# The Advocate

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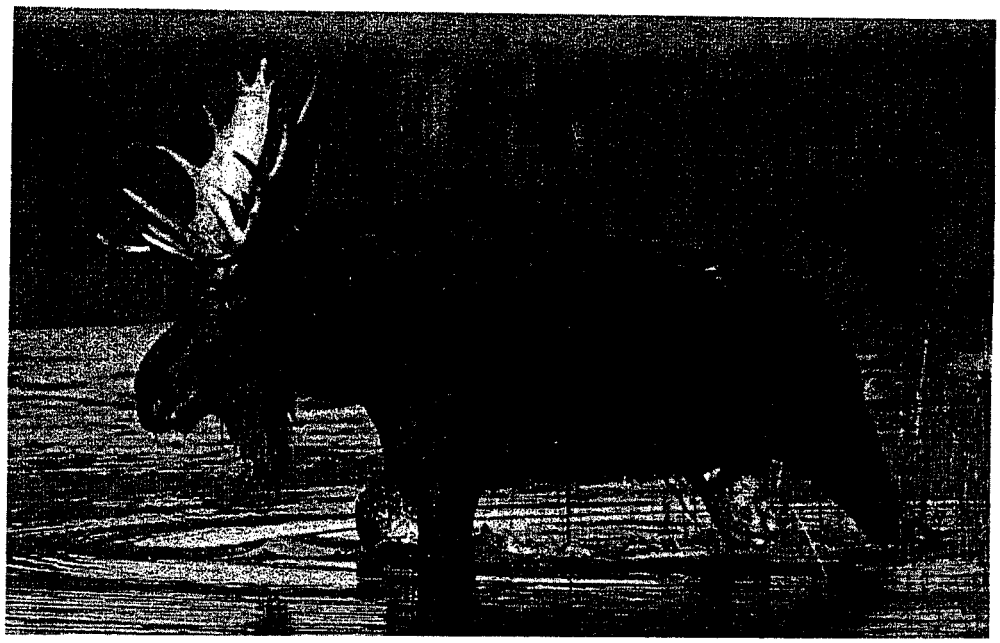

# *Clearly Identifying the Moose on the Table Cooperative Problem-Solving*

## FROM THE EDITOR:

**Conflict.** is as predictable as death, taxes and change. Bosnia, Haiti, Rwanda are today's leading international conflict arenas. A half century ago the June 6 D-Day landings in Normandy of 700 ships and 4000 landing craft were stark images of the world's raging conflict. The killings of the world's seemingly infinite wars is surely linked by degree and kind to the fighting and conflict that manifests itself in our legislatures, occupations and private lives. Significant conflict is endemic to our adversarial criminal justice system. Too often we inhale and exhale conflict. We cannot stave off death, taxes, change nor conflict. But we surely can raise our awareness, reduce our presumptions and learn to manage conflict better. **Deanne Shapiro** of Life Skills Associates in West Hartford, Connecticut provides us adversaries a challenging call to conquer conflict. **Give us Your Conflict Views.** Conflict is so pervasive in our work that we invite your reactions, insights, and further thoughts on conflict in our profession, organizations, and lives. Can different behavior by us transform tomorrow's conflict into previously unknown opportunities?

**False Memory.** Sexual Abuse cases' increased volume is exceeded only by their increased complexity. The views are varied and increasingly challenging. We continue the dialogue in this issue by presenting views on false memories from Kentucky's Carol Jordan and Pennsylvania's Pamela Freyd and Anita Lipton.

With the passage of HB 388 there will be $377,000 available for funds for experts and others. With this substantial new money, we begin a series on obtaining funds for resources for the defense of indigents.

*Edward C. Monahan,* **Editor**

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

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Integrity
Staff Professionalism
Indepedence
Interdependence

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

- Goethe

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# 'Putting the Moose on the Table':
## Healthy Conflict Resolution in Public Defender Offices

### An Outstanding Turkey!

We all know the scene: It's Thanksgiving, the family has gathered, and Aunt Emma stands proudly, surveying the feast she has prepared. The family tries hard to hide its dismay, for on the table in place of the succulent turkey, is a large, smelly moose which our dear aunt, in a state of confusion, accidently ran over on the highway, scrapped up, brought home, and prepared for our reunion. Not wanting to spoil her proud moment, we comment: "*Why, Aunt Emma, the turkey is even more outstanding this year?*" and thus, we are condemned to eat it, along with our words, in order to avoid conflict.

In families, this mythical scene is about family secrets and tensions which all family members know but cover up, staying in collusion with each other. At work, the scenes of conflict avoidance, collusion and resulting moose-eating are equally stressful, and public defender offices are no exception.

### Are Attorneys Trained In Collaborative Problem-Solving

I have had the opportunity to work with public defenders and managers of defender offices both at the state and national level, in particular at the National Legal Aid and Defender Association Defender Management Training Conferences in 1990, 1993, and 1994. On the basis of this work, it is clear that office conflicts are serious issues for public defenders, and that law school does not prepare attorneys for the intricacies of tense and tricky human relations anymore than training in other professional disciplines. In fact, the adversarial nature of the field may contribute to either conflict avoidance or confrontation, rather than a positive orientation to conflict as an opportunity for collaborative problem-solving.

### Confronting Conflict

In reality, suppressed conflict can be dangerous not only to working relationships but to individual health as well. Avoiding or smoothing over a serious disagreement or disruption in a work unit can cause permanent damage. Yet many of us seek to ignore or avoid conflict and hold back strong feelings to preserve work relationships and surface harmony.

If dealt with honestly and directly, conflict is a sign of a healthy relationship. It indicates that you care enough to be honest with yourself and with others, and that you trust enough in the basic strength of the relationship to risk expressing your true needs and feelings.

### 4 Classic Defender Conflicts

So - how would you approach the following situations, either as a colleague or as a manager?

• **The Rude Star.** An attorney in our office is a courtroom "star," but in the office is insensitive and rude to support staff and patronizing in her dealings with less experienced attorneys. While her legal work is clearly a valuable contribution, she affects office morale negatively, disrupts office functioning, and seems oblivious to her impact on others. Those affected seem reluctant to address her directly about her behavior, but try to avoid working with her whenever possible.

• **Offensive Comments by Staff.** You overhear one of the investigators in the office making derogatory comments about clients, often within earshot of other clients. In addition, he has made comments directly to you about female employees which you consider to be offensive and sexist in nature. You do not know if clients or other staff members are offended by his comments, but he does seem very isolated from others and does not participate in the social camaraderie of the office.

• **Unsolicited Editing.** A secretary who works closely with you is very competent. She has worked for the public defender office for twelve years and, as she phrases it, she has "seen it all." She is knowledgeable about the law and as a result, makes unsolicited changes in materials she prepares for you. While these changes are most often helpful and correct, you are not entirely comfortable with her exercising this editorial function since she is not an attorney.

• **Polarized Relationship.** You do not have much occasion to work directly with Attorney A, but there has been apparent tension between you since you first met. When you must work together, your opinions on any issue seem to polarize immediately. When your paths cross in the office, you are both short-tempered, unwilling to share information or resources, and you are aware that Attorney A speaks negatively about you to anyone in the office who will listen. You find it increasingly difficult not to respond in kind.

Sound familiar? We've all been in classic conflict situations like these, where inappropriate behavior, personality differences, role confusion, or opposing viewpoints have crystallized to the point where each person in the conflict seems firmly committed to a particular seemingly unmovable stance. How do you manage these situations in a way that leaves both parties intact and the relationship whole?

## Collaborative Problem-Solving Transformation

A key to healthy conflict resolution is to transform the conflict situation into an opportunity for shared problem-solving. But how, especially when you are angry, upset and sure that you are right and that the other party deserves to be scolded, shunned, scorned, or separated from the organization?

• **Learning Moment; Speak the Moose.** Start with the belief that conflicts such as these present *learning moments* for the organization to identify the unspoken *moose on the table* tensions which have existed under the surface of working relationships for some period of time, and thus are welcome challenges.

• **Understand the Other.** Keep in mind that people's behavior makes sense to them, even if it makes no sense to you, that they behave as they do for reasons which have truth for them. Seek to listen in a spirit of inquiry rather than judgement, in order to understand the situation from the other party's perspective.

• **Inclusive Reframing.** Remember that at this point, you have a problem with the other party's behavior, but the other party does *not* necessarily perceive or share the problem or an interest in resolving it. Therefore, you will need to frame the problem in such a way that the other party feels represented in the statement of the problem and interested in its resolution.

In this way, the rude attorney situation becomes a question of *How can we enhance courtesy and cooperation between attorneys and other staff?*

The investigator situation becomes *How can we assure a work environment which includes everyone and eliminates negative comments about individuals or groups?*

The secretary situation becomes *How can we clarify our respective roles and areas of expertise while valuing and learning from each other's perspective and experience?*

The situation with Attorney A becomes *How can we identify and understand the differences between us so that we can agree to disagree?*

## Conflict Resolution Principles

Once you're *reframed* the conflict as a shared problem to be solved, you've moved sufficiently from the position of *my way or the highway* to be able to listen to one another and seek mutually agreeable alternatives. You are now far more ready and willing to approach the situation with several basic guidelines for healthy conflict management in mind:

1. **Agreed Process.** Establish a mutually agreeable framework of procedures and groundrules for collaborative problem-solving, *i.e.* "How about if we each talk about what we're feeling or experiencing and try to find alternatives we can both consider"?

2. **Listen.** Listen attentively to the other person's position, feelings and needs. Your goal here is to understand rather than to evaluate, to "walk in the other person's shoes" and hear /see/feel the situation from their perspective.

3. **Reflect to Check.** Paraphrase the other person's statement and feelings behind the statements so that you can *check out* your understanding of his/her position, *e.g.* "It sounds like you want to help me avoid making mistakes when you make changes in work you're preparing for me. Am I understanding you correctly"?

4. **Clarify and Communicate.** Clarify your feelings and needs in your own mind so that you can communicate them clearly to the other person without conveying the attitude that "this is the only correct position," *e.g.* "I appreciate your wanting to help me and I want to have your help. Here's what's going on for me. I'm uncomfortable when you make changes without consulting me because I may not notice them and then be held accountable for them as the attorney."

5. **Facts Not Judgments.** Focus on describing facts and feelings, not on blaming, judgements, or attempts to change the other person. Avoid statements like "You try too hard to look like an expert when you're not," or "You should limit yourself to the duties in your job description." Instead, speak from the first person about "how I feel", "the way I see," "it sounds to me."

6. **Need of Other.** Concentrate on understanding the need underlying the other party's stated position. What's really going on for the other person? Does she really want to edit your work or is something else going on? For example, she may be feeling undervalued for her experience and expertise, concerned about the frequency of errors in your work, or unsure about how to talk with you directly and thus uses this method as a mode of communication. Once you know the underlying need, you are

In approaching conflict, Anne Hall suggests:

1. Determine the personality traits of the persons involved.
2. Never use anger.
3. Determine the needs of the persons.
4. Decide the process.
5. Decide what your objectives are.
6. Be a coach.

Anne Hall, "The Importance of Conflict in a Defender Office and How To Work with Conflict When You Have It," *The Advocate*, Vol. 15, No. 3 at 25 (June 1993).

more able to identify alternatives to help meet that need in conjunction with your own needs.

7. **Brainstorm Solutions.** Generate ideas for approaches or solutions to the shared problem. The best ideas are often developed by brainstorming: both parties suggesting ideas as they come to mind without critiquing suggestions until all ideas are on the table. If the other party won't participate in idea-generation, you can offer suggestions to meet both parties' needs.

8. **Select, Agree, Implement, Evaluate.** Select the alternative which both parties are most ready to try. Agree on how this approach will be implemented, for how long, by whom, and when you will meet again to assess if the approach was successful in resolving the problem. Implement the approach and reconvene at the agreed time with the other person to evaluate how well this approach meets your individual and mutual needs.

9. **Value the Relationship.** Give significant attention to maintaining both the work relationship and personal relationship over and above the resolution of the immediate situation. Let the other person know that you value the relationship and him/her, and want to continue to communicate openly and to work together more positively.

10. **Life After Conflict.** Don't invest your total physical or emotional well-being in the situation or the outcome. There *is* life after conflict, and more to your working relationship than this problematic situation. Be able to compromise or concede as you feel it appropriate. Be prepared to *go it alone* or to take alternative action if the other party is unwilling to engage in collaborative problem-solving. Know when to quit the conflict management effort without quitting the working relationship or worse still, your job or yourself.

## Managing Conflicts Is Possible

Does this mean that all conflicts in the office will be resolved, that the rude attorney will cease and desist, the investigator will become a model of respectful behavior, the secretary will consult with you on all change in documents, and Attorney A will become your best friend?

Not necessarily, but it does enhance the possibility of successful conflict resolution and even more importantly, your ability to maintain both positive working relationships and your own professional integrity in the process.

If the *moose on the table* is clearly identified and talked about, patterns of conflict avoidance, denial or collusion in defender offices can be lessened, and work relationships among colleagues enhanced. Working in a public defender office is a hard enough job; why make it more difficult when the alternative of clear communication, collaborative problem-solving and effective conflict resolution can make life at work a little bit easier for all concerned?

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## The Value of Cooperative Conflict

Dean Tjosvold in "Putting Conflict to Work," *Training & Development Journal* (Dec. 1988) identifies 3 ways people manage conflict: "the first approach emphasizes working it out together in cooperation; the second emphasizes winning and losing in competition; the third emphasizes avoidance and smoothing over difference. He details the inevitability of conflict and the value of cooperative conflict:

When employees emphasize cooperative goals, they realize the benefits of conflict and minimize its costs. Cooperative conflict contributes to effective problem-solving and decision making. It motivates people to dig into a problem, encourages expression of many ideas (and the reasoning and information behind them), energizes people to seek a superior solution, and fosters integration of several ideas to create high-quality solutions not previously considered...

Conflict management is vital to rejuvenating our organizaitons and making them competitive in the marketplace. Every day, managers and employees disagree, fight, argue, and bicker. Such conflict is inevitable, but handled correctly, it can stimulate energy and creativity. Progressive managers are already experimenting and altering our organizations, and human resource development specialists can contribute to the revolution by showing how conflict management facilitates innovation.

# The False Memory Syndrome

**Carol Jordan**

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 process 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.

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# False Memory Syndrome Phenomenon

> *A decline in public respect for the presumption of innocence is no minor matter. A society that lets a notion like "recovered memory" gain such force that it overwhelms its most basic judicial principles has waded into deep and dangerous waters.*
>
> Editorial, *Wall Street Journal*, December 1, 1993

Public awareness of the horrors of child sexual abuse and other types of victimization has increased tremendously in the past decade. As a society, we have moved from blaming victims for the crimes perpetrated against them to an understanding of the complex social factors that may have caused such past biases. We have come to appreciate the possible long-term negative consequences to victims, especially of crimes of a sexual nature. These changed atti-

tudes and understandings are more compassionate and caring. It would be a tragedy if something were to happen to undermine this positive change.

## Recovered Memories

Yet, in the past few years a new phenomenon has appeared that poses a serious danger to do just that if it is not checked. In only two years, more than 13,000 people have contacted the False Memory Syndrome (FMS) Foundation to report that someone in their family has sud-denly acquired a new belief system that he or she had been a victim of childhood sexual abuse 20, 30 or 40 years ago.

Celebrities such as Roseanne Barr-Arnold claim they "recovered memories" of past sexual abuse. Well-known people such as Cardinal Bernardin have been accused by people who claimed they had "recovered memories."

Families have been destroyed because of "recovered memories." Laws have been changed because of "recovered memories." Lawsuits are brought because of "recovered memories." The current wave of "recovered repressed memories" has even been compared to the witch hunts of the past because guilt is implied purely on the basis without regard to evidence.

What, indeed, are "recovered repressed memories?" What is going on?

## Foundation Formed

In March of 1992, a small group of accused families and concerned professionals who had come to know one another because of a newspaper article in the *Philadelphia Inquirer* formed the **False Memory Syndrome Foundation**, a 501(c) 3 organization, to study this perplexing new phenomenon, to help those affected by it and to try to find ways to stop its spread. The Scientific and Professional Advisory Board of the Foundation is composed of some of the most highly respected memory researchers and clinicians in the country. The recognition that a new phenomenon has emerged does not in any way deny or negate the terrible reality or the widespread extent of child sexual abuse. It is a parallel problem.

In order to try to make sense of the bizarre and tragic reports, the Foundation set out to collect as much detailed information as possible from families who said someone they love was affected with FMS. The Foundation has never claimed to know the truth or the falsity of any of individual report but rather has collected them as systematically as possible and then looked to see what patterns emerged. It is the patterns that have spread alarm in the mental health community.

## Patterns

The pattern that emerged from the interviews and surveys was the following: An adult, generally a well-educated white woman between 25 and 45, entered therapy because she was distressed. Most often this distress was from what we might call ordinary life experiences such as depression, concern overweight, anxiety over relationships, or job related stress. Early on in the therapy, the notion seemed to be set that the reason the person was distressed was not the problem she brought to therapy but rather stemmed from a childhood trauma. The fact that the patient didn't remember any terrible trauma became the evidence that the trauma was repressed and that it must have been sexual abuse. Patients became convinced that they exhibited all the signs of someone who was abused. Believing that she would not get better unless she remembered the trauma, she started doing "memory work." Techniques known to have suggestive influence such as hypnosis, sodium amytal, dream interpretation, guided imagery, body massages, participation in survivor groups and reading of self-help books were used to try to help the trauma memory return.

The pattern continues. The patient claimed to get a "flashback" or a "body memory" and then designated someone as the "perpetrator." She then offered that person, in most cases a father, brother, grandfather or uncle, the option of confessing and entering therapy or else being cut off from any contact with the accuser who henceforth identifies herself as a "survivor." Typically the accusations grow to include multiple incidents of abuse extending over more than a decade. The families who contact the Foundation report that their children and the therapists refuse any contact with those who question her status as a "survivor."

The families who contact the Foundation are concerned about the accusations, clearly, but they seem more concerned that their accusing child appears to be getting worse as a result of therapy and because there is no contact. Families are concerned that the therapist never interviewed other family members or examined childhood medical or school records. Families have tried filing complaints with monitoring boards only to be told that the board cannot help them because the therapists records are confidential. Families are asking to have their situations investigated.

If any other medical product had over 13,000 complaints it would be taken off the market and examined. There is no process for doing this in the mental health system. It is becoming apparent that the resolution of the current crisis is likely to come through the legal community.

An FMS Foundation legal survey indicated that one out of sixteen of the families who contact the FMS Foundation is being sued by the person who has recovered memories. Three-quarters of these suits are civil and of these civil suits, and over 50% are dismissed, most with prejudice.

> If you don't remember your abuse you are not alone. Many women don't have memories, and some never get memories. This doesn't mean they weren't abused (Bass and Davis, 1988, *Courage to Heal*, p. 81).

## Critical Memory Principles

While the media has often printed stories highlighting the "FMSF controversy," the fact of the matter is that there is much agreement on the critical issues of memory that are involved.

The first major point of agreement is that some memories are true, some are a mixture of fact and fantasy and some are false. People misremember things all the time.

The second point of agreement is that memory is not at all like a video tape recorder. There is no magic button to push that can guarantee accurate replay of events.

The third point of agreement is that memory is a highly constructive process. People take bits and fragments that are stored and they reconstruct a memory that makes sense to them in the here and now. There is a lot of filling in the blanks when people have a memory.

The fourth point of agreement is that there is a large body of scientific research that demonstrates how easy it is to influence what a person remembers.

The fifth major point is that techniques such as hypnosis, sodium amytal, etc. are highly likely to lead to confabulations even though the patients may be convinced they are accurate.

The sixth major point of agreement is that no one can know the truth or falsity of decades-delayed memories in the absence of corroborating evidence.

## Is There Valid Scientific Basis?

The confusion arises over the claim by repressed memory therapists that there is some special memory process that takes place when a person experiences a "trauma." They claim that this special process results in a memory that is somehow different and, the assumption has been, also more accurate.

Generally, in science when people make such a claim they are expected to demonstrate the scientific evidence to support it. For whatever reason, perhaps our cultural mindset or political pressure, the media, therapists, legislators, judges and lawyers have acted upon the theory in the absence of scientific evidence of its validity. The Franklin case, for example, was the first example of a criminal case of a person convicted for murder only on the evidence of a "recovered memory."

There now seems almost a scramble by repressed memory therapists to try to show that trauma memories are special. The effort has included two types of evidence, neither of which proves the existence of a "robust" form of repression that could account for the claims of amnesia of multiple incidences of abuse taking place for periods of 3 to 20 years.

The first type of evidence falls into the category of retrospective research studies. The studies most often quoted are those of Briere and Conte (1989), Herman and Schatzow (1987), and Williams (1994). While these studies demonstrate that people can forget (or not want to report) past sexual abuse, they do not in any way show that there is some memory process that results in other than some memories that are true, some a mixture of fact and fantasy and some false.

The second direction of the research to try to show that trauma memories are different is the search for a biological explanation. Van der Kolk (1988) and recently Kandel & Kendel (1994), for example, have suggested that this may be the case. This research direction, however, is speculative. The evidence not been demonstrated, obviously a necessity before it can be accepted or rejected by the scientific community. The challenge, of course, is that any biological process that can account for the loss of some memories of traumatic events must at the same time account for the fact that most people remember the horrors of concentration camps, the murder of parents, the pet dog being hit by a car.

At this time, a fundamental problem exists in the effort to show that trauma memories are different. There is no basic understanding of what makes an event traumatic to a person or why a particular event will seem traumatic to one person and not to another.

> Romona's case highlights the crying need to define more clearly whether evidence that is ferreted out -- or fabricated -- during therapy should be allowed as evidence in trials.
> Editorial, *San Diego Union Tribune*
> April 17, 1994

## Reliability

For the legal profession, the current mental health crisis about recovered memories poses a critical challenge. Will legal decisions be based on "belief" or on "science." The problem of "belief" vs. "science" arises in two main areas in "repressed memory" cases. One is the problem of evidence and standard of proof and the other has to do with the role of expert testimony on the reliability of repressed memory and on possible causative factors.

## Standard of Proof

What *standard of proof* will be applied to legal decisions in repressed memory cases? Where independent corroborative evidence is lacking, can testimonial evidence be viewed as sufficient particularly when there exist:

- ✓ possible prejudicial effect of suggestive therapeutic environment;
- ✓ research demonstrating that level of confidence does not predict historical accuracy.

Several recent cases have indicated the courts concern with meeting the burden of proof in "repressed memory" cases:

A judge of the Superior Court of the State of Washington, King County, wrote that a trial court is concerned with historical fact and that the plaintiff has the burden of proving that the abuse occurred by a preponderance of the evidence. Failure to meet this burden, even if the plaintiff sincerely believes her memories, requires judgment for the defendant.

The New Hampshire Supreme Court in *McCullum v. D'Arcy*, 638 A.2d 797, 800 (N.H. 1994) stated that "the plaintiff still carries the burden to substantiate her allegations of abuse and, if challenged, to validate the phenomenon of memory repression itself and the admissibility of evidence flowing therefrom."

In *Regina v. Neilson*, (Ontario Court (Provincial Division) Peel Region, unreported, July 12, 1993, before Judge Allen, J. (Copies available through FMS Foundation)) the Canadian Court of Appeals found, in reversing a conviction in a repressed memory case, that "...The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable... The reliability of the evidence is what is paramount."

## Role of the Expert

The problem of evaluating expert opinion testimony for admission into record has a long history. In repressed memory cases, it is particularly important to limit testimony to that which may be shown to be accurately based on a reliable predictive and/or theoretical model, and reflects "scientific, technical or other specialized knowledge" which "will assist the trier of fact to understand or determine a fact in issue." Many state professional agencies have further requirements for licensed mental professionals who testify in court.

In Minnesota, for example, a professional's report must include any reservations or qualifications concerning the validity or reliability of the conclusions formulated and recommendations made... and the impossibility of absolute predictions...[and] a notation concerning any discrepancy, disagreement, or conflicting information regarding the circumstances of the case that may have a bearing on the psychologist's conclusions...."

Several recent cases have challenged a professional's reliance on the results of "memory recovery techniques" such as hypnosis or sodium amytal. The United States Supreme Court in *Rock v. Arkansas*, 483 U.S. 44 (1987) acknowledged the legitimate scientific concerns regard-

ing the per se inadmissibility of hypnotically-refreshed testimony. Other cases have challenged an assumption of "causality," that is that a set of symptoms implies a past history of childhood sexual abuse, even in the absence of external corroborating evidence or research indicating that such a causal connection indeed exists.

### Retractors: New Victims

In just the past few months, 200 former patients have retracted their accusations and joined the False Memory Syndrome Foundation to urge improved education and monitoring of mental health professionals, especially in issues that involve memory. Retractors are a new class of victims: *victims of psychotherapy gone awry*. They say that their families were victims of their false allegations of sexual abuse.

It appears that the FMS crisis is entering a new phase. Many of this new group of retractors are initiating lawsuits against their former therapists. Their complaints contend that they were not fully informed of the facts about memory or about the possible negative consequences of the therapy. Their complaints contend that they were subjected to techniques that do not have any scientific foundation.

The well-publicized Romona case in Napa, California is the first third-party suit that has gone to trial in which a father has sued his daughter's therapist. This case has brought international attention to the issues of concern to the False Memory Syndrome Foundation: duty of care to those who may not be patients but who are affected by the course of therapy, and the use of therapy techniques that are not grounded in science.

### Scientifically Grounded Theory Necessary

The False Memory Syndrome Foundation has been trying to educate the public and professionals about a growing problem. It seems obvious that any large number of false allegations will undermine the credibility of victims who try to come forth. As a society we have come to appreciate the issues of victimization. Now we must ensure that the processes that are used in dealing with these issues are well-defined and consistent and just. If we truly care about stopping the victimization of women and children, we must take care that people have accurate information. We must ensure that professionals base their work in scientifically grounded theory and that they are careful in the procedures they use. In this way we will surely bring the greatest help to all victims.

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### The United States Supreme Court on Memory Enhancement Techniques

The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled.

Responses of individuals to hypnosis vary greatly. The popular belief that hypnosis guarantees the accuracy of recall is as yet without established foundation and, in fact, hypnosis often has no effect at all on memory. The most common response to hypnosis, however, appears to be an increase in both correct and incorrect recollections. Three general characteristics of hypnosis may lead to the introduction of inaccurate memories: the subject becomes "suggestible" and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to "confabulate," that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences "memory hardening," which gives him great confidence in both true and false memories, making effective cross-examination more difficult. See generally M. Orne et.al., Hypnotically Induced Testimony, in Eyewitness Testimony: Psychological Perspectives 171 (G. Wells & E. Loftus, eds., 1984); Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 Calif.L.Rev. 313, 333-342 (1980). Despite the unreliability that hypnosis concededly may introduce, however, the procedure has been credited as instrumental in obtaining investigative leads or identifications that were later confirmed by independent evidence. See, *e.g., People v. Hughes*, 59 N.Y.2d 523, 533, 466 N.Y.S.2d 255, 453 N.E.2d 484, 488 (1983); see generally R. Udolf, Forensic Hypnosis 11-16 (1983).

The inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards. One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. See Orne, The Use and Misuse of Hypnosis in Court, 27 Int'l J. Clincial and Experimental Hypnosis 311, 335-336 (1979). These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if they hypnosis is conducted in a neutral setting with no one present but the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked. *Id.*, at 336. Such guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggstions....

*Rock v. Arkansas*, 483 U.S. 44 (1987)

# Attorney General's Task Force on Child Sexual Abuse Final Legislative Summary

**Carol Jordan**

After a comprehensive study of the issue of child sexual abuse, the Attorney General's Task Force on Child Sexual Abuse proposed fourteen bills and one separate budget request to the 1994 General Assembly. These proposals addressed the areas of awareness and prevention, civil remedies, the criminal justice system, custody and visitation, sexual offenders, multidisciplinary teams, sexual misconduct by professionals, social services, training, advocacy and treatment services for victims and survivors of sexual abuse. Ten bills incorporating nine of the original proposals and the budget request successfully passed the Kentucky Legislature (one bill was passed as a companion bill with both Senate and House versions). The following list summarizes the primary provisions of each of the successful bills.

**SB 43** - Sen. Jeff Green
*AN ACT relating to the registration of sexual offenders*

The bill amends KRS 432 to require persons convicted of committing rape, sodomy or sexual abuse (KRS 510); incest (KRS 530.020); unlawful transaction with a minor (KRS 530.064); or use of a minor in a sexual performance (KRS 531.310) to register with probation/parole for ten years following release or maximum serve out. Registration information will include name, current address and crime information and will be maintained and accessible only to law enforcement. The provisions apply only to persons convicted of a crime subsequent to the effective date of the act. Failure to comply with the provisions of the Sex Offender Registry requirements constitute a Class A misdemeanor and can result in revocation of parole or probation.

**SB 86** - Sen. Henry Lackey
*AN ACT relating to child sexual abuse and exploitation*

The bill amends KRS 15.935 relating to the Child Sexual Abuse and Exploitation Prevention Board to authorize the expenditure of funds for a statewide public education and awareness campaign.

**SB 107** - Sen. Gerald Neal
**HB 115** - Rep. Bob Damron
*AN ACT relating to sexual misconduct by professionals*

The bill requires professional licensure boards to develop guidelines to follow upon receipt of an allegation of sexual misconduct by a professional licensed or certified by the board, and to receive training on dynamics of professional sexual misconduct. The proposal also stipulates that when licensure boards substantiate that sexual contact occurred between a professional and a client/patient/student while the person was under the care or in a professional relationship with the professional, the professional's license or certification may be revoked or suspended with mandatory treatment of the professional as proscribed by the board. At the discretion of the board, the professional may be required to pay a specified amount for mental health services for the client/patient/student which are needed as a result of the misconduct.

Additionally, licensure boards may find as grounds for revocation of a license or certification the fact that the professional has been adjudicated guilty of an offense under KRS 530.020, KRS 530.064, KRS 531.310; a felony offense under KRS Chapter 510 or a misdemeanor 510 offense related to a client/patient/student; or has been found by the board to have had sexual contact as defined in KRS 510.010(7) with a client/patient/student while the client/patient/student was under the care of the professional.

**SB 172** - Sen. Jeff Green
*AN ACT relating to crimes and punishments*

The bill amends the definition of "incest" found within KRS 530.020 to include deviant sexual intercourse (sodomy) in addition to sexual intercourse as these terms are defined in KRS 510.010.

**HB 95** - Rep. Paul Mason
*AN ACT relating to the prosecution of crimes*

The bill amends KRS 15.760 relating to Commonwealth's Attorneys to permit the employment of a victim advocate, and creates new sections of KRS Chapter 15 to permit the Prosecutor's Advisory Counsel (PAC) to apply for funds to provide crime victim assistance. The bill stipulates minimum qualifications and requires written job descriptions for victim advocates, and prohibits advocates from practicing law or engaging in political activities. The bill requires Commonwealth's and County Attorneys to assist local child sexual abuse multidisciplinary teams, and requires PAC to collect data regarding proceedings in cases of sexual offenses involving a minor.

**HB 96** - Rep. Bob Damron
*AN ACT relating to sexual offenders*

The bill amends KRS 439.265 to prohibit shock probation of Class A, B, and C felony sex offenders, and to require courts considering motions related to shock probation of Class D felony sex offenders (KRS 510) to order a mental health evaluation of the offender (allows evaluations for misdemeanant sex offenders). If the court suspends a sentence, outpatient treatment is a mandatory condition of probation.

The bill amends current law which prohibits the probation of certain types of sexual offenders to remove the prohibition on probating class D felony sex offenders (KRS 510). Prior to granting probation, the court shall order a mental health evaluation of the offender, and if the court chooses to probate a class D felony sex offender, treatment of the offender shall be

a mandatory condition of probation. The bill further amends statutes related to pre-sentence assessments (KRS 532.050) to require specialized mental health evaluations of defendants convicted of felony sex offenses or convicted of misdemeanor sex offenses committed in conjunction with other felonies. If the court suspends a sentence and places the defendant on probation, outpatient treatment shall be a mandatory condition of probation.

The bill amends current Kentucky law to expand the type of offenses for which a juvenile may be declared an "eligible sex offender" to include all offenses under KRS 510, incest, unlawful transaction with a minor in the first degree, and use of a minor in a sexual performance. The ACT also extends jurisdiction of the court in these cases to age 19 and moves the provisions of current law (KRS 208) into the Juvenile Code.

**HB 190** - Rep. Steve Nunn
*AN ACT relating to the Kentucky Multidisciplinary Commission on Child Sexual Abuse*

The bill creates the Kentucky Multidisciplinary Commission on Child Sexual Abuse with a membership to include the Department for Social Services, the Department for MH/MR Services, the Justice Cabinet, the Administrative Office of the Courts, the Attorney General's Office and one survivor of sexual abuse. The duties of the Commission are established in the Act to include:

* developing and distributing a model protocol for the investigation and prosecution of child sexual abuse;

* providing consultation to local communities on the implementation of the protocol and the development of local multidisciplinary teams and seeking funds for their operation;

* collecting data on child sexual abuse cases to better inform service providers, survivors, family members and the General Assembly about how Kentucky communities are responding to child sexual abuse cases;

* receive and make recommendations related to complaints regarding local multidisciplinary teams to increase the accountability of the system.

**HB 223** - Rep. Ruth Ann Palumbo
*AN ACT relating to the investigation of child sexual abuse*

The bill amends KRS 431.600 to require that all investigations of child sexual abuse be conducted jointly by law enforcement and the Department for Social Services. Other professionals may be added to the multidisciplinary team, including prosecutors, mental health professionals and others. Protocols describing team roles and responsibilities shall also be adopted by multidisciplinary teams.

**HB 514** - Rep. Jesse Crenshaw
*AN ACT relating to increasing the accessibility of mental health services*

This bill expands the type of mental health professionals who can be reimbursed by insurance providers beyond psychiatrists to include licensed psychologists and licensed clinical social workers. The bill is not a mandate to include mental health coverage in every insurance policy. It applies only to insurance policies which already offer mental health coverage but are currently only reimbursing for mental health services provided by psychiatrists.

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## SB 39 CREATES A NEW SECTION OF KRS CHAPTER 15

**Indemnification for Prosecutors: Senate Bill 39**: SB 39 creates a new section of KRS Chapter 15. SB 39 requires the commonwealth to indemnify certain public officers and their employees who are sued as a result of their official duties. The bill applies to the attorney general, commonwealth's attorneys, county attorneys, and their staffs. It requires the state to reimburse any such person for any actual financial loss resulting from the enforcement and satisfaction of a judgment arising out of any act or omission in the course of his or her duties.

Before indemnification pursuant to the bill may occur, the Prosecutor's Advisory Council must determine that the act or omission which resulted in liability was within the scope of the officer's employment, occurred during the performance of official duties and was committed in good faith belief that the act or omission was lawful and proper. If it is the attorney general applying for indemnification, the governor, rather than the Prosecutor's Advisory Council, must make this determination.

Mention before the jury of the indemnification provided by this bill is strictly prohibited. The bill provides that any comment regarding such indemnification "shall result in an immediate mistrial." Senate Bill 39 passed the House 96-0 and the Senate 37-0 and was signed by the Governor on April 11, 1994. KRS 15.573 reads as follows:

(1) This section shall apply to:
   a) The Attorney General and his staff;
   b) A county attorney and his staff; and
   c) A Commonwealth's attorney and his staff.
(2) A person named in subsection (1) of this section who is sued for any act or omission in the course of his duties and who has a judgment for monetary damages rendered against him and who personally suffers actual financial loss, unreimbursed from any source, by the enforcement and satisfaction of the judgment, including any costs or attorney's fees awarded pursuant thereto, shall be indemnified by the Commonwealth from funds appropriated to the Finance and Administration Cabinet for the payment of judgments, to the extent of his actual financial loss.
(3) The indemnification shall be contingent upon an express determination by the Prosecutor's Advisory Council that the act or omission which resulted in liability was within the scope and course of the officer's employment and occurred during the performance of duty and was committed or omitted in the good faith belief that the act or omission was lawful and proper.
(4) If the officer seeking indemnification is the Attorney General, the determination referred to in subsection (3) of this section shall be made by the Governor.
(5) The indemnification shall not be construed to abrogate or limit any privilege, immunity, or matter of defense otherwise available to the person claiming indemnification and shall not constitute a waiver of any privilege, immunity, or matter or defense including the sovereign immunity of the Commonwealth.
(6) The indemnification shall not be the subject of comment, directly or indirectly, before any jury hearing any cause of action in which the Attorney General, a county or Commonwealth's attorney, or a member of their staff is a party, and any comment before the jury shall result in an immediate mistrial.

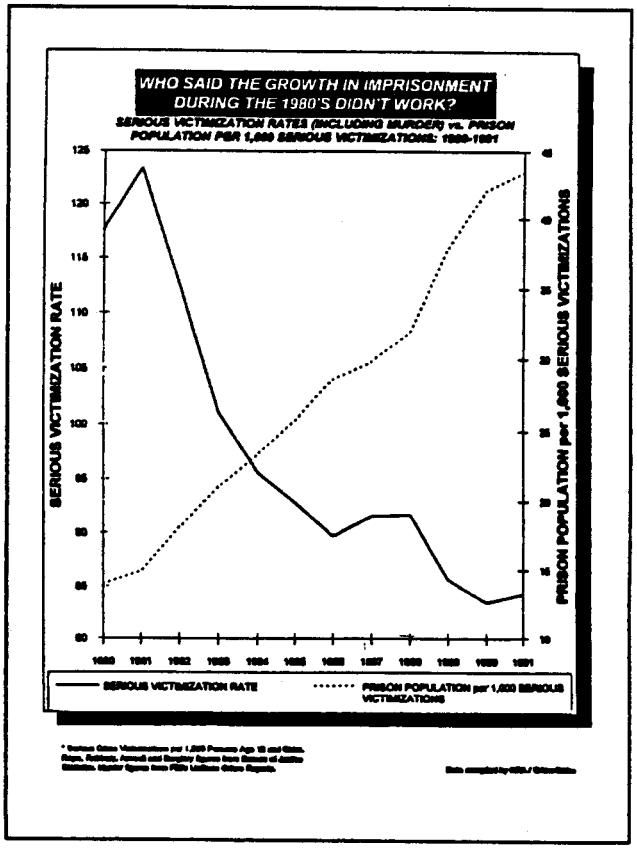
# Did The Growth of Imprisonment During the 1980s Work?: The NRA and the Misuse of Criminal Justice Data

Recently, a subsidiary of the National Rifle Association issued a position paper and report in favor of building and filling still more prisons in the United States.[1] In support of its central thesis, the NRA prepared a graph purporting to show a consistent and dramatic decline in serious crim against a sharp rise in incarceration over the years 1980-1991. The graph is provocatively titled: "Who said the growth in imprisonment during the 1980's didn't work?" Based on how this graph looks, it would seem foolish for anyone to have ever made such a statement. The graph seems to show that as imprisonment of "serious" offenders increased sharply, the crime rate declined.

But while the NRA's graph is plotted with "real" data obtained from the Bureau of Justice Statistics and carries the aura of objectivity, it is highly misleading. In preparing its graph, the NRA manipulated the data and used highly selective information. A more honest portrayal of the data reveals very different conclusions.

The analysis below details some of the NRA's misrepresentations.

✓ **Disproportionate Scaling.** The NRA chose scales for its graph so that there is a line rising sharply upward from left to right to show a rise in imprisonment rates, and a line falling at a roughly equal rate from left to right to show declining victimization rates. The right-hand scale used to show incarceration rates allows for a 350% increase over the height of the graph -- from 10 to 45. The left-hand scale showing victimization runs from 80 to 125 over the height of the graph, which allows only for a 56% increase. The scales thus exaggerate the change in the victimization rates against the change in the prison population. If the NRA used scales that were in proportion to each other, then similar slopes would indicate a similar rate of change. Were this the case, the line representing "serious victimization rate" would still fall from left to right, but only through about 29% of the height of the graph, instead of almost 90% as depicted. Figure 1 shows a more accurate portrayal of the NRA data, but with both left and right vertical scales in proportion.




✓ **Selective Use of Victimization Data.** The NRA chose to include crimes of rape, robbery, assault, murder and burglary as the crimes for which it would portray a "serious victimization rate." No one would dispute that burglary can be a "serious" crime, but the Bureau of Justice Statistics, the FBI, and other researchers all categorize crimes differently than did the NRA for its graph. All government agencies distinguish between crimes of violence (murder, rape, robbery, assault) and property crimes (including burglary, larceny and motor vehicle theft).

Even among property crimes, household burglaries are not the most significant offense in terms of financial loss. In 1992 the economic loss to victims of burglary was only about half the loss to victims of auto theft ($3.97 billion vs. $7.82 billion).[2]

The NRA did not include auto thefts in its "serious victimization rate."

By including burglary with violent crimes, the NRA seriously misrepresents the data since there are far more burglaries committed than violent crimes and the rate of burglaries declined in the period 1980-91, by 36%. The decline in burglary explains 91% of the supposed drop in "serious victimizations." Had the NRA included auto theft instead of burglary in its calculations, the rate of serious victimizations would have actually increased during this period, since auto theft rose by 33%. As can be seen in Figure 1, looking only at violent offenses, we find

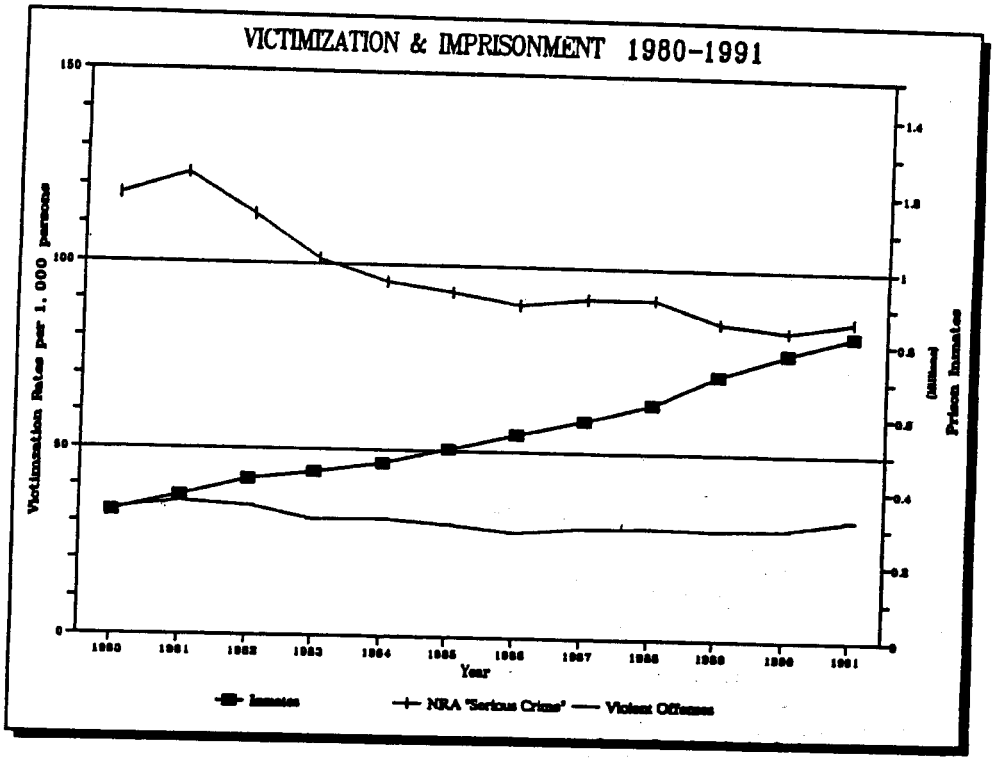



**Figure 1**

that these declined by less than 4% in the period of 1980-91, despite a 150% increase in the number of inmates.

Although the NRA does not claim that increased incarceration caused a unique decrease in burglaries, it is of course theoretically possible that increases in incarceration were responsible for this decline. Other explanations have been offered, though. Some experts, for example, have noted the dramatic increase in drug arrests during this period (data not reflected in the NRA report), and speculated that persons who might previously have committed a burglary have not shifted their activities to the drug trade.[3] Without any such explanation, the NRA inclusion of burglary with violent crimes does a real disservice to any serious analysis.

✓ **Choice of Time Frame.** Historically, 1980-81 was a peak period for crime rates in recent years. While it might appear logical for the NRA to portray victimization rates from the beginning of a decade which saw such a dramatic increase in incarceration, this choice of time frame also turns out to provide the data most favorable to the NRA conclusion. If there actually is a relationship between incarceration and crime, it should be one that is consistent over varying time periods. Breaking up the NRA data into two time frames shows that the NRA analysis does not hold up over time.

As can be seen in Tables 1 and 2, two distinct trends are evident in the period 1980-91. From 1980 to 1986, incarceration rates rose by 65% and violent crime declined by 16%. From 1986 to 1991, incar-4eration increased by 51%; however, violent crime also increased, by 15%. Thus, the "relationship" claimed by the NRA between incarceration and crime falls apart upon closer examination.

## Toward a Better Understanding of Crime and Incarceration

The NRA suggests that there is a strong relationship between incarceration and crime. This is an issue that has been studied for many years. The most recent examination in this area has been conducted by the National Research Council in its comprehensive volume, *Understanding and Preventing Violence* (National Academy Press, 1993). After describing the fact that the average prison time served per violent crime tripled between 1975 and 1989, the Council asked "What effect has increasing the prison population had on levels of violent crime?" Their answer: "Apparently, very little."

Criminologists have known for a long time that demographics plays a key role in understanding crime rates. Since young males in the age group 15-24 commit a disproportionate amount of crime, any change in the proportion of the population in this age group will have an impact on crime. In looking at changes in the crime rate during the period 1980-88, criminologists Darrell Steffensmeier and Miles D. Harer concluded that demographics explained the entire shift in the crime rate as measured by the FBI and 55% of the shift as measured by the Justice Department's victimization surveys.[4]

One issue about which there is no debate is the fact that prison populations increased dramatically in the 1980s. What goes unmentioned by the NRA, though, is that the single most significant factor leading to that rise was the increased incarceration of drug offenders, many of whom are non-violent and low-level users and dealers. A recent study by the Department of Justice shows that 36% of all federal drug inmates fall into just this category.[5]

Thus, the NRA has tried to obscure an unfortunate aspect of the contemporary prison population. The harsh, punitive policies that accompany the NRA-endorsed "though on crime" strategies have wastefully filled jails and prisons

with thousands of low-level petty offenders for whom treatment and community sanctions provide less expensive, fully adequate responses.

Serious criminologists believe that at best there is a modes correlation between incarceration and crime rates. But for anyone interested in drawing connections, an accurate representation of the data fails to support the NRA's ideologically-based conclusion that more prisons equates to less crime. In fact, such an analysis shows that, if measured by changes in violent crime rates, the growth in imprisonment during the 1980s, while expensive, didn't work.

## FOOTNOTES

[1]*The Case for Building More Prisons*, (National Rifle Association CrimeStrike, Alexandria, Virginia, 1994).

[2]Bureau of Justice Statistics, *Criminal Victimization in the United States*, 1992 (Washington, D.C. 1994) p. 148.

[3]James Austin and John Irwin, *Does Imprisonment Reduce Crime? A Critique of 'Voodoo' Criminology*, National Council on Crime and Delinquency, February, 1993.

[4]Darrell Steffensmeier and Miles D. Harer, *Did Crime Rise or Fall During the Reagan Presidency? The Effects of an 'Aging' U.S. Population on the Nation's Crime Rate*, **Journal of Research in Crime and Delinquency**, Vol. 28, No. 3, August 1991.

[5]*An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, U.S. Department of Justice, February 4, 1994.

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## TABLE 1
## Changes in Imprisonment 1980 - 1991

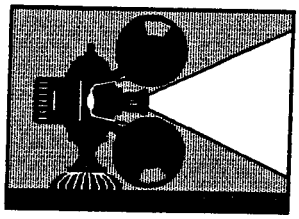
| | 1980 | 1986 | Change | 1986 | 1991 | Change |
|---|---|---|---|---|---|---|
| Prisoners | 329,821 | 545,378 | + 65% | 545,378 | 824,133 | + 51% |

## TABLE 2
## Changes in Victimization Rates 1980 - 1991

| Offense Category | Victimization Rates per 1,000 Population | | | | | |
|---|---|---|---|---|---|---|
| | 1980 | 1986 | Change | 1986 | 1991 | Change |
| **Burglary** | 84.3 | 61.5 | - 27% | 61.5 | 53.9 | - 12% |
| **Violent Crimes: Murder*** | 0.102 | 0.086 | - 16% | 0.086 | 0.098 | + 14% |
| **Rape** | 0.9 | 0.7 | - 22% | 0.7 | 0.9 | + 29% |
| **Robbery** | 6.6 | 5.1 | - 23% | 5.1 | 5.9 | + 16% |
| **Assault** | 25.8 | 22.3 | - 15% | 22.3 | 25.5 | + 14% |
| **Total Violent Crime** | 33.4 | 28.2 | - 16% | 28.2 | 32.4 | + 15% |

* Murder rates, reported by the FBI per 100,000, are shown to three decimal places in order to observe trends.

# Movie Review



## "Last Light"

*A Vidmark film direct by Keifer Sutherland and starring Forest Whitaker, Keifer Sutherland, Clancy Brown and Lynn Moody.*

Now at your video store and a "must-see" for all participants in the criminal justice system. This is Keifer Sutherland's directorial debut. He brings us a stark and realistic film that will shock and upset many viewers. Sutherland also has a featured role as the inmate awaiting execution, Denver Bayliss.

Many of us have represented someone very much like Denver, who was brought into the system as a juvenile and never got out.

Forest Whitaker portrays Fred Whitmore, a newly-hired prison guard assigned to Death Row and to Bayliss.

Whitmore - an ex-cop forced out over a shooting ruled bad - adjusts rather easily to the authoritarian nature of his new job. Yet he cannot abide by all that his fellow guards do to Denver.

Something about Denver Bayliss haunts Whitmore and the two men form an unexpected friendship that transforms their lives. But Whitmore gets into real trouble when he refuses to take part in the brutality inflicted by the other guards, especially his cruel boss, Lt. Lionel McMannis, played by Clancy Brown.

While this film seems a deceptively simple stage for presentation of some of the issues in the death penalty debate, the film has an anti-death penalty message and ends with information about the number of people then on Death Row nationwide (2676) and the number of inmates executed between 1983 and 1993 (191).

You must see this film for these three scenes:

1) Watching Denver emerge from The Hole;

2) Listening to the conversation between guard Whitmore and one of Denver's former attorneys;

3) Witnessing the exchange between Whitmore and his son on the even of Denver's execution.

***Don't Miss This One!***

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# Plain View

**Ernie Lewis**

### *Mercer v. Commonwealth*
1994 WL 179935 (Ky.App.)

An officer with the Department of Fish and Wildlife Resources has authority to arrest a person for DUI, according to this opinion of the Court of Appeals of Kentucky, issued May 15, 1994. In a straightforward opinion of Judge Schroder, joined by Judges Dyche and Emberton, the Court relied upon KRS 150.090(1) and an Attorney General's Opinion.

KRS 150.909(1) gives full police powers to Fish and Wildlife officers, including powers outside of their normal duties where life-threatening situations arise and where requested to assist by other law enforcement bodies.

OAG 90-3, requested by the Department of Fish and Wildlife Resources, confirmed that the Commissioner of Fish and Wildlife could authorize his officers to exercise police powers in life threatening situations, and that other law enforcement agencies could request assistance of the same officers.

In this case, William Mercer was arrested by an officer of the Fish and Wildlife Resources Department. He moved to dismiss based upon his assertion that the officer lacked the authority to arrest. After losing the motion, a conditional guilty plea was entered.

The Court of Appeals held that there was no ambiguity in KRS 150.090(1). Because the KSP had requested assistance of the officers of Fish and Wildlife, and because the Commissioner had issued "specific regulations for the officers to follow," the officer was within his authority to make his DUI arrest.

### *United States v. Johnson*
22 F.3d 674

Does a kidnap victim held over several days in an apartment have authority to consent to a search of that apartment once she is freed?

The Sixth Circuit has held that she does not, at least where she is confined behind an iron gate, and thus had no authority over the area for which she gave consent.

The case arose in Detroit, where the police received a call that Johnson was holding a 14 year old girl against her will. When they went to Johnson's apartment, they found her behind an iron gate. She told the officers she was being held and that Johnson was threatening her with guns. She showed the officers a closet where the guns were. The officers seized the guns, later resulting in a conditional plea to possession of a firearm by a convicted felon.

The Sixth Circuit reversed the district court's decision overruling the defendant's motion to suppress the guns. The Court recognized that while officers may search premises which they reasonably believe a third party has authority over, that here such a belief would have been unreasonable under the facts. "First, the officers knew that Skinner was physically restrained from leaving. Additionally, as far as the officers knew, Skinner had only been present at the apartment for four days. Finally, the guns were found in the defendant's closet. The government has not produced any evidence that Skinner had personal possessions in the closet which would indicate common authority over the closet."

In dissent,Judge Suhrheinrich asserted that by creating a prison, Johnson had lost all reasonable expectation of privacy in his home. The home was an instrumentality of the crime. Further, exigent circumstances justified a search of the apartment under *Arizona v. Hicks*, 480 U.S. 321 (1987).

## THE SHORT VIEW

1. ***People v. Hoff***, 29 Cal.Rptr.2d 239 (Ct.App. 1994). A case out of California may give counsel some indication of how to work with one of the exceptions to our new good faith exception.

In this case, the court held that in order for a case to fall within the "so lacking in probable cause" exception, the court would look at the following: "(1)if the information comes from an informant, the affidavit must contain facts which establish the informant is reliable and the information given is factual, not conclusory, and from personal knowledge... (2)there must be facts establishing time of critical events so a magistrate can determine whether the information is fresh and reliable or stale and unreliable...(3)there must be facts establishing a nexus between the information of criminal activity, the items sought and the place to be searched...(4) the affidavit must contain facts identifying with particularity the place to be searched and the items to be seized."

Where these fail, the good faith exception does not apply.

2. ***State v. Joyce***, 639 A.2d 1007 (Conn. 1994). Finding no federal case on point, the Connecticut Supreme Court has used their state's constitution to hold that a defendant has a reasonable expectation of privacy in the clothes he had cut off him as a result of a burn. The police seized the clothes thereafter when the defendant was not a suspect. Thereafter, when he became an arson suspect, the police sent the clothes to a lab for analysis. Because the clothes were analyzed by a lab without a warrant, the defendant's privacy rights were violated.

3. ***Pratt v. Chicago Housing Authority***, 848 F.Supp. 792 (N.D.Ill. 1994). This is the Chicago Housing Authority case which has received national press, and a response by the Clinton Administration. Here, the U.S. District Court for the Northern District of Illinois has restrained the Housing Authority from putting into practice its policy of conducting warrantless sweeps of low income housing projects in Chicago. The Authority had been authorizing sweeps 48 hours after gunfire. The court was troubled that the sweeps were being conducted after the exigency had evaporated, and that entire buildings were being swept.

The court noted that many of the residents were "prepared to forgo their own

constitutional rights. They apparently want this court to suspend their neighbors' rights as well. Finally, many Americans are simply fed up with crime. Although they would not dream of allowing police to search their own homes without their consent or without warrants, they support police sweeps of inner city neighborhoods."

The court rejected these concerns, saying that the "erosion of the rights of people on the other side of town will ultimately undermine the rights of each of us."

In response, the Clinton Administration announced that barring exigent circumstances, sweeps of housing projects would be confined to areas of public access, vacant apartments, or consensual searches. HUD Secretary also recommends that future public housing leases include a consent clause allowing for routine firearms inspections of the housing units.

An aditorial in the May 9, 1994 issue of *Time* magazine puts this all into perspective. There are 3 million Americans living in 17,491 public housing projects that would be the object of these invasions of privacy.

4. ***People v. Machupa***, 29 Cal.Rptr.2d 775 (Calif. 1994). Officers may not rely upon warrants where information upon which the warrant is based was obtained as a result of a warrantless, illegal entry into a residence. Here, the police unlawfully entered into a residence during an investigation into a shooting. Because it was the error of the police rather than the error of the magistrate, the good faith exception of *U.S. v. Leon*, 468 U. S. 897 (1984) did not apply, and the exclusionary rule did.

5. ***Commonwealth v. Guaba***, 632 N.E.2d 1217 (Mass. 1994). A search conducted pursuant to a warrant which is not in the police officer's possession at the time of the execution of the warrant is to be evaluated as if no warrant existed.

The reason for this is that the purpose of a search warrant is more than the determination of probable cause; a search warrant provides guidance to the executing officers, and it informs the persons being search of the authority by which the officers are acting. "Although many jurisdictions regard the failure of the police to possess the warrant at the commencement of the search as a technical error, mandating suppression only when the warrant's absence prejudices the defendant, we view the omission as invalidating the reasonableness of the search...The failure of the police to possess a copy of the warrant when they commenced searching the apartment rendered the search warrantless."

6. ***State v. Reid***, 872 P.2d 416 (Ore. 1994). A warrant authorizing a search of "all persons present" at a particular place is an illegal warrant, and evidence obtained from those persons must be suppressed, according to the Oregon Supreme Court. The court, which had previously condemned similiar language permitting a search of all vehicles at a particular scene, stated that the warrant failed the particularity requirement of the Fourth Amendment.

7. ***United States v. Bloomfield***, ___ F.3d ___ (8th Cir. 5/19/94). The Eighth Circuit has held that being nervous, having red eyes, opening the truck door only part way, having the interior of your truck smell of deodorizer, and wearing a pager, does not give the police the right to detain you past what is necessary for a routine traffic stop. Each of the factors has an innocent explanation, and should not be used to expand a traffic stop into an hour-long detention to await a drug-sniffing dog. "Sustaining the search in this case would invite police to stop and detain innocent out-of-state rental truck drivers (and others) without reasonable suspicion of criminal activity, in violation of the Fourth Amendment."

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**Paul F. Isaacs**

FRANKFORT, Ky. - Governor Jones today announced the appointment of the 49 year old Paul F. Isaacs of Sadieville, Kentucky, as Acting Secretary of the Justice Cabinet. Isaacs, reared in Pulaski County, Kentucky, currently serves as General Counsel in the Justice Cabinet and has spent his entire professional life serving in various capacities in the criminal justice system.

"Paul's experience in the criminal justice area and his integrity give him the two qualities needed to lead the Justice Cabinet effectively," Governor Jones said. "I also want to take this opportunity to thank Bob Lawson for the excellent job he did as interim secretary," the Governor said. "I look forward to the opportunity to serve the Jones administration as Secretary of the Justice Cabinet," said Isaacs.

Paul was Public Advocate from 1983-1992. He is a 1969 graduate of the University of Kentucky Law School and a 1966 *cum laude* graduate of Barbourville's Union College. He currently serves as a member of the Kentucky Parole Board Advisory Committee and the Kentucky Supreme Court Task Force on Gender Bias. He was a member of the National Legal Aid and Defender Association from 1984-92. He is the co-author, Clary and Isaacs, of *Kentucky Juvenile Law*.

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

## New Funds for Indigents

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

## $50 DUI Fee

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.

## $40 Administrative Fee

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."

## Trust Fund

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

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

## Affidavit of Indigency

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

## Funds for Experts

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

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

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

## Effective Date

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

**Governor Brereton Jones** signs HB 388 into law on April 11, 1994 as (standing from left to right) Secretary of Public Protection & Regulation Cabinet, **Edward Holmes**; Public Advocate, **Allison Connelly**; Governor's General Counsel, **Mark Guilfoyle**; and DPA's General Counsel, **Vince Aprile** look on.

# Funds for Independent Defense Experts

*This is the first of a series of articles addressing funds for independent defense expert assistance in light of the new substantial funding available statewide.*

## INDIGENT'S RIGHT TO EXPERT ASSISTANCE PRETRIAL AND AT TRIAL

Money and resources make a difference in how well a public defender is able to represent her clients. More and more, funds for expert help are necessary for minimally adequate defense representation.

The Kentucky Supreme Court has long held that indigent defendants are entitled to funds for necessary expert assistance.[1]

From 1972-1994 the county fiscal court bore the responsibility to provide the funding.[2] The 1994 General Assembly changed the funding mechanism for 119 counties. Jefferson County continues under the system in place for the last 22 years. Under the revised KRS 31.185 the 119 counties other than Jefferson County pay $.125 per capita into a special statewide fund. The $377,000 generated will be available to satisfy court orders for funds for experts. If exhausted, the state will be responsible for the additional funds.

For the first time in the history of the Commonwealth, there is money available statewide to provide indigents funds for resources necessary to investigate and present their defense.

The right to funds for indigents is being enforced in Kentucky. In ***Sommers v. Commonwealth***, 843 S.W.2d 879 (Ky. 1992) the Kentucky Supreme Court reversed the two murder convictions and the 500 year sentence of David Sommers because the trial judge refused to provide the indigent defendant funds for independent expert assistance.

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

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

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

Likewise, federal and other state courts have readily found that their statutes and the Constitutions of their states and the United States require experts for indigent criminal defendants when there is a reasonable showing of need for investigation, testing, consultation, and testimony.[3]

In fact, in ***Little v. Streater***, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1985), a paternity action which is only quasi-criminal, the Court held that under 14th amendment due process the state cannot deny the putative father blood grouping tests if he cannot otherwise afford them because the indigent father is entitled to a *meaningful opportunity to be heard.*

If money is required for expert assistance in that quasi-criminal case, it is constitutionally required in cases where a defendant's mental state is in issue or where an expert is needed to assist in the marshalling of the defense.

## UNITED STATES SUPREME COURT CASELAW ON RIGHT TO COMPETENT, CONFIDENTIAL EXPERT HELP FOR DEFENSE

Competent, confidential assistance by experts, mental health, medical, investigative, forensic is frequently crucial to the defendant's ability to effectively challenge his criminal responsibility by effectively presenting his defense. The United States Supreme Court has told us that competent defense advocacy requires independent expert assistance on critical matters in issue, like the mental state of the accused.

In ***Ake v. Oklahoma***, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) the Court determined a defendant is entitled to meaningful use of a psychiatrist at trial when:

> ...the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer.... *Id.* at 1095.

> ...the defendant's mental condition is seriously in question. *Id.* at 1097.

> ...mental state at the time of the offense was a substantial factor in his defense.... *Id.* at 1098.

When the mental state of the defendant is "seriously in question," 14th amendment due process requires the state to:

> ...at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation,and presentation of the defense. *Id.* at 1097.

*Ake's* holding was premised on the critical nature of the expertise and opinions of experts to effectively present a defense on matters the state has made essential to criminal culpability:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. *Id.* at 1095.

While *Ake* recognizes that an "...indigent defendant [does not have] a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own," *Id.* at 1097, *Ake* unmistakably recognizes that when a state through its statutes, its practices or through the action of a trial judge, does not permit an indigent defendant whose defense is insanity to hire his own mental health expert but instead forces the indigent to use a state-employed expert, the accused is constitutionally entitled to the following from that state expert:

1) one who is a psychiatrist;
2) competent, effective, 105 S.Ct. at 1093, 1097;
3) evaluation of and opinions on mental states for guilt/punishment, 105 S.Ct. at 1095, 1097, 1098;
4) marshal defense, evaluate, prepare, present, 105 S.Ct. at 1095, 1097;
5) penalty phase assistance, 105 S.Ct. at 1097;
6) assistance in cross-examining state experts, 105 S.Ct. at 1096;
7) rebutal state expert, 105 S.Ct. at 1097;
8) confidential help, 105 S.Ct. at 1097 (*ex parte*);
9) meaningful access to justice, 105 S.Ct. at 1094.

Let's take for example a case where the defendant's mental state is the only issue at trial. The jurors have to determine if under KRS 504.020 the defendant, as a result of his mental illness or retardation, lacked substantial capacity either to:

1) appreciate the criminality of his conduct; or
2) conform his conduct to the requirements of the law.

The indigent defendant is statutorily and constitutionally entitled to be provided with the independent, competent assistance necessary to effectively marshall evidence on these issues and effectively cross-examine and rebut the state's evidence of insanity.

Kentucky appellate courts appreciate the pivotal role experts play in criminal defenses. In ***Hunter v. Commonwealth***, 869 S.W.2d 719 (Ky. 1994) the Kentucky Supreme Court explicity recognized that indigent defendants were entitled under *Ake* to be provided "a psychiatrist to assist in building an effective defense." *Id.* at 722. In cases where the mental state is at issue, *Hunter* readily acknowledges that *Ake* requires a *competent psychiatrist* to assist in *evaluation, preparation* and *presentation of a defense. Id.*

**FOOTNOTES**

[1]*See e.g., Young v. Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979) ("we readily concede that indigent defendants are entitled to reasonably necessary expert assistance.")

[2]*Perry County Fiscal Court v. Commonwealth*, 674 S.W.2d 954, 957 (Ky. 1984). ("...the Perry County Fiscal Court is directed and ordered to pay the reasonable fees of such expert witnesses as are reasonably necessary for the defendant Harlow Gwinn."); *Cf. Boyle County Fiscal Court v. Shewmaker*, 666 S.W.2d 759, 762 (Ky.App. 1984) ("We hold the appellant fiscal court was obliged to appropriate and thus provide sufficient funds in addition to those supplied by the state and those generated by reimbursement to sustain the public advocacy system it elected, once state and other funds provided had been depleted. This obligation included providing funds to pay Sparrow's $325.00 fee in question.").

Under KRS 31.200(3) there is an exception to the fiscal court's liability. The "Department of Public Advocacy must bear the expenses for...experts for indigent persons confined in a state correctional institution regardless of the time or location of the crime." *Lincoln County Fiscal Court v. DPA*, 794 S.W.2d 162, 163 (Ky. 1990).

[3]*See, e.g., United States v. Pope*, 251 F.Supp. 234 (D.Neb. 1966) (firearms); *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975) (firearms); *Commonwealth v. Bolduc*, 411 N.E.2d 483 (Mass.Ct.App. 1980) (ballistics); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (pathologist); *People v. Hatterson*, 405 N.Y.S.2d 296 (1978) (physician in sex case); *United States v. Tate*, 419 F.2d 131 (6th Cir. 1969) (psychiatrist); *Burns v. State*, 312 S.E.2d 317 (Ga. 1984) (blood test in paternity case); *State v. Poulsen*, 726 P.2d 1036 (Wash.Ct.App. 1986) (money for psychologist for diminished capacity defense); *Little v. Armontrout*, 835 F.2d 1240, 1243-45 (8th Cir. 1987) (hypnotist).

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***** Next Issue: *****
**"Neutral" Experts**
**Constitutionally Insufficient**

# Collateral Estoppel: Equity or Compounded Injustice?

In 1989 John Doe, who was then an eighteen year old boy, appeared in District Court for the first time as an adult. John was brought over from the jail for arraignment on Wednesday morning, having been detained since the previous Saturday night on a bond too high for him to post. When he was called before the judge, he was informed that he was charged with one count of DUI, first offense. The public defender was in trial in circuit court that day, so a local attorney was asked to stand in for arraignment purposes only. The judge told John that he was entitled to have an attorney appointed, to plead not guilty, and to have his case tried on the next jury day one month from then. The judge also said that, if John were to plead guilty, he would be released from jail and fined $200.00 plus costs, and be given ample time to pay. John pleaded guilty.

On the previous Saturday night, the police officer who arrested John had taken him to have a blood sample drawn. The blood sample was then sent to the police lab for analysis. The lab report was still pending when John entered his guilty plea. The County Attorney received his copy one week later, and filed it in John's court file, which had been transferred to the old fines docket. The County Attorney then closed his own file. The blood test revealed that John had been driving with a BA of 0.02%.

John had no high school diploma and no job. He eventually began to receive SSI for his alcoholism. He rapidly acquired two more DUI convictions, and, early in 1994, he was indicted for DUI, 4th offense. He received no plea bargain offer and elected to go to trial.

At John's trial, the prosecutor was allowed to introduce John's priors during her case-in-chief. John's attorney recorded an objection to the trial court's ruling. During John's case in chief, his attorney attempted to introduce the blood test from John's first conviction to show that John was factually not guilty in 1989, despite his guilty plea. The prosecutor objected, claiming that principles of collateral estoppel precluded John from challenging the factual predicate of his 1989 conviction. *What should the trial court do?*

## THE ISSUE

The issue is whether, in a criminal proceeding, the Commonwealth is constitutionally free to use collateral estoppel against the defendant. There are no reported Kentucky cases which have squarely decided this question. Two federal circuits allow limited use of collateral estoppel against criminal defendants, while one federal circuit and the state of New Jersey forbid the prosecution to use this procedure on constitutional grounds. These are apparently the only courts which have decided this question.

As the John Doe case illustrates, this issue can implicate broader concerns of equity and justice. There obviously is an interest on the part of society that litigation, at some point, finally end. The doctrine of collateral estoppel serves this purpose. Yet in the Doe hypothetical there is a limited good derived from the unchallenged use of Doe's first DUI conviction in the later felony trial. Doe should never have been convicted in 1989, and it simply compounds injustice to use this prior conviction to make Doe a felon. This injustice becomes even worse if Doe is not allowed to explain the true facts of the matter.

## COLLATERAL ESTOPPEL

### A) Definition and History

Collateral estoppel is a branch of the broader doctrine of res judicata, which provides that, when an issue of ultimate fact has been determined as between two parties by a valid and final judgment, that issue can never again be litigated as between those parties or their privies. The doctrine of collateral estoppel apparently arose in civil law and, at some point prior to the adoption of the United States Constitution, began to be applied to criminal litigation as well.

Although criminal collateral estoppel has existed, apparently, from the earliest days of the Republic, the question of whether a defendant had a constitutional *right* to invoke the doctrine remained undecided for years. It was long held that collateral estoppel was a doctrine distinct from the double jeopardy protection provided by the Fifth Amendment. Yet attempts to ground the doctrine in the Due Process Clauses of the Federal Constitution never proved successful, and the Supreme Court continued to doubt that collateral estoppel implicated the Constitution at all. The Court finally held that collateral estoppel is a doctrine expressing one of the protections provided by the Fifth Amendment's Double Jeopardy Clause.

This protection applies as against the states via the Fourteenth Amendment. Accordingly criminal defendants in Kentucky courts have a federal right to invoke collateral estoppel. There is even a statute granting Kentucky defendants the right to use collateral estoppel in certain circumstances where the "plaintiff" in the prior action was not the Commonwealth, but a sister state or the Federal Government. Moreover it should be remembered that Kentucky courts applied common law collateral estoppel to criminal cases long before the federal constitutional right was recognized.

There apparently are no cases clearly recognizing collateral estoppel as part of the protections provided by Section Thirteen of the Kentucky Constitution. However our High Court has used the following language of the doctrine:

*Res judicata is a rule of universal law pervading every well regulated system of jurisprudence. It has two bases, embodied in the common law; the one, public policy and necessity...the other, the hardship on the individual that he should be vexed twice for the same cause.*

From this standpoint, it is no large leap to the view that collateral estoppel, whether or not enshrined in Section Thirteen, is part of the Due Process protections granted by Section Two. Practitioners in Kentucky seeking to invoke collateral estoppel on behalf of an accused should therefore plead both Section Thirteen and Section Two.

### B) Mutuality of Estoppel: The Commonwealth's Ability to use Collateral Estoppel

The doctrine of mutuality of estoppel provides that unless *both* parties in a second action are bound by a judgement in a previous case, *neither* party may use the prior judgement to determine a fact in the subsequent case. This doctrine causes difficult problems in the criminal context because of the strong policy against limiting the defendant's right to try all issues to the jury. At least three attempts to solve these problems have been made.

One attempt applied the following logic:

1. **PRIMARY ASSUMPTION**: Collateral estoppel is not available to either party, where it is not available to both parties.

2. **SECONDARY ASSUMPTION**: The government is not entitled to invoke collateral estoppel in a criminal case, due to the defendant's broad right to trial of all issues by the jury.

3. **CONCLUSION**: Collateral estoppel does not exist in criminal cases, even to protect the defendant.

As has been seen above, this approach has been fully discredited.

A second approach has taken the following shape:

1. **PRIMARY ASSUMPTION**: Collateral estoppel exists in criminal cases.

2. **SECONDARY ASSUMPTION**: Collateral estoppel is not available to either party where it is not available to both parties.

3. **CONCLUSION**: Collateral estoppel is available to the Government in a criminal case.

A third approach is based on the following thinking:

1. **PRIMARY ASSUMPTION**: Collateral estoppel exists in criminal cases.

2. **SECONDARY ASSUMPTION**: The defendant has a right to try every issue to a jury, even those already determined in previous, concluded litigation.

3. **CONCLUSION**: The government is NOT entitled to invoke collateral estoppel in a criminal case.

This last approach, in other words, rejects the application of mutuality of estoppel to criminal cases, whereas the second approach, supra, embraces mutuality of estoppel in the criminal context.

A number of courts have adopted the third rejectionist stance concerning mutuality. Others have accepted the second approach, which allows the Government to invoke collateral estoppel. Kentucky has inclined towards allowing the Commonwealth to use collateral estoppel in the criminal context, but, as yet, our courts have yet fully to discuss the broader constitutional implications such a decision would entail.

## CASES ON MUTUALITY OF ESTOPPEL

### A) Rejecting Mutality.

In the very recent case of *United States v. Pelullo*, 54 Cr.L 1430 (3d Cir. 1994), a federal appeals court firmly held that the United States Constitution restrains the Government from utilizing collateral estoppel against a criminal defendant. In that case, the defendant had been charged with a RICO violation. At trial, the Government was allowed to introduce a prior judgement convicting the defendant of wire fraud to prove one of the predicate acts required to obtain a RICO conviction. The trial court then instructed the jury that the Government had proven that one element of its case and that the jury was to so find. The trial court's ruling was based on a view that the defendant was collaterally estopped to deny his prior conviction.

The Third Circuit reversed, holding that the trial court's ruling violated the defendant's right to trial by jury and to the presumption of innocence. A prior conviction can never be used conclusively to prove an element of an offense. The accused always has the right to explain his actions and to mount a complete defense, even if that means calling into question the factual basis of a prior conviction. The Government, therefore may not prove a prior violation simply by introducing a prior judgement.

*Pelullo* was based in part on an earlier decision of the New Jersey Supreme Court in the case of *State v. Igenito*, 87 NJ 204, 432 A.2d 912 (1981). There the defendant was charged with Possession of a Firearm by a Previously Convicted Felon. To prove the element of possession, the State introduced a previous judgement convicting the defendant of Unlicensed Transfer of a Weapon. The New Jersey Supreme Court held that this procedure had deprived the accused of his right to trial by jury. The jury alone is to determine guilt or innocence, solely on the basis of the evidence before it. To apply collateral estoppel as against an accused is to direct a partial verdict for the State. Such a procedure violates both the federal and New Jersey Constitutions. The State therefore may not even introduce a prior judgement to prove the underlying prior violation of the law. The accused, accordingly, is entitled to a trial de novo of the facts giving rise to his prior conviction.

### B) Accepting Mutality.

In the case of *United States v. Rangel-Perez*, 179 F.Supp 619 (SD Calif. 1959), the accused was charged with illegal entry into the United States. At his bench trial, he presented the theory that he was a citizen, and therefore entitled to enter this country. The prosecutor presented a judgement from a prior case where the accused had been previously convicted of illegal entry. The District Court held that, in the circumstances of this case, it was proper for the Government to present and for the court to receive the prior judgement as evidence; and that the defendant was estopped to claim that he had been an American citizen as of the prior judgement's date.

However, the court made clear that there are certain due process requirements attending the use of collateral estoppel against the defendant. First, the Court must be satisfied from the record of the prior proceeding that the issue presently in contention had actually been decided adversely to the accused in the former proceeding; and that that adverse decision had been necessary to make a final determination of the matter. Secondly the Court must be certain that the prior determination of the issue had been made after a full and adequate hearing. The mere missed *opportunity* to have had a fair hearing would apparently be inadequate. Rather the court would insist on something in the record to show that the truth had been arrived at, as far as humanly possible.

*Rangel-Perez* was quoted with approval at length in *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968), in which opinion the Ninth Circuit approved the use of collateral estoppel by the Government. The Eighth Circuit has reached a similar result. Both Circuits have been criticized by the Third Circuit in the *Pelullo* case, *supra*, for failing to conduct a constitutional analysis. Because the federal circuits are split on this

issue, one gathers the United States Supreme Court will consider the question when presented with an appropriate case.

## APPLICATION OF THE LAW IN KENTUCKY PRACTICE

From the few cases squarely on point, it appears that the use of collateral estoppel by the Commonwealth may violate the accused's right to trial by jury and thus be forbidden. And, as we have seen, those courts which allow the Government to use collateral estoppel against the accused are somewhat careful lest the doctrine be applied in such a way as to turn a falsehood into a truth, and cause an innocent person to be convicted. Practitioners in Kentucky may well ponder several questions, given the paucity of local authority on this question.

**A) Does the use of Collateral Estoppel by the Commonwealth Violate an Accused's Right to a Jury Trial.**

Section Seven of the Kentucky Constitution provides as follows: "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate." Section Nine states that "in all indictments for libel the jury shall have the right *to determine the law and the facts*, under the direction of the Court, as in other cases" (emphasis added).

In other words, the framers of the Kentucky Constitution explicitly recognized the jury's power to sit in judgement over, and to nullify the law. From this it follows that Kentucky must surely give the jury's role the greatest possible deference. Without engaging in extended discussion of the matter, it would appear that our unique history bears this out. The founders of the Commonwealth seem to have inclined to a Jeffersonian distrust of government, and saw the jury as a means of empowering the people against the judiciary.

As Kentucky holds the right to jury trial so dear, it seems the competing efficiency concerns embodied in the doctrine of collateral estoppel would be given less weight. Therefore the use of collateral estoppel by the Commonwealth, which empowers the court to direct the jury to find on a disputed issue in the Commonwealth's favor, would hopefully be looked upon by our appellate courts with disfavor.

If Kentucky adopts this view, the introduction of the prior judgements of conviction in the Doe hypothetical *supra* would be forbidden. Doe would be entitled to a trial de novo on the underlying facts of his priors. The Commonwealth could not prove that Doe was actually guilty at the time of his first conviction, and Doe, if convicted at all, would be convicted of misdemeanor DUI.

**B) If the Commonwealth May Utilize Collateral Estoppel, is its Right to do so Without Limits?**

From the *Rangel-Perez* case *supra* it appears that, as the use of collateral estoppel by the government is dangerous, its use by the government should be hedged about with caution. For example, if John Doe in our hypothetical is estopped to show the low BA in his 1989 conviction, a falsehood would become, by operation of law, a pseudo-truth. Such a result has no social utility at all.

Accordingly, a court following the *Rangel-Perez* view of mutuality of estoppel will admit the prior conviction only if it has probative value, *i.e.* if the prior judgement was based on a full and adequate hear-

# *DPA's New Librarian*

**Brian Throckmorton**

**Brian Throckmorton** joined the Frankfort staff of the Kentucky Department of Public Advocacy on May 16, 1994 as librarian. He comes to DPA from the Kentucky Legislative Research Commission, where he was an assistant to the Reviser of Statutes.

Brian's 15 minutes of fame elapsed in 1975 in his hometown of Richmond, Virginia, where he became a finalist in the National Spelling Bee. (He eventually choked on "dipsomania," placing him 18th out of seven million entrants.) Brian's educational background includes a B.A. in English from Georgetown University in Washington, D.C. He came to Kentucky in 1987 with is partner, Kevin Nance (arts reporter for the Lexington *Herald-Leader*), and earned a M.S. in Library Science from the University of Kentucky in December 1989.

Brian says that librarianship should be conceptually classified with social work, counseling, and the other *helping professions.*

His long-range hopes for the DPA library include getting the card catalog on-line, converting the brief bank into a computer-accessible database, and switching some print subscriptions to CD-ROM, all in the interest of providing faster, more comprehensive access to the Frankfort staff and to the field offices and contract attorneys as well.

He encourages Kentucky's public defenders to make use of the library's resources, and to remember the librarian's motto:

*If we don't have that information here in the library, I'll find a way to get it for you.*

Previous librarians have been: **Barbara Sutherland** (1991-1992); **Tezeta Lynes** (1985-1990); **Karen McDaniel** (1983-1985); **JoEllen McComb** (1980-1983); **Peggy Richardson**.

ing of the evidence. It also must be apparent from the record that the prior judgement actually resolved the issue in dispute, a question which is not always easy to answer.

A judgement based on a guilty plea can meet these standards; but in the John Doe hypothetical, the District Court judge accepted Doe's first guilty plea by an irregular procedure, with a factually incorrect judgement as the result. If Doe had been arraigned promptly after his arrest, given a reasonable bond, afforded meaningful legal representation, given a prompt trial date; and if the judge had conducted an inquiry into facts before accepting a plea, it appears quite certain that Doe would never have been convicted of DUI in 1989. The law, unfortunately, has the power to punish an innocent person, but it lacks the power actually to turn falsehood into truth. Doe's first prior does not prove that he is guilty of felony DUI, and the Commonwealth should not be allowed to claim otherwise. Thus, even a court allowing the Commonwealth to utilize collateral estoppel as a general rule, should not allow it to estop John Doe with his first prior in this particular instance.

## CONCLUSION

Every court which has squarely considered the issue has held that the defendant's right to trial by jury is lost when the government is allowed to utilize collateral estoppel. In these courts, the Government is not allowed to introduce prior judgements as evidence of substantive guilt. Rather the accused is entitled to a trial de novo of the facts attending his or her prior convictions.

Some courts allow the Government to utilize collateral estoppel, but even those courts are sensitive to the dangers of this procedure. Accordingly, they admit prior judgements only if they are sure from the record what issues the prior judgement resolved, and if the prior judgement was actually based on a fair and adequate hearing.

In Kentucky there are several offenses where a prior conviction for one offense is an element of proof of another offense. Felony DUI is not yet one of these, but there is enormous pressure to make it so. Other charges, such as Flagrant Nonsupport, can hinge upon the existence of earlier civil judgements. However to say that proof of a prior judgment is admissible as substantive proof of a second offense only raises the question of the nature and type of proof required. The doctrine of collateral estoppel and the constitutional limits placed on it must always be considered when planning a defense to a charge of this type.

## FOOTNOTES

[1] *Smith v. Lowe*, Ky., 792 S.W.2d 371 (1990).

[2] *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed 161, 164 (1916).

[3] *Oppenheimer*, 61 L.Ed. 164.

[4] *Hoag v. New Jersey*, 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913 (1958).

[5] *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

[6] *Id.*

[7] KRS 505.050.

[8] *Barnett v. Commonwealth*, Ky., 349 S.W.2d 834 (1961).

[9] *United States v. Bruno*, 333 F.Supp. 570, 576 (E.D. Pa. 1971).

[10] See *e.g., Oppenheimer, supra.*

[11] *State v. Igenito*, 432 A.2d 912 (N.J. 1981).

[12] *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968); *United States v. Rangel-Perez*, 179 F.Supp. 619 (S.D. Calif. 1959).

[13] *Barnett v. Commonwealth*, 348 S.W.2d at 836.

[14] *Hernandez-Uribe v. United States*, 515 F.2d 20 (8th Cir. 1975).

[15] *Rangel-Perez, supra*, arose in the context of a bench trial, where the right to a jury trial obviously was not an issue.

[16] *Collison v. Commonwealth*, Ky. App., ___ S.W.2d ___ (1993: NOT FINAL) for example will allow the Commonwealth to introduce DUI priors in its case-in-chief to show jurisdiction. The opinion recites that, absent such proof, the defendant is entitled to a directed verdict (slip op. p. 4). This ignores the obvious fact that a court without jurisdiction lacks the power to grant a directed verdict, to enter any judgment, or even to conduct a trial in the first place. It also makes jurisdiction into a jury issue. *Collison* is a poorly-reasoned opinion, but we may be stuck with it by the time this goes to press.

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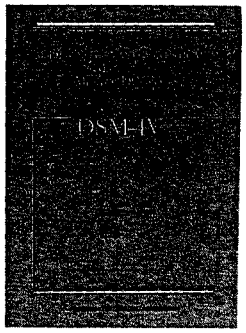
Participants at the 22nd Annual Public Defender Conference

# Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV)




**American Psychiatric Press**
**Washington, D.C.; May 1994. $54.00**

## DSM-IV: Psychiatry's Course Correction

The *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)* was published for the first time in May of 1994. It will become the contemporary nosological text in January of 1995 after the *International Classification of Diseases-9-Clinical Modification (ICD-9-CM)* has been updated in October of 1994 and subsequently published by the US Department of Health and Human Services. The ICD-9-Manual is a product of the World Health Organization (W.H.O.). The Clinical Modification variation is a product of the US Government. DSM-IV had been planned for release in tandem with ICD-10 which was published by the W.H.O. in 1993. However, for a variety of reasons involving many organizations, including many data collection/keeping entities which must change coding and gear up for automated processing with new codes, it is unlikely that ICD-19 will be used in the United States before the end of this decade.

There has always been a need to organize medical classifications into a diagnostic scheme so that individuals with mental and physical disorders can be identified and treated. The first time the W.H.O. presented a Classification of Mental Disorders was in the volume *International Classification of Diseases-6 (ICD-6)* which was published in 1948. The first time the American Psychiatric Association published a *Diagnostic and Statistical Manual of Mental Disorders (DSM-I)* was in 1952 and at that time 106 diagnostic categories were identified. ICD-8 was published in 1968 as was DSM-II and at that time there were 182 different diagnostic categories described in this latter American Psychiatric Association publication.

In 1980 ICD-9 and DSM-III were published simultaneously and in a fashion that permitted a "crosswalk" between each of these diagnostic manuals. DSM-III included 265 diagnostic categories and represented a radical shift in how psychiatric diagnoses were conceptualized. The paradigm shift included an emphasis on diagnostic criteria that were meant to be neutral with regard to etiology and usable across the many different theoretical orientations in American psychiatry. The outcome of these explicit diagnostic criteria and the multi-axial diagnostic system introduced at that time improved on the record of poor diagnostic reliability of the previous DSM systems and helped clinical communication and research. The result was that studies were able to show that different psychiatrists using the new DSM classification system in evaluating the same patient agreed on the diagnosis 80% of the time. This is a high level of diagnostic reliability and comparable to that for many other medical illnesses.

DSM-III-R was published by the American Psychiatric Association in 1987. This volume was meant to correct inconsistencies found in the DSM-III and to include new evidence for diagnostic criteria. DSM-III-R expanded the number of diffe-rent diagnostic categories to 296. DSM-III-R defined diagnoses even more clearly but involved few exclusionary hierarchies - in other words, it was more difficult to render diffe-rential diagnoses and to describe an individual with only one or two psychiatric diagnoses. Multiple diagnoses were encouraged for the same individual and the concepts of co-morbidity and dual diagnoses were embraced. The trend towards inclusion of less severely ill patients into the diagnostic schema had become manifest and the diagnostic criteria had become more inclusive rather than exclusive.

An American Psychiatric Association Task Force for DSM-IV was appointed in May of 1988 after it had become clear from the early drafts of the W.H.O. ICD-10 scheduled for publication in 1993 that there were real differences from DSM-III-R and the ICD-9 Section on Mental Disorders. Since the United States is bound by a treaty obligation to make it's diagnostic coding and descriptions for the various and many medical disorders coincide with those used in the W.H.O. *International Classification of Diseases Manual*, something had to be done in terms of the dissonance. The solution was DSM-IV.

A 27 member Task Force worked five years to develop the DSM-IV manual in a process that involved more than 1,000 psychiatrists and other mental health professionals. The Task Force on DSM-IV was divided into 13 different work groups involving 5 or 6 members who drew on the expertise of between 50-100 advisors. The development of DSM-IV involved 3 empirical steps:

1) One hundred fifty reviews of the scientific literature were accomplished by the end of 1989 to obtain an empirical data base for decision making;

2) Individuals of each work group then focused on specific issues unanswered by the literature reviews and drew upon the resources of unpublished data sets. The re-analysis of 50 separate sets of data were used to obtain additional information and this was accomplished by mid-1990.

3) The Field Trials took place from 1991 through 1993. This project was carried out at a total of 88 universities and research institutions in the United States and abroad involving more than 7,000 subjects and evaluated the utility of various possible diagnostic criteria sets and dealt with difficult questions associated with differential diagnoses. Each of the Twelve Field Trials focused on criteria related to a single disorder such as Post Traumatic Stress Disorder or Somatization Disorder or else on a group of disorders such as Autism and the Pervasive Developmental Disorders. In each Field Trial information was collected on the performance (*i.e.*, reliability, face validity, coverage, goodness of fit) of diagnostic criteria used in DSM-III, DSM-III-R, the research criteria being developed for the 10th Edition of the *International Classifica-tion of Diseases* (ICD-10), and the criteria sets proposed for DSM-IV.

The goal involved the creation of a common language for mental health clinicians and researchers to communicate about mental illness. The major methodological innovation of DSM-IV was the effort to move beyond expert consensus (DSM-III) and place greater emphasis on careful and objective accumulation of empirical evidence from available research data through a systematic and explicit process which was constructed and documented.

The 13 topical Work Groups of the DSM-IV Task Force included the subjects of:

1) Anxiety Disorders;
2) Childhood and Adolescent disorders;
3) Eating Disorders;
4) Late Luteal Dysphoric Disorder;
5) Mood Disorders;
6) Multiaxial Issues;
7) Organic Disorders;
8) Personality Disorders;
9) Psychiatric Interface Disorders;
10) Psychotic Disorders;
11) Sexual Disorders;
12) Sleep Disorders;
13) Substance Abuse Disorders.

The 12 Field Trials involved in the third empirical developmental step included:

1) Antisocial Personality Disorder;
2) Autism and Pervasive Developmental Disorders;
3) Disruptive Behavior Disorder;
4) Insomnia Disorder;
5) Major Depression and Dysthymia;
6) Mixed Anxiety-Depression;
7) Obsessive Compulsive Disorder;
8) Panic Disorder;
9) Post Traumatic Stress Disorder;
10) Schizophrenia and related Psychotic Disorders;
11) Somatization Disorder;
12) Substance Abuse Disorders.

DSM-III-R consisted of 567 pages and DSM-IV includes 886 pages. DSM-IV includes 290 diagnostic entities grouped by categories and subcategories; DSM III-R included 296 categories. There were 13 diagnostic categories that were added, such as Acute Distress Disorder and Bipolar-II Disorder. There were eight diagnostic category deletions including Sadistic Personality Disorder and Passive Aggressive Personality Disorder. Some specific diagnoses were integrated such as Social Phobia disorder which now subsumes DSM-III-R Avoidant Disorder of Childhood. Some disorders previously existed in DSM-III-R but now are made more specific such as Mood Disorder due to a General Medical Condition and Substance Induced Mood Disorder. Both of these replace the terminology "Organic Mood Disorder" which was used in DSM-III-R. Each mental disorder entry contains a specific definition which incorporates a listing of objective signs and symptoms (criteria), possible physical and laboratory findings, epidemiological data, and information about possible links to other medical illnesses. These comprehensive entries enable clinicians to identify patients' illnesses with a high degree of reliability and confidence.

A five volume DSM-IV Source Book is being assembled which will elaborate on the research background for the DSM-IV manual along with commentary by the Work Groups that produced it. This effort will become an archival reference. The research findings specified prevalence, age of onset, and course of illness in far greater detail than earlier efforts. This book will provide a comprehensive resource for recommendations about needed future research.

The terminology "Organic" has been redacted from DSM-IV in an attempt to minimize the usage of an anachronistic concept of a mind-body dichotomy. This term has been eliminated because it incorrectly implied that other psychiatric disorders (not described as organic) did not have biological links.

The criteria for Post Traumatic Stress Disorder have been changed. The new Criterion A requires that an individual "has experienced, witnessed or been confronted with an event or events that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others and that the person's response to the stressor must involve intense fear, helplessness, or horror." A new criterion requiring that the symptoms cause clinically significant distress or impairment has been added. The previous criterion A that described the stressor as "outside the range of normal human experience" has been deleted because experience with clinical application proved to be unreliable and inaccurate.

Conservatism was the guiding principal. Many diagnostic categories were simplified while a quest for precision added distinctions and subtypes to many disorders. Separate sections for "Delirium, Dementia, and other Cognitive Disorders," "Substance-Related Disorders," and "Mental Disorders due to a General Medical Condition" have been created. There was an expansion of the Dementia section which added specific types including "Dementia due to HIV Disease." Attention to cultural factors has been emphasized in order to diminish misdiagnoses based on cultural misunderstandings. There is an Appendix on Culture-Specific Syndromes and most individual diagnoses have sections on specific cultures, age, and gender features. Recognition is also given to the finding that mental illness has changing patterns across the life span.

The authors have stressed that rather than being on the cutting edge of research, it was the intention that DSM-IV to be on the trailing edge. In other words, DSM-IV is following research and not initiating it.

Small changes in criteria, nomenclature ("Multiple Personality Disorder" becomes "Dissociative Identity Disorder," for example), subtypes, and organization were many. Examples

and explanations are listed in the 20 page Appendix D - the new "crosswalk" between DSM-III-R and DSM-IV. The most marked expansion was in the treatment of differential diagnoses. Criteria sets were abbreviated and simplified - notably for Somatization Disorder, Generalized Anxiety Disorder, Antisocial Personality Disorder and Schizophrenia (in ways that do not materially influence the number of patients so diagnosed).

Although the boundaries between the psychiatric disorders were left largely unaltered, particular attention was paid to "the boundary with normality." Therefore, descriptions of significant impairment or distress were made more explicit in the criteria sets. The defining presence of a mental disorder requires first of all, the criterion that the disorder cause "clinically significant distress or impairment in social, occupational, or other important areas of functioning." DSM-IV was written for all mental health workers and it does not pontificate about which diagnoses are biomedically based and which are psychosocially based disorders. It is value neutral and descriptive.

The concept of mental disorder, like many other concepts in medical science, lacks a consistent operational definition which covers all situations. In DSM-IV, each of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress, (*e.g.*, a painful symptom) or disability (*i.e.*, impairment of one or more areas of functioning) or with a significant increased rate of suffering, death, pain, impairment or an important loss of freedom. In addition, the syndrome or pattern must not be readily anticipated or culturally sanctioned in response to a certain event, *e.g.*, the death of a loved one. Whatever the original stressor, the disorder must currently be considered a manifestation of behavioral, psychological, or biological dysfunction in the individual.

One important change involves the category of Somatoform Disorders. The common feature of the Somatoform Disorders is the presence of physical symptoms which suggest a general medical condition but which are not fully explained by the general medical condition alone, by the direct effects of a substance, or by another mental disorder. The subcategory Psychogenic Pain Disorder has been replaced by the term Pain Disorder. The essential feature of Pain Disorder is characterized by pain as the predominant focus of clinical attention (Criterion A). In addition, psychological facts are judged to have an important role in the onset, severity, exacerbation or maintenance of pain. A specific set of criteria for subtypes and specifiers are described. The three separate subtypes include 1) Pain associated with Psychological Factors; 2) Pain associated with both Psychological Factors and General Medical Condition; 3) and Pain Disorder associated with a General Medical Condition. The latter condition is not considered a mental disorder but is included for discussion in the spirit of completeness.

This attempt to deal in a straightforward way with pain coincides with the decision by the American Medical Association (A.M.A.) to develop a specific chapter (Chapter 15) in the 1993 A.M.A. *Guides To The Evaluation of Permanent Impairment, (Fourth Edition).* In the A.M.A. text it is stated that the Secretary of the US Department of Health and Human Services in 1985 formed a Commission on the Evaluation of Pain which concluded that chronic pain is not a psychiatric disorder. Despite that caveat, basic assumptions are elaborated and clinicians are subsequently encouraged to evaluate pain impairment although it is acknowledged in the text to be a difficult task.

Now with the sanction of the American Medical Association as portrayed in the 1993 A.M.A. *Guides* and with the blessing of the American Psychiatric Association (A.P.A.) through the 1994 DSM-IV, psychiatric clinicians will venture forth into what this writer considers a most uncertain area, pain assessment for purposes of determining degree of impairment. This writer anticipates that this subject will require the accumulation of experience and skill on the part of evaluators which will come only with time as both the 1993 A.M.A. *Guides* and the 1994 APA DSM-IV descriptions are applied to this topic. The concepts of reliability and validity will be sorely tested.

A common misconception is that a classification of mental disorders classifies people; whereas, what are actually being classified are disorders that people experience. Over one million copies of DSM-III and DSM-III-R were published. These two texts have been made available in 17 different languages. Now DSM-IV will provide the new clinical reference map with many coordinates that a careful reader will find illuminating, useful, and practical.

## Additional Reading:


1) Weitzel WD: "DSM-IV: Gestation Report." *The Advocate*, April 1991; pp 43-45.

2) Pincus HA, Frances A, Davis WW, First MB, Whit-taker TA: "DSM-IV and New Diagnostic Categories: Holding the Line on Proliferation." *Am. J. Psychiatry* 1992; 149:112-117.

3) First MB, Vettorello N, Frances AJ, Pincus HA: "Changes in Mood, Anxiety, and Personality Disorders." *Hospital and Community Psychiatry* 1993; 44: 1034-1036, 1043.

4) First MB, Allen JF, Pincus HA, Vettorello N, Davis WW: "Changes in Substance-Related, Schizophrenic, and Other Primarily Adult Disorders." *Hospital and Community Psychiatry* 1994; 45:18-20.

5) Frances AJ, First MB, Pincus HA, Davis WW, Vettorello N: "Changes in Child and Adolescent Disorders, Eating Disorders, and the Multiaxial System." *Hospital and Community Psychiatry* 1994; 45:212-214.

6) "Guides To the Evaluation of Permanent Impairment - Fourth Edition." American Medical Association. Chicago, Ill: June 1993.



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# A Report on the State of the Judiciary in the Commonwealth and Other Meanderings of the Chief Justice

**Chief Justice Stephens**

*Remarks of the Chief Justice on June 20, 1994.*

I am honored to be here at the Annual Public Defender Training Conference. As many of you may know, and for whatever it is worth, I have long been a supporter of this office and heartily endorse its goals and aspirations.

I congratulate all of you, and in particular, Allison Connelly, for your success in the recent session of the Kentucky General Assembly. In view of the financial condition of the state, and all the political pressures put on the members of the General Assembly for appropriations, and in view of the hard sell it is to persuade legislators to spend money for the defense of accused criminals, I believe that your track record is just a little short of sensational.

It is my hope that the extra resources that will be made available to you will be used to reward the underpaid and overworked attorneys who have labored so hard and so long, in this greatly needed public resource. It is my hope that more help will be on the way. As head of the Judicial System, it will be a goal of mine to involve the appropriate judges in the collection of the money, where we are responsible. I am determined that we will do a good job.

Today, in a rather informal, rambling way, I would like to spend a little time giving you my personal perception as to the status of the Kentucky Judiciary. Our ability to render service, in a quick, effective, fair and accurate manner is my number one concern.

It goes without saying that the workload - of *most judges* - is increasing every year. By that, I do not necessarily mean just the actual number of cases that are filed, but also the fact that the substantive and procedural issues are becoming more and more complex.

As attorneys become better, as new rights are given by appellate courts, as the Congress and State Legislatures enact new and complex legislation, and as more and more people resort to courts for redress for either real or imagined wrongs, the court systems are paying this price. The work is there, and it must be done.

There are no easy answers to this problem. Every State Chief Justice and Court Administrator has wrestled with the problem. The NCSC has a team working constantly. Academicians and other interested parties have written literally millions of words on the subject. In Kentucky, in the past several years, we have instituted several programs - some of which have worked and some of which have not.

We have installed a computer based management system in 80 of Kentucky's counties and the balance of the counties will have the system within the next 18 to 24 months. As you know, it is called SUSTAIN. This system improves the record keeping, and enables the trial judge to keep on top of the deadlines and progress in every case, and to make better management decisions.

Also, we have obtained law clerks for 36 of the busiest circuit judges. This has been an obvious boost in the judges productivity. (And hopefully, in quality of decisions.)

We have developed a very effective and thorough continuing education system for judges. I believe it has certainly improved their knowledge of the law and has improved their management skills.

We have developed a monitoring system on each judge, and his or her individual case load. We have been thereby able to determine when a backlog develops. When we see a problem, we *privately* talk to the judge to see if he or she has a problem. If so, we send in a special judge or, in some cases, a *team* of special judges. Frequently, we will assign a regular portion of an overcrowded docket to a judge who does not have a burdensome workload. I can tell you that this "special docket assignment" is rarely satisfactory - especially to the special judge, the attorneys, and to the litigants who deserve to be served by someone for whom they have voted. The monitoring of dockets has, in a few cases, resulted in a fringe benefit. That is, since "big brother" is watching some slower judges have speeded up their pace a bit.

Two other areas are worthy of note. In those circuits, we now have the so-called ELP rules in effect. As you may know, these only apply to non-criminal cases. These rules, basically, reduce the deadlines for the various pleadings, mandate a settlement conference with the trial judge with the trial judge and most significantly, substantially reduce the amount of pre-trial discovery. Our statistics indicate that the disposition of cases has increased dramatically. There is, for example, in Campbell County, evidence that the cases are disposed of in 65% of the time than comparable cases under the regular civil rules. I will encourage the KBA and the Supreme Court to look to the statewide adoption of these rules.

Another rapidly developing area is, of course, the use of alternative dispute resolution. Literally billions of words have been written about the subject, and local and state jurisdictions have adopted projects. In Kentucky, we have several pilot systems working - in the civil area, and in the divorce area. They involved mediation *and* arbitration. It is my belief that either the General Assembly, or the Supreme Court, will soon begin an in-depth look at state-wide mandatory ADR.

One last thought, the ABA has developed as you know, standards which recommend the number of cases a trial judge (in a court of general jurisdiction) should have. The ABA recommends between 700 and 900 per year. In Ken-

tucky, we have over 22 circuit judges that have more than 900 cases per year, and we have 25 more that have *less* than 700 cases per year. On the extreme side, we have 2 judges who have less than 500 cases and do not have to travel. We also have several judges who have over 1,200 cases per year. And yet, they all make the same salary and have the same job benefits. This situation, obviously cries out for a re-circuiting and re-districting bill. I will recommend to the Supreme Court (and to the General Assembly) such a bill in the 1996 session. If you think pay raise for public advocates and judges was difficult to achieve, wait till you see this one!

The next major concern of judges-was, partially solved by the 1994 session of the General Assembly. That is, of course, the area of compensation and retirement benefits. Even with the pay raise given, our judges - particularly at the appellate level, are in the lower range of other state judges. Although the quality of Kentucky judges is good - *it could be better.* We need more *trial* attorneys (both criminal and civil) on the bench - at all levels. To achieve this goal, we must continue to upgrade the salaries and other fringe benefits.

Finally, another project in the works is a study of the present Kentucky disciplinary code for attorneys. As you may know, several years ago the President of the Kentucky Bar Association, Sheryl Snyder, invited the American Bar Association to study our present system of attorney discipline and to make recommendations for change. A Blue Ribbon, select committee of attorneys (none from Kentucky) did so. The ABA filed an extensive written report with the KBA and with the Kentucky Supreme Court. It analyzed our present system - section by section - and made recommendations for change. The major change suggestions lie in the following areas:

1. Involving lay people in the system;
2. Opening the system to the public at the inquiry tribunal level;
3. Removing the disciplinary function from the present Board of Governors and creating a separate body to deal with those matters.

There were numerous other suggestions, which were not nearly as dramatic or controversial. All of those proposed changes appear in the spring issue of the *Bench and Bar.* If you have not, you should take a few moments and read them.

Following this, the KBA responded by studying the ABA report, and issued a report itself, which made certain recommendations. This report also appears in the *Bench and Bar.* You should also study this.

On Wednesday, June 22, 1994, at the KBA Annual Meeting in Lexington, beginning at 8:30 a.m. there was an extensive discussion of the ABA and the KBA plans. The session will be video-taped, and will be shown at the district bar meetings this year. Hopefully, the Supreme Court then will tentatively adopt a new set of rules, and there will be presented - for comments and questions - at the *1995* Annual Meeting of the KBA in Louisville. Final action would be taken by the Supreme Court in August or September of 1995, and any new rules would become effective in January of 1996.

As you can see, we consider this issue to be one of major importance and we plan on an in depth study and hopefully, will have substantial input from Kentucky's attorneys before final action is taken.

As my 12th year as Chief Justice winds down, and as my 15th year on the Court nears an end, I realize that I am well along in becoming a senior citizen. My years on the Court have been rewarding in many ways and disappointing in others. In those years, as all of you are keenly aware, there have been many, many changes in the legal profession. And, I suggest, not all those changes are for the better.

What saddens me most is the fact that our profession (at least much of it) has become a trade, a business. Too many of us are no longer professionals. Fortunately, that change has *not* occurred in your area - your specialty. You are still professionals - dedicated to service. That is not to say that *all* other attorneys have become tradespeople. Thankfully, we still have many attorneys - particularly in small firms and individual practitioners - who are attorneys in the traditional sense. Sure, they earn money, but they also serve. Money is not their primary goal. The practice of law is - to them - very rewarding *in all ways.*

I could speak much longer about this sad turn of events in our great profession. I could tell you that lawyer advertising, authorized by the U.S. Supreme Court as being constitutional, is the primary cause of this. I could tell you about the awful effects of the *Shapiero* case, where direct mail solicitation was declared to be constitutional. I could also tell you that simply because something is constitutional does not make it right. I could harangue and maybe bore you - and recite a litany of things we can do (and should do) to begin the long road of change - to restore our profession to its greater days.

Time will not permit me to do this. I would only say that I hope you will not change. I hope the defense of indigents, charged with crimes, will stay as it is. (With however, better pay and more resources with which to do your work.) I hope that by example and by positive action, you will carry the torch.

I know that this talk has given you the impression that I am a prophet of gloom and doom. You may infer that I have become cynical and pessimistic in my old age. Perhaps that is true, to a certain extent. Clearly, not all lawyers have lost their professionalism. Clearly we have many men and women laboring in the legal vineyard who do serve the public. The problem is, as in all facets of life, that the impression - the message - given by the few - too often becomes the message given by the many.

Over the past 14 plus years, I have seen many fine, highly professional lawyers - particularly among the young. I see a re-birth of old ideals and principles. I hope, and I believe, that this trend will continue to grow and that the infectiousness and energy of these young people - young in age and young in ideals - will ultimately prevail. I believe it will.

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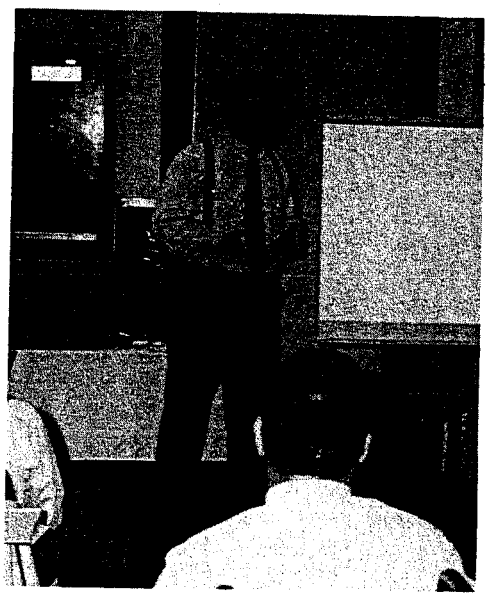
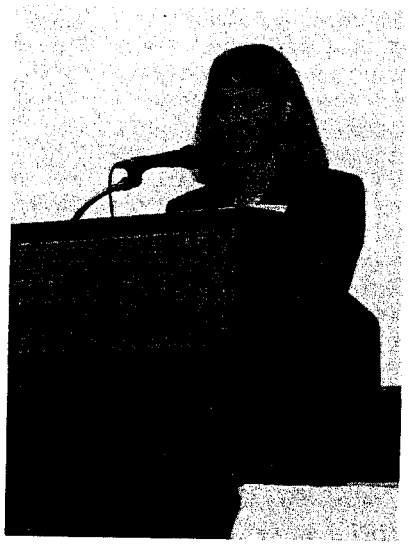
"There is far too much law for those who can afford it and far too little for those who cannot."

- Derek Bok
former president of Harvard University, in a 1983 report to the Board of Overseers

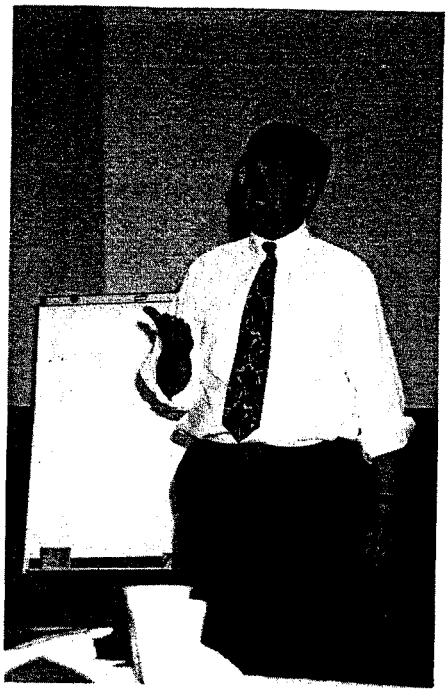
# 22nd Annual Public Defender Training Conference Highlights



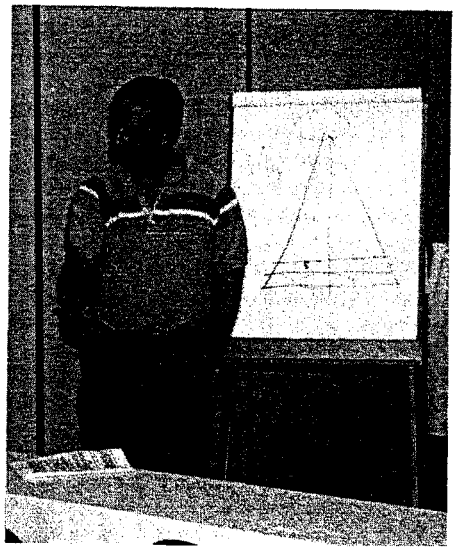
To an overflowing crowd, world renouned, **Terence MacCarthy**, long-time Chicago federal defender, directs the audience on *Look Good Cross-Examination.*



**Julie Butcher** of Landrum & Shouse in Lexington, Kentucky speaks on *The Quest for Equality: Issues of Sexual Harassment and Balancing Interests*



**David Niehaus** on *Common Prosecutor Tricks*



**Ed Monahan** explains why a triangle has 3 sides!

# Capital Case Update

## Thompson, Thomas, Hunter, Jacobs, Bowling, Bussell, Simmons

### KENTUCKY CASES

### *Thompson v. Commonwealth* 862 S.W.2d 871 (Ky. 1993)

Reversed: 6-1.
Majority: Leibson (writing), Stephens, Lambert, Combs, Reynolds, Spain
Minority: Wintersheimer (writing)
Issues addressed: 6 of 36 briefed

When Western Kentucky Farm Center employee Fred Cash picked up inmate William Thompson for work on May 9, 1986, although it was warm, Thompson had street clothes on under his prison work clothing and he wore brown suede shoes rather than work boots. He also had a razor in his pocket and took along an extra jacket and pair of glasses, both of which he did not need. *Thompson, supra*, at 872.

After Thompson had trouble hooking a chain to a tractor so the two could start it and Cash told him it should not be that hard, Thompson thought Cash was criticizing him, and his eyes welled up with tears. He picked up a hammer and hit Cash as he knelt on the ground. Thompson admitted hitting Cash once, but a pathologist testified that Cash had been hit twelve times with the hammer. Thompson then pulled Cash's body into barn and removed Cash's keys, wallet and knife. Thompson took the prison van and in a gas station in Princeton, shaved his mustache and goatee, changed his hairstyle and bought a bus ticket to Indianapolis. When the bus arrived in Madisonville, Thompson was arrested. *Id.*, at 873.

### CHANGE OF VENUE

On October 6, 1986, two days before the trial was to begin, counsel filed a change of venue motion, which included affidavits and a good number of newspaper articles, transcripts of local radio broadcasts concerning the case and a copy of a letter to the editor of a local paper, referring to Thompson's 1974 Pike County conviction and bearing the signatures of 150 local residents. One day later, counsel filed the results of a sampling public opinion poll, which showed that 94% of Lyon County citizens knew about the case; 44% thought Thompson guilty, and 52% preferred that Thompson be given the death penalty. The Commonwealth filed four affidavits showing that Thompson could be given a fair trial in Lyon County.

At the October 8, 1986, hearing, the prosecution raised the lack of reasonable notice of the filing of the petition. The trial court denied the motion for that reason, without commenting on the merits. However, in its order overruling the motion for new trial, the court said that "one of the few motions" which "may have had merit" was Thompson's change of venue motion. *Id.* at 873.

The trial court was correct in denying the motion for change of venue because "appellant was aware of the pre-trial publicity, the feelings of the community about the case, and that such a delay constituted (sic) a waiver of the right to file a petition two days before the trial." The trial court did not abuse its discretion by denying the motion. *Id.* at 874.

### RESTRICTIONS ON INDIVIDUAL VOIR DIRE

The Supreme Court reiterated its post-trial holding in *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988), that the trial court holds final authority to decide whether individual voir dire is to be conducted, but said that "in this case, where the prior knowledge of the case is the subject matter", the "'better practice'" was for questioning to be conducted out of the presence of the other jurors. *Thompson, supra*, at 874.

The first twenty-five veniremen were questioned as a group, then by counsel individually. For the following prospective jurors, the trial court ordered that individual examination about pretrial publicity on the death penalty could not be conducted. Explaining that out of convenience to the jurors and because he felt trial counsel were asking inappropriate questions, the trial judge conducted the questioning himself. It was "clear" to the Supreme Court, despite questions about "changing horses in the middle of the stream", that the trial court adequately questioned jurors about pretrial publicity and the death penalty. However, the Supreme Court did suggest on retrial that voir dire be conducted following their "better practice" (individual voir dire). *Id.*

### FOR CAUSE EXCUSALS

Venireman Virgil Peek knew both the Commonwealth's Attorney and the chief investigating officer of the crime. He was in favor of the death penalty, but needed proof "beyond a shadow of a doubt." However, he stated several times that he believed in "an eye for an eye" and also felt that a person "should receive what he has accomplished." *Id.*, at 875.

Goldia Parrish was related to a prison employee and knew many other prison employees. She had detailed knowledge of the facts of the case, including that Thompson had a prior murder conviction. She also thought Thompson "might be guilty", and that whoever had killed Cash "should have the penalty." She also could not consider mitigation. The defense was forced to use a peremptory after its cause challenge was denied. *Id.*

V.T. Holt initially claimed that he knew nothing about the case and had not discussed it with anyone. However, after defense questioning, he admitted that he had signed a letter to the editor of the local paper, which included certain facts of the previous murder for which Thompson had been convicted. Holt sat on the jury. *Id.*

Hylan Galusha also sat on the jury, despite knowing the chief investigating officer of the crime, and having discussed the case with his two brothers, who worked at the prison. *Id.*

Each of these persons "had strong preconceived notions about [Thompson's guilt], based on knowledge from several sources...It cannot be argued that each

of the venirepersons was impartial." *Id.* at 875. Thus, the trial court abused his discretion by not removing those persons.

## REFUSAL TO INSTRUCT ON THEFT AND SECOND DEGREE ESCAPE

The trial court rejected Thompson's tendered instructions on theft and second degree escape. The Supreme Court agreed with the trial court, saying that Thompson virtually admitted killing Cash and that in closing argument, defense counsel did admit that Thompson had killed Cash, therefore, the murder "certainly qualifies as a use of force"--an element of Escape First, and as a "physical injury"--an element of robbery first. With those criteria, the jury could have concluded only one of two things: Thompson was guilty of all charges, or he was not guilty of all charges. *Id.*, at 876.

## REFUSAL TO INSTRUCT ON EED

The evidence showed that Thompson felt "uneasy" and "upset" because he felt Cash criticized his work. Under the *McClellan v. Commonwealth*, 715 S.W.2d 464, 468 (Ky. 1986) definition (temporary state of mind so "enraged, inflamed or disturbed" as to overcome one's judgment and cause his to act uncontrollably because of the disturbance rather than evil or malicious purposes), Thompson's "unease" and "upset" did not necessitate an EED instruction. *Id.*, at 877.

## USE OF 1974 CONVICTION AS AGGRAVATOR

One of the aggravators used was Thompson's prior conviction for a capital offense. However, the Supreme Court had found in a 1987 opinion that Thompson's 1974 conviction was still pending. *Thompson v. Commonwealth*, 736 S.W.2d 319 (Ky. 1987). Because a criminal appeal "suspends the judgment," which does not become final until the appeal is completed, the Commonwealth improperly relied on the 1974 conviction. *Thompson, supra*, at 877, citing *Foure v. Commonwealth*, 214 Ky. 620, 283 S.W. 958 (1926).

## DISSENT

Chief Justice Stephens concurred in the majority opinion, but dissented because of his feeling "an overwhelming sense of *deja vu*" in reading the briefs and parts of the transcript of this case because "[t]he highly charged atmosphere of the potential jurors in this case is identical to that in *Grooms*", in which case Justice Stephens dissented because he felt the need for a change of venue. *Thompson, supra* at 878. Stephens also felt that because of *McClellan*, *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky. 1989) (instruction on EED needed whether used as element of murder, manslaughter or as mitigating circumstance); and *Holbrook v. Commonwealth*, 813 S.W.2d 811 (Ky. 1991) (EED instruction needed so jury could differentiate between intentional murder and manslaughter first), an EED instruction should have been given. *Id.*

## DISSENT

Justice Wintersheimer dissented because he felt the trial court did not abuse his discretion in refusing the for cause strikes and because there was sufficient aggravation "to permit the punishment" in this case. *Id.*

## *Thomas v. Commonwealth* 864 S.W.2d 252 (Ky. 1993)

Vacated and remanded: 5-2 majority
Majority: Leibson (writing), Stephens, Combs, Lambert, Reynolds.
Minority: Wintersheimer and Spain.
6 of 34 issues addressed (two broad areas)

Alfred Thomas and 16-year-old William David Morton were charged with the 1987 slashing murder of Grace Back, a 75-year-old widow living in Knott County. Her body was found in the road 150 yards from her house, which had been burglarized and burned.

Prior to trial, Morton pled guilty to the murder, testified at Thomas' trial and afterwards received a 30-year sentence. In his pretrial statements, Morton said that Thomas instigated the crime and was the sole person who slashed the victim. At trial, Morton acknowledged that he also slashed Back, but said that Thomas was the one who said the two had to kill the victim, who first caught up the fleeing victim, and who first slit her throat. Finally, Morton said, Thomas "just went crazy on her." Defense theory was that Thomas was too drunk to know what happened and too intoxicated to form the specific intent to burglarize the house or to be the instigator of the crimes. *Thomas, supra* at 253.

## JURY SELECTION

During voir dire, two jurors initially responded that they were firmly committed to the death penalty were Thomas to be convicted, but after questioning, each said they could consider all sentencing options. They were not challenged for cause. The third, Walter Davidson, was unequivocal: he felt Thomas deserved death if he were found guilty. The prosecutor attempted to rehabilitate Davidson, who answered that he could decide a proper penalty based on evidence heard during the penalty phase. However, Davidson "indicated a bias so strong that the prosecutor's questions did not serve to remove the disqualification." The other two jurors were not struck, "no doubt because the defense had run out of peremptory challenges and their somewhat equivocal answers made leaving these undesirables on the jury less onerous than others." *Id.*, at 254-255.

Other jurors who indicated they could not consider some types of or any mitigation at all were not challenged for cause. None of their answers suggested that the trial court *sua sponte* should have excused them, however, "their answers were such that common sense suggests" the defense would have desired to exercise peremptories had any been left. *Id.*

Gilbert Hall said that he would be more likely to believe Morton's testimony because he had ready Morton's story in the newspaper. Hall was peremptorily challenged. McCray Amburgey knew that Grace Back had been slashed and her home burned, and thus, could not presume that Thomas was innocent. Amburgey was also released on a peremptory challenge. Still another juror said his wife was possibly related to the victim, but that fact would not influence his decision. He was not challenged for cause. *Id.*, at 256.

Gary Dixon, who sat on the jury, was married to the prosecutor's first cousin, but didn't think sitting on the jury would cause him any embarrassment. However, the juror also said that because of newspaper reports, he would consider Thomas more responsible than Morton. Because of Dixon's relationship to the prosecutor, he should have been excused for cause. Moreover, the Commonwealth "knew it was error to overrule the previous challenge" because when it came time to select alternates, the Commonwealth offered to "agree" with the cause challenge and have Dixon as an alternate. *Id.*

Furthermore, the cause challenges to Walter Davidson, Gilbert Hall and McCray Amburgey should have been

permitted, as should the challenges to two more jurors. The fact that four other jurors who were "obviously undesirable" because of their voir dire answers sat "provides reason to believe the defense ran out of peremptories before being able to strike them." *Id.* at 257.

The Supreme Court disagreed with the Commonwealth's assertion that once jurors agree to accept the responsibility to decide the case impartially, any bias suggested by a previous answer is harmless.

> There is no 'magic' in the 'magic question.'....The message from this decision to the trial court is the 'magic question' does not provide a device to 'rehabilitate' a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on voir dire....[T]he concept of 'rehabilitation' is a *misnomer* in the context of choosing qualified jurors...[We] direct trial judges to remove it from their thinking and strike it from their lexicon.

*Id.* at 258, quoting *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1992), emphasis in original.

## *ROSS v. OKLAHOMA*

The Commonwealth based its second contention--that the errors were unpreserved because none of the jurors challenged for cause participated in the verdict and because defense counsel did not request additional peremptories--on language in *Turpin v. Commonwealth*, 780 S.W.2d 619 (Ky. 1989) (no prejudice because jurors removed by defense peremptories) and *Dunbar v. Commonwealth*, 809 S.W.2d 852 (Ky. 1991) (defendant's right to impartial jury infringed only if unqualified juror sits). *Id.*

This language conflicts with RCr 9.36 and RCr 9.40 and is a misunderstanding of *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) (in order to preserve "cause" errors peremptory must be exercised to remove juror, all peremptories must be exhausted and defendant must prove that incompetent juror forced upon him), because, unlike *Ross*, Kentucky law "presume[s]" prejudice. In other words, a defendant is entitled to reversal in cases in which he has been forced to exhaust peremptories against jurors who should have been excused for cause. Furthermore, the Kentucky Rules of Criminal Procedure require only that a party exercise all of his peremptories, not that a peremptory be exercised on a particular juror or that he prove his claim. *Thomas*, *supra*, at 259.

> The object of voir dire is to start the trial on a level playing field; it is **not** a level playing field if there are jurors on the panel who are predisposed to decide one way or the other. A defendant has been denied the number of peremptory challenges procedurally allotted to him when forced to use peremptory challenges on jurors who should have been excused for cause.

*Id.*, emphasis in original.

## USE OF "RECOMMEND" IN PENALTY PHASE INSTRUCTIONS

Thomas was tried in 1988, three years after *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (unconstitutional for jury to be led to belief that it does not bear responsibility for sentencing a criminal defendant to death).

Although previous Kentucky cases first denounced, and then banned, use of the word "recommend" in penalty phase instructions, the prosecutor asked Thomas' jury to "recommend" that the trial court sentence Thomas to death. The instructions on burglary and arson reinforced this theme by calling for the jury to **fix** sentences on these crimes. *Id.* at 260, citing *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984); *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985); and *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1989), emphasis added.

While there might be "some difficulty" in reversing under the *Ice/Ward* standard, the colloquy between juror Larry Dixon and the court in which the court agreed with the prosecutor that there was "an automatic appeal" were Thomas to be sentenced to death left the "question whether the jury fully shouldered the 'awesome responsibility' for deciding the death penalty (*Ice, supra*)...in serious doubt" and rendered the verdict unreliable. *Id.* at 260-261.

## DISSENT

Justice Liebson, joined by Justice Combs, concurred with the majority, but dissented from the assertion that no other substantial errors existed. The trial court abused its discretion in not granting the defense motion for change of venue.

The case involved "a gruesome murder in a sparsely populated, rural county, with high visibility coverage of the details", including a complete account of William Morton's statement placing blame directly on Thomas "with extensive quotations." All but two of the 67 veniremen questioned had knowledge of the case, either through reading or hearing about it in the community or both. *Id.*, at 261.

The trial court also improperly suppressed evidence that Morton had two prior convictions for burglary. The point was not to impeach Morton' credibility, but to **disprove** facts Morton asserted: that Thomas was the lead instigator and that Morton "was a relatively blameless juvenile accomplice." *Id.* at 262, emphasis added.

The trial court also erred in not allowing cross-examination on details of discussions between Morton and his attorney regarding the plea negotiations. Morton testified that he was remorseful, not that he wanted to escape punishment by first confessing and then testifying. Justice Liebson felt this was proper cross-examination under *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (refusal to allow cross-examination to show witness' status following juvenile adjudication denial of right of confrontation) and a denial of Thomas' "meaningful opportunity to present a complete defense" under *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). *Id.*, at 263.

Thomas should have been able to identify Morton's juvenile adjudications for burglary as "a reasonably implied corollary to statutory mitigator #5" (defendant accomplice whose participation in capital offense was relatively minor). The KRS 532.075(3)(c) mandate that the Kentucky Supreme Court consider whether a death sentence "'is excessive or disproportionate to the penalty imposed in similar cases, strongly suggests the probity of evidence of the sentencing disposition of a confederate as mitigating evidence." *Id.*

Finally, the jury may have been misled by a verdict form which provided the only place to list its finding that aggravating circumstance(s) exist on the same form which provided for sentences of either Life Without Parole for 25 years or death. In other words, the verdict forms could have misled the jury into thinking it had the option of only **two** sentences, rather than a range of from 20 years to death. *Id.* at 264.

## DISSENT

Justice Wintersheimer dissented because he felt that Thomas "received a fundamentally fair trial." *Id.* at 265.

## *Hunter v. Commonwealth* 869 S.W.2d 719 (Ky. 1994)

Reversed: 4-3 majority
Majority: Stephens (writing), Leibson, Lambert, Stumbo
Minority: Wintersheimer (writing), Reynolds, Spain
2 of 26 issues addressed.

In the early morning of June 25, 1990, 33-year-old Debbie Sue Stratton Hunter burned to death in a fire that began in the bedroom where she was sleeping with her husband of five weeks. Three days afterward, while in the hospital recovering from second and third degree burns to his legs and feet, 19-year-old James Dewayne Hunter was charged with the arson murder of his wife. *Hunter, supra*, at 720.

James Hunter testified at trial that he awoke, saw the house in flames and ran through the fire to get out of the house. Expert testimony indicated, however, that the absence of burns on the bottom of Hunter's feet and his upper body, his lack of singed hair and/or respiratory damage was inconsistent with Hunter's story, as well as conclusions reached about the intensity and course of the fire. James Hunter also could not explain how his burned blue jeans, which tested positive for "weathered gasoline" were found in a laundromat trash can some yards away from the burned house. *Id.*

Undisputed testimony was that Hunter's car had been seen going in the direction of the victim's home between 2:30 and 2:45 a.m., shortly before the witnesses heard sirens and saw the smoke and light from the fire. Other testimony detailed the couple's turbulent marriage, numerous separations, infidelities, the victim's plans to seek an annulment and an argument early on the evening before the fire. *Id.*

## PRE-TRIAL

On October 9, 1990, defense counsel filed a motion for a Kentucky Correctional Psychiatric Center (KCPC) evaluation, which the trial court granted. On December 7, 1990, one month before trial was to begin, the Commonwealth filed notice of its intention to seek the death penalty. By December 27, results of Hunter's competency evaluation had not been obtained. In his motion seeking a continuance because the competency results were not available, defense counsel also asked that the court order that the KCPC evaluation include information as to the availability of any mental health based defenses or mitigating factors. The trial court ordered the additional evaluation on January 10, 1991, and set the trial for March 11, 1991.

Dr. Donald Beal, who had already spent three hours determining Hunter's competency to stand trial, examined Hunter for another thirty minutes in order to determine whether mental health defenses or mitigation existed. *Id.*, at 721.

The KCPC report was filed on February 27, 1991, and stated that Hunter was competent to stand trial and sane at the time of the offense. However, the report did not address either the issue of possible guilt phase defenses or whether any mitigating factors existed. Beal contacted defense counsel and told him that Hunter may have an EED defense, but that because of Hunter's "vagueness during the clinical interview and...a tendency to carefully censor his responses to this examiner", he could not pursue it any further. His opinion was that Hunter's unwillingness to cooperate was because of the non-confidentiality warning Hunter received at the beginning of the interview. *Id.*

## COUNSEL REQUESTS CONTINUANCE

At a non-evidentiary hearing the week before trial, defense counsel moved for a continuance based on Hunter's mental condition. Counsel said that for seven months he had observed Hunter's "steady deterioration" to the extent that counsel doubted whether James Hunter could assist in his own defense or testify in his own behalf; and expressed again Dr. Beal's inability to give a complete assessment of James Hunter's mental condition. Lastly, counsel said that he had been trying to locate a private psychiatrist and had finally been able to find Dr. David Shraberg, who could evaluate James Hunter the next day. *Id.*, at 721-22. The trial judge overruled the motion, saying that counsel's observations of "'depression, apprehension, or lethargy'" were not enough for him to grant a continuance. Further, the court said, the only evidence it **would** consider would be evidence that James Hunter was incompetent to stand trial. *Id.*, at 722, emphasis added.

## PENALTY PHASE

James Hunter was found guilty of murder and arson on March 15, 1991. Counsel's motion to postpone the penalty phase until the next working day was denied. At the beginning of the penalty phase on March 18, counsel moved for a 24-hour postponement so that Dr. Shraberg could examine James Hunter and possibly testify. The court overruled that motion. *Id.*

On April 11, 1991, the day of James Hunter's formal sentencing, defense counsel informed the court that Dr. Shraberg had conducted his examination and that his preliminary report showed "'more severe signs of a [mental] illness than a mere personality disorder,'" including "probable borderline personality with paranoid and dependent features." Dr. Shraberg also offered his opinion that James Hunter's IQ was likely in the low 70s. *Id.*

## DENIAL OF FEDERAL DUE PROCESS

The trial court's denial of defense counsel's motions for continuance violated James Hunter's right to due process. The Supreme Court examined the three factors set out in *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985), for determining whether a continuance is mandated: 1) the private interest; 2) the governmental interest, and 3) the probable procedural value of providing a psychiatrist and the risk of an erroneous deprivation if psychiatric assistance is not provided. *Hunter, supra* at 723.

**Private Interest.** "In this capital case, appellant's stake in the outcome cannot be overstated, and must weigh heavily in our analysis." *Id.* at 723.

**Government's economic interest.** "[I]nsubstantial when compared to the interest of both the State and the individual" in obtaining an accurate outcome. The Supreme Court noted the undercurrent in the Commonwealth's arguments that this case should be dispatched in the interests of judicial economy and forestalling 'routine claims' which are in reality, only tactics designed to delay prosecution, but said that requests for time to inquire into matters that "'are the basic tools of an adequate defense'" should never be subordinate to the state's desire for expediting cases, especially those in which the defendant's life is at stake. *Id.*

**Value of psychiatrist.** The Supreme Court cited *Hayden v. Commonwealth*,

563 S.W.2d 720 (Ky. 1978), a similar case in which counsel's observations of his client were enough to trigger the RCR 8.06 mandate of an evidentiary hearing to determine a defendant's present competence to stand trial. The fact that the KCPC report did not address possible defenses or mitigating factors provided the court with adequate grounds to grant a motion for continuance under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct 2954, 57 L.Ed.2d 973 (1978). Finally, James Hunter's somewhat bizarre behavior at trial, remarked upon by both the court and the prosecutor could have been enough to raise the trial court's RCr 8.06 obligation to inquire into Hunter's competency. *Id.*, at 723-724.

**Risk of Error.** The risk of error analysis involved two considerations: 1) the defendant's need for psychiatric assistance in the first place; and 2) the nature of the consequences themselves. "Clearly, as the probable value of psychiatric assistance to an accurate jury determination increases, so does the actual risk of error in its absence." Moreover, because of the "complex nature and the finality of the consequences of a capital trial," the result of the error is more serious as well." *Id.* at 724.

## DENIAL OF STATE DUE PROCESS

In its state due process analysis the Supreme Court applied the six factors set out in *Snodgrass v. Commonwealth*, 814 S.W.2d (Ky. 1991):

**Length of delay.** Counsel's requests for from "one day" to several weeks left "little doubt that he was simply trying, in good faith, to obtain sufficient time for a thorough psychiatric evaluation of his client." Furthermore, in light of the fact that the KCPC psychologist could not grant Hunter confidentiality, counsel's request could not be seen as unreasonable. *Id.*

**Previous continuances.** Only two continuances were granted in the six months between arraignment and sentencing. In *Snodgrass* itself, four continuances had been granted in a sexual abuse trial held one year after arraignment. The Supreme Court did not prescribe a certain time, but said that the trial court has the authority and the duty to proceed in a manner which allows "reasonable development and presentation of relevant evidence." *Id.* at 725.

**Inconvenience to litigants.** In opposing Hunter's counsel's motions, the Commonwealth never alleged that further delay would inconvenience it or any witness. In *Snodgrass*, the Commonwealth objected to the delay because "'[w]e have a room full of witnesses and have everybody subpoenaed in.'" *Snodgrass*, at 580.

**Whether the delay is purposeful or caused by the accused.** Unlike in *Snodgrass*, defense counsel's requests for continuance were based on "bona fide doubts about his client's present competency." He also had reason to believe that an additional examination could form the basis of an EED defense, or at least be the basis for EED mitigation. *Id.*, at 725.

**Availability of other competent counsel.** Inapplicable to the case.

**Complexity of the case.** "The fact that resolution [of this case] may eventually lead to [Hunter's] execution renders the need for a complete, accurate evaluation of his mental health thoroughly compelling." *Id.*

**Identifiable prejudice.** Each of the above issues could have affected the outcome of the trial.

## PENALTY PHASE INSTRUCTIONS

The trial court refused to give an EED mitigation instruction. While the Supreme Court "agreed" that the evidence did not warrant a guilt phase instruction, it felt that James Hunter was entitled to the instruction on EED as mitigation, simply because of the circumstances of the case:

> At the time of the crime, [James Hunter] was a nineteen year old man of limited mental capabilities, married to the victim who was thirty-three years of age. Testimony at trial portrayed a disturbed young man involved in a five-week marriage that suffered from numerous separations and regular infidelities on the victim's part...The record also indicates that [James Hunter] and his wife fought constantly... Additionally, there was evidence that [James Hunter] knew his wife had gone camping with another man the weekend of the fire and was also with a man at her house the night of the fire.
> *Id.*, at 726.

"There existed more than sufficient grounds in support of an instruction to the jury on the statutory mitigating factor of extreme emotional or mental disturbance." *Id.*

## DISSENT

Justice Wintersheimer, joined by Justices Spain and Reynolds, dissented, because he felt the trial court did not abuse his discretion in denying Hunter's continuance motions and because the penalty phase instructions were correct. *Id.*, at 727-728.

## *Jacobs v. Commonwealth* 870 S.W.2d 412 (Ky. 1994)

Reversed: 5-2 majority.
Majority: Reynolds (writing), Stephens, Lambert, Leibson, Combs (special justice)
Minority: Wintersheimer (writing), Spain.
5 of 42 issues addressed.

In 1986, Alice Lloyd College student Judy Howard was found bludgeoned to death. Clawvern Jacobs was found about seven miles from the scene and told police a story about three or four persons who had driven out of the mountains in a truck, "whipped" him and took the victim away. Found in the cab of Jacobs' truck were a pair of lady's blue jeans, a white blouse and bra, keys with the name "Judy" on the identification and a jacket with Judy Howard's Alice Lloyd identification in the right pocket. *Jacobs, supra*, at 415.

## VENUE

The murder was described by Knott County officials as one of the most brutal in county history. Initial and subsequent news reports described Jacobs' conviction for a killing under similar circumstances and his release after the earlier conviction was overturned on appeal. Opinions, not only to Jacobs' guilt, but also to what punishment he should receive were reported. A public fund raising event raised $2,922 to aid in Jacobs' prosecution. A public opinion survey/poll filed in the record indicated that 98 of 100 persons called had read or heard about the crime; 93 persons had heard both radio and television reports; some of those 93 persons had heard at least 100 reports; 85 people considered Jacobs guilty; 65 people thought Jacobs would receive a fair trial in Knott County. Even with all this evidence, the trial court overruled a change of venue motion.

Of the 153+ people individually voir dired, 112 were excused because of precon-

ceived opinions about Jacobs' guilt, could not presume Jacobs' innocence, or admitted knowledge of his prior conviction. Of the 38 jurors accepted, 19 initially opined that Jacobs was guilty; four of those actually sat on the case. *Id.*

Although jurors do not have to "be totally ignorant of the facts and issues involved" in a case, under the totality of the circumstances of this case, it was clear that a change of venue should have been granted. "Even the appellant's investigator was immobilized by fear and the appellant's attorneys worked under an atmosphere of apprehension." *Id.*, at 416.

## JACOBS' CONTROL OF HIS DEFENSE

Defense counsel presented an insanity defense over Jacobs' objection and desire to present a defense of innocence. The trial judge knew that Jacobs objected to the insanity defense, because he had received a letter to that effect.

Jacobs's Sixth Amendment right to present his defense was undermined by counsel's presentation of the insanity defense. "Neither counsel nor the court has the power to contravene a defendant's voluntary and intelligent decision to forego an insanity defense." *Id.* at 418, citing *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky. 1989). The Supreme Court added that were it not reversing on the venue issue, the facts of this case "even more glaring than in *Dean*" would require that the judgment be vacated and remanded." *Id.*

In the future, if counsel has fully informed a defendant of the considerations bearing on the decision to present an insanity defense and the defendant insists on an "ill-advised" course of action, counsel should inform the trial court of the conflict between the two and seek "a determination of whether the accused is capable of voluntarily and intelligently waiving the defense." Even if a defendant is competent to stand trial, he may, nevertheless, be incapable of making an intelligent choice about the type of defense to present. *Id.*

Further, the court mandated that any inquiry into Jacobs' competency held upon retrial question be on the record. If the defendant is incompetent to make the choice, counsel should proceed "as the evidence and his professional judgment permit." However, if the defendant is found competent to make the decision to waive the defense, "both counsel and the trial court must proceed according to the defendant's wishes." *Id.*, citing *Dean, supra.*

## IMPROPER CROSS-EXAMINATION

During the cross-examination of Dr. Candace Walker, a KCPC psychiatrist, the prosecutor noted that from 1979 and 1981, Walker did not practice medicine. Walker questioned the relevance of the information, but the prosecutor finally elicited the information that Walker was a "professional belly dancer". *Id.* at 419. The court sustained the defense objection and admonished the jury. The Supreme Court could find no relevance in the questioning "to the issues of this case... Such prosecutorial misconduct does not equate to properly disqualifying but only demeaning the defense expert in the minds of the jury..." However, the court found that the trial court's admonition cured the error. *Id.*

## AGGRAVATOR

KRS 532.025 denotes eight aggravators to be used in deciding upon a penalty. In this case, the prosecution offered the aggravator of attempted rape. Attempt crimes do not appear in the statute. *Id.*, at 420.

Because the "literal language" of the last sentence is in conflict with the general purpose of the statute, the Supreme Court found "inartfully drafted" that portion of the statute which states that:

> [i]n all cases unless at least one of the statutory aggravating circumstances enumerated in subsection 2 of the section is so found, the death penalty or the sentence to imprisonment for life without benefit of probation or parole until the defendant has served a minimum of 25 years of his sentence, shall not be imposed.

*Id.*, citing KRS 532.025(3).

In other words, under the statute, "the jury's consideration of aggravating circumstances was not limited to one exactingly and specifically enumerated." The jury made the required finding of aggravation when it found that at the time he killed Judy Howard, Jacobs was "engaging in the commission of rape in the first degree." Thus, even though the jury found Jacobs guilty of **attempted rape** in the guilt phase and **first-degree rape** in aggravation, "this does not infer that the jury acquitted [Jacobs] of first-degree rape during the guilt phase," because the instructions did not require such a determination. *Id.*

## JURY'S RESPONSIBILITY FOR SENTENCING

Although Jacobs asserted that the trial court characterized the jury's verdict as a recommendation, "the record discloses a change and a correction wherein the term 'fix the defendant's punishment' was used in lieu of the impermissible term." *Id.* at 421. Thus, no error occurred.

## DISSENT

Justice Wintersheimer, joined by Justice Spain, wrote in dissent that, on the facts of the case, he did not believe Jacobs was entitled to a change of venue. Further, he did not believe it was error for trial counsel to present an insanity defense because the record did not make it "abundantly clear" that Jacobs personally objected to that defense. *Id.*

## *Bowling (Thomas Clyde) v. Commonwealth* 873 S.W.2d 175 (Ky. 1994)

| | |
|---|---|
| Affirmed: | 5-2 majority |
| Majority: | Wintersheimer (writing), Stephens, Lambert, Reynolds, Spain. |
| Minority: | Leibson (writing), Burke (in part) (writing). |

Thomas Clyde Bowling was sentenced to death for the April, 1990, murders of Eddie and Tina Earley and the wounding of their two-year-old son. The prosecution could give no motive for the shootings. Evidence introduced at trial showed that Bowling's wife had left him, he was having trouble finding work, and that he had been somewhat suicidal prior to the crimes. *Bowling, supra*, at 177.

## VENUE

During voir dire, the trial judge decided to add four jurors to the panel, even though only 44 potential jurors were required (the defense had received 18 peremptory challenges; the prosecution 12). The court stated that the additional four jurors were "'protection against unseen things and revised opinions.'" Bowling did not object at that time, but the following day, asked that the trial court review its decision not to strike two previously qualified jurors for cause. The next morning, the court agreed to strike one of the jurors. *Id.*, at 177.

There was found no substantial deviation from the random selection of jurors; nor did the court abuse its discretion in refusing to issue cause strikes to jurors who allegedly were biased. Each juror said he was able to consider the full range of penalties. The fact that some jurors tended "toward the most severe penalty when presented with specific situations" did not mandate automatic dismissal. *Id.*

Bowling's claim that the court's refusal to strike some jurors for cause caused Bowling to unfairly exhaust his peremptories was found to be without foundation. The majority noted that Bowling had been given "more than twice" the number authorized by RCr 9.40. *Id.*, at 178.

## PROSECUTORIAL MISCONDUCT

The prosecutor had not led the jury to conclude that the legislature, rather than the jury itself, had imposed the death penalty. Furthermore, comments regarding parole and "Golden Rule" violations were found "far more limited" than those in *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1992) and to have occurred in the guilt, rather than the penalty phase. *Bowling, supra*, at 178.

Prosecutorial assertion that it could not comment on potential motive "because only the man who pulled the trigger knows" was found not to be a violation of Bowling's Fifth Amendment right not to incriminate himself because it did not directly refer to Bowling. The prosecutor's objection during the defense guilt phase argument "did not denigrate the specific mitigating circumstances presented by the defense", but merely gave an analysis of the facts which tended to show Bowling's guilt. Likewise, the prosecution's closing argument was based on the evidence and reasonable inferences to be drawn therefrom. *Id.*

## SYMPATHY FOR VICTIMS

During the trial, several members of the victims' family made emotional outbursts. The court "took proper steps to limit these distractions"; thus, no "undue prejudice" was found. *Id.*

## INSTRUCTIONS

Bowling was not entitled to instructions on EED and Manslaughter First because "there was no evidence that Bowling's judgment was overcome on the morning of the killings, nor any evidence that he acted uncontrollably or as a result of anything other than an evil or malicious purpose." *Id.* at 179.

Defense objections to transferred intent were properly sustained. There was evidence at trial that Tina Earley's wounds could have come from bullets which went through her husband and were intended for him; however the jury was presented with "ample evidence" that Bowling intended to cause both Eddie and Tina Earley's deaths. *Id.* The court properly refused to give mitigation instructions on EED, mental disease or defect and intoxication because "no reasonable juror could have so determined with the evidence presented." *Id.* at 180.

Furthermore, the court properly refused to instruct on each nonstatutory mitigating factor Bowling wished, because "[t]here is no requirement to enumerate each...in detail." *Id.*

Bowling's *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) argument also failed. The wording of the instructions in *Mills* "is totally different" and unlike *Mills*, there was no requirement that jurors be unanimous in applying the mitigating factors found. *Id.*

## DISSATISFACTION WITH TRIAL COUNSEL

Bowling told the trial court of his dissatisfaction with his attorneys after the guilt phase, and the trial court permitted Bowling to "fully set forth the basis for his alleged dissatisfaction." The court then ruled, properly, that Bowling had not given sufficient cause to discharge his counsel. *Id.*

## DOUBLE MURDER AGGRAVATOR

The death penalty for the double murder was not excessive because mitigation clearly did not outweigh aggravation. Finding the multiple murder aggravator did not violate double jeopardy because once the jury determined that "two of Bowling's acts of killing were intentional and resulted in multiple deaths," the multiple murder aggravator was applicable. *Id.*, at 181, quoting *Simmons v. Commonwealth*, 746 S.W.2d 393 (Ky. 1988). Moreover, Bowling's sentence was based on the murder of two separate victims, "all that is necessary." *Id.*

## DISSENT

In a dissent joined in part by Special Justice Kathryn Burke, Justice Leibson wrote that he would reverse on the trial court's failure to instruct on EED and manslaughter first in the guilt phase and EED, mental disease or defect and intoxication in the penalty phase.

Leibson felt that the majority failed to address Bowling's evidence demonstrating the need for the instructions. Bowling's mother and sister testified about his bizarre behavior, suicidal comments and depression in the days leading up to the murders. There was also evidence that Bowling's mental problems were exacerbated by his use of drugs and alcohol. *Id.*, at 183.

The Supreme Court "severely and unduly limited the effect of EED as evidence of diminished capacity at the penalty phase" in *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky. 1986). Furthermore, the Penal Code never intended to limit EED "by requiring proof that the defendant acted 'uncontrollably from the impelling force of the extreme emotional disturbance **rather than** from evil or malicious purposes.'" *Id.*, citing *McClellan, supra*, at 468-469. The Penal Code never required that EED be "the sole cause, or the exclusive reason" for a homicide before it applies. Both of those requirements changed with the court's decision in *McClellan*. *Id.*, at 183-184.

Nevertheless, the requirement for a penalty phase EED instruction is even smaller. The statute itself shows this lesser degree: "even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime." *Id.*, at 184, quoting KRS 532.025(2)(b)(2).

The penalty phase instructions also improperly omitted the use of mental illness or retardation or intoxication as mitigation. Once again, the statute requires only evidence that the defendant "'was impaired.'" *Id.*

In his penalty phase close, the prosecutor acknowledged as much: "T.C. Bowling is not mentally ill. T.C. Bowling is mean....", but went farther because it "compounded the error by supplementing the evidence with the prosecutor's **personal** experience and opinion, which is obviously improper." *Id.*

## DISSENT

Special Justice Burke agreed with Justice Leibson, but also felt that the prosecutorial misconduct was the same as that criticized in *Clark, supra*. *Id.*, at 185.

## PETITION FOR REHEARING

In a March 24, 1994 order denying Bowling's petition for rehearing, the Supreme Court addressed Bowling's three points.

First, the Court said that it did review the trial court's failure to instruct on mitigation, and reiterated its conclusion that the evidence did not support the contention that the requested mitigation was present in this case. *Id.*

Second, the court felt that the issue of the trial court's failure to give specific instructions on EED, mental disease or defect and intoxication was "fully reviewed", and that once again, there was insufficient evidence to call for a guilt phase instruction on EED. *Id.*

Lastly, the court once again found that the prosecutor's behavior did not rise to that in *Clark*, *supra*. *Id.*

Justices Leibson and Stumbo would have granted the petition for rehearing.

## *Bussell v. Commonwealth* 1994 wl 141048 (April 21, 1994)

Affirmed.

Majority: Wintersheimer (writing), Leibson, Lambert, Spain and Reynolds.

Minority: Stephens (writing) joined by Stumbo

Stumbo (writing) joined by Stephens

Charles Bussell, a black man, was sentenced to death by an all white jury for the robbery and murder of an elderly white widow.

## RECUSAL

"Although the conduct of the trial judge was not a textbook example of judicial patience," denial of the recusal motion was not reversible error. Slip opinion, at p. 2.

At the beginning of a hearing held on June 13, 1991, the trial judge indicated on the record that he had represented Bussell on a murder charge in 1974. The court indicated a willingness to recuse himself, if a motion was made at that time. Counsel stated that he and Bussell had discussed recusal, but found no reason to ask for it. Thus, "Bussell clearly waived any objection to the trial judge sitting on the case at that time." *Id.*

Six days before trial, a 3-ground written motion to recuse was filed. The first was that the court had previously represented Bussell on a federal criminal matter, on which Bussell was sent to federal prison. This ground is "factually incorrect." The trial court had indicated at the June 13 hearing that he represented Bussell in state court on a charge later dismissed. The recusal motion presented no new facts which the court could have learned during his representation of Bussell which would render him biased against Bussell. Slip opinion, at p. 3.

The second allegation, found without merit, was that the trial court had ruled on an ex parte motion for a search warrant. The third allegation, based on newspaper reports, was that there had been public disclosure of confidential information pertaining to Bussell's competency evaluation, including Bussell's refusal to cooperate with the first psychologist who attempted to examine him. "The fact of trial competency is not confidential and can readily be ascertained from the public record in the case." Thus, Bussell was not prejudiced. Slip opinion, at p. 4.

## SYMPATHY FOR VICTIM

The victim's sister and son testified during the trial. During his penalty phase close, the prosecutor reminded the jury that the victim had a sister and a son. It is permissible that the jury know the victim was a living person and not a statistic. Thus, "in view of the total picture given to the jury", Bussell suffered no undue prejudice. Slip opinion, at p. 6., citing *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), and *Templeman v. Commonwealth*, 785 S.w.2d 259 (Ky. 1990).

## PENALTY PHASE INSTRUCTIONS

Bussell argued that the jury should have been given a "life option" instruction (even though aggravation found, jury can still sentence defendant to less than death). "Instruction No. 4 clearly advises the jury that it could recommend a sentence of life. The verdict forms also so indicate." *Id.*

The trial judge used the word "recommend" in "two isolated incidents" in the instructions. This was a "technical violation" of *Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988), but did not unduly prejudice Bussell. *Id.*

## DIRECTED VERDICT

Bussell was not entitled to a directed verdict of acquittal on murder and robbery. There was sufficient evidence for a "reasonable juror" to find guilt as to both murder and robbery first. Slip opinion, at p. 8.

## PREMATURE SENTENCING DECISION

Bussell argued that he was denied his Sixth, Eighth and Fourteenth Amendment rights because the trial court had already prepared the final judgment and the trial judge's report as required by KRS 532.075(1) before the final sentencing hearing. The trial court conducted "a proper [final] sentencing hearing and heard evidence and argument on behalf of the accused concerning the propriety of the death sentence." The judge's preparation of a "tentative draft" of the final judgment did not affect his ability to consider evidence and argument at the final sentencing hearing. Slip opinion, at p. 9.

## ARBITRARY APPLICATION OF THE DEATH PENALTY

In his reply brief, Bussell introduced a 1992 Kentucky General Assembly study collecting and analyzing the cases of all persons sentenced to murder from 1976 through 1991 in support of his claim that the death penalty is more likely sought against black persons, and that blacks who kill whites are more likely to receive a death sentence.

"The introduction of a 1992 study by means of an appendix to the reply brief gives the Attorney General no opportunity to respond in any fashion." However, the study itself indicates "that it is difficult, if not impossible, to control any perceived racial bias through judicial review." "[T]here is no logical connection between the crime, the imposition of the death penalty and racial bias." Slip opinion, at p. 12.

## DISSENT

Chief Justice Stephens wrote that the rule announced in *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988), "could not have been more unambiguous": the word "recommend" cannot be used in referring to a jury's sentencing responsibilities anywhere at any phase of a capital trial. By its reference to the violation as merely "technical", the majority "ob-

scures well-defined waters and encourages an impression that this Court does not mean what it says." Dissent, slip at p. 1.

## DISSENT

Justice Stumbo joined Chief Justice Stephens' dissent, but wrote that she would also find that the prosecution was allowed to introduced evidence for the sole purpose of eliciting sympathy for the victim.

## *Simmons v. South Carolina*
## To be reported at 114 S.Ct. 2187 (June 17, 1994)

Reversed.
7-2
majority: Blackmun (writing), Stevens, Souter, Ginsburg
O'Connor (writing), Rehnquist, Kennedy (concurring in judgment)
Dissent: Scalia (writing) and Thomas

In states where a defendant's future dangerousness is an issue and state law prohibits his release on parole, Fourteenth Amendment due process requires that the sentencing jury be informed that the defendant is ineligible for parole.

In July 1990, Jonathan Dale Simmons beat an elderly woman to death. Before his trial on those charges, Simmons pled guilty to Burglary First and two counts of Criminal Sexual Conduct in connection with two prior assaults on elderly women.

During the penalty phase of Simmons' trial, the defense presented mitigating evidence tending to show that Simmons' behavior reflected serious mental disturbances which stemmed from years of neglect and extreme sexual and physical abuse suffered while Simmons was an adolescent and that Simmons was a continuing danger to elderly women. Female employees of the county jail where Simmons had been held prior to trial also testified that Simmons had adapted well to life in the jail and that he had not been violent to either inmates or staff.

Defense counsel asked the court to tell the jury that "life imprisonment" in Simmons' case meant that he would serve the rest of his life in prison. Counsel also proffered the testimony of attorneys for the Department of Probation, Parole and Pardons and the Department of Corrections that Simmons was not eligible for parole or any other type of early release program.

Also offered was a public opinion survey conducted by the University of South Carolina a few days before the trial. The results showed that 7.1% of adults eligible to be jurors firmly believed that a life sentence meant just that. Nearly half believed that a life-sentenced prisoner might be paroled within 20 years; nearly 75% believed that release would occur in less than 30 years. More than 75% of those surveyed said that, were they to serve on a capital jury, the amount of time the defendant would spend in prison would be an "extremely" or "very" factor in their choice between life or death.

During deliberation, the jury asked whether "the imposition of a life sentence carr[ies] with it the possibility of parole?" The court told the jury "[parole or parole eligibility] is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning." Simmons, slip op. at p. 4. Less than 30 minutes later, the jury returned with a death verdict.

## FALSE CHOICE

The jury's misunderstanding of Simmons' ineligibility for parole could have "had the effect of creating a false choice between sentencing [him] to death and sentencing him to a limited period of incarceration." Simmons, slip op. at p. 5. The misperception "was encouraged by the trial court's refusal to provide the jury with accurate information regarding [Simmons'] parole ineligibility, and by the State's repeated suggestion that [Simmons] would pose a future danger to society if he were not executed." *Id.* Although consideration of defendant's future dangerousness is constitutional, see *Jurek v. Texas*, 428 U.S. 262, 275, (1976); *California v. Ramos*, 463 U.S. 992, 1003, no. 17 (1983), the South Carolina statute does not mandate such consideration, but includes it in non-statutory aggravating evidence.

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant...[I]t is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he will never be released on parole.

*Simmons*, slip op. at p. 6.

Where the prosecution relies on future dangerousness in its request for the death penalty, "elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal." *Id.*, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986). *Gardner v. Florida*, 430 U.S. 349 (1977), also compelled the decision reached in this case because sentencing a man to death "on the basis of information which he had no opportunity to deny or explain" violates fundamental due process.

The state's argument that parole ineligibility could mislead a jury because future legislative reform, commutation, clemency and escape could allow Simmons' release into society "is misplaced." *Simmons*, slip op. at p. 7. The instruction counsel requested is more accurate than no instruction at all, which could lead the jury to speculate about exactly what "life in prison" meant. Moreover, a large number of states provide for life in prison without parole as an alternative to the death penalty.

## STATE DETERMINES INFORMATION GIVEN IN SENTENCING

Generally, the Supreme Court will defer to a state's determination as to what a jury should be told about its sentencing decision. "In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole." However, "nothing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release." *Simmons*, slip. op. at p. 8.

If the state argues future dangerousness, however, "the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society...[D]ue process plainly requires that [the defendant] be allowed to bring [his parole ineligibility] to the jury's attention by way of argument by defense counsel or an instruction from the court." *Id.*

The Court also disagreed with the South Carolina Supreme Court's contention that the trial court granted Simmons' request for a parole ineligibility instruction when it told the jury that life in prison was to be understood in its "'plain and ordinary meaning.'" because "[f]or much of our

country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than the stated term." Thus, an instruction to understand life in prison "in its plain and ordinary meaning" does nothing to dispel a juror's fears that a defendant may be back on the streets at some point. *Simmons*, slip. op. at 8-9.

Furthermore, the court's instruction that the jury was not to consider parole and that it was not a proper consideration

> actually suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact. Undoubtedly, the instruction was confusing and frustrating to the jury, given the arguments by both the prosecution and the defense relating to [Simmons'] future dangerousness, and the obvious relevance of [Simmons'] parole ineligibility to the jury's formidable sentencing task.

*Simmons*, slip op. at p. 9.

## CONCURRENCE

In her concurrence, Justice O'Connor said that despite the Supreme Court's "general deference" to state decisions regarding what the jury will be told about sentencing, she agreed that due process requires that a defendant be allowed to present his parole ineligibility to the jury in cases in which the only alternative sentence to death is life in prison without parole. *Simmons*, slip op. at p. 13.

O'Connor also agreed that in this case, because the jury felt compelled to ask whether parole was available, it showed that these jurors did not know whether a person sentenced to life would be released from prison. Moreover, the prosecution's reference to "self-defense" in asking for the death sentence "strongly implied that [Simmons] would be let out eventually if the jury did not recommend a death sentence." *Simmons*, slip op. at p. 14.

## CONCURRENCE

Justice Souter concurred in the decision but felt the additional duty should be imposed on the trial court.

## CONCURRENCE

Justice Ginsburg felt that this case was resolved under "a core requirement of due process, the right to be heard."

*Simmons*, slip op. at p. 15. However, she did not read Justice Blackmun's opinion to mean that the judge, rather than defense counsel, must tell the jury about a defendant's parole ineligibility.

## DISSENT

Scalia felt there was "no basis for [the pronouncement that due process requires the jury's consideration of a defendant's parole ineligibility when future dangerousness is an issue], neither in any near uniform practice of our people, not in the jurisprudence of this Court." *Simmons*, slip op. at p. 16.

The overwhelming majority of the 32 states with capital punishment statutes do not allow information regarding parole be given to the jury, although many of those states include life without parole in the jury's sentencing options. Even among those states which permit the jury to choose only between life and death, South Carolina "is not alone" in not allowing the jury to consider parole in its decisions; four other states in "widely separated parts of the country" follow the South Carolina practice. Still others lack any clear procedure. Only ten states follow the procedure mandated by *Simmons*. "This picture of national practice falls far short of demonstrating a principle so widely shared that it is part of even a current and temporary American consensus." *Simmons*, slip op. at p. 16.

Although both Justice Blackmun and Justice O'Connor tried to bring *Simmons* under the umbrella of *Skipper*, and *Gardner*, *supra*, "it does not fit." *Id.* Both Justice Blackmun and Justice O'Connor presented a picture of a prosecutor who stressed Simmons' future dangerousness. In Scalia's eyes, "the record" showed something quite different: a prosecutor stressing the nature of the crimes, the murder of a 79-year-old woman in her home, and the rapes and beatings of three elderly women, one of them Simmons' own grandmother. Furthermore, future dangerousness outside prison "was not even mentioned." *Simmons*, slip op. at p. 17.

Lastly, Scalia felt that the *Simmons* decision was "difficult to reconcile" with the decision in *Romano v. Oklahoma*, 114 S.Ct. 2004 (1994) (admission of prior capital conviction irrelevant, but not fundamentally unfair. "I do not see why the unconstitutionality criterion for excluding evidence in accordance with state law should be any less demanding than the unconstitutionality criterion *Romano* cites for admitting evidence in violation of state law." *Simmons*, slip op. at p. 19.

> I fear we have read today the first page of a whole new chapter in the 'death-is-different' jurisprudence which this Court is in the apparently continuous process of composing...(at great expense to the swiftness and predictability of justice) year-by-year. The heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerilla war to make this unquestionably constitutional sentence a practical impossibility. *Id.*

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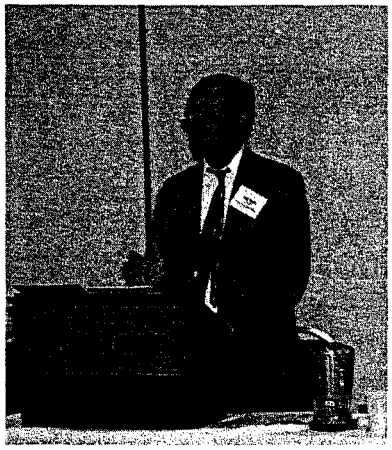
**Allison Connelly** meets with DPA Investigators

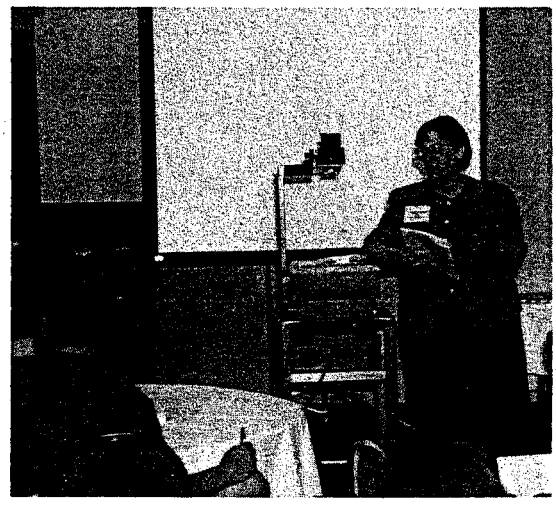
# 22nd Annual Public Defender Training Conference Highlights

**Chief Justice Robert Stephens** receives hat commissioning him as a Bill of Rights officer after speaking on *A Report of the State of the Kentucky Judiciary*

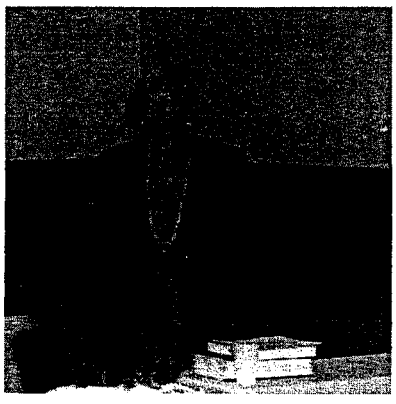
**Kim Allen, Carol Jordan & Allison Connelly** educate us on the *1994 Sex Abuse Legislation*



**Don Meier** on *Juvenile Law Litigation*



**Sharon Marcum** of Kentucky's Governmental Services Center educates DPA Managers on *Behaviorial Interviewing*



Parole Board Chair, **Helen Howard-Hughes**

# 22nd Annual Public Defender Training Conference Highlights

Public Advocate **Allison Connelly** presented with recognition from the Public Advocacy Commission for her work in the 1994 General Assembly by Vince Aprile on behalf of the Commission

**Bob Lotz** talks to Gardner Wagers after talking on *1994 Criminal Law Legislation*

**Allison Connelly** meets with DPA Paralegals & Sentencing Specialists

Many members of the DPA Staff form the backbone of producing the Annual Conference. Pictured here are (left to right) **Joy Brown, Patsy Shyrock, Tina Meadows, Brenda Kramer, Chris Craig, Angela Meadows & Cheree Goodrich**

# DPA's "Coming's & Going's"

## Departures

**Mike Zaiden**: Investigator in the Northern Kentucky area retired from DPA on March 1, 1994. He's been with the Department since January, 1975.

**Suzanne Romano**: Assistant Public Advocate in DPA's London Office. She left our office in March 1994 to go into private practice.

**Doris Terrell:** DPA's receptionist since April of 1979. She transferred to the Attorney General's office in March 1994.

**Greg Butrum:** Assistant Public Advocate in DPA's Paducah Office. He left our office in April 1994 to go into private practice.

**Rob Bolaney:** Assistant Public Advocate in DPA's Paducah Office. He left our office in June 1994.

**John Murphy:** Investigator with the Kentucky Capital Resource Center retired effective July 1994. He's been with the Department since the inception of the Resource Center in 1989, and formerly with the Jefferson District Public Defender Office.

## Appointments

**Michelle Church:** Secretary in DPA's London Office in March 1994.

**Ken Zeller:** Assistant Public Advocate Manager - Head of P & A Legal Unit in March 1994.

**Lisa Clare:** Assistant Public Advocate with P & A in April 1994.

**Mike Pratt:** Assistant Public Advocate with the London Office in March 1994.

**Vicki Stewart:** Investigator with the Stanton Office in May 1994.

**Stefanie McArdle:** Assistant Public Advocate with the Resource Center in June 1994.

**Rebecca Lytle:** Assistant Public Advocate in the Stanton Office in June 1994.

**Jim Baechtold:** Assistant Public Advocate in the Richmond Office in July 1994.

## Transfers

**Dave Eucker:** Richmond Office trial attorney to Frankfort's Appeals Section.

**John West:** Northpoint Office trila and post-conviction attorney to the LaGrange Trial Unit.

**Melissa Bellew:** Capital Resource Center federal habeas attorney to Northpoint Office as trial and post-conviction attorney.

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If one advances in the direction of his dreams, one will meet with success unexpected in common hours.

- Henry David Thoreau

**Vince Aprile** on *Ethics*

# Upcoming DPA, NCDC & NLADA Education

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