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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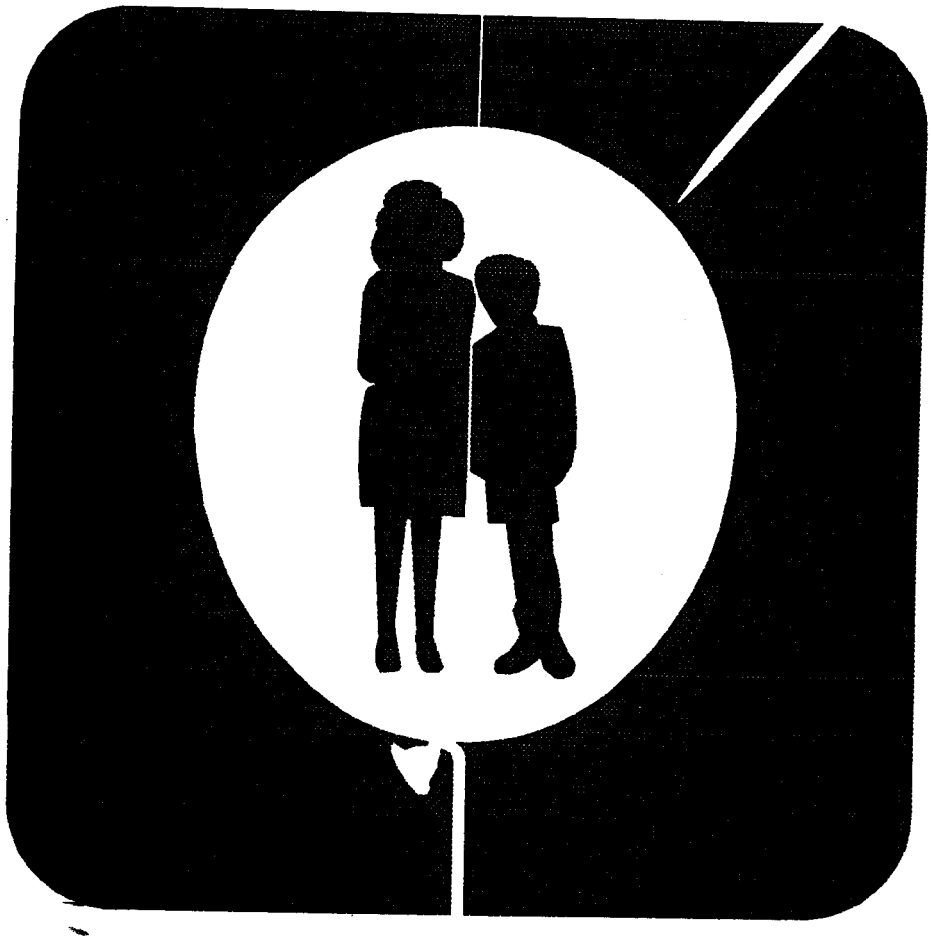

Child Sex Abuse Cases

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

FROM THE EDITOR:

New Levels are Needed: "The significant problems we face cannot be solved at the same level of thinking we were at when we created them," Albert Einstein wisely informed us. *The Advocate* continues in this issue to try to bring more knowledge and deeper thinking to the criminal justice's signficant problems, especially criminal defense problems. Vivid examples of our efforts are presented in this issue with contrasting articles on sex abuse issues by Carol Jordan of CHR and David Neihaus of the Louisville Defenders.

Our Writers: We are proud to continue our 16 year history of working to raise the level of criminal justice thinking. *The Advocate's* accomplishments continue to be the product of its associate editors and other authors who so generously work to help increase the quality of our collective thinking and work. We appreciate the authors who bring us their varying perspectives to the issues which challenge us all.

Help! We need your help. There are large difficulties that need additional thought and analysis...issues of race, sexual abuse, drugs, mental health to name a few. Send us your ideas, your articles, your suggestions. Cooperatively we can meet the problems which face us.

Annual Conference: For over two decades the Department has offered annual training on the areas facing defenders and criminal defense attorneys. Our 22nd Conference again offers top national and Kentucky presenters on an extraordinary variety of topics. If criminal defense is a significant part of your practice, you won't want to miss this education opportunity. From the highly pragmatic to the cutting edge, our Annual Conference has what you need. Over 35 presentations are offered in mostly simultaneous sessions so you can select what best meets your current needs. More information in this issue.

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.

Letters to the Editor

Dear *Advocate*,

We are students from the fourth grade classes at Brodhead Elementary in Rockcastle County. We have been learning about the three branches of government, about courts, law, and the justice system. We also learned about how a trial works and what people work in the courthouse. Our class (see picture below) plans to visit Frankfort in the spring for a field trip.

Our class decided to put on a trial. We charged Goldilocks with criminal mischief, criminal trespass, and theft under one hundred dollars. We wrote bond motions and members of our class wrote opening statements, questions for witnesses, and closing arguments. We were helped by the lawyers from the Somerset Public Defenders Office. Several of the lawyers came and answered our questions, explained about the law, and spent time talking to us. They also came a second time as supporting lawyers and as the judge for our trial. Our jury found Goldilocks guilty of all charges.

Our class discussed the pros and cons of being a public defender. We brainstormed lots of ideas. We thought of good reasons to be a public defense like helping people, learning new things and learning about the law. The bad thing about public defense work include that the pay is poor, it is a hard job, there are too many cases and not enough lawyers, and it may be dangerous. Time with your family may be limited and the job can be depressing. The public defenders that came to our school said even though the job was hard, they had to do it because they made sure everybody had a fair trial. Without public defenders, some poor people might not get the help they deserve.

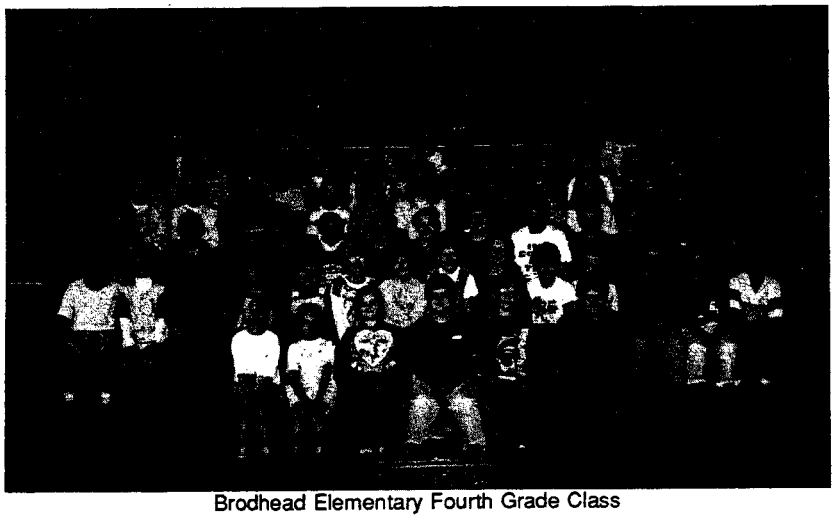
We know the General Assembly has been discussing the need to give more money to public defenders office in the state. We are sure you understand that these employees need more money, appreciation, and support. We know you respect these public defenders and we do too. That's why we are writing this letter.

Jessica Harrison, Secretary
Writing Committee: Justin Bradshaw, Danielle Worley, Cassie Sowder, Skyler Bishop

Dear *Advocate*,

Once again the December issue of *The Advocate* is the best. I learned more law, and I am more informed from that publication than any other. Please keep up the good work. Enclosed please find my small contribution toward your overhead. Thank you so much for what you do.

Kelly Thompson, Jr.
Attorney at Law
Bowling Green, Kentucky



Brodhead Elementary Fourth Grade Class

The Myths and Realities About Child Sexual Abuse

Carol E. Jordan

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

Child Sexual Abuse is Rare

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 28 percent of females will be sexually victimized at some point in their lives. Research data related to male victimization is less available and undoubtedly underrepresented by the currently reported figure of 8.7 percent. 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 43,000 male children in this Commonwealth will be sexually abused before the age of eighteen. Far too many women and men, their first experience of sex occurs in the context of violence and manipulation rather than love and trust.

Professionals Know About Every Case

The large caseloads of social services and mental health professionals would seem to indicate that the system attends to every case of child sexual abuse. In reality, however, the majority of sexual abuse cases involving children never come to light. Research estimates now indicate that as many as 84-90% of cases are never reported to law enforcement or protective services agencies.

If we Just Don't Talk About it, the Child will Forget About the Abuse

Who really benefits from not talking about child sexual abuse? Not the child... Children who are sexually victimized tend to suffer extreme levels of guilt and self-blame as they try to comprehend their involvement in an adult world. Children are not prepared developmentally to conceptualize or understand sexual behavior or the use and penetration of their body by a big person. Sleep and eating disturbances are common, as are school phobias, withdrawal, depression, impulse control disorders and other reactionary behaviors.

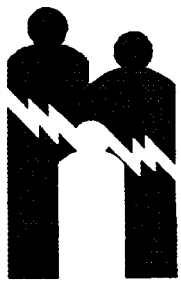
From some children, the path to recovery from sexual abuse is completed with short-term support and intervention. Studies show that other children, however, continue to re-experience the trauma with symptoms of fear, anxiety, nightmares, phobias, clinging behavior, depression, suicidality, alcohol or drug abuse, self-destructive behavior, and invulnerability to future victimization. The high percentage of sexually abused children within psychiatric hospitals and residential facilities within this Commonwealth, and the significant percentage of children with a serious emotional disturbance who have memories of sexual abuse speaks to the formidable impact which victimization can bear.

The Myth of the "Perverted Dirty Old Man"

Unfortunately, society still believes the stereotype about the dirty old man who hangs around the corner with candy to kidnap and abuse children. Our prevention efforts in the area of child sexual abuse for a long time focused on "don't talk to strangers" and "stranger-danger" - when in fact the most danger for children is in their own home. In over 80% of cases, the perpetrator is someone known to the child. Most sexual abuse involves fathers, stepfathers, uncles or other family members. These are people who have ready access to children in the home, and these are the people who most often abuse children.

Boys will be Boys...

In the past five years, controversy has grown about whether the increasing number of child sexual abuse reports are in fact true cases of abuse. As the number of cases reported has risen, so to has the cry that they must represent false reports. Research on the incidence of false reporting of child sexual abuse now shows that between 2 and 10% of all cases are false. In one of the largest studies, David Jones studied over 500 cases investigated by the Denver Department for Social Services and found a 6% fabrication rate. The most significant number of false allegations in these cases were not initiated by children, but rather by adults (*e.g.*, parents of the children). In a recently reported study at Cornell University in which researchers interviewed non-abused children over an eleven week period of time to see if they would fabricate the experience of a medical procedure, a much higher false reporting rate was found. This and other similar studies give important information about the circumstances under which false reports are more likely, and thus what circumstances to avoid. These include interviewing children after a long day; using repeated interviews of children; interviews during which the child felt intimidated by the interviewer and where multiple interviewers were used at the same time; and the use of leading questions. The perception that all custody cases now involve false allegations of abuse has not been supported in the research which shows that only 8 to 10% of custody proceedings involve allegations of child sexual abuse.



The False Memory Syndrome

Recent development of the False Memory Syndrome Foundation has brought public and media attention to the controversy over whether memories of child sexual abuse reported by adult survivors are valid. Repression is one of the more extensive forms of dissociation, a pro-

cess which involves a disruption in the normal connection between feelings, thoughts, behavior and memories. When the disruption involves memory, a person does not have recall of important events. This disruption is frequently the result of trauma, most notably childhood trauma such as sexual abuse. Dissociation (and repression) are adaptive survival skills in that they allow relatively normal functioning for the duration of the traumatic event and protect the victim from what is too overwhelming to be processed at the time. Research studies have revealed that up to 60% of child sexual abuse survivors report incomplete or total absence of abuse-specific memories at some point after their victimization. This coping mechanism is positively related to more violent and terrorizing cases of abuse. For abuse survivors, memories which have been "walled off" frequently return first as symptoms of anxiety or a reliving of the event (*e.g.*, flashbacks or nightmares). The point at which memories begin to resurface as frightening symptoms in adulthood is frequently a time when survivors seek therapy.

It is interesting that society initially accepted the concept of repressed memory without major difficulty, for example with Viet Nam veterans, until it was discovered in sexual abuse survivors. False Memory Syndrome, a label without established scientific or clinical validity, first came to prominence as survivors began to seek recourse in the courts. As a clinical issue, the resurfacing of sexual abuse memories should cause no controversy. In the safety of the therapy setting, survivors should be allowed, though never prodded, to recall victimization. Therapy is not interrogation or a process of "digging for the truth." Good therapists understand that memories must come at the survivor's pace and that repression is a sign of what the client can cope with. Psychotherapy is a painful process of recovering bits of traumatic memory at a time, and coping with the reality of having been violated by someone loved and trusted. Questions about the validity of memories, which like every other human endeavor are subject to bias, remain an issue for the courts, not the therapy relationship.

The high standard of evidence required by due process has questioned the credibility of testimony based on delayed recall of abuse memories. Questions should result in additional research and case law but should not invalidate the actual experience of any abuse survivor. For some abuse survivors, it is not enough to think and talk about their experience in an effort to understand. For some survivors, an action in the court system is an important part of recovery. Current controversies fed by an insensitive and incredulous society should never block what is a reasonable remedy for injustice.

Conclusion

The significant impact of childhood sexual abuse is unquestionable. This impact, however, speaks not only to the individual child victim of the crime, but also to the professional community. There is no longer a question of whether child sexual abuse is a criminal justice problem or a social services problem or a mental health problem or a school problem, for its power pervades the territory of each. The question must now lie in the resolve of all professionals to overcome skepticism with acknowledgement, disbelief with understanding, indifference with indignance, and reluctance to intervene with an unswayable intolerance of the victimization of all children.

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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.

Unusual Sex Discrimination Settlement Aids Battered Women

Clare Dalton, who filed the first sex discrimination complaint against Harvard Law School in 1987, in September arranged an innovative settlement for the pending case. Ms. Dalton, now a tenured professor at Northeastern University, declined to pursue personal damages, and proposed that Harvard instead pay $260,000 to the domestic violence advocacy project she had founded at Northeastern. Harvard, anxious to avoid what was expected to be a highly rancorous proceeding, agreed. The money will fund the training of lawyers to represent battered women. Harvard Law today has only four women among its tenured staff of fifty-seven - one less than in 1987.

The Minority Rules

A 1994 Legislative Review

Some wag (certainly neither one of these writers) once said that instead of meeting for 60 days every two years, the Kentucky legislature would do more good and less harm by convening for two days every 60 years. Defense lawyers in particular await each session with trepidation; this year is no different. In general, the actions of the legislature do not benefit our clients insofar as crime and punishment is concerned. New crimes are created; the class of persons who may be prosecuted is enlarged; penalties are increased; evidentiary protections are abolished. The rights of alleged criminals are not a high priority on the working agenda of any elected legislative body.

When this legislative review was written, the 1994 Kentucky General Assembly session was not completed. By the time this article is published and read, the session will be entirely concluded, with passed bills signed and vetoes upheld or overruled.

With that proviso in mind, we would like to present a review of legislation which was introduced and which would affect juveniles in some way. Please bear in mind that these bills may or may not have been enrolled and signed by the Governor -- that is for you to determine! (The Bill Status toll-free number is 1-800-592-4557.)

We begin with the horrendous juvenile provisions of three bills which passed both houses and were delivered to the Governor: SB 29, HB 390 and SB 222.

SB 29 at first simply created the crime of "retaliating against a juror." However, during the last few chaotic legislative days, Rep. Charles Geveden of Wickliffe was able to transform the provisions of his then-dead HB 224 into an amendment to SB 29. This addition now effectively abolishes the juvenile justice system as we know it. Children 14 or over who are charged with capital offenses or Class A or B felonies shall be proceeded against in adult court, as would children 16 or over who have two prior separate felony adjudications. Also, any child who was 14 or older charged with "a felony offense involving a deadly weapon or a felony offense wherein a deadly weapon was used" would automatically be prosecuted in adult court. Children so charged would have to convince a Circuit Judge to transfer their case to Juvenile Court: a so-called "reverse-waiver" proceeding. It is estimated that in Jefferson County alone this would affect 1300 children. The philosophical and practical implications of this law are devastating.

HB 390 was the Governor's crime bill. However, it too was poisoned by an amendment, this one from Senator David Williams of Burkesville. This revision (which was originally SB 364) mandates that any child 14 or older at the time of the alleged commission of a felony in which a firearm was used shall be tried in Circuit Court as an adult offender and shall be subject to adult penalties. Until the age of 18, such a child shall be held in a "secure detention facility for juveniles or for youthful offenders;" unless released on probation or parole, the child at age 18 must be transferred to adult Corrections to serve the remainder of the sentence.

SB 222 also began as an uncomplicated bill, sponsored by Senator Gerald Neal of Louisville, which mandates 18-month post-dispositional review of abused, neglected or dependent children committed to CHR. In the legislative process, however, Representative David Stengel of Louisville included an amendment, two of the provisions of which were adopted: For alleged public offenders being held in a secure juvenile detention facility or a juvenile holding facility, the detention hearing time limit has been lengthened from 24 to 48 hours. Also, if a court commits a child to CHR, the court may order further detention for a reasonable time upon a finding that CHR has found a suitable residential facility but that no bed is currently available, and that the circumstances surrounding the child are such as to endanger his welfare or that of the community.

Other juvenile-related legislation met with varying degrees of success in the General Assembly.

HB 359 passed and has been signed by the Governor. This law creates two new crimes: Possession of a handgun by a minor (Class A misdemeanor for the first offense and a Class D felony for each subsequent offense), and unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun (Class D felony). (Multiple Sponsors.)

HB 207 passed both houses and was in conference committee to work out slight differences between the two chambers. Under this law, no child charged in a Chapter 645 action (mental health action) shall be held in a secure juvenile detention facility or juvenile holding facility unless a status or public offense action is also pending. Peace officers may not subvert this purpose. (This bill also bans jailing of mentally ill adults in 202A actions.) (Multiple Sponsors.)

HB 205 also passed both houses with slight differences and was in conference committee. This law specifically allows the victim of a crime, his family or legal representative, to be admitted to the proceedings in a juvenile court case, unless this causes a threat of violence or disruption. (Multiple Sponsors.)

SB 67 passed both houses and was delivered to the Governor. It prohibits the use of corporal punishment, including spanking or paddling, for any reason, in child day-care centers and family child-care homes. (Sponsor: Susan Johns, Louisville.)

SB 86 and **HB 190** passed both houses and were delivered to the Governor. SB 86 authorizes the Child Sexual Abuse and Exploitation Prevention Board to conduct a state wide public education and awareness campaign. (Sponsor: Henry Lackey, Henderson.) HB 190 creates the Kentucky Multidisciplinary Commission on Child Sexual Abuse. (Multiple Sponsors.)

HB 96 passed both houses and received the Governor's signature. This law relates to sexual offenders, and it limits probation and suspended sentences, requires mental health evaluation, and makes it easier to revoke certain sexual offenders. It also abolishes the remaining KRS Chapter 208 juvenile sexual offender treatment provisions and establishes revised guidelines for juvenile sexual offenders in KRS Chapter 635. "Juvenile Sexual Offender" is redefined, and such

an offender may be placed in the care of CHR until age 21. An actively psychotic or mentally retarded juvenile could not be classified as a juvenile sexual offender. (Multiple Sponsors.)

HB 223, which clarifies the composition of the specialized multidisciplinary team which shall conduct investigations of suspected child sexual abuse, passed both houses and was delivered to the Governor. (Multiple Sponsors.)

HB 115, passed by both houses and delivered to the Governor, establishes detailed guidelines and procedures relating to sexual misconduct by professionals (*e.g.*, teachers, physicians, nurses, psychologists, social workers). (Sponsors: Robert Damron, Nicholasville; Bill Lile, Louisville; Tommy Todd, Nancy.) Similar bill, SB 107) sponsored by Gerald Neal of Louisville, also passed both houses.

HB 479, passed by both houses and delivered to the Governor, this law gives CHR 72 hours (instead of 48) to make a written report concerning a child abuse investigation to local law enforcement officials. (Multiple Sponsors.)

HB 494, passed by the legislature and delivered to the Governor, this law grants continuing jurisdiction to district court to conduct dispositional review hearings no later than 18 months after custody of a child is given to CHR. Specific factors that the court must consider are set forth, along with the responsibility of the court at the conclusion of the hearing. (Sponsor: Tom Burch, Louisville.) (Similar to the original provisions of SB 222, discussed above.)

SB 337, passed by both houses and in conference committee, defines assault in the third degree to include assault of an employee in a state residential treatment facility (or state secure facility) for public or youthful offenders. (Sponsor: Gex Williams, Verona.)

HB 312, passed by both houses and in conference committee, creates the new crime of unlawful possession of a weapon (including firearms, deadly weapons and booby traps) on school property (Class D Felony). (Multiple Sponsors.)

SB 112, which passed both houses and was delivered to the Governor, relates to the reporting of specified incidents. Parents are required to report their child's expulsion for designated crimes; student records must reflect expulsion; school officials are required to report certain crimes to the appropriate law enforcement agency if the offense occurs on or near school premises; and, certain confidential information and privileges are waived. (Sponsor: Joey Pendleton, Hopkinsville.)

HB 656, which passed both houses, establishes guidelines and regulations for the operation of a nonsecure youth alternative center by counties which also have secure detention facilities. (Sponsor: Louis Johnson, Owensboro.)

Lastly, without the force of law, **HR 85** encouraged the development of psychiatric residential treatment facilities for children with severe emotional problems. (Sponsor: Tom Burch, Louisville.)

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Gifts-in-Kind or Money Donations

Anyone wishing to donate non-financial gifts to the Department of Public Advocacy should contact the Department at (502) 564-8006 for current "Gift-in-Kind" needs. Gifts-in-Kind help the Department meet needs without affecting the operating budget. Current needs are:

Training:

- ✓ A camcorder for videotaping trainees during practice institutes
- ✓ Big screen (35") TV & stand for showing videos to trainees - $2,700
- ✓ Portable flipchart easel - $265
- ✓ Overhead projector cart - $271
- ✓ TV/Video cassette recorder for trainees to review video performances - $800
- ✓ Therm-A-Bind system to bind training materials - $199
- ✓ Additional Library resources

If you can help with any of these items or have something else to donate to the Department please contact the Department today!

Misuse of Juvenile Court

With the inception of the Kentucky Education Reform Act, Kentucky has had the opportunity to address both challenging and exciting changes in its schools. Unfortunately, rather than seeking creative responses to the ever present problems with school discipline, some schools have sought resolutions through juvenile court. Children have been taken to court by the schools they attend for offenses ranging from assault to terroristic threatening to "beyond control of school personnel." Many people do not realize that a substantial percentage of these children are not subject to the jurisdiction of juvenile court because they are disabled under both federal and state law. The presence of a disability affords to these children certain due process protections under these laws which would preclude the use of juvenile court.

Schools have a duty under the mandates of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400-1485, to locate and identify those students in need of special programs. The types of disabilities which may be identified include mental retardation, emotional disturbance, learning disabilities, all types of physical disabilities, and many more. These children have a right to a "free, appropriate public education," which means they have a right to "specially designed instruction...to meet the unique needs of a handicapped child."

Many children who are taken to court have not been identified by the school district as disabled but do in fact qualify as disabled children. For example, children who are disruptive in class or fighting with peers may be emotionally disturbed or behavior disordered. The appropriate course for a school to take in such a case would be to evaluate the child regarding the suspected disability and to provide a suitable program, not to take the child to court.

Schools may be hesitant to identify children as disabled because of the due process protections disabled children enjoy. The school's failure to identify a child as disabled does not, however, preclude raising the issue of his/her disability after the school has chosen to discipline the child in a manner that is inconsistent with his/her rights under IDEA. In *Hacienda La Puente Unified School District of Los Angeles v. Honig*, 976 F.2d 487 (9th Cir. 1992), the Court upheld a hearing officer's decision that the school had inappropriately expelled a child with a disability, though the child had not been identified as disabled prior to the inception of the due process hearing held pursuant to IDEA. The hearing had been requested as a result of the expulsion and the failure of the district to identify the child as disabled. The hearing officer had found that this failure of the school district to identify the child as disabled violated the mandates of IDEA. In upholding the hearing officer's decision, the Ninth Circuit said:

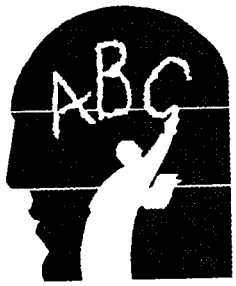
> [a] contrary result would frustrate the core purpose of the IDEA, which is to prevent schools from indiscriminately excluding disabled students from educational opportunities.... If we found issues concerning the detection of disabilities to be outside the scope of IDEA "due process hearings," school districts could easily circumvent the statute's strictures by refusing to identify students as disabled.

Similarly, in the case of *In the Matter of Shelly M.*, 453 N.Y. Supp. 2d 353 (1982), a New York court rejected the recommendations for out-of-home placement of a truant child whom the school district had failed to identify as disabled until after her court involvement. As a result of her identification as disabled, the court required the school district to fulfill its obligation under New York education law and provide an appropriate program for the child.

Schools may be resorting to juvenile court because of their inability to suspend or expel children with disabilities in the same manner as nondisabled children. All decisions regarding placement, *i.e.* where a disabled child's educational program will be implemented, must be made by a group of people known in Kentucky as the Admissions and Release Committee (ARC). The parent of the child is a permanent member of the ARC and thus has input in all of its decisions. Any change in placement requires the ARC to convene and determine that a change is appropriate.

The Supreme Court of the United States in *Honig v. Doe*, 484 U.S. 305, 98 L.Ed.2d 686, 108 S.Ct. 592 (1988), has ruled that a suspension of ten days or more constitutes a significant change in placement. Thus, if a school suspends a child for more than ten days or wishes to expel the child, an ARC must be convened and the child reevaluated to determine what changes need to be made in the child's program. This process gives parents input into their child's school program.

The Court's decision in *Honig* was designed to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school" and "deny school officials their former right to 'self-help.'" The law provides an administrative procedure to be followed in case of disagreement between the school and a parent.



If an ARC is convened and the school and parents disagree as to the appropriate program for the child, either party may ask for a due process hearing with an impartial hearing officer appointed by the state to resolve their differences. Either side may appeal that decision to an appeals board. During the pendency of these actions, the child remains in the prehearing placement unless the parents agree otherwise. While schools may no longer make unilateral decisions regarding a disabled child, they do have recourse to a due process hearing, should a disagreement concerning a child's program arise. As with any system in which an administrative procedure has

been established, the rules of exhaustion apply.

By using juvenile courts, schools are asking judges to do what the Supreme Court has told the schools not to do: make unilateral decisions regarding children's school programs. At least one court has rejected a school district's attempt to use juvenile court to circumvent the due process requirements guaranteed to disabled children. In *In re: Tony McCann*, 17 EHLR 551 (Tenn. Ct. App. 1990), the Tennessee Court of Appeals overturned a finding of unruliness on a petition taken by a school against a disabled child. The court held that the "school system must follow mandated administrative procedures before turning the handicapped child over to the juvenile court system." *Id.*, p. 253. Tony was before the court on allegations that he had threatened teachers and refused to do classroom work. Rejecting the school's use of juvenile court to resolve discipline problems and displaying the adequacies of special education procedures in handling difficult children, the court cited *Stuart v. Nappi*, 443 F. Supp. 1235, 1243 (D. Conn. 1978):

> First, school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children. Secondly, [an ARC] can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools with both short-term and long-term methods of dealing with handicapped children who are behavioral problems. *McCann*, at p. 553.

Schools must be forced to utilize the administrative procedures outlined in the law for dealing with disabled children. If the school petitions juvenile court to deal with a child with a disability and the parent requests a due process hearing under IDEA in order to resolve the problem which has led to juvenile court involvement, the hearing officer at the IDEA hearing has the discretion to order the school to take all necessary steps to seek dismissal of the juvenile court petition. *In re Child with Disabilities*, 20 IDELR 61 (TN. 1993). If a school has a truly dangerous child in its school, the school can go to court and seek temporary removal of the child *until* an appropriate program can be established and appropriate due process procedures followed. The appropriate court to petition, however, is the court that has the power to issue a temporary injunction, the state circuit or federal district court, and *not* juvenile court.

The law is clear, however, that an injunction is only a temporary measure until a more appropriate program can be established. If the school does not have an appropriate program, one must be created. Schools are required to provide the type of program that a child needs; thus, the law envisions that a school will provide educational services on a continuum from least restrictive to most restrictive. If a child is disruptive, he/she may need a more restrictive learning environment; if he/she is fighting with other students, the school program should be designed to assist the child with that problem. If a school does not have the program that a child needs, it may contract for those services with another school district or agency.

Schools are also required to provide disabled children with related services, which are "transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education." These services include psychological counseling, parent counseling and training, and social work services. Schools should not be allowed to abrogate their responsibility to provide services by forcing it upon the court through juvenile court action.

Not all disabled children are found in special education classes. They are, nonetheless, disabled and protected by the law. Under these laws, it would be next to impossible for a disabled student to be beyond control of a school. Similarly, if fighting or name calling is the result of a child's handicap, juvenile court is not the solution. The child's program must be revised. If removal from the school district is the school's aim in taking a child to court, the court should remember that many private child care facilities and all state group homes send their residents to the public schools in the district in which the home is located. If the court acts to remove a child for disruptive behavior in school, the only thing the court is accomplishing is transferring one school district's problem and responsibility to another school district.

Footnotes:

[1]See the Individuals with Disabilities Education Act, 20 U.S.C. 1400-1485; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706(7), 794, 794a, 794b; KRS 157.200-157.290; 34 C.F.R. 300 *et seq.*; 34 C.F.R. 140 *et seq.*; 707 KAR 1:003-1:140.

[2]707 KAR 1:170 Section 3.

[3]707 KAR 1:200; 34 C.F.R. 300.5; 34 C.F.R. 104.3(j).

[4]34 C.F.R. 300.8, 300.17, 300.121

[5]See 707 KAR 1:200 Section 7 for regulation regarding emotional-behavioral disabilities.

[6]But see also *In the Interest of B.C., Jr.*, 19 IDELR 760 (LA. 1992) (Juvenile court has jurisdiction to order homebound instruction for disabled juvenile declared "child in need of supervision" as a result of a petition taken by two classmates.)

[7]See KRS 158.150(4)

[8]707 KAR 1:180 Section 4 and 1:220 Section 4.

[9]707 KAR 1:180 Section 4.

[10]707 KAR 1:180 Section 5 (c) and 1:220 Section 9. Regulations for Section 504 require that reevaluation occurs before any change in placement. 34 C.F.R. 104.35(a).

[11]*Honig*, 98 L.Ed.2d at p. 707.

[12]707 KAR 1:180 Section 11.

[13]707 KAR 1:180 Section 11 (10).

[14]*Honig*, 98 L.Ed.2d at p. 707.

[15]*Id.*, at p. 709.

[16]See *Honig*, 98 L.Ed.2d at p. 707.

[17]CR 65; Fed R 65.

[18]See *Texas City Independent Sch. Dist. v. Jorstad*, 752 F. Supp. 231 (S.D. Tex. 1990); *Board of Ed., Cook Co., IL, v. Kurtz-Imig*, 16 EHLR 17 (N.D. Ill. 1989).

[19]707 KAR 1:220 Section 3.

[20]707 KAR 1:250.

[21]34 C.F.R. 300.16(a).

[22]34 C.F.R. 300.16 (b).

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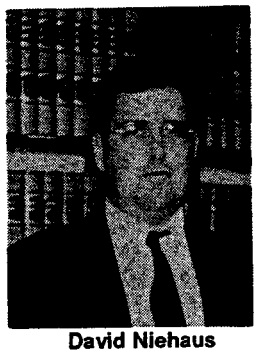
EXPERT WITNESSES IN ABUSE CASES



David Niehaus

In two recent cases, ***Hall v. Commonwealth***, Ky., 862 S.W.2d 321 (1993) and ***Alexander v. Commonwealth***, Ky., 862 S.W.2d 856 (1993), the Supreme Court of Kentucky has restated the limitations on so-called expert testimony in child sex abuse cases. I use the phrase so-called expert testimony, because although these witnesses usually are qualified as persons able to give an opinion, the type of opinion testimony that has been elicited from them is anything but. These cases are worth looking at not only to see what the law is, but also to formulate a method of analysis under the Kentucky Rules of Evidence as far as the testimony of social workers, physicians, and others involved in such prosecutions are concerned.

Hall

In *Hall*, the prosecutor denied that there was a rule prohibiting expert testimony on the "ultimate fact" of the case and examined a psychologist intern on the subjects of (1) whether, in the intern's professional opinion, the child had been abused, and (2) whether, in her opinion, the child was telling the truth. The witness responded that she thought the child had been abused and that the child's consistency in her reports of abuse meant that the child's statements were "accurate."

The Supreme Court pointedly noted that it had reversed convictions for child sexual abuse on seven previous occasions because of improper expert testimony. The court also, somewhat impatiently, observed that "this issue continues to resurface" and that "[b]y this time the law in Kentucky should be clear."

As to psychologists or social workers, neither is qualified to express an opinion that a person has been sex-ually abused. No expert witness of any type may vouch for the truthfulness of a witness's out of court statements be-cause this invades the province of the jury under the ultimate fact rule. In addition, the court held that psychologists and social workers, because of their training, accept the facts as provided by patients and therefore were unqualified to give an opinion on veracity. Because the social worker had testified to improper matters, the court reversed.

Alexander

Alexander involved three forms of misuse of expert witnesses. First, an inexperienced police detective volunteered that after hearing what the child said, the detective obtained an arrest warrant because, in her opinion, the child was telling the truth. This of course was what used to be called "investigative hearsay," but the court upheld the denial of a mistrial on this ground because the statement was not made in bad faith, because a strong admonition was given, and because it seemed unlikely to the court that the admonition would be disregarded.

A social worker was called and she read the child's out of court statements from CHR records made when the worker had interviewed the child. According to the Supreme Court, the trial court had misapplied *Drumm v. Commonwealth*, Ky., 783 S.W.2d 380 (1990) to admit these statements under the business records exception to the hearsay rule. The court held that this evidence was inadmissible as a business record because the child had no business duty to report anything to the social worker and therefore the statements lacked the truthworthiness necessary to justify admission. In an important follow-up to this rationale, the court stated a quick test of admissibility under the business records rule: *Would the information found in the business record have been admissible if the witness were testifying from memory?* If not, the court held that "merely placing the same material in a written report does not automatically make it admissible."

The final important part of *Alexander* dealt a hard blow to one of the Commonwealth's favorite ploys with expert witnesses, asking the expert whether a certain result is "consistent" with particular acts. In *Alexander*, the examining physician testified about the medical history given by the child, (that the defendant had put his penis in her vagina), and that what the defendant had done was "consistent" with a small hymen tear that the doctor had observed in the examination. The doctor diagnosed the injury as being the "result of such activity." According to the court, this amounted to an opinion that the defendant was guilty of rape. The error was deemed highly prejudicial.

Jury is Sole Factfinder

Both *Hall* and *Alexander* were decided as matters of common law evidence. I don't believe there is a significant difference between the analysis under common law and the analysis found under the Kentucky Rules of Evidence. It is important to keep in mind that expert witness testimony is restricted in Kentucky to make sure that no one, including witnesses, interferes with the jury's function as the sole finder of fact.

This grows out of Section 7 of the Constitution of Kentucky which guarantees the ancient mode of jury trial.

RCr 8.22 provides that all issues of fact in a criminal case shall be tried by a jury where jury trial is required by law. This rule is the successor of former Criminal Code Section 180 which was enacted to give effect to the right to the ancient mode of jury trial. *Lucas v. Commonwealth*, Ky., 82 S.W. 440, 441 (1904). Part of the ancient mode of jury trial is the determination of the credibility of witnesses, a function assigned exclusively to the jury. *Davis v. Commonwealth*, 111 S.W.2d 640, 647 (1937). No judge may interfere with these functions. No witness may do so either.

This probably is why proposed KRE 704 was not adopted. It is important to keep this limitation in mind during any analysis of evidence questions.

Opinions of Veracity Not Relevant

In addition to the lack of qualifications noted in *Hall*, there are other grounds for excluding a witness's opinion as to the veracity of another witness. The opinion is irrelevant because the fact that a witness believes or doesn't believe what another witness says does not have "any tendency" to make the existence of the facts of the offense more or less likely. Such opinions are not relevant as that term is defined in KRE 401 and therefore must be excluded under KRE 402. The ancient mode of jury trial guaranteed by Section 7 of the Constitution does not include the use of "oath helpers," medieval forerunners of witnesses who appeared in court to swear that the party on whose behalf they swore was truthful. Credibility judging is a function of the jury. Even if some minute tendency to assist the determination of fact could be found in such testimony, the evidence would have to be excluded under KRE 403 because these opinions as to veracity would lead the jury to decide guilt or innocence on the strength of the "oath helpers" rather than on the basis of the factual evidence presented at trial. This is particularly true when the "oath helper" has been qualified as an expert. This witness's opinion carries a patina of scientific or expert authority that would tend to over-persuade jurors and cause them to give too much effect to that opinion.

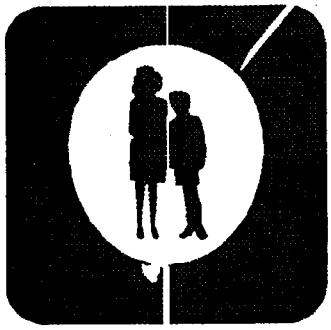
Qualifications of Experts

The Kentucky Supreme Court makes a very important point about qualifications of expert witnesses in *Hall*. Under the rules, KRE 702 does not allow expert opinion except upon fulfillment of certain conditions. The proponent of the expert must show that scientific, technical or other special knowledge will help the jury and that the proposed expert "is qualified...by knowledge, skill, experience, training or otherwise...." Expert "oath helpers" fail to qualify on both grounds.

There is no training course for acquiring the ability to discern truth or falsehood. It comes from everyday experience repeated over a number of years. Jurors know without being told that consistency of a story can be the hallmark of truth. They do not need an "expert" to tell them this. Therefore, aside from the lack of qualification, the testimony of an expert oath helper would not assist the jury in determining the truth of the testimony of a witness. In any event, consistency of testimony is irrelevant to prove truthfulness.

Prior Consistent Statements

The fact that a person has told the same story one or 50 times before trial is irrelevant unless and until the adverse party makes an issue of it. The jury is required to hear the witnesses at trial and decide on that basis. CR 43.04(1). Prior consistent statements, if offered to convince the jury of their truthfulness are hearsay under the definition of KRE 801 (c) and are therefore excluded by KRE 802 except when offered to rebut allegations of recent fabrication, witness subornation, and the like pursuant to KRE 801A(a)(2). They cannot be used as pre-emptive rebuttal testimony during the Commonwealth's case-in-chief before the declarant's credibility is attacked, nor, as the Supreme Court points out in *Alexander*, does the mere fact of writing them down in a report magically make the statements non-hearsay. Remember the test set out on page 862 of the *Alexander* opinion.



Business Records

The business records exception, KRE 803(6) does not of its own terms make anything admissible at trial. Rather, it does two things. First, it relieves the proponent of the records of the duty to produce the keeper, and second, it provides that the records are not excluded from evidence simply because they constitute hearsay. There is no language in the rule that says that business records are admissible in any and all circumstances once the proponent shows that they are business records. Even when the hearsay hurdle is overcome, the proponent must show that they are relevant and not unfairly prejudicial under KRE 401-403. And with respect to opinion testimony found in business records, it is important to note that there is an additional requirement found in KRE 803(6) (B) that does not appear in the federal rule.

This subsection of the rule specifically provides that opinions contained in business records are not admissible unless the person whose opinion is recorded in the records would be permitted to testify to that opinion directly under KRE 702 and the other provisions of Article VII of the Rules. *Hall* and *Alexander*, say that no one is qualified to give an opinion on the veracity of the prosecuting witness.

Only a physician is qualified, upon proper foundation, to testify about the occurrence of sexual abuse.

Therefore, under the plain language of KRE 803(6) opinions of the type given in *Hall* and *Alexander* simply are not permissible. It is important to make sure that judges understand this in order to protect the defendant's right of cross-examination and confrontation.

Consistency

The last important matter taken up in *Alexander* is a matter of intense interest to me. One of the prosecution's favorite tricks with expert witnesses of all types is to ask such witnesses whether the observed "physical findings" were consistent with rape, penetration, the prosecuting witness's statement, shooting on an up or down angle or any of a number of improper conclusions. On its face, this question concerning "consistency" has always been objectionable. Doctors are never supposed to give opinions except when those opinions are based on a reasonable medical probability. Usually, physicians and other experts are only asked the "consistency" question when the witness either will not or cannot come across with an opinion based on the appropriate standard. The example in *Alexander* is instructive although not entirely clear. In that case, the child's hymen was injured. The physician was asked whether the injury was consistent with the acts allegedly committed by the defendant. It requires no genius to conclude that practically any sort of probing or penetration could have caused this injury. Therefore, the injury was consistent because hymen damage can be the result of any type of probing, whether of a sexual nature or not and whether caused by a penis or not.

In *Alexander*, the court held this question and answer to be erroneous because it amounted to an expert opinion that the defendant did commit the acts alleged by the Commonwealth.

However, this opinion does not mean necessarily that all "consistency" questions are objectionable.

There are other objections to this type of testimony and it is important to know them. The first point to consider is why experts should be allowed to give an opinion of this type in the first place. Both KRE 701 and 702 allow opinions only in certain instances. KRE 702 allows an expert to give an opinion if scientific, technical or specialized knowledge will help the jury understand the case or decide a fact issue. Most juries can be presumed to know that injury to a hymen is "consistent" with sexual activity, that is, they can figure out that it is not beyond the realm of physical possibility that sexual activity caused that type of injury because that is what "consistency" means. It is important to distinguish between probability, which means that something is more likely than not, and consistency, which simply means that it cannot be excluded. There is no need or justification for this type of pseudo-expert testimony.

The vice in this type of testimony is the veneer of scientific validation of the Commonwealth's case that the physician's testimony gives. Sexual abuse cases, particularly those involving children, quite naturally make juries really angry. Juries will want to punish someone if they believe that the acts described by the prosecuting witness have occurred.

However, in many cases, juries also consciously or subconsciously realize that the evidence against the defendant often is not the best that could be hoped for. In many cases, the evidence will come down to a small and generally appealing child testifying that a grown-up took advantage of him or her but there is no "objective" confirmation of this testimony. How comforting then for the jury to have the prosecutor put a physician or some other type of expert witness on the stand and have that witness give the scientific stamp of approval to the Commonwealth's case.

Probable vs. Not Impossible

The trouble is that the person in the white lab coat is not really saying that the Commonwealth's theory of the case is likely or probable. Rather, she is only saying that the physical facts found in the examination or the interview do not exclude the theory from the realm of possibility.

How many times does the jury actually understand this distinction? And how many times can the defense really illustrate the point on cross-examination? Typically, the defense will cross-examine the expert and cause the expert to say something to the effect that physical findings are consistent with certain other hypotheses. In terms of logic or in terms of checking a subject off the cross-examination list, this may be satisfactory. But the important question is whether or not the jury really gets the point. Does this type of question and answer on cross-examination really negate the impression that the Commonwealth has created?

A scientist, with no ostensible ax to grind, has said that the physical and scientific evidence presented in the case in some way supports the Commonwealth's theory of the case. At least this physical and scientific evidence does not contradict the Commonwealth's theory of the case. If the jury is looking to believe the sympathetic prosecuting witness who may have told a somewhat improbable story, does the fact that the doctor or other expert has acknowledged other possible sources of injury really make any difference? In any case with close facts, once the doctor says the magic word "consistent," no amount of cross-examination is sufficient to repair the damage. The jury now has a justification to believe the prosecuting witness. At worst, the doctor said that it was not impossible. Therefore, it is essential to keep the evidence away from the jury in the first place, either by pretrial *in limine* motion or by an objection made before the question is asked.

Relevance vs. Misuse

Under the Kentucky Rules of Evidence, the fact that a type of evidence is authorized by a rule is not the end of the analysis. In every instance, a judge must determine relevancy and balance this against the potential for misleading the jury. Therefore, assuming that an opinion about consistency could be given under KRE 702, the judge must always balance relevance against the potential for misleading the jury under KRE 401-403.

In most cases, this analysis should be easy. The typical "consistency" question and answer only marginally aids the jury in deciding the facts of consequence in a sex offense trial. The two questions presented to the jury in such cases are whether unconsented to sexual touchings or penetrations took place and whether the defendant performed these actions. Simply having a witness say something is not impossible is not a sufficiently strong showing of relevance to counteract the obvious tendency to over-persuade the jury to decide on an incorrect basis. The effect of the testimony on the jury, as I have argued above, is much greater than the spoken words indicate. Given the weak relevance and the great potential for misuse by the jury, unless the judge believes that an admonition under KRE 105 could prevent misuse, the evidence should be excluded.

Admonition

An admonition would be counter-productive in this situation. An effective admonition under these circumstances would have to be something like the following: *Although the witness has qualified as an expert, she is not now telling you that as an expert she believes that the acts the defendant is charged with committing were the cause of the symptoms or injuries that the witness observed. Instead, the witness is telling you only that it is not impossible that the symptoms or injuries could have been the results of the act charged.*

In rare cases, an admonition of this type would be useful. However, it is extremely unlikely that any prosecutor would agree to an admonition like this and probably almost as unlikely that a judge would actually give one. But this is the type of admonition that would be necessary to make sure that the jury did not misunderstand the effect of the "concistency" testimony. Therefore the evidence would have to be excluded. Under the federal rules and under KRE 105 and 403, the judge is authorized to refuse admission to evidence that will inject an unnecessary problem into the trial process. Graham, *Handbook of Federal Evidence*, 3rd Ed., p. 52 (1991). The trial judge has a duty under KRE 611 to control the presentation of evidence to make it "effective for the ascertainment of truth." The judge can do this only by excluding the evidence or giving an admonition of the type I have suggested. In addition, the prosecutor has a legal duty under KRE 103(c) and an ethical duty under SCR 1.030(3.4e) not to suggest to the jury the existence of evidence (*i.e.*, that the expert believes the Commonwealth's theory of the case), when this is not true. Therefore, there can be no excuse for a "consistency" question in any case. If the witness cannot give an opinion within a reasonable medical or scientific probability, the extremely limited relevance of the evidence is so greatly outweighed by its potential for misleading the jury that the entire subject matter must be excluded.

In any event, juries are smart enough to know what is consistent and what is not.

They do not need "experts" to tell them that a hymenal ring is usually broken by a probe of one sort or the other. Because there is no need for such pseudo-expert testimony, and because it is so likely to be misused, courts should simply forbid prosecutors to ask this question under any circumstances.

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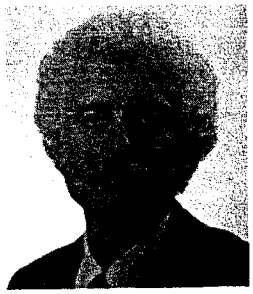
RUBES FOR FUN

"...And it is my firm belief that inner peace comes only when we can fully learn to trust one another."

Ask Corrections


David E. Norat


Karen D. Cronon

Question #1:

Do Probation and Parole Officers get training on sentence calculation?

Response to #1:

No. Probation and Parole Officers process amounts of jail credit to provide the court for review and disposition.

Question #2:

Do Probation and Parole officers receive training on when to recommend probation?

Response to #2:

If the court solicits information in order to make a determination regarding probation, all relative information is provided. Not all courts solicit such information. The decision of probation is solely that of the sentencing court.

Question #3:

My client recently had a conviction reversed by the Court of Appeals and remanded for a new trial. Does the appellate court, on a reversal of a judgment of conviction, provide this information to the Department of Corrections?

Response to #3:

No. The Department of Corrections is not a party to the criminal prosecution of the defendant, nor a party to the appeal process. Therefore, this information is rarely provided to the Department of Corrections directly from the appellate court. However, this information would be provided to the sentencing court and the defendant and/or his attorney.

Once information is received by the Department of Corrections that a prisoner's sentence has been reversed, all necessary actions would be undertaken to release him from service of that sentence.

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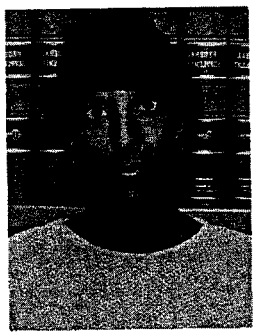
One-half the troubles of this life can be traced to saying yes too quickly and not saying no soon enough.
- Josh Billings

West's Review



Julie Namkin

Dawson v. Commonwealth, 92-CA-001840-DG, 12/3/93

The defendant was tried and convicted by a jury in the Fayette District Court for fourth degree assault upon his wife and resisting arrest. His convictions were affirmed by the Fayette Circuit Court.

After a domestic argument that turned physical, a police officer responded to a call from the defendant's residence. The officer asked the defendant's wife what happened and she said her husband had been drinking and had grabbed her by the arms and hit her in the stomach. The officer saw red marks and a cut on the wife's arms and she appeared angry and upset. The defendant testified that after arguing with his wife, she grabbed his hair and he then seized her arms.

Pursuant to the officer's request, the wife signed a domestic violence report and the defendant was arrested. The report was filled out with the assistance of a second police officer who had subsequently arrived at the scene.

At trial the defendant's wife refused to testify against her husband. The district court, relying on the excited utterance exception to the hearsay rule, allowed the two police officers to repeat the wife's statements made on the night of the alleged incident and admitted the domestic violent report into evidence.

The Court of Appeals granted discretionary review to decide whether the district court correctly allowed the police officers to testify to statements made to them by the defendant's wife as well as allowing the domestic violence report to be introduced.

Although KRS 421.210(1), the spousal privilege statute, provides that one spouse cannot be compelled to testify against the other, the Court of Appeals concluded that under KRS 209.060, which provides that the spousal privilege shall not be a ground for excluding evidence of abuse, the defendant's wife had no right to refuse to testify.

The Court of Appeals reasoned that the spousal privilege was designed to protect marital harmony. However, in cases of violence between spouses there is no harmony to protect and KRS 209.060 amounts to an exception to the privilege. The Court of Appeals also cited KRE 504 (c)(2) to support its holding that the spousal privilege is not applicable in cases of abuse.

Although the wife's statements could not properly be excluded under the spousal privilege, the question remained whether the wife's statements could be excluded under the hearsay rule.

Although the Court of Appeals recognized that the defendant's wife's statements to the first police officer were made in response to the officer's questions, it still found her statements to be spontaneous.

Thus the statements were admissible under the excited utterance exception to the hearsay rule. However, the Court of Appeals found the wife's statements to the second police officer and her statements in the domestic violence report (which by its very nature lacks spontaneity) were not spontaneous and were thus not admissible under the excited utterance exception to the hearsay rule. Nevertheless, since the second officer's testimony and the information in the domestic violence report were merely cumulative to the first officer's testimony, the Court of Appeals found the error to be harmless and affirmed the defendant's convictions.

Vaughn v. Commonwealth, 93-CA-0016-S, 12/3/93

The defendant committed two DUI offenses in Kentucky. By the time he pled guilty to the second DUI offense he had moved to Florida and had a Florida driver's license. When Florida learned of the conviction, it revoked his license for five years. The defendant then returned to Kentucky and reapplied for a driver's license before the five year revocation period had elapsed. His application was denied by the Transportation Cabinet.

The defendant appealed the denial of the license to the Franklin Circuit Court which upheld the Transportation Cabinet.

The Court of Appeals affirmed the Franklin Circuit Court.

The Court of Appeals held that KRS 186.440(4) compels the denial of a Kentucky license to a nonresident during the time his license remains revoked in the issuing state. The defendant was a "nonresident" of Kentucky at the time his Florida license was revoked. Also 601 KAR 12:020 Section 2 provides the Transportation Cabinet may not issue a Kentucky driver's license during the period in which any state has revoked an applicant's driving privileges.

The Court of Appeals rejected the defendant's equal protection argument since there is "a rational relationship" between the above-mentioned statute and regulation and the purposes they serve. There is a strong governmental interest in protecting the public from drivers whose licenses have been suspended for DUI offenses, and there is a strong governmental interest in preventing "license shopping" by nonresidents with suspended out-of-state licenses trying to obtain Kentucky licenses before their suspension period has ended.

Commonwealth v. Hobson, 92-CA-2346-MR, 12/3/93

The fact situation in this case is similar to that in the above-mentioned *Vaughn* case. However, when the defendant appealed the Transportation Cabinet's denial of his application for a Kentucky driver's license, the Johnson Circuit Court ordered the Cabinet to issue a license to the defendant. The Transportation Cabinet appealed the circuit court's order to the Court of Appeals which reversed the circuit court for the same reasons it gave in the *Vaughn* case.

Wilson v. Commonwealth, 92-CA-2836-MR, 1/14/94

The defendant was tried and convicted of first degree manslaughter for shooting and killing his sister's boyfriend. The defendant relied on the defense of self-defense.

The Court of Appeals held the trial court committed reversible error when it refused to let the defendant introduce four specific acts of violence committed by the boyfriend/victim which had been witnessed by the defendant or of which the defendant was aware prior to the shooting. The defendant argued, and the Court of Appeals agreed, this evidence was relevant to show the defendant's state of mind with respect to his belief that he had to use deadly physical force to protect himself from the victim.

The Court of Appeals also found that even though the evidence was conflicting, it was sufficient to support a self-protection instruction with an "initial aggressor qualification."

The defendant's conviction was reversed and remanded for a new trial.

Commonwealth v. Doughty, 92-CA-2584-MR, 1/28/94

The defendant pled guilty to DUI fourth offense, a class D felony. The Commonwealth recommended a one year sentence. The Fayette Circuit Court concluded one year in the penitentiary was too harsh so it sentenced the defendant to one year in the Fayette County Detention Center less the 91 days he had already served. The Commonwealth appealed the circuit court's sentencing order.

The Court of Appeals upheld the sentence imposed by the Fayette Circuit Court. The Court of Appeals relied on KRS 532.070(2) which allows the trial court to impose a term of one year or less in a county or regional correctional institution in a case where a Class D felony is fixed by the jury. The Court of Appeals failed to see any logic in the Commonwealth's argument that for KRS 532.070(2) to be applicable a jury must have imposed the defendant's sentence before it could be amended by the circuit court.

The Court of Appeals pointed out that the defendant ended up serving the entire twelve months in the detention center, while due to the possibility of parole, good time credit, and that the defendant had already served three months, he might have served a lot less time in the penitentiary than the actual one year sentence.

The Court of Appeals also made it clear that even though the defendant was given a sentence for a misdemeanor offense, his conviction was still a felony and would be considered a felony for enhancement purposes under the PFO statute. *See Hamilton v. Commonwealth*, Ky.App., 754 S.W.2d 870 (1988).

Grogran v. Commonwealth, 92-CA-000091-MR, 2/25/94

The defendant was convicted of flagrant nonsupport and being a PFO II. His five year sentence was enhanced to ten years due to his PFO II conviction. The court probated his sentence provided he remain employed, and his wages were garnished. After the defendant failed to report to work, his probation was revoked.

The defendant raised three issues on appeal. First, the defendant argued he was entitled to a directed verdict of acquittal because the Commonwealth failed to prove his ability to provide support. He argued the Commonwealth's lack of evidence of his employment during the years he allegedly failed to pay child support entitled him to a directed verdict.

The Court of Appeals stated that under KRS 530.050(2), "the ability to reasonably provide support is an element of the offense" of flagrant nonsupport and must be proved beyond a reasonable doubt by the Commonwealth to obtain a conviction. However, the Court of Appeals refused to hold the Commonwealth must present evidence of a defendant's specific place of employment during periods of nonpayment. The Commonwealth need only "present evidence of the defendant's physical ability to work, appropriate job skills, or other evidence supporting the inference that the defendant is an employable member of the general labor pool.

The defendant's second argument was that the trial court improperly allowed the Commonwealth to introduce evidence of nonsupport during years not covered by the indictments. The indictments covered the time period from July 1988 to May 1990. The Court of Appeals found it was not error for the Commonwealth to introduce evidence of the defendant's failure to pay child support prior to July 1988 because the statute requires a showing of six consecutive months without payment. Even if it had been error for the Commonwealth to introduce the complained of evidence, the Court of Appeals held any error was harmless because there was more than sufficient evidence of the defendant's failure to pay child support during the time period alleged in the indictments.

The defendant's third argument was that it was improper for the prosecutor to describe the defendant in closing argument "as an able-bodied man capable of earning a living," because the prosecutor knew the defendant was in and out of prison during the time he was charged with nonpayment. The Court of Appeals held this argument was proper because "[i]ncarceration does not discharge the duty to pay child support."

The defendant's convictions were affirmed.

Canler v. Commonwealth, 93-SC-049-DG, 1/31/94

After picking their five month old baby up from their babysitter, the parents found bruises on their child. Suspecting abuse, they took their baby to be examined by a doctor. An investigation focused on the defendant whose wife was the babysitter.

Before any charges were filed against the defendant he employed an attorney. The defendant then agreed to submit to a polygraph examination. In addition, the attorney requested and received specific agreement that no questions, other than those relating to the polygraph test, would be asked.

On the day prior to the scheduled polygraph exam, the site was changed from Bowling Green to Madisonville. As a result of a scheduling conflict, the defendant's attorney was unable to attend. The defendant went to the polygraph exam without his attorney and signed a waiver of his *Miranda* rights. The polygraph test lasted seven to ten minutes. The exa-

miner then questioned the defendant for approximately two hours resulting in the defendant's statement that "I did. I hit her."

The Logan Circuit Court granted the defendant's motion to suppress his statement. The Court of Appeals reversed the circuit court and held the statement was admissible. The Kentucky Supreme Court granted discretionary review and concluded that even though no findings of fact were made by the trial court, the language in the trial court's order that the defendant's statement cannot be used by either party under any circumstances, not even in rebuttal, is conclusive that the trial court found the defendant's statement was involuntary. *See Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) holding that an involuntary statement cannot be used at trial under any circumstances.

Because the Commonwealth failed to meet its burden of proving, under *Tabor v. Commonwealth*, Ky., 613 S.W.2d 133 (1981), the defendant's statement was voluntary, the Kentucky Supreme Court held the defendant's statement must be suppressed and reversed the Court of Appeals.

The Kentucky Supreme Court also upheld the constitutionality of the first degree criminal abuse statute, KRS 508.100, and refused to hold that spanking can never be cruel punishment.

Commonwealth v. Hicks, 93-SC-048-DG, 1/31/94

Scott Hicks was charged with third offense DUI and reckless driving. On the date set for trial the Commonwealth moved for a continuance. When the case was called for trial two months later, the Commonwealth again moved for a continuance because the breathalyzer technician, a subpoenaed witness, had not appeared.

Defense counsel then moved to dismiss the charges. The district court, expressing its annoyance at the Commonwealth, sustained the motion to dismiss for lack of prosecution.

The Commonwealth pointed out to the court that its continuance motion was still pending and that if the court were to deny the continuance the Commonwealth would proceed to trial without the breathalyzer technician. The district court held fast to its dismissal order but informed the parties the charges could be refiled. In its final order the court noted that the Commonwealth's continuance motion is denied and the defense motion to dismiss is sustained.

The Commonwealth did not appeal the dismissal order but refiled the charges against Hicks. Hicks moved to dismiss on double jeopardy grounds. The court denied the motion on the ground that jeopardy had not attached.

Hicks then filed a motion for writ of prohibition in the circuit court which was denied.

Hicks then appealed the denial of the writ of prohibition to the Court of Appeals which granted an order of prohibition.

The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review.

The Kentucky Supreme Court pointed out that the district court was without authority to dismiss the charges against Hicks because the Commonwealth had announced ready for trial and its willingness to proceed without the breathalyzer technician. However, the Commonwealth never appealed the district court's dismissal order. The Kentucky Supreme Court, citing CR 54.01, also explained that a "judgment" is a written order and oral statements are not judgments until set forth in writing. Where there is a conflict between a trial court's oral statements and its written order, the written order prevails.

Relying on CR 41.02(3), the Kentucky Supreme Court concluded that a judgment or order of dismissal, other than a dismissal for lack of jurisdiction, improper venue, lack of prosecution under CR 77.02(2), or failure to join a party under CR 19, results in an adjudication on the merits. Such an interpretation of the Rule serves the purpose of finality.

Applying these civil rules to this criminal case, the Kentucky Supreme Court held the district court's order was a dismissal with prejudice. For the Commonwealth to have obtained relief from the district court's dismissal order it should have filed a timely appeal of that order or a timely amendment of the order. Since the Commonwealth failed to take the appropriate steps for relief, the dismissal order became final and any subsequent litigation by the Commonwealth was barred.

The Supreme Court affirmed the Court of Appeals' entry of an order granting Hicks' writ of prohibition.

Bedell v. Commonwealth, 90-SC-965-MR, 1/31/94

The defendant was convicted of murder, rape, kidnapping, first degree wanton endangerment, and first degree unlawful imprisonment and sentenced to life without parole for twenty-five years, twenty years, twenty years, five years, and five years respectively. The sentences were ordered to run consecutively.

In its opinion affirming the defendant's convictions, the Kentucky Supreme Court, citing *Wellman v. Commonwealth*, Ky., 694 S.W.2d 696 (1985), remanded the case to the trial court with instructions to order the sentences to run concurrently with the sentence of life without parole for 25 years.

Believing *Wellman* to be inapposite, the Commonwealth filed a petition for rehearing, citing *Rackley v. Commonwealth*, Ky., 674 S.W.2d 512 (1984), to show it was proper to run the defendant's sentences consecutively.

After hearing oral argument, the Kentucky Supreme Court denied the Commonwealth's petition for rehearing and modified its original opinion by overruling *Rackley* and stating "no sentence can be ordered to run consecutively with such a life sentence in any case, capital or non-capital."

Commonwealth v. Sego, 92-SC-1062-DG and 93-SC-305-DG, 1/31/94

The defendant was tried and convicted for conspiracy to commit second-degree arson. The Court of Appeals, relying on KRS 506.070(3), reversed the conviction because an undercover police officer cannot be a party to a conspiracy and an indicted conspirator becomes a non-conspirator by pleading guilty to a lesser charge. Thus the defendant was entitled to a directed verdict of acquittal.

Granting the Commonwealth's motion for discretionary review, the Kentucky Supreme Court held the defendant was

not entitled to a directed verdict of acquittal under KRS 506.070(3). That the co-conspirator was granted immunity from prosecution for conspiracy by being allowed to plead guilty to facilitation in exchange for his testimony against the defendant did not amount to an acquittal or circumstances amounting to an acquittal as set out in KRS 506.070(3). An acquittal under the cited section of the statute does not encompass a negotiated plea where the co-conspirator still admits participation in the conspiracy.

In addition, that the defendant's other co-conspirator was a police agent did not mean that he was "discharged under circumstances amounting to an acquittal" so as to entitle the defendant to an acquittal. It is not a valid defense that ones co-conspirator is a police agent who did not truly agree to the conspiracy.

KRS 506.070(2)(a)-(c) makes a defendant's criminal culpability dependent upon his own conduct rather than that of his associates. KRS 506.070(3) cannot be used to except a conspirator from a conviction if the co-conspirator is otherwise exempt from culpability or prosecution under KRS 506.070(2). KRS 506.070 (3) requires acquittal or dismissal, not merely non-prosecution.

The defendant raised three issues on cross-appeal. As to the denial of the defendant's motion for a mistrial when the undercover agent opined he was convinced the defendant would carry out his promise to burn the house, the Court held the collective facts rule allows an individual to testify about a party' mental conditions and emotions as manifested to that witness. The Court also found the grand jury had been properly empaneled and there was no palpable error in the trial court's instructions.

The defendant's conviction was reinstated.

Commonwealth v. Burnette, Wolfe and Kelly, 92-SC-161-DG, 2/24/94

Burnette and Wolf were convicted by a jury of theft by deception and Kelly was convicted of complicity to theft by deception. Each man received a fine but no jail time. The Court of Appeals reversed all three convictions due to insufficiency of the evidence. The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review and found ample evidence to support all three convictions.

The charges in this case arose from Burnette (who had been elected Commissioner of Agriculture in November 1987, but did not officially take office until January 4, 1988) and Wolf (who was on leave of absence from his job in the Department of Agriculture and was subsequently appointed Deputy Commissioner of Agriculture) and two private citizens taking two privately chartered plane flights on December 14 and 15, 1987, at the Commonwealth's expense.

An employee of the charter flight service testified that she was instructed by one of the private citizens on the flight (who denied this allegation at trial) to list the flight dates as January 4 and 5, 1988, out of concern the Agriculture Department might not pay for flights taken in December before Burnette took office.

The invoices for the flight were submitted to Roger Wells, Secretary of Finance and Administration. Wells turned the bills over to his chief assistant, appellee Kelly.

There was also testimony the dates were changed again to January 14 and 20, 1988, at the request of appellee Kelly (who denied this allegation) because he did not want the bill to indicate the flights occurred only one day apart. Kelly did admit telling the employee to change the bill to the Central Rock Company rather than Wilkinson Flying Service since the state could not engage in business with a company owned by the Governor.

The Court of Appeals found the Commonwealth failed to produce evidence the flights were not for the purpose of furthering the agricultural interest of the Commonwealth through a hay program. However, there was testimony that during discussions with Wolf regarding the bill he never made any mention of the hay program and Burnette and Wolf both referred to the flights as a "celebration" for the election.

The Court of Appeals also found that since Wells testified the erroneous flight dates on the invoices were of no consequence when considering payment, no deception had occurred.

The Supreme Court disagreed and held that Wells' testimony fell far short of providing a reason to hold there was a failure of proof that a theft took place. The Court pointed out that Wells testified that *if* the facts were as the defense attorneys put them and *if* the proper documentation were provided, then he would have approved payment of the bills. Wells also testified he would have had to consult with his attorney to determine if an incoming commissioner and an on-leave employee would be eligible for reimbursement since he had not looked into the matter that closely. There was other testimony that if the actual flight dates had been known, it would have been an issue. Thus, contrary to the Court of Appeals' holding, the flight dates on the invoices were of significant consequence in determining whether to pay the invoices.

Since there was sufficient evidence to induce a reasonable juror to believe beyond a reasonable doubt that the defendants were guilty, the Supreme Court reversed the Court of Appeals and reinstated the defendants' convictions.

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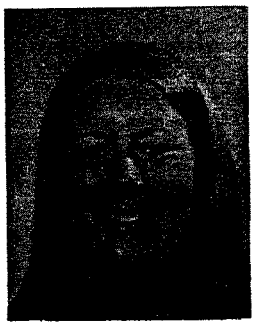
"If a juror feels that the statute involved in any criminal case being tried is unfair, or that it infringes upon the defendant's natural God-given inalienable, or Constitutional rights, then it is his duty to affirm that the offending statute is really no law at all and that the violation of it is no crime at all -- for no one is bound to obey an unjust law... The law itself is on trial, quite as much as the cause which is to be decided."

- Harlan F. Stone, Chief Justice, U.S. Supreme Court
50 Harvard Law Review (1936

Sixth Circuit Highlights



Donna Boyce

DNA Profile Evidence

In a case of first impression for the 6th Circuit, the Court upheld the admission of DNA profile evidence. ***U.S. v. Bonds***, 12 F.3d 540, (6th Cir. 1993). Adhering to *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993), the 6th Circuit ruled that the *Frye*[1] test is no longer controlling and that FRE 702 now governs.

Daubert sets out a flexible and more lenient test that favors the admission of any scientifically valid expert testimony that is helpful to the trier of fact. An inquiry into the scientific validity of evidence includes an examination of whether the new theory or technique has been or can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error and the maintenance of standards controlling the technique's operation, and whether the theory or technique has been generally accepted in the particular scientific field.

In light of the four *Daubert* factors, the 6th Circuit held that the underlying principles and methodology used by the FBI to declare matches and make statistical probabilities based on DNA profile evidence are scientifically valid. The Court further found that this evidence met the relevance requirement of being helpful to the trier of fact. The Court, thus, concluded that such evidence meets the *Daubert* standard and is admissible under FRE 702.

The Court acknowledged the numerous substantive, heated disputes over the procedures used by the FBI and over the accuracy of the results these procedures produced. Following the lead of *Daubert*, the 6th Circuit recommended vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof as the traditional and appropriate means of attacking shaky but admissible evidence.

Confessions

In ***U.S. v. Whaley***, ___ F.3d ___, 23 SCR 3, 3 (6th Cir. 1/10/94), the 6th Circuit examined whether a police officer's reinterrogation of Whaley after he declined to talk without an attorney present required suppression of his subsequent confession. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the U.S. Supreme Court ruled that the police cannot reinterrogate a suspect who has invoked his *Miranda* rights and who does not initiate further discussion of his offense. However, whether there has been an "*Edwards* initiation" can present a difficult question.

The 6th Circuit held that an *Edwards* initiation occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case. The Court stressed, however, that not every statement from a suspect's mouth shows such a desire.

Whaley has invoked his *Miranda* rights when first questioned by a police officer when he appeared before a judge. That police officer later had Whaley removed from his cell and began the questioning that resulted in an inculpatory statement.

The 6th Circuit recognized that a *Miranda* waiver cannot be established by showing only that he responded to further police-initiated custodial interrogation despite having been advised of his rights.

The Court rejected the government's argument that Whaley initiated contact when, awaiting a medical appointment three weeks prior to the interrogation, he responded to another police officer who spoke to him by asking the officer to come closer because "I want to talk to you about me getting arrested." The officer advised Whaley he would have to talk to the officer on his case. The Court pointed out that Whaley spoke only after the officer acknowledged him, said nothing further after being told he should speak to the officer assigned to his case, and did nothing in the next three weeks to tell anyone he wanted to talk about the case.

The 6th Circuit stated that finding that Whaley initiated a conversation under these circumstances would undermine the protections of *Edwards* by allowing the police to wear down a suspect's resistance to waiving his right to counsel by repeated questioning while the suspect is imprisoned. The Court held Whaley's statement should have been suppressed.

[1]*Frye v. U.S.*, 1293 F. 1013 (CADC 1923).

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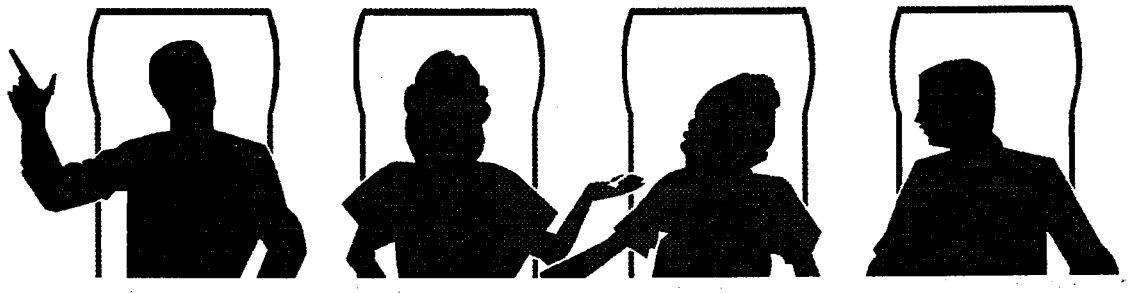
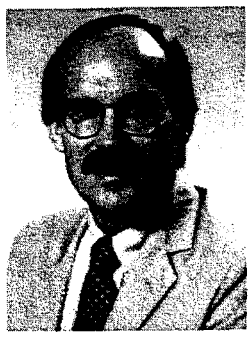


Plain View



Ernie Lewis

Albright v. Oliver

The Fourth Amendment, rather than the Fourteenth Amendment, is to be used when alleging a denial of liberty in a 1983 action, according to this new opinion of the United States Supreme Court.

Here, Kevin Albright was arrested and charged with the sale of a look-a-like substance. This charge was ultimately dismissed, after which he sued the police officer under 42 U.S.C. §1983, saying that he his Fourteenth Amendment liberty interest had been deprived him by his being held without probable cause.

A fractured court held that "it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claims must be judged." Justice Rehnquist was joined by O'Connor, Scalia, and newly confirmed Ginsburg in this holding.

Justice Ginsburg's concurring opinion gives some insight into her future Fourth Amendment decisions. She speculates that Albright had filed his claim under the Fourteenth Amendment out of a fear that the Fourth Amendment seizure had ended after Albright's release from custody. She would read the effect of the seizure more broadly, saying the seizure extended as long as the prosecution did. "A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense." With this sensitivity to the effect of a seizure of a person by the government, one can anticipate eagerly the new Justice's opinions in this area.

Justice Kennedy concurred in the judgment, joined by Justice Thomas. He writes primarily to assert that "the due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution."

Justice Souter also wrote separately, and concurred in the judgment. He reminded the court to act sparingly on new constitutional claims. In his view, all of the harm in this case had occurred as a result of the unlawful seizure, rather than any unlawful prosecution separate from the seizure. "There may indeed be exceptional cases where some quantum of harm occurs in the interim period after groundless criminal charges are filed but before any Fourth Amendment seizure. Whether any such unusual case may reveal a substantial deprivation of liberty, and so justify a court in resting compensation on a want of government power or a limitation of it independent of the Fourth Amendment, are issues to be faced only when they arise."

Justice Stevens was joined by Justice Blackmun in dissent. In his view, the question in this case was whether "the Due Process Clause of the Fourteenth Amendment imposes any comparable constraint on state governments" similar to the Fifth Amendment. "[A]n official accusation of serious crime has a direct impact on a range of identified liberty interests. That impact, moreover, is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection." Because of that, Albright's action under the Fourteenth Amendment as well as the Fourth Amendment would have been proper. He reminds readers that the plurality opinion was not a majority, and that none of the opinions had rejected his "principal submission: the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime."

United States v. Travis

In the last issue, a *Kentucky Post* article was noted in which a woman was appealing the denial of her motion to suppress due to racial discrimination in her arrest.

The case is entitled *United States v. Travis*, D.C. E. Ky., 54 Cr. L. 1261 (11/23/93). Here, Angela Travis was stopped by Detective Mike Evans in the Cincinnati Airport. A consensual search of her purse revealed cocaine.

This case must be understood in the backdrop of the concern expressed by both the Sixth Circuit and Judge Bertlesman of the Eastern District of Kentucky regarding possible racial discrimination during drug stops at the Cincinnati Airport. See for example *United States v. Taylor*, 956 F. 2d 572 (6th Cir. (en banc) 1992).

In a unique move, Judge Bertlesman suggested to the Airport Task Force that they compile statistical figures regarding the racial makeup of the stops occurring at the airport. These statistics were admitted during the hearing held in this case on the motion to suppress. They showed that African Americans and Hispanics were at least twice as likely to be stopped at the airport than whites. In 1991, of 263 people encountered, 49.5% of them were African-American, and 12.5% were Hispanic. The trend worsened in 1992.

However, the officers who testified said that they were not enforcing the law using discriminatory means, all the while acknowledging that minorities were being stopped at a disproportionate rate. One officer opined that the reason for the disparity in the stops was that the drug

trade in big cities was controlled by black gangs.

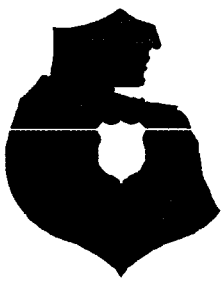
The court did not grant the motion to suppress. The court held that while "a consensual encounter may not be initiated solely on the basis of race," the prosecution had shown that the government had "met the burden of justifying the consensual encounter with the defendant by the agents' uncontested testimony concerning the intelligence they had concerning the Crips and the Bloods."

The court ended by suggesting that randomly selecting passengers and their baggage would be preferable to the method presently being employed by the Cincinnati Airport.

United States v. Carter

The Sixth Circuit demonstrates how sometimes the application of the law of standing makes but little sense to the common person, as well as to this lawyer. Here, two police officers in Memphis saw a van with a temporary plate on it. They pulled the van over, and talked with the driver, who rushed out to talk with them. When the driver would not give consent to search the van, they put him in their cruiser and searched anyway, finding loads of marijuana. Eventually, his motion was suppressed due to the unlawful detention. His charges were eventually dismissed.

A passenger in the van, however, did not fare as well. The passenger, Carter, was prosecuted and convicted. On appeal to the Sixth Circuit, the court held that he had no standing to challenge the seizure because he had no reasonable expectation of privacy in the driver's van. Further, the discovery of the marijuana resulted from the driver's illegal detention rather than his own, and thus was not the fruit of his illegal detention.



Centanni v. Eight Unknown Officers

Marilyn Centanni went to her boyfriend's house around midnight. She left shortly thereafter. The police, who had set up surveillance on her boyfriend's father's house, suspecting the father of murder, pulled her over, searched her, and transported her to the police station. There, she was questioned, and held for four hours until the father could be arrested. She later sued the police under 42 USC 1983, alleging a deprivation of her Fourth Amendment rights. The district court denied the motion of the police for a summary judgment.

The Sixth Circuit, on February 3, 1994, in an opinion of Judges Martin, Jones, and Demascio, affirmed the denial of the motion for a summary judgment. In doing so, they affirmed very basic tenets of Fourth Amendment law. The court held that when Centanni was seized and transported to the police station, that she had been arrested de facto, and thus her arrest required probable cause, which the police in this case clearly did not have. There is no such thing as a "Terry transportation", which would allow for seizure of a person and transportation of them on less than probable cause.

Short View

1. ***State v. Beveridge***, N.C. Ct. App., 54 Cr. L. 1263 (12/7/93). *Minnesota v. Dickerson*, 53 Cr. L. 2186 (1993) established the "plain touch" doctrine. The North Carolina Court of Appeals applied *Dickerson* to suppress drugs where the officer continued to search after he had assured himself that the "bulge" he was feeling was not a weapon nor could he tell whether it was contraband. "[W]hile Officer Gregory was justified in conducting a limited pat-down of the defendant to determine whether the defendant was armed, once the officer concluded that there was no weapon, he could not continue to search or question the defendant in order to ascertain whether the plastic bag was indeed contraband."

2. ***People v. Mitchell***, Ill. App. Ct., 54 Cr. L. 1352 (12/17/93). A different result was reached here regarding the application of *Dickerson*'s "plain touch" exception. An experienced officer followed a car down an alley. When he approached the car on foot, he saw paraphernalia used in smoking crack cocaine. A *Terry* search of the driver for weapons resulted in feeling a baggie with something rock-like in it. The court held this to be squarely within the plain touch exception, allowing for the seizure of what the officer believed to be contraband.

3. ***People v. McPhee***, Ill. App. Ct., 54 Cr. L. 1265 (11/29/93). A warrant authorizing a search of a letter addressed to a home did not authorize the entry into the home after the delivery of the letter. Noting that the warrant did not authorize a search of the home, but was rather limited to the envelope, the court suppressed the evidence found therein. The court also noted that *Leon*'s good faith doctrine did not require admission of the evidence because that doctrine does not apply to instances of officers acting outside the scope of the warrant.

4. ***People v. Banks***, Cal., 54 Cr. L. 1351 (12/23/93). The California Supreme Court has held that while publicity regarding a sobriety checkpoint is an important indicator of reasonableness, the lack of publicity does not render the stopping at the checkpoint unconstitutional.

5. ***State v. Evans***, Ariz., 54 Cr. L. 1373 (1/13/94). An arrest warrant for a misdemeanor had been quashed. The warrant, however, remained on the computer. Thus, when Evans was arrested for a traffic violation, a computer check brought up the warrant, resulting in Evans' arrest and a search which resulted in finding marijuana. The Arizona Supreme Court held that under these facts the marijuana should have been suppressed, and that the good faith exception did not apply. "While it may be inappropriate to invoke the exclusionary rule where a magistrate has issued a facially valid warrant (a discretionary judicial function) based on an erroneous evaluation of the facts, the law, or both...it is useful and proper to do so where negligent record keeping (a purely clerical function) results in an unlawful arrest. Such an application will hopefully serve to improve the efficiency of those who keep records in our criminal justice system." The court was particularly mindful of the important role of the exclusionary rule even in modern times. "[A]rrest warrants result in a denial of human liberty, and are therefore among the most important of legal documents. It is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness. As automation increasingly invades modern life, the potential for Orwellian mischief grows. Under such cir-

cumstances, the exclusionary rule is a 'cost' we cannot afford to be without."

6. ***Mozo v. State***, Fla. Ct. App., 54 Cr. L. 1458 (1/19/94). Using two sections of the Florida Constitution, the Florida Court of Appeals has ruled that interception of cordless telephone conversations by the use of a radio scanner was unconstitutional. Florida prohibits "the unreasonable interception of private communications by any means" in its constitution, as well as containing a broad and explicit right to privacy. As a result, when the police picked an apartment complex and randomly selected conversations on cordless telephones to listen to in hopes of uncovering illegality, they violated the rights of those whose conversations they heard.

7. ***Commonwealth v. Lewis***, Pa. Sup. Ct., 54 Cr. L. 1479 (1/28/94). The fact that someone matches a "drug courier profile" does not create reasonable suspicion sufficient to justify an investigative detention. In language that should have been part of the majority opinion in *United States v. Sokolow*, 490 U.S. 1 (1989), the court stated that the "danger inherent in defining reasonable suspicion in the context of a 'drug courier profile' is that the police officer's suspicion is not aroused by personal observation of an individual whose behavior sets him apart from other travelers. The use of a drug courier profile encourages the police officer to direct his attention to any individual whose behavior falls within an overinclusive set of characteristics that include innocent actions. A drug courier profile should serve only as a starting point of, and not as a substitute for, independent observation of an individual's behavior."

8. ***State v. Hoke***, Wash. Ct. App, Div.1, 54 Cr. L. 1483 (2/7/94). An officer violates the Constitution by walking around the outside of a house in hopes of smelling marijuana. Thus, when an officer in this case did just that, and thereafter obtained a warrant, evidence found in execution of the warrant had to be suppressed. Here, the area in which the officer walked was the side yard, which was denominated to be part of the curtilage not impliedly opened to the public. The court rejected the state's argument that a homeowner had an obligation to exhibit an expectation of privacy in the curtilage, saying to "impose such a burden would be inconsistent with existing law and would seriously weaken the constitutional protection against unreasonable searches."

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Top 10 Reasons Why Indigent Defense Advocacy is Unimportant

by Vince Aprile with apologies to David Letterman

10. Self-representation is effective.
9. The police always get the right man.
8. Prosecutors must seek justice
7. Judges are never biased.
6. Juries are fair and impartial.
5. Prosecutors always turn over exculpatory evidence.
4. Juries naturally presume a criminal defendant innocent.
3. Appellate courts will correct any injustice inflicted in the trial courts.
2. Lawyers instinctively try cases well.

And the Number 1 Reason Why Indigent Defense Advocacy is Unimportant:

1. Every criminal defendant in the U.S. automatically gets a fair trial.

RELICS, EVOLUTION, AND REALITY:
BREATHALYZER FOUNDATIONS AND THE VIABILITY OF **OWENS**

Dave Eucker

Commonwealth v. Owens, Ky., 487 S.W.2d 897 (1972) sets out the standard universally advocated by prosecutors for the admissability of the breathalyzer: *whether the breathalyzer was in proper working order, operated by a certified breathalyzer operator, consistent with the operator's training.*

Since *Owen*, however, KRS 189A.103(3)(a) was enacted, requiring that the breathalyzer conform to regulations promulgated by the Cabinet for Human Resources. These regulations, 500 KAR 8:030, *et. seq.*, go beyond *Owen*. What then? Is defense counsel left to their own devices to determine conformity to the regulations, or are the elements set forth in the regulations to be proven as a foundational matter by the prosecution? Bottom line, if faced with the former situation, defense counsel has a number of additional reasonable doubts. If the latter, defense counsel has a number of additional reasons to challenge the breathalyzer.

Since a breathalyzer result is relevant (KRE 401), and helpful to a jury (KRE 702) an expert, usually an officer, qualified by experience or training can testify as to these results, provided the breathalyzer proponent lays a KRE 901(b)(9) authentication foundation, to establish that the breathalyzer result is what it purports to be; the breath alcohol level of a particular accused at a particular time. Since 1972, authentication of the breathalyzer in Kentucky has required that the proponent show:

1. The operator is properly trained.
2. The operator is properly certified to operate the breathalyzer.
3. The breathalyzer machine was in proper working order.
4. The breathalyzer was administered according to standard operating procedures.

This has been the burden of the proponent, who in most cases is the Commonwealth. *Owens*, 487 S.W.2d at 900. Since *Owens*, Kentucky has twice, once in 1984 and once again in 1991, slammed the door on drunk drivers. Kentucky has also passed an Evidence Code.

As a result of the 1984 DUI Bill, elder counsel will recall that most counties received new and improved Breathalyzers, usually the Breathalyzer Model 1000. Following the 1991 DUI slam, most counties received another new and improved breath testing instrument, the Intoxilyzer 5000. This model was touted to be so foolproof as to justify as "per se" DUI law. The 1991 DUI Bill also required, pursuant to KRS 189A.103(3)(a) and (4), that breath tests be performed according to regulations made by the Justice Cabinet, and that the tests be administered according to the manufacturer's instructions for use of the instrument. Suffice it to say that the landscape has changed rather significantly since *Owens*.

When addressing the issue of what the prosecution must prove in order admit the result, recourse ought first be made to the constitution. Confrontation and cross examination principles are placed at issue if a prosecutor chooses not to call as witnesses the inspector, the person responsible for filling the calibration ampoule, and someone familiar with KRE 602 firsthand knowledge of the manufacturer's instructions. Thus, counsel should first determine whether the Sixth and Fourteenth Amendments to the U.S. Constitution and Section 10 of the Kentucky Constitution are applicable. *See, Constitutional Law - Right of Confrontation - Right of the DUI Defendant to Cross - Examine a Laboratory Technician,* 54 Tenn.L.Rev. 525 (1987).

Besides constitutional argument, there exists case law requiring as a foundational matter testimony by a witness with KRE 602 firsthand knowledge of the particular foundational fact to be proven. See, *e.g., People v. Freeland,* 497 N.E.2d 673 (N.Y. 1986) (where no evidence presented that machine working properly, results suppressed). For example, 500 KAR 8:020 Section (2)(1) requires that the breathalyzer be inspected at regular intervals. Police officers usually do not perform this inspection. It is rare, however, that defense counsel will encounter a witness with firsthand knowledge that the breath machine at issue was up-to-date in its inspections. In *McManus v. State*, 695 P.2d 884 (Okla. App. 1985), the court suppressed a result where it had not been established that the machine used had been maintained in accordance with state regulation. Frequently counsel will encounter a conclusory statement by a witness to the effect that the machine was used in compliance with state regulation. Aside from problems of a lack of KRE 602 first hand knowledge, it has been held that an operator's failure to know the regulations concerning the breathalyzer render that operator incompetent to testify. *People v. Crawford,* 318 N.E.2d 743 (Ill. App. 1974). By way of explanation, if an operator doesn't know the regulations, that operator certainly has no firsthand knowledge of whether the machine conforms to the regulations. Without such knowledge, there is no basis for finding that the result complies with 901(b)(9), because there is no basis sufficient to support a finding that the breathalyzer result is what it purports to be - a measure of an actual breath alcohol level.

Another fruitful area concerns calibration. The solution in the jar attached to the Intoxilyzer 5000 contains a solution which is measured to determine calibration. 500 KAR 8:020 Section 1(2) requires calibration within a range of .095 to .105. There will rarely, if ever, be any testimony as to

whether what's in the jar was measured and mixed properly. Without such testimony, there is not evidence sufficient to support a finding that the machine is properly calibrated. See, *State v. Salhus*, 220 N.W.2d 852 9 (N.D.1974)(reversible error to admit the results where state failed to show accuracy of machine had been checked against a known sample).

Should counsel be unsuccessful in suppressing the breathalyzer, despair is hardly in order. Each of the reasons counsel may give as a reason to suppress the breathalyzer is a reason to doubt that the accused's blood alcohol level at the time of operation was at a particular level. Each of these reasons is also a separate area of inquiry upon cross-examination of the breathalyzer operator. A reason to suppress a result is also a fact that the operator, especially one who professes not to know the "inner workings' of the machine, does not know.

Kentucky's law as to the foundation necessary to admit the Intoxilyzer 5000 is ripe for review. Trial counsel is well advised to preserve this issue, and use it creatively in formulating cross-examination and closing argument.

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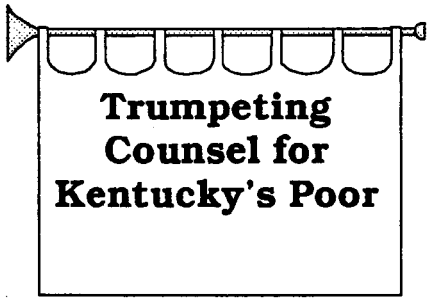
Public Advocate Seeks Nominations



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.

CHAPTER 8
BREATH ANALYSIS OPERATORS

500 KAR 8:010. Certification of operators.

RELATES TO: KRS 15A.070, 189A.103(3)(6)
STATUTORY AUTHORITY: KRS 15A.160
NECESSITY AND FUNCTION: 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 Department of Criminal Justice Training.

(2) Successful completion shall mean receiving a passing score on a standardized written examination as provided by the department and the satisfactory completion of a standardized practical proficiency examination administered by a certified instructor.

(3) The examinations shall be included in a minimum of forty (40) hours of instruction which shall also include the demonstration of physiological effects of alcohol in the human body, general instrumentation theory, and operation of approved instruments which measure alcohol concentration.

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 operator 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 of this regulation for six (6) months following revocation.

Section 3. The employer of a certified operator shall notify the Department of Criminal Justice Training in writing within two (2) weeks of the change in the event of change of employment to a different criminal justice agency or termination of employment with a criminal justice agency.

Section 4. To obtain recertification, a certified operator shall review standards and procedures for a minimum of four (4) hours of recertification instruction.

Section 5. (1) The following are grounds for revocation of certification to operate a breath analysis instrument:

(a) Misuse of the instrument by the operator in violation of law;

(b) Refusal or failure to perform procedures in an acceptable manner;

(c) Failure to testify at any judicial proceeding under KRS Chapter 189A without just cause; and

(d) Dismissal of an operator from his employment with a criminal justice agency.

(2) Revocation will be held only following a hearing conducted by the Commissioner of the Department of Criminal Justice Training, or his designee, following written notice to the certified operator of the basis for revocation.

Section 6. A person who has received training from the Department of Criminal Justice Training, the Department of State Police, or the Lexington-Fayette Urban County Government Division of Police in breath analysis instrument operation before January 1, 1991, shall be exempt from the requirements of Section 1 of this regulation. Each person who has not received this training more recently than January 1, 1989, shall comply with Section 4 of this regulation. (17 Ky.R. 1885; Am. 2203, 2440; eff. 2-7-91; 18 Ky.R. 148; 454; 1131; 1333; eff. 11-8-91.)

500 KAR 8:020. Breath alcohol analysis instruments.

RELATES TO: KRS 189A.300
STATUTORY AUTHORITY: KRS 15A.160, 189A.103(3)(a)
NECESSITY AND FUNCTION: This regulation establishes procedures for providing breath alcohol analysis instruments as mandated by KRS 189A.300.

Section 1. (1) The Forensic Laboratory Section, Department of State Police, shall be responsible for the purchase of breath alcohol analysis instruments and related units.

(2) All breath alcohol analysis instruments and related units owned by the state used pursuant to KRS Chapter 189A shall be assigned to the Department of State Police, Forensic Laboratories Section..

Section 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. (18 Ky.R. 564; Am. 1132; 1334; eff. 11-8-91.)

500 KAR 8:030. Administration of chemical analysis tests.

RELATES TO: KRS 189A.103
STATUTORY AUTHORITY: KRS 15A.160, 189A.103
NECESSITY AND FUNCTION: This regulation establishes procedures for administering chemical analysis tests pursuant to KRS 189A.103.

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. The following procedures shall apply regarding chemical tests of blood for alcohol or other substances:

(1) The blood sample shall be collected in the presence of a peace officer, or another person at the direction of the officer, who can authenticate the sample.

(2) The blood sample shall be collected by a person authorized to do so by KRS 189A.103(6).

(3) Collection of the blood sample shall be by the following method:

(a) No alcohol or other volatile organic substance shall be used to clean the skin where a sample is to be collected.

(b) All samples shall be collected with needles and syringes or vacuum-type collecting containers approved by the licensing agency of the collector.

(c) Blood collecting containers shall not contain an anticoagulant or preservative which will interfere with the intended analytical

method.

(d) Individual containers shall be appropriate and securely labeled to provide the following information:

1. Name of person giving sample;
2. Date and time of collection;
3. Collector's name and agency identification;
4. Requesting officer's name and agency identification;
5. Complete uniform citation number; and
6. Officer present during collection of sample.

(4) The blood sample shall be delivered to a Kentucky State Police Forensic laboratory or a clinical laboratory certified by the Cabinet for Human Resources for analysis for the presence of alcohol or other drugs in the sample.

Section 3. The following procedures shall apply regarding chemical analysis of urine for alcohol or other substances:

(1) Urine samples shall be collected at two (2) separate times in the presence of a peace officer, or another person at the direction of the officer, who can authenticate the samples. The witnessing person shall be of the same sex as the person providing the sample.

(2) The subject person shall empty his bladder and this first sample shall be tested for substances of abuse other than alcohol.

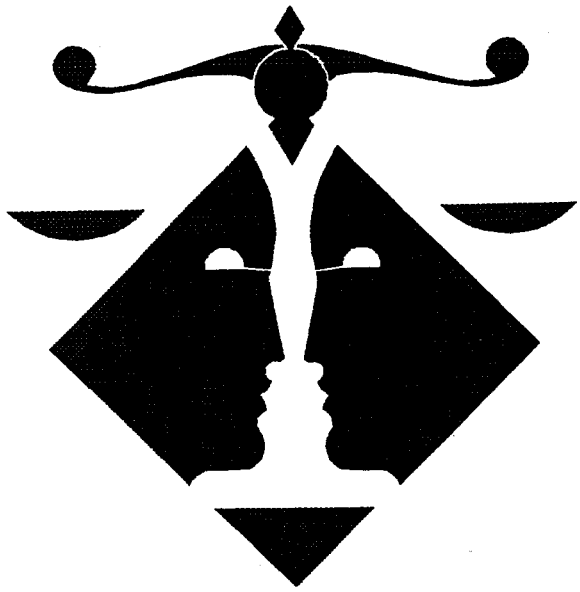
(3) Thirty (30) minutes following the initial emptying of the bladder, the subject person shall be requested to again empty his bladder and this second sample shall be tested for alcohol and may be tested for substances of abuse other than alcohol.

(4) Samples shall be collected in clean, dry containers. No preservatives shall be used. Each container shall be securely sealed.

(5) Each container shall be appropriately and securely labeled to provide the following information:

(a) Name of person giving the sample;
(b) Date and time of collection;
(c) Collecting attendant's name and agency identification;
(d) Complete uniform citation number; and
(e) Requesting officer's name and agency identification.

(6) The urine samples shall be delivered to a Kentucky State Police Forensic laboratory or a clinical laboratory certified by the Cabinet for Human Resources for analysis for the presence of alcohol or other drugs in the sample. (18 Ky.R. 565; Am. 1132; eff. 11-8-91.)



"Jurors should acquit, even against the judge's instruction...if exercising their judgment with discretion and honesty they have a clear conviction that the charge of the court is wrong."

- Alexander Hamilton, 1804

To be an effective criminal defense counsel, an attorney must be prepared to be demanding, outrageous, irreverant, blasphemous, a rogue, a renegade and a hated, isolated and lonely person.

Few love a spokesman and active defender for the despised and the damned.

- Clarence Darrow, A Lawyer

Capital Case Review

This month's capital case summary is somewhat different because it contains digests of two dissents, one from a petition for certiorari; the other from a denial of a motion to vacate a stay of execution.

Perhaps the most noteworthy occurrence so far this term was Associate Justice Harry Blackmun's decision that the death penalty cannot be imposed constitutionally. When Blackmun used his dissent from a denial of cert in *Callins v. Collins*, a Texas case, to argue his position, speculation was that he would be retiring at the end of this term. That speculation proved true, when, on April 6, 1994 (the same day U.S. Representative William Natcher was buried in his native Western Kentucky), Blackmun announced that he would indeed retire at the end of the 1993 term. The third most noteworthy occurrence was a news story that the Supreme Court had decided fewer cases this year than in the past.

***Callins v. Collins*,**
114 S.Ct. 1127
February 22, 1994

> On February 23, 1994, ...Bruce Edwin Callins will be executed by the State of Texas ....Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die.
> *Id.*, at 1128.

With those words, Justice Blackmun began his explanation of why he feels the death penalty can no longer be considered a constitutional form of punishment. Despite legislative and judicial efforts to devise formulas and rules to meet the challenge of fair, consistent imposition of the death penalty, problems still remain, albeit in a form different from those found in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Id.*, at 1129.

"It is tempting" to sacrifice either the elimination of arbitrariness and discrimination or the guarantee of individual sentencing when the two conflict so terribly, but such maneuvers "are wholly inappropriate. The death penalty must be imposed 'fairly, and with reasonable consistency, or not at all.'" *Id.*, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982).

"On their face", these goals "appear to be attainable," but in Blackmun's view, the Supreme Court has "engaged in a futile effort to balance these constitutional demands" and is retreating from both consistency and rationality and individualized sentencing as well. *Callins, supra* at 1129.

> From this day forward, I no longer shall tinker with the machinery of death.... Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.
> *Id.*, at 1130.

"There is little doubt now that *Furman's* essential holding was correct...if the death penalty cannot be administered consistently and rationally, it may not be administered at all." *Eddings, supra*, 455 U.S. at 112, 102 S.Ct. at 875. Blackmun has "faithfully adhered" to that holding, and has come to believe it "indispensable to the Court's Eighth Amendment jurisprudence." *Id.*, at 1131.

After *Furman*, "serious efforts" were made to eliminate racism and random infliction of sentencing from the death penalty. Some states attempted to define whose crime was death-eligible by "the use of carefully chosen adjectives" See Fla. Stat. §921.141(5)(h) (crime was "especially heinous, atrocious, or cruel"). Other states specified that aggravating and mitigating circumstances were to be weighed against one another. See Ga. Code Ann. §17-10-30(c). Unfortunately, it soon became apparent that the need for discretion could not be eliminated from the capital sentencing process without threatening the enhanced need for fairness, *i.e.*, individualized consideration when a defendant faces the loss of his life--a punishment different from any other. *Id.*, at 1132.

However, there **is** "real tension" between these two demands; a tension "laid bare" in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), where Johnny Paul Penry alleged that none of the three Texas "special issues" allowed the jury to give full weight to his mitigating evidence of mental retardation and child abuse. The only issue the evidence did apply to--whether Penry was a continuing threat to society--was a two-edged sword because it both diminished his blameworthiness and made more probable the fact that he may be dangerous at some time in the future. "Texas had complied with *Furman* by severely limiting the sentencer's discretion, but those very limitations rendered Penry's death sentence unconstitutional." *Id.*, at 1133-4.

Over time, Blackmun has come to realize that attempting to balance the need to narrow the class of death-eligible crimes with the need for individualized sentencing is unacceptable. "It seems that the decision whether a human being should live or die is so inherently subjective--rife with all of life's understandings, experiences, prejudices, and passions--that it inevitably defies the rationality and consistency required by the Constitution." *Id.*, at 1135.

The arbitrariness is "exacerbated by the problem of race." Despite "staggering evidence" of racism in the Georgia capital punishment system (the Baldus study) presented by Warren McCleskey, the majority, faced with the fact that while the State of Georgia had instituted more legal safeguards than other states, it still could not eliminate racism, "turned its back" while wondering if it were ever possible to achieve consistent and rational sentencing without sacrificing individual sentencing. See *McCleskey v. Kemp*, 481 U.S. 279, 312, 107 S.Ct. 1756, 1778, 95 L.Ed.2d 262 (1987). This suggests that "[a]ll efforts to strike an appropriate balance between these conflicting constitutional demands are futile because there is a heightened need for both in the administration of death." *Callins, supra* at 1136.

In frustration because of its inability to strike a balance between *Furman* and *Lockett*, the Supreme Court has retreated, to the point where some members are willing to pick one requirement over the other. *See Graham v. Collins*, 113 S.Ct. 892, 913 (1993) (Thomas, concurring); *Walton v. Arizona*, 497 U.S. 639, 673, 110 S.Ct. 3047, 3067-3068, 111 L.Ed.2d 511 (1990) (Scalia concurring) (either *Furman* or *Lockett* is wrong and a choice between the two must be made; Scalia will no longer enforce Lockett). *Id.*, at 1137.

Blackmun's belief that the Court would not enforce the death penalty in accordance with the Constitution is enforced by the decisions in the last few years. *See Sawyer v. Whitley*, 112 S.Ct. 2514 (1992); *Coleman, supra*; *McCleskey v. Zant*, 111 S.Ct. 1454 (1991); *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990).

Herrera v. Collins, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (not Eighth Amendment violation to execute possibly innocent defendant) only lends more certainty to Blackmun's position. "The Court is unmoved" by the "nearly insurmountable barriers" it has erected to a defendant's ability to obtain an evidentiary hearing on his claim of actual innocence"; "it prefers 'finality'" to "reliable determinations of guilt". *Callins, supra* at 1138.

Blackmun "may not live" to see the day the Supreme Court decides that the effort to eliminate arbitrariness while preserving fairness is so "plainly doomed to failure that it–and the death penalty–must be abandoned," but he "has faith that eventually it will arrive. The path the Court has chosen lessens us all." *Id.*, at 1138.

SCALIA CONCURRENCE TO DENIAL OF CERT

Justice Scalia wrote that while Justice Blackmun spoke of his intellectual, moral and personal perceptions, he never addressed the "text and tradition of the Constitution." In Scalia's view, the Fifth Amendment provision that no one be deprived of his life without due process of law "establishes beyond doubt that the death penalty is not a "cruel and unusual punishment." *Id.*, at 1127.

In his view, the two requirements of rational, consistent sentencing and individualized consideration were the products of just such "intellectual, moral and personal" perceptions, but had no textual or historical support. Reiterating his opinion that either *Furman* or *Lockett* must be wrong, Scalia said Justice Blackmun had come to the wrong conclusion. *Id.*

Scalia also castigated Justice Blackmun for "reading [anti-death penalty views] into a Constitution that does not contain them" and for "thrust[ing] a minority's views on the people" and for "picking" a relatively non-brutal crime with which to expound upon his views. *Id.*, at 1128.

Collins v. Byrd
1994 wl 77437
March 14, 1994

It is unusual to digest a dissent from a denial of an application for a stay of execution; however, this case originates in Ohio.

In April 1983, Collins and an accomplice robbed a convenience store and killed the clerk. Collins' sentence was affirmed on direct appeal in 1987, as was his 1991 appeal from the denial of his state post-conviction motion.

On March 7 of this year, eight days before his scheduled execution, Collins filed his first habeas petition, a "formidable filing...includ[ing] 29 claims for relief and fill[ing] almost 300 pages." Citing the time gaps between Collins' conviction, and affirmance of his direct appeal and state post-conviction motions, the district court rejected the habeas.

The Sixth Circuit granted the stay, which the State of Ohio then asked the Supreme Court to vacate.

Scalia had "considerable sympathy" for the district court's decision that Collins' habeas should be rejected because of "inexcusable delay." District courts can exercise "equitable discretion", of which one consideration is delay in filing the petition. *See Withrow v. Williams*, 507 U.S. ___, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). *Cf. McCleskey v. Zant*, 499 U.S. 467, 489, 111 S.Ct. 1454, 1467, 113 L.Ed.2d 517 (1991). Scalia feels the Supreme Court has "abandoned (or forgotten) the equitable nature of habeas corpus." Under that state of the law, Scalia "cannot say" that the Sixth Circuit would have abused its discretion by requiring the District Court to consider the habeas petition on the merits, or to stay the execution pending that consideration.

Scalia had problems because the Sixth Circuit went much further: apparently on its own motion, it stayed Collins' execution for 120 days to allow further investigation and discovery of possible claims.

> [Collins] has had six years to 'investigate and discover possible habeas claims'.... The Court of Appeals' action tells counsel for death-row inmates that they should not only wait until the eleventh hour to file their habeas petitions, thereby assuring a postponement of execution to enable consideration of the petition, but should be sure that, even then, their petitions are not fully researched and investigated, so that further postponement can be obtained for that purpose as well. Only one bent on frustrating the death penalty can think this right... The Court of Appeals...decree... seems to me a plain abuse of discretion, if not entirely ultra vires.

The Sixth Circuit also ordered the proceedings held in abeyance until the Supreme Court made a decision on Collins' petition for cert, because the decision is directly relevant to one of Collins' habeas claims. Scalia felt the questions of 1) whether the Supreme Court's decision is relevant to the district court's task and 2) whether the possibility of relevance to one claim is worth delaying the entire proceeding were initially to be decided by the district court. Thirdly, the Sixth Circuit gave Collins leave to amend his habeas within 60 days. Once again, Scalia felt this was a decision which should be left up to the district court.

Victor v. Nebraska and
Sandoval v. California
1994 WI 87447
(March 22, 1994)

These cases dealt with "reasonable doubt" instructions given during two capital trials, one in Nebraska; the other in California.

SANDOVAL

During Sandoval's capital trial, reasonable doubt was defined as

> not a mere possible doubt, because everything relating to human affairs...is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

The wording was taken from an instruction given in *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850), which was approved in an 1866 California case, *People v. Strong*, 30 Cal. 151, 155 (1866). The bulk of the *Webster* instruction was codified in the California Penal Code, which the judge had used. See Cal. Penal Code Ann. §1096 (West 1985).

"MORAL CERTAINTY"

Sandoval complained about the words "moral certainty", saying that jurors may have understood them to mean a standard of proof lower than "beyond a reasonable doubt." Sandoval cited the modern definition of the words "based on strong probability" (Webster's New Twentieth Century Dictionary, p. 1168) or "resting upon convincing grounds of probability" (Random House Dictionary of the English Language 1249).

Justice O'Connor wrote that while the words "moral certainty" themselves may be somewhat ambiguous, the remainder of the instruction gave substance to the phrase. The judge had already told jurors that matters relating to human affairs are determined by moral evidence, which gave an identical meaning: that jurors knew they needed "to reach a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560 (1979).

VERDICT BASED ON EVIDENCE PRESENTED

Sandoval's second argument was seen as a variant of the first. Citing *Cage v. Louisiana*, 498 U.S. 39, 40, 111 S.Ct. 328, 329, 112 L.Ed.2d 339 (1990), he argued that while a juror may be convinced to a "moral certainty" of his guilt, the government may still have failed to prove his guilt beyond a reasonable doubt. Once again, O'Connor said that an examination of the instruction as a whole did not demonstrate the same problem as in *Cage*, where jurors were simply told that they must be "morally certain" of the defendant's guilt. In Sandoval's case, jurors were clearly told that their verdict must be based on the evidence presented, by that and other instructions ("determine the facts of the case from the evidence presented"; "must not be swayed by pity...or prejudice [against the defendant]...by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling").

REASONABLE LIKELIHOOD

The majority did not see a "reasonable likelihood" that the jury had understood their standard of proof as less than "beyond a reasonable doubt" or allowing conviction on matters not in evidence. *See Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); *Estelle v. McGuire*, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)

The Court noted that while it did not condone inclusion of the words "moral certainty" in an instruction, and that in the future, such inclusion may violate *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that read in context at this time, the California instruction did not violate due process.

Lastly, Sandoval challenged the word "possible" in the phrase "not a mere possible doubt." O'Connor said that the Court found that part of the *Cage* instruction proper, and that the final phrase of the sentence that everything "is open to some possible or imaginary doubt," illustrated the sense in which the word was used.

VICTOR V. NEBRASKA

Victor's instruction told the jury that reasonable doubt is:

> such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon...a doubt [that] will not permit you, after full, fair and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced...beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt...that is reasonable. A reasonable doubt is an actual and substantial doubt arising from the evidence, from the facts or circumstances shown by the evidence, or from the [state's] lack of evidence, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

EVOLUTION OF THE INSTRUCTION

Much of the instruction was taken from *Webster, supra.* Other portions evolve from a series of Nebraska decisions which approved instructions cast in terms of a doubt which would cause a "reasonable person to hesitate to act." *See Whitney v. State*, 53 Neb. 287, 298, 73 N.W. 696, 699 (1898); *Willis v. State*, 43 neb. 102, 110-111, 61 N.W. 254, 256 (1894); *Polin v. State*, 14 Neb. 540, 546-547, 16 N.W. 898, 900-901 (1883). At the time Victor was tried, a court rule directed that model jury instructions based on the above cases be used.

USING "SUBSTANTIAL DOUBT" OVERSTATED DEGREE OF DOUBT NECESSARY FOR ACQUITTAL

Victor argued that equating a "reasonable doubt" with a "substantial doubt" exaggerated the degree of doubt necessary for acquittal. The court agreed that this was "somewhat problematic," because substantial could mean either "not seeming or imaginary," *i.e.*, a reasonable doubt is more than mere speculation or "that specified to a large degree," which could lead the jury to a doubt greater than that required by *Winship, supra.* See Webster's Third New International Dictionary at 2280.

Once again, however, the court felt that "any ambiguity" in the instruction was removed by reading the phrase in the context of the sentence, which distinguished substantial doubt from "mere possibility, from bare imagination, or from factual conjecture", phrasing which was not available in the instruction given in *Cage, supra.* The doubt was further removed by the alternative definition: "a doubt that would cause a reasonable person to hesitate to act." Therefore, under either definition, it was not "reasonably

likely" that the jury could have misunderstood the meaning of the instruction.

"MORAL CERTAINTY" CHALLENGED

"Instructing the jurors that they must have an abiding conviction of the defendant's guilt does much to alleviate any concerns that the phrase moral certainty might be misunderstood in the abstract." The trial court did just that, by saying that jurors must be convinced of Victor's guilt "after full, fair and impartial consideration of all the evidence", and that their determination of guilt must be "governed solely by the evidence introduced," not by "speculation, conjectures, or inferences not supported by the evidence."

Once again, O'Connor said the Court did not countenance inclusion of the words "moral certainty" in a reasonable doubt charge, but felt there was no "reasonable likelihood" the charge resulted in *Winship* error.

STRONG PROBABILITIES

Victor argued that reference to "strong probabilities" lowered the prosecution's burden of proof. Citing *Dunbar v. United States*, 156 U.S. 185, 199, 15 S.Ct. 325, 330, 39 L.Ed. 390 (1895), which upheld a nearly identical instruction, O'Connor said that the context of the entire sentence explained that "probabilities" must be so strong as to exclude a "reasonable doubt".

JUSTICE KENNEDY

While he concurred "fully" in the Court's opinion, Justice Kennedy wrote separately to say that some of the phrases used in both cases "confuse far more than they clarify."

He found the California phrase "moral evidence...the most troubling...and quite indefensible," although not fatal to the conviction. He "could not understand" why the term should be used at all when jurors perform a difficult task, even with clear instructions. "The inclusion of words so malleable, because so obscure, might in other circumstances have put the whole instruction at risk."

JUSTICE GINSBURG

In her concurrence to the judgment, Justice Ginsburg said that two other portions of the instruction in Victor's case were "[s]imilarly unhelpful": 1) the "hesitate to act" formulation, which has been criticized by a committee of federal judges as a misplaced analogy because most of the decisions made in personal lives "generally involve a very heavy element of uncertainty and risk-taking ...wholly unlike the decisions jurors ought to make in criminal cases." Federal Judicial Center, Pattern Criminal Jury Instructions 18-19 (1987) (commentary on instruction 21).

"Even less enlightening" than the former is the passage of the instruction which told the jury that strong probabilities could be used to find an accused guilty, as long as those probabilities excluded any "reasonable doubt" of his guilt. "Jury comprehension is scarcely advanced when a court 'defines' reasonable doubt as 'doubt...that is reasonable.'"

Citing these doubts, Ginsburg mentioned that some courts questioned the need for a reasonable doubt instruction, but said that the "argument for defining the concept is strong" because "the words 'beyond a reasonable doubt' are not self-defining for jurors."

Ginsburg cited the Federal Judicial Center "reasonable doubt" instruction as one which clearly explained the term and "surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensively", but said that because the Supreme Court has no supervisory power over state courts, and because there was no "reasonable likelihood" that jurors misunderstood the instruction, she concurred.

JUSTICES BLACKMUN AND SOUTER

Justice Blackmun was joined Justice Souter in concurring in part and dissenting in part. Souter did not concur in Part II, in which Blackmun restated his belief that the death penalty is unconstitutionally applied. *See Callins v. Collins, supra* (Blackmun, J., dissenting).

Blackmun said that while the Court purported to follow *Cage, supra*, the only difference he found in the *Cage* instruction and the one given in *Victor* was that the Victor instruction did not include the words "grave uncertainty." The majority's assertion that the Victor "substantial doubt" has a meaning different from that found in *Cage* "fall[s] under its own logic."

The majority conceded that equating reasonable doubt with substantial doubt was "somewhat problematic," but said that the jury likely had not interpreted the instruction in this manner because of other language. However, the *Cage* instruction also included the "substantial doubt" language and was found to violate due process because the words "substantial" and "grave commonly" suggest a higher degree of guilt than is required" for acquittal because of a reasonable doubt as to guilt. "In short, the majority's speculation....is unfounded and is foreclosed by *Cage* itself."

The majority's "final effort" to distinguish *Cage* by citing the alternate definition ("hesitate to act") used in the instruction also falls. Justice Blackmun agreed with Justice Ginsburg that this language was "far from helpful" and may have made matters worse by a bad analogy. However, even assuming the alternate definition was helpful, "existence of an 'alternative' and accurate definition" elsewhere in the instruction does not render the instruction constitutional if it is "reasonably likely" the jury relied on the faulty definition in its decision.

Further, "[i]t seems that a central purpose of the instruction is to minimize the jury's sense of responsibility for the conviction of those who may be innocent." Viewed as a whole, the instruction seems to assure jurors that although they may be mistaken as to guilt, they are to make their decision on "strong probabilities," and only if a "substantial doubt" remains should they acquit the defendant.

The qualification of "strong probabilities" as those "strong enough to exclude any doubt of [the defendant's] guilt that is reasonable" falls because that doubt is defined as "substantial doubt" in the **very next sentence**.

Finally, in *Cage*, the Court disapproved of the use of the phrase "moral certainty" because of the real possibility that jurors could be led reasonably to believe they could base their decision on moral standards of emotion in addition to or instead of the evidence presented. This risk is "particularly high in cases where the defendant is alleged to have committed a repugnant or brutal crime."

Although some of the same language was used in Sandoval, **all** of the misleading language in Victor is "mutually reinforcing, both overstating the degree of doubt necessary to acquit and understating the degree of certainty required to convict." Thus, there is a "reasonable likelihood" that Victor's jury believed the prosecution had a lesser burden of proof and that it required less certainty than a reasonable doubt in order to convict.

Lastly, although Blackmun concurred in the judgment in Sandoval, because of his view that the "death penalty cannot be imposed fairly within the constraints of our Constitution", he would vacate both

death sentences, even if he did not believe the Victor's conviction was unconstitutional.

Burden v. Zant
114 S.Ct. 654 (1994)

After the Supreme Court remanded this case to the Eleventh Circuit because the courts below had failed to give a state court determination on conflict of interest (Burden's pretrial counsel had represented the key prosecution witness against him and obtained immunity from prosecution) a presumption of correctness, the Eleventh Circuit found that there was no need for a federal court to presume the correctness of the finding because it "had not been adequately developed" in the state proceeding, the panel upheld its denial of relief on that ground. 975 F.2d 771, 774-775 (11th Cir. 1992) (trial court's conclusion in an administrative report to the Georgia Supreme Court was a "personal impression" on an issue not subject to significant dispute at trial).

The dissent to the panel opinion maintained that the district court had made no such finding and that the other members had overlooked strong record evidence that indeed some deal for immunity had been struck.

In a per curiam opinion, the Supreme Court said it was "convinced" the dissenter was correct and that reversal was warranted so that the Eleventh Circuit, or upon its order, the district court, could determine whether there was "an actual conflict of interest adversely affect[ing] counsel's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980).

Schiro v. Farley
114 S.Ct. 783 (1994)

The Double Jeopardy Clause does not require vacation of Thomas Schiro's death sentence.

At the time Schiro was convicted of murder in the commission of rape, Indiana law defined murder as "knowingly or intentionally causing the death of another human being", killing "another human being while committing [a number of crimes including] rape and criminal deviate conduct. Schiro was charged on three counts of murder, each of them under a different definition. When the jury returned its verdict, it found Schiro guilty under County II (murder in the commission of rape) and left the other verdict forms blank. The judge overrode the jury's recommendation of a sentence of less than death. After a remand for written findings, the trial court found the aggravating circumstance that Schiro had intentionally killed his victim while committing rape. *Id.*, at 787.

Schiro argued on direct appeal and in state and federal post-conviction that because the jury had not found that he intentionally killed the victim (Count I), that fact operated as an acquittal of intentional murder, and therefore, the Double Jeopardy Clause prohibited use of the intentional murder aggravating circumstance. Neither the Indiana Supreme Court nor the federal courts agreed with Schiro's contention. *Id.*, at 788.

TEAGUE ANALYSIS

The State of Indiana argued that granting relief to Schiro would require application of a new rule, in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). While states are free to rely on any legal argument in support of the judgment below. See *Dandridge v. Williams*, 397 U.S. 471, 475, n.6, 90 S.Ct. 1153, 1157, n. 6, 25 L.Ed.2d 491 (1970), the state did not argue *Teague* in its brief in opposition to the cert petition. Since states can waive a *Teague* defense, see *Godinez v. Moran*, 113 S.Ct. 2680, 2685, n. 8, 125 L.Ed.2d 321 (1993), and because the propriety of reaching the merits of a claim is "an important consideration" in the Court's grant of cert, "the State's omission of any *Teague* defense at the petition stage is significant." Thus, the Court did not, in this case, use its discretion and discuss *Teague's* applicability.

DOUBLE JEOPARDY

Justice O'Connor said that while the Court's Double Jeopardy cases have established that "the primary evil to be guarded against is successive prosecutions." See *United States v. DiFrancesco*, 449 U.S. 117, 132, 101 S.Ct. 426, 435, 66 L.Ed.2d 328 (1980), none have established the same precedent regarding a sentencing proceeding. Citing cases in which a **second** sentencing proceeding was found constitutional, O'Connor said that if that is the case, the majority "fail[s] to see how an initial sentencing proceeding could do so."

Use of prior convictions to enhance sentences for subsequent convictions has also been found constitutional, even if it means that in a certain sense, a sentencing hearing relitigates conduct for which a defendant was previously tried. *Spencer v. Texas*, 385 U.S. 554, 560, 87 S.Ct. 648, 651-652, 17 L.Ed.2d 606 (1967).

The decision in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) (when a person is not sentenced to death and the sentence is overturned, he cannot, on resentencing, be liable for the death penalty) is not contradictory. Schiro's case "is manifestly different." The state did not reprosecute Schiro for intentional murder, nor did he undergo a second sentencing phase. The state is entitled to "one fair opportunity" to prosecute a defendant, *Bullington, supra*, at 446, 101 S.Ct. at 1862. That opportunity extends to both guilt and **penalty** phase proceedings.

COLLATERAL ESTOPPEL

Schiro said the doctrine of collateral estoppel (when an issue has been litigated to a valid final judgment, that issue cannot again be litigated by the same parties in a future lawsuit) applied because the jury acquitted of him of "intentional murder," which in turn, prevented the trial court from finding the existence of the intentional murder in the course of rape aggravating circumstance. The court did not address this claim because Schiro did not meet his burden of establish the factual predicate--that "an issue of ultimate fact has once been determined."

The jury could have based its verdict on a fact other than an intent to kill. It was not told to return verdicts on all counts listed on the verdict sheets. Indeed, the record indicates the jury may have believed it could only return one verdict. The defense guilt phase closing argument told the jury that it would "have to go back there and try to figure out which **one** of eight or ten verdicts" to return. The prosecution told the verdict that it could return only one verdict. *Id.* at 791.

The dissent's inference that the only way the jury could have expressed its conclusion that Schiro was innocent of intentional murder was to leave that verdict form blank fails to take into account the fact that the jury could have reached a

verdict on murder while committing rape without ever deliberating on whether the murder was intentional. In other words, it was not clear to the jury that it needed to consider each count independently. *Id.*

Further, the instructions could have led the jury to believe that it must find a knowing and intentional killing in order to convict Schiro on any of the three counts of murder.

Lastly, the record indicates that intent to kill was not a significant issue in the case. The defense primarily tried to prove that Schiro was insane and did not dispute that he had committed the crime. Neither defense counsel nor the defense witnesses discussed the issue of intent to kill. Schiro's own admission showed that he decided to kill the victim after she tried to escape and he realized she would go to the police. The physical evidence itself suggested a deliberate murder.

BLACKMUN DISSENT

Although he joined Justice Stevens' dissenting opinion, Justice Blackmun wrote a separate noting his belief that *Bullington, supra* provided a basis to vacate Schiro's death sentence.

The *Bullington's* essential holding was that capital sentencing proceedings can constitute jeopardy under the Double Jeopardy Clause because the bifurcated sentencing proceeding has "the hallmarks of the trial on guilt or innocence"...where the prosecution must provide proof beyond a reasonable doubt before a defendant can be sentenced to death. Therefore, a death penalty punishment phase is a trial which places a defendant in jeopardy of being sentenced to death. *Bullington, supra*, at 439, 101 S.Ct. at 1858, 1860.

Schiro's sentencing phase is indistinguishable from the one conducted in *Bullington*. "The 'trial-like' nature of Schiro's capital sentencing proceeding and the trauma he necessarily underwent in defending against the sentence of death, are directly analogous to guilt-phase proceedings and thus bring th Double Jeopardy Clause into play." *Schiro, supra* at 793. Thus, the jury's failure to convict Schiro of intentional murder implies an acquittal under the Double Jeopardy Clause: Schiro could not have been reprosecuted for intentional murder; the aggravator required the prosecution to prove the identical elements of that count of murder, on which the jury had already acquitted Schiro.

JUSTICE STEVENS DISSENT

While Justice Stevens agreed that the gruesome character of Schiro's crime was significant, he reiterated that despite hearing that evidence, the jury unanimously agreed that Schiro should not be sentenced to death. Evidence about Schiro's unusual personality, drug and alcohol addiction, history of mental illness, testimony about Schiro's attachment to a mannequin and other incidents supporting diminished capacity and the details of his confessions apparently convinced the jury that his mental state did not represent that of an intentional murderer.

The only way Schiro was sentenced to death was by the trial court's use of his finding that Schiro was guilty of intentional murder, even though the jury had found otherwise. Although judges can override jury verdicts and sentence defendants to death, Double Jeopardy applies if the judge bases a death sentence on a factual predicate the jury did not find.

None of its three reasons: 1) Schiro's confession; 2) the instruction finding an intent to kill or 3) uncertainty as to whether the jury believed it could return more than one verdict justifies the majority's opinion.

Schiro's confession, when taken with the record as a whole, is "fully consistent with the conclusion that the jury rejected" the prosecutor's proof on intent. The instruction which told the jury that in order to sustain the murder conviction, the prosecutor had to have proved intent referred only to Count I (knowing and intentional killing of a human being). No Indiana Supreme Court opinion construed that instruction as applicable to Counts II and III.

The majority's speculation that the jury could have believed it could return more than one verdict is unfounded, especially in light of the trial court's instructions that the jury foreman must sign and date the verdict(s) on which the jury agreed. Defense counsel's remark to one verdict is inapplicable because he later suggested that jurors first consider the issue of Schiro's insanity, "because depending on that, *you may just stop there or go on.*" *Id.*, at 797 (emphasis in original).

If the prosecutor's statement meant that the jury could return only one of the ten forms given them, he "blatantly misstated Indiana law." *Id.*

Lastly, the doctrine of collateral estoppel should have precluded the state from attempting to prove intentional murder at Schiro's penalty phase proceeding. The majority's decision that collateral estoppel does not apply "amounts to a rejection of [that] rule in capital sentencing proceedings."

Caspari v. Bohlen
113 S.Ct. ___ (Feb. 23, 1994)

The Double Jeopardy Clause does not prohibit a state from twice subjecting a defendant to a non-capital sentence enhancement proceeding (Persistent Felony Offender proceedings in Kentucky).

In 1981, Christopher Bohlen was convicted on three counts of first-degree robbery; convictions which carried terms of not less than ten nor more than thirty years or life in prison. Under Missouri law, even though the jury sentences a person, if the judge finds the defendant to be a persistent offender (a person who has pled or been found guilty of two or more felonies committed at different times), the judge sets the penalty without the jury's advice. For a defendant who has committed a Class A felony (*i.e.*, robbery in Missouri), the authorized sentencing range is not altered. The judge sentenced Bohlen to three consecutive fifteen year terms. Finding that no proof of the prior convictions had been given, the state court reversed Bohlen's sentences. *State v. Bohlen*, 670 S.W.2d 119 (1984).

On remand, evidence of four prior felony convictions were introduced, over Bohlen's objections, on Double Jeopardy grounds. The Missouri Court of Appeals affirmed his sentence, and the denial of his state post-conviction actions. *State v. Bohlen*, 698 S.W.2d 577, 578 (1985); *Bohlen v. State*, 743 S.W.2d 425 (1987).

After the district court denied Bohlen's habeas petition, the Eighth Circuit reversed, saying that "the persistent offender sentenc[e] enhancement procedure in Missouri has protections similar to those in the capital sentencing hearing in *Bullington* [*v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)]." The Eighth Circuit also said that it was not announcing a new rule of law, and therefore, did not violate *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Justice O'Connor, writing for the 8 member majority, and reversing the Eighth Circuit, first dealt with the question of whether addressing the *Teague* issue had been raised in the cert petition. She

said that although the primary question presented in the cert was whether the Double Jeopardy Clause applied to successive non-capital sentence enhancement proceedings, the *Teague* issue was "a subsidiary question fairly included in the question presented", because "a threshold question presented in every habeas case..is whether the court is obligated to apply the *Teague* rule to the defendant's claim." Nonretroactivity is non-jurisdictional in nature, "federal courts must raise and decide the issue sua sponte", but if a state does argue that *Teague* attaches, the court must apply a *Teague* analysis before addressing the merits of the claim. In Bohlen's case, Missouri argued *Teague*, therefore, it must be addressed.

Bohlen's conviction and sentence became final on January 2, 1986. At that time, "it was well established that there is no double jeopardy bar to the use of prior convictions in sentencing a persistent offender."

Bohlen said that Missouri's failure to prove his persistent offender status at his first sentencing acted as an acquittal and, thus, *Bullington*, *supra* and *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) attached.

The majority felt the reasoning in both those cases was based "largely on the unique circumstances of a capital sentencing proceeding." *Bullington* itself distinguished prior cases because "the sentencing procedures for capital cases instituted after the decision in *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 53 L.Ed.2d 346 (1972)] are unique."

Although the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) standard for evaluating claims of ineffective assistance of counsel was found applicable to both trials and capital sentencing, that decision was based on the fact that counsel's role in a capital sentencing proceeding is comparable to that of his role at trial.

In other words, no case before Bohlen applied the Double Jeopardy Clause to noncapital sentencing proceedings; therefore, at the time Bohlen's conviction became final, "reasonable minds" could have differed over its application to the same.

Neither *Teague* exception applies to Bohlen: 1) the new rule does not place certain kinds of conduct beyond the power of the criminal law to proscribe; [Bohlen is still subject to his imprisonment on the robbery convictions, whether he is a persistent felon or not] and 2) the new rule is not a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding [either a defendant has the requisite number of convictions to be found a persistent offender or he does not].

In dissent, Justice Stevens wrote that because the nonretroactivity principle announced in *Teague* is "a judge-made defense that can be waived" and the court had "fashioned harsh rules regarding waiver and claim forfeiture to defeat substantial constitutional claims" and applied them to defendants, "we should hold the warden to the same standard."

He also wrote that it was not necessary for the court even to address the *Teague* issue in deciding the case. Stevens felt that under Missouri law, courts must make findings of fact that persistent offender status applies to a defendant after the prosecutor makes a showing of proof beyond a reasonable doubt. That status subjects a defendant to harsher sentences and deprives him of jury sentencing. Thus, sentence enhancement has the same legal effect as conviction of a separate offense. Missouri law acknowledges this fact by requiring that the proof be beyond a reasonable doubt; thus, "[a] defendant opposing such an enhancement undoubtedly has a constitutional right to counsel and to the basic procedural protections the Due Process Clause affords."

Delo v. Lashley
113 S.Ct. 1222 (1993)

The United States Constitution does not require that state courts give instructions on mitigating circumstances when no evidence is offered to support them.

At his trial for the murder and robbery of his foster mother, Frederick Lashley's attorney requested that a Missouri trial court instruct the jury on the mitigating circumstance that Lashley had no significant history of prior criminal activity. Defense counsel sought the instruction even though she had repeatedly said that she would not try to show Lashley lacked a criminal history. Counsel also moved to prohibit the prosecutor from cross-examining defense witnesses about Lashley's juvenile history. Although the trial court did not expressly rule on the latter motion, it said that Lashley would not be entitled to an instruction on the mitigator without supporting evidence.

At trial, the attorneys presented no proof that Lashley lacked a significant criminal history; the prosecutor also did not submit any evidence in support of the mitigator. After the Missouri Supreme Court and the federal district court agreed, a divided panel of the Eighth Circuit granted relief because it felt the judge's ruling violated *Lockett v. Ohio*, 438 U.S. 586, 98 s.Ct. 2954, 57 L.Ed.2d 973 (1978).

In a *per curiam* opinion, the Supreme Court felt that the panel "plainly misread" precedent. *Lockett* itself said that a sentencer must be able to consider any mitigation "*that the defense proffers* as a basis for a sentence less than death." *Lockett, supra*, 98 S.ct. at 2965 (emphasis added). Eleven years later, *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 1 (1982), echoed that language: "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence *introduced by a defendant*" (emphasis added).

Furthermore, defendants are better able than the state to make provide the evidence. Prosecutors may have access to records of crimes within its own jurisdiction, but none to those crimes committed in others. Defendants, on the other, hand, have access to witnesses who could testify as to the lack of a significant criminal record. Both parties could introduce a presentence report.

The majority disagreed with the dissent that the case was not about *Lockett, supra*, but about the presumption of innocence because, as it said in *Herrera v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993), the presumption of innocence disappears after a defendant is found guilty of a crime. Although the court had not previously considered whether a presumption that the defendant is innocent of other crimes attaches at the sentencing phase, assuming that it did, Lashley was still not entitled to such a presumption.

Such an "instruction would have been constitutionally required only if the circumstances created a genuine risk that the jury would conclude, from factors other than the State's evidence, that the defendant had committed other crimes" *Lashley, supra* at 1226, citing *Kentucky v. Whorton*, 441 U.S. 786, 789, 99 S.Ct. 2088, 2090, 60 L.Ed.2d 640 (1979) (per curiam). Lashley had not contended that such circumstances existed; therefore, "[n]othing disturbed the presumption that [he] was a first offender" *Id.*

Justice Stevens, joined by Justice Blackmun in dissent, wrote that the majority had acknowledged that a defendant's assertion of innocence of other crimes **would** support an instruction on lack of criminal history; however, it failed to recognize that the presumption of innocence also requires such an instruction. When the record contained no evidence of a prior record of criminal activity, the jury should be so instructed.

This was even more important for Lashley, because of his age (17 at the time of the crime), the fact that he was on trial for his life and because the trial court had told counsel that if she insisted on offering evidence that Lashley had no criminal record, he would permit the state to offer evidence that Lashley had committed several juvenile offenses--a ruling "flatly contrary to state law." *Lashley, supra* at 1229, citing *Lashley v. Armontrout*, 957 F.2d 1495, 1500, n.1 (8th Cir. 1992).

Stevens said that "[w]hen the trial record reveals no prior criminal history at all the presumption [of innocence] serves as 'a prima facie case, and in that sense it is, temporarily, the substitute or equivalent for evidence'" *Lashley, supra*, at 1229, citing J. Thayer, A Preliminary Treatise on Evidence at the Common Law, Appendix B, p. 575 (1898).

The court's suggestion that a defendant is better able to make a proffer of such evidence was found "inconsistent with our refusal to allow the capital sentencing process to burden the defendant's Fifth Amendment privilege against self-incrimination." *Lashley, supra*, at 1230. Lastly, Stevens believed such an instruction was "entirely appropriate when a state seeks to take the life of a young person." *Lashley, supra*, at 1231.

Brecht v. Abrahamson 113 S.Ct. 1710 (1993)

The *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), standard of "harmless beyond a reasonable doubt" does not apply when determining, on collateral review, whether the prosecution's use for impeachment purposes of a defendant's post-*Miranda* silence (*Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1986) error) violates due process.

Todd Brecht was convicted of the murder of his brother-in-law. At trial, the prosecution asked whether Brecht had told anyone at any time before the trial that the shooting was an accident. After the Wisconsin Supreme Court reinstated Brecht's conviction, on habeas, the district court agreed that the state's use of Brecht's post-*Miranda* silence violated due process, but disagreed that the error was harmless. The Seventh Circuit reversed, saying although the state's use of Brecht's silence was error, the *Chapman* harmless error standard did not apply on federal habeas. The Seven-th Circuit said "given the many more, and entirely proper, references to [petitioner's] silence preceding arraignment," he could not contend that use of his post-*Miranda* silence was substantial and injurious.

Justice Rehnquist, writing for Justices Stevens, Scalia, Kennedy and Thomas, said Brecht proved the state had crossed the line, and thus, error had occurred. However, because *Doyle* error is subject to a harmless error standard, and *Chapman* had been applied in other federal habeas cases, the Supreme Court had never addressed whether *Chapman* applied in the *Doyle* error collateral review context.

"Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Brecht*, at 1721. However, granting habeas relief because there is a "reasonable possibility" that trial error contributed to the verdict is also wrong. Therefore, a "less onerous standard" of constitutional error should be applied on habeas review. *Kotteakos* fits that requirement.

"Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trail error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, at 1722. *Kotteakos* is thus better suited to collateral review and "more likely" to promote finality, comity and federalism.

Although the error which occurred in Brecht's trial ultimately did not "substantially influence the verdict", Rehnquist did admit that certain cases with "deliberate and especially egregious error" either by itself or combined with a pattern of prosecutorial misconduct, may require granting habeas relief, even if the error "did not substantially influence the jury's verdict." *Id.*, n. 9.

Withrow v. Williams 112 S.Ct. (1993)

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (Fourth Amendment claims cannot be litigated on federal habeas if a full and fair state hearing was held) does not apply to state court *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966) claims.

Justice Souter, writing for Justices White, Blackmun, Stevens and Kennedy, said that *Stone, supra* could not apply because while *Miranda* may be a prophylactic rule, it nonetheless "safeguards 'a fundamental **trial** right,'" unlike *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), on which *Stone, supra*, was based. Secondly, the right served by *Miranda* cannot be "divorced from the correct ascertainment of guilt." Lastly, and once again emphasizing the direction in which the court is going, eliminating federal review of *Miranda* claims "would not significantly benefit the federal courts in the exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way." *Withrow, supra*, at 1754, and indeed, may only cause *Miranda*-type issues to be recast on Fourteenth Amendment due process grounds.

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

Justice O'Connor and Chief Justice Rehnquist dissented from that part of the court's decision which relied on equity and judicial administration.

Once again, words were written about the rise in the number of habeas petitions (over 12,000 in 1990 according to the Administrative Office of the United States Courts), and about finality. "It goes without saying that, at some point, judicial proceedings must draw to a close and the matter deemed conclusively resolved; no society can afford forever to question the correctness of its every judgment." *Withrow, supra*, at 1756.

Most importantly, O'Connor wrote that not only could exclusion of evidence deprive a jury of probative and sometimes dispositive evidence, but also the "truth-finding process" is "deflected" and the guilty are "often freed." When that happens,

> all of society suffers: The executive suffers because the police lose their suspect and the prosecutor the case; the judiciary suffers because it processes are diverted from the central mission of ascertaining the truth; and society suffers because the populace again finds a guilty and potentially dangerous person in

its midst, solely because a police officer bungled.
Id., at 1758.

That cost may be acceptable when a state court reviews the case, but it is not when the case reaches federal habeas because the penalty of exclusion "comes too late to produce a noticeable deterrent effect." *Id.*, quoting *Stone*, *supra*, 96 S.Ct. at 3051.

SCALIA AND THOMAS CONCUR IN PART AND DISSENT IN PART

Justice Scalia wrote that *Stone v. Powell* should apply to **all** habeas corpus cases because

> [p]rior opportunity to litigate an issue should be an important equitable consideration in **any** habeas case, and should ordinarily preclude the court from reaching the merits of a claim, unless it goes to the fairness of the trial process or to the accuracy of the ultimate result.
> *Id.*, at 1768.

In a footnote to the majority opinion, Justice Souter addressed Scalia's dissent, by saying that his reasoning went beyond the question asked in the cert petition. It is interesting to note that the cert petition in *Caspari v. Bohlen*, *supra* did not address whether *Teague v. Lane*, 109 S.Ct. 1060 (1989) applied to *Bullington v. Missouri* claims, but the Supreme Court decided that question anyway.

Sullivan v. Louisiana
113 S.Ct. 2078 (1993)

A constitutionally deficient reasonable doubt instruction can never be harmless error.

Justice Scalia wrote for a unanimous court that the Sixth Amendment right to trial by jury fundamental to the American scheme of justice is related to the defendant's Fifth Amendment that the jury decide his guilt "beyond a reasonable doubt".

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court divided federal constitutional errors into two classes: 1) those which would not require reversal if the error did not contribute to the verdict; and 2) those errors which will always invalidate a conviction. Thus, because harmless error review looks at the basis on which the jury actually came to a verdict, there must necessarily **be** a verdict.

In cases such as Sullivan's, "there has been no jury verdict within the meaning of the Sixth Amendment" because when the "essential connection" to the BRD fact-finding consists of a misdescription of that burden of proof, all the jury's findings are vitiated. Thus, a reviewing court may only engage in speculation. When that happens, "the wrong entity [the appellate court] judge[s] the defendant guilty. *Sullivan, supra*, at 2082, quoting *Rose v. Clark*, 478 U.S. 570, 580, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986).

Lastly, Scalia said, even examining the beyond a reasonable doubt error another way, it infects the very **structure** of the trial. Thus, the verdict cannot stand.

REHNQUIST CONCURRENCE

In concurrence, Chief Justice Rehnquist wrote the court had distinguished cases in which it found jury instructions which created an unconstitutional presumption regarding an element of the offense subject to harmless error analysis. *See Rose v. Clark*, *supra*; *Connecticut v. Johnson*, 460 U.S. 73, 96-97, 103 S.Ct. 969, 983, 74 L.Ed.2d 823 (1983).

Nevertheless, even though he had lingering doubts that because of the similarities in *Sullivan* and *Rose*, because juries normally do not make explicit fact-findings *Sullivan* would be amenable to harmless error analysis, he concurred.

Gilmore v. Taylor
113 S.Ct. 2112 (1993)

Once again, the Supreme Court denies, on the basis of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) the grant of a petitioner's habeas.

Kevin Taylor had argued to an Illinois jury that he was acting with sudden and intense passion when he killed his former wife's live-in boyfriend, and, thus, should be convicted of voluntary manslaughter. The jury convicted him of murder. A panel of the Seventh Circuit Court of Appeals granted Taylor's habeas petition on the basis of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), which said that Illinois pattern jury instructions on murder and voluntary manslaughter were unconstitutional because they allowed a jury to return a murder verdict without considering whether the defendant was in such a mental state that he should instead have been sentenced to voluntary manslaughter.

Justice Rehnquist, writing for the usual majority, said that because Taylor's sentence was final, *i.e.*, his petition for cert on direct appeal had been denied, or the time for filing had tolled, in 1990, he could not take advantage of the relief found in *Falconer, supra*.

Rehnquist said the panel in *Falconer* was incorrect in deciding that *Falconer* was based on the precedent found in *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 109 L.Ed.2d 316 (1990) and *Connecticut v. Johnson*, 460 U.S. 73. 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). As Rehnquist pointed out, *Boyde* was a capital case, which requires greater accuracy and fact-finding than non-capital cases. In fact, in the non-capital context, the Supreme Court had held that instructions which "contain errors of state law may not form the basis for federal habeas relief." *Taylor*, at 2117, quoting *Estelle v. McGuire*, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Furthermore, the *Boyde* standard is a reasonable likelihood of jury application of the instruction in a manner preventing consideration of constitutionally relevant evidence, a standard which cannot be found in non-capital cases.

Connecticut v. Johnson, *supra*, on the other hand, dealt with whether *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (constitutional error occurs when jury could have "reasonably concluded" instructions created a presumption of guilt) error can be subject to a harmless error analysis. Rehnquist found those cases related to *In re Winship*, while the "most" that could be said of the instructions given in Taylor's trial was that there may have been a risk that the jury would fail to consider evidence relating to an affirmative defense, to which *Winship* does not apply.

The majority found that if it applied the rule Taylor propounded: that the right to present a defense includes the right to have the jury consider it, the *Estelle v. McGuire* rule would become a "nullity."

Lastly, the majority said that the new rule did not apply under either *Teague* exception: 1) it did not decriminalize a behavior (even voluntary murder is a criminal behavior; and 2) the new rule was not "implicit in the concept of ordered liberty."

O'CONNOR CONCURRENCE IN JUDGMENT

Justice O'Connor, joined by Justice White, wrote separately that because she would not decide the merits of the rule, nor would she construe cases as narrowly as the court did, she concurred only in the judgment.

Citing *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 1870, 100 L.Ed.2d 384 (1988) (constitutional error occurs when there is a "substantial probability" instructions precluded consideration of constitutionally relevant evidence) and *Sandstrom, supra*, O'Connor said that prior to the *Boyde, supra*, clarification, the court had not been totally consistent in its review of jury instructions.

O'Connor felt the question was not whether *Boyde* was a new rule, because it is not. The question, rather, is whether "reasonable jurists" could disagree over whether the instruction created a reasonable likelihood that the jury did not consider Taylor's affirmative defense. The Seventh Circuit had found that the cases rising from *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), as standing for the proposition that any instruction which leads the jury to ignore exculpatory evidence in finding a defendant guilty of murder violates due process. It found meaningless the distinction between elements of an offense and affirmative defenses to that offense.

Two Supreme Court cases found that in some circumstances, the distinction is not "meaningless." In *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), it was found that due process did not require the state to prove the absence of extreme emotional disturbance beyond a reasonable doubt; instead the burden of proof could be placed on the defendant. *Martin v. Ohio*, 480 U.S. 288, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), affirmed the holding and rejected the petitioner's claim that requiring her to prove self-defense by a preponderance of the evidence shifted to her the burden of disproving elements of the crime with which she was charged. Thus, the two cases confirm that the rule promulgated by the Seventh Circuit went beyond anything the Court had seen as a constitutional requirement.

BLACKMUN DISSENT

Justice Blackmun argued that if even if the rule Taylor requested were "new", he felt it would apply under the second *Teague* exception. While Illinois law defined murder and voluntary manslaughter as two separate crimes, albeit with two common elements (defendant had to have caused death of victim; and 2) defendant intended to kill or cause great bodily harm to the victim), the distinction was that voluntary manslaughter required a "sudden and intense passion resulting from serious provocation" or an unreasonable (but honest) belief that deadly force was justified to prevent defendant's imminent death or great bodily harm. Therefore, when a person was found guilty of voluntary manslaughter, he was **innocent** of murder.

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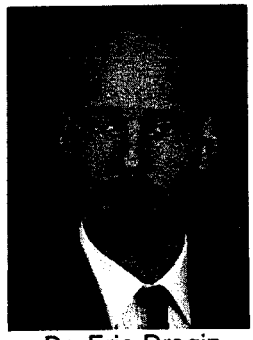

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District Court Order: Roadblocks

GRANT DISTRICT COURT

COMMONWEALTH OF KENTUCKY, PLAINTIFF

VS. JOHN D. SIMS, DEFENDANT

FINDINGS OF FACTS

This matter comes before the court as a suppression hearing under Criminal Rule 9.78, in which the defendant moves to exclude all evidence obtained against him as a result of the roadblock stopping as he alleges said stopping was an improper search and seizure prohibited under the Fourth Amendment of the U.S. Constitution.

Further the defendant objects to the admission into evidence of the results of a Urine test taken from the defendant after he was stopped at a roadblock on September 5, 1992 near the intersection of Highways 330 and 36 near the community of Cordova in Grant County.

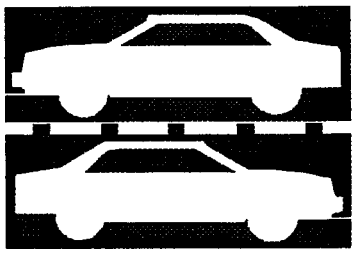
The suppression hearing held December 2, 1992, revealed that the defendant was driving his automobile eastbound on Kentucky Highway 36 at about 11:00 p.m. when he was stopped at a roadblock operated by the Kentucky State Police. As a result of the stopping the defendant was directed to pull his vehicle off the traveled portion of Hwy. 36, onto a private gravel parking lot on Hwy. 330, as there was not sufficient right of way or shoulder to utilize on Hwy. 36. Highway 330 generally bisects Hwy. 36 in a north-south direction.

The Sims vehicle was the last of 10 to 20 vehicles that were stopped at this roadblock. The roadblock had been ordered/authorized by KSP Sgt. Taylor, a half hour before the stopping of the defendant. All cars coming from either direction were stopped.

The officer testified that upon inspection of the defendant's vehicle they "smelled marijuana" upon the passenger Wright and "smelled alcohol and marijuana" on the defendant Sims. The defendant was subjected to a Preliminary Breath Test, and the result was negative giving no indication of the use of any significant amount of alcohol. No improper driving was observed, the defendant passed the Horizontal Gaze Nastigmus test, but in the officer's opinion failed the Field Sobriety Test (walk and turn test).

Subsequent to the PBT test the defendant Sims was given a blood test which registered a blood alcohol level of .01%, a level that under Kentucky law is presumed *not* to be sufficient for intoxication under KRS 189A.520(3).

The police subsequently searched the vehicle and discovered a marijuana cigarette, a pair of pliers and a "roach clip." (Neither the pliers or the "roach clip" revealed any trace of marijuana.) The defendant was then charged with DUI and possession of marijuana. A small quantity of marijuana was also found on the person of the passenger, Mr. Timothy Wright.



Are the Urine Test Results Admissible?

At the police station the defendant Sims was subjected to a urine test with an officer present, but during which only one sample of urine was taken in violation of the Administrative Regulations that require two urine samples be taken thirty minutes apart. (See: 18 Ky.R. 565, Am. 1132; eff. 11-8-91).

(KSP crime lab technicians have testified in the Grant District court on a number of occasions that a urine test by its nature does not necessarily indicate recent "drug" use, since it is possible that the "drug" use occurred hours or even days prior to the taking of the sample, as some substances remain in the urine long after they have been passed from the blood. Therefore, proof of a "drug" in the urine will not necessarily prove intoxication or that the defendant was "under the influence" of said substance.)

Judge Stan Billingsley

This court has previously ruled that Administrative Regulations must be complied with if the urine test results are to be admitted into evidence against a defendant. The Commonwealth argues that the test should be admitted on the theory that the failure to take the second test only prevents an evaluation of whether or not the level of the suspected substance is "increasing or decreasing" in the defendant's body. But the Commonwealth has the burden of proof on the urine test, and the court finds that the failure to comply with the Administrative Regulations requiring two samples twenty minutes apart were not complied with.

The Kentucky Courts have held that Administrative Regulations, "*...properly adopted and filed have the full effect of the law and must be enforced.*" See, *Harrison's Sanitorium, Inc. v. Dept. of Health*, 417 S.W.2d 137 (1967) (Court of Appeals).

Therefore since the urine test does not comply with the Administrative Regulation for the administration of urine tests, it is defective and cannot be admitted into evidence.

Was the Roadblock Conducted in Compliance with the Fourth Amendment of the U.S. Constitution?

The Commonwealth cites two reasons for the implementation of the roadblock. The first reason cited was to look for a person believed to be driving a "...large pickup with cab lights..." who may have been involved in a domestic violence incident in Harrison County some four hours prior to the stopping of the defendant. This would be a *random* stop. The second justification for the roadblock was to check for violations of the DUI laws.

The first reason cited may well be subject to different standards than the second so this decision will first examine them separately.

Was this a random stop based on "articulable suspicion"?

Under the U.S. Supreme court case of *Terry v. Ohio*, 392 U.S. 1, 16, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968) a standard of "articulable suspicion" was clearly enunciated as the minimum level of justification to stop a person (including motorist) for questioning.

The Kentucky Criminal Law Manual, published by the Kentucky Justice Cabinet, Department of Criminal Justice Training, (Fifth Edition, 1990) at page 29, states seven factors that were mandated by *Terry v. Ohio*, "which might give an officer 'reasonable suspicion' to stop..." a person for questioning. Those factors are:

"1) The place (such as a high crime area);
2) The time (such as late at night);
3) Suspicious conduct (...sneaky conduct, etc.);
4) Recent report of crime in vicinity;
5) Resemblance of suspect to description of wanted criminal;
6) Tips from reliable informants; and
7) Officer's experience.

Even though one of these factors by itself may not be enough, combinations of them can justify a stop."

In applying those *Terry* standards to the facts of this case, we note that few of those seven factors apply to this stopping. Indeed, the hour was late. But it is difficult for this court to believe that "there was a *recent*"...report of a crime (four hours earlier) *"in the vicinity"* (the next county). It was after 11:00 p.m. but there were 10 to 20 other vehicles on that same road within the span on one half hour. It is difficult to say that there is anything "reasonably" suspicious about that. And the report of the crime was to the effect that the suspect was driving a *"large pickup* with cab lights." The defendant in this matter was driving an *automobile*. The scene of the alleged crime was in Harrison County at least ten miles form the roadblock site.

In applying these seven factors, we must note that "10 to 20" cars were stopped in this dragnet before the defendant, so there must not have been a very strong reason to cause the police to focus on any particular car. Indeed, the police testified that they did not witness anything unusual about the defendant's driving prior to his stopping.

If there clearly was insufficient articulable suspicion to stop one defendant on the basis of a "random" stop, it does not cure the 4th Amendment violation by bundling his seizure with twenty other motorists (who also did not exhibit any articulable suspicion of criminal behavior).

Based on these facts, the court finds that there was not an "articulable" or "reasonable suspicion" to justify the stopping of the Defendant on the basis of a *random* stop. We must therefore examine further to see if the *general* roadblock was justified.

Was this roadblock in compliance with *Delaware v. Prouse*?

The underlying message of *Delaware v. Prouse*, 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979) and the more recent U.S. Supreme Court decision in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), was that there could *not be unbridled discretion left to the police* in the planning and conduct of a roadblock.

In *Delaware v. Prouse* it was stated that roadblocks must not be "...subject to the discretion of the official in the field." Also it was said *"...standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed,* at least to some extent."

(The court finds nothing in the more recent roadblock case of *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), that affects the standards from *Delaware v. Prouse* cited herein above. *Sitz* basically deals with the *issue of "effectiveness"* of roadblocks and overrules *Delaware v. Prouse only on that issue.* But *Sitz* still upholds the necessity for neutral "guidelines' and in particular refers to "site selection" as being a decision that should not be left up to the officer in the field. *Sitz* specially refers to *Martinez v. Fuerte*, 428 U.S. at 559, which held that a:

> "...claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to *post-stop judicial review..."*
>
> (See also: *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982), 110 S.Ct. 1536, 108 L.Ed.2d 774 (1990).

In order to comply with these roadblock requirements the Kentucky State Police has adopted guidelines for the conduct of roadblocks. The KSP guidelines are embodied in a General Order dated Jan. 1, 1990, a copy of which is incorporated herein by reference as an exhibit to this finding. (This General Order was referred to in the hearing, but the copy used here has been provided by the Commonwealth at the request of the court.)

We must examine the facts of this case to determine if those minimal guidelines were complied with and whether or not they comply with the law.

The KSP General Order requires:

1. Notification of the appropriate post of the location and purpose of the checkpoint.
2. Must have prior supervisory approval.
3. Sufficient personnel must be utilized to adequately conduct the checkpoint effectively while insuring the safety of the officers and the motoring public.
4. Either a predetermined plan stopping only numerically selected motorists may be used when all motorists are not stopped.
5. There must be supervisory approval prior to the establishment of any non-emergency checkpoint.
6. If traffic congestion occurs or enforcement action requires, the officer may allow all cars to pass through the roadcheck (presumably until the congestion is alleviated).
7. Officers shall be in uniform and utilizing marked cars with flashing blue lights and emergency flashers operating. The police vehicles must be parked off the traveled portion of the roadway.
8. Checkpoints shall be established on straight and level highways with clear visibility in all directions for at least 500 feet during daylight hours and for at least 1000 feet visibility at night. At night at least two cruisers must be utilized.
9. Checkpoints shall only be established in locations which permit vehicles to be pulled completely off the roadway when the vehicle or occupant is the subject of an

enforcement action, private property shall never be used for this purpose.

10. The starting and ending times of the checkpoint operation shall be noted on the KSP-209 (time sheet) of any officer participating in the checkpoint along with the name of the supervisor who authorized the checkpoint.

11. Checkpoints shall not be conducted in inclement weather or on rain or ice slickened highways.

12. If at all possible, cautionary signs should be obtained and erected to warn oncoming motorists of the checkpoint.

13. All officers conducting checkpoints shall be courteous and professional.

The defendant argues that these general orders of the KSP are mandatory and that the roadblock should be found to be in violation of the 4th Amendment *if any* of the guidelines are ignored. The Commonwealth in essence argues that these are only guidelines and *substantial compliance* is all that is necessary.

The additional Commonwealth argument cites *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. 1983) for the proposition that if the Commonwealth merely shows that *all motorists were stopped*, then the roadblock meets 4th Amendment standards. This appears to be an overly broad reading of *Kinslow* as that case only states one issue and in no way says that the guidelines mentioned in the much later case of *Sitz* (1990) are not to be considered.

This court finds that a reading of *Martinez v. Fuerte* and *Delaware v. Prouse* lead this court to conclude that a judicial review of a roadblock is required and that if the court finds that "unbridled discretion" was left to officers in the field without reasonable and material compliance with the General Order of Jan. 1, 1990 and with relevant case law, then the court must find that the roadblock violates the 4th Amendment. *This court finds that in applying this test to a questioned roadblock it is possible that one or more of the KSP or judicial guidelines could be ignored and the roadblock might still pass constitutional muster* if the only discretion utilized by the field officers was reasonable under the exigent circumstances *and not unbridled or unconstrained.*

Important factors that must be considered in a judicial review, are:

1. The emergency necessity of the roadblock that might justify minor deviations from the guidelines.

2. The actual degree of involvement of police supervisor in formulating the necessity for a particular roadblock.

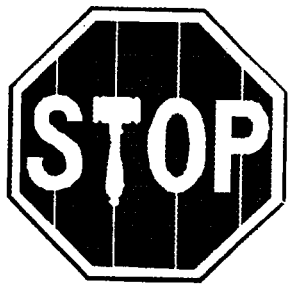
3. Advance planning and involvement by supervisory personnel with consideration of whether the person who authorized the roadblock is also the "officer in the field."

4. Consideration of the underlying reasons for the particular roadblock.

5. Substantial good faith compliance with the guidelines the police agency has imposed upon itself.

6. Substantial compliance with the standards as imposed by the Supreme Court and other case law.

7. Evaluation of the degree of discretion actually left to the officers in the field as to the location, timing, manner of operation, and prior planning of the roadblock.



A review of the facts of this case finds several areas where the guidelines were violated or ignored.

1. A view of the scene by the court (made at the request of the Commonwealth), confirms the testimony of a surveyor (Ron Wilhoite) employed by the Defendant to the effect that there was *not* 1000 feet of (nighttime) visibility in either direction along Hwy. 36, nor on Hwy. 330, from the point of the roadblock. (There wasn't even 500' in both directions.) See Defendant's exhibit *#3.*

2. The checkpoint was clearly *not* "established on a straight and level highway. The surveyors charts reveal that the stop was on a relatively steep hill (5% grade) and was on a curve. See Def.'s exhibit *#6.*

3. The checkpoint was conducted at a place that did not provide a place for the motorist to pull completely off a roadway without being directed to a private gravel parking lot around the corner on Hwy. 330.

4. Cautionary signs were *not* erected to warn oncoming motorists of the checkpoint.

The supervisor that authorized the roadblock, was Sgt. Taylor. *He testified that he called the trooper who set up the roadblock and ordered him to set it up at that location.* His justification for the roadblock was an interest in trying to locate the suspect in the Harrison County domestic violence incident. He further testified that that location had been used frequently by the KSP for roadblocks at least since 1985. (The court must consider the issue of whether or not Sgt. Taylor was "the officer in the field" since he testified that he ordered the roadblock, or if he was an impartial "supervising authority" that was assigned to monitor the compliance with the KSP guidelines of a roadblock requested by others under his control.)

A well reasoned Massachusetts case in 1986 (*Commonwealth v. Amaral*, 495 N.E.2d 276) dealt with this issue and found that:

> "The fact that a Captain in the State Police was responsible for setting up this roadblock is not sufficient. Administrative officers using carefully established standards and neutral criteria should determine the time and location of the roadblocks and the procedures to be followed."
>
> "The testimony of a field officer that he personally did not indiscriminately choose a time,place and manner for conducting a roadblock is not sufficient. Most states have ruled that 'roadblocks stand or fall based on some set of neutral criteria governing the officers in the field."

The court notes that the decision by Sgt. Taylor to order this roadblock was made one half hour before it was commenced. This certainly does not reveal a great deal of prior planning and control by *"administrative"* or *"supervisory"* personnel. A compelling argument that this

was an emergency situation has not been made, especially considering that the domestic violence incident used as a justification for the roadblock was over four hours prior to the roadblock and was at some distance away.

The issue then must be viewed in light of the guidelines stated above and with particular attention to the provisions of the KSP general order that were ignored in this roadblock. Was the failure to follow these guidelines regulating the location of this roadblock therefore left to the "unbridled" "unconstrained discretion" (See: *Commonwealth v. Kinslow*, Ky.App., 660 S.W.2d 677 (1983)) of Sgt. Taylor?

It appears that all of the relevant Supreme Court cases operate on the theory that the guidelines must be in place *before* the roadblock is conducted and this basic requirement is mandatory in order for the roadblock to meet the 4th Amendment requirements. Therefore *any practice that permits the guidelines to be made up or modified in the field would appear to violate this theory espoused by the U.S. Supreme Court.*

In the instant case, the roadblock clearly violated the guidelines on at least four essential issues. Since the guidelines were not followed it must be said that in this roadblock the "time, manner, publicity and location' of this roadblock was left up to the discretion of Sgt. Taylor. This violates both the spirit and the letter of *Delaware v. Prouse*, *Michigan Dept. of State Police v. Sitz*, and *Martinez v. Fuerte*.

In applying the standards of review that this court believes are required this court comes to the conclusion that the KSP have adopted a reasonable set of guidelines for compliance with Supreme Court standards, but that the practice has developed (certainly in this case) of ignoring the basic philosophy of the law to the effect that *roadblocks are unconstitutional seizures except in carefully regulated and controlled situations.* Any roadblock whose prior planning is largely limited to a radio transmission request and whose authorization is only a return radio transmission, and which is accompanied by material violations of the KSP general order, and when no immediate emergency justifies such conduct, then that roadblock must be closely reviewed by the court as it would appear on its face to be only a casual compliance and fatally lacking in *actual supervisory control*, thereby leaving the request, the operation, the site selection and the justification for the roadblock to the officer in the field. A police action that negates the protections of the 4th Amendment should not be so lightly taken, and is not authorized by current law.

This roadblock clearly did not meet the guidelines of the KSP General Order of Jan. 1, 1990. The Commonwealth has the burden of showing that the roadblock passed constitutional muster when that issue has been raised by the defendant. The burden is clearly on the Commonwealth to prove the constitutionality of the roadblock, and this court finds that the Commonwealth has failed to meet that burden, and this court is directed by *Martinez v. Fuerte* to conduct a post-roadblock judicial review to assure compliance with the requirements of the 4th Amendment.

Indeed, it appears from the testimony of Sgt. Taylor that he was the person who decided there was a need for a roadblock, and he was the party who ordered the setting up of the roadblock and selected the site. If this is true, (and the evidence before the court requires such a finding), then "unbridled and unconstrained discretion" was left to Sgt. Taylor.

The court has not ignored the fact that Sgt. Taylor was the supervisor in charge of the officers who actually conducted the roadblock. Nevertheless, the court finds from the evidence presented in this case that he was no less of *an officer in the field* than the Police Captain in the Massachusetts case cited herein above. (*Commonwealth v. Amaral*)

From that and the other reasons mentioned herein, the court finds form the evidence that the seizure and resulting search of the Defendant and his vehicle was in violation of the 4th Amendment.

CONCLUSION

For the reasons stated herein, the court finds that the seizure and resulting search of John D. Sims, his vehicle, (and his passenger) in the aforementioned roadblock of Sept. 5, 1992, was in violation of 4th Amendment rights, and all evidence obtained as a result of that seizure and the resulting search must be suppressed.

Done this the 11th Day of December, 1992.

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Contributions to the library by practicing attorneys is encouraged. 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.

House Bill 388 Becomes Law

House Bill 388, which was signed into law by Governor Jones on Monday, April 11, 1994, creates two innovative funding sources to help finance Kentucky's public defender system which provides lawyers to represent poor persons who are either charged with or convicted of committing crimes. The present $150 service fee assessed against individuals convicted of drunk driving will be increased to $200 with the additional $50 earmarked to defray the cost of providing public defender lawyers for indigent defendants in all criminal cases including drunk driving prosecutions.

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

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

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

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

Another provision in House Bill 388 addresses the funding of expert witness fees and other direct expense of representation, including the cost of transcripts, in cases covered by KRS Chapter 31. Beginning with the next fiscal year the fiscal court of each county or the legislative body of an urban-county government containing less than ten (10) circuit judges shall annually appropriate twelve and a half cents per capita of the population of the county to a special account administered by the Finance and Administrative Cabinet to pay court orders entered against counties, pursuant to KRS Chapter 31, for expert witness fees and other comparable expenses.

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

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

House Bill 388 has an effective date of July 15, 1994.

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Fax: (502) 564-7890

Brief Guide to "Transforming Power"

1. Seek to resolve conflicts by reaching common ground.
2. Reach for that something good in others.
3. Listen before making judgements.
4. Base your position on truth.
5. Be ready to revise your position, if it is wrong.
6. Expect to experience great inward power to act.
7. Risk being creative rather than violent.
8. Use surprise and humor.
9. Learn to trust your inner sense of when to act.
10. Be willing to suffer for what is important.
11. Be patient and persistent.
12. Build community based on honesty, respect, and caring.

- *Peaceways* January 1994

NEWS & Views

Criminal Justice Officials Find Boot Camp Prisons Ineffective in Crime Control and Cost Savings, According to New Report

WASHINGTON, D.C.... Correctional boot camps have generally not reduced recidivism or prison overcrowding and have not resulted in cost savings in most of the states that operate them, according to a new report by the Campaign for an Effective Crime Policy.

The Campaign for an Effective Crime Policy, a Washington-based coalition, was founded in 1992 to promote informed debate about criminal justice issues. The group includes more than 800 state and local officials, including governors, state legislators, judges, prosecutors, law enforcement and corrections officials in all fifty states.

The new report, "Evaluating Boot Camp Prisons," cites finding from numerous studies conducted in recent years. The studies indicate that boot camps have generally not met the goals they were intended to serve. According to the report:

- Boot camp graduates return to prison at approximately the same rate as other offenders. The only evidence of positive results comes from programs that have intensive "aftercare" services including community treatment, employment and vocational programming.
- Boot camps have generally not reduced prison crowding because a significant proportion of their offenders would not have otherwise received a prison term. To reduce crowding, programs must select at least 80 percent of boot camp participants from the pool of inmates already incarcerated and must substantially reduce their overall sentence lengths.
- Most boot camps cost as much or more than traditional prisons on an inmate per day basis. Any cost savings depend on reducing the prison time that boot camp participants would otherwise have served. Few programs have achieved this.

Joseph D. Lehman, the Chair of the Campaign's Steering Committee and Pennsylvania Commissioner of Corrections, stated that "The military boot camp experience was followed by vocational training and an actual job. Most correctional boot camps do not provide these critical follow-up components. The follow-up programs may actually be more important than what goes on in the boot camp itself."

The study was conducted by Walter J. Dickey, special Counsel for Policy for the Campaign and a Professor of Law at the University of Wisconsin.

Copies of "Evaluating Boot Camp Prisons" may be obtained from the Campaign for an Effective Crime Policy, 918 F Street NW, Washington, D.C. 20004; (202) 628-1903, for $3.00.

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**** Materials Available ****

The Department of Public Advocacy has collected many motions and instructions filed in actual criminal cases in Kentucky, and has compiled an index of categories of the various motions and instructions. Instructions are categorized by offense and statute number. Many motions include memorandum of law.

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

In addition to containing tendered capital instructions, the DPA Instructions Manual contains instructions actually given in many Kentucky capital cases for both the guilt/innocence and penalty phases.

A copy of the index of available instructions and the categories and listing of motions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the actual instructions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Each DPA field office has an entire set of the instructions. *Criminal defense advocates can obtain copies of any of the motions for the cost of copying and postage.*

If you are interested in receiving an index of the categories, a listing of the available motions or instructions, copies of particular motions, instructions, contact: DPA Librarian, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601; Tel: (502) 564-8006.

The Kentucky Department of Public Advocacy's Advertising Rates for *The Advocate*

Advertising Rates

Black & White

	1 Issue	6 Issues
Full Page	$150	$700
Half Page	$ 80	$350
1/4 Page	$ 50	$200

NOTE: Stapling inside the newsletter up to a 4-sided insert would be double the cost for a full page ad.

Ad Sizes

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7-13/16" x 4-1/2"

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All live matter must be contained within 7" x 9-1/2"

CLOSING DATES

*Published Bi-monthly

ISSUE	PUBLICATION DATE	AD DEADLINE
February	February 15	January 1
April	April 15	March 1
June	June 15	May 1
August	August 15	July 1
October	October 15	September 1
December	December 15	November 1

MECHANICAL REQUIREMENTS

- ✓ Negatives, positives, engraving or camera-ready art accepted
- ✓ Offset printing
- ✓ Black & White
- ✓ Trim size: 8-1/2" x 11" - 3 columns/page
- ✓ Halftone screen 133

Circulation

Your advertising message is delivered to a highly selective group of readers. *The Advocate* has a circulation of approximately 2,000 which includes all full-time public defenders, many private criminal defense attorneys, members of the criminal justice system and the judiciary in Kentucky, federal district judges and judges of the 6th Circuit Court of Appeals.

The Advocate is the most comprehensive and effective advertising medium to reach Kentucky's growing criminal justice community and defense bar. *The Advocate* is retained permanently by most lawyers as a resource.

For further information contact: Tina Meadows, *The Advocate*, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; (502) 564-8006, FAX (502) 564-7890.

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, Terrance MacCarthy, Laurie Shanks, 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.

23rd Annual Public Defender Training Conference - June 4 - June 6, 1995

NCDC Trial Practice Institutes

June 12-25, 1994 & July 17-30, 1994, Macon, GA - $950 tuition & $375 housing

*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.

NLADA Appellate Defender

May 19-21, 1994, New Orleans, LA - $260

NLADA 72nd Annual Conference

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.

The Advocate now has an electronic mail address. You may reach us at **pub@advocate.pa.state.ky.us** via internet. If you have any questions or comments for a particular author, your comments will be forwarded to them.

Anyone wishing to submit an article to *The Advocate* electronically, please contact Stan Cope at 100 Fair Oaks Lane, Ste. 302, Frankfort, KY 40601 or by phone, 502-564-8006.

More details on electronic submission and advocate articles available for download will appear in the next issue.

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