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Child Sex Abuse

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

The Advocate

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

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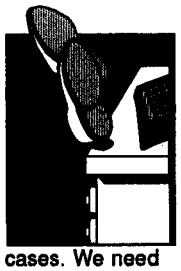
FROM THE EDITOR:



Have we got an issue of education and research for you!

Sex Abuse. Kentucky's criminal justice community continues to wrestle with sex abuse cases. We need more resources, education and training on these difficult human tragedies. This issue we begin a 3-part series on judging true and false accusations written by the nationally prominent psychiatrist, **Richard Gardner**. This issue also contains a review by Circuit Judge **William Stewart** of the recent published sex abuse book written by **Lane J. Veltkamp, M.S.W. & Thomas W. Miller, Ph.D., ADPP**. The imbalance of prosecution and defense resources continues to increase with the addition of $1.6 million for prosecution victim advocates and no additional resources for the defense.

Capital. Marla Sandys of Indiana University's Criminal Justice Department is doing major research on decisionmaking of jurors in death penalty cases. She teaches us a lot about our assumptions.

Management of Ourselves. How do you manage yourself, your resources, your time in your personal and professional life? **Rob Sexton** helps us reflect on time management...an area for all of us to improve on.

Good Faith Exceptions. What does the good faith exception mean after our decade of experimenting with it? **Ernie Lewis** analyzes this creation of the courts.

DUI Roadblocks. Bell District Judge **James Bowling, Jr.'s** September 1994 opinion educates us on roadblocks by the Kentucky State Police.

Confidential Request for Funds. When we ask for money to hire defense experts, we are entitled to make the plea confidentially in order to assure the defense is not inappropriately or prematurely revealed. This is the focus of our fourth installment of our series on funds.

Edward C. Monahan, **Editor**

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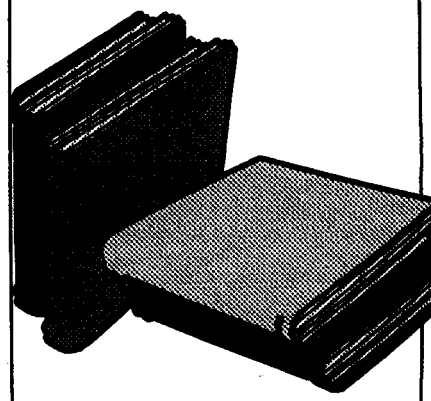

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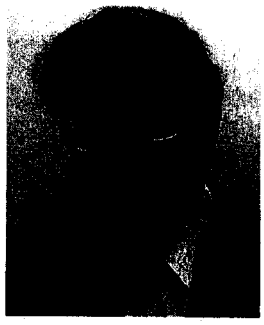
Child Sex Abuse

Differentiation Between True & False Sex Abuse Accusations in Child-Custody Disputes: Indicators of Pedophilia for the Accused Father



Richard Gardner, M.D.

Dr. Gardner is Clinical Professor of Psychiatry, Division of Child Psychiatry, Columbia University, College of Physicians and Surgeons. This is the first of a series of three articles.

In recent years there has been a progressive increase in sex abuse accusations in the context of child-custody disputes. Some of these accusations are valid and some are not. Because such an accusation can serve as an extremely powerful vengeance and exclusionary maneuver, it has become particularly attractive to parents embroiled in such disputes. Differentiating between true and false sex-abuse accusations in such a setting may be extremely difficult. Presented here are some of the criteria the author has found useful for making this differentiation. Utilization of these criteria require interviews with the child, the accuser, and the accused. Eighty-three differentiating criteria are presented divided among the three interviewees: 24 for the accused, 31 for the child, and 28 for the accuser.

Child sex-abuse accusations are burgeoning. In some situations--where the potential pedophile has the opportunity for ongoing contact with the child, such as homes (incest and babysitters), boarding schools, and residential centers--it is probable that the prevalence of sex abuse is quite high. In other situations -- such as vicious child-custody disputes (where the vengeance element and the opportunity for exclusion of a hated spouse is operative) and day-care centers and nursery schools (where the potential pedophile has little opportunity for ongoing contact with the child alone)--the prevalence is probably quite low. In all these situations, the hysterical reactions surrounding the accusation (whether true or false) have been formidable, resulting sometimes in the *validation* of sex abuse when there is good reason to believe that the alleged perpetrator is innocent.[1]

Accordingly, it is crucial that we develop criteria for differentiating between true and false accusations. Such differentiation may be extremely dif-ficult, especially if the evaluator does not interview the accused, the alleged child victim, and the accuser, *i.e.*, all three parties involved in the accusation.

Over the last decade the author has developed criteria for differentiating between true and false sex-abuse accusations. In this article he will focus on the criteria he has found useful for making this differentiation in the context of child-custody disputes. These criteria cannot be utilized unless all three parties are interviewed, namely, the accused, the child, and the accuser. Eighty-three criteria are presented: 24 for the accused, 31 for the child, and 28 for the accuser. Many of these criteria are supported by studies in the scientific literature (studies for which references will be provided), and others were developed by the author himself on the basis of approximately 100 cases studied in depth over the last decade. Because mothers are the accusers far more often than fathers, for simplicity of presentation the accuser will be referred to as the mother and the accused as the father. These criteria, however, are still applicable when the father is the accuser.

The term *false* will refer to a whole range of specious allegations, from those that are consciously fabricated to those that are delusional. Sometimes an initially fabricated accusation may become a delusion, especially if the accusation is supported by overzealous evaluators.

The term *true* will refer to sexual molestation or abuse accusations that are valid. Here too there is not only a range but there are certain situations in which there might be differences of opinion regarding whether a particular parent/child sexual encounter might justifiably be referred to as molestation or abuse, *e.g.*, allowing a child to observe adult sexual encounters, bathing with latency-aged children, and programming a non-abused child to believe that he (she) was sexually abused. Although many of these criteria are applicable to other situations in which a sex-abuse accusation is made, *e.g.* the day-care center and boarding school situations, some are not.

It is not the purpose of this article to describe in detail the interview techniques that I have found most useful when conducting sex-abuse evaluations.[2] I will, however, emphasize one procedure that I have found extremely useful when attempting to differentiate between true and false sex-abuse accusations. Specifically, the examiner does well to trace meticulously the evolution of the accusation from the very first time the accuser considered the possibility that the child was sexually abused until the time of the evaluator's examination. This evolution should not only be traced in detail with the accuser but with the accusing child and the alleged perpetrator. The information so elicited not only provides data for the assessment criteria presented here, but provides important additional information of help to the evaluator in determining whether an accusation is true or false.

These differentiating criteria are presented as an initial offering and the author recognizes that when our experiences with this relatively new phenomenon increases, we will be in a better position to refine, elaborate, and assess these criteria.

Differentiating Indicators of a Sex Abuse Accusation for the Accused

An important determinant as to whether an accused father has sexually abused his child is the presence of pedophilic tendencies. The greater the similarity

between the father's behavior and personality characteristics and those of bona fide pedophiles, the greater the likelihood the child has been sexually abused. I use the word *pedophilia* to refer to a sexual act between an adult and a child. Although there are some who would restrict the use of this term to certain subcategories of adult-child sexual encounters, I prefer (as do many workers in the field) to use the term in a broader sense, namely, to refer to any kind of sexual behavior between an adult and a child -- regardless of the setting and regardless of the nature of the relationship. Because the vast majority of pedophiles are male, most studies of the characteristics of pedophiles are usually conducted with male pedophiles.

I wish to emphasize that there is no such thing as *the typical personality* or the typical profile of the adult male pedophile. There are many kinds of individuals who engage in pedophilic behavior, and they cover a broad spectrum of personality types, with much overlap regarding personality qualities. Furthermore, it is rare to find a person who is exclusively pedophilic. Most pedophiles engage in other forms of sexual behavior, especially atypical behavior.[3] Also, there are varying degrees of exclusivity, ranging from those whose sexual practices include a very high percentage of pedophilic acts and those whose pedophilia may be transient and circumstantial. And this is especially the case for female pedophiles.

Those whose pedophilia appears to be a lifelong pattern are generally referred to as *fixated pedophiles*. These are people who generally never marry and present with a history of ongoing pedophilic acts extending back into adolescence and sometimes even earlier. At the other end of the continuum are individuals who are sometimes referred to as *regressed pedophiles*. They are individuals who may have engaged in pedophilic behavior on one, or only a few, occasions. Often they are married and do not present with a history of significant involvement in a variety of atypical sexual behaviors. The closer the individual is to the fixated end of the continuum, the greater the likelihood the term *pedophile* would be warranted; in contrast, the closer the individual is to the regressed end of the continuum, the less the likelihood one could justifiably apply this label.

The list of differentiating criteria presented here refer primarily to individuals whose history more justifiably would place them at the fixated end of the continuum. There are certain behavioral manifestations that are more commonly found in pedophiles than in those who do not engage in such behavior. I will refer to these behaviors as *indicators*. The greater the number of indicators present, the greater the likelihood the party has engaged in pedophilia. It is important for the evaluator to appreciate that some of the criteria may be contradictory, so much so that a particular individual cannot possibly satisfy all criteria. For example, the *Coercive-Dominating Behavior* indicator may be satisfied by some individuals, but these same people cannot possibly satisfy, at the same time, the *Passivity and Impaired Self-Assertion* criterion. Clearly, it is unrealistic to expect any individual to satisfy all of the criteria. Rather, one should follow the principle that the greater the number of criteria satisfied, the greater the likelihood the individual has committed pedophilic acts.

This list of indicators should not be used in isolation; rather, its findings are most meaningful when combined with other data collected in the course of the evaluation, especially from the alleged child victim as well as the accuser--both in individual and joint interviews. The *conclusion* that the accused has indeed engaged in pedophilic behavior should *not* be based on these criteria alone, but on the broader picture and additional data obtained during the evaluation, especially data obtained from the accuser and the alleged victim(s).

1. History of Family Influences Conducive to the Development of Significant Psychopathology

There are many forms of family dysfunction that may contribute to the development of psychiatric disturbances in the children growing up in such families, and pedophilia is one example of such disturbance.[4] Some examples: family history of violence, alcoholism, drug abuse, psychopathy, serious psychiatric disturbance, and suicide. The more serious the family history of dysfunction, the more seriously disturbed an individual is likely to become, and pedophilia is one type of such disturbance. In contrast, men who are falsely accused are less likely to have a history of such severely psychopathological family influences.

2. Longstanding History of Emotional Deprivation

Pedophiles often have a longstanding history of emotional derivation, especially in early family life. They may have been abandoned by one or both parents, or grown up in homes where they were rejected, humiliated, or exposed to other privations. And such privations may have been suffered subsequently in their relationships with others. Many authors have described this relationship between pedophiles and a family background of emotional neglect.[5] Accordingly, there is strong support in the scientific literature for this relationship. In contrast, men who are falsely accused are less likely to have a background history of emotional deprivation.

3. Intellectual Impairment

Whether or not the average pedophile is of lower intelligence than those who do not engage in this practice is a controversial subject. Peters[6] found pedophiles to be of average or below average intelligence. Gebhard and Gagnon[7] also considered pedophiles to be uneducated and *somewhat simpleminded*. In contrast, Weiner[8] found fathers who involve themselves in incestuous relationships with their daughters to be of high intelligence. History provides us with many examples of highly intelligent pedophiles. Lewis Carroll (1832-1898)(see below in my discussion of the child pornography, indicator Number 16) is one such example. James M. Barrie (1860-1937), the author of *Peter Pan* (clearly an effeminate boy who is often played by girls), was another well- known pedophile.[9] Another famous writer of children's books, Horatio Alger (1834-1899), was also attracted to young boys, and it was this attraction that resulted in his enforced retirement from the Unitarian Ministry.[10]

These occasional (and even famous) exceptions notwithstanding, it seems reasonable that people of low intelligence are less likely to appreciate the consequences of their atypical and illegal behavior and so are more likely to indulge themselves in the expression of latent pedophilic impulses. Furthermore, their poor judgment increases the likelihood that their behavior will be disclosed to others because they are not intelligent enough to engage in pedophilic acts under circumstances where they will not be discovered or divulged. Because there is no strong support for this criterion in the scientific literature, especially because one occasionally sees pedophiles who are quite bright, I consider this a weak indicator, but I consider it an indicator nevertheless.

4. Childhood History of Sex Abuse

Pedophiles are more likely to have been sexually abused in childhood than those who do not exhibit such behavior. It is part of the family pattern, and the pedophile may be the latest in a long line of sexually abused children, extending back many generations.

Finklehor[11] states that "this [sexual abuse in childhood] is one of the most consistent findings of recent research."

Money[12] also describes this phenomenon, with particular emphasis on the feelings of entrapment and dilemma that such youngsters experience. When this occurs, it may result in the eroticization of parental love.[13]

Longo[14] reported that approximately half of his adolescent sex offenders had been sexually molested in the prepubertal years. Becker et al.[15] found that 23 percent of adolescent sex offenders had been the subject of pedophilic experiences. Frisbie[16] found that 24 percent of a group of sex offenders of children reported childhood histories of sexual contact with an adult. Groth[17] found that 25 percent of sex offenders of children had childhood sexual experiences with adults. Condy et al.[18] found that 37 percent of sexual offenders in his study had childhood sexual experiences with an adult at least five years older than themselves.

In contrast, men who have been falsely accused are less likely to have a childhood history of sex abuse.

5. Longstanding History of Very Strong Sexual Urges

Although there are certainly normal, healthy people who have strong sexual urges and who date back their strong sexual drive to childhood, pedophiles are much more likely to provide such a history. Most (but certainly not all) adults date the onset of strong sexual urges to the pubertal period; pedophiles are more likely to date their sexual urges back even further. In fact, there are some who claim that they cannot remember a time when they did not have strong sexual desires. Some will date the onset of their sexual urges to their own childhood sexual encounters with adults, and these experiences, of course, will serve as a model for their own subsequent pedophilic behavior. The age at which masturbation first began can provide important information in this regard. This abnormally strong sexual drive is one of the reasons why the pedophile may be aroused by children of both sexes and even adults of both sexes.

In contrast, men who have been falsely accused of sex abuse are not as likely to date the onset of strong sexual urges to the very earliest years of their lives, significantly before the pubertal period.

6. Impulsivity

Pedophiles are often impulsive. In order to perpetrate a pedophilic act, an individual must break through internal barriers to such behavior (guilt and the anticipation of shame if the acts are disclosed) as well as external deterrents (such as the anticipation of punishment). They frequently exhibit impulsive behavior in other areas of their lives, unrelated to their pedophilia. Inquiry into school and work history of pedophiles will often reveal inability to stick to tasks over long periods, with the result that their academic and work histories reveal frequent shifts, temper outbursts, and other manifestations of their impulsivity.

Finkelhor[19] makes reference to impulsivity as one of the preconditions for pedophilia: "The potential offender had to overcome internal inhibitions against acting on that [pedophilic] motivation." Hauggaard and Reppucci,[20] in their extensive review of the literature, found poor impulse control to be one of the hallmarks of the male child sex abuser. In contrast, men who have been falsely accused are less likely to have had a longstanding history of impulsivity.

7. Feelings of Inadequacy and Compensatory Narcissism

The narcissism so frequently seen in pedophiles is compensatory for the underlying feelings of inadequacy. They have a strong craving to be loved and will gravitate toward children because children will so predictably be adoring of an adult who treats them kindly. Children are somewhat indiscriminate in their affection for and even admiration of adults. Accordingly, they are more likely to provide pedophiles with those responses that can serve to compensate for the pedophile's feelings of inadequacy. This indicator finds strong support in the scientific literature in that many who have studied bona fide pedophiles have concluded that they suffer with deep-seated feelings of inadequacy and often compensatory narcissism.[21]

24 Indicators for The Accused

1. History of Family Influences Conducive to the Development of Significant Psychopathology
2. Longstanding History of Emotional Deprivation
3. Intellectual Impairment
4. Childhood History of Sex Abuse
5. Longstanding History of Very Strong Sexual Urges
6. Impulsivity
7. Feelings of Inadequacy and Compensatory Narcissism
8. Coercive-Dominating Behavior
9. Passivity and Impaired Self-Assertion
10. History of Substance Abuse
11. Poor Judgment
12. Impaired Sexual Interest in Age-Appropriate Women
13. Presence of Other Sexual Deviations
14. Psychosis
15. Immaturity and/or Degression
16. Large Collection of Child Pornographic Materials
17. Career Choice Which Brings Him in Contact with Children
18. Recent Rejection by a Female Peer or Dysfunctional Heterosexual Relationship
19. Unconvincing Denial
20. Use of Rationalizations and Cognitive Distortions That Justify Pedophilia
21. Resistance to Taking a Lie Detector Test
22. Lack of Cooperation in the Evaluative Examination
23. Duplicity Unrelated to the Sex Abuse Denial and Psychopathic Tendencies
24. Moralism

In contrast, fathers who have been falsely accused are less likely to suffer with deep-seated feelings of inadequacy and compensatory narcissism.

8. Coercive-Dominating Behavior

Some pedophiles are very aggressive individuals, to the point where they will impose themselves physically on others. Sometimes, such behavior is exhibited in the context of antisocial acts, *e.g.*, stealing, mugging, assault and battery, and quickness to engage in physical altercations. The domination factor that may be found in pedophilia is not simply a manifestation of species survival domination derived from lower forms. It may also serve the purposes of ego-enhancement and compensation for feelings of inferiority. Some pedophiles are not so dominating that they physically overpower others in order to force them to submit to their desires; rather, they use psychological and verbal methods of getting others to submit to their wills. A father, for example, who requires the family's rigid adherence to his commands and is excessively punitive regarding the imposition of disciplinary measures on his children would be an example of this kind of behavior. These men's wives also are required to submit to their domination. There is strong substantiation for this criterion in the scientific literature.[22]

In contrast, fathers who have been falsely accused of sex abuse are less likely to have a history of such coercive- dominating behavior.

9. Passivity and Impaired Self-Assertion

In contrast to the kinds of aggressive and domineering behaviors described above, there are some pedophiles who exhibit the opposite kind of behavior, that is, they are passive and inhibited in their capacity to assert themselves. There is also strong support for this type of pedophile in the scientific literature.[23] Sometimes individuals of this type have intellectual impairments or serious psychiatric disturbance and are willing to engage in a wide variety of atypical and even illegal behaviors into which they are coerced by more dominant individuals (such as gang or group leaders). Or, they may be so inhibited and passive that their pent-up impulses occasionally break out as the barriers become weakened by the strength of their primitive desires.

In contrast, fathers who have been falsely accused are less likely to have a history of this kind of personality disorder.

10. History of Substance Abuse

Pedophiles are more likely to present with a history of alcohol and/or drug abuse. Sometimes, the pedophilic act is committed under the influence of such substances. It is then that barriers (both internal and external) that suppress pedophilic impulses are weakened and the individual engages in such behavior. These substances can also produce a state of amnesia for the pedophilic act(s), thereby lessening the guilt the individual might otherwise feel for having engaged in such behavior. Wakefield and Underwager[24] report the findings of the Minneapolis Family Renewal Center (1979), in which it was found that alcoholism among incest fathers and sex abusers ranges from 25 to 80 percent. They also quote the studies of Sgroi et al,[25] in which the authors state, "We are beginning only dimly to appreciate the causal role played by alcohol when the perpetrator of child sexual assault is the father or a father figure." Peters[26] found that in over half of the pedophiles he studied, the assault occurred while the offender was drinking. Hauggaard and Reppucci,[27] on the basis of their review of the literature on fathers who had abused their children, found problems with drugs or alcohol to be common.

In contrast, fathers who have been falsely accused of sex abuse are less likely to have a history of substance abuse.

11. Poor Judgment

Mention has already been made of the poor judgment of people with intellectual impairments and psychosis. However, there are individuals who do not fall into either of these categories who exhibit poor judgment. For example, there are people who have masochistic tendencies that drive them to place themselves in situations where they may be rejected and punished. Some grew up in homes where they just didn't learn good judgment. Even small amounts of drug utilization (such as alcohol and marijuana)--not to the point of intoxication--can impair judgment. When judgment is impaired, latent pedophilic impulses may break through internal (and even external) barriers.

In contrast, fathers who have been falsely accused of sex abuse are less likely to have a history of poor judgment as an ongoing pattern in their lives.

12. Impaired Sexual Interest in Age-Appropriate Women

Many pedophiles do not feel competent enough to pursue successfully heterosexual involvement with women their own age. They may not be able to tolerate the inevitable rejections that such pursuit involves. Therefore, they may be attracted to children, who will be more receptive and with whom there will be less of a likelihood of rejection. The longer the past history of inadequate or impaired age-appropriate sexual involvement with women their own age, the greater the likelihood this criterion will be satisfied. Many studies in the scientific literature indicate that pedophiles manifest this kind of anxiety with age- appropriate adult females.[28] It is important to appreciate, however, that the regressed pedophile may have a past history of interest in age-appropriate women but, in response to stresses, regress to an interest in children. But even these individuals are likely to have a past history of sexual dysfunction and/or involvement in atypical sexual practices.

In contrast, fathers who have been falsely accused are likely to have a past history of involvement with females who are age-appropriate.

13. Presence of Other Sexual Deviations

Individuals who are pedophiles generally do not exhibit their pedophilia in isolation from other sexual deviations. One rarely, if ever, sees a well-adjusted adult heterosexual patient who exhibits an isolated sexual deviation such as pedophilia. Rather, other deviations are usually present, *e.g.*, voyeurism, exhibitionism, frotteurism, sadomasochism, rape, or fetishism. There is good substantiation for this criterion in the scientific literature.

Abel et al.[29] found there to be a wide variety of paraphilic sexual activities practiced by pedophiles, *e.g.*, rape, exhibitionism, voyeurism, frottage, obscene mail, transsexualism, transvestism, fetishism, sadism, masochism, obscene phone calling, public masturbation, bestiality, urolagnia, and coprophilia.

Silva,[30] a jailed physician who wrote an autobiographical account of his pedophilia, describes a wide variety of paraphilic behaviors dating back to age nine. Accordingly, I consider this to be one of the stronger differentiating criteria.

In contrast, fathers who have been falsely accused are less likely to exhibit the

wide variety of atypical sexuality so commonly seen in pedophiles. Rather, they typically have a normal sexual developmental history regarding age of onset of sexual urges, masturbation, dating age-appropriate women in their teens and twenties, and one or more traditional ongoing heterosexual relationships or marriages.

14. Psychosis

Although psychotic behavior can result from early childhood rejections, abandonments, and other forms of psychological trauma, many forms of psychosis have a genetic loading. There are many psychotic manifestations that might be associated with pedophilia. The individual may hear voices that encourage and even command the pedophilic behavior. Psychotic individuals are more likely to entertain a wide variety of primitive-sexual fantasies, fantasies that include pedophilia. The judgment of psychotics is often impaired, again increasing the risk of discovery and revelation. Their thought disorders (illogical and bizarre thinking) may result in their believing that what they are doing is benevolent, God- commanded, or worthy of the highest praise.

In contrast, fathers who have been falsely accused are less likely to be psychotic or even to exhibit borderline tendencies and/or prepsychotic types of psychopathology.

15. Immaturity and/or Regression

Many pedophiles are more comfortable relating to children because psychologically they are either fixated at or have regressed to earlier levels of development. There may be generalized manifestations of immaturity, or they may regress to such immature levels in response to stress. Some examples of such immature behavior would be bedwetting, failure to live up to day-to-day responsibilities, insensitivity to the feelings of others, selfishness, and low frustration tolerance. Cohen et al.[31] consider the immature offender to be one of the three types they have found and the regressed offender to be another type. When attempting to differentiate between bona fide offenders and those who have been falsely accused, one will generally find that the falsely accused, who is more likely to have greater ego-strength, is less likely to decompensate under the stresses of the interrogations.

The term *regressed pedophile* is sometimes used to refer to a type of pedophile who has exhibited a reasonably normal heterosexual pattern and then, under certain circumstances of stress, regresses to involvement in pedophilic behavior. In such cases, the pedophilic acts begin relatively late in the individual's life (even in old age) and are not present earlier. Obviously, in such individuals the pedophilia is not a deep-seated pattern, is far more likely to be suppressed or repressed, and is far more amenable to psychotherapy.

16. Large Collection of Child Pornographic Materials

The majority of pedophiles have collections of child pornographic materials, *i.e.*, books, magazines, and videotapes. They are often obsessed with their collections, and many have what can only be described as an insatiable desire to collect such materials. Many not only have trunks full of such materials, but rooms full, attics full, and even trucks full. In recent years videotapes have been added to their collections of printed materials. Postal officials know them well for the kinds of mail they receive, legally or illegally. Police investigators are familiar with this phenomenon and will often search the home of the alleged pedophile for child pornographic materials. Kinsey et al.[32] found collections of pornographic materials to be the most characteristic finding in his studies of known pedophiles. Accordingly, this is one of the strongest of the indicators for pedophilia.

Men who involve themselves significantly with taking photographs (and more recently videotapes) of children are highly suspect. This is especially the case if they are particularly interested in photographing children in various degrees of nudity, not necessarily complete. Although the pedophile may not involve himself any further with the children, the photographs are frequently used for masturbatory purposes.

Probably one of the most famous pedophiles who combined pedophilia with photographing naked children was the Reverend Charles Dodgson (1832-1898), also known as Lewis Carroll, the author of *Alice's Adventures in Wonderland* and *Through the Looking Glass*. Carroll was an avid photographer, befriended the mothers of young girls, and obtained their permission to take photographs of their naked daughters.[33] It is of interest that both of Carroll's books were written for one of the young girls to whom he was attracted.

17. Career Choice Which Brings Him in Contact with Children

Some (but certainly not all) pedophiles enter careers that bring them into close contact with children, thereby providing them with opportunities to indulge their pedophilic impulses, for example, nursery school and elementary school teacher, school bus driver, scout master, camp director, music teacher, physical education teacher, children's choir master, and pediatrician. People who are not pedophiles are less likely to involve themselves in these careers (although they certainly might).

18. Recent Rejection by a Female Peer or Dysfunctional Heterosexual Relationship

Some pedophiles will embark upon pedophilic behavior after rejection by an age-appropriate female companion. And this is especially the case if there was a series of such rejections. The greater the number of such rejections, the greater the likelihood that dormant pedophilic impulses will break through the barriers to such behavior. Men with no pedophilic tendencies will not resort to such behavior, no matter how many rejections they suffer. In the divorce situation, this criterion might be satisfied if the involvement in pedophilic behavior takes place very shortly after the separation, especially if the separation is at the initiation of the wife. This criterion is not satisfied if there has been a long time-gap between the separation and the accusation. This is especially the case if there has been custody litigation and/or a series of exclusionary maneuvers by the wife. Tollison and Adams[34] found that 50 percent of the pedophiles they studied turned to children after unsatisfactory relationships and conflicts with their age-appropriate sexual partners. Some of the pedophiles who satisfy this criterion would be considered *regressed* because of their previously adequate heterosexual adjustment. It is reasonable to assume, however, that pedophilic tendencies were present earlier.

19. Unconvincing Denial

People who have been falsely accused of pedophilia often suffer with a sense of impotent rage. They feel helpless and they may suffer terribly because of the accusation, suffering that may include long jail sentences and destruction of their lives. Accordingly, their professions of innocence are convincing, and do not have an artificial quality. In contrast,

bona fide pedophiles often exhibit weak and/or obviously feigned denials that are not particularly convincing.

20. Use of Rationalizations and Cognitive Distortions That Justify Pedophilia

Many pedophiles rationalize their behavior, *e.g.*, "I'm a survivor of child abuse myself, so I'm entitled to abuse children," "She enjoyed it, so what's wrong with it," "She's a little Lolita. You just wait until she grows up." Some subscribe to the dictum that having sex with a child is a good way to introduce the child to sexual education. Others believe that the adult-child relationship is enhanced by the sexual activities. Some hold that a child who does not physically resist really wants to have sex.

Abel et al.[35] and Groth et al.[36] describe in detail these and other rationalizations commonly provided by pedophiles.

Leahy[37] states, "The pedophile often has gradiose notions of being at the forefront of a cultural revolution in the liberation of child sexuality."

It may be that intellectual weakness may enable the individual to subscribe to these dicta or utilize these rationalizations. The ability to believe such patently absurd rationalizations is another reason why I consider it likely that the average pedophile is of lower than average intelligence.

In contrast, individuals who have not engaged in pedophilic acts, when asked what they think about sex between an adult and a child, will profess the usual attitudes present in our society regarding such acts, *e.g.*, "It's a disgusting act," "It's good they have laws to protect children from such characters," and "It's one of the worst things that an adult can do to a child."

21. Resistance to Taking a Lie Detector Test

Bona fide perpetrators will generally refuse to take a lie detector test and often provide a wide variety of justifications for not doing so--such as the test may have false positives or that their lawyer advised them against it. In contrast, people falsely accused of pedophilia are often (but not always) eager to undergo such an examination, even when they recognize that it is not foolproof. People who are knowledgeable about the polygraph know well that psychopaths, delusional individuals, and people under the influence of certain relaxing drugs will lie *smoothly and coolly* without concomitant physiological reactions. Thus they can *fool* the instrument. They take the position that they will take their chances with it because they are so confident that they will do well. It is important to note that this criterion has nothing to do with the *findings* on the lie detector test, but rather the person's *attitude* toward taking the test.

22. Lack of Cooperation in the Evaluative Examination

Individuals who have involved themselves in pedophilia recognize that they have perpetrated a criminal act and are likely to be reluctant to reveal themselves fully to a mental health examiner because they recognize that their simple denial may not be enough to convince the interviewer of their innocence. They recognize that other things they may say in the course of an evaluation may reveal their pedophilia--either directly or indirectly. Accordingly, they may be uncooperative and obstructionistic, and they may find excuses to circumvent the interviewer's efforts to learn about them. They may even find excuses (sometimes legal) to avoid being interviewed at all. In contrast, people who are innocent welcome interviews by qualified examiners, even if they have legal sanction for not involving themselves in the evaluation (such as the invoking the Fifth Amendment).

23. Duplicity Unrelated to the Sex Abuse Denial and Psychopathic Tendencies

Pedophiles generally present with a long-standing history of deceit. Most recognize the revulsion of society to their deviant behavior as well as the fact that it is a criminal act. Accordingly, they usually exhibit a longstanding pattern of misrepresentation, minimization, denial, and conscious deception about their deviant sexuality.[38] Furthermore, many are psychopathic. This is not surprising because child sex abuse is a form of exploitation and those who indulge in it also show little sensitivity to the effect of their behavior on their child victims.

Hauggaard and Reppucci's[39] review of the literature concluded that many pedophiles exhibit a high *Minnesota Multiphasic Personality Inventory* (MMPI) psychopathic deviant score.

Bona fide perpetrators are not only being deceitful when they deny the pedophilia but will generally exhibit *other* deceits in the course of the evaluation--deceits not directly related to the allegation of pedophilia. The greater the number of such deceptions, the greater the likelihood the individual has perpetrated the pedophilic act. The ancient legal principle is applicable here: *Falsus in uno, falsus in omnibus* (Latin: False in one [thing], false in all [things]). In contrast, those who have not committed such acts are less likely to reveal duplicities in other aspects of the evaluation.

24. Moralism

Some bona fide pedophiles are rigidly moralistic and exhibit significant condemnation of those who *stray from the narrow path* -- especially in the sexual realm. They may be proselytizers and *hell, fire, and damnation* preachers (ordained or not). Their preoccupation with the condemnation of those who might *stray* serves as a vehicle for them to suppress their own inner impulses in the sexual realm. They demonstrate well the psychological principle of reaction formation. This is a process in which individuals vehemently condemn in others behavior that they themselves might secretly (and often unconsciously) wish to engage in themselves, but cannot permit themselves to do, or even recognize that they have the exact same inclinations. Not surprisingly, these pent-up impulses become strong and when they break through they might result in a pedophilic act. People who are not pedophiles are less likely to exhibit this personality trait.

Concluding Comments

When utilizing these criteria for ascertaining whether a suspect has indeed sexually molested a child, one does well to appreciate that some of the items on this list of indicators are mutually contradictory (*e.g.*, there is an item on passivity and another on aggressivity). Accordingly, it is not likely that an individual will be *clean free*, that is, not satisfy any (or satisfy all) of the criteria. However, this factor notwithstanding, a person who is a pedophile is likely to satisfy many of the criteria, and a person who has not committed a pedophilic act is likely to satisfy few if any of them. There is no formal cut-off point and I have studiously avoided providing any numbers here. Furthermore, it is important that the information derived from this list of differentiating criteria be considered along with information provided from other sources, especially from the interviews with the alleged child victim and the accuser(s).

I confine myself here to the indicators for pedophilia for the accused father. Because in child-custody disputes it is most often the father, rather than the mother, who is accused of sex abuse, I have confined myself here to a description of the indicators I utilize when assessing men in such situations. Elsewhere[40] I describe the indicators I utilize for assessing female pedophiles.

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▹ 1. The Job of Jurors

Did you know that America's Founders intended for trial juries to play a political role in the new nation?

They certainly did: they expected citizen juries to protect our rights from infringement by the government.

How? Juries were to consider the fairness or constitutionality of the law itself, before using it on an accused person.

Do juries still have this political job? Yes!

Time Management

The very concept of time management has a dreary and uninviting flavor. It conjures images of compulsive fussing with calendars and lists; nocturnal panic attacks; unwelcome telephone calls; family duties neglected; unappetizing meals taken at one's desk; exercise postponed; sleep delayed; and, in general, the whole hideous state of existential alienation to which modern society ever more rapidly tends. Yet the concept of time management is predicated upon the simple notion that our time is ours to manage. No one need simply give up to the social and economic pressures which could quite easily turn any of us into poor facsimiles of machines.

So, when viewed in this fashion, the concept of time management takes on a rather more interesting, and, indeed, rebellious cast. It invites us to use such hateful impedimenta as telephones, fax machines, calendars, lists and the like as tools in the vitally important struggle to become and to remain humane and free. Accordingly, it follows that time management is a topic which should interest everyone seeking to build that more just and perfect Union envisioned by the framers of the Constitution. Surely everyone who refuses to abandon their freedom to manage their own time makes the same freedom ever so slightly easier for others to attain.

TWO VIEWS OF HUMAN NATURE AND OF WORK

The view of time management which I have adopted is based upon a view of human nature and of work, which I have for my own convenience, called the *Empowerment Model.* The *Empowerment Model* may best be understood by contrasting it with a competing view, which I have called the *Exploitation Model.* Neither the *Empowerment Model* nor the *Exploitation Model* is fully realized anywhere. Every work place and every society merely tends towards one or the other. By the names I have chosen, however, my bias should be clear: I assume that the *Empowerment Model* is practically and morally superior to the *Exploitation Model.*

A) THE EXPLOITATION MODEL

The *Exploitation Model* assumes that human nature, though capable of goodness and even greatness, is fundamentally bad. People by nature are lazy and venal, and will not seek employment unless compelled by economic pressure. Once employed, people won't work well unless rigidly controlled by supervisors.

In this Model, businesses are organized in a strict hierarchy with many levels. The people on each level do not communicate with one another: they communicate with their superior. Everyone is in competition with their peers for the very limited number of places which become available in the hierarchy. Because control is important, promotions are not made strictly by merit; but also by evaluation of one's conformity to a corporate culture composed of such matters as appearance, social background and participation in approved non-work activities.

Tasks in this Model are made as specialized as possible. Each worker's job is designed to require as little exercise of

thought and discretion as possible. Thus, with everyone working according to a standard scheme imposed by the higher levels of the hierarchy, it follows that meaningful power in the enterprise is concentrated in the very highest levels of the hierarchy.

Enterprises in this model are therefore inflexible. Spontaneous adaptations made by employees on the lower levels diminish the power of the supervisors on the upper levels. Rigidity, therefore, to this extent is seen as a countervailing good. However, the rigidity of the enterprise prevents the enterprise from improving its product by adapting it to the needs of the market. Therefore, through a combination of advertising and government intervention, the enterprise seeks to control the market and to adapt it to the product. When this fails, whenever possible, the enterprise will threaten to cause economic dislocation by moving the enterprise elsewhere. This tends to discipline markets with the temerity to disfavor the enterprise's products.

Training in this Model is seen as the responsibility of schools and colleges, which are expected to produce new graduates perfectly prepared to function in a small niche in a large business structure.

▹ 2. Responsibility of Jurors

Many Americans don't know that when they sit on a jury, they have both the right and the responsibility to vote according to conscience in pursuit of justice.

That means a trial juror should vote to acquit a defendant if he or she believes the law itself is bad.

It also means trial jurors can make a big difference in the laws we live by, because jury verdicts affect the opinions of lawmakers.

Therefore, business enterprises in this model seek to gain power over education. Universities are encouraged to emphasize professional and graduate training at the expense of the liberal arts. This produces more specialized graduates; as well as graduates who are desperately in debt, who are more vulnerable to economic pressure, and are thus more compliant. High schools are encouraged to graduate a core of poorly educated people who can only learn to perform one small task, such as tightening a particular bolt, over and over again throughout their careers.

In this Model the costs of production are shifted as much as possible away from the enterprise and to society as a whole. This is done through the entirely legitimate practice of passing costs along to the consumers of the product, but also through the more questionable practice of competing for government subsidies, services and tax breaks. This last practice passes the costs of production not only along to the product's consumers, but to members of society who, for various reasons, do not wish to buy the enterprise's product.

In short, the goods produced or the services provided by an enterprise in this Model are almost an afterthought. The main concern is power over the customers of the enterprise, over those in society who do not wish to use the enterprise's products, over lower-level workers in the enterprise and over the educational system. To the extent that this power is held by an enterprise it may shift its costs of production and training away from the enterprise, and maximize its profits without worrying a great deal about the quality of its products.

B) THE EMPOWERMENT MODEL

The *Empowerment Model* assumes that human nature, though capable of great evil, is fundamentally good. People by nature are energetic and creative, and will seek employment freely because work is fulfilling. Once employed the people who actually do a job may be entrusted to do it well, with the guidance and assistance of the managers of the enterprise.

In this Model there is no sharp distinction between labor and management. To the extent there is a hierarchy at all, it will have as few levels as possible between the top and the bottom. Corporate cultural diversity is valued, not solely for its own sake, but also because it allows all decisions to be made according to only one overarching concern: the excellence of the product. To this last end, all the collaborative energies of the enterprise are directed.

This Model places a high value on workers who can function in many work settings in the enterprise, and who can see the interconnections between the functioning of its various parts. These skills are especially required of the managers of the enterprise. Everyone is encouraged spontaneously to improve the manner in which he or she works. It is recognized that the person who does a job knows more about it, can do it better, and can improve it better than a manager usually can. Accordingly everyone's contributions are welcomed.

Flexibility is a paramount virtue in this Model. Again, flexibility is not valued so much for its own sake, as it is as a prerequisite for the continual improvement of the products of the enterprise. A sensitive understanding of the needs of the market is always avidly sought. Once this knowledge is attained, it is applied. Work patterns are continually reorganized, new research is continually factored into decisions, the enterprise's strengths are built upon and its weaknesses are corrected. This process never stops. In this Model, while an enterprise will often compete ferociously with other businesses in the same field, it will tend to discourage competition among its own workers. This last type of competition, unless placed on a friendly basis as a means of strengthening morale, will tend to decrease the free collaboration which the enterprise needs to succeed.

Training in this Model is not something to be shifted to the educational system, but is done primarily in-house. In hiring, value is placed on people who are as broadly educated as possible, because flexibility is valued. Accordingly, the BA will usually be sufficient for an entry-level management position. Workers are sought who can actually make the products the enterprise produces. Accordingly, high school diplomates are not valued as mere potential bolt-tighteners, but as potential skilled tradespeople, comfortable with a wide variety of tasks.

This Model minimizes the tendency of businesses to shift their costs to social groups other than their own consumers. An enterprise which rigorously seeks to serve its marketplace has a correspondingly diminished need to control its marketplace.

In sum, a business in this model seeks success in the good old fashioned way: it tries to provide the best products at the lowest price. In competition, an enterprise using the *Empowerment Model* will tend to defeat an enterprise using the *Exploitation Model*, as long as this competition takes place in a free society.

TIME MANAGEMENT IN THE TWO MODELS

A) IN THE EXPLOITATION MODEL

Unless one is placed in the upper levels of a large business hierarchy, it does not

▷ 3. Hindsight is Helpful

If you had been a juror at the Salem Witch Trials, would you have wanted to know about your right to vote according to conscience, so that you could help stop a terrible injustice?

In those days, jurors knew about their power. When they stopped convicting women of witchcraft, it ended those trials.

Today, jurors still have that power, but too many of them don't know about it. Now you know.

make sense to speak of time management in the *Exploitation Model*. In this Model, no one's time is one's own to manage. Instead of managing one's time, one is required to conform to a supervisor's demands on one's time, which is a very different thing. Here employment is deemed to be a sort of Faustian bargain between employer and employee, with the employer cast in the role of Mephistopheles. The bargain may be summarized as follows:

1. Your time belongs to your boss.
2. In exchange for your wages, your boss gets power over you.
3. Time at work is dominated by external demands for efficiency.
4. Free time is dominated by anxiety over work, or by meaningless activity to escape from anxiety over work.
5. There is a sharp theoretical distinction between free time and work.

This bargain is the sovereign prescription for social alienation and tends, as stated above, to maximize economic inefficiency.

B) IN THE EMPOWERMENT MODEL

Here the bargain between employer and employee requires intelligent time management on the part of the employee. That bargain may be summarized as follows:

1. Your time belongs to you.
2. In exchange for your wages, your boss gets your willing and enthusiastic participation in the enterprise.
3. Time at work is dominated by collaborative quest for quality and productivity.
4. Free time is dominated by meaningful and fulfilling recreation.
5. Free time and work blend into one another.

This bargain allows an enterprise to gain maximum use of its human resources, and could form the basis for a society which functions far more smoothly than ours does at present.

C) AN EMPOWERMENT MODEL THEORY OF TIME MANAGEMENT

An employer in the *Empowerment Model* wants nothing more than employees who are mature, self-directed, self-aware, and who have willingly chosen to advance the goals of the enterprise. Such employers actually want employees to have the freedom to manage their own time as much as possible, because they trust and rely on their employees to use their time well.

Within this sphere of freedom, therefore, time management may be generally defined as the art of living well in view of the certainty of our mortality. Thus time management consists simply of not wasting time; or, in positive terms, it consists of the devotion of our attention solely to significant matters.

In this Model, every individual has the freedom and the duty to decide for himself or herself what is significant, but accepts that this freedom must be exercised in the context of responsibilities to others. Thus people in this Model will not go to work for an enterprise without making a willing commitment to the goals of the enterprise.

In this Model it is assumed that the manner in which a person acts is an expression of that person's deepest sense of self: what a person does expresses who that person is. Self-knowledge is thus the key to deliberate time management. To gain much practical self-knowledge, a person must answer such questions as these:

A. What is my calling or purpose in life?

B. What goals must I reach to be true to that purpose?

C. What must I do to achieve these goals? What must I do this month? What must I do today? What must I do now?

Although each individual has the freedom to answer such questions for himself or herself, each individual bears the risk of arriving at wrong or useless answers to those questions. Therefore, because of the close link between being and doing, bad time management alerts one to his or her need to personal growth. Conversely, when one has achieved a certain inward harmony, that will give rise to the effective use of time.

APPLICATIONS FOR ATTORNEYS

A) FROM THE REALM OF ABSTRACT THEORY TO THE REALM OF CONCRETE HISTORY

The *Empowerment Model* outlined above is very largely based on classical theories of how capitalism is supposed to work. Without belaboring the point here, it is enough to state that classical capitalist theory was based on a very positive, Eighteenth Century view of human nature. It saw a business enterprise, and indeed society as a whole, as a nexus of contracts, intelligently and voluntarily made by self-interested but not entirely selfish people. It sought to maximize human freedom as a prerequisite to maximizing human creativity; and, in this manner it was felt that the needs and

▷ 4. The Power of Jury Verdicts

Did you know that before the Civil War, juries often refused to convict people arrested for helping slaves escape, even though they had clearly broken the Fugitive Slave laws?

And did you know that even before that, most of the northern states had outlawed slavery as a result of jury verdicts?

Most importantly, did you know that jurors today have the same power to reject bad law that they had back then?

legitimate desires of a civilized and humane society could best be met.

The *Exploitation Model* outlined above is an attempt to describe how business is done in a context where human beings are devalued. This Model has often been made manifest in history in a hypocritical way, as a non-capitalist wolf dressed in capitalist sheep's clothing. It is however quite inimical to the application of classic capitalistic theory. Whether based on Calvinist theories of the total depravity of man; or Social Darwinist theories of survival of the fittest; or Fascist idealization of the will to power; or Leninist conceptions of a dictatorship exercised nominally on behalf of workers, the Exploitation Model has had a long, sad history in diverse countries and cultures. Fortunately, in free societies, enterprises which adopt the *Exploitation Model* tend to go out of business because of their rigidity, or are forced by market pressure to adopt more creative ways of doing their work.

In the United States today, there are probably few or no enterprises which perfectly incarnate either Model. Businesses in the real world simply tend to one extreme or the other. In an enterprise-wide review of time management practices, however, it seems that managers should encourage practical measures to implement the *Empowerment Model* as much as possible. It simply makes good practical sense.

B) EMPOWERMENT MODEL TIME MANAGEMENT FOR PUBLIC DEFENDERS

A public defender is an attorney who has made the willing election to maximize human freedom, by representing poor people charged with crimes. Our clients, in general, suffer from two forces seeking to minimize their liberty: the culture of poverty and the criminal justice system itself.

Societies tending towards the *Exploitation Model* often deliberately maintain a large underclass. Entrance to this underclass is made relatively easy, whereas exit is correspondingly difficult to achieve. It is felt in such societies that working people will not work effectively absent economic pressures threatening to force one into the underclass. The criminal justice system in such societies frequently is co-opted into becoming a force easing entrance into and hindering exit from the underclass. Even poor people charged with minor offenses are often vexed with a multiplicity of court appearances, and given fines which make it difficult to live on their monthly incomes. In this manner, regular employment, savings, job training and other means of economic self-betterment are made impossible. A felony conviction, even with a probated sentence, often makes exit from the underclass permanently impossible.

It will be clear to many of us that American society is edging towards these features of an Exploitation Model society: a permanent underclass, which the criminal justice system helps maintain. In this context, public defenders are contrarians. We, along with such thinkers as the classic theorists of capitalism, believe that no society is wealthy enough simply to dispose of the talents of any of its members; and so, to every extent possible, we seek to place our clients back within the nexus of purposeful economic and social interaction without which a free society cannot flourish. Although the strategy varies with the case, the goal is ever constant.

The practical means of time management become less dreary to contemplate and less threatening to use when they are used with this goal in mind. We work efficiently, not in response to some external mandate from our supervisor, but to achieve a purpose to which we have made a willing commitment. When viewed in this light, our position is enviable: by the responsible use of our freedom, we become empowered to maximize the freedom of others.

With these principles in mind, it becomes a simple matter of common sense for an attorney soundly to manage his or her docket. An acceptance of the duty to train continually is paramount, because good results can be obtained for one's clients with much less effort as one's expertise increases. Moveover, the judicious use of new technology, while never an end in itself, can vastly increase one's power to represent large numbers of clients well. An intuitive ability to distinguish important from unimportant matters is also vital, as one should seek freely to devote one's time only to that which is important. Finally the skilled, yet not slavish, use of one's calendar is an essential component of good time management.

CONCLUSION

Time management is the disciplined art of claiming autonomy and responsibility for ourselves, and extending these benefits to others.

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▹ 5. Jurors: The Voice of the Public

Earlier this century, alcohol was outlawed. But Prohibition failed because, across the country, jurors wouldn't convict their neighbors for selling or possessing alcohol.

Prohibition was then repealed, because lawmakers recognized that jury verdicts show true public opinion.

This is just one example of how juries make democracy work, by bringing in acquittals when the law is wrong.

Kentucky Capital Jury Project in Progress:

Guided Discretion or Negotiated Peace of Mind? (Part II)

This article is a reprint of an article in the National Legal Aid & Defender Association's Capital Report (#40), 1625 K Street, N.W., Washington, D.C. 20006; Tel: (202) 452-0620; Fax: (202) 872-1031 and is reprinted with permission.

This is a continuation of the article that appeared in *The Advocate*, Vol. 16, No. 1 (February 1994) at 44-49 and which also appeared in NLADA's last issue of *Capital Report* (#39 at p. 1). Thus, the background information (*i.e.*, the method, survey and tables) from that previous article should be consulted when reading this one. The focus here is on an analysis of two jurors who first thought the defendant should receive a life sentence, but who ultimately voted for a sentence of death. *See, Table 3, Id., at p. 45.* As in the previous article, this analysis suggests the invalidity of assumptions about jurors' decisionmaking which underlie much of the United States Supreme Court's jurisprudence.

Life-to-Death Converts

These two life-to-death converts served on different cases, but in judgment of crimes sharing similarities. In both cases, the victim was a white female and the defendant's employer. Moreover, the motive in both cases was, to some degree, money.

Juror 1

The first life-to-death convert to be discussed never really felt that a sentence of less than death was appropriate. Rather, he wanted to give a sentence of less than death, but he did not think the facts warranted such a decision. When asked what punishment he thought the defendant deserved, after the finding of guilt, but before the penalty phase, the juror responded:

> I didn't want to give him the death sentence, and I wasn't undecided.... I mean the average person is not used to that, and, the average person has a fight within themselves to find out what their views are. I was always raised against the death penalty, so it was a rough decision and no, I didn't want to, I was always looking for a way out...

However, at the end of the penalty phase, but just before the sentencing deliberations, the juror became increasingly aware of the possibility of sentencing the defendant to death:

> There was a little voice inside of me that said "yes, he should" [receive a sentence of death], but I ...wanted to wait until I heard other people's views about it before I said my opinion.

On the first sentencing vote, which occurred "probably within...half an hour," the juror cast his vote for death. The question, of course, is how a self-proclaimed life-long opponent of capital punishment comes to vote for a sentence of death? It appears that this juror did so out of a sense of legal or social responsibility. When asked for the strongest factors opposing a death sentence, the juror responded:

> Me personally? Born against the death penalty. Is it possible to be against the death penalty and still enforce it? It's about responsibility, and okay, in my view you have to carry life with parole the way the law is written, regardless of my own personal feelings, so *I kept my personal feelings out if it*, that's part of the responsibility *(emphasis added)*.

The juror touched upon the theme of responsibility earlier in the interview, when referring to death qualification in jury selection:

> You weren't *ready* for it, and I seriously questioned myself, could I do that? And, I knew what the judge was going to ask me. As a matter of fact I had to do a little soul searching before I accepted. And the reason I accepted was I think it's a matter of responsibility... It wasn't an easy thing to do.... It's a responsibility and you just do it; it's something that you have to do.

One might expect that this juror experienced a tremendous amount of conflict between his personal convictions and his sense of responsibility in arriving at his decision for death. However, that does not appear to be the case; it appears the juror found a viable way of divorcing his personal opinions from the task at hand. The sense of responsibility he mentions

▷ 6. Your Opinion

How long has it been since the government asked for your opinion on the laws of the land?

Before you say "Never," consider this: your opinion of the law is being asked every time you serve on a jury.

How so? As a juror, if you disapprove of the law, you can vote to acquit a defendant, no matter how solid the evidence may be.

is not personal, but a responsibility to society. In the tradition of the Classical School, this juror adheres to the belief that individuals must relinquish certain individual freedoms for the betterment of society - the law is responsible for deciding who should live and who should die. In fact, when asked to rank what or who was most responsible for the defendant's punishment, this juror claimed that the law was most responsible, followed by the defendant, the jury, the judge, and then finally, the individual juror.

The extent to which the juror attributed responsibility to the law for the sentence imposed is somewhat surprising given the reality of the law in Kentucky. There is Kentucky caselaw that prohibits the use of the term "recommend" when addressing jurors about their role in the sentencing decision, *Tamme v. Commonwealth*, 759 S.W.2d 51 (KY 1988), and Kentucky is not a judge-override state. Still, this juror indicated that the law was responsible for the death sentence.

An obvious question is why this juror come to that conclusion. It appears that the juror misunderstood the jury instructions. After disagreeing with the statement that "the judge's sentencing instructions to the jury had little or no influence on the jury's decision," the juror elaborated:

> Let me re-phrase that. It was in the outline, you know, if we found him *guilty*, we *had to go by Kentucky state law*. If we found him guilty on certain counts, and we found him guilty of capital murder, or a capital crime, and we had to weigh some other things too but, you know, we had to give him capital punishment, *by state law (emphases added)*. And he (the judge) also explained to us too that he was the one, this is *after* [we decided on the sentence], that this was just more or less a *decision* and it's not the final verdict, that he had the final say-so when he reviewed the case *(emphases in original)*.
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> Our's was not a decision, well it is a decision, in fact we were just following the law. In Kentucky, you know, capital punishment is legal, so we were going by the law and then he [the judge] had to make the final decision.

So, according to this juror, who was personally opposed to capital punishment, there was not much of a decision to make, aside from the determination of guilt. Rather, his interpretation of the judge's sentencing instructions led him to believe that the sentencing decision was based, primarily, on the jury's determination of guilt. And, even at that, he seemed to believe that the jury merely made a recommendation to the judge.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968) the United States Supreme Court expressed concern about including opponents of capital punishment on capital juries, fearing that they would nullify a guilt verdict to avoid a death sentence. Obviously, that fear is not supported by the reports of this juror. In fact, this juror reported that the jury's determination of guilt "really wasn't a *hard* decision to make." *(emphasis in original)*.

Hence, this juror seems to be exactly the type the courts are looking for, one who does not let personal opposition to capital punishment interfere with guilt or sentencing determinations. Moreover, the judge's post-sentencing comments regarding his own ultimate responsibility for the determination of the final sentence, probably did much to alleviate any possible conflict the juror was experiencing. And, the juror himself took heart in the fact that he was not alone in deciding upon death: "I guess the fail safe (is that) it's not one sole decision, it's the decision of twelve individuals, after discussion of all the evidence."

The discussion thus far has focused on the juror's attribution of responsibility for the sentencing decision. It appears as though the juror absolved himself of personal responsibility for the sentence, placing it upon the law and the collective jury. Thus, he resolved any cognitive dissonance he may have been experiencing. What remains to be explained is what about the facts of the case led this juror to vote for guilt, thinking as he did that such a verdict would necessarily lead to a sentence of death?

The decision appears to have been based on the perceived cruelty of the crime. When asked how he would describe the killing, the juror responded very succinctly: "Sadistic, sick, I don't know, it was just terrible, animalistic." When asked if there was anything about the crime that he kept thinking about, the juror referred to a vivid recollection of the brutality of a particular knife wound.

There should be no attempt to diminish the brutality of such an act. And, if the defendant is proven guilty, he should be punished. However, the law requires that capital jurors base their sentencing decisions on a weighing of aggravating and mitigating circumstances of the crime and the defendant, not the brutality of the crime alone.

One could argue that there were no mitigating factors to the crime. Yet, the jurors on this case all noted that the defendant was an alcoholic, and this particular juror mentioned that the *defendant* had been drinking on the night of the crime.

Also, in expressing some degree of sympathy for the defendant, this juror mentioned another mitigating factor: "I think

▷ 7. Jurors Have Power

Remember the slogan, "Power to the People"? Nostalgic, isn't it?

Maybe that's because it didn't happen. These days we, the people, seem to have even less power than we did then.

There is an answer, though. It's called jury veto power. It enables ordinary citizens to hve the last say on the laws we live by.

he was a very neglected child, and he just didn't have the opportunities growing up. He was neglected, he was more or less left on his own." The other jurors on the case acknowledged the existence of mitigating factors (although never mentioned as such), but never in the context of sympathy for the defendant.

One final issue is whether the juror's attitude toward capital punishment changed as a result of his experience on the jury? Interestingly enough, throughout the interview the juror maintained his position as an opponent of capital punishment, but acknowledged that he must be somewhat in favor of it since he voted for death. It seems as though the brutality of the crime led him to believe that there are some occasions when capital punishment is the most appropriate penalty:

> As far as how I felt, well, maybe this would haunt me the rest of my life, but it doesn't, I *do* think about it, yes I do. I hate to see this happen, I hate this to be as it is. But this kind of thing cannot go on and as a society we're so confused ourselves that we don't know how to handle the situation. It's like abortion, it's a very controversial thing, *very* controversial. You just have to weigh the crime with the punishment. *(emphases in original).*

Juror 2

The second juror discussed in this paper shared some of the same sentiments as the first. In particular, the second juror also expressed what could be considered sympathy for the defendant. In fact, when asked if he found the defendant "likable as a person," the juror said, "he had good appearance, in a way, yes, strangely enough." This juror also expressed sympathy for the defendant's family, acknowledging that he imagined what it would be like to have a family member charged with a capital crime.

Another area in which the two jurors converge is in their perceptions that the law requires jurors to decide on the sentence without regard to their personal views. The second juror noted when asked to recall the judge's sentencing instructions:

> That we were to make our decision on the basis of his instructions and the law, not what we felt, not what we thought ought to be, but what we were constrained to do by the instructions he gave us, which he told us was the law of this state....that a verdict of guilty for that type of crime had these specific options, and that we had to go with those guidelines and that our personal opinions of the law were not to come into play. If we thought it was a just law, or an unjust law, that was not to matter.... We were to make the decision according to his instructions, as to what the law said.

Hence, both jurors agreed that their task was to determine the sentence, irrespective of their personal opinions. However, the second juror appears to have struggled substantially more than the first juror in distinguishing between his personal views and his perceptions of what the law requires.

At the end of a series of questions asking the juror how important each of the considerations were to his personal sentencing decision, the interviewer said: "On the question 'desire to apply the law correctly,' you said fairly important, but you sort of grimaced when you said it." The juror responded:

> Well again, I guess what is legal is not always ethical and moral. It should be, and I think it usually is, but it is *not* always.... Yes, you want to see the law obeyed, ah, but you're not trying to be vengeful for instance. And if you feel the law is not correct, of course, there's just an interplay of feelings, and emotions, and instructions that come into play in this. Maybe not with every juror, but there was with me. And, I understood that we were to follow the law and not judge whether we felt the law was correct or not. But, yet, at the same time, perhaps you can't always do that. I don't know.

One major distinction between the two jurors is that the second one acknowledged that the jury was faced with sentencing options; he did not believe that a determination of guilty of a capital crime necessarily meant the defendant would be sentenced to death. In fact, this juror said that during the guilt deliberations the jury talked about whether the defendant would, or should get the death penalty "Perhaps some, but that was pretty much separate when we decided the penalty phase. So, really, we stuck pretty much to the...guilty and not guilty aspect of it."

Another issue on which the two jurors are different is that the second juror never described himself as an opponent of capital punishment. Rather, he said:

> I guess I am reluctantly in favor of the death penalty, enough to have gone ahead and voted in favor of it in this case. Had I not been, I don't believe I ever would have been on the jury in the first place.

Though the second juror described himself as favoring the death penalty, he expressed beliefs and feelings which clearly resulted in more difficulty than the

▹ 8. Bad Verdicts

Did you ever wonder how the jury, in a case you've followed, could have reached such a bad verdict?

Sometimes, it's because the jurors weren't told the truth about their power. That is, they're rarely informed that if applying the law would bother their conscience, they can acquit.

Instead, they're told to apply the letter of the law, like it or not. If they do as they're told, they may go home feeling as badly about their verdict as you do.

first juror experienced in imposing the death penalty. In discussing jury selection, the second juror recalled concluding that he probably could not vote for death:

> That was a struggle also. The judge's question in chambers during jury selection was "Could you *consider* capital punishment?" If he had said, "Would you *vote* for capital punishment?" I would have probably disqualified myself at that point, but I could consider it. *(emphases in original).*

Although this juror was in favor of capital punishment, he expressed tremendous conflict in reaching his decision to sentence the defendant to death. One way the juror manifested this conflict was to draw a distinction between his personal impressions of the defendant and those he garnered through the evidence. This distinction was verbalized eloquently when the juror was asked how well he thought the phrase "dangerous to other people" described the defendant:

> My impressions of him, just observing, I would say not well. But, of course, the facts, speaking from intellectual observation as opposed to emotional observation... Are we speaking as a result of the trial, of the evidence that I heard and had to decide upon, or just my general impressions of him, seeing him, running into him in the corridor, and...that sort of thing?

Interviewer: It would be more like if you were to talk to somebody about the case, how would you describe him [with regard to dangerousness]?

> Okay, very well, based on testimony. It's just strange, you'd have a break and he'd use the same restroom as you would and he'd speak. Of course, he may have been trying to sway a juror, I don't know. After the trial I ran into people who went to high school with the fella. They said, "You know, he seemed to be a good guy...I'd have never thought he'd of done that." Also, after the trial you learn that he had been suspected in another murder case before the policemen were able to get enough evidence on him. So, my impressions of him, just emotional, as a person to run into him and to hear people who knew him as buddies in school is that he was not a dangerous person. But obviously he is a dangerous person. I know I'm probably not helping your cause, but I have this dichotomy of thought here. Of course, I'm sure no defendant is going to try and appear dangerous in a courtroom.

The second juror, like the first, stressed the issue of responsibility. However, the two jurors' interpretations could not be more divergent. The second juror first brought up the issue of responsibility when he was asked to explain why he was reluctant to go along with the majority on the defendant's punishment, focusing on personal responsibility rather than a responsibility to society or the law:

> Circumstantial evidence, and then ethical, personal, religious considerations. You know, I just, sentencing a man to death is an overwhelming responsibility, and uh, I had to view it in a moral and personal framework, and a spiritual and religious one.

When asked to elaborate on the religious aspects, the juror said:

> Well, I guess it's just, is it right to take another person's life? Um, one man on the jury said, "Well, I couldn't pull the switch." Well, of course, if we sentence him to death, we're as responsible as the person who *does (emphasis in original)* pull the switch. Ah, so you have to really grapple with that and really grasp with that. Ah, um, in a very strict, objective perspective, I feel that scripture does not, that it does condone capital punishment. But, emotionally, I still have trouble dealing with it. *I guess I just take the responsibility very seriously (emphasis added).*

As compared to the first juror, this second juror more definitely expressed his inclination that the defendant should be given a sentence of less than death. He acknowledged thinking that the defendant should receive a sentence of less than death well into the sentencing deliberations. In fact, he was in effect the last hold-out for a sentence other than death. The question, then, is what transpired during the jury's sentencing deliberations to convince this juror to vote for death? As with many of the death-to-life converts, *See, The Advocate* (Vol. 16, No. 1 (February 1994), and NLADA *Capital Report* #39, pp. 1, 9, this juror indicated that a primary concern for all of the jurors was the defendant's possible release from prison. The juror began recounting the sentencing deliberations by noting that critical point of agreement among the jurors:

> I think the overriding emotion or feeling among the jury was that he should not ever be out where he could...cause harm to society again. In fact, we had to, according to the judge's instructions, give capital punishment and I think the next level of punishment was...life with no parole for 30 years, which would have put him out on the streets, he was

▹ 9. A Quiz

Here's a quiz about power in the courtroom: Which of these players can refuse to apply a bad law to a defendant?

The judge? The prosecutor? The jury?

The correct answer is, any of them. But jurors are rarely told about this power. They are often told they're required by oath to apply the law, good or bad.

Not so. As long as they don't go beyond finding someone guilty as charged, jurors can do whatever seems right.

31, at the age of 61. There were some of us who were willing to do that...but the majority were not. So, we went back in to the judge and asked him is there... life with no chance of parole? He simply said "I've given you the only instructions I can give you by law." We had to go back in and make our decision. So, I think that was the overriding factor that we pretty much agreed that he shouldn't be allowed to be out where he could harm someone again.

The juror then went on to elaborate on why some of the other jurors were uncomfortable with parole after 30 years:

> The main thing would be whether the possibility of parole after 30 years was, well, from some people's point of view, a *severe* enough punishment, or whether it would assure society that they were safe from the man. A lot of people felt that at 60, 61, he might get out of prison even more hardened than when he went in; he would still be dangerous when he came out, and there would be a very *real* possibility of him getting paroled. *(emphases in original).*

The interviewer then asked: "In the process of getting to unanimity, what sorts of things seemed to shift the dissenters over to capital punishment?"

> I would think the convincing of some of the jurors that yes, this man would still be dangerous if he gets out of prison at age 61. *I think that without a doubt, if the jury could've been assured that he would be given life without any possibility of parole, the jury would've voted to do that.* But, that seemed not to be an option. So, it seemed that one-by-one the jurors, the four of us, were convinced that capital punishment was the only alternative. It finally got down to another lady and myself holding out for the life with no parole for thirty years. I gradually came to see that...if I changed my mind, she would change her's. I didn't want to influence her one way or the other. At the same time, I felt the jury had deliberated honestly, and I did not want it to be a, I didn't know whether it could become a hung jury on the penalty phase of the trial or not... And, finally, I guess I collapsed on that, and when I did, she did also. So, we reach a unanimous verdict. *(emphasis added).*

Later in the interview, when asked why he personally changed his vote, the juror highlighted the same themes:

> I guess the fact that I did not want him to create harm in society again, and also, I felt the jury had done as good a job as any jury probably would. I didn't know whether it could go back to a retrial or not. Again, it was a combination of things. It was an awareness that it would be... appealed, appeals mandated by law. If...I had not been aware that there would be a necessary appeal, I might *not* have changed my mind. *(emphasis added).*

So, again, as with the jurors discussed in the previous article, the defendant's release from prison was a critical factor in this jury's deliberations. Also, it appears as though this juror diminished his personal responsibility for imposition of the death penalty by falling back on the law providing for mandatory appellate review.

Conclusion

What can be said of these jurors who at first were inclined to vote for life, but ended up voting for a sentence of death? The most obvious statement is that their reluctance to vote for a sentence of death is based on personal beliefs, not mitigating factors which are supposed to guide their discretion toward leniency. If this finding holds true for other jurors who express a reluctance to vote for death, then the Supreme Court's endorsement of guided discretion statutes as the means to curtailing arbitrariness in capital sentencing is open to question.

Another tentative conclusion that can be drawn from this analysis is that the Court's concern over guilt nullifiers is unwarranted. Neither of the two jurors in this study expressed any reluctance to vote for guilt. (The second juror claimed that the first vote on guilt, after substantial discussion, was unanimous.)

One positive conclusion that can be drawn from this analysis is that at least some jurors can, regardless of personal

beliefs, consider the full range of available penalties, as required by *Wainwright v. Witt*, 469 U.S. 412 (1985). The jurors discussed in this article both expressed reluctance to vote for death, but were able to overcome their personal opposition and follow the law. The problem is, it appears that they both misinterpreted, or failed to apply, the judges' sentencing instructions. In particular, nowhere in the two interviews did the jurors allude to anything resembling the line of cases beginning with *Lockett v. Ohio*, 438 U.S. 586 (1978), which require consideration and weighing of mitigating evidence. Thus, it is as though the jurors thought the law precluded them from evaluating the very mitigating factors that should have been guiding their sentencing decisions, as determined by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976).

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Law Firm Moves:
Baldani, Rowland & Richardson

Baldani, Rowland & Richardson has moved their office to 300 West Short Street, Lexington, Kentucky 40507

Partners/Associates of the firm include: Russell J. Baldani, Lee W. Rowland, R. Tucker Richardson, III, Michael T. Palermo, and Richard Melville. Mr. Richardson is the managing partner.

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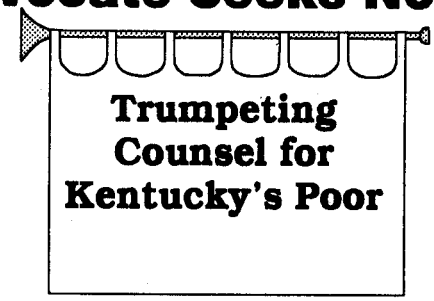
Public Advocate Seeks Nominations



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

In celebration of the 30th Anniversary of the United States Supreme Court's landmark decision in ***Gideon v. Wainwright***, 372 U.S. 335 (1963), the Kentucky Department of Public Advocacy established the *Gideon* Award in 1993. The prestigious award is presented at the Annual DPA Public Defender Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. The first award was presented in 1993 to the career public defender of 21 years **J. Vincent Aprile, II**, General Counsel of DPA, by Allison Connelly, Public Advocate. The 1994 Award was presented to **Daniel T. Goyette** and the **Jefferson District Public Defender's Office** by Public Advocate Allison Connelly.

Written nominations should be sent to the Public Advocate by May 1, 1995 indicating the following:

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

Plain View

Ernie Lewis

Revisitation of the Good Faith Exception: A Primer

It has been over ten years since the good faith exception to the exclusionary rule of the Fourth Amendment was established by the United States Supreme Court, and over a year since the Kentucky Supreme Court declared that the exception would likewise apply under Section Ten of the Kentucky Constitution. The purpose of this article is to revisit this exception, and refresh ourselves on what it means.

The Exception

The good faith exception was established primarily in ***United States v. Leon***, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). That case said that the exclusionary rule should not be used to suppress evidence seized in objectively reasonable reliance upon a warrant issued by a magistrate. Because the primary purpose of the exclusionary rule, according to the Court, was deterrence of the police, suppressing evidence where the mistake was made by the magistrate rather than the police would do nothing to advance police deterrence. This is *Leon* in sum.

A companion case to *Leon* was ***Massachusetts v. Sheppard***, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). T Court held that the good faith exception would also apply to warrants which are "subsequently determined to be invalid" as a result of a technical deficiency. There, the officer's affidavit had properly set out the items to be seized, but because of the use of an improper form, brought to the magistrate's opinion who assured the officer that he would correct the search warrant but did not, and who failed to incorporate the affidavit into the warrant, the warrant failed to set out the particular items to be seized.

A third good faith case is ***Illinois v. Krull***, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987). The Court held that the exception applies to an officer's reliance upon the constitutionality of a statute which is thereafter held to be unconstitutional. There, an officer conducted a warrantless administrative search of an automobile wrecking yard authorized by a state statute which was later declared to be unconstitutional.

Several other important parts of the exception that need to be understood.

1. It is important to remember that the good faith exception applies only in cases where evidence is seized pursuant to a warrant. If your case does not involve a warrant, then no good faith analysis is used.

2. The good faith exception only modifies the exclusionary rule; it does not eliminate it.

3. The officer's reliance on the magistrate's probable cause determination must be objectively reasonable. That means that you do not look at the subjective good faith of the individual officer. Rather, you examine whether the "reasonable" officer who has been reasonably well-trained could have relied upon the probable cause determination of the magistrate.

4. If the Fourth Amendment violation relates to improprieties during the execution of the warrant, then the good faith exception does not apply. The good faith exception, for example, would not apply to the following:

   a. The warrant is not executed in a timely fashion.

   b. The entry was without prior notice of the authority and the purpose of the entry.

   c. Persons were improperly detained or searched incident to the execution of a warrant.

   d. The scope, intensity, or duration of the warrant were exceeded by the execution. Was probable cause stale by the time of the execution of the warrant? Did the scope of the search exceed that clearly authorized by the warrant? Did officers stay for an unreasonably long period of time?

   e. Items not named in the warrant were improperly seized.

   f. Places to be searched and items seized were not named with particularity.

5. The burden is on the prosecution to plead and establish the good faith exception.

6. Whenever suppression of the evidence under the particular circumstances of the case could arguably deter the police, then the good faith exception should not apply.

Exceptions to the Good Faith Exception

There are four exceptions explicitly detailed in *Leon*. These exceptions are not exclusive. Counsel should try to phrase his/her pleadings in such as way that one of these exceptions fit when faced with evidence seized pursuant to a warrant.

1. **The Lying Police Officer.** "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." ***Leon***, 82 L.Ed.2d at 699. This exception relies upon ***Franks v. Delaware***, 438 U.S. 154 (1978).

   In ***United States v. Baxter***, 889 F.2d 731 (6th Cir. 1989), the Court had an opportunity to explore this exception. Here, the police received information from an anonymous informant. The officer did not tell the magistrate in his affidavit that he could not demonstrate the reliability of his informant.

The Court held that the first exception to *Leon* would apply. "[W]e believe this to be a 'bare bones' affidavit within the meaning of footnote 24 in *Leon*, and the officer involved here had to realize that the source of the information against defendant was an unknown party who was unavailable and could not be demonstrated to be 'reliable'." *Id.* at 734.

2. **The Prosecutorial Magistrate.** "The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role..." *Id.* This exception relies upon ***Lo-Ji Sales, Inc. v. New York***, 442 U.S. 319 (1979). If a judge is known as a rubber-stamp for the police, counsel needs to prove this in the hearing, and fit that conduct within this particular exception. Similarly, if the magistrate fails to read the affidavit, or merely scans it prior to signing the warrant, this exception should apply.

3. **Clearly No Probable Cause.** "Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.*

   This exception is the one that should be most fruitful in exploring in the typical case, as can be seen by comparing the following cases from the Sixth Circuit. This exception will not always be fruitful. In ***United States v. Savoca***, 761 F. 2d 292 (6th Cir.), *cert. den.*, 88 L. Ed. 126 (1985), the Court had suppressed evidence prior to *Leon*. After *Leon*, the Court found good faith.

   The case involved an affidavit which showed only that persons arrested for a bank robbery had previously been in a particular motel room. The Court explored whether this exception applied, and held that it did not, despite the affidavit's failure to describe the relationship of persons arrested to the place to be searched, or even when the bank robberies had occurred. The Court held that a reasonably trained police office could have known of particular cases distinguishing the controlling cases, and could have believed in the existence of probable cause. Judge Jones in dissent has the better of the argument, noting that taken to its limit, "this analysis implies that there are no general probable cause principles that well-trained officers should know ...the majority assumes that police officers have the responsibility to distinguish properly among fine gradations of legal precedent in particular factual settings." *Id.* at 300.

   In contrast, in ***United States v. Leake***, 998 F.2d 1359 (6th Cir. 1993), the affiant used an anonymous caller's information without corroboration. The Court held that this exception applied because no reasonably well-trained police officer could have relied on the warrant in light of knowledge that corrobration was needed and there was none. Noteworthy is that the hearing revealed an officer who "himself was very unsure about the adequacy of investigation he performed in the wake of the anonymous tip...Judged on objective criteria, a reasonably well-trained police officer 'would have known that the search was illegal despite the magistrate's authorization.'" *Id.* at 136.

   This is the exception to use to demonstrate that unreliable hearsay was used to show probable cause. While ***Aguilar/Spinelli*** has been abandoned, demonstrate here that the informant was not reliable, or that the informant's basis of knowledge was not proven. Prove also that the affidavit does not show the time of the occurrence of facts which were observed.

4. **Facially Deficient Warrant.** "Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient--*i.e.*, in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid." *Id.*

   This exception did not apply in ***United States v. Shields***, 978 F.2d 943 (6th Cir. 1992), where the affiant testified to the magistrate under oath. Because this was not allowed under state law, the defendant attempted to suppress the evidence seized. The Court held that federal law applied, and that "courts have found it objectively reasonable for law enforcement officers to believe that a flaw in a warrant application could be cured by responding under oath to questions by the judicial officers." *Id.* at 947.

   There are a lot of possibilities here. Look at whether the affidavit was sworn to by the officer. See whether the magistrate went outside the four corners of the affidavit in finding probable cause.

Crayton

It took Kentucky nine years to decide whether to adopt the good faith exception to the exclusionary rule. There were excellent reasons not to; specifially, Kentucky had a long tradition of enforcing Section Ten of the Kentucky Constitution more stringently than the Fourth Amendment. Further, the Court had specifically rejected a similar good faith exception earlier in the century. See generally "Celebrating the Rich History of Kentucky's Section 10," *The Advocate*, Vol. 13, No. 2 (Feb. 1991) at 40-44; ***Youman v. Commonwealth***, 224 S.W. 860 (Ky. 1920).

Any doubt about Section Ten and the good faith exception ended with ***Crayton v. Commonwealth***, 846 S.W.2d 684 (Ky. 1993). There, Justice Lambert writing for the Court adopted the reasoning of *Leon* virtually lock, stock, and barrell. The Court noted that there was little difference between Section Ten and the Fourth Amendment, calling them "parallel." The Court rejected the ancient *Youman* case, saying that the exclusionary rule's purpose was police deterrence rather that the "prevention of harm to the administration of justice and prevention of disrespect for the constitution or laws." *Id.* at 687. The Court adopts the four exceptions of *Leon*.

Two noteworthy comments must be remembered about ***Crayton***. First, the Court affirms that the Court did not "eviscerate the exclusionary rule when the evidence is obtained pursuant to a search warrant." *Id.* at 687. Further, the Court expressed their concern in that case that the same judge on the district court bench who found probable cause and issued the warrant found no probable cause but good faith once he became the circuit judge (in the same case!). So much for reliance upon the reviewing magistrate

After *Crayton*, the only other good faith exception opinion in Kentucky has been ***Commonwealth v. Litke***, 873 S.W.2d 198 (Ky. 1994). There the Court reversed the decision of the Court of Appeals, which had found the existence of one of the four *Leon* exceptions. In *Litke*, the affiant attached to the affidavit a corroborating interview with an employee of the search target. The affiant had run the affidavit by two Assistant Attorneys General prior to taking it to the magistrate. However, the affidavit failed

to specify the time in which the informant had made particular observations. The Court held that the Court of Appeals "clearly erred in its conclusion that 'no "reasonably well-trained officer" could have believed that the affidavit in this case was sufficient.' Given *Crayton* and the 'totality of the circumstances' test adopted in ***Beemer v. Commonwealth***, 665 S.W.2d 912 (Ky. 1984), probable cause supported this search." *Id.* at 199.

Other Challenges

Obviously, when faced with a warrant, counsel needs to explore the particular facts of his/her case to see whether one of the exceptions of *Leon/Crayton* apply. However, counsel should not stop there. Justice Lambert reminded us that *Crayton* does not end the exclusionary rule. *Leon* reminds us that the particular facts of the case will determine the outcome of the suppression motion. Nothing could be worse than for us to give into the good faith exception without a fine analysis of the facts of our case. Some things to look for:

1. **Training of the police.** If your affiant is a poorly trained officer, prove that and compare it to the knowledge of the "reasonably well-trained" police officer. How do you prove that? One could imagine a number of different methods, including calling a professor at EKU's criminal justice training school, putting on a syllabus, or perhaps eliciting from another police officer his/her knowledge of the particular search and seizure tenet.

2. **Judge Shopping.** Look for any previous unsuccessful attempts to have another judge sign the warrant.

3. **Prosecutorial Advice.** If a prosecutor advises that a warrant application is insufficient, bring that out at your hearing.

4. Was there **illegal warrantless activity** prior to applying for the warrant? If so, put that in, and argue that the information in the warrant is the illegal fruit of the warrantless acitivity and good faith does not apply.

5. If there is an **flagrant misconduct** on the part of the police, put that in and argue that good faith should not apply under such circumstances.

6. Utilize the **cost-benefit** analysis used by the Court in *Leon.* Is the cost of exclusion more serious than particular misconduct by the police?

This is not by any means an exhaustive list. Make every effort to confine the good faith exception to the run of the mill case where probable cause is a close question, and where an officer really could have relied upon the magistrate's decision in good faith.

Arizona v. Evans
115 S.Ct. 40

The United States Supreme Court is looking at the reach of the good faith exception in the case of ***Arizona v. Evans***, argued on December 7, 1994. There, an arrest warrant had been removed, but this removal had not been made effective in the police department's computer. Thereafter, Evans was arrested pursuant to a non-existent warrant. Contraband was seized during the arrest. The state supreme court had held that ***Leon*** did not apply because the exclusionary rule was needed here to deter government and not just the police officer.

The argument gives insight into the particular positions of the Justices regarding the good faith exception.

Justice O'Connor asked the Maricopa Assistant County Attorney whether the police do not have a duty to keep records up-to-date.

Justice Ginsburg stated during the argument that the police would be deterred by applying the exclusionary rule in this situation.

Interestingly, Justice Souter asked whether the Court had been wrong in *Leon* that the purpose of the exclusionary rule was just that of police deterrence.

Justice Breyer wondered whether excluding the evidence in such a case would deter the responsible person. He also stated that exclusion of evidence makes the police get their act together, but he wondered about computer operators.

Justice Scalia saw no deterrence value if suppression were ordered, saying he did not see how a computer operator would be deterred. Justice Kennedy was similarly concerned that applying the exclusionary rule under these facts would deter no one.

Good faith lives. It is now our responsibility to find ways to argue that evidence still should be suppressed, that the Fourth Amendment and Section Ten still have bite, and that the citizens' privacy in this Commonwealth still needs to be protected.

Commonwealth v. Crowder
884 S.W.2d 649 (Ky. 1994)

Crowder was arrested in Jefferson County on trafficking in marijuana on May 4, 1991 in a "'hot drug area.'" That case was resolved in district court. Ten days later, an informant told the police that if Crowder was seen again on the same corner that he would be selling drugs. Two days thereafter, the officer saw Crowder on the corner. The officer told his partner to detain Crowder and pat him down. The partner detained Crowder, patted him down and felt what he thought might be a "bindle of drugs...like a small gumball." A seizure revealed .016 of an ounce of cocaine. A motion to suppress was denied.

The Court of Appeals reversed Crowder's conviction, holding that since "the officer did not feel anything resembling a weapon, we believe that the officer exceeded the scope of permissible search under a ***Terry*** patdown when he reached into appellant's pocket to retrieve an object which he believed to be drugs and not a weapon." ***Crowder***, 884 S.W.2d at 650.

A motion for discretionary review was granted. In an opinion written by Special Justice John M. Rosenberg, the Court affirmed the Court of Appeals. Special Justice Rosenberg discussed at length the case of ***Minnesota v. Dickerson***, 508 U.S. ___, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993), finding it "virtually indistinguishable from the present case." *Crowder*, 884 S.W.2d at 650.

In ***Dickerson***, the police approached a suspect leaving a crack house who walked into an alley after making eye contact with the police. The officer patted the suspect down, and found no weapon. Instead, a "small lump" was found in the defendant's jacket. The officer reached into the pocket of the jacket and pulled out a plastic bag of cocaine. The Court held that while the officers could pat down the defendant, that "the further exploration of the suspect's pockets after determining that it contained no weapon 'over-stepped the bounds of the "strictly circumscribed" search for weapons allowed under ***Terry*** and the Fourth Amendment's protection against unreasonable searches and seizures." *Id.* at 651. Only where contraband is "*immediately apparent* from the sense of touch," *Id.*, can it be seized by the officer during a ***Terry*** patdown.

The Court found that in the instant case the officer "did not immediately recognize what he felt in Crowder's pocket as drugs." *Id.* Thus, he was not authorized under ***Dickerson*** to seize the packet.

The Court also explores whether Section 10 allows for the "plain touch exception." Unfortunately, the Court reads ***Crayton v. Commonwealth***, 846 S.W. 2d 684 (Ky. 1992) and ***Holbrook v. Knopf***, 847 S.W.2d 52 (Ky. 1993) to hold that Section 10 is virtually the same as the Fourth Amendment, and thus provides no further privacy protections to Kentucky's citizens. Thus, the Court provides that there is a plain touch exception in Kentucky.

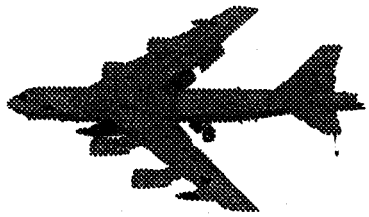
Justice Lambert wrote a concurring opinion, joined by Justice Reynolds. In his opinion there is no need for a "plain-feel" doctrine. He finds ***Dickerson*** to be "hair-splitting in the extreme." ***Crowder***, 884 S.W.2d at 653. He believes that ***Terry*** allows for contraband to be seized when in plain view, and that ***Dickerson*** is unnecessary. "A far more rational rule would be to permit seizure of any item of contraband discovered in the course of a ***Terry*** search. Of course, no search would be permitted after it was determined that the suspect was unarmed, but any item suspected of being contraband and discovered in the course of the search for weapons should be subject to seizure and the convoluted process required by *Dickerson* entirely avoided." *Id.* at 653.

Justice Wintersheimer dissented, joined by Justice Spain. In their opinion, ***Dickerson*** should lead to a reversal of the Court of Appeals. Despite the officer's equivocation as cited in the majority opinion, the dissenters state that "the police officer immediately recognized the bindle of drugs during the pat-down search for weapons." ***Crowder***, 884 S.W.2d at 654. The dissenters state that the "'plain touch'" doctrine should be recognized in Kentucky.

My reading of the majority opinion is that it has been recognized. The dissenters, however, would allow for seizure "if as a result of lawful touching, a police officer develops probable cause to determine that the object is contraband." *Id.* at 654. The majority opinion, on the other hand, clearly holds that prior to seizure occurring, the nature of the contraband must be readily apparent.

LaFollette v. Commonwealth
1994 WL 669806 (Ky.App.)

The Court of Appeals has reviewed a case involving a plane flying over property and perceiving whether excessive heat was leaving the house. This appears to be a case of first impression in Kentucky.



The case arose when an informant called *Crimestoppers* in Lexington. The informant told Sergeant Pate that he recently saw marijuana growing in Lafollette's house. Pate notified Det. Roe, and told him the informant had been reliable previously. Roe confirmed that Lafollette owned the residence, and found out that Lafollete had a previous marijuana cultivation charge. Thereafter, Roe flew over the property with a helicopter equipped with a FLIR (Forward Looking Infrared Device). The FLIR found that an "excessive amount of heat" was being emitted from LaFollette's house. The helicopter flew between 500 and 1000 feet. Roe then applied for and received a search warrant, which was executed resulting in the seizure of marijuana. Lafollette appealed conditionally following the trial court's overruling of his motion to suppress.

In an opinion by Judges Lester and Emberton, and concurred in by Judge Dyche, the Court of Appeals affirmed. Relying primarily upon ***United States v. Penny-Feeney***, 773 F.Supp. 220 (D. Hawaii 1992, aff'd. ***United States v. Feeney***, 984 F.2d 1053 (9th Cir. 1993), the Court found no search had occurred when the FLIR was used because no reasonable expectation of privacy had been breached. The Court was not troubled by the fly-over, relying upon ***California v. Ciraolo***, 476 U.S. 207 (1986) and ***Florida v. Riley***, 488 U.S. 445 (1989). Further, the Court held that absent the information provided by the fly-over, there was probable cause to issue the warrant. Finally, the Court held that there was no problem with the informant's tip, relying upon the totality of the circumstances standard for determining probable cause of ***Illinois v. Gates***, 462 U.S. 213 (1983) as adopted in ***Beemer v. Commonwealth***, 665 S.W.2d 912 (Ky. 1984).

The Short View

1. ***State v. Tucker***, 626 A.2d 1105 (N.J. 1994). The police flirted successfully with losing a confession in this murder-robbery case out of New Jersey. The defendant was arrested on a Friday and was not taken before a judge until Monday morning. This violated the 48-hour rule established in ***Riverside v. McLaughlin***, 500 U.S. 44 (1991). The Court consideration the 48-hour rule violation as one of the factors in the voluntariness determination. Under the circumstances of this case, the Court held the confession to be voluntary despite the violation of the rule.

2. ***United States v. Nelson***, 36 F.3d 758 (8th Cir. 1994). The intrusion possible in the "war on drugs", and the concomitant need for strict construction of the Fourth Amendment, is nowhere more apparent than in this case. Here, an informant told the police that Nelson was going to be carrying drugs. The police sought a warrant, and in the affidavit stated that they desired to search Nelson's rectum. However, in the petition for the warrant, they failed to indicate that they desired to search Nelson's body cavities. Armed with a warrant of Nelson's "person," the police proceeded to conduct a body cavity search, several x-rays, and eventually an endoscopy, which resulted in a package of heroin being seized. Several times during the procedure, Nelson asked to see what the warrant authorized. The Eighth Circuit held that the search exceeded the scope of the four corners of the warrant. "The need to provide specificity in a warrant is clearly exhibited in this case where appellant was to be subjected to a body cavity search and twice asked to see the warrant authorizing the search before submitting to this invasive procedure. The warrant in this case was unable to convince the appellant of the officers' authorization to conduct such a search." The Court further held that the good faith exception did not apply. The exception was inapplicable because there was no objectively reasonable basis for the officers' mistaken belief that a search of the "person" included a "body cavity" search.

3. ***State v. South***, 56 Cr.L. 1173 (Utah Ct. App. 1994). Smelling marijuana coming from a house provides pro-

bable cause to believe a crime is being committed inside. However, that does not give the police the authority to make a warrantless search of the house. While under similar circumstances a car could be entered without a warrant, according to the court, due to the exigent circumstance of inherent mobility, there are no exigent circumstances in regards to the search of a house.

4. ***State v. Fowler***, 883 P.2d 338 (Wash.Ct.App. 1994). When conducting a "Terry" search, a police officer may only seize that which feels like a weapon. After the police seize a "hard object" which turns out to be a pager, they may not complete their search of "soft objects." "During the course of a protective frisk, police may not intentionally seize items they know not to be weapons.

5. ***State v. Arroyo-Sotelo***, 884 P.2d 901 (Ore.Ct.App. 1994). Consent to search a car does not authorize the police to screw off parts of the car to conduct their search, according to the Oregon Court of Appeals. Where the defendant authorized the officer to search the car, the officer's auth-ority was quite broad; however, it did not extend to areas which he could not gain access to without tearing the car apart. "Absent specific facts to suggest otherwise, a general consent to search a car does not authorize an officer to search areas of a car that are not designed to be routinely opened or accessed."

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

- Alexander Hamilton, 1804

Directing Attorney Changes

On November 14, 1994 Public Advocate **Allison Connelly** stated, "It is with great pleasure and pride that I announce the promotion of **Harolyn Howard** to Directing Attorney of the **Pikeville** office. Harolyn, who has been acting directing attorney for several months, will formally assume this position on December 1, 1994. Harolyn's commitment to our Department's clients is well-known among our staff. She is a dedicatd and intelligent defender, who has turned down many lucrative job offers in order to do this work. I feel extremely fortunate to have Harolyn assume this position." Harolyn replaced David Williams who is now in private practice in Pikeville.

♦ ♦ ♦ ♦

On November 14, 1994 Public Advocate **Allison Connelly** stated, "I am pleased to announce that **Carolyn Keeley** is returning to the Department as the Directing Attorney of the **Paducah** office. Carolyn will assume this position on December 1, 1994. I have followed Carolyn's career with great interest and have been impressed with her maturity, leadership abilities and trial skills. The Department is very fortunate to have Carolyn in a position of eladership, and I look forward to working with her."

In accepting the position, Carolyn stated, "I'm delighted to be back on the defense side. I have learned one important thing prosecuting. It is defense counsel who has the real power in the courtroom... I'm happy to be able to get back into court with that knowledge." Carolyn replaced Don Muir who is now a staff attorney in the Paducah DPA office.

♦ ♦ ♦ ♦

On December 22, 1994 Public Advocate **Allison Connelly** announced that **Frank Trusty, II** will head up the Kenton County Public Advocacy full-time office which began operating in January, 1995 and will be fully operational by July, 1995. The new office will be responsible for representing all poor people accused of a crime in Kenton County and will serve as a public defender resource center for the surrounding counties.

"Frank Trusty brings an immense amount of criminal justice experience to defending indigents accused of crime," Connelly said. "His wealth of leadership and integrity as a Commonwealth Attorney, district and circuit judge and now as a public advocate are in the greatest traditions of public service by lawyers. Indeed, the Commonwealth and Kenton County are extremely fortunate to have a person of Frank Trusty's stature and credibility start-up and lead this new office," Connelly observed.

District Court Order: *Roadchecks*

BELL DISTRICT COURT

COMMONWEALTH OF KENTUCKY,
PLAINTIFF

VS.

BRYAN PARTIN, DEFENDANTS
DEBBIE MCGREGOR,
THOMAS BOHR,
JANET REDMON

The facts in all of these cases are nearly identical. Kentucky State Police Troopers Perry and Dalton established roadchecks at the foot of Cumberland Mountain in the north bound lane of US 25-E. The roadchecks were conducted at night during times designed to coincide with the closing of various drinking establishments in neighboring Tennessee. Every vehicle approaching the roadblock was stopped and the operator was checked for a driver's license, car registration and liability insurance. Additionally, the driver of each vehicle was given a cursory examination for evidence of impairment due to drugs, including alcohol. Drivers with apparent violations or those suspected of being under the influence were directed to pull over to the side of the road so that further investigation might take place. All of the above defendants were arrested as a result of coming into contact with these roadchecks.

Testimony in hearings held concerning these matters revealed that all planning for the roadchecks was done by either Trooper Perry or Trooper Dalton. These officers determined the times, the location and the length of the roadblock. Since neither of these troopers occupy supervisory positions with the State Police, each trooper, before the roadcheck, made a radio transmission to Harlan Post 10 to obtain permission to conduct the roadcheck.

Each defendant is now asking the Court to dismiss the charges against him on the ground that the conduct of the roadcheck constituted an unlawful seizure in violation of the Fourth Amendment to the United States Constitution. The U.S. Supreme Court has held in every case concerning roadchecks that a roadcheck stop is a seizure within the meaning of the Fourth Amendment even though the purpose of the stop is limited and the detention quite brief. *U.S. v. Martinez-Fuerte*, 96 S.Ct. 3074, *Delaware v. Prouse*, 99 S.Ct. 1391, *Michigan Dept. of State Police v. Sitz*, 110 S.Ct. 2481.

In analyzing roadcheck stops the Supreme Court has held that in making a seizure which is less intrusive than a traditional arrest (*i.e.*, roadcheck stops) the Fourth Amendment requires the seizure to be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Brown v. Texas*, 99 S.Ct. 2637. Standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. *Delaware v. Prouse*, 99 S.Ct. 1391.

The Kentucky State Police has recognized the Supreme requirement for developing plans and standards for conducting roadchecks. On October 21, 1992, the Kentucky State Police issued a Revised General Order governing the conduct and establishment of roadchecks and it is the adherence thereto by Troopers Dalton and Perry that form the basis for all of the claims put forward by the defendants.

The KSP General Order consists of six parts. Since only parts one and five are germaine to the issues presented here only those parts will be included in this Order.

Paragraph one of the KSP General Order states as follows:

> Traffic checkpoints shall be scheduled by the Post Commander, or his designee(s), who shall determine the locations and approximate times of the checkpoints. The Post Commander or his designee(s) shall develop and maintain a list of authorized roadcheck locations. The development of checkpoint locations and their justification whould involve both supervisory and non-supervisory post personnel. Traffic checkpoints shall not be held at locations other than those on the list, except under extenuating circumstances.
>
> Traffic checkpoints shall be scheduled by memo or noted on the work schedule. Approved locations with the approved range of times and durations for the traffic checkpoints shall be listed and assigned personnel shall conduct traffic checkpoints during those hours unless: other law enforcement activities obligate the officer(s), there are extenuating circumstances which make the detail unreasonable, or the detail is canceled by a supervisor. The determination of where and when a traffic checkpoint will be held shall bear a reasonable and articulable relationship to a public safety or traffic violation problem which has been experienced or is anticipated in a particular location.
>
> Non-supervisory officers may request to establish traffic checkpoints at approved locations and times consistent with the above guidelines.

Paragraph Five of the KSP General Order states as follows:

> Any traffic checkpoint shall include a supervisor or a officer designated as a supervisor to monitor the traffic checkpoint.

The first issue for the Court to consider is whether the location of the roadcheck was from the approved list. Both troopers testified that the Cumberland Mountain location was on the approved list of locations for roadchecks but, unfortunately, neither trooper took it upon himself to bring this list to Court or to have someone subpoenaed who could produce such a list. KRE 1002 requires that

to prove the content of a writing (or in this case a list) the original writing or a duplicate is required to be introduced into evidence. Since the approved list of roadcheck locations was not introduced at any of the hearings involving these defendants the Court cannot determine with any legal certainty that the Cumberland Mountain checkpoint was conducted at an approved location.

None of the roadchecks involving these defendants were scheduled roadchecks. Instead, these roadchecks came about as the result of radio requests made by Troopers Perry and Dalton. Since neither of these Troopers are supervisors they called Post 10 to request permission from a supervisor. During the hearings neither Trooper could remember the name of the supervisor who consented to the roadchecks except in one instance when permission was obtained from a Sergeant Davidson. Sergeant Davidson did not testify at any of the hearings nor did any other supervisor testify that he or she had given permission for the roadcheck. Since the Commonwealth has the burden of proof in these matters it was the Commonwealth's responsibility to put these supervisors on the witness stand, but, since the Troopers could not remember which supervisor they talked to it is understandable why the Commonwealth could only offer the rankest form of hearsay to prove to a legal certainty that a supervisor had actually given permission for a roadcheck.

The last issue noted by the Court is the lack of supervisory personnel present at any of these roadchecks. 2This is a clear violation of paragraph five of the KSP General Order. As noted earlier neither Troopers Dalton or Perry occupy supervisory positions with the State Police. Trooper Perry testified that it was customary for the senior trooper present at a roadcheck to assume the role of supervisor but a literal reading of paragraph five makes it quite clear that an actual supervisor or his designee must be present. The Court can only assume that if the KSP meant for the senior trooper to be the supervisor it would have said so in its General Order. Since there was not a supervisor present nor any proof of a designated supervisor the Court can only conclude that the conduct of these roadchecks violated paragraph five of the General Order.

The KSP General Order appears to contain a well thought policy and procedure which effectively and properly limits the discretion of the officer in the field. As long as the Order is followed the KSP should be able to conduct safe, fruitful roadchecks. However, the Commonwealth has failed to prove that the Order was followed in these cases. The Commonwealth's failure to establish that these roadchecks were conducted at an approved location, with the consent and knowledge of a supervisor and in the presence of a supervisor or his designee reduces the seizure and arrests of these defendants to an exercise of arbitrary discretion and thus violative of the Fourth Amendment to the United States Constitution.

Accordingly, all charges currently pending against these defendants as a result of these unlawful seizures are hereby dismissed with prejudice.

This is a final and appealable Order entered this Fifth day of September, 1994.

James L. Bowling, Jr.; Bell District Judge

Trial & Post-Trial Manager Changes

On October 18, 1994 Public Advocate **Allison Connelly** stated, "It is with great pleasure and pride that I announce the promotion of **Steve Mirkin** to **Trial Services Branch Manager**. Steve possesses extraordinary commitment to the poor, outstanding litigation skills and is an efficient, fair and effective administrator. I feel extremely blessed that Steve has stepped forward to take up one of the most important positions of leadership within the Department of Public Advocacy. I look foward to working closely with him."

In accepting the appointment, Steve said, "This is an exciting time for DPA. We have aggressive leadership at the top to go along with our dedicated staff, we have successfully made our case for increased funding with the legislature and executive branch, and now we are embarking on new projects to increase our effectiveness around the Commonwealth. I am pleased to have this opportunity to be a part of it, and hope that we are able to continue the positive developments in carrying out our mission that have begun over the past two years."

Steve Mirkin replaces Bette Niemi, who is now with the Jefferson County Public Defender Major Litigation Division doing capital trials.

On November 4, 1994 Public Advocate **Allison Connelly** stated, "It is with great pleasure and pride that I announce the promotion of **Donna Boyce** to **Post-Trial Services Branch Manager**. Donna will assume this position on December 1, 1994. Donna's long-time commitment to our Department's clients is well-known among our staff. She is an efficient, dedicated, and intelligent defender, as her clients and co-workers can attest. I feel extremely fortunate that Donna has stepped forward to take up one of the most important positions of leadership within the Department of Public Advocacy. She will be a valued member of our management team."

Effective December 1, 1994 **Margaret Case** transferred from her position as manager of the Post-Trial Services Branch to a staff attorney at the Kentucky Capital Post-Conviction Center. She is looking forward to returning to more direct client representation.

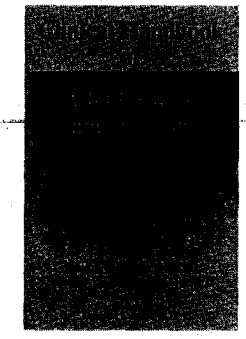
Book Review

Clinical Handbook of Child Abuse and Neglect

Judge William Stewart

This compact volume was created by two Kentuckians well known in their fields of expertise. It was written specifically for the use of clinical specialists, graduate students, pediatric residents, child psychologists, students in social work studies, law enforcement personnel and other related fields. This textbook is also of great value to a large group of attorneys. This would include the plaintiff's attorneys evaluating cases of sexual abuse for damages, criminal defense lawyers, and guardian ad items. This volume also contains significant information of value in hotly contested domestic relations cases in which issues of child sexual abuse are becoming more common.

The clinical professionals using this volume are the very individuals that attorneys are going to be meeting in the courtroom, thus, better preparing counsel for direct or cross examination. This textbook contains valuable information about the standards clinicians are to adhere to in preparation of their case reports, interviews, and case notes. It also contains insightful information on every aspect of their involvement in a case. The legal professional will gain an overview of the clinical approach. Attorneys should have this volume in their library and should without question utilize it in their case preparations. It contains extensive information that is readily available, and because it isn't a lengthy volume it can be accessed rapidly and its index can lead them in the appropriate direction. It is a resource for the identification of experts in this state who would be available either for the plaintiff's case or as a defense expert This aspect of the volume would also give attorneys an idea of what they might expect from these experts and how to guide them in developing the information they need in their case preparation.



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Chapters One through Six give a fundamental outline of the subjects that are covered; from physical abuse, neglect of children including emotional maltreatment, and child sexual abuse. These are reoccurring issues in court at this time.

Chapter Eight - The Medical Evaluation of Child Sexual Abuse - is of particular interest and offers a foundation into the criteria the medical profession is using in evaluating cases. It also contains a very important reference and bibliography section for additional information on the subject.

Chapter Nine - Treatment Strategies and Considerations - deals with evaluating and assessing victim's interactions and relationships within the abusive family. This information is helpful in issues of child placements. Custody and removal or termination of parental rights. The assessment, treatment and rehabilitation of the juvenile offender is also addressed.

Chapter Ten - The Court Report and Courtroom Testimony - will give the lawyer a general review of how our profession is perceived by the clinician, medical doctor, or professional who will be testifying in the courtroom. It gives an opinion of how they perceive the legal profession and how we can better elicit the evidence or testimony in court from the witness.

This textbook contains a wealth of information and the reader should not be deceived by its size. It is a comprehensive guide for the legal professional and a great introduction to the complexities of child abuse, sexual abuse, and neglect cases. This should be mandatory reading for the trial attorney in civil or criminal litigation and is equally important to attorneys representing children in juvenile court in dependency and neglect hearings and it must not be overlooked.

JUDGE WILLIAM STEWART
Circuit Judge, 53rd Judicial Circuit
Commonwealth of Kentucky
P.O. Box 1327
Shelbyville, Kentucky 40066-3327
Tel: (502) 633-3412

Judge Stewart is a Mobile, Alabama native. He received his B.S. in botany from the University of Kentucky and his J.D. from the University of Louisville. He was a partner in the law firm of Neal, Stewart and Davis until his election to district court in 1985. The judge is a member of Veterans of Foreign Wars and the American Legion. He co-chaired the Attorney General's Sex Abuse Task Force.

Mastering the lawless science of law,
That codeless myriad of precedent,
That wilderness of single instances,
Thro' which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.

- Tennyson, "*Aylmer's Field*" (1793)

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Copies of the DPA 1995 *Evidence & Preservation Manual (2d Ed.)* are available for **$39.00**, including postage & handling. This 96 page work includes the Kentucky Rules of Evidence, Commentary to each rule by David Niehaus, an extensive article on preservation by Marie Allison, Julie Namkin & Bruce Hackett and many more evidence and preservation articles. Send check made payable to *Kentucky State Treasurer* to:

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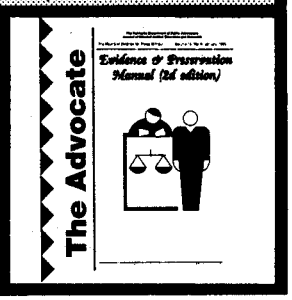
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006; Fax: (502) 564-7890
E-mail: tmeadows@dpa.state.ky.us

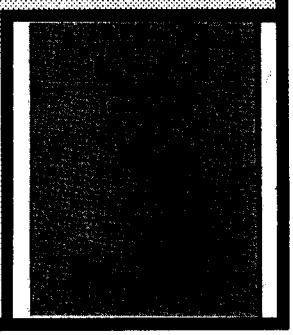


Bill of Rights Manual

Through a generous donation of $854.65 from the Kentucky Bar Foundation, the Department of Public Advocacy distributed copies of its special 1992 Bill of Rights issue of *The Advocate*, a 175 page special work, to Kentucky schools across the Commonwealth. It has articles on the history of Kentucky's Constitution from Thomas Clark, an article on using the State Constitution written by the Public Advocate, Allison Connelly, and articles on the many individual liberties guaranteed by the Constitution including the right to counsel.

Through this donation this document will be available to Kentucky's children as a resource into the next decade.

The Department expresses it's deep appreciation to the critical assistance of the Kentucky Bar Foundation for the distribution of this manual in addition to the Kentucky Bar Foundation's previous donation for printing and also to the anonymous donor who also financed the printing of this wonderful resource.



Defenders Bring life to Individual Liberties

Gideon v. Wainwright (1963); *Douglas v. California* (1963); *Miranda v. Arizona* (1966); *Coleman v. Alabama* (1970); *Moore v. Illinois* (1977); *United States v. Wade* (1967); *Gagnon v. Scarpelli* (1973); *Moore v. Michigan* (1957); *Chimel v. California* (1969); *In Re Gault* (1967); *Gregg v. Georgia* (1976); *Sheppard v. Maxwell* (1966)

Your public defender employs these cases in a variety of ways to provide guidance, advice and counselling. Defenders use these cases to argue, fight and plead to protect their clients' life and liberty, and by extension the liberty protections available to us.

In the hands of public defenders these cases have astonishing effects: *fair process and reliable results, acquittals, conviction of a lesser offenses,* and *reduced sentences.*

Defenders transform the legal principles of these cases into the right to present evidence which communicates the defense which insures suppression of evidence unfairly seized, which obtains the discovery of information helpful to telling the truth.

Every day defenders across Kentucky stand up for their poor clients and proclaim the principles of these cases to root out injustice, to insure equal protection, and to make sure each client receives the process due him!

Defenders representing Kentucky indigents have instigated development of new rights by the United States Supreme Court in *Evitts v. Lucy* (1985), *Batson v. Kentucky* (1986), *Taylor v. Kentucky* (1978), *Carter v. Kentucky* (1981), *James v. Kentucky* (1984), *Crane v. Kentucky* (1986), and *Olden v. Kentucky* (1988).

DEFENDER COMPENSATION

Just Compensation? A Preliminary Report of the NLADA Salary Survey of Defender Systems (Dec. 7, 1994) by Alvita Eason & Billie Bitely is a nationwide salary survey of defender systems. Below is an exerpt from the survey which is reprinted with permission of NLADA:

Table 2 shows the defender program salary averages nationwide for full-time entry-level attorneys, attorneys with one to three years of experience, supervising attorneys and heads of programs.[13] Table 3 shows a national comparison of the figures between defender programs that are a part of a statewide system and defender programs that are countywide or other.

Table 2 - NATIONWIDE SALARY AVERAGES	*Mean*	*Median*	*Low Range*	*High Range*
Entry level (80 responses)	$29,956	$28,673	$19,500	$44,433
1-3 years experience (74 responses)	$33,158	$30,500	$22,000	$51,756
Supervisor (45 responses)	$54,215	$52,904	$24,366	$110,328
Chief Defender/Head of Office (78 responses)	$69,921	$65,701	$26,195	$144,164

Table 3 - STATEWIDE vs COUNTYWIDE/OTHER	*Entry level*	*1-3 years experience*	*Supervisor*	*Chief Defender/ Head of Office*
Statewide Programs	$31,070	$33,937	$52,316	$70,166
Countywide/Other Programs	$29,610	$32,908	$54,987	$64,738

 For further information, contact Alvita Eason, NLADA, 1625 K Street, N.W., Washington, D.C. 20006-1604; (202) 452-0620.

How does Kentucky compare? The entry level salary for Kentucky defenders is $21,600. A staff attorney with DPA for 3 years makes $33,541.20. An attorney supervising a field trial office starts at $35,220.

F • O • R S • A • L • E:

Department of Public Advocacy **Bill of Rights Enforcer Hats** are available for $4.00 (*includes postage & handling*). Please make check payable to *Kentucky State Treasurer* and send payment to:

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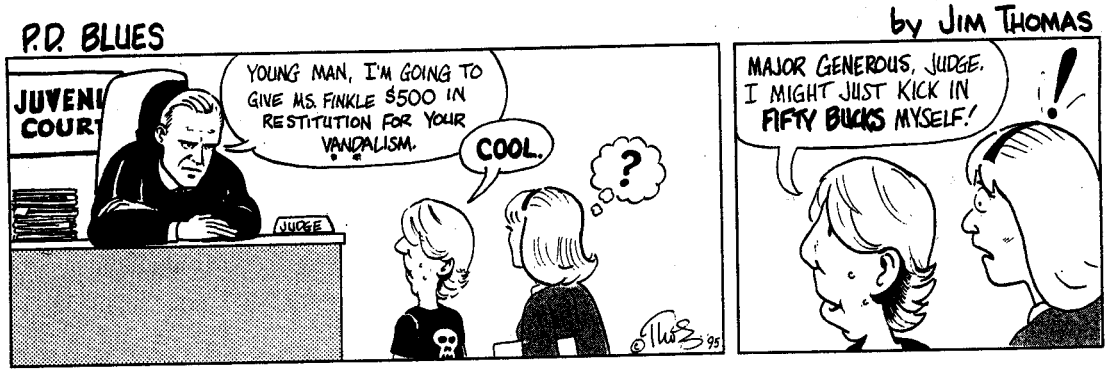
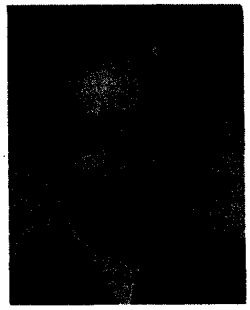
E-mail: tmeadows@dpa.state.ky.us



Confidential Request for Funds for Experts & Resources



Ed Monahan

This is the fourth of a series of articles addressing funds for independent defense expert assistance in light of the substantial new funding available statewide under 1994 amendments to KRS 31.185 and 31.200.

Funds for experts and other resources lose much of their meaning if obtained at the expense of confidentiality. Fortunately, our Constitution and statutes recognize the need for requests for funds by indigents to be confidential without the prosecutor, public or media present.

Non-Confidential Requests Create Constitutional Problems

A request for funds for experts or other resources must contain enough information to meet the *threshold showing* which is necessary to justify the fourteenth amendment right to the defense resources. ***Ake v. Oklahoma***, 470 U.S. 68, 105 S.Ct. 1087, 1091, 1096, 84 L.Ed.2d 53 (1985). Almost necessarily, that *threshold showing* will contain privileged information about the defense which the prosecutor is either never entitled to discover or not entitled to discover at this early juncture of the proceedings.

A non-indigent criminal defendant selects and hires experts, investigators, etc. without knowledge of the prosecutor or court. In order to obtain public funds for resources, indigents rightly have to present information to a neutral judge who decides whether the requested assistance is reasonably necessary. But revealing that confidential information to the prosecution in a way that a non-indigent criminal defendant does not have to reveal it violates equal protection.

Even in the civil arena, information about the retention of an expert by a party is not discoverable. *See, e.g.*, ***Newsome v. Lowe***, 699 S.W.2d 748 (Ky.App. 1985).

In assessing the request for public funds, the judge is entitled to the thoughts, reasoning and strategy of the defense but the prosecutor is not entitled to that privileged information.

Kentucky's Statutes

With a rare exception, criminal defendants are not required to reveal their defense prior to trial. While KRS Chapter 31 provisions do not explicitly recognize the right to make requests for funds for resources *ex parte*, KRS 500.070(2) states, "No court can require notice of a defense prior to trial time."

The necessary implication of this statutory provision is that a defendant cannot be required to reveal his defense by having to make his threshold showing in front of the prosecutor, public or media.

Ake Requires Requests Be *Ex Parte*

Ake, *supra*, states, "when the defendant is able to make an *ex parte* threshold showing to the trial court...." "The intention of the majority of the *Ake* Court that [the threshold showing] hearings be held *ex parte* is manifest...." ***McGregor v. State***, 733 P.2d 416 (Okla.Ct.Crim.App. 1987).

Kentucky Caselaw Requires *Ex Parte* Process to Protect 5th & 6th Amendment Rights

While no Kentucky case specifically addresses whether an indigent criminal defendant is entitled to make his funds request *ex parte*, the Kentucky Supreme Court has held that the *ex parte* process is required in a highly analogous situation.

In the extraordinary writ case of ***Jacobs v. Caudill***, 94-SC-677-OA (Ky., Sept. 2, 1994) the Kentucky Supreme Court unanimously held that the hearing to "determine petitioner's competency to voluntarily and intelligently waive any defenses or otherwise direct his defense...." had to be conducted in accord with the 5th and 6th amendments. "To avoid any possible violation of the petitioner's constitutionally protected rights, it is mandated that when issues arise in said hearing involving petitioner's attorney-client privilege, right against self-incrimination or his right to prepare and present a defense, said proceedings shall be conducted by the trial court *in camera* and *ex parte*, but on the record."

No competent criminal defense attorney reveals any defense information prematurely, absent some strategic advantage.

In ***McCracken County Fiscal Court v. Graves***, 885 S.W.2d 307 (Ky. 1994) the Kentucky Supreme Court set out a very helpful principle: *Indigents are entitled to be represented to the same extent as monied defendants.*

The Court said, "We also take this opportunity to offer a bit of guidance to trial courts for the purpose of future determinations of what constitutes a reasonable and necessary indigent expense. In KRS 31.110(1)(a), it is stated that a needy defendant is entitled: To be represented by an attorney to the same extent as a person having his own counsel is so entitled. While this certainly cannot mean that an indigent defendant is entitled to have any and all defense-related services, scientific techniques, etc., that a defendant with unlimited resources could employ, we think it is a useful standard as a starting point. At a minimum, a service or facility the use of which is provided for by statute should be considered by a trial court, as a matter of law, to be 'reasonable and necessary.'" *Id.* at 313.

There "is no need for an adversarial proceeding, that to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with non-indigent defendants." *McGregor, supra*, at 416.

The Federal Statute & Rule

Since 1964, the Criminal Justice Act, 18 U.S.C. 3006A(e)(1), has provided that requests by indigents for funds for resources be done *ex parte* if the defendant wants that confidential process.

That statute states, "Counsel for a person who is financially unable to obtain investigative, expert, or other services *necessary* for adequate representation may request them in an *ex parte* application."

Federal Rule of Criminal Procedure 17(b) allows applications for subpoenas by defendants unable to pay for their service be done *ex parte* to the court." See ***Holden v. United States***, 393 F.2d 276 (1st Cir. 1968). That rule states, "**Defendants Unable to Pay**. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense."

Other Caselaw

An indigent defendant is entitled to ask for funds for expert help *ex parte* to avoid prejudicing the defendant by "forcing him to reveal his theory of the case in the presence of the district attorney." ***Brooks v. State***, 385 S.E.2d 81 (Ga. 1989).

The "use of *ex parte* hearings...is a well recognized technique available to any party" who is faced with the dilemma of being "forced to reveal secrets to the trial court and prosecution" in order to support" a motion. ***State v. Smart***, 299 S.E.2d 686, 688 (S.C. 1982).

"Where counsel for defendant objects to the presence of Government counsel at such a hearing, the failure to hold an *ex parte* hearing is prejudicial error." ***Mason v. Arizona***, 504 F.2d 1345, 1352 n.7 (9th Cir. 1974). "The manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case." ***Marshall v. United States***, 423 F.2d 1315 (10th Cir. 1970). See also ***United States v. Sutton***, 464 F.2d 552 (5th Cir. 1972).

Standing of Funding Authorities

Under KRS 31.185 fiscal courts, except for Jefferson County, now pay a fixed sum into a statewide indigent resources fund with the state paying anything above this fixed amount.

When the county fiscal courts had sole responsibility for these funds, the county clearly had standing to challenge the court's determination. After July 15, 1994, the effective date of the amendment to KRS 31.185, the only entity likely to have standing to challenge the authorization of funds or their amount is the Finance and Administration Cabinet since county fiscal courts must pay a fixed amount of money into the statewide special fund, and only the state has an open financial obligation if the fund is exhausted.

Presence of Attorney for Funding Authority

The ultimate funding authority, now the Commonwealth of Kentucky through the Finance and Administration Cabinet, is not legally entitled to be present at any *ex parte* hearing. *See* ***Boyle County Fiscal Court v. Shewmaker***, 666 S.W.2d 759, 762-63 (Ky.App. 1984).

The presence of counsel for the funding authority "would create unnecessary conflicts of interest; in any event, county counsel's presence cannot be permitted because such petitions are entitled to be confidential." ***Corenevsky v. Superior Court***, 204 Cal.Rptr. 165, 172 (Cal. 1984) (In Bank). The funding authority's right to challenge the awarding or amount of funds is available after entry of the order.

Local Rules

Recently the Fayette County local rules, Rule 8B, were amended to require *ex parte* hearings when indigents requested funds for an expert or other resource.

Conclusion: Lack of Money Does Not Mean Less Protection

Requesting funds for resources to insure a competent defense must be *ex parte* to make sure that obtaining appropriate funds is done without sacrificing confidential information. Indigents are entitled to the same confidential aid that monied defendants do not even have to seek.

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Due Process Entitles Indigent to a Defense Expert for Evaluation, Preparation & Presentation

The Kentucky Supreme Court in a unanimous opinion written by Justice Wintersheimer in ***Binion v. Commonwealth***, ___ S.W. 2d ___ (Ky 1/19/95), decided that a *neutral* expert was not enough to satisfy due process, *Ake v. Oklahoma*, and the necessity of a level playing field.

When an indigent defendant is entitled to funds for an expert, the indigent is entitled to a *defense* expert who will assist in evaluation, preparation and presentation of the defense. As the Court stated in ***Binion***, a case involving a Madison County rape and robbery tried by Ernie Lewis: "The appointment of [the KCPC contract psychologist] as a neutral mental health expert was insufficient to satisfy the constitutional requirement of due process because the services of a mental health expert should be provided so as to permit that expert to conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense. The benefit sought was not only the testimony of a mental health professional, but also, the assistance of an expert to interpret the findings of the expert used by the prosecution and to aid in the presentation of cross-examination of such an expert. The defendant was deprived of his right to a fundamentally fair trial and due process without such assistance. *Cf. U.S. v. Sloane*, 776 F.2d 926 at 929 (10th Cir. 1985).

This Court has previously explicitly recognized that indigent defendants are entitled under *Ake* to be provided with a psychiatrist to assist in building an effective defense. *Hunter v. Commonwealth*, Ky., 869 S.W.2d 719 (1994).

We are persuaded that in an adversarial system of criminal justice, due process requires a level playing field at trial. As noted in *DeFreece v. State*, 848 S.W.2d 150 (Tex.Cr.App. 1993), there is a need for more than just an examination by a neutral psychiatrist. It also means that there must be an appointment of a psychiatrist to provide assistance to the accused to help evaluate the strength of his defense, to offer his own expert diagnosis at trial, and to identify weaknesses in the prosecution's case by testifying and/or preparing counsel to cross-examine opposing experts."

FUNDS FOR ACCIDENT RECONSTRUCTION EXPERT

In ***State v. Van Scoyoc***, 511 N.W.2d 628 (Iowa App. 1993) the indigent defendant was charged with 4 counts of vehicular manslaughter for recklessly driving his van off the road and over a tent of campers killing four. The only issue at trial was whether the defendant's driving was reckless.

The trial court authorized $3,000 for the defense to retain an accident reconstruction expert to analyze the physical evidence, the road, the terrain, statements of witnesses, speed of the van, manner of operation. The defense asked for an additional $2,500 for this expert to testify. The trial court refused on the ground that $120 per hour was excessive even though the state retained its expert at $110 per hour.

The appellate court held that "the trial court abused its discretion in refusing to provide funds to permit the defendant to have his expert witness available for trial." *Id.* at 631. The state presentation of testimony about the speed of the van made the "defendant's ability to counter that evidence...essential." *Id.*

According to the court, the "defendant is entitled to effective representation of counsel. Effective representation of counsel includes the right to an expert witness. These rights are guaranteed under the Sixth Amendment to the United States Constitution." *Id.* at 630.

DPA PERSONNEL INFORMATION

MARY MIRKIN - On November 16, 1994 Mary transferred to DPA's Protection & Advocacy Division as an Advocatorial Specialist from Cabinet for Human Resources, Department of Social Services where she worked in the social worker/family services field for 15 years.

ALLA CASE - On November 16, 1994 Alla transferred to DPA's Capital Trial Unit as a legal secretary from Kentucky Higher Education Assistant Authority. She worked in the General Counsel's office.

KATHY FRANKS - joined DPA's Stanton office as an Assistant Public Advocate November 16, 1994. She is a 1994 graduate of the University of Kentucky Law School. She replaces Donna Hale who is now in private practice in the Stanton area.

DARNELL DEL SANTO - transferred to DPA's Protection & Advocacy Division as an Advocatorial Specialist from Cabinet for Human Resources, Department of Social Services December 1, 1994.

JOE MYERS - On November 16, 1994 Joe transferred from DPA's Post-Conviction Office in LaGrange as a staff attorney to the Directing Attorney of DPA's Northpoint Trial & Post-Conviction Office. He replaces John Halstead who is now with the Tennessee Public Defender's Office in Knoxville.

Attorney General Announces Funding 26 Victim Advocates; No New Resources for the Defense

Attorney General Chris Gorman announced January 27, 1995 that his office is using $1.6 million in grant money to establish 26 victim advocate positions across the Commonwealth.

The advocates will represent, among others, the victims of child sexual abuse, domestic violence and sexual assault, and will serve as a special liaison between the victims and the criminal justice system. For example, the advocates will be established in county and commonwealth's attorneys' offices, rape crisis centers, a hospital, mental health centers, and a spouse abuse shelter, with a special emphasis on areas that have been underserved by the criminal justice system.

The grant money revives HB 95, sponsored by Rep. Paul Mason, which authorizes a victim advocate to be established in each commonwealth's attorney office. This legislation, a product of the Attorney General's Task Force on Child Sexual Abuse, was passed by the 1994 General Assembly but has not been fully implemented because of a lack of state funds. Gorman said the grant money is a way to "jump-start" this program and bring a new level of accountability to the criminal justice system.

"Without a doubt, victim advocates are one of our more important weapons in the fight against child sexual abuse," Gorman said. "They truly are a voice for innocent victims, and give us reason to hope that no child will ever be lost or ignored."

Gorman credited Rep. Mason for his efforts in establishing the grant program. He announced the grants during a news conference in Frankfort.

Indigent criminal defendants, who must defend themselves in these increasingly complicated prosecutions, have not been afforded any new sex abuse resources.

CHILD VICTIM DEFENSE FUND GRANTS
January 1, 1995 - June 30, 1995

Area Development District - Purchase

Paducah-McCracken County Child Watch, Inc. (Paducah)
McCracken County — $20,000

Rape Victim Services, Inc. (Paducah)
Ballard, Calloway, Carlisle, Fulton, Graves, Hickman, Marshall, & McCracken Counties — $14,326

Area Development District - Pennyrile

Sanctuary, Inc. (Hopkinsville)
Caldwell, Christian, Crittenden, Hopkins, Livingston, Lyon, Muhlenberg, Todd & Trigg Counties — $16,460

Commonwealth's Attorney (56th Cir.): G.L. Ovey (Eddyville)
Caldwell, Livingston, Lyon & Trigg Counties — $10,000

Commonwealth's Attorney (4th Cir.): David G. Massamore (Madisonville)
Hopkins County — $13,800

Area Development District - Green River

Commonwealth's Attorney (51st Cir.): Bill Markwell, Henderson County Attorney, Charles McCollom III; and Henderson County Child/Victim Task Force, Inc. (Henderson)
Henderson County — $17,550

Area Development District - Barren River

Rape Crisis and Prevention Center, Inc. (Bowling Green)
Allen, Barren, Butler, Edmonson, Hart, Logan, Metcalfe, Monroe, Simpson, & Warren Counties — $14,440

Area Development District - KIPDA

Children First (Louisville)
Jefferson County — $19,112

Bullitt County Attorney: Walter A. Sholar (Shepherdsville)
Bullitt County — $10,331

Commonwealth's Attorney (53rd Cir.): Markita J. Shelburne (Shelbyville)
Anderson, Shelby & Spencer Counties — $10,000

Area Development District - No. Ky.

No. Ky. Children's Advocacy Center of the St. Luke Hospitals (Bellevue)
Boone, Campbell & Kenton Counties — $ 6,214

Kenton County Attorney: Garry L. Edmondson (Covington)
Kenton County — $20,000

Area Development District - Buffalo Trace

Women's Crisis Center (Maysville)
Bracken, Fleming, Lewis, Mason & Robertson Counties — $12,238

Area Development District - FIVCO

Pathways, Inc. (Ashland)
Greenup County $15,000

Area Development District - Big Sandy

Commonwealth's Attorney (24th Cir.):
Anna D. Melvin (Paintsville)
Johnson, Lawrence & Martin Counties $15,000

Commonwealth's Attorney (31st Cir.):
John Earl Hunt (Prestonsburg)
Floyd County $20,000

Area Development District - Kentucky River

Commonwealth's Attorney (33rd Cir.):
Stephen L. Tackett (Hazard) Perry County $12,415

Letcher County Sheriff's Department
(Whitesburg) Letcher County $16,270

Kentucky River Community Care, Inc. (Hazard)
Lee and Letcher Counties (later programs
in remainder of ADD - Breathitt, Knott,
Leslie, Owsley, Perry & Wolfe Counties) $20,000

Area Development District - Cumberland Valley

Commonwealth's Attorney (27th Cir.):
Thomas V. Handy (London) Knox County $15,028

Commonwealth's Attorney (34th Cir.):
Allen C. Trimble (Corbin)
McCreary and Whitley Counties $13,760

Area Development District - Lake Cumberland

Commonwealth's Attorney (28th Cir.):
Lawrence Ray Carmichael (Somerset)
Lincoln, Pulaski & Rockcastle Counties $20,000

Area Development District - Bluegrass

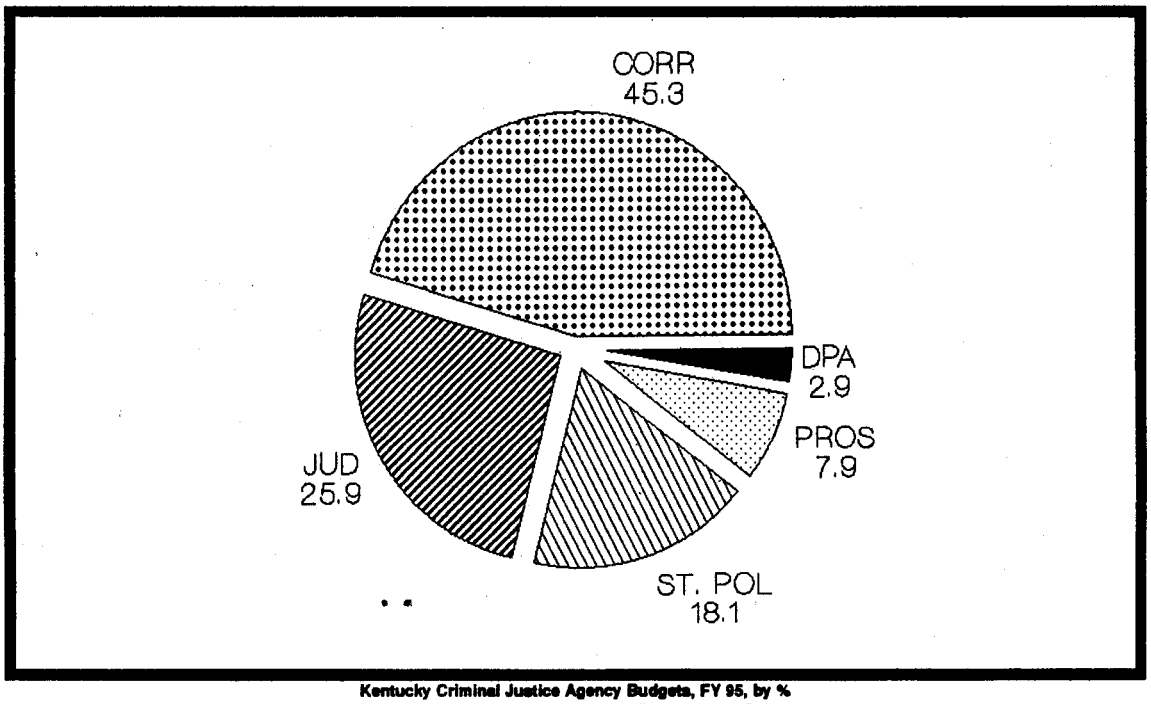
Commonwealth's Attorney (14th Cir.):
Gentry E. McCauley, Jr. (Versailles)
Bourbon, Scott & Woodford Counties $20,000

Commonwealth's Attorney (13th Cir.):
Thomas L. Lockridge (Nicholasville)
Garrard & Jessamine Counties $10,258

Bluegrass Regional Mental Health -
Mental Retardation Board, Inc. (Frankfort)
Harrison & Nicholas Counties $ 6,768

Bluegrass Regional Mental Health -
Mental Retardation Board, Inc. (Richmond)
Madison County $19,996

TOTAL AMOUNT AWARDED $388,966



Kentucky Criminal Justice Agency Budgets, FY 95, by %
Corrections, Judiciary, State Police, Prosecution, Department of Public Advocacy

Virtues & Values Etched in Stone

Compassion
Wisdom
Learning
Equality
Justice
Service
Community
Truth
Fidelity
Honesty
Conscience
Liberty
Charity
Integrity
Fairness
Trust

Upcoming DPA, NCDC & NLADA Education

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June 4 - June 6, 1995
Lake Cumberland State Park

10th Trial Practice Persuasion Institute
October 8 - October 13, 1995
Kentucky Leadership Center

DUI Trial Practice Persuasion Institute
October 8 - October 13, 1995
Kentucky Leadership Center

NOTE: DPA Training is open only to criminal defense advocates.

NCDC Advanced Cross-Examination
March 3 - March 5, 1995
Atlanta, Georgia

NCDC Trial Practice Institute
June 11-24 & July 16-29, 1995
Macon, Georgia

For more information regarding NCDC programs call Marilyn Haines at Tel: (912) 746-4151; Fax: (912) 743-0160 or write NCDC, c/o Mercer Law School, Macon, Georgia 31207.

NLADA Life in the Balance VII:
March 3 - March 5, 1995
Kansas City, Missouri

NLADA Defender Advocacy Trial Practice Institute
April 22 - April 28, 1995
Asheville, North Carolina

NLADA Appellate Defender Conference
May 18 - May 21, 1995
Estes Park, Colorado

NLADA Defender Management Conference
June 23 - June 26, 1995
San Diego, California

For more information regarding NLADA programs call Joan Graham at Tel: (202) 452-0620; Fax: (202) 872-1031 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006.

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