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

THE ADVOCATE

The Means of Defense for Those Without

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The lawyers who make Kentucky's indigent defense system work are in a great tradition. They prove what Justice Holmes said long ago: "It is possible to live greatly in the law."

- ANTHONY LEWIS
The New York Times

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

FROM THE EDITOR:

Anthony Lewis - Kentucky public defenders live greatly in the law. This message is brought to us in a very special article for *The Advocate* by the *New York Times'* Anthony Lewis, one of this country's preeminent social commentators. We are indebted to him for hisencouragement of Kentucky defenders of our Bill of Rights.

Carol Jordan - This issue we feature the second article in a 4-part series by Carol Jordan of the Cabinet for Human Resources, a widely respected Kentucky mental health expert and advocate. We are pleased to share her considered thoughts in our continued effort for quality adult public dialogue on criminal justice issues which matter to the Commonwealth.

Rodney McDaniel - Unfair racial factors too often seep into the criminal justice system. This issue presents an article from Rodney McDaniel reviewing cases which have applied *Batson.*

RACISM - How can Kentucky more effectively rid its criminal justice system of racism, both blatant and subtle? We seek your views for future *Advocate* issues.

Judge Stan Billingsley - We also begin this issue a unique series of benefit to Kentucky defenders and the Kentucky criminal justice community - a series of selective unpublished orders from the Kentucky district courts on significant criminal issues. This is possible due to the generous assistance of Judge Stan Billingsley of Carrollton who has created a District Court Opinion Library. We appreciate his help.

Capital Trials - Marla Sandys presents eye-opening empirical data on Kentucky death cases. We had better take notice of this life and death research.

Edward C. Monahan, **Editor**

DPA'S CONSTITUTION (1993)

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

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☞ IN THIS ISSUE ☜

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

Living Greatly in the Law

Anthony Lewis

Anthony Lewis, twice winner of the Pulitzer Prize, is a columnist for The New York Times. Resident in Boston, he travels widely in this country and abroad. He has also covered the Supreme Court for The Times, and been chief of its London Bureau.

Mr. Lewis was born in New York City on March 27, 1927. He attended the Horace Mann School in New York and received his B.A. degree from Harvard College in 1948.

From 1948 to 1952 he worked for the Sunday Department of The Times. In 1952 he became a general assignment reporter for the Washington Daily News. In 1955 he won his first Pulitzer Prize for national reporting, for a series of articles in the Daily News on the dismissal of a Navy employee as a security risk. The articles led to the employee's reinstatement.

Mr. Lewis joined the Washington Bureau of The Times in 1955, to cover the Supreme Court, the Justice Department and other legal subjects. In 1956-57 he was a Nieman Fellow at Harvard, studying law. In the following years he reported on, among other things, the Warren Court and the Federal Government's responses to the civil rights movement. He won his second Pulitzer Prize in 1963 for his coverage of the Supreme Court.

He is the author of three books: Gideon's Trumpet, about a landmark Supreme Court case, Portrait of a Decade, about the great changes in American race relations, and (in 1991) Make No Law: The Sullivan Case and the First Amendment. He has published numerous articles in legal journals.

Mr. Lewis was for fifteen years a Lecturer on Law at the Harvard Law School, teaching a course on The Constitution and the Press. He has taught at a number of other universities as a visitor, among them the Universities of California, Illinois, Oregon and Arizona. Since 1983 he has held the James Madison Visiting Professorship at Columbia University.

He has received a number of honorary degrees. In 1983 he was the Elijah Parish Lovejoy Fellow at Colby College. In 1987 he delivered the John Foster Memorial Lecture at University College, London.

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Our Response to *Gideon*

When the *Gideon* case was decided, now more than 30 years ago, I thought this country would respond in the spirit of the Supreme Court's unanimous judgment. I believed that the states and the Federal Government would promptly and fully meet the obligation to assure counsel for all who faced criminal charges without the money to pay a lawyer.

How wrong I was. Today Congress often fails to appropriate sufficient funds for the defense of indigent Federal defendants, and many states and localities are trying to reduce funding as the caseload balloons.

The Burden Falls on Lawyers Representing the Poor

The result is to put an increasingly heavy burden on lawyers who devote themselves to defense of the poor. They bear an extraordinary respnsibility: not just to stand up for indigent defendants but really to maintain faith in our system of justice. The public does not always understand their role, as hardly needs to be said in this age of outcry for more jails, more punishment, more convictions. But the public's sense of justice will be diminished, in time, if people are railroaded to prison because no adequate defense was made on their behalf.

Texas as an Example

An acute example of inadequate legal resources is the situation faced today by those on death row in Texas: 368 men and 4 women. As many as 70 of them have no lawyers to help them through the crucial final efforts to avoid execution. That is twice as many unrepresented as a year ago, despite repeated appeals to the Texas bar and help from out-of-state lawyers.

Gideon did not cover post-conviction remedies; in those processes there is no constitutional right to counsel. But no one who understands how capital cases work in this country can doubt the crucial importance of counsel at the final stages. It is, literally, a matter of life and death. Many convictions have been set aside in Federal habeas corpus proceedings because of grave constitutional errors, and a significant number of convicted persons have actually been found innocent. So it is a sad comment on the state of justice that not enough Texas lawyers are willing to volunteer for the representation of men and women on death row. And, of course, it is a comment on the state of Texas that, unlike other states with large death row populations, it provides neither money nor lawyers itself.

Public Defenders do Society's Work

Lawyers who volunteer or work at modest salaries to represent the poor are doing society's work. But I do not think that it should really be regarded as a burden. It is an honor that gives meaning to their professional lives.

Lawyers Redeem Us from Injustice

Again and again in American history lawyers have come forward to redeem our society from cruelty and injustice. Often it is only a few brave lawyers, but they bring honor to the profession. I think of those who defended witnesses before Congressional committees in the McCarthy days, or helped others facing charges of Communist associations. Or of Charles Evans Hughes, who during the Red Scare of the 1920's represented Socialists who had been elected to the New York Legislature but were being denied their seats. Or of Gilbert E. Roe and Walter Pollak and the others whose briefs informed the Holmes and Brandeis dissents in the early free speech cases that led, eventually, to the rights we now enjoy under the First Amendment.

Kentucky Public Defenders Live Greatly in the Law

The lawyers who make Kentucky's indigent defense system work are in a great tradition. They prove what Justice Holmes said long ago: "It is possible to live greatly in the law."

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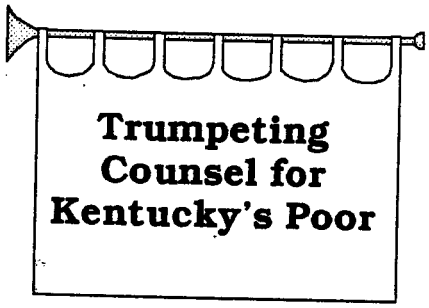
"Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

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

Public Advocate Seeks Nominations



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

In celebration of the 30th Anniversary of the United States Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Kentucky Department of Public Advocacy established the *Gideon* Award in 1993. It is presented at the Annual DPA Public Defender Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. The first award was presented in 1993 to J. Vincent Aprile, II, General Counsel of DPA, by Allison Connelly, Public Advocate. Written nominations should be sent to the Public Advocate by May 1, 1994 indicating the following:

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

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

- *The Washington Post* (1963)

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

- Anthony Lewis, *Gideon's Trumpet* (1964)

***Gideon's* Plea**

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

But the Spirit of the Lord came upon Gideon, and he blew a trumpet....

- Judges 6:34

Batson v. Kentucky in Kentucky

Rodney McDaniel

Batson v. Kentucky, 476 U.S.79, 106 S.Ct. 1713, 90 L.Ed.2d 69 (1986) held that the Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the state's case against a black defendant. A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. *Id.*, 106 S.Ct. at 1723. Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. *Id.* This paper will discuss some of the Kentucky cases that have applied *Batson v. Kentucky*.

PROCEDURAL REQUIREMENTS

In *Simmons v. Commonwealth*, Ky., 746 S.W.2d 393 (1988), a case in which the defendant was sentenced to death, the Kentucky Supreme Court held that it was not procedurally sufficient to merely move for a mistrial and continuance after the remaining jurors were discharged and had left the courtroom and the jury was sworn to try the case. In the words of the Court, "no objection was made here until after appellant had stated his satisfaction with the jury, the remaining jurors were discharged and had left the courtroom, and the jury was sworn to try the case. The only relief sought was a mistrial and a continuance of the case. We do not think the Commonwealth should be subjected to such delay and additional expense as would be caused by a new trial when the appellant could have avoided the situation entirely by making a timely motion. *Id.*, 746 S.W.2d at 398. The Court set forth the procedure which should be followed in this state:

> There is nothing to prevent a party from seeing the list of strikes of the opposing party after the strikes have been made and the list returned to the judge. **If there is a challenge to be made to the exercise of peremptories in this state, it should be made when the list of strikes has been returned to the judge and before the jury has been accepted by the parties and sworn to try the case and before the remainder of the jurors have been discharged from service.** *Id.*, Emphasis added.

Other courts have refused to address the *Batson* issue because the issue was not raised in a timely manner. *Moorman v. Commonwealth*, Ky. App., (decided October 11, 1991) ("In this case, the appellant merely objected but did not specifically state the relief sought. Since the black juror had already been discharged, as a practical matter, had the court sustained the motion the only available remedy would have been to dismiss the already sworn jury and declare a mistrial. Since appellant's motion was not timely raised, it was properly overruled"); *Ralston v. Commonwealth*, Ky.App., (decided April 2, 1993) ("A review of the record reveals that absolutely no objection was raised by defense counsel regarding the prosecutor's alleged discriminatory use of peremptory challenges until after the jurors had been sworn, other prospective jurors had been discharged and the trial was underway with opening arguments having been completed and the second day of trial about to commence. The trial court refused to hold a *Batson* hearing because the issue was not timely raised").

BATSON AND EFFECTIVE ASSISTANCE OF COUNSEL

The failure to make an objection to the discriminatory use of peremptory challenges can amount to ineffective assistance of counsel. *Black v. Commonwealth*, Ky.App., (decided August 24, 1990). Black, who was black, was tried by an all-white jury. It was established that at least two blacks were struck from the jury by peremptory challenges. It was also clear from the record that Black's attorney did not register a complaint to the exclusion of the blacks. Black filed an RCr 11.42 motion based on his attorney's failure to object to the exclusion of the black jurors. The Court of Appeals first rejected the trial court's holding that the 11.42 motion could be denied without a hearing because the trial court believed there was not a reasonable probability that the result would have been different if the excluded black veniremen had been permitted to sit on the jury. The Court of Appeals pointed out that the total or seriously disproportionate exclusion of black people from the venire because of their race is itself an unequal application of the law unrelated to the outcome of a particular case or trial. Additionally, the Court stated that "an attorney has a duty to assert all proper defenses." And "where a defense is weakened, because of unawareness of a rule of law, the accused has received ineffective assistance." The Court concluded as follows:

> In this case two of the prongs required to make out a prima facie case of discrimination were established. *Batson, supra.* Thus, the trial court must consider any and all circumstances, including statements made during the voir dire, and determine if a prima facie case of discrimination has been established. If it is determined that a prima facie case was established, the trial court must then require the prosecution to provide a neutral explanation of its exclusion of the black veniremen. Ultimately, if it is concluded that the black veniremen were excluded because of their race, Black's sentence must be vacated pursuant to RCr 11.42.

THE PRIMA FACIE CASE

To establish a prima facie case, "the defendant must first show that he is a member of a cognizable racial group... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'....Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire-

men from the jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination". *Batson, supra*, 106 S.Ct. at 1723.

In *Hardy v. Commonwealth*, Ky., 775 S.W.2d 919 (1989), a majority of the Supreme Court reversed the Court of Appeals which had found a prima facie case based on the prosecutor's striking of a black from the jury *and* the fact that the defendant, a black man, was charged with the rape of a white, under-aged female. The majority opinion focused only on the alleged "simple numerical calculation" and held that "Numbers alone cannot form the only basis for a prima facie showing." *Id.*, p. 920. While the majority opinion also pointed out that questions and statements during voir dire may be used to support or refute an inference of discrimination, it interestingly concluded that Hardy "cannot demonstrate any circumstance in this regard because it was the defense counsel, not the prosecutor, who asked the panel if they would have a problem with the fact that the defendant was black and the victims were white." *Id.*

Some of the "other relevant circumstances" which have been offered to establish a prima facie case of discrimination include an alleged neutral reason for excluding black jurors that was not applied to white jurors. For example, in *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112 (1990), one of the reasons the prosecutor gave for striking a black juror was his imposing appearance. Stanford pointed out that three white men on the jury were as big or bigger than he was and that "the only difference between Mr. Patrick and these three jurors is that he is black and they are white."

THE PROSECUTOR'S NEUTRAL EXPLANATION

It could be said that the Court's in Kentucky have shown a willingness to accept practically any explanation offered by the prosecution for peremptorily striking black prospective jurors. Perhaps the most interesting example of this is the case of *Commonwealth v. Snodgrass*, Ky., 831 S.W.2d 176 1992) In this case, a juror in question did not respond to the question of whether he knew the defendant. The prosecutor struck the juror and gave as his reason that the juror knew the defendant even though the juror had not said he knew the defendant and even though the prosecutor did not question the juror about this. Reversing the decision of the Court of Appeals, the Supreme Court held that "*Batson* does not require the neutral explanation for peremptorily striking a potential juror be derived from voir dire." *Id.*, p. 179. The Court went on to explain that a "prosecutor may utilize his own personal knowledge concerning a juror and information supplied from outside sources. *Whether the information is true or not is not the test.* The test is whether the prosecutor has a good faith belief in the information and whether he can articulate the reason to the trial court in a race-neutral manner which is not inviolate of the defendant's constitutional rights."

Stark v. Commonwealth, Ky., 828 S.W.2d 603 (1991) held that peremptory challenges "may be based upon perception or impressions of counsel." *Id.*, p. 605. The prosecutor in *Stark* claimed he struck the juror because none of the Commonwealth's representatives had a "reading" on the juror because she had not spoken during voir dire. *Id.* According to the Supreme Court, Stark "has not demonstrated the explanations to be pretextual and the prosecutor's explanations met *Batson* standards."

Snodgrass v. Commonwealth, Ky.App., (decided march 29, 1991), reversed in *Commonwealth v. Snodgrass, supra*, may be the only Kentucky case to have found that a prosecutor failed to give an explanation sufficient to show that a juror was not excluded because of his race. There are countless other opinions which have upheld various reasons offered by prosecutors for striking black jurors. It would not be useful to catalog all the various reasons the courts have found sufficient for striking jurors.

OTHER ISSUES

Gender. Does *Batson* prohibit the use of peremptory challenges to strike jurors based on gender? *Hannan v. Commonwealth*, Ky. App., 774 S.W.2d 462 (1989) says no.

Defense. Does *Batson* prohibit the use of peremptories to strike jurors who are sympathetic to a particular defense? In *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990), the Court stated, "We do not deem either the holding or the rationale in *Batson* to be so broad as to apply to the exercise of peremptory challenges to remove jurors who share, among themselves and with the defendant, a sympathetic attitude toward a particular legal defense... It is inconceivable that the equal protection principles underlying the *Batson* decision extend to persons especially disposed to consider an insanity defense."

Civil Cases. Following *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), the Court of Appeals has recognized that *Batson* applies to civil cases. *Washington v. Goodman*, Ky.App., 830 S.W.2d 398 (1992).

SIXTH CIRCUIT CASES

In *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1521-1522 (6th Cir. 1988), the Court listed some of the factors to be taken into account in assessing the inference of discrimination necessary to make a prima facie case:

> If, after the jury selection process has ended, the final jury sworn has a percentage of minority members that is significantly less than the percentage in the group originally drawn for the jury (or in the whole jury pool or in the district), then that would be a factor pointing toward an inference of discrimination. If, on the other hand, the percentage of minority members in the ultimate jury is the same or greater, that would be factor tending to negate the inference of discrimination.
>
> If there are minority members on the jury but the prosecutor did not use all its peremptory challenges, that would be a factor tending to refute discrimination. However, if all the prosecutor's challenges were used, that fact would point toward an inference of discrimination. Moreover, if the defense did not display a pattern of strikes against non-minority members, that fact might support an inference of discrimination. Yet, if the defense has clearly engaged in a pattern of striking non-minority members, that might make an inference of discrimination arising from the prosecution's opposing strikes less tenable.

These factors are equally useful in reviewing the proferred neutral explanation by the prosecution to determine if the reasons given are pretextual. *United States v. Peete*, 919 F.2d 1168, 1179 (6th Cir. 1990).

In *United States v. Walton*, 908 F.2d 1289, 1297-1298 (6th Cir. 1990), the Court found that the defendant had not made a prima facie case of discrimination. Some of the factors leading to this conclusion were "that the government had two unused peremptory strikes, yet

failed to use them to strike any of the three remaining black jurors from the panel. Had the government been intent on obtaining a non-black jury it is unlikely that these strikes would have gone unused. This is particularly true where the final composition of the pool of 15 had a higher percentage of black members than did the initial pool of 56: 20% black for the pool of 15 versus 15% black for the initial pool of 56."

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GOVERNOR SPEAKS ON DPA'S NEEDS

The budget also contemplates strong support for an often neglected aspect of the criminal justice system. Ever since the Office of Public Advocacy was established in 1972, it has survived from "hand to mouth." In my judgment, this was attributable not only to their often unpopular job of defending poor people charged with crimes, but also from a lack of imagination with respect to seeking financial support.

Under the leadership of Public Protection Secretary Holmes, the Task Force on the Delivery and Funding of Public Defender Services recently concluded its work with a recommendation that the public advocate receive significant additional funding from non-traditional sources. These include an increase in the DUI service fee of $50 and a $40 user fee for those criminal defendants who have the money to help pay for the legal services they receive. These two non-General Fund fees will enable the public advocate substantially to expand services and properly discharge their responsibilities.

- Governor Brereton Jones
State of the Commonwealth Speech to the 1994 General Assembly

DUI Roadblocks: Don't 'Sitz' Around

In *Michigan v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481 110 L.Ed.2d 412 (1990), the United States Supreme Court upheld suspicionless stops at roadblocks under the Fourth Amendment. That is not the end of the matter, though. Intrusion, efficacy, and guidelines still remain watchwords in determining the legality of a particular roadblock. This article will discuss the evolution of these three concepts, *Sitz*, Kentucky case law, and other roadblock caselaw, both before and after *Sitz*.

In *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L. Ed 2nd 607 (1975), the Supreme Court held that warrantless stops near the Mexican border must be made with articulable suspicion. Articulable suspicion is reasonable, constitutionally, because of "the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border...." *Id.* 422 U.S. at 881. The Court rejected the Government's argument that stops can be suspicionless because the Court was "...not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic." *Id.* at 883. In other words, intrusions unnecessary to meet the needs of law enforcement are unreasonable, too.

Interestingly, suspicionless stops were unnecessary in *Brignoni - Ponce* because of the many objective facts typical to border patrol stops. A car can be traveling near the border, or on a road frequented by alien smugglers. Driving may be erratic or evasive. An automobile may contain many people or people trying to hide. The car may be large, or appear heavily loaded. *Id.* at 885. Thus, the objective facts incident to a border patrol stop make suspicionless stops constitutionally unreasonable. A DUI practitioner should be familiar with the objective facts incident to a DUI arrest--weaving, traffic violations, etc.--and the resultant argument against the need for suspicionless stops for DUI. The primary significance of *Brignoni-Ponce*, however, is its three - prong balancing test to determine Fourth Amendment reasonableness: state interest, the need for the state action at issue, and the intrusions of those actions on individuals.

This balancing continued in *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct 3074, 49 L.Ed.2d 1116 (1976). The Court upheld suspicionless stops at a permanent checkpoint to question the citizenship of occupants. The Court noted the state interest in stopping illegal aliens, and the need for suspicionless stops at permanent checkpoints, to deter "well disguised smuggling operations," and because a reasonable suspicion requirement would slow traffic too much, and the "limited intrusion" on individuals. *Id.* at 557.

In determining the intrusion on the individuals, the Court looked to the objective, or physical intrusion - "...the stop itself, the questioning, and the visual inspection..." - and to the subjective or phychological intrusion - "...the generation of concern or even fear on the part of lawful travelers." *Id.* at 558. The objective intrusion was the same as in *Brignoni-Ponce*, but the subjective intrusion was less, allowing the balance to be tipped in favor of the Government. *Id.*

Many types of interference condemned in *Brignoni-Ponce* did not exist in *Martinez-Fuerte*. There was no surprise inherent in a permanent check point, and much less "discretionary enforcement activity." *Id.* at 559. The checkpoints were done in a "regularized manner," at a location chosen by someone other than a field officer. *Id.* Thus, from *Martinez-Fuerte*, the practitioner gleans the division of individual intrusion into subjective and objective components, and a comparison of the relatively more intrusive roving stop with the less intrusive fixed checkpoint stop.

In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2nd 660 (1979), the Court struck down a suspicionless stop of a driver to check their license and vehicle registration. *Id.* at 650. It is important to know that *Prouse* did not involve the constitutionality of roadblocks. *Id.* at 651. It merely held that traffic stops

to check for licenses and registration must be based on articulable suspicion. *Id.*, at 663.

To determine the reasonableness of the stop, the Court balanced once again "the intrusion on the individual's Fourth Amendment rights against it's promotion of legitimate government interests." *Id.* at 654. The Court acknowledged the state interest in promoting public safety. *Id.* at 658. It measured the objective and subjective intrusion on the individual motorist, and analogized the stop to the *Brignoni-Ponce* traffic stop, and not the *Martinez-Fuerte* fixed checkpoint stop. *Id.* at 657.

An unsettling retreat from the examination of the necessity of governmental conduct to an examination of mere promotion of governmental conduct was mitigated by a finding in favor of the defense. "Absent empirical data to the contrary...," the Court noted that "[t]he contribution to highway safety made by [suspicionless] stops...will...be marginal at best." *Id.* at 660.

Thus, from *Prouse*, we glean: (1) *Prouse* did not deal with roadblocks, only with suspicionless traffic stops, (2) the Court continued to balance state interest with individual interference to determine Fourth Amendment reasonableness and (3) the Court retreated from the examination of the necessity of the government conduct to an examination of whether the conduct promotes the given state interest, and 4) The state must empirically demonstrate that the roadblock promotes its interest.

Hence, *Michigan v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L.Ed.2nd 412 (1990). *Sitz* is not as broad one may think. The Court merely upheld "the use of sobriety check points generally." *Sitz*, 496 U.S. 444, 450. The sobriety checkpoint at issue was fairly elaborate, being operated pursuant to "guidelines setting forth procedures governing checkpoint operations, site selection, and publicity," which were drawn up by a "sobriety checkpoint committee, comprising representatives of the state police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute." *Id.* at 447.

Detention after the initial stop were not at issue, either, and even Chief Justice Rhenquist acknowledged that "detention of particular motorist for more extensive field sobriety testing may require satisfaction of an individualize suspicion standard." *Id.* at 451. See, *Ekstrom v. Justice Court of State*, 663 P.2d 992, 996 Arizona (1983) (roadblock invalidated because officers unsure whether to merely to stop and question or to act more intrusively, without additional factual basis).

The Court balanced the state interest in eradicating drunk drivers with the subjective and objective intrusions on motorists stopped at the check point, and the effectiveness of the check point at issue. The Court noted that, unlike *Prouse*, *Sitz* did not involve a "complete absence of empirical data...." *Id.* at 454. Based on the empirical data provided, the Court concluded not that the check point was necessary, nor that it promoted the governmental interest to a sufficient degree. The Court merely found that the empirical data demonstrated that check points were "reasonably effective...." *Id.* at 455.

What, then, is useful to the practitioner from all this? First, it is clear that the Fourth Amendment requires a balancing of the state interest, both the subjective and objective intrusion on the individual, and the effectiveness of governmental conduct in promoting it's interest. Second, empirical data is necessary to show effectiveness, as was shown in *Martinez-Fuerte*, 428 U.S. at 554, *Prouse*, 440 U.S. at 659, and *Sitz*, 496 U.S. at 454 to 455. Third, *Sitz* certainly leaves open the question of whether any particular roadblock, even one with guidelines, is constitutional. Fourth, guidelines are necessary.

Subjective intrusion - the creation of fear and anxiety in motorists - can come from many sources. Unsafe roadblocks increase fear and anxiety. Lack of warning signs is one unsafe practice cited in *Webb v. State*, 739 S.W.2d 802, 810 (Tx. Crim. App. 1987). Lack of warning lights or warning signals is another. *State v. Jones*, 483 So.2d 433, 439 (Fla. 1986) ("Failure to [use proper lights or warning signals] would increase the threat of traffic accidents and frustrate the entire goal of the check point."). Field officers shinning headlights into the eyes of oncoming motorists was cited in *Brower v. Inyo*, 489 U.S. 593 (remanding a section 1983 action for finding as to whether such conduct is reasonable under the Fourth Amendment). Subjective intrusion can result from factors unrelated to safety, too, such as to whether the motorist was informed as to the purpose of the roadblock, either by advance public notice or statement of the field officer upon the stop. See, *State v. Koppel*, 499 A.2d, 977, 982 (M.H. 1985). All of these factors effect fear, surprise, or concern of motorists, and therefore effect the subjective intrusiveness of a roadblock.

Objective intrusiveness focuses on the physical intrusiveness of a roadblock. The duration of a stop is one factor. See, *U.S. v. Place*, 462 U.S. 696, 709; 103 S.Ct. 2637, 2645; 77 L.Ed.2d 110 (1983) (the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion). *Sitz* noted that stops lasting, on average, 25 seconds were "brief." *Sitz*, 496 U.S. at 448. In *State v. Barcia*, 562 A.2d 248, 249 (N.J. App. Div. 1989), a roadblock causing traffic jams and delays of up to four hours for some motorist was, predictably, struck down. Any stop lasting longer than necessary to satisfy the reason for the detention should be disallowed. See, *State v. Chatton*, 463 N.E.2d 1237 (Ohio 1984).

Other factors bearing on objective intrusiveness include what was asked of all the motorists, what was asked of the particular motorist involved, and whether the motorist was asked to perform any verbal tests during the stop.

Effectiveness is often a fruitful area of inquiry. A number of law enforcement officers, most notably those involved in *Sitz*, have admitted that roadblocks are simply less effective than stops based on driving irregularity. *Sitz*, 496 U.S. at 462, n. 4 (Stevens, J., dissenting). The nature of "effectiveness" is of some debate, ranging from necessity, in *Brignoni-Ponce* and *Martinez-Fuerte*, to some permissible arrest rate, as used in *Sitz*. It is clear that empirical data is necessary to demonstrate effectiveness, at any rate. Empirical data were employed in *Sitz*, and their absence was denounced in *Prouse*. See, *Prouse* 440 U.S. at 659 ("[a]bsent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers."). It should be remembered, incidentally, that such statistical data is the burden of the prosecution, since roadblocks constitute a warrantless seizure, thus placing the burden of proof on the Commonwealth. *Vale v. Louisiana*, 399 U.S. 30, 34, 90 S. Ct. 1969, 26 L.Ed.2nd 409 (1970); *State v. McLaughlin*, 471 N.E.2nd 1125 (Ind. App. 1984)(state failed to meet its burden of proving reasonableness of roadblock).

Assuming the existence of effectiveness data, it is important to determine to what one is comparing when measuring effectiveness. Comparison should be made be made between convictions resulting from roadblocks as opposed to convictions resulting from *Terry* stops, as a jury may be more hesitant to convict in a roadblock case, since there is no observed driving irregularity. Comparison ought also be made between the arrest or conviction rate with a roadblock as opposed to the arrest or conviction rate of a roving police detail, publicly advertised, which searches for driving irregularities. See, *Koppel*, 499 A.2d at 982. It seems unlikely that DUI roadblocks are effective, since their only usefulness as an instrument of crime detection lies in their ability to detect drivers under the influence who fail to exhibit any driving irregularities. One wonders how prevalent, and how real is the problem of drunk drivers who drive well.

When the low rate of roadblock effectiveness is revealed to the Court, prosecutors will often turn to the "deterrent effect" to justify the roadblock, arguing that the rates of arrest and/or conviction are low because the roadblock effectively deters people from driving. Recall, first of all, that no deterrent effect is logically possible without advance public notice. Furthermore, even if there is public notice, there likely will be a paucity of empirical proof as to the deterrent value of a roadblock, especially as compared to the deterrent value of a well publicized police detail of officers who stop only upon observed driving irregularities. See, *Koppel* 499 A.2d at 982-983 (acknowledging deterrence but still striking down the roadblock).

Turning now to guidelines, they are most properly thought of as a means of limiting subjective intrusion. Checkpoints conducted in a "regularized manner" are "reassuring to motorists." *Martinez-Fuerte*, 428 U.S. at 559. Guidelines create this regularity, and thereby reduce the fear caused by arbitrary, discretionary law enforcement tactics. Courts carefully considering roadblocks tend to give more weight to discretion in determining the amount of subjective intrusion, so discretion will be considered separately from other aspects of subjective intrusion. See, *State v. Deskins*, 672 P.2d 1174, 1185 (Kan. 1983) (unbridled discretion runs afoul of *Prouse* regardless of other favorable factors); *State v. McLaughlin*, 471 N.E.2d 1125, 1139 (Ind. App. 1984) (level of discretion left to officers in executing seizures can be a factor of overriding importance). Guidelines are clearly necessary. In both *Martinez-Fuerte*, and *Sitz*, the check points were governed by guidelines. *Martinez-Fuerte*, at 546, and *Sitz* at 447. Without guidelines, there would be nothing to check the "'standardless and unconstrained exercise of discretion of the official in the field'" condemned by *Prouse*. *Sitz* at 454, quoting *Prouse* at 661. See, *State v. Simms*, 808 P.2d 141, 147 (Utah App. 1991) ("the requirement of explicit guidelines...is a prerequisite to any judicial balancing analysis of a suspicionless roadblock.") See, *Brown v. Texas*, 443 U.S. 47, 51; 99 S.Ct. 2367; 61 L.Ed.2d 357 (1979) (if stop not based on articulable suspicion, stop "must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.") Assuming guidelines exist, defense counsel should examine them carefully. *Webb v. State*, 739 S.W.2d 802, 811 (Tx. Crim. App. 1987) (a neutral plan without more does not fulfill Fourth Amendment reasonableness requirements.) Strict adherence to the guidelines is required. *Commonwealth v. Anderson*, 547 N.E.2d 1134, 1137 (Mass. 1989) (stop unconstitutional where it exceeded the duration of a roadblock by 15 minutes). The guidelines should be made by administrative officers, as suggested by *Martinez-Fuerte* at 558. Otherwise, there is little to distinguish the situation from the "roving patrol," condemned in *Brignoni-Ponce* and *Prouse*. See, *State v. Kirk*, 493 A.2d 1271, 1288 (N.J. Super. 1985)(guidelines must be issued by supervisory authority to overcome constitutional infirmity). Field officer discretion to choose which among pre-approved locations to utilize was fatal to the roadblock in *Hall v. Commonwealth*, 406 S.E.2d 674, 676 (Va. App. 1991). Where police are allowed to select which cars to stop, there exists too much discretion. *Commonwealth v. McGeohegan*, 499 N.E.2d 349 (Mass. 1983). Where guidelines are unclear as to whether field officers should only question those they stop or also cursorily search the vehicle, the stop is unreasonable. *State v. Ekstrom*, 663 P.2d 992, 996 (Ariz. 1983). One insightful case cautions officers to keep track of cars going through the roadblock, to avoid claims of discretionary stopping. *State v. Coccomo*, 427 A.2d 131 (N.J. Super. 1980). Thus, guidelines are necessary, and should be drawn up by superiors in order to govern both the site selection and the duration of the roadblock, and must be strictly adhered to. Any ambiguity should be resolved in the favor of the defendant as this is a warrantless seizure.

In Kentucky, *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. App. 1983), *cert. denied* 465 U.S. at 1105, 104 S.Ct. 1606 80 L.Ed.2d 136 (1984) is the latest, and only word in Kentucky on roadblocks. In this brief, one page opinion, the Court upheld a roadblock in which all vehicles were stopped. The Court of Appeals deemed key the fact that all vehicles were stopped and therefore unbridled discretion did not exist. The Court cited *Prouse* for this proposition, apparently failing to realize that *Prouse* did not address roadblocks. The Court solely interpreted the Fourth Amendment and made not mention of Section Ten in the course of the opinion. Moreover, there was no balancing at all, and no empirical evidence whatsoever. It would seem that roadblocks are ripe for appellate challenge in Kentucky.

Some states have outlawed roadblocks completely. Citing, among other things, an aversion to the Supreme Court's abdication of its traditional role of overseeing government conduct, the Michigan Supreme Court outlawed roadblocks, on remand from the Supreme Court. *Michigan Department of State Police v. Sitz*, No. 93851, Sept. 14, 1993, available for $24.50, payable to "State of

Michigan," from the Supreme Court Clerk, P.O. 30052, Lansing, Michigan 48909; (517) 373-1020. Utah has declared roadblocks violative of the Utah State Constitution, despite *Sitz. Sims v. State Tax Commission*, 841 P.2d 6, 8-9 (Utah 1992) (also ruling the consent to search following the illegal stop as invalid as a fruit of the poisonous tree). Likewise, Louisiana has, after *Sitz*, maintained the unconstitutionality of roadblocks under the Louisiana constitution. *State v. McHugh*, 598 So.2d 1171, 1175 (La. App. 1 Cir. 1992). Rhode Island struck down roadblocks under it's constitution, as, "it would shock and offend the framers of the Rhode Island Constitution if we were to hold that the guarantees against unreasonable and warrantless seizures should be subordinated to the interest of efficient law enforcement." *Pimental v. Dept. of Transportation*, 561 A.2d 1348, 1352 (R.I. 1989). Washington has outlawed them under the Washington Constitution. *City of Seattle v. Messiani*, 755 P.2d 775 (Wash. 1988). One of the most persuasive arguments for outlawing roadblocks was cited in the Oklahoma Supreme Court in *State v. Smith*, 674 P.2d 562, 564-565 (Okl. Cir. 1984);

> "Were the authorities allowed to maintain such activities as presented in this case, the next logical step would be to allow similar stops for searching out other types of criminal offenders. For example, it is well known to the public that shoplifting is an every day occurrence which constantly plagues merchants in Oklahoma and elsewhere. Are law enforcement authorities then to be allowed to establish fixed checkpoints, permanent or otherwise, outside of every shopping center in the area to question all exiting shoppers as to whether they possess sales receipts? Are law enforcement authorities to be allowed to demand all shoppers to produce such receipts or be subject to arrest every time they go shopping? The potential for abuse is apparent."

Cf. State v. Koppel, 499 A.2d 977, 983 (Souter, J., dissenting) (distinguishing DUI roadblocks from shoplifting roadblocks in terms of the risk posed by driving and the concomitant pervasive regulation of driving activity).

It is the responsibility of the criminal defense practitioner to prevent "police state practices," which threaten to slowly, yet finely, grind the Fourth Amendment into a nullity. See, *Smith*, 674 P.2d 562, 564 (Okl. 1984). It is hoped that this article provides a starting point toward fulfillment of this responsibility.

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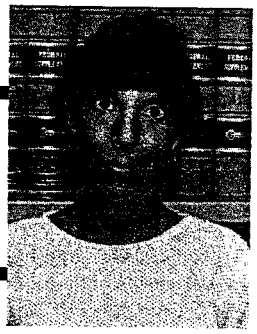
> "If we can know where we are and something about how we got there, we might see where we are trending - and if the outcomes are unacceptable, to make timely change."
> - Abraham Lincoln

West's Review



Julie Namkin

***Collison v. Commonwealth*, 92-CA-001157-MR, 9/24/93**

The defendant was charged with the felony of driving under the influence, fourth offense, under KRS 189A.010(4)(d). Because this offense is a felony, the defendant is entitled to a bifurcated trial under the Truth-In-Sentencing statute. Prior to trial, the defendant moved to exclude evidence of his prior DUI convictions from the guilt phase of his trial, but the motion was denied. The defendant entered a conditional guilty plea and appealed the denial of his motion.

On appeal the defendant argued that proof of his prior DUI convictions is not an element of the charged DUI offense, but serves only to enhance the penalty upon conviction.

Relying on *Division of Driver Licensing v. Bergman*, Ky., 740 S.W.2d 948 (1987), the Court of Appeals held that evidence of the defendant's prior DUI convictions are not an element of the offense. However, the Court of Appeals held the defendant's prior DUI convictions were admissible in the guilt phase of the Commonwealth's case in chief to prove the circuit court had proper jurisdiction. Therefore, the Court of Appeals affirmed the trial court's denial of the defendant's motion to exclude his prior DUI convictions from the guilt phase of his trial.

***Michaels v. Commonwealth*, 92-CA-001695-MR, 10/1/93**

This case involves an appeal of the denial of the defendant's RCr 11.42 motion.

The defendant pled guilty as a subsequent offender to trafficking in a Schedule II narcotic and trafficking in a Schedule IV non-narcotic.

The defendant then filed and RCr 11.42 motion challenging his guilty plea under *Woods v. Commonwealth*, Ky., 793 S.W.2d 809 (1990). The defendant argued that since his prior drug trafficking convictions were not obtained under the same subsection of KRS 218A.990 as his present trafficking convictions, they could not be used to support the subsequent offender charge to which he pled guilty. Thus, his counsel was ineffective for failing to object to the improper enhancement of his sentence. The Court of Appeals agreed.

Although the *Woods'* opinion was rendered only three weeks prior to the entrance of the defendant's guilty plea and was not final at the time of entry of the plea, the Court of Appeals stated that "trial counsel had a duty to keep up with all new developments in the law and, at a minimum, should have been aware of this case and taken some step, whether

by asking for a continuance until the *Woods'* opinion was final or by having the Appellant enter a conditional guilty plea under RCr 8.09, to protect the Appellant's rights."

The Court of Appeals held that trial counsel's performance was not ineffective as to the merits of the underlying trafficking offenses. Thus, the defendant was entitled to be resentenced on the trafficking offenses as a first, rather than a subsequent, offender.

***Jett v. Commonwealth*, Ky. App., 862 S.W.2d 908 (1993)**

An undercover police officer observed the defendant exchange a plastic bag containing a white powdery substance for money on a Lexington street corner allegedly known for drug trafficking. The officer also saw the defendant take a plastic bag from his coat and throw it beside a garbage bin. As a result of this transaction, the defendant was tried and convicted of trafficking in cocaine.

Prior to trial, the defendant's motion to obtain the exact location of the police officer, who had observed him engage in the alleged transaction, so he could examine the location was overruled.

This opinion is the first Kentucky case to address the so-called "surveillance location privilege." Although the defendant argued that his right to cross-examine the police officer was impermissibly restricted when he was unable to obtain the officer's precise location at the time of the surveillance, the Court of Appeals disagreed.

Relying on *U.S. v. Harley*, 682 F.2d 1018, 1020 (D.C. Cir. 1982), the Court of Appeals stated the defendant never demonstrated "a need to know" the officer's exact location by presenting evidence there was reason to believe the officer's view was obstructed or the street lighting was poor. Nor did the defendant demonstrate that alternate methods of obtaining the information were unavailable. In fact, the officer positively identified the defendant and testified the light and weather were good.

Balancing the conflicting interests of the defendant's need to know and right to confrontation and the Commonwealth's need to restrict such information to protect the future usefulness of the location and the safety of the police and the citizens, the Court of Appeals found no error in denying the defendant the information based on the facts of this particular case.

The Court of Appeals also held the trial court did not err in failing to set aside the entire jury panel when a prospective juror stated, in the presence of the entire panel, that a drug trafficker killed his daughter, and in failing to exclude evidence that the defendant was carrying a beeper and $427.00 in cash at the time of his arrest.

The Court of Appeals also indicated that an admonition is sufficient to cure an improper reference by a police officer to the defendant as a "drug dealer;" and a police officer may desribe what he observed and properly refer to the exchange of cash for a plastic bag containing a white powdery substance as a drug transaction.

Finding no merit to any of the defendant's arguments, the Court of Appeals affirmed his conviction.

***Riddle v. Commonwealth*, Ky.App., ___ S.W.2d ___ (1993)**

The defendant's convictions for trafficking in a controlled substance were reversed and remanded for a new trial because the trial court abused its discretion when it overruled defense counsel's challenge for cause to fourteen prospective jurors "who had a close personal relationship with the Commonwealth's Attorney's Office." The prospective jurors indicated they had been represented by the Commonwealth's Attorney or his assistant in the past and would go to them in the future for advice and counsel.

The Commonwealth objected to the challenge for cause because if it were sustained it would never be possible to select a jury in Cumberland county which has a small population and very few lawyers.

The Court of Appeals held that once the prospective jurors admitted they had previously been represented by the prosecutors and would return to them for representation in the future, they were not qualified to sit as jurors under the standards of "the probability of bias or prejudice," and "actual or implied or reasonably inferred [bias]." Furthermore, the trial court's efforts to rehabilitate the prospective jurors after their admissions cannot remove their actual or implied bias or the probability that they will be biased.

The Court of Appeals also expressed concern that the trial court improperly restricted defense counsel's efforts to establish the prospective jurors' bias on voir dire.

This opinion makes clear that "the integrity of the jury system is just as sacred" in a small rural county "as anywhere else, and it must be preserved."

As to the defendant's complaint that the two year delay between the charged offenses and the indictment necessitated dismissal of the indictment, the Court of Appeals found the defendant did not sufficiently show how he was harmed by the delay and thus he could be retried.

***Estis v. Commonwealth*, 92-CA-2065-MR, 11/5/93**

The defendant entered a conditional guilty plea to driving under the influence, third offense, under KRS 189A.090(2)(c). The defendant claimed he could not be convicted as a third offender, which is a Class D felony, because each of his two prior offenses was prosecuted as a Class B misdemeanor under KRS 189A.090 (2)(a). According to the defendant, for him to be properly prosecuted as a third offender, his second offense should have been prosecuted as a Class A misdemeanor under KRS 189A.090(2)(b).

The Court of Appeals disagreed. The Court of Appeals concluded there is nothing in the statute indicating "that a defendant must first be convicted of the Class A misdemeanor for the second such offense before he can be convicted of the Class D felony." Looking at the language of the statute, the Court of Appeals stated the "legislative intent is to raise the seriousness of the offense as well as the punishment based on the number of times a defendant has committed the offense of operating his motor vehicle while his license is suspended or revoked." The Commonwealth need only prove the defendant was previously convicted two or more times under KRS 189A.090(1) to support a third offender conviction. There is no requirement the defendant be previously convicted of a Class B and a Class A misdemeanor under KRS 189A.090(2)(a)&(b) prior to being charged under KRS 189A.090(2)(c) of a Class D felony.

The defendant's conviction was affirmed.

***Osborne v. Commonwealth*, 92-CA-1631-MR, 11/19/93**

As a result of a car accident on May 6, 1991, the defendant was charged on June 27, 1991, with second degree manslaughter, driving under the influence, operating a motor vehicle without liability insurance, and operating a motor vehicle without proper registration plates. After a jury trial, the defendant was convicted of all four offenses.

The defendant raised four issues on appeal. The first issue was that the Commonwealth failed to prove the second degree manslaughter offense beyond a reasonable doubt because there was no proof the defendant was driving the car at the time the fatal crash occurred and the other occupant of the car was killed. The defendant denied he was driving the car at the time of the crash. However, a police accident reconstructionist opined that based on his investigation of the scene the defendant was driving the car. Thus, the Court of Appeals concluded it was not error for the trial court to submit the case to the jury.

The second issue raised by the defendant is the focus of the Court of Appeals' opinion. The facts revealed that in November, 1991, **subsequent** to the fatal car accident but prior to trial, the defendant was caught driving under the influence. The defendant pled guilty to this DUI offense on November 20, 1991.

Immediately prior to the defendant's trial on the original four charges, without moving to amend the indictment, the Commonwealth moved to introduce the November 20th DUI conviction to prove the original DUI charge was a second offense under KRS 189A.010(2)(b). Trial counsel's objection to the evidence on relevancy grounds was overruled.

The subsequent DUI conviction was introduced at the deendant's trial, but the jury was never admonished that it could not be considered in deciding the defendant's guilt on the manslaughter charge. [The opinion does not indicate that trial counsel ever asked for such an admonition.]. Moreover, the prosecutor "specifically urged" the jury, in his opening statement and closing argument, to use the evidence of the subsequent DUI conviction as proof of the defendant's guilt on the second degree manslaughter charge. In addition, the trial court's instruction on second offense DUI was improper because it did not require the jury to make the necessary finding that the defendant had previously been convicted of DUI. As a result of the aforementioned reasons, the Court of Appeals held it was reversible error for the trial court to admit the evidence that the defendant had been **subsequently** convicted of DUI. The Court reversed the defendant's second degree manslaughter conviction because of this error and remanded for a new trial.

The third issue raised by the defendant was that his convictions for second degree manslaughter and DUI violated principles of double jeopardy since they were based on a single course of conduct: operating a motor vehicle while under the influence. The Court of Appeals agreed and vacated the defendant's sentence and fine on the DUI charge.

Lastly, the defendant argued that evidence of his blood test should have been suppressed. Since the blood test was obtained as part of the hospital's routine diagnostic procedure when the defendant was taken to the hospital from the scene of the accident, the Court of Appeals found no merit to this claim.

The Court of Appeals affirmed the defendant's convictions for operating a motor vehicle without liability insurance and without proper registration plates.

Releford v. Commonwealth, Ky., 860 S.W.2d 770 (1993)

The defendant was convicted of trafficking in or transfer of cocaine and his conviction was affirmed by the Court of Appeals. After granting discretionary review to consider whether the trial court erred in admitting "investigative hearsay," the Supreme Court affirmed.

An informant, wired with a transmitter, went to the defendant's home in an attempt to buy cocaine from him. The defendant and the informant went into the informant's car and discussed the proposed sale. This conversation was monitored and tape recorded by the police. The informant and the defendant met a number of times over the next several hours. After several other people under investigation for drug activity showed up with the defendant at one of the meetings, the informant and the police feared the informant's cover had been blown, so the transmitter was was removed from the informant and the surveillance ended for that evening. However, the informant told the police the defendant had contacted him later that evening and set up the sale for the next day. When the defendant sold the cocaine to the informant the following day, the informant was not wearing the wire.

At trial, the defendant objected, as "investigative hearsay," to the testimony of the two police officers to the fact of and their reason for removing the 'eavesdropping device' from the informant on the night prior to the sale, thus explaining why the informant was not wearing the wire at the time of the sale.

The Supreme Court agreed with the Court of Appeals that this testimony was not hearsay because the Commonwealth had the right to inform the jury through testimony as to the circumstances surrounding the removal of the transmitter before the drug transaction. The Courts' conclusion seems to be based on the particular facts of the case in that the informant had already testified **without objection** about the wiring occurring on the day before and the jury had already heard the tape recording of the conversation between the defendant and the informant discussing the proposed drug sale.

Pettiway v. Commonwealth, Ky., 860 S.W.2d 766 (1993)

The defendant was convicted of first degree robbery and being a first degree persistent felony offender. One of the defendant's prior convictions, that was a basis for his PFO I conviction, was based on a guilty plea under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

The defendant argued that under Kentucky Rules of Evidence 803(22) and 410 a conviction obtained through an *Alford* plea may not be used as a basis for a persistent felony offender conviction.

The Supreme Court disagreed stating that "[e]ven though KRE 803(22) and 410 exclude the introduction of an *Alford* plea as an admission against interest, this exclusion has no relationship to the use of an *Alford* plea to enhance a sentence in a PFO hearing."

Affirming the defendant's PFO I conviction, the Supreme Court held "that a conviction obtained by an *Alford* plea is admissible as evidence in determining PFO status."

Turner v. Commonwealth, Ky., 860 S.W.2d 772 (1993)

The defendant was found guilty but mentally ill of wanton murder.

Prior to trial the defendant filed notice that he might elect to introduce evidence of mental illness or insanity at trial. At trial the defendant introduced expert testimony that he was a paranoid schizophrenic and he was not criminally responsible when he killed the victim because he was responding to his paranoia. The expert testified that at the time of the alleged incident the defendant "was experiencing an exacerbation of paranoid schizophrenia." The Supreme Court stated that "this kind of expert testimony could have warranted an insanity verdict."

However, although the Commonwealth's expert agreed the defendant was a para-

noid schizophrenic, he found no evidence the defendant was "acting under an exacerbated form of that disease a the time of the killing," thus disputing the degree to which the disease was a factor.

Based on this equivocal expert testimony, the trial court instructed the jury it could find the defendant not guilty by reason of insanity or it could find the defendant guilty but mentally ill. The defendant objected to the GBMI instruction.

The Supreme Court found no error in giving the GBMI instruction since it was supported by the testimony of the Commonwealth's expert, and it is the court's duty to instruct on the whole law of the case. Since both experts agreed the defendant was a paranoid schizophrenic, it was up to the jury to determine from the evidence the degree to which the disease affected the defendant at the time of the charged offense.

The facts also reveal that after a pretrial competency hearing the trial court found the defendant incompetent to stand trial. As a result, over the defendant's objection, the court ordered intrusive intervention in the form of the medications of Mellaril and Lithium for sixty days. The court relied on the defense expert's recommendation that there was a high probability that with the medication the defendant would attain competency in the forseeable future. After another competency hearing two months later, the court found the defendant competent to stand trial.

The defendant argued on appeal that it was error for the trial court to order the involuntary administration of anti-psychotic drugs. The Supreme Court disagreed stating that KRS 504.060(10) explains that treatment includes medication. The medication ordered pursuant to KRS 504.110 was in accord with the standards set out by the U.S. Supreme Court in *Riggins v. Nevada*, 504 U.S. ___, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). Also, the defendant argued at a bond reduction hearing that he would continue to take his medication on an outpatient basis if his bond were reduced, and counsel complained at trial that the defendant was not getting his medication and he would not be able to testify without it.

Finding no reversible error by the trial court, the Supreme Court affirmed the defendant's conviction.

***Commonwealth v. Grubb*, Ky., 862 S.W.2d 883 (1993)**

Undercover police officers purchased twelve pills from the defendant. Ten pills were Percodan (a Schedule II narcotic) and two pills were Dilaudid (a Schedule II narcotic). The defendant was tried and convicted of four counts of trafficking in a Schedule II controlled substance. Two counts were for trafficking in Percondan and two counts were for trafficking in Dilaudid.

The Court of Appeals reversed one of the convictions for trafficking in Percodan and one of the convictions for trafficking in Dilaudid on double jeopardy grounds.

The Supreme Court granted the Commonwealth's motion for discretionary review and affirmed the Court of Appeals.

Because all the pills sold by the defendant were in the same schedule, the defendant could be convicted once for each type of pill, *i.e.*, two convictions because there were two different controlled substances in the **same schedule**, but not once for each pill, *i.e.*, not twelve convictions because there were twelve pills. Therefore, the Court of Appeals, relying on *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321 (1990) and Section 13 of the Kentucky Constitution, properly reversed two of the defendant's four convictions as a violation of double jeopardy principles.

***Commonwealth v. Welch*, 92-SC-490-DG, 9/30/93**

The defendant was charged with second degree criminal abuse due to her giving birth to a baby that suffered neonatal abstinence syndrome as a result of the baby's having become passively addicted to drugs by being exposed through the defendant's drug abuse during her pregnancy. The defendant was also charged with possession of a Schedule II narcotic and possession of drug paraphenalia. The defendant was tried and convicted of all charges.

The Court of Appeals vacated the defendant's conviction for criminal abuse because under *Hollis v. Commonwealth*, Ky., 652 S.W.2d 61 (1983) and *Jones v. Commonwealth*, Ky., 830 S.W.2d 877 (1992), a fetus is not a "person" as that word is used in the criminal abuse statute (KRS 508.110).

The Supreme Court granted discretionary review.

In *Hollis* and *Jones* the Supreme Court applied the common law meaning of the word "person" to criminal homicide statutes. But since there was no common law crime of child abuse, the Court had to look elsewhere to determine the meaning of the word "person" in the criminal child abuse statutes.

The Supreme Court looked to whether the General Assembly intended to include prenatal injury from a woman's **self-abuse** as well as injury inflicted by third persons (which was the situation in *Hollis* and *Jones*) as prohibited conduct under the criminal abuse statutes. The language of the Maternal Health Act of 1992 makes it obvious the General Assembly intended to treat the problem of alcohol and drug use during pregnancy solely as a public health problem and not through punitive actions against the mother. Likewise an amendment to KRS 218A.990 providing special punishment for the person who supplies drugs to the pregnant woman, but not for punishment of the woman who takes the drugs while pregnant, makes it clear the General Assembly intended no additional criminal punishment for the pregnant woman's drug or alcohol abuse apart from the punishment imposed upon any person caught committing a crime involving those substances.

The Supreme Court also looked to cases from other jurisdictions having criminal child abuse statues similar to Kentucky's. All of the cases concluded that such statutes are not intended to punish as criminal conduct self-abuse by an expectant mother potentially injurious to the baby she carries unless the statute expressly states such conduct is prohibited.

The Supreme Court affirmed the opinion of the Court of Appeals.

***Hall v. Commonwealth*, Ky., 862 S.W.2d 321 (1993)**

The defendant was convicted of first degree sodomy and first degree sexual abuse resulting from conduct with his six year old niece. The Supreme Court reversed the defendant's convictions on two separate grounds.

First, over the defendant's objection, the trial court allowed the Commonwealth's psychologist, who had examined the child, to testify that in her professional opinion 1) the child had been sexually abused, and 2) the child was telling the truth when she said it was the defendant who had abused her.

In a note of outrage, the Supreme Court reiterated, for the eighth time, the general rule that opinion evidence must not decide an ultimate issue of fact. Thus, it was reversible error for the psychologist to give her opinion that 1) the children had been sexually abused, and 2) that the child's testimony was most likely accurate.

Second, over the defendant's objection, the prosecutor elicited from the detective

that the defendant failed to give a statement at the time of his arrest. On appeal, the Commonwealth conceded error but argued it was harmless. The Supreme Court disagreed.

The Supreme Court characterized the evidence against the defendant as "no better than weak." There were no witnesses and no physical evidence linking the defendant to the charged offenses. The Commonwealth's evidence consisted solely of the victim's testimony which was improperly bolstered by the inadmissable expert testimony. In addition, the jury sentenced the defendant to the maximum punishment of life in prison. The Court stated this error was one of fundamental constitutional magnitude that had been on the books for 25 years and required reversal.

***Skinner, Griffieth, and Madden v. Commonwealth*, 92-SC-216-MR, 92-SC-394-TG, & 92-SC-395-TG, 10/28/93**

The three defendants (Skinner, Griffieth, and Madden) were jointly tried and convicted for charges arising out of a residential burglary. The fourth participant in the charged burglary accepted a plea offer a few days before trial and testified for the Commonwealth.

Skinner was convicted of first degree burglary, first degree wanton endangerment, and PFO II. He raised six issues in his appeal, none of which the Supreme Court found to have merit.

When Skinner expressed his desire to accept the Commonwealth's plea offer on the day of trial, the Commonwealth responded that the offer, made some five months previously and which included dismissal of the PFO II charge, was conditioned upon acceptance by all four participants in the charged burglary. Since some defendants rejected the offer, the Commonwealth considered it withdrawn.

The Supreme Court found no abuse of discretion in the trial court's refusal to accept Skinner's guilty plea on the substantive charges conditioned on dismissal of the PFO indictment. The Court found no evidence Skinner had relied on the Commonwealth's offer "to the point of neglecting his defense in the event of rejection." Moreover, dismissal of the PFO charge was separately subject to the trial court's discretionary approval under RCr 9.64.

Rejecting Skinner's claim that he was entitled to a trial separate from his co-defendants, the Supreme Court held he did not sufficiently demonstrate he was prejudiced by the joint trial.

As to Skinner's claim that his incriminating statements to the police should have been suppressed because they were made after he invoked his right to counsel, the Supreme Court, believing the suppression hearing testimony of two police officers, found Skinner "intelligently and knowingly relinquished" his right to counsel by initiating the conversations with the police.

Skinner argued that the jury's verdicts finding him guilty of first degree burglary while finding his two co-defendants guilty of second degree burglary were inconsistent. Since Skinner was the only participant armed with a weapon, the Court found Skinner's argument without merit. Likewise, Skinner's argument that he was entitled to a directed verdict on the charge of attempted murder was without merit since Skinner was convicted of the lesser offense of first degree wanton endangerment.

At the Truth-in-Sentencing portion of the trial, the Commonwealth introduced the parole eligibility guidelines and urged the jury in closing argument to fix a severe sentence for Skinner because under the guidelines "life equals eight years...." The jury fixed Skinner's sentence on the burlary charge at 15 years, enhanced to 30 years upon conviction as a PFO II, and 5 years on the wanton endangerment charge, enhanced to 10 years upon conviction as a PFO II. Even though the trial court overruled trial counsel's objection to the prosecutor's comment, the Supreme Court, without citation to authority, stated it did "not believe that the prosecutor's remark induced the jury to believe that a defendant sentenced to life would in fact be paroled after eight years." [*Ruppee v. Commonwealth*, Ky., appears to hold to the contrary.].

Griffieth, Skinner's co-defendant, raised five issues on appeal. The Supreme Court found that a police officer's testimony violated a court order that references to Griffieth must be omitted from the statements of non-testifying co-defendants. Even though the officer had been cautioned about the trial court's order, the Court held the officer's reference was inadvertent and did not constitute an intentional violation by the prosecutor. Since the reference did not impute any criminal activity to Griffieth, the Court found the error to be harmless.

The trial court instructed the jury it could find Griffieth guilty of first degree burglary, complicity to first degree burglary, second degree burglary, or complicity to second degree burglary. The trial court refused to instruct the jury on criminal facilitation. The jury found Griffieth guilty of second degree burglary. Although the Supreme Court found it was proper to instruct the jury under a complicity theory, it did not believe the evidence supported a criminal facilitation instruction because Griffieth provided the car, drove the car to the scene, returned to the scene on foot, held open the door to the house while two co-defendants loaded items from the house into a wheelbarrow, and accompanied the two co-defendants with the wheelbarrow in flight from the house.

Madden was convicted of complicity to second degree burglary, but like Griffieth argues the trial court erred in failing to instruct the jury on criminal facilitation. The Supreme Court disagreed. Since Madden drove his co-defendants to and from the scene, the Court referred to him as "an active participant in the crime." Without attributing actual knowledge of the scheme to Madden, the Court states that "[k]nowledge of the scheme necessarily implies in these circumstances an intention to facilitate the commission of the offense, and clearly demonstrates that Madden aided or attempted to aid the others in committing the offense."

Thus, he was not entitled to a facilitation instruction. The Supreme Court affirmed the convictions of all three defendants.

***Anderson v. Commonwealth*, 92-SC-194-MR, 92-SC-207-MR, 10/28/93**

The defendants, husband and wife, were convicted of rape and criminal abuse of their fourteen year old daughter after their joint trial at which they were represented by the same attorney.

The Commonwealth's case was based on the daughter's testimony. There was no physical examination, medical evidence or eyewitness testimony. The defense case was based on testimony of the neighbors that the daughter was angry at her parents because they prevented her from seeing her 29 year old boyfriend, Willie Watson. One neighbor also testified the daughter was babysitting on the dates of the two alleged incidents.

The Supreme Court found four errors each necessitating reversal of the defendants' convictions.

First, relying on its decision in *Shields v. Commonwealth*, Ky., 812 S.W.2d 152 (1991), the Supreme Court found the trial court erred when it sustained the Commonwealth's objection to trial counsel's attempt to meaingfully voir dire the jprospective jurors on whether they could consider the full range of penalties for the

charged offenses. Since both defendants received the maximum punishment on all offenses, the Court found the error, which required only reversing the penalty, was not harmless.

Second, relying on information learned after trial, the defendants moved for a new trial because one of the jurors was related to and lived in the same area as the daughter's 29 year old boyfriend. Yet during voir dire when trial counsel asked if anyone knew Willie Watson, no one responded. The defendants filed affidavits to support their new trial motion attesting that the juror and the daughter's boyfriend lived in the same area and were related. The Supreme Court held the affidavits were "more than enough to compel the inference Juror Clark concealed vital information on voir dire" which may have justified a challenge for cause or been used in exercising their peremptories. Thus, the defendants were entitled to a new trial.

Third, the Supreme Court found the Commonwealth was obliged to produce a taped statement of the complaining witness, pursuant to RCr 7.26(1), even if the prosecutor was not personally aware of the statement because the detective, who was sitting at the Commonwealth's table throughout the trial, testified he had a taped statement from the daughter. The Court concluded that "the knowledge of the detective is the knowledge of the Commonwealth," and that "prejudice must be presumed" from the Commonwealth's violation of RCr 7.26(1). In addition, the error was compounded because the trial court prohibited defense counsel from approaching the bench and requesting the statement and the conclusion of the daughter's direct testimony.

Fourth, the trial court erred in failing to exclude testimony by a social worker as to an oral statement made by the defendant/wife that incriminated both defendants. The defendants had sought discovery under RCr 7.24 and it had been granted. However, to protect the confidentiality of the Cabinet for Human Resources' records, the trial court ordered the records turned over to the court and it would allow the defendants access to those portions of the records that are either discoverable or exculpatory. Yet the trial court notified counsel there were no discoverable items in the CHR records. Because the information in the records was discoverable, and because the information was not provided to the defendants, it was reversible error to let the social worker testify to the wife's incriminating statement. This violation of the discovery order was extremely prejudicial since it denied the defendants the opportunity to seek separate trials since the statement was only admissable as to the wife and was hearsay as to the husband. The failure to turn over the statement also denied the defendants the right to present a defense and to confrontation.

Lastly, the Supreme Court specifically singled out the improper conduct of the trial court in repeatedly preventing trial counsel from making a record of his objections and his arguments in support of those objections.

***McCarthy v. Commonwealth*, 92-SC-0264-MR, 10/28/93**

The defendant was convicted of first degree burglary, fourth degree assault, and PFO II when he went to the home of his estranged wife, in violation of an Emergency Protective Order (EPO), sought and was denied entry, kicked the door down, and a fight resulted.

At trial a clerk testified to the general nature of EPOs and read from the most recent EPO against the defendant. Over the defendant's objection, the clerk was then permitted to testify to a history of EPOs against the defendant. The trial court then refused the defendant's request for an admonition that an EPO was not proof that he was guilty of a crime.

On appeal, the defendant argued the clerk should not have been allowed to testify to the history of EPOs against the defendant. Relying on KRE 404(3)(b) and *Matthews v. Commonwealth*, Ky., 709 S.W.2d 414 (196), the Supreme Court found that EPOs "are relevant as evidence of motive or state of mind, and also as part of the immediate circumstances bearing on the crimes charged."

The jury was instructed it could find the defendant guilty of first degree burglary or first degree criminal trespass. To show he was prejudiced by the clerk's testimony, the defendant referred to a question asked by the jury during its deliberations as to whether the phrase "with intent to commit a crime" in the burglary instruction "refers to the crime of coming onto the property or the crime of assault." The trial court answered : "To commit any crime."

The Supreme Court found the trial court's answer to the question was a correct statement of the law.

The defendant also argued on appeal that the trial court erred in not allowing him to voir dire on the complete penalty range, i.e., a sentence of 20 years to life for the PFO II offense. The Supreme Court found this argument was not preserved for review because even though the defendant moved for voir dire on the penalty range for first degree burglary and second degree assault, he did not include the penalty range for PFO II. Moreover, since the defendant received the minimum sentence, 20 years on the PFO II charge, the Supreme Court said there was no error.

The defendant's convictions were affirmed.

THE WIZARD OF ID BY BRANT PARKER and JOHNNY HART

By permission of Johnny Hart and Creators Syndicate, Inc.

***Blakeman v. Schneider*, 93-SC-321-MR, 10/28/93**

The circuit court found the defendant was in civil contempt of court for failing to make payments to his ex-wife pursuant to a divorce decree because the evidence showed the defendant had the resources to pay. An arrest warrant was taken out against the defendant. The defendant then sought a writ of mandamus in the Court of Appeals pursuant to CR 76.36 to vacate the order of confinement. The Court of Appeals denied the defendant relief.

The defendant argued the trial court erred in ordering him to jail for failing to pay the $200,000.00 owed to his wife because he did not have the ability to pay and thus could not purge himself of the contempt.

The contemnor's ability to pay the purge amount is a fact to be determined by the trial court and will not be set aside unless clearly erroneous. The trial court correctly found the defendant had the ability to pay, and the defendant failed to meet his burden of proving his inability to pay the purge amount.

The purpose of civil contempt is to coerce the individual into doing an act rather than to punish the person. A person may not be punished for contempt for failure to perform an act that is impossible. The defendant must show his inability to comply with the contempt oder "clearly and categorically" and "must prove that he took all reasonable steps within his power to insure compliance with the order."

The Supreme Court affirmed the Court of Appeals' denial of relief because if the defendant had obeyed the order and "paid up," he would not have faced jail.

***Staggs v. Commonwealth*, 93-SC-006-DG, 11/24/93**

The defendant was convicted of first degree sexual abuse.

The issue on appeal was whether the trial court commited prejudicial error when it admitted, over objection, the testimony of Sandra Graves, Ph.D., acknowledged by the defense as an expert in the field of art therapy.

The Court of Appeals, affirming the defendant's conviction, held it was not error to admit the expert's testimony, but the Supreme Court disagreed and reversed.

The alleged victim attended an art therapy group for children of alcoholics. The child drew a drawing of his family that caused concern to the art therapist who referred the matter to the authorities for investigation. During the invistigation, the child and his brother alleged they had been sexually abused by their father.

At the defendant's trial, the drawing was admitted into evidence during the child's testimony. The Commonwealth also presented the testimony of Dr. Sandra Graves, an art therapist, who was qualified as an expert and testified at length, over defense objection, about the drawing and its message. Dr. Graves testified that deviations from the norm in the child's drawing lead her to believe the child was the victim of sexual abuse.

Relying on *Frye v. United States*, 293 F. 1013 (D.C. Circuit 1923) and *Harris v. Commonwealth*, . Ky., 846 S.W.2d 678 (1993), the Supreme Court held that the Commonwealth failed to present sufficient evidence to show that art therapy has gained general acceptance as reliable in the relevant scientific community. The only evidence offered by the Commonwealth to meet this standard was Dr. Graves' own testimony that art therapy is a technique generally recognized in the mental health field. The Supreme Court stated that in light of art therapy's recent entrance into the courtroom, "it is appropriate to require some evidence from the larger scientific community to establish not only that the technique is generally accepted, but that is is accepted as reliable for the purpose for which it is intended to be used at trial."

The Supreme Court also pointed out that when the Commonwealth offers expert opinion on a matter of scientific knowledge, the Commonwealth must establish that the tests or analyses conducted in the case conformed to the accepted methodology of the science. In the case at bar, the Commonwealth offered no such evidence. In fact, Dr. Graves admitted the technique used in this case (a single drawing and no interview of the child) did *not* comply with the acknowledged method for applying this science. As a result of Dr. Graves' testimony, admittedly unscientific testing was used to infer from the drawing that sexual abuse had occurred.

Because no recognized scientific methodology of art therapy, assuming there is one, was followed in this case, Dr. Graves' opinion was nothing more than her personal opinion. Hence, it was irrelevant and more prejudicial than probative.

The Supreme Court made a point of noting it was not saying that art therapy cannot qualify as a scientific method for diagnosing sexual abuse. What it was saying is that in this particular case the Commonwealth failed to establish the necessary foundation of scientific reliability and relevance.

***Harris v. Commonwealth*, 91-SC-712-MR, 11/24/93; *Walker v. Commonwealth*, 92-SC-341-TG, 11/24/93**

Harris and Walker were jointly charged with trafficking in cocaine. In addition, Harris was charged with a separate trafficking offense and being a persistent felony offender. After a joint trial, Walker was found guilty as a principal on the joint trafficking offense, while Harris was found guilty of facilitating said offense. Harris was also found guilty of the separate trafficking charge and as a PFO II.

A key witness for the prosecution was an informant who was also facing drug trafficking charges. If the informant were convicted of the charges against him, he could receive a sentence of five to ten years which could be enhanced to ten to twenty upon conviction as a PFO. However, the trial court prohibited Harris from cross-examining a police officer as to the possible penalties the informant was facing and limited Harris to eliciting that the informant was facing "more than one year" if convicted. Referring to the information Harris wanted to elicit as "somewhat speculative," and noting that Harris was able to show that the informant hoped to gain favorable treatment by testifying for the prosecution, the Supreme Court held Harris was not denied his rights to confrontation and cross-examination or to impeach the informant's credibility. Because there was "powerful" evidence against Harris, such as taped conversations with the informant, the Court found Harris was not prejudiced by the trial court's ruling.

Five days prior to trial Harris' appointed lawyer withdrew. A new lawyer was appointed and moved for a continuance, which was renewed at the time of trial. Because the withdrawing lawyer had told the court the defendant said he had no witnesses to subpoena, and because the newly appointed lawyer did not clearly state any grounds for needing more time, the Supreme Court found the trial court did not abuse its discretion in denying the continuance motion.

The trial court instructed the jury it could find Harris guilty as a principal on the trafficking offense or it could find him guilty of facilitating Walker. The court gave the same instructions as to co-defendant Walker. The jury found Harris

guilty under a facilitation theory and Walker guilty as a principal. Harris complained that it was error for the trial court to instruct the jury that Walker "aided" him in trafficking in cocaine. Although the Supreme Court found there was evidence to support such an instruction, the Court found no prejudice to Harris since Walker was found guilty as a principal not as a facilitator.

Thus, the Supreme Court affirmed Harris' convictions.

Walker argued on appeal that he was entitled to be tried separately from Harris because Harris was also on trial for a separate drug offense to which Walker had no connection. Relying on *Jackson v. Commonwealth*, Ky., 670 S.W.2d 828 (1984), the Supreme Court agreed with Walker. That there was evidence that Harris had trafficked in narcotics on a different occasion made it more likely the jury would infer that Walker participated in the charged trafficking offense. As a result, Walker was prejudiced by being jointly tried with Harris and was entitled to a reversal and a new trial.

***Commonwealth v. Hocker*, 92-SC-966-DG, 11/24/93**

The defendant was tried and convicted of first degree assault and received the minimum sentence of ten years.

The victim's injuries were the result of a street brawl. The victim was found by his mother lying on the ground, bleeding and unable to get up. The victim was in intensive care for two days and remained in the hospital for six additional days. Certified hospital records showed he sustained a skull fracture as well as hemorraging and blood clots from contusions to his head.

The Court of Appeals reversed Hocker's first degree assault conviction because the evidence did not show the victim sustained a "serious physical injury." Hocker as well as the Court of Appeals made much of the fact that the Commonwealth did not call any medical experts to testify to the victim's injuries or prognosis.

Reversing the Court of Appeals and reinstating Hocker's conviction, the Supreme Court held that medical testimony is not an absolute requisite to establish serious physical injury or even physical injury. The Court stated the victim was competent to testify about his own injuries. Likewise, the victim's mother's testimony about her observations of her son's condition immediately after the assault were sufficient to overcome a directed verdict motion. Thus, the evidence was sufficient to support a finding of serious physical injury and a first degree assault conviction.

The Supreme Court also noted the test for first-degree assault under the penal code must focus on the severity of the resulting injury rather than the nature of the attack.

Justice Leibson dissented on the ground that the victim's injuries did not meet the statutory definition of serious physical injury. Except in obvious cases, Justice Leibson would require medical evidence to prove serious physical injury.

***Derossett v. Commonwealth*, 92-SC-767-MR, 12/22/93**

The defendant shot the victim six times. He was convicted of wanton murder and received a forty year sentence. The Supreme Court affirmed his conviction.

The defendant raised four issues on appeal, all of which were rejected by the Supreme Court. First, the defendant challenged two prospective jurors for cause. One prospective juror drove to the scene on the night of the incident "out of curiosity." The other prospective juror lived four houses from the victim's family and knew two of the victim's sisters "pretty well." Both challenges were denied and the defendant struck each prospective juror with a peremptory. The Supreme Court held that the trial court's ruling was not clearly erroneous because neither prospective juror "had such a close situational relationship with the victim or incident as to compel a presumption of bias." As the dissent points out, this holding appears to conflict with two recent cases of the Court: *Anderson v. Commonwealth*, Ky., ___ S.W.2d ___ (10/28/93) and *Thomas v. Commonwealth*, Ky., ___ S.W.2d ___ (5/27/93). The Court also pointed out that the record was not clear as to whether the defendant had used all his peremptories. This comment is a reminder to make sure the juror strike sheets are included in the record and to also orally state for the record that you have used all your peremptories and would like more.

As to the two improper comments by the prosecutor in closing argument, the Supreme Court found that since the defendant's objection was sustained and no motion for a mistrial was made, the appropriate relief was granted. Therefore, be sure to move for a mistrial even if the trial court sustains your objection. The Supreme Court did acknowledge that that the prosecutor's comment that the victim was "my client" was "less than commendable."

Third, the defendant argued the prosecutor engaged in improper impeachment of the defendant's character (under the guise that the defendant opened the door when he testified he was not a violent person) when he questioned the defendant about prior bad acts. The Supreme Court found the prosecutor had a basis for cross-examining the defendant about his propensity for violence and since the trial court sustained the defendant's objections and admonished the jury to disregard the prosecutor's improper questions, but failed to ask for a mistrial, the defendant received all the relief he was entitled to. Once again, remember to move for a mistrial even if the court sustains your objections to preserve any error for review. The dissent noted that the defendant had not put his character for peacefulness in issue and thus the cross-examination was improper. *See Sanborn v. Commonwealth*, Ky., 754

Court ruling too late for vet

Associated Press

PADUCAH — The U.S. Supreme Court's decision on property forfeitures this week came too late for disabled Vietnam veteran Steve May, who lost his home after being convicted on a misdemeanor drug charge.

The federal government seized his half of his $65,000 home and 33 acres after state police found 45 marijuana plants growing on his Livingston County property.

A Livingston Circuit Court jury convicted him of growing marijuana for his own use in 1991. Federal authorities sold the property in February.

May, who suffers from post-traumatic stress disorder and uses a cane to walk, had said he was growing the marijuana to help him relieve the pain in his back.

The Supreme Court ruled Monday that seizure of property for drug crimes can violate the Constitution's prohibition against cruel and unusual punishment.

The Cincinnati Post, Wednesday, June 30, 1993

S.W.2d 534 (1988) and *Warner v. Commonwealth*, Ky., 621 S.W.2d 22 (1981).

Lastly, the Supreme Court found it was not error to instruct the jury on intentional murder even though the Commonwealth failed to produce expert testimony to rebut the defendant's uncontradicted evidence of extreme emotional disturbance.

***Hayes v. Commonwealth*, 93-SC-46-DG, 12/22/93**

The defendant was convicted of reckless homicide and sentenced to five years. The Court of Appeals affirmed his conviction. The Supreme Court granted discretionary review and reversed and remanded for a new trial.

The sole issue on appeal was whether the defendant was entitled to an instruction on self-protection against multiple agressors acting in concert.

The defendant began as the victim of a robbery. After the robbers fled, the defendant retrieved a gun from his car. The defendant then approached a car that he thought contained the fleeing robbers. At the same time, one of the fleeing robbers emerged from between two buildings, ran toward the car and shot at the defendant. The defendant returned fire and killed one of the occupants in the car.

The trial court refused to instruct the jury on the right of self-protection against multiple agressors. The Supreme Court found there was sufficient evidence to support the giving of such an instruction and reversed and remanded for a new trial.

***Martin v. Commonwealth*, 92-CA-002587-MR, 12/10/93**

The defendant was convicted of trafficking in cocaine and of being a PFO II. He was sentenced to 11 years.

On appeal, the defendant raised four issues. First, the defendant claimed he was denied access to two police reports. Pre-trial the defendant moved for discovery as well as for exculpatory evidence. The Commonwealth submitted a police "Buy Report" that made reference to two earlier case reports invloving the defendant. The defendant specifically requested one of these earlier case reports and asked for detailed information regarding the other report. The Commonwealth objected to disclosing the two earlier reports on the ground that they did not contain exculpatory evidence. The defendant never complained about the Commonwealth's failure to produce the reports until after the Commonwealth closed its case.

The Court of Appeals found the defendant's failure to demand production of the reports until he called his first witness resulted in a waiver of his motion for production under RCr 7.26(1).

However, the Court of Appeals stated the Commonwealth has a continuing duty to turn over exculpatory evidence whether or not the defendant requests it. However, the "failure to produce favorable evidence is constitutional error only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Since the requested reports were never turned over to the trial court for an in camera inspection as to their exculpatory nature and since the reports were not made part of the record on appeal, the Court of Appeals remanded the case, pursuant to RCr 7.26 (2), for an in camera inspection by the trial court to determine the relevancy of the reports. The reports must then be sealed and made available to the Court of Appeals as a supplemental transcript upon receipt of which the Court of Appeals will proceed with the disposition of the defendant's appeal.

Second, the Court of Appeals found there was no *Batson* error because the prosecutor's reasons for striking two prospective black jurors were racially neutral: one had a prior misdemeanor conviction and the other "seemed uninterested, was generally unresponsive to the ... questions..., and had a scowl on his fave throughout *voir dire*."

Third, the Court of Appeals found the grand jury that indicted the defendant was legally selected even though it had been selected from the petit jury pool because under the Administrative Procedures of the Court of Justice, Pt. 2, § 10 and KRS 29A.060 the members of the grand jury are to be selected at random from among those persons who make up the jury panel.

Fourth, relying on *Pettiway v. Commonwealth*, Ky., 860 S.W.2d 766 (1993), the Court of Appeals held that the defendant's prior felony conviction, which was the result of an *Alford* plea, was properly admitted to prove he was a persistent felony offender.

***Commonwealth v. Runion*, 92-CA-002369, 12/17/93**

This case involves the Commonwealth's appeal of the trial court's favorable ruling on the defendant's motion for judgment notwithstanding the verdict.

Runion was involved in a motor vehicle collision. The driver of the other car was killed and the passenger was injured. Runion was indicted for murder and first degree assault. The jury found him guilty of reckless homicide and sentenced him to the minimum of one year. The jury found him **not** guilty on the assault charge (the jury was instructed on first, second and fourth degree assault).

Runion filed a motion pursuant to RCr 10.24 for JNOV based on the insufficiency of the evidence to prove reckless homicide. The following day he filed a second motion for JNOV alleging that the jury's *not* guilty verdict on the assault charge amounted to a finding he was not reckless in his operation of his vehicle.

The trial court granted the motion for JNOV because of the insufficiency of the evidence as well as the inconsistent verdicts, and the Commonwealth appealed.

The Court of Appeals noted that the Commonwealth produced evidence that Runion's blood alcohol content was .074 and that "small" levels of drugs were detected in his blood and urine. The Court of Appeals then reasoned that even though the statutory presumption of KRS 189.520()(c) **only** applies in misdemeanor DUI prosecution, it was within the jury's province to determine if Runion was driving under the influence and if his conduct was reckless. The Court then concluded that since evidence of driving under the influence is sufficient to prove wanton conduct, and since wanton conduct requires greater culpability than reckless conduct, evidence of driving under the influence is sufficient to prove reckless conduct.

Although the trial court found the accident was caused by the decedant "turning left in front of [Runion] as he was passing [her] in a legal passing zone," the Court of Appeals stated "[i]t was not clear as to what point in time [Runion] began to pass [the decedant] or when she began to turn." The Court of Appeals also noted the Comonwealth introduced evidence that the decedant either had her brake lights or her left turn signal on at the time of the collision and Runion left an 85-foot skid mark. Thus, the Court of Appeals found it was up to the jury to determine whether Runion's conduct caused the accident.

The Court of Appeals further noted that the Commonwealth presented testimony [there is no mention whether it was

"expert" testimony] that Runion's level of alcohol and drugs would impair an individual's reactions. Therefore, it was not clearly unreasonable for the jury to conclude Runion acted recklessly in driving his vehicle while impaired. Thus the trial court erred in granting the JNOV motion and the guilty verdict is reinstated.

As to the inconsistent jury verdicts, the Court of Appeals found they were the result of an improper jury instruction on the definition of fourth degree assault. Although neither party objected to this instruction at trial, the Court of Appeals stated that since Runion benefited from the erroneous instruction, he should not be permitted to argue its inconsistency on appeal. [One would think that under this line of reasoning, the Commonwealth, who also did not object to the erroneous instruction at trial, should not be allowed to argue on appeal that but for the erroneous instruction the jury would have found Runion guilty of some degree of assault.]

The dissent points out that there is no evidence the not guilty verdict on the assault charge was the result of the erroneous instruction. Moreover, either Runion drove his car recklessly causing the decendant's death *and* her daughter's injuries or he did not.

***King v. Commonwealth*, 92-CA-002910-DG, 12/29/93**

The defendant was arrested for drunk driving. He blew a .100 on the Intoxilyzer 5000 which has a maragin of error of plus or minus .005. The .100 reading was introduced at trial and the defendant was convicted of per se DUI in violation of KRS 189A.010(1)(a).

The defendant maintained he was entitled to a directed verdict of acquittal in light of the .005 margin of error. However, the Court of Appeals held that an Intoxylizer 5000 reading of .100, even with a margin of error of .005, is sufficient probative evidence to prove beyond a reasonable doubt a violation of the per se DUI statute.

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"Long range planning does not deal with future decisions, but with the future of present decisions."
- Peter F. Drucker

Is The Death Penalty Applied Fairly?

JUSTICE BLACKMUN: Well, because I'm not sure the death penalty, as administered, is fairly administered. I think it comes close to violating the equal protection clause of the Constitution, and I'm not certain at all that the death penalty can be constitutionally imposed. I haven't taken that position yet, but I'm close to it.

TOTENBERG: I remember when you were first on this Court, and the Court was struggling with the death penalty issue, and you felt as long as the public wanted it and expressed that through legislation, adopted by a majority vote in state and federal legislatures -- that that should be -- abided by. I hear in your words that you're close to changing that view. This court very rarely, but on occasion, does say that the majority can't rule. What in your experience over the last decade and a half, two decades, has made you --

JUSTICE BLACKMUN: Well, I've seen us struggle with these capital punishment cases through a series of decisions, *Furman* and *Gregg* and *McCleskey*. And I think a question can be raised as to whether we have been consistent, and as to whether it squares with other provisions of the Constitution of the United States and the Bill of Rights, namely and particularly the equal protection clause. And of course, cutting across all of it are the disturbing statistics that come in when one considers race.

TOTENBERG: Statistics that so many more -- disproportionately large numbers of --

JUSTICE BLACKMUN: Yes.

TOTENBERG: African-Americans are executed?

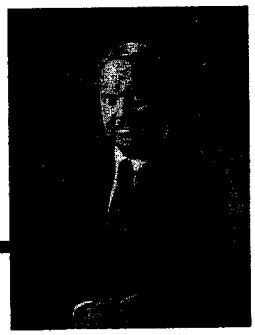
JUSTICE BLACKMUN: Yes, and, of course, some people can rationalize that to their satisfaction, but there it stands, and I'm bothered by it. I don't like death penalty cases. I cringe every time we get them, and in some states, particularly Texas, they are moving along, so that some weeks we have more than one.

TOTENBERG: Have you had times when you thought that possibly genuinely innocent people were executed?

JUSTICE BLACKMUN: Yes, hmm.

From a November 18, 1993 ABC News Nightline Conversation with U.S. Supreme Court Justice Harry Blackmun.

Preliminary Breath Test



Judge Stan Billingsley

{The Advocate begins with this issue to print selective district court orders and opinions of significant interest to Kentucky defenders and to the criminal justice community.}

GRANT DISTRICT COURT

COMMONWEALTH OF KENTUCKY, PLAINTIFF

VS. MICHAEL REED, DEFENDANT

ORDER

This matter comes before the court as a motion to suppress the results of a Preliminary Breath Test (PBT) administered on September 16, 1993 in Grant County Kentucky.

Defense Attorney Steve Howe argues that the results of the PBT should not be admitted into evidence unless all requirements of KRS 189.103 *(Consent to tests for alcohol or substance in blood; test procedures; who may administer; personal testing.)* and KRS 189A.105 *(Effect of refusal to submit to tests; information required to be provided when tests requested; court ordered testing)* are fully complied with.

Grant County Attorney James Purcell, objects to this motion and argues that these statutes apply to the *Breathalyzer* (stationary breath testing machine) but not to the *Alco Sensor III* (portable hand held breath testing unit that was used in this case). The Commonwealth relies on the *Allen* case (*Allen v. Commonwealth*, 817 S.W.2d 458, Ky. Oct. 1991), for the proposition that the PBT results are admissible.

IS THE PBT EXEMPT FROM THE REQUIREMENTS OF KRS 189A.103 AND KRS 189A.105?

First we shall examine the argument of the Commonwealth that KRS 189A.103 and KRS 189A.105 do not apply to the use of the PBT. If the Commonwealth is correct then of course the introduction of PBT results will be greatly eased.

KRS 189A.103 has several provisions that clearly show the intention of the legislature to impose all test conditions stated therein, to both the Breathalyzer *and* the PBT.

Section (1) (a) uses the plural form to state that *"tests"* "shall have been performed according to the administrative regulations promulgated by the secretary of the Justice Cabinet". This must be read to include blood, breath, and urine tests. This section does *not* exclude the PBT, and therefore its inclusive language must be read to include the PBT. It should be noted that the PBT was in wide use at the time of the passage of this statute in 1991. The *Allen* case involved a PBT test that was administered in 1989, some two years before the effective date of KRS 189A.103. But the most dispositive provision of KRS 189A.103 is Section (5) which specifically mentions the PBT, it states:

> "(5) When the *preliminary breath test*, breath test, or other evidence ..."

A reading of KRS 189A.103 convinces this court that the legislature clearly intended KRS 189A.103 to apply to the procedures for the administration of the PBT as well as to the Breathalyzer and blood and urine tests.

KRS 189A.105 likewise applies to the PBT because this statute in its first section specifically refers back to KRS 189A.103 by saying that:

> "(1) No person shall be compelled to submit to *any test or tests* specified in KRS 189A.103..."

(Again it should be noted that Section (5) of KRS 189A.103 specifically mentions the "preliminary breath test".) This language is a specific inclusion of the PBT into the standards of the statutory scheme for the use of any testing device intended to be used to provide an additional basis for the establishment of probable cause or for introduction of evidence.

This court therefore finds that before the *results* (*i.e.*, specific reading of BAC) of any PBT test (or other breath, blood or urine test) may be admitted into evidence, that the Commonwealth must meet the burdens established by KRS 189A.103 and KRS 189A.105.

DID THE *ALLEN* CASE NEGATE KRS 189A.103 AND KRS 189A.105?

First we should note that the *Allen* case concerns a PBT test administered on February 16, 1989 over two years prior to the effective date of KRS 189A.103 and KRS 189A.105. Any discussion of the *Allen* case must be distinguished by this very important fact. The decision handed down by the Court of Appeals was rendered on October 25, 1991, almost four months after the effective date of these two statutes.

It would have been unfair to the Commonwealth for the Court of Appeals to apply the restrictions of these two statutes that only became effective two years, four months and twelve days *after* the officer administered the PBT to *Allen*. Clearly, the Court of Appeals only applied the law in effect at the time of the administration of the PBT.

One cannot conclude from anything in *Allen*, that the Court of Appeals intended to limit the application or effect of KRS 189A.103 or KRS 189A.105.

Some would suggest that *Allen* is a blanket rule of law that allows the introduction of the PBT results without any restrictions.

But a reading of the *Allen* case reveals that the Court of Appeals found the following preceded their finding that the results were admissible:

1) "...we find, based on the evidence, that it was in proper working order."

2) "...that particular machine had been used five or six times on the evening in question and had not had a positive reading until used on appellant."

3) "The operator further related that he calibrated the device as suggested by his instructors..."

4) "...that he had received the requisite training in its use...that he had used the machine 'on thousands of occasions'..."

5) "Nothing indicates to us that anything was amiss with the Alco Sensor III used on appellant nor that the operator was not fully trained."

6) "Mr. Allen stated he had not (been drinking)." (Thereby impeaching the defendant by revealing the presence of alcohol.)

7) "...attempts to discredit the technology *may* do just that..."

These findings by the Court of Appeals in the *Allen* case show that prior to the admission of the PBT results (in the *Allen* case the results were .16%) certain evidentiary standards still had to be met by the Commonwealth. Nothing in *Allen* suggests that the PBT has some special absolution from any procedural or evidentiary burdens when the use of the reading or test results is sought to be introduced into evidence.

A reading of *Allen* leads to the conclusion that the only effect of *Allen* (with regard to the PBT) was to conclusively find that if all evidentiary burdens were met by the Commonwealth, then the specific test results could be read to the fact finder and admitted into evidence.

(Any other conclusion would have created a situation where the admittedly more reliable Breathalyzer, had a great number of evidentiary hurdles to clear before its BA results were admissible, but the less reliable PBT could provide the same BA results without having any evidentiary hurdles to clear. Such an illogical conclusion was not visited upon us by *Allen*.)

In the past a number of jurisdictions limited the introduction of the PBT test results to statements about either the "presence of alcohol being indicated" or "the results indicated a reading above or below .10%" or "pass or fail" results. *Allen* clearly holds for the proposition that the specific reading established by the PBT device may be introduced but only when all evidentiary requirements are met.

DOES *ALLEN* PRECLUDE THE USE OF THE REGULATIONS AND MANUFACTURER'S INSTRUCTIONS?

Allen states in reference to *Tipton v. Commonwealth*, Ky.App., 770 S.W.2d 239 (1989) that the 'eyeball rule' "is nothing more than a section from the Chemical Test Manual for Kentucky *which has no binding affect upon the judiciary.*"

That comment appears to be dicta but it does state a correct principle of law that publications of executive agencies in and of themselves are not regulations or laws that must be adhered to by the courts in setting procedure or rules of evidence for the courts.

Nevertheless, we should examine KRS 189A.103(3)(a) where the legislature has stated:

> "(a) Tests of the person's breath, blood or urine, to be valid pursuant to this section, shall have been performed according to the administrative regulations promulgated by the secretary of the Justice Cabinet."

And KRS 189A.103 Section (4) which states:

> "A breath test shall consist of a test which is performed in accordance with the manufacturer's instructions for the use of the instrument."

These two statutes became effective after the defendant in the *Allen* case submitted to his PBT test, and after his trial. Further the regulations adopted by the Justice Cabinet in compliance with KRS 189A.103 (3)(a) only became effective a month after the *Allen* decision was rendered.It is impossible to conclude that the Courts statement about the Chemical Test Manual was intended to overrule or limit the effect of KRS 189A.103.

Accordingly, we conclude that while the Chemical Test Manual may not be binding on the court, the relevant administrative regulations and the applicable manufacturer's instructions for the operation of the PBT, by statute (KRS 189A.103 Section (3)(a) and (4), *must be duly considered* by the court prior to the admission of the PBT test results.

The newly enacted Kentucky Rules of Evidence (which became effective after the rendition of *Allen*) may distinguish *Allen* in the manner in which evidence is introduced. The KRE may now permit the introduction of the Chemical Test Manual and similar treatises.

Exceptions to the hearsay rules are KRE 803 (8) which allows the introduction of "Public records and reports" and KRE 803(18), "learned treatises". These exceptions may permit the introduction of the Chemical Test Manual and the Student Manual used by the U.S. Dept. of Transportation.

KRE (18) the "Learned treatises" exception allows a properly qualified witness to read the contents of pamphlets and books on subjects of history, medicine, science and art. It is possible for the court to take judicial notice of such publications.

Accordingly, the court takes judicial notice of the "*DWI Detection and Standardized Field Sobriety Testing Student Manual*" which is published by the U.S. Dept. of Transportation, Transportation Safety Institute, National Highway Traffic Safety Administration. (This publication was introduced for the court's consideration by the defense.)

This student manual makes the following comments about the PBT:

> "PBT instruments have accuracy limitations. Although all PBT instruments currently used by law enforcement are reasonable accurate, they are subject to the possibility of error, especially if they are not used properly. There are factors that can affect the accuracy of preliminary breath testing devices. Some of these factors tend to produce "high" test results; others tend to produce "low" results.
>
> There are two common factors that tend to produce *high* results on a PBT:
>
> 1. **Residual mouth alcohol.** After a person takes a drink, some of the alcohol will remain in the mouth tissues. If the person exhales soon after drinking, the breath sample will pick up some of this

left-over mouth alcohol. In this case the breath sample will contain an additional amount of alcohol and the test result will be higher than a true BAC.

If takes approximately 15 minutes for the residual alcohol to evaporate from the mouth. Evaporation cannot be speeded up in significantly by having the suspect gargle with water or in any other way.

The only sure way to eliminate this factor is to make sure the suspect does not take any alcohol for at least 15 minutes before conducting the breath test. Remember, too, that most mouthwashes, breath sprays, cough syrups, etc., contain alcohol and will produce residual mouth alcohol. Therefore, it is always best not to permit the suspect to put **anything** in their mouth for at least 15 to 20 minutes prior to testing.

2. **Breath contaminants**. Some types of preliminary breath tests might react to certain substances other than alcohol. For example, substances such as ether, chloroform, acetone, acetaldehyde and cigarette smoke conceivable could produce a positive reaction on certain devices. If so, the test would be contaminated and its result would be higher than a true BAC. Normal characteristics of breath samples, such as halitosis, food odors, etc., do not affect accuracy.

There are two common factors that tend to produce *low* PBT results:

1. **Cooling of the breath sample**. If the captured breath sample is allowed to cool before it is analyzed, some of the alcohol vapor in the breath may turn to liquid and precipitate out of the sample. If that happens, the subsequent analysis of the breath sample will produce a low BAC result.

2. **The composition of the breath sample**. Breath composition means the mixture of the tidal breath and alveolar breath. Tidal breath is breath from the upper part of the lungs and mouth. Alveolar breath is deep lung breath. Breath testing should be conducted on a sample of alveolar breath, obtained by having the subject blow into the PBT instrument until all air is expelled from the lungs."

This Student Manual also states that the PBT "should never be the sole basis for a DWI arrest." "The PBT is only one of many factors the officer considers in determining whether the suspect should be arrested for DWI." Nevertheless the PBT result is an important factor because it provides *direct* indication of alcohol influence." (HS 178 R1/90, Vii-6).

It would appear that the U.S. Department of Transportation views the PBT device as only a screening device that should be used to provide the arresting officer with additional grounds to establish "*probable cause*" for an arrest. The subsequent test by the Breathalyzer is considered to be far less amenable to improper operation.

In the statutory scheme in Kentucky, KRS 189A.100 permits the use of the PBT "*...in the field to a person suspected of violation of KRS 189A.010 before the person is arrested.*" This statute permits the use of the PBT to provide a basis to establish probable cause for an arrest. *When the PBT is used only to establish probable cause under KRS 189A.100, then the mandatory requirements of KRS 189A.103 do not appear to apply.*

If the establishment of probable cause is the only intended use of the PBT test results, then the many courts that ascribe to the rule that only permits testimony of "presence of alcohol indicated" or "pass/fail" testimony, seem to be correct.

But KRS 189A.103 applies to tests administered *after an arrest* (Section 1) and only when the officer has "reasonable grounds to believe the person has committed a violation of KRS 189A.010(1) or 189A.520(1)" (Section 3). *If all the applicable requirements of KRS 189A.103 and KRS 189A.105 are met, then PBT results are admissible into evidence.* This is consistent with the ruling in the *Allen* case.

WHAT IS REQUIRED BEFORE ADMISSION OF THE PBT RESULTS INTO EVIDENCE?

KRS 189A.103

Step I: This statute states that anyone "*...arrested* for any offense arising out of a violation of KRS 189A.010(1) or 189.520(1)", shall be deemed to have given their consent to one or more tests of his blood, breath or urine.

It would appear that the PBT test given *prior to an arrest* must be accompanied by a knowing and voluntary affirmative consent, but after an arrest the consent is assumed by the statute. (See KRS 189A.103 (1).) This consent must be accompanied by the reading of the warnings required under KRS 189A.105 (2)(a) (1) and (2).

If the test is requested *prior to the arrest* then under KRS 189A.100 (1), "A person's refusal to take a preliminary breath test shall not be used against him in a court of law or in any administrative proceeding."

Step II: The test shall be administered at the direction of a peace officer having reasonable grounds to believe the person has committed a violation of KRS 189A.010(1) or 189.520(1). (See section (3) of KRS 189A.103.)

Step III: The tests shall be performed according to the administrative regulations promulgated by the secretary of the Justice Cabinet. (KRS 189A.103(3) (a).)

The Kentucky Administrative Regulations adopted by the Justice Cabinet in compliance with KRS 189A.103 (3)(a) state as follows:

500 KAR 8:010

"This regulation establishes the certification of breath analysis operators as required by KRS 189A.103 (3)(6);

Section 1; (1) To become certified to operate a breath alcohol analysis instrument the person shall successfully complete the training program of the Dept. of Criminal Justice Training..."

"*Section 2*; (1) Operator certification shall be valid for a period of two (2) years from the date of issuance.

(2) Certification shall be terminated if it is not renewed within a two (2) year period or the operators ceases to be employed by a criminal justice agency.

(3) An operator whose certification has been revoked pursuant to this section shall be eligible for recertification pursuant to Section (4) for six (6) months following revocation.

(Other sections of the relevant KAR include Section (3) dealing with employing agencies duties to report terminations, Section (4) which requires a 4 hour recertification process, Section (5) which sets out grounds for revocation of a certificate, and Section (6) which creates a grandfather clause for certain police officers.)

500 KAR 8:020

Sec. 2. (1) A breath alcohol instrument shall be accurate within plus or minus 0.005 alcohol concentration units reading to be certified. To determine accuracy of instruments, a technician trained or employed by the Forensic Laboratory Section of the Department of State Police shall perform analyses using a certified reference sample at regular intervals.

(2) All breath alcohol analysis instruments shall be examined by a technician trained or employed by the Forensic Laboratory Section of the Department of State Police prior to being placed into operation and after repairs of any malfunctions.

500 KAR 8:030

Section 1. The following procedures shall apply to breath alcohol tests.

(1) A certified operator shall have continuous control of the person by present sense perception for at least twenty (20) minutes prior to the breath alcohol analysis. During that period the subject shall not have oral or nasal intake of substances which will affect the test.

(2) A breath alcohol concentration test shall consist of the following steps in this sequence:

a. Ambient air analysis;
b. Alcohol simulator analysis;
c. Ambient air analysis;
d. Subject breath sample analysis, and,
e. Ambient air analysis.

(3) Each ambient air analysis performed as part of the breath alcohol testing sequence shall be less than 0.010 alcohol concentration units.

(Section (2) of 500 KAR 8.030 contains regulations for blood and urine testing, and for testing for substances other than alcohol.)

STEP IV: All tests shall be administered by a peace officer holding a certificate, as an operator of breath analysis instrument issued by the secretary of the Justice Cabinet or his designee. (KRS 189A.103(3)(b).)

Step V: The breath test shall consist of a test which is performed in accordance with the manufacturer's instructions for the use of the instrument. (KRS 189A.103(4).)

In this case the defense introduced a photo copy of the manufacturer's instructions which include the guidelines for the proper test procedures. Those procedures are:

CALIBRATION

At least once a month the instrument should be calibrated according to the calibration procedure. This includes a:

a) zero display check; (.000 should be seen for 7 to 10 seconds.)
b) calibration check; (check temperature strip on back of Alco Sensor III. Visible number verifies proper operating temperature. (Should be between 20 degrees to 36 degrees centigrade. This is equal to 68 degrees F and 98 degrees F.)
c) make sure SET button is depressed.
d) Perform test; (Three different methods are suggested for test of the calibration.)

1) prepare *Mini-Alco Can*: remove plastic sleeve, attach value to stem, attach short end of mouthpiece to plastic nozzle on value; or,
2) prepare *Alco Tank* (and follow instructions on tank); or,
3) Use simulator (use simulator manual to conduct test).

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CALIBRATION PROCEDURE:

A. USING MINI-ALCO CAN:

Step:
4.1 Attach Alco Assembly to Alco-Sensor III.
4.2 Observe the value marked on the alco can, THIS IS THE TARGET VALUE!
4.3 Depress valve on alco can for 4 seconds, on the 3rd of the 4 second count, depress the READ button and hold it down.
4.4 Remove the valve assembly from the Alco-Sensor III and observe the reading until it becomes stable for 5 second.
4.5 If the reading is +/-.010% of the can value, unit is considered calibrated. If not the unit should be calibrated.

B. USING ALCO TANK:

Step:
4.1 Open valve on top of tank.
4.2 Check gauges on regulator for proper settings.
4.3 Attach mouthpiece to end of regulator line.
4.4 Bleed regulator line by depressing button on regulator for approximately 7 to 10 seconds.
4.5 Attach line assembly to Alco-Sensor III.
4.6 Depress button on regulator for 5 seconds, on the 4th of the 5 seconds, depress READ button.
4.7 Remove line assembly from Alco-Sensor III.
4.8 Results should be +/-.010% of value marked on tank.

C. USING SIMULATOR:

Step:
4.1 Check to make sure simulator is up to temp. (45°c +/-.2°).
4.2 Check Alco Sensor III for readiness (refer to 2.1 or 2.2.
4.3 Attach mouthpiece to Alco-Sensor III and then to simulator.
4.4 Blow into inlet of simulator with a constant breath for 5 seconds. On the 4th of the 5 seconds count, press READ button.
4.5 Remove Alco Sensor III and observe reading.
4.6 Results should be +/-.010% of solution.

If unit does not read within specs it needs calibration.

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e. Calibration: using calibration screwdriver turn calibration screw two full turns clockwise, attach alco assembly, depress valve on can for 4 sec., on 3rd. sec. depress READ button, quickly remove alco assembly and insert screwdriver in the calibration screw, carefully observe reading. Once the reading surpasses the value marked on the can, immediately turn the calibration screw counterclockwise until the value on the can and the reading are once again the same. When the value is stabilized and when it holds for 5 seconds, the unit is calibrated. Under no circumstance should the screw be

turned clockwise to increase the number displayed by the adjustment. Once satisfied with the reading, DEPRESS SET BUTTON, and verify calibration. The reading should be within .003 if a proper job of calibration has been done.

MANUFACTURER'S INSTRUCTIONS FOR ADMINISTERING PBT TESTS

1. Remove unit from box and note number from 20 to 36 on temperature window.
2. Mount mouthpiece.
3. Press READ BUTTON and hold down. Check to see if .000 is constant. (Checking for contamination.)
4. Depress SET BUTTON. (Flushes unit and prepares for sample taking.)
5. Instruct subject to give sample.*
6. Push READ BUTTON before exhalation ceases. (Sample after at least 3 seconds while subject is still blowing.)
7. Keep READ BUTTON depressed until reading. (Read maximum reading attained).
8. Push SET BUTTON to accelerate elimination of reading (Purge and electrically clean cell surface.)
9. Replace Alco Sensor III in pocket with SET BUTTON depressed. (This cleans cell.)

*No smoking within fifteen minutes of test. If subject has not used alcohol in last fifteen minutes perform test. If he has used alcohol within last fifteen minutes wait fifteen minutes before testing. If the test is positive, wait 2 to 5 minutes and take a second test. A similar result indicates true blood alcohol level. A much lower lever suggests mouth alcohol was present at the time of the first test.

Since calibration will partially be dependent upon handling and storage of Alco Sensor III, if results are to be used as important evidence, it is recommended that a STANDARD be run prior to a test to establish the calibration of the unit for the day. Unit should stay calibrated for days.

If Alco Sensor III is being used EVIDENTIALLY, the subject must be kept under observation for 15 minutes as previously described.

The pocket model will lose sensitivity if more than 5 positive (alcohol present) tests are run in an hour. Avoid mass testing of subjects of more than .10 BAC unless the unit is recalibrated every 5 tests.

Under no circumstances should raw cigarette smoke be blown into the instrument. It will permanently damage the FUEL CELL.

Principle of Operation/ Alcohol in Breath

"The accuracy of any breath alcohol test is dependent upon the relationship between the concentrations of alcohol in the blood and deep lung breath. This ration is 2100 to 1 is well established.

The amount of alcohol in a properly collected breath sample is governed by the amount of alcohol in the blood in the lungs. To get an accurate reading, a deep lung breath sample must be collected and analyzed.

A recent drink of an alcoholic beverage or regurgitation could introduce "mouth alcohol" to the breath thus causing an exaggerated reading. A 15 minute waiting period prior to testing will insure the elimination of "mouth alcohol"."

Introduction

"With normal usage the unit should provide thousands of tests before the sensor needs replacing." "Field use indicates the cells generally have a life of 2-5 years."

"Good sampling technique is essential to obtaining a deep lung sample, and a deep lung sample is essential to get a true blood alcohol reading."

Mouthpieces

"Using mouthpieces of other design than those supplied by the manufacturer may cause inaccurate readings by as much as 10 to 20%.

Whistling mouthpieces can either (sic) venturi room air into the breath sample or pressurize the system causing a low Blood Alcohol reading on a subject. On the other hand,extremely restrictive mouthpieces can result in false high Blood Alcohol readings. Additionally, the use of a mouthpiece adaptor mounted on the Alco Sensor which permits the use of plain, straight mouthpieces can result in the accumulation of alcohol-bearing condensate at the intake port. This will result in positive blank readings and inhibit the clean up of the instrument."

REQUIREMENTS OF KRS 189A.105

(Effect of refusal to submit to tests; information required to be provided when tests requested; court ordered testing.)

This statute states that no person shall be compelled to submit to any test (but a refusal can result in revocation of driving privileges). This statute requires that ALL persons subjected to "any test" or tests "shall be informed at the time the test is taken" of the following:

I If the person refuses the test the person's privilege to drive shall be revoked for six months or more; and,

II If a test is taken and the results indicate that the person has an alcohol concentration of .10 or greater, or if the person is under the influence of alcohol or a substance that impair's ones driving ability or a combination of alcohol and such substance, the person shall be subject to criminal penalties and the person's driving license shall be revoked for a period of at least 90 days; and,

III That the person has the right to have a test or tests of his blood performed by a person of his choosing described in KRS 189A.103(6) (*i.e.*, physician, registered nurse, phlebotomist, medical technician, or medical technologist), within a reasonable time of his arrest at the expense of the person arrested.

This court finds that the requirements of KRS 189A.105 do not apply to "probable cause" screening tests given under KRS 189A.100, since Section (1) of KRS 189A.105 limits its application to tests administered under KRS 189A.103, and after an arrest has been effected. But if the Commonwealth intends to introduce the specific results of a PBT test into evidence, then the provisions of KRS 189A.105 do apply.

(The *Allen* case also holds for the proposition that a PBT test (authorized under KRS 189A.100, *i.e.*, prior to an arrest) which indicates a sufficient presence of alcohol,provides proper grounds for the issuance of a search warrant to obtain a blood test.) (This use was made of the PBT in A*llen*).

Many police officers have wrongly assumed that the statutory consent in Chapter 189A precluded any of the requirements of KRS 189A.105 about providing information to the defendant in cases where he agreed to take the test. They have assumed that these warnings were only required when the defendant *refused* the test. But Section (2)(a) states:

> "At the time a breath, blood, or urine test is requested, the person shall be informed:"

This statute does not restrict the reading of these warnings only to those situations where the test is refused. Also such an interpretation loses credibility in light of Section(2), *where the consequences of failing the test are listed.* This section would not make any sense unless one interprets it to mean that it includes situations other than refusals, *i.e.*, situations where the defendant is willing to take the offered tests. This is certainly meant to be a warning to those who do intend to take the test as well as to those who may refuse to submit to the test.

This was obviously inserted by the legislature so that all defendants would understand the two options available to them, *i.e.* to take the test or to refuse. This court cannot assume that the legislature had any intention other than exactly what these statutes state in plain and simple language.

CONCLUSION

Officer Humphrey was the only witness called by the Commonwealth to testify at the suppression hearing, and his testimony was devoid of a number of evidentiary requirements including but not limited to proof of proper compliance with the manufacturer's instructions, the regulations of the Justice Cabinet, and the reading of the warnings listed in KRS 189A.105 Section (2)(a)(1), (2) and (3).

For these reasons the motion of the Defendant to suppress the results of the preliminary breath test, administered to the defendant Michael Reed on September l6, 1993, is hereby granted, and accordingly, said PBT test *results* may not be introduced into evidence upon trial. The officer will be permitted to testify upon proper grounds;

That he administered the PBT as one of several field tests (and/or personal observations) and they, taken as a whole, indicated the presence of alcohol and provided him with reasonable grounds for the arrest for a violation of KRS 189A.010.

In any case where the Commonwealth intends to offer the PBT test *results into evidence*, they must comply with the statutory requirements of KRS 189A.103 and KRS 189A.105.

Done this the 23th. day of December, 1993.

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District Judge's Association forms Opinions Library

Jefferson District Judge **Paul Gold**, President of the Kentucky District Judge's Association, has appointed Carroll District Judge **Stan Billingsley** to be Chairman of the Opinions Library project. The purpose of this project is to collect unpublished decisions affecting district court practice.

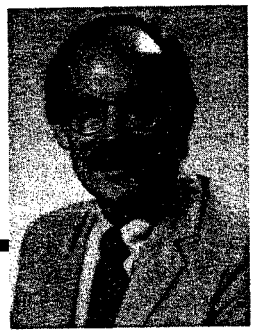
Judge Billingsley and his committee have been in the process of soliciting relevant decisions from District and Circuit Judges. At present the library contains decisions and orders setting out procedures for the conduct of roadblocks, limitations on the use of the PBT results at trial, ruling in leading cockfighting cases, a decision on the hibitual violator statute, and several other interesting subjects.

The committee is particularly interested in collecting and cataloguing appellate decisions of Circuit Judges who have written decisions on appeals from the District Court. If future plans are placed into effect, the library will be moved from Judge Billingsley's office in Carrollton, to the care of the State Law Library. It is possible that such decisions may be placed on a computer bulletin board so that they can be accessed 24 hours a day by judges and attorneys. Such a system might also permit automatic faxing capability, and also provide an E mail system for use by the courts.

Contributions to the library by practicing attorneys is encouraged. The more opinions and decisions placed in the library will of course increase it's value to the bench and bar. Anyone having a decision should forward them to Judge Billingsley at his office at 802 Clay Street, Carrollton, Kentucky 41008. These may be mailed in, or if possible, they can be copied on computer disk.

Persons wishing to access the library in its present primary stage, should call Judge Billingsley at (502) 732-5880, write him at his office, or FAX your requests to Judge Billingsley at (502) 732-4924. The FAX number is available 24 hours a day. If you will include instructions on how to return the requested data to you, your request will be processed as soon as time permits. There is no charge for this service at this time.

Plain View



Ernie Lewis

United States v. Layne

The defendant was arrested in Marion County by the Sequatchie County, Tennessee Sheriff, for a crime committed in Sequatchie. During the arrest, a shotgun was discovered in his truck. Eventually he was charged in federal court with being a felon in possession of a handgun. Layne entered a conditional plea.

The Sixth Circuit affirmed Layne's conviction. There was no issue regarding whether probable cause existed or not, since a license number had been given to the police by eyewitnesses. Rather, the issue was whether the arrest was illegal, spoiling the search of the truck, due to the fact that an officer went outside of his county to make the arrest. The court relied upon Tennessee law. In *State v. Johnson*, 661 S.W. 2d 854 (Tenn. 1983), the court had held that an extraterritorial arrest by the police was legal under the Tennessee citizen's arrest statute. According to the Sixth Circuit, this was dispositive of the federal issue as well.

United States v. Ferguson

When do suspicious factual circumstances turn into a pretextual arrest? The Sixth Circuit explored this question in an *en banc* decision.

In the early morning hours of October 18, 1990, a Memphis, Tennessee police officer was talking with a security guard at a motel. Two cars drove in, and for a period of time engaged in suspicious activity, including laying down in the front seat, and going in and out of rooms and vehicles. Eventually they drove off. The officer followed for a time, and then stopped them after observing that their car had no license plate. The resulting search revealed drugs and a gun. Ferguson was not issued a citation for having no license plate. The case arose on an appeal of a conditional guilty plea after the trial court had overruled Ferguson's motion to suppress.

A panel of the court reviewed the question of pretext using the 11th Circuit's standard in *United States v. Smith*, 799 F. 2d 704 (11th Cir. 1986):

> ...the proper inquiry...is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.

Based upon this standard, the court stated that "we do not believe that a 'reasonable officer' would have stopped Lester because his vehicle had no visible license plate, absent some additional, invalid purpose...there is overwhelming evidence that Writesman stopped the vehicle because he wanted to conduct an investigatory drug stop, suspicious of the activity he observed at the motel." Accordingly, the conviction was reversed. *United States v. Ferguson*, 989 F. 2d 202 (6th Cir. 1993).

Judge Boggs dissented. He insisted that the majority had substituted their subjective opinion for the objective standard. "The proper inquiry is whether a reasonable officer would have stopped Ferguson and Lester 'in the *absence* of an illegitimate motivation.'" "Conduct arousing suspicion of criminal activity does not immunize a citizen from being stopped for a different, though significant, violation of the law." *Id.* at 206.

The Sixth Circuit *en banc* vacated the decision of the panel, and affirmed the district court's denial of the motion to suppress. Judge Batchelder wrote the decision for the court. He posed the question to be decided as follows: "Where an officer has probable cause to make a traffic stop, and also has motivations that are unrelated to the traffic stop such as an intent to investigate suspicious activity, may the stop be deemed unconstitutional because it is pretextual."

The court rejected their previous statement of the standard as articulated in the *Smith* case. No longer will pretextual stops be judged based upon whether a reasonable officer "would" have stopped under similar circumstances. Rather, the court will look simply at whether the individual officer has probable cause to make a traffic stop. "We hold that so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment...We focus not on whether a reasonable officer 'would' have stopped the suspect (even though he had probable cause to believe that a traffic violation had occurred), or whether any officer 'could' have stopped the suspect (because a traffic violation had in fact occurred), but on whether this particular officer in fact had probable cause to believe that a traffic offense had occurred, regardless of whether this was the only basis or merely one basis for the stop. The stop is reasonable if there was probable cause, and it is irrelevant what else the officer knew or suspected about the traffic violator at the time of the stop. It is also irrelevant whether the stop in question is sufficiently ordinary or routine according to the general practice of the police department or the particular officer making the stop."

Using this standard, the court decided that the officer had probable cause to believe that the car was in violation for not having a license plate displayed.

Judges Keith and Jones, the majority in the panel decision, filed separate dissents. Judge Keith criticized the abandonment of the *Smith* "would" test, noting that by "merely focusing on whether an officer 'could' stop an individual, the majority fails to assess the reasonableness of an officer's conduct. Under the 'could' test, officers are given virtually unlimited discretion to determine who they will stop for minor traffic violations."

Judge Jones also wrote a dissent. He states powerfully that the new test of the court is one which is "neat and efficient", but one which "ignores the Constitution." He predicts that the police will now be able to stop individuals based upon mere hunches, and other factors, such as race, whenever a minor traffic violation is present.

United States v. Czuprynski

A criminal defense lawyer in Bay City, Michigan named Czuprynski hired an

associate named Sawicki. After firing her, she brought assault charges against him. At trial, Czuprynski was acquitted.

Thereafter, prosecutors and Sawicki, after two judges turned them down, obtained a search warrant for Czuprynski's office, apartment, and car based upon previous search warrants in which marijuana was found, and based upon Sawicki's affidavit that Czyprynski used marijuana, that she used it with him, and that she had bought it from him. The search revealed a small amount of marijuana (1.6 grams), and a federal indictment for possession of marijuana followed. The district court denied Czuprynski's motion to suppress, and he was convicted at trial.

The Sixth Circuit reversed. *United States v. Czuprynski*, (6th Cir. 11/9/93). Judge Martin wrote the opinion and was joined by Judge Wiseman. The court was concerned that nothing in the warrant application revealed Sawicki's credibility, and that based upon her having been fired by Czuprynski, and having filed assault charges against him, that there was reason to doubt her credibility. Furthermore, no officer corroborated any of the information in Sawicki's affidavit. Thus, the "warrant was facially deficient because it failed to establish any basis for the magistrate to conclude either that Sawicki was a reliable informant in general or that her allegations in this case were credible."

The court further rejected the government's effort to save the search based upon the good faith exception. "In our opinion, a warrant application which contains no information from which a magistrate could conclude that the informant's information is reliable or credible" is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Finally, the court was concerned by the clear evidence of judge shopping involved in this case.

Judge Kennedy dissented. In her opinion, the fact that Sawicki was a lawyer and personally appeared before the magistrate was sufficient to ensure her reliability. She also disputed the evidence relied upon by the majority that judge shopping had occurred in obtaining the warrant.

United States v. Respress

This is another "airport search" case, out of the Cincinnati airport. Here, Respress was noticed by Officer Jones as he deplaned due to the fact that he was coming from a "drug source city", he was one of the last passengers to get off the plane, he wore an "all-black sweatsuit and a quantity of gold jewelry", and he carried no baggage on board the plane with him. Respress was watched as he sat in the gate area, smoked a cigarette, and asked an agent about his connecting flight. Officer Jones approached Respress as he was going to his connecting flight, and began to question him. Jones found that Respress' ticket used an alias. Jones asked to search Respress and his baggage. Respress said that he did not want to be delayed. Respress then left and made a call. Respress left the terminal and got into a taxi. Officer Parker and a patrolman stopped the taxi.

Respress was search, and $700 was found. Respress again would not consent to a requested search of his baggage. Respress left. Officer Jones then seized the suitcase from the airline, and obtained a search warrant. A search of the bag revealed 2.8 kilograms of cocaine. Later, Respress attempted to pick his bag up, and was arrested. He entered a conditional guilty plea following his failed motion to suppress.

The only issue Respress raised was whether the officers were justified in seizing his suitcase. The court held that this was "a plain old-fashioned seizure of a person's effects, based on probable cause, in order to prevent the disappearance of evidence and so that a warrant could be obtained and a search conducted." The ten hours between the time of the seizure and the obtaining of the warrant was also viewed as reasonable by the court.

Judge Jones issued a dissenting opinion. He criticized the majority for ignoring the warrant requirement for seizing and searching personal effects. "The majority in effect establishes a new and unprecedented exception to the warrant requirement, one that allows a seizure whenever a magistrate properly determines afterwards that probable cause existed at the time of the government's action." Judge Jones also disagreed that the officers had probable cause to seize the luggage. Further, while there was reasonable suspicion, under *U.S. v. Place*, 462 U.S. 696 (1983), holding the luggage for ten hours was unreasonable. Judge Jones ends his dissent with beautiful language calling us to the core of the Fourth Amendment: "I align myself with the wise counsel Lord Atkin offered during the darkest days of World War II: 'In England amidst the clash of arms the law are not silent.' Similarly, in the United States, as the so-called war on drugs is waged, the guarantees of the Fourth Amendment do no stand mute."

A footnote is appropriate here. In the Tuesday, December 7, 1993 edition of *The Kentucky Post*, it was reported that a woman was appealing her warrantless stopping in the Cincinnati airport. The district judge had rejected her allegations that she had been stopped because she was black. The article notes that while 88% of all travelers are white, and 6% black or Hispanic, 63% of travelers stopped in the Cincinnati airport had been black or Hispanic. In 1992, this figure went up to 74%.

United States v. Johnson

This case arises from odd facts. The police were called by neighbors saying that a burglary was in progress at Johnson's house. When the police arrived, they found a broken window and two people inside. These persons were placed in the police cruiser. Other persons were found inside as well during a

Do you favor:
Allowing police in your area to stop and search people for weapons if these people fit a criminal profile?

Yes 47% **No 50%**

From a telephone poll of 1,000 adult Americans taken for TIME/CNN on Jan. 17-18 by Yankelovich Partners, Inc. Sampling error is ± 3%. "Not sures" omitted.

TIME MAGAZINE, February 7, 1994

search of the premises. Eventually, the defendant and owner of the home arrived, and denied the police his consent to search completely. Due to seeing different suspicious items during the initial sweep, a warrant was obtained, and eventually a silencer was found. The defendant entered a conditional plea to possessing an unregistered silencer.

Judge Kennedy wrote the opinion for the court. The court noted that a prerequisite to the exigent circumstances exception to the warrant requirement is the existence of probable cause. Probable cause was present here due to the police being called, and there being a broken window and two people inside under suspicious circumstances. Although the court acknowledged that the Supreme Court had recognized "only a few emergency circumstances excusing the need for a warrant, namely, hot pursuit of a fleeing felon, destruction of evidence, and fire", the court believed that this extended to burglary as well. Thus, the initial entry into the house was legal.

After the initial entry, the Bomb Square and BATF also entered after the police saw suspicious items in the house. The court viewed these entries as being justified by exigent circumstances as well. As a result of the reasonableness of the initial entries, the final seizure of the silencer, which was based upon the earlier observations of the police, was lawful.

Judge Keith dissented. In his opinion, expanding the Supreme Court's exigent circumstances exception to a burglary "cripples the Fourth Amendment." "It resembles an Orwellian scenario where officers, based on an 'anonymous tip,' approach a home, and upon an occupant's inability to produce identification, arrest the resident and search her home.... Numerous invasions of privacy will result from imaginary and unsubstantiated burglaries fabricated from the combination of officers' active imaginations, wary suspicious, and arrogance."

Short View

1. ***People v. Corpany***, Colo. Sup. Ct., 54 Cr. L. 1079 (10/4/93). A traffic stop during which passengers furtively place something under the seat allows for a protective search of the car, under *Michigan v. Long*, 463 U. S. 1032 (1983). However, where the searching officer finds a fanny pack, and a frisk of the pack does not reveal anything indicative of a weapon, the officer cannot search the fanny pack. "The safety concerns that justified the initiation of the search of the passenger compartment...did not justify a further search of the inside compartments of the closed soft container once the initial pat down suggested that the fanny pack did not contain any weapons."

2. ***U.S. v. Gooch***, 54 Cr.L. 1081 (9th Cir. 10/6/93). Is a tent more like a motor home, which an officer can search upon probable cause without a warrant, or a home, which requires a warrant? According to the 9th Circuit, it is more like a home, and thus the warrantless search of a camper suspected of firing a weapon was illegal. The threshold question of whether a person can have a reasonable expectation of privacy in his tent was answered by the court easily in the affirmative.

3. ***Popple v. State***, Fla. Sup. Ct., 54 Cr.L. 1102 (10/14/93). The Florida Supreme Court has decided that it takes a reasonable and articulable suspicion for the police to be able to ask a driver to get out of his/her car. While police talking to citizens is viewed as consensual, where the police have a citizen get out of his/her car before questioning, the Fourth Amendment requires a minimal level of suspicion.

4. ***People v. Wood***, Mich. Ct. App., 54 Cr. L. 1104. A child told her teacher that she was having problems because her parents were using drugs. She repeated the story to a child protective worker. The worker then told the police, and became the affiant in a warrant to search the child's parents' house. The Michigan Court of Appeals held that this violated the social worker-client privilege, which could be asserted by the parents because they could also waive the privilege for their children. Suppression was viewed as the proper remedy because no remedy was contained in the statute establishing the privilege, and because without such a remedy as exclusion, the violation of the privilege would be beyond the reach of the law.

5. ***Barrett v. Commonwealth***, Va. Ct. App., 54 Cr. L. 1109 (10/19/93). The police violated the Fourth Amendment when they stopped a car that had been parked on the side of the road and then started as if to get back on the road after the officer turned around to investigate. The court rejected Virginia's assertion that the suspicionless stop of the car was justifiable under the "community caretaking" function of *Cady v. Dombrowski*, 413 U.S. 433 (1973).

6. ***U. S. v. Puglia***, 54 Cr. L. 1115 (7th Cir. 10/25/93). Can a grand jury use evidence that has been suppressed by the district court due to a violation of the Fourth Amendment. According to the 7th Circuit, it can. The court looked at *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920), in which the court had held invalid grand jury subpoenas based upon information illegally obtained, and *U.S. v. Calandra*, 414 U.S. 338 (1974), in which the court held that the exclusionary rule does not apply in grand jury proceedings. The 7th Circuit resolved the conflict by relying on the latter case, while acknowledging that it was a close question. "We hold that a Fourth Amendment violation that did not occur at the hands of the grand jury returning the indictment should not bar use of that evidence by the grand jury."

7. ***United States v. Perdue***, 54 Cr.L. 1158 (10th. Cir. 11/1/93). The use of extensive force during a "Terry stop" can require the giving of *Miranda* warnings prior to questioning the person detained, according to the 10th Circuit. Here, officers stopped a car that turned around upon seeing 15-20 officers searching property for marijuana. Guns were drawn, and the defendant was required to get out and lie face down. While he was face down, questions were asked, during which the defendant said that the marijuana on the property was his. "One cannot ignore the conclusion...that by employing an amount of force that reached the boundary line between a permissible Terry stop and an unconstitutional arrest, the officers created the 'custodial' situation envisioned by *Miranda* and its progeny.... Questioning pursuant to *Terry* should not have commenced until the officers dispelled the coercive atmosphere or otherwise made clear to Mr. Perdue that he would not be physically harmed if he did not cooperate with the officers. Their failure to do so under these circumstances rendered Mr. Perdue's confession involuntary in violation of the Fifth and Fourteenth Amendments."

8. ***State v. Blacksten***, Minn. Sup. Ct., 54 Cr. L. 1168 (11/5/93). Despite the fact that the police have reasonable suspicion sufficient for a Terry stop, they may not hold an accused for an hour waiting for a magistrate to issue a search warrant.

9. ***State v. Gutierrez***, NM. Sup. Ct., 54 Cr. L. 1203 (11/18/93). NACDL President and state constitution guru John Henry Hingson is smiling a little more broadly after this decision. New Mexico has joined numerous other states in upholding the majesty of their state constitution and rejecting the good faith exception to the exclusionary rule. In

Truth Imperative When Obtaining A Search Warrant

"You got a warrant?" It's a surly and insolent question. It's hurled in the faces of cops as they stand at the front doors of unruly jerks who smell of booze and haven't showered or flossed in a while. But as rude as the question sounds, it's one of the great, defiant noises of liberty in our republic. It shows that citizens know their right to keep government out of their homes unless the government has good cause to come in.

Of course, it's the very same government that gets to decide if the cause is good enough - if some police officer's stated reason for wanting to search a home is sufficient. And there is only one oil that makes the machinery of constitutional protection work. It is truth.

That brings us to the sad case of Randy Sebastian. Sebastian was a cop for 14 years, mostly with Campbell County police, where for several years he was an investigator. Until the morning in April when he was busted on a perjury charge, he was assigned to the Northern Kentucky Drug Strike Force. While investigating a case in March, Sebastian learned there was enough marijuana in the home of a walton couple to justify felony arrests. A woman told him the marijuana was there. She believed this because a man who was a reliable police informant had told her it was. Sebastian obtained a search warrant by swearing that a reliable, confidential informant had told him that the informant had seen the drugs in the past 48 hours. Sebastian had not even talked recently with the informant. But he wanted to claim that he'd received his information from the man because the man was a proven informant, while the woman was not. Sebastian short-circuited the procedure cops are supposed to use. Instead of going to the informant to confirm what the woman had told him, he simply swore that he had.

Truth, like rubber band, doesn't stretch much without braking. that was especially true when Sebastian stretched it while it was supporting something as weighty as the Fourth Amendment. Kentucky State Police Detective Rodney Ballard, who busted Sebastian, put it this way: "The court system is based on telling the truth, and when law enforcement doesn't tell the truth, the system breaks downs."

Boone District Judge Charlie Moore, who sentenced Sebastian, said prosecutors had no objection to giving the former officer a suspended sentence. But Moore sent Sebastian to jail for 72 hours to make a point. The point was that officers must tell the truth. If they don't, they put judges in the position of ordering the violation of the constitution. "When it comes to search warrants," Judge Moore told Sebastian, "We really accept (officers' statements) as gospel. We let you go just about anywhere."

Not only go, but kick the door in and take the property, too. That's what the Fourth Amendment to the U.S. Constitution, formally Article IV of the Bill of Rights, is about. It's a single sentence of 54 words:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

That sentence is 202 years old. But it's remarkably spry, gets up and goes to work every day. Unlike the other amendments its age. Which work mainly during business hours, the Fourth Amendment is on call in the middle of the night. The work of the Fourth Amendment goes on in the minds of police officers and judges and prosecutors and legal defense counsel. It centers on the line at which the government - in the form of a police officer - can break down your door, walk in and take your stuff *without violating the Constitution.*

The line is drawn by two little words: "probable cause." The term "cause" is easy for us non-lawyers to understand. The presence in a person's home of enough illegal drugs to constitute a felony, for example, is cause for a search. A police officer asking a judge for a warrant must do more than just say there's a cause. The officer must persuade the judge it's *probable.* And the officer must swear to it. The reason for the swearing its that the only satisfactory way to get the truth from a person is to place the person under oath and then ask questions.

So when an officer swears falsely to obtain a search warrant, as Sebastian did to Boone District Judge Michael Collins, the system indeed breaks down. Sebastian said there's more to this case than meets the eye, but he can't tell it yet without consulting with an attorney. But he did say a few things. he said that even though he's not prohibited by law from becoming a cop again, he has no desire to do so after what other officers have done to him. And he told Judge Moore: "I feel deep remorse, and I apologize to your honor and Judge Collins, and apologize for any embarrassment to the Drug Strike Force."

There's a lesson here for anyone who thinks all cops just automatically stick together no matter what one of them does. They don't.

Reprinted with permission. The Kentucky Post, 6/29/93, William Weathers, reporter and columnist for The Kentucky Post.

sweeping language, the court stated that "[t]he very backbone of our role in a tripartite system of government is to give vitality to the organic laws of this state by construing constitutional guarantees in the context of the exigencies and the needs of everyday life. Denying the government the fruits of constitutional conduct at trial best effectuates the constitutional proscription of unreasonable searches and seizures by preserving the rights of the accused to the same extent as if the government's officers had stayed within the law. The basis we articulate today for the exclusionary rule in this state--to effectuate the constitutional right in the pending case--is incompatible with any exception based on the good-faith reliance of the officer on the magistrate's determination either of probable cause or of the reasonableness of the search."

10. ***United States v. Nielsen***, 54 Cr.L. 1227 (10th Cir. 11/22/93). The smell of marijuana does not give the police the authority to search the car trunk after a search of the passenger compartment reveals nothing corroborative of the smell. Thus, where the defendant withdrew his consent after the passenger compartment search, the subsequent search of the trunk was illegal, and the cocaine found there should have been suppressed.

11. ***Jenkins v. Chief Justice of the District Court Dept.***, 619 N.E. 2d 324 (1993). The Massachusetts Supreme Judicial Court has held that under their state constitution, persons who have been arrested must receive a probable cause determination within 24 hours. This cuts in half the outer limit set by *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991). Kentucky apparently does not recognize the authority of *Riverside*, and in many instances people are held without appearing before a magistrate for over 48 hours.

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Scope of the Problem of Child Victimization

This is the second of a four-part series of articles written by Carol Jordan on mental health issues in the criminal justice system.

The extensive nature of the victimization of children in our society is in part a reflection of its ability to touch any child, in any setting, and in a multitude of ways. Children of all ages, and from all socio-economic backgrounds are experiencing physical, sexual, and emotional abuse, both within the family setting and without. As a society, we are becoming more aware of the problem of child abuse. In 1976, Lou Harris conducted a poll which showed only 10% of Americans considered abuse of children a serious national problem. A similar poll conducted only two years later, however, revealed over 90% of Americans voicing a concern about the seriousness of the abuse of children in the United States (Gelles, 1978). The most recent national incidence data shows the number of actual cases of child victimization reaching estimates of 1.5 to 2.0 million (Gelles & Straus, 1987). According to the National Incidence Study of the National Center on Child Abuse and Neglect, more than 1.5 million children were endangered by abuse or neglect in 1986 (National Center on Child Abuse and Neglect, 1988).

INCIDENCE & DEFINITIONS OF VICTIMIZATION BY TYPE OF ABUSE

Sexual Abuse: As late as 1983, psychiatric literature was reporting child sexual abuse as a rare phenomenon. Research throughout the 1980's, however, has documented the true extent of the crime. Studies related to the incidence of sexual abuse and assault against women report that between 15 to 30 percent of females will be sexually victimized at some point in their lives (Finkelhor, Hotaling, Lewis, & Smith, 1989; Finkelhor, 1984; Russell, 1984). Research data related to male victimization is less available and may be underrepresented by the currently reported figure of 10-15% (Finkelhor et al, 1989). The application of national studies to Kentucky population figures reveals that over 580,000 females will be directly impacted by sexual abuse during their child or adult years, and that over 74,000 male children in this Commonwealth will be sexually abused before the age of eighteen.

The sexual abuse of children involves a wide range of behavior, including molestation (sexual contact), rape and sodomy (penetration) and sexual exploitation.

Physical Abuse: Research has reported over the past decade the significant number of children in the United State whose severe maltreatment by caretakers would categorize them as physically abused. Gelles and Straus (1987) found in a national study of the rate of "severe" parent-child violence in the United States for the past decade that the rate has been approximately 11%-14%. The National Center on Child Abuse and Neglect (1988) now reports that an estimated 1,000 to 5,000 are killed by their parents each year in this country. A Colorado study of confirmed serious child injury (*e.g.*, brain damage, skull fractures, dislocations, internal injuries, serious burns) between 1977 and 1984 identified 1474 cases (Rosenthal, 1988).

Physical abuse is generally defined as physically harmful action directed against the child which is an act of commission by the perpetrator. Examples of injuries sustained as a result of physical abuse include bruises, burns, bite marks, head injuries, fractures, abdominal injuries, or poisoning.

Psychological Abuse: The National Center on Child Abuse and neglect estimates that approximately 200,000 cases of emotional maltreatment occur in the United States each year (National Center on Child Abuse and Neglect, 1988). Studies by the American Humane Association (1981, 1984) have reported that approximately 11% to 13% of all reported child abuse cases consist of psychological child abuse. Experts agree that these figures are most likely underestimates of the true prevalence of the psychological maltreatment of children (*e.g.*, Hart et al, 1987).

Psychological abuse of children can be defined in terms of eight types of behaviors exhibited by parents or caretakers which are based upon the work of Garbarino, Guttman, and Seeley (1986) and Hart et al (1987):

1. *Rejecting* - the child is avoided or pushed away, and is made to feel unworthy and unacceptable;

2. *Degrading/devaluing* - the child is criticized, stigmatized, deprived of dignity, humiliated, and made to feel inferior;

3. *Terrorizing* - the child is verbally assault, frightened and threatened with physical or psychological harm;

4. *Isolating* - the child is deprived of social contacts beyond the family, not allowed friends, and kept in a limited area for long periods of time without social interaction;

5. *Corrupting* - the child is taught to behave in an antisocial manner, encouraged to develop socially unacceptable interests and appetites;

6. *Exploiting* - the child is taken advantage of, used to meet the needs of his or her caretakers;

7. *Denying essential stimulation, emotional responsiveness, or availability* - the child is deprived of loving, sensitive caregiving; his or her emotional and intellectual development is stifled; and the child is generally ignored;

8. *Unreliable and inconsistent parenting* - contradictory and ambivalent demands are made of the child, parental support of caregiving is inconsistent and unreliable, and familial stability is denied the child.

THE IMPACT OF CHILDHOOD VICTIMIZATION

Research into childhood victimization has now identified those factors which appear to be most germane to the impact which the experience will have ont he victim. While the most significant amount of research has focused on the impact of sexual child abuse (*e.g.*, Finkelhor, 1984), the following factors may apply to child abuse cases as a whole:

1. *The age and developmental level of the child, and the child's ability to understand the significance of the act.* Generally, the impact of childhood abuse increases with age the developmental level as older children are better abuse to understand the inappropriateness of the abuse against them. Older children are also more likely to understand and interpret the negative reaction of family members and others to the abuse, and as a result, feelings of guilt and shame for children also increase with age.

2. *The degree of physical harm caused by the abuse, and the use of weapons.* More serious physical injury and greater levels of terror for a child are positively associated with a more long term and traumatic impact.

3. *How the act is perceived by the child.* Most children experience abuse as painful, confusing or frightening, and are likely to be traumatized by the event, resulting in physical symptoms of distress, sleep and eating disturbances, or school phobias. In some cases, particularly including selected cases of sexual abuse, children experience the abusive relationship in a partially or predominately positive way because there is an increase in attention paid them by the perpetrator. Particularly where children have no family, or where relationships with families are nonrewarding, the positive attention of the perpetrator may have such value as to cause them to endure the abuse.

4. *How long the abuse continues before being discovered.* Abuse which occurs over a long period of time may increase feelings of helpless and hopelessness in children, and as such will have a more negative impact.

5. *Whether the abuse is accompanied by threats of continued or more serious harm is the child tells of its occurrence.* Children who experience threats of harm for disclosure are likely to be more severely impacted by the abuse than children who are not threatened.

6. *The nature of the non-abusive part of the relationship between the child and the perpetrator.* Generally, children are more traumatized by abuse when it occurs in the context of a trusting relationship, for example, when parents perpetrate abuse or when the perpetrator is a babysitter, minister, or other person significant in the child's life. This is in part a result of the violation of trust established between the victim and perpetrator which accompanies abuse. The child may also experience feelings of grief or loss upon separation from a perpetrator with whom a significant relationship existed.

Characteristics of Abusive Parents

In 97% of reported cases of child abuse, parents are the perpetrators of the crime. A large percentage of these cases involve natural parents as the primary perpetrator, although other caregivers (such as stepparents, relatives, foster parent, and guardians) are more likely to perpetrate certain types of maltreatment, particularly including sexual abuse. Parents who perpetrate abuse of their children have often began families at a younger age than did nonabusive parents, many being teenagers at the birth of their first child. When all forms of abuse are considered, females are more often reported as abusive caretakers than males (60.8% female, 39.2% male), reflecting the predominance of female-headed households and child-rearing responsibilities. The sex of the perpetrator differs significantly by type of abuse, however, with males committing more major and minor physical abuse, and the vast majority of sexual abuse against children.

Wolfe, D.A., *Child Abuse: Implications for Child Development and Psychopathology*. (1987) Sage Publications, Newbury Park

Characteristics of Abused Children

Victims of child abuse and neglect tend to be relatively young, the average age being just over 7 years. Neglect is most often reported among the youngest children (infancy and toddlerhood), with incidence declining as the child ages. In contrast, reports of sexual abuse and emotional maltreatment occur more frequently among older, school-aged children and adolescents. Physical abuse is more often spread more evenly among all age groups of children, though the highest rate of physcial injury is found among older children (12-17 years of age). This latter finding appears to correspond with increasing parent-child conflict which is often characteristic of adolescent development. With the exception of sexual abuse (where females comprise 85% of the victims), boys and girls are reported at approximately the same rate for physical abuse and neglect. Studies analyzing the race of child victims indicate that the percentage of black and white children who are abuse victims is representative of the U.S. population at large.

Wolfe, D.A., *Child Abuse: Implications for Child Development and Psychopathology*. (1987) Sage Publications, Newbury Park

7. *The response of the child's family or significant others to the abuse when it is discovered.* The trauma experienced by a child as a result of abuse can be significantly reduced if families or significant others believe the child and offer protection when the disclosure of abuse is made. Support given a child can serve to reduce feelings of fear, abandonment, confusion, and self-blame.

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Carol currently serves as Administrator of the Sexual and Domestic Violence Program of the Kentucky Department for Mental Health and Mental Retardation Services. In that capacity, she provides consultation and training to the state's Community Mental Health Centers and Rape Crisis Centers on the delivery of sexual and domestic violence services. She serves on the Attorney General's Task Force on Domestic Violence Crime, the Kentucky Coalition Against Rape and Sexual Assault, and the Attorney General's Task Force on Child Sexual Abuse. She also serves as legislative liaison for the Division of Mental Health. Ms. Jordan received a Master of Science degree in Clinical Psychology in 1983.

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"As long as people accept exploitation, exploiter and exploited will be entangled in injustice. But once the exploited refuses to accept the relationship, refuses to cooperate with it, they are already free."

- Mohandas K. Gandhi

Jones has Solid Crime Plan

Gov. Brereton Jones has come forward with anti-crime proposals that warrant serious consideration by the General Assembly. Jones' plan includes many ideas already introduced by legislators or offered by other officials, including Attorney General Chris Gorman. Most noteworthy is that Jones and Gorman want a ban on possession of firearms by juveniles in most cases and to make parents or guardians liable if they let juveniles have these guns.

Other gun control measures the governor would like include a background check and five-day waiting period for buyers of some assault-style weapons. He's not for a total ban, since he said many people want them for self-defense.

Even easier to support is Jones' plan to ask the legislature for 30 more troopers for the Kentucky State Police. The request for more officers would make the agency as strong in personnel as ever.

Victims of crimes would also get more help from an increase in the number of victim advocates. Jones wants someone to stand up for victims in each of the 56 judicial circuits, wherein only 12 advocates now exist. Complementing the move toward victims' rights is the idea to have prison wardens notify crime victims of the release of their aggressors.

The governor, at the same time, wants to return more criminals to their communities to make prison room for more violent offenders. This idea is unsettling to anyone subscribing to the "bird in the hand" philosophy. But if it works to ensure that more violent offenders take the place behind bars of those less brazen, there will have been jusitification in the concept.

Overall, Jones is on solid ground in attempting to make violence a little less likely and crime a little more painful for the criminals while at the same time providing more support for the victims.

- (Bowling Green) Daily News

Capital Case Needs in Kentucky

It is difficult to imagine a more complex, difficult, or serious case than cases requiring death penalty litigation. Death is different, and it is recognized as such by both state and federal appellate courts. Mistakes or oversights which would be inconsequential in other cases assume a different significance when a person's life is on the line.

CAPITAL LITIGATORS HAVE A DUTY TO EDUCATE THE JUDICIARY

Major civil litigation involves mountains of paperwork, motions, evidentiary hearings, discovery efforts, and many hours of court time in the same manner as death penalty cases. However, judges who patiently endure extensive litigation from civil lawyers, may exhort criminal defense counsel to "move things along." Every defense attorney has heard that phrase. The reason could very well be that judges are familiar with the civil litigation process and unfamiliar with capital litigation.

As capital litigators, attorneys have the responsibility to educate the judges who hear these cases. Your case may very well be the first death penalty case the Court has heard. The issue may be new to the Court. The complicated constitutional issues commonplace in death cases, but uncommon in the "typical" criminal case, must be briefed with the goal in mind of not only setting out the law persuasively, but also to educate the Court. Nothing can be assumed as being so fundamental that an explanation is unnecessary.

The practice of oral motions, motions made at the "llth hour," and vague pleadings for relief without a stated basis have no place in capital cases. All capital litigation must be done with an eye toward persuasive fact and law based arguments and creating a record for appeal. The Trial Court will understand that a record has to be made for review, but attorneys may have to litigate the creation of the record through avowals and evidentiary hearings on disputed matters to flesh out the issues for meaningful appellate review.

THE NEED FOR THE ADOPTION OF CAPITAL LITIGATION STANDARDS

In discussing cases with attorneys throughout the Commonwealth, the biggest areas of need relate to early motion practice, issues related to arrest and immediately thereafter, matters which should be presented to the District Court, jury selection, mitigation evidence, and the proper way to formulate funding assistance issues. In reading opinions at the appellate levels, it is apparent that there is a great need for lawyers to undertake evidentiary hearings at the pretrial levels. Higher courts are increasingly intolerant of attorneys who fail to preserve the record properly.

One means of establishing uniformity in the practice of capital cases would be the establishment of practice "Standards" for Kentucky capital litigators. At the very least the lawyer would have a checklist to determine just what he or she is expected to do at a minimum in a capital case.

The ABA and NLADA [National Legal Aid & Defender Association] Standards of practice for capital litigation is not required reading for most judges, prosecutors, and defense counsel, so there is a general lack of knowledge by the bench and bar about the substantial responsibilities and obligations, both ethical and legal, uniquely imposed upon capital defense attorneys which extends to both the guilt and penalty phases. Capital litigators need to be familiar with these standards and follow them until Kentucky adopts standards in order to render effective assistance of counsel to capital clients.

CAPITAL LITIGATORS NEED TRAINING

Lawyers handling capital cases are not trained in the mental health fields, fields of neuropsychology or psychopharmacology, in social work or counselling. Yet lawyers handling capital cases suddenly find themselves embroiled in litigation requiring that they investigate, research, and question witnesses who can lay foundations of proof for mental illnesses, proof of dysfunctional family life, brain lesions, and other highly specialized fields of expertise. Lawyers must educate themselves about mental health matters that arise in their cases by reading, attending seminars, and retaining the services of mental health professionals to test and consult with them regarding capital clients.

THE NEED FOR ATTORNEYS HANDLING CASES TO CONTACT CTU

Currently within the Commonwealth there is no real, consistent way to establish and maintain a flow of information from the central DPA offices to attorneys in the field handling capital cases. Manuals really aren't the answer because developments in the law and practice occur so quickly that manuals would require bi-weekly supplements to be kept up-to-date. Bi-annual or tri-annual seminars, while important, are not the complete answer either. Even this publication doesn't get sent out often enough to keep attorneys in the field abreast of changes in the capital litigation field.

The idea of some sort of "newsletter," or mailing, to keep field attorneys up to date on new procedures, practices, and rulings in capital cases has been considered. Unfortunately funding and personnel shortages severely limit our ability to proceed with such an effort. We've gotten a decent start on collecting capital motions, but the time isn't available to go further at any decent rate of progress. We still have hope of compiling a capital motions file for distribution on disk.

Currently, CTU [DPA's Capital Trial Unit: composed of two attorneys, an investigator, an administrative assistant and one secretary] is available on a limited basis to any attorney handling a capital case. We are available on a daily basis for limited consultations over the telephone. Additionally, we try to dovetail hearings around the state with brainstorming meetings with capital litigators,or if you prefer we are always available to meet with you within our offices at DPA- just call for an appointment. We encourage you to call on us for help on your capital cases.

CONSULTING ATTORNEYS

As a contract public defender, prior to coming to DPA in 1989 Mike contacted a consulting DPA attorney in his first capital case, and it probably saved the client's life. The consulting attorney's suggestions were responsible for obtaining a jury verdict on *lesser charges* in a case with five deaths and a confession.

There are very willing and knowledgeable appellate and post-conviction attorneys employed at DPA who are available to consult with you in capital cases. The consulting attorney's sole function would be to brainstorm, provide limited assistance in research, and be available to meet and discuss your case as it progresses.

We suggest having a "consulting counsel" in *every* capital case.

THE NEED FOR ACCURATE TIME RECORD KEEPING

A great deal of time is expended in capital cases that goes unrecorded. Judges and prosecutors [and legislators] will never gain any appreciation of the real time and efforts expended by public defenders in a death penalty case unless time keeping becomes second nature to attorneys.

For private counsel who have contracted with DPA in a death penalty case, time records are being demanded prior to the receipt of payment. Most submit not only time records to document the use of the $2500 fee, but also to show the uncompensated hours they worked on a capital case. It is not unusual for all of the $2500 fee to have been used up early in pretrial litigation.

A natural consequence of death cases for contract attorneys or field office attorneys is that the lawyer must spend extraordinary blocks of time on the death case, for which there is no compensation, a situation grossly unfair to the attorneys.

For full time public defenders, the time spent on a death case usually drains the field attorney of time which would otherwise be spent on other pending cases. Field office attorneys are often faced with a Hobson's choice of which pending case to work on. A death penalty client's case may be put on the "back burner" in order to address the immediate needs of the multitude of cases handled daily in field offices -- rapes, robberies, manslaughters, "ordinary" homicides, DUI's, etc. It is not uncommon for capital cases to be worked on in the attorney's "off hours." This is unfair both to the attorney and their client.

Caseload problems are compounded when a Court refuses to set a trial date far enough in advance for the attorney to have time to prepare the capital case in addition to meeting the daily demands of other cases, often in several circuits.

Defense counsel must demonstrate to the Court in good faith that his or her current case obligations simply cannot be met in the time available. This cannot be demonstrated without a showing to the Court of how the lawyer is spending his or her time.

Time spent is a language that most politicians, judges and others can understand. Given the fact that the normal work week for state government employees is composed of 37.5 hours, it becomes apparent that an attorney is overloaded when an attorney representing indigent clients consistently spends an average of 60 hours or more per week on their cases. Even Judges that have expressed that attorneys have a duty to donate a portion of their free time to indigent clients can see the unfairness of consistent demands of uncompensated overtime.

The public defender attorney's gift of uncompensated time subsidizes a system that is understaffed and underfunded.

Public defenders, be they contract or full-time, may not see the value to time keeping as it gives them extra work to do and they're already stretched to breaking point. Many attorneys don't keep time records because they know that they will not be compensated for hours over a ceiling point.

Without an attorney's keeping track of his or her time and efforts in cases, the overworked public defenders and private counsel will never adequately protect their clients' rights to truly effective assistance. With the caseloads currently being carried by public defenders, one must assume that adequate preparation time in most cases simply isn't available. If we don't begin to maintain these records, and if we fail to make the proper showing of need for assistance, including time to prepare, there is no one to blame but ourselves, and the system will continue to plod along comfortable with the facade that indigent clients are receiving the same representation as their wealthy counterparts.

COURT ORDERED REIMBURSEMENT OVER AND ABOVE THE $2500 FEE CAP IN CAPITAL CASES

For a competent attorney handling a capital case most of the $2500 fee for handling the case has been utilized in preparation for, and appearances in pretrial matters even before the case goes to trial. Essentially, contract lawyers are being asked to donate hundreds of hours of their time to prepare and try capital cases.

Upon a motion by the attorney, capital cases can be found by the trial court to be a "special circumstance" case, and attorneys may be reimbursed for hours above the $2500 fee cap set by their employment contract with DPA. There is some debate as to the source for payment of the fee. The usual source for payment is the county fiscal court. This issue is currently being litigated. Contact CTU for a copy of the motion.

NEED FOR FUNDS FOR INVESTIGATION RESOURCES

An attorney representing a capital client can expect to spend 100 - 300 hours in investigation, especially mitigation investigation. Tracing and documenting the client's history takes an extraordinary amount of time. The failure to adequately investigate mitigation evidence is one of the leading reasons appellate courts reverse and remand death penalty cases.

CTU is encountering capital clients who are from other states. Full time public defenders within this Commonwealth and private contract counsel simply cannot perform an adequate investigation when the necessary records and witnesses are out of state or out of the area normally worked by the attorney or defender office. When seeking sensitive mitigation on topics like sexual abuse, etc. telephone interviews are out of the question, even though Courts often suggest that attorneys utilize telephone interviews for out-of-state potential witnesses.

When the necessary witnesses in a death penalty case are located out of state, or the geographical differences between the witnesses is substantial, DPA does not have the personnel or financial resources to provide the investigation needed. DPA is unable to fund any investigations out of state or over too broad a geographical area.

Funding assistance for out of state investigation, even for field offices that have an investigator, must be provided by the county fiscal courts. The counties continue to deny their responsibilities imposed upon them by Chapter 31, even though the Supreme Court has repeatedly held them to their obligations.

DPA investigators are in a worst caseload position than field office attorneys as they are responsible for the investigation for all of the cases arising in a field office. Cases should not be going to trial without investigation.

CTU has had success with asking the Court for money to fund the DPA investigator's costs of out-of-state travel when investigation is needed out of state, by compiling information necessary to make a showing of necessity.

Attorneys should routinely request funding assistance for investigative resources in every case if their field office investigator cannot devote attention to the case. CTU is available to consult on this issue.

AGGRESSIVE PRETRIAL LITIGATION TO ASSESS PLEA BARGAINING THE CASE

No one in 1993 can engage in litigation without looking at the fiscal impact due to budget shortfalls and the overall tight money situation in the State. Lawyers have a duty to avoid needless and costly litigation whenever possible.

Capital cases require a great deal of time, effort and money. Courts are cost-conscious as they are responsible both to their constituents, and to the criminal justice system. Courts attempt to balance their ever burgeoning court dockets with the tremendous time, money, and effort expended in capital litigation, and public concerns about capital crimes.

Cases that are a close question, a retrial, cases where defendants have been overcharged, cases which have fatal flaws in their pretrial procedures or are not likely to result in a death verdict at trial may allow counsel to present an argument that it is unnecessary to take up docket time, or burden a county with the cost for experts and other funding when a plea agreement would bring a just result, and save everyone involved time, effort and money.

Bear in mind that capital cases with facts worse than the one you are handling have received a sentence less than death. Among your duties as an advocate for your capital client, you are charged with exploring a reasonable resolution of the case, and that includes approaching the prosecutor about pleading the case.

If you cannot receive an offer from the State and feel strongly about the Court's fairness and have a case with good facts, and a client with extensive mitigation, consider an RCr 8.08 unconditional guilty plea to the Court. Under *Corey*, Judges must be cautious about entry into the plea negotiation process.

A strong word of caution is advisable in use of RCr 8.08. You must be as certain as you can be that the evidence that you can present to the Court is such that after hearing it the Court will not give your client a death sentence.

Once a guilty plea is entered, the Court, along with the prosecutor and defense counsel, in the defendant's presence, can enter into a sentence negotiation. See *Commonweath v. Wiley*, 575 S.W.2d 166.

We encourage every capital litigator to engage in extensive pretrial litigation to gain a clear picture of the evidence and issues, the client's mental health, and background with an eye toward plea negotiations.

THE NEED FOR MOTION PRACTICE

CTU has the function of tracking capital cases in the State of Kentucky. In keeping with that function docket sheets are obtained for ongoing capital cases around the state. Docket sheets show the motions that have been filed or responded to in a case.

Public defenders and contract attorneys are urged to enter as early an appearance as possible in capital cases to preserve issues, specifically issues such as preservation of evidence, notes and reports of police, protections against police contacts with clients, preservation of the scene, preservation of samples, etc.

There are certain motions which should be filed in every capital case, not only to preserve state issues, but to preserve federal issues. Remember your client's life may depend upon issues which are currently percolating in the federal system, and your failure to raise these issues may be fatal.

Motion practice accomplishes many useful things in a capital case.

Judges are more receptive if we give them a chance to be prepared. Pretrial *in limine* motions on various issues such as admissibility of evidence, the use of priors, the use of character evidence, etc., can be decided before trial when there is time for reflection, and when there is no need to send the jury out of the room, thus causing delays in trials and impatience on the part of the court and jury.

Pretrial motions allow us to become more informed about just what evidence is going to be heard, thus we can better prepare for voir dire and opening arguments. Further, we can learn what "negative" evidence is going to be allowed so that we can determine how to deal with it before the jury.

Finally, pretrial practice can sometimes demonstrate to the Court and prosecutor that this case need not be a death penalty matter. To avoid going to trial the client may be willing to plead to a sentence that would most likely be the jury verdict given the facts of the case, and the mitigation available to present to the jury. A plea may be in the best interest of all parties.

DPA has numerous motions on file, and will gladly, for copying costs, send an index of motions and a copy of any requested motion to you. These motions are a starting point for preservation and litigation of issues that are necessary to defend a person charged with a capital offense, although they are case specific and should *always* be revised to fit your case's particular needs.

Public defender attorneys and contract attorneys need to diligently file the appropriate motions to preserve issues. Although time consuming, it is an important function of an attorney representing a person charged with a capital offense. Be diligent in routinely stating in all motions the appropriate state and federal Constitutional amendments as a basis for your right to relief and request a full and fair hearing.

THE NEED FOR EARLY ADVOCACY

Public defenders must talk to clients upon being taken into custody in the case and tell them to not talk with police, prosecutors, prosecution investigators, jailers, and any inmate in the jail about the facts of their case.

Motions must be made at the earliest opportunity to preserve testing, records, and investigative notes and diagrams.

We routinely file notice that the client is relying on his 5th and 6th amendment rights to be free from questioning by state police or other law enforcement personnel. That notice includes jail house snitches and jailers who act as agents of the police.

Preliminary hearings must never be waived because they provide an early opportunity to learn about the nature of the evidence against the client.

THE NEED FOR ASSURING COMPLIANCE WITH THE JUVENILE CODE

Children are being waived to circuit court that should never have been transferred. This is a timely topic, due to the Todd Ice case in which a 15 year old boy was transferred to the adult court and never received the benefits to which he would have been entitled as a juvenile including management of his mental illness, to prepare him for an eventual life back out in society.

The Juvenile Code sets out strict guidelines that must be met to waive children to adult court properly. From calls CTU get from across the State, juvenile cases are being handled incorrectly by police and court personnel. Parents or guardians are not being called to be present at interrogation. Parents and guardians are not being contacted prior to the continued custody of a child within a police station, and notice to parents are often deficient or non-existent. Court designated workers are not being contacted as they should be, and most importantly, insufficient evidence is being presented to support a decision to transfer the case to circuit court. Often District Court Judges merely parrot the statutory criteria in their reports without stating a basis in their findings specific to the juvenile.

When a child is charged with a capital offense, it seems that all parties: the courts, the prosecutors, CHR, and defense counsel are of in a hurry to "move the case along" rather than conduct the full inquiries mandated by the *Kent* case.

Full effort must go into the transfer hearing to make sure the child's rights are complied with, and that a record is made for appeal on the appropriateness of transfer. Experts can be hired to make determinations about competency and maturity, and, in a potential death penalty case, funding assistance for experts must be sought. Transfer hearings were never meant to be the mere facade of a due process hearing.

Motions must be made when a child has been inappropriately waived to have the case remanded to juvenile court. Looking closely at the process which brought the child before the Grand Jury or District Court may reveal shortcomings which add up to a lack of jurisdiction in the Circuit Court.

THE NEED FOR AN UNDERSTANDING OF CONFLICTS, AND HOW TO HANDLE THEM

Capital cases often bring two or more clients to a field office or a contract attorney's office for representation. Attorneys should be aware that without signed waivers, they cannot represent two clients charged with the same offenses.

Obtaining a signed waiver may not be adequate to protect the client's rights as the client may have standing on post-conviction to challenge the soundness of advice that an attorney did not foresee at the time that a conflict would arise. So, early familiarity with the facts and theories of the case assumes an important role on this issue.

In a death penalty case we should always remember there are *two* trials essentially. Although there may not be a legal conflict during the "guilt phase," there could very well be during the "penalty phase" of the case. Read the *Foster v Commonwealth* case out of Fayette County. This case points out the problems of codefendants during penalty phases of a case.

To be safe, and to avoid causing unnecessary delays in the system, conflict counsel ought to be obtained when an office is appointed to represent two or more people charged with capital murder.

THE NEED TO REPORT HOMICIDES IN CONTRACT AND FIELD OFFICE COUNTIES

CTU has a duty to track all the active capital cases within the Commonwealth of Kentucky. This includes obtaining a docket sheet to review motions filed, sending out letters to attorneys advising them of the availability of certain resources at DPA, maintaining a list of cases and upon their resolution passing informaton regarding the case on to the Capital Resource Center for compilation for challenges to the constitutionality of the statute.

Newspaper clippings are provided to CTU from the Resource Center regarding cases in Kentucky. Contract attorneys are mandated by their most recent contract to send in forms related to each capital case in their region. Please continue to do so as all capital cases are not covered by news reports.

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"Instead of worrying about the future, let us labor to create it."

- Hubert H. Humphrey

Capital Case Review

As part of my duties in the Kentucky Capital Litigation Resource Center, I track cases and issues pertaining to capital jurisprudence through the United States Supreme Court. Below is a listing current as of January 28, 1994. Next month, the synopsis of decided cases will continue; look for the synopsis about every other month.

A. CASES DECIDED

1. *Tennessee v. Middlebrooks.* 92-989. January 10, 1994.

   Petition for cert dismissed as improvidently granted December 13, 1993. Reversed and remanded for resentencing January 10, 1994.

2. *Tennessee v. Bane.* 93-19. January 10, 1994.

   Remanded for jury's reconsideration of whether remaining aggravating circumstances warrant death penalty.

3. *Tennessee v. Smith.* 93-19. January 10, 1994.

   Remanded for jury to consider whether aggravating circumstances other than fact that murder was committed in perpetration of felony warrant death penalty.

4. *Tennessee v. Sparks.* 93-224. January 10, 1994.

   Remanded for resentencing.

B. CASES ARGUED

1. *Sandoval v California.* 92-9049. January 18, 1994. [Decision below: 841 P.2d 862 (Cal. 1992)]
   Question presented:
   Was petitioner deprived of due process and fair jury trial by use of constitutionally defective reasonable doubt jury instructions that invited jury to base its verdict on improper "moral" considerations rather than on evidentiary evaluation?

   argued with

   Victor v. Nebraska. 92-8894. January 18, 1994. [Decision below: 494 N.W.2d 565 (Neb. 1993)]

   Question presented:
   Did Nebraska Supreme Court err in failing to reverse trial court's refusal to retroactively apply *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)?

2. *Simmons v. South Carolina.*
92-9059. January 18, 1994.
[Decision below: 427 S.E.2d 175 (S.C. 1993)

Questions presented:
Does Eighth Amendment entitle capital defendant to have sentencing jury informed, as reason not to impose death penalty, that under state law jury's sentencing alternative of "life imprisonment" means life without possibility of parole?

Did trial court's refusal to inform jury that petitioner could never be paroled if his due process right to rebut prosecution's case for death, when state argued that petitioner would pose grave risk of future violence unless he was executed, and when jury specifically asked about possibility of parole?

3. *Caspari v. Bohlen.*
92-1500. December 6, 1993.
[Decision below: *sub nom. Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992)]

Questions presented:
Should Double Jeopardy Clause which prohibits state from subjecting defendant to successive capital sentencing proceedings, apply to successive non-capital sentence enhancement proceedings?

Does this court's decision in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), expand protection afforded by Double Jeopardy Clause contrary to original intent of clause as articulated by framers of Constitution and beyond traditional protections of clause?

C. CERT GRANTED (To Date)

1. *Tuilaepa v. California.*
93-5131. December 6, 1993.
[Decision below: 842 P.2d 1142 (Cal. 1992)]

Question presented:
Is California's death penalty statute vague as written and applied, in violation of *Stringer v. Black*, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) and Eighth Amendment?

2. *Proctor v. California.*
93-5161. December 6, 1993.
[Decision below: 842 P.2d 1100 (Cal. 1993)]

Question presented:
Does California's capital sentencing scheme violate Eighth Amendment requirement that judges' and jurors' discretion be limited and channeled: a) by failing to specify whether particular penalty phase factors are to be treated as aggravating or mitigating circumstance; b) by allowing absence of mitigating evidence to be treated as aggravating circumstance; and c) by permitting judge and jury that did not determine guilt phase issues to consider undefined "circumstances of the crime" as aggravating factor?

3. *McFarland v. Collins.*
93-6497. November 29, 1993.
[Decision below: 7 F.3d 47 (5th Cir. 1993)]

Question presented:
Does federal district court possess jurisdiction to grant stay of execution under either 28 U.S.C. §2251 or 1651(a) in order to appoint counsel for indigent pro se death row inmate who has not yet filed habeas corpus petition but who has expressed intention to file petition once counsel is obtained?

4. *Romano v. Oklahoma.*
92-9093. November 1, 1993.
[Decision below: 847 P.2d 368 (Okla. 1993)]

Question presented:
Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?

5. *Stansbury v. California.*
93-5770. November 1, 1993.
[Decision below: 846 P.2d 756 (Ca. 1993)]

Question presented:
May trial court determine that criminal defendant is not "in custody" for purposes of *Miranda* (*v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)), on basis of police officers' subjective and undisclosed conclusions that they did not consider defendant "suspect"?

D. CERT DENIED

1. *Withrow v. Williams.*
93-807. January 14, 1994.
[Decision below: unpublished but available on Westlaw at 1993 WL 309816, 6th Cir. 8/12/93)]

Questions presented:
In light of this court's directive to remand cause for further proceedings consistent with its opinion on merits, should this court grant certiorari in order to enforce its opinion on merits in case in which court below instead remanded with directions to grant retrial?

Following partial reversal and remand for further proceedings, is federal court of appeals acting within its authority to remand case in manner inconsistent with this court's opinion on merits?

In this case, given existence of *Miranda* (*v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)) violation, is question whether introduction of petitioner's *Miranda*-defective statement into evidence at his state court trial harmless error still open to litigation, or is appeal court correct in treating this court's reversal as dicta?

2. *Hall v. Arkansas.*
93-731. January 10, 1994.
[Decision below: *sub nom. Sheridan v. State*, unpublished, but available on Westlaw at 1993 WL 199218), Arkansas Supreme Court, 6/21/93)]

Question presented:
When state court holds that appointed counsel in capital cases are constitutionally entitled to just compensation and equal protection of law, as

guaranteed by Fifth and Fourteenth Amendments, by payment of just, reasonable fee for his or her legal services, see *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991), does that court deny just compensation and equal protection of law to criminal defense lawyers by then paying appointed appellate counsel in capital case $14.02 - $14.81 per hour when counsel's overhead is over $85 per hour, when court routinely orders reasonable compensation of$100 per hour and more in private litigation?

3. *Hirsh v. Pennsylvania.*
93-660. January 10, 1994.
[Decision below unpublished, Pa Superior Court 2/12/93]

Question presented:
Does instruction to jury in state criminal trial to keep reasonable doubt rule "in proper perspective" and to temper its application with "common sense" violate Due Process Clause?

4. *Lewis v. United States District Court for the District of Arizona.*
93-406. January 10, 1994.
[Decision below: 9th Cir. 7/21/93)]

Question presented:
Did court below abuse its discretion by refusing to issue writ of mandamus to supervise orderly administration of district court in case in which evidence clearly demonstrated that district court had shown constant refusal to rule promptly on pending capital habeas corpus cases?

5. *Singletary v. Cumbie.*
93-637. December 13, 1993.
[Decision below: 991 F.2d 715 (11th Cir. 1993)]

Question presented:
Was *Coy v. Iowa* (,487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)) erroneously applied on merits in case in which habeas petitioner's Confrontation Clause claim was procedurally barred and any Confrontation Clause error was harmless?

6. *Olivarez v. McKinney.*
93-602. December 6, 1993.
[Decision below *sub nom. McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993)]

Questions presented:
Does introduction of character evidence to show propensity in closely balanced case constitute per se violation of Due Process Clause?

If so, is application of such rule contrary to *Teague*, as applying "new rule" for first time on collateral review?

If state appellate court has found that permissible inferences were raised by certain evidence and that evidence was probative of issues in dispute, are such findings binding under *Sumner v. Mata* (, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982)) as facts, which collateral reviewing court must treat deferentially, or are such findings legal conclusions, which collateral reviewing court can completely ignore?

Does failure by collateral reviewing court to recognize permissible inferences found by state appellate court violate this court's holding in *Estelle v. McGuire* (, 112 S.Ct 475, 116 L.Ed.2d 385 (1991)) by ignoring permissible inferences to be drawn from introduction of evidence, rather than, as in *Estelle*, finding that permissible inferences do not relate to matter in dispute?

7. *Echlin v. LeCureux.*
93-536. November 29, 1993.
[Decision below: 995 F.2d 1344 (6th Cir. 1993)]

Question presented:
Did this court in *Batson* (*v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)) create, inconsistently with Fourteenth Amendment, two classes of criminal defendants--one black and one white--and accord to black defendant right to challenge exclusion of jurors of his race from petit jury on basis solely of race and deny that same right to white defendant?

8. *Whitley v. Standen.*
93-451. November 29, 1993.
[Decision below: 994 F.2d 1417 (9th Cir. 1993)]

Question presented:
May habeas petitioner predicate actual prejudice, and therefore habeas relief, on trial error that was undeniably invited by considered defense strategy, and, if so, may that error be deemed harmless despite overwhelming evidence of guilt?

9. *Guardino v. California.*
93-456. November 15, 1993.
[Decision below: California Court of Appeal, 6th District, 4/28/93)]

Question presented:
Did forced administration of anti-psychotic drugs during pretrial proceedings and trial violate petitioner's rights under Sixth, Eighth and Fourteenth Amendments?

10. *Moore v. United States.*
93-504. November 1, 1993.
[Decision below: Unpublished, but available on Westlaw at 1993 WL 179226 4th Cir. 5/26/93)]

Questions presented:
Did defense counsel's representation to court that "Where I was at fault is I substituted my judgment of government's evidence for my client's evidence" deny petitioner effective assistance of counsel under Sixth Amendment?

Were admitted actions of defense counsel ineffective under Sixth Amendment in case in which counsel coerced petitioner to plead guilty, defense counsel admitted to coaching petitioner in his plea responses, petitioner protested his innocence to defense counsel and U.S. attorney, and petitioner noticeably hesitated to plead at arraignment?

Did admitted failure of defense counsel to inquire of petitioner concerning petitioner's defense of case and failure to interview single witness deny petitioner his Sixth Amendment rights?

Did misadvice by defense counsel before plea agreement was signed as to length of incarceration, civil liability, consequences of his plea, and withdrawal of guilty plea deny petitioner his Sixth Amendment rights?

Did failure of defense counsel to protest submitting of memorandum of sentencing by U.S. attorney unilaterally to court, which courts found improper in light of U.S. attorney's promise to take no position at sentencing, deny petitioner his rights under Sixth Amendment?

Did failure of defense counsel to brief petitioner on parole commission guidelines on old law counts deny petitioner his rights under Sixth Amendment?

Did defense counsel's violations of DR 7-104(A)(1) of Code of Professional Responsibility and Rule 3.7 of West Virginia State Bar Rules of Professional Conduct deny petitioner his rights under Sixth Amendment in case in which counsel refused to withdraw?

Did admitted failure of defense counsel to submit petitioner's version of case to probation officer for pre-sentence investigation report, after committing himself on record to make such submission, with result that pre-sentence investigation report did not contain any of petitioner's comments or version of case, deny petitioner his rights under Sixth Amendment?

Does Rule 11 proceeding, standing alone, cure admitted misadvice and ineffectiveness of defense counsel?

Has petitioner been denied his constitutional rights when every court has judged and evaluated petitioner's own abilities rather than effectiveness or ineffectiveness of defense counsel?

Did court below err in failing to consider de novo matters presented on appeal, in case in which there is, in record, substantial uncontroverted support for petitioner's claim of ineffectiveness of counsel?

11. *Medley v. United States.*
93-703. November 1, 1993.
[Decision below: unpublished but available on Westlaw at 1993 WL 299338 7th Circuit, 8/2/93)]

Questions presented:
In light of this Court's recent decision in *McCormick v. United States*, (111 S.Ct. 1807, 114 L.Ed.2d 307 (1991)) did evidence in this cause, viewed in light most favorable to government, fail to establish that petitioner's conduct constituted offense of corruptly accepting thing of value, in violation of Section 666?

Was petitioner deprived of effective assistance of counsel in case in which counsel's decisions so prejudiced petitioner at trial that they substantially contributed to his conviction?

12. *Frazier v. Texas.*
93-364. November 1, 1993.
[Decision below: unpublished but available on Westlaw at 1993 WL 55212 (Texas Court of Appeals, First District, 3/4/93)]

Question presented:
Does it violate criminal defendant's Sixth Amendment right to assistance of counsel if prosecution does not fully make opening argument on question of guilt?

Does it violate criminal defendant's Sixth Amendment right to assistance of counsel if prosecution waives opening and reserves closing on question of punishment in argument to jury?

Does failure of prosecution to fully open on both guilt and punishment deny criminal defendant due process of law under Fifth and Fourteenth Amendment and thereby violate defendant's right to assistance of counsel under Sixth Amendment?

13. *Jabe v. Bunker.*
93-665. October 22, 1993.
[Decision below: *sub nom. Bunker v. Jabe*, unpublished but available on Westlaw at 1993 WL 206533, 6th Circuit, 4/1/93]

Question presented:
Should certiorari be granted on ground that decision granting habeas corpus relief from 26-year-old murder conviction on basis of *Sandstrom v. Montana* (, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) conflicts with retroactivity analysis of *Teague v. Lane* (, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)) and harmless error analysis of *Brecht v. Abrahamson* (, 113 S.Ct. 1710, 123 L.E.2d 353 (1993))?

14. *Long v. Alabama.*
93-311. October 18, 1993.
[Decision below: 621 So.2d 383 (Ala. 1993)]

Questions presented:
Did state courts violate defendant's constitutional right to fair and impartial jury in capital murder case by refusing to grant mistrial and subsequently denying motion for new trial when, in midst of trial, trial court was advised that juror had been treated recently in mental hospital for drug and alcohol abuse and said juror had failed to so respond in voir dire?

Did state courts violate defendant's constitutional rights by allowing conviction to stand in case in which evidence allegedly failed to establish guilt beyond reasonable doubt and to moral certainty?

15. *Seale v. Utah.*
93-133. October 4, 1993.
[Decision below: *sub nom. State v. Seale*, 853 P.2d 862 (1993)]

Questions presented:
Was defendant denied effective assistance of counsel in case in which counsel chose to advance insanity defense unsupported by law, evidence and defendant's own testimony?

Was defendant who intended to assert defense based upon his innocence denied assistance of counsel in presentation of defense he had elected to assert, in case in which counsel on his own initiative pursued alternative pleas of not guilty by reason of insanity?

Did defendant waive his right to counsel theory of his defense and his right to assistance of counsel in advancement of his chosen defense by failing to make contemporaneous objection to conduct on part of his counsel?

16. *Vasquez v. United States District Court for Eastern District of California (Murtishaw, Real Party in Interest).*
92-123. October 4, 1993.
[Decision below: unpublished, (9th Cir. 5/20/93)]

Questions presented:
May federal district court engaged in collateral review ignore California's procedural default rules simply because California Supreme Court retains discretion in application of those rules?

Is mandamus appropriate remedy to review order denying motion to dismiss for procedural default, in case in which petitioner has no other means of reviewing procedural default issue?

17. *In re Lewis.*
92-2035. October 4, 1993.
[Writ of Mandamus sought]

Should this court issue writ of mandamus to compel court below to resolve claims remaining undecided after this court's opinion in *Lewis v. Jeffers*, 497 U.S. 764 (110 S.Ct. 382, 111 L.Ed.2d 606) (1990), in case in which court below has ignored command in *In re Blodgett*, (112 S.Ct. 674, 116 L.Ed.2d 669) (1992), to "take all steps necessary to ensure a prompt resolution" of this capital case and has considered Jeffers' appeal for nearly three years without deciding it?

18. *Orlebeck v. Florida.*
92-1609. October 4, 1993.
[Decision below: 611 So.2d 534 (Fla. App. 1992)]

Questions presented:
Was defendant denied his Fifth and Fourteenth Amendment rights to equal protection when, upon defense counsel's objection prior to jury's being sworn that state had systematically struck three minority members from venire, trial court refused to conduct inquiry under *Batson v. Kentucky*, 476 U.S. 79, (106 S.Ct. 1712, 90 L.Ed.2d 69) (1986), on ground that counsel's objection was untimely?

Were defendant's Fifth and Fourteenth Amendment rights to due process and equal protection violated when court below affirmed conviction in reliance upon its decisions retroactively holding that *Batson* claim is procedurally barred from appellate review unless defendant not only objects to illegal peremptory strikes, but makes motion for mistrial, motion to strike venire panel, or motion for continuance?

E. DOCKETED CASES (To Date)

1. *North Carolina v. Ballard.*
93-143. November 15, 1993.
[Decision below: 428 S.E.2d 178 (1993)]

Question presented:
Does United States Constitution mandate *ex parte* hearings for indigent defendants who attempt to make threshold showing for expert assistance?

2. *Bishop v. United States.*
93-50. October 12, 1993.
[Decision below: 5th Circuit, unpublished, 3/4/93)]

Questions presented:
Was defendant deprived of right to effective assistance of counsel as guaranteed by Sixth Amendment in light of actual conflict of interest that existed between defense counsel and former client, who was prosecution's star witness?

Was defendant's due process right to fair trial as guaranteed by Fifth Amendment impaired by actual conflict of interest that existed between defense counsel and former client, who was prosecution's star witness?

F. OTHER

1. *Burden v. Zant.*
92-8836. January 10, 1994.

Cert granted, decision vacated, and remanded to Court of Appeals for the 11th Circuit, or at its order, the district court, to determine whether defense counsel's representation created "an actual conflict of interest adversely affect[ing] [his] performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (100 S.Ct. 1708, 64 L.Ed.2d 333) (1980).

2. *Pasch v. Illinois.*
92-7794. October 12, 1993.

Petition for cert dismissed due to petitioner's death on September 10, 1993.

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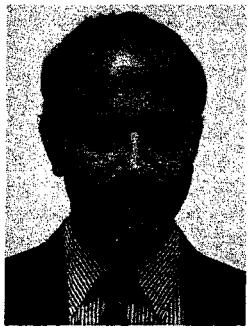
As we demand new policies from government and reinvestment in our communities from business, we shall demand from ourselves new respect.

Let's face the future with guts not guns; ***more jobs not more jails***, medical supplies not military supplies; bread not bombs; tractors not tanks; love not hate; ballots not bullets; votes not violence; brotherhood not sheets and a hood; diversity without adversity.

- Rev. Joseph E. Lowery
SCLE President

Computers in Evidence



Kevin Batts

This is the last of the 3-part series of articles by Mr. Batts.

The legal profession is on the brink of a major evolution in courtroom evidence -- the routine use of computer graphics as an instrument of persuasion.

Sharp litigators have begun using computer graphics in the courtroom to help paint a picture in the minds of jurors. As you know, it's not unusual for members of the jury to become overwhelmed by volumes of information and complex fact patterns. Everyone recognizes the value of demonstrative evidence in helping the jury understand complex issues. A recent study found that jurors' retention rate increased 100 percent when using visual presentations over oral testimony.

When you combine visual and oral presentations, the retention rate jumps to 650 percent over oral presentations alone. The message is clear -- if you want a jury to understand and retain complex details about your case, you need to show them as well as tell them. For years, visual or demonstrative evidence was pretty much limited to hand-drawn charts or photographs. Then in the 1980's, computer-generated images could be animated. About 5 or 6 years ago, it finally became possible to produce a simulated event right in the courtroom.

At first, computer graphics were slow to take off. It required months of painstaking accuracy to duplicate an event or process on computer. The cost was considerable, and there was never any guarantee the court would even allow the graphic animation into evidence. The first federal court allowed sophisticated computer graphic animation into substantive evidence in 1985. That was the case involving the crash of Delta Flight 191 at the Dallas/Fort Worth airport. Delta tried to blame the air traffic controllers, but the Government won the case. A reading of that opinion clearly shows that the Government's extensive use of animated computer graphics is what tipped the scales in its favor. The bench decision referred to the Government's computer graphics over a dozen times in support of key findings of fact.

Recent advances in computer hardware and software have made computer graphics and animation readily available. And prices continue to plummet. Computer graphics can be used to turn complex issues into comprehensible visual evidence. They can illustrate expert testimony, reveal pitfalls in an adversary's theory, and examine alternate scenarios without taking on the expense of an actual re-creation.

For an additional investment, some attorneys are video-taping their computer graphics then offering the videotape into evidence. This protects the attorney from unexpected computer glitches in the courtroom. Multiple monitors can be set up for the judge, jury, witnesses, and counsel. Or you can have a large projection-monitor set up in the front of the courtroom.

As you develop your computer skills, you may want to try using computer graphics in the courtroom. And even if you don't, it's very likely your prosecutors will begin using computer graphics in the next year or two -- if they're not already doing so.

A prosecutor may surprise you one day with plans to use a computerized re-enactment of a crime or re-creation of events leading up to a crime. Of course, all the rules of evidence apply and you can batter away at the admissibility just as you would anything else.

Computer graphics are treated just as any other exhibit and must be accurate as well and fair and complete. It's nothing more than a visual depiction that most conform EXACTLY to the facts. The presentation must not be prejudicial or misleading. If you can show any element of the prosecutor's presentation improperly colors the subject that it's intended to represent, then you have a good chance of having the entire exhibit rendered inadmissible.

Look to see if the prosecutor's graphics contain ALL RELEVANT information, even though it may not be material to his or her theory. If it doesn't, you can argue that a juror could be misled by a critical omission. The purpose of demonstrative evidence is to illustrate and clarify evidence to the finder of fact. Demonstrative evidence has no probative force beyond the testimony it illustrates. For that reason, computer graphics are generally NOT admitted before the jury during deliberations.

Under the *Frye*[1] Rule, scientific evidence must "have gained general acceptance in the particular field in which it belongs," for it to be admissible. About half the federal circuits still apply this rule to admissibility of computer graphics as well, as do several states, but the trend is toward replacing *Frye* altogether with the Federal Rules everywhere.

Under the Federal Rules, first the proponent of computer graphics must establish *authenticity* by showing that every element is what it is claimed to be. You've got to establish the reliability of the computer, followed by the accuracy of its output.

You can attack *relevancy* of an adversary's computer graphics with a showing that the graphics would tend to make the existence of any material fact more or less probable than it otherwise would be. Even relevant graphics can be excluded if they're found to be unfairly prejudicial, confusing, misleading, or if they constitute cumulative evidence.

The computer graphics must be fair, accurate, complete, and not of undue length. Nor must courtroom use of them create delay or disruption. If you are the proponent of the computer graphics, especially graphic animations, be prepared to show the graphics only once. Otherwise, the presentation may very well constitute cumulative evidence.

You can likely get computer graphics admitted under the expert testimony rule (702).[2] Expert testimony is admissible "in the form of an opinion OR OTHERWISE." This would include graphics which themselves express expert conclusions or simply illustrate the basis of opinion testimony by experts. It's a

very broad standard. The prerequisite to meet is the concept of "HELPFULNESS." And computer graphics which illustrate the basis of expert opinion meet the criteria where "the untrained layman would not be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from experts."

There is a constraint to watch for (Rule 703). That's the requirement that facts not admissible in evidence, but upon which an expert bases an opinion, must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." And of course opposing counsel has a chance to dig through underlying facts on cross-examination. So if the prosecutor has been successful in getting computer graphics introduced, you still have a great opportunity to pick away at facts and conclusions that constituted the foundation of their computer graphics presentation.

You cannot exclude expert opinions and inferences on ultimate issues merely on the basis that they embrace an ultimate issue to be decided by the finder of fact (Rule 704).[3] The Rules protect opinions and inferences from exclusion on that basis alone. Therefore computer graphics MAY conclusively depict an ultimate issue in dispute.

If you plan to use computer graphics at trial, the foundation must be established with intricate detail:

→ You will need to establish that all the calculations and data analysis of source data is trustworthy and that the source data itself is reliable.

→ You will need to describe how the data was entered into the computer, and how it was verifiedafter being entered.

→ You will need to illustrate how the computer and this particular software work, and how its capable of creating the presentation.

→ You will need to explain how the graphics are generated, and any assumptions or alterations that occur in the process.

→ If graphics are videotaped or printed out, you'll need to explain how the presentation reached its final form.

→ And you will need to establish the accuracy of the presentation in its final form.

If possible, get a pre-trial stipulation as to joint admissibility of computer graphics prepared by all parties. Without a stipulation, a motion in limine on the admissibility issue alone would avoid disrupting the trial.

The following checklist might prove helpful, whether you come across a case where you decide to try out some of these ideas.....or if you need to prepare questions for a prosecutor who attempts to enter computer graphics into evidence.

EVIDENCE CHECKLIST FOR ADMISSIBILITY OF COMPUTER GRAPHICS

♦ Are the graphics accurate, as well as fair and complete?

♦ Is the presentation unduly prejudicial or misleading?

♦ Is all relevant information presented, even if it is not necessarily material to the proponent's theory?

♦ Are the graphics sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact?

If graphics are admitted as demonstrative evidence only, then they have no probative force beyond that provided by the testimony they illustrate. Remember this if you think the court is about to allow the graphics before the jury during deliberations.

♦ Has the proponent established authenticity by showing every element is what it is claimed to be?

♦ Has the proponent established the inherent reliability of the system and/or process used to produce the computer graphics?

♦ Has the proponent established the accuracy of the computer's output?

♦ Are the graphics relevant? Do they tend to make the existence of a material fact more or less probable than it otherwise would be?

♦ Are the graphics unfairly prejudicial, confusing, or misleading?

♦ Are the graphics of undue length?

♦ Will the graphics presentation create a delay or disruption in the trial?

♦ If the proponent seeks to have computer graphics introduced as part of their expert testimony, has the standard of "helpfulness" of "scientific, technical, or other specialized knowledge" to the finder of fact been established?

♦ If admitted as expert testimony, do the graphics explain "what the untrained layman would [not] be qualified to determine intelligently and to the best possible degree without enlightenment from [the graphics]?"

♦ Do these computer graphics constitute evidence "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject?"

♦ Will the underlying facts stand up to a full range of inquiry by opposing counsel on cross-examination?

♦ Has the proponent established the trustworthiness of the original source data, including all calculations and assumptions used in analyzing the data?

♦ Has the proponent established how the data was input into the computer, and how the data was then verified?

♦ Has the proponent established that the hardware and software are dependable and recognized in the scientific community?

♦ Has the proponent established that the hardware and software were working properly at the time the computer graphics were generated?

♦ Has the proponent established the trustworthiness of the output process used for graphics and the medium used to reproduce the graphics for presentation at trial?

♦ Has the proponent established the accuracy of the final presentation itself?

Footnotes

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

[2] Kentucky Rules of Evidence Rule 702, Testimony by experts, states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

J. David Niehaus observed in his commentary to that rule found in *The Advocate*, Vol. 14, No. 6 (Dec. 1992) at 25, "the other big question here is the type of scientific technical or other specialized knowledge that may be admitted. This brings up the question of *Frye v. United States*, 293 F. 1013 (D.C. Cir., 1923), and whether it will continue as the rule in Kentucky. In the federal system, two federal appellate circuits maintain that the failure of the rules specifically to mention *Frye* in relation to FRE 702 amounts to an abrogation of the *Frye* doctrine and substitution of a new one in which the judge does not have to make a determination of the general acceptance of a particular scientific or technical process. Under this view, the judge makes a determination that the scientific process or theory appears reliable and therefore may assist the jury. [1 McCormick, p. 872-873; ABA Problems, p. 172-174]. Although Kentucky appears to be rather conservative on the adoption of new scientific techniques, and the

current Supreme Court appears to require adherence to the substance of the *Frye* rule of general acceptance within a particular scientific or technical community, it is important to know that there is this other theory lurking about and that it may become prominent under the Rules."

[3]Kentucky does not have a Rule 704. J. David Niehaus states in his commentary to that rule found in *The Advocate*, Vol. 14, No. 6 (Dec. 1992) at 26, "This is another important deletion from the original draft of the rules. KRE 704 originally was intended to do away with the ultimate fact rule in Kentucky. Most people know what the ultimate fact is in theory, but the decisions of Kentucky appellate courts show that in practice it is difficult to predict when a particular type of information might interfere with the jury's determination of ultimate fact. Actually, the only real reason to invoke the ultimate fact rule is when the testimony of the expert is on a subject so specialized or difficult to deal with that jurors would be likely to give up their role as fact finders in favor of the conclusion of the "expert" on the subject. The absence of the rule should be interpreted as a determination by the Court and the legislature that opinions on the ultimate issue usually should be disallowed. However, this is a matter for the good judgment of the trial judge. It is unlikely that the Supreme Court of Kentucky will allow opinions on insanity or other subjects on which it currently excludes ultimate opinion testimony."

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C. Kevin Batts, M.B.A., J.D., is Director of Information Systems and Attorney with the Tennessee District Public Defenders Conference. Batts has authored numerous articles for national publications in the fields of computer science, law and management. He has appeared on network television and radio programs addressing technology issues. For seventeen years, Batts designed computer systems for the federal government. Many of his systems are still in use today by the federal court system, the Department of Defense, the Department of Treasury, the Internal Revenue Service, and the U.S.D.A. Batts resides in Nashville with his wife and two children.

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10 Commandments of Computer Ethics

1. Thou shalt not use a computer to harm other people.
2. Thou shalt not interfere with other people's computer work.
3. Thou shalt not snoop around in other people's computer files.
4. Thou shalt not use a computer to steal.
5. Thou shalt not use a computer to bear false witness.
6. Thou shalt not copy or use proprietary software for which you have not paid.
7. Thou shalt not use other people's computer resources without authorization or proper compensation.
8. Thou shalt not appropriate other people's intellectual output.
9. Thou shalt think about the social consequences of the program you are writing or the system you are designing.
10. Thou shalt always use a computer in ways that ensure consideration and respect for your fellow human.

- Computer Ethics Institute

The Capital Jury Project in Progress: Kentucky

The Decisionmaking of Kentucky Capital Jurors is Studied

Portions of this paper were presented at the annual meeting of the American Society of Criminology, October 30, 1993, in Phoenix, Arizona.

Guided Capital Discretion

The U.S. Supreme Court endorsed guided discretion statutes as the means to curtail arbitrariness in capital sentencing (*Gregg v. Georgia*, 1976 and companion cases). Although various sentencing schemes were found to be constitutional, the Court mandated that all capital statutes must include three provisions.

Appeal. First, there must be an automatic appellate review of all death sentences to the state Supreme Court. The purpose of such a review is not merely to determine whether the sentence was lawfully imposed. Rather, the task requires a proportionality review, to ascertain whether the sentence is "excessive or disproportionate considering both the crime and the defendant" (*Gregg v. Georgia*, 1976, 2948).

Mitigation & Aggravation. Another requirement of all guided discretion statutes is that the sentence be based on a consideration of the aggravating and mitigating circumstances of both the crime and the defendant. This stipulation attempts to ensure that sentences will be individualized. In fact, the U.S. Supreme Court found mandatory death sentences (whereby everyone convicted of a capital offense would receive a sentence of death) to be unconstitutional (*Woodson v. North Carolina*, *Roberts v. Louisiana*, both 1976).

Bifurcated. The final requirement of guided discretion statutes is that capital trials be conducted as bifurcated proceedings. Similar to all criminal cases, a jury in a capital case must first decide whether the accused is guilty or innocent. Then, if the jury finds the offender guilty of a capital crime, the same jury hears evidence (aggravating and mitigating circumstances) as to the appropriate sentence. By implementing a two-part trial in capital cases, the Justices made several assumptions about human nature, one of which is that jurors will wait until the end of the penalty phase to decide on the appropriate sentence.

When Do Kentucky Capital Jurors Decide Punishment?

The remainder of this paper is devoted to answering the question of whether capital jurors, by their own accounts, do in fact wait until the end of the penalty phase to decide on the appropriate sentence.

Method

As part of the Capital Jury Project, the jurors are asked:

(1) whether there was any discussion of the death penalty during the guilt deliberations;

(2) what punishment they thought the defendant deserved after the guilt phase, but before any evidence was presented in the penalty phase; and

(3) how certain they were about the appropriate punishment at that point in the trial.

To put the issue into perspective, the frequency of responses from 68 jurors (40 who served on cases that resulted in a sentence of death and 28 who served on cases that resulted in a sentence of less than death) to the three items noted above are presented below.

As can be seen in Table 1, approximately half of the jurors, regardless of the final sentence, acknowledge that some discussion of the death penalty took place during their guilt deliberations. Most jurors, as evidenced in Table 2, also were willing to express their penalty preference before the sentencing phase of the trial. In fact, only 34 percent (n = 23) of the jurors interviewed claimed that they were undecided as to the sentence at this time in the trial. There was not much difference in terms of the percent of jurors who were undecided by actual trial outcome -- 32% of jurors on life cases, compared to 36% of jurors on death cases. However, there appears to

Frequency of Discussion About Death During Guilt Phase
In deciding guilt, did jurors talk about whether or not (DEF) _____ would, or should, get the death penalty?

TABLE 1	TRIAL OUTCOME		
	LIFE	DEATH	TOTAL
YES	13	20	33
NO	15	20	35
TOTAL	28	40	68

Thoughts Regarding Appropriate Sentence Before Penalty Phase
After the jury found (DEF) _____ guilty of capital murder, but before you heard any evidence or testimony about what the punishment should be, did you then think (DEF) ___ should be given....?

TABLE 2	TRIAL OUTCOME		
	LIFE	DEATH	TOTAL
DEATH SENTENCE	9	20	29
LIFE SENTENCE	10	5	15
UNDECIDED	9	14	23
TOTAL:	28	39[1]	67

[1]One juror stated that she did not realize that the jury would have to decide the sentence. Therefore, she did not think about the penalty at that time.

be a greater presumption that death is the appropriate penalty than life as 43% of the jurors thought the defendant should receive a sentence of death compared to only 22% who thought the defendant should receive a life sentence. Another interesting finding from Table 2 is that slightly over half of the jurors on the death cases (n = 20, 51%) thought the defendant should receive a sentence of death before the penalty phase of the trial. In contrast, 36% (n = 10) of the jurors on the life cases thought the defendant should receive a sentence of life before the penalty phase. Therefore, more work is required of the defense than the prosecution in the penalty phase as they have to convince more jurors that their defendant deserves a life sentence.

Table 3 reports the degree of certainty associated with the jurors' penalty preferences before the sentencing phase of the trial. The most striking finding is that 70 percent (n = 30) of the jurors were "absolutely convinced" of their penalty preference before they heard any evidence as to the appropriate sentence. An additional 25 percent (n = 11) of the

Degree of Certainty Regarding Penalty Before Sentencing Phase
How strongly did you think so? (Follow up to question associated with Table 2)

TABLE 3	TRIAL OUTCOME				
	LIFE		DEATH		
	Initial Preference		Initial Preference		
Degree of Certainty	Life	Death	Life	Death	Total
Absolutely Convinced	8	7	0	15	30
Pretty Sure	2	2	2	5	11
Not Too Sure	0	0	2	0	2
TOTAL	10	9	4	20	43

NOTE: Jurors who claimed they were undecided as to the sentence before the penalty phase began were not asked this question (n = 23). Also, two jurors did not answer this question.

jurors were "pretty sure" of the appropriate penalty, and only 5 percent (n = 2) were "not too sure".

The findings presented thus far demonstrate quite clearly that bifurcated proceedings do little to separate the guilt and penalty decisions of capital jurors. Of course, this finding violates the assumption advanced in *Gregg* that guided discretion would curtail arbitrariness in capital sentencing. If capital jurors are making their guilt and sentencing decisions concurrently, then how can they be evaluating the aggravating and mitigating factors presented in the penalty phase that should be guiding their sentencing decisions?

There are two cells in Table 3 that stand out. First, there are seven jurors who are "absolutely convinced" the defendant should receive a sentence of death before the penalty phase, yet the defendant actually receives a life sentence. Also, there are two jurors who, before the penalty phase, are "pretty sure" the defendant should receive a life sentence, yet he ultimately receives a sentence of death. An understanding of the sentencing decisions of these nine jurors could provide valuable insights into the importance of the penalty phase of capital trials as well as the content of penalty-phase deliberations. For the purposes of this paper, however, only the seven jurors who switched from being absolutely convinced that the defendant deserved a sentence of death to voting for life will be examined.

If the principles advanced in *Gregg* are in fact guiding jurors' sentencing decisions, one would expect at least some reference to aggravating or mitigating factors as the reason for the change in the penalty preferences of these seven jurors. As will become evident, that is rarely the case. Rather, these jurors' accounts of their sentencing decisions are case studies in the social influence processes that occur in capital jury deliberations.

Death to Life Converts

Three of the seven jurors who initially said they were convinced the defendant should receive a death sentence, when he in fact received a life sentence, were from the same jury. Another juror from the same case also was interviewed; she was undecided as to the appropriate sentence after the guilt phase. An examination of the sentencing decisions of these four jurors is included below. However, a brief discussion of the other four jurors who were convinced the defendant deserved a sentence of death, yet he received a life sentence, follows immediately.

One of the four remaining death to life converts is the only interview I was able to obtain from the jury. The defendant in this case had an (alleged) accomplice, which seemed to weigh heavily on the juror's sentencing decision. According to the lone juror interview from the trial, the most important factor in the jury's sentencing decision was "how much he (the defendant) willingly participated in the crime, how strong the coercion was (from the other defendant) and could he prevent it." Interestingly, the accomplice was sentenced to life in prison as well.

The story of another one of the death to life converts is quite similar. Again, two people were charged with the crime. According to the juror, the reason he changed his vote was because "it (the jury) had to be unanimous." Earlier in the interview this juror also said that "he (the

defendant) was responsible, well of course I think (others were) responsible - might (referring to defendant) not be the one most responsible. The direct action, yes he did I mean, but someone else was responsible for his being there and carrying it out." Another juror on this same case (who thought the defendant deserved a sentence of life before the penalty phase) had this to say about the sentencing deliberations: "Just give him enough so he'd be too old to do anything. They decided we all better vote the same way. Everything we had seen and heard, we better just do it and get it over with." According to this juror, the most important factor in the jury's sentencing decision was "everybody thought someone else was more guilty." It is interesting to note that the defendant actually was the triggerman, not the accomplice. Moreover, the defendant, because he was more culpable, was represented by experienced capital litigators. The co-defendant's attorney was court appointed. The co-defendant received a death sentence.

The defendant in the case of the third death to life convert was very young at the time of the crime. The juror explained his reason for changing his sentence preference very succinctly, "a compromise." The juror said there were three other jurors who felt the defendant deserved a lesser sentence because of his youth. Another juror on the case concurred; "everyone agreed (defendant) didn't deserve death penalty because of age." This juror also added that the jury "wanted to keep him (defendant) there for a long time" and the "death penalty would just get appealed."

The story of the final death to life convert to be discussed briefly is consistent with the others. According to this juror, the "only reason I didn't stick with it (death penalty), didn't want a hung jury cause he might get off on a technicality. I think he's guilty and deserves death penalty." All of the jurors interviewed from this case noted early on that this was the defendant's second trial; the first trial resulted in a hung jury as to guilt. One interview on this case is especially revealing. The juror, due to his own knowledge, was not impressed with the pathology evidence presented by the state. In fact, the juror claims: "After she (state pathologist) had presented the evidence, I even went to the judge that evening in the parking lot and said if this lady is not lying, she's lying by omission. If this stands, unless the defense at least mentions this, I think that I'm going to have to mention it. So, we had a little agreement worked out and the judge was going to call on me if the defense didn't bring it up. In Kentucky you can do that. If you have a question, you can say, uh, the judge will look at you, you know. He can say - raise eyebrows - and you say, yes, I have a question. This lady was basically lying about this; it bothered me a lot." This juror "thought he (defendant) was guilty, but thought that [it] wasn't right to go with death due to strength of evidence, *circumstantial* (emphasis added) evidence."

As mentioned previously, the remaining three death to life converts served on the same jury; they are all white. The fourth juror interviewed is African American.

At the start of the interview the jurors are asked to recount the facts of the crime. All of the death to life converts on this jury did just that. However, the African American juror's response to this same item had little to do with the facts of the crime:

> I was selected as a juror. They brought this boy in. He was a black boy. I didn't know the boy and had never seen him. Testimony lasted a week, maybe longer. Then they decided what the punishment was gonna be. Everybody wanted to electrocute him except me. I didn't do it because he was black. I didn't do it because I knew the boy. But I did what I did because I had a conscience to live with and I don't believe in taking somebody else's life. And taking his life wasn't going to bring the girl back, which he was accused of doing. I don't believe in that. I do think they put him where he wouldn't do anything to anybody else. I didn't know the boy. I knew of his daddy. I didn't personally know any of them. But I do think when a person's accused of doing something like this they should be... I don't say take their life 'cause I don't want anybody to take my life. But I do think they should be put where they won't [do] any harm to anybody, any kind of way.

After this explanation, the juror did mention some of the facts of the crime.

Two of the three death to life converts claimed that there were no disagreements as to the defendant's guilt. Both of these jurors said that first vote during the guilt deliberations was 12 for guilty of capital murder. The third death to life convert mentioned that there was one dissent. According to the African American juror, who acknowledged that she was undecided, "the question was what would the punishment be, life or execution. That was the question. And you voted yes (guilty of capital murder) if you wanted to kill him and no if you didn't." At first reading this quote may sound as though the juror was confusing the guilt and penalty deliberations. However, the interviewer asked whether the question the juror talked about was the issue at the guilt stage, and the juror said yes.

Interestingly, this juror claims that she never changed her vote. According to her "I didn't change my vote, didn't have to agree on guilt. The only thing you had to agree on was the punishment. That was the whole thing." Had this juror been aware of the fact that unanimity on guilt is required, she probably would be the prime example of a guilt nullifier, the great concern of the Court in *Witherspoon v. Illinois*. However, her lack of such knowledge makes her the prime example of the failure of bifurcated proceedings instead.

As might be expected, this jury's sentencing deliberation was much more eventful than the one on guilt; all four jurors agreed on this point. Again, this section of the interview begins with an open-ended question that asks the jurors to recount how the jury reached its' sentencing decision. Not surprisingly, the hold-out juror was the primary focus of the three death to life converts' stories. In fact, the converts' descriptions of the hold-out juror were quite hostile:

> We all pretty much agreed *except that one person* (emphasis added). She held out on guilt because she didn't want to see him executed. That's why we were in there so long. We didn't know how she got on there. *We figured they just put her in there to have an argument with us.* She believed he was guilty really, but didn't believe in execution. Everybody agreed on life sentence once we agreed on guilt.

Notice how this juror's description of the hold-out corroborates her own claim that she never changed her vote on guilt. Moreover, the convert questions how the hold-out ever made it on the jury, alluding to the questions asked as part of the death-qualification process. Another one of the death to life convert's description of the sentencing deliberation picks up on this same theme, but is even more to the point:

> One juror admitted that under no circumstance, none whatsoever, could impose the death penalty. I had a real problem with that because

in the jury selection I specifically remember the judge ask the question - You realize this is a capital offense and death penalty is an option and should you deem it warranted, would you have any problem voting for the death penalty? Jurors were polled individually on this, so I'm not sure how she (the hold-out) answered for sure. Maybe she said no and it was misunderstood that no, she wouldn't have a problem with it - I don't know. She admitted to us as a jury that we could sit here until whenever, she did *not* (emphasis in original) believe in the death penalty. I don't have a problem with that, but that being the case, I don't think she should have served. I'm convinced that's the only reason that the death penalty was not imposed....

The hold-out realized that her opposition to the death penalty was the heart of the sentencing deliberation:

> Main question was what the punishment should be. All wanted death but me. The others didn't change their minds, they just saw I wasn't going to change mine. When they found I wasn't going to change, they changed to life without parole. To me, if you kill him then you're an accessory to murder. I've got a conscience. My conscience is clear. I've said what I felt about it and I can go home and take a bath and go to bed and go on to sleep.

This juror also felt the need to address the issue of race at this time as she continued with; "I'm not doing it because he's black. Of course, I was the only black on the jury. Nobody said anything about it (her race)." The hold-out also acknowledged that the other jurors probably resented her, but that did not seem to bother her:

> I'm sure they were upset with me but it didn't make any difference. I told them everybody's entitled to their opinion. So, I'm a big girl and I can take care of myself. I said your opinion is yours and mine is mine and that's that.

Evidently, the hostility expressed by the other jurors was not conveyed to the hold-out as she claimed "everybody was very nice." Perhaps the other jurors were reluctant to pressure the hold-out for fear that their comments would be interpreted as racist. In fact, none of the death to life converts ever mentioned that the hold-out was African American.

One question, of course, is how did the jury ever reached consensus on the sentence? All of the jurors noted that they asked the judge what would happen if they could not agree on the sentence. After learning that the case would be retried, there appeared to be greater determination to find common ground. As one juror said "[The] next jury wouldn't get evidence presented as we heard it and they probably wouldn't feel as strong as we did."

As noted previously, the death to life converts realized that the hold-out was not going to change her position. That knowledge, combined with a desire to avoid a re-trial, seems to have been the impetus for the sentence negotiation. At that point, the focus of the deliberation shifted to concerns about parole eligibility. Again, the jurors went to the judge. This time they asked for information on when the defendant would be released if given a term of years, which the judge did not provide. One juror summarized the jury's road to consensus as follows:

> When it became obvious we weren't going to change this lady we discussed the options. I believe we even asked the judge what would happen if we couldn't reach a verdict. I believe they said they could declare a hung jury and the whole thing thrown out - a new trial. We determined that it would be better for us to agree on some type of lesser punishment than let that happen. Personally, I didn't feel that way because my conviction was that he (the defendant) deserved the death penalty. I went [sic] up going along with them. We gave him some ridiculous sentence, life with 100 or life with 200 years, more to make a statement of how adamantly we felt about it and be sure that [the defendant] would not be eligible for parole, even though we didn't know that or couldn't really ensure it.

The hold-out's perception of the road to agreement was slightly different. According to her, "They [the other jurors] thought I wasn't going to change my mind, so let's get out of here."

In sum, the death to life converts appear to have changed their vote because of the lone hold-out, and the desire to avoid a re-trial. Evidently, the primary concern was that the defendant not be released from prison. In fact, according to a newspaper account of the trial, the jury even recommended that the sentences be served consecutively. Actually, one of the jurors remained concerned that the defendant would be released:

> After we voted for life, they told us parole was in seven and a half years. Prosecutor said give him a couple of hundred years and it'll give a message to the parole board that you don't want to see him out no more. When they see a sentence like that it lets them know you're very disturbed about what had happened. So we gave him a little extra. We gave him 300 years which is another seven and a half years, but they are to run consecutively to bring it almost to 15 years before he can get out.

Hence, the jurors reached a compromise. The hold-out did not compromise her views as a literal death sentence was not imposed. However, the jurors who supported a death sentence also triumphed in that the defendant did, figuratively, receive a death sentence. Moreover, even the juror who mentioned that the defendant could be released after 15 years probably could take heart in the fact that the jury's sentence was exceptionally harsh. And, this juror agreed that the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision. Thus, the juror could take comfort in the fact that an "early" release was not his decision.

The Reality of the Death-Qualification

One of the most intriguing questions about this jury is how exactly *did* the hold-out juror get on the jury? Given her adamant opposition to capital punishment, it seems unlikely that she would be deemed death qualified. There are few clues in the juror's interview. Unlike other sections of the interview, the juror did not elaborate on any of the questions asked about the jury selection. When asked if any of the questions were especially hard for her to understand, she said no. Moreover, throughout the entire interview the hold-out never questioned how she made it on the jury, nor did she say anything about the questions she was asked during voir dire. Therefore, I obtained the transcript of the actual voir dire of all the jurors interviewed on this case.

The answer to how the hold-out ever made it on the jury is embedded in the death-qualification component of the voir dire. The general death-qualification was conducted by the judge, who asked a *Witt*-type question. For the most part, the judge asked the same single question to

all of the prospective jurors. Yet, the phrasing and syntax of the question asked to the hold-out was slightly different than that posed to the other jurors. Below are the actual questions asked of each of the four jurors interviewed on this case.

Juror 1:

Judge: Okay sir. You heard me read the indictment out loud yesterday, didn't you?

Juror: Yes, sir.

Judge: The first two of those offenses that I read you in there carry possible penalties upon conviction of anywhere from ten years confinement up to life imprisonment. And the third count is the capital offense of intentional murder. You heard me read that?

Juror: Yes, sir.

Judge: Now in Kentucky the law provides possible penalties in this case upon conviction of the capital offense of intentional murder of the death penalty, life imprisonment or confinement in the penitentiary for not less than 20 years. Now if you were seated on this jury and you and your fellow jurors, after hearing all the evidence and instructions of the Court, determined beyond a reasonable doubt that the defendant is guilty of intentional murder, could you consider that entire range of penalties provided by the law of Kentucky as I have outlined them to you?

Juror: Yes, sir.

Juror 2:

Judge:You heard me read the indictment out loud this morning. You know the charges that are in this indictment. Let me make this statement to you, that there's three different offenses charged in there and the first two of those carry with them upon conviction possible punishments of as little as ten years confinement in an institution of the Corrections Cabinet on up to life imprisonment. And then Count Three, which is the intentional murder count, upon conviction carries permissible punishments of death, life imprisonment or confinement for a term of not less than 20 years. Now if you were selected for the jury and if you and the other members of the jury determined, under the instructions of the Court, beyond a reasonable doubt that the defendant is guilty of intentional murder, could you consider the entire range of penalties provided by the law of this state as I have just outlined them to you?

Juror: Yes, sir.

Juror 3:

Judge: You heard me read the charges out loud yesterday to the jury, didn't you?

Juror: Uh-huh.

Judge: And you heard me say the first two counts are burglary and rape and then the third count was capital intentional murder charge?

Juror: Yes, sir.

Judge: Those first two counts carry with them a range of penalties all the way from ten years confinement up to life imprisonment. Count three, the intentional murder count, under Kentucky law in this case carries with it permissible penalties of the death penalty, life imprisonment or confinement for a term of not less than 20 years in the penitentiary. If you were selected to sit on this jury and if you and the other 11 jurors determined, under the instructions of the Court, beyond a reasonable doubt that the defendant is guilty of intentional murder, could you consider the entire range of punishments as outlined to you just now under Kentucky law?

Juror: Yes, sir, I believe I could.

Juror 4 (hold-out):

Judge: You heard me read the charges from the indictment out loud to the jury, didn't you?

Juror: Yes, I did.

Judge: The first two of those, the burglary and the rape charge carry a range of punishments upon conviction all the way from ten years confinement up to life imprisonment. And Count Three, which is the capital offense of intentional murder, you heard me read that also, didn't you?

Juror: Yes, I did.

Judge: I want to advise you that under Kentucky law in this case the capital offense of intentional murder carries with it possible penalties *upon conviction of the death penalty* (emphasis added), life imprisonment or confinement for not less than 20 years. Now if you're seated as a juror in this case and along with your fellow jurors, after hearing the evidence and the instructions of the Court, determined that the defendant is guilty of intentional murder, could you consider the entire range of permissible punishments provided by the law in Kentucky that I have just outlined to you?

Juror: I think I could.

Thus, the hold-out was told that "the capital offense of intentional murder carries with it possible penalties *upon conviction of the death penalty*, life imprisonment or confinement..." In contrast, the other jurors were told: "the intentional murder count... caries with it permissible penalties of the death penalty, life imprisonment..." (juror), or "...the intentional murder count, upon conviction carries permissible punishments of death, life..." (juror); or "...the law provides possible penalties in this case upon conviction of the capital offense of intentional murder of the death penalty, life imprisonment..." So, the hold-out juror was, in effect, told that if the defendant was convicted of the death penalty, the sentences could be life imprisonment... whereas the other jurors were told that death was a possible punishment if the defendant was convicted of intentional murder.

None of the jurors were asked their personal attitudes toward capital punishment. All jurors only were asked whether they could consider the entire range of penalties. According to the question asked of the hold-out, she answered honestly... she could consider a sentence of life imprisonment or confinement for not less than 20 years. Neither the judge nor the attorneys ever asked the hold-out whether she could "convict the defendant of the death penalty," whatever that means.

Given the question she was asked, it is not surprising that the hold-out thought the defendant would receive a sentence of death if the jury convicted him of capital murder. Moreover, this juror was never asked if she could consider voting for a sentence of death. Thus, the hold-out's serving on the jury was the result of a cursory voir dire, not her dishonesty.

Conclusion

In sum, the interviews from this jury highlight fascinating issues that may confront capital jurors as they travel the road toward agreement. The data presented herein support the idea that many capital jurors actually make their guilt and sentencing decisions at the same time. Also, when there is not consensus at the outset of the sentencing deliberations, jurors attempt to negotiate a sentence that is amenable to all. The primary concerns, as expressed by the juror interviews discussed in this paper, are the desire to avoid a hung jury and an early release of the defendant. If the desire to avoid a hung jury is paramount, it is likely that the defendant will receive an exceptionally harsh sentence, but not death.

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NO DISCUSSION OF PUNISHMENT INSTRUCTION

You cannot discuss punishment or make any decision about punishment during this guilt/ innocence phase. If you find the defendant not guilty, no punishment will be set. If you find the defendant guilty, punishment will be fixed by you only after you hear all the evidence in the next phase in which you determine what penalty is appropriate. If any juror discusses penalty during this guilt/innocence phase, you shall report that to the Court immediately.

- Larry Marshall, Kelly Gleason, Ed Monahan

Ask Corrections

Question #1:

Are there any circumstances where an inmate, or his attorney, are able to obtain a copy of the Presentence Investigation Report?

Response to #1:

Presentence Investigation Reports are privileged by statute and exempt from inspection under KRS 61.878(1)(K).

However, according to Corrections Policies and Procedures 28-01-09, the factual contents contained in a *waived* PSI may be released, per *Commonwealth v. Donnie Ray Bush*, 740 S.W.2d (Ky. 1987). In addition, the completion of the Presentence Investigation Report may be delayed until after sentencing upon written request of the defendant. KRS 532.050(1).

The inmate, or his attorney, may request in writing the factual contents contained in the Presentence Investigation Report. This request should specify the county of conviction and indictment number in question.

Upon receipt of the request, the file will be reviewed to determine if the individual is entitled to receive the factual contents contained in the Presentence Investigation Report.

Question #2:

My client was paroled in 1983 on a sentence of 20 years. He has been released from active parole supervision and is no longer reporting to his parole officer. His maximum expiration date is April 15, 1999. However, his minimum expiration date before being paroled was March 20, 1994. Will he be eligible for a final discharge from parole in March 1994?

Response to #2:

No. KRS 439.354 provides that unless a final discharge is ordered by the board, prior to the maximum expiration of sentence, a final discharge shall be issued when the prisoner has been out of prison on parole for a sufficient period of time to have been eligible for discharge from prison by maximum expiration of sentence had he not been paroled.

Therefore, once he is discharged by parole he is working toward his maximum expiration date rather than his minimum expiration date.

However, he may make an application to the Parole Board for consideration of a final discharge, if and when eligible, based on the Board's parole regulations.

The release from supervision form should indicate when he would be eligible to apply for a final discharge. If he has reached that date, he should contact the local probation and parole office for an application.

Once the application has been completed and submitted to Central Office the Parole Board will make the determination to grant or deny the request.

If the application is approved by the Parole Board, and a final discharge is issued by the board, that would terminate his liability on that sentence. KRS 439.356.

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"Organizing is what you do before you do something, so that when you do it, it is not all mixed up."
- A.A. Milne

Governor Jones: Violent Crime is Our Call to Action

Governor Brereton Jones

Remarks of Governor Brereton Jones at the January 12, 1994 Kentucky Crime Commission meeting in Frankfort, Kentucky.

Sheriff Steve Bennett; Deputy Sheriff Arthur Briscoe; Sheriff Cecil Cyrus; Mary Byron; Edith Schwab.

The mere mention of these victims of violent crime provokes grief and despair; grief in knowing that vibrant, productive human beings have had their lives ended violently and senselessly.

Despair in thinking that our society is saturated in violence. We cringe at the thought that our children are exposed to this wave of violence. We fear that our children are themselves in the line of fire and we are stunned that, more and more, children are the perpetrators of violent criminal acts.

We cannot be immobilized by despair and grief. Rather, the tragedies that are a result of violent criminal behavior must be our *call to action.*

Today, I come before you to announce a crime control package for consideration by the General Assembly currently in session. Many of your recommendations are included in the package.

I appreciate your involvement to date and ask that you continue to work with our administration to make these legislative proposals a reality.

Our crime control package has a number of interrelated components.

Juvenile

First, in the area of juvenile crime, we must prohibit the *possession* of handguns, *and assault weapons*, such as the Chinese SKS-47 Assault Rifle you see here, and *handgun ammunition* by juveniles. And we must prohibit the *transfer* of handguns, *and assault weapons* or handgun ammunition to juveniles.

Certain exceptions such as adult-supervised target practice, hunting and safety instruction are allowed.

Next, our legislation would prohibit a parent or legal guardian from *knowingly allowing* a juvenile to possess a handgun, assault weapon or handgun ammunition in violation of the law. The *penalty* for such a violation would be a fine of up to five hundred dollars.

We believe that if we are to have any success in confronting the problem of juveniles and guns, we must find ways to get the attention of their parents and guardians. This measure, we believe, does that.

Next, our legislation prohibits the carrying of firearms or deadly weapons on school property, whether concealed or not, and requires school officials to immediately notify law enforcement officials when a firearms offense is witnessed on school property. There is no place for guns in our schools. We must have the support and active involvement of school officials to confront this problem.

Finally, in the area of juvenile crime, our legislation would allow for juveniles over the age of fourteen to be tried as adults when charged with the commission of a firearm-related offense, if they have, on one prior occasion, been found delinquent of a felony offense.

Our legislation also calls for *additional* penalties, such as the imposition of a curfew, community service work and loss of driver's license when a juvenile is convicted of violating the provisions we have outlined. We need to give judges more discretion to punish juveniles, so that juveniles realize criminal activity means harsh consequences.

Guns, Drugs, Bullets

Beyond juvenile crime, our legislation contains other specific anti-crime measures.

First, guns and drugs -- their combination is often deadly, and must be treated as such.

First, we would enhance penalties for individuals who commit a drug offense while in the possession of a firearm.

Second, we would prohibit felons from possessing *assault weapons* and *other* firearms. Currently, our state law only prohibits felons from possessing *handguns.*

Third, we would prohibit the possession of a *firearm* by someone other than the owner in buildings licensed to sell alcohol.

Fourth, our legislation prohibits the transfer of a handgun *or* an assault weapon to a convicted felon.

Fifth, we would ban the sale of armor-piercing and black talon ammunition.

I have with me a bullet that is called a "cop-killer." When these bullets are fired out of guns you can see the deadly shape they take. Once inside the human body, the damage is virtually impossible to repair.

Sixth, we would provide that firearms forfeited in connection with the commission of crimes either be destroyed or transferred to the State Police Lab, and no longer auctioned to the public after confiscation. We believe it is unconscionable to continue to put forfeited firearms back in circulation as is currently required under the law.

More State Police

Next, it has become apparent that we need more manpower to deal with the problem of violent crime. I am announcing today that the biennial budget that I will propose next week will contain funding for an additional 30 state police officers, so that we may reach force

strength of 1,000 state police officers over the next two years. The state police are one of our best resources in fighting crime, and I believe there is a clear need for additional police officers to ensure the safety of all Kentuckians.

Victims & Victim Advocates

Our legislation also recognizes that victims are entitled to know when the criminals who have victimized them are released. We would require prompt notification by commonwealth's attorneys to victims who have requested such notice, and we would require wardens of penitentiaries to notify victims who have requested notification in advance. Victim notification would also include public notice of the filing of all petitions for involuntary hospitalization relating to a prisoner who is to be released from confinement.

Finally, I am very pleased to announce our budget will contain full funding for full-time victims' advocates in all judicial circuits. This measure is needed not just from the standpoint of addressing the problem of child sexual abuse, but also in tending to the needs of all victims of crime.

Wiser Use of Limited Prison Cells

Our crime control package is balanced in that we will propose the development of a number of programs to ease the burden on our corrections system. We must responsibly manage our jails so we have room for the violent offenders we propose to put in jail. To this end, we are proposing that the persistent felony offender statute be amended to exclude non-violent property offenders. These criminals will still be punished, but they will not be subject to the add-on penalties required by the persistent felony offender statute.

Second, our budget will fund a day treatment program in Fayette County, and expand the existing community corrections program which diverts non-violent felony offenders.

These programs have worked well in Kentucky, and we believe that by expanding such programs we can more effectively deal with non-violent offenders whom the taxpayers should not have to support in a corrections facility.

More Funding for Representation of Poor

Our crime control package also contains proposals to provide additional funding for the Department of Public Advocacy. No one can question that this Department is underfunded.

Our legislation calls for charging defendants a 40 dollar fee. It also calls for raising the D.U.I. service fee from 150 dollars to 200 dollars with the 50 dollar increase being dedicated to funding the Department of Public Advocacy.

We applaud the Task Force that put together these recommendations and believe their creative suggestions will greatly enhance our ability to provide quality legal services for the indigent.

5 Day Waiting Period

Finally, and significantly, our legislation proposes a five-day waiting period on all sales of assault weapons in Kentucky.

Most of us in this room know that the recently enacted Brady bill applies only to *handgun* sales.

We believe that a similar waiting period on the sale of assault weapons is in order and makes sense for all of Kentucky.

General Assembly Leadership

We are pleased to announce that Representative Greg Stumbo will sponsor the measures I have outlined, and we look forward to working with legislative leadership and all of the members of the General Assembly to get these proposals passed.

Now, I will ask Justice Cabinet staff to take the time to brief you on the specific legislative language that is connected with these proposals and, again, I look forward to working with each one of you as we work to pass significant crime legislation during this session of the General Assembly.

Thank you.

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Notes on Consumerism

We hate the poor because they are violent, because they spend their money on entertainment rather than housing, because they prefer leisure to work. We hate the poor because they are irresponsible, depressing, and superficial. Ultimately, we hate the poor because they personify the evils of the whole society writ large.

...We are disappointed and frustrated when the poor mimic the violence, rapaciousness, and acquisitiveness that form the very heart of our consumer culture. The poor are the ones who have most effectively internalized the cultural myths that character is defined by possessions, that work is onerous, and that leisure and consumption are the only important goals in life.

- Jeff Dietrich

Upcoming DPA, NCDC & NLADA Education

22nd Annual Public Defender Training Conference

June 19 - June 21, 1994
Radisson Inn Airport, at the Greater Cincinnati Airport in Florence, Kentucky

The largest yearly gathering of criminal defense advocates offering the greatest number and variety of education on both bread & butter and cutting edge issues facing defenders. Featured presenters include: **Chief Justice Robert F. Stephens, Stephen Dale Wolnitzek, Julie Butcher, Dr. Curtis Barrett, Dr. Eric Drogin, Anne Oldfather.**

DPA Death Penalty Practice Persuasion Institute

October 23 - October 28, 1994
Kentucky Leadership Center, Faubush, Kentucky (1/2 hour west of Somerset)

Intensive practice on death penalty trial skills, knowledge and attitudes with a focus on persuasion through a *learn by doing* format. Practice with feedback is the heart of this formation. Advanced, intermediate and beginning tracks are offered. This Institute is the most effective education available for learning successful criminal defense litigation in death penalty cases.

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NCDC Advanced Cross-Examination Seminar

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*For more infomration regarding NCDC programs call Jane Blumoff at (912) 746-4151 or write to NCDC, c/o Mercer Law School, Macon, GA 31207.

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December 5-11, 1994, Washington, D.C. $240

For more information regarding NLADA programs call Joan Graham at (202) 452-0620 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006.

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