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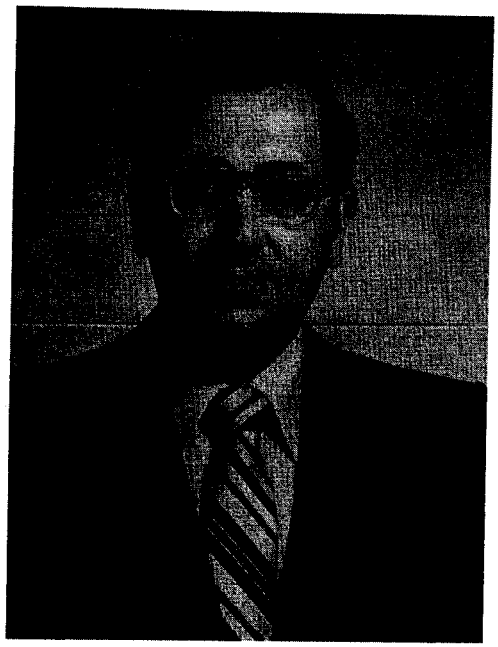
The Advocate



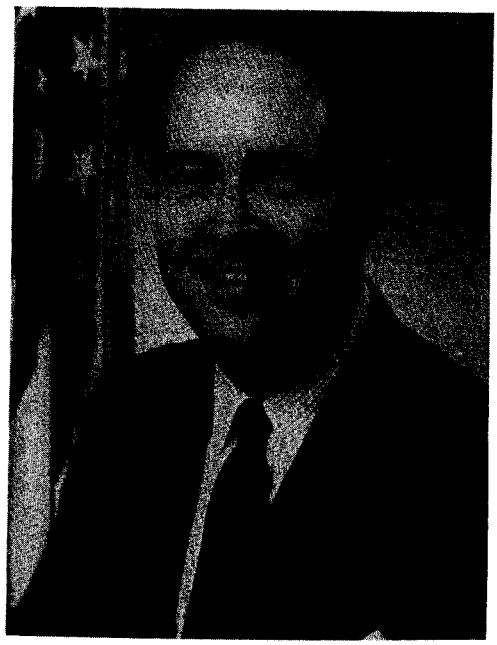
Frank E. Haddad, Jr.

1928 - 1995

A Kentucky Criminal Defense Benchmark Passes

Kentucky Criminal Justice Statesman

Competent Counsel in Capital Cases



Dick Thornburgh

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.

FROM THE EDITOR:

Frank E. Haddad, Jr.'s death should give all of us pause. To paraphrase John Donne's Meditation XVII, Frank's death diminishes us, because we are criminal justice professionals and humans, and therefore never send to know for whom the bell tolls; It Tolls For Thee.

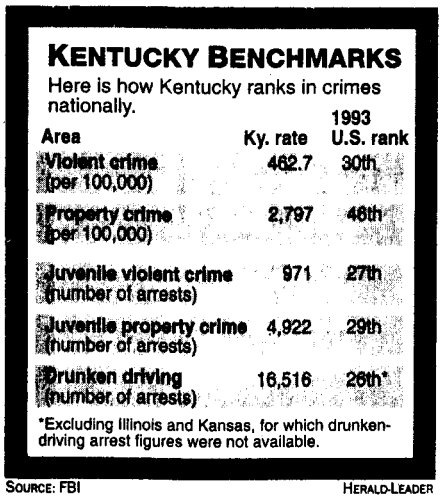
Dick Thornburgh & **Dan Burton** communicate to us substantial thoughts about the necessity of competent counsel in capital cases...a problem that Kentucky is too familiar with in light of its $5,000 maximum for capital cases.

Dr. Marilyn Wagner provides most helpful understanding of the inner workings of the mind through the window of the fast developing science of neuropsychology.

State Constitution. Today's criminal defense advocates are impotent without sophisticated state constitutional skills. **Rebecca DiLoreto** fills us in on the latest developments.

Evidence & Preservation Survey. *We need your help!* We are working to provide a top notch manual on Evidence & Preservation issues. Our second edition appeared as the January 1995 *Advocate*. As our customer, we need your evaluative thoughts on the Manual. Please take 5 minutes and return the enclosed survey.

Edward C. Monahan, **Editor**



KENTUCKY BENCHMARKS

Here is how Kentucky ranks in crimes nationally.

Area	Ky. rate	1993 U.S. rank
Violent crime (per 100,000)	462.7	30th
Property crime (per 100,000)	2,797	46th
Juvenile violent crime (number of arrests)	971	27th
Juvenile property crime (number of arrests)	4,922	29th
Drunken driving (number of arrests)	16,516	26th*

*Excluding Illinois and Kansas, for which drunken-driving arrest figures were not available.

SOURCE: FBI — HERALD-LEADER

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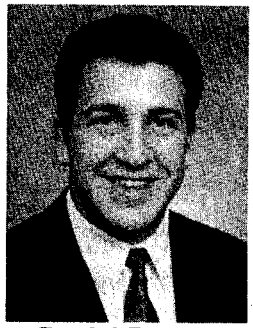
Dick Thornburgh

Incompetent Counsel in Capital Cases: A Root Cause of Delay in Habeas Corpus Proceedings



Daniel Burton

> "It's imperative that the courts have before them counsel who are competent in capital cases.... We do think it's essential that competent counsel be obtained in capital cases and it's very difficult to obtain them.... The records are huge, the expenditure of time is great. The lawyers who take these cases are burned out after taking just one whether they win or lose it. This is a very, very difficult area."
>
> Associate Justice Anthony Kennedy, U.S. Supreme Court, Testimony before the House Appropriations Subcommittee, 104th Congress, 1st Session (March 8, 1995).

A great deal of attention has been focused recently on delay in the enforcement of capital sentences in the United States. Legislative proposals have been debated at length in both the Congress and state legislatures as we seek to come to grips with frustrations caused by incessant appeals in our court system of cases where capital punishment has been imposed. It is the thesis of this article that incompetent counsel for indigent defendants in capital cases is the cause of much of this delay and is, in fact, one of the greatest shortcomings in the administration of the death penalty. It is not only unfair to the defendant, because it may deprive him or her of a viable defense, but it is also unfair to the American public. Lengthy delay in post-conviction review, to the extent it can be attributed to poor legal representation, comes at a great expense to the American people. Moreover, such delays considerably weaken the deterrent effects of capital punishment. The system's delay also raises the level of cynicism among the citizens of the United States who rely on government to enforce their country's laws. Ensuring competent counsel in capital cases is thus fundamental to the establishment of a fair and effective system of capital punishment.

Lengthy Habeas Corpus Delay

Congress enacted the first habeas corpus statute in 1867. Under that law, federal courts are permitted to review state and federal convictions and sentences to determine whether they violate the laws or Constitution of the United States. Many, if not all, of the states also have enacted some form of collateral review process for capital convictions.

A convicted inmate under a capital sentence has every incentive to use or abuse habeas corpus in order to keep his sentence from being carried out. That is precisely what is happening today. Post-conviction review proceedings are causing inordinate delays in the effectuation of capital sentences. According to its recent *Capital Punishment 1993 Bulletin*, the U.S. Department of Justice, Bureau of Justice Statistics reported that "[a]mong prisoners executed between 1977 and 1993, the average time spent between the imposition of the most recent sentence received and execution was 7 years and 10 months."[1]

The *Capital Punishment 1993 Bulletin* also reported that the 38 prisoners executed during 1993 had been under sentence of death an average of 9 years and 5 months. More than 100 persons under sentence of death on December 31, 1993 were sentenced prior to 1980. Specific instances of delay are even more shocking. One inmate in Florida, Thomas Knight, has been under a sentence of death for 20 years! These statistics clearly reveal an ineffective and unacceptable system in need of reform.

The United States Supreme Court has recognized the need for reform in this area. In 1988, Chief Justice William Rehnquist asked former Associate Justice Lewis Powell to chair a committee to study "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases in which the prisoner had or had been offered counsel."[2] The committee's report indicated that "our present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law."[3] The committee's stated goal, as explicitly set forth in its report, asserted that "[c]apital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, *and with the assistance of competent counsel for the defendant.* When this review has concluded, litigation should end."[4]

In its recent report entitled *Toward a More Just and Effective System of Review in State Death Penalty Cases* (the "ABA Report"), the American Bar Association (the "ABA") also recommended that restrictions be placed on the filing of successive federal habeas corpus petitions.[5] Under the ABA's proposal, after a single independent, objective review in state and federal collateral proceedings, most successive petitions would be dismissed summarily. Only under limited circumstances would the federal court entertain a subsequent claim. A system

allowing for "one bite out of the apple" can provide a fair, effective and efficient collateral review process for convicted capital defendants who have had the opportunity to be represented by competent counsel at all stages of the proceedings.

Incompetent Counsel is a Significant Factor in Habeas Corpus Delay

Incompetent counsel can clearly result in errors that are partly to blame for the "seemingly endless challenges" of capital sentences.[6] Although there is a dearth of statistics regarding the number of cases overturned as a result of incompetent defense counsel, the ABA Report asserted that "knowledgeable counsel at trial" would result in "fewer colorable claims of ineffective assistance of counsel and fewer of the reversals and retrials that now so frequently and substantially prolong the process."[7] Incompetent counsel simply increases the potential that capital convictions will be tainted by fundamental constitutional errors.

Incompetent counsel also results in capital cases being overturned later in the process than they would have been had competent counsel been present. Legitimate claims often surface only after lengthy and costly habeas corpus litigation because incompetent counsel failed to assert these claims and have them addressed at earlier stages in the proceedings.

Right to Effective Assistance of Counsel

The Supreme Court provided for an indigent criminal defendant's right to counsel in *Powell v. Alabama*[8] and *Gideon v. Wainwright*[9]. In *Strickland v. Washington*, the Supreme Court reaffirmed its prior holdings that the Sixth Amendment right to counsel "is the right to the effective assistance of counsel."[10] This right to effective assistance of counsel derives from the adversary model of criminal procedure. In such an adversarial system, in order to ensure justice, competent legal representation must be provided to defendants to counter the ample resources of the state. As the Supreme Court stated in *Strickland*,

> [t]hat a person who happens to be a lawyer is present at trial alongside the accused...is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[11]

However, even under *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential."[12] In order for a defendant to show ineffective assistance of counsel, he must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...."[13] Against this backdrop, it is easy to understand how even mediocre representation can satisfy the standard as set forth in *Strickland*. Judge Alvin Rubin may have put it best in his concurring opinion in *Riles v. McCotter*[14] when he remarked that the "Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. It requires representation only by a lawyer who is not ineffective...." By no means has *Strickland* created a level playing field in the arena of capital litigation.

Lack of Competent Counsel in Capital Cases

The current state of affairs demonstrates that the right to effective assistance of counsel, as interpreted by the courts, has not ensured truly competent counsel in death penalty cases. While there are some dedicated and able lawyers handling capital cases, the lack of competent counsel for indigent capital defendants is pervasive. Generally speaking, lawyers handling capital cases across the country are underskilled, unprepared and underpaid. This is an extremely tragic commentary on a process that involves the potential deprivation of human life. The ABA has concluded that "[p]ut simply, there are relatively few attorneys who are competent to try capital cases."[15]

Too often, lawyers are unskilled and untrained in capital case defense. In many instances, courts appoint lawyers with limited, if any, experience in criminal law to represent capital defendants. Oftentimes, appointed counsel have only recently become members of the bar. "Death sentences have been imposed in cases in which defense lawyers had not even read the state's death penalty statute or did not know that a capital trial is bifurcated into separate determinations of guilt and punishment."[16] The *National Law Journal* found that over half the defense counsel questioned in a survey acknowledged that they were handling their first capital trials when their clients, now on death row, were convicted.[17]

The problems associated with this lack of skill and training are compounded by the fact that the "defense of a capital case is perhaps the most technically difficult form of litigation known to the American legal system."[18] In its February 1989 *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, the ABA commented that at "every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high stakes, complex litigation."

A review of hundreds of death penalty cases, conducted by *New York Newsday*, found "wide-ranging problems in death penalty representation." Among these problems, the review found that court-appointed defense counsel often spend no more than a week preparing for capital trials that experts claim require from 400 to 1,000 hours of investigation and legal research.[19] Lack of preparation inevitably results in counsel overlooking critical facts and failing to recognize and assert critical claims.

One of the principal reasons for inadequate counsel in capital cases is the inadequacy of compensation and investigative resources available in such cases. Most public defender services do not receive sufficient funding to adequately staff the number of cases they must handle. Otherwise competent counsel become incompetent when they take on overwhelming caseloads. Lack of necessary funding also makes it difficult for such services to attract quality law students and lawyers to this type of work.

The ABA has found that "[i]n many jurisdictions, the state pays virtually nothing for representation in a capital case."[20] The lack of proper funding in this area makes it difficult to recruit experienced, quality appointed representation for capital defense. A 1988 study prepared for the Criminal Law Section of the Virginia State Bar and the Virginia General Assembly determined that the effective hourly rate paid to a survey sample of Virginia attorneys representing indigent defendants in capital trials was approximately $13.[21]

Moreover, the statutory fee limitations that are imposed by some states provide

that appointed counsel in capital cases can be paid as little as $1,000 for out-of-court work. Many states that do not impose such caps provide for extremely low hourly rates. Frequently, counsel must reach deep into their own pockets to cover costs relating to expert, investigative and other support services. It is only to be expected that many capital defense attorneys, to avoid personal financial disaster, will limit the time and resources that they put into a capital case, even when the case may require more. Many competent attorneys, who would represent capital defendants if it were not for the lack of reasonable compensation, do what they can to avoid such representation under the present circumstances. "The fee systems diminish not only the *quality* of capital representation, but also the *quantity* of available representation, because few lawyers are willing or able to accept capital cases."[22]

Conclusion

More needs to be done to ensure that competent counsel is provided in capital cases. We must work towards an adequately staffed public defender apparatus which includes attorneys who have experience handling capital cases, or which has the ability to look externally to find experienced help. Federally and state funded death penalty resource centers, to the extent that they are available, can provide a strong source of such outside assistance.

Reasonable compensation must also be provided to lawyers appointed to represent capital defendants. Statutory fee maximums should be raised so that lawyers are not financially restrained from taking the time needed to prepare a complete defense. Funding must be provided to cover the costs of expert, investigative and other support services. This is not to say that the American public should write a blank check to cover these costs or expenses to an unreasonable extent. This might cause even further unnecessary delays. One need look no further than the much publicized O.J. Simpson trial to find an example of what can happen when a seemingly bottomless pit of resources is available.

Simply providing more funding, however, will not by itself ensure competent counsel in capital cases. Guidelines must be established (1) to train counsel to become more competent, (2) to screen out truly incompetent counsel, and (3) to ensure that otherwise competent counsel do not become incompetent due to overburdensome workloads.

By taking steps necessary to ensure the presence of competent counsel in capital cases, we can reduce habeas corpus delay and help restore integrity to our system of capital punishment. Providing competent counsel will result in fewer constitutional errors and fewer colorable claims of ineffective assistance of counsel. Providing competent counsel also will result in critical claims being addressed earlier in the process, thereby reducing the extent of habeas corpus litigation. Providing competent counsel at all stages of the proceedings will further the establishment of a single, independent objective review in state and federal collateral proceedings, thus eliminating much of the piecemeal and protracted post-conviction litigation that frustrates the current process.

A collateral review process is necessary in capital cases, to be sure, as a means of ensuring that the Constitution and laws of the United States have not been violated. However, finality in that process is also necessary to ensure the American people that the penalties prescribed under their laws are being enforced with a reasonable measure of dispatch and certainty.

Footnotes

[1]It was not always thus. Consider the case of Guiseppe Zangara, who was executed in 1933 for the attempted assassination of President-elect Franklin D. Roosevelt in which Chicago Mayor Anton J. Cermak was fatally shot. Zangara pleaded guilty in state court on March 10, was sentenced to death, and was executed on March 20 -- an interval of 10 days! Kenneth J. Davis, *FDR: The New York Years 1928-1933* (Random House, 1985) at 427-435.

[2]Powell Committee Report, *reprinted in* 135 *Congressional Record* S13480, S13482 (1989).

[3]*Id.*

[4]*Id.* (Emphasis added)

The *Effective Death Penalty Act of 1995* (H.R. 729), a bill passed by the U.S. House of Representatives on February 8, 1995, incorporates many of the recommendations proposed by former Associate Justice Powell's committee. If enacted into law, H.R. 729 would not only reduce delay in the post-conviction review process but would also provide an incentive for states to ensure competent counsel in state post-conviction review proceedings. H.R. 729 would limit the time in which a state prisoner may file an application for a writ of habeas corpus to one year; however, if a state establishes certain enumerated procedures aimed at ensuring competent counsel in state post-conviction review proceedings, the proposed legislation would reduce that limit to 180 days for a prisoner in the state's custody who is subject to a capital sentence.

[5]*Task Force on Death Penalty Habeas Corpus, American Bar Association, Toward A More Just and Effective System of Review in State Death Penalty Cases,* 35 (1990) ("ABA Report").

[6]Stephanie Saul, "When Death Is the Penalty; Attorneys For Poor Defendants Often Lack Experience and Skill," *N.Y. Newsday,* Nov. 25, 1991, at 8.

[7]ABA Report, *supra,* at 6.

[8]287 U.S. 45, 53 S.Ct. 55 (1932).

[9]372 U.S. 335, 83 S.Ct. 792 (1963).

[10]*Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449, n.14 (1970)).

[11]*Strickland,* 466 U.S. at 685.

[12]*Id.* at 689.

[13]*Id.*

[14]799 F.2d 947, 955 (5th Cir. 1986).

[15]ABA Report, *supra,* at 55.

[16]Stephen B. Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer," 103 *Yale Law Journal* 1835, 1842 (1994).

[17]Marcia Coyle, et al., "Fatal Defense: Trial and Error in the Nation's Death Belt," 12 *National Law Journal* 30 (1990).

[18]Albert L. Vreeland, II, Note, "The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation," 90 *Michigan Law Review* 626, 645 (1991).

[19]Saul, *supra,* at 24.

[20]ABA Report, *supra,* at 61.

[21]Nancy Gist, "Assigned Counsel: Is the Representation Effective?," 4 *ABA Criminal Justice* 16, 18 (1989).

[22]Note, "The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials," 107 *Harvard Law Review* 1923, 1929 (1994).

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Daniel Burton is an associate of Kirkpatrick & Lockhart, Washington, D.C.

A Kentucky Criminal Defense Benchmark Passes

The Kentucky Bar Association and its membership suffered a terrible loss with the death of Frank Haddad, Jr. Frank served the Bar Association most ably on its Board of Governors, and as President. As Past-President, his counsel was routinely sought. The citizens of Kentucky also lost a tremendous advocate for the rights of those accused of criminal wrongdoing. Frank was a giant among the defense bar of the Commonwealth, and his counsel and assistance will be greatly missed.

- Stephen D. Wolnitzek, President
Kentucky Bar Association

Frank Haddad, Jr. was a skillful trial lawyer and tireless worker. Frank was a volunteer. He always accepted invitations to speak at seminars, especially those involving young lawyers, to share his knowledge and experience in the practice of law. He was unafraid to take the unpopular case and represent his client to the fullest. Not many Haddads are around these days and I will miss him.

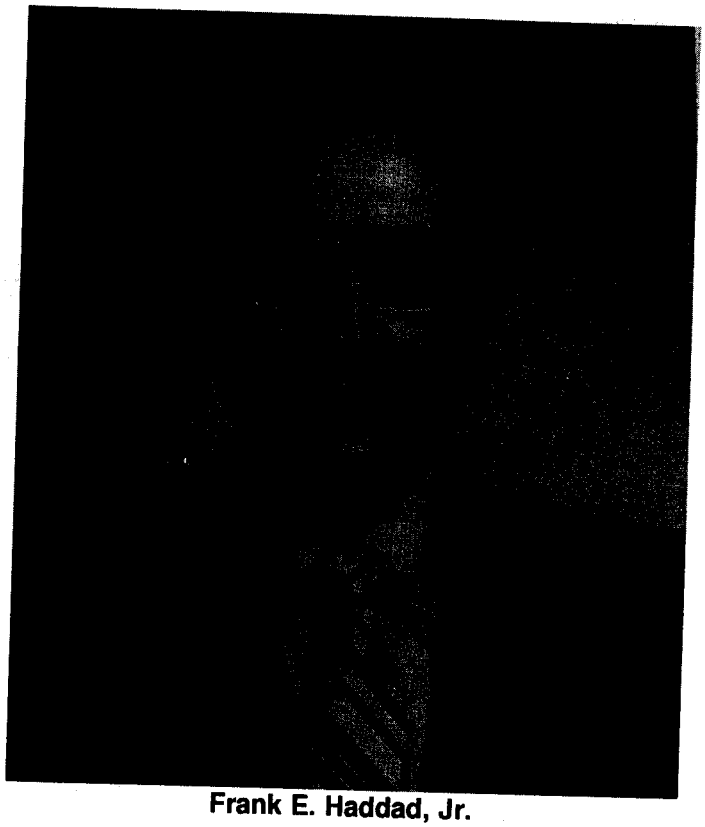
- Judge Henry R. Wilhoit, Jr.
United States District Court
Eastern District of Kentucky

I became acquainted with Frank Haddad, Jr. shortly after I graduated from law school and while I was clerking. It was suggested that I pay careful attention to Frank Haddad, Jr. during the course of a multiple defendant gambling trial. It took only a few days for me to realize that I was watching an artist at work, a man that painted a masterpiece during the trial.

Over the years, my admiration of Frank Haddad, Jr. grew. I continued to admire his artistry in the courtroom while learning to appreciate him as a friend. I particularly admired his keen sense of humor, one which was not affected by the battles in the courtroom.

I miss Frank Haddad, Jr. already.

- Judge Joseph M. Hood
United States District Court
Eastern District of Kentucky



Frank E. Haddad, Jr.

Frank E. Haddad, Jr.'s fame was only outstripped by his performance. He set a standard of practice as a criminal defense litigator that was marked by tenacious advocacy, rigorous resoluteness and indefatigable integrity. He was a master at the craft of representing clients whose freedom was at risk.

It was no accident that he was asked to serve as the first President of the *Kentucky Association of Criminal Defense Lawyers* in 1987. His stature was essential to the viability of that Association, and he graciously served a second year as leader of that Association. After all, he was a past President of the *National Association of Criminal Defense Lawyers*.

Frank never said no to requests for help from Kentucky's public defender program. He educated public defenders; lobbied in Frankfort, Kentucky and Washington, D.C. for just laws, and worked to insure that the Kentucky Rules of Criminal Procedure were fair. He was President of the *Kentucky Bar Association* from 1977-78, and President of the *Legal Aid Society* of Louisville from 1967-71. In recent time, he defended Roger Wells, Jr., Bill Collins and Bruce Wilkinson.

Frank E. Haddad, Jr. died Friday, April 7, 1995 at Louisville's Audubon Hospital as a result of complications of a heart ailment. He was 66. He lives on in the standard of practice he set for the representation of the accused, and the value of helping others in need.

Frank was the consummate lawyer. He had all of the attributes of the great lawyers. He was not afraid to take on the best the opposition had to offer. Frank was always well prepared and brought with him to trial the personality and charm so necessary to a litigator. He hated injustice but I never saw him display his anger in court. He had the ability to suppress hostility and to maximize its energy in advocating his client's case in a way that was always pleasing to the judge and the jury.

Frank was a complete lawyer. He could try any kind of case. He was a man of good humor. Few could match his ability to tell a story and to enhance the telling with gestures and mimicking.

Despite being an aggressive trial lawyer, he was a kind and gentle man. He was always willing to give his time to help others. Many of us, if we had a problem, would pick up the telephone and call Frank and he was always there to help us. He will be sorely missed. The likes of Frank Haddad, Jr. seldom come along but when they do they are never forgotten.

- William E. Johnson, Attorney at Law
Past-President of Kentucky Association of Criminal Defense Lawyers
Frankfort, Kentucky

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Frank Haddad, Jr. has appeared many times in our court and has been a great help to the court not only in the handling of cases before us but also as a member of the Lawyer Advisory Committee to the Sixth Circuit and in many other ways. He deserves great credit for his pro bono work. As a lawyer he has performed his role in the highest and best tradition of a noble profession.

- Chief Judge Gilbert S. Merritt
United States Court of Appeals
for the Sixth Circuit

❧ ❧ ❧ ❧ ❧

Frank Haddad played hard ball and he played to win, but he always played by the rules. Accepting victory with humility and defeat with dignity, he was truly a master of his profession.

- Karen K. Caldwell, Attorney at Law
Former United States Attorney,
Eastern District of Kentucky
Lexington, Kentucky

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Frank Haddad, Jr. was a giant in the criminal defense bar. Besides his legendary reputation, it was other things that drew me to him. He was always available to take a call, to answer a question, to give advice. He selflessly served for two years as President of KACDL, moving that organization from its infancy into a powerful part of the criminal justice system. He always was willing to teach at times when you knew he had little time to devote. And, he always had a sparkle in his eye as he talked of representing the citizen accused. He will be missed greatly.

- Ernie Lewis
Assistant Public Advocate
Department of Public Advocacy

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NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the ***KENTUCKY ASSOCIATION OF CRIMINAL LAWYERS*** *that one of our greatest lawyers, members and leaders is lost to us through the death of* ***FRANK E. HADDAD, JR.****; that the bar, at large, has suffered a huge loss, his associates a friend and example; and the people of Kentucky a great advocate in the arena of the rights of the individual which he so zealously strove to protect. In this spirit we pay tribute to* ***FRANK E. HADDAD, JR.***

ADOPTED UNANIMOUSLY BY THE BOARD OF DIRECTORS, KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS HELD ON SATURDAY, APRIL 7, 1995.

- Russell J. Baldani, President
Kentucky Association of Criminal Defense Lawyers

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My last extended contact with Frank occurred a few weeks before he was hospitalized. I had asked him to speak to my evening Criminal Procedure class at the U of L law school and, as always, he agreed without hesitation. Even though he was coming off one big case and heading into another, and was visibly tired, he was his usual candid, entertaining and informative self. He held the students' attention well past the end of the class period and stayed until the last question was answered sometime after 9:00 p.m. It was yet another example of his seemingly inexhaustible capacity to give of himself, to share his time and expertise. Although I believe those students realize how fortunate they were to have met and heard Frank during that class, I regret they will not have the privilege of practicing with him as so many of us have, and benefiting from his example as a dedicated, uncompromising advocate for those in need. He was top of the line in all respects, and the profession as well as the community will be the lesser having lost him.

- Daniel T. Goyette
Jefferson District Public Defender
Past-President, Louisville Bar Association

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In thinking about what I may say today, it became clear to me one thing. Frank Haddad, Jr. was not so great because he was superhuman. Frank Haddad, Jr. was so great because he was so human. He was a manifestation of and represented the very best that the human condition, the human spirit, and a human being has to offer. Faith, hope, love, charity, loyalty, wisdom, intelligence. You could just click them off. Every positive quality of the human condition, of the human spirit, he possessed - and in bundles. And, of course, courage. So many times, Frank would look at me and say, "Mr. Hillerich, they may carry me away, but they will never scare me away." And as we carry him away today, it should be unmistakably clear that no one, but no one, every scared him away.

- Gary R. Hillerich
Associate in the Haddad Law Office
Funeral Eulogy

Neuropsychological Evidence in Criminal Defense:
Rationale and Guidelines for Enlisting an Expert

What Traditional Psychology Misses

The use of psychological evidence in criminal cases is well-established. Clinical psychologists are frequently called upon to testify to the identity and expected consequences of mental disorders such as major depression, schizophrenia, and personality disorders, and how they or conditions of chronic stress, physical abuse, substance abuse, etc., may affect an individual in such a way as to precipitate criminal behaviors, diminish intent or responsibility, or mitigate the circumstances of a criminal act.

Traditionally, the emphasis has been on the impact of these "functional" or emotional factors on issues of criminal behavior, with little regard to mental disorders that result from brain dysfunction. Among these organic disorders are disease entities such as tumors, cerebrovascular disease, and progressive dementias, but they also include acquired brain injury from perinatal insults and other circumstances that lead to mental retardation, effects of chronic alcoholism, and traumatic brain injuries.

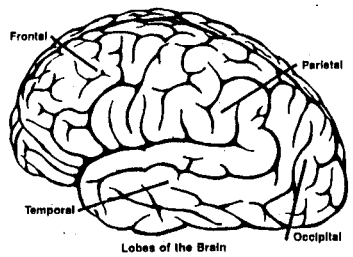
Can the same degree of behavioral control demanded from individuals who are without functional psychopathology be expected of someone who has suffered a traumatic brain injury, has had surgery for removal of a tumor, or has a seizure disorder? As it turns out, it cannot.

The presence of a "traditional" functional disorder is not necessary for the conditions of "mental illness" to be met. Brain damage independently affects behavior in unique, significant, and oft-times dramatic ways, and in areas of behavior highly correlated with criminal behavior. Brain dysfunction, regardless of the source, may result in impairments of memory, language, cognition, or behaviors that have significant implications for criminal-legal standards of behavior.

However, most psychologists are neither trained or experienced in the nature of brain injury and its complex effects on behavior. The result is frequently that factors of brain injury are not considered in forensic evaluations.

The relevance of brain damage to criminal behavior has only recently emerged as an area of forensic attention (Anchor, et al., 1985; Hall & McNinch, 1988). There is now a large body of research in the neurobehavioral literature associating specific brain lesions with specific behavioral effects (Lezak, 1995).

Only in the past 10 years or so has research accumulated which establishes a connection between brain damage and the increased risk of violent behavior due to the impairing of inhibition of violent impulses (Volavka, Martell & Convit, 1992). High base rates of brain damage have been found in violent offenders versus nonviolent offenders (Langevin, et al., 1987; Martell, 1992; Nachshon & Denno, 1987; Silver & Yudofsky, 1987). Similarly, a study of both adult and juvenile offenders (Lewis et al., 1986) found evidence of brain damage on neuropsychological testing in the majority of death row inmates.



Lobes of the Brain

The Relationship Between Brain Damage and Criminal Behavior

That the brain is a very complex organ for processing information and generating behavior is not a point of argument. How it goes about doing this has constantly been debated and modified to take into account new information in neuroanatomy, neurophysiology and neuropsychology.

Although there are many aspects of brain function and dysfunction that are unresolved, it is generally agreed that the brain processes information in several different ways. Some areas of the brain are very specifically associated with certain behaviors. For example, the hypothalamus, a small structure on the basal surface of the brain, controls drive states such as hunger, thirst, and sexual behavior. Damage to the hypothalamus, depending on the specific area lesioned, can result in compulsive eating leading to obesity, in severe changes in sexual drive, or in any number of other abrupt changes in appetitive states.

Some behaviors recruit multiple areas of the brain, integrated into a functional, collaborative network. Motor responses require several areas of the cortex, subcortical structures known as the basal ganglia, and the cerebellum.

Finally, the brain is thought to function as a whole during certain complex activities, such as the processes we typically label as "thinking."

There are several brain structures and groups of structures that, when damaged, generate behaviors which may be associated with criminal behavior:

Temporal Lobe. The temporal lobe is a major division of the brain's lower lateral surface (cortex) in both the left and right hemispheres. Among the cognitive functions it mediates are memory and learning. It is also part of a large system of brain structures known as the limbic system which regulates emotional behavior. Damage to the temporal lobe can be associated with distinct loss of memory for events, impaired comprehension of language, and with aggressiveness and violent behavior (Devinsky & Bear, 1984; Stone, 1984). Seizure activity in the temporal lobe can be associated with very sudden onset of such violent behavior.

Limbic System. In addition to the temporal lobe, the limbic system consists of brain structures below the surface of the brain. These subcortical structures are involved in the more primitive aspects of emotional behavior. Damage to any of a variety of limbic system structures may result in marked aggression or violence, hypersexuality, or rage reactions. Sudden loss of control over aggressive tendencies, such as in explosive episodes, with minimal stimulation, can be found in limbic system lesions.

Frontal Lobe. This is the large, most anterior area of each hemisphere's surface that lies behind the frontal bone. It is considered to be the most complex structure in the brain; it is not fully developed until adolescence, and it is involved in the mediation of judgment, self-regulation of behavior, executive control (planning, organization of behavior), and personality. Damage to the frontal lobes is associated with gross disturbances in judgment and reasoning, disinhibition of impulses (*e.g.*, aggressive and sexual), and in personality changes. Frontal lobe damage is especially relevant to criminal-legal situations, as it impairs those cognitive functions associated with an individual's self-regulation of behavior, which may result in irrational decision making, the inability to inhibit behavioral impulses (sexual or aggressive), or the inability to accurately evaluate the consequences of one's behavior through reasoning. A finding for decreased criminal responsibility in a defendant requires that the individual lack the capacity to *appreciate* the criminality of the action (involves comprehension and judgment), and be unable to *conform* his conduct (self-regulation of impulses).

Damage to other areas of the brain, while not directly related to aggressive behavior or impulse control, can nevertheless greatly impair a defendant's cognitive capacity relevant to state of mind forensic issues such as competence, responsibility, and intent. The cognitive capacity required to comprehend court proceedings, make reasonable decisions, and recall court proceedings from one day to the next depends upon intact brain function.

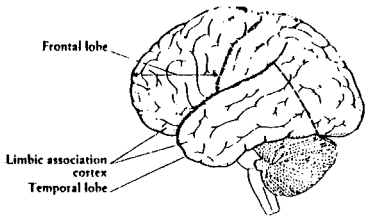
Martell (1992b) noted that in one instance of criminal cases converted to civil status due to a finding of incompetence, 70% of the defendants were found to have documented brain damage. Both specific and diffuse damage to any number of structures in the brain could result in the interruption of those functions. In addition, cognitive impairment secondary to brain injury may be raised as a mitigating factor during the sentencing phase of a trial.

Prognosis and Treatment Potential in Brain Damage

A separate but related issue involves how the presence of brain damage, once established, relates to the disposition of the defendant. Relevant factors to be considered in disposition are questions of possible progression of brain damage with resultant behavior deterioration, prognosis for recovery or improvement, and whether management or treatment of impaired behaviors is possible.

Some brain damage is progressive. It will worsen over time, with aberrant behaviors and cognitive deficits intensifying and additional impairments emerging. Progressive dementias, including Alzheimer's disease, the sequelae of tumors, and the cognitive effects of chronic alcohol abuse show such progressive deterioration of functioning.

Other conditions, such as traumatic brain injury, the sequelae of neurosurgery, and developmental insults, are stable, *i.e.* the cognitive and behavioral damage will not deteriorate further, and depending on the length of time since injury, may improve slightly or significantly. Even in cases of damage associated with prolonged alcoholism, abstinence typically leads to moderate improvements in functioning.



Depending on the etiology of the damage, some behavioral and cognitive dysfunctions are treatable, or at least partially reversible. Violent or aggressive episodes triggered by seizure activity may be able to be controlled by anticonvulsant medication. Generalized behavior dyscontrol is amenable to both medication (typically tegretol) and behavioral management strategies in structured environments. At least on some occasions, individuals can be taught alternative responses to aggression via a structured regimen that assumes the problem-solving role for the individual, with eventual improvement in self-regulation. Mere abstinence from drugs and alcohol can have a profound positive effect on impulse control, as these substances are notorious for their intense disinhibiting effects on persons with brain injury.

The Unique Role of Neuropsychology

The burgeoning area of neuroimaging techniques has greatly enhanced medicine's ability to detect areas of CNS damage. Yet, the physical identification of structural neural damage does not, of itself, establish the emotional, cognitive, or behavioral effects of such damage that relate to criminal behavior, nor does it address the level of impairment.

Neuropsychology is that branch of psychology whose focus is on these very behavioral consequences. A neuropsychology expert is able to present quantifiable, normative data about the relationship between physical aspects of brain damage and its behavioral consequences, in sharp contrast to traditional reliance on professional opinions deduced merely from clinical interview impressions, or mental status examinations. Neuropsychological evaluations utilize a large variety of psychological tests to assess the degree of disruption in cognitive functions, both in isolation (as in focus of attention), and collectively, in more complex behaviors, such as in abstract reasoning or the planning and organization of activities.

These tests and test batteries have been extensively researched and validated. In some cases, neuropsychological assessment has even been shown to be more sensitive as a detector of brain damage than neuroimaging (Barth, et al., 1986).

Traditional clinical psychology practice does not address the issues of behavioral consequences specific to brain damage. Until recently, few training programs in clinical psychology included any instruction in neuropsychology. Likewise, patients and defendants historically have not been evaluated from the perspective that brain damage might be a factor in their behavior. As a result, many diagnoses of functional disorders given were unwarranted, or behavior was not associated with mental illness at all. In many cases, brain injury takes a subtle initial toll, especially when the damage is incurred at an early age. Later, problematic behaviors may be attributed to other causes. The advantage of a neuropsychological evaluation over traditional psychological testing is that *both* functional and organic bases for behavior are investigated.

Neuropsychology is in a unique position to detect and track changes in an individual's cognitive capacity. In cases where change in neurobehavioral status is anticipated, baseline and serial testing may be conducted to verify such changes in status to evaluate the potential for restoration to competence, according to *Jackson v. Indiana* (1972).

Determining When A Neuropsychologist As Expert Is Warranted

Not all criminal cases demand a neuropsychologist as expert. The neuropsychological evaluation is more time consuming than traditional psychological assessments, and therefore more expensive. Limited availability of neuropsychoIgists also preclude their inclusion in many cases. However, there are some conditions under which investigating from a neuropsychological perspective is strongly indicated. In order to determine if the use of a neuropsychological expert is desirable in a specific case, the following questions should be posed concerning the defendant:

1) Were there any developmental events (perinatal or childhood in origin) that (could have) involved CNS injury, whether or not they were considered important at the time? Thinking about brain injury has changed so drastically over the past two decades, that it is not unusual for fairly significant CNS events to have been discounted and ignored (Lezak, 1995).

2) Have there been any events leading to loss of consciousness or disorientation, even if hospitalization did not occur? Motor vehicle accidents, incidents of physical abuse, assaults, and combat injuries are good examples of these events.

3) Is there any documented disorder involving brain damage (*e.g.*, head injury, stroke, seizures, Alzheimer's Disease, mental retardation)?

4) Is there a history of significant alcohol abuse or polysubstance abuse for several years or more?

5) Is the criminal behavior completely out of character for the defendant?

6) Is there a pattern of problems with impulse control, memory dysfunction, or violent behavior?

Positive responses in any of the above categories would suggest proceeding to involve a neuropsychologist who would then determine if there is sufficient reason to suspect the presence of brain dysfunction in a defendant and whether a neuropsychological evaluation is indicated.

The Evaluation Process

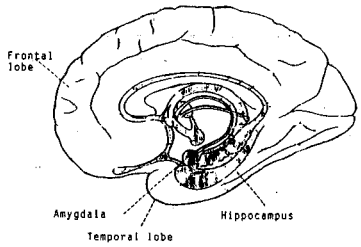
Once a neuropsychological evaluation is deemed appropriate, it will be necessary to provide the neuropsychological expert with the following documents prior to the evaluation:

1) Medical records documenting any injury involving the CNS, significant illness, and/or ER visit;

2) School records of grades, testing, behavioral problems;

3) Records of any previous psychological problems, testing, or treatment;

4) Psychosocial history.



Medial view of the right hemisphere, showing some limbic system structures.

The expert will also find helpful information describing the crime, the defendant's behavior at the time of arrest, the defendant's account of the crime or their actions of the day in question, the defendant's behavior prior to the crime from the perspective of a family member or someone familiar with them, and access to a close significant other for possible additional interview.

Clearly define for the expert, in advance if possible, what issues in the defense the neuropsychological evidence will address (*e.g.*, competence, intent, or diminished capacity). Neuropsychological evaluations usually consist of a core of tests used in all cases, and additional tests that are included to more comprehensively evaluate any areas of cognition that are especially critical to the issues in question.

Knowledge of the defendant's history, the criminal behavior in question, and the legal issues specific to the case will aid the neuropsychological expert in determining the total content of the evaluation.

Expect to need to discuss the assessment findings with the expert at length, both to help clarify for the attorney the significance of the results for the specific issues of the case, and because the nature of the findings themselves might precipitate additional issues to be investigated that the expert might not be in a position to anticipate.

In cases where a finding of incompetence is expected, and potential for restoration to competence is an issue, serial assessments should be anticipated and tentatively scheduled.

With positive findings, the expert may recommend the addition of neuroimaging or another medically-related assessment, if they are not already in the record. There are dual purposes for this. First, it could (but will not always) corroborate the neuropsychological evidence and thereby strengthen the conclusions of the behavioral sequelae (see Barth et al., 1986). Secondly, many circumstances of brain injury require medical intervention, and if not previously detected, would need to be medically evaluated for the benefit of the defendant.

Considerations

The relative newness of this type of expert testimony may precipitate some questions regarding admissibility and relevance. There is case law both supporting (*People v. Wright*, 1982) and challenging (*GIW Southern Valve Co. v. Smith*, 1985; *Executive Car & Leasing v. DeSerio*, 1985) the neuropsychologist's role as a medical expert in cases of brain injury.

In addition, neuropsychological assessment is open to the same challenge as is leveled at traditional psychological evidence. Namely, that this type of testing, *i.e.* indirect measurement of behavior, is not at parity with physical medical evidence. However, a neuropsychology expert can provide quantitative as well as qualitative evidence regarding the presence, specific nature and consequences of brain injury, describe its relevance to legal standards of behavior, provide a prognosis for improvement or further deterioration, and in some cases, suggest options for treatment or management of negative behaviors.

There is no physical medical evidence that can address these dimensions. For this reason, it is not surprising that the discipline of forensic neuropsychology is fast gaining status and acceptance as a source of valid and compelling evidence which speaks uniquely and directly to the difficult questions connected to criminal proceedings.

Cases

Executive Car & Truck Leasing v. DeSerio, 468 So.2d 1027 (Fla. App. 4 Dist. 1985).

GIW Southern Valve Co. v. Smith, 471 So.2d 81 (Fla. App Dist 1985).

Jackson v. Indiana, 406 U.S. 715 (1972).

People v. Wright, 648 P. 2d 665 (CO. 1982).

References

Anchor, K.N., Rogers, J.P., Solomon, G.S., Barth, J.T., Peacock, C., & D.A. Martell (1985) "Fundamentals of Disability Determination and Rehabilitation: A Higher Ground for the Applied Neurobehavioral Sciences." *American Journal of Trial Advocacy* 8:337-375.

Barth, J.T., Gedeon, D.A., Sciara, A.D., Hulsey, P.H., & K.N. Anchor (1986) "Forensic Aspects of Mild Head Injury." *Journal of Head Trauma Rehabilitation* 1:63-70.

Devinsky, O., & D. Bear (1984) "Varieties of Aggressive Behavior in Temporal Lobe Epilepsy." *American Journal of Psychiatry* 141:651-656.

Hall, H. V., & D. McNinch (1988) "Linking Crime-Specific Behavior to Neuropsychological Impairment." *The International Journal of Clinical Neuropsychology* 10:113-122.

Langevin, R., Ben-Aron, M., Wortzman, G., Dickey, R., & L. Handy (1987) "Brain Damage, Diagnosis and Substance Abuse Among Violent Offenders." *Behavioral Sciences and the Law* 5:77-94.

Lewis, D.O., Pincus, J.H., Feldman, M., Jackson, L., & B. Bard (1986) "Psychiatric, Neurological and Psychoeducational Characteristics of 15 Death Row Inmates in the U.S." *American Journal of Psychiatry* 143:838-845.

Lezak, M.D. *Neuropsychological Assessment*, 3rd Ed (New York, 1995).

Martell, D.A. (1992a) "Estimating the Prevalence of Organic Brain Dysfunction in Maximum-Security Forensic Patients." *Journal of Forensic Sciences, JFSCA* 37:878-893.

Martell, D.A. (1992b) "Forensic Neuropsychology and the Criminal Law." *Law and Human Behavior* 16:313-336.

Nachshon, I., & D. Denno "Violent Behavior and Cerebral Hemisphere Function." In S. A Mednick, T. E. Moffitt & S. A. Stack (eds.) *The Causes of Crime: New Biological Approaches* (New York, 1987).

Silver, J.M., & S.C. Yudofsky (1987) "Aggressive Behavior in Patients with Neuropsychiatric Disorders." *Psychiatric Annals* 17:367-370.

Stone, A. (1984) "Violence and Temporal Lobe Epilepsy." *American Journal of Psychiatry* 141:1641.

Volavka, J., Martell, D.A., & A.J. Convit (1992) " Psychobiology of the Violent Offender." *Journal of Forensic Sciences JFSCA* 37:237-251.

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Child Sex Abuse

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

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Here I describe the characteristics of parents who promulgate, both directly and through their children, false sex-abuse accusations in the context of child custody disputes. Such an accusation provides a rejected parent with an extremely powerful vengeance and exclusionary maneuver that will attract the court's attention and often bring about immediate action by the court. Because mothers, much more commonly than fathers, are likely to initiate such accusations, I will refer to the accuser as the mother in my general comments about the accuser. However, it is important to appreciate that fathers may also initiate such accusations, and this has become more common in recent years as a backlash to such mothers' accusations.

There is no such thing as the typical personality pattern of a parent who initiates and promulgates a false sex-abuse accusation. There are, however, indicators that may prove useful for examiners attempting to ascertain whether the accusation is true or false. I list 30 indicators here. There is no sharp cut-off point that can be utilized to determine whether a particular person is indeed promulgating a false sex-abuse accusation. Rather, the greater the number of indicators that the accuser is promulgating a false accusation, the greater the likelihood the accusation is false.

The reader will note that some of these criteria require joint interviews. I routinely conduct joint interviews between the accuser and the accused. I have found this can be extremely valuable for "smoking out the truth." I do not routinely conduct joint interviews with the accused and the child. I only reserve the right to do so if I consider such interviews indicated.

1. Childhood History of Having Been Sexually Abused Herself

Mothers of children who have actually been sexually abused are more likely to have been sexually abused themselves in childhood than mothers who provide false accusations. Some (but certainly not all) mothers who have been sexually abused in childhood may create situations that enhance the likelihood that their own children will become sexually abused as well. Sometimes the mother's abuse has resulted in sexual inhibition problems, result ing in their viewing sex as disgusting. They may then facilitate (consciously or unconsciously) their children serving as sexual substitutes in order to protect themselves from involvement in sexual acts. Furthermore, sexual abuse tends to repeat itself down the generations, so that a mother who was sexually abused in childhood is more likely to have a child who is sexually abused. It is as if sexual abuse "runs in the family."

However, mothers who have been sexually abused as children may still contribute to a false sex-abuse accusation. For such mothers, sex may be very much on their minds and they may tend to interpret the most frivolous and inconsequential activities as strong indicators of bona fide sex abuse. They may be ever vigilant for signs of sexual molestation and this preoccupation may fuel such misinterpretations. Furthermore, there may be psychological "unfinished business" regarding their reactions to their own childhood sexual experiences. They may still harbor ongoing animosity toward the perpetrator and may readily displace such anger onto any man who provides them justification for such release. And a rejecting husband may serve such a purpose well.

Accordingly, this indicator is a difficult one to apply. What I am basically saying is that of mothers who were sexually abused as children, there is one category whose accusations are more likely to be true, and another category whose accusations are more likely to be false. The mothers in the first category serve as models and facilitators, and the mothers in the second category are projectors and vengeance accusers. In contrast, mothers who have not been sexually abused as children do not satisfy this criterion.

2. History of Poor Impulse Control

Mothers of children who are genuinely abused are not typically impulsive or have a history of such behavior. In contrast, mothers of children who falsely accuse are more likely to have a history of impulsivity, and the false accusation may be one manifestation of such impulsivity. Rather than weighing carefully the pros and cons of the "evidence," they impulsively call in authorities and investigators. Typically, they do not call first the child's father, the person who might give them some information regarding whether or not the abuse took place. Rather, they quickly call a lawyer, child protection services, or other external authority who can be relied upon to take action quickly. Or they may impulsively bring their child for an emergency appointment with an examiner who they know (or sense) beforehand will confirm the abuse. Such a mother is especially likely to seek an examiner who is designated a "validator" or "child advocate." In contrast, mothers whose children have been genuinely abused are not as likely to be impulsive, especially with regard to the aforementioned manifestations of impulsivity related to dealing with the accusation.

3. Exposure of the Child to Sex-Abuse "Educational Material"

We are living at a time when young child-

ren are being increasingly exposed to an ever wider variety of sexual materials. Not only do we have sex-abuse prevention programs in schools, but there are sex-abuse videotapes, audiotapes, and coloring books. Parents, as well, have been provided with a wide variety of materials, the purpose of which is to help protect their children from being sexually abused. Not surprisingly, children may incorporate information from these materials into their sex-abuse litanies.[1] In contrast, children who promulgate false sex-abuse accusations are less likely to have been subjected intensively to such indoctrination, although they may have been exposed to some of these materials, so ubiquitous are they. However, their descriptions are less likely to incorporate this educational material and much more likely to include actual events.

4. Moralism

Mothers who provide false sex-abuse accusations may be excessively moralistic. They may condemn vehemently normal and healthy manifestations of childhood sexuality and may even see sexuality in normal encounters that are not basically sexual. They tend to project their own unacceptable sexual impulses onto others and condemn in others what they wish to basically disown in themselves.

Sometimes the mothers were not particularly moralistic prior to the divorce, but progressively became so. This is especially the case in situations in which the father has involved himself with a new woman friend. Typically, such mothers begin by vehemently claiming that the children should not be permitted to sleep over at the father's home when the new woman friend is there (even though sleeping behind a locked bedroom door). If this maneuver does not prove successful, they may claim sexual improprieties (*e.g.*, undressing in front of the children, exposing the children to sexual encounters, etc.) when there is no evidence for such. Such exposures, if they did indeed take place, would generally be considered improprieties and manifestations of injudiciousness. However, in the climate of hysteria in which we are living, they easily become labeled "sexual molestation" and even sexual abuse. The next step, of course, is direct accusations of parent-child sexual abuse, either by the father or his woman friend.

Mothers of children who were genuinely abused are less likely to exhibit such vehement moralism. An inquiry into their religious background and beliefs does not usually reveal the presence of excessive and/or sexual moralistic attitudes.

5. The Utilization of Exclusionary Maneuvers

Exclusionary maneuvers are commonly utilized by mothers in the course of programming their children to be alienated from their fathers. These often antedate a child custody dispute and may even antedate the separation. A sex-abuse accusation may represent the final culmination of these maneuvers. It is especially likely to be utilized when earlier exclusionary maneuvers prove inadequate and/or futile. Often these methods of exclusion are part of a program of over-protectiveness, and the mother may consider herself to be more deeply committed to the children than others who are viewed as not taking proper precautions.

Prior to the separation, the mother may have distrusted the father when assuming a wide variety of normal father involvements, *e.g.*, bathing the children, swimming with them, taking them alone to the park, etc. After the separation she may not tell him about medical appointments, PTA meetings, school recitals, sports events, and other activities involved in the children's lives. A favorite exclusionary device is the telephone answering machine that screens all his calls, but allows all other callers to be put through. The greater the number of such maneuvers, the greater the likelihood the sex-abuse accusation is false. Mothers of children who have been genuinely abused are less likely to provide such a history.

6. The Presence of a Parental Alienation Syndrome

Some children involved in a child custody dispute develop a parental alienation syndrome (see indicator #13 for the accusing child). A sex-abuse accusation may arise in the context of a parental alienation syndrome. Generally, it is a late development. Usually, there is a whole series of previous exclusionary maneuvers that have not proven successful in bringing about removal of the father, and the sex-abuse accusation emerges as a final attempt to remove him entirely from the children's lives. In contrast, a parental alienation syndrome is less likely to be present when the accusation is true.

7. The Timing of the Accusation

Sex-abuse accusations that arise in the context of a child custody dispute have a higher likelihood of being false. After all, a sex-abuse accusation is a very powerful maneuver for wreaking vengeance and excluding a hated spouse.

There certainly are children who have been sexually abused while their parents have been disputing for their custody. However, it is likely that the abuse took place *before* the custody dispute and even before the separation. If the divulgence of the abuse was the cause of the separation, then this would be an argument that the accusation is true. In contrast, a sex-abuse accusation that originates *after* the separation--especially after the development of a parental alienation syndrome--argues strongly for a false accusation. It is for this reason that it is crucial that the examiner inquire regarding the exact timing of the accusation, and this should be part of the inquiry into the details of the evolution of the sex-abuse accusation.

8. Direct Programming of the Child in the Sex-Abuse Realm

Some parents who promulgate a false sex-abuse accusation in their children involve themselves in direct programming. Sometimes the child is instructed to deliberately lie, but more often the programming is subtle and the child is gradually brought to the point of actually believing that the sex abuse took place, when it did not. Some parents make audiotapes of the child's accusation and a detailed study of these recorded interchanges between the parent and the child will often enable an examiner to ascertain whether this process has taken place. Under such circumstances the examiner does well to listen for the presence of leading questions and other coercive maneuvers. Sometimes the child will unwittingly give information regarding this indicator, *e.g.* "My mother said it happened" and "My mother said my father put his wee-wee into my pee-pee.

In contrast, mothers of children who have actually been sexually abused do not show evidences for such programming. They recognize that the child can be relied upon to give a credible story and does not need to be reminded and rehearsed before interviews with evaluators and other examiners.

9. Exaggeration of the First Abuse Allegation

Mothers of children who are genuinely abused are often very reluctant to admit the abuse--may go for weeks, months, and even years denying it--both to themselves and others. Some are passive-dependent and are fearful of divulging the abuse lest they be beaten or otherwise subjugated or penalized by their husbands. Others may recognize that disclosure of the sex abuse may destroy the family and even bring about the incarceration of the accused. They would rather live in a situation in which their children are being sexually abused than suffer the breakup of the marriage and the attendant effects on the whole family. There may be a long time-lag, then, between the first disclosures and the bringing of the abuse to the attention of others.

In contrast, mothers of children who falsify are very quick to report the abuse, especially to those who can cause pain, embarrassment, and other difficulties for the accused. There is no period of denial or down-playing the abuse. Rather, the opposite is the case: they exaggerate every possible indicator and vociferously describe it in detail to anyone who will listen.

10. Failure to Notify the Father Before Reporting the Alleged Abuse to Outside Authorities

Typically, mothers who falsely accuse do not inform the father first in order to get input from him regarding whether the abuse occurred. The most common reason given: "He would deny it anyway." Typically, such mothers will first call an attorney, a "sex abuse expert," or child protection services. Many will use state laws to justify their taking immediate action. All 50 states now have laws requiring immediate reporting of sex abuse to proper authorities. These laws notwithstanding, there are millions of mothers who are not reporting their husbands, especially when there is nebulous or inconsequential evidence.

Furthermore, there is no law that prevents the mother from first confronting the husband under such circumstances. There is no law that prevents her from discussing the matter with him and deciding not to report if the two together believe that there was no abuse.

In contrast, mothers of children who have been genuinely abused are less likely to reflexively report the husband to outside authorities. Rather, they are more likely to deny, delay, and confront him first in the hope that the behavior will be discontinued.

11. Enlistment of the Services of a "Hired Gun" Attorney or Mental Health Professional

Mothers of children who falsify are quite likely to engage the services of attorneys and mental health professionals who they

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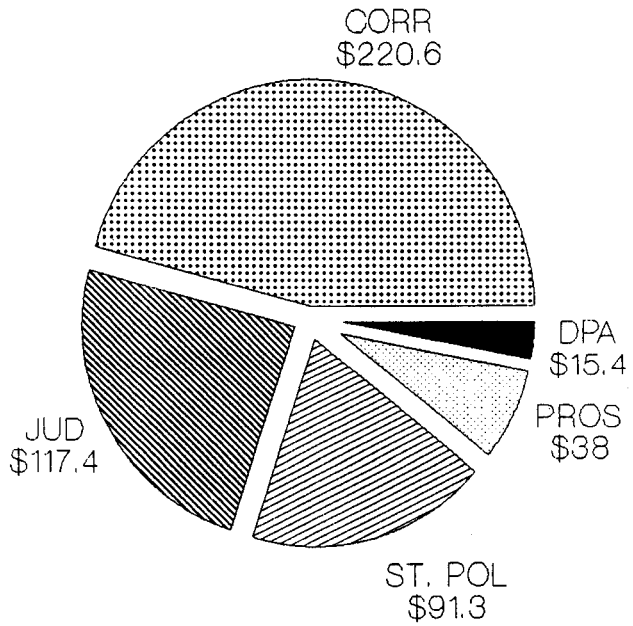

DOLLARS ARE IN MILLIONS

know in advance will support their position quite zealously. They generally will resist the court appointment of an impartial examiner, because they recognize that such an evaluator may appreciate that they are fabricating or delusional and will therefore not provide them with support for their campaign of vilification and exclusion. In contrast, mothers of children who are genuinely abused are not as likely to be so resistant to the court appointment of an impartial evaluator, but they may on occasion be so.

12. History of Attempts to Destroy, Humiliate, or Wreak Vengeance on the Accused

Mothers who promulgate false accusations are generally quite desirous of destroying, humiliating, and wreaking vengeance on the accused. They relish the thought of incarcerating the accused, even for years. They are so bent on destroying the accused that they may blind themselves to the fact that such incarceration may cut off permanently all the funds they are receiving.

Mothers of children who are genuinely abused are less likely to want to wreak such vengeance on the perpetrator, but they certainly may on occasion. Although mothers of children who have been genuinely abused may on occasion be very vengeful, my experience has been that their retaliatory rage is only a small fraction of that which one sees in the false accuser. They are generally not blind to the economic effects of the accusation. In fact, as mentioned, it is a factor that plays a role in the downplaying of bona fide sexual abuse by many mothers.

13. Exaggeration of Medical Findings Related to the Sex Abuse

Mothers of children who have been genuinely abused are not likely to exaggerate the medical findings, although some may occasionally do so. In contrast, mothers who provide false accusations are likely to exaggerate enormously the most minor medical findings and consider them proof of sex abuse. Typically, such mothers bring to their pediatrician's attention the most minor genital lesions with the hopeful expectation that proof of sex abuse will be provided. It is not uncommon for such mothers to make a pilgrimage to a series of doctors in the hope of providing such confirmation.

14. Failure to Appreciate the Psychological Trauma to the Child of Repeated Interrogations

Mothers of children who falsify sexual abuse are often so enraged that they blind themselves to the psychological trauma to the child of repeated interviews. Typically, they embark on a campaign of interrogations by physicians, psychologists, child protection evaluators, "validators," lawyers, prosecutors, detectives, and any other individual who would be willing to interview the child in order to "validate" the abuse. They appear to be oblivious to the fact that subjecting their children to such a parade of interrogations may bring about formidable psychological disorder. Often, the symptoms that are generated from the interrogations then become "proof" of the abuse.

In contrast, mothers of children who have been genuinely abused are more sensitive to such trauma, and they will do everything possible to protect their children from such a parade of interrogations.

15. The Acquisition of a Coterie of Supporters and Enablers

Typically, mothers who promulgate false sex-abuse accusations collect a coterie of individuals who provide them with support for their accusation. I often refer to these people as "enablers," a term borrowed from Alcoholics Anonymous. These are the people who provide psychological and often financial and physical support to alcoholics and other drug abusers. Although the term is new, the phenomenon is well known in that most forms of psychopathology involve the participation of enablers.

Unfortunately, many enablers are therapists, especially women who are "treating" or "counseling" the accusing mother. Commonly, the sisters, mothers, aunts, and other relatives of the accusing mother will jump on her bandwagon and participate in the campaign of denigration of the father that, of course, filters down to the children. Because the sex-abuse accusation most often has a very weak foundation, the accuser needs these supporters in order to protect the whole "house of cards" from falling down.

Although mothers of children who have been genuinely abused may need some support from close friends and relatives, they rarely sweep them up in a wave of denigration and ask for their assistance in destroying the father. Nor do they need continual "validation" required by falsely accusing mothers, especially when information comes their way that may make them intermittently question whether the abuse really took place.

16. Deep Commitment to the Opinions of the "Experts"

Conducting child sex-abuse accusations is "open territory" for would-be evaluators. To the best of my knowledge, there are no state certifications for the discipline of "sex-abuse evaluator." Even in the fields of psychiatry and psychology, the fields in which one would think that such evaluations should take place, there is no formal subspecialty specifically designated for such evaluations. At this point sex-abuse evaluations are being conducted by a wide variety of individuals from numerous disciplines. Furthermore, the knowledge, training, and experiences necessary to conduct such examinations have not been clearly defined.

There are many individuals, however, who were never trained in any of the formal mental health disciplines and who are self-appointed sex-abuse evaluators, "validators," "child advocates," and "therapists." Typically, those who foster false sex-abuse accusations are quick to designate as "experts" such unqualified individuals and typically do not ask pertinent questions about their background and degree of expertise. The fact that the "expert," after a 15 to 30-minute interview, was willing to come to the conclusion that the child had been sexually abused, does not seem to shake the mother's faith in her expertise. The fact that the expert was willing to write on her (his) chart that the father was the abuser--without even the need to make a telephone call to him (let alone see him)--does not shake such a mother's faith in the evaluator's ability.

Mothers of children who are genuinely abused do not generally have such commitment to experts, whether they be in the mental health or legal professions.

They recognize the reality of the situation, namely, that there is a wide variety of individuals, of varying degrees of expertise, ranging from the most incompetent to the most competent. They are likely to ask questions about the training and experience of those who are examining their children and take a more discriminating attitude with regard to their receptivity to the findings of the professionals who evaluate their children.

17. Little If Any Over Revelation of the Abuse

Mothers of children who are genuinely abused are often very ashamed of the fact that their husbands have sexually abused their children. Such shame will manifest itself early in the course of the interviews with the examiner. They will often say that such abuse reflects negatively on the family's reputation and that they have done everything possible to keep the abuse a secret from friends, relatives, and neighbors.

In contrast, mothers who are angry and support false sex-abuse accusations, because they recognize that they can be a powerful weapon in a custody dispute, generally exhibit little if any shame over revelation of the abuse. Some of these mothers relish the opportunity to discuss the abuse on nationally syndicated television. Commonly, they call newspapers (sometimes anonymously) in order to publicly humiliate their husbands, and they relish the thought of friends and neighbors reading articles about his depravity.

18. Attitude Toward Taking a Lie Detector Test

This indicator does *not* relate to the *results* of a lie detector test. Rather, it relates to the receptivity or lack of receptivity to taking the test. Mothers who genuinely believe that the abuse took place are likely to be receptive to taking the test. Those who are consciously fabricating are often quite reluctant to take the test and may utilize their attorneys to protect them from pressure to do so. They recognize that the test (even though not foolproof) may reveal their duplicity. Mothers who are delusional, however, who actually believe that the abuse took place (when there is absolutely no evidence that it did), may offer to take a lie detector test, so convinced are they that their accusation is a valid one.

Unfortunately, such mothers, if they do take a lie detector test, may "pass" because they are so convinced that the abuse occurred that they exhibit none of the physiological changes that manifest lying.

My experience has been that the question of a lie detector test being administered for the accused is quite common. In contrast, it is rare for the question to be raised for the accuser. This is a strange phenomenon. All agree that the tests are not foolproof, and most appreciate that there are many courts in which the findings of such tests will not be admitted into evidence. It would seem, therefore, that these drawbacks of the test would apply equally to both the accused and the accuser. In practice, they do not. Rather, the falsely accused person almost routinely requests the tests, its drawbacks notwithstanding. A person suspected of being a false accuser, however, is rarely asked to take a lie detector test.

19. Impaired Appreciation of the Importance of Maintenance of the Child's Relationship with the Accused

Mothers who promulgate false sex-abuse accusations are often so angry that they do not appreciate the importance of the child's relationship with the father. They do everything to sever it (often completely) and may view the sex-abuse allegation as a potent mechanism for attaining this goal. Such mothers welcome every legal authority who will support their exclusionary maneuvers, of which a sex-abuse accusation is one of the most powerful.

Mothers of children who have been genuinely abused are more likely to be appreciative of the father-child relationship, but at times may very well want to discontinue it.

20. The Use of the Code Term "The Truth" to Refer to the Sex-Abuse Scenario

Mention has already been made of the pilgrimage embarked upon by mothers who promulgate false sex-abuse accusations, a pilgrimage whose purpose is to find out "the truth" regarding whether or not the sex abuse really occurred. Actually, they are not looking so much to find out the truth as they are looking for people to substantiate that the sex abuse took place. Those examiners whose version of the truth is that no sex abuse took place are ignored. In contrast, they proclaim fidelity to an ever-growing parade of examiners who will verify that the real truth is that the abuse took place. It is not long before the term "the truth" becomes the code-term for the sex-abuse scenario and the child learns this important meaning of the words "the truth." When this point is reached, the child can be relied upon to go into the interview and tell the examiner "the truth." The child knows then that this is the person to whom the litany of sex abuse is to be recited.

In contrast, mothers of children who are genuinely abused do not repeatedly teach their children that the label they should use to refer to their description of the sex abuse is "the truth." Nor is there the use of the shibboleth "the truth" to refer to the description of the sexual abuses.

21. Hysterical and/or Exhibitionistic Personality

Mothers who fabricate a sex-abuse allegation are often hysterical and/or exhibitionistic.[2,3,4] They typically exaggerate situations, "make mountains out of molehills," and will take every opportunity to broadcast the abuse. They see danger in situations in which others are not concerned.

Accordingly, they are likely to see sexual molestation in situations that others consider a normal activity. The child who touches her vulva is not seen as engaging in normal behavior, but must be doing so because she was sexually abused. Hysterics usually need an audience, and this is one of the factors operative in their acquiring a coterie of enablers. They can be very exhibitionistic and dramatic and may do extremely well on the witness stand. Such skilled actresses have sent many men to jail. Judges may be taken in by their tears and their theatrical skills. One of the hallmarks of the hysteric is the quick turnoff when there is no longer an audience. (No actress can possibly play to an empty theater.) Accordingly, once off the witness stand, and in the privacy of a small room off the courtroom, they will gloat over the success of their performances. In contrast, mothers whose children have been genuinely abused are far less likely to be exhibitionistic or histrionic about the abuse.

22. Paranoia

The presence of paranoia not directly related to (or focused on) the abuse increases the likelihood that the sex abuse has become part of a paranoid system.[5,6,7] In such cases the conscious fabrication element is less likely than the delusional in bringing about the sex-abuse allegation. Women who were not paranoid prior to the separation may become so, especially after prolonged exposure to divorce and/or custody litigation. The paranoid system may include only her husband and his extended family, and a sex-abuse accusation may become incorporated into the delusional

system that centers on him. As is true of paranoid symptoms, the delusions are not changed by confrontations with reality, no matter how compelling.

I believe that paranoia is much more common than generally appreciated. And this is especially the case when the paranoia confines itself to a relatively narrow area, such as a delusional accusation of child sex abuse. A hint that paranoia may be operative may be provided in a situation in which the mother refuses to allow previously trusted extended family members to supervise the visitation. She may come to believe that the father can easily convince these friends and relatives to allow, facilitate, or engage themselves in sexual activities with the child(ren). And these may be people who by no stretch of the imagination would involve themselves in such behavior.

In contrast, mothers of children who have been genuinely abused are less likely to be paranoid. I am not stating that they are immune from this disorder, only that they are less likely to exhibit its manifestations.

23. Enthusiastic Commitment to the Data-Collection Process

Evaluators, especially "validators," and police investigators, generally find mothers who are promulgating a false sex-abuse accusation to be extremely cooperative regarding collecting evidence. When their allegedly abused child is with them, their notebooks are ever at hand to ensure that they will be able to jot down verbatim anything the child says that might provide "proof" that the sex abuse took place. Such children have never enjoyed such attention and have never been taken so seriously. Of course, these maneuvers only entrench in the child's mind the notion that the abuse has taken place and reinforces the expression of comments supporting the allegation. Mothers who have previously been otherwise somewhat relaxed and loose now become obsessive-compulsives with regard to keeping these notebooks. The books are brought to the "validator's" and/or therapist's office in order to ensure that this material becomes focused on in the course of treatment. The presence of such a notebook is one of the hallmarks of the false accuser.

In contrast, mothers of children who have been genuinely abused are rarely as compulsive with regard to such note-taking. They are usually confident that the child herself (himself) will provide the necessary facts.

24. Corroboration of the Child's Sex-Abuse Description in Joint Interview(s)

Mothers of children who falsify will often provide clues to the child in joint interview in order to ensure that the child provides the "right" story and will tell "the truth." Similarly the child may "check" with the mother, through side glances and gestures, in order to be sure that he (she) is telling the correct story. Obviously, examiners who do not conduct joint interviews will not be able to avail themselves of this important indicator.

Mothers of children who are genuinely abused are less likely to send such messages and their children are less likely to need them in joint interview. In this situation the mothers need not provide clues and reminders; they can rely upon the child to provide a credible description.

25. Impaired Cooperation During the Course of the Evaluation

Mothers of children who are genuinely abused wish to cooperate fully with an impartial examiner, and they in no way impede his (her) investigations. In contrast, mothers who are supporting false accusations are likely to be obstructionistic because they recognize that the more information the examiner has, the more likely he (she) will conclude that the allegation is false. Such obstructionism may manifest itself by refusal to sign permission slips necessary for the review of reports by other examiners, cancellation of appointments, refusal to participate in joint interviews, lateness, and other maneuvers designed to impede and even bring about a discontinuation of the evaluation.

In contrast, mothers of children who were genuinely abused are much more likely to be cooperative in the course of the evaluation. They have nothing to hide and hope that the evaluator will find o ut exactly what has happened.

26. Belief in the Preposterous

Falsely accusing mothers are likely to accept as valid the most preposterous statements made by the child. They are similar to the many overzealous evaluators in this regard, and the two together often involve themselves in a *folie-deux* relationship. They utilize as well the wide variety of rationalizations that serve to make credible the incredible. They selectively ignore information that might shed doubt on implausible and even impossible elements in the sex-abuse scenario. They pathologize the normal and utilize the mechanism of retrospective reinterpretation in order to justify the sex-abuse accusation.

In contrast, true accusations do not generally include extremely implausible and even impossible elements, so there is nothing preposterous for such accusing mothers to believe. There is no need to "suspend disbelief" or provide mind-stretching rationalizations in order to justify ludicrous or impossible elements in the allegation.[8]

27. Expansion of the Sex-Abuse Danger to the Extended Family of the Accused

Whereas previously the extended family of the accused father may have had reasonably good relationships with the accusing mother, following the promulgation of a false sex-abuse accusation, the father's parents and other members of his extended family somehow become tainted. On occasion I have seen them to be directly accused as on-site facilitators and/or direct participants in the sexual abuse. Accordingly, they will fight vigorously against the appointment of these extended family members as visitation supervisors. Sometimes these mothers do not go so far afield. They just distance themselves from these family members and consider them to have been indirect facilitators of the abuse. In contrast, when there has been genuine sex abuse, the parents of the abusing father may be viewed as sympathetic by the abusing mother and may be brought in to be of assistance.

28. Duplicity in Aspects of the Evaluation Not Directly Related to the Sex-Abuse Accusation

One way of assessing the honesty of an interviewee regarding a sex-abuse accusation is to determine whether there have been duplicities exhibited in other areas of the evaluation, not directly related to the sex-abuse accusation. A person who is dishonest in one area is more likely to be dishonest in another. This relates to the ancient legal principle:

Falsus in uno, falsus in omnibus (Latin: False in one [thing], false in all [things]). Accordingly, mothers of children who falsely accuse are more likely to exhibit dishonesty in other aspects of the evaluation; whereas mothers of children who are genuinely abused are less likely to exhibit duplicity in areas of the evaluation unrelated to the sex-abuse issue.

Concluding Comments

As mentioned, there is no minimum number of criteria that must be satisfied before one can conclude that an accusation of sex abuse is false. The greater the number of indicators satisfied, the greater the likelihood that the accusation is a false one. However, and this is an important point, the decision cannot be made simply on the basis of the criteria applied to the accuser. One must consider, as well, other data, especially data derived from the examinations of the alleged child victim and the alleged perpetrator. In fact, in some cases of a false accusation only a few of these criteria for the false accuser may be satisfied. However, each of them may be satisfied very strongly, and there is a wealth of data from other sources that support the conclusion that the accusation is false.

Discussion

My purpose here has been to present the criteria I have found useful for differentiating between true and false sex-abuse accusations in the context of child- custody disputes. I have not addressed myself to the criteria that I utilize in other situations in which such an accusation has been made, *e.g.*, boarding schools, residential treatment centers, nursery schools, day-care centers, elementary schools, and babysitting situations. I have also not addressed myself to belated accusations of sexual abuse in which an adult woman accuses her elderly father of having sexually abused her in childhood. Although some of the differentiating criteria presented here may be applicable to these other situations, many of them are not. In these other situations, other criteria are often necessary. Elsewhere[9] I have elaborated upon the criteria I have presented here for the child-custody situation as well as those that I use for making this differentiation in the situations not focused on in this article. In recent years, objective evaluations of child sex abuse have become increasingly difficult because of the high level of hysteria that often surrounds such evaluations.[10] Such hysteria often beclouds objectivity and obviously interferes with the examiner's ability to conduct reliable assessments. It is my hope that the differentiating criteria presented here will serve as useful guidelines for making this important differentiation.

As mentioned, these criteria are only meaningful when all three parties are evaluated, namely, the accused, the alleged child victim, and the accuser. Sometimes, this may necessitate a court order in order to ensure that all three of these parties are involved in the evaluation. Without such participation, the evaluation is likely to be seriously compromised. Many of these criteria require joint interviews (at the examiner's discretion). Furthermore, the application of these criteria should not be considered to represent a total evaluation. Other sources of information are important to consider before coming to a final conclusion. As mentioned, one wants to trace in detail the evolution of the sex-abuse accusation from the very first time the accuser began to entertain the notion that the sex abuse was taking place. Medical reports are important to review as well as the reports of previous examiners. Comparing present statements with past statements can be extremely useful for determining whether certain criteria are satisfied, *e.g.* variation, the presence of preposterous elements, and "programming" by overzealous parents and examiners.

FOOTNOTES

[1]Krivacska, J.J. (1989), *Designing Child Sex Abuse Prevention Programs*, Springfield, Illinois: Charles C. Thomas, Publisher.

[2]Blush, G.J. & Ross, K.L. (1987), *Sexual Allegations In Divorce: The Said Syn-drome*, Conciliation Courts Review, 25(1): 1-11.

[3]Underwager, R.C. & Wakefield, H. (1990), *The Real World of Child Interrogations*, Springfield, Illinois: Charles C. Thomas Publisher.

[4]Wakefield, H. & Underwager, R. (1988), *Accusations of Child Sex Abuse*, Springfield, Illinois: Charles C. Thomas Publisher.

[5]G.J. Bush and K.L. Ross, *Sexual Allegations In Divorce: The Said Syndrome*, Conciliation Courts Review, 25(1): 1-11 (1987).

[6]Underwager, R.C. & Wakefield, H., 1990, *The Real World of Child Interrogations*, Springfield, Illinois: (Charles C. Thomas Publisher, 1990).

[7]H. Wakefield & R.C. Underwager, *Accusations of Child Sex Abuse* (Charles C. Thomas, Publisher 1990).

[8]R.A. Gardner, *True and False Accusations of Child Sex Abuse: A Guide for Legal and Mental Health Professionals* (Creative Therapeutics 1992).

[9]*Id.*

[10]R.A. Gardner, *Sex Abuse Hysteria: Salem Witch Trials Revisited* (Creative Therapeutics 1991).

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Every new truth which has ever been propounded has, for a time, caused mischief; it has produced discomfort and oftentimes unhappiness; sometimes disturbing social and religious arrangements, and sometimes merely by the disruption of old and cherished associations of thoughts.... And if the truth is very great as well as very new, the harm is serious.

- Henry Thomas Buckle,
English Historian

28 Indicators for The Accuser

1. Childhood History of Having Been Sexually Abused Herself
2. History of Poor Impulse Control
3. Exposure of the Child to Sex Abuse 'Educational Material'
4. Moralism
5. The Utilization of Exculsionary Maneuvers
6. The Presence of a Parental Alienation Syndrome
7. The Timing of the Accusation
8. Direct Programming of the Child in the Sex Abuse Realm
9. Exaggeration of the First Abuse Allegation
10. Failure to Notify the Father Before Reporting the Alleged Abuse to Outside Authorities
11. Enlistment of the Services of A 'Hired Gun' Attorney or Mental Health Professional
12. History of Attempts to Destroy, Humiliate, or Wreak Vengeance on the Accused
13. Exaggeration of Medical Findings Related to the Sex Abuse
14. Failure to Appreciate the Psychological Trauma to the Child of Repeated Interrogations
15. The Acquisition of a Coterie of Supporters and Enablers
16. Deep Commitment to the Opinions of the 'Experts'
17. Little if Any Over Revelation of the Abuse
18. Attitude Toward Taking a Lie Detector Test
19. Impaired Appreciation of the Importance of Maintenance of the Child's Relationship with the Accused
20. The Use of the Code Term 'The Truth' to Refer to the Sex Abuse Scenario
21. Hysterical and/or Exhibitionistic Personality
22. Paranoia
23. Enthusiastic Commitment to the Data Collection Process
24. Corroboration of the Child's Sex Abuse Description in Joint Interview(s)
25. Impaired Cooperation During the Course of the Evaluation
26. Belief in the Preposterous
27. Expansion of the Sex Abuse Danger to the Extended Family of the Accused
28. Duplicity in Aspects of the Evaluation not Directly Related to the Sex Abuse Accusation

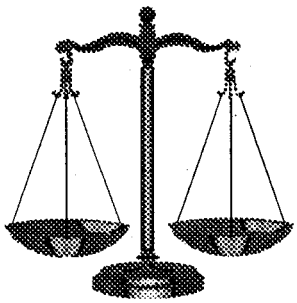
31 Indicators for The Child

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

The New Federalism/State Constitutionalism: Is It Alive and Well in Kentucky?



- ♣ LOCKSTEP
- ♣ INTERSTITIAL
- ♣ PRIMACY
- ♣ DUAL RELIANCE

"The New Federalism," a phrase born of the writings of Justice William J. Brennan, describes what some call the "state constitutional renaissance" or "state law movement."[1] What is state constitutionalism? How do appellate courts analyze state constitutions, when considering whether to recognize individual liberties at the state level which are above the federal floor? What do recent Kentucky cases tell us about how we can best advocate for our clients at the trial and appellate level? Is the new federalism alive and well in Kentucky? This article will try to answer those questions in an admittedly summary format.

What is State Constitutionalism?

State constitutionalism or the new federalism was heralded by Justice William J. Brennan as a remedy to the "rights-contracting Burger era."[2] In the 1960's, the sense that the states' bill of rights were insufficiently protective of individual liberties fueled the Warren Court to interpret the four key criminal justice Bill of Rights provisions more broadly with respect to the protections provided and to ultimately apply the Bill of Rights to the states through the due process clause of the Fourteenth Amendment.

In the 1970's, the pendulum swung in the opposite direction and the more punitive-minded Burger Court back-tracked on the Court's recognition of constitutionally protected individual liberties, within the context of criminal jurisprudence. Challenging that political environment, Justice William J. Brennan, Jr. encouraged a return to federalism. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U.L. Rev. 535 (1986). Innovative defenders of the accused pulled out their dust covered copies of their state constitutions (or turned to their as yet untouched state constitutional sections of the Criminal Law of Kentucky) and began arguing under Sections 2, 3, 4, 7, 10, 11, 12, 13, 14, 16, 17, 18 19, 20 and 26.

How Do State Courts Analyze State Constitutions When There Is A United States Supreme Court Decision on an Analogous Bill of Rights Provision?

Hon. Stewart F. Hancock, Jr., retired Associate Judge of the New York State Court of Appeals describes the four models for appellate review of state constitutional law issues in ***The State Constitution, A Criminal Lawyer's First Line of Defense***, 57 Albany Law Review 271 (1993).

Lockstep. The "Lockstep" model presumes that a state court will simply interpret the state constitution in accord with the United States Supreme Court's interpretation of the analogous provision.

Interstitial. The "Interstitial" or "Supplemental" model first considers the United States Bill of Rights. If the interest raised is protected under the federal constitution as currently interpreted by the United States Supreme Court, the analysis stops there. If the right has gone unrecognized then the state court takes the time to define the state provision. This approach has been criticized as being too reactionary and not leading to a consistently developed body of state constitutional jurisprudence.[3]

Primacy. In contrast, the "Primacy" model considers the state provision first in the light of state history, state law and distinctive state policies or attitudes. If the right is protected under state law, the analysis is complete without reference to the federal constitution. The "Primacy" model implicitly recognizes that historically, state constitutions (having preceded the Bill of Rights) were our founding parents' first line of defense. It also has the advantage of saving the United States Supreme Court needless review of cases that can be solely decided under state law.

Dual Reliance. The "Dual Reliance" model analyzes and decides the issue using both constitutions. Though it has the appearance of being the most thor-

ough, such an approach is criticized for rendering one advisory and one real opinion.

Within these four different models, Judge Hancock recognizes that there is also the interpretivist versus noninterpretivist dichotomy.

Interpretivist. The interpretivist focuses on textual differences between the state provision and its federal counterpart.

Non-Interpretivist. The non-interpretivist approach examines "any preexisting state statutory or common law defining the scope of the individual right in question, the history and traditions of the state in its protection of the individual right, and any identification of the right as being one of peculiar state or local concern."[4]

These models serve as an aid in understanding and giving description to an individual court's analysis or a particular case. The model which affords state courts and state constitutions the most respect is the primacy model. It allows state courts to insulate their decisions from federal review when a plain statement is included in the opinion that the state court is relying on its state constituiton and any federal cases are only being cited for comparison but not as controlling the state court's decision. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1981). An excellent resource for state court decisions adhering to the primacy model can be found in Barry Latzer's work *State Constitutions & Criminal Justice* (Connecticut, 1991). Though each court may vary a great deal in their allegiance to one approach or the other (even within a single opinion), the four models offer the creative advocate another tool or method of persuasion.

The Lessons Behind Recent Kentucky Cases

Three fairly recent Kentucky Supreme Court cases display the Court's reliance on the Lockstep model, the Dual-Reliance model, and the Primacy model.

In the most recent case of ***Commonwealth v. Cooper***, ___ S.W.2d ___, 42 K.L.S. 28 (Ky., 2/16/95) (not final), the issue as framed by the majority was "whether Section Eleven of the Constitution of Kentucky or a viable doctrine of the common law requires suppression of a confession coerced or improperly obtained by private parties." The Court quickly and squarely held that "[p]revailing decisional law answers firmly in the negative [*Peek v. Commonwealth*, Ky., 415 S.W.2d 854 (1967)], and is in accord with controlling precedent interpreting the Constitution of the United States. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)." In holding that state action is necessary for a violation of the right against self-incrimination under Section Eleven, the majority was emphatic, "...our prior decisions are clear and we reiterate that Section Eleven of the Constitution of Kentucky and the Fifth Amendment to the Constitution of the United States are coextensive and provide identical protections against self-incrimination." *Id.*

The dissenting opinion by Justice Leibson, joined by Chief Justice Stephens and Justice Stumbo is equally emphatic. "This Court has relied on *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), which is not and should not be considered dispositive of the issues in this case. *Colorado v. Connelly* is factually inapposite in critical particulars. Further, as I will document, it turns on different constitutional principles than those that should control our decision here." *Commonwealth v. Cooper*, *supra*. Justice Leibson writes that our state compulsory self-incrimination clause is drawn from a common-law heritage and the text of other state constitutions, not the federal bill of rights. Most significantly, he offers a different interpretation of *Colorado v. Connelly*.

> Actually the opinion simply restates the longstanding principle that rights guaranteed by the Federal Constitution only apply in state prosecutions through the Fourteenth Amendment, which requires that "state action" be involved in the violation of such rights. All that *Colorado v. Connelly* really holds is that unless there is state action there is no federal question. *Cooper*, *supra*.

Justice Leibson goes on to state that the real issue should be not what the United States Supreme Court would say if asked to decide whether Cooper was protected by the Federal Constitution against the Commonwealth's use of his statements at trial. Rather, "[i]t is whether the law of our state, Kentucky, as expressed in the constitutional mandate in Section Eleven of the Kentucky Constitution and our cases interpreting Kentucky's self-incrimination privilege, is limited to official misconduct or extends to intolerable behavior used by private persons to extract a confession." Justice Leibson advocates for a Primacy model. Though he is in the minority, it is significant that two justices voted with him.

One of the dissenters in *Cooper*, Chief Justice Stephens, wrote the opinion in ***Hunter v. Commonwealth***, 869 S.W.2d 719 (Ky. 1994). The Court reversed Hunter's conviction and death sentence. Using the Dual-Reliance model, in discussing the failure of the trial court to grant a continuance, Justice Stephens first discussed the law under the federal constitution and then set forth the law under the state constitution.

The danger to the defense in a case like *Hunter* is that it could be argued that the opinion lacks the language required by *Michigan v. Long*, *supra* to protect the Kentucky Supreme Court's decision from federal scrutiny. To avoid scrutiny by the United States Supreme Court, the state court must "[m]ake clear by a plain statement in its judgement or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the Court has reached." *Id.*

In ***Eldred v. Commonwealth***, ___ S.W.2d ___, 41 K.L.S. 11 (Ky. 10/27/94), a non-death penalty case, Eldred's conviction was also reversed, in part, because of the trial court's failure to grant a continuance. Unlike *Hunter*, *supra*, Justice Stumbo in *Eldred*, did not refer to the federal constitution in discussing the issue. Neither, did she refer directly to the state constitution but, rather, only cited supporting Kentucky case law. The primary case cited, *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), in turn, refers neither to the state nor the federal constitution. *Eldred* and *Snodgrass* also rely on RCr 9.04.

Eldred provides stronger constitutional analysis in its determination that Eldred's convictions for murder and arson violate Section Thirteen of the Kentucky Constitution. Justice Stumbo is careful to state that the issue the Court is deciding is not *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), which was overruled by *United States v. Dixon*, 509 U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

Using the Primacy model, she sets forth the Kentucky Supreme Court's two-part process under Section Thirteen, as first enunciated by the Court in *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321 (1990). Recognizing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) as the floor for double jeopardy rights, the first step

Pennsylvania State Constitution Cases

Commonwealth v. Lloyd, 567 A.2d 1357 (Pa. 1989) (Defendant access to victim psychiatric records. Whether the statements of the prosecution's witnesses would have been helpful to the defense is not a question to be determined by the prosecution or by the trial court. They would not be reading the statements with the eyes of a trial advocate engaged in defending a client." Under confrontation clause of Pa. Const., Appellant denied right to confrontation when attorney denied access to victim's psychotherapeutic records. Right to inspect mandated by compulsory process clause of Pa. Const. Art. 1, § 9).

Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989) (Pen registers cannot be used by law enforcement authorities without an order based on probable cause).

D'Elia v. Pa. Crime Comm'n, 555 A.2d 864 (Pa. 1989) (Immunity, statutory use and derivative use immunity fell short of constitutional protections against self-incrimination therefore, witness before Crime Commission could refuse to testify).

Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) (Dog sniff search. Dog may be deployed to sniff for presence of narcotics if: 1) police are able to articulate reasonable grounds for believing that drugs may be present in place they seek to test; and 2) police are lawfully present in place where canine sniff's conducted).

Commonwealth v. Evans, 512 A.2d 626 (Pa. 1986) (Right to impeach).

Commonwealth v. Thomas, 507 A.2d 57 (Pa. 1986) (Use of uncounseled conviction to enhance sentence).

Commonwealth v. Goldhammer, 489 A.2d 1307, *rev'd sub nom. Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985) (per curiam) (Double jeopardy).

Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983) (Standing).

Commonwealth v. Turner, 454 A.2d 537 (Pa. 1982) (Impeach by silence).

Commonwealth v. Henderson, 437 A.2d 367(Pa. 1981) (*Miranda* for juveniles. "Interested Adult Rule," "the administering of *Miranda* warnings to a juvenile without providing an opportunity to that juvenile to consult with a mature, informed individual, concerned primarily with the interest of the juvenile, [is] inadequae to offset the disadvantage occasioned by his youth.").

Commonwealth v. Bussey, 404 A.2d 1309 (Pa. 1979) (*Miranda* waiver).

Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979) *cert. denied*, 444 U.S. 1032 (1980) (Bank records seizure).

Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975) (*Harris v. New York*).

Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974) (*Kirby v. Illinois*).

Commonwealth v. Mills, 286 A.2d 638 (Pa. 1971) (Dual sovereignty).

of *Ingram*, *supra*, is *Blockburger's* same elements test.

However, Section Thirteen requires a second step. Multiple prosecutions in Kentucky are prohibited "where the offense(s) arose from a single act or impulse with no compound consequences, even though '[b]y virtue of additional, circumstantial facts, the behavior was offensive to two criminal statutes.'" *Eldred*, 41 K.L.S. at 25 (quoting *Ingram*, *supra* at 324-25). Justice Stumbo notes that the *Ingram*, "single act or impulse test" is narrower than the United States Supreme Court's now over-ruled *Grady v. Corbin*, "same conduct test."

Thus, in the area of double jeopardy our Court has chosen to implement the Primacy model and fashion double jeopardy jurisprudence which fits within the history of Kentucky law and justice.

A Final Note From *Commonwealth v. Wasson*

No discussion about state constitutionalism in Kentucky can be complete without mention of *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993). *Wasson* ruled our sodomy statute unconstitutional. The statute was challenged at the trial and appellate level solely on state constitutional grounds, given *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (held that federal constitutional protection of the right of privacy not implicated in laws penalizing homosexual sodomy).

Justice Leibson relied in *Wasson* on both an interpretivist and a noninterpretivist analysis of our state constitution. He points to both "textual and structural" differences between the federal Bill of Rights and our own. He then recognizes as even more significant Kentucky's rich and compelling tradition of protecting privacy interests and individual liberties. This tradition has been recognized in the caselaw of this state beginning with *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. 1909).

Finally, Justice Leibson turns to the Commonwealth of Pennsylvania for support. He notes the "common heritage shared by the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790. Decisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting our own." *Wasson*, *supra* at 498.

He, thus, offers us another tool in our arsenal of defense, Pennsylvania cases helpful to our clients.

To those of us in the business of defending the constitution, Justice Combs' offers inspiration from his concurring opinion in *Wasson*.

"Insofar as it comprises a moral code, the Constitution embraces - yea, embodies - the immutable values of individual freedom, liberty, and equality.

"Those who decry today's result are quick to note the absence of the word 'privacy' from the Constitution. To them I say, first, that Section 1, in enumerating certain inherent rights, does not purport to be exclusive. Its words are that those may be reckoned *among* every person's inalienable rights. The Constitution also omits mention of one's right to play checkers, to smile or frown, to rise or rest, to eat or fast, to look at a king. I have no doubt, as a citizen or as a jurist, that these rights exist. (Likely, neither is this list exhaustive.)... Third, given the nature, the purpose, the promise of our Constitution, and its institution of a government charged as the conservator of individual freedom, I suggest that the appropriate question is not **'Whence comes the right to privacy?' but rather, 'Whence comes the right to deny it?'**" *Wasson*, *supra* at 503.

FOOTNOTES

[1] Barry Latzer, *State Constitutions and Criminal Justice* (Connecticut 1991).

[2] Latzer, *supra*.

[3] Ronald K.L. Collins, *Reliance on State Constitutions-Away From a Reactionary Approach*, 9 Hastings Const. L.Q. 1, 2-3, 13 n.42 (1981).

[4] Stewart F. Hancock, Jr., *The State Constitution, A Criminal Lawyer's First Line of Defense*, 57 Albany Law Review 283 (1993).

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FOURTH AMENDMENT U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause....

SECTION 10, KENTUCKY CONSTITUTION

The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizures; and no warrant shall issue to search any place or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Arizona v. Evans

115 S.Ct. 1185 (1995)

The Supreme Court has revisited the issues first enunciated in *U.S. v. Leon*, 468 U.S. 897 (1984), this time in the context of cyberspace, and again the rights of the citizen accused were the loser.

The facts were rather simple. A Phoenix police officer saw Evans driving the wrong way on a one-way street. He stopped Evans, and entered information given by Evans into a computer terminal located in the police car. The computer confirmed that Evans' license had been suspended and more importantly that an arrest warrant existed. The defendant was arresed, and evidence was found during the search. Later, it was found that the arrest warrant had been quashed and the police department advised of that fact seventeen days before the arrest. As a result, the trial court granted Evans' motion to suppress. After the Court of Appeals reversed, the Arizona Supreme Court held that the trial court had properly suppressed the evidence.

In a 7-2 opinion written by Justice Rehnquist, the Supreme Court overturned the decision of the Arizona Supreme Court. Initially, the Court declined to overrule *Michigan v. Long*, 463 U.S. 1032 (1983), which held that when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Ironically, in a time when "conservative" means to send power back to state, that most conservative of Chief Justices asserts the broadest of theories of federal jurisprudence in order to impose his views of the rights to privacy on the citizens of all of the states.

The Court on the merits held that based upon the reasoning in *Leon*, the exclusionary rule would not be applied to clerical errors because to do so would fail to deter those people who made the error.

"[T]he exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees." *Id.* at 1193. The Court also noted that nothing had been shown that "court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Id.* at 1191. Finally, the Court states that "there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed." *Id.* at 1193.

Justice O'Connor wrote a concurring opinion in which Justices Souter and Breyer joined. She pointed out that good faith would not apply if the police unreasonably relied upon admittedly out-of-date or faulty recordkeeping.

Justice Souter also wrote a brief concurring opinion in which he pointed out that what was not being decided was whether the exclusionary rule should be extended beyond deterring the police to the government as a whole.

Finally, the lone voices of dissent were written by Justice Stevens and Justice Ginsberg. Stevens detailed a majestic view of the Fourth Amendment, with a broad and expansive exclusionary rule. "The Amendment protects the fundamental 'right of the people to be secure in their persons, houses, papers, and effects,' against **all** official searches and seizurs that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely on some of its agents...The remedy for its violation imposes costs on that sovereign, motivating it to train all of its personnel to avoid future violations." *Id.* at 1195. Stevens further disagreed that the exclusionary rule was an "extreme sanction." Finally, Stevens condemned the majority for rely-

ing on *Leon* in this arrest-without-a-warrant case.

Justice Ginsberg dissented, joined by Stevens, for an altogether different reason. In her view, the Court had no business taking this case given the opinion of the state court below. She would reverse the *Long* case and hold that "absent a plain statement to the contrary, that a state court's decision of the kind here at issue rests on an independent state-law ground." Further, Justice Ginsberg believed that the majority minimized the error here. "[C]omputerization greatly intensifies the need for prompt correction; for inaccurate data can infect not only one agency, but the many agencies that share access to the database." Because of that, she believed that Arizona should be free to enforce an exclusionary rule in order to see whether such a rule would increase the accuracy and reliability of law enforcement technology. "'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.'"

Commonwealth v. Smith and Roberts

1995 WL 276134 (Ky.App.)

Nothing is quite as confusing in search and seizure law than situations where more than one individual is involved; this is particularly the case where more than one place to be searched also exists. In this long and informative decision of the Court of Appeals written by Judge Johnson and joined by Judges Howerton and Huddleston, those issues are explored and ultimately unresolved, as the Court remands the case back to the trial court.

The case arose when Detective Johnson presented an affidavit to the district court stating that an informant had told him that illegal drug trafficking by Eugene Smith was occurring at 2709 West Chestnut Street. The warrant was issued, and a search revealed a small amount of rock cocaine in Smith's room. Additional marijuana was found in a cigarette pack in a Roberts' room.

The police followed this seizure with another affidavit asking for another search warrant. This was based upon additional information that Smith had received a large shipment of cocaine. The warrant was issued allowing for a search of 2709 West Chestnut Street in Louisville, Eugene Smith, "and/or persons(s) present who may conceal or destroy evidence" and any other contraband. A search pursuant to the warrant resulted in the seizure of cocaine and other evidence from Smith's bedroom and Roberts' bedroom.

A suppression hearing held pursuant to a suppression motion revealed that 2709 West Chestnut was a three story house in which many people lived. These people may have had numbered rooms. Smith may have had a key to all of the rooms. All persons paid rent to Smith's mother.

The trial court held that the evidence found in the first search was admissible. The court granted the motion to suppress on the second search because the police knew that there were many people living in the house. "Because the warrant described a single-family dwelling, the trial court concluded that it was not sufficiently particular and therefore void." The trial court also found that the affidavit supporting the second search was inaccurate. The Commonwealth appealed the court's suppression of the evidence.

The Court of Appeals decided to remand the case to the trial court for an additional hearing. The opinion is a virtual text on the difficult issues contained under these circumstances. The court educates the bar, saying that *"a search warrant directed against a multiple-occupancy structure will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of other units located in the building and occupied by innocent persons."*

The Court notes that there is a "'multiple-unit'" exception to the general rule. This exception occurs when neither the affiant nor the investigating officers knew of the multiple-occupancy nature of the place to be searched.

Further, there is a "community-living exception, which applies where several persons occupy the premises in common, rather than individual, as where the occupants share common living quarters but have separate bedrooms."

The Court remands the case back to explore the facts under each of these rules. "The trial court on remand must make a finding of whether the building contained subunits or whether the premises were occupied in community fashion...The question to be resolved here is whether there existed an equal right of access to the individual rooms between those who had keys to those rooms."

The Court rejects Roberts' claim that because he was not named in the warrant, the evidence found in searching his room must be suppressed. The Court disagreed, holding that a search warrant "'may issue without the slightest clue as to the identity of the criminal, if there is probable cause to believe that fruits, instrumentalities or evidence of criminal activity are located at the place to be searched.'"

United States v. Czuprynski

16 F.3d 704

The Sixth Circuit has issued yet another opinion surrounding the 1983 seizure of "1.6 grams of residue" of marijuana seized from a defense lawyers' office.

The facts are the most interesting part of the case. A defense lawyer fired an associate. She responded by charging him with assault. When he was acquitted at trial, she filled out an affidavit for the police saying that he smoked marijuana every day, and that she had smoked with him. The police took the affidavit first to a judge who declined to issue the warrant. The affidavit was then taken to a judge who the defense attorney had once fired when they both worked for the city. The second judge issued the warrant, the execution of which resulted in the seizure of "1.6 grams of residue."

The District Court overruled the motion to suppress, basing its decision upon the good faith exception of *United States v. Leon, supra.* However, a panel of the Sixth Circuit reversed, holding that the good faith exception was not applicable because the supporting affidavits were "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Czuprynski,* 8 F.3d 1113 (6th Cir. 1993, *vacated on reh'g en banc,* 16 F. 3d 704 (6th Cir. 1994).

In a decision en banc, the Court affirmed the decision of the District Court. The Court rejected the allegation that the earlier firing of the magistrate did not trigger the exception in *Leon* that "the issuing magistrate lacked neutrality and detachment." Further, the Court rejected the earlier panel's reliance upon another of *Leon*'s exceptions. The Court discounted that Sawicki, the junior attorney, had a reason to lie and thus should not be believed. "[P]ersons with personal motives are often the source of very reliable information. To require a police officer to discount such information would result in the rejection of a good deal of evidence relied upon daily by courts and juries."

Thus, "Sawicki's highly-detailed affidavit provided a substantial basis for the magistrate's probable cause determination. Its only weakness was its possible staleness. We hold that Officer Tait's good-faith reliance upon it was entirely reasonable."

Judges Martin, Keith, Jones, and Daughtrey dissented. In their view, the affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" The basis for this was that Czuprynski was acquitted of the assault charges brought by Sawicki, the affidavit of Sawicki's did not include any specific dates when she had seen Czuprynski with marijuana, other police departments had declined to involve themselves in Sawicki's vendetta against her former boss, there had been a dispute between Czuprynski and the prosecutor's office, and the police officer had not corroborated any of Sawicki's information. The dissenters were also troubled that the affidavit of the police officer contained stale information regarding searches conducted 9 and 18 years earlier of Czuprynski's office. Finally, the dissenters brought up the small amount of residue found in the case and the amount of time it had occupied in federal court. "We just cannot condone the type of prosecutorial overkill that has taken place here; it only points out the great expense of this Court's time and resources in rehearing en banc a case involving such an insignificant amount of marijuana."

United States v. Dotson
49 F.2d 227

The Sixth Circuit has addressed the issue of the importance of flight in the determination of probable cause to arrest. In this case, Dotson and another man had purchased a car with cash and placed the title in his mother's name. The IRS received a tip that the car was being purchased with cash by persons using fictitious names. The IRS and the Cleveland Police set up surveillance of Dotson. On April 1, 1993, Dotson was stopped by Officer Gannon in an unmarked car. Gannon walked up to the car. As Dotson was getting out and starting to run, Gannon and then Agent Kahler tackled Dotson.

The District Court affirmed the search of Dotson. The Sixth Circuit, with Judge Jones being joined by Judges Lively and Daughtrey, disagreed that there was probable cause to arrest Dotson at the moment of the seizure. However, the Court held that there was an articulable suspicion which ripened into probable cause once Dotson fled. Accordingly, the arrest was legal and items seized from Dotson at the time of the arrest were legally seized.

Short View

1. ***State v. Canelo***, 56 Cr.L. 1505 (New Hampshire Sup. Ct. 2/3/95). Another state has rejected the good faith exception to the exclusionary rule. This time, the New Hampshire Supreme Court has decided that the exclusionary rule's purpose goes beyond police deterrence. "The exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance with the probable cause requirement...In so doing, the rule also preserves the integrity of the judiciary and the warrant issuing process...We hold that the good faith exception is incompatible with and detrimental to our citizens' strong right of privacy inherent in part I, article 19 and the prohibition against the issuance of warrants without probable cause." Thus, the anticipatory warrant which resulted in the seizure of cocaine in this case was issued without probable cause, and the evidence should have been suppressed.

2. ***Commonwealth v. Wilson***, 56 Cr.L. 1561 (Pa. Super. Ct., 2/24/95). Getting out of a car twice and returning after a short period of time is not an articulable suspicion sufficient to conduct a Terry stop, even where this occurs in a "drug-infested" neighborhood. "An investigatory stop under *Terry* cannot, without more, rest solely on a finding that a person did not possess a 'legitimate purpose' for being present in a particular neighborhood. A suspect's mere presence in an area known for high drug-related activity is not sufficient to create a reasonable suspicion in the minds of police in order to justify a warrantless investigative stop under *Terry*."

3. ***State v. Smith***, N.C. Ct. App., 56 Cr. L. 1575 (3/7/95). How far can police officers go in searching a person pursuant to probable cause? The North Carolina Court of Appeals gives some guidance in this case, where the police had probable cause to believe that the defendant was trafficking in cocaine. Where the police went wrong was in pulling down the trousers and underwear of the defendant in a public place and seizing cocaine located under the defendant's scrotum. "[T]he search of defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment."

4. As *The Advocate* goes to press, the Court announced the knock and announce is part of the reasonableness requirement of the 4th Amendment. All I know is that Justice Thomas, in ***Wilson v. Arkansas***, Docket No. 94-5707 (decided May 22, 1995) wrote for a unanimous Court. This will be reported in more detail in the next issue.

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"We can examine any solution proposed to a problem of violence (by asking) 'Does this help to decrease alienation?' If it does not, it is no solution. If it actually increases alienation, as many contempory measures do, the remedy is only going, in the long run, to exacerbate the malady."

- Michael Nagler in *America Without Violence*

Capital Case Review

United States Supreme Court

Kyles v. Whitley
1995 WL 227644
(decided April 19, 1995)

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

Concurrence:
Stevens (writing), Ginsburg and Breyer

Minority:
Rehnquist (writing), Scalia, Kennedy, Thomas

Curtis Lee Kyles is entitled to a new trial because the cumulative weight of the evidence not disclosed to his trial attorney raises a reasonable probability that disclosure would have produced a different result at trial.

PROCEDURAL HISTORY

On Thursday, September 20, 1984, Dolores Dye visited a Schwegmann Brothers' grocery store in New Orleans. As Dye left with her packages, a man accosted her, killed her with one shot to her left temple, and drove away in her red Ford LTD.

Eyewitness descriptions of the man differed, and the police had no leads until the Saturday after the shooting, when a man who said his name was James Joseph called the police and said that he had bought a red Thunderbird from a friend, later identified as Kyles, on the day of the murder. *Kyles v. Whitley*, at 4.

A few hours later, a detective with a hidden microphone had a conversation with the informant, whose name he now said was Joseph "Beanie" Banks. Beanie's story had changed also. He now said he had not seen Kyles at all on Thursday, but had bought the car on Friday. He said that he lived with Kyles's brother-in-law, Johnny Burns, whom he referred to as his "partner", and that although Kyles did wear his hair in plaits at times, his hair was combed out when he sold Beanie the car. Beanie told the detective that Kyles made his living by robbing people and that he regularly carried two pistols, a .38 and a .32. *Id.*

Beanie said that he and Burns had taken Kyles to get his car from the Schwegmann's lot. There were a lot of groceries and a new baby's potty in the car. Kyles retrieved a brown purse from some bushes. Beanie expected a reward from his police assistance. *Id.*, at 5.

Beanie then accompanied the officer to the police station, where his statement was recorded. Some parts of the story were consistent: Beanie bought a car from Kyles on Friday evening, Kyles's hair was combed out, and that Kyles carried a .32 or a .38 with him all the time.

Other parts of Beanie's story had changed or embroidered what he had already said. Beanie said that after the sale, he and Kyles unloaded the groceries and put them in Kyles's car, and that Kyles took a purse from the front seat of the car. Then he said that a few hours later, he and his partner went with Kyles to Schwegmann's, where they recovered Kyles's car and a "big brown pocketbook" from "next to a building." The police did not notice the inconsistencies. *Id.*

Beanie's fourth statement, given to a prosecutor after a jury hung on convicting Kyles, changed again. This time, he said he and Kyles went to the Schwegmann's on Thursday, not on Friday. He also said, for the first time, that another man, Kevin Black, who had testified for the prosecution in the first trial, had gone with them, and that after going to Black's house, they took some bags of groceries, a child's potty and a purse to Kyles's apartment. He also said that on Sunday, the 24th, he visited Kyles's apartment several times, and "rode around" with a police officer until the early morning hours of the 24th. Also during the early morning of the 24th, because the police believed the victim's personal papers and the Schwegmann's bags might be there, detectives were sent to pick up the rubbish outside Kyles's building. *Id.*, at 6-7.

At 10:40 a.m. on September 24, 1984, Kyles was arrested and the apartment was searched. Police found a .32 revolver which later was shown to be the murder weapon. Cans of dog and cat food, some of them the brands the victim typically bought, were found in the kitchen. Later that afternoon, the victim's purse and other personal belongings were found among the rubbish obtained from outside Kyles's apartment. *Id.*, at 6.

The gun had been wiped clean of fingerprints. Several prints on the purse and the LTD were not identified as Kyles's, but his fingerprints were found on a small Schwegmann's receipt on the floor of the LTD. A second Schwegmann's receipt was found in the trunk of the victim's LTD, but Kyles's prints were not on it. Beanie's fingerprints were not used as a comparison on anything. *Id.*

Prior to trial, counsel asked for disclosure of *Brady* evidence. The prosecution responded that there was no exculpatory or impeachment evidence, despite the fact that there were six contemporaneous eyewitness statements, records of Beanie's initial call, the tape recording of his conversation with the police, the typed and signed statement Beanie had given, a computer print-out of license numbers of cars parked at the Schwegmann's which did not list Kyles's car; the police memorandum upon which the police seized the rubbish from outside Kyles's apartment, and evidence linking Beanie to other crimes at Schwegmann's and to an unrelated murder committed in January of 1984.

On collateral review, these violations were revealed. Relief was denied by the district court and the Fifth Circuit Court of Appeals.

BRADY VIOLATION

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963), the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A defendant's failure to request such evidence does not relieve the government of its duty in three situations:

1) where evidence revealed that the prosecution introduced testimony it knew or should have known was perjured;

2) where the government failed to acquiesce to a defense request for specific exculpatory evidence; and

3) where the government failed to volunteer exculpatory evidence "of sufficient significance to result in the denial of the defendant's right to a fair trial" was never requested or requested only generally. *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

In *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985), the Supreme Court did away with the distinction between the second and third circumstances, and held that irregardless of a request, favorable evidence is material and error results from its non-disclosure "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley* also fashioned a four part examination.

First, the showing of materiality does not require demonstration by a preponderance that disclosure of the evidence would have resulted in the defendant's acquittal. *Id.* "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles, supra*, at 9.

Second, this not a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal...does not imply" insufficient evidence to convict. *Id.*

Third, once a court has found constitutional error, it need not perform harmless error review. *Bagley* itself said that the standard is a "reasonable probability" that the outcome would have been different, which "necessarily entails the conclusion that the suppression must have had a substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 10, quoting *Brecht v. Abrahamson*, 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

Finally, the suppressed evidence is to be considered collectively, not individually. While this definition leaves the government with some discretion, it also imposes a burden. Showing that the prosecution did not disclose an item of favorable evidence, without more, does not amount to a *Brady* violation. However, "the prosecution, which alone can know what is undisclosed," also has the responsibility "to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." This includes a duty to learn of any favorable evidence known to other persons, including the police, acting on the government's behalf. *Id.* at 11.

The state of Louisiana requested an even more lenient rule. Arguing that it did not even know some favorable evidence existed until after the trial, it said prosecutors should not be held accountable for evidence known only to the police and not to the prosecution. "To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases." Although there are times when the police fail to disclose favorable evidence to the prosecution, "'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'" *Id.*, quoting *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 313 L.Ed.2d 104 (1972). "[T]he government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." *Id.*

CUMULATIVE EVALUATION -- EYEWITNESS STATEMENTS

The main thrust of the state's case was eyewitness testimony which identified Kyles as the killer. Had their statements been disclosed to the defense, the prosecution's case would have been "markedly weaker" because the value of two witnesses would have been reduced or destroyed. *Kyles, supra*, at 12.

One witness, rated as the state's best, testified that he saw the struggle and that Kyles actually shoot Dolores Dye. However, his undisclosed contemporaneous statement was that the assailant was a black male, 19 to 20 years old, 5'4" or 5'5", 140 to 150 pounds, medium build, and possibly plaited hair. Kyles is 6 feet tall and thin. Defense cross-examination would have been much more effective with disclosure of the witness's statement. Furthermore, since Beanie did resemble the contemporaneous description, the defense "would have had a compelling argument" that Beanie, not Kyles, had done the shooting. *Id.*, at 13.

A second witness testified that he saw Kyles take a .32 out of his pocket, shoot the victim, and drive off in her LTD. However, his statement immediately after the crime was different. In it, he said he had not seen the actual shooting nor the assailant outside the victim's car. He also said that as the car passed where he was standing, the driver was a teen-age black male with a mustache and braided hair. Furthermore, his testimony substantially improved upon his statement: he identified the murder weapon as a .32, identify the car as an LTD instead of a Thunderbird, and said nothing about his post-shooting description. Such differences could have "rais[ed] a substantial implication that the prosecutor had coached him". *Id.*

CUMULATIVE EVALUATION -- BEANIE

The state admitted that Beanie was essential to their investigation and had made their case. However, Beanie's statements were full of inconsistencies that might have allowed a jury inference that Beanie "was anxious to see Kyles arrested" for the murder. Disclosure of the various statements would also have revealed that the police were uncritical of the things Beanie had told them. Had the defense been able to call Beanie, he would have "be[en] trapped by his inconsistencies." *Id.*, at 14.

In his first meeting with the police and in his signed statement, Beanie said he bought Dolores Dye's LTD and helped Kyles retrieve his car from the Schwegmann's lot on Friday, the day after the murder. However, in his initiating call to the police, he said he bought the LTD on Thursday, the day of the murder. When he talked to the prosecutor between trials, Thursday was the day he helped Kyles get his car back from the Schwegmann's lot. Beanie also mentioned Kevin Black for the first time after Black implicated Beanie at the first trial. Dye's purse was found next to a building, in some bushes, in Kyles's car and at Black's house. *Id.*

Even had Beanie not testified, Kyles's defense lawyer could have used the statements to attack the reliability of the police investigation because no one seemed to consider whether Beanie himself was guilty of the crime or the

"serious possibilities that incriminating evidence had been planted." *Id.*, at 15.

CUMULATIVE EFFECT -- INTERNAL MEMORANDUM

Beanie's statements and the internal memorandum could have supported the defense's contention that Beanie "was no mere observer, but was determining the investigation's direction and success." This is corroborated by the prosecutor's admission at a state post-conviction hearing that he could not recall an instance where the police had searched and seized garbage from in front of a residence and by a detective's admission at the same hearing that at the time, he felt there was a possibility that Beanie had planted the evidence in the garbage. "If a police officer thought so, a juror would have, too." *Id.*

CUMULATIVE EFFECT -- LIST OF CARS

The prosecution's list of cars in the Schwegmann's lot would also have had some value as exculpatory and impeachment evidence. The fact that Kyles's car was not in the lot would have undermined a police assumption that because the killer drove off in Dolores Dye's LTD, his car would have remained in the lot. The prosecution also introduced a grainy photograph of the parking lot which it said showed Kyles's car in the background. The list could have helped counter this assertion. Furthermore, the list would have shown that the police knew that Beanie's assertion in his second and third statements that he had helped Kyles retrieve his car from the lot were false, or that the police had taken Beanie's story at face value, without bothering to check the veracity of what he said. *Id.*, at 16.

Although bullets were found in Kyles's apartment, the jury may have suspected that they, as well as the gun, had been planted. The pet food cans found in Kyles's apartment were consistent with defense testimony that Kyles had a dog and his children fed stray cats. The small Schwegmann's receipt with Kyles's fingerprints on it was consistent with Kyles's story that the receipt had probably fallen out of a bag after Beanie had driven him to the Schwegmann's, where he bought transmission fluid and cigarettes.

Although the testimony of the remaining two eyewitnesses may have been enough to convict, "the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." *Id.*, at 17.

CONCLUSION

Perhaps the verdict could have survived the evidence impeaching two of the four eyewitnesses if the discoveries of the gun and purse were not suspicious. However, "confidence that the verdict would have been unaffected cannot survive" when suppressed evidence would have told the jury that the eyewitness's statements and testimony were not consistent, that the discovery of the gun and purse were not above suspicion, and that Beanie "was insufficiently informed or candid." *Id.*, at 18.

"This is not the 'massive' case envisioned by the dissent; it is a significantly weaker case than the one heard by the first jury, which could not even reach a verdict." *Id.*

CONCURRENCE

Justice Stevens, with Justices Ginsburg and Breyer, said he was writing in response to Scalia's criticism of the Court's decision to grant *cert.* Although a substantial number of capital cases are not heard, aside from the "legal importance" of the case, Justice Stevens found three other reasons for the court to grant "favored treatment" to *Kyles*:

1) the fact that the jury hung at the first trial "provides strong reason" to believe that the errors which occurred at the second trial prejudiced Curtis Lee Kyles;

2) cases in which the state has failed to reveal so much exculpatory evidence "are extremely rare"; and

3) despite his "high regard" for Judge Higginbotham, the author of the Fifth Circuit majority opinion, Stevens's review of the case left him with the same "serious reservations about whether the State has sentenced to death the right man" that Judge King, the lone dissenter from the Fifth Circuit's opinion, stated. *Id.*, at 18, citing *Kyles v. Whitley*, 5 F.3d at 820.

Although this case does not fashion "a newly minted rule of law[,] [t]he current popularity of capital punishment makes this generalized principle' especially important." "I wish such review were unnecessary, [but] [s]ometimes the performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis." *Id.* at 19.

DISSENT

Justice Scalia wrote that:

"[i]n a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety...not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed.... [Reversals by a higher court] 'reflect[] a difference in outlook normally found by personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done.'" *Id.* at 20, quoting *Brown v. Allen*, 344 U.S. 443, 540, 73 S.Ct. 397, 427, 97 L.Ed. 397 (1953) (Jackson, J., concurring).

Therefore, Scalia felt *Kyles*, was "wholly unprecedented." The *Brown* policy should be honored even more "in this case" because not only the federal habeas courts, but also the state post-conviction courts, reviewed and rejected the claim. *Id.*

The majority stated that cert was granted because the Court's "'duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.'" *Id.*, quoting *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987). The court's citation to this case is "perverse" because the very next sentence says that when a lower court has found no constitutional error, "'deference to the shared conclusion of two reviewing courts'" prevents substituting a higher court's speculation for the lower courts' "'considered opinions.'" *Id.*, citing *Burger, supra.*

FAVORED TREATMENT

Scalia is "puzzle[d]" as to why Kyles was given favored treatment. Perhaps *Kyles* is a symbol used "to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made." If so, it is false because "[t]he reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere"--in the state trial, appellate and post-conviction courts, and in the lower federal courts. "[W]e do nothing but encourage foolish reliance to pretend otherwise." *Id.* at 21.

FIFTH CIRCUIT CONSIDERED *BAGLEY*

In its opinion affirming the district court, the Fifth Circuit stated clearly that it applied the *Bagley* standard to Kyles. *Kyles v. Whitley*, 5 F.3d 806, 811 (5th Cir. 1993). The Fifth Circuit also did not announce a rule of law requiring independent evaluations of materiality; in fact, it said there was no reasonable probability that the jury found have found differently if exposed to "any or all of the undisclosed materials." *Id.* at 21, quoting *Kyles, supra*, 5 F.3d at 807.

Although Scalia feels that the Court's mistake is not one often to be repeated, he is "still forced to dissent" because the Court has the facts wrong.

ANALYSIS

The petitioner bears a burden of showing that in light of all the evidence, including that not tainted by *Brady*, it is reasonably probable that the jury would have a reasonable doubt about the defendant's guilt. The Court, in Scalia's opinion, has not done so.

First, Scalia felt the assertion that Beanie had framed Kyles was implausible. The suggestion that Beanie had injected both Kyles and himself into the investigation in order to get Kyles convicted was "stupid." Even more stupid was the intimation that Beanie suggested the police search Kyles's apartment "a full day before he got around to plating the incriminating evidence on the premises." *Id.* at 23.

The second half of Kyles's theory was that four eyewitnesses mistakenly identified him as the murderer. Three had picked Kyles out of a photo-array and after comparing Kyles with Beanie, all four affirmed their identifications in open court. *Id.*

Neither the majority's conclusion that it is reasonably probable witness interviews would have persuaded the jury that the eyewitnesses were mistaken nor the conclusion that Beanie's undisclosed statements would have persuaded that jury of the veracity of Kyles's theory "is remotely true." "[E]ven if they were" the Court still did not consider the "infinitesimal probability of the jury's swallowing the entire concoction of implausibility squared." *Id.*

The jury's guilty verdict is "perfectly consistent" with the possibility that Beanie lied, that he was an accessory after the fact, or that he planted evidence. *Id.*

PHYSICAL EVIDENCE CONFIRMS IMMATERIALITY OF NONDISCLOSURE

The police found Dolores Dye's purse and other belongings in the trash outside Kyles's home. Inside the apartment, they found the .32 revolver which killed Dye, some .32 rounds, eight empty Schwegmann's bags and another Schwegmann's bag containing 15 cans of pet food. Kyles's account that Beanie planted the purse and gun, that the ammunition was Beanie's collateral for a loan, and that Kyles had bought the pet food on the day of the murder "strains credulity to the breaking point." *Id.* at 27.

Although the *Brady* material would have supported Kyles's claim that Beanie planted the purse and the gun, "we must see the whole story" Kyles presented. *Id.*

Kyles's contention would have Beanie planting the evidence on the day after the police searched Kyles's home. Moreover, he planted the gun while there were between 10 and 19 people present in Kyles's apartment. Beanie, who was wearing either a tank-top or a short sleeved shirt, had to be concealing both the gun used to kill the victim and another, which he showed to Kyles. "Only appellate judges could swallow such a tale." *Id.*

Kyles's only supporting evidence was his brother-in-law, Johnny Burns's, testimony that he had seen Beanie stooping behind the stove. That testimony was disregarded by the state post-conviction judge, who had also presided over the trial. The district court also concurred with the state judge's findings. Lastly, although Burns repeatedly said Beanie was his best friend, he was later convicted of killing Beanie. *See State v. Burnes*, 533 So.2d 1029 (La. App. 1988).

PET FOOD

Scalia felt that Kyles's "confused and changing explanations" for the presence of the pet food "must have fatally undermined his credibility before the jury." He noted the "full story" that Dolores Dye and her husband had two cats and a dog, for whom Mrs. Dye bought several different brands of food at a time. *Id.* at 28.

The police found cans of Nine Lives, Kalkan and Kozy Kitten cat food in Kyles's house. Found in Mrs. Dye's home were Nine Lives, Kalkan and Puss 'n Boots cat food. When pressed to explain why he bought fifteen cans of cat food, Kyles who "was a very poor man" supporting "a common-law wife, a mistress, and four children," said the food was on sale, even in light of testimony by Schwegmann's advertising director that the food was not on sale. *Id.* at 28.

CONCLUSION

"The State presented to the jury a massive core of evidence (including four eyewitnesses) showing that [Kyles] was guilty of murder, and that he lied about his guilt." The effect of the *Brady* materials "can only be called immaterial", either in the guilt or the penalty phase. *Id.* at 29.

Lackey v. Texas 115 S.Ct. 1421 (decided March 27, 1995)

In a dissent from a denial of certiorari, Associate Justice John Paul Stevens writes the following: "[p]etitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment." *Lackey v. Texas*, 115 S.Ct. 1421 (1995). However, even though Justice Stevens felt the question was important for the court to address, nevertheless, he also felt the court should wait until after other courts had addressed the issue.

GREGG v. GEORGIA

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court held that the Eighth Amendment did not prohibit capital punishment on two grounds:

1) the death penalty was considered permissible by the framers of the constitution; and

2) the death penalty might serve the "social purposes" of retribution and deterrence.

Stevens said "[i]t is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death" because such a delay would have been rare at the time the constitution was written in 1789 and the practice of the framers would not "justify a denial" of Lackey's claim; and because after such a length of time, "the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted." *Lackey, Id.*

In *In re Medley*, 134 U.S. 160, 172, 10 S.Ct. 384, 388, 33 L.Ed. 885 (1890), the

Court recognized that "of the most horrible feelings to which [a condemned person] can be subjected [during the time he awaits execution] is the uncertainty during the whole of it." If the court accurately described Medley's feelings during the four weeks before he was executed, "that description should apply with even greater force in the case of delays that last for many years." *Lackey*, *Id.* Finally, the additional deterrence of an execution compared to Lackey's 17 year presence on the row and his "continued incarceration for life, on the other, seems minimal." *Id.*, 115 S.Ct. at 1422.

ENGLISH LAW

Justice Stevens found further strength for Lackey's argument in English and other jurisprudence. "'[E]xecution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689." *Id.* slip op. at 2, quoting *Riley v. Attorney General of Jamaica*, [1983] 1 A.C. 719, 734, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarman, dissenting, joined by Lord Brightman). "[T]hat section is undoubtedly the precursor of our own Eighth Amendment." *Id.*

SOME PORTION OF DELAY SHOULD NOT BE INCLUDED

"There may be constitutional significance to the reasons for the various delays that have occurred in [Lackey's] case". *Id.* Although *Pratt v. Attorney General of Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769, 786 (P.C. 1993) (en banc) and other English cases indicate that a petitioner should not be held accountable for the "legitimate exercise of his right to review" or "the negligence or deliberate action of the state", Justice Stevens saw a difference between those occurrences and abuse of the judicial process by his escape or repetitive, frivolous filings." Thus, "it is at least arguable" that some portion of the 17 years should not be included in the analysis.

FURTHER STUDY NEEDED

"Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit" from further study by the lower courts." *Lackey*, slip op. at 3.

JUSTICE BREYER

Justice Breyer agreed that the issue was "an important undecided one."

Schlup v. Delo
115 S.Ct. 851 (1995)

Vacated and remanded.

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

Dissent:
Rehnquist (writing), Kennedy, Thomas, Scalia (writing), Thomas

The *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), requirement that a habeas petitioner show that constitutional error has "probably resulted" in the conviction of a person who is actually innocent, rather than the more stringent *Sawyer v. Whitley*, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992) "clear and convincing evidence" of actual innocence standard governs the inquiry when a petitioner raises an actual innocence claim in order to avoid a procedural bar to consideration of his constitutional claims.

Lloyd Schlup, an inmate at the Missouri State Penitentiary, was convicted of the murder of a fellow inmate. The state had no physical evidence linking Schlup to the crime, but relied on the testimony of two guards who claimed they saw Schlup from a distance of at least 40-50 feet go against the flow of inmates heading for their noon meal and join the attack on the victim.

Schlup's defense was a videotape which clearly showed him first in line for the mid-afternoon meal and getting his food. The tape also showed guards responding to a call for help 65 seconds after Schlup entered. Nearly half a minute after that, the videotape showed another inmate running into the dining room covered in blood.

Schlup also presented the testimony of an inmate-clerk for the housing unit, who made a phone call for help shortly after the altercation began. No one disputed the fact that if the call went out shortly after the murder, Schlup would not have had time to go from the scene of the murder to the dining room in order to be caught on the videotape. *Schlup*, *supra*, 115 S.Ct. at 855-856.

PREVIOUS FEDERAL ACTIONS

In January 1989, Schlup filed a *pro se* habeas petition alleging in part that trial counsel was ineffective because he failed to interview and call witnesses who could establish Schlup's innocence. The district court found this claim barred and denied relief. Without relying on the bar, the Eighth Circuit affirmed. *Schlup v. Armontrout*, 941 F.2d 631 (8th Cir. 1991).

New counsel filed a second habeas in early 1992, alleging actual innocence, that trial counsel failed to interview alibi witnesses and that the state had not committed *Brady* error. A number of affidavits from inmate witnesses also affirmed that Schlup was not a participant in the murder. *Schlup*, *supra*, 115 S.Ct. at 858. The district court, finding that Schlup could not provide adequate cause for his failure to raise the claims in his first habeas, dismissed the petition. The court also refused to hold an evidentiary hearing because it felt that Schlup could not meet the *Sawyer*, *supra*, standard. *Id.*

Schlup then requested a stay pending resolution of his appeal, which the Eighth Circuit denied, stating that the *Sawyer*, *supra*, standard was proper. The court also noted that an affidavit included in Schlup's application was inconsistent in part with the inmate's prison interview and his testimony at trial. Yet another affidavit--from an inmate who had testified at trial--was found to be "an effort to embellish and expand" upon the inmate's testimony. *Id.* 115 S.Ct. at 859. *See Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993).

Judge Heaney dissented, saying that because Schlup's evidence was "truly persuasive" of his actual innocence, the District Court should have addressed the merits of the claim. Judge Heaney also found that trial counsel's ineffectiveness was substantial, noting counsel's apparent failure to conduct individual interviews with "any of the potential witnesses to the crime." *Schlup*, *supra*, 115 S.Ct. at 860.

During pendency in the Eighth Circuit, Schlup found a former prison guard, whose affidavit said that he had seen Schlup on his way to lunch, and that Schlup was walking normally, was not winded, and that he was physically near Schlup for at least 2-1/2 minutes.

DIFFERENCES BETWEEN *SCHLUP* AND *HERRERA*

In *Herrera v. Collins*, 103 S.Ct. (1993), Leonel Herrera argued that execution of an innocent person would violate the Eighth Amendment. On the other hand, Schlup argued that he was denied full constitutional protection because of his counsel's ineffective assistance and the

prosecution's *Brady* error. However, Schlup faced a hurdle Herrera had not: because he could not establish "cause" and "prejudice" for his failure to present the evidence, review of his claims could only occur if he fell "within the 'narrow class of cases...implicating a fundamental miscarriage of justice.'" *Id.* 115 S.Ct. at 861, quoting *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

Schlup's claim differs in at least two ways from *Herrera*. First, the argument is not in and of itself a basis for relief because it depends on the validity of his *Strickland* and *Brady* arguments. Thus, these claims are a "gateway" through which Schlup must pass in order to have his otherwise barred claims reviewed. *Id.* citing *Herrera*, *supra*, 113 S.Ct. at 862. The *Herrera* court also assumed that Herrera's trial was error-free. Thus, because Herrera was fully protected by the United States Constitution, "it is appropriate to apply an 'extraordinarily high' standard of review." *Herrera*, *supra*, 113 S.Ct. at 874.

Schlup also claimed his innocence, but by contrast, asserted that his trial was not error-free. "For that reason, [his] conviction may not be entitled to the same degree of respect" as an ostensibly error-free trial. Without new evidence of innocence, the existence of a constitutional violation is not sufficient to reach the merits of an procedurally barred issue. *Schlup, supra*, 115 S.Ct. at 861.

If a petitioner presents evidence so strong that the court is not confident that the trial was free of harmful constitutional error, the petitioner should be allowed to pass through the "gateway" and argue his claims on the constitutional merits. *Id.*

FUNDAMENTAL MISCARRIAGE OF JUSTICE

Therefore, a lesser burden attaches to Schlup's evidence of innocence: he "must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial." *Id*, 115 S.Ct. at 861-862.

Although the Supreme Court established rules severely limiting second and successive habeas petitions, *see e.g.. Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), *McCleskey, supra*, *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 2502, 53 L.Ed.2d 594 (1977), and *Murray v. Carrier, supra*, "[a]t the same time, the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy." *Schlup, supra*, 115 S.Ct. at 863. However, "there are 'limited circumstances under which the interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment.'"-- the fundamental miscarriage of justice exception. *Id.* quoting *Murray v. Carrier, supra*, 106 S.Ct. at 2626.

To ensure that the fundamental miscarriage of justice exception applies only rarely and only in extraordinary cases, the Supreme Court "explicitly" tied this exception to the petitioner's innocence. *Schlup, supra*, 115 S.Ct. at 864. Doing so "thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'" *Id.* citing *Carrier, supra*, 106 S.Ct. at 2649.

In *Sawyer, supra*, the Supreme Court fleshed out the exception to mean that when a petitioner alleges that his death sentence was inappropriate, scrutiny must focus on the elements which rendered him eligible for the death penalty. The Court also backed away from the *Murray v. Carrier* "probably" language and held that the "clear and convincing error" standard must apply. No attempt was made to reconcile the two standards. *Schlup, supra*, 115 S.Ct. at 865.

SAWYER DOES NOT APPLY

Carrier properly strikes that balance when the issue is that constitutional error has resulted in the conviction of one who is actually innocent of the crime. *Id.*

Substantial claims that constitutional error has caused an innocent person's conviction are "extremely rare" because those issues require a petitioner "to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Id.*

Because that evidence is unavailable the "vast majority" of the time, actual innocence claims were rarely successful, even pre-*Sawyer*. "The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing." *Id.* 115 S.Ct. at 866.

"The quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Id.* Because the standard reflects the importance attached to the decision to sentence someone to death, *see Addington v. Texas*, 441 U.S. 418, 423 (1979), "[t]he paramount importance of avoiding the injustice of executing one who is actually innocent thus requires application of the *Carrier* [probably resulted] standard" when a petitioner sentenced to death raises a claim of actual innocence to avoid procedural barriers to consideration of the merits of his constitutional claims. *Id.* 115 S.Ct. at 866.

MURRAY v. CARRIER

Under *Carrier*, a habeas petitioner must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup, supra*, 115 S.Ct. at 867. This is a stronger showing than that needed to prove prejudice, but less than the *Sawyer* "clear and convincing" standard. Thus, the *Carrier* standard continues the "extraordinary case" directive while ensuring that petitioners have "a meaningful avenue by which to avoid a manifest injustice." *Id.*

Justice Stevens noted that the inquiry is for actual innocence, which allows the reviewing court to relax the rules of admissibility which govern trials and "make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *Id.* citing Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 145 (1970).

The analysis must also "incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup, supra*, 115 S.Ct. at 867-868. This is not a showing that the new evidence causes a reasonable doubt to exist, but rather that no reasonable jury would have found the defendant guilty. In other words, "the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* 115 S.Ct. at 868.

Finally, the reasonable juror language presumes that reasonable jurors consider fairly all of the evidence presented. It must also be presumed that a juror would conscientiously obey the instructions of

the trial court requiring proof beyond a reasonable doubt. *Id.*

JACKSON v. VIRGINIA

Although *Carrier* requires a substantial showing, it is not equivalent" to the *Jackson v. Virginia*, 443 U. S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979), sufficient evidence standard. In *Jackson*, the credibility of witnesses "is generally beyond the scope of review", whereas, in *Schlup*, the new evidence presented may call into question the credibility of trial witnesses. *Schlup, supra*, 115 S.Ct. at 868.

More importantly, the language of the two standards is different: the *Jackson* "could" focuses on the **power** of the jury to reach its conclusion, whereas the *Schlup* "would" focuses the inquiry on the likely **behavior** of the jury. *Id.* The Court's adoption of the phrase "more likely than not" reflects the difference and the evidence presented below--the sworn statements of several eyewitnesses that Schlup was not involved in the murder--illustrates it.

Although the new statements may be unreliable, if they are true, as the Court of Appeals assumed, "it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Id.* 115 S.Ct. at 869.

EVIDENTIARY HEARING

Finally, the Court noted that Schlup asked only for an evidentiary hearing. "In applying the *Carrier* standard to such a request, the District Court must assess the probative force of the newly presented evidence in connection with the guilt adduced at trial." *Id.* Thus, because both the district court and the Eighth Circuit evaluated Schlup's claim under an improper standard, an evidentiary hearing must be held.

CONCURRENCE

Justice O'Connor explained her understanding of the court's decision: that in order to have an abusive or successive habeas claim heard on the merits, a petitioner must show that is more likely than not that a reasonable juror would have voted to convict in light of the newly discovered evidence of innocence, and that the standard is "substantively different from that noted in *Jackson v. Virginia*, [*supra*]." *Schlup, supra*, 115 S.Ct. at 869.

The Court also does not "sow confusion in the law", but balances the mandates of justice with the need to safeguard the actual innocence exception as a "'safety valve' for the 'extraordinary case.'" *Id.* 115 S.Ct. at 870, quoting *Harris v. Reed*, 489 U.S. 255, 271, 109 S.Ct. 1038, 1047, 103 L.Ed.2d 308 (1989).

DISSENT

In dissent, Chief Justice Rehnquist felt that the Court's decision to apply Carrier to cases such as Schlup's "both waters down the standard... and, will inevitably create confusion in the lower courts." *Schlup, supra*, 115 S.Ct. at 870. Although Rehnquist agreed the question of which standard should apply was "open," he felt that *Sawyer* provided the proper measurement. *Id.* 115 S.Ct. at 872.

He was also troubled by majority's version of *Carrier* because "'[m]ore likely than not' is a quintessential charge to a finder of fact," while "'no reasonable juror would have convicted him in the light of the new evidence' is an equally quintessential conclusion of law similar to the standard that courts constantly employ in deciding motions for judgments of acquittal in criminal cases." *Id.* 115 S.Ct. at 873.

FAILURE TO ACKNOWLEDGE SIMILARITIES BETWEEN *SCHLUP* AND *JACKSON*

Habeas actual innocence claims are different from *Jackson* "because the habeas court analyzing the claim is faced with more evidence than was presented at trial and then must predict the affect this new evidence would have had on the deliberations of reasonable jurors. "This new evidence, however, is not a license for the reviewing court to disregard the presumptively proper determination by the original trier of fact." *Id.* 115 S.Ct. at 874.

Therefore, Rehnquist feels a "properly modified" *Jackson* standard "faithfully reflects" the *Carrier* language. The habeas judge can consider and resolve the great majority of cases on the pleadings submitted. However, in those highly unusual cases where the district court believes actual innocence may be established, a limited evidentiary hearing at which those persons the court believes are crucial to the showing may testify and be cross-examined. After that hearing, the district court would be able to determine if the claim had been proven. *Id.*

SCALIA DISSENT

Although Finality of Determination may be found at 28 U.S.C. §2244, the majority does not ask what that statute says or even how the Supreme Court has interpreted it. Instead, the majority asks about the fairest standard to apply and looks to recent Supreme Court caselaw. Scalia "would proceed differently... Section 2244 controls this case; the disposition it announces is plain enough, and our decisions contain nothing that would justify departure from that plain meaning." *Id.* 115 S.Ct. at 874-875.

.The decision that successive or abusive habeas petitions must be entertained and not dismissed if a petitioner makes a sufficiently persuasive showing that a fundamental miscarriage of justice has occurred "flatly contradicts the statute, and is not required by our precedent." *Id.* 115 S.Ct. at 875.

Sixth Circuit Court of Appeals

In re Parker 49 F.3d 204 (6th Cir. 1995)

Panel:
Boggs (writing), Kennedy, Siler

PROCEDURAL HISTORY

Kevin Stanford was sentenced to death for the rape, sodomy and murder of a Louisville, Kentucky store clerk. The Kentucky Supreme Court affirmed Stanford's conviction and sentences in 1987. *Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987). The United States Supreme Court affirmed Stanford's death sentence on the ground that the execution of a person who was seventeen at the time of the crime is not cruel and unusual punishment. *Stanford v. Kentucky*, 488 U.S. 887, 109 S.Ct. 217, 102 L.Ed.2d 208 (1989). The denial of Stanford's state post-conviction motion under RCr 11.42 was affirmed on January 21, 1993. *Stanford v. Commonwealth*, 854 S.W.2d 742 (1993). The Supreme Court denied cert in early 1994. *Stanford v. Kentucky*, ___ U.S. ___, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994).

Kentucky procedures allow for 90 days after denial of cert on post-conviction in which to file a habeas petition. As the end of the 90 days approached, Stanford's counsel requested an additional 90

days, to and including July 9, 1994. On July 13, 1994, because no habeas petition had been filed, Governor Brereton Jones signed a warrant setting Stanford's execution date for August 12, 1994.

On July 19, 1994, Stanford's counsel, basing his motion on 21 U.S.C. §848(q)(4)(b) and *McFarland v. Scott*, ___ U.S. ___, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994), asked the federal district court to appoint counsel and stay the execution. On July 27, 1994, the court denied the Kentucky Attorney General's motion that the order appointing counsel be vacated, and entered an indefinite stay.

The Attorney General filed a petition for mandamus requesting directions to the district court to revoke appointment and to dissolve the stay.

MANDAMUS

"Mandamus is a drastic remedy, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." *Parker, supra*, citations omitted.

Mandamus "'lies when there is practically no other remedy.'" *In re NLO, Inc.*, 5 F.3d 154, 156 (6th Cir. 1993), quoting *Helstoski v. Meanor*, 442 U.S. 500, 505, 99 S.Ct. 2445, 2448, 61 L.Ed.2d 30 (1979).

FIVE-STEP PROCEDURE

In *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 303-04 (6th Cir. 1984), the Sixth Circuit adopted a five-step process to determine whether mandamus relief is warranted in a particular circumstance:

1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief needed;

2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal;

3) whether the district court's order is clearly erroneous as a matter of law;

4) whether the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules;

5) whether the district court's order raises new and important problems, or issues of law of first impression. The factors are cumulative and should be balanced; they may not all point to the same conclusion. Furthermore, the absence of any factor is not controlling. *Id.*

OTHER ADEQUATE MEANS OF OBTAINING RELIEF

There were other possible means of relief. The state could have directly appealed the stay. Or, at the end of the proceedings, "assuming that [a habeas] is ever filed", the state could appeal the initial appointment of counsel. *Parker, supra.*

However, "to call these means 'adequate' would be thin gruel indeed," because there does not appear to be any means short of mandamus for the state "to gain a prompt and effective review of the pre-petition appointment and stay." *Id.* If the state waited until the district court decided the petition, "when and if Stanford actually files it", the issue would be moot. An appellate decision would not remedy the improper delay caused by the stay and, in fact, create an even greater delay. *Parker, supra.*

DAMAGE OR PREJUDICE TO PETITIONER NOT CORRECTABLE ON APPEAL

Stays create prejudice because "memories fade and evidence dissipates," which creates a burden to the state in the event of a retrial. *Id.* citing *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). "[D]elay itself impinges on the sovereignty of the state" because the state cannot carry out its sentence "without the review and at least tacit approval of the federal courts." *Parker, supra.*

Thus, death penalty cases require priority. "'[I]n a capital case the grant of a stay of execution...by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.'" *Id.* citing *In re Blodgett*, 502 U.S. 236, 240, 112 S.Ct. 674, 676, 116 L.Ed.2d 669 (1992).

"It has been more than fourteen years since Stanford sodomized and murdered Baerbel Poore....The delay caused by the stay of execution in this case prejudices Kentucky in a way not correctable on appeal." *Parker, supra.*

IS DISTRICT COURT'S ORDER CLEARLY ERRONEOUS AS A MATTER OF LAW?

Parker argued that once all state appeals, including a petition for certiorari, have been exhausted, the state is free to carry out the execution. However, "[s]tate policy is to grant a period of ninety days after the Supreme Court's denial of certiorari before it even sets an execution date." *Id.* Stanford was granted an additional ninety days, and another thirty after the warrant was signed, in which to file his habeas petition. Stanford argued that Congressional enactment of 21 U.S.C. §848(q)(4)(b) and *McFarland, supra*, changed matters.

"Stanford is wrong in both respects." *Parker, supra.*

Scott McFarland was sentenced to death in Texas and "by any meaning of the word, 'unrepresented' by counsel" as he prepared his state collateral action. His request for appointment of counsel and a stay of execution in order to file his petition were denied by the district court. "McFarland was, until almost the very end, unrepresented and appearing completely pro se. It is this fact that provides the fundamental difference between *McFarland* and this case." *Id.*

Kevin Stanford was represented by the Jefferson District Public Defender during his direct appeal and the 1989 Supreme Court review. Since then, Stanford has been represented by the Department of Public Advocacy and the former Kentucky Capital Litigation Resource Center. "Unlike in the State of Texas, where there were no means to secure publicly financed counsel from the Texas Capital Resource Center...Kentucky has provided and continues to provide the very type of preapplication legal assistance and representation that §848 (q)(4)(b) requires ...Stanford has been, is, and will be represented by publicly financed, undoubtedly qualified, counsel." *Id.*

"Counsel for the condemned warmly argues that his tactics are not dilatory, that he is simply busy and the case is complex, and he needs more time to file a petition that he considers "adequate." While it is certainly true that each of us involved in the law, and perhaps in any area of human endeavor, could do a better job if given more time, that is not the standard....[W]e note that counsel affirmatively stated at oral argument what is, in any event, obvious; had this court several months ago granted the writ of man-

damus....counsel would already have filed a petition, that though he might consider it unsatisfactory, would have properly invoked federal jurisdiction." *Id.*

The district court's entry of a stay "was clearly erroneous as a matter of law." *Id.*

WHETHER ORDER IS AN OFT-REPEATED ERROR OR MANIFESTS A PERSISTENT DISREGARD OF THE FEDERAL RULES

The Court has reviewed *McFarland* on only one other occasion. *See Steffen v. Tate*, 39 F.3d 622 (6th Cir. 1994). "Clearly this is not an oft-repeated error, nor does the district court's decision manifest a persistent disregard for the federal rules." *Id.*

Boggs feels parts four and five "are to some degree contradictory" because if an order raises a "new or novel" problem, it is unlikely to simultaneously demonstrate a "persistent disregard for the federal rules" or be an "oft-repeated error." Therefore, he sees part four as more "a rule of inclusion" than "exclusion." *Id.*

WHETHER THE ISSUE RAISES NEW AND IMPORTANT PROBLEMS OR ISSUES OF LAW OF FIRST IMPRESSION

"*McFarland* opens a new area containing a novel problem. Coming as it does in the area of capital punishment, it is particularly important that the Circuit speak as immediately as possible on the issue....[I]t is [also] clear that in many circumstances delay is the best strategy for those representing condemned prisoners....'since there is only one significant bite at the apple of federal habeas, and since that procedure must almost always be completed before an execution can be carried out, the filing of a habeas petition is a powerful card in the hand of the defendant, but it is a card that can only be played once. Therefore, it is almost always in the interest of a death-sentenced prisoner to delay filing that petition as long as possible.'" *Id.* quoting *Steffen*, *supra*, 39 F.3d at 625.

STAY CLEARLY ERRONEOUS

"Mindful that mandamus is an extraordinary remedy", the court believes it is appropriate in this case. During the period between November 12, 1992, when the case was submitted to the Kentucky Supreme Court and the date of the *Parker* opinion, the filing of a habeas petition should have been a "realistic aim...had the paramount goal been anything other than delay..." *Id.*

The district court is ordered to vacate the stay of execution; the motion to revoke the order appointing counsel is denied.

Houston v. Dutton
1995 WL 128700
(decided March 28, 1995)

Panel:
Merritt (writing), Guy and Ryan

The United States District Court for the Eastern District of Tennessee granted Richard Houston's petition for habeas corpus, finding seven separate grounds which required reversal of his convictions for murder and armed robbery and his sentence to death.

The Sixth Circuit affirmed two grounds, reversed another, pretermitted four, and reinstated Houston's conviction for armed robbery.

JACKSON v. VIRGINIA ISSUE

The district court granted Houston's petition because it felt the evidence that he had committed murder was insufficient under *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2780, 2789, 61 L.Ed.2d 560 (1979) (in sufficiency challenges, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

However, the Sixth Circuit felt that the evidence "was strong, indeed practically undisputed", that during the course of a robbery, Houston killed the owner of a Knoxville gas station. Although Houston's defense that the murder occurred during a struggle over a gun was "possible," the circumstantial evidence pointed to "premeditation and deliberation." *Houston*, *supra*, at 2.

Houston approached a Knoxville gas station with a loaded .38 caliber revolver. The victim, Stanley Blasinger, was unarmed and hit in three places: the mouth, heart and mid-section. The evidence supported the notion that the mouth wound was first, and although non-fatal, "would certainly have incapacitated" the victim. Powder burns around the other two wounds indicate the shots were fired from point-blank range. *Id.*

Furthermore, although Houston testified that he ran away from the shooting, a witness who did not see or hear the shots said he saw Houston walk calmly to his car. This evidence is corroborated by testimony that Houston went back to his hotel room, reloaded his gun, drank three beers, took a shower and attempted to wash the victim's blood from his clothing, asked his girlfriend for sex, and on his way to a Kentucky Fried Chicken for dinner, drove by the gas station to see if the police were there. Viewed in the light most favorable to the State, the evidence is sufficient enough to find deliberate and premeditated murder in order to eliminate the only eyewitness to Houston's crime, and thus, prevent his arrest. *Id.*

The district court relied upon *State v. Brown*, 836 S.W.2d 530, 542 (Tenn. 1992) (evidence of repeated blows alone is not sufficient evidence to infer premeditation) in concluding that the state's evidence did not meet the *Jackson*, *supra*, standard.

The Sixth Circuit felt that if it were to uphold the district court's reasoning, Houston's retrial would be barred by double jeopardy. In addition, the district court erred when it applied the state law case (*Brown*) to "set the federal standards for a sufficiency of the evidence analysis", since under *Jackson*, *supra*, the federal standard had been met. *Houston*, *supra*, at 3.

PRESUMPTION OF MALICE

The trial judge gave the following malice instruction:

"Malice is an essential ingredient of murder, and it may be either express or implied. Express malice is actual malice against the party slain. Implied malice is malice not against the slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.

If the state proves beyond a reasonable doubt that a killing has occurred, it is presumed to be malicious unless rebutted by other facts and circumstances to the contrary.

. . . . .

A deadly weapon is an instrument, which from the use made of it at the time, is

likely to produce death or to do great bodily harm." *Id.*

"[T]he Fourteenth Amendment's guarantees prohibit a State from shifting to the defendant an element of the crime charged." *Sandstrom v. Montana*, 442 U.S. 510, 527, 99 S.Ct. 2450, 2461, 61 L.Ed.2d 39 (1979) (Rehnquist, J. concurring). This concept was specifically applied to malice instructions in *Francis v. Franklin*, 471 U.S. 307, 317, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985). In *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 1892, 114 L.Ed.2d 432 (1991), the Supreme Court again looked at an instruction which told the jury to infer malice from an unlawful act such as a killing, or from the use of a deadly weapon, found the instruction unconstitutional and warned lower courts not to assume that such instructions were harmless. *Id.*, 500 U.S. at 402.

HARMLESS ERROR ANALYSIS

In *Houston*, the state conceded that the instruction violated *Sandstrom*, *Francis* and *Yates*, but argued that the violation was harmless. The Sixth Circuit conducted its analysis under both *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993) ("substantial and injurious effect or influence" upon the jury) and *O'Neal v. McAninch*, 115 S.Ct. 992 (1995) ("grave doubt" about harmlessness to be resolved in petitioner's favor).

Houston's only defense was that the murder was an accident which occurred during a struggle over the gun. "In both law and common sense, accident and malice are conceptually incompatible." Therefore, the instruction to assume malice from the "unrefuted facts of an unlawful killing and the use of a deadly weapon" mandated that the jury reject Houston's claim of an accidental killing. "By thus destroying defendant's theory of accident at the outset, the malice instruction substantially and injuriously affected the verdict, resulting in prejudice to the defendant." *Houston, supra*, at 5. Because the error was harmful, the district court's issuance of the writ was affirmed.

HEINOUS, ATROCIOUS AND CRUEL (HAC) AGGRAVATOR

Tennessee is a "weighing" state. In other words, after a Tennessee jury finds beyond a reasonable doubt that an aggravator exists, it then balances aggravation against any mitigating circumstances individually found.

The instruction read: "The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind." *Id.* at 7.

The state also conceded error on this issue. However, the Sixth Circuit, citing *Richmond v. Lewis*, 113 S.Ct. 528 (1992), said that even if there were no other error, Houston's death sentence could not stand. In *Richmond*, a similar HAC instruction was given, and the Supreme Court, in reversing the district and circuit courts stated:

"Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." *Richmond, supra*, 113 S.Ct. at 535.

"The state courts in Tennessee have not found this instruction to constitute error and therefore have not performed a 'new sentencing calculus' in this case." Thus, the District Court's grant of habeas relief was affirmed. *Houston, supra*, at 7.

ROBBERY CONVICTION

The district court vacated Houston's armed robbery conviction because of the prosecution's closing argument comments which Houston claimed made direct reference to his failure to testify and his shackling during part of the trial.

The Sixth Circuit, citing Houston's undisputed role in the armed robbery, his confession which was fully corroborated by other evidence, and his apprehension while in possession of money and checks taken in the robbery, found each error harmless because neither had a "substantial and injurious effect or influence on the jury." *Id.*

CASES AWAITING ARGUMENT OR DECISION

O'Guinn v. Dutton

En banc oral argument in *O'Guinn v. Dutton* is scheduled for June 14, 1995.

McQueen v. Scroggy, No. 93-5854 (appeal from the United States District Court for the Eastern District of Kentucky)

On April 12, 1995, *McQueen v. Scroggy* was argued in front of a panel consisting of Judges Damon Keith, Cornelia Kennedy and Danny Boggs.

Issues argued were: 1) *Morgan v. Illinois*, 112 S.Ct. 2222 (1992) violation; 2) *Witherspoon v. Illinois*, 88 S.Ct. 1770 (1968) violation; 3) penalty phase ineffective assistance of counsel.

Attorneys for Harold McQueen: Randall L. Wheeler (argued); Melissa Bellew, Assistant Public Advocates.

Attorneys for Gene Scroggy: David Smith (argued); Elizabeth Myerscough, Assistant Attorneys General.

Kentucky Supreme Court

Skaggs v. Commonwealth 94-SC-393-MR (decided March 23, 1995)

David Skaggs was convicted of the murder of an elderly Barren County couple in 1981. The Supreme Court affirmed the convictions in 1985. *Skaggs v. Commonwealth*, 694 S.W.2d 672 (Ky. 1985).

Skaggs' 11.42 motion, based in part upon a later discovery that Elya Bresler, the mental health expert who testified at trial, was a fake, was denied. The Kentucky Supreme Court, finding "that substitution for Bresler would not have affected the outcome of the trial", affirmed the denial. *Skaggs v. Commonwealth*, 803 S.W.2d 753 (Ky. 1990).

In his third motion for new trial, based on two psychological evaluations in which Skaggs was found to be mildly mentally retarded, or "at most" have a "slight mental disorder," Skaggs argued that the conclusions reached were "radically different from the diagnosis and conclusions" Bresler presented to the jury. *Skaggs, supra*, at 2.

AGREEMENT WITH CIRCUIT COURT

Motions for new trials may be based on newly discovered evidence. RCr 10.02 and CR 60.02. The standard of review is that a new trial should be granted "when the new evidence is such that would, with reasonable certainty, change the verdict on retrial." *Id.* citing *Hollowell v. Commonwealth*, 492 S.W.2d 884 (Ky. 1973) and *Carwell v. Commonwealth*, 694 S.W.2d 469 (Ky.App. 1985).

"After a careful review of the record," the Supreme Court said "we must agree with

the circuit judge that these two new evaluations do not contain any new evidence that with reasonable certainty would change the verdict upon a retrial." *Skaggs, supra*, at 3. The new evaluations support the jury's rejection of Skaggs' insanity defense. Furthermore, "Bresler's fraud as to his credentials did not have a material effect on his presentation of evidence to the jury. In fact it was stronger then the so-called newly discovered evidence." *Id.* at 4.

COMMONWEALTH'S MOTION TO DISMISS APPEAL

The Commonwealth argued that the appeal was frivolous and meant only to delay Skaggs' entry into federal habeas; that the motion was procedurally barred because it was undertaken more than ten years after the RCr 10.06(1) one year deadline had expired; that the motion was successive because all three of Skaggs' motions for new trial were based on mental health expert assessments; and because of *res judicata*.

The Court agreed that "the pursuit of the same claim again and again is successive regardless of whether it is done through RCr 10.02, RCr 11.42 or RCr (*sic*) 60.02", but "because this case involves the death penalty," "we believe [Skaggs' motion] should be denied rather than dismissed." *Id.* at 5.

MENTAL RETARDATION CLAIM

Skaggs argued that because he had been found mentally retarded, KRS 532.140 should bar his execution. "KRS 532.140(3) specifically states that the statute shall apply only to trials commenced after July 13, 1990. [Skaggs'] trial was begun on February 23, 1982. Therefore, his claim is without merit." *Id.*

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Truth-in-Sentencing: Treating the Disease on Voir Dire

In 1987 Justice Leibson described the "Truth-in-Sentencing" statute (KRS 532.055) as one that "qualifies as a cure worse than the disease." ***Commonwealth v. Reneer***, Ky. 734 S.W.2d 794, 805 (1987). One of the many nagging side-effects of this cure has been the proceedural questions left unanswered. One of the most vexing of those questions is: *what to do with penalty inquiry during the voir dire phase of the trial.* An examination of where Kentucky courts have been will point the defense attorney to a strategy aimed at protecting her client's interests.

Imagine the suprise of counsel for Rodney Shields when the Supreme Court of Kentucky told him in a published opinion that the trial court was correct in denying him permission to voir dire the jury on penalty, because he had not included the possible PFO enhancement when he told the court what he intended to ask! ***Shields v. Commonwealth***, 812 S.W.2d 152, 153 (Ky. 1991). Who could have guessed that bifurcating all felony jury trials meant that counsel must ask the jury about the posibility of punishment including enhancement? Such is now the rule in this Commonwealth thanks to a trial judge sustaining a prosecutor's motion in limine for the wrong reason.

In death penalty cases, it is clear that jurors who cannot consider the full range of punishments cannot sit on the jury. See *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Common sense would dictate that, under Kentucky's sentencing scheme with its seperate penalty phase, a similar rule should apply. The only way to know if a juror can consider the actual range of punishment is to ask the juror about actual penalties.

The Supreme Court of Kentucky made this clear in *Shields* when it stated: "It is true that our current criminal trial procedure generally precludes the jury from hearing purely 'sentencing information' during the guilt or innocence phase of a trial. However, it does not absolutely preclude their being given some information of that type incidental to a proper voir dire examination. In order to be qualified to sit as a juror in a criminal case, a member of the venire must be able to consider any permissible punishment. If he cannot, then he properly may be challenged for cause. See ***Grooms v, Commonwealth***, 756 S.W. 2d 131 (Ky. 1988). This type of questioning, of course, must come before the guilt or innocence phase since there is no separate voir dire thereafter but before the punishment phase." *Shields*, 812 S.W.2d at 153.

The court was careful to set limits on this voir dire process. The court clearly intended sentencing questions to be a part of voir dire, but not a total sidestepping of the statutes intent. The court went on to say: "A meaningful voir dire examination by both sides is a *sine qua non* to the seating of a fair and impartial jury. ***Sizemore v. Commonwealth***, 306 S.W.2d 832 (Ky. 1957). Of course, care must be exercised to assure that information unduly prejudicial to either side is not introduced into the voir dire examination unnecessarily or by subterfuge for the real purpose of influencing the jury prematurely. For example, it would be impermissible for the Commonwealth at that stage to attempt to inform the jury of a defendant's prior criminal record or the fact that there would be a persistent felony count to be tried if there were a guilty verdict as to the underlying offense." *Shields, supra* at 153.

So under *Shields*, trial courts would be routinely granting defendants requests to voir dire on penalty, right? Well the cases that followed *Shields* seem to indicate otherwise. If the trial court denies the defendant the right to voir dire on penalty then under *Shields* that should be a given for a reversal, right? Well, not exactly every time. As the appellate courts have continued to struggle with application of the basic premise of a meaningful voir dire, the cases have opened a new door. And what is behind that door, Alice?

In ***Anderson v Commonwealth***, 864 S.W.2d 909 (Ky. 1993), the court reversed a conviction, among other reasons, because the defendants were not permitted to voir dire on penalty and they received the maximum sentence from the jury.

The maximum sentence part of this reversal is critical to understanding where the court is headed. Justice Leibson wrote: "The appellants claim it was reversible error to deny their counsel the opportunity to question the venire about whether the jurors could consider the entire range of penalities in the event a guilty verdict was returned. During voir dire the trial court sustained objection to defense counsel's mention of the penalties possible in this case. In *Shields v. Commonwealth*, Ky., 812 S.W. 2d 152, 153 (1991), we held: 'In order to be qualified to sit as a juror in a criminal case, a member of the venire must be able to consider any possible punishment. If he cannot, the he properly may be challenged for cause.' Here the appellants were denied the right to meaningful voir dire on the issue of punishment. Since both received the maximum sentence on all charges, we can hardly say that it was harmless error to deny meaningful inquiry into whether the jurors were open to consideration of a lesser sentence within the range of possible penalties, should circumstances warrant it. This *Shields* error requires reversing the judgment as to penalty. It [does] not, per se, require setting aside the findings of guilt,...."

The Supreme Court in *Anderson* laid out two critical additions to *Shields*. If a defendant is not permitted to voir dire on penalty and he receives a maximum sentence it is not harmless error. The result of the error is a new penalty phase, not a new trial. The defense practioner must then always raise the issue of penalty phase voir dire. He can do so by pretrial motion or by asking the question and having the court deal with the prosecuter's objection. No matter how it is done penalty questions must be a standard part of a defense attorney's voir dire.

The *Anderson* case also gives rise to another possible strategy for reducing a maximum sentence. If you were not al-

lowed to voir dire as to penalty, remind the judge of the sure reversal to come, in your request for a lesser penalty. The judge has a tough choice, whether to impose the harshest sentence and know the case will be back for at least a new penalty phase, or to reduce the sentence. The client wins either way. It starts with voir dire questions.

The question that I am sure occurs to anyone reading this article up to this point is what happens when your client does not get the penalty voir dire and does not get the maximum sentence? There is a partial answer in ***McCarthy v. Commonwealth***, 867 S.W. 2d 469 (Ky. 1994). The defendant was not permitted to voir dire on the penalty enhanced by PFO. He was convicted of a Class B felony and PFO, however he received a twenty year sentence which was the minimum possible under his charges. The Supreme Court wrote: "As appellant received the minimum sentence, the trial court's alleged failure to allow voir dire on the penalty range was not error." *Id.* at 472.

The practioner must remember that *Shields* only gave a right to voir dire on penalties for charged offenses, not all possible lesser included offenses. *McCarthy* extends that to say that if the defendant receives the minimum possible under what he is charged with, then he has all of the benefits he would have had under *Shields*. If the defendant has all the benefits he is entitled to, then there is nothing to correct.

What then of cases where the jury decides on something *between* the maximum sentence and the minimum sentence? There is no case with an exact answer to that question, yet. However, there are arguments to be made based on the cases handed down already. The defense practioner should be prepared to make these arguments and get the rest of us an answer to the above question.

Any sentence above the minimum given without benefit of penalty voir dire questions appears to violate the reasoning of *Anderson* and *McCarthy*. The defendant obviously had a jury that did not reach the minimum sentence, and that could have been because one or more jurors would or could not consider the minimum sentence. No one will ever know since they weren't asked, and that cannot be harmless to a defendant. Again, setting up the issue begins with asking the questions during voir dire or making sure the record reflects that counsel attempted to do so.

CONCLUSION

The simple lessons of the cases discussed in this article are clear. Counsel must ask or attempt to ask penalty phase questions during voir dire. Either use a pretrial motion or ask the questions, creating an opportunity for the prosecution to object. The questions must encompass the entire penalty range but must not be an effort to exceed the limits set out by the cases. Where your client is also charged as a PFO, the voir dire questions must include that possible range of penalties as well, but take care not to allow the prosecution to let on to the jury on voir dire that your client has a previous felony conviction. Finally, counsel must press the court for a reduction in sentences given where no penalty questions were permitted.

Simple hard work and a little bit of creativity can give a client, particularly one headed for a maximum sentence, a chance for relief somewhere down the line. Maybe that can be the "spoon full of sugar" that makes this "cure" Justice Leibson described almost ten years ago easier to swallow.

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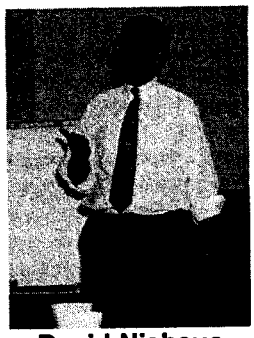
"Completeness"



David Niehaus

This article begins a somewhat regular new series in which I will look at the way in which other jurisdictions treat the language found in the Kentucky Rules of Evidence. Although the Supreme Court and the Court of Appeals are deciding evidence cases with some regularity, it takes time to develop a suitably large body of opinions construing rule language. Therefore, for those questions on which there is not much Kentucky law, it makes sense to examine the law of other jurisdictions who have the same language. Including the District of Columbia and the federal court system. Forty jurisdictions follow the federal rules pretty closely.

Although it is difficult to get to all of these decisions sometimes, you can take time each week when your Southwest 2d Advance Sheet arrives to look through the part in the front captioned "Cumulative Statutes" which lists the statutes and rules construed in that particular advance sheet. Of the states that are reported in the Southwest Reporter, only Missouri is not a Federal Rules of Evidence state. Therefore, even without access to a law library that might have the different reporters, your weekly advance sheet gives you the decisions of four state courts (Kentucky, Tennessee, Arkansas and Texas) on the Rules of Evidence. It's worth the extra 10 or 15 minutes it might take to read these cases.

KRE 106

In this article, I am going to discuss the language of KRE 106 which is one of those rules that seems, at first glance, pretty straightforward. It says that if a party introduces a writing, a recorded statement, or a part of either one, the adverse party may require introduction at that time of "any other part or any other writing or recorded statement which ought, in fairness to be considered contemporaneously with it."

Unless you are in the habit of parsing statutes, you probably consider the rule simply as one that allows you to demand that the exculpatory part of your client's pretrial confession be played or read into the record at the same time the police officer is talking about the inculpatory parts. If you do so, you are in good company, because this is the approach that Judge Jack Weinstein takes in his very influential treatise on the Federal Rules of Evidence.

Under this view, KRE 106 might be considered just a special order of proof rule similar to RCr 9.42 and KRE 611. The Commentary to the rule does not suggest any broader role. But other jurisdictions having the same language have recognized that Rule 106 language standing alone or in conjunction with the language of KRE 611(a)(1) allows much more.

CURATIVE ADMISSIBILITY

KRE 106 is a specific application of the common law evidence rule called "curative admissibility," (otherwise known as "opening the door"), which states the principle that "when a party opens up a subject, he cannot complain if the opposing party introduces evidence on the same subject." [*U.S. v. Bolin*, 514 F.2d 554, 558 (7th Cir. 1975)].

The purpose of the Rule 106 rule of "completeness" is to make sure that a "misleading impression created by taking matters out of context is corrected on the spot, because of the inadequacy of repair work when delayed to a point later in the trial." [*U.S. v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986)].

THE CRITERIA

Application of the rule to achieve this purpose is relatively straightforward. The party wishing to invoke the rule must show two things.

First, the party must show that the other evidence is relevant to the issue at trial.

Second, the party must show how the evidence qualifies or explains the portions already admitted. [*U.S. v. Sweiss*, 814 F.2d 1208, 1212 (7th Cir. 1987)].

Once the party has shown relevance, the judge should consider several points before admitting the evidence: "(1) Does it explain the admitted evidence? (2) Does it place the admitted evidence in context? (3) Will admitting it avoid misleading the trier of fact? and (4) Will admitting it ensure a fair and impartial understanding of all the evidence?" [*U.S. v. Valesco*, 953 F.2d 1467, 1475 (7th Cir. 1992)].

Although the plain language of the rule seems to leave the decision of whether to use it up to the adverse party ("an adverse party may require introduction"), that right is qualified by the phrase "ought in fairness" be considered contemporaneously. The judge decides what fairness requires under KRE 106 subject to reversal on appeal under an abuse of discretion standard.

ON DIRECT

It is also important to note that KRE 106 is not limited solely to the document or recording relied upon by the witness. Certainly the rule refers to any other part of the writing or recording, meaning the writing or recording introduced through the witness. But it also refers to "any other writing or recorded statement" that should be considered. If your client has given two statements to the police, one exculpatory and one not-so-exculpatory, under KRE 106 you are entitled to interrupt the direct examination of the witness to introduce the more exculpatory statement. It doesn't matter if one is written and one is tape recorded. KRE 106 is broad enough to allow introduction of both if that is necessary to prevent misleading the jury.

ON CROSS

Of course, you are not required to use KRE 106. If you feel that it would be more advantageous to introduce clarifying evidence on cross-examination of the witness or during your own case in chief, the Rules of Evidence allow you to do so. This is usually justified under KRE 611(a) or under the theory that the common law of evidence (curative admissibility) has not been superseded by the enactment of KRE 106. [*Bolin*, at 558; *U.S.*

v. Lewis, 954 F.2d 1386 (7th Cir. 1992)]. This choice is tactical.

OTHER REMEDIES

The breadth of KRE 106 raises interesting questions on which the courts are divided. The announced purpose of KRE 106 is to cure misimpressions created by a party's introduction of part of a writing or recording. But KRE 403 explicitly allows the judge to exclude otherwise relevant evidence if its probative value is substantially outweighed by its tendency to confuse the issues or mislead the jury. KRE 106 is not necessary if a timely motion *in limine* under KRE 103(d) and KRE 403 has excluded the misleading evidence in the first place. If your prosecutor has a track record of introducing only the inculpatory snippets of a pretrial statement or of medical records, the best approach is to attempt to get all such information excluded on the ground that it is much easier to prevent prejudice in the first place under KRE 403 than it is to attempt to repair it under KRE 106. This is particularly true in cases where the corrective portions of a statement may be privileged or otherwise inadmissible. [*U.S. v. LeFevour*, at 981].

However, in many cases, you won't know what the prosecutor is going to do until she does it. Then the question of repair by otherwise inadmissible evidence may arise. Some courts explicitly forbid it. When Ohio adopted its Rules of Evidence it added the phrase "which is otherwise admissible" to the 106 language to make sure that no judge would use the rule to by-pass the other rules governing admissibility. Some other jurisdictions have done so by court decision. [*e.g.*, *USFL v. NFL*, 842 F.2d 1335 (2nd Cir. 1988)].

But other courts, most noticeably the D.C. Circuit, maintain that Rule 106 can only fulfill its purpose by permitting admission of otherwise inadmissible evidence. [*U.S. v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986)]. The justification for such an interpretation, other than reliance on retaliation theory, is that a construction of the rule that prohibits admission of evidence that can clear up a misimpression "raises the specter of distorted and misleading trials." [*U.S. v. LeFevour*, at 1368].

A more practical justification for such a construction is that the alternative is mistrial. If a party has misled the jury on a material point such that Rule 106 allows correction at the point the misimpression is created, the misimpression more than likely is serious enough to justify a mistrial. Admission of otherwise inadmissible evidence may well seem to the judge to be the lesser of two evils in such a situation. Which, of course, points out the need for careful pretrial planning by way of a motion *in limine* under KRE 403 to keep the evidence out entirely, if possible.

ORAL

A final question, whether oral statements may be used under KRE 106, has not generated a lot of controversy although the language of the rule obviously does not provide for introduction of oral statements. Those courts that do not say that the common law allows such use say that KRE 611(a)(1) does. [*e.g.*, *U.S. v. Alverado*, 882 F.2d 645 (2nd Cir. 1989)].

A judge is bound under KRE 611(a)(1) to make the presentation of evidence "effective for the ascertainment of the truth." If it takes interrupting the prosecutor's direct examination of a witness to do so, then that must be done. [*U.S. v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993)].

However, introduction of oral statements may present such serious practical problems like the difficulty of calling a witness during the middle of the prosecutor's direct examination of another witness that under KRE 403 and 611(a)(2) the judge may well defer relief under KRE 106 and 611(a)(1) until after the direct examination.

ETHICS RULES

KRE 106 provides a number of ways to deal with prosecutors who pick and choose from among the records, writings and recordings that they have to present as evidence. Any writing, recording or oral statement that will tend to clear up any misimpression that the prosecutor has made can be used under KRE 106. In theory, anyway, KRE 106 cases should not be that numerous.

The Kentucky Rules of Professional Conduct require all attorneys to disclose to the tribunal material facts to prevent fraud being perpetrated on the tribunal. [Rule 3.3(a)(2)]. A prosecutor has a special responsibility under Rule 3.8(c) to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the liability for the offense.

A construction of these two rules that would require the prosecutor to bring such evidence to the attention of the defendant before trial but then allow the prosecutor to pick and choose what is to be introduced at trial takes the sporting theory of law too far. But if prosecutors do so, KRE 106 exists to allow the correction of the misimpression, on the spot.

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Are We Connected to Who We Kill?

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes be-yond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. The destinies of the two races in this country are indissolubly linked together, and the way in which we choose those who will die reveals the depth of moral commitment among the living. The Court's decision to-day will not change what attor-neys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of disucssion. McCleskey's evidence will not have obtained judicial accept-ance, but that will not affect what is said on death row. However many criticisms of today's decision may be ren-dered, these painful conversa-tions will serve as the most eloquent dissents of all.

- Dissent of Justice William Brennan In *McCleskey v. Kemp*, 481 U.S. 279 (1987)

Funds for Defense Experts and Resources: What National Benchmarks Require

You must continuously compare yourself against the very best. In this game, good enough seldom is.

- Richard Dolinsky
DOW USA

This is the sixth 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.

The Necessity of Experts & Resources

Asking for, obtaining, and using funds for defense experts and other defense resources is understood as necessary when viewed in the context of the increasingly recognized national standard of practice. In fact, national standards now require that defense attorneys access experts and resources when the case demands them.

In a case involving the issue of whether an indigent was entitled to funds to hire or access a defense psychiatrist, this country's highest court announced that sufficient supporting services were critical to a competent defense:

"We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

A brain surgeon without an operating room, an anesthesiologist, or other assistants is not functional, despite the surgeon's competence. A general contractor is impotent without numerous subcontractors and their special skills. Criminal defense attorneys, regardless of their skill, are increasingly unable to perform competently without an investigator and testifying and consulting expert(s).

Quality Performance is the Global Benchmark

Quality. Customers demand *quality*. Nothing else will do. When we receive medical care, as the patient we want the very best available nationally or in the world. We have but one body and one life. We do not want our ailing heart, broken hip, or raging cancer treated with anything less than the latest and best.

Global. The market today is no longer statewide, or even regional. It is national and worldwide. A professional or a company which expects to successfully compete and prosper over the long haul has no choice but to meet and beat international competitors, and satisfy the patient, the client, the customer.

Benchmarking. Benchmarking is a method of providing the very best service. "In simple terms, benchmarking is learning from the pros. Benchmarkers first evaluate their own operations to pinpoint their weaknesses, then identify, study, and imitate organizations that excel in those areas. By adopting world class standards and practices, many organizations have catapulted ahead of their competitors almost overnight, and some have even surpassed the performance levels or 'benchmarks' set by their mentors." Sandra Millers Younger, *Understanding Benchmarking: The Search for Best Practice* (July 1992), American Society for Training and Development Info-Line.

Benchmarks for quality performance of lawyers are likewise national and global. No longer is it sufficient to be as good as those in your town, county or region... especially when dealing with someone's liberty or life.

ABA and NLADA Standards

The American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA) have for some time been bringing together appropriate criminal justice professionals to study and develop national professional benchmarks or standards for the practice of criminal defense.

ABA Standards

The American Bar Association ***Standards for Criminal Justice Providing Defense Services*** (3d ed. 1992) were recently updated by a distinguished committee of Shirley Abrahamson, Justice of the Wisconsin Supreme Court;

Norman Lefstein, Dean of the Indiana University Law School; Charles English, private practitioner; Chaleff, English & Cutalono, Santa Monica, California; Ronald Clark, King County Chief Deputy prosecutor, Seattle, Washington; Professor Sam Dash, Georgetown Law Center; and Bennett Brummer, Miami Florida Public Defender.

This third expression of standards by the ABA recognizes the need for constant evolution of the level of practice. "The third edition changes recognize the significant growth in defense services over the past decade, as well as the profound changes in interpretation of the constitutional right to counsel and the scope of the criminal sanction, as viewed by the United States Supreme Court. These new changes should serve as a useful tool to both the policy-maker and the litigator who seeks legal and ethical guidance on the provision of defense services in the state and federal courts." *Id.* at xii.

Relevant ABA standards communicate that quality representation includes the use of experts and other resources. Lone ranger defenses from the seat of your experience only is no longer sufficient to meet the customer's needs.

Quality. The ABA's ***Providing Defense Services* Standard 5-1.1** sets the overriding standard of criminal defense representation: *"The objective in providing counsel should be to assure that quality legal representation is afforded all persons eligible for counsel pursuant to this chapter."*

Experts & Resources. The ABA ***Providing Defense Services* Standard 5-1.4** requires that defenders have the necessary resources for quality representation:

"The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense preparation in every phase of the process...."

The commentary to Standard 5-1.4 states the obvious, "A *sine qua non* of quality legal representation is the support personnel and equipment necessary for professional service.... Quality legal representation cannot be rendered either by defenders or by assigned counsel unless the lawyers have available other supporting services in addition to secretaries and investigators. Among these are access to necessary expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing. The quality of representation at trial, for example, may be excellent and yet unhelpful to the defendant if the defense requires the assistance of a psychiatrist or handwriting expert and no such services are available."

The ABA ***Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*** (1989), Guideline 8.1 addresses supporting services:

"The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Guidelines with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase."

The Commentary to 8.1 explains: "Counsel assigned to represent defendants in capital cases must engage in ongoing research in order to keep abreast of the rapidly changing legal developments in the complex body of law surrounding death penalty issues. In order to make use of sophisticated jury selection techniques... for example, the defense requires access to social scientists and other experts who can assist in voir dire questioning and the profiling of prospective jurors. Since pretrial investigation and preparation are fundamental to attorney competence at trial.... [A]ssigned counsel requires the services of trial assistants such as investigators to gather evidence and witnesses favorable to the client and to enable counsel to intelligently assess conflicting options. An adequate defense also requires the services of expert witnesses to testify on behalf of the client and to prepare defense counsel to effectively cross-examine the state's experts. Additionally, counsel in a capital case is obligated to conduct a thorough investigation of the defendant's life history and background and, if it is in the best interest of the client, to present mitigating evidence uncovered during the course of that investigation at the penalty phase of the trial.... counsel, whether practicing privately or within a defender office, cannot adequately perform these and other crucial penalty phase tasks without the assistance of investigators and other assistants.

It is critical, therefore, for each jurisdiction to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal and post-conviction and to procure the necessary expert witnesses and documentary evidence. Assigned attorneys involved in capital cases are typically provided with few, if any, resources to fund this aspect of case preparation. According to one source, the funds which states and counties provide for defense counsel are far below the amounts that would be needed even if capital trials had only one phase. Furthermore, funds available to appointed defense counsel are *substantially* below those available to the prosecution. This inequity is unconscionable."

NLADA Standards

NLADA. The National Legal Aid and Defender Association has also developed national standards for criminal defense representation of indigents. NLADA is a private, non-profit, national membership organization dedicated to assuring the availability of high-quality legal services for poor people.

NLADA's *Performance Guidelines for Criminal Defense Representation* (1995) Guideline 4.1(7) addresses expert assistance:

"Counsel should secure the assistance of experts where it is necessary or appropriate to:
(A) the preparation of the defense;
(B) adequate understanding of the prosecution's case;
(C) rebut the prosecution's case."

Continuous Improvement

There must be a constant effort to practice according to national standards. As Robert C. Camp of Xerox explains, "You've got to be continuously looking for a better way to do things...benchmarking is a change in mentality from productivity as a one time event to a continuum."

We must continue to represent clients at higher levels. Defending the constitutional rights of the accused or convicted is not a one time event but a continuum. Obtaining funds for defense experts and defense resources is necessary to achieve the objective of the vigorous, effective, quality defense of indigent criminal defendants.

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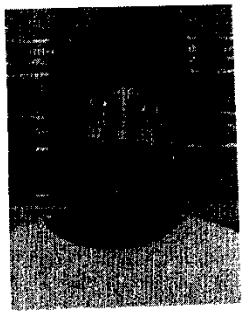
West's Review



Julie Namkin

Whalen v. Commonwealth
891 S.W.2d 86 (Ky.App. 1995)
(Jefferson Circuit Court - Judge Schroering)

The defendant was convicted of first degree bail jumping as well as several other offenses arising out of confrontations with his ex-wife and the entry upon and the destruction of her property.

On appeal, the defendant argued it was error for the trial court to fail to instruct the jury on the lesser included offense of second degree bail jumping. The Court of Appeals held that second degree bail jumping was not a lesser included offense of first degree bail jumping because first degree bail jumping relates to a defendant who jumps bail when charged with a *felony*, while second degree bail jumping relates to a defendant who jumps bail when charged with a misdemeanor. Since Whalen was charged with a felony, the trial court was not required to instruct on second degree bail jumping.

The Court of Appeals also held that even though KRE 803(22) and KRE 410 exclude the introduction of an *Alford* plea as an admission against interest, this exclusion has no relationship to the use of an *Alford* plea at the sentencing phase of a trial held pursuant to KRS 532.055. Thus, no error occurred when Whalen's *Alford* plea was introduced at the sentencing phase of his trial.

Error did occur however, when the trial court failed to instruct the jury it could recommend whether Whalen's sentences be served consecutively or concurrently. The trial court was under the mistaken impression that the sentences had to be served consecutively because of KRS 533.060(3). However, *Commonwealth v. Wilcoxson*, Ky.App., 846 S.W.2d 719 (1992), held that a defendant is not "awaiting trial," as that phrase is used in KRS 533.060(3), until he has been indicted. That a defendant has been charged with an offense and released on bond pending indictment is not enough to invoke the statute's prohibition against concurrent sentences. When Whalen committed the August 1992 offenses with which he was subsequently charged, he had not been indicted for the August 1991 offenses or for bail jumping. Thus, concurrent sentences were permissible under KRS 532.110.

Whalen's convictions were affirmed, but his sentences were vacated and his case remanded to the circuit court to determine whether to run his sentences concurrently or consecutively.

Commonwealth v. Kenneth Allen Fint
93-CA-1728-MR, 1/27/95
as modified on 4/7/95
(Jefferson Circuit Court - Judge Knopf)

The defendant pled guilty to four counts of theft by unlawful taking over $300.00 resulting from his theft of meat valued at $18,000.00 from the Kroger Company. At final sentencing the Commonwealth filed a motion for forfeiture, pursuant to KRS 514.130, of the truck the defendant used to transport the stolen meat. The trial court denied the forfeiture motion as being "unnecessarily punitive" in this case.

On appeal, the Commonwealth argued the trial court's ruling was contrary to the forfeiture statute (KRS 514.130(1)).

The Court of Appeals relied on *Austin v. U.S.*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), which held that forfeiture was payment to the sovereign as punishment for an offense. Thus, as punishment, the question is whether the forfeiture is "excessive" under the 8th Amendment to the U.S. Constitution [which is the same as § 17 of the Kentucky Constitution]. The Court of Appeals concluded the trial court did not abuse its discretion in denying the Commonwealth's forfeiture motion, while noting it "most likely would not agree with the trial court's conclusion that forfeiture of the truck [valued at $1,875.00] was 'unnecessarily punitive,'" *i.e.*, "excessive."

The Court of Appeals also rejected the Commonwealth's argument that the forfeiture statute is mandatory upon the trial court once the Commonwealth has filed the appropriate motion. The Court stated the statute was constitutional on its face, but its application was subject to the limitations of the 8th Amendment to the U.S. Constitution and § 17 of the Kentucky Constitution.

The circuit court's order denying the forfeiture motion was affirmed.

Jerry Bush v. Commonwealth
92-CA-3070-MR, 2/10/95
(Letcher Circuit Court - Judge Collins)

This case involves an appeal of a circuit court order directing that Bush's Ford Bronco be returned to him "upon payment of storage fees." Bush argues the trial court erred when it required him to pay storage fees as a condition to return of the Bronco.

In *Robey v. Winn*, Ky., 453 S.W.2d 763 (1970), the court made it clear that when a motor vehicle is seized by law enforcement officers because of its use in the commission of a crime, and it is later found there was no such use, whatever arrangement the officers may have made for storage of that vehicle 'cannot impose liability on the owner nor impair his right to possession under [a] court order.'

Thus, the Court of Appeals vacated the circuit court's order requiring Bush to pay storage fees as a condition to regaining possession of his Bronco.

McKinnon v. Commonwealth
892 S.W.2d 615 (Ky.App. 1995)
(Fayette Circuit Court - Judge Paisley)

The defendant was convicted of second degree assault as a result of a shooting incident. At the truth-in-sentencing phase of his trial, the Commonwealth introduced evidence of his 1979 Ohio felony conviction for carrying a concealed weapon. On appeal, the defendant argued the fourteen year old conviction was too remote to be relevant and thus it should not have been admitted.

The Court of Appeals pointed out that the truth-in-sentencing statute imposes no time limits for the introduction of prior convictions contrary to KRE which sets out a ten year time limit for the introduction of prior convictions in the guilt phase for impeachment purposes. Also, *Grenke v. Commonwealth*, Ky., 796 S.W.2d 858 (1990), makes it clear there is no "bright line" rule for determining the relevancy of prior convictions introduced under the truth-in-sentencing statute.

The Court of Appeals found no abuse of discretion by the trial court and the defendant's conviction and nine year sentence were affirmed.

Brian Cooper v. Commonwealth

94-CA-0014-MR, 2/24/95
(Warren Circuit Court - Judge Minton)

Between December, 1991 and January, 1992, Cooper (a juvenile) committed numerous burglaries. Upon arrest, the juvenile court ordered Cooper to remain on yard restriction in his home with his father. There is nothing in the record to indicate Cooper was subjected to any surveillance or monitoring as a result of this yard restriction. After Cooper turned 18 on March 19, 1992, he was transferred to circuit court and tried as an adult. An indictment was returned in April, 1992, and pursuant to Cooper's not guilty plea a cash bond was set. As an additional condition of Cooper's release on bond, the circuit court ordered him to remain on yard restriction. Cooper was on yard restriction for a total of 81 days, until May, 1992, when he entered a guilty plea in exchange for a ten year sentence.

On November 23, 1993, Cooper filed a motion for jail credit alleging that his court-ordered pre-sentence "yard restriction" constituted "custody" for which he was entitled to credit for time served. Cooper based his argument on KRS 532.120(3). The Court of Appeals disagreed.

The Court of Appeals stated that under KRS 520.010(2) "custody" "does not include...constraint incidental to release on bail." Since Cooper's court-imposed yard restriction was the result of his release on bail, it is "specifically exclude[d]" by statute and Cooper is not entitled to credit for time served.

The Court of Appeals concluded: "Release on bond is indeed a privilege granted to an arrestee allowing the court broad discretion to impose conditions sufficient to guarantee his appearance later for trial. The alternative to release on bond, regardless of how stringent, is the ultimately more restrictive confinement in the county jail prior to trial. Time served in the county jail must by statute be credited later against a sentence upon conviction and sentencing for the same crime. KRS 532.120(3). Time released on bond, regardless of the restrictive conditions imposed, is not the same as jail time and is specifically excluded by statutory definition as a substitute for jail time. KRS 520.010(2)."

The Court of Appeals affirmed the denial of Cooper's motion for credit for jail time. The moral of this case is that if you are released on bond, even with some restrictions, you will not be able to count this time as "time served" toward your ultimate sentence.

Terry Lee Waddell v. Commonwealth

893 S.W.2d 376 (Ky.App. 1995)
(Kenton Circuit Court - Judge Lape)

Waddell was charged with flagrant nonsupport. He moved to dismiss the indictment on the ground that the Indiana judgment (finding him to be the father and ordering him to pay weekly support) entered against him in the original paternity action was void for lack of personal jurisdiction over him because the proof was taken in his absence and the order was entered by default. Upon the trial court's denial of his motion to dismiss, Waddell entered a conditional guilty plea reserving the right to appeal the denial of his motion to dismiss.

On appeal, Waddell argued the Indiana judgment was void due to insufficiency of service of process and not entitled to full faith and credit. The Court of Appeals noted that Waddell had to show the judgment was void under Indiana, not Kentucky law.

Indiana law allows for service of process by publication (which is what occurred in this case) where the individual cannot be personally served, cannot be found, has concealed his whereabouts or has left the state. Because the uncontradicted facts of the case show that Waddell was not amenable to any other method of service (a summons had been issued for Waddell in care of his mother but it was returned with the notation: not found, moved out 6 months ago, last time heard from he was in California), the Court of Appeals held the notice by publication met the requirements of due process. Thus, Indiana had personal jurisdiction over Waddell. Hence, it was not error for the trial court to deny Waddell's motion to dismiss the indictment.

The defendant also argued on appeal that the affidavit in support of the motion for notice by publication did not contain sufficient facts for a reviewing court to conclude a diligent search had been made to locate him. The Court of Appeals pointed out that Waddell never offered any proof as to his whereabouts at the time of the notice, or that he had left a forwarding address with the postal service. Nor did he ever dispute the affidavit's claim that he could not be found and/or was concealing his whereabouts. The Court of Appeals found the affidavit contained several facts to support the petitioner's claim that Waddell had either fled the jurisdiction or was purposely hiding to avoid process.

The Court of Appeals also rejected Waddell's argument that the Commonwealth failed to prove he knew he had a "duty to provide [support] by virtue of a court or administrative order," since Waddell waived any failure of proof by his guilty plea. Moreover, the record revealed Waddell had actual notice of the judgment.

Lastly, Waddell argued that KRS 530.050 is unconstitutional because it violates Section 18 of the Kentucky Constitution which prohibits imprisonment for failure to pay a debt. The Court of Appeals pointed out that the crime of flagrant nonsupport does not seek to impose a punishment for a debt, but "to redress the intentional financial abandonment of one's legal responsibilities." The judgment denying the motion to dismiss was affirmed.

Kenneth Wayne Williams v. Commonwealth

93-CA-1982-MR, 3/17/95
(Fayette Circuit Court - Judge Tackett)

The defendant was indicted for two counts of first degree sodomy, one involving M.J. and the other involving C.J., M.J.'s younger brother, and one count of attempted first degree sodomy involving C.J. After a jury trial, the defendant was convicted of the one count of first degree sodomy involving M.J. and the one count of attempted first degree sodomy involving C.J. The defendant was found not guilty on the charge of first degree sodomy of C.J.

On appeal, the defendant argued the trial court erred when it permitted the prosecutor to define "reasonable doubt" to the jury during voir dire. Although the trial

court recognized the prosecutor's comments were improper when brought to its attention by defense counsel, the trial court thought the best solution was to simply continue on, despite the prosecutor's offer to cure any misstatement. Trial counsel specifically stated he wanted "to leave it the way it is now" and did not want an admonition. As a result, the Court of Appeals concluded the error was not adequately preserved for review.

The other issue raised on appeal concerned the Commonwealth's admission of evidence of other uncharged acts under KRE 404(b).

Although only a single incident was charged in the one count of the indictment relating to M.J., M.J. was allowed to testify to three other uncharged acts committed against him by the defendant. Likewise, although the indictment charged two separate incidents relating to C.J., C.J. was permitted to testify to a third uncharged incident committed against him by the defendant.

Holding it was not error to allow the Commonwealth to introduce evidence of additional uncharged acts committed by the defendant, the Court of Appeals, relying on *Messmear v. Commonwealth*, Ky., 472 S.W.2d 682 (1971), pointed out that these additional uncharged bad acts "related entirely to acts committed against the victims of the charged acts." The Court of Appeals distinguished this case from those cases in which such evidence has been held inadmissible because in those cases the evidence of prior misconduct was committed upon persons other than the victim of the charged acts.

The defendant's convictions were affirmed.

Danny Lee Pierce v. Commonwealth

93-CA-1330-MR, 3/17/95

(Jefferson Circuit Court - Judge Wine)

This case is an appeal of a denial of the defendant's RCr 11.42 motion, which was filed two years after the entry of his guilty plea. The basis of the Rcr 11.42 motion was that trial counsel was ineffective because he failed to discover the grand jury that indicted him was improperly constituted as recognized in *Commonwealth v. Nelson*, Ky., 841 S.W.2d 628 (1992).

The defendant was indicted on July 16, 1990 and pled guilty on March 25, 1991. *Nelson, supra*, held that the Jefferson County grand and petit juries were improperly empaneled from March 28, 1988 through July 1992.

The Court of Appeals held the defendant failed to meet the two-pronged test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984), because "[o]ne attorney successfully raising the argument [made in *Nelson, supra*], which ultimately struck down the procedure, does not render the performance of Pierce's trial counsel either inadequate or ineffective." In addition, Pierce cannot meet the prejudice prong of *Strickland, supra*, because the Commonwealth Attorney's office reindicted those defendants whose indictments were dismissed pursuant to *Nelson, supra*. Thus, Pierce would have been reindicted if his attorney had raised the issue.

The denial of the Rcr 11.42 motion was affirmed.

James Gray v. Commonwealth

93-CA-1433-MR, 3/17/95

(Warren Circuit Court - Judge Minton)

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

On February 1, 1989, the defendant pled guilty to flagrant non-support and was sentenced to one year, which was probated for three years. On December 3, 1990, the Commonwealth moved to revoke the defendant's probation. On April 10, 1991, all parties agreed to set aside the February 1, 1989 guilty plea and to enter a new guilty plea to the same charges. This time the defendant was sentenced to three years which was probated for three years. On November 22, 1991, the Commonwealth again moved to revoke the defendant's probation. On February 28, 1992, the trial court revoked the defendant's probation and sentenced him to three years. On January 25, 1993, the defendant filed an RCr 11.42 motion which was denied on April 13, 1993. The basis of the defendant's argument was that, pursuant to CR 59.05, the trial court lost jurisdiction ten days after he pled guilty on February 1, 1989, and thus it lacked jurisdiction to enter a new judgment of conviction and a new sentence based on the April 10, 1991 guilty plea.

The Court of Appeals agreed with the defendant because under CR 59.05, after the expiration of the ten day period, the trial court loses jurisdiction of the case and an order modifying a sentence is void. The doctrine of finality prohibits the trial court from setting aside the first judgment. The Court of Appeals rejected the Commonwealth's argument, that because the defendant agreed to the increased sentence attached to the second guilty plea he must be held to his bargain, because "lack of jurisdiction... cannot be conferred by consent or agreement."

The case was remanded for the reinstatement of the February 1, 1989 judgment of conviction.

Richard Lynn Curley v. Commonwealth

93-CA-002312-MR, 3/24/95

(Jefferson Circuit Court - Judge Shake)

The defendant was indicted for two Class D felonies, one Class B misdemeanor, and a violation. Pursuant to a plea agreement, the defendant pled guilty to one Class A misdemeanor, and the Class B misdemeanor and the violation. When the defendant failed to appear at his scheduled sentencing hearing, the trial court issued a bench warrant for his arrest. The defendant was subsequently indicted for first degree bail jumping.

Several months later the defendant entered a conditional guilty plea to first degree bail jumping, but reserved the right to appeal whether he could be convicted of first degree bail jumping when he had only been convicted of misdemeanor offenses.

On appeal, the defendant argued he could not be convicted of first degree bail jumping under KRS 520.070 because the original felony charge for which he had been indicted had been amended to a misdemeanor (the other felony count for which Curley had originally been indicted was dismissed), and the trial court had accepted his guilty plea to the misdemeanor before the bail jumping occurred.

The Court of Appeals agreed and explained that first degree bail jumping (KRS 520.070) applies when the accused fails to appear "in connection with a charge of having committed a felony," while second degree bail jumping (KRS 520.080) applies when the accused fails to appear "in connection with a charge of having committed a misdemeanor." The Court of Appeals rejected the Commonwealth's argument that the determining factor is the original charge brought against the accused, not the stage of the proceedings at which the accused fails to appear. The Court of Appeals held "the nature of the charge(s) against a defendant at the time he jumps bail determines

whether" the offense is first or second degree bail jumping.

The defendant's conviction for first degree bail jumping was reversed.

Freddie Preston v. Commonwealth
93-CA-001816-MR, 3/24/95
(Lawrence Circuit Court - Judge Knight)

The defendant was indicted on January 12, 1990, for possession of a Schedule II controlled substance. Trial was set for June 5, 1990. On May 11, 1990, the defendant moved for a continuance, which was granted, because he was still recovering from back surgery and could not prepare for or participate in his upcoming trial. On April 10, 1992, almost two years later, the Commonwealth moved for a new trial date. On the same date, the defendant moved to dismiss the indictment because he had been in "judicial limbo" since his indictment while the Commonwealth was trying to decide whether to prosecute. Trial was rescheduled for the following year on June 7, 1993. On the morning of trial, the defendant again moved to dismiss the indictment and specifically asserted a violation of his right to a speedy trial. The trial court overruled the motion, and the defendant was convicted. Although the jury recommended a three year sentence, the trial court reduced the sentence to one year.

On appeal, the defendant argued the forty-one month delay between his indictment and his trial violated his right to a speedy trial.

The Court of Appeals concluded this lengthy delay was sufficient to trigger an inquiry under *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). As to whether the delay was attributable to the defendant or the government, the Court of Appeals found, and the defendant conceded, that he requested two continuances: one while he was recuperating from back surgery and the second so his counsel could attend the annual public defenders' conference. The first request accounted for almost two years of the total delay, while the record is unclear as to how much delay was attributable to the second request. A third continuance was attributable to the trial court undergoing surgery; however, the defendant never objected to this delay. No continuances were requested by the Commonwealth. Thus, most of the delay was attributable to the defendant while none was attributable to the Commonwealth.

The Court of Appeals also found the defendant did not assert a violation of his right to a speedy trial until the morning of the trial. Rather, the relief the defendant requested was dismissal, not an immediate trial. In essence, the defendant hoped to take advantage of the delay to obtain a dismissal of the charge, not a trial on the charge.

Lastly, the Court of Appeals found the defendant was not prejudiced by the 41 month delay. The defendant was free on bond and had a steady job. Although the defendant complained in general terms of anxiety from not having his case resolved, he failed to meet his burden of showing "psychic injury." Also, although the defendant contended a witness to the incident had died prior to trial, he was not sure whether the witness would have testified for or against him. In fact, the defendant conceded the witness would have had to incriminate himself to testify on his behalf.

Thus, the Court of Appeals concluded that despite the forty-one month delay, the defendant's right to a speedy trial was not violated. The defendant's conviction was affirmed.

Terry Michael King v. Commonwealth
93-CA-001163-MR, 4/7/95
(Jefferson Circuit Court - Judge Knopf)

Terry King and Eugene Boyd were arrested and charged with conspiracy to sell or possess with intent to sell marijuana over five pounds. The two men were jointly tried, but after opening statements, Boyd entered a guilty plea. The trial proceeded against King and he was convicted of conspiracy to possess marijuana over five pounds.

The issue on appeal is whether the trial court erred in admitting Boyd's statement, pursuant to KRE 801A(b)(5) which exempts statements of a co-conspirator from the hearsay rule, to undercover Detective Greg Treadway that King was the "money man" in Boyd's marijuana operation. [It is not clear who testified to this statement at trial, since the only testimony referred to in the opinion comes from Detective Warman.]

For Boyd's hearsay statement to be admissible under the exception in KRE 801A(b)(5), the Commonwealth must establish King's participation in the conspiracy by a preponderance of the evidence. The Court of Appeals, relying on *Canada v. Commonwealth*, 262 Ky. 177, 89 S.W.2d 880,881 (1936), stated "the Commonwealth must produce independent, corroborating evidence to make Boyd' statement admissible."

The Commonwealth pointed to three pieces of independent evidence linking King to the conspiracy to buy marijuana. First, King arrived at Boyd's home at the time Boyd was scheduled to sell the marijuana to the undercover detective. Second, King was in the house when the actual sale occurred. Third, King was near a trash can (one detective testified King was standing over the trash can) from which one pound of marijuana was retrieved.

Rejecting the Commonwealth's argument, the Court of Appeals stated that "mere presence during the time of illegal activity is not sufficient to link a person with the crime committed." King was in a different part of the house from where the alleged drug transaction was occurring and there was no evidence he was aware of what was going on between Boyd and the undercover detective. Also, there was no evidence King knew what was in the trash can or that he put the marijuana there. His fingerprints were not on the trash can or the package of marijuana.

Thus, the Court of Appeals concluded the commonwealth failed to meet its burden of proving that a conspiracy existed and King knew about it and participated in it. Hence, Boyd's statement was not admissible under the co-conspirator exception to the hearsay rule.

King's conviction was reversed and his case remanded for a new trial.

Rex Allen v. Commonwealth
92-CA-3104-MR, 4/7/95
(McCracken Circuit Court - Judge Graves)

On June 30, 1992, the defendant was indicted for first degree criminal abuse by the McCracken County Grand Jury. On October 5-6, 1992, he was tried by a jury and convicted. On November 19, 1992, the Kentucky Supreme Court rendered its opinion in *Commonwealth v. Nelson*, Ky., 841 S.W.2d 628 (1992) (holding that the authority to determine which jurors should be disqualified, postponed or excused cannot be delegated to administrative personnel). On November 30, 1992, prior to the defendant's final sentencing, trial counsel filed a "Motion to dismiss Indictment or in the Alternative

for a New Trial" alleging the Grand Jury which indicted the defendant was selected contrary to KRS 29A.080, KRS 29A.100 and Administrative Procedures of the Court of Justice, Part II, sections 8 and 12. Counsel cited *Nelson, supra*, in support of his motion.

The trial court gave the defendant until December 11, 1992, to present evidence to support his motion. On said date, counsel filed the affidavit of the McCracken County Court Administrator in which she admitted making decisions regarding which jurors should be excused or transferred to another month. She further admitted there was no way to determine from looking at a juror's questionnaire whether she or the judge excused the juror. Notwithstanding the admissions in the court administrator's affidavit, the trial court overruled the defendant's motion on December 21, 1992, just prior to his final sentencing.

On appeal, the Court of Appeals held the trial court's failure to grant the defendant's motion to dismiss or for a new trial was reversible error. Consistent with *Nelson, supra*, the Court of Appeals reversed the defendant's conviction and remanded for dismissal of the indictment. Under *Nelson*, the defendant may be reindicted by a properly selected grand jury.

It should be noted that on appeal the Commonwealth argued the issue was not properly preserved for review. However, the Court of Appeals, relying on *Bartley v. Loyall*, Ky.App., 648 S.W.2d 873 (1982), rejected this argument because there was no way the defendant could have known the grounds for challenging the grand jury selection process before or during his trial. As the court administrator admitted in her affidavit, there was no published delegation of the power to grant grand juror disqualification, postponement or excusal to her. Thus, only questioning of the court administrator or the judge would lead counsel to suspect some irregularity.

The other issue raised on appeal by the defendant was that it was error to allow the Commonwealth to introduce a model of the paddle the defendant allegedly used to abuse the child victim, since the model was not an exact replica of the actual paddle used and no proper foundation was laid for its introduction.

Agreeing with the Commonwealth this time, the Court of Appeals found the argument was not properly preserved for review because trial counsel's objection "was merely that the model was not the actual paddle, not that the model was inaccurate." [Trial counsel's exact words were "show my objection as that's not the paddle that we're discussing."]

Shafer, Harmon, and Holmes v. Commonwealth

93-CA-1364, 93-CA-1414-MR, 93-CA-1415-MR, 4/21/95
(Jefferson Circuit Court - Judge Morris)

Defendant Shafer, a doctor, was being investigated by the Kentucky Board of Medical Licensure. Defendant Holmes, an Assistant Attorney General, was the hearing officer for the Board. Defendant Harmon was Holmes' secretary at the Attorney General's office.

The facts reveal the following scenario. In 1987 the Board filed a complaint against defendant Shafer. In July 1989 the Board held a hearing on the complaint after which Holmes suggested the parties try to settle the complaint. In August 1989 a relationship developed between defendants Shafer and Holmes. In November 1989 the Board rejected the settlement offer and stated further hearings were necessary. In December 1989 the Board completed its proof. Sometime prior to the complaint being dismissed in August 1991, Shafer and Holmes were married in Tennessee. Then in May 1992 Holmes and Harmon were married. As a result of a search of Shafer's home in June 1992, the marriage license for Shafer and Holmes was discovered.

Further investigation revealed that Holmes had falsely claimed compensation from the Attorney General's office for days which he had not worked. Harmon had prepared some of Holmes' time sheets.

Indictments were returned charging Shafer with bribery of a public servant; charging Holmes with bribery of a public servant, bigamy and theft by deception over $100.00; and charging Harmon with complicity to theft by deception over $100.00. After a joint trial, each defendant was convicted of the charged offenses.

The Court of Appeals reversed all three defendants convictions for several reasons.

First, the Court of Appeals held the trial court abused its discretion when it conducted a joint trial for the three defendants. Holmes was the only common link in the charged offenses and his defense poisoned Shafer's and Harmon's defenses. The Court stated the defendants met their burden of proving not only that their defenses (which are not clearly set out in the opinion) were antagonistic, but that this antagonism misled or confused the jury. The Court of Appeals even admitted to being confused and misled. As a result, the defendants are entitled to be retried at separate trials.

Second, all three defendants are entitled to new trials because of the Commonwealth's introduction of polygraph evidence. This inadmissible evidence was introduced when the Commonwealth played a tape recording of a television talk show during which Holmes was asked whether he had taken a polygraph examination and what the results were. Although the Commonwealth assured the trial court it would hit the "mute" button before the mention of the polygraph exam, it failed to do so and the inadmissible evidence was heard by the jury.

Third, defendant Shafer argued the Commonwealth withheld exculpatory evidence. Shafer's defense was that at the time of her marriage to Holmes, she was under the impression that the matter between herself and the Board had been settled. [The exact date of Shafer's marriage to Holmes is not stated in the opinion.] In support of her defense, she introduced he copy of the settlement agreement. She argued she never received adequate notice of the Board's rejection of the agreement. The prosecutor questioned the existence of the agreement and went so far as to suggest in closing argument that it was fabricated. Yet at the sentencing hearing the Board produced its copy of a signed settlement agreement which it had in its possession all along. Even if the Commonwealth was unaware of the agreement in the Board's possession, as it claimed it was, the error was not harmless and Shafer is entitled to new trial for this additional reason.

Fourth, Holmes argued the Commonwealth withheld exculpatory evidence from him by failing to turn over copies of Shafer's tax returns on which she declared her marital status as "single." The Court of Appeals held this error was not of prejudicial magnitude requiring reversal and would not occur upon retrial.

Fifth, Shafer argued the trial court erred when it allowed the Board's investigator to give hearsay testimony about prior Board charges against her which were dismissed with prejudice. The Commonwealth argued the evidence was necessary to show why the Board was investigating Shafer and a possible motive for Shafer's bribery of Holmes. The Court of Appeals disagreed holding that the investigator's testimony went far beyond

the reasons advanced by the Commonwealth. On retrial, the investigator's testimony should be limited to his personal knowledge of charges before the Board when Holmes was the hearing officer.

Lastly, the Court of Appeals rejected the defendants' challenge to the trial being held in Jefferson Circuit Court. The Court stated sufficient contacts were shown for each offense to make Jefferson County a proper venue.

In light of the reversal of the defendants' convictions, their motions pursuant to CR 60.02 are rendered moot.

Bernard Whitaker v. Commonwealth

93-SC-822-MR, 2/16/95

(McCracken Circuit Court - Judge J.W. "Bill" Graves)

This case involves the defendant's appeal of his murder conviction for which he was sentenced to life imprisonment.

The defendant went to his estranged wife's place of employment, asked her to sign some tax documents, and then shot her in the head at close range. At trial, the defendant claimed he did not recall the actual shooting. He requested instructions on extreme emotional disturbance and first degree manslaughter, but they were denied. The Kentucky Supreme Court held there was no error in the failure to give the requested instructions.

However, the Kentucky Supreme Court did find merit to two other arguments raised on appeal.

The defendant was initially represented by a member of the local public defender's office. Two and one half months later, the defendant's counsel resigned and went to work for the local Commonwealth's Attorney's office. Prior to the beginning of the trial, the new defense counsel objected to the Commonwealth's Attorney's office prosecuting the case, since the defendant's previous counsel in this case is now employed in that office. The trial court summarily denied the motion. The prosecutor then added that he was aware that a member of his staff had previously represented the defendant in this case, but stated he had not discussed the matter either directly or indirectly with said attorney, and she had performed no work and taken no part in the prosecution. There was no discussion as to the extent of the prior attorney's relationship or representation of the defendant.

The Kentucky Supreme Court held the case must be remanded for an evidentiary hearing to determine if the attorney "participated personally and substantially in the preparation of a defense of Whitaker." If so, the entire Commonwealth's Attorney's office would be disqualified from the prosecution of the defendant. The Court stated the relationship between the lawyer and client...must be the focus of the conflict examination. The trial court must examine the depth to which the attorney/client relationship was established. Specific factors for the trial court to examine would be whether the attorney's contact with the defendant had been brief and perfunctory without an exchange of confidential information in the form of planning trial strategy, or whether there were discussions of potential witnesses to be called on the defendant's behalf or avenues of investigation to be undertaken by defense counsel.

Contrary to the Commonwealth's urging and reliance on *Summit v. Mudd*, Ky., 679 S.W.2d 225 (1984), the Kentucky Supreme Court specifically stated there need **not** be a showing of prejudice by the defendant to bar the Commonwealth's Attorney's office from prosecuting this matter.

After the evidentiary hearing, if the trial court determines the Commonwealth's Attorney's office should have been disqualified, the defendant should receive a new trial on both guilt and penalty.

Notwithstanding this determination, the defendant is entitled to a new penalty phase trial because of misstatements by the prosecutor in his penalty phase closing argument which "could easily be interpreted as stating that Whitaker would be released at the end of twelve years" even if sentenced to a life sentence.

Commonwealth v. Robert Edward Cooper

93-SC-618 and

93-SC-1021-DG, 2/16/95

(On review from Court of Appeals; Jefferson Circuit Court -Judge Karem)

The issue in this case "is whether Section Eleven of the Kentucky Constitution or a viable doctrine of the common law requires suppression of a confession coerced or improperly obtained by private parties."

The facts are that Robert Cooper, an employee of UPS, was found standing over two packages, one of which was open. Upon questioning by his supervisor, Cooper confessed to having opened the parcel and to having committed other UPS thefts. In the course of the interrogation, UPS personnel assumed the role of authority figures and asserted control over Cooper. Cooper felt significantly intimidated by the questioning which lasted over one hour and occurred in a windowless room with possibly locked doors. UPS personnel expressly or impliedly promised Cooper that in exchange for his cooperation he would not be prosecuted.

There was no evidence of violence or threat of violence against Cooper. He was not physically prevented from leaving the scene and was urged only to tell the truth.

The trial court suppressed Cooper's statements and the Court of Appeals affirmed.

Since the confession in this case was obtained by a private person, no "state action" was involved. The majority opinion notes there is dictum in several Kentucky cases that "is broad enough to permit the conclusion that state action [is] not always required." *Baughman v. Commonwealth*, 206 Ky. 441, 267 S.W. 231 (1924). Yet the majority concludes the facts of this case "are woefully insufficient to justify application of the common law rule" that "a confession induced by coercive techniques, including the use of promises or of undue influence, while under the authority of civil...personnel during an interrogation is, indeed, involuntary and inadmissible in a criminal prosecution." Court of Appeals' Slip op., p. 4. For a confession to be suppressed where no state action is involved, "the use of physical force or some other means which would shock the conscience" must be present.

Thus, the Kentucky Supreme Court, relying on *Peek v. Commonwealth*, Ky., 415 S.W.2d 854 (1967), held that because no state action was involved, the trial court erred when it suppressed Cooper's confession. The Court of Appeals' opinion affirming the trial court's ruling was reversed.

Sidney Roberts v. Commonwealth

93-SC-908-MR, 2/16/95

(Jefferson Circuit Court - Judge Ewing)

The defendant was arrested as a suspect in a series of robberies. The following day, while still in custody and after

waiving his *Miranda* rights, the defendant expressed his concern about being charged as a persistent felony offender and asked the police to contact the Commonwealth's Attorney's office. The detective was assured by the First Assistant Commonwealth's Attorney, John Stewart, that the defendant would not be charged with being a PFO I if he gave a detailed, complete and truthful statement about the robberies that could be corroborated by police investigation. The Commonwealth's assurance was related to the defendant by the detective, and the defendant then gave a lengthy taped statement to the police admitting to eight robberies.

Meanwhile, a co-defendant gave a statement and testified at trial that the defendant was involved in twelve robberies. Also, evidence showed the defendant was not truthful about the location of the gun used in the robberies.

The defendant was set to be tried on twelve counts of robbery and being a PFO I. Prior to trial the defendant moved to suppress his taped statement because it was not voluntary and because it was "made in the course of plea discussions with an attorney for the prosecuting authority" it was not admissible under KRE 410.

Because there are no Kentucky cases interpreting KRE 410, the Kentucky Supreme Court looked to federal cases interpreting a similar federal rule of evidence.

The Court adopted the following two part test, to be applied by trial courts, for determining whether a discussion is a plea discussion for purposes of KRE 410:

> "1) Whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and
> 2) [w]hether the accused's expectation was reasonable given the totality of the objective circumstances."

Applying this test to the case at bar, the Supreme Court found the police sought to clear up a series of robberies and the defendant sought to avoid a PFO conviction. "There was a quid pro quo. Each side made a concession. This was clearly a 'plea discussion.'" Also, the police bargained on the express authority of the First Assistant Commonwealth's Attorney. Thus, the plea discussions were made with an attorney for the prosecuting authority. Federal cases hold it is not necessary for the government attorney to be physically present when the statement is made to authorized agents.

The Kentucky Supreme Court went on to discuss the scope of KRE 410. The rule applies even though a guilty plea does not result or is entered and later withdrawn. The rule also applies if the plea discussions occurred before formal charges were filed, as was the situation in the case at bar. Thus, under KRE 410, the defendant's taped statement should not have been admitted at his trial.

The Kentucky Supreme Court rejected the defendant's argument that his statement was not voluntary because it was made in reliance on police promises. The defendant "knowingly, willingly and voluntarily struck a bargain." Because the defendant did not keep his end of the bargain, since his statement was neither truthful nor complete, the Commonwealth could properly try him as a PFO I.

The defendant's convictions were reversed and remanded for a new trial at which his taped statement would not be admissible.

The Kentucky Supreme Court also made a passing comment at the conclusion of its opinion that failure of the Commonwealth to provide full and timely discovery pursuant to RCr 7.24 and RCr 7.26 will result in severe sanctions.

Tommy Richard Davis v. Commonwealth

93-SC-855-MR, 3/23/95

(Warren Circuit Court - Judge Lewis)

The defendant was convicted of two counts of first degree robbery and being a first degree persistent felony offender.

On appeal, the defendant challenged the trial court's failure to grant him separate trials on the two robbery charges. The Kentucky Supreme Court held the trial court did not abuse its discretion in failing to grant separate trials because "[t]he substance of the two robbery charges was so similar."

The facts revealed that in a two week period the defendant entered the same convenience store, during the early morning, once with a knife and once with a broken bottle, and demanded the store's clerk hand over all the money from the store's two cash registers.

Davis also challenged his PFO conviction which was based on prior felony convictions in Arkansas. To prove these convictions the Commonwealth introduced, through the testimony of a detective of the Commonwealth's Attorney's office who admitted he had no personal knowledge of any prior convictions by Davis, four documents certified by the Arkansas court clerk. However, these documents were not exemplified by a judge, as required for a document to be self-authenticating, nor were they authenticated by a witness.

The Kentucky Supreme Court held these documents were not sufficient evidence to support Davis' PFO conviction because the documents were not self-authenticating under Kentucky's Rules of Evidence and did not meet the requirements of RCr 9.44, CR 44.01, or KRS 422.040. Nor did any witness with knowledge of the facts surrounding the documents testify to their authenticity. The Court distinguished *Commonwealth v. Mixon*, Ky., 827 S.W.2d 689 (1992), because there the custodian of the records of Mixon's former convictions testified to the contents of the records and Mixon's status as a convicted felon. The Court also distinguished *Jackson v. Commonwealth*, .Ky., 703 S.W.2d 883 (1986), where certified records were introduced through a witness who was competent to testify about the records and the former convictions. Neither of these safeguards was present in Davis' case.

Davis also argued he was entitled to a directed verdict of acquittal on the PFO charge because the Commonwealth failed to prove he was on probation or parole when he committed the underlying convenience store robberies or that he had completed service of his sentence from his 1989 conviction. Because the Commonwealth's detective did not testify that Davis was on probation or parole at the time he robbed the convenience store or that he had completed service of his sentence for his 1989 conviction, and because the record is silent as to why Davis was released from prison, the Kentucky Supreme Court found the Commonwealth failed to meet its burden of proof as required by KRS 532.080. Thus, it would violate principles of double jeopardy to retry Davis on the persistent felony offender charge under *Burks v. U.S.*, 98 S.Ct. 2141 (1978), and *Hobbs v. Commonwealth*, Ky., 655 S.W.2d 472 (1983).

Two other arguments raised by Davis on appeal (that the jury panel saw him being brought into the courtroom in handcuffs, and that the store clerk said she was afraid to give her home address or place of employment because she was afraid of Davis) were found to have no merit.

Davis' two robbery convictions were affirmed, but his PFO conviction was reversed with directions that it be dismissed upon remand.

Joseph Lynch v. Commonwealth

94-SC-338-DG, 4/20/95

(Fayette Circuit Court - on review from the Court of Appeals)

The defendant was found guilty in the Fayette District Court of operating a motor vehicle under the influence of intoxicants in violation of KRS 189A.010. His conviction was affirmed by the Fayette Circuit Court as well as the Kentucky Court of Appeals. The Kentucky Supreme Court granted discretionary review.

The unusual fact situation of this case is that the defendant was driving on his own private driveway at the time he was arrested. The defendant's driveway was at least one-quarter mile in length.

Early DUI legislation is this Commonwealth prohibited a person from operating a motor vehicle "on a highway" while under the influence. In 1968 the legislation was amended to prohibit a person from operating a motor vehicle "anywhere in this state" while under the influence. It is this change in the legislation that is at issue in this case.

In its opinion, the Kentucky Supreme Court concludes that as a result of the change in the statutory language from "on a highway" to "anywhere in this state," the defendant's own private driveway comes within the confines of the statute. Thus, KRS 189A.010 prohibits a person from driving while intoxicated on his own personal property.

Another issue addressed by the Court was whether the statutory prohibition constitutes an unreasonable restriction on an individual's conduct by violating the individual's constitutional right to privacy and to do as he pleases on his own property. The Court concluded the statute did not violate Section 2 of the Kentucky Constitution because it "is not unbridled government decision making, as it is not a law restricting individual freedom without any relation to a valid public interest."

The defendant's conviction was affirmed.

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High Court Turns Down Appeal by Blandford

WASHINGTON - The U.S. Supreme Court yesterday rejected former Kentucky House Speaker Don Blandford's appeal of his extortion and racketeering convictions for taking bribes.

The court, without comment, turned down Blandford's argument that there was no proof he agreed to do anything in exchange for the money.

Blandford, 57, of Philpot, was convicted of extortion, racketeering and lying to the FBI. He was sentenced to five years and four months in prison, fined $10,000 and ordered to pay $108,000 for incarceration costs.

"It doesn't really surprise me," Blandford said of yesterday's ruling. "I didn't really expect them to hear it.

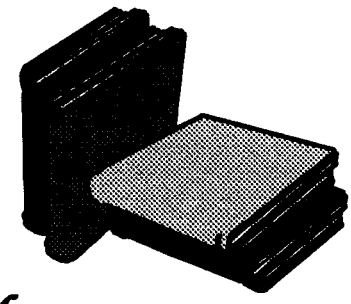
"I know there's a good-old-boy network going here. Unless it has to do with gay rights, blacks' rights or illegal aliens, the Supreme Court doesn't really want to hear it."

Blandford was arrested in 1992 after receiving three separate $500 payments from a lobbyist for Kentucky harness-racing interests.

He was among nearly two dozen lobbyists, lawmakers and state officials charged in the federal Operation BOPTROT investigation of state government corruption.

- *Associated Press* by Laurie Asseo on 5/2/95

Book Review:



Understanding and Preventing Violence

Alternative Perspectives on Violence

In 1993, a compilation of research on violence, *Understanding and Preventing Violence* was published under the auspices of the National Research Council and edited by Social Scientists Albert J. Reiss and Jeffery A. Roth.

Strategies for Intervention

A panel was created to review the existing literature on violence and develop strategies for intervention through an understanding of violent behavior. Throughout their review the panel examined the topic through a Psycho-social, a Bio-Medical and a Social approach. Through this comprehensive approach the panel attempted to explain violent behavior in the same way other human behaviors are understood.

A Comprehensive Look

This book offers options to the reader that are not often found in journalistic articles or newscasts. The contents encompass causes of violent behavior from prenatal through environmental stressors as an adult. It is well written and offers a myriad of explanations for violent behavior. In the following paragraphs I highlight some of the more compelling information contained in this state of the art composition.

The book is divided into three sections:

1. Violent Human Behavior;
2. Understanding Violence; and
3. Harnessing Understanding to Improve Control.

These sections divide the eight chapters into subsections that facilitate easy comprehension by the reader.

The Status Of Violent Crime and Predisposing Factors

The first section, *Violent Human Behavior* offers information on the current status on violent crime statistics in the United States. It is important to note here that the most comprehensive sources for statistics are tenuous at best. The Uniform Crime Report (police reports), and the National Crime Survey (victim personal accounts) were the panel's source for statistical data on crime. Aggregate data on violent crime in the United States is not available. The data available from both of these sources are not accurate accounts numerically or factually. The most reliable account of violent behavior, according to this work, is the number of homicides.

One of the questions posed in this section is: "Is life in the United States more violent than ever before?" As stated previously a strong indicator of violence is the number of homicides. Homicide rates have reached several peaks over the last century culminating in a phenomenal peak from 1979 - 1981. The trend in homicides is cyclical, each peak has been followed by a steady decline. At the time this book was pub-lished, the 1979-1981 peak had not been matched.

Astonishingly, the peak from 1979-1981, the number of white males being murdered had tripled over the previous two decades. The number of black males has always been markedly higher. The percentage of murdered black males to white males was sometimes as high as 11 to 1 and has never been lower than 5 to 1.

This section of the book also focuses on environmental factors that may predispose a child to violent behavior as an adult. One of the primary interventions proposed is to improve children's television viewing habits. The deleterious effects of persistent viewing of violence on television manifests itself through a child's perception that aggressive behavior is socially acceptable.

Factors Influencing Violence

Section two of the book "Understanding Violence," identifies several types of violence including Sexual violence, domestic violence and violence involving firearms. This section also explores several independent variables that may have an effect on violent behavior, such as pornography, brain functioning, head trauma, alcohol, psycho-active drugs, and cultural differences.

At the time of conception, actions of both the mother and the father can have an effect on the aggressive nature of the child. The father of a child may pass on genetic deficiencies to this unborn child, as well as the effects of drugs or alcohol being used at the time of conception. The mother's drug habits also influence the development of the fetus. In addition the stress and trauma that a woman experiences during both pre and perinatal development can have a pejorative effect on the disposition of the child.

This work finds that poverty is the primary motivator in the commission of crimes. Most crimes that become violent do not start out to be acts of violence. These acts are a result of a carelessly planned robbery or other bungled crime in which the perpetrator feels threatened.

In all statistics that have been found, African Americans far exceeds Whites in representation in violent crime. Several reasons for this have been postulated from existing evidence. Many of the predisposing factors to violent behavior are prevalent in the black population.

Although many white citizens live in poverty, a study in 1980 showed that 85% of all poor blacks lived in poverty stricken areas compared to only 30% of poor

whites. In addition 40% of all poor blacks lived in areas characterized by extreme poverty compared to only 7% of poor whites in the same financial position.

Residential areas signified as high violent crime areas are characterized by dense population, high population turnover, high residential mobility, poor family structure and high family discord. This type of housing is found in urban areas where the greater part of the population is black. This identifies some predisposing factors that may account for the uneven ratio of blacks to whites when measuring violent crime.

In addition to the afore mentioned stressors, the individuals in these Urban areas are not subject to other social advantages indicative of suburban areas. In the United States, 50% of all households own a gun. Gun ownership is more prevalent in the south than the northeast, higher for whites than blacks and more higher income households own guns than low income according to legal gun sales in the United States.

In the most easily identified violent crimes; homicides, firearms were the weapon of choice. It is estimated that in 60% of all homicides a gun is used and in 55% of all commercial robberies a gun is used.

In one study, incarcerated felons report that 32% of them stole guns and 52% borrowed or bought them from private sources.

In an effort to intradict illegal gun sales the Federal Gun Control Act was implemented in 1968. The Bureau of Alcohol Tobacco and Firearms was to enforce this law by ensuring that guns were sold only through a licensed dealer. It is interesting to note that during the crime peak in 1980 and 1981 the Bureau dramatically cut their staff and did not return to the previous level until 1989.

Another example of a gun control effort happened in Washington, D.C. in 1977, when a law was passed prohibiting ownership of a hand gun unless you were a police officer, a security officer, or owned the gun prior to the passing of this law. After passage of this law the city still supported 41 licensed gun dealers.

Despite all attempts to deter the use of guns, the United States is failing to successfully implement and maintain any consistent regulations.

Future Research Needs

The last of the chapters in the book focus the Panel's cumulative findings and suggestions for future research. One of the most important findings was that of sentencing efficacy.

The panel contends that mandatory sentencing has a greater effect on decreasing crime than longer prison terms.

The iterative process through longitudinal and evaluative studies is recommended by these scientists. The paucity of research available in the United States makes it difficult to decisively determine appropriate interventions.

The panel found that biological, medical, epidemiological, and social scientist all contributed to the understanding of violence. A complete understanding of violent behavior is not projected in the foreseeable future. Analogous to the AIDS epidemic, a comprehensive understanding of the causes of violence is not necessary in order to take preventative measures. Through awareness and education this insidious problem may slowly start to recede. The salutary information in the findings by the panel, can be extrapolated to various disciplines. The panel recommends that these different disciplines have an important role in future research on violence.

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Feds Defend Prosecution of Minorities in Crack Cases

LOS ANGELES - Federal prosecutors defended their handling of crack cocaine cases in a 500-page court filing released yesterday, while leaders in the black community pressed the U.S. Attorney's Office to explain why the federal war on crack in Southern California has exclusively targeted minority neighborhoods.

Hundreds of blacks and Hispanics in the area have been locked up for five and 10 year mandatory federal prison terms, records show. Virtually all whites arrested for crack offenses have been prosecuted in state court, where the penalties are far less.

Not a single white defendant has been convicted federally of a crack offense in Los Angeles or six other Southern California counties since 1986, when Congress enacted stiff new penalties to quell an epidemic of the drug. One white was indicted in February and is now awaiting trial.

"We want to see about those numbers and why they are that way. They raise more questions than they answer," said Kerman Maddox, chariman of the political outreach committee for the First AME Church in south central Los Angeles.

Maddox said he has requested that U.S. Attorney Nora M. Manella meet with a group of prominent black leaders to discuss federal crack prosecutions.

While U.S. Justice Department officials declined to comment, Rep. Maxine Waters, D-Calif., sent a letter to U.S. Attorney General Janet Reno yesterday asking for an explanation why 96 percent to 97 percent of federal crack defendants nationwide are minorities.

- *Lexington Herald-Leader*
Friday, May 26, 1995

Revisiting the What Is and the How It Works of Alternative Sentencing in Kentucky

In December, 1987, *The Advocate* carried an article on alternative sentencing entitled: Is There An Alternative To Prison ... The Response, Yes Your Honor, There Is!.

In the seven and one-half years since that article has appeared there has been considerable turn over of criminal justice system participants - judges, defenders, and probation officers. To help those who have joined the criminal justice system since December, 1987 and those whose memories may be clouding a little, let us take a moment to revisit...the *what* and *how*...of the Department of Public Advocacy's Alternative Sentencing Program in Kentucky works.

COURT: IS THERE AN ALTERNATIVE TO PRISON?

COUNSEL: YES, YOUR HONOR, THERE IS!

May I present to the Court an Alternative Sentencing Plan (ASP) designed to meet the individual needs of my client who stands before you convicted of a felony? This plan also addresses the public and judicial interests of punishment, community safety, restitution, and treatment. What we did in this plan is address the circumstances which were present at the time the crime was committed and worked to reduce the likelihood that those circumstances will reoccur.

As you are aware, your Honor, jails and prisons in the Commonwealth of Kentucky are overcrowded and administratively overburdened. More than 1,000 of Kentucky's sentenced prison population of approximately 10,000 are housed in local county jails while waiting for space in state correctional facilities.

Your Honor will agree that before this Alternative Sentencing Plan was presented your only options were prison or conventional probation. With this sentencing plan, I can now offer you an intermediate option that will have a double impact:

it will avoid the risk and debilitating effects of imprisonment for developmentally disabled offenders and other felony offenders, and

it will provide my client with a constructive, individualized sentencing plan allowing treatment, employment, residential placement and greater supervision and control within his own community.

This plan offers this Court both punitive and restorative sanctions, such as restitution, as well as the treatment and rehabilitative services arranged through the Cabinet for Human Resources and the private sector.

My primary goal, your Honor, is to prevent the inappropriate incarceration of my client in Kentucky's overcrowded prisons and jails.

My secondary goal, is to increase the awareness of sentencing options for use at the circuit and district court levels.

Your Honor, an alternative sentencing plan incorporates elements such as, but not limited to, supervision, employment, home incarceration, community services, medical or other treatment components, and payments of restitution. This plan and future plans are intended to be both punitive and rehabilitative and to provide the Court with constructive control over sentenced offenders.

Your Honor, what we are doing is networking services which are available through governmental agencies or the private sector. Based on that networking, I am offering the Court a meaningful option between prison and conventional probation.

Your Honor, I respectfully request that you place my client on probation incorporating the Alternative Sentencing Plan as a condition of his probation.

DPA's Alternate Sentencing Specialists

The Department of Public Advocacy's Alternative Sentencing Specialists and where are they located:

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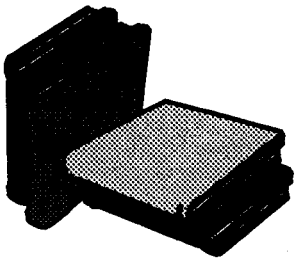
Paducah, Kentucky 42001
Tel: (502) 575-7285
Fax: (502) 575-7055

You may call any of them with questions or Dave Norat in Frankfort at (502) 564-8006.

Recent Juvenile Law Cases



BLOOD TESTING

State ex. rel. Juvenile Department v. Mitchell, 880 P.2d 958 (Or. Ct. App. 1994). Requiring juvenile to undergo blood testing would not violate his due process rights by labeling him a sex offender and impairing his ability to successfully respond to treatment.

CAPACITY TO COMMIT OFFENSE

State v. K.R.L., 840 P.2d 210 (Wash. Ct. App. 1992). Where eight year old convicted of residential burglary, state did not meet its burden to rebut by clear and convincing evidence that child was incapable of committing crime in light of fact that no expert testimony was offered indicating that at time of action child understood conduct was wrong and no evidence presented showing child's state of mind when he entered house or showing child previously engaged in bad acts unusual for child of similar age or that child received treatment for such acts.

Watson v. Commonwealth, 57 S.W.2d 39 (1933). Boys aged 13 and 11 were convicted of manslaughter and sentenced to 2 years in the penitentiary, but because of their age the judgment directed that they be taken to Juvenile Reform House and be confined until they both reach 21. The court held that to seize one unable to swim and against his will, intentionally into deep water where he drowns constitutes homicide. But that boys between 7 and 4 should be acquitted, unless they had guilty knowledge that they were doing wrong when they pulled the victim into the river. There is a rebuttable presumption that boys between 7 and 14 are innocent of evil intent. Furthermore, jurisdiction of juvenile court over children is exclusive, and, until it was waived and boys transferred to circuit court, circuit court had no power to try boys for homicide.

Thomas v. Commonwealth, 300 Ky. 480 (1945). Defendant, 11 years old, was convicted of detaining a child, 5 years old, against her will with intent to have carnal knowledge and he appeals. No rule defines any particular age as conclusive of incapacity as a witness. Where a child offered as a witness is so young as to preclude a presumption of competency, court should inquire into witness' qualifications. Whether a child offered as a witness has sufficient intelligence and other essentials to qualify as a witness is for the court to determine. A child below the age of 7 is incapable of committing crime and there is a presumptive incapacity between the ages of 7 and 14 which may be overcome by evidence. The jury should be charged that presumption is that defendant did not know that the act charged was wrong, which entitled defendant to acquittal unless jury believed from the evidence that defendant was aware of the wrongful character of the act and his legal responsibility.

CONFESSIONS

Rhoades v. State, 869 S.W.2d 698 (Ark. 1994). Confession not admissible where law enforcement officers failed to follow required juvenile procedures in obtaining confession. If juvenile petition filed then must follow juvenile procedures even if ultimately in adult court.

Rincher v. State, 632 So. 37 2d (Ala. Crim. App. 1993). Juvenile's confession was coerced where police officer told juvenile he could go home if he told the truth.

CONFESSION - RIGHT TO COUNSEL

People v. Lee, 589 NYS.2d 263 (N.Y. Sup.Ct 1992). Parents' statement that they would retain a lawyer made in response to school principal's suggestion that they should get a lawyer, and made in presence of juvenile and police as juvenile was taken into custody at high school, was sufficient to invoke juvenile's right to counsel. Parents of unemancipated minor could invoke his rights and police recognized parents' intended course of action by giving parent phone number at police precinct and telling parent to have attorney call. Therefore, confession must be suppressed.

CONFESSIONS - STATEMENTS, COERCION

Johnson v. Trigg, 28 F.3d 639 (7th Cir. 1994). Juvenile's statements were not coerced when police arrested his mother for failing to produce him for questioning and promised to release her if he confessed to crimes; juvenile who turned himself in before his mother's arrest, was a "hardened criminal," and a fugitive who was estranged from his mother.

CONFIDENTIALITY

In re Peter B., 516 N.W.2d 746 (Wis. Ct. App. 1994). Where juvenile court acted "with the utmost care" in ordering disclosure of juvenile's escape from secure detention facility, court correctly balanced need to protect the public (child charged with possession of a dangerous weapon) with child's best interests. Danger to community sufficient for judge to have released child's name, address, birthdate and photograph.

United States v. A.D., 28 F.3d 1353 (3d Cir. 1994). Under Juvenile Court Act, trial court has authority to determine whether confidentiality is necessary on case-by-case basis; Act does not require closed proceedings and sealed records in all circumstances.

CURFEWS

Quth v. Strauss, 11 F.3d 488 (The Cir. 1993), cert denied, 114 S.Ct. 2134 (1994). Dallas Texas curfew analyzed under strict scrutiny analysis held constitutional because classification (those under 17 not allowed out during certain hours with certain exceptions) was related to state's interests and least restrictive means of accomplishing goal present. Those under 17 not a suspect class however app. court assumed that the ordinance impinged upon a fundamental right. Ordinance only a minimal intrusion on parent's right of privacy to raise children as they saw fit.

DEATH PENALTY/ CRUEL AND UNUSUAL PUNISHMENT

Allen v. State, 636 So.2d 494 (Fla. 1994). Imposition of death penalty on 15

year old juvenile convicted of first-degree murder was cruel and unusual punishment under state constitution.

Castillo v. State, 874 P.2d 1252 (Nev. 1994). Life sentence imposed on juvenile who was almost 16 years old was not cruel and unusual punishment; juvenile signed plea bargain stating he could receive maximum sentence, sentence was within statutory limits and juvenile's escape to another state where he committed similar crimes demonstrated "flagrant disregard for the law."

HARASSMENT CHARGE/ VIOLATION OF FREE SPEECH

In re Doe, 869 P.2d 1304 (Haw. 1994). Because police officer was bigger and stronger than juvenile and trained not to be provoked to violence by words, juvenile's first amendment rights violated when he was charged with harassment. Officer had picked juvenile up for not being in school. When officer took juvenile home, juvenile was rude to his mom. Officer told juvenile he should not talk to his mother that way. Juvenile told officer he should take off his badge and gun and fight like a man. Juvenile's speech not "fighting words" because officer "not likely to be provoked to a violent response." Thus, words protected by first amendment.

PRETRIAL DETENTION

In re K.H., 647 A.2d 61 (D.C., 1994). Pretrial detention of juvenile in secure facility for 213 days did not violate due process where child would have been brought to trial in 4 months but for attorney's illness, judges were then unavailable to try case in the summer and child did not seek relief in appellate court until two months after illness of counsel and trial will be held shortly and child acquired new charge making release unlikely.

RELEVANT CIVIL LITIGATION - CAPACITY OF CHILD TO COMMIT SEX OFFENSE

Fire Insurance Exchange v. Diehl, 520 N.W.2d 675 (Mich Ct. App. 1994). Did insurer have duty to provide coverage to its insured Mom, Dad and their son, who were being sued in an underlying civil action brought by defendant (counterclaim to recover for physical insult, bodily injury and dangers suffered) whose daughter was victim of sexual assault by boy. Two assaults, boy age 7 or 8, girl age 4 or 5, second assault boy age 9, girl age 6. No dispute that boy's acts were intentional. Acts also had to be occurrences, *i.e.*, "neither expected nor intended by the insured." Boy neither expected nor intended to cause bodily injury to girl. Case quotes examination of boy to demonstrate that boy did not understand that "mating" hurt. They ask him if he had seen mating on T.V. "Did it look like they were having fun?" "No," "Did you ever think in watching that they were hurting each other?" "No." The boy testified that he did not mean to hurt the girl in any way. The abuse in this case was oral sodomy. Psychologist testified that 8 to 9 year old children display limitation in the capacity to develop empathy for others thus boy could not recognize emotional damage to girl. In prior insurance cases, Michigan courts have held that "engaging in sexual contact with a child is an intentional act and that the intent to injure or harm can be inferred as a matter of law from the sexual contact itself." "*Because the perpetrator of the sexual assault was a child, we find that such an inference is improper.*" Trial court applied reasonable man standard. App. Court found that to be in error. *Mixed objective/ subjective reasonable child standard to determine whether results of those acts were reasonably foreseeable.* Based on the record before it, the appellate court found that an average 7 to 9 year old child could not reasonably foresee that his or her sexual acts could cause harm to another child.

RELEVANT CIVIL LITIGATION - *HIV/AIDS*

ADH v. State Department of Human Resources, 640 So.2d 969 (Ala., 1994). Mother who believed that child was not affected with HIV virus, though medical evidence indicated otherwise, and who did not raise constitutional arguments below could not argue that lower court's decision that mother can be forced to submit child for HIV treatment was in error. Decision to force treatment affirmed.

Sherman v. Sherman, 1994 WL 649148 (Tenn. App. 1994). Mother could not restrict father's visitation rights with adolescent daughters because he shared house with HIV positive brother where no medical evidence presented that children were in danger of contracting disease (children stayed in grandparents home next door, used different bathroom facilities, brother was not allowed to be present when food was being prepared, disposable plates and cups were used and silverware was washed with bleach).

RELEVANT CIVIL LITIGATION - CHILD SUPPORT

Douglas v. Alaska, Department of Revenue, 880 P.2d 113 (Alaska, 1994). Even though mother was incarcerated and indigent, she was still subject to state statute's minimum support obligation.

RIGHT TO TREATMENT

E.T. v. State, 879 P.2d 363 (Alaska Ct. App. 1994). Juvenile's placement outside of the community was the least restrictive alternative considering the several crimes juvenile had previously committed (showing his danger to community) and the inadequate treatment facilities available in community.

In re Johnnie F., 443 S.E.2d 543 (S.C. 1994). Family court lacked the authority to impose a condition of probation emancipating the juvenile from attending school. Delinquent juvenile probated and ordered not to be on any school property nor to attend any school related function. South Carolina Supreme Court reversed. State statute authorizes probation but not as punishment. It must be imposed as a measure for the protection, guidance, and well-being of the child and the family. Preventing him from attending school is a punishment.

SEX OFFENDER

State v. Acheson, 877 P.2d 217 (Wash. 1994). Sex offender registration statute applies to juveniles because statute RCW 9A.44.130 provides that any adult or juvenile, who has been found to have committed or has been convicted of any sex offense shall register with the county sheriff...explicitly includes children.

State v. Eccles, 169 Ariz. Adv Rep. 10 (Ariz. 1994). Defendant convicted of child molestation could not be forced to waive his privilege against self-incrimination as a condition for probation and as part of his sex offender treatment. "The state may not force defendant to choose between incriminating himself and losing his probationary status by remaining silent." Instead he must answer all questions truthfully and can choose to not answer those questions that would incriminate him in future criminal proceedings. He can not be penalized for claiming the privilege.

SPEEDY TRIAL RIGHT - DUE PROCESS DENIAL

In re L.A.E., 447 S.E.2d 627 (Ga. Ct. App. 1994). Juvenile's right to speedy trial was denied when trial court failed to schedule adjudicatory hearing within 10 days after filing delinquency petition, as required by statute; court's scheduling of arraignment hearing within 10 days did not satisfy statutory requirement, since arraignment hearing and adjudicatory hearing have distinct purposes.

State ex rel. Juvenile Department v. Hallingen, 873 P.2d 476 (Or. Ct. App. 1994). Juvenile's due process rights were not violated by state's nine month delay in filing delinquency petition to protect 14 year old victim from testifying before she was ready. Juvenile court judge had dismissed case finding that delay was intentional and for purposes of protecting juvenile "victim" from having to testify. Appellate court reversed dismissal finding that juvenile had not suffered substantial prejudice. Investigator had testified that he could not find several witnesses. App. Court found that no proof had been presented that these witnesses would have been any easier to find earlier. **REMEMBER TO MAKE YOUR PROOF OF PREJUDICE WITH WITNESSES, AFFIDAVITS, ETC.**

State v. Hallock, 875 S.W.2d 285 (Tenn. Crim. App. 1994). Defendant was not denied speedy trial when trial was delayed twice due to other court business and 10 months of delay were due to defendant's request for psychological evaluation.

State v. Jones, 521 N.W.2d 662 (S.D. 1994). Fourteen-month delay in bringing juvenile to trial as adult did not violate his constitutional right to speedy trial, since juvenile was partially responsible and was not prejudiced by delay.

TRANSFER

In re G.T.K., 878 P.2d 1189 (Utah, 1994). Child loses in reverse certification with unusual statute. Child charged in adult court for one capital felony, one third degree felony. Motion filed to recall jurisdiction. Juvenile court heard recall motion. Juvenile court's finding that age and inconsequential legal record were mitigating factors but charges so serious that they outweighed mitigation. Juvenile court properly considered all three statutory factors so no violation of due process. Juvenile argued that court should have used clear and convincing standard of proof. Appellate court said that statute put burden of proof on child by clear and convincing evidence. Standard is not that given the three factors, it is not in best interest of child to recall. Best interest standard not applicable.

People v. Lyons, 513 N.W.2d 170 (Mich. Ct. App. 1994). Trial court abused its discretion by sentencing juvenile to juvenile offender system, rather than adult system. Findings of fact clearly erroneous. Nature of offense very grave, physical and mental maturity questionable, not amenable to treatment, likely he would disrupt juvenile program, would be a threat to public if released at age 21.

State In re A.L., 638 A.2d 814 (N.J. Super. Ct. App. Div. 1994). Waiver statute did not violate juvenile's right to due process and equal protection, since legislature's exclusion of certain serious offenses from juvenile court jurisdiction was not arbitrary or discriminatory. Waiver statute requirement that a juvenile demonstrate likelihood of rehabilitation did not violate juvenile's right against self-incrimination, since his testimony could not be used to determine his guilt.

USE OF GUN

State ex. rel. Juvenile Department v. Poston, 873 P.2d 429 (Or. Ct. App. 1994). Juvenile's possession of gun was lawful since he reasonably believed gun was necessary to defend mother in physical altercation; juvenile never pointed gun and returned it to safe place when he learned mother was out of danger.

USE OF PRIOR JUVENILE ADJUDICATIONS

People v. Armand, 873 P.2d 7 (Colo. Ct. App. 1993). Under Colorado statute, once juvenile case transferred to adult court, prior juvenile adjudications cannot be used to impeach juvenile in adult court. Former language of code "in a proceeding to have a child adjudicated a delinquent" vs new language of code "in any case brought under this title". New language does not allow admissions of juvenile dispositions in adult court. Conviction Reversed.

United States v. Johnson, 28 F.3d 151 (D.C. Cor. 1994). Trial court's consideration of a 19 year old defendant's juvenile records to determine his sentencing category was proper. Where juvenile repeatedly commits crimes, society's stronger interest is in punishing appropriately an unrepentant criminal.

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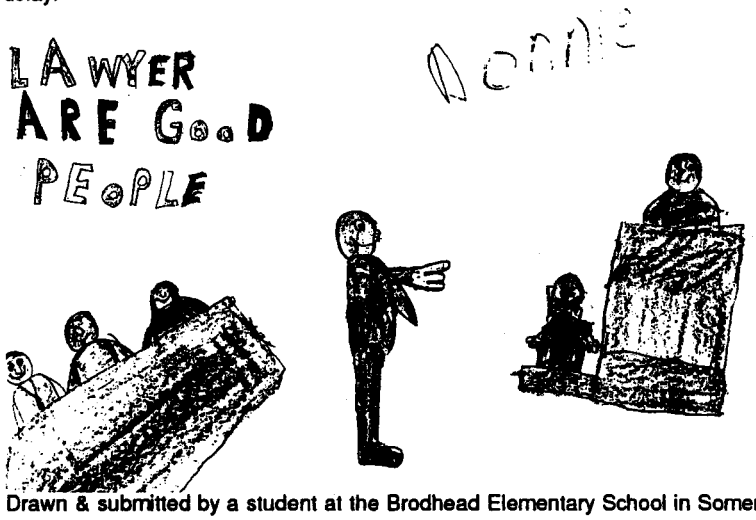

Drawn & submitted by a student at the Brodhead Elementary School in Somerset.

Making and Meeting Objections:
Insuring That the Client's Story is Communicated

This is an update of the January 1995 article that appeared in The Advocate.

X. CLOSING ARGUMENT

RCr 9.22 - Defense counsel is required to object to the prosecutor's improper comments during his closing argument at the time the comments are made. Defense counsel must make known to the trial court the type of relief she desires, *i.e.*, admonition, mistrial. Defense counsel need not state the grounds for her objection unless requested to do so by the court. Counsel needs to be aware of all possible grounds for the objection and types of relief because failure to mention a specific ground at trial, if requested to do so, will foreclose ability to argue said ground on appeal. *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993); *Kennedy v. Commonwealth*, 544 S.W.2d 219, 221 (Ky. 1977). Also, failure to request the specific relief desired will foreclose the ability to argue you are entitled to said relief on appeal. *Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993); *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989).

Where the trial court denies defense counsel a reasonable opportunity to make a record, the appellate court will not hold defense counsel strictly accountable to the rules regarding making contemporaneous objections. *Alexander v. Commonwealth*, 864 S.W.2d 909, 914-15 (Ky. 1993).

Two procedures to deal with the prosecutor's closing argument are to (1) move *in limine*, prior to trial, to preclude improper comments in closing argument; and (2) make timely objection at trial during the closing argument. Each procedure requires knowledge and understanding of the types of arguments which have been found to be improper by the Kentucky courts.

Trial counsel must be alert for prejudicial and improper arguments by the prosecutor at both the guilt and truth-in-sentencing phases of the trial. Counsel must make a contemporaneous objection (RCr 9.22) to the improper argument and move for a mistrial. Counsel should always invoke Section 2 of the Kentucky Constitution and the Due Process Clause of the 14th Amendment to the U.S. Constitution to support her objection and mistrial motion. Counsel should resist the judge's offer to give the jury a "curative" instruction or an admonition rather than grant a mistrial. Counsel should point out that such an instruction or admonition is insufficient to cure the prejudice. You can never unring the bell. *Bruton v. U.S.*, 88 S.Ct. 1620, 1628 (1968); *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994).

Besides becoming familiar with the law regarding closing argument, counsel should become familiar with the practices of the prosecutor trying the case. Many prosecutors make the same (or variations on a theme) improper argument over and over again. By being familiar with the types of arguments and issues of your particular prosecutor, you can move the court *in limine* to preclude the use of the types of improper and prejudicial arguments likely to be used by the prosecutor. Even if your motion in limine is denied, you will be better prepared to object at trial.

Examples of unfair arguments:

708 - Scope and effect of summing up

709 - For prosecution

Prosecutor is given wide latitude in closing argument, *Bowling v. Commonwealth*, 873 S.W.2d 175 (Ky. 1993), but prosecutor may not cajole or coerce jury to reach a verdict. *Lycans v. Commonwealth*, 562 S.W.2d 303 (Ky. 1978).

717 - Arguing or reading law to jury

Prosecutor misstated law on insanity when he told jury test was whether defendant knew right from wrong. *Mattingly v. Commonwealth*, 878 S.W.2d 797 (Ky. App. 1994).

Prosecutor improperly defined reasonable doubt. *Sanborn v. Commonwealth*, 754 S.W.2d 534, 544 (Ky. 1988); *Commonwealth v. Goforth*, 692 S.W.2d 803 (Ky. 1985).
A prosecutor shall not knowingly make a false statement of law to a tribunal. SCR 3.130-3.3(a)(1).

718 - Arguing matters not within issues

A lawyer shall not knowingly or intentionally allude to any matter that the lawyer does not reasonably believe is relevant. SCR 3.130-3.4(e).

719 - Arguing matters not sustained by the evidence

A lawyer shall not knowingly or intentionally allude to any matter that will not be supported by admissible evidence. SCR 3.130-3.3(e).

1) in general

Prosecutor may not mention facts prejudicial to defendant that have not been introduced into evidence. *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992); *Bowling v. Commonwealth*, 279 S.W.2d 23 (Ky. 1955).

3) personal knowledge, opinion or belief of counsel

A lawyer shall not state a personal opinion as to the justness of a cause, the credibility of a witness or the guilt or innocence of an accused. SCR 3.130-3.4(e).

Prosecutor's expression of his opinion is proper when based on the evidence. *Derossett v. Commonwealth*, 867 S.W.2D 195 (Ky. 1993).

It was error for prosecutor to make statement about believability of defendant's explanation of how he received certain injuries and to present demonstration of defendant's explanation which was outside the evidence presented. *Wager v. Commonwealth*, 751 S.W.2d 28 (Ky. 1988).

It was improper for prosecutor to tell jury that he knew of his own personal knowledge that persons referred to by defendant's alibi witness were "rotten to the core." *Terry v. Commonwealth*, 471 S.W.2d 730 (Ky. 1971).

4) evidence excluded

It was error for prosecutor to argue there was a vast store of incriminating evidence which the jury was not allowed

to hear because of the rules of evidence. *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993).

Where trial court ruled part of a tape recording was not admissible, it was error for the prosecutor to tell the jury he "wished" it could have heard those parts that had been excluded. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982).

720 - Comments on evidence or witnesses

1) in general

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

Prosecutor violated defendant's right to remain silent when he told the jury that if the defendant, who was a passenger in the car, had really been innocent he would have accused other individual in car of committing crime. *Churchwell v. Commonwealth*, 843 S.W.2d 336 (Ky.App. 1992).

Prosecutor violated defendant's right to remain silent when he told jury that defendant would have denied ownership of pouch containing drugs if he were innocent. *Green v. Commonwealth*, 815 S.W.2d 398 (Ky.App. 1991).

2) misstatements of evidence

It was improper for prosecutor to misstate testimony of psychologist both on cross-examination and in closing argument. *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984).

5) credibility and character of witnesses

A lawyer shall not state a personal opinion as to the credibility of a witness, including the defendant. SCR 3.130-3.4(e).

It was error for prosecutor to make statement about believability of defendant's explanation of how he received certain injuries and to present demonstration of defendant's explanation which was outside the evidence presented. *Wager v. Commonwealth*, 751 S.W.2d 28 (Ky. 1988).

The personal opinion of the prosecutor as to the character of a witness is not relevant and is not proper comment. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982).

It was improper for prosecutor to comment that he had known and worked with police officer for a long time, that officer was honest and conscientious, and officer's word was worthy of belief. *Armstrong v. Commonwealth*, 517 S.W.2d 233 (Ky. 1974).

6) inferences from and effect of evidence in general

It is improper for prosecutor to infer the potentiality of another crime. *Elswick v. Commonwealth*, 574 S.W.2d 916 (Ky.App. 1978).

720.5 - Expression of opinion as to guilt of accused

It is always improper for the prosecutor to suggest the defendant is guilty simply because he was indicted or is being prosecuted. *U.S. v. Bess*, 593 F.2d 749 (6th Cir. 1979).

A lawyer shall not state a personal opinion as to the guilt or innocence of an accused. SCR 3.130-3.4(e).

721 - Comments on failure of accused to testify

1) in general

Commonwealth should not comment on defendant's failure to testify. *Powell v. Commonwealth*, 843 S.W.2d 908 (Ky.App. 1992).

In a joint trial, counsel for co-defendant may not comment on defendant's failure to testify. *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977).

5) reference to testimony as uncontradicted and failure to produce witnesses or testimony - is not held to be an improper comment on the accused's failure to testify or a violation of his right to remain silent under Section 11 of the Kentucky Constitution and the Fifth Amendment of the U.S. Constitution, but you should object anyway because such a comment denies the accused due process of law and a fair trial under the Fourteenth Amendment to the U.S. Constitution.

721.5 - Comments on failure to produce witnesses or evidence

It is error for the prosecutor to comment on the defendant's spouse's failure to testify. *Gossett v. Commonwealth*, 402 S.W.2d 857 (Ky. 1966).

722 - Comments on character or conduct of accused or prosecutor

It was error for the prosecutor to make demeaning comments about defendant and defense counsel. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

Where defendant is on trial for possession of a controlled substance, it is improper for the prosecutor to make the defendant appear to be [insinuate] involved in trafficking in a controlled substance. *Jacobs v. Commonwealth*, 551 S.W.2d 223 (Ky. 1977).

722.5 - Comments on commission of other offenses by accused

Where the defendant was on trial for second degree manslaughter arising out of an automobile accident, it was error for the prosecutor to urge the jury to consider the defendant's prior conviction for DUI while deliberating on the manslaughter charge. *Osborne v. Commonwealth*, 867 S.W.2d 484 (Ky.App. 1993).

It is improper for prosecutor to infer the potentiality of another crime. *Elswick v. Commonwealth*, 574 S.W.2d 916 (Ky.App. 1978).

723 - Appeals to sympathy or prejudice

1) in general

Prosecutor's reference to decedent as "my client" was "less than commendable," although it was not reversible error. *Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993).

A prosecutor may not minimize a jury's responsibility for its verdict or mislead the jury as to its responsibility. *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1992).

Prosecutor may not encourage verdict based on passion or prejudice or for reasons not reasonably inferred from the evidence. *Bush v. Commonwealth*, 839 S.W.2d 550 (Ky. 1992). *See* also *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1992); *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky. 1989); *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989); *Ruppee v. Commonwealth*, 754 S.W.2d 852 (Ky. 1988); *Estes v. Commonwealth*, 744 S.W.2d 421 (Ky. 1988).

2) Golden Rule argument

It is error for prosecutor to urge jurors to put themselves or members of their families in the shoes of the victim. *Lycans v. Commonwealth*, 562 S.W.2d 303 (Ky. 1978).

3) Deterrence argument - appeals for enforcement of laws

It is error for prosecutor to urge jury to convict in order to protect community values, preserve civil order, or deter future lawbreaking. *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).

It is error for the prosecutor to appeal to the community's conscience in the context of the war on drugs and to suggest that drug problems in the community would continue if the jury did not convict the defendant. *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).

4) threats and appeals to fears of jury

It was prosecutorial misconduct for prosecutor to repeatedly refer the jury to the danger to the community if it turned the defendant loose. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

5) appeals to racial prejudices

Dotye v. Commonwealth, 289 S.W.2d 206 (Ky. 1956).

724 - Abusive language

Prosecutor's reference to defendant as "black dog of a night," "monster," "coyote that roamed the road at night hunting woman to use his knife on," and "wolf" was improper. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

725 - Instructions to jury as to its duties

Prosecutor may not argue to jurors that a not guilty verdict (or a guilty verdict on a lesser included offense) is a violation of their oath. *Goff v. Commonwealth*, 44 S.W.2d 306, 241 Ky. 428 (1932).

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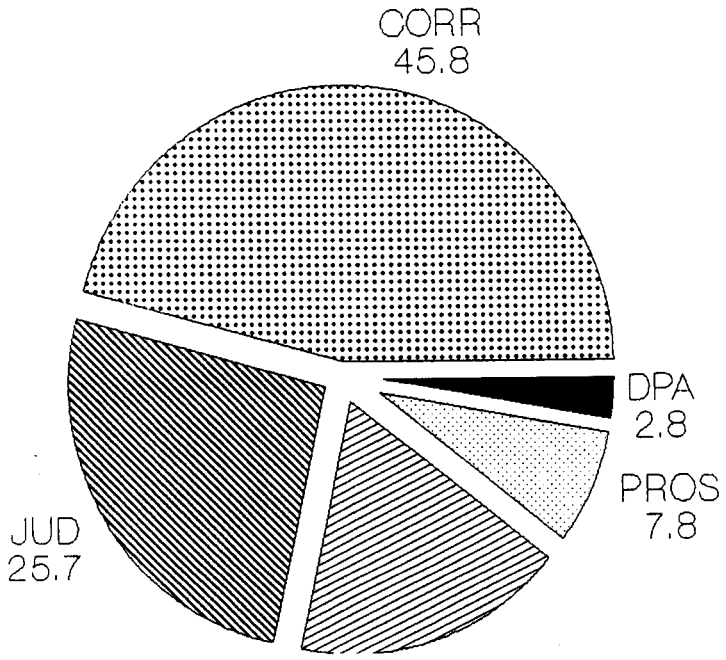

DPA Evidence & Preservation Manual Survey

We want to find out: a) if the Evidence & Preservation Manual (January 1995 issue of *The Advocate*) is meeting your needs; b) if we should continue to update it; and c) how it needs to improve. Please give us your thoughts by filling out the attached, folding & mailing it to us.

1. How often do you use the *DPA Evidence & Preservation Manual* (2d edition), *The Advocate*, Vol. 16, No. 6 (January 1995)?

   ☐ Never ☐ Daily ☐ Weekly ☐ Monthly

2. The 3 most helpful parts of the Manual are:

   ☐ The KRE & Niehaus Commentary
   ☐ Making & Meeting Objections
   ☐ Need Quick Answers
   ☐ Preservation in Capital Cases
   ☐ Obtaining Medical Records
   ☐ Table of Cases Which Have Cited KRE
   ☐ Niehaus KRE User's Guide
   ☐ Components of Objections
   ☐ Preserving Funds for Experts
   ☐ Improper Police Bolstering
   ☐ Alphabetical Table of Cases

3. The most frequent evidence/preservation problems you face:

4. The most difficult evidence/preservation problems you face:

5. What additional chapters or articles should be included:

26. What do you think of the format?

7. Is it too lengthy or too short?

8. Should the cover be stronger, more durable?

9. Should the type size be bigger (this would extend the length and increase the cost)?

10. DPA should use its limited resources for education:

A. ☐ by continuing to update & reissue this Evidence/Preservation Manual every 2 years because

B. ☐ for something other than the Evidence/Preservation Manual. Do not update and do not reissue the Manual. The following would be a much more useful resource:

11. Other thoughts:

THANKS!

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SO YOU'RE GOING TO BUILD A JUVENILE DETENTION CENTER

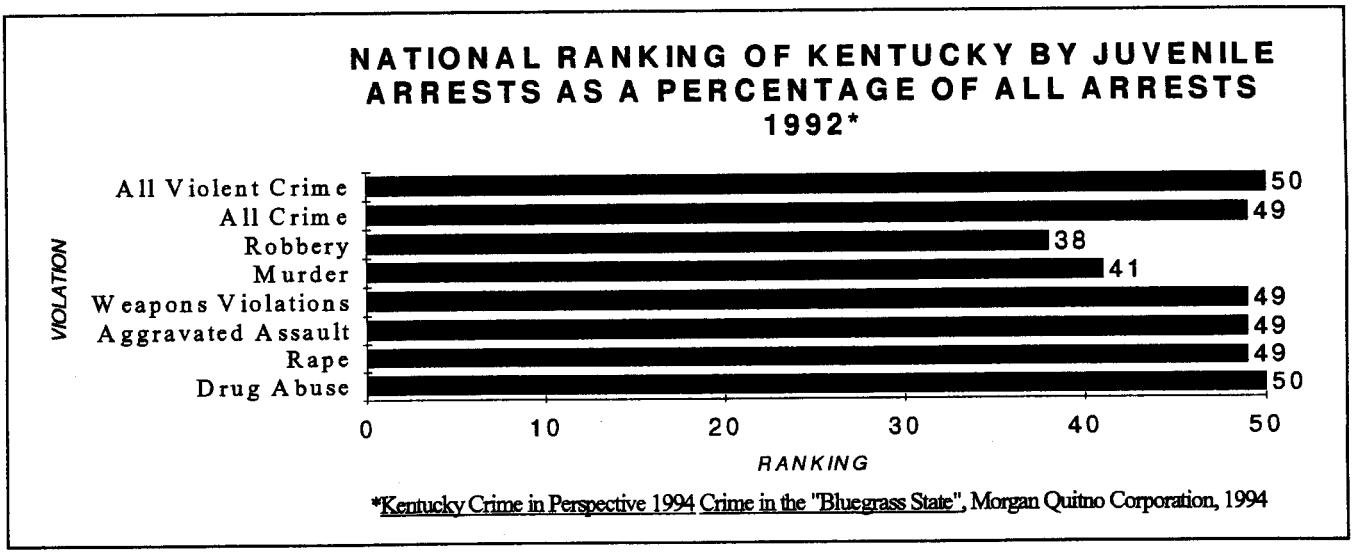
The Justice Cabinet constantly receives snippets of information from all over the state about counties and regions considering building their own juvenile detention centers. A locality should carefully ponder such a decision even in the planning stages for many reasons including demographics and costs.

The *Kentucky Annual Vital Statistics Report 1993* released early this year provides much food for thought. The 1992 population estimates divide the population into age ranges of four years. Presently, most of the juveniles being served come from the 15 to 19 cluster which is exceeded in size only by those from 30 to 34 and 35 to 39. The 10 to 14, 5 to 9 and 1 to 4 year age ranges following the group we are now serving are considerably smaller. The 10 to 14 group is over five percent smaller that the 15 to 19; the 5 to 9 year is six and one half percent smaller than the 10 to 14; and the 1 to 4 is 20 percent smaller that the 5 to 9 year old group. Juvenile detention's client base is shrinking, and Kentucky's juvenile share of violent crime is the lowest in the nation. (See chart which follows.)

Many local plans evolve from spontaneous assessments of needs in consultation with an architect who specializes in designing detention centers, and the financial analysis ends with paying the architect and getting bids on the building. Communities planning detention centers should keep in mind that the actual construction represents only seven percent of the total cost over the length of the bond. Operation and interest absorb the rest. A juvenile facility that meets constitutional and conditional requirements may cost up to 1.25 million dollars per bed over 20 years. Certainly some youth require secure custody for pubic safety purposes but many can be served in less intrusive yet equally appropriate settings for far less cost.

Presently, a belief exists that Congress will appropriate millions of dollars for juvenile detention. National demographics are just like Kentucky's with an increasingly smaller juvenile population. The Juvenile Justice and Delinquency Prevention Act of 1974 never provided capital construction costs, and whatever happens to this legislation, repealed or expanded, no evidence exists that construction costs will be added.

The Justice Cabinet and experts with whom it has contracted are available to you for your community's planning. To prevent you from developing a strategy that will burden your local budget with unnecessary debt, make sure that you have considered every possibility before you embark on a plan that may leave you with a little used, obsolete facility which you can ill afford to staff or operate.



*Kentucky Crime in Perspective 1994 Crime in the "Bluegrass State", Morgan Quitno Corporation, 1994

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Iran, Iraq and the United States are the only countries in the world that allow the execution of persons for crimes committed while they were children.

Virtues & Values Etched in Stone

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NLADA Defender Management Conference
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73d NLADA Annual Conference
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For more information regarding NLADA programs call Joan Graham at Tel: (202) 452-0620; Fax: (202) 872-1031 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006.

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

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