The Advocate

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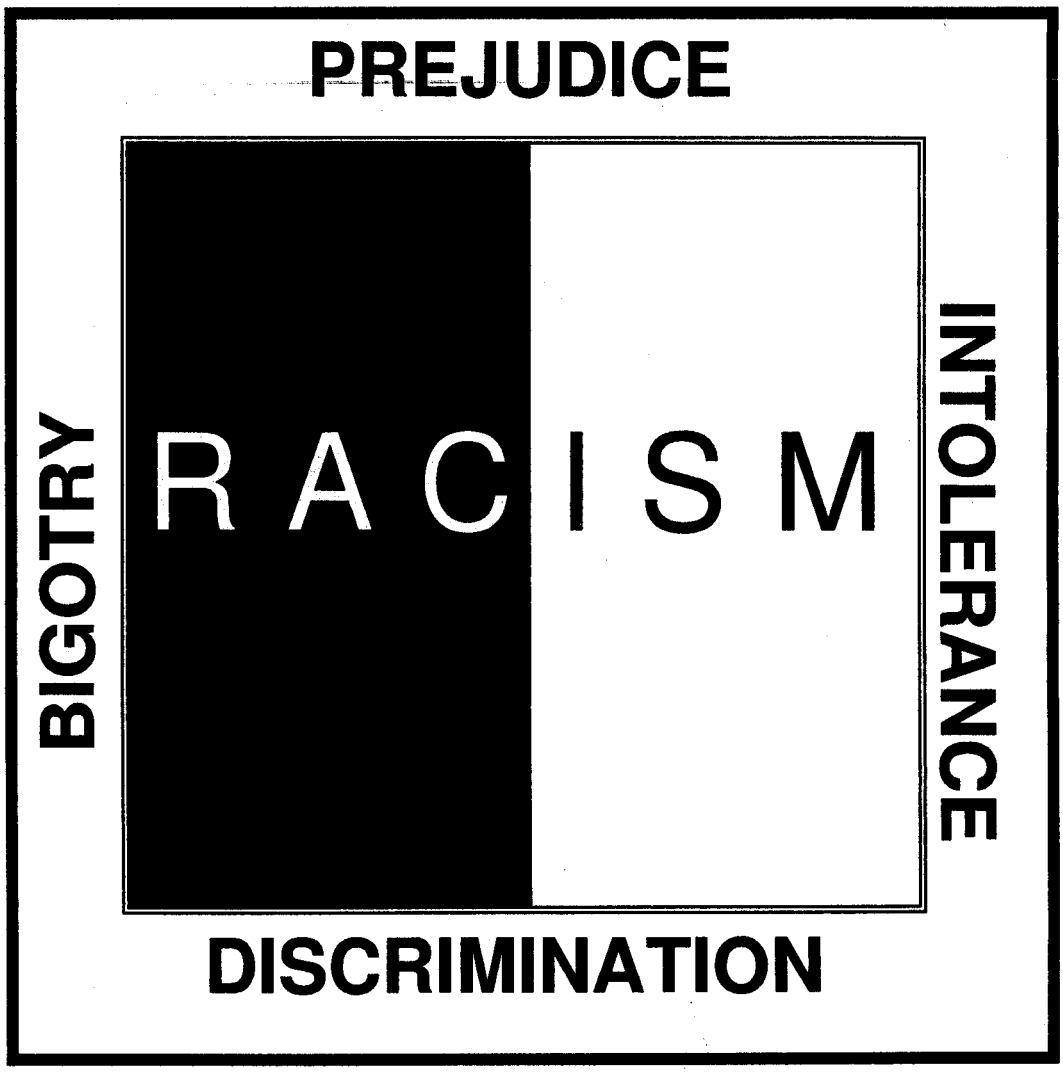
KBA President on the Right to Counsel



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.

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

KENTUCKY

FROM THE EDITOR:

Right to Counsel. Public advocates work to insure justice. Our KBA president, Stephen D. Wolnitzek, speaks to the essential nature of the right to counsel for Kentucky's poor accused.

Race. This issue of *The Advocate* we explore race. We know some facts about race in the criminal justice system, especially in homicides. See if you recognize any definite patterns.

While 7% of Kentucky's population is black, 35% of its inmates are black. This is a 2% increase of black inmates in the last year. *Why is the disparity so pronounced? Why is the disparity increasing?*

Of the 28 men on death row, 6 are black...21%. All of their victims are white. *Why is the disparity so large?*

Two University of Louisville professors who have done repeated and massive analysis of whether there is any racial bias in Kentucky's capital sentencing conclude "*Kentucky's 'guided discretion' system of capital sentencing has failed to eliminate race as a factor in this process.*" Senator Gerald Neal has previously proposed, without success, legislation to confront this inappropriate racial reality.

Nationally, 40% of the 2948 persons on death rows are black. Of the 253 persons executed in the United States since 1976, 38% are black. The race of the victims killed by those persons we have executed since 1976 is 84% white. *What does this teach us? Are there serious, undeniable racial problems with the way we decide to kill people?*

Sexual Abuse. We bring you the second of the 3-part series by Dr. Gardner on the challanges of validly and reliably assessing sexual abuse.

Funds. The consulting expert is emerging as an essential member of the criminal defense team. We highlight how to obtain funds for consultants.

Inequities. We highlight the inequity of defender and prosecutor salaries in Kentucky, and how very far behind inflation defender hourly rates lag.

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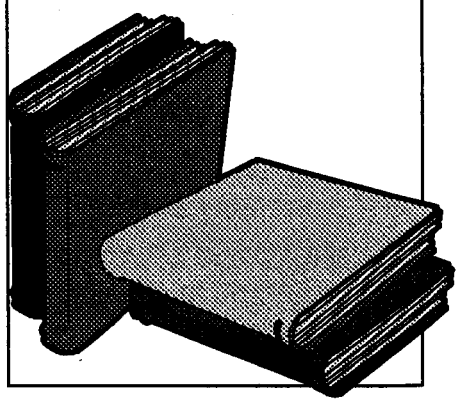

Justice...Not Just A Word: The Role of Public Advocates

Stephen D. Wolnitzek

Gideon and *Bradshaw*

Some 32 years ago the Supreme Court of the United States issued its landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), requiring indigent defendants in state courts to be provided with the assistance of legal counsel if their liberty is at stake. The Kentucky Supreme Court, in another important decision nine years later, opined that lawyers in Kentucky could not be compelled to represent indigent defendants without some compensation. *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972).

Kentucky's State-Wide Indigent Defense System

As a result of these two important decisions, the Department of Public Advocacy, and its predecessors came into being. Many of those charged with serious crimes are without sufficient assets to afford counsel. The Department of Public Advocacy and its staff and contract attorneys have come to be involved in over 80,000 of criminal prosecutions in Kentucky. The service which these men and women render to the citizens of this Commonwealth, both law-abiding and non law-abiding, is probably the least understood and appreciated by the average citizen.

The Right to Effective Assistance of Counsel

Public advocates are the lawyers who stand up in Courthouses throughout the Commonwealth and speak up for the rights of those accused of crimes. This has never been a popular avocation, and certainly with the general increase in violence in our society, and the increase in the number of violent crimes being perpetrated, along with the attendant publicity given to these crimes, it is certainly less than popular today.

However, the work that these public advocates do is of utmost importance if our system of criminal justice is to survive. What sets our criminal justice system apart from most others is the right to effective assistance of counsel. All of our other Constitutional and statutory rights which we, as American citizens and Kentucky residents, are guaranteed would not be of much value if an attorney did not insure that the guarantee was met. More often than not it is the Public Advocate who insures that the accused is treated appropriately. Often this is a thankless job, (even from the standpoint of the client), and frequently one that the public wishes was not done because it slows down the rush to judgment and the incarceration of the accused.

But as we continue to see various stories surfacing about persons who are convicted of crimes they did not commit (a very small number thankfully), we must all remember what I believe we were taught at some point in our legal education: "*it is better for 9 guilty persons to go free rather than one innocent person be convicted.*" It is the criminal defense lawyer, and that usually means the public advocate, who makes sure that the system works as it is designed.

While the bulk of the American public may usually believe that this is a job better left undone, their view changes dramatically when they, a close relative or friend stands accused, whether rightfully or wrongfully. It is at this point that they see the need for effective assistance of counsel, and come to realize that all these "technicalities" are important safeguards to their individual liberty and freedom. They then understand what it is that public advocates are fighting for everyday.

As we sit and contemplate what has occurred over these last three decades since *Gideon*, we need to remember the men and women who have devoted themselves to insuring that the safeguards granted to us by the Constitution which we too often take for granted, still exist.

Justice...Not Just A Word

For the past several years, each Kentucky Bar Association President has taken a theme or motto for their year. The phrase which has been chosen for this year is "*Justice . . . Not Just a Word.*" There is no doubt that the public advocates live this everyday and do much to insure that those in our society who are charged with a criminal offense receive justice. It is the public advocates that attempt to insure that justice is not only a lofty aspiration, but a reality in the life of their clients.

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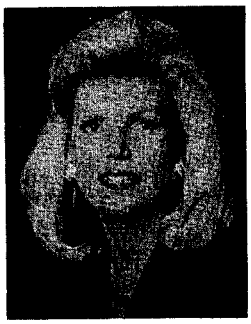
The Value of Counsel Decreases Dramatically Over 22 Years

In 1972 when Kentucky's state-wide public defender system was established the hourly rates were $20 per hour out-of-court and $30 per hour in-court with a $500 maximum for a misdemeanor and $1,000 for a felony. The statutory rates today are $25 and $35. The statutory maximums are $500 and $1,250. What would the 1972 rates and case maximums be today if they had kept pace with the inflation of 255% from 1972-1994:

1972	1992	1994
$ 20	$ 62.27	$ 71.06
$ 30	$ 100.90	$ 106.58
$ 500	$1681.80	$1776.40
$1000	$3363.59	$3552.80

Clary Appointed Kentucky Supreme Court Clerk



Susan Stokley Clary

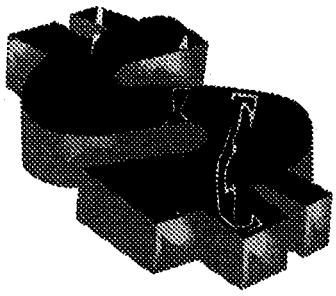
John C. Scott retired as Clerk of the Supreme Court of Kentucky on February 28, 1995. Effective March 1, 1995, **Susan Stokley Clary**, a 1981 graduate of the University of Kentucky's Law School, assumed the duties of the Clerk for the Supreme Court.

In October, 1983 Ms. Clary became General Counsel to the Kentucky's Supreme Court. In 1988 she became Court Administrator. From 1986-1988 Ms. Clary was General Manager of AOC's Juvenile Services developing and implementing a state-wide program of court designated workers under Kentucky's Unified Juvenile Code.

Prior to 1983, Susan Stokley Clary served as Administrative Assistant to Chief Justice Stephens, law clerk for Justice Stephenson, legal intern for United States Magistrate James F. Cook, law clerk at *Trimble, Stapleton, Reaves & Slone.*

Among the many organizations she is involved with, Ms. Clary has been a member of the Public Advocacy Commission since 1983.

Inequitable Salaries: Prosecutors vs. Public Defenders



A part-time Kentucky prosecutor who can also have a private civil practice is paid $10,000 more than a full-time public defender directing a multi-county office.

A full-time prosecutor makes $40,000 more than a full-time public defender multi-county office director.

A February 21, 1995 Kentucky Attorney General Opinion (OAG 95-5) relates the salaries for Kentucky Commonwealth Attorneys and County Attorneys, as adjusted for the consumer price index changes.

Salaries for full-time public defenders is set by the State's Personnel Department. A DPA directing attorney is in charge of a field office which covers multiple counties.

Why the inequity in salaries and why is the inequity so very large?

Prosecutors & Defenders	1995	1994	1993
1) County Attorney Prosecutorial & Civil Duties	$75,361	$73,411	$71,462
2) County Attorney Prosecutorial Only	$45,216	$44,047	$42,877
3) Commonwealth Attorney	$75,361	$73,411	$71,462
4) *Part-Time* Commonwealth Attorney	$45,216	$44,047	$42,877
5) DPA Directing Attorney Full-Time	$35,220	$35,320	$35,320

Race and the Death Penalty in Kentucky Murder Trials: 1976 - 1991

A Study of Racial Bias as a Factor in Capital Sentencing

*Paper presented at the "Variations in Capital Punishment" panel, Academy of Criminal Justice Sciences, Chicago, IL. This paper is based upon a report that was developed in response to Kentucky Senate Bill 8 - **Bias Related Crime Reporting** passed by the 1992 Kentucky General Assembly. The authors wish to express their appreciation to the following persons who assisted in the development of this report: 1) Fonda Butler of the Kentucky Justice Cabinet, 2) Dale Helton of the Kentucky Department of Public Advocacy, 3) Kathy Black-Dennis, Colleen E. Williams, and Bill Clark of the Kentucky Department of Corrections and 4) James Oakes, Greg Bucholtz, and Jeanne M. Fenn, our graduate research associates at the University of Louisville.*

We also thank Dr. Donald C. Swain, President of the University of Louisville, for providing release time support. Dr. Deborah G. Wilson (chair, Justice Administration) and Deans Thomas J. Hynes (College of Arts and Sciences) and Patrick Flanagan (Graduate School) provided support to restore our original data set and made continued study possible.

Points of view and opinions expressed in this report are those of the authors and do not necessarily represent the official position of the University of Louisville, the Kentucky Justice Cabinet, the Department of Public Advocacy or the Department of Corrections.

Abstract

This study re-examines the effect of race of the victim on the probability that an accused murderer is charged with a capital crime and sentenced to death in Kentucky. It adds over five years of data to our original study. The results show that blacks accused of killing whites had a higher than average probability of being charged with a capital crime (by the prosecutor) and sentenced to die (by the jury) than other homicide offenders. This finding remains after taking into account the effects of differences in the heinousness of the murder, prior criminal record, the personal relationship between the victim and the offender, and the probability that the accused will not stand trial for a capital offense. Kentucky's "guided discretion" system of capital sentencing has failed to eliminate race as a factor in this process.

Race and the Death Penalty in Kentucky Murder Trials: 1976 - 1991

Historically, race has played a role in the imposition of the death penalty in the United States. In *Furman v. Georgia* (408 U.S. 238 1972; see also Bowers 1983; Bowers and Pierce, 1980; Zimring and Hawkins, 1985), a number of the Supreme Court justices raised serious questions about discrimination and arbitrariness in the application of the death penalty. For example, Justice Douglas noted (*Furman*, 408 U.S. at 242):

> It would seem incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, of if it is imposed under a procedure that gives room for the play of such prejudices.

In other words, the death penalty was "cruel and unusual" because its application revealed that it was "pregnant with discrimination." Although this decision is the subject of several different interpretations, it prohibited the arbitrary infliction of the death penalty (Gross, 1985: 1278-1279; see also Kleck, 1981 for an alternative interpretation).

At that time, a massive body of research indicated that racial bias clouded the capital sentencing process. In particular, it clearly demonstrated that blacks were far more likely to receive a death sentence than were whites (Brearley, 1930; Mangum 1941; Garfinkle 1949; Johnson 1957). Also, it was determined that whites were more likely to have their death sentences commuted to a lesser sentence (Wolfgang, Kelly, and Nolde 1962).

Other studies found that capital sentencing was based not only on the race of the killer but also was determined by the race of the victim. For example, Zimring, Eigen, and O'Malley (1976) found that Philadelphia blacks charged with murdering whites were more likely to receive a death sentence than were other race of the offender -- race of the victim combinations. This pattern also was present in rape cases. Wolfgang and Riedel (1973; 1976) showed that blacks convicted of raping whites were eighteen times more likely to attract a death sentence.

This research evidence served as the backdrop for the *Furman* decision. Yet, *Furman* did not outlaw the death penalty. Rather, it questioned the results of the unbridled discretion typically at work in the capital sentencing process. In 1976, the Supreme Court (*Gregg v. Georgia*) approved a new Georgia system. The Supreme Court ruled that Georgia's "guided discretion" statute provided adequate protection against the arbitrary and capricious application of the death penalty. In other words, the Supreme Court concluded that the Georgia process provided adequate protection against racial bias and other arbitrary, extra-legal influences.

The Georgia law had several significant features. First, it required a bifurcated trial. In the first phase of the trial, the jury addressed the issue of guilt or innocence. In the second or sentencing phase, the penalty was decided. Second, the law delimited specific aggravating (and, later, mitigating) circumstances that juries would consider during the sentencing phase of the trial. The court would later give broad latitude to the defense regarding what could be introduced in mitigation. Third, the Georgia law required an automatic appeal of all death sentences to the state supreme court. The Court believed that these processes provided sufficient protection for rights of the accused.

Research on Capital Sentencing Since the *Gregg* Decision

Research on capital sentencing conducted following *Gregg* indicates that race is still a dominant factor in the decision to execute. For example, studies of the capital sentencing process in Florida revealed that blacks who kill whites have the greatest probability of receiving the death penalty (Arkin, 1980; Radelet, 1981; Radelet & Pierce, 1985; Zeisel, 1981; Radelet & Pierce, 1991). Other studies found evidence of this specific pattern of discrimination or in cases involving white victims, including Arkansas, Georgia, Illinois, Kentucky, Louisiana, Mississippi, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, Texas, and Virginia (Baldus, *et al.*, 1983 and 1990; Bienin *et al.*, 1988; Ekland-Olson, 1988; Gross & Mauro, 1988; Keil & Vito, 1990; Paternoster, 1983, and Smith, 1987). This pattern of racial discrimination was not a function of other factors. For example, cases in which blacks killed whites were not more aggravated or particularly heinous homicides (see Barnett, 1985; Keil & Vito, 1989).

This research evidence was the focus of an evaluation synthesis conducted by the U.S. General Accounting Office (1990). This analysis was required under The Anti-Drug Abuse Act of 1988. Specifically, this legislation called for a study of capital sentencing procedures to determine if the race of either the victim or the defendant influenced the capital sentencing process. The GAO uncovered 53 studies of capital sentencing. They excluded those that did not contain empirical data or were duplicative. As a result, 28 studies were judged methodologically sound. Based upon their review, the GAO concluded that:

- In 82 percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty (especially those who murdered whites).

- The race of the victim influence was found at all stages of the criminal justice system process. This evidence was stronger at the earlier stages of this process (*e.g.* prosecutorial decision to seek the death penalty or to proceed to trial rather than plea bargain) than in the later stages.

- Legally relevant variables (*e.g.* aggravating circumstances, prior record, culpability level, heinousness of the crime, and number of victims) were influential but did not fully explain the reasons for racial disparity in capital sentencing.

- The evidence for the influence of the race of defendant on death penalty outcomes was equivocal. The relationship between race to the defendant interacted with another factor (*e.g.*, rural/ urban areas, black who killed whites).

- More than three-fourths of the studies that identified a race of the defendant effect found that black defendants were more likely to receive the death penalty (GAO, 1990: 5-6).

The GAO concluded that this evidence represented a strong race of victim influence over capital sentencing.[1]

Our previous research on capital sentencing was a part of this review. We studied all persons charged, indicted, convicted, and sentenced for murder in Kentucky between December 22, 1976 (the date the most recent Kentucky statute governing capital punishment went into effect) and October 1, 1986 (Vito & Keil, 1988; Keil & Vito, 1990). We found that blacks who killed whites in Kentucky were more likely to be charged with a capital offense and sentenced to death than any other offender-victim racial combination. This finding was independent of other factors surrounding the murder case, including the seriousness (or heinousness) of the homicide (Keil & Vito, 1989).

Here, we extend the initial study by examining death-eligible Kentucky murder cases through December 31, 1991. Thus, the first fifteen years of the reinstatement of capital sentencing in Kentucky is examined. Again, the central question we address is: "Are there signs of racial bias in Kentucky's capital sentencing system?"

Capital Sentencing in Kentucky

In capital sentencing systems, the discretionary authority of prosecutors and juries are sequentially linked. The Kentucky system is no exception. The process begins when the prosecutor files a motion to proceed capital. A Kentucky prosecutor cannot seek the death penalty unless at least one of the aggravating circumstances listed in the statute is present. However, the prosecutor has the latitude to reject trying a case as a capital crime, even if the such factors are present. If the prosecution does not seek the death penalty, it cannot be imposed.

Juries also have a considerable degree of discretionary authority. While juries may not issue a death sentence unless requested to do so by a prosecutor, they are not compelled to follow a prosecutor's recommendation. A jury may decide that, even though the accused is guilty of murder, the circumstances surrounding the crime do not warrant a capital sentence. In such circumstances, Kentucky juries can impose some other penalty, such as a life sentence.[2]

The present study examines the impact of race at these two stages of the capital sentencing process. First, we attempt to determine the extent to which blacks who kill whites face a greater risk of being charged with a capital crime *by the prosecutor* than other offenders. Second, we examine the extent to which blacks who kill whites are more likely to receive a death sentence *from the jury.*

Methods

The present study uses a procedure designed to provide explicit modeling between the stages of the capital sentencing process. In the pool of eligible cases, the equations that predict who is charged with a capital crime and who is sentenced to death are linked. This technique permits detailed comparisons and facilitates the examination of the impact of the predictor variables, net of their effect upon the risk of being charged with a capital crime. We can correct for specification errors that may be introduced into the equations by not modeling the selection criteria for being charged with a capital crime directly into the equation predicting sentence outcome (Berk 1983; Heckman, 1980; Peterson and Hagan 1984; Hagan and Palloni, 1986). Also, we can examine if bias in sentencing has continued or abated in the time period since the previous study.

Sample Selection

The universe of cases includes all persons charged and indicted, convicted, and sentenced (for murder or a lesser offense) in Kentucky between December 22, 1976 (the effective date of the most recent Kentucky statute governing capital punishment) and December 31, 1991 (N = 1177).[3] Institutional files compiled and maintained by the Kentucky Corrections Cabinet were the main source for data on offenders and victims. In the following

analyses, we focus on a subset of these cases - individuals who: 1) met the minimum legal requirements for receiving a death sentence (they had an aggravating circumstance present in their case);[4] 2) had complete data on the predictors that measured aggravating circumstances;[5] and 3) who were sentenced by a jury, rather than a judge.[6] The size of this subset is 577 cases.[7]

Independent Variables

To develop the equations, we used the following set of independent variables to measure the seriousness of the homicides: *concurrent felony*, which indicates whether the murder was committed in conjunction with one or more of the following crimes -- Robbery I, Burglary I, Arson I, Rape I, or Sodomy I; *multiple victims*, scored zero if the offender had one victim and one if there was more than one victim; *silence*, scored one if the accused had killed the victim in order to prevent testimony against the offender. Unlike the previous two variables, *silence* is not listed as an aggravating circumstance under Kentucky law. However, it is a legal factor in other states and it represents a rational and instrumental motive for murder.

We have also included a measure of prior criminal record of the offender, *violent history*, scored one if the accused had at least one previous conviction for violent crimes and zero if not. In addition, there is an indication of whether the accused was charged with more than one of the aggravating circumstances defined by statute in addition to the homicide charge - *multiple aggravating circumstances*. This variable was scored one if more than one aggravating circumstance was present and zero if there was only one. Finally, the variable *stranger* indicates if the victim was a stranger to the accused. If the victim was a stranger, this variable was coded as one and otherwise, it was given a zero.

In the various analyses, we also entered a variable indicating race. In the equations for the total sample, this variable is *black killed white*, scored one if this was the racial pattern of the offense and zero if otherwise. The equations estimating the probability of a *death sentence* include "hazard rates" as covariates. These hazard rates represent the probability of not being tried as a capital case. They are defined as one minus the probability of being tried before a death qualified jury. The hazard rates were constructed from logit models for the total population.[8]

Table 1 presents a breakdown of the cases studied throughout the capital sentencing process by the variables included in the prediction models. Here, race of the offender does not have a statistically significant relationship across the capital sentencing process. While white offenders constitute a majority, cases with white victims are more likely to pass through the process at a higher rate. In addition, indicators of the severity of the offense reveal that the most severe cases are targeted for capital sentencing. Cases with more than one aggravating circumstance, multiple victims, and offenders who silenced their victims or had a concurrent felony were more likely to charged with and receive a death sentence.

Table 1: Frequency distributions for independent and dependent variables for Kentucky murderers, 1976 - 1991.

	Cases Eligible for a Death Sentence (N = 577)		Capital Charges (N = 158)		Charges Plus Death Sentence (N = 43)	
	N	%	N	%	N	%
Race of Offender: Black	168	29.1	44	27.8	9	20.9
White	405	70.9	114	72.8	34	79.1
Race of Victim[1]: Black	126	21.8	20	12.7	2	4.7
White	451	78.2	138	87.3	41	95.3
KY Mulipie Aggrava-No	331	57.4	53	33.5	9	20.9
ting Circumstances[2]:Yes	246	42.6	105	66.5	34	79.1
Multiple Victims[3]: No	490	84.9	110	69.6	28	65.1
Yes	87	15.1	48	30.4	15	34.9
Silenced the Victim[4]:No	480	83.2	106	67.1	19	44.2
Yes	97	16.8	52	32.9	24	55.8
Capital Charges: No	419	72.6				
Yes	158	27.4	158	100	43	100
Death Sentence: No	534	92.5	115	72.8		
Yes	43	7.5	43	27.2	43	100
Concurrent Felony[5]: No	306	53.0	47	29.7	9	20.9
Yes	271	47.0	111	70.3	34	79.1
History of Violent No	212	36.7	84	53.2	18	41.9
Offenses[6]: Yes	365	63.5	74	46.8	25	58.1
Victim-Offender Relation-						
ship: Non-stranger	404	70.0	101	63.9	24	55.8
Stranger	173	30.0	57	36.1	19	44.2

[1]Chi-square value = 9.84; [2]Chi-square value = 31.20; [3]Chi-square value = 21.69;
[4]Chi-square value = 37.73; [5]Chi-square value = 38.36; [6]Chi-square value = 13.29.

Dependent Variables

Our first equation identifies the variables associated with the prosecutorial decision to seek the death penalty. The dependent variable, *capital charges*, indicates whether the defendant was charged with a capital offense. It is scored one if the prosecutor charged the defendant with a capital offense and zero if other charge was filed. We examine the correlates of *capital charge* in the total sample of eligible offenders. Within this subsample, one hundred and fifty-eight persons were prosecuted for a capital crime and forty three were sentenced to death.

The second set of equations examines the correlates of the jury's decision to sentence an offender to death. This variable is *death sentence*. It was scored one if the accused received a death sentence, and zero if some lesser sentence was imposed. In this subsample, between 1976 and 1991, twenty seven percent of the persons who were tried before death qualified juries received a death sentence (43/158) in Kentucky.

Results

Race of the Offender and the Victim: Descriptive Statistics

Table 2 presents the percentage of cases in the four categories of offender/victim relationship and their distribution by the type of charge they received and sentence imposed. The percentages reveal the substantial selectivity exercised by Kentucky prosecutors seeking the death penalty.

Capital charges were most likely sought against blacks who killed whites (33%), followed by whites who killed whites (20%), and whites who killed blacks (17%). None of the whites who killed blacks received a death sentence. Blacks who killed whites also had the highest percentage of cases receiving a *death sentence* from the jury (12%). The data presented in Tables 1 and 2 raise the question of the impact of discrimination upon the two stages of the Kentucky capital sentencing system. Naturally, the inferences drawn as a result of such univariate, tabular analyses are limited. There may be legitimate reasons why this racial difference occurs. For example, cases where blacks murder whites may be more likely to involve a concurrent felony.

Table 2: Percentage of eligible persons who were charged with a capital offense or sentenced to death in Kentucky, 1976-1991.

Race of Offender-Race of Victim	No Capital Charges	Capital Charges[7]	Death Sentence[8]	Total
White Killed White (391)	72	20	8	100
Black Killed Black (108)	84	14	2	100
Black Killed White (57)	55	33	12	100
White Killed Black (18)	83	17	0	100
(N = 577)	73	20	7	100

[7]Percentage of persons with capital charges who did not receive a death sentence.
[8]Percentage of cases that had capital charges and were sentenced to death.

In order to make a more accurate deter2-mination of the factors influencing this process, an analysis featuring logit regression was conducted. In order to determine if race had an effect independent of the seriousness of the homicide, we estimated two sets of logit models (Norusis, 1988) using the previously listed independent variables. One set of logit models was estimated to predict who received a *capital charge* and who received a *death sentence*.

In the following analyses, we first developed separate equations for white and black offenders. Here, we consider and compare the probability that white and black offenders will be prosecuted for and receive a capital sentence. Then, we run another set of equations using the interaction term (blacks who killed whites) to determine whether this variable had an independent effect upon these probabilities. This analysis should reveal whether differences occur in capital sentencing decisions occur along racial lines.

Black and White Offenders: Capital Charges Filed by Prosecutor

Table 3:
Impact of Race of the Offender Race on Prosecutors' Decisions to File Capital Charges: Murder Cases in Kentucky, 1976-1991.

	BLACK OFFENDERS		WHITE OFFENDERS	
Parameter	**Coefficient**	**Antilog**	**Coefficient**	**Antilog**
Capital Charges	.155	0.17	.232	1.26
Concurrent Felony	.499*	1.64	.099	1.10
Multiple Victims	.619*	1.86	.248*	1.28
History of Violent Offenses	.010	1.01	-.225	0.80
Victim-Offender Relationship	-.219	0.80	-.037	0.96
Kentucky Multiple Aggravating Circumstances	.193	1.21	.230*	1.26
Silenced the Victim	.316*	1.37	.157*	1.17
White Victim	.378*	1.46	.044	1.04
Cases Since 1986	-.211	0.81	.100	1.11

*Coefficient is greater than or equal to twice its standard error.

Here, the equations for black and white offenders show some interesting similarities and differences. First, the similarities include crimes featuring multiple victims and the motive "silencing the victim." They are important factors in prosecutorial deliberations regardless of the race of the offender. Second, the differences begin with the variable "concurrent felony." This is a significant predictor among black cases but not among white offender cases. Blacks who kill whites are more likely to be prosecuted capital. In fact, they are 1.5 times more likely to be charged with a capital offense than other black killers. There is no white victim effect for white offenders. White offenders who have more than one aggravating circumstance present are more likely to be targeted for the death penalty by prosecutors.

In sum, the seriousness of the case appears to play a pivotal role in the decision to seek the death penalty in a Kentucky murder case. However, these factors also indicate that whites must commit a more aggravated homicide (more than one aggravating circumstance) while blacks need to have a white victim to be prosecuted capital. Therefore, the killing of a white by a black is treated as an aggravating circumstance. Race is the sole illegitimate factor that contaminates the capital sentencing process at this level.

Black and White Offenders: Imposition of the Death Penalty[9]

Table 4: Impact of Race of the Offender Race on Death Sentence: Murder Cases in Kentucky, 1976-1991.

	BLACK OFFENDERS		WHITE OFFENDERS	
Parameter	**Coefficient**	**Antilog**	**Coefficient**	**Antilog**
Death Sentence	3.671*	39.29	3.351*	28.53
Concurrent Felony	.837	2.31	.007	1.00
Multiple Victims	1.087*	2.97	.415*	1.51
History of Violent Offenses	.135	1.14	-.207	0.81
Victim-Offender Relationship	-.334	0.72	-.014	0.99
Kentucky Multiple Aggravating Circumstances	.324	1.38	.432*	1.54
Silenced the Victim	.460**	1.58	.570*	1.77
White Victim	.532**	1.70	N/A	N/A
Cases Since 1986	-.058	0.94	.069	1.07
Hazard Rate	-13.20*	0.00	-7.746	0.0004

* Coefficient is greater than or equal to twice its standard error.
** Coefficient is greater than or equal to 1.64 times its standard error.

The decision of the jury to sentence an offender to death is also tainted by racial bias. Among black offenders, committing more than one murder and killing to silence the victim increase the probability of a death sentence. However, blacks who killed white victims have a seventy percent greater probability of being sentenced to death than blacks who killed blacks.

For white offenders, the probability of a death sentence is greatest for those who had multiple victims. They had a fifty one percent greater probability of a capital sentence than whites who had one victim. In addition, the chance of being sentenced to die increases by 77 percent if silencing the victim was a motive and by 54 percent if more than one aggravating circumstance was present in the case.

Blacks Who Killed Whites: Capital Charges Filed by Prosecutor

Table 5: Impact of Victim-Offender Race on Prosecutors' Decisions to File Capital Charges: Murder Cases in Kentucky, 1976-1991.

Parameter	**Total Sample** (N = 577)	**Antilog**
Capital Charges	.00003	1.00
Capital Charges by Concurrent Felony	.152*	1.16
Capital Charges by Multiple Victims	.342*	1.16
Capital Charges by Silenced the Victim	.205**	1.23
Capital Charges by History of Violent Offenses	-.186*	0.83
Capital Charges by Victim-Offender Relationship	-.049	0.95
Capital Charges by Kentucky Multiple Aggravating Circumstances	.230**	1.26
Capital Charges by Black Killed White	.196**	1.22
Cases Since 1986	.049	1.05

* Coefficient is greater than one and a half its standard error.
** Coefficient is greater than twice its standard error.

Here, we derived prediction models for the entire sample and used blacks who killed whites as another independent variable. It is clear that the more serious the offense, the greater the probability that prosecutors will seek the death penalty. Offenders who committed a concurrent felony, killed more than one victim, who killed in order to prevent their victim from giving testimony against them, and who had more than one aggravating circumstance present are more likely to be charged with a capital crime. However, the coefficient for blacks who killed whites is also significant and its sign is positive. This is a partial coefficient. This means that the effect of *black killed white* is present even when other variables in the equation are controlled for. A history of past convictions for violent offenses is negatively associated with the risk of being charged with a capital crime. Also, there are no significant differences between the cases prosecuted since 1986 compared to those from the previous study.

Overall, these results indicate that the impact of race upon prosecutorial deliberations cannot be justified by the presence of other legitimate factors. Blacks who killed whites were more likely to be the target of capital prosecution than any other offender-victim racial category.

Blacks Who Killed Whites: Imposition of the Death Penalty

To reiterate, the imposition of a death sentence takes place in a two step process. First, the prosecutor must charge the accused with a capital offense. Second, a jury must decide if the defendant is guilty and deliberate over a possible death sentence. In capital sentencing, the second decision is clearly dependent upon the first. Therefore, this contingent relationship must be taken into account when estimating who will have the greatest chance of receiving a death sentence.

Table 6: Impact of Victim-Offender Race on Death Sentence: Murder Cases in Kentucky, 1976-1991.

Parameter	Total Sample	Antilog
	(N = 577)	
Death Sentence	2.775**	1.61
Death Sentence by Concurrent Felony	.0736	1.08
Death Sentence by Mulitple Victims	.538**	1.71
Death Sentence by Silenced the Victim	.507**	1.66
Death Sentence by History of Violent Offenses	-.095	0.91
Death Sentence by Victim-Offender Relationship	.026	1.03
Death Sentence by Kentucky Multiple Aggravating Circumstances	.351**	1.42
Death Sentence by Black Killed White	.346**	1.41
Cases Since 1986	-.037	1.04
Death Sentence by Hazard Rate	-6.22**	0.002

*Coefficient is greater than one and a half its standard error.
** Coefficient is greater than twice its standard error.

The data in Table 6 reveal that offenders who: killed more than one victim, murdered to keep the victim from testifying against the accused, and had more than one aggravating circumstance present were more likely to receive a *death sentence*. Again, blacks who killed whites were also more likely to be sentenced to die by the jury. These relationships hold even when adjustments for the hazard rate are made.[10] The remaining predictors did not have a statistically significant effect upon who received a death sentence.[11]

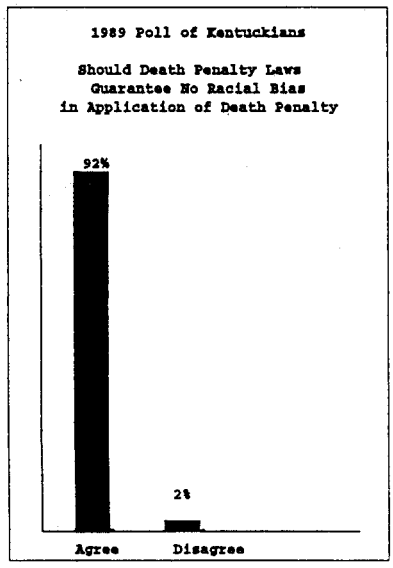
The results indicate that Kentucky juries evaluated aggravating circumstances differently, depending on the race of the killer and the victim. This finding holds even when we consider the total sample of eligible homicide offenders, not just those tried before death qualified juries and when other important factors are controlled for. In Kentucky, capital juries considered the killing of a white by a black more deserving of capital punishment.

Conclusions

The capital sentencing process in Kentucky has been significantly influenced by race. From 1976 through 1991, the data indicate that white homicide defendants must commit a more aggravated murder to be eligible for a Kentucky death sentence. Furthermore, blacks who killed whites were more likely to be charged with a capital offense and to receive a death sentence. These results cannot be accounted for by the presence of legally relevant factors (*e.g.*, more aggravating circumstances). Race was not an extraneous factor in Kentucky's capital sentencing system. Blacks who killed whites were singled out by the capital sentencing process. There are several possible ways to attempt to explain this finding.

First, labelling theory provides a basis for our findings on capital sentencing. One premise of labelling is that punishment for crimes is determined by social status of the offender and the victim (Erickson, 1962; Becker, 1963). Thus, blacks who killed whites were targeted for death in Kentucky primarily because of social status and the threat to social structure that this crime personifies (see Black, 1976).

A second related interpretation involves history. The decisions of both the prosecutor and the jury follow Kentucky's history of racial violence against blacks. Traditionally, the murder of a white by a black has been viewed as a particularly serious crime. This point of view may be culturally ingrained (see Johnson 1941; Myrdal 1944). Wright (1990) has produced an exhaustive study of lynchings and executions in Kentucky between 1866 and 1934 - the last year in which a recorded lynching took place. During this time frame, Wright demonstrates that the peak period of lynchings was between 1865 - 1880. These years were marked by increased political activity by blacks. Some white voters viewed this event as a direct threat to their political and economic hegemony.



The third set of explanations considers the systemic nature of capital sentencing. In our previous studies, we concluded that there may be several reasons why Kentucky prosecutors were more likely to seek the death penalty in cases where blacks murdered whites (Keil and Vito, 1990: 204). These rationales include: ease of conviction (see Paternoster, 1984), political and/or media pressure, or the greater social visibility of cases where blacks kill whites. Therefore, it may be politically advantageous for prosecutors to seek the death penalty in such cases.

Our findings indicate that systemic bias exists in the application of the death penalty in Kentucky. Yet, the exact source of the discrimination is impossible to pinpoint. For example, research in New Jersey (Bienin *et al.*, 1988) and Louisiana (Smith, 1987) reported a geographic effect where one or several counties were the source of discrimination. In Kentucky, the data reveal a systemic effect, not an individual one. From a Durkheimian perspective, the capital sentencing system is one in which "the whole does not equal the sum of its parts; it is something different, whose properties differ from those displayed by the parts from which it is formed" (Durkheim, 1982: 128). Like Durkheim's concept of society, the criminal justice system exists at its own level and produces its own unique effects that are independent of separate actions. After all, both prosecutors and juries deal with individual cases. However, these findings are not a "statistical artifact." Discrimination did occur somewhere in this process but it is often subtle and difficult to discern.

For example, in a Shelbyville (KY) case, Commonwealth Attorney Ted Igleheart reiterated the facts of a case and described the victim as a "young white woman." The defendant, William Stark was a black man charged with the murder of Vanissa Waford during the course of a robbery. Defense Attorney Steve Mirkin immediately filed a motion objecting to the specification of the victim as a "white woman" in Stark's indictment (Meece & Eigelbach, 1990: 1).[12] Such treatment may be common in racially-tainted, capital sentencing systems.

Bohm (1994) has identified several possible sources and rationales for bias in capital cases. First, there is the evident explanation that blacks are discriminated against out of fear, hatred, or both. Second, jurors and prosecutors may psychologically identify with white victims in black offender cases. Third, these disparities may be the product of a long history of institutional racism.

Similarly, Johnson (1988) cites "unconscious racism" as a factor in capital sentencing. She states that there are three reasons why this factor is present. First, ignorance is an obstacle to the court's recognition of unconscious racism. We tend to attribute racism in its most obvious and obnoxious forms - in hate crimes such as beatings and cross burnings - rather than its indirect and covert forms. Second, there is the fear that if unconscious racism is legitimately recognized as a factor in capital sentencing, the premise will spread like kudzu to other facets of sentencing. This fear is irrational. Recognition of McCleskey's legal claim could have been limited by the Court without its spread to other unjustified circumstances (see Gross & Mauro, 1989: 181-182). Finally, denial is at work. We do not wish to acknowledge that racism infects us all (Johnson, 1988: 1027-1031).

It may simply be that these results are the result the racial bias that persons bring to the courtroom. A recent survey found that respondents who were confronted with changing vignettes describing two murder cases were more likely to support capital punishment when the victim was white. Of course, this bias is far beyond the control of procedural safeguards in capital sentencing (Applegate, *et al.*, 1993).

Such bias is also very difficult, if not impossible, to control through judicial review (see Radelet, 1981). A Supreme Court justice, on the state or national level, applying the most rigorous standards on a case by case basis, may find little "wrong" with the Kentucky system. In fact, the Supreme Court has favorably ruled on the constitutionality of a system that produces such evidence of racial discrimination.

In *McCleskey v. Kemp*, the Court stated that the research evidence produced by Baldus, Pulaski and Woodworth (1983 and 1990) on the Georgia system revealed only a "discrepancy... correlated with race" and required defendants complaining about discrimination to directly prove that it existed in the process of their individual case (Bynam, 1988: 1091). Thus, as Bowers (1993: 158) opines, "The Court's ruling in *McCleskey* meant that the kind of evidence that

Race Resources

The Department of Public Advocacy has the following race resources available for loan. Contact the DPA Librarian, Brian Throckmorton, at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006; Fax: (502) 564-7890; E-mail: bthrock@dpa.state.ky.us.

1. *Racial Violence in Kentucky*, 1865-1940 (1990). A book by G.C. Wright, Louisiana State University Press, Baton Rouge, Louisiana.

2. *Double Justice: Race and Capital Punishment* (1991). A 19 minute video of the ACLU and the NAACP Legal Defense Fund.

would suffice to save McCleskey's job could not save his life" (see also, Gross & Mauro, 1989: 173-184). Given this decision, it is unlikely that the U.S. Supreme Court would strike down capital punishment on the basis of research evidence. As Acker (1993: 67) has indicated, the Court has upheld capital sentencing practices despite "impressive social science evidence" to the contrary.[13]

When the entire body of potentially capital cases are considered, race clearly emerges as a crucial factor in capital sentencing in Kentucky. It is a factor that cannot be accounted for by its interrelationship with other legally relevant variables. Kentucky's "guided discretion" system of capital sentencing has failed to eliminate race as a factor in this process.[14]

We must confront the conclusion that the capital sentencing system yields a discriminatory result that cannot be corrected. U.S. Supreme Court Justice Harry A. Blackmun has reached this decision. In his dissent in *Callins v. Collins* (1994), he noted that "despite the effort of the States and courts to devise legal formulas and procedural rules" to eliminate problems in capital sentencing, "the death penalty remains fraught with arbitrariness and discrimination."[15] As Justice Blackmun has suggested, it is time to "stop tinkering with the machinery of death" and discover another nondiscriminatory punishment for murder. Kentucky's system of capital sentencing is fraught with discrimination that defies identification, elimination or control.

Footnotes

[1]One study based upon California data did fail to discover a race of victim effect. Klein and Rolph (1991) analyzed 496 California defendants whose convictions for homicide required sentences of life without possibility of parole or death and found no evidence of racial discrimination. However, this study is limited in several respects. First, by their own admission, their "study addresses possible racial bias only in the last step and does not speak to possible racial biases at earlier stages (Klein and Rolph, 1991: 34).

Therefore, they do not consider all cases that were eligible for a death sentence under California law. Second, they only considered race of the victim and race of the offender as separate variables. They did not examine the impact of a combined variable on race of the offender and race of the victim. Third, they did not consider region as a variable. In a state as populous and ethnically and geographically diverse as California, there could be some regional variation in capital sentencing. This study was published after the GAO conducted its review of capital sentencing research.

[2]Kentucky has a system of jury sentencing in non-capital felony cases which prohibits judges from raising any penalty levied by the jury. However, a judge's authority to override the jury's recommendation in a capital case is not clear. In *Ward v. Commonwealth*, the Kentucky Supreme Court stated that "the death penalty cannot be assessed by any judge unless recommended by the jury." In other cases the court has stated that the judge has "the ultimate responsibility of fixing the penalty as prescribed by statute (*Grooms v. Commonwealth*)." Regardless, no judge in Kentucky has ever imposed the death penalty after a jury's recommendation for some other sentence. Therefore, any prophylactic value of a judge override is statistically insignificant. Kentucky trial judges do have the authority to not accept a jury's recommendation of a death sentence and impose a lesser penalty (*Smith v. Commonwealth*, 634 S.W.2d 411, 413 Ky. 1982).

[3]The addition of five years worth of data resulted in a total N of 1177 (up from 864). As a result, this study had 116 more murder cases with complete data on all predictors. Of this subset, we had 54 more cases with capital charges and 8 more cases that received a death sentence.

[4]The research team made the determination of whether an aggravating circumstance (under Kentucky statute) was present in the case.

[5]87 cases had missing data on one or more of the predictors at this stage.

[6]There were only two cases sentenced by a judge in this data set.

[7]In order to determine the nature of possible biases that could result from eliminating cases with missing data on any of the predictor variables, a series of cross-tabulations were examined. For the total sample, missing values on *capital charges* and *death sentence* (the two dependent variables) occurred most frequently among the cases that had lower values for the independent variables. In other words, cases associated with less serious homicides were most likely to be excluded from this study due to missing values. Therefore, the data is not biased such that the seriousness of the homicide is overestimated. In fact, the results yield a conservative estimate of the effects of the various predictors on the dependent variables under consideration. The independent variable that had the

Race Profile of All Kentucky Correctional Institutions, 1995

White	6,933	63%
Black	3,895	35%
Native American	4	
Hispanic	29	
Asian	2	
Other	22	
TOTAL	**10,885**	**100%**

greatest number of missing values was race of the victim (9.5% of all the cases). Kentucky has only one category of murder (capital). It then has two levels of manslaughter, first and second degree.

[8]In order to address these questions, we followed the procedure outlined by Berk (1983) and Peterson and Hagen (1984). The normal procedure for estimating a hazard rate with categorical data is probit regression. However, probit regression assumes that bivariate error terms are normally distributed. Plots of our bivariate errors indicated enough of a departure from normality to suggest that this assumption was not tenable. For this reason, logit regression was utilized to compute the hazard rate (Berk 1983) for all accused murderers in the total sample. The computation of a hazard rate enables us to explicitly model the selection process into the equations that predict who is likely to receive a death sentence.

The hazard rate was entered as a covariate in logistic regression equations (Norusis 1988) for *death sentence* in the total sample, murderers charged with killing whites, and for blacks charged with murder. This procedure enabled us not only to address the issues addressed above but also to correct for specification errors that may be introduced into the equations by not including the hazard rate.

The equations estimated using logit regression, with the corrected coefficients, are presented in Table 4 (Norusis 1988). While there is multicolinearity between the predictors and the hazard rate, the nonlinear form of the logistic regression equation allows for the identification and, hence, estimation of parameters (Berk 1983). The intercorrelations among the estimates for the predictors, including the hazard rates, are available from the authors.

[9]We could not include a measure for white victims in the white offender equation because they were not enough cases to make analysis possible. In these equations, the hazard rate refers to the probability of NOT being charged with capital murder.

[10]The hazard rate has a significant negative relationship with whether the offender is sentenced to death. The negative effect was anticipated, since it represents the probability of not being tried before a death qualified jury. In other words, it symbolizes the probability that an offender will not be viewed by prosecutors as someone who deserves the death penalty.

[11]Appropriate diagnostics indicate that there is no significant colinearity between the hazard rate and the exogenous variables used in Tables 3 and 4.

[12]On March 22, 1993, the indictment against William R. Stark, Jr. was dismissed without prejudice, reserving issues of prosecutorial misconduct by Circuit Judge William F. Stewart.

[13]Reviewing U.S. Supreme Court cases on capital punishment between 1986-89, Acker (1993) reported that justices cited social science research evidence in 10 out of 28 decisions (35.7%). This evidence was discussed in cases involving racial discrimination and arbitrary application of the death penalty. It also tended to be cited by the "more liberal, due process oriented" justices (Blackmun, Brennan, and Marshall) who were opposed to capital punishment.

[14]A survey of attitudes toward capital punishment found that over 92% of Kentuckians believe that the law should guarantee that there is no racial bias in the application of the death penalty (Keil & Vito, 1989).

[15]In fact, arbitrariness still appears to be a particularly significant problem. Berk, Weiss, and Boger (1993) examined capital sentencing patterns in San Francisco between 1978 and 1988 and found that the process was lottery-like in its determinations. This is exactly the type of system that was denounced in the *Furman* decision.

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Racial Justice Act

In the 1994 Kentucky General Assembly Bill No. 265 was introduced by Senator Gerald A. Neal on Wednesday, February 23, 1994. It was not enacted into law. Its text follows:

AN ACT relating to racially discriminatory capital sentencing.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS:

Sections 1 to 4 of this Act shall be cited as the Kentucky Racial Justice Act.

SECTION 2. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS:

(1) No person shall be put to death under color of state law in the execution of a sentence which was imposed based on race.

(2) An inference that race was the basis of a death sentence is established if valid evidence is presented demonstrating that race was a statistically significant factor in decisions to seek or impose the sentence of death in the Commonwealth at the time the death sentence was sought or imposed.

(3) Evidence relevant to establish an inference that race was the basis of a death sentence may include evidence that death sentences were sought or imposed significantly more frequently:

(a) Upon persons of one race than upon persons of another race; or

(b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

(4) If statistical evidence is presented to establish an inference that race was the basis of a sentence of death, the court shall determine the validity of the evidence and if it provides a basis for that inference. The evidence shall take into account, to the extent it is complied and publicly made available, evidence of the statutory aggravating factors and shall include comparisons of similar cases involving persons of different races.

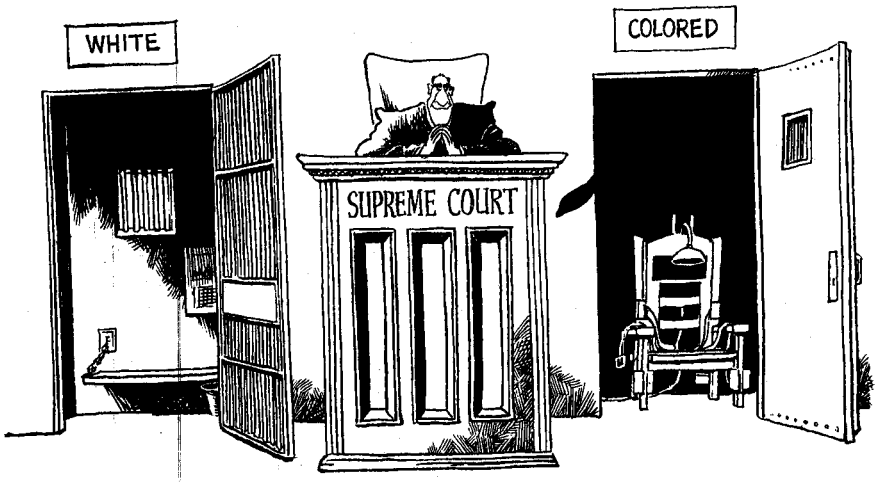
(5) If an inference that race was the basis of a death sentence is established, the death sentence shall not be carried out unless the state rebuts the inference by clear and convincing evidence. The state cannot rely on mere assertions that it did not intend to discriminate or that the case fits the statutory criteria for seeking or imposing the death sentence.

SECTION 3. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS:

Data collected by public agencies concerning factors relevant to the imposition of the death sentence shall be made publicly available pursuant to the Kentucky Open Records Act, KRS 61.870 to 61.884 and the Supreme Court of Kentucky rules of discovery in civil cases.

SECTION 4. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS:

Section 1 to 4 of this Act shall be considered as retroactive and no persons shall be barred from raising any claim under Section 2 to 4 of this Act on the ground of having failed to raise or to prosecute the claim before the enactment of Sections 1 to 4 of this Act, nor by reason of any adjudication rendered before that enactment.



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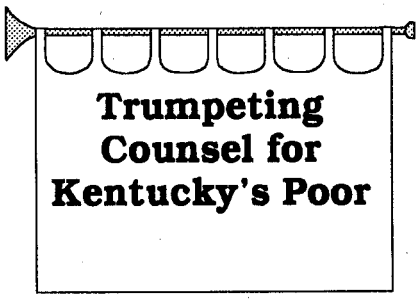
Fowler Appointed Clerk of Court of Appeals

George E. Fowler, Jr.

The Court of Appeals announced that John C. Scott, Clerk of the Court of Appeals since its inception in 1976, has retired and that **George E. Fowler, Jr.**, of Frankfort, Kentucky, has been appointed as Clerk of the Court of Appeals. Both actions were effective March 1, 1995.

After graduation from St. Meinrad College in St. Meinrad, Indiana in 1969, Mr. Fowler served in the U.S. Navy, first, as a nuclear reactor operator and, later, as a supply corp officer. He attended the University of Kentucky Law School from which he graduated in December of 1977. Mr. Fowler was first employed by the Court in March of 1978 as a Staff Attorney. He has been the Chief Staff Attorney of the Court since September of 1979.

Public Advocate Seeks Nominations



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

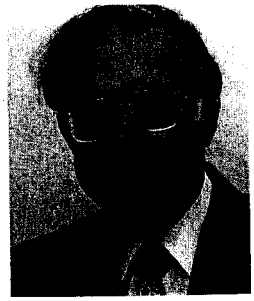
In celebration of the 30th Anniversary of the United States Supreme Court's landmark decision in ***Gideon v. Wainwright***, 372 U.S. 335 (1963), the Kentucky Department of Public Advocacy established the *Gideon* Award in 1993. The prestigious award is presented at the Annual DPA Public Defender Conference 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.

Child Sex Abuse

Differentiation Between True & False Sex Abuse Accusations in Child-Custody Disputes: Indicators of a Sex Abuse Accusation for the Child



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 second of a series of three articles. © *Richard A. Gardner, M.D., 1994.*

The criteria for discriminating between true and false sex-abuse accusations are designed to serve as guidelines for making this important and crucial differentiation. They are most applicable in extreme situations, *i.e.*, when there has been severe and chronic sex abuse or when there has been absolutely no sex abuse and the accusation is patently false. Such situations may be relatively easy to assess. Under these circumstances, most of the criteria will readily be applied and one can conclude quite easily that most of the criteria indicate true sex abuse or most of the criteria indicate that the accusation is highly likely to be false.

Application of these criteria, however, may be compromised and very difficult in certain situations. For example, not all children who have had a sexual encounter with an adult are traumatized by it. The experience may have been an enjoyable one, and they may not have recognized that they were being exploited until adults informed them that this was the case. Such children, then, may not satisfy some of the criteria, especially those that are applicable when there has been a significant degree of psychological trauma, *e.g.*, fear of retaliation by the accused, depression, withdrawal, and psychosomatic disorders. Another complication relates to the child's experiences with previous interviewers. The greater the number of previous interviews, the greater the likelihood the child's description will become routinized and the greater the likelihood it will resemble the litan y typically provided in early interviews by the child who presents a false-accusation scenario. Furthermore, a particular criterion may not be applicable because of special considerations pertinent to the particular child being evaluated. However, in most cases it is likely that the majority of the criteria can be utilized to provide information regarding whether or not the sex abuse has taken place.

There is no sharp cut-off point regarding the number of indicators that must be satisfied before coming to the conclusion that sex abuse took place. The greater the number of indicators satisfied, the greater the likelihood the sex abuse occurred. Not only must one consider the *quantity* of the criteria satisfied but the *quality* as well. For example, a child may say, "My daddy took a big knife and put it into my wee-wee hole and my poo-poo hole. There was a lot of bleeding. My mommy was there and she got very angry at my daddy and she gave him 'time out.'" Such an allegation easily satisfies criterion #6 (Credibility of the Description) for a false sex-abuse accusation. Regardless of the number of other criteria satisfied, this statement in itself provides strong evidence for a false sex-abuse accusation.

1. Degree of Hesitancy Regarding Divulgence of the Sexual Abuse

Children who have been genuinely abused are often quite hesitant to reveal the abuse. They may feel guilty over or ashamed about their participation in the sexual acts. Or they may have been threatened with dire consequences if they divulge the abuse. They are fearful of inquiries by professionals and often have vowed to keep the "special secret" about "our little game." Such fear may relate to the threat of the abuser that terrible harm will befall them and their loved ones if they are ever to reveal the sexual activities.

In contrast, those who are falsely accusing are likely to unashamedly and unhesitantingly describe their sexual experiences. They have no history of a special secret, of threats, or of bribes. In the early phases of their "divulgences" they may not know that such a history is common among children who have been genuinely abused. However, after many interrogations they may learn that this is one of the experiences they are expected to describe and so the "secret" may become incorporated into their scenarios.

However, the child who has been genuinely abused, and who has been subjected to a series of evaluations, may become desensitized to them and not reveal the hesitancy that was present during the first (and/or earlier) interviews. This is one of the reasons why the first examiner is in a better position than subsequent examiners to assess a child who claims to have been sexually abused.

2. Degree of Fear of Retaliation by the Accused

Children who falsely allege sex abuse often make their accusations directly to the accused without any particular fear of retaliation. First, they have not usually been threatened with terrible consequences for divulgence, and second, they are generally reassured by the supporting accuser that they have nothing to fear. They recognize that such divulgences will ingratiate them to the accuser as well as other overzealous examiners who are supporting the false accusation. Children who have been genuinely abused are often threatened with dire consequences by the abuser and so exhibit significant fear when asked to discuss the abuse, especially in the presence of the alleged offender.

The child who is falsifying a sexual abuse accusation generally does not describe fear of the alleged perpetrator and may be free from tension in the perpetrator's presence. If there is any tension, it relates to fear that the perpetrator

will punish the child for the false accusation. The child who has been genuinely abused will be quite fearful of the perpetrator, both inside and outside the examiner's office. In fact, the fear may generalize to others of the same sex, so that the child who was abused by a father may be fearful of being alone with any male figure--including a male examiner.

3. Degree of Guilt Over the Consequences of the Divulgence to the Accused

Younger children, both those who are providing false accusations and those who provide true accusations, do not manifest guilt. This relates to their cognitive immaturity, as a result of which they are unable to appreciate that their accusation can literally destroy the life of the accused and can result in such consequences as loss of career, lifelong rejection, incarceration, and suicide. It is in older children that the guilt criterion can be of value for differentiating between the two types of accusation. Older children who provide false sex-abuse accusations may not exhibit guilt over their divulgences because of the morbid gratification they are experiencing over the pain and harm they are causing the alleged abuser. They are acting out the wishes of the coaching parent, are gaining support for their accusations, and are identifying with a person (parent or supporting examiner) who exhibits no guilt over the formidable pains and suffering the accusation causes the accused.

Children who have suffered bona fide sexual abuse may feel guilty over their disloyalty and the recognition that the disclosure is going to result in formidable painful consequences for the perpetrator. The perpetrator has often laid the groundwork for such guilt by telling the child never to reveal the secret lest there be terrible consequences.

4. Degree of Guilt over Participation in the Sexual Acts

Children who have been genuinely abused may experience guilt over their participation in the sexual activities -- especially if they have been exposed to an environment in which their sexual encounters are viewed as heinous sins or crimes (the more common situation). In contrast, children who provide false sex-abuse allegations do not generally experience such guilt because there were no sexual activities over which to feel guilty. They have not learned that many children who have been sexually abused may feel guilty about their participation. However, if exposed to a series of interrogations in which they pick up the idea that the examiners are desirous of such comments, they will ultimately provide them. Once again, the first examiner is in the best position to decide whether this indicator of sex abuse is present.

5. Degree of Specificity of the Details of the Sexual Abuse

Children who have been genuinely abused are more likely to be able to provide specific details of the sex abuse because they can refer to an internal visual image related to the abuse experience. When talking about the abuse, the visual image that is brought into mind includes many details that go beyond the imagery directly related to the abuse. This includes details about the place where the abuse occurred, often the approximate time of day (or night), the presence (or absence) of other individuals, and statements made by the abuser, the child, and others who may have been present.

In contrast, children whose accusations are false are far less likely to have such an internal visual image because there was no actual experience they can bring into conscious awareness. Accordingly, when asked to describe details of the abuse, *e.g.*, what exactly was said, what was worn, and who was in the vicinity, they have difficulty providing the corroborative details. When asked to provide these details they may say, "I forgot," "I don't remember," or "Ask my mother. She remembers those things better than me." The latter response, of course, "lets the cat out of the bag" and provides strong support that the child has been programmed.

Commonly, the false accusation scenario has a nidus of truth related to some realistic experience. But this core of reality will be elaborated upon significantly, especially with the prompting of the false accuser. For example: A father may have, indeed, taken his daughter to the bathroom and helped her wipe herself. Or, the father may have indeed taken a shower with his two boys. In the course of these experiences the inevitable contact between the father's hand and the child's genitalia serves as a nucleus for the sex-abuse allegation, especially after prompting by an adult, such as an accusing parent or an overzealous evaluator.

6. Credibility of the Description

Children who have been genuinely abused are likely to provide a credible description of their experiences. In contrast, those who provide false accusa-

31 Indicators for The Child

1. Degree of Hesitancy Regarding Divulgence of the Sexual Abuse
2. Degree of Fear of Retaliation by the Accused
3. Degree of Guilt Over the Consequences of the Divulgence to the Accused
4. Degree of guilt Over Participation in the Sexual Acts
5. Degree of Specificity of the Details of the Sexual Abuse
6. Credibility of the Description
7. Variations in the Description
8. Advanced Sexual Knowledge for Age
9. Sexual Excitation
10. Attitude Toward One's Genitals
11. Desensitization Play
12. Threats and Bribes
13. The Presence of a Parental Alienation Syndrome
14. Timing of the Accusation
15. The Litany
16. The Borrowed Scenario
17. Depression
18. Withdrawal
19. Pathological Compliance
20. Psychosomatic Disorders
21. Regressive Behavior
22. Sense of Betrayal
23. Sleep Disturbances
24. Chronicity of Abuse
25. Seductive Behavior
26. Pseudomaturity
27. Antisocial Acting Out
28. School Attendance and Performance
29. Fears, Tension, and Anxiety
30. Running Away from Home
31. Severe Psychopathology

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

tions are more likely to provide descriptions that are preposterous and/or ludicrous. Sometimes the fantastic elements are derived from fairy tales and other children's stories.

Sometimes the fantastic elements are derived from the primitive sexual fantasies of children[1] those that are manifestations of what Freud[2] referred to as the child's "polymorphous perversity." Sometimes the absurd fantasies will involve adventures and age-appropriate rescue and superhero fantasies so commonly seen in boys. The inclusion of these in the scenario is one of the hallmarks of the false sex-abuse accusation. The younger the child, the more likely such absurd elements will be seen in the description. Having no reality experiences to provide, their fantasies run free, and they do not often appreciate the absurdity of what they are saying.

Children who have been the subject of repeated interrogations, especially by zealous "validators," are likely to provide ever more absurd scenarios. Such evaluators will often accept as valid some of the most preposterous elements, and this only increases the child's desire to provide ever more fantastic elaborations. Ultimately, many of these children move into the realm of satanic fantasies in which the most bizarre elements may be incorporated, *e.g.*, cannibalistic orgies, ritualistic murders of infants, and eating of feces and drinking of urine.[3]

Another clue to the credibility of the description is the child's emotional tone while describing the abuse. One is particularly interested in ascertaining whether the affect is appropriate to the content of what is being said. If the child has been traumatized then one would expect sadness, grief, fear, guilt, and other appropriate emotional reactions to be exhibited at the time the child relates the experiences. In contrast, children who are fabricating will typically present their scenarios in singsong fashion, as if they were reciting a well-memorized poem.

It is common for overzealous evaluators to claim that the child's affect was appropriate when relating the details of the alleged abuse. However, when one listens to the audiotapes of their interviews or (better) views a videotape, one sees

that this is often not the case. Rather, one may see levity, smiles, and hear the singsong quality of the false-accusation scenario. Obviously, written transcripts are less likely to provide information in this realm. Because the determination as to whether affect is appropriate or inappropriate is often subjective, one may be left in the position of having to trust the word of the evaluator as to whether or not this indicator of credibility was present.

7. Variations in the Description

Children who have been genuinely abused will most often present a description that does not vary over time to a significant degree. They consistently rely on their memory of actual events. In contrast, children who have not been abused, having no actual experience to bring into memory, are likely to provide different renditions at different times. In order to determine whether such variations are present, the examiner does well to conduct at least two (and sometimes more) interviews. Furthermore, the examiner should compare the renditions provided him (her) by the child with those related to previous examiners. Children who have been genuinely abused may not repeatedly relate their experiences with 100 percent accuracy. However, the number of inconsistencies provided by the child who is providing a false accusation is far greater than that which is found in the child who has been genuinely abused. Significant inconsistencies is one of the hallmarks of the false accusation.

Mutually exclusive contradictions are one type of variation that is seen in the false accusation. For example, in one version, the child states that when the abuse occurred, he (she) was completely clothed. In another variation the child may state that he (she) was completely naked. Sexual activites that are pointless are also one of the hallmarks of the false accusation. The child will describe an allegedly sexual encounter that serves absolutely no purpose. Accordingly, it is highly unlikely that a bona fide pedophile would engage in such an activity. An example would be the alleged perpetrator putting his penis into the victim's body oriface without any movement. Sometimes the pointless scenario may not include a sexual element, but is part of a larger accusation that does, *e.g.*, taking a long trip to the alleged perpetrator's home, looking at a room, and then returning to the sight of origin without anything specific (sexual or otherwise) having occurred at the destination.

This criterion is one of the most important utilized by those who consider a detailed analysis of the statements of the child ("statement validity analysis") to be the most important source of information regarding whether or not a sex-abuse accusation is true or false.[4,5,6,7,8,9] My primary criticism of this approach is that it is somewhat too narrow and does not give proper consideration to the wide variety of other sources of information, especially information derived from interviews with the accuser and the accused.

8. Advanced Sexual Knowledge for Age

Children who have been genuinely abused often have a sexual vocabulary that is beyond that of other children their age. Currently, when children are being excessively exposed to sexual information, this criterion may still be valid. When applying this criterion, one must not simply consider the content of the child's statements with regard to whether or not they reflect age-appropriate knowledge of sexual matters, but the degree of familiarity and comfort that the child has when discussing sexual matters. Children in this category often appear "street smart" and speak in a matter of fact way about "French kissing," "humping," and "going down." At a time when sexual knowledge by young people is so ubiquitous, the latter element is more important than the former.

9. Sexual Excitation

Children who have been genuinely abused are often prematurely brought into a state of adult-level sexual excitation. Children who have not been abused, having had no such excitation, are not likely to exhibit signs and symptoms of sexual arousal. There are, however, some nonabused children who exhibit a high level of sexual excitation, and this may even date back to infancy. This may relate to their being at that point on the bell-shaped distribution curve at which a small percentage of normal children start to exhibit sexual excitation. Or they may be children who resort to masturbation as a tranquilizer, antidepressant, or source of pleasure to counterbalance tensions and frustrations related to family privations and stresses.

Zealous examiners will consider any degree of genital self-stimulation, no matter how transient and no matter how rare, as an this indicator of sex abuse. They ask no questions about the age of onset, the frequency, the intensity, and orgastic response. Examiners who fail to ask these questions are not in a position to determine whether the child has reached a level of excessive sexual stimulation. Furthermore, the excessive sexual excitation seen in the child who has been genuinely abused does not confine itself to masturbation. The child will exhibit other forms of sexualized behavior, such as frequently rubbing his (her) genitals against adults and children.

10. Attitude Toward One's Genitals

Children who have suffered genuine sex abuse often consider their genitals, the organs involved in the "crime," to have been damaged. Sometimes the presence of a sexually transmitted disease will contribute to such a feeling. In contrast, children who provide false allegations do not generally describe such feelings of genital deformity, injury, etc. Furthermore, they may not have learned from those who coach them that this is one of the signs of genuine sex abuse.

Some children who have been sexually abused have indeed suffered physical damage to their genitals, and such trauma will generally be verified in medical reports. However, there are children who have been abused who have not suffered any physical damage to their genitals, but still feel that their genitalia have been damaged because of their appreciation of the cultural attitudes toward their sexual activities. Furthermore, the programmers of children who provide false sex-abuse accusations may have brought the child for numerous physical examinations in the hope that the examining physician might provide supporting evidence for sexual abuse. Their hope is that the physician will agree that a minor blemish, a normal rash, inflammation caused by occasional rubbing, etc., is indeed a sign of sexual abuse. Nonabused children who have been subjected to such repeated examinations may thereby come to believe that their genitals have somehow been damaged.

11. Desensitization Play

Children who have been genuinely abused will often attempt to work through their psychological trauma by repeatedly making reference to it, either directly or in symbolic form, in their play activities. This is a form of natural desensitization that helps them work through the psychological trauma. Each time they reenact the event, they make it a little more bearable. This phenomenon is also referred to as *traumatic reliving* and *spontaneous reenactment*. Such play may also include coping mechanisms in which they provide themselves with maneuvers for pro-

tecting themselves from the perpetrator or removing him (her).

Children who provide false allegations, not knowing that this is a common phenomenon for sexually abused children, do not introduce such themes into their play. Furthermore, the person who initially programs the child to profess the abuse may not be aware of this phenomenon either and so not instruct the child to participate in such play.

However, the child who has been in "treatment" by an overzealous examiner (regardless of whether or not genuinely abused) is likely to be taught by the therapist to include such themes in the play. Such inclusion is frequently referred to as "empowering." Children who have been in treatment with such therapists will often include these fantasies in their play and thereby deprive the examiner of knowing whether true desensitization play is being manifested or play fantasies that derive from their sessions with their therapists.

12. Threats and Bribes

Children who have been genuinely abused have often been threatened that there will be terrible consequences to themselves and their loved ones if they ever divulge the special "secret." Common threats include murdering the child's mother and/or other loved ones, murdering the child, and the perpetrator's leaving the home or even committing suicide. Others may be bribed to discourage disclosure. And some children are exposed to both methods of getting them to keep the "secret." Children who are fabricating sex abuse have not been exposed to such threats or bribes and are generally not sophisticated enough to describe them.

Unfortunately, many nonabused children who are subjected to the interrogations of overzealous evaluators learn early that the "secret" is an important part of the scenario. Generally they learn about this from leading questions, which ask them whether the alleged perpetrator either threatened or bribed them to keep "the secret.

The 13. Presence of a Parental Alienation Syndrome

The parental alienation syndrome[10,11,12,13] is a disorder that arises in child custody disputes in which a child will view one parent as all good and another as all bad. Most often the mother, who has been the primary child rearer, is viewed as perfect or close to it, and the father, who is disputing for custody, is viewed as a despicable individual. Such children guiltlessly vilify the father and create a variety of malevolent delusions about him, especially with regard to how detestible and heinous he is. Most often, these children have been programmed by their mothers to hate their father and to subject him to a campaign of denigration, but the children themselves often contribute their own scenarios of hostility. It is this *combination* of both the parent's and the child's contributions that warrant the term *parental alienation syndrome.*

A false sex-abuse allegation can often be part of this package. It is a powerful weapon in the campaign and can be a very attractive accusation for a parent who wishes to wreak vengeance upon and/or exclude a hated spouse. The child complies with the programming parent's coaching and provides the sex-abuse scenarios. When a parental alienation syndrome exhibits itself in full-blown form, it is more likely to support the conclusion that the sex-abuse allegation is false. In contrast, children who have been genuinely abused are less likely to develop the symptoms of a parental alienation syndrome. Their hostility is based on genuine abuse. The parental-alienation-syndrome concept is not applicable when bona fide abuse has taken place.

14. Timing of the Accusation

Sex-abuse accusations made in the context of a custody/visitation dispute are more likely to be false. This is especially the case if the sex-abuse allegation arose after the onset of the dispute. In contrast, a sex-abuse accusation that *brings about* the marital separation--and is the primary reason for the separation--is much more likely to be true. I am not claiming that bona fide sex abuse does not occur at all in the context of a custody/visitation dispute, only that the allegations that arise during such disputes are more likely to be false. An important differentiating criterion is the exact time when the sex-abuse allegation was first made. An allegation made after the child becomes aware of the custody dispute, and especially after parental-alienation-syndrome maneuvers have not proven effective, is more likely to be false. Blush and Ross[14] use the term SAID syndrome (Sex Abuse In Divorce syndrome) to refer to the same phenomenon, namely, the use of a false sex-abuse accusation in the context of a vicious child-custody dispute. This is an extremely important differentiating criterion, so much so that the failure to give serious consideration to it can seriously compromise an evaluation.

15. The Litany

Mention has been made of the litany that false accusers may have created for the benefit of the parade of examiners who interview them. This has a rehearsed quality and may include adult terminology such as "Daddy molested me" and "I was sexually abused." At a moment's notice they are ready to "turn on the recording" and provide a command performance. This indicator is especially applicable to the term "programming," which is frequently utilized when referring to the process by which a child develops a parental alienation syndrome. It is as if the brainwashing process embeds in the child's brain a scenario that can be reproduced when the proper button is pressed.

Sometimes the child will begin the first interview with a little speech, without the examiner's even providing some introductory and/or facilitating comments. Children who have been genuinely molested will not generally have a litany at the outset, nor are they as likely to use adult terms. Rather, they are hesitant to divulge the abuse and will often speak of it in a fragmented way. However, after repeated inquiries, such genuinely abused children may then develop a litany and even incorporate adult terminology (now learned from the interrogators). This differentiating criterion then becomes less useful.

16. The Borrowed Scenario

When comfortable with the examiner, children who have been genuinely abused are capable of describing well the details of their abuse and generally confine sexual discussion to these specific experiences. Those who are providing false accusations, having no such experiences, create their scenarios. Originally, the basic elements and guidelines are provided by the programmer, although he (she) will generally claim that the comments flowed in itially from the child without any prompting or coaching. Additional elements in the scenario, however, are inevitably brought in. These are encouraged both by the original programmer and other interrogators, especially overzealous evaluators. These additional elements may be derived from classroom sex-abuse prevention programs, video and audiotapes about sex abuse, coloring books about sex abuse, or pornographic movies observed by the child without the parents' awareness. This differentiating criterion may become weakened when the child who has indeed

been abused also has similar environmental exposures to information about sex abuse.

The child who has been genuinely abused will not generally use adult terminology; rather the child uses descriptive terms appropriate to the idiosyncratic terms used in that child's home, *e.g.*, "He touched my 'gina," "He kissed my pee-pee," and "He put his big pee-pee where my doo-doo comes out." In contrast the child who is falsely accusing sex abuse will often use terms "borrowed" from others, especially the programmer and interrogators who use leading questions. One five-year-old child said to me, "I've been penetrated." When I asked her what penetrated means she replied, "I don't know, my mommy told me that I was penetrated." Other comments commonly "lifted" from such materials and programs include references to "good touches" and "bad touches," comments about "my body is my own," and "I said no." Commonly, such terminology is also derived from inexperienced and/or naive therapists who embark upon a treatment program with little if any extensive inquiry regarding whether or not the sex abuse indeed occurred.

17. Depression

Children who have been genuinely sexually abused are often depressed, especially if they have been abused frequently over time, and especially if there have been terrible threats made regarding disclosure of their sexual experiences. The main manifestations of the depression may be depressive affect, loss of appetite, listlessness, loss of enjoyment in play, impaired school curiosity and motivation, poor appetite, and difficulty sleeping. The depression may often be associated with suicidal thoughts, especially if the child is significantly guilty about the sexual experiences and/or if the child feels trapped in a situation in which the child cannot escape from being abused. The depression may be related to the feelings of betrayal engendered not only by the offender, but by the passivity and/or failure of others (often the mother) to protect the child and prevent a repetition of the abuse. Depression may be related to pent-up resentment that is not allowed expression, lest the perpetrator carry through with the threats of retaliation.

Those who are falsely accusing are not generally depressed, although they may profess being upset over their alleged sexual experiences. Rather, they appear to be getting a kind of morbid gratification from their accusations, especially when they provide them with a degree of attention and notoriety they never previously enjoyed.

18. Withdrawal

Children who have been genuinely abused may often withdraw from involvement with others. They prefer more a fantasy world that is safe and free from the traumas of real life. Frequently, they have a rich fantasy life that provides them with a pleasurable respite from their painful existences.[15] Such withdrawal is observed in the interview and is described as existing in the home, in school, and elsewhere. In school they a redescribed by their teachers as being removed from the others and as having little interest in learning and even socializing with their classmates. They are listless, wan, sad, and pathetic. They have few friends in their neighborhood, and they neither seek nor are sought by peers.[16] Those who falsely accuse are not generally described as withdrawn; they are typically outgoing and outspoken.

Children who have suffered bona fide sex abuse often withdraw from the abuser because of the trauma they anticipate when involved with him. They tend to generalize and assume that others, especially those of the same sex as the abuser, will subject them to sexual indignities as well. They may exhibit fear of going into washrooms, showers, and other places where sex abuse has taken place. The examiner may observe such withdrawal in the interview. And this is especially the case when the examiner is of the same sex as the perpetrator.

19. Pathological Compliance

Sexually abused children are often quite compliant. Their experiences with the perpetrator have often been ones in which they have been threatened that noncompliance will result in terrible consequences to themselves and their loved ones. Especially in situations where the perpetrator lives in the home, the child's life is controlled, both body and mind. It is only through compliance that the child may be protected from the realization of the perpetrator's threats. Many develop a cheerful facade that extends to inhibiting themselves from expressing dissatisfaction in any situation and contributes to their compliant behavior. Children who provide false sex-abuse accusations do not generally exhibit such compliant behavior, because they have not had the coercive experiences suffered by the genuinely abused child. What compliance they do exhibit is generally with the request of the programming accuser to provide details about the encounters to anyone and everyone who may ask about them.

20. Psychosomatic Disorders

Children who have been genuinely abused are more likely to suffer with psychosomatic disorders than those who have not. Their bodies have indeed been traumatized, and they may thereby generalize from the genital trauma to other areas. In addition, such children may develop formidable tensions and anxieties, which may have somatic components such as nausea, vomiting, and stomach aches. Sometimes children who have been forced into oral sex will complain about nausea, vomiting, and stomach aches. Those who falsely accuse do not typically suffer with psychosomatic complaints. Because many falsely accusing children are encouraged to express their anger by naive therapists, they tend to externalize rather than to internalize their emotions. This lessens the likelihood that such children will develop psychosomatic symptoms. However, some false accusers may have such complaints (common in childhood) from other sources. The fact that they are being programmed to provide false accusations of sex abuse is in itself a source of tension.

The younger the child, the less the likelihood the child is going to remember exactly the scenarios being programmed. Not providing the "right" answers for a programming parent, overzealous evaluator, or therapist can engender significant anxieties. I have seen many cases of falsely accusing children who, in the course of their "therapy," develop psychosomatic complaints. These complaints are considered by their "therapists" to be related to the recent divulgences. The unrelentless sledgehammering that these children are subjected to is the cause of their psychosomatic symptoms.

Those children who provide false accusations in the context of a child-custody dispute may also suffer tensions related to their sense of betrayal, the loyalty conflict that the divorce hostilities engender, the separation anxieties attendant to the separation, and other tension-engendering exposures attendant to the parental divorce. And such children might also develop somatic complaints as the result of such exposures. These other causes of psychosomatic complaints, causes having nothing to do with sex abuse, weaken this differentiating criterion. However, it still may be a valuable differentiating criterion, especially if the examiner is successful in delineating the

factors that are the sources of the child's psychosomatic symptoms.

21. Regressive Behavior

Children who have been sexually abused are likely to exhibit regressive behavior such as enuresis, encopresis, thumb-sucking, baby talk, and separation anxieties. Having been psychologically traumatized at a higher level of development, they may regress to earlier levels in order to gain the securities attendant to these more primitive states. Children who are falsely accusing are less likely to exhibit such regressive manifestations. However, children who are exposed to the stresses of parental divorce are also likely to regress. And children who have been subjected to sledgehammer interrogations and "therapy" may also regress. A careful history delineating the evolution of the allegation and the time of onset of the regression may shed light on the question of whether the regression is a manifestation of sex abuse or the result of these other factors.

22. Sense of Betrayal

Children who have genuinely been abused may suffer with deep-seated feelings of having been betrayed. They feel betrayed by the offender because of his exploitation of them, and they may feel betrayed by their mothers, especially in situations in which the latter does not provide them with protection from further abuse.[17,18] Many sexually abused children do not initially feel betrayed by the abusing parent. They may have enjoyed the experience and considered themselves to have been singled out for special favors. It is only later, when they learn about the social attitudes about what has been going on, that they may learn to feel betrayed. And there are some children who have had sexual encounters with adults who never adopt these social attitudes and therefore never feel betrayed.

23. Sleep Disturbances

Because putting the child to bed is commonly used as an opportunity for sexually abusing children, it is not surprising that children who are genuinely abused may fear going to sleep. These include refusal to go to bed, insomnia, bedwetting, and nightmares (about which I will say more below). Children who falsify sex abuse are not as likely to develop sleep disturbances from the fear of being sexually abused at bedtime. They may, however, develop sleep disturbances in association with other psychological traumas, such as being subjected to a series of interrogations and/or embroilment in their parents' hostilities, especially if the parents are litigating over their custody. It is for this reason that this is a poor differentiating criterion.

Nightmares are commonly considered to be one of the important indicators of sex abuse. There is hardly an article on child sex abuse that does not list nightmares as one of the indicators.[19,20,21,22,23] My experience has also been that overzealous evaluators invariably will list nightmares as one of the important manifestations of child sex abuse. It is rare for any differentiation to be made between nightmares that might relate to sex abuse and nightmares that may have other sources. It is rare for zealous examiners to ask questions about the *content* of the nightmare in order to try to make some assessment in this regard. But even if one does conduct such an inquiry, one may be hard put to know whether the content relates to sex abuse or to other issues. This problem no twithstanding, the inquiry into content should still be made because there is still the possibility that such an inquiry might enable one to make the differentiation.[24,25] For a nightmare to be considered a manifestation of bona fide sex abuse, it must be trauma specific, *i.e.*, it must either depict directly some aspect of the abuse or be so closely related to it that most examiners would agree that it is a direct derivative of the abuse. The more one must resort to speculations regarding what the symbolic significance is of the dream element, the less likely it will be useful as an indicator of bona fide sexual abuse.

24. Chronicity of Abuse

By the time bona fide sex abuse comes to the attention of others, it may have been going on for a long period.[26] This is especially the case because the majority of pedophiles involve themselves in such behavior on a compulsive and frequent basis. Typically, they are highly sexualized people.

Falsely accusing children usually describe only one or two experiences initially. In divorce cases this is enough for the purposes of bringing about exclusion of the alleged perpetrator and wreaking vengeance on him (her). However, in the hands of overzealous evaluators and therapists, one can predict an elaboration of the number of times the abuse allegedly took place, to the point where the episodes become countless. This is not a strong differentiating criterion because there certainly are children who have been sexually abused on only one or two occasions before being brought to the attention of authorities. And there are false accusers who, from the outset, describe ongoing sexual encounters over time. This drawback notwithstanding, chronicity still speaks more for the abuse being genuine.

25. Seductive Behavior (Primarily Girls)

The girl who has been sexually abused by her father, and who does not consider her acts to be sinful or bad, may exhibit seductive behavior in the joint interview(s) with him. She may not recognize that such seductive behavior may be a source of embarrassment to him and threaten disclosure of the sexual encounters. On occasion, the seductive behavior may be even encouraged by the abuser. After an initial period of getting used to the situation, the abuser may relax his guard and slip into a typical pattern of relatedness with the child. There may be giggling, grabbing, and excessive tickling. One would think that an abuser would be very hesitant to allow such displays in the presence of an examiner, especially an examiner involved in a criminal evaluation. However, the seductive, playful mode of interaction may be so prevalent that it may be the primary mode of relatedness between the two. Accordingly, it may not be easily covered up.

Girls who are false accusers, not having developed a sexual tie, are not as likely to be seductive with their fathers. Boys who have been sexually molested are less likely to exhibit seductive behavior with the accused. This criterion provides an excellent example of the value of the joint interview; obviously, it cannot be assessed without such an interview.

26. Pseudomaturity (Primarily Girls)

Some girls who have been sexually abused by their fathers have been prematurely pressured into a pseudomature relationship with him.[27] In some cases the abuse was actually encouraged (overtly or covertly) by the mother in order to use the child as a substitute object for the father's sexual gratification. Such mothers view sexual encounters as odious, and the child is used as a convenient replacement--protecting the mother thereby from exposure to the noxious sexual act. Sometimes this pattern extends itself to the mother's encouraging the daughter to assume other domestic roles such as housekeeping, caring for the other children, serving as the mother's confidante, etc. The result is a pseudomature girl who provides the father with a variety of wife-like gratifications.

Girls who are false accusers are less likely to be pseudomature and/or placed in such a situation. However, pseudomaturity can result from other factors--factors having nothing to do with sex abuse--thereby weakening this differentiating criterion. Boys who have been sexually molested are less likely to become pseudomature. If they do exhibit this behavioral pattern, it is more likely the result of other influences.

27. Antisocial Acting Out

Children who have been sexually abused in the home situation have much to be angry about, especially if there has been a coercive element associated with the abuse and they recognize the degree to which they have been exploited. Because of their fear of the perpetrator, they are not capable of expressing their resentments directly to him. Accordingly, they may act out their anger elsewhere. If, in addition, their mothers or other potential protectors refuse to hear their complaints, the pent-up anger becomes even greater. And this may be acted out outside the home, especially in school and in the neighborhood.

In contrast, children who have not been abused are less likely to exhibit such antisocial acting out. However, children whose parents are divorcing, especially parents who are themselves embroiled in vicious battles, are also likely to become angry and are also likely to act out their anger. Accordingly, this criterion is somewhat weakened for children of divorce, and it therefore behooves the evaluator to differentiate between anger derived from exposure to and embroilment in a parent's divorce and anger that may be the result of sexual molestation. Furthermore, there are many other causes of antisocial acting out in children, having nothing to do with parental divorce and/or sex abuse. And these sources of the child's anger must also be investigated before one can come to the conclusion that the antisocial behavior is a manifestation of sex abuse.

28. School Attendance and Performance

Children who are being genuinely abused may often arrive at school early and leave late. Obviously, the school is being used as a refuge from the home. Schools also provide an opportunity for peer contact that may be prohibited by the perpetrator. Of course, this manifestation is only applicable to situations in which the perpetrator lives with the child. Many abused children are so disturbed by their sexual encounters that they have trouble concentrating in school and may thereby find attendance there a source of embarrassment. Such children will not be finding excuses for coming early and staying late. In contrast, children who have not been abused do not demonstrate this particular kind of school attendance problem.

Because the school situation is one of the most sensitive indicators of a child's psychopathology, and because it is one of the earliest areas in which psychiatric difficulties may manifest themselves, impaired school performances is a very poor indicator of sex abuse, but it may be an indicator nevertheless.

29. Fears, Tension, and Anxiety

Children who have been subjected to frequent episodes of sexual abuse may become chronically fearful and tense. They often present with an expression of what Goodwin refers to as "frozen watchfulness."[28] These children not only exhibit the previously described fear of people of the same sex as the perpetrator (more often than not, men) but fear of situations similar to those in which the abuse occurred: bedrooms, bathrooms, showers, washrooms, etc. This fear, especially prominent in younger children who are more helpless, relates to their feelings of impotence about being subjected to the sexual abuses. Older children may be fearful primarily of the consequences if they were to disclose any hints of what they have been subjected to. They may fear that they will be murdered, beaten, or abandoned, or that significant individuals in their lives will be subjected to similar consequences. They may fear breakup of the family if they reveal the molestation. Such fears may result in a chronic state of timidity that is observed by friends, relatives, teachers, neighbors, etc.

In contrast, children who are fabricating sex abuse are far less likely to present with such a picture. There are children, however, who have not been sexually abused but who have been subjected to other traumas that may bring about a similar state. This may be seen in children whose parents have been constantly fighting and who themselves have been subjected to physical and/or severe emotional abuse. Children exposed to and embroiled in ongoing divorce disputes, especially custody disputes, may also present with this picture.

30. Running Away from Home

Children who have been molested in the home situation may find the home so intolerable that they run away. This is especially the case when the youngster has not been able to obtain help and protection from the other parent.[29] In contrast, children who falsely accuse sex abuse are not as likely to have a history of such behavior.

31. Severe Psychopathology

Occasionally, one sees a child who exhibits severe psychopathology in which there are both psychotic and psychopathic features. Such a child may become involved in indiscriminate accusations of sex abuse involving a wide variety of individuals. No one in sight is immune, therapists included.[30] The accusations are characteristically indiscriminate and often do not have even the nidus of reality, which, as mentioned, is often present in false sex-abuse accusations.

Concluding Comments

I have provided 31 indicators for the child that I consider to be useful for differentiating between true and false sex-abuse accusations. There is no cut-off point with regard to a specific number of indicators that should strongly suggest bona fide sexual abuse. Rather, one does well to view these indicators as on a continuum; that the greater the number of indicators present, the greater the likelihood the child was sexually abused. As mentioned at the outset, one must not only consider the *quantity* of indicators satisfied but their *quality*. In some cases only a small number of indicators may be satisfied, but each one is compellingly supportive of the conclusion that the child was (or was not) sexually abused. Of course, these indicators for the child must not be considered in isolation from the indicators of the accuser and the alleged perpetrator. Also, one must consider the results of the important inquiry into the evolution of the sex-abuse accusation.

FOOTNOTES

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From the Recruiting Corner

The Recruiter and Personnel Director have been busy these past few months securing attorney, secretary, investigator and paralegal staff for our new and old offices.

KENTON COUNTY

Kenton County, with Directing Attorney, Hon. Frank Trusty, has hired Mary Rafizadeh and John Delaney. Mr. Trusty will soon bring on a secretary, investigator and three additional staff attorneys.

ELIZABETHTOWN

George Sornberger will be returning to DPA as directing attorney of our new Elizabethtown office. He will be hiring a secretary to assist him.

PADUCAH

Paducah has one vacancy with the departure of Carolyn Miller for the law firm of Shirley Cunningham in Lexington.

HAZARD

Nancy Bowman-Denton will be departing the Hazard directing attorney position for the challenge of a staff attorney position in CTU. This leaves her position vacant in Hazard.

CAPITAL TRIAL UNIT

CTU anticipates hiring two new attorneys immediately. The Department then hopes to bring on an additional investigator, secretary (perhaps with paralegal skills) and two other staff attorneys by July 1.

CAPITAL POST-CONVICTION

With the departure of Jennifer Word the Post Conviction Defender Organization will be in need of someone with the skills of a paralegal, investigator or mitigation specialist. Ms Word began employment with the Kentucky Bar Association on March 3.

If you are interested in being considered for any of these vacancies or have questions concerning a position with the Department please call Rebecca Ballard DiLoreto.

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Plain View

Ernie Lewis

Brown v. Commonwealth
890 S.W.2d 286
(Ky. December 22, 1994)

The Kentucky Supreme Court evaluated a Fourth Amendment issue in this capital case. Brown was a man convicted of killing a car salesman who accompanied him on a test drive. Brown was arrested pursuant to an arrest warrant. The FBI agent who arrested him saw him place a gun into the car. A search of the car recovered various evidence.

The Court assumed without ruling that Brown had standing to challenge the search of the car which he had stolen. The Court had no trouble finding that no privacy violation had occurred. First, the Court stated that a search of the trunk of the car was incident to a lawful arrest under *Chimel v. California*, 395 U.S. 752 (1969).

The Court further approved of the search of the passenger area of the car. With little analysis, the Court held that there was probable cause to search the car under *Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1984) and *United States v. Ross*, 456 U.S. 798 (1982). The search was also incident to a lawful arrest, citing *New York v. Belton*, 453 U.S. 454 (1981) and *Commonwealth v. Ramsey*, 744 S.W.2d 418 (Ky. 1988).

Pitman v. Commonwealth
1995 WL 39027

Cecil Laudell Pitman was standing on the road near two green bags in Metcalfe County when two police officers drove by, saw Pitman, and when he turned his back, stopped. Pitman told the officers that he was waiting for a ride; he further said that his clothes were in the bags. The police picked up the bags, and from their feel determined that they did not contain clothes. The police then opened the bags and discovered over 15 pounds of marijuana. Pitman was arrested and charged with possession of over 5 pounds of marijuana with intent to sell. When his motion to suppress was denied, he entered a conditional plea of guilty.

In an opinion written by Judge Combs and joined by Judges Johnstone and Miller, the Court of Appeals reversed. The Court held that the warrantless search was unreasonable and was not jusitifed as a stop and frisk search. *Terry* was inapplicable because the officers did not frisk Pitman for weapons; rather, they immediately searched the garbage bags lying on the ground.

The Court also examined the "plain feel" cases of *Minnesota v. Dickerson*, 124 L.Ed.2d 334 (1993) and *Commonwealth v. Crowder*, 884 S.W. 2d 649 (Ky. 1994). Neither case jusitifed the search because "the existence of the contraband was far from readily or immediately apparent from the sense of touch."

What is heartening about this case is the strong language used by the Court in condemning the search and upholding the Fourth Amendment. In an eloquent summary, the Court said that "*Terry* still carefully reiterated the sacrosanct status of the Fourth Amendment's protection of our citizenry from arbitrary pilfering of their belongings or premises, noting that court 'cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.'"

Short View

1. ***United States v. Bute***, 43 F.3d 531 (10th Cir. 12/23/94). The Tenth Circuit has held as unreasonable the warrantless entry by a police officer of a commercial structure with its garage door open. The Court specifically rejected the State's attempt to justify the search as a "security check" and a "protection-of-property" exigency. Accordingly, evidence found there that the structure housed a drug lab had to be suppressed. "We simply cannot accept the notion that an open door of a commercial building at night is, in and of itself, an occurrence that reasonably and objectively creates the impression of an immediate threat to person or property as to justify a warrantless search of the premises."

2. ***People v. Souza***, 885 P.2d 982 (Calif.Sup.Ct. 12/28/94). Flight without more is not sufficient to supply reasonable suspicion, according to the California Supreme Court. While rejecting the State's request for a bright line rule which would allow for the detention of anyone fleeing from the police, the Court went on to hold that under the circumstances of this case, flight in addition to other factors did constitute a reasonable suspicion. "No single fact--for instance, flight from approaching police--can be indicative in *all* detention cases of involvement in criminal conduct. Time, locality, lighting conditions, and an area's reputation for criminal activity all give meaning to a particular act of flight, and may or may not suggest to a trained officer that the fleeing person is involved in criminal activity. Consequently, a 'bright-line' rule applicable to all investigatory stops... would be improper."

3. ***People v. James***, 645 N.E.2d 195 (Ill. Sup.Ct. 12/22/94). The police may not rely upon the driver's consent to search a vehicle in order to search a purse found there. The Court distinguished *Florida v. Jimeno*, 500 U.S. 248 (1991) which had held that consent to search a vehicle included a search of a brown paper bag found there, by saying that in *Jimeno* there was no question regarding the driver's authority over the vehicle and the brown bag. Here, the driver was a male, and the purse was found in a passenger seat. Under these circumstances, the Court held that it was not reasonable to believe that the driver's consent to search extended to the purse found in the vehicle.

4. ***People v. Spencer***, 84 N.Y.2d 749 (NY Ct.App., 1/17/95). The police

may not stop a motorist in order to question him about his knowledge regarding a suspect. Thus, where the police had a complaining witness with them who told the police that Spencer would know the location of the person who assaulted her, the police could not pull over Spencer in order to question him. Thus, incriminating items found in Spencer's car were inadmissible against him.

"[U]nder the circumstances of this case, there was no genuine need for so immediate and intrusive an action as pulling over defendant's freely moving vehicle. When the governmental interest in finding and apprehending the suspect in this case is considered in relation to the effectiveness of the procedures chosen to promote it, the intrusiveness of pulling over defendant's freely moving vehicle cannot be justified."

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Holding the Commonwealth To Its Word

Has anyone ever negotiated a plea and stood in front of the judge to enter the plea only to hear Mr./Ms. Commonwealth Attorney say "*nevermind*!" As defenders of the Constitution, we will not let the government get by with breaking its word.

Kentucky courts have stated "It is better to let a criminal go free than to allow the state to welsh on a deal." *Commonwealth v. Reyes*, 764 S.W.2d 62, 66 (Ky. 1989). Defendants tend to agree with this.

Plea agreements are not a constitutional or statutory right but a system that benefits both sides. But once you do make a plea bargain, then the plea bargain becomes a *constitutional contract*. Most cases are disposed of through the plea bargain procedure. This is necessary to prevent a complete shutdown of the system. In 1993 less than 2% of the Department of Public Advocacy's caseload went to trial.[1]

Kentucky courts have not spelled out black letter law on enforcing plea agreements. In determining the enforceability of plea agreements, the courts combine a constitutional analysis with theories of contract law.

In any given plea agreement, many Constitutional rights are involved. By entering into the plea agreement, defendants sacrifice constitutionally protected rights including the right to remain silent, the right to a fair trial, the right against self incrimination, the right to effective assistance of counsel, and the due process right to fundamental fairness. *Reyes, supra*, 764 S.W.2d at 64, quoting Justice Brennan's dissent in *Ricketts, etc. v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d, (1987). The nature of plea agreements, containing an offer, acceptance and performance, extends the court's analysis into theories of contract law.

When the Commonwealth welshes on the deal, the defendant's remedy is to request specific performance of the plea agreement. There are many considerations for a motion to enforce a plea agreement.

Is There A Plea Bargain?

There must be an offer and acceptance with both parties having an understanding as to the terms of the agreement. The understanding of the parties can be written or oral. For obvious reasons we recommend a written agreement. As in contract law, there are two actions which trigger enforcement of a deal which would entitle a defendant to specific performance. These actions were enforced in *Reyes, supra*, where the defendant agreed to cooperate with the state and plead guilty in return of not being subject to the death penalty. The Court found that in order for the agreement to be enforceable, there must be detrimental reliance or performance by the defendant. Without detrimental reliance or performance, a plea agreement is a useless unexecuted contract. In *Reyes*, the Court found that pleading guilty and assisting the state with prosecution is sufficient detrimental reliance and ordered the prosecutor to enforce the deal.

Detrimental Reliance

Examples of detrimental reliance are:

a) entering a plea;
b) giving a confession;
c) leading police to evidence and revealing strategic case investigations which could be used against the defendant if the Commonwealth were permitted to proceed with the trial.

Although the above mentioned examples could be considered as the defendant performing his end of the bargain, it is the involvement of constitutional rights which creates detrimental reliance. In *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971) the Court found that when the defendant pleads guilty in reliance to a plea agreement, guaranteed due process rights are implicated. The prosecution must fulfill their end of the bargain. In applying *Santobello* for example, the defendant foregoes his right to a speedy trial when pleading guilty.

Performance

Performance is when the defendant upholds his end of the bargain without necessarily involving detrimental reliance. This is when the defendant does what he agreed to do. This does not necessarily involve action to his detriment. In *Workman v. Commonwealth*, 580 S.W.2d 206 (Ky. 1979) the state offered to dismiss murder charges if the defendant took a polygraph test which indicated there was no involvement with a murder. Although there was no detrimental reliance, the

Court found that there was an offer, acceptance and full performance by the defendant. The Court therefore ordered the indictment be dismissed with prejudice. Some examples of performance are taking a polygraph (*Workman*), giving a statement, helping to recover stolen items, leading the police to evidence against others, revealing names of others involved, and wearing a wire for the police.

Unenforceable Agreements

If there is an offer and an acceptance, but no detrimental reliance, a plea offer can be withdrawn. Not only is the Commonwealth capable of withdrawing from the agreement, but so can the defendant.

Unaccepted Offers

If the defendant never accepts the plea offer, as in contract law, the offer is revocable by the Commonwealth at any time, unless the defendant takes action to his detriment in reliance of the plea offer. In *Adkins v. Commonwealth*, 647 S.W.2d 502 (Ky.App. 1982) the defendant did not accept the plea offer. The Court found that the offer should not be enforced because there was no indication that the defendant relied on the offer to his detriment. The Kentucky Courts in *Cope v. Commonwealth* 645 S.W.2d 703 (Ky. 1983), and *Adkins* discuss an estoppel principal which would make an offer enforceable.

Caveat

Our clients do not do this, but rumor has it that some defendants occasionally deviate from the truth. In such instances, agreements induced from fraud are not enforceable. However, minor factual differences amongst witnesses falls short of a clear and convincing standard that the plea bargain was induced from fraud. *Reyes, supra*, 764 S.W.2d 62 (1989).

Motion Ingredients

In writing your motion to seek specific performance of the plea agreement, use the following guidelines. First, establish that a deal exists and what the terms are. Second, explain how the Commonwealth broke the deal. Third, demonstrate the enforceability of the agreement by showing either the defendant's performance or detrimental reliance. Fourth, cite the appropriate case law, *Reyes* for detrimental reliance, or *Workman* to show performance. Fifth, show all the constitutional provisions which are implicated. Lastly, request the remedy that the dastardly Commonwealth be forced into specific performance.

Conclusion

"The question is not whether the Commonwealth's bargain was wise or foolish. The question is whether the Commonwealth should be allowed to break its word." *Workman, supra*, 580 S.W.2d 206 at 207.

As defense attorneys not only are we the enforcers of constitutional rights, we also must uphold the honor of the Commonwealth.

FOOTNOTES

[1]This does not include Jefferson County or Fayette County.

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Funds for Consulting Experts

This is the fifth 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.

"Only a foolhardy lawyer would determine tactical and evidentiary strategy in a case with psychiatric issues without the guidance and interpretation of psychiatrists and others skilled in the field." *Edney v. Smith*, 425 F.Supp. 1038, 1047 (E.D.NY 1976) *aff'd* 556 F.2d 556 (2nd Cir. 1976).

The purpose of this article is to assist the attorney in understanding the role of the mental health *consulting* expert so that funds for that consultant can be obtained in order to insure the client receives competent representation.

Increased Complexity of Criminal Defense Work

The sophistication of criminal defense practice continues to increase at least at the pace of other legal practice areas. In many ways the velocity of criminal defense work is greater due to draconian penalties, national performance standards, and the insights nonlegal disciplines bring to bear on culpability.

Several examples illustrate the dramatic increase in the intricacies of criminal defense work which has occurred in a relatively short period of time.

Twenty years ago only a handful of criminal cases involved experts testifying, and fewer involved defense experts testifying.

The increased penalties of the last two decades have forced defense attorneys to perform with greater proficiency, efficiency, and creativity as their clients face drastically decreased chances for probation, substantially less frequent parole, or imprisonment for the rest of their productive life.

Psychological and biological advances allow mental health experts to understand and communicate scientific explanations for the behavior of the accused. In turn, defense attorneys fight for new ways to present those complex insights to the factfinders who decide culpability.

Scientific advances continue to be applied to evidence in criminal cases. Sophisticated fingerprint machines now quickly search exponential sets of prints, new breathtesting devices have been deployed, DNA analysis has arrived across the nation and in the Commonwealth. The complexity of these scientific domains is daunting to the non-specialist criminal defense attorney.

Capital litigation has led the pack in increased difficulty in all phases - investigation, client relationship, motion practice, discovery, exculpatory and mitigating evidence, voir dire, venue, assistance of experts, persuasion skills. Capital federal habeas law and practice is labyrinthine. Sexual abuse cases present perplexing litigation puzzles. Drug cases dare effective representation.

Need for Second Counsel, Consulting Counsel, Consulting Expert

This prominent reality of increased litigation complexity has two significant consequences:

1) *Many cases can no longer be competently handled by one attorney because of quantity and quality demands.*

   More cases require two attorneys as counsel and/ or one or more consulting attorneys with the appropriate specialty. For example, sex abuse cases involve very difficult legal performance duties which require sophisticated skills of cross-examining a child victim, cross-examining the medical doctor, cross-examining the mental health professional, and obtaining full investigation and discovery from CHR.

2) *The nonlegal skills needed to provide competent representation require nonlegal experts in more cases.*

   This reality is the focus of this article. The need for mental health experts provide a good example of this problem. The mental illness dimensions of many cases are so significant that a mental health consultant is needed to work with the attorney at trial, appeal, or in post-conviction to:

   a) assist in making the threshold showing required by *Ake* to obtain funds for evaluating and testifying experts;

   b) develop the mental illness theory of the case;

   c) identify appropriate testifying mental health experts with the necessary specialties;

   d) assist in the mental health investigation;

   e) search for challenges to the qualifications, and to the accuracy of the methodologies and findings of state mental health experts and assist in the development of cross-examination of the state experts; and,

   f) help prepare defense experts for the direct testimony and expected cross-examination.

For further discussion of the assistance the consultant can provide, see Clark, Veltkamp, Monahan, ***The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense***, ABA Criminal Justice, Vol. 8, No. 2 (1993) at 22.

Experts Can Serve Only One Master

The **ABA Criminal Justice *Mental Health Standards* (1989)** recognize several distinct roles which mental health experts fulfill:

1) scientific and evaluative;
2) consultative, and
3) treatment and habilitation.
Standard 7-1.1.

It is tempting for the attorney to ask an expert who has been hired by the defense to investigate, evaluate, and testify to also serve as a consultant. Mixing these two distinct expert roles is a recipe for an alphabet soup whose letters spell d-i-s-a-s-t-e-r. *See Sanborn v. Commonwealth*, ___ S.W.2d ___ (Ky. 1994) (minister in a capital case).

The mental health consultant's work is completely protected from discovery by the Sixth Amendment and the attorney-client privilege. *See Miller v. District*

Court, 737 P.2d 834 (Colo. 1987). The testifying expert's work is not completely protected. See *Hickman v. Taylor*, 329 U.S. 495 (1947); *Foster v. Commonwealth*, 827 S.W.2d 670, 678-79 (Ky. 1992); KRE 705.

In the civil arena, some courts are willing to completely protect the consultation aspect of one expert who also performs the testifying function if the consulting work was done prior to the lawsuit. When "a consultant is hired for the purpose...of evaluating claims and rendering consultative evaluation reports, his consultation reports are certainly within the orbit of privileged matters. Prelitigation consultative evaluations are encouraged; if there is no confidentiality with them, the procedure will not be utilized." *Newsome v. Lowe*, 699 S.W.2d 748, 752 (Ky. 1985) (prelitigation consultative evaluation letter of doctor in medical malpractice case). Discovery "cannot encroach upon the attorney's work product or the attorney's or other representative's (here consultant's) mental impressions, conclusions, opinions or legal theories concerning the litigation." *Id. See also Morrow v. Stivers*, 836 S.W.2d 424, 428 (Ky.App. 1992). But one expert fulfilling dual roles is fraught with risks.

The *ABA Standards* discourage experts filling dual roles, and prohibit experts from simultaneously serving in the testifying and consulting roles when they conflict with each other. ABA Criminal Justice *Mental Health Standard* 7-1.1(a) states:

> Because these roles involve differing and sometimes conflicting obligations and functions, these professionals as well as courts, attorneys, and criminal justice agencies should clarify the nature and limitations of these respective roles.

The necessity to bifurcate these two roles is best understood in terms of discovery ramifications.

An expert who acts in the evaluative/testifier role has his work subject to discovery by the opponent when the expert is called to testify. See *Standard* 7-3.8(b)(ii).

The consultative role does not expose the expert's work to any discovery by the opponent. "When providing consultation and advice to the prosecution or defense on the preparation or conduct of the case, the mental health or mental retardation professional has the same obligations and immunities as any member of the prosecution or defense team." *Standard* 7-1.1(c). *See also* Federal Rules of Criminal Procedure 16(b)(2).

Beyond discovery consequences, the two roles are very distinct. The *Commentary* to *Standard* 7-1.1 identifies representative tasks of the consulting expert:

> assist at client interviews, probe for information helpful to counsel, assess client credibility, evaluate client ability to withstand cross-examination, and offer advice and suggest strategy and tactics on issues important to the litigation.

"For example, a consultant can apprise an attorney about the relative strengths and weaknesses of the consultant's opinion and the openness of other professionals and can prepare useful strategies to satisfy a factfinder that expert opinions supporting the attorney's case are valid." *Id.*

It is clear why the loyalties of the two roles conflict. "Difficulties arise when professionals attempt to serve in the dual capacities of evaluator and consultant. Ideally, these roles should be separated so that the objectivity of an evaluation is not contaminated...." *Id.*

While the *Commentary* to *Standard* 7-1.1 recognizes that practicalities may prohibit having two experts to fill both distinct roles, it limits how one person can fulfill both roles by requiring the consulting function to only occur after the evaluation function is complete. In the end, the *Commentary* warns that the "conflicting obligations of evaluators and consultants might warrant an absolute bifurcation of these two roles." *Id.*

The Ethical Principles of Psychologists and Code of Conduct, American Psychologist (Dec. 1992) provide that a forensic psychologist insure conflicting roles and their consequences are clarified *before* employment to avoid compromise and misleading:

"7.03 Clarification of Role - In most circumstances, psychologists avoid per-

Characteristics of An Effective Mental Health Consultant

What type of person makes an effective mental health consultant for criminal cases? We recommend looking for seven main characteristics when you consider hiring a consultant for your case:

1) Expertise in the area of family theory and a biopsychosocial systems orientation. (George L. Engel, *The Clinical Application of the Biopsychosocial Approach*, 137(5) Am.J. Psychiatry 535-43 (1980).)
2) Expertise in detecting childhood trauma and a clinical understanding of how it affects persons later in life.
3) In-depth background in human development research and theory, along with a practical knowledge of psychopathology *and* the ability to "translate" this specialized knowledge for laypersons.
4) Understands human behavior as purposeful and sees even violent behavior as often an attempt to meet crises and to solve problems.
5) An interdisciplinary orientation and an understanding of the expertise of mental health professionals from disciplines other than his/her own.
6) Enjoys working with attorneys, investigators, and paralegals, and understands and appreciates legal ethics as well as the criminal justice system's valuing of the adversarial process.
7) *Perhaps most critical:* Sees the client as a human being who is ultimately comprehensible and deserving of the best mental health assistance and advocacy possible.

Clark, Veltkamp, Monahan, ***The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense***, ABA Criminal Justice, Vol. 8, No. 2 (1993) at 61.

forming multiple and potentially conflicting roles in forensic matters. When psychologists may be called on to serve in more than one role in a legal proceeding - for example, as consultant or expert for one party or for the court and as a fact witness - they clarify role expectations and the extent of confidentiality in advance to the extent feasible, and thereafter as changes occur, in order to avoid compromising their professional judgment and objectivity and in order to avoid misleading others regarding their role."

With the substantial hurdles of different discovery consequences and conflicting duties, no expert can properly fill both the role of evaluator and consultant on the same case. No competent criminal defense attorney will risk revealing confidential information by asking experts to provide two conflicting functions.

It is axiomatic that "No man can serve two masters. He will either hate one and love the other or be attentive to one and despise the other." Matthew 6:24

Constitutional Right to Consulting Expert

When experts are relevant to criminal cases, indigent defendants are entitled to not only an expert who will testify on behalf of the defense but also to an expert who will advise and consult on tactics and strategy.

In ***Binion v. Commonwealth***, 891 S.W.2d 393 (Ky. 1995), a case involving an insanity defense, the Court held in a unanimous opinion written by Justice Wintersheimer that due process required defense access to two distinct expert functions:

1) an "expert to conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense," *Id.* at 386, and

2) "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." *Id.*

To satisfy due process in an insanity case *Binion* held, "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." *Id.*

The United States Supreme Court has clearly communicated that when a defendant is entitled to an expert the Constitution requires the defense to consultation from an expert on how to cross-examine the prosecution's expert and uncover weaknesses in the state's case. ***Ake v. Oklahoma***, 470 U.S. 68 (1985) recognizes that due process affords an indigent criminal defendant the right to both an evaluating expert and a consulting expert when a threshold showing of necessity has been met.

While courts and attorneys may contemplate these two distinct expert functions can be performed by the same expert, the functions are so inherently conflicting that one mental health expert can neither ethically nor practically perform both roles simultaneously.

Funds for Consulting Experts

Attorneys representing indigents are increasingly asking courts for funds to hire experts who will be defense consultants in cases in addition to funds for a second expert who evaluates and testifies in cases.

If a court is not persuaded to authorize funds for a consulting expert, other sources can be explored. Universities and colleges have a wealth of experts, some of whom will assist *pro bono* to be of public service, to gain further experience in the criminal justice system, or to obtain data for publishing requirements. Forging cooperative ventures with these experts can prove to be win-win efforts for our clients.

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State Neutral Expert Constitutionally Insufficient

The Eighth Circuit in ***Starr v. Lockhart***, 23 F.3d 1280 (8th Cir. 1994) decided that access to a neutral state mental health expert was not constitutionally sufficient for a capital defendant who was mentally retarded.

Starr determined that in 1985 *Ake* required more than the right to subpoena a state neutral expert: "Before *Ake*, the ability to subpoena and question a neutral expert on whose examination both the state and the defense were relying may have satisfied due process. *See United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568, 73 S.Ct. 391, 394-95, 97 L.Ed. 549 (1953) (due process satisfied when insanity defendant is examined by neutral psychiatrists on issue of insanity, and those experts testify). However, *Ake* expressly disavows the result in *Smith* and explains that the requirements of due process have fundamentally changed since that decision. *Ake*, 470 U.S. at 85, 105 S.Ct. at 1097." *Starr*, *supra*, at 1290-91.

Also, *Starr* found the neutral state expert's examination inadequate since it did not go beyond the issues of sanity and competency. The Court looked to the testimony of the expert at trial to assess the adequacy of the examination in light of due process requirements. *Starr*, *supra* at 1289-90. "The inadequcy of the examination is illustrated by the testimony of the examining psychologist." *Id.* at 1290.

The Kentucky Supreme Court is in accord with *Starr*. ***Binion v. Commonwealth***, 891 S.W.2d 393 (Ky. 1995).

Capital Case Review

U.S. SUPREME COURT

Harris v. Alabama,

to be reported at 115 S.Ct. 1031
(decided February 22, 1995)

Majority: O'Connor (writing, Rehnquist, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer

Dissent: Stevens

The Eighth Amendment does not require a state to define the weight a sentencing judge must give to a jury's advisory verdict.

Louise Harris was convicted of asking her lover to find someone to kill her deputy sheriff husband and then sharing the victim's death benefits with her paramour. Although the trial judge found the existence of one statutory mitigator, Harris' lack of a criminal record, and several nonstatutory mitigators, he nevertheless concluded that the pecuniary gain aggravator far outweighed the mitigation and rejected the jury's recommendation of life without parole. *Harris*, slip op. at p. 3.

Comparison of Alabama and Florida Capital Sentencing Schemes

The Alabama and Florida death penalty statutes both provide the trial court with the ability to override a jury's sentencing recommendation, with one important difference: a Florida judge must give "great weight" to the jury's verdict and may not override a life sentence unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). The same deference applies to a recommendation of death. *See Grossman v. State*, 525 So.2d 833, 839 n.1 (Fla. 1988).

The Alabama Supreme Court has refused to read the Alabama death penalty statute as requiring the stricter *Tedder* standard. *See Ex parte Jones*, 456 So.2d 380, 382-3 (Ala. 1984). An Alabama trial judge is required only to "consider" the jury's recommendation. *Harris, supra*, slip op. at p. 3.

Although the Supreme Court has "spoken favorably" of *Tedder, see Dobbert v. Florida*, 432 U.S. 282, 294, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), "[t]hese statements of approbation...do not mean that the *Tedder* standard is constitutionally required." *Id.* "[T]he hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results." *Id.*, at 5-6, citing *Proffitt v. Florida*, 428 U.S. at 252-253 (joint opinion of Stewart, Powell and Stevens, JJ.).

Weighing Standards

There is no constitutional requirement that a "specific method" be used to weigh aggravating and mitigating circumstances. *Id.*, quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). There is also no requirement that a state give a particular weight to the aggravating and mitigating factors considered by the sentencer. *Harris, supra*. To require a judge give to "great weight" to the jury's recommendation would be micromanage "tasks that properly rest within the State's discretion to administer its criminal justice system." *Id.*

There have been only five cases where an Alabama judge has rejected a jury's death verdict, in comparison with 47 instances where the judge has overridden the jury's recommendation for life. *Id.*, slip op. at p. 7, citing statistics compiled by the Alabama Prison Project (Nov. 29, 1994). There have also been variation in the weight different Alabama judges have given to jury verdicts. *Id.*, [cites omitted]. However, "the disparate treatment of jury verdicts simply reflects the fact that, in the subjective weighing process, the emphasis given to each decisional criterion must of necessity vary in order to account for the particular circumstances of each case." *Harris*, slip op. at p. 8, citing *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

> The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight. *Id.*

Dissent

In dissent, Justice Stevens called the Alabama death penalty statute unique because an Alabama trial judge, unlike judges in "any other State in the Union," "has unbridled discretion to sentence the defendant to death" even if a jury has determined that a life sentence is appropriate and no reason exists that another jury would come to a different conclusion. *Id.*

Capital and Noncapital Sentencing Differences

When a trial judge sentences a noncapital defendant, he or she considers the societal interests of rehabilitation, prevention of crime and deterrence. However, rehabilitation plays no role in capital sentencing; prevention of crime "is largely irrelevant", and the assumption that the death penalty is a deterrent is unsupported by the evidence. *Id*, slip op. at p.9.

> Instead, the interest that we have identified as the principal justification for the death penalty is retribution: 'capital punishment is an expression of society's moral outrage at particularly offensive conduct'...and expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity...[However, a]n expression of community outrage carries the legitimacy of law only if it rests on fair and careful consideration, as free as possible from passion or prejudice. *Id.*, quoting and citing *Gregg v. Georgia*, 428 U.S. 153, 183-84, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

The jury system insulates against societal passions. Voting for a political candidate who has stated that he will be tough on crime is much different from voting to condemn a capital defendant to

death. Jurors are concerned about their own consciences; they rarely think about reprisals after the verdict is returned. Juries focus only on one person, rather than on "a generalized remedy for a global category of faceless violent criminals." In short, "[a] jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community." *Id.*, slip op. at p. 9-10.

Judges May Answer to Higher "Political" Power

The Constitution

> reflect[s] a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges...Fear of unchecked power...found expression in the criminal law in the insistence upon community participation in the determination of guilt or innocence. *Id.*, at p. 10, quoting *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

> The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office--or who merely wish to [be reelected every six years and thus remain judges]--must constantly profess their fealty to the death penalty. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III. *Harris, supra*, slip op. at p. 10.

Total Reliance on Judges to Sentence Capital Defendants Unconstitutional

Justice Stevens believes the Alabama sentencing scheme violates the Double Jeopardy Clause. Trial judges almost always adopt a jury's death sentence; however, a prosecutor who gets a jury recommendation of life "gets a second, fresh opportunity to secure a death sentence": the judge is presented "exactly the same evidence and arguments that the jury rejected." Therefore,

> a scheme that we assumed would 'provide capital defendants with more, rather than less, judicial protection,' has perversely devolved into a procedure that requires the defendant to stave off a death sentence at each of two *de novo* sentencing hearings. *Id*, at p. 11, quoting *Dobbert v. Florida, supra*, 432 U.S. at 295.

The fact that only five judges have overridden a jury's death sentence proves Justice Stevens' point. "Death sentences imposed by judges, especially against jury recommendations, sever the critical 'link between contemporary community values and the penal system.' *Harris*," *supra*, at p. 11, citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

> The Court today casts a cloud over the legitimacy of our capital sentencing jurisprudence. The most credible justification for the death penalty is its expression of the community's outrage. To permit the state to execute a woman in spite of the community's considered judgment that she should not die is to sever the death penalty from its only legitimate mooring. The absence of any rudder on a judge's free-floating power to negate the community's will, in my judgment, renders Alabama's capital sentencing scheme fundamentally unfair and results in cruel and unusual punishment.
> *Id.*, slip op. at p. 13.

O'Neal v. McAninch,

to be reported at 115 S.Ct. 992
(decided February 21, 1995)

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

Dissent: Thomas (writing), Rehnquist, Scalia

When a federal habeas court finds constitutional error but has grave doubt about whether the error had "a substantial and injurious effect or influence on the jury's verdict", the error cannot be harmless.

Petitioner, Robert O'Neal, filed a federal habeas petition challenging his Ohio convictions for murder and other crimes, which the district court granted. On appeal, the Sixth Circuit Court of Appeals reversed. They did find an error: possible jury "confusion" about the state of mind necessary to convict O'Neal, combined with a statement by the prosecutor. Using the substantial and injurious effect" standard set out in *Brecht v. Abrahamson*, which had adopted the *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) criterion, the court found the error harmless. The court said that O'Neal had not met his "burden of establishing" whether the error was prejudicial. *O'Neal, supra*, slip op. at p. 3, *citing O'Neal v. McAninch*, 3 F.3d 143, at 145.

Grave Doubt Means Petitioner Must Win

In his first death penalty opinion, Justice Breyer said that *O'Neal* did not involve a case where a judge shifted a burden of proof, but rather, involved application of the harmless error standard in cases where the record "is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error." In such cases, the petitioner must win. *O'Neal, supra*, at p. 3.

Precedent

"'[T]he original common-law harmless-error rule put the burden on the beneficiary of the error [here, the State]...to prove that there was no injury...'" *Id.*, at p. 4, quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The same rule was applied for nonconstitutional error on direct appeal, *Kotteakos, supra*, 328 U.S. at 764-5 and direct appeal constitutional error, *Chapman, supra*, 386 U.S. at 24. Although *Brecht, supra*, established the "actual prejudice" standard, and should normally control habeas review of constitutional errors, *Brecht* involved a **choice** between two standards, both of which resolved the issue by placing the risk of doubt on the state. *O'Neal, supra*, at 5.

The State of Ohio had argued that in civil cases, the petitioner bears the burden of showing the prejudice against him, and since habeas litigation is technically civil, the habeas petitioner must bear the burden of proof. *Id.*, at 6, citing *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 269, 98 S.Ct. 556, 54 L.Ed.2d 521.

Breyer found "one problem" with the state's argument: it failed "to take into account the stakes involved in a habeas proceeding", that "someone's custody, rather than mere civil liability, is at stake." Because habeas review involves errors from criminal litigation, "if the harmlessness of the error is in grave doubt, relief must be granted." *Id.*

Moreover, the harmless error sections of both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure refer to 28 U.S.C. §391, now codified at 28 U.S.C. §2111, which was inter-

preted in *Kotteakos*, *supra*. "[R]elevant authority rather clearly indicates that...the courts should treat similarly the matter of 'grave doubt' regarding the harmlessness of errors affecting substantial rights." *O'Neal*, *supra*, slip op. at p. 6-7.

Consistent with Basic Purposes of Habeas

Because the Court assumed *arguendo* that the judge could only decide that "it [was] extremely difficult to say" if the error had a substantial and injurious effect on the jury's decision,

> [i]n such circumstances, a legal rule requiring issuance of the writ will, at least often, avoid a grievous wrong--holding a person 'in custody in violation' of the United States Constitution...Such a rule thereby both protects individuals from unconstitutional convictions and helps to guarantee the integrity of the criminal process by assuring that trials will be fundamentally fair. *Id*, slip op. at p. 7.

"Administrative Virtues"

Lastly, the rule announced in *O'Neal* is consistent with long-standing court treatment of "important trial errors." *Id.* "In a highly technical area such as this one, consistency brings with it simplicity, a body of existing case law available for consultation, and a consequently diminished risk of further, error-produced, proceedings." *Id.*, at p. 7-8.

Judges also do not have to read "lengthy records" to determine prejudice in every habeas petition filed in each court. "These factors are not determinative, but offer a practical caution against a legal rule that, in respect to precedent and purpose, would run against the judicial grain." *Id.*, at p. 8.

The state's last argument was that 28 U.S.C. §2254(a) says the federal courts should entertain a habeas petition only on the ground that the petitioner's custody violates the Constitution, law or treaties of the United States. *Id.*, at p. 8. Thus, because a constitutional violation is harmless, there is no causal connection between "violation" and "custody," and the prisoner could not be in custody in violation of the Constitution. Breyer found "no significant support" for this position. *Id.*

Dissent

Justice Thomas felt that habeas courts "may not upset the results of a criminal trial unless [they] conclude[] both that the trial was marred by a violation of the constitution or a federal statute and that this error was harmful." *Id.*, at p. 9.

Thomas felt the "proper" place to begin examination of the question presented was not in the harmless error statute, but in §2254, which requires a causal link between the constitutional violation and the petitioner's custody. Harmless error "could not be said to have been a cause of the custody." *Id.*

Because the habeas petitioner (the plaintiff) "'seeks to change the present state of affairs,' he 'naturally should be expected to bear the risk of failure of proof or persuasion'" that some action on the defendant state's behalf caused the harm. *Id.*, quoting 2 McCormick on Evidence §337, at 428 (J. Strong, 4th ed. 1992).

"Under the majority's rationale, however, the habeas petitioner need not prove causation at all; once a petitioner establishes error, the government must affirmatively persuade the court of the harmlessness of that error." *Id.*

Requiring a habeas petitioner to bear the risk comports with other court mandates on habeas relief, *i.e.*, finality. *Id.* at p. 9-10, quoting *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); and *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986).

Thomas had no "quarrel" with the majority's conclusion that when an error is shown on direct appeal, the government must demonstrate the harmlessness of the error. *Id.*, at p. 11. However, the "harmless error precedents relied upon by the majority are certainly not dispositive." *Id.*

Civil Cases Have Greater Relevance

Thomas felt the Court could "just as easily conclude that the civil rule should be followed in the criminal context" because habeas is a civil proceeding and because the Courts of Appeals which have examined the issue place the burden of prejudice on the civil plaintiff, *Id.*, at p. 12.

Basic Purposes of Habeas

Despite its rhetoric about convicting innocent persons, the majority "merely balances the costs and benefits associated with disturbing judgments when a court is in grave doubt about harm." *Id.* However, by drawing the line at "grave doubt," rather than "significant" or "any doubt," the Court "is not willing to go as far as it must in order to ensure that no one is unlawfully imprisoned." *Id.*

Administrative Concerns

Thomas felt that the civil rule espoused by most of the Courts of Appeals was "equally attractive" and "consistent with longstanding practice." *Id.*, at p. 13.

Further, "I thought it settled" that the habeas court's duty is to "consider the trial record as a whole" when making a harmless error analysis. *Id.*, citing *United States v. Hasting*, 461 U.S. 499, 509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The judge could not find himself to be in grave doubt, and immediately cease reading to issue the writ. "Indeed, given that further review always has the potential to resolve any grave doubt, one is tempted to require a judge to continue to read and reread the relevant portions of the record until his grave doubts dissipate." *Id.*

SIXTH CIRCUIT COURT OF APPEALS

O'Guinn v. Dutton,

42 F.3d 331 (6th Cir. 1994)
(petition for rehearing granted 3/10/95)

Majority: Batchelder (writing), Ryan

Dissent: Martin

In only its second post-*Furman* death penalty opinion, the Sixth Circuit reversed the United States District Court for the Middle District of Tennessee's conditional grant of Kenneth Wayne O'Guinn's petition for habeas corpus.

On May 23, 1981, the victim, Sheila Cupples, celebrated her high school graduation at the Hat & Cane Club in Jackson, Tennessee by drinking beer, taking a few Darvon and dancing with several men. Two witnesses who testified at trial said they saw the heavily intoxicated victim outside the club around midnight, where she tripped over a motorcycle, and later left with a man identified as O'Guinn. *O'Guinn*, *supra*, at 333.

In the afternoon of the next day, the victim's body was found in a field at the end of a dead end street. Her face had been beaten severely and she had been vaginally penetrated with a blunt metal or wooden object. *Id.*, at 333-334.

Little progress was made in finding the killer until O'Guinn's July 4, 1983 arrest in connection with the rape and assault of an Alabama woman. During the interrogation arising out of his arrest, O'Guinn contended that he invoked his right to counsel, but the investigator, Duffey, later testified that O'Guinn never made such a request. *Id.*, at 334.

Because O'Guinn could not post bond, he remained in jail, where on July 11, a Tennessee investigator traveled to Alabama to interview O'Guinn in connection with the Cupples murder. O'Guinn was given his *Miranda* rights during the Tennessee investigator's interview. When confronted with the results of a polygraph which revealed guilty knowledge, O'Guinn said that his brother Robert had confessed to Cupples' murder. *Id.*

On August 10, another Tennessee investigator received permission from O'Guinn's Alabama counsel to conduct an interview, which the investigator did after advising O'Guinn of his *Miranda* rights. On August 12, O'Guinn sent word that he wished to speak with Duffey, who took the Tennessee investigator with him. O'Guinn was again given his *Miranda* warnings and implicated himself in the Alabama murder. Later that day, the Tennessee investigator interviewed O'Guinn alone. He did not readminister the *Miranda* warnings, but relied on those given earlier in the day and on O'Guinn's acknowledgement that he had been *Mirandized* and was giving his statement freely and voluntarily. O'Guinn then gave a handwritten statement which detailed his involvement in the Cupples murder, and another handwritten and oral statement on August 15. All four confessions were admitted at trial. *Id.*

Mixed Petition/*Brady* Error

O'Guinn alleged that the state had removed exculpatory evidence of the involvement of three other people, including Cupples' cousin, a former Jackson police officer and O'Guinn's brother, and that Cupples was murdered because she provided information about the distribution of illegal drugs before defense counsel was allowed to inspect and copy the prosecution's files. The state responded that the error was procedurally defaulted because O'Guinn had not raised the issue in state litigation prior to filing his habeas. O'Guinn replied that it was not until he was able to utilize habeas discovery procedures that he discovered the claim. *Id.*, at 335.

Noting the district court's full hearing on the issue as part of its decision to consider the issue in "the interests of justice and comity", the Sixth Circuit found that the claim **was** unexhausted. *Id.*, at 336, citing *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987).

Review of O'Guinn's cross-appeal from the district court's denial of the *Brady* claim:

> persuades us that none of the material withheld was reasonably exculpatory and even if it were, it was fully available to the defendant with reasonable investigation (because the government had provided O'Guinn with a full witness list, and even if not fully available, any error was harmless. *Id.*, at 347.

***Miranda* Warnings**

The district court erred in finding that O'Guinn had been misinformed about the nature of his right to counsel and that his waiver was therefore not knowing and intelligent.

The issue was considered several times by the Tennessee state courts. The trial court, denied O'Guinn's motion to suppress, apparently because it disbelieved O'Guinn's testimony that he had requested an attorney and because it believed Duffey's testimony that O'Guinn had not done so. The Tennessee Supreme Court reviewed the transcript of the suppression hearing and found that the motion had been properly denied, even though the trial court had not supplied detailed findings of fact. However, the district court, apparently relying on testimony from an Alabama suppression hearing not introduced in Tennessee state proceedings, the opposite. *Id.*, at 337-338.

The Sixth Circuit found "no basis" in the district court's conclusion that "the trial court's decision [was] unsupported by the record." *Id.*, at 341. "[W]here the findings of fact by the state court find support in the record, those findings must control, notwithstanding federal habeas court findings that might also find support in the record." *Id.*, citing *Wainwright v. Goode*, 464 U.S. 78, 85, 104 S.Ct. 378, 382-83, 78 L.Ed.2d 187 (1983) and *Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S.Ct. 843, 949-50, 74 L.Ed.2d 646 (1983).

Although the district court's findings of fact could have been an accurate description of what really happened, "federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *O'Guinn, supra*, at 341, citing §2254(d) and *Lonberger*, 459 U.S. at 434, 103 S.Ct. at 851. Thus, the Tennessee courts' findings must be accepted.

Constitutionally Inadequate Warning

The district court did not address whether Duffey's misinformation that only a court could appoint an attorney for O'Guinn was sufficient to render the warnings inadequate and O'Guinn's waiver invalid. However, the Sixth Circuit believed that Duffey's explanation was not an inadequate recitation of O'Guinn's *Miranda* rights. *O'Guinn, supra*, at 341.

Oregon v. Elstad

At oral argument, the state expressed its willingness to concede that O'Guinn's first confession was inadmissible but that its admission was harmless error.

However, in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) the Supreme Court held that a second confession given with *Miranda* warnings, did not render a first, non-*Mirandized* confession inadmissible.

Oregon v. Elstad, supra, controls O'Guinn's situation. The Sixth Circuit felt that admissibility of O'Guinn's first confession may have been stronger because of the warnings given to him on July 4, July 11, August 10 and August 12. *O'Guinn, supra*, at 343.

Sentencing Phase IAC Procedurally Defaulted

Although O'Guinn did not assert the issue of trial counsels' ineffectiveness at the sentencing phase until his second, *pro se*, post-conviction action, and the state court expressly refused to consider it because of O'Guinn's waiver, the district court improperly did not address the waiver, but instead considered trial counsel's performance.

The Sixth Circuit's analysis found that because he did not have a right to effective assistance of counsel in state post-conviction, O'Guinn could not show "cause" for post-conviction counsel's failure to raise the issue. *Id.*, at 346, citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) and *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

The Court then undertook the only option available: an "actual innocence" review.

O'Guinn's assertion that trial counsel should have put on the testimony of family and friends to testify about O'Guinn's terrible childhood did not meet the *Sawyer v. Whitley*, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992) "actual innocence" requirement that "must focus on those elements which render a defendant **eligible** for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error". *O'Guinn, supra*, at 347.

Cross-Appeal

The district court properly dismissed six claims: 1) that the state interfered with O'Guinn's ability to interview two witnesses and intimidated them into not cooperating with the defense; 2) that another witness was intimidated into giving false testimony at trial; 3) that a state witness's identification was based on a suggestive photo array; 4) that O'Guinn's death sentence did not meet the heightened degree of reliability required by the Eighth and Fourteenth Amendments; 5) that O'Guinn's statements were coerced while he was mentally and physically weak; and 6) that counsel rendered ineffective assistance of counsel at the guilt phase. *Id.*

There was neither cause nor prejudice to excuse O'Guinn's failure to raise any of the six issues on direct appeal or in post-conviction. *Id.*

Surprise Testimony

During preparation for trial, a medical examiner told defense counsel that none of the medical reports contained a determination of whether the victim was alive at the time she was penetrated by the blunt object. However, during trial, the pathologist who prepared the reports gave his medical opinion that the victim was indeed alive at the time the object lacerated her vaginal wall.

The Sixth Circuit agreed that although the testimony was a surprise, it was not the result of any state action or inaction. "In fact, the State itself was itself surprised by [the doctor's] testimony. [Furthermore], regardless of the testimony regarding the timing of the rape, substantial evidence existed to support the jury's recommendation of the death penalty." *Id.*, at 350.

HAC Aggravator Constitutional

O'Guinn argued that the Tennessee heinous atrocious or cruel because of torture or depravity of mind aggravator was unconstitutionally vague. The district court rejected O'Guinn's challenge, citing *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 3057-8, 111 L.Ed.2d 511 (1990), in which the Supreme Court ruled that even when a jury is instructed using a vague or improperly defined aggravator, a federal court can affirm a death sentence 1) if state courts have defined the aggravator more specifically and 2) if the state appellate court determines that the evidence in the case warrants the properly defined circumstance.

The Tennessee Supreme Court had further defined the aggravator, *State v. Williams*, 690 S.W.2d 517 (Tenn. 1985). It also found that the evidence supported finding the HAC aggravator. *O'Guinn, supra*, at 351.

Thus the aggravator was constitutional, and application of the death penalty in this case was proper. *Id.*, citing *Walton, supra.*

Dissent

In dissent, Judge Merritt said there was no procedural default on the IAC at sentencing issue because the Tennessee trial court had ruled *sua sponte* on counsel's effectiveness: "'the Court finds affirmatively from the evidence that the Petitioner did receive the effective assistance of counsel....The Court is of the opinion that Petitioner was provided with effective assistance of counsel...at trial and on appeal.'" *Id.*, at 352, citing *O'Guinn v. State*, No. C-87-23, Mem. Order at 2 (Tenn. Cir. Ct., June 30, 1988).

Further, a merits inquiry showed that defense counsels' failure to investigate or prepare for sentencing because of miscommunication between the two, combined with their unprepared attempt to present mitigation failed to meet the minimum requirements for effective assistance of counsel at the penalty phase. *Id.*, at 353, citing *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990; *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992); and *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991).

Miranda

Judge Merritt would remand for further findings and conclusions on the *Oregon v. Elstad* issue. *O'Guinn, supra*, at 358.

KENTUCKY DEATH NOTES (March 15, 1995)

1) Number of people executed since statehood, 1795	**470**
2) Number of people executed in the electric chair	162
3) Number of people who applied for the position of executioner, 1984	150
4) Number of people now on death row*	28
5) Number of people who are Viet Nam veterans on death row	1
6) Number of people who are women on death row	0
7) Number of people who were juveniles when the crime was committed on death row	1
8) Number of people who have committed suicide on death row	1
9) Number of people whose trial lawyers have been disbarred or had their license suspended	4
10) Number of people on death row who can afford private counsel on appeal*	1
11) Number of people sentenced to death for killing a black person	0
12) Percentage of death row inmates who are black	25%
13) Percentage of Kentucky population that is black	7%
14) Number of black prisoners who were sentenced by all white juries	3
15) Number of persons sentenced to death in Kentucky who were later proven innocent	1

Brady

Merritt could not determine from the record whether O'Guinn's assertion that his *Brady* claim became available only after federal discovery was true. Thus, he felt the claim should be dismissed with prejudice so that the Tennessee state courts could have first review. *Id.*, at 359.

KENTUCKY SUPREME COURT

Sanborn v. Commonwealth,

__ S.W.2d __
(rendered October 27, 1994)

Affirmed.

Majority: Spain (writing), Stephens, Lambert, Reynolds, Wintersheimer, Stumbo, Leibson

Dissent: Stumbo (writing), Leibson

In a decision marked by dissent on only one issue, the Kentucky Supreme Court upheld Parramore Sanborn's resentencing to death for the 1983 kidnapping, rape, sodomy and murder of a Henry County woman. The trial took place in Jefferson County after the original trial judge recused himself and granted a change of venue. A special judge, from far Western Kentucky, was then appointed.

Defense Counsel's Misconduct

On the afternoon of March 25, 1991, the prosecutor informed the trial court that his *voir dire* notes had turned up missing from counsel's table. The court received negative answers to his question as to what happened to the notes. However, the following morning, as the Commonwealth prepared to watch videotapes from the previous day's activities, counsel informed the court, outside the presence of the jury and Sanborn, that she had taken the notes. She admitted that she was "being nosy" and called the conduct "inexcusable." *Sanborn* slip op. at p.6.

The trial judge agreed; the Commonwealth responded that he was in a "Catch-22" situation, but would make no motions because he wished the case to proceed. Lead defense counsel made no recommendation. The court said he would attend to the matter later in the proceedings. *Id.*

During presentation of the defense case, defense counsel, outside the presence of the jury, told the court about a news report of her actions and expressed her concern that the jury may have been contaminated by that report. Counsel's motion for a mistrial was denied, but the trial court offered to question the jurors as to whether they had read or watched accounts of the trial in the news media. The Commonwealth's Attorney said he had not told the media, and that he told his assistant not to do so either. *Id.*

Counsel's motion for recusal was denied. Counsel then moved that she and lead counsel be permitted to withdraw because a conflict of interest existed, and that because of the trial court's threat of further action, her attention had been taken from defending her client. The court also denied those motions, but did question each juror about his or her knowledge of the media reports to which the jurors replied in the negative. *Id.*, at p. 7-8.

On appeal, Sanborn said counsel's actions created a "conflict *per se*" and argued that defense counsels' responsibility "to vigorously defend" their client was chilled by the conflict. Further, Sanborn claimed that counsel was "forced" to choose between her interests and Sanborn's and that she must avoid "'antagonizing the court any further.'" The court found this attitude "very disturbing."

> We do not think the responsibility of counsel to 'vigorously defend' a client is ever compromised by the professional, ethical conduct of a lawyer in relationships with the court. Furthermore, all ethical lawyers should at all times conduct themselves so as to avoid 'antagonizing the court.' *Id.*

The court "fail[ed] to understand" the actual conflict between the best interests of counsel and those of Sanborn's. "More importantly...[w]e decline to indulge in any such presumption" of a conflict of interest *per se*. Instead, prejudice is presumed "'only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.*, citing *Burger v. Kemp*, 483 U.S. 776, 783, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987).

Sanborn did not show that defense counsel was forced to make a choice between her interests and Sanborn's. Further, he "certainly" had not shown "in light of all the circumstances, [that any] acts or omissions [of either defense counsel] were outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. at (1984).

The trial court also did not err when it did not hold a hearing in Sanborn's presence on this matter because "[n]o testimony was taken and there was accordingly no need for cross-examination" and because Sanborn was present when the jurors were questioned. *Sanborn, supra*, slip op. at p. 14.

Further, there was "no merit" in Sanborn's claim that lead counsel was impaired in his representation because there was no attempt to show his knowledge of counsel's actions. Lastly, because neither government prosecutors nor public defenders (as both defense counsel are), "have any personal stake in representing a client", the vicarious disqualification rule" does not apply. *Id.*, citing *Summit v. Mudd*, 679 S.W.2d 225 (Ky. 1984).

Testimony of Minister Not Privileged

The Rev. Barclay Brown's testimony was important to the Commonwealth because Brown, who testified that Sanborn admitted that the victim was alive and screaming when he raped her could belie the defense's contention that the victim was dead when Sanborn sexually abused her.

Even though Brown had assisted the defense at the first trial, the Supreme Court "fail[ed] to find either an attorney-client or priest-penitent privilege." "Although Rev. Brown may have been considered a representative of a lawyer, the statements made to him are not privileged because they were not made with the clear understanding that they were confidential." *Id.*, at p. 17. Confidentiality implies that it will not form the foundation for expert testimony "because expert testimony must be cross-examinable." *Id.*, citing KRE 705 and *Foster v. Commonwealth*, 827 S.W.2d 670, 678-79 (Ky. 1992).

Furthermore, Sanborn's first defense counsel testified that while she thought Rev. Brown might testify about a theological perspective on the death penalty, she later decided not to call Rev. Brown. However, "it was not made clear that Rev. Brown was only meant to be a consultant for [Sanborn's] defense"; thus, the attorney-client privilege could not be invoked. *Id.*

The testimony was also not covered under the priest-penitent privilege. "For a communication to be covered under this privilege it must be communicated to a member of the clergy when that person is acting as a spiritual advisor and the

information is not meant to be transferred to anyone else." *Id.* at 19, citing KRE 505(b). Thus, because Brown talked to Sanborn "in contemplation of testifying", because there was no testimony that Sanborn obtained spiritual advice or discussed his spiritual health, and because Brown talked to Sanborn as part of a seminary class he was taking and had prepared a paper on his involvement, the priest-penitent privilege did not apply. *Id.*, at p. 19-20.

Refusal to Permit Mental Health Expert Testimony

Before trial, Sanborn filed notice of his intent to rely on Extreme Emotional Disturbance as a defense, and provided copies of the reports of Dr. Philip Johnson, a psychologist, to the prosecution. The Commonwealth then obtained the services of Dr. Victoria Skelton a KCPC psychiatrist, in order to rebut Johnson's testimony.

At trial, the Commonwealth claimed Johnson's testimony was inadmissible because a proper foundation had not been laid, and further objected because the testimony was a hearsay report of what Sanborn had told Johnson during interviews, especially since Sanborn did not testify.

The trial court properly excluded the testimony because the only evidence of the EED "triggering event" and Sanborn's reaction to it were based only on Sanborn's statements to Dr. Johnson that the victim had refused his "romantic advances and mocked his stuttering." Further, the fact that Sanborn had told several different versions of the events of the night of the murder, Johnson's statements that other witnesses' testimony could be indicative of mental illness or antisocial personality as well as EED, and that he did not believe the story Sanborn had told him could mean that "the 'triggering event' may never have occurred. *Id*, slip op. at p. 22-3.

Inmate Informant's Testimony

James Tingle, imprisoned with Sanborn during December of 1983, was called to testify about Sanborn's threat to another inmate that "'I have killed once but they cannot kill me but once.'" After the defense complained of insufficient notice, the trial court allowed counsel to question Tingle, about his criminal record and possible bias against Sanborn. Tingle was then allowed to testify. *Id.*, at 24.

On appeal, Sanborn asserted that the Commonwealth's lack of notice violated discovery and that Tingle's testimony should not have been admitted. The Supreme Court disagreed, pointing out that counsel was allowed to extensively cross-examine Tingle and that Sanborn "merely speculates that he could possibly have uncovered some exculpatory evidence if given earlier notification. *Id.*, at p. 25.

Sanborn's other contention, that the other crimes evidence was unduly prejudicial, was also not reversible error. "Since [Sanborn] was often inclined to change his version of the facts, Tingle's testimony was relevant to show that in December of 1983 Sanborn admitted having killed someone prior to his incarceration." *Id.*, at p. 27.

Penalty Phase Testimony

Dr. Skelton, the Commonwealth's expert, testified during the penalty phase that she had conducted two separate interviews with Sanborn, in which Sanborn first said he was not involved in the victim's murder; but at the second, Sanborn admitted killing the victim under the influence of EED. Over defense objection, the trial court permitted Skelton to state her opinion of why Sanborn had changed his story, but limited the testimony so that the jury could not infer that defense counsel had encouraged Sanborn to change his story. *Id.*, at 28-9.

Citing *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), Sanborn argued that the trial court violated Sanborn's rights to counsel and against self-incrimination and that the testimony was irrelevant and highly prejudicial. However, the Supreme Court felt that this case was more similar to the *Estelle* exception: when a defendant introduces psychiatric evidence, he must submit to an examination by the prosecu-

YANKEE DOODLES by JIM THOMAS

With jury selection completed, Dave's client inexplicably changed his plea.

tion expert. Because this evidence could be used in rebuttal,

> the scope and admissibility of the expert's findings are not as limited as they were in *Estelle*. If the statements are necessary for the expert to formulate and explain her opinion, then the statements are admissible and are not violative of the defendant's rights. *Id.*, at 29-30.

Also, because Dr. Skelton testified during the penalty phase, "[i]t is not improper for a jury to be informed of a change in a story by a defendant so that they may consider the motivation behind the change while determining the appropriate punishment for a crime." *Id.*

Prosecution Expert's Disagreement with Defense Expert

Dr. Skelton's testimony that, based on her evaluations, Sanborn's actions were "'contemplated,'" was not an improper opinion on Sanborn's mental state at the time of the crime, but only an expression of the opinions formed from her evaluations and the information she had. *Id.*, at 31.

"A jury is not bound by the testimony of an expert"; thus, the jury could have found the defense expert, Dr. Johnson's, testimony that Sanborn was in a state of rage on the night of the murders "a more accurate characterization of his mental status at the time the murder occurred. *Id.*, at 32.

Furthermore, Dr. Skelton's testimony that she based her opinions on Sanborn's reports and records, rather than on what he told her because antisocial personalities tend to be untruthful was not intended to denigrate that of Dr. Johnson, whose opinion was based on his interview with Sanborn. Rather, the question was used to contrast Dr. Skelton's opinion with that of Dr. Johnson "in order to best determine which explanation of the defendant's mental state was more accurate and to account for the differences in opinion." *Id.*, at 33-4.

Mitigation Evidence

Prior to the penalty phase, defense counsel's motion for continuance in order to depose Sanborn's brother and sister in Florida was denied. A motion to read affidavits of the evidence into the record was also denied. However, both the defense and the Commonwealth agreed that the testimony from the first trial's penalty phase could be read into the record. The trial court also ruled that the original prosecutor's improper cross-examination of defense witnesses would not be read. Based on the above, the trial court did not abuse its discretion by denying the continuance motion. *Id.*, at 35.

The Commonwealth also did not commit error by telling the jury that mitigation evidence did not "excuse" the crime. *Id.*, at 36, citing *Boyde v.California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

Prosecution's Impeachment Of Its Own Witness

The prosecution called Tommy Wallace as a witness at both phases of the trial, but impeached Mr. Wallace with a prior felony conviction at the penalty phase only.

Defense counsel was not sandbagged by the prosecution's actions. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1193, 10 L.Ed.2d 215 (1983) does not require the prosecution to disclose information which is part of a public record. Furthermore, because the Commonwealth did not become aware of Wallace's conviction until the sentencing phase, there is no suggestion that the Commonwealth was acting in bad faith. *Sanborn, supra*, slip op. at 38.

Although *Romans v. Commonwealth*, 547 S.W.2d 128 (Ky. 1977) requires exclusion of evidence not provided in accordance with a discovery order, it also mandates that the party claiming error must take every reasonable step to rectify the situation. In *Sanborn*, he failed to prove prejudice, because although defense counsel objected, he failed to get a final definitive ruling on the objection. *Sanborn, supra*, slip op. at 39-40.

Dissent

Justice Stumbo, joined by Justice Leibson, dissented from the court's ruling with regard to Rev. Barclay Brown because it was clear that counsel had brought Brown and Sanborn together and that Brown had acted as a spiritual counselor. Defense counsel at the first trial also testified that she considered Brown a member of the defense team and that, because of that relationship, she told Brown that his communications with Sanborn were confidential. *Id.*, at 42-43.

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Black Police Officers Allege Discrimination

PADUCAH (March 8, 1995) – Four black police officers have filed a complaint alleging racial discrimination with the Paducah Police Department.

The four have asked for an investigation and formal hearing before the City Commission.

The Jan. 26 complaint cited alleged inconsistencies in the application of policies and requested "fairness and equal opportunity, and a better working environment for all in this police department."

The complaint originated with officers Lawrence Acree, Wendell Rene Long, Stefan Jagoe and Phillip Crider.

Ways to Implement Supplemental Jury Questionnaires

Until recently, jury questionnaires were used only in high-stakes commercial cases and death penalty cases. In fact, many trial lawyers and jury consultants think that it is almost malpractice not to employ a supplemental juror questionnaire in these kinds of cases. Articles about the rationale for using jury questionnaires have been published in criminal defense publications in New York, Texas, Ohio, Oregon, Tennessee, Georgia, Illinois, Indiana, Missouri and Kentucky.[1] This article gives ways to ensure that the court will accept the questionnaire and allow for ample time to assimilate the information.[2]

Ask court personnel what has worked before. They are often a resource of information for successful use. Also, because of the increased use of questionnaires, they are interested in ideas for successfully implementing the process.[3]

Contact a consultant in advance to help with the processing of the questionnaire; including construction, grading and summarizing and analyzing the results. Clients are pleased because consultants work at an hourly rate equal to or lower than that of lawyers; courts are pleased because specialize in this kind of work and avoid pitfalls which may occur when courts first implement this approach. A consultant's presence often influences the judge to permit the use of the questionnaire.

Point out advantages for the judge. Protection of his or her reputation in sensitive or high publicity trials. Court time is used more productively.[4] You may wish to start with a long questionnaire like the O.J. Simpson and shorten if the judge is hesitant to use a questionnaire that is long.[5]

Ask the court to have the jurors fill out the questionnaire in advance. While short questionnaires mailed to jurors have a higher response rate than long questionnaires, the return rate is still lower than if the jurors fill out the questionnaire at the courthouse.

Better decisions can be made about whether or not to proceed with the trial.

Civil attorneys frequently settle after evaluating the questionnaires. If the criminal defense attorney can choose to plea, the decision is best made after more thorough questioning. Prosecutors in several cases decided to drop charges when they saw that the defense attorneys were prepared with a questionnaire as well as other pretrial motions.

Footnotes

[1] *How To Save Your Client While Saving the Court Time* by Inese A. Neiders, *The Advocate*, Vol. 16, No. 5, p. 32 (Oct. 1994).

[2] More information is collected by using questionnaires, so it is critical to have time to assimilate it. Multiple choice and forced choice questions are quick to grade and have some advantages over open-ended questions so they should be included with open-ended questions.

[3] I welcome questions from courts.

[4] Michael Stout suggested that such materials as the witness list and other less interesting questions be place in the questionnaire. Some of the more interesting questions can be used in open *voir dire*.

[5] It is desirable to have a comprehensive instrument like those in the O.J. Simpson and Rodney King cases, but judges sometimes prefer shorter questionnaires. It is better to have a small supplemental questionnaire than none at all.

** I would like to thank Don Larrick, Ph.D. for editing this article and critiquing the methodology.*

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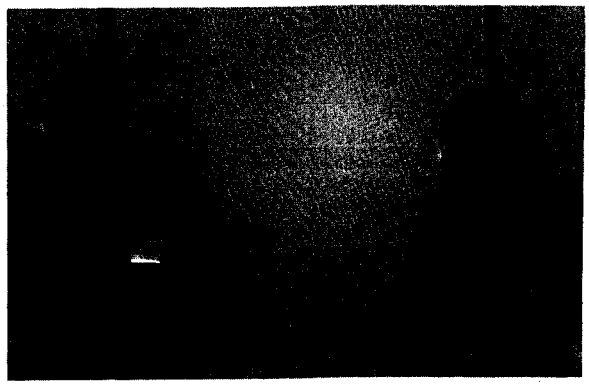
Inese A. Neiders is a jury consultant from Columbus, Ohio. She has successfully used questionnaires in death penalty, drug conspiracy, police brutality, child sexual abuse, white collar product liability and torts.

Lee Norton & Bob Carran at DPA's Death Penalty TPI



Rick Kammen & Allison Connelly during a small group session at DPA's Death Penalty TPI

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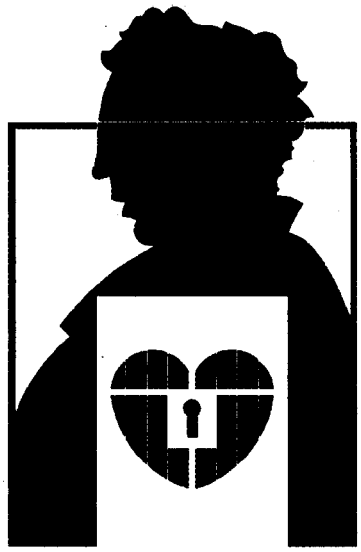

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BA Results: Relation Back

December 1994 Carroll District Court Order

CARROLL DISTRICT COURT
Action No. 94-T-376

COMMONWEALTH OF KENTUCKY
PLAINTIFF

VS.

JAMES ANDREW DEFENDANT

This matter comes before the court as a motion by the defendant to suppress the results of the blood alcohol test (BAC) administered in this case via a Breathalyzer machine, named the Intoxilyzer 5000. Under the given facts of this case, the defendant was tested at 11:29 p.m., 44 minutes after the time of his reported driving, and his test results when tested were .10%. The defendant states that he consumed his last beer at 10:30, some 59 minutes prior to the BA test.

Let us initiate this discussion in the Socratic style and begin with the facts upon which we do agree.

a) KRS 189A.010 (1) and (1)(a) states that "No one shall operate a motor vehicle..." "While the alcohol concentration in his blood or breath is 0.10 or more..."

   The 1991 DUI amendments deleted a provision of prior law that stated the "time of testing" was the relevant point for consideration of the BA results, but the emphasis is now on "while operating." This requires a retrograde extrapolation by the court since BA tests are usually given 45 minutes to an hour after the actual act of driving.

b) Based on expert testimony of Dr. Harry Plotnik and the conclusions published by the Kentucky Justice Cabinet, we conclude that after anyone drinks alcohol, *it takes from 20 to 60 minutes for complete absorption of an alcoholic beverage from the gastrointestinal tract.* (The *Kentucky Driver's Manual* cites 20 to 40 minutes. Dr. Plotnik says 30 to 60 minutes.)

c) The *Kentucky Driver's Manual** published by the Kentucky State Police and the Kentucky Department of Justice, contains a chart on page 63 which purports to show the "*Estimated % of Alcohol in the Blood by Number of Drinks in Relation to Body Weight.*" The court will take judicial notice of that chart pursuant to KRE Rule 802 (18). (* See exhibit.)

d) As alcohol is being absorbed the BAC reading will rise for a period of time, and then it will fall for a period of time. The speed with which a person's BAC reading rises and falls will vary from person to person within certain average parameters.

e) "It takes about an hour to get rid of one drink." (One drink is defined as 1 oz. of alcohol, *i.e.* one beer.) *Kentucky Driver's Manual*, page 64.

f) It is assumed by the court that there was no additional consumption of alcohol by the defendant after his motor vehicle was stopped by the arresting officer.

In deciding this case we shall apply the given facts and scientific conclusions listed above to try to arrive at a fair and reliable conclusion about what the defendant's BAC level was at the actual time of operation (in *Per Se* cases).

If we assume that the defendant's weight was 178 pounds at the time of the BA test (this weight is taken from the traffic citation), and if we then refer to the *Kentucky Driver's Manual* chart, we can make a determination of how many ounces of alcohol (drinks) were consumed in order to achieve the BAC reading of .10% as shown on the BA test slip.

The chart indicates that a person weighing 180 pounds would have to drink 5 beers in order to register a reading of .10%. If we assume the drinking ceased one hour prior to the stopping, then we should deduct one drink from this reading based on the manuals assertion that a person will burn up one drink per hour, and the test was almost one hour after the driving, then we might conclude that at the actual time of driving his BAC reading may have been a maximum of .12% (which assumes a drop in his BAC level of one drink an hour of .02% per hour).

On the other hand, if we assume that the defendant stopped drinking at the time he states (10:30 p.m.), then we might assume that during the first hour or so, after his traffic stop, his BAC level might have risen. Without knowing how much alcohol he actually consumed in the hour preceding his stopping, we don't know with any degree of certainty what his reading would have been one hour later, at the end of his period of absorption. But assuming his BAC went up for the first hour until absorption was complete, we can reasonably estimate that at the time of operation of the motor vehicle the reading could have been as low as .08% (giving credit for one full hour of a rising BAC level.)

If the absorption level was as fast as 20 minutes, then his maximum level of BAC would have been at 10:50, some five minutes after his last act of driving. After that time his BAC should have fallen at the rate of .02% per hour. The BA test would have been administered 39 minutes after his maximum BAC level, and by crediting him with 65% of the .02% per hour anticipated drop in BAC level, we would be able to determine that his BAC level at the time of driving was .013% higher than the BA reading at the time of the test, or .113%.

Under two of these scenarios we might conclude that the defendant had a BAC reading in excess of .10% at the time of driving. But under the second scenario we reach an opposite conclusion. Therefore, we are not able to determine conclusively from the facts given, that the defendant either was or was not in violation of the *Per Se* provision of KRS 189A.010 (1)(a).

This conclusion is buttressed by the stipulated letter of Dr. Harry Plotnik which by agreement of the parties was introduced into evidence in this case. (And is attached hereto as an exhibit.)

CONCLUSION

In the process followed by the court herein, we have taken certain given facts and by taking judicial notice of other facts we have tried to develop a fair and rational method under which the law may be reasonably applied. Other courts have taken

a different view and place upon the Commonwealth a greater burden. That other view perceives a duty on the Commonwealth to submit evidence to prove the relation of the BA test result to the BAC at the time of actual driving.

Judge Doug Stephens of the Kenton Circuit Court acknowledged in *Commonwealth v. Tim A. Price* (94-XX-00030) (an appeal affirming a decision by Judge Martin Sheehan, Kenton District Court, Action # 93-T-06088) that it was the duty of the Commonwealth to introduce evidence to extrapolate in the retrograde, and take the BA reading and relate it back to the BAC at the actual time of driving.

Judge Stephens concluded:

> "...there was no witness who provided an extrapolation or evidence enabling the trial judge to extrapolate Price's BAC back one (1) hour and twenty (20) minutes to the time of driving. Therefore, the trial judge's finding that Price was operating a vehicle with a BAC over .10% was based on insufficient evidence. *State v. McDonald*, 421 N.W.2d 492 (S.D. 1988) and *State v. Fode*, 452 N.W.2d 779 (S.D. 1990).
>
> While the evidence before the trial court may have been sufficient for a conviction under KRS 189A.010 (1)(b), it was not sufficient for a conviction under the *per se* section, KRS 189A.010 (1)(a). *Allen v. Com.*, Ky. App., 817 S.W.2d 458, 461 (1991), *McDonald, supra*, and CR 52.01.
>
> (Note: This court acknowledges that unpublished decisions may not be cited as *authority*, but Judges Stephens and Sheehan are cited here for the logic of their reasoning on a point of law that is not yet settled in Kentucky.)

This court agrees with Judges Stephens and Sheehan, that there exists a gap between the BA test and the BAC at the time of operation, but believes that that gap may be bridged in many cases by the judicial notice of the *Kentucky Driver's Manual* chart. This court has provided herein a method for evaluating similar cases that may arise in the future. Simply stated that method is:

The Retrograde Extrapolation Rule

In the absence of contrary evidence, this court will permit the introduction of all BA tests in *Per Se* cases, wherein the BAC as indicated by a properly administered BA test, is .10% or greater, after a deduction of .02% in the BA test reading, for each hour subsequent to the proven time of operation.

The deduction of .02% per hour, will not be applied until one hour after the proven cessation of drinking. If the time of the cessation of the drinking is not otherwise proven, then the court will find that the drinking ceased upon the stopping of the defendant's vehicle by the arresting officer.

In any case where the BA reading is .12% or greater at or after one hour subsequent to the act of operation, and the defendant has consumed no additional alcohol during that period, then a BAC of .10% will have been proven and the BAC test results will be admissible.

	Drinking Cessation	BAC Direction	BA Test Results	Conclusion	BAC at Time of Operation
1.	Def. drinks steadily up to time of traffic stop, then ceases	One hour after drinking cessation BAC absorption causes BAC to rise	.10%	The BAC was still rising at time of BA or blood test	Deduction of .02% means that BAC level at time of peration was .08% BA SUPPRESSED!
2.	Def. ceases drinking 30 to 60 minutes before traffic stop, then ceases	After absorption complete BAC falls	.10%	The BAC was falling at the time of BA or blood test	BAC was actually .12% at time of driving, by adding .02% for one hour of declining BAC level BA ADMITTED!
3.	Def. drinks steadily up to time of traffic stop, then ceases	Assuming *2 hour delay* after stop until BA test given	.10%	The BAC level would rise for the first hour and then fall .02% second hour	The BAC at the time of operation was .10% BA ADMITTED!

Applying that rule to this fact situation, the court finds that the drinking ceased at 10:30 p.m., and that the BA reading was .10% at 11.29. Therefore it is assumed that the BAC level was rising from 10:30 to 11:30 and would not have begun until after the BA test was administered. Therefore, the court must conclude that the BA level at the time of operation (10:45 p.m.) was below .10%. Accordingly the BA level needed for a conviction of a per se violation under KRS 189A.010(1)(a) has not been met, and the BA results must be suppressed.

This suppression order will only apply to a Per Se prosecution of the defendant, and does not preclude admission of the BA test results under any other prosecution under KRS 189A.

However, pursuant to previous rulings of this court,* the Commonwealth will not be permitted to introduce the BA results without same being properly supported with other "competent" evidence. (*See *Commonwealth vs. James Satterwhite*, Owen District Court - 1994).

This restriction is necessary since the General Assembly has repealed the presumption of intoxication for BA readings of .10% or greater. Therefore in "under the influence" cases with BA readings of .10% or greater, the BA is inadmissible unless there is accompanying "competent" evidence to permit the jury to understand the meaning of any particular BAC reading. It would appear that such "competent" evidence would be satisfied by a medical doctor, a qualified chemist, or other expert properly trained in the physiological effects of specific levels of alcohol upon human beings as measured by an accepted method of measurement.

The "presumption of intoxication" that is found in KRS 189.520, but which was not included in the amended Chapter 189A), was an exception to the general rule against any presumption against the interests of a defendant. Professor Lawson notes that the omitted presumption in 189.520 was necessary under the old DUI law. He explains its presence by observing that it;

> "*...serves only to obviate the necessity for expert testimony to validate the scientific findings stated in the (DUI) statute.* The statutory presumption is to be read to the jury by the trial court in connection with testimony concerning blood-alcohol content and given no other effect in the trial of the case." Lawson, *Kentucky Evidence Law Handbook*, Page 340.

Lawson's work acknowledges that the BA presumption was a necessary element of evidence so that a juror would be able to make some sense of the raw BA reading. But the legislature left this presumption out of the new *Per Se* offense created by KRS 189A.010(1)(a). Since the presumption has been removed, then the Commonwealth must substitute that presumption with "...expert testimony to validate the scientific findings stated in the statute."

The omission of the presumption was not an error on the part of the legislature, but an essential feature of the new legislative scheme, because now the *status* of having a BA reading of .10% or more at the time of driving is a new offense. (See the Botkin decision "different breed of cat ruling," 1994, Kentucky Supreme Court). The legislature clearly wrote language that requires that the BA reading be extrapolated back to the time of *operation.*

The BA results shall be suppressed in any prosecution in this case for a violation of KRS 189A.010(1)(a).

Done this the 6th day of December, 1994.

STAN BILLINGSLEY
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November 11, 1994

Edward M. Bourne, Attorney at Law
114 North Madison Street
Owenton, Kentucky 40359

Dear Mr. Bourne:

At your request, I have performed an analysis of the facts and circumstances surrounding the arrest of James E. Andrew on March 11, 1994, for operating a motor vehicle with a prohibited concentration of alcohol in his breath. All opinions contained in this letter are based upon a reasonable degree of scientific probability. In performing my analysis, I have assumed the following facts:

(1) James E. Andrew was arrested for an offense which occurred at 10:45 p.m. on March 11, 1994;
(2) A breath alcohol test performed at 11:29 p.m. on the same date using a Kentucky Model 5000 Intoxilyzer indicated that the defendant's breath contained 0.100 grams of alcohol per 210 liters of breath; and
(3) Mr. Andrew was consuming beer on the evening of his arrest and completed his last bottle of beer at 10:30 p.m., fifteen minutes prior to the time of the alleged offense.

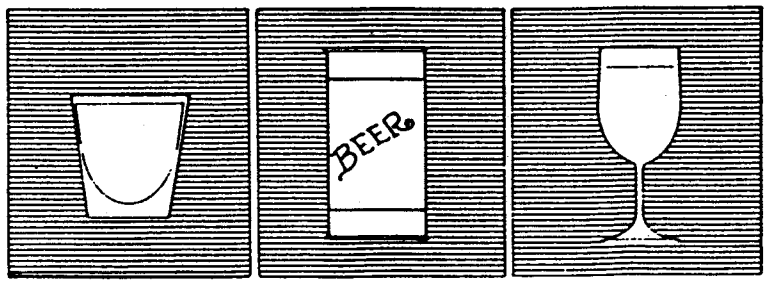
Based upon these assumed facts, it is my professional opinion that there is no way of predicting whether the defendant's blood alcohol concentration was above or below 0.100% at the time of the alleged offense. That is because he completed his last beer fifteen minutes prior to the time he was stopped. It generally takes from 30 to 60 minutes for complete absorption of an alcoholic beverage from the gastrointestinal tract. It is just as likely that Mr. Andrew's blood alcohol level was rising as it is that it was falling at the time of the arrest.

Very truly yours,
Harry B. Plotnick, Ph.D., J.D.

the fatal accidents in which only one car was involved. Nationally, thousands of people die each year in drinking-related accidents. If you drink even a small amount, your chances of having an accident are greater than if you were not drinking.

When alcohol enters your stomach, it goes directly into your bloodstream and then to all parts of your body. It reaches your brain in 20 to 40 minutes. Alcohol affects those parts of your brain that control your judgment, vision, and skill. As the amount of alcohol increases, your judgment, vision, and skill deteriorate. You have trouble judging distances, speeds, and movement of other vehicles. Finally, you have trouble controlling your vehicle.

The minimum blood-alcohol concentration at which a person is presumed to be under the influence of intoxicants in the State of Kentucky is .10%. Blood-alcohol concentration is determined by the amount of alcohol that is present in the blood and is measured by a breathalyzer or other chemical tests. "Under the influence" means that due to drinking alcoholic beverages a person has lost (to some degree) the clearness of mind and self-control that he would otherwise possess. Loss of judgment, vision, and skill may occur long before obvious symptoms of intoxication.



A "drink" means 1 oz. of liquor or a 12 oz. can of beer or a 4 oz. glass of wine

All three of the above contain the same amount of alcohol. Other beverages may contain different amounts.

The chart below shows estimated blood-alcohol levels for different body weights and number of drinks. This is a general rule for the average person; however, this may vary when measured by certified instruments.

Estimated % of Alcohol in the Blood by Number of Drinks in Relation to Body Weight

	Number of Drinks — % Blood-Alcohol											
Body Wt.	1	2	3	4	5	6	7	8	9	10	11	12
100 lb.	.03											
120 lb.	.03											
140 lb.	.02	.05										
160 lb.	.02	.04										
180 lb.	.02	.04										
200 lb.	.01	.03	.05									
220 lb.	.01	.03	.05									
240 lb.	.01	.03	.04									

HAS DRINKING MADE YOU AN ILLEGAL DRIVER?

Percent of blood alcohol can be estimated by counting your drinks?
(1 drink = 1 oz. 100 proof whiskey, or 12 oz. beer or 4 oz. 12% wine)

Under Number of Drinks and opposite Body Weight, find the % of blood-alcohol listed on the chart above. Subtract from this number the average % of alcohol "burned up" (1 drink per hour) since your first drink.

Example.....180 lb. man — 7 drinks in 4 hours
7 minus 4 = 3 drinks or .06% BAC

CAUTION: This is a mathematical calculation. Many factors influence the effect of alcohol on different people and the same person at different times.

If you plan to drink, you can control the effects by:

- **SPACING OUT YOUR DRINKS.** Do not drink more than one drink an hour. This keeps alcohol from building up in your blood.
- **KNOWING WHAT YOU ARE DRINKING.** People who mix drinks often put in more than one ounce. One cocktail may have as much alcohol as two drinks. Know how much is in your drink.
- **EATING FOOD.** Food in your stomach slows down how fast alcohol gets into your blood. Eat before you drink and while you are drinking.

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