteen years imprisonment. The defendant presented six arguments for reversal of his conviction.

First, the defendant argued he was entitled to a directed verdict of acquittal, but the Court of Appeals found that since the defendant had told the police that the gun was in his hands when it went off, it was not clearly unreasonable for the jury to find the defendant guilty.

Second, the defendant argued it was error for the trial court to allow the Commonwealth to admit evidence that about one year prior to the charged offense the defendant had assaulted his wife on four separate occasions. Two Judges of the Court of Appeals concluded that since the key issue in the case was the defendant's mental state, the evidence of the prior assaults was relevant to show the defendant's intent. Moreover, because the rest of the Commonwealth's evidence "was far from overwhelming, the probative value of the prior assaults outweighed their prejudicial value.

The two Judges further concluded the trial court did not err when it permitted police officers to testify to these prior assaults under the excited utterance exception to the hearsay rule. KRE 803(2). The victim was visibly distraught and shaking and crying when she made the reports to the police between five and seventy-five minutes after each assault. There was no evidence the assaults were fabricated, that the victim had any motive to fabricate the assaults, or that the victim was trying to gain some advantage by making the statements. The Court of Appeals distinguished *Barnes v. Commonwealth*, Ky., 794 S.W.2d 165 (1990), because in that case there was no claim the affidavit was admissible as an excited utterance.

A third Judge dissented and would have reversed the defendant's conviction due to the admission of the police officers' testimony as to the prior assaults.

Third, the defendant argued he should have been permitted to introduce evidence of the victim's suicide threats to him during the course of their relationship since such evidence was relevant to show the victim's then existing state of mind under KRE 803(3).

The Court of Appeals found no error in the exclusion of this evidence because the excluded threats were not made within a reasonable time before the victim's death. Since the defendant was allowed to inform the jury of his wife's suicide threat on the night of the alleged incident, the trial court's refusal to admit extensive psychiatric evidence regarding the victim's mental and emotional disorders was harmless.

Fourth, the defendant argued it was error to qqualify a police officer as an expert on high-velocity blood spatter. The Court of Appeals found no abuse of discretion by the trial court given the officer's experience of having investigated over 100 crime scenes involving gunshots; having worked with other experienced detectives during his eleven years as a detective and four years with the evidence technician unit; and having attended a two week course at a police institute which included training in blood spatter analysis.

Fifth, the defendant argued a gunshot analyst's testimony should have been excluded because the test results were not furnished prior to trial. The Court of Appeals found the gunshot analyst had given the defendant a report prior to trial containing the test results complained of, but the defendant did not understand the report as making the inference he argued was omitted.

Lastly, as to the Commonwealth's argument that it should have been permitted to introduce the videotape, the Court of Appeals stated the issue was moot because of its affirmance of the defendant's conviction; but in any event, the tapes probative value was outweighed by its prejudicial effect so there was no error.

Johnson v. Commonwealth
Ky., 875 S.W.2d 105 (1994)

This case involves Johnson's retrial as a first degree persisitent felony offender. Johnson's previous first degree persistent felony offender conviction had been vacated pursuant to an RCr 11.42 motion.

The Commonwealth's theory was that Cholly Bernadine Dickerson, convicted in 1968 for robbery, was the same person as Cholly B. Johnson, convicted in 1973 for robbery. The Commonwealth's case was based on testimony from Department of Corrections' records, over Johnson's hearsay objection, that showed the two individuals had the same birth date, the same social security number, the same parents, and the same home address.

Johnson argued below and on appeal that any hearsay testimony from Corrections' records other than age and proof of parole status is inadmissible and beyond the scope of *Garner v. Commonwealth*, Ky., 645 S.W.2d 705 (1983).

Finding no qualitative difference between that portion of Corrections' records which contains age and parole status and that portion which contains birth date, social security number, parents' names and home address, the Kentucky Supreme Court expanded *Garner* to include such information as long as it satisfies the regular business entries exception to the hearsay rule and identity is the disputed issue.

Johnson also argued it was double jeopardy to retry him after his PFO I conviction was vacated. However, since Johnson's claim of ineffective assistance was based on trial counsel's failure to object to the admission of incompetent evidence, such error is considered "trial error" and does not prevent a retrial. It is only where the Commonwealth presents no evidence that a retrial is barred on double jeopardy grounds.

The Kentucky Supreme Court also found it was not an abuse of discretion for the trial court to deny Johnson's continuance motion made on the day of trial. Although trial counsel and the Commonwealth announced ready for trial, Johnson, who had been designated co-counsel prior to trial, stated he was not ready because his incarceration in the penitentiary had prevented him from having contact with his appointed counsel and the court had not yet ruled on his motion to dismiss on double jeopardy grounds.

Johnson's PFO I conviction was affirmed.

Linehan v. Commonwealth
Ky., 878 S.W.2d 8 (1994)

The defendant was arrested on rape and burglary charges arising out of an incident with his estranged wife. He waived his *Miranda* rights and made a voluntary statement admitting the burglary but claiming the sex was consensual. He was arraigned and counsel was appointed to represent him.

Five months after this alleged incident, the defendant again engaged in a series of assaults upon his estranged wife. After again being arrested, he again waived his *Miranda* rights and gave a voluntary, but incriminating statement. He also indicated his purpose in assailing his estranged wife this second time was at least partly to intimidate her regarding the prior charges for which he had been indicted. The defendant was subsequently indicted for the offenses arising out of this second alleged attack.

The Commonwealth moved to consolidate the two indictments for trial pursuant to RCr 6.18.

The defendant moved to suppress the statement he made to the police after the second alleged attack upon his estranged wife because it was taken in violation of his Sixth Amendment right to counsel. The trial court granted the motion to suppress and the Commonwealth appealed. The Court of Appeals reversed and the Kentucky Supreme Court granted the defendant's motion for discretionary review.

The Kentucky Supreme Court reversed the Court of Appeals and sustained the trial court's order "to the limited extent that the [second] statement must be suppressed in any joint trial of the two indictments wherein the [second] statement will incriminate [the defendant] not only as to the [second] set of offenses but also as to the [first set] of offenses." The Court also stated that if the Commonwealth elected to try the two indictments separately, the second statement would not be admissible at the defendant's trial on the charges arising out of the first incident but would be admissible at the defendant's trial on the charges arising out of the second incident.

The Kentucky Supreme Court rejected the defendant's additional argument that because the police who questioned him after the second incident were aware he had been indicted and was represented by counsel as to the first incident, they should not have questioned him about that incident without first asking whether he wanted to talk to his attorney who represented him on the first incident.

The Court concluded that "[t]he police... are at liberty to question a willing suspect about new offenses without regard to whether there is a prosecution pending on other charges, whether similar or different in nature, but they must be cognizant that the evidence thus obtained may *not* be used to incriminate him on pending charges wherein he is represented unless his counsel is present."

Butler v. Groce
93-SC-179-DG, 5/26/94

The defendant pled guilty in district court to driving under the influence, first offense, in violation of KRS 189A.010. His license was revoked for 90 days, but the court granted a hardship license because he was a first offender.

Unfortunately for the defendant, Transportation Cabinet records showed the defendant had a prior DUI conviction in another county. As a result, the circuit clerk refused to honor the order granting the hardship license because the defendant was actually a second offender, and second offenders are not entitled to hardship licenses under KRS 189A.410.

The defendant then obtained a writ of mandamus from the circuit court requiring the clerk to issue the hardship license and a restraining order prohibiting the Transportation Cabinet from interfering with the issuance of a hardship license. The Transportation Cabinet then obtained an order dissolving the restraining order and the circuit court entered a summary jugment holding the district court was bound by the Transportaion Cabinet records as to the number of offenses.

On appeal the defendant argued that the exclusive authority to determine license suspensions under the 1991 extraordinary session DUI law is vested in the district court. The Kentucky Supreme Court disagreed and relying on *Division of Drivers' Licensing v. Bergman*, Ky., 740 S.W.2d 948 (1987), held that the license revocation periods provided in KRS 189A.070 are mandatory and not subject to the district court's discretion. The Kentucky Supreme Court held that a court cannot change the number of DUI offenses by merely characterizing a conviction as a first offense.

The Kentucky Supreme Court further held that district courts have jurisdiction to issue hardship licenses pursuant to KRS 189A.410 **only to true** first offenders. Since the defendant was a second offender, he did not qualify for a hardship license. Even though the district court called the DUI conviction a first offense, since the Transportation Cabinet's records showed otherwise, the district court could not grant a hardship license.

As a result, the defendant's license suspension for one year was upheld and he was denied a hardship license.

Morgan v. Commonwealth
Ky., 878 S.W.2d 18 (1994)

The defendant was tried and convicted for the murder of his wife. After his conviction was reversed on appeal, the defendant was retried and again convicted of intentionally murdering his wife.

The alleged incident occurred on the defendant's 30th birthday. In celebration of his birthday, the defendant and his wife

began drinking champagne around 5:00 p.m. About 7:00 p.m. the defendant went to pick up his mistress Lisa for a pre-arranged birthday dinner during which the defendant drank some wine. After dinner, Lisa took the defendant to a suprise birthday party where he consumed some brandy and remained until 1:00 to 3:00 a.m. The defendant then accompanied Lisa to her home where they had sex and went to sleep. The defendant told the police he left Lisa's about 3:00 a.m., while Lisa told the police it was between 5:00 and 5:30 a.m.

Around 6:15 p.m. that same day, the defendant called 911 and reported his house had been broken into and his wife was not breathing. When the police arrived, the victim was lying face down on the bed with 24 stab wounds in her back. She had a blood alcohol level of .05 percent. Clothes and jewelry were strewn on the bedroom dresser and floor. A birthday cake was in pieces on the kitchen floor. Various papers, bills and receipts were scattered on a kitchen desk and the victim's purse was open with its contents dumped out.

The defendant first told the police his wife was asleep in the bedroom when he came home. He went to sleep downstairs on the couch. His wife woke him later that morning and he went to work.

In a second statement, given six hours after the first statement, the defendant admitted "hurting" his wife after they got into an argument before he went to work. He didn't remember "grabbing anything... or having anything in [his] hands...or [his] pockets or anything." The defendant's wife's employer called the defendant two times at work asking if the defendant knew his wife's whereabouts. The defendant said he did not on both occasions.

The defendant did not testify at trial, but requested an instruction on first degree manslaughter based on extreme emotional disturbance. The trial court refused and instructed the jury only on intentional or wanton murder.

On appeal the defendant argued the trial court should have instructed the jury on the lesser included offense of first degree manslaughter based on extreme emotional disturbance, but the Kentucky Supreme Court disagreed stating "there was no evidence to suggest [the defendant] was acting under the influence of extreme emotional disturbance, or that there were any circumstances existing at the time of the killing to to provoke or stimulate such a disturbance."

The Supreme Court also found it was not error for the Commonwealth to introduce financial records, including evidence the defendant had bought gifts for his mistress, since they were relevant to show motive. However, the Commonwealth was not permitted to introduce evidence that the victim had a life insurance policy through her employment since the Commonwealth failed to show the defendant knew of the policy.

Lastly, the Supreme Court concluded it was not error for the prosecutor to replay a portion of the defendant's 911 call to the police during his closing argument because the defendant failed to object and the prosecutor told the jury "he wasn't sure that his interpretation of the tape was correct" and the jury should decide for themselves.

The defendant's conviction and life sentence were affirmed.

Howard v. Transportation Cabinet
Ky., 878 S.W.2d 14 (1994)

This case holds that a vehicle enforcement officer (VEO) has the statutory authority, under KRS 281.765, to arrest the driver of a passenger automobile for driving under the influence.

In this case the on-duty VEO officer happened upon an automobile accident. It was obvious to the officer that the driver of the car was intoxicated. After being unable to reach the Kentucky State Police or his own headquarters by radio for twenty to thirty minutes, the officer arrested the driver and took him to the county jail.

The officer's employer, the Transportation Cabinet, issued a disciplinary letter of reprimand to the officer for exceeding the scope of his authority. The officer brought an action in circuit court which concluded VEO's have an obligation to enforce DUI laws with regard to all types of motor vehicles pursuant to KRS 281.765 and KRS 189.010 through 189.090. The circuit court also ordered the Transportation Cabinet to remove the letter of reprimand from the officer's personnel file. The Court of Appeals reversed the circuit court, and the Kentucky Supreme Court granted discretionary review.

The Kentucky Supreme Court analyzed the issue as a conflict between KRS 281.770 and KRS 281.765 and concluded the latter statute is the enabling statute which dictates the scope of authority within which VEOs, as Transportation Cabinet employees, must operate. The Court cited KRS 189.520(2) as support for its conclusion. The Court also overruled *Wilson v. Bureau of State Police*, Ky.App., 669 S.W.2d 18 (1984), (for which discretionary review was never sought), to the extent that its holding conflicts with this opinion.

The Court also noted that KRS 189.520 (2) requires all peace officers and state police officers to rigidly enforce the DUI statutes.

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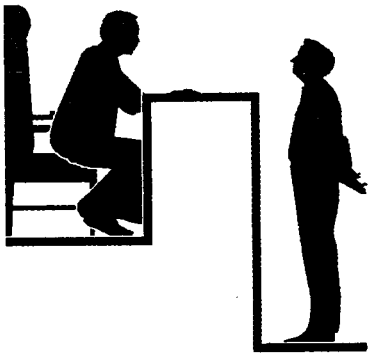
It is still the mystery of the appellate process that a result is reached in an opinion on throughly logical and precedential grounds while it was first approached as the right and fair thing to do.

- Circuit Judge Gurfein
2nd Circuit



Funds for Experts, Affidavits of Indigency, DUI & Administrative Fees

New Funds for Representing Kentucky Indigents

House Bill 388, which was signed into law by Governor Jones on Monday, April 11, 1994, creates two funding sources to help finance Kentucky's public defender system which provides lawyers to represent poor persons who are either charged with or convicted of committing crimes.

$50 DUI Fee KRS 189A.050

The present $150 service fee assessed against individuals convicted of drunk driving will be increased to $200 with the additional $50 earmarked to defray the cost of providing public defender lawyers for indigent defendants in all criminal cases including drunk driving prosecutions.

The current statute was amended as follows:

189A.050
(1) All persons convicted of violation of KRS 189A.010 shall be sentenced to pay a service fee of ***two*** ~~[one]~~ hundred ~~[fifty]~~ dollars (***$200***) ~~[($150)]~~, which shall be in addition to all other penalties authorized by law.

(2) The fee shall be imposed in all cases but shall be subject to the provisions of KRS 534.020 relating to the method of imposition and KRS 534.060 as to remedies for nonpayment of the fee.

(3) The service fee shall be utilized to fund enforcement of this chapter and for the support of jails, record-keeping, ~~[and]~~ treatment and education programs authorized by this chapter, ***and the Department of Public Advocacy.***

(4) Twenty-five percent (25%) of the service fee collected pursuant to this section shall be allocated to the Department of Public Advocacy. These funds shall be placed in a special trust and agency account for the Department of Public Advocacy, and the funds shall not lapse.

$40 Administrative Fee KRS 31.051

Additionally, any indigent person assigned a public defender lawyer in a criminal case will be assessed a non-refundable $40 administrative or user fee at the time of the lawyer's appointment. That fee, which can be reduced or waived on the basis of an individual's financial situation, will also be used to underwrite the cost of the public defender program. This amendment to KRS 31.051 emphasizes that "[t]he failure to pay the fee shall not reduce or in any way affect the rendering of public defender services to the person."

The statutory additions are:

31.051
(1) With the exception of the administrative fee contained in subsection (2) of this section, all moneys received by the public advocate from indigent defendants pursuant to KRS Chapter 31 or which are collected by the public advocate pursuant to KRS Chapter 431 shall be credited to the public advocate fund of the county in which the trial is held and shall not be credited to any general account maintained by or for the public advocate. Moneys credited to a county public advocate fund may be used only to support the public advocate program of that county.

(2) Any person provided counsel under the provisions of this chapter shall be assessed at the time of appointment, a nonrefundable forty dollar ($40) administrative fee, payable, at the court's discretion, in a lump sum or in installments. The court may reduce or waive the fee if the person remains in custody or does not have the financial resources to pay the fee. In any case or legal action a needy person shall be assessed a total administrative fee of no more than forty dollars ($40), regardless of the stages of the matter at which the needy person is provided appointed counsel. In the event the defendant fails to pay the fee, the fee shall be deducted from any posted cash bond or shall constitute a lien upon any property which secures the person's bail, regardless of whether the bond is posted by the needy person or another. The failure to pay the fee shall not reduce or in any way affect the rendering of public defender services to the person.

(3) The administrative fee shall be in addition to any other contribution or recoupment assessed by the court pursuant to KRS 31.120 and shall be collected in accordance with that section.

(4) The administrative fees collected pursuant to this subsection (2) shall be placed in a special trust and agency account for the Department of Public Advocacy, and the funds shall not lapse.

Trust Fund

Both of these fees will be placed in a special trust and agency account for the Department of Public Advocacy and will not lapse.

These new funding mechanisms will greatly contribute to Kentucky's ability to insure that even the most needy citizen of this Commonwealth, facing a criminal charge, will have the assistance of a qualified, competent lawyer to protect his or her rights in the criminal justice system.

Affidavit of Indigency KRS 31.120

House Bill 388 also mandates that the affidavit of indigency required by KRS 31.120 will be compiled by the pretrial release officer. Prior to the passage of this amendment, the law directed that only "where practical" would the pretrial release officer compile the affidavit.

The statute is amended to read as follows:

31.120
(1) The determination of whether a person covered by KRS 31.110 is a needy person shall be deferred no later than his first appearance in court or in a suit for payment or reimbursement under KRS 31.150 whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each step in

the proceedings, whether he is a needy person. However, nothing herein shall prevent appointment of counsel at the earliest necessary proceeding at which the person is entitled to counsel, upon declaration by the person that he is needy under the terms of this chapter. In that event, the person involved shall be required to make reimbursement for the representation involved if he later is determined not a needy person under the terms of this chapter. At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person ***who has requested*** [~~for whom~~] a public defender [~~has been appointed~~] is able to pay a partial fee.

(2) In determining whether a person is a needy person and in determining the extent of his, and, in the case of an unemancipated minor under KRS 31.100 (3)(c), his cutodial parent's or guardian's inability to pay, the court concerned shall consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail, or any other method of release provided in KRS Chapter 431, shall not necessarily prevent him from being a needy person. In each case, the person, and, if an unemancipated minor under KRS 31.100(3)(c) and (d), his custodial parent or guardian, subject to the penalties for perjury, shall certify by affidavit of indigency ***which shall be*** compiled by the pre-trial release officer [~~, where practical~~], as provided under KRS Chapter 431 and supreme Court rules or orders promulgated pursuant thereto, the material factors relating to his ability to pay in the form the Supreme Court prescribes.

Funds for Resources/Experts KRS 31.185; 31.200

Another provision in House Bill 388 addresses the funding of expert witness fees and other direct expense of representation, including the cost of transcripts, in cases covered by KRS Chapter 31. Beginning July 15, 1994 the fiscal court of each county or the legislative body of an urban-county government containing less than 10 circuit judges shall annually appropriate 12.5 cents per capita of the population of the county to a special account administered by the Finance and Administrative Cabinet to pay court orders entered against counties, pursuant to KRS Chapter 31, for expert witness fees and other comparable expenses. This will generate $377,000.

All of these court orders will be paid from this special account until the funds in the account are depleted. In any given year once the account is exhausted, the Finance and Administration Cabinet will pay the remaining orders from the Treasury in the same manner in which judgments against the Commonwealth and its agencies are paid.

The funds in the special account will not lapse and will remain in the account to be used in future years. Only court orders entered after July 15, 1994 will be payable from this special account.

Two Chapter 31 statutes were amended as follows:

31.185
(1) Any defending attorney operating under the provisions of this chapter is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county.

(2) The fiscal court of each county or legislative body of an urban-county government containing less than ten (1) circuit judges shall annually appropriate twelve and a half ($0.125) cents per capita of the population of the county, as determined by the Council of Local Governments' most recent population statistics, to a special account to be administered by the Finance and Administration Cabinet to pay court orders entered against counties pursuant to subsection (1) of this section. The funds in this account shall not lapse and shall remain in the special account.

(3) The Finance and Administration Cabinet shall pay all court orders entered pursuant to subsection (1) of this section from the special account until the funds in the account are depleted. If in any given year the special account including any funds from prior years is depleted and court orders entered against counties pursuant to subsection (1) of this section for that year or any prior year remain unpaid, the Finance and Administration Cabinet shall pay those orders from the Treasury in the same manner in which judgments against the Commonwealth and its agencies are paid.

(4) Only court orders entered after July 15, 1994, shall be payable from the special account administered by the Finance and Administration Cabinet or from the treasury as provided in subsections (2) and (3) of this section.

(5) Each county with a judicial district containing ten (10) or more Circuit Judges shall be solely liable for any court order entered against it pursuant to subsection (1) of this section.

31.200
(1) Subject to KRS 31.190, any direct expense, including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript that is necessarily incurred in representing a needy person under this chapter is a charge against the county on behalf of which the service is performed; ***provided, however, that such a charge shall not exceed the established rate charged by the Commonwealth and its agencies.***

(2) Any direct expense including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript shall be paid from the special account established in KRS 31.185(2) and in accordance with the procedures provided in KRS 31.185(3).

(3) [~~(2)~~] If two (2) or more counties jointly establish an office for public advocacy, the expenses not otherwise allocable among the participating counties under subsection (1) shall be allocated, unless the counties otherwise agree on the basis of population according to the most recent decennial census.

(4) [~~(3)~~] Expenses incurred in the representation of needy persons confined in a state correctional institution shall be borne by the state Department of Public Advocacy.

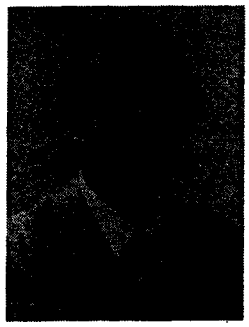
Section 6. The funds made available to the trust and agency account established by Sections 1 and 3 of this Act are hereby appropriated for expenditure for the purposes provided for by this Act.

Effective Date

House Bill 388 was effective July 15, 1994.

Kids In Court:

Strategies for Attorneys Representing Children Facing Petitions Initiated by School or Parent



Bill Stewart

A relatively new situation for attorneys representing children in juvenile court proceedings involves children whose pending petitions involve allegations of criminal offenses or status offenses filed by schools or parents.

Attempted commitments by families are often characterized as attempts to "get help" for children. However, children in custody of the Department for Social Services are often subjected to numerous placement changes and a lack of coordinated services. Children represented by the agency have had as many as 38 placements and one child had three placements in a week at Christmas. Children move from foster care to psychiatric hospital to runaway shelter with alarming frequency. School systems have begun to initiate juvenile petitions with increasing frequency. Many times this is an attempt by schools to relieve themselves of the legal responsibility for educating children deemed problematic. The premise of this article is that community based treatment and education are preferable to state commitment and we include information and suggested strategies for accessing those services.

EDUCATION

In the 1970s, while finalizing critical negotiations regarding the Pershing II missile, Jimmy Carter provided the world with words of wisdom which fit well in the realm of the criminal and education advocate in dealings with Kentucky's local education authorities. "Trust, but verify," he advised. Verification will be our operant term in this article.

STATUTORY OVERVIEW

The Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1401 *et seq.*, was formerly known as the Education for All Handicapped Children Act (EAHCA or EHA). In general, children identified under IDEA are those who meet thirteen specific categories set forth under 20 U.S.C. 1401 (a)(1)(A). No state or local education agency may receive federal funding without compliance with this statute. The categories provided under IDEA include mental retardation, hearing impairments, speech and language impairments, orthopedic impairments, seriously emotionally disturbed, and other health impaired or children with specific learning disabilities who, by reason thereof, require special education and related services.

Each Fall the Division of Protection and Advocacy receives several phone calls from confused parents who have been told by their children's teacher that they do not qualify for services under IDEA. One sad commentary this year was the assertion by a special education coordinator that services had not been provided to a medically fragile child for a two-year period because "we kept thinking he would die."

The advocate should question the contention by the school that the child does not qualify under IDEA, particularly if the school has failed to complete testing which is conducted by professionals with expertise in diagnosis (doctors, psychologists, psychiatrists, etc.) not just school personnel.

Should it be determined that the assessment is correct, the child may still qualify for services under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. Section 504 is a civil rights statute aimed at curbing discrimination against persons who are disabled and who are participating in federally funded activities such as public education. Under Section 504 an "individual with a disability" is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B). Obviously, Section 504 is much broader in scope.

RELATED SERVICES

It is clear from the 1983 amendments to IDEA that services which are provided be designed to address each child's unique needs. These services may include not only the child's academic needs, but other needs which impinge on the child's ability to learn, including social, health, emotional, communicative, physical, and vocational needs. *Timothy W. v. Rochester N.H. School District* 875 F2d 954 (1st Cir. 1989), *cert. den.* 493 U.S. 983, 110 S. Ct. 519, 107 L.Ed.2d 520 (1989). Education, then, is quite broadly defined. A frequent lament of schools is that they will not pay for physical therapy, for example, "because it is medical." Not so. To the extent the child's educational needs hinge on physical therapy, it is incumbent upon the school to provide the therapy.

PROCEDURE FOR DEVELOPING AN INDIVIDUALIZED EDUCATION PLAN (IEP)

The procedure for insuring an appropriate Individualized Educational Plan (IEP) under IDEA is to request the child's teacher, principal, or special education coordinator to arrange a meeting of an Admissions and Release Committee (ARC). The parent may call an ARC meeting at any time, may tape such meetings, and may invite anyone they wish to participate in the meeting. It is a good idea to include persons familiar with and sympathetic to the child's disabilities such as past teachers, social workers, physicians, therapists, and so on. Where a professional cannot participate, it is perfectly acceptable to notify the school ahead of time to arrange for the professional to participate by conference call. In the event the parent finds the ARC's recommendations for the child unacceptable, the parent should refuse to sign the conference summary and instead sign a dissent which should be attached to the summary.

504 ACCOMMODATION PLANS: A COROLLARY TO THE IEP

A similar meeting can be set up for children covered under Section 504 by notifying the special education coordinator, teacher, or principal of a need to meet to formulate a Section 504 accommodation plan.

Frequently, parents with some knowledge of the education law will request a meeting of an Admissions and Release Committee (either an SBARC or AARC) and will be told that no such meeting can be held since their child has not been identified. The astute advocate will ask that the meeting take place for the purpose of determining identification and, should it be determined following requisite examinations that IDEA does not apply, a Section 504 meeting and accommodation plan should issue. Semantics are being used to confound parents.

Briefly, the procedure for appealing an ARC decision is to request a due process hearing by sending notice to the Department of Education. This administrative remedy must normally be sought prior to filing in federal district court although futility is an exception to the rule.

In the event a parent finds that the school system has failed to meet the needs of a Section 504 child, several possibilities exist. A Section 504 hearing may be requested by writing to the superintendent of the local education authority. Section 504 does not require exhaustion of administrative remedies, however, so federal district court remains another option. Some parents elect to file a complaint with the Office of Civil Rights as a third alternative.

SCHOOLS' ATTEMPTS TO EXCLUDE DISABLED CHILDREN

Various means have been traditionally employed against Kentucky's special education students to exclude troublesome students from the public education environment. These methods have included various abuses of the juvenile court system, including blaming the parents of seriously emotionally disturbed children by repeatedly calling in claims of abuse, referring the children for foster care (with the possibility that the child will be placed outside the county), seeking commitment to the Cabinet for Human Resources and, most recently, the filing of criminal charges against special education children by their special education teachers and aides. More frequent abuses include "informal" suspensions with no written record in the child's educational file where the parent is simply told to "come and pick up" their child, formal suspensions, and expulsions. One homeless special education child with emotional disabilities was told not to come back to school until he could pay for a broken sink. It is helpful to note that suspensions in excess of ten (10) days over the course of an entire school year amounts to a change in placement, an event which is permissible only by the well-reasoned analysis of the child's ARC. It is also important to note that the child may not be suspended prior to the meeting of an ARC for the purpose of determining whether conduct which the school wishes to punish is related to the child's disability. 707 KAR 1:180 Section 14 (4)(b). (For children suffering from attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder, and Tourette's syndrome, most of their undesirable conduct is directly related to their disabilities.) For these children, the answer is modification of a behavioral management plan, not exclusion from the school environment.

All too often, students with disabilities are finding themselves funneled through a juvenile justice system in which the child's conduct or that of the child's parents are on trial. This shifting of the blame is a popular method of exiting children whom Kentucky school systems have failed to properly identify as disabled.

EXPULSION AND ABUSE OF THE JUVENILE COURT SYSTEM: Favorite Tools of Exclusion Prohibited Under I.D.E.A.

In *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) the Supreme Court concluded that the court did not possess the unilateral authority they had traditionally employed to exclude disabled students from school. Emotionally disturbed children had been especially vulnerable to such exclusion. The *Honig* court also set aside its usual reluctance to assume that the state would reinflict injury on the student given the student's continued inability to control his conduct in a classroom setting. *Honig* is significant, then, for granting relief from the merry-go-round in which a parent files for a due process hearing, prevails, the school district is ordered to provide services, the child again violates conduct codes, and the school again reacts punitively. Under *Honig*, should the local school authority fail to provide for the child's needs, the state itself is held to provide for the child with the threat of loss of federal funds should compliance not issue.

In re Kirkpatrick, 354 N.Y.S.2d 499 (1972) concerns a child not unlike many of those routinely excluded from public school in Kentucky and routed through the juvenile court system. The child exhibited an array of anti-authoritarian behaviors manifested in drug use and other delinquencies. The court concluded that the evidence supported a conclusion that the school's programs were inadequate and that an effective education would require personnel who were able to tolerate and understand the child's difficulties and defiance and, in so doing, devise a program to overcome the learning impairment. The conduct of school personnel who routinely send students home, suspend or expel is, in essence, an admission against interest as to the failure to adequately provide for the child's needs. It is the system who has failed, not the child.

A strong argument can be made that the entire milieu of the disabilities and conduct related to disabilities of special education children inside a public school setting is preempted by IDEA under the Supremacy Clause of the U.S. Constitution. Congress, after all, was motivated by two cases in which special education children had been excluded from public school, combined in *Honig*. In one case, the school was permitted to remove a student under extraordinary circumstances. In the other, no exception was made. Further, we must conclude that the omission of a "dangerousness" exception from 20 U.S.C. 1415 (e) was intentional. *Honig* at 316.

The legislative history is telling. Congress was deeply concerned that the most severely handicapped children, those most difficult to handle, not only receive services, but receive priority of services. Because the legislative findings conclude that handicapped children are being systemically excluded from education outright or are receiving grossly inadequate education, we must conclude that matters relating to exclusion, such as the inappropriate use of juvenile court, are no longer permitted under federal preemption. 20 U.S.C. 1400 (b); *Honig* at 309.

Juvenile court proceedings are a varied lot. Creative abuse by various Kentucky school districts has included petitions for commitment to the Cabinet for Human Resources, recommendations for foster placement (often in a foreign county), and the filing of criminal charges by

special education teachers against their special education students.

Many of the children with whom the advocate will find themselves dealing will be found to have diagnoses of Attention Deficit Hyperactivity Disorder, Tourette's Syndrome, and Oppositional Defiant Disorder. In order to suspend the student in excess of ten days (CITE) the ARC must first meet and make a reasonable determination that the child's conduct is unrelated to the disability. *Everything* that an ADHD child can do to disrupt the educational experience is related to the diagnosis.

Close to home is the case of young Tony McCann, a public school student in Tennessee who found himself the subject of a juvenile court action for "unruly" behavior in 1987. 18 EHLR (DEC) 551 (Tenn. C.A. 1990) Tony was diagnosed with mild mental retardation and was found to be emotionally handicapped. The school's solution was to file an "unruly" petition under Tennessee state statute following an incident of threatening behavior to teachers and other students. As a result of the petition, Tony was suspended from the school for ten days. Later, after returning to the school, he was involved in a fight. This time, after failing to gain admission to a residential facility, the school notified the child's parents that "the ...school system has scheduled an appointment with the juvenile judge to try to determine the best placement for Tony. You will be notified of the court date through the court system." A second unruly petition was filed alleging physically abusive behavior to other students and verbal threats to staff. No ARC meeting was ever held following the incident.

The county Juvenile Court held hearings on both unruly petitions and Tony was found to be unruly. He was placed in the temporary legal custody of the Department of Human Services with the court recommending placement in a group home. The child was provided no educational services from January 5, 1988 until March 16, 1988 since the judge had ordered that he not return to school. Upon a *de nova* hearing, the juvenile court proceedings were affirmed. The parents appealed, in part, on the issue as to whether both petitions should have been dismissed for failure of the school system to follow mandatory procedures required by state and federal laws governing discipline of handicapped students. The issue was purely one of law. Therefore, the scope of the federal court of appeals was *de novo* with no presumption of correctness for the trial court's conclusions of law.

Noting that IDEA requires all states to provide a free appropriate education for handicapped children, and that compliance with these programs is necessary in order to assure equal protection to the handicapped children, and that Tony in particular was entitled to such services the Court of Appeals found that the school system failed to follow the procedures designed to determine the relationship of the child's behavior to his disability and failed to explain procedural safeguards to the child's parents. Citing the *Honig* court's conclusion that IDEA guaranteed the child a substantive and enforceable right to a public education, the court reversed.

"The [act] provides adequate administrative procedures for the schools to deal with discipline problems of handicapped children..." and the inappropriate use of the juvenile court is limited by federal and state laws governing special education. *McCann* at 553.

KENTUCKY STATUTES PROVIDE SELDOM USED LIMITATIONS ON ABUSE OF SYSTEM BY SCHOOL PERSONNEL

KRS 630.020 grants exclusive jurisdiction in proceedings concerning any child who:

(1) has been an habitual runaway from his parent or person exercising custodial control or supervision of the child;

(2) has not subjected himself to the reasonable control of his parent or guardian or school personnel or person exercising custodial control or supervision of the child; or

(3) has been an habitual truant from school.

Under KRS 630.120 (5) the juvenile court may commit a child to the custody of the Cabinet for Human Resources only after "all appropriate resources have been reviewed and considered insufficient to adequately address the needs of the child and his family..." It follows then, that the failure of a local education authority to adequately develop a behavioral management plan and related services attendant to the child's needs will negate the possibility of a school system "dumping" a problem student on the Cabinet. Prior to a commitment to the Cabinet, most juveniles are entitled to a full hearing during which the ARC process and the legitimacy of the IEP are called into question. To the extent more could be done, commitment is inappropriate. The commitment statute further specifies that treatment programs be community based and nonsecure except as provided by federal law. KRS 630.120 (5)(a). The statutory language at KRS 630.120 (5)(a) and reliance on federal law, IDEA or Section 504, mandates that the conduct of the local education authority be first examined in instances where a school has filed a petition to initiate commitment.

RECENT TREND: SPECIAL EDUCATION CHILDREN CRIMINALLY CHARGED BY THEIR SPECIAL EDUCATION TEACHERS

Recently, the trend in Kentucky has been for special education teachers or aides to file criminal actions against their special education students. Ostensibly, such action is that of an agent of the school. The technique, obviously, is an attempt by school personnel to circumvent the considerable obstacles to exclusion of special education children set forth under IDEA and 504. Test cases now proceeding through the federal courts will determine the legitimacy of such actions.

To the extent assault or harassment behaviors (the current favorites of Kentucky's special education teachers) are a result of the failure of the school or the teacher to develop an adequate behavioral management plan or to follow such a plan, the question becomes whether the school and teacher then set in motion the disruptive behavior through their failure to meet the child's needs as mandated by IDEA and 504. To the extent that the school, teachers and aides have participated in fomenting the behavior, then they must be said to aiders and abettors, even principals in the misconduct given their higher authority and responsibility for the child's educational well-being. The school stands *in loco parentis*. Under general principles of liability, "conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred." KRS 501.060. Any teacher who fails to implement an adequate behavior modification plan, designed by one who is expert in the field, cannot be surprised by an ADHD child's impulsiveness, aggressiveness, and difficulty with self-restraint.

The more interesting question then becomes, not whether the child is guilty of criminal misconduct, but whether the teacher is a principal in the action and, if so, can a teacher be both a principal to the action and a victim of the action. Of course not. In intensive behavioral man-

agement programs, one will frequently find a team of professionals, *i.e.* teachers, social workers, nurses, therapists and so on meeting weekly or more often as the case requires. This is as opposed to the all too frequent finding upon examination of educational records of annual ARC meetings with intermittent suspensions throughout the year. The teeth provided by IDEA is federal funding. 20 U.S.C. 1412, 1412 (1).

COMMUNITY BASED TREATMENT

In the late 1980s, with skyrocketing Medicaid bills for psychiatric hospitalization of children and increasing questions about the value of extended stays in hospitals, the Kentucky IMPACT Program was created. The Legislature found that the existing system of services to children with emotional disabilities was fragmented and ineffective and provided statewide funding for IMPACT. KRS 200.501 - 200.509 provide a statutory basis for a program that is "community centered and based on the needs of the individual child and his family."

ELIGIBILITY

At its best, IMPACT is an innovative, multi-agency program which uses flexible dollars with existing resources and case coordination. KRS 200.503 defines a child with a severe emotional disability (SED) as "a child with a clinically significant disorder of thought, mood, perception, orientation, memory, or behavior that is listed in the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders and that:

(a) Presents substantial limitations that have persisted for at least one (1) year or are judged by a mental health professional to be at high risk of continuing for one (1) year without professional intervention in at least two (2) of the following five (5) areas: "Self-care," defined as the ability to provide, sustain, and protect his or herself at a level appropriate to his or her age; "Interpersonal relationships," defined as the ability to build and maintain satisfactory relationships with peers and adults; "Family life," defined as the capacity to live in a family or family type environment; "Self-direction," defined as the child's ability to control his or her behavior and to make decisions in a manner appropriate to his or her age; and "Education," defined as the ability to learn social and intellectual skills from teachers in available educational settings; or

(b) Is a Kentucky resident and is receiving residential treatment for emotional disturbance through the interstate compact; or

(c) The Department for Social Services has removed the child from the child's home and has been unable to maintain the child in a stable setting due to behavioral or emotional disturbance; or

(d) Is a person under twenty-one (21) years of age meeting the criteria of paragraph (a) of this subsection and who was receiving services prior to age eighteen (18) that must be continued for therapeutic benefit. (Enact. Acts 1990, ch. 266, Subsection 2, effective July 13, 1990.)

Current estimates are that there are more than 50,000 children in Kentucky with emotional disabilities. Decisions for admissions to IMPACT and services to be provided are made by eighteen (18) regional interagency councils (RIACS) whose members include representatives of the Department for Social Services, the local community mental health/mental retardation agency, a local school system employee, a court designated worker, and a parent.

IMPLEMENTATION

Priorities are set by the RIAC, typically children most at risk of removal from the community. Each RIAC has an allocation of flexible dollars to build a program around a child and his family. Funds have been expended for in-home therapy, physical modifications of homes, computers, and respite. Respite is essentially the provision of an in-home or out-of-home caretaker for the child for specified periods to give the parent/guardian time to do essential activities such as grocery shopping or simply to take a break. Services are based on an individual plan developed with input by providers, parents, and child.

RESULTS

Since October 1990, over 2,400 Kentucky children have received IMPACT services. Initial statistical reviews of results are extremely positive. IMPACT involvement decreases in-patient hospitalization days by almost half. Changes in placements are decreased and significant numbers of children are judged to have improved behavior.

Unfortunately, as information on these programs has been more widely distributed, greater pressure has been directed at the RIACS to serve larger numbers of children. With funding increasingly thinly distributed, some RIACS have adopted a cookie cutter approach of providing uniform levels of respite, case management, and little else. This is an unfortunate situation which defeats the original premise that services should be individualized and built around the needs of the child. Children and their families and representatives can appeal decisions not to admit children to the program or not to provide specific services. Disagreements can be appealed to the statewide governing body of the program.

Referrals for IMPACT services can be made to the local resource coordinators (LRCs) listed on the next page.

OTHER PROGRAMS

A final and hopeful note is that Oregon has initiated a program based on statutory change which allows parents to access treatment services for their children without relinquishing their custody to the Department for Social Services. The success of this program is being closely scrutinized in Kentucky as well as other states with an eye towards development of a similar program. While this is obviously a long term plan, it is encouraging that so many individuals are aware of the difficulty of parents who feel they are forced to turn their children over to the state to help them access services.

Individuals with questions or comments can call the Protection and Advocacy Division.

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Bill Stewart has been supervisor of the Kentucky Protection and Advocacy Division's Mental Health Section since 1986. Protection and Advocacy represents individuals in public and private psychiatric facilities. A significant number of mental health clients have issues related to KRS 202A.

Referrals for IMPACT Services

Region #1
Purchase RIAC
Joseph Stambaugh
502/442-9767

Region #2
Pennyrile RIAC
Sara Reid
502/889-9891

Region #3
Green River RIAC
Ellen Freedman
502/683-0277

Region #4
Barren River RIAC
John E. Turner
502/842-4864

Region #5
Lincoln Trail RIAC
Carol Belcher
502/769-1304

Region #6J
Jefferson RIAC
Jackie F. Stamps
502/589-8085

Region #6S
Salt River RIAC
Martha Campbell
502/589-8085

Region #7
Northern KY RIAC
Jane DeVore
606/491-1348

Region #8
Buffalo Trace RIAC
606/564-4016

Region #9
Gateway RIAC
Doris Johnson
606/783-1940

Region #10
FIVCO RIAC
Nancy Simmons
606/324-1141

Region #11
Big Sandy RIAC
Rita Conley
606/886-8572

Region #12
Kentucky River RIAC
Shelagh Cassidy
606/436-5761

Region #13
Cum. Valley RIAC
Linda Smallen
606/528-7010

Region #14
Lake Cum. RIAC
Sandy Colyer
606/678-2768

Region #15E
Bluegrass East RIAC
Suzanne Austin/
Jeanette Coufal
606/254-3106

Region 15W
Bluegrass West
Lori Mefford
502/875-3772

Region 15S
Bluegrass South
Stephen Applegate
606/792-3081

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How to Save Your Client While Saving the Court Time

Trial courts are afforded great latitude and discretion in structuring the method by which voir dire will be conducted. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981). Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able to follow the Court's instructions and evaluate the evidence cannot be fulfilled. *Rosales-Lopez, supra.* The entire voir dire should be directed to determine whether, for any reason, a juror has a bias of mind in favor or against either party such that his impartiality as to quilt would be impaired.[1]

The most cost-effective and time-saving approach to jury selection is the questionnaire. Jury questionnaires are increasingly being used in both civil and criminal cases. Most often questionnaires have been used successfully in death penalty cases, white collar cases, child rape cases, police brutality cases, battered women's cases and drug cases. In the civil area they are most often used in asbestos cases, but sometimes this method is appropriate for medical malpractice cases, product liability cases and environmental cases. The "Agent Orange" questionnaire is a classic instrument.

The major reasons for using the questionnaire are the following:

1. The questionnaire streamlines the jury selection process. Courts, clients and lawyers save time often wasted in unnecessary repetition of questions. The questionnaire can be distributed to jurors and filled out by them before voir dire is conducted in court. Each juror's questionnaire can be photocopied prior to the trial and copies can be provided to each of the parties and one copy to the judge. These copies are to be used by all parties solely for the purpose of jury selection.

2. The questionnaire allows a greater number of questions to be administered to each juror. This results in greater accuracy in the use of challenges. More potential biases may be uncovered, so more competent voir dire can be conducted.

3. The questionnaire permits jurors to consider their answers more carefully. The jurors do not have to respond immediately to questions. Instead they can think about their answers. This is critical if they are repressing unpleasant memories such as being victimized.

4. The questionnaire permits the greater uniformity in administering the questionnaire. Each juror is presented with each question in the same manner.

5. The questionnaire gives the jurors a sense of privacy as does individual in-court voir dire. Jurors can answer questions without being required to give their answers in a very public and formal setting. This permits more personal responses to the questions. Jurors will not be required to state that they dislike the prosecution or the defendants in open court. They can do so privately.

6. The questionnaire also permits the lawyers and judge to assess the literacy level of the jurors because they are required to write the answers. This also is a measure of the ability of the jurors to relate to complex ideas that they are not likely to use in their daily lives. These complexities may arise because of legal issues, complex evidence or complex testimony particularly from expert witnesses.

7. The questionnaire is useful because written, rather than oral, responses assist the lawyers recall the responses of the jurors. Recall of oral materials declines very quickly, particularly over the first twenty- four hours.

8. The questionnaire provides better information for jurors not in the box. In many counties, most of the jurors are almost ignored. The jurors in the box receive most of the attention of the lawyers. In fact, often jurors are ignored when they raise their hands.

9. The questionnaire provides a more unbiased finding of the jurors' responses than the oral voir dire provides because the lawyer cannot influence the jurors by the way he or she asks the questions. The personality of the lawyer does not influence the respondents.

10. The questionnaire provides a way to measure each juror's own biases and ideas rather than those of the other jurors. When jurors are questioned in a group, they often give the same responses as the other jurors. Since each juror must fill out the questionnaire without the input of the other jurors and does not hear the responses of the other jurors, he or she cannot give the same response that the other jurors do, but must arrive at his or her own answers measuring that juror's own opinions and biases.

11. The questionnaire reduces the jurors' opportunity to contrive to be seated or excused. A juror who has reasons for being excused must state them without having seen which excuses have (or have not) worked for other jurors.

12. The questionnaire method does not permit the jurors to hear the responses of the other jurors. Thus, the jurors cannot be contaminated by the opinions and biases of the other jurors. This is critical if some jurors are not only biased but articulate.

13. The questionnaire can incorporate complex and reliable "lie scales" measures. Historically, questionnaires have incorporated these measures. This is critical for such issues as race and ethnicity in particular.

14. The questionnaire can incorporate open-ended questions, multiple choice or forced-choice questions. Generally, it makes the open-ended

questions easier to rate and allows for the greater use of multiple choice questions which are also easier to rate.

15. The questionnaire approach makes it difficult for the jurors to figure out whether it is the defense attorney or the prosecution who wants to know the answers to the questions. Therefore, they do not know with whom to be upset when they do not like some of the more personal questions or realize that some of the questions are designed to measure their prejudices. This is important because some of the most critical questions are sensitive questions and may evoke much feeling and bias among the jurors.

16. The questionnaire approach is less expensive than other jury selection approaches such as surveys and mock juries. Therefore, more criminal defendants will be able to use the method. In situations where courts allocate funds for jury selection, the costs will be lower for the community.

17. The questionnaire reduces the time and tedium involved in asking questions repititiously.

18. The questionnaire makes the jurors more aware of their potential perjury because the responses are written and the questionnaires are signed.

19. The questionnaire is helpful in arranging a better plea bargain since the prosecutors are aware that the defense attorneys are prepared. In two cases, charges were dropped because of the preparation of the defense attorneys.

20. Finally, the questionnaire approach is fair to both the defense and the prosecutors. Both have access to the information generated by the instrument.

I do not recommend this procedure for every criminal case. It is critical in cases that involve very high penalties, cases that involve extensive pretrial publicity, cases that are located in areas that are noted for discrimination or volatile ethnic relations or cases involving sensitive issues which may easily evoke prejudice in jurors.[2]

The questionnaire is only one tool to measure attitudes and does not resolve all jury selection problems. It does provide a way to ensure that jurors who will be seated are competent.

Footnotes

[1]I would like to thank William Kunstler, Ronald Kuby, Terry Gilbert and Ralph Buss and for this excerpt taken from the motion for individual sequestered voir dire in *United States v. Yee*, 89 CR 9720 (N.D. Ohio).

[2]The questionnaire is not designed to take the place of in-court individual voir dire during death penalty cases. There must be a way to follow up on misinterpreted questions. It is necessary to be able to observe possible evasiveness and apparent reluctance of the respondents. This is best done by in-court individual jury selection.

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Litigation Strategies in Civil Contempt Cases:

Avoiding the Trip from the Poorhouse to the Courthouse to the Jailhouse

INTRODUCTION: Two Centuries in the Making

In *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993) the Kentucky Supreme Court took the logical but to date unenunciated position that poor people facing jail who have *not* been charged with the commission of a crime should enjoy the same benefit of appointed counsel as those who *have* been charged. That this principle of law in this Commonwealth should have taken more than two centuries to emerge is somewhat troubling, but also somewhat unsurprising. The law of civil contempt is a field that has been largely ignored by the defenders of this Commonwealth. Until the *Lewis* decision, the law was derived mainly from trying to put various labor leaders, suspected mafia leaders and assorted miscreants into the jails of our land. As a result, the poverty law aspects of civil contempt have been neglected. However, from these divergent opinions emerges a firm body of law from which we can develop defense strategies that may be able to keep some of our clients from the caring hands of the local jailer.

One of the problems which will confront defenders is adapting to a new style of litigation in which some of the bedrock principles we rely upon are gone. Imagine a world in which there is no presumption of innocence, where the burden is not on the person trying to send your client to jail, a world where it is presumed that the defendant is guilty and he or she must prove innocence. The world of civil contempt is such a world, and case law reveals it to be relatively unyielding.

On the other hand, it is also a world in which poverty is an effective defense. Given the fact that sometimes all our clients have going for them is being poor, the effective use of their poverty can be a powerful tool to help them retain their liberty.

This article will assume that the reader has been appointed to represent the defendant pursuant to KRS Chapter 31 and the *Lewis* opinion. Because of this, many of the things which should be done on the front end of litigation (such as making sure that the original order correctly took into account the inability of the person to comply) would not be available. It is assumed that the case is a mess and the trial judge is appointing a defender as the last step before locking up the client. Throughout this article, it is assumed that the majority of these cases will result from the non-payment of child support obligations. Most of the litigation strategies set forth here will not be applicable to other forms of contempt actions, although it is suggested that the major principles can be easily transferred.

I. THE *LEWIS* OPINION

In *Lewis*, two poor people accused of failing to pay child support were found to be in civil contempt and ordered jailed until they purged themselves of this contempt by paying money. In the case of Charles Lewis, he was not given the opportunity to explain why he had not paid support (or even if he was really behind) nor was he allowed to introduce his tax return into evidence. In the companion case involving Tony Price, the Court did not make any findings as to whether he was able to make any payments.

Even though no issues were properly preserved for appeal, the Court found that the issues were reviewable to prevent a "manifest injustice." (Whether these same issues would be considered reviewable had counsel been present is an open question.)

Appellate counsel asked the Court to review the case under the Fourteenth Amendment to the United States Constitution. The Court declined to reach that issue, resolving the case instead upon the plain language of KRS Chapter 31. The Court held that "...the legislature has determined that an indigent person who is facing incarceration for any amount of time is entitled to appointed counsel. KRS 31.100 (4); KRS 31.110 (1)(a)." *Lewis*, 875 S.W.2d at 864.

The Court held that an indigent was entitled to appointed counsel before he or she could be jailed for contempt. The Court stated that "...we hold that the statutes of the Commonwealth require that an indigent person has the right to appointed counsel in civil contempt proceedings prior to the execution of an order of incarceration." *Lewis*, 875 S.W. 2d at 864.

The appellate counsel had attempted to have the Court rule that incarceration in the absence of proof of a present ability to purge the contempt violates the Kentucky and Federal Constitutions. The Court declined to reach that issue, instead deciding the case on the more narrow issue of abuse of discretion. However, in doing so the Court readopted several key principles of the law of Civil Contempt.

- The ability of the debtor to satisfy the judgement is a question of fact to be determined by the trial judge.
- The power of contempt cannot be used to compel the doing of an impossible act.
- A person delinquent in child support, but financially unable to pay, has a valid defense to the contempt charge.
- The trial judge must make findings on the ability to pay and any further contempt proceedings are limited to those amounts the delinquent person has been found able to pay.
- A person in custody only because they lack the ability to pay a fine because of indigence must be released.

- This release does not extinguish the amount owed and the debtor can still be compelled to pay, but the debtor must be given some reasonable alternative to satisfy the fine.

The Court went on to point out to the trial court several options it had to deal with the indigent short of jail. The Court's suggestions were:

- Requiring the debtor to appear periodically to show the efforts made to obtain employment;
- Impounding state and federal income tax refunds;
- Requiring the debtor to disclose the debt when applying for unemployment.

The Court set out some procedures for conducting a hearing with a purportedly indigent person. In some ways these procedures are problematic. The Court's suggested procedures are as follows:

1. The Court conduct a hearing to allow the defendant to explain why he/she should not be incarcerated for civil contempt.
2. If the defendant is without counsel at the hearing, the Court should make a specific finding of fact concerning the person's indigence.
3. If the defendant is found to be indigent, counsel must be appointed.
4. The defendant, through counsel, should be given an opportunity to show cause why the order of incarceration should not be executed.

The order of these procedures is somewhat troubling. The appointment of counsel would apparently come only after the primary findings of fact have been made: that the defendant has an ability to pay and is in contempt. However, as shown below, this procedure is not out of line with the theory of civil contempt in that inability to pay is an affirmative defense and not a factor to be disproved by the plaintiff.

Equally troubling, if not more so, is that the procedures specifying a finding of fact regarding the defendant's indigence present significant and difficult problems for the Court and the defense in that completion of the affidavit (or the taking of sworn proof in open court) could very well constitute an admission of the offense. Certainly there is a meritorious argument based on *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968) and that line of cases that such a requirement amounts to an intolerable choice which forces a defendant to surrender one constitutional right in order to assert another. Possible solutions to this dilemma include the following: 1) KRS Chapter 31 states that counsel must be provided to a defendant upon assertion of the right. If this provision were utilized, the affidavit of indigence would not be necessary and a fee could be assessed in cases in which it was later determined that there was no entitlement to defender services; 2) enact a rule and procedure that would protect confidentiality of the affidavit of indigence (much the same as the Pretrial Services report on bail information is kept confidential) and prohibit its use in any form or fashion in the contempt hearing; 3) make a motion that the Judge determining indigence do so *ex parte* and that that same judge not be permitted to preside at the contempt hearing; or 4) if trial commissioners are available in the local jurisdiction, use the Commissioner to make a recommendation on the issue of indigence to the presiding judge so that the trial judge is insulated from potentially prejudical information.

Lewis does make one additional definitional statement of some note. In *Lewis* it is found that the term "present ability to pay" means that the person has the "funds available to purge themselves of contempt and thus the key to their own release." *Lewis*, 875 S.W. 2d at 865.

II. POSSIBLE DEFENSE POSITIONS ON CONTEMPT ORDERS

A. THERE HAS BEEN COMPLIANCE

The basis of this defense is familiar to most defense lawyers: *the plaintiff is lying about the lack of performance and there has in fact been full compliance.* Obviously, in those cases in which the defendant has kept his canceled checks this defense is easy. More likely, the defendant will claim that he paid the amounts in cash and doesn't have receipts. As Judge Revell, in his text entitled Kentucky Divorce [sec 22:4, p. 141] points out, the result is often that a "swearing contest ensues." In this swearing match the defendant needs to be particularly convincing because "the burden of proving payment is on the party obligated to make payment." *Raymer v. Raymer*, 752 S.W.2d 313 (Ky.App. 1988).

The more common claim will be that the defendant has made some other form of payment rather than a cash payment. Examples of this would be similar to those in *Tucker v. Tucker*, 398 S.W.2d 238 (Ky. 1965). In that case the debtor/defendant claimed that he had made mortgage payments, had paid some payments in cash, and had some of the children live with him for a period of the time. The court disallowed, or disbelieved, most of these, finding that "... if a party wishes to contribute to the support of his children in some manner other than that directed, he should seek a modification of the decree." Revell, Kentucky Divorce, sec 22:4, pp 141-142. An exception to this general rule disallowing payments in a manner not allowed in the original order would be the use of Social Security payments. Such payments are allowed to be credited against the debtor's obligation for child support. Revell, Kentucky Divorce, sec 22:4, p. 142; *Board v. Board*, 690 S.W.2d 380 (Ky. 1985).

In some cases, the defendant will claim that the plaintiff had earlier agreed to a lesser amount in payment or for payment in some other form. Proof of such an oral modification is, at best, tricky. As Judge Revell notes: "To prevail in the defense of oral modification, it must be shown with reasonable clarity that an oral agreement of modification was made, and, in addition to proving the modification, the court must also approve the modification. Two risks are present when a claim of oral modification is asserted: one is that the evidence will not be sufficient to convince the court that such an agreement was made, and, secondly, the court may refuse to approve the agreement because the court may find that the modification is not equitable or fair to the affected child. The party contending that there has been an oral modification agreement must be able to prove the agreement with reasonable certainty." Revell, Kentucky Divorce, sec 22:4, p. 142; *Ruby v. Shouse*, 476 S.W.2d 823 (Ky. 1972); *Whicker v. Whicker*, 711 S.W.2d 857 (Ky.App. 1986); *Arnold v. Arnold*, 825 S.W.2d 621 (Ky.App. 1992); *Tinnell v. Tinnell*, 681 S.W.2d 918 (Ky.App. 1984).

For these reasons, it is apparent that, aside from a few cases, the defense of "compliance" is not a consistently winning defense. It is more probable that a combination of partial compliance, ignorance and impossibility will prove more effective.

B. THERE HAS BEEN PARTIAL COMPLIANCE

This defense, absent any other defense, is not a "true defense." Without some

factor that excuses full performance, partial compliance is an admission of contempt. However, as a pragmatic matter, it would seem that it may be helpful to have the court fully aware of how much compliance there has been in order that the court views the failure more sympathetically than if it holds the view that the defendant is in total non-compliance. When the court is deciding whether or not jail is an appropriate sanction, this could prove to be an important point.

C. THERE WAS IGNORANCE OF THE ORDER

In most instances this "defense" will prove less than overwhelming. It will be the rare case in which the defendant can prove that he or she was unaware of the Court's order. It is possible that this will sometimes occur in the context of default judgements, but in those instances other defensive remedies (*i.e.*, CR 60.02 motions, etc.) may prove more effective.

Aside from these rare instances, the "defense" of ignorance can be used to dilute or mollify the finding of "willfulness." If the Court believes that the defendant was unable to pay the full amount, but was able to pay a substantial portion and did not do so, the "defense" of ignorance that partial payments could be made could help to establish good faith so as to avoid jail.

D. COMPLIANCE WITH THE ORDER WAS IMPOSSIBLE

This would seem to be the mainline defensive position for our clients, those who have been found by the Court to be indigent within the meaning of KRS Chapter 31. Indeed, on the surface, the position seems unassailable: since the Court has already found indigence, what more need be shown?

Unhappily, it would seem if we leave it at that a lot of our clients will be going to jail. It may be that the Court, by its finding of indigence, has fully accepted the poverty decision. However, it is at least equally possible that the Court is merely being cautious in following its perception of the mandate of *Lewis* and still intends to jail the client.

III. BURDEN OF PROOF

The burden of proof of impossibility/ indigence would seem to be on the defendant in a civil contempt proceeding. "A party is not to be punished for contempt for failure to perform an act which is impossible. An inability to comply must be shown clearly and categorically by the defendant, and the defendant must prove that he took all reasonable steps within his power to insure compliance with the order." *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993); *Campbell County v. Kentucky Corrections Cabinet*, 762 S.W.2d 6 (Ky. 1989).

Unfortunately, this view would seem to be in keeping with the Due Process Clause of the Federal Constitution. In *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 1433, 99 L.Ed.2d 721 (1988), the Supreme Court was dealing with a case in which the question of burden of proof as to the issue of impossibility was squarely presented. In this case, the Court clearly found that while placing the burden of proof on the defendant in a criminal contempt proceeding would be a violation of Due Process, it was clearly held to be permissible in the context of civil contempt.

It is possible that an argument could be made that the trial court's finding under KRS Chapter 31 may somewhat change this. In brief, the argument would be that this finding would shift the burden of persuasion to the plaintiff on this issue and that the plaintiff would therefore have to present some evidence to show the Court's finding was erroneous. As it is the present ability to purge and not the historical failure to pay which is at issue, then there would be some basis for this argument as a matter of logic if not yet in the current caselaw.

IV. ALL REASONABLE STEPS MUST BE TAKEN TO COMPLY

As was noted in *Blakeman*, 864 S.W.2d at 906, the "defendant must prove that he took all reasonable steps within his power to insure compliance with the order." The question is what 'all reasonable steps means'? If a person cannot afford to pay while working one job, must she obtain another? Must the defendant forego what would normally be considered necessities of life in order to have "taken all reasonable steps?" In Blakeman, it was also noted that "a contemnor cannot voluntarily produce his own inability to pay." 864 S.W.2d at 906. This phrase will haunt the trial of these actions when the defense of impossibility is raised. One method is to show the court what has been historically meant by this phrase. In *Tucker v. Commonwealth ex rel Attorney General*, 187 S.W.2d 291 (1945) the Attorney General decided to "clean up" Campbell County by having a special judge order the local cops to seize and present to the Court Clerk a number of slot machines owned by Tucker at the Beverly Hills Supper Club. The local chief of police had the machines seized and held them at the club. Mysteriously, he then ordered the cop guarding the machines to leave his post at the same time that some unknown persons pulled up a truck and took the machines away. In the contempt proceeding, both the chief of police and Tucker claimed impossibility in providing the machines to the clerk as they had "disappeared." The Court took proof and was somewhat dubious as to the 'good faith' employed. The Court noted that the "defendants are correct and are sustained by authorities cited that the inability of the contemnor, without fault on his part, to obey the order holding him in contempt is sufficient to purge him of the contempt charged....But where the contemnor 'has voluntarily or contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt.' Like the trial judge, we do not think it is impossible for defendants to produce these machines, and we believe their failure to do so is a continuing contempt on their part." 187 S.W.2d at 302-303. If it is stressed that it is this form of a defendant "voluntarily producing his inability" that is contemptuous, this may dilute the force of the plaintiff's argument.

V. PREHEARING PREPARATIONS AND INVESTIGATION

As with the presentation of any defense, it is clear that the contempt hearing should not be conducted without adequate preparation. If, after speaking to the client, it is determined that the primary defense will be impossibility to comply, the defense will need to gather evidence to support this claim. While the defendant's testimony, if believed, is sufficient to support the burden on the defendant, it is important to be able to buttress and corroborate this testimony whenever possible. It is suggested that the defense gather documents in order to perform a 'financial autopsy' of the defendant in order to show that he or she was unable to comply. To do this it is helpful to gather any financial records that could support the claim. These records would include:

- All tax returns for the period in question
- the most recent W-2 form

- any government assistance benefit entitlement proof
- unemployment insurance details
- bankruptcy pleading
- rent receipts
- proof of other bills and other obligations
- the affidavit of indigence filed in the case

In order to defeat a claim of "voluntarily produced poverty" it could be helpful to show why the defendant is unable to hold a job or is only able to hold a 'McJob.' Proof of a medical or psychiatric condition which prevents employment is obviously helpful. Proof of lack of education or lack of vocational skills is also helpful. If this is a result of a learning disability, it would be even more persuasive. A chemical dependency problem or an extensive criminal record which scares off prospective employees might be 'helpful', but is at best a two-edged sword.

Since the attorney has been appointed pursuant to KRS Chapter 31, it may be appropriate to ask the Court, prior to the hearing, for appointment of an expert to analyze the defendant's financial condition. In metropolitan areas such as Louisville or Lexington this may be able to be done at little or no cost through such credit counselling agencies as Project Accept. If the request is denied, it would then hardly seem fair that the plaintiff could then argue that the defendant's proof could be better. It would arguably be a denial of the equal protection of the laws to allow such an argument.

VI. PREPARING AND PRESENTING A THEORY OF DEFENSE

In order to be persuasive in any task, it has been said that we should always present a cogent and understandable reason why our position is correct and why we should win. This 'theory of defense' is as important in the context of a contempt hearing as in any other trial. Hopefully, this theory would show how the defendant was acting, not in disregard or defiance of the Court's authority, but in fact acting at all times in complete good faith and simply unable to do what he or she should do because of circumstances beyond their reasonable control. If the Court is at least somewhat sympathetic to the idea that putting poor people in an already overcrowded jail when they have committed no public offense is a bad idea, this theory may win the day.

VII. PREPARING FOR SENTENCING

Of course, sometimes nothing will win the day. But this does not mean that the client must go to jail. It is clear that the Court retains all of its normal discretion in imposing a sentence. There is no reason why a ruling of contempt necessarily means immediate incarceration. Indeed, the Court in *Lewis*, 875 S.W.2d at 864 noted that incarceration is "extraordinary." It is entirely possible that the Court might grant probation of incarceration with an order to comply in the future. Indeed the plaintiff may welcome such an order if it appears likely that some money will be forthcoming. If the judge is going to order incarceration, it is then important to argue for the most lenient possible purge amount, that amount necessary to release the defendant. The amount of the "purge" must be related to the defendant's present ability to pay. *Lewis*, 875 S.W.2d at 865. If a person, during the cited period of contemptuous behavior had resources, but has, through no 'voluntarily' produced misfortune, lost the present ability to comply at the time of the execution of the contempt sentence, it would seem that a jail sentence cannot be imposed. The "purge" amount must be related to an actual ability of the defendant to pay, not some speculative amount. For example, other jurisdictions have found that the fact the defendant may have wealthy relatives who can lend the defendant money is not a relevant matter in determining the "purge" amount. *Perez v. Perez*, 599 So.2d 682, 683 (Fla.App. 1992).

In the event that the Court determines that incarceration is an appropriate sanction, this does not necessarily mean that there is no release possible. There is the possibility of Home Incarceration. At the very least, KRS 439.179 allows for work release, job search release, school release, and releases to care for the family or to obtain medical attention. It is arguable that KRS Chapter 439 "shock probation" may be applicable.

There is, of course, the remedy of appeal. It would appear that an appeal of a civil contempt incarceration is to be treated as an appeal in a civil action rather than a criminal appeal. For this reason it appears that the notice can be filed up to 30 days after judgement rather than 10 days. *Boyle County Fiscal Court v. Shewmaker*, 666 S.W.2d 759 (Ky.App. 1984). It is suggested that the notice be filed as rapidly as possible since, once the notice is filed, the defendant can then file for Intermediate Relief pursuant to CR 76.33 if he or she can show 'immediate and irreparable harm.' As this would be an appeal from a civil action, it is probable, but not certain, that RCr 12.76 (2) would not apply.

CONCLUSION

The mandate of *Lewis* and KRS Chapter 31 places upon us a unique responsibility and opportunity. Across this Commonwealth there are poor persons who face incarceration because of their poverty. This state of affairs is wrong as a matter of law, policy and morals. It is also entirely unnecessary as the law, even without the advancements that can be reasonably expected now that appointment of counsel is mandated, does not require or allow this.

In the Victorian era it was quite common for the poor to be committed, without proof of crime, to the poor house or the work house when they were unable to satisfy their debts. The nature of the modern reform movement was a reaction against this unfeeling and unfair system. The working poor were given the benefit of bankruptcy to prevent the seizure of their persons and the tearing apart of their families to satisfy a debtor. The newly independent colonies, as a matter of their organic law, instituted provisions against imprisonment for debt in the absence of fraud.

And yet, before the *Lewis* opinion, these modern debtors had to rely upon the understanding of Judges often too rushed to listen, or upon their own wits in the face of paid and sophisticated counsel for their creditors. Often Justice was not done, and surely it appeared that Justice was never done.

The time has now arrived for justice to be done for all people in this Commonwealth irrespective of means or the nature of the legal action if liberty is to be deprived. With some luck and effective advocacy on our part, debtors prisons will continue to exist only in the pages of Dickens' novels.

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Indigent's Right to Independent, Defense Expert Help

This is the second of a series of articles addressing an indigent's right to funds for independent defense expert assistance in light of the new substantial funding available statewide.

Our criminal justice system's most fundamental principle is that the truth is best obtained through an adversary process which depends on vigorous partiality. For this process to succeed as designed, both sides must be able to present their evidence in a partisan manner, including evidence from experts. Experts who testify for the prosecution and for the defense are not and should not be neutral. We should not pretend that neutrality is a reality. We who believe in the benefits of the adversary process should foster the presentation to the factfinders of partisan expert opinions so that the truth is best achieved.

THE SYSTEM IS ADVERSARY

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975).

If the criminal trial "loses its character as a confrontation between adversaries, the constitutional guarantee [of the effective assistance of counsel of the Sixth Amendment] is violated." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984).

"[T]he use of an 'impartial' expert subverts the adversary system by shifting the decision from the jury (or judge) to the expert.... [A] 'battle of the experts' in the context of the adversary system... permits the jury to evaluate scientific opinions." *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 Mich. L.Rev. 1326, 1348-49 (1986).

"Because partiality is one essence of the adversary system," psychiatrists, in the "forensic role, do become part of it, and this fact is to be openly acknowledged." Rachlin, *From Impartial Expert to Adversary in the Wake of Ake*, 16 Bull.Am. Acad. Psychiatry Law 25, 30 (1988).

The "ideal of the completely impartial psychiatric witness is, in most cases, what Freud entitled an 'ideal fiction.'" Gorman, *Are There Impartial Expert Psychiatric Witnesses?* 11 Bull. Am. Acad. Psychiatry Law 379, 381 (1983).

NEUTRAL EXPERT IS A PRETENSE

"[P]sychiatric evaluation and diagnosis are prone to professional disagreement. Scientific and extra-scientific factors can lead to subtle biasing that undermines reliability and validity. Systems that use only allegedly neutral experts present to the fact finder an illusion of intellectual neutrality, encourage excessive deference to expertise, and place unwarranted power in the experts' hands." Zisla, *Psychiatric Assistance for Indigent Defendants Pleading Insanity: The Michigan Experience*, 20 J. of Law Reform 907, 915 (1987).

The "illusion that the psychiatrist remains impartial and outside the adversary system" is something the law cannot permit. It is a pretense which the law must discard. Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations & Speculations*, 63 Mich.L. Rev. 1335, 1344 (1965). Each side of a criminal dispute must have its mental health expert when the defendant's state of mind is a significant factor because as Diamond & Louisell observe:

1) the science of the mind is not an exact science;
2) the mind and its processes are not visible as is the data in the biological sciences;
3) the mental state is difficult to uncover since the expert can only evaluate the derivatives of the mental processes;
4) extensive collaboration between the attorney and expert is an absolute necessity for the psychological essence of the human mind to be uncovered and presented;
5) the opinion of the evaluating expert is a product of deductions and inferences which are colored by his training, experience and the theoretical framework used to order, explain and interpret his observations. It is not a neutral, objective opinion; rather it is a professional viewpoint;
6) a mental health expert provides a hypothesis which explains specific human behavior. *Id.*

DISCIPLINED SUBJECTIVITY

The theoretical framework and viewpoint of an expert is critical to a litigator's ability to effectively advocate his position. For instance, to those who litigate cases it is no surprise that the primary predictor of how an expert views a case involving an insanity or other mental health defense is a function of the expert's personal training, experiences and beliefs toward the defense. *See*, Homant, Kennedy, *Judgment of Legal Insanity as a Function of Attitude Toward the Insanity Defense*, 8 International J. of Law of Psychiatry 67, 68, 76 (1986).

When representing a capital defendant who has been sexually, physically or emotionally abused, it is crucial for the defense to present that evidence through an expert whose theoretical framework, experience and professional viewpoint are that criminal behavior can be connected to prior abuse.

This professional viewpoint or "disciplined subjectivity" is the core of what mental health professionals are able to bring to the criminal dispute. Neutrality or objectivity is a dangerous pretense. Diamond, *The Psychiatrist or Advocate*, 1 J. Psychiatry & Law 5, 19 (1973).

DIRE CONSEQUENCES

If the defense or prosecution is not allowed to bring partisan experts to the critical dispute, dire, unacceptable consequences result...unreliable verdicts. Therefore, the adversary system requires a defense expert for the defense of insanity, especially since the defense

bears the burden of proving insanity in Kentucky.

To advance the truthseeking process, we should identify experts for both sides accurately with the knowledge that there is no proof that partisan experts are hired guns.

"[S]erious injustice may occur when an adversary witness is disguised as a neutral witness.... In a legal situation where impartiality is impossible, let us frankly label the witness for what he is, and let the jury choose." Diamond, *The Fallacy of the Impartial Expert*, 3 Archives of Criminal Psychodynamics 221, 230 (1959).

A fear that partisan experts lead to "hired guns is unfounded." It "must be noted, however, that little if any empirical documentation of such testimonial venality exists." Kennedy, Kelley, Homant, *A Test of the 'Hired Gun' Hypothesis in Psychiatric Testimony*, 57 Psychological Reports 117 (1985).

STATE EXPERTS: CONFLICT OF INTEREST

The state's "neutral" experts are most often not able to provide the constitutionally required kinds and levels of assistance with the assured procedural safeguards due to their conflicting interests. This is recognized by the state experts themselves. For instance, in the mental health arena, a series of letters from Secretaries of the Kentucky Cabinet for Human Resource (CHR) and their staff repeatedly have indicated that the Kentucky Correctional Psychiatric Center (KCPC) experts would only give an opinion - a neutral opinion - to the court on sanity and competency, and they would do no more. These significant limitations were particularized as follows in a July 19, 1990 affidavit by the director of KCPC:

> The Kentucky Correctional Psychiatric Center cannot act in the capacity of a "defense expert." By a "defense expert" affiant means a mental health professional being bound by client confidentiality, and assisting defense attorneys in the evaluation, preparation and presentation of a defense to a charge of a criminal defense and/or assisting defense attorneys in the evaluation, preparation and presentation of a mitigation or penalty phase of a criminal case.

In a February 7, 1994 letter, Angela M. Ford, General Counsel for CHR, wrote, "The clinician is also available to consult with defense counsel about the evaluation process or to clarify the findings of the evaluation (if not prohibited by the court order), however, the clinician is not in a position to provide ongoing consultation with counsel for purposes of preparing for trial or developing defenses."

The State Fire Marshall recognizes its duties and loyalties lie with those who have a conflict of interest with the defense:

> It is the duty of the State Fire Marshal and his agents and employees to consult with, as well as assist, law enforcement, both Kentucky State Police and local law enforcement agencies.
>
> Because of the duties of this office, it would be a conflict of interst to be a "court-appointed defense consultant" in any case, but especially cases in which this office might be a material witness on behalf of the Commonwealth.
>
> . . . .
>
> If forced to act as a defense consultant, this would place any member of the Fire Marshal's Office in the position of having to report any incriminating evidence during the course of said assistance for consultation, and this would create practical difficulties both for the fire marshal involved as well as the defense lawyer. Further, said person would be placed in the position of testifying, in effect, against another fire marshal. *Sommers v. Commonwealth*, 843 S.W.2d 879, 884-85 (Ky. 1992).

The Kentucky State Police recognize the conflict, as stated in *Sommers*:

> Counsel also presented the affidavit of Capital Larry Fentress, Legal Officer with the Kentucky State Police, which affidavit included:
>
> Affiant states that the assignment of a state police officer, sworn to take law enforcement upon probable cause to believe that any violation of law has occurred, to assist in the defense of a criminal defendant, places the officer in a position of a possible conflict of interest should he discover additional incriminating evidence during the course of his assistance to the public defender. *Id.* at 885.

Most judges refuse to order KCPC to work confidentially based on their knowledge that, "Anything KCPC does will be public, not for one side or the other side."

THE LAW: NEUTRAL NOT ENOUGH

Ake v. Oklahoma, 470 U.S. 68, (1985) requires more than Kentucky's KCPC neutral expert, or the Kentucky state police's expert.[1] *Ake* compels an expert who will investigate, interpret, testify, and marshal the defense. *Id.* at 82-83. *Ake* dictates access to an expert to help determine the viability of the defense, such as a mental defense, and:

> to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witness.... *Id.* at 82.

The state KCPC mental health experts or the Kentucky state police lab experts are often unable to adequately investigate what the defense needs, or refuse to adequately interpret defense data, or refuse to adequately testify, refuse to assist in cross-examining other state experts, or refuse to help marshall the defense.

Ake commands an expert who will help "*...marshall his defense*," *Id.* at 80, by performing the traditional, valuable role of a an expert, like a psychiatrist:

> In this role, psychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrist and how to interpret their answers. *Id.*

Assistance from a "neutral" state expert is constitutionally and statutorily insufficient. Courts do not hesitate to so hold.[2]

In ***United States v. Crews***, 781 F.2d 826 (10th Cir. 1986) the Court stated that "Such a psychiatrist is necessary not only to testify on behalf of the defendant, but also to help the defendant's attorney in

preparing a defense.... Although four treating or court-appointed psychiatrists testified with respect to Crews' mental condition, Crews also was entitled to the appointment of a psychiatrist 'to interpret the findings of... expert witness[es] and to aid in the preparation of his cross-examination.'" *Id.* at 834.

In ***United States v. Sloan***, 776 F.2d 926 (10th Cir. 1985) the Court held that under *Ake* more than a nonpartisan state doctor was required. "The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution. In this case, the benefit sought was not only the testimony of a psychiatrist to present the defendant's side of the case, but also the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination. Without that assistance, the defendant was deprived of the fair trial due process demands." *Id.* at 929.

In ***Holloway v. State***, 361 S.E.2d 794 (Ga. 1987) the Court determined that a capital defendant who had been examined by a state psychologist and state psychiatrist was nevertheless entitled to an independent psychiatrist under the constitutional rationale of *Ake* on criminal responsibility and other issues.

In ***Cowley v. Stricklin***, 929 F.2d 640 (11th Cir. 1991) the indigent defendant was charged with sexual assault. His appointed attorney asked for psychiatric assistance due to the defendant's strange behavior. Before granting that request, the trial judge sent the defendant to the state psychiatric hospital. The state psychiatrist found the defendant competent and sane. The continued requests of the defense for psychiatric help were refused by the trial judge, even though a significant mental health history was produced, including a prior diagnosis of schizophrenia. At trial, the state psychiatrist testified that he found the defendant sane.

In *Cowley* the defense was entitled to more than state psychiatric assistance. "It does not follow that, because Judge Snodgrass had evidence from [the state psychiatrist] that Cowley was sane at the time of the crime and competent for trial, he was justified in refusing the request for psychiatric assistance. This argument makes little sense in a system of trial by jury. There was *some* evidence that Cowley was sane, but there was also substantial evidence that he was not sane. The validity of the defense should then have been for the jury to decide. Otherwise, as long as there is a modicum of evidence indicating sanity, any indigent with a mental disability could be denied psychiatric assistance to present an insanity defense." *Cowley, supra* at 643.

The assistance of the state psychiatrist given to Cowley was inadequate. "The district court found that [state psychiatrist] was a 'qualified,' independent psychiatrist.' This may have been the case, but [the state psychiatrist] did not provide the constitutionally requisite assistance to Cowley's defense. *Ake* holds that psychiatric assistance must be made available for the *defense*. This assistance may include conducting 'a professional examination on issues relevant to the defense,' presenting testimony, and assisting 'in preparing the cross-examination of a State's psychiatric witnesses.' [The state psychiatrist] performed none of these essential tasks on Cowley's behalf.... The state cannot preempt a defendant's right to a defense psychiatrist by first appointing its own expert." *Cowley, supra* at 644.

"The right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate...." ***Smith v. McCormick***, 914 F.2d 1153, 1157 (9th Cir. 1990). "But under *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process." *Id.* at 1158-59.

DeFreece v. State, 848 S.W.2d 150 (Tx.Cr.App. 1993) extensively analyzes what expert assistance an indigent is entitled to receive under *Ake*, due process, and the line of state supreme court and federal courts of appeal cases since *Ake*.

In *DeFreece* the defendant was examined by a state psychiatrist and psychologist. While "it is true that some jurisdictions have said, essentially in dicta, that the statutory provision of a single neutral psychiatrist to service both parties and the court is sufficient to meet the due process minimum of *Ake*," *DeFreece* recognizes that "the greater weight of authority holds otherwise. And, in our view with good reason." *DeFreece, supra*, 848 S.W.2d at 158.

In "an adversarial system due process requires at least a reasonably level playing field at trial. In the present context that means more than just an examination by a 'neutral' psychiatrist. It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts." *Id.* at 159.

The right to funds for *defense* experts is recognized in Kentucky. In ***Sommers v. Commonwealth***, 843 S.W.2d 879 (Ky. 1922) the Kentucky Supreme Court reversed the two murder convictions and the 500 year sentence of David Sommers because the trial judge refused to provide the indigent defendant funds for independent expert assistance.

The two victims were found in a house destroyed by fire. State testing indicated that the killings were from suffocation prior to the fire, and that the fire was deliberately started. The Commonwealth's theory was that the defendant killed to silence the girls he had sexually abused, and the fire was set to conceal the homicides.

The Court observed "that due process requires that indigence may not deprive a criminal defendant of the right to present an effective defense...." *Id.* at 883. This constitutional principle is recognized in KRS 31.110 by requiring an indigent to be represented by counsel and provided the resources necessary for competent representation. *Id.*

In *Sommers*, due process and KRS Chapter 31 required "funding of a pathologist and an arson investigator to serve as consultants and/or witnesses for the defense." *Id.* at 883. There was *reasonable necessity* for funds for the "assistance of an *independent* pathologist and an *independent* arson expert or the equivalent," *Id.* at 885, because "both the causes of death and the genesis of the fire were matters of crucial dispute, resolvable only through circumstantial evidence and expert opinion." *Id.* at 884. (emphasis added).

The Court termed these independent experts as defense experts.

FOOTNOTES

[1]Justice Rehnquist in his dissenting opinion in *Ake* recognized that the majority had indeed held that access to a defense expert was required. *Id.* at 87.

[2]*United States v. Crews*, 781 F.2d 826 (10th Cir. 1986) (defense psychiatrist); *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985) (defense psychiatrist required); *Lindsey v. State*, 330 S.E.2d 563 (Ga. 1985) (defense psychiatrist); *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) (investigator); *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975).

EDWARD C. MONAHAN
Assistant Public Advocate

CONSTITUTIONAL INADEQUACY OF POLICE OR STATE EXPERT'S ASSISTANCE

The failure of state experts to meet requirements of the Kentucky and United States Constitutions is evident:

What Entitled to by Due Process; AKE; Section 2; Section 11	***Experts Who Work for the Police or the State***
1. Qualified professionals in all relevant disciplines	1. Not qualified for some purposes (*e.g.*, neurology)
2. Who competently perform the work according to accepted methodologies	2. Fails to do work comprehensively due to limited resources, or statutory limitations.
3. Who affirmatively evaluate defense issues & defenses throughout the litigation phases, *e.g.*, mental status, cause of death, voluntariness, mitigation	3. Unable or unwilling to look at all that is relevant to defense, *e.g.*, all mental states (intoxication, EED); fails to interview all necessary witnesses; unfamiliar with mental health history; unwilling to look at what is mitigating
4. Who marshal evidence for the defense at direction of defense attorney	4. Unable or unwilling to help marshal defense or evaluate at direction of attorney
5. Who help cross-examine prosecutor's experts	5. Unable or unwilling to help cross-examine prosecutor's experts; conflict of interest to question colleague's work
6. Who rebut state's experts	6. Unable or unwilling to rebut state evidence; conflict of interest
7. Who do the work confidentiality	7. Unable or unwilling to provide confidential help; conflict of interest
8. Who provide meaningful access to justice	8. Unable to justly present his side through the expert
9. Who owe a duty of loyalty to the defense	9. Whose loyalty is to neutrality or the state, not to the defense or the defendant

Implementation of Kentucky Supreme Court Decision in Lewis v. Lewis, Ky., 875 S.W.2d 862 (1993)

As a result of the Kentucky Supreme Court's holding in the case of *Lewis v. Lewis*, Ky., 875 S.W.2d 862 (1993), the Department of Public Advocacy is now responsible for providing representation in all cases in which indigents charged with civil contempt are facing incarceration. To help meet this new mandate, the 1994 General Assembly appropriated to DPA a limited amount of money for the next two years to pay attorney fees to court appointed civil contempt attorneys.

This is a new area of responsibility for the Department of Public Advocacy and creates new appointment responsibilities for the court. Since no civil contempt caseload figures presently exist, the Department Of Public Advocacy will administer the appointment and payment of attorneys in *Lewis* cases in a way *similar* to the procedure now used for appointments and payments of attorneys in dependency and neglect cases.

For court appointed counsel to receive payment from DPA as a result of a judicial appointment pursuant to *Lewis v. Lewis*, Ky., 875 S.W.2d 862 (1993) the following procedure is to be followed:

TRIAL LEVEL CIVIL CONTEMPT APPOINTED COUNSEL

At the conclusion of the case, appointed counsel must send to David E. Norat, Law Operations Division, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky 40601 a signed Appointment Of Counsel Order (DPA - 001; See Figure 1) and a Contempt Of Court Payment Order (DPA - 002; See Figure 2). The Contempt of Court Payment Order (DPA - 002) must be **completed in its entirety**.

APPELLATE LEVEL CIVIL CONTEMPT APPOINTED COUNSEL

In cases where the individual has been found to be in contempt of court and there is an appeal, at the conclusion of the appeal, court appointed counsel must forward to David E. Norat, Law Operations Division, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky 40601 a signed Appointment Of Counsel Order (DPA - 001; See Figure1) and a completed Contempt Of Court Report And Payment Document (DPA - 003; See Figure 3).

PROCESSING OF PAYMENT DOCUMENTS BY DPA

1) All payments on judicially approved and completed Payment Orders will be paid monthly and will be prorated if necessary. Any excess funds from one month will be evenly disbursed over the remaining months.

2) Upon receipt of the documents, DPA's Law Operations will date stamp the documents. For documents to be processed, all information requested on the forms ***must*** be provided by the attorney of record.

3) Documents received with incomplete data will be returned with a request to provide the missing information. Naturally, this will delay payment.

4) Payment documents received and stamped by the 5th of the month, or the first working day after the 5th of the month, for work completed in the preceding month will be processed for payment.

5) Information reported by the appointed attorneys on their pay documents will be compiled by the Law Operations Division.

In all cases where an individual charged with civil contempt is facing incarceration, the Department requests that you appoint a private practicer to provide the mandated legal representation using DPA Form 001 (See Figure 1). At the final disposition of the case, please sign the form verifying the attorney work completed. (See Figure 2). After obtaining your signature, the civil contempt attorney will submit the form to DPA for payment of services rendered.

In the event the indigent individual is found to be in contempt and requests an appeal, please appoint private counsel by using DPA Form 001. (See Figure 1). Payment will be made by using DPA form 003. (See Figure 3).

Please note, however, that unlike dependency and neglect cases, the Department of Public Advocacy, rather than the Finance Cabinet, will process all claims for payment in indigent civil contempt cases. (See Figure 2). Also note that the Department will supply the clerk's office with all required forms.

Payment vouchers may be submitted to DPA for a judicially approved amount up to $250.00 at the statutory hourly rate of $25.00 out of court and $35.00 in court. All payments will be made monthly and will be prorated if necessary. Any excess funds from one month will be evenly disbursed over the remaining months.

The information reported by the appointed attorneys on their pay vouchers will be compiled by Public Advocacy over the biennium. The compiled information, which will include caseload statistics, will help the state determine the cost of this new and necessary extension of the right to counsel. Moreover, a properly completed voucher will allow the department to request additional funding in fiscal year 96-98, if necessary, to more accurately reflect caseloads and attorney time and expenses.

If you have any questions or comments concerning the procedure please do not hesitate to call Dave Norat, 502-564-8006.

DAVID E. NORAT
Law Operations Division
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890

COMMONWEALTH OF KENTUCKY
_____ COURT
CASE NO. _____

IN THE MATTER OF _____

APPOINTMENT OF COUNSEL
ORDER IN CIVIL CONTEMPT CASE

This matter being before the Court and the Court being duly advised finds the defendant/respondent, _____, to be an indigent facing incarceration within the meaning of KRS 31.110 and to be eligible for the services of publicly furnished counsel in order to represent his/her interests at a civil contempt of court hearing on _____.

It is therefore ordered and adjudged by the Court that _____, be and is hereby appointed as counsel of record to represent said indigent at the aforementioned hearing or at a future stage of the proceedings including the appeal. Counsel will be compensated for services rendered at the rate of $25.00 per hour out-of-court and $35.00 per hour in-court up to $250.00. Said sum is subject to proration by the Department of Public Advocacy.

ENTERED this _____ day of _____, 1994.

_____
JUDGE

DPA-001

Figure 1

COMMONWEALTH OF KENTUCKY
_____ COURT
CASE NO. _____

IN THE MATTER OF _____

TRIAL LEVEL CIVIL CONTEMPT OF COURT PAYMENT ORDER PURSUANT TO *LEWIS V. LEWIS*

****

By separate order of this Court, The Hon. _____ was appointed, on the ____ day of _____, 199__, to represent the above-named individual at a civil contempt of court hearing. At said hearing, held before the Court on the ____ day of _____, 190__, the court adjudged the defendant:

_____ Not Guilty of Contempt of Court
_____ Guilty, with an opportunity to purge
_____ Guilty, no opportunity to purge
_____ Remanded from the docket/no official action taken

Further, the Court being aware of the representation provided in the above-styled matter and being satisfied that services were fully and competently rendered, HEREBY ORDERS the Department of Public Advocacy to pay to the above-named attorney the following sum, not to exceed $250.00, and which is subject to pro-rata:

In Court - $35 x _____ hours = _____
Out of Court $25 x _____ hours = _____

TOTAL = _____

_____
JUDGE
_____ _____ COURT

Submitted By:
The Hon. _____
(Please Type or Print)

S.S.# _____
Address _____
_____
_____

_____
Attorneys Signature

Please attach order of appointment and Submit for Payment to The Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601.

DPA-002

Figure 2

CONTEMPT OF COURT REPORT AND APPELLATE PAYMENT DOCUMENT PURSUANT TO *LEWIS VS. LEWIS*

THIS IS A PAY DOCUMENT. FOR PAYMENT TO BE MADE, ALL BOXES MUST BE COMPLETED IN FULL AND SIGNED BY THE ATTORNEY. MAIL THE COMPLETED FORM TO: DEPARTMENT OF PUBLIC ADVOCACY, DIVISION OF LAW OPERATIONS, 100 FAIR OAKS LANE, SUITE 302, FRANKFORT, KENTUCKY 40601

COUNTY & CITY CODE	APPEAL TO	APPELLATE CASE NO.
	____ COURT OF APPEALS ____ SUPREME COURT	

CLIENT		ATTORNEY	
LAST NAME	FIRST NAME	LAST NAME	FIRST NAME

CASE OPENING DATE	CASE CLOSING DATE

SIGNATURE OF APPOINTING ATTORNEY	FINAL DISPOSITION OF CASE
	_____ Affirmed _____ Reversed _____ Affirmed in Part, Reversed in Part _____ Appeal Dismissed

HOURS AND COST

IN COURT $35 X _____ HOURS = _____
OUT OF COURT $25 X _____ HOURS = _____

TOTAL = _____
PAYMENT NOT TO EXCEED $250

BILLING CERTIFIED BY ATTORNEY	APPROVED BY APPOINTING AUTHORITY
SIGNATURE:	SIGNATURE:
DATE:	DATE:

FORM MUST HAVE ATTORNEY SOCIAL SECURITY # AND THE ADDRESS WHERE PAYMENT IS TO BE MADE IN ORDER TO BE PROCESSED.

SOCIAL SECURITY # _____

ADDRESS: _____
_____

DPA-003 06/03/94

Figure 3

Capital Case Update

Tuilaepa v. California and *Proctor v. California*
114 S.Ct. 2630,
129 L.Ed.2d 750 (1994)

Affirmed. 8-1 majority.

Majority: Kennedy (writing), Rehn-quist, O'Connor, Scalia (concurrence), Souter (concurrence) and Thomas.
Stevens and Ginsburg (concurrence in judgment)

Minority: Blackmun (writing)

Three California aggravating circumstances are not vague, and therefore do not violate the Eighth Amendment.

Justice Kennedy began the majority opinion by describing the two different aspects of the capital decisionmaking process: eligibility and selection. To be eligible for the death penalty, a defendant must be convicted of a crime for which the death penalty is "a proportionate punishment." Thus, to be eligible for the death penalty for a homicide, the defendant must have been convicted of murder and one or more aggravating circumstances (contained in the definition of the crime or a separate sentencing factor, or both) at either the guilt or penalty phases must be found. The aggravator must also apply to only a subclass of defendants convicted of murder and must not be unconstitutionally vague. *Tuilaepa*, 114 S.Ct. at 2634, citing *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); *Lowenfield v. Phelps*, 484 U.S. 231, 244-246, 108 S.Ct. 546, 554-555, 98 L.Ed.2d 568 (1988); *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983); *Arave v. Creech*, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993); and *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-5, 64 L.Ed.2d 398 (1980).

"Selection" for the death penalty comes after an "individualized determination on the basis of the character of the individual and the circumstances of the crime", when the jury considers the defendant's mitigating evidence. *Tuilaepa*, 114 S.Ct. at 263, quoting *Zant, supra*; *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); and *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990).

Although these factors are "in some tension", one standard is common to both: "[t]he State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Id.*, at 2635, quoting *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

The Supreme Court's review for vagueness is "quite deferential", and relies on the principle that a factor is not unconstitutional "if it has some 'common-sense core of meaning...that criminal juries should be capable of understanding.'" *Id.*, quoting *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

Lastly, the concerns the Supreme Court has about a specific proposition, *e.g.*, a HAC (heinous, atrocious or cruel) aggravator, are "mitigated when a factor does not require a yes or a no answer to a specific question, but instead only points the sentencer to a subject matter. Both types of factors (and the distinction is not always clear) have their utility." However, when examining the "propositional content of a factor", the *Jurek* test applies. *Id.*, at 2636.

FACTOR (a) CHALLENGE

Both Proctor and Tuilaepa challenged California factor (a)--jury considers "the 'circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.'" *Id.*

This challenge "is at some odds with settled principles", because earlier cases established that sentencers should consider the circumstances of the crime in their capital sentencing decision. *Id.*, at 2637, citing *Woodson, supra*. The Supreme Court "would be hard pressed" to invalidate an instruction to do what the law requires. "[T]his California factor instructs the jury to consider a relevant subject matter and does so in understandable terms." *Id.*

FACTOR (b) CHALLENGE

Tuilaepa's challenge to factor (b)--which requires a consideration of the defendant's prior criminal activity--fails for many of the same reasons. "[I]t is phrased in conventional and understandable terms and rests in large part on a determination of whether certain events occurred, thus asking the jury to consider matters of historical fact." *Id.* Citing the future dangerousness portion of the Texas capital statute, Kennedy said that "[b]oth a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process...and the States have considerable latitude in determining how to guide the sentencer's decision in this respect." *Id.*

FACTOR (i) CHALLENGE

Tuilaepa's last challenge--to factor (i), which requires consideration of the age of the defendant--was based on his reasoning that the age factor is equivocal and that in typical cases, no matter how young or old the defendant is, the prosecution will always argue in favor of the death penalty. "It [was] neither surprising nor remarkable" that the defendant's age could "pose a dilemma" for the sentencer. "But difficulty in application is not equivalent to vagueness." Both the prosecution and the defense are able to present arguments regarding the significance of the defendant's age, which "serve[s] to promote a more reasoned decision." *Id.*

SELECTION DOES NOT HAVE TO MEET REQUIREMENT FOR ELIGIBILITY FACTORS

Both petitioners argued that a capital sentencing jury could not be instructed to consider "open-ended subject matter," such as the circumstances of the crime or the background of the defendant.

Kennedy felt that not only did this argument ignore "the obvious utility" of these factors as part of the sentencing decision but also "it contravene[d] our precedent." *Id.*, at 2638. Both Zant, *supra*, and *Gregg, supra*, demonstrate that, at the selection stage, "states are not confined

to submitting to the jury specific propositional questions." *Id.*

FACTORS DO NOT INSTRUCT JURY ON HOW TO WEIGH

Tuilaepa and Proctor argued that a single list of sentencing factors was unconstitutional because it did not guide the jury in evaluating and weighing the evidence, and because it allowed both the prosecution and defense to make wide-ranging arguments about whether the defendant is deserving of the death penalty. This argument is also "foreclosed by our cases." *Tuilaepa, supra*, at 2638, citing *California v. Ramos*, 463 U.S. 992, 1008-1009, 103 S.Ct. 3446, 3457-8, 77 L.Ed.2d 1171; *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Zant, supra*; *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); and *Gregg, supra*.

SCALIA CONCURRENCE

Justice Scalia continued propounding his view that once a state has narrowed eligibility for the death penalty, it has complied with Eighth Amendment jurisprudence, by saying that while "[t]oday's decision adheres to our cases which acknowledge additional requirements... since it restricts their further expansion it moves in the right direction." *Id.*, 114 S.Ct. at 2639.

SOUTER CONCURRENCE

Justice Souter joined the opinion because it recognized that factors which genuinely narrow the class of persons eligible for the death penalty and which guide the jury in its selection of which persons receive the death penalty "are not susceptible to mathematical precision", but depend on a "'common-sense core of meaning.'" *Id.*, citing *Jurek, supra*.

STEVENS CONCURRENCE IN JUDGMENT

Justice Stevens, joined by Justice Ginsburg felt *Tuilaepa* "rests on the same assumption that we made in *Zant*," that statutes which confine the class of persons eligible for the death penalty to a narrow category in which there is a special justification for the imposition of a more severe form of punishment are constitutional. *Tuilaepa*, 114 S.Ct. at 2639-2640.

Zant, supra, also held that incorrect characterization of a relevant factor as an aggravator did not prejudice the defendant. Thus, the failure to characterize factors (b) and (i) as aggravators or mitigators "is also unobjectionable. Indeed, I am persuaded that references to such potentially ambiguous, but clearly relevant, factors actually reduces the risk of arbitrary capital sentencing" because those factors are relevant to an individualized sentencing decision. *Id.*, at 2640.

JUSTICE BLACKMUN DISSENT

Justice Blackmun felt that, were he not opposed to the death penalty because it cannot be imposed within the constraints of the United States Constitution, the three factors did not withstand a vagueness analysis because they failed to guide the sentencer's discretion. *Id.*, at 2641, citing *Stringer v. Black*, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

The California scheme does not simply direct jurors' attention to certain subjects; the eleven factors listed authorize the jury to treat any one of them as an aggravator in favor of sentencing a defendant to death. Jurors are given no guidance as to how to consider these factors.

The majority's distinction between propositional and nonpropositional challenges "is novel" and "largely illusory." Under the majority's analysis, the HAC aggravator would be propositional, while the presence or absence of special heinousness, atrociousness, or cruelty would be nonpropositional. Blackmun is "at a loss to see how the mere rephrasing does anything more to channel or guide jury discretion." *Id.* Furthermore, this distinction seems not to play any role in *Tuilaepa*. "The Court nowhere discloses specifically where the line is drawn, on which side of it the challenged factors fall, and what relevance, if any, this distinction should have to the Court's future dangerousness analysis." More relevant is what the sentencer is told to do with an aggravating factor. *Id.*, at 2642.

The Supreme Court has made a distinction between states, such as Georgia, where aggravators have no specific function in the jury's decision whether under all the circumstances of the case, a defendant should receive the death penalty, and California, where the sentencer is instructed to weigh aggravators and mitigators, because in states such as California, "a vague aggravator creates the risk of an arbitrary thumb on death's side of the scale." Each of the California factors could be used to convince jurors that "just about anything is aggravating." *Id.*, at 2642.

CIRCUMSTANCES OF THE CRIME (FACTOR (a))

Citing numerous cases, Justice Blackmun said that "because neither the California Legislature nor the California courts have ever articulated a limiting construction of [the] term, prosecutors have been permitted to use the 'circumstances of the crime' as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide..." *Id.*, at 2643.

This circumstance could also include a juror's improper consideration of the defendant's race in his/her sentencing decision. "This risk is not merely theoretical. For far too many jurors, the most important 'circumstances of the crime' are the race of the victim or the defendant...The California capital sentencing scheme does little to minimize this risk." *Id.*, at 2645.

AGE OF THE DEFENDANT (FACTOR (b))

Factor (b) also fails to adequately guide the jury. "In practice, prosecutors and trial judges have applied this factor to defendants of virtually every age: in their teens, twenties, thirties, forties, and fifties at the time of the crime." *Id.*, at 2643.

The California Supreme Court has added to the mixture by describing age as a "metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." *Id.*, citing *People v. Lucky*, 753 P.2d 1052, 1080 (Cal. 1988).

PRESENCE OR ABSENCE OF CRIMINAL ACTIVITY (FACTOR (i))

Although the California Supreme Court described the presence or absence of criminal activity as limited to violations of criminal statutes, such an instruction has not been required and was not given at Tuilaepa's trial, which "left the prosecution free to introduce evidence of 'trivial incidents of misconduct and ill temper" and freed the jury to find the aggravator. *Id.*, at 2644.

> In short, open-ended factors and a lack of guidance to regularize

> the jurors' application of these factors create a system in which, as a practical matter, improper arguments can be made in the courtroom and credited in the jury room. I am at a loss to see how these challenged factors [guide the jury and enable a rational review of the process for deciding upon a death sentence]. *Id.*

CALIFORNIA STATUTE NOT HEALTHY

The majority's unwillingness to conclude that the factors are facially valid "leaves the door open to a challenge to the application of one of these factors in such a way that the risk of arbitrariness is realized. The cases before us, for example, do not clearly present a situation in which the absence of a mitigator was treated as an aggravator." The opinion also does not address the constitutional adequacy of the California "eligibility process." With nearly 20 special circumstances available, an "extraordinarily large" number of cases are death-eligible. The Court did not address whether that system provides "sufficient, meaningful narrowing." *Id.*, at 2646.

Justice Blackmun also said that with future litigation on these questions, the Court would be "well advised to reevaluate its decision in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 2029 (1984). *Id.*, at 2647.

> In summary, the Court isolates one part of a complex scheme and says that, assuming that all the other parts are doing their job, this one passes muster. But the crucial question, and the one the Court will need to face, is how the parts are working together to determine with rationality and fairness who is exposed to the death penalty and who receives it. *Id.*, at 2647.

McFarland v. Scott
114 S.Ct. 2568
129 L.Ed.2d 666 (1994)

Reversed. 6-3 majority.

Majority: Blackmun (writing), Stevens, Souter, Ginsburg, Kennedy, O'Connor (in part)

Minority: Thomas (writing), Rehnquist, Scalia, O'Connor (in part)

A capital defendant need not file a Petition for a Writ of Habeas Corpus in order to invoke his right to counsel under 21 U.S.C. §848(q)(4)(B) and to establish a federal court's jurisdiction to grant a stay of execution. *McFarland, supra*, 114 S.Ct. at 2570.

Frank McFarland was convicted of a Texas murder and sentenced to death in 1989. After the Supreme Court denied *cert* in June, 1993, the Texas trial court scheduled McFarland's execution for September 23, 1993. On September 19, McFarland filed a pro se motion with the court, requesting a stay or withdrawal of his execution in order to allow the Texas Resource Center to find volunteer counsel for his state habeas proceedings. The Attorney General of Texas opposed the motion, arguing that McFarland had not filed a federal petition for habeas, and therefore, the court lacked jurisdiction to enter that stay. The trial court did not appoint counsel, but did extend the execution to October 27, 1993. *Id.*

On October 16, the Texas Resource Center told the court it had not been able to recruit counsel, and asked for an appointment from the court. The court refused, saying that Texas law did not authorize the appointment of counsel for state habeas proceedings. McFarland then filed a pro se motion in the United States District Court for the Northern District of Texas, stating that he wished to file a federal habeas challenge to his conviction, and requesting appointment of counsel and a stay to give counsel time to prepare and file the petition. *Id.*

The District Court denied the motion nine days later, concluding that no "post conviction proceeding" had been filed. Thus, McFarland did not warrant appointment of counsel, and the court did not have jurisdiction to grant the stay. The Fifth Circuit noted the same issues. *Id.*, at 2571.

Shortly before the Fifth Circuit ruled, a federal magistrate judge found an attorney willing to accept appointment, and suggested that if the attorney file a shell petition, the district court might be willing to appoint the attorney and grant the stay. After the attorney did so, the District Court found the petition insufficient and denied the motion for stay on the merits. Finally, on October 27, 1993, the Supreme Court granted the stay and granted cert to resolve "an apparent conflict with *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991).

APPOINTMENT OF COUNSEL PRIOR TO FILING HABEAS PETITION

In his final majority opinion, Justice Blackmun wrote that although the language of 21 U.S.C. §848(q)(4)(B) entitles a defendant to "the appointment of one or more attorneys and the furnishing of such other services [as experts, investigators, and other reasonably necessary services], the statute does not specifically set out how a capital defendant's right to counsel in his federal habeas corpus proceedings should be invoked. *McFarland, supra*, 114 S.Ct. at 2571.

However, §848(q)(4)(B) expressly incorporates 21 U.S.C. §848(q)(9) (capital defendant entitled to expert and investigative services upon a showing of necessity). Thus, §848(q)(9) "clearly anticipates that capital defense counsel will have been appointed under §848(q)(4)(B) before the need for such technical assistance arises, since the statute requires 'the defendant's attorneys to obtain such services from the court.'" In adopting 21 U.S.C. §(q)(4)(B), then, Congress established a defendant's right to preapplication legal assistance in his habeas corpus proceedings. *Id.*, at 2572.

Because of the seriousness of the penalty and the "unique and complex nature of the litigation"--heightened pleading requirements, compliance with doctrines of procedural default and waiver, avoidance of abuse of the writ--"[a]n attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial." *Id.*

> We therefore conclude that a 'post conviction proceeding' within the meaning of §848(q)(4)(B) is commenced by the filing of a death row defendant's motion requesting the appointment of counsel for his federal habeas corpus proceeding. *Id.*, at 2572.

DISTRICT COURT JURISDICTION TO GRANT STAY

Frank McFarland argued that his request for appointment of counsel in a post-conviction proceeding initiated his habeas within the meaning of 28 U.S.C. §2251 and that the district court had jurisdiction to grant his stay motion. The Attorney General of Texas argued that even if post conviction under 21 U.S.C. §848(q)(4)(B) can be triggered by a request for appointment of counsel, nothing is pend-

ing under §2251, thus no stay can be entered until a "legally sufficient habeas petition is filed." *Id.*, at 2573.

Each statute refers to the same proceeding. Furthermore, the terms "post-conviction" and "habeas corpus" are used interchangeably to refer to proceedings under either statute. Thus, the statutes "must be read...to provide that once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under §2251 to enter a stay of execution. Neither statute grants a right to an automatic stay of execution." *Id.*

O'CONNOR CONCURRENCE IN JUDGMENT IN PART AND DISSENT IN PART

Justice O'Connor agreed that 21 U.S.C. §848 entitled a capital defendant to a "properly trained attorney" and that this right included legal assistance in preparing a habeas petition. Thus, she also agreed that a defendant need not file his habeas petition in order to invoke his right to counsel. *Id.*, at 2574.

She disagreed, however, that a district court is allowed to grant a stay of execution pending counsel's preparation of that petition. While 28 U.S.C. §2251 allows a United States justice or judge before whom a habeas petition is pending to grant a stay, "it does not explicitly allow a stay prior to the filing of a petition" because "our cases have made it clear that capital defendants must raise at least some colorable federal claim before a stay of execution may be entered." *Id.*

THOMAS DISSENT

Justice Thomas said the court's decision was "at odds with the terms of both statutory provisions." §848(q)(4)(B) and §2251 allow appointment of counsel or a stay only after a habeas proceeding has been commenced. *Id.*, at 2576.

"[T]he clear import" of §848(q)(4)(B) is that an indigent prisoner is not entitled to attorneys, experts, investigators or other services until his habeas has been filed. *Id.*, at 2577, citing §2254(d) (presumption of correctness of state court findings attaches in a federal court proceeding begun by an application for a writ of habeas corpus); 28 U.S.C. §2241 (power to grant habeas triggered only by application for writ of habeas corpus); 28 U.S.C. §1914 (filing of application for habeas equated with instituting a proceeding for purposes of setting filing fees). *Id.*, at 2577.

Regarding the district court's jurisdiction to grant stays of execution, Thomas said that the court "should not lightly assume that Congress intended to expand federal courts' habeas power [through §848(q)(9)]." *Id.*, at 2580.

Stansbury v. California 114 S.Ct. 1526 (1994)

Per curiam.

Concurrence: Justice Blackmun.

A police officer's subjective and unvoiced view concerning whether an person being interrogated is a suspect in a crime is irrelevant to the assessment of whether that person is in custody.

During the search for the killer of a ten-year-old girl, a Los Angeles County Sheriff learned that the victim had talked to two ice cream truck drivers before her disappearance. The officer considered the other driver to be a leading suspect, but also desired to talk with Robert Edward Stansbury. The other person was brought in for questioning, and Stansbury was asked to come in for an interview a short time later--for questioning as a potential witness. *Stansbury, supra*, 114 S.Ct. at 1527.

Stansbury agreed to come in and was not given his *Miranda* warnings. He told the officers that he had spoken with the victim around 6 p.m. on September 28, 1982, had returned to his home around 9 p.m., and left around midnight, driving his housemate's turquoise car. Because the color and description of the car matched one a witness had seen in the area of the victim's disappearance, and Stansbury admitted to prior convictions for rape, kidnapping and child molestation, the interview was terminated and Stansbury was advised of his rights. *Id.*

The trial court denied Stansbury's pretrial motion to suppress because Stansbury was not "in custody" until he mentioned taking the car for a late night drive. Before that question, the court reasoned, suspicion was on the other ice cream truck driver. The California Supreme Court affirmed on direct appeal, setting out the following legal standard:

> 'the totality of the circumstances is relevant, and no one factor is dispositive. However, the most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.' *Id.*, at 1528, quoting *People v. Stansbury*, 846 P.2d 756, 775 (Cal. 1993).

The California court focused on the second factor, and accepted the trial court's factual determination that Stansbury became the focus of the investigation only when he said he had been in a turquoise car on the night of the crime. Thus, Stansbury "was not subject to custodial interrogation" before that. *Id.*

The Supreme Court said that a court must examine all the circumstances surrounding the question of whether a person is in custody, but "'the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" *Id.*, quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983).

However, it is clear that the initial determination of whether a person is in custody depends on the "objective circumstances of the interrogation", not on the views of the interrogating officers or the person being questioned.

> In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave. *Id.*, at 1530.

Thus, the California Supreme Court's analysis is not consistent with prior Supreme Court principles and the court's conclusion that Stansbury's right to *Miranda* warnings was triggered only after he became the focus of the investigation is also incorrect. *Id.*

The state had acknowledged that the officers' suspicions did not bear on the question of whether Stansbury was in custody, but maintained that Stansbury was not. Stansbury asserted just the opposite, that he was in custody even before his arrest. *Id.*

Finding it "appropriate for the California Supreme Court to consider this question

in the first instance", the Supreme Court remanded for further proceedings.

Powell v. Nevada
114 S.Ct. 1280 (1994)

Vacated and remanded. 7-2 majority.

Majority: Ginsburg (writing), Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter

Minority: Thomas and Rehnquist

In its decision that *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) did not apply to Powell's case, the Nevada Supreme Court misread the *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987) mandate that a new rule of criminal procedure applies retroactively to those cases not yet final when the rule is announced.

Powell was sentenced to death for the murder of his girlfriend's four-year-old daughter. On direct appeal, Powell argued that because 10 days elapsed between his arrest for the crime on November 3, 1989 and his initial appearance before a magistrate on November 13, the state had violated Nevada's initial appearance statute by failing to bring him before a magistrate within 72 hours of his arrest. *Powell, supra*, 114 S.Ct. at 1282.

The Nevada Supreme Court agreed with the state that Powell had waived his right to a speedy arraignment by not waiving his right to remain silent and his right to counsel. The state court also made an inquiry into whether the Nevada state law violated Supreme Court precedent, and decided that *McLaughlin* rendered the state statute unconstitutional insofar as it permitted an initial appearance up to seventy hours of arrest, but also declared *McLaughlin* inapplicable to Powell because *McLaughlin* was handed down **after** Powell was arrested.

MAJORITY OPINION

Justice Ginsburg wrote that the state had conceded that the delay between Powell's arrest and his appearance was "presumptively unreasonable" under *McLaughlin*, and that the Nevada Supreme Court's retroactivity analysis was incorrect. *Id*, at 1283.

The majority said that notwithstanding its ruling, it "does not necessarily follow... that Powell must 'be set free'" or be entitled to other relief, because other questions remained, *i.e.*, the Nevada Supreme Court had not yet considered the appropriate remedy for delay in determining probable cause, or the state's assertion of harmless error in view of a similar, shorter statement Powell made on November 3, prior to his arrest. Thus, the case was remanded. *Id.*

DISSENT

Justice Thomas felt the petition was "improvidently granted" because there was no confusion in the lower courts about the meaning of *Griffith, supra*. *Id.*, at 1284.

Powell argued that the statement he made on November 7 should be suppressed because of the error in the timing of his first appearance. Thomas said this error "bore no causal relationship whatsoever to his November 7 statement." It would have affected his statement only if a hearing before the deadline had resulted in a finding of no probable cause. However, because there was probable cause in this case, even had Powell's initial appearance been made before the deadline, the result would have been the same: Powell would have been held. *Id.*, at 1286. Powell's arrest is also lawful, because the police had probable cause. *Id.*, at 1287.

Johnson v. Texas
113 S.Ct. 2659 (1993)

Affirmed. 5-4.

Majority: Kennedy (writing), Rehnquist, Scalia, Thomas and White

Minority: O'Connor (writing), Blackmun, Stevens and Souter

The Texas capital sentencing procedures in effect at the time of nineteen-year-old Dorsie Lee Johnson's capital murder trial allowed for adequate jury consideration of his youth.

At trial, the prosecution presented evidence that Johnson's robbery and murder of a store clerk were not his first experiences with the criminal justice system. At the time of that robbery, Johnson was still on probation for the 1984 burglary of a store in Waco. Johnson had twice violated that probation by smoking marijuana. In addition, a longtime friend testified that in 1986, Johnson had hit her, thrown a large rock at her head and pointed a gun at her on several occasions. His girlfriend reported that one afternoon in 1986, he became angry at her and threatened her with an axe. A classmate testified that Johnson had cut him with a piece of glass when they were in the seventh grade. Another classmate reported the same crime while Johnson was in eighth grade. Johnson stabbed a third classmate with a pencil. *Johnson, supra*, at 2662.

The defense presented Johnson's father, Dorsie Lee Johnson, Sr., who attributed his son's criminal history to drug use and youth. The elder Johnson said that his 19-year-old son was at "a foolish age. They tend to want to be macho, built-up, trying to step into manhood" and that eighteen or nineteen-year-olds have "undeveloped mind[s]..he just don't evaluate what is worth--what's worth and what isn't like he should like a thirty or thirty-five year old man would." Dorsie Johnson, Sr. also said that his son was a regular churchgoer and had had problems following the death of his mother in 1984 and the murder of his sister in 1985. *Id.*, at 2663.

During voir dire, jurors were questioned about whether they believed people could change and whether the venirepersons had done things in their youth they would not do now. Johnson's counsel returned to that theme in his closing argument. *Id.*, at 2664.

MAJORITY OPINION

Justice Kennedy said that while the *Lockett/Eddings* line of cases prevents a state from placing relevant mitigation beyond the reach of the jury, those Eighth Amendment cases have never prevented a state from **guiding** the jury's consideration of that mitigating evidence. *Boyde v. California*, 494 U.S. 370, 377, 110 S.Ct. 1190, 1196, 108 L.Ed.2d 316 (1990), clearly said that "there is no... constitutional requirement of unfettered sentencing discretion in the jury" and that states may "structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Johnson, supra*, at 2666.

Secondly, the statute under which Johnson was sentenced to death was found constitutional in four earlier Supreme Court opinions. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), in the group of five cases decided on the same day as *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), determined that the Texas system satisfied the requirements of the Eighth and Fourteenth Amendments concerning consideration of mitigating evidence. *Jurek, supra*, (joint opinion of Stewart, Powell, and Stevens, JJ.). Three

other justices agreed with this reasoning. *Johnson, supra*, at 2667.

Twelve years later, in *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), a plurality of the Supreme Court felt that the second Texas special issue (continuing threat to society--future dangerousness) gave the jury an opportunity to reflect on a defendant's prison disciplinary record as mitigation because that issue dealt with his character. Thus, the Texas system guided the jury's consideration of mitigating evidence, while still providing for the necessary discretion. *Johnson, supra*, at 2667.

The very next year, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Court said that the Texas special issues did not allow for an "appropriate consideration" of Johnny Paul Penry's mitigating evidence of mental retardation and childhood abuse, because the jury had never been instructed that it could consider the evidence as mitigating and that it could give mitigating effect to that evidence in deciding Penry's sentence. Further, under the future dangerousness special issue, Penry's evidence was only relevant as an **aggravating** factor because it suggested that Penry could be dangerous at some point in the future. Lastly, the Court made it clear that *Penry* was an application of *Jurek*, *Lockett* and *Eddings*, and not a *Teague v.Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) new rule. *Johnson, supra*, at 2667.

Graham v. Collins, 506 U.S. ___, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), confirmed this limited view, but was somewhat different, because the evidence Gary Graham offered was relevant to the issue of future dangerousness. Lastly, the court decided that Graham was trying to avail himself of a *Teague* "new rule," and, therefore, could not benefit from it. *Johnson, supra*, at 2667.

There is "no dispute" that a defendant's youth is relevant mitigation which must be within the reach of the jury if a death sentence meets *Lockett/Eddings* scrutiny. However, the instruction that the jury was to decide whether there was a probability that Johnson would commit criminal acts which would constitute a continuing threat to society met the *Boyde v. California, supra*, test that there must be a "reasonable likelihood" that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

Further, the jury was told that it could consider all the mitigating evidence presented during both the guilt and penalty phases of Dorsie Johnson's trial. *Johnson, supra*, at 2669.

"Even on a cold record, one cannot be unmoved by the testimony of petitioner's father" that his son's actions were, in large part, due to his young age. Thus, "ample room" existed in the future dangerousness issue for the jury "to take account of the difficulties of youth as a mitigating force in the sentencing determination." Further, as recognized in *Graham*, the fact that a juror might view that evidence as aggravation, rather than mitigation, does not mean that a *Lockett* violation has occurred, because as long as mitigating evidence is within the juror's reach, the Eighth Amendment is satisfied. *Id.*, quoting *Graham, supra*, 113 S.Ct. at 901-902.

Johnson argued that the forward looking prospective of the second special issue allowed the jury to take into account how his youth bore upon his culpability for his crimes. The majority disagreed with this contention because "this forward-looking inquiry is not independent of an assessment of personal culpability. It is both logical and fair for the jury to make its determination of a defendant's future dangerousness by asking the extent to which youth influenced the defendant's conduct." *Id.*, at 2670. Thus, because if any juror believed that "the transient qualities" of Johnson's youth made him less culpable, there was no "reasonable likelihood" that the juror could have seen himself foreclosed from considering that in evaluating Johnson's future dangerousness. Texas might "have provided other vehicles" for considering Johnson's youth, but no further instructions were necessary. *Id.*

PENRY REASONED MORAL RESPONSE

Johnson argued that because the second special issue called for a narrow factual inquiry into his future dangerousness, the jury could not make the "reasoned moral response" mandated in *Penry*. *Id.*, at 2670.

The jury must make more than a factual inquiry in order to answer that question. In *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 2527, 65 L.Ed.2d 581 (1980), the Supreme Court said that the Texas system required jurors to "exercise a range of judgment and discretion." Further, "continuing threat to society" terms in the second special issue gave the jury room for independent judgment in reaching a decision. *Franklin v. Lynaugh, supra*, 108 S.Ct. at 2332, n.12, made that clear: a Texas jury deliberating the special issues "is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates those answers in a manner similar" to juries in "pure balancing states." Indeed, in his dissent in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 1091, 108 L.Ed.2d 255 (1990), Justice Brennan used the Texas statute when he said that "by focusing on the deliberateness of the defendant's actions and his future dangerousness, [Texas juries are] compel[led] to make a moral judgment about the severity of the crime and the defendant's culpability." *Johnson, supra*, at 2671.

Lastly, the majority felt that if it were to find Johnson's sentence constitutionally defective, *Jurek* would then fall, and *Lockett/Eddings* would be significantly altered because juries would then be required to "give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Id.* Finally, were the Court to rule in Johnson's favor, "all power" on the part of the states to structure consideration of mitigating evidence would be removed. *Id.*, at 2672.

SCALIA CONCURRENCE

Justice Scalia reiterated his view that *Lockett/Eddings* is "incompatible" with the *Furman* requirement that the sentencer's discretion must be channeled. *Id.*

THOMAS CONCURRENCE

Justice Thomas continue to advance his opinion that *Penry* was "wrongly decided". *Id.*

DISSENT

Justice O'Connor, joined by Justices Blackmun, Stevens and Souter, wrote that in its decision, the majority invoked "a highly selective version of *stare decisis*" and misapplied the Court's habeas ruling to a case on direct appeal. *Id.*

The dissent began by recounting Johnson's less than stellar youth, and by detailing how a juror could easily have thought that while Johnson would outgrow his temper and violent behavior as he matured, it was more likely that juror saw Johnson's life as a pattern of violence that would continually escalate as Johnson grew older. Even if jurors could have seen Johnson's youth as transient,

the dangerousness associated with his age would not dissipate until sometime in the future. Thus, whether a juror believed either circumstance true, the answer to the second special issue would still have to be yes, that Johnson would be dangerous in the future and that Johnson's youth would be an aggravating factor, not the mitigation it was intended to be. *Id.*, at 2673.

However, even if a juror could give the evidence some mitigating weight, O'Connor felt an additional instruction was constitutionally required because none of the special issues allowed a jury to give effect to the relation of a defendant's youth to his culpability for the crimes he commits. *Id.*, citing *Skipper v. South Carolina*, 476 U.S. 1, 106 s.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986). In other words, a juror could conclude that a defendant acted deliberately, that he would be dangerous in the future, and still believe that, because of his young age, the defendant was less responsible for his crimes than an older person. O'Connor thought *Eddings* itself had made this proposition clear:

> [Y]outh is more than a chronological fact. It is a time and a condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults. *Johnson*, *supra*, at 2673, citing *Eddings*, *supra*, 102 S.Ct. at 977.

Graham reached the same conclusion: "[y]outh may be understood to mitigate by reducing a defendant's moral culpability for the crime, for which emotional and cognitive immaturity and inexperience with life render him less responsible." *Id.*, quoting *Graham*, *supra*, 113 S.Ct. at 924 (Souter, J., dissenting).

Graham does not control *Johnson*. *Teague v. Lane*, *supra*, does not come into effect until finality--after the Supreme Court has denied *cert* on direct appeal or the time for filing a petition for *cert* on direct appeal has expired. Until that time, finality and comity are not an issue, only the Constitution is. The Court should not ask whether rules can fairly be discerned from past precedent, or even if reasonable jurists would have discerned it from past precedent. The only question is whether the result is **dictated** by past cases, or whether it is "susceptible to debate among reasonable minds." *Johnson*, *supra*, at 2675, quoting *Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990).

If the *Graham* rule is new, it is only because the Supreme Court had never before held that the former Texas statute required an additional instruction regarding a defendant's youth.

> To allow our failure to address an issue to create [an insurmountable reliance] interest would elevate our practice of letting issues 'percolate' in the 50 states in the interests of federalism over our responsibility to resolve emerging constitutional issues. On direct review, the question is what the Constitution, read in light of our precedents, requires. *Id.*, at 2675.

The Court's previous cases give "considerable support" to the proposition that a sentencing jury must give full effect to all the mitigating evidence a capital defendant presents. *Gregg* and *Jurek*, *supra*; *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Lockett*, *Eddings*, and *Skipper*, *supra*, **all** made this clear.

Furthermore, *Jurek* has nothing to do with *Johnson*. *Jurek* was a facial challenge to the constitutionality of the Texas death penalty statute, not a challenge to the statute as applied. In *Franklin v. Lynaugh*, *supra*, the first as-applied challenge to the Texas statute, five members of the Supreme Court rejected the plurality's reliance on *Jurek*, and disagreed with the suggestion that a state could limit the sentencing authority's ability to give effect to mitigating evidence.

Penry, *supra*, plainly held that the Texas special issues violated the Fourteenth Amendment to the extent that juries were not able to give full consideration to a defendant's relevant mitigating evidence. Contrary to the majority's view, *Penry* did not limit itself to evidence which could be aggravating under the "future dangerousness" special issue; rather, *Penry* meant what it said: that a jury must be able to give full effect to the mitigating evidence it hears. *Johnson*, *supra*, at 2679, citing *Penry*, *supra*, 109 S.Ct. at 2966.

Godinez v. Moran
113 S.Ct. 2680 (1993)

Reversed. 7-2 majority.

Majority: Thomas (writing), Rehnquist, O'Connor, Kennedy, Scalia, White, Souter

Minority: Blackmun (writing) and Stevens.

The competency standard for pleading guilty or waiving the right to counsel is the same as the standard for competency to stand trial: whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (*per curiam*).

In 1984, Richard Allen Moran entered a Las Vegas bar, shot and killed the bartender and a patron, took the cash register and left. Nine days afterward, Moran shot his former wife five times and killed her and then shot himself. While in the hospital recovering from the suicide attempt, Moran confessed to the bar killings. After Moran pleaded not guilty, the trial court ordered psychiatric examinations, after which Moran was found competent to stand trial and the state announced that it would seek the death penalty. Nearly three months after the examinations, Moran returned to court and announced his intention to discharge his attorneys and plead guilty to the crimes. By doing so, he said he wanted to prevent the introduction of mitigating evidence at his sentencing. *Godinez v. Moran*, 113 S.Ct. at 2682-2683.

The trial court advised Moran that he had a right to the assistance of counsel and to self-representation, but warned Moran of the "dangers and disadvantages of representing himself, inquired into his understanding of the proceedings and his awareness of his rights." The court accepted Moran's guilty pleas, and explicitly found that Moran "knowingly and intelligently" waived his right to the assistance of counsel and that the guilty pleas were "freely and voluntarily" given. *Id.*, at 2683.

After affirmance on direct appeal and dismissal of his state post-conviction pleading, Moran filed a habeas petition. The Ninth Circuit reversed the district

court's denial because the record should have led the trial court to "entertain a good faith doubt" about Moran's competency to make a voluntary, knowing and intelligent waiver of his rights. Therefore, the Ninth Circuit said, the trial court should have held a competency hearing before it accepted Moran's decision to discharge his trial counsel and plead guilty, because competency to waive constitutional rights requires a higher level of mental functioning than that required for a person to stand trial. The Supreme Court granted *cert* to correct the conflict in the federal courts the question had caused. *Id.*, at 2683-5.

MAJORITY OPINION

Justice Thomas said that the Ninth Circuit read too much into *Westbrook v. Arizona*, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966), a *per curiam* opinion in which the Supreme Court vacated a conviction because while there had been a hearing on the petitioner's competence to stand trial, there was no inquiry into whether the petitioner was competent to waive his constitutional right to the assistance of counsel. *Moran, supra*, at 2685.

GUILTY PLEA

Defendants who stand trial are likely to be presented with choices which entail relinquishing the same rights as those given up by a defendant who pleads guilty. He may decide to waive his right to testify for himself, his right to trial by jury, and his right to confront the witnesses against him. He may also have to decide whether (and how) to present a defense, and whether to raise affirmative defense(s). "In sum, **all** criminal defendants--not merely those who plead guilty--may be required to make important decisions once criminal proceedings have been initiated." *Id.*, at 2687, (emphasis in original). While the decision to plead guilty is profound, it certainly is no more complicated than any of the other decisions a defendant makes while he is on trial. Thus, there is no basis to require a higher level of competence for those defendants who choose to plead guilty. *Id.*, at 2686-7.

A defendant who chooses to waive his right to the assistance of counsel also need not be more competent than a defendant who does not waive that right. Moran's argument that a defendant who represents himself must meet a higher standard because he must have greater powers of comprehension, judgment and reason is "flawed" because the necessary competence is the competence to **waive** the right, not the competence to represent oneself. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), made this clear: while a defendant must knowingly and intelligently waive his right to counsel, his "technical legal knowledge" is "not relevant" to the determination of his competence to waive this right. *Moran, supra*, at 2686.

2While the trial court must find that the defendant is competent, it must also satisfy itself that a defendant's guilty plea or waiver of his right to counsel is knowing and voluntary. Thus, there is a "heightened" standard for pleading guilty and waiving the right to counsel, but no "heightened" standard for competence. *Id.*, at 2687.

This two-part standard (competence to waive counsel and plead guilty and a knowing and voluntary waiver) is what the court had in mind in *Westbrook, supra*. *Moran, supra*, at 2688.

KENNEDY AND SCALIA CONCURRENCE

Justice Kennedy joined the Court's opinion, but had "some reservations" about one part of the decision. Kennedy said the Court compared the types of decisions made by the defendant who chooses to go to trial with those required to waive counsel and plead guilty. He felt that "[t]his comparison seems to suggest that there may have been a heightened standard of competency required by the Due Process Clause if the decisions were not equivalent." Kennedy had "serious doubts" about that proposition, because the Court should "not confuse" the content of the standard for a criminal defendant's competency to make a decision affecting his case with the "occasions for its application." *Id.*, at 2688.

"What is at issue here is whether the defendant has sufficient competence to take part in a criminal proceeding and to make the decisions throughout its course." *Id.*, at 2689.

Both the Ninth Circuit and Moran read the *Dusky* standard too narrowly, because *Dusky* applies from the time a defendant is arraigned until after a verdict is returned. *Dusky* focused on a particular level of mental functioning, not the possibility that consultation of counsel will occur. If a defendant wishes to stand trial and act as his own counsel, the law does not then require an added degree of competence.

The Due Process Clause itself did not mandate different degrees of competency at various stages of a criminal proceeding. Furthermore, the single standard has its roots in English common law. Blackstone himself made no distinction between competency for pleading and competency to stand trial. A number of 19th century cases from this country also support the single standard. *Id.*, at 2689-90.

Finally, trial courts are obligated to conduct hearings if there is a sufficient doubt about a defendant's competence. *Id.*, at 2691, citing *Drope v. Missouri*, 420 U.S. 162, 180-181, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). However, the competency standard still does not change.

"A single standard of competency to be applied throughout the criminal proceedings does not offend any 'principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Id.*, at 2691, citing *Medina v. California*, 112 S.Ct. 2572, 2573, 120 L.Ed.2d 353 (1992). No caselaw compels a different conclusion. Adoption of a rule decreeing various standards of competency would "prove unworkable both at trial and upon appellate review." *Id.*

BLACKMUN AND STEVENS DISSENT

Justice Blackmun dissented because he felt the Court upheld a death sentence for a person whose decision to discharge his counsel, plead guilty and present no defense may have been the product of medication or mental illness.

The two psychiatrists who performed the court-ordered evaluation of Moran were concerned only with his capacity to stand trial with the assistance of counsel. One psychiatrist found Moran to be "in full control of his faculties insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so." *Id.*, at 2692. However, the expert went on to say that because Moran was expressing considerable remorse and guilt, he felt Moran "may be inclined to exert less effort towards his own defense." *Id.* Even under those circumstances, however, the psychiatrist felt Moran's state of mind "was not necessarily a major consideration." *Id.*

The second psychiatrist also characterized Moran as very depressed, remarking that Moran "showed much tearing" in talking about his incarceration, particularly when Moran spoke about his ex-wife. *Id.* This psychiatrist also

concluded that Moran had knowledge of the charges against him and can "assist his attorney" in his own defense. *Id.*

When Moran went before the trial court with his wish to waive counsel and plead guilty, he told the trial court that he opposed all efforts to mount a defense in his behalf. The trial judge asked if Moran were under the influence of drugs or alcohol and Moran replied, "[j]ust what they give me in, you know, medications." Had the judge gone farther and asked exactly what Moran was taking, he would have been told that Moran was taking two anti-seizure medications, an anti-arrhythmic, and a depressant, all of which have varying degrees of impact on mental functioning. Moran later testified that when he was taking the drugs, "I guess I really didn't care about anything...I wasn't very concerned about anything that was going on...as far as the proceedings and everything were going." *Id.*

During the waiver and guilty plea proceedings, Moran gave monosyllabic answers to the questions being asked him, and at one point, replied, "No. I didn't do it--I mean, I wasn't looking to kill her, but she ended up dead" to the question of whether he deliberately, with premeditation and forethought killed his ex-wife. The trial judge asked the question again, and got the response that Moran "[didn't] know. I mean I don't know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn't plan on doing it, you know what I mean?" The trial judge asked the question a third time, but this time gave a definition of deliberation and premeditation. That time, Moran answered yes. *Id.*

Justice Blackmun had no argument with the majority's standard for competence to stand trial. However, he ran into problems with the standard for assessing a defendant's competence to waive counsel and represent himself. A person's competence to stand trial only establishes that he can assist his attorney. However, unlike the majority sees it, a much different question is asked when a defendant whose competency to stand trial is questionable seeks to waive counsel and represent himself.

"The majority's monolithic approach to competency is true neither to life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose." *Id.*, at 2694. The Court's own cases have recognized that a defendant's mental condition may have relevance to more than one legal issue, each with its own distinct rules. *See Rees v. Peyton*, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) (court must "determine petitioner's mental competence in the present posture of things").

In *Massey v. Moore*, 348 U.S. 105, 75 S.Ct. 145, 147, 99 L.Ed. 135 (1954), the Supreme Court ruled that a defendant found competent to stand trial with the assistance of counsel should have had a hearing as to whether he was competent to represent himself because, while he may not have been insane, he may not have been competent enough to stand trial without the assistance of counsel. *Westbrook, supra*, itself made this point.

"Certainly the competency required for a capital defendant to proceed **without the advice of counsel** at trial or in plea negotiations should be no less than the competency required for a capital defendant to proceed **against the advice of counsel** to withdraw a petition for certiorari." The Ninth Circuit standard "closely approximates" the *Rees* standard. *Id.*, at 2695, (emphasis added).

Justice Blackmun found exception with the majority's reliance on *Faretta, supra*, because "*Faretta* does not confer upon an **incompetent** defendant a constitutional right to conduct his own defense." *Faretta* "is confined to those who are able to choose [to represent themselves] competently and intelligently." *Id.*, (emphasis added).

The majority's assertion that the competence of a defendant seeking to waive his right to counsel is the competence to waive the right is incorrect. It is obvious that a defendant who waives his right to counsel must represent himself; however, "a defendant who is utterly incapable of conducting his own defense cannot be considered 'competent' to make such a decision." *Id.*, at 2695.

The record supplies grave doubts about Moran's abilities to discharge his counsel and represent himself. Moran "essentially volunteered himself for execution"; he was, by his psychiatrists' admission "deeply depress[ed]; he was being given four different drugs, each of which had varying degrees of impact upon his mental abilities"; the plea colloquy itself demonstrates these concerns.

"To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system." *Id.*, at 2696.

Delo v. Blair
113 S.Ct. 2922 (1993)

In a *per curiam* decision, the Supreme Court granted a motion to vacate an Eighth Circuit stay of execution because it is "particularly egregious" to enter a stay on second or subsequent petitions unless the *Herrera v. Collins*, 113 S.Ct. 853, 873, 122 L.Ed.2d 203 (1993) "substantial grounds upon which relief might be granted" standard is met. *Blair*, 113 S.Ct. at 2923.

In this case, the district court said that the facts in *Herrera* "mirror[ed]" those in *Blair*; the Eighth Circuit did not question that assessment. Thus, there was no "conceivable need" for the Eighth Circuit to give the case a "more detailed" five week study. *Id.*

The Eighth Circuit abused its discretion by interfering with the orderly process of a states' criminal justice system" in a case "for all relevant purposes indistinguishable" from *Herrera*. *Id.*

BLACKMUN AND STEVENS DISSENT

Justice Blackmun felt the Supreme Court erred twice in its decision to vacate the stay of execution.

First, the standard by which motions to vacate stays is abuse of discretion. The Eighth Circuit wanted time to consider Blair's evidence. Thus, the Eighth Circuit did not abuse its discretion by granting the stay. Although the habeas was Blair's third, his principal claim was that he was actually innocent. In *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 91991), the Supreme Court itself recognized that a showing that a habeas petitioner is actually innocent is an exception to the abuse of the writ doctrine.

Secondly, the Court erred by not ordering an evidentiary hearing. Under *Herrera* itself, if a petition raises factual questions and the state has failed to provide a full and fair hearing, the district court is **required** to hold an evidentiary hearing. *Id.*, at 2924, citing *Herrera, supra*, 113 S.Ct. at 581-2 and *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) (emphasis in original).

Walter Blair submitted seven affidavits tending to show his innocence. The state did not dispute the fact that no state relief was open to Blair. Thus, because Blair's affidavits raised factual questions which could not be dismissed summarily, the

district court erred by denying Blair's petition without first holding an evidentiary hearing.

JUSTICE SOUTER

Justice Souter would have denied the motion to vacate the stay.

CASES RELATING TO CAPITAL ISSUES TO BE ARGUED THIS TERM

1. *Harris v. Alabama*, 93-7659.
   June 27, 1994.
   [Decision below: 632 So.2d 543 (Ala. 1993)]

   Is death sentence invalid when trial court overrides constitutionally protected jury verdict of life without parole and imposes death, when court relies on no norm or standard for limiting its discretion to override and when it gives no reason as to why jury verdict is improper?

   Does capital sentencing scheme in which trial courts are free to reject jury life-without-parole verdicts without regard to any articulated standard or norm, and in which rejection of those verdicts results in haphazard and inconsistent application of death penalty, violate Eighth Amendment?

2. *O'Neal v. McAninch*. 93-7407.
   April 4, 1994.
   [Decision below: *sub nom. O'Neal v Morris*, 3.F.3d 143 (6th Cir. 1993)]

   Question presented:
   Does state have burden of proving constitutional error to be harmless under *Brecht v. Abrahamson* [, 113 S.Ct. 1710, 1718, 123 L.Ed.2d 353 (1993)]?

3. *Schlup v. Delo*. 93-7901.
   March 28, 1994.
   [Decision below: *Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993)]

   Questions presented:
   Whether the *Sawyer* [*v. Whitley*, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)] standard or the *Kuhlman* [*v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986)] standard governs a claim regarding the determination of guilt or innocence in a capital case.

   Whether, if *Sawyer 's* test applies, it requires a habeas petitioner to show that the evidence of guilt was constitutionally insufficient to support conviction.

4. *Kyles v. Whitley*. 93-7927.
   February 10, 1994

   [Decision below: *Kyles v. Whitley*, 5 F.3d 806 (5th Cir. 1993)]

   Questions presented:
   Would production by state of exculpatory materials, proper prosecutorial conduct, and effective performance by petitioner's trial counsel have resulted in acquittal or mistrial?

   Would production by state of exculpatory materials, proper prosecutorial conduct, and effective performance by petitioner's trial counsel have produced sufficient residual doubt in mind of at least one juror to result in life sentence rather than death penalty?

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Ask Corrections

QUESTION:

My client received a one (1) year felony sentence for Burglary 3rd Degree in the Circuit Court. In addition, the District Court found him to be in contempt of court and imposed a ten (10) day jail term, which is to run consecutive to the felony sentence. It is my understanding that the jail sentence would run concurrently to the felony sentence pursuant to KRS 532.110(1)(a). Is this correct?

ANSWER:

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