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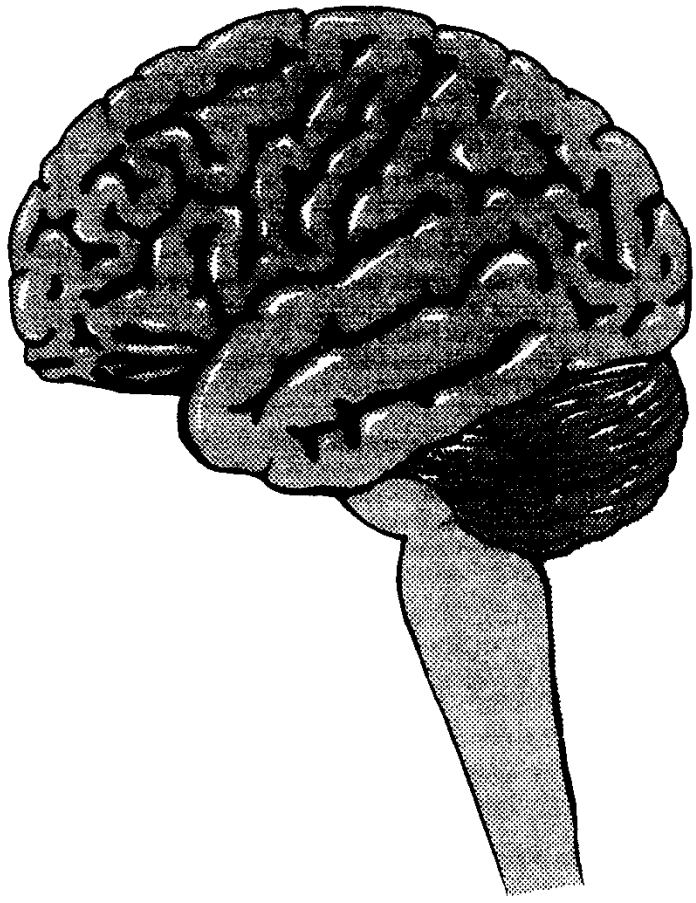

The Elements of A Competent & Reliable Mental Health Examination

The Advocate

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

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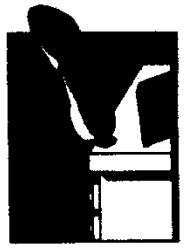
FROM THE EDITOR:



Why do persons behave improperly? How do we discern the reasons for their behavior?

"The unique feature that distinguishes *Homo sapiens* from the other creatures who inhabit the planet is the degree of development of those higher nervous system functions that humans subsume under the construct of mind. The Human mind has fascinated countless observers throughout recorded history. For many centuries, the formal study of the functions of the mind was assumed by theologians and philosophers. It was inevitable that the concept of disorders of the mind would ultimately emerge. That which functions, can malfunction. This insight was obvious to both the theologians and the philosophers, although they differed as to their explanations for causes of the malfunctioning. This historical tradition of observation, inference, and conclusion without either an empirical base or hypothesis testing is an important one in psychiatry. Similarly, the search for causality as the explanation of phenomena also has played a critical role in Western thought." Kaplan & Sadock, *Comprehensive Textbook of Psychiatry IV* (1985).

We focus in this issue on the ever important mental illness and mental retardation issues in the criminal justice system, and our duty to evidence them more effectively to insure clients are adjudicated with all relevant factors considered.

An article by **John Blume** looks at the 5 components of a complete mental health evaluation. **Robert Perske** helps us understand the world of the mentally retarded as they face questioning. **Brian Throckmorton** has compiled DPA mental health resources into a very useful bibliography.

What mental health issues are you facing in your practice?

Edward C. Monahan, **Editor**

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Chance favors the prepared mind.

- Louis Pasteur

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

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IN THIS ISSUE

Letter to the Editor & Author's Response

May 11, 1995

Dear Editor,

I read with interest the article on "Race and the Death Penalty in Kentucky Murder Trials" in Vol. 17, No. 2, of THE ADVOCATE. If I correctly understand Table 1 in the cases eligible for a death sentence, approximately 71% of the offenders were white. In nearly 73% of the cases in which there were capital charges, they were placed against white defendants. In over 79% of the case in which there were capital charges, plus the death sentence, the defendant was white.

If I understand this data correctly, I am not sure I understand the statement at p. 6 of this article, "The evidence for the influence of the race of the defendant on death penalty outcomes was equivocal." It would appear rather clearly, if I understand Title 1 correctly, that the race of the defendant actually worked adversely to white defendants rather than to black defendants. This would seem to be the case regardless of the race of the victim. Table 1 also indicates that a majority of the defendant's "silenced the victim" and had "a history of violent offenses." This seems to me on the face of it to indicate a fairly unbiased racial factor insofar as defendants against whom capital charges were placed and defendants who received the death sentence.

Yours very sincerely,

HARRY W. WELLFORD
Senior Circuit Judge
United States Court of Appeals
for the Sixth Circuit
1176 Federal Building
Memphis, Tennessee 38103

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Response to Letter to the Editor from the Author

June 15, 1995

Dear Editor,

Thank you for this opportunity to respond to the questions raised by Judge Wellford in his letter on our article, "Race and the Death Penalty in Kentucky Murder Trials." While Judge Wellford has correctly read the data presented in Table 1, he has misinterpreted and overemphasizes the results of these preliminary findings.

First of all, Judge Wellford misunderstood the quote on page 6 of the article. This statement ("The evidence for the influence of the race of the defendant on death penalty outcomes was equivocal") was not made by us in reference to this research, but rather, it was the conclusion made by the General Accounting Office in their review of the research findings on capital sentencing at that time.

Second, Judge Wellford is attempting to use Table 1 (a breakdown of the attributes of capital cases at each stage of the process) to do what we do later in the multivariate analysis. Taken separately and individually, it is true that more whites than were eligible for, charged with, and ultimately received a death sentence than blacks. It is also true that a majority of offenders who received the death penalty had "silenced the victim" and had a "history of violent offenses." However, this analysis considers each variable separately and individually but not in combination. In fact, Judge Wellford does not address the results of Table 2 where two variables were considered together (race of the offender and race of the victim). Here, greater percentages of cases in which blacks killed whites were charged with a capital offense and ultimately received a death sentence.

Our multivariate results revealed that race was a factor in capital sentencing in Kentucky. In other words, the factors that Judge Wellford highlighted in Table 1 did not account for or remove the influence of race from this process. Put simply, cases in which blacks killed whites did not result in a Kentucky death sentence because they were more likely "silence the victim" or "have a history of violent offenses" or any other legally constituted aggravating factor. Race had its own separate and independent effect that is also not diminished by the fact that a higher percentage of which were present at each stage at the Kentucky capital sentencing process. In fact, our consideration of the odds of receiving a capital sentence has taken this factor into account. For example, we note on page 9 that: "Blacks who kill whites are more likely to be prosecuted capital. In fact, they are 1-5 times more likely to be charged with a capital offense than other black killers."

To consider the research findings in legalistic terms, the results of the multivariate analysis is a higher standard of proof. Our analysis considered all relevant aggravating factors simultaneously to consider their independent effects. If race (or any other variable) was not a factor, it would not have emerged as a final predictor. Again, this did not happen in our analysis of Kentucky murder cases.

Thank you for the opportunity to respond. We welcome the opportunity to discuss the findings of our research with officials like Judge Wellford who figure so prominently in the capital sentencing process.

Sincerely,

GENNARO F. VITO, PH.D.
University of Louisville
Justice Administration
Louisville, Kentucky 40292

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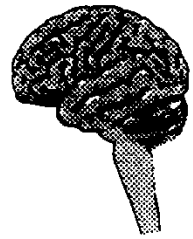
Mental Health Issues in Criminal Cases



The Elements of a Competent and Reliable Mental Health Examination

I. Introduction: Competent Mental Health Evaluations are Critical

A persistent problem in the defense of criminal (and especially capital) cases, is incomplete, inadequate and unreliable evaluations regarding the defendant's mental state at the time of the offense and at trial. I constantly review trial records where a mental health professional, called by the state (or even at times by the defense), testifies that a defendant was competent to stand trial, not insane at the time of the offense, not under the influence of an extreme emotional disturbance and met all the criteria for the diagnosis of antisocial personality disorder. Another frequent scenario I encounter is to review a trial record where no mental state evidence was put on at all by the defense at trial. Then, either in reviewing trial counsel's file or in talking to trial counsel, I learn that no evidence was presented because there was a "bad" pretrial mental health evaluation.

Over the years, I have learned through experience to view with skepticism all previous mental health evaluations and expert trial testimony. I do so for the simple reason that many of the conclusions reached are either incomplete or wrong. The errors occur because, as will be discussed shortly, these evaluations do not meet existing standards in the mental health profession delimiting the adequacy of forensic mental state examinations. However, as tragic as the consequences of an incomplete or incompetent mental state evaluation might be, the situation is not necessarily irredeemable. An unreliable mental health evaluation often serves as the basis for a constitutional violation with a legal remedy. Furthermore, bringing the true facts to light regarding your client's mental impairments in post-conviction proceedings may establish a viable claim of ineffective assistance of counsel as well as other federal constitutional violations.

The importance of a competent mental health evaluation in criminal and capital litigation cannot be overestimated. It can provide powerful evidence on a range of mental health issues in addition to traditional questions concerning sanity at the time of the offense, competency to stand trial, and mitigation. It can offer a basis for challenging the validity of prior offenses and convictions, for disproving specific intent for underlying felonies as well as the murder itself, and for defending against premeditation and malice. Diminished capacity, extreme emotional disturbance, duress, domination by others, and non-accomplice status are all factors that can be addressed by mental health professionals. A defendant's mental status has obvious implications for defense challenges to events surrounding the arrest and its aftermath such as consent to search, *Miranda* waiver, voluntariness of confessions, and reliability of confessions. A thorough and reliable mental health evaluation is also relevant to any waivers, *i.e.*, of counsel, specific defenses, right to be present at all stages of trial, mitigating circumstances or a jury trial, as well as to any determination of competency at the various stages of litigation from the preliminary hearing to an execution. The point is clear: *defense counsel should not be precluded from pursuing viable avenues of defense by an incomplete, incompetent or unreliable mental health evaluation.* It is also the purpose of this article to provide counsel with practical steps to follow to secure a competent evaluation at any stage of a case.

II. The Constitutional Framework

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the United States Supreme Court held that "the Constitution requires that an in-

digent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition," when the defendant's mental health is at issue. *Id.* at 70. The Court, after discussing the potential help that might be provided by a psychiatrist, stated:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, *assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense.* This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a *competent psychiatrist* for the purpose we have discussed, and as in the case of the provision of counsel we leave to the states the decision on how to implement this right. *Id.* to 83 (emphasis added).

This holding recognized the entitlement of an indigent defendant, not only to a "competent" psychiatrist (*i.e.*, one who is duly qualified to practice psychiatry), but also to a psychiatrist who performs competently - who conducts a professionally competent examination of the defendant and who on this basis provides professionally competent assistance.

The rationale underlying the holding of *Ake* compels such a conclusion, for it is based upon the due process requirement that fact-finding must be reliable in criminal proceedings. *Id.* at 77-83. Due process requires the state to make available mental health experts for indigent defendants, because "the potential accuracy of the jury's determination is...dramatically enhanced" by providing indigent defendants with competent psychiatric assistance. *Id.* at 81-83. In this context, the Court clearly contemplated that the right of access to a competent psychiatrist who will conduct an appropriate examination would include access to a psychiatrist who would conduct a professionally competent examination. To conclude otherwise would make the right of "access to a competent psychiatrist" an empty exercise in formalism.[1]

Some courts have explicitly or implicitly recognized this aspect of *Ake* holding that the due process clause entitles an indigent defendant not just to a mental health evaluation, but also to a professionally valid evaluation. *See, e.g., Mason v. State*, 489 So.2d 734 (Fla. 1986). Because the psychiatrists who evaluated Mr. Mason pretrial did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior," or his history "indicative of organic brain damage," and because the court recognized that the evaluations of Mr. Mason's mental status were flawed if the physicians had "neglect[ed] a history" such as this, the court remanded Mr. Mason's case for an evidentiary hearing. *Id.* at 735-37; *see also Sireci v. State*, 536 So.2d 231 (Fla. 1988);[2] *but see Waye v. Murray*, 884 F.2d 765 (4th Cir), *cert. denied* 492 U.S. 936, 110 S.Ct. 29, 106 L.Ed.2d 634 (1989).

Similarly, in *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), the court recognized that the defendant's right to effective assistance of counsel was impaired by the State's withholding of evidence "highly relevant, or psychiatrically significant, on the question of [defendant's] sanity" from the psychiatrist who was ordered to evaluate the defendant's sanity. 758 F.2d at 532. Even though that evidence was disclosed to the psychiatrist on the witness stand at trial, "[o]bviously, he was reluctant to give an opinion when confronted with this information for the first time on the witness stand.... This was hardly an adequate substitute for a psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Id.* at 532, n. 10, 533.[3]

Additionally, there have been numerous cases where counsel has been found to have rendered ineffective assistance of counsel for failing to adequately develop and present evidence regarding a client's mental state, even in cases in which counsel retained expert assistance. *See, e.g., Baxter v. Thomas*, 45 F.3d 1501, 1514-15 (11th Cir. 1995) (Counsel was ineffective for failing to investigate petitioner's long history of mental illness and resulting psychiatric commitments. Information was readily available had counsel only obtained records. Counsel's omission was prejudicial because "[p]sychiatric mitigating evidence 'has the potential to totally change the evidentiary picture.'"); *Hill v. Lockhart*, 28 F.3d 832, 835 (8th Cir. 1994) (Counsel was ineffective at penalty phase for failing to present in coherent fashion evidence regarding capital defendant's mental state at the time of the offense, history of psychiatric hospitalizations and failure to take antipsychotic medications); *Deutscher v. Angelone*, 16 F.3d 981 (9th Cir. 1994) (Counsel was found ineffective in successor habeas petition for failing to develop and present mitigating evidence regarding petitioner's history of mental illness. Counsel failed to discover petitioner's history of mental illness, diagnoses of schizophrenia and organic brain damage and his commitments to mental institutions. There was also evidence, which was available and not presented, that petitioner had been severely abused as a child); *Lloyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2345 (1993) (Counsel was ineffective for failing to obtain adequate independent mental health evaluation which would have discovered "mental defects" and organic brain damage).

The purpose of this article, however, is not to discuss in detail the legal bases of a challenge to an inadequate evaluation but rather to attempt to outline *what is an adequate evaluation.*

III. The Elements of a Complete, Competent and Reliable Mental Health Evaluation

As the *Ake* Court held, the due process clause protects indigent defendants against incompetent evaluations by appointed psychiatrists. Accordingly, the due process clause requires that appointed mental health professionals render that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances.[4] In the mental health area, as in other medical specialties, the standard of care is the national standard of care recognized among similar specialists, rather than a local, community-based standard of care.[5]

A. The Proper Standard of Care Involves a 5 Step Process Before Diagnosis

In the context of diagnosis, exercise of the proper level of care, skill and treatment requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. On the basis of generally agreed upon principles, the standard of care for both general mental health and forensic mental health examinations reflects the need for a careful assessment of medical and organic factors contributing to or causing psychiatric

or psychological dysfunction. H. Kaplan & B. Sadock, *Comprehensive Textbook of Psychiatry*, 543 (4th ed. 1985). The recognized method of assessment, therefore, must include, at a minimum, the following five steps:

1. ***An accurate medical and social history must be obtained.***

Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub & F. Black, *Organic Brain Syndromes* 42 (1981), an accurate and complete medical and social history has been called the "single most valuable element to help the clinician reach an accurate diagnosis." Kaplan & Sadock, *supra* at 837.

2. ***Historical data must be obtained not only from the patient, but from sources independent of the patient.***

It is well recognized that the patient is often an unreliable and incomplete data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan & Sadock, *supra* at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id.* Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant. Kaplan & Sadock *supra* at 550.

See also American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," *Issues in Forensic Psychiatry* 202 (1984); Pollack, *Psychiatric Consultation for the Court*, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson *Forensic Psychiatry* 38-39 (2d ed. 1965).

3. ***A thorough physical examination (including neurological examination) must be conducted.***

See, e.g., Kaplan & Sadock *supra* at 544 837-38 & 964. Although psychiatrists may choose to have other physicians conduct the physical examination,[6] psychiatrists:

> [s]till should be expected to obtain detailed medical history and to use fully their visual, auditory and olfactory senses. Loss of skill in palpation, percussion, and auscultation may be justified, but loss of skill in observation cannot be. If the detection of nonverbal psychological cues is a cardinal part of the psychiatrists' function, the detection of indications of somatic illness, subtle as well as striking, should also be part of their function. Kaplan & Sadock *supra* at 544.

In further describing the psychiatrist's duty to observe the patient s/he is evaluating Kaplan and Sadock note in particular that "[t]he patient's face and head should be scanned for evidence of disease.... [W]eakness of one side of the face, as manifested in speaking, smiling, and grimacing, may be the result of focal dysfunction of the contralateral cerebral hemisphere." *Id.* at 545-46.

4. ***Appropriate diagnostic studies must be undertaken in light of the history and physical examination.***

The psychiatric profession recognizes that psychological tests, CT scans, electroencephalograms, and other diagnostic procedures may be critical to determining the presence or absence of organic damage. In cases where a thorough history and neurological examination still leave doubt as to whether psychiatric dysfunction is organic in origin, psychological testing is clearly necessary. *See* Kaplan & Sadock *supra* at 547-48; Pollack *supra* at 273. Moreover, among the available diagnostic instruments for detecting organic disorders, neuropsychological test batteries have proven to be critical as they are the most valid and reliable diagnostic instruments available. See Filskkov & Goldstein, *Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery*, 42 J. Of Consulting & Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, & Snow, *The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment*, 162 J. of Nervous and Mental Disease 360 (1976).[7]

5 Step Forensic Mental Health Assessment Process

1) An accurate medical and social history must be obtained.

2) Historical data must be obtained not only from the patient, but from sources independent of the patient.

3) A thorough physical examination (including neurological examination) must be conducted.

4) Appropriate diagnostic studies must be undertaken in light of the history and physical examination.

5) The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment.

5. ***The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment.***

As Kaplan and Sadock have explained, "[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," and such loss can be characterized as "(1) impairment of orientations; (2) impairment of memory; (3) impairment of all intellectual functions, such as comprehension, calculation, knowledge, and learning; and (4) impairment of judgment." *Id.* at 835. While the standard mental status examination (MSE) is generally used to detect and measure cognitive loss, the standard MSE - in isolation from other valuative procedures - has proved to be very unreliable in detecting cognitive loss associated with organic impairment. Kaplan and Sadock have explained why:

> When cognitive impairment is of such magnitude that it can be identified with certainty by a brief MSE, the competent psychiatrist should not have required the MSE for its detection. When cognitive loss is so mild or circumscribed that an exhaustive MSE is required for its recognition then it is likely that it could have been detected more effectively and efficiently by the psychiatrist's paying attention to other aspects of the psychiatric interview.
>
> In order to detect cognitive loss of small degree early in its course, the psychiatrist must learn to attend more to the style of the patient's communication than to its substance. In interviews, these patients often demonstrate a lack of exactness and clarity in their descriptions, some degree of circumstantiality, a tendency to perseverate, word-finding problems or occasional paraphasia, a paucity of exact detail about recent circumstances and events (and often a lack of concern about these limitations), or sometimes an excessive concern with petty detail, manifested by keeping lists or committing everything to paper. The standard MSE may reveal few if any abnormalities in these instances, although abnormalities will usually be uncovered with the lengthy MSE protocols.
>
> The standard MSE is not, therefore, a very sensitive device for detecting incipient organic problems, and the psychiatrist must listen carefully for different cues. *Id.* at 835.

Accordingly, "[c]ognitive impairment, as revealed through the MSE, should never be considered in isolation, but always should be weighed in the context of the patient's overall clinical presentation - past history, present illness, lengthy psychiatric interview, and detailed observations of behavior. It is only in such a complex context that a reasonable decision can be made as to whether the cognitive impairment revealed by MSE should be ascribed to a organic disorder or not." *Id.* at 836.

In *sum*, the standard of care within the psychiatric profession which must be exercised in order to diagnose is concisely stated in Arieti's *American Handbook of Psychiatry (1986)*:

> Before describing the psychiatric examination itself, we wish to emphasize the importance of placing it within a comprehensive examination of the whole patient. This should include careful history of the patient's physical health together with a physical examination and all indicated laboratory tests. The interrelationships of psychiatric disorders and physical ones are often subtle and easily overlooked. Each type of disorder may mimic or conceal one of the other type.... A large number of brain tumors and other diseases of the brain may present as "obvious" psychiatric syndromes and their proper treatment may be overlooked in the absence of careful assessment of the patient leading him to the diagnosis of physical illness. Indeed, patients with psychiatric disorders often deny the presence of major physical illnesses that other persons would have complained about and sought treatment for much earlier. *Id.* at 1161.

IV Common Deficiencies in Forensic Evaluations

It can be readily seen that many, if not most, of the mental health evaluations conducted in criminal cases do not satisfy the applicable standard of care. This is not surprising because, as in many other areas, the indigent defendant receives short shrift in the criminal justice system. Most state institutions do not have the funds or staff to follow the above five steps. Furthermore, since many defendants are sent to these institutions for a very limited purpose--in most cases only to determine if the defendant is competent to stand trial--the staff may not believe it is necessary to do a complete evaluation.[8] Additionally, in many cases defense counsel are not sufficiently conversant with the elements of a complete, reliable mental health evaluation to educate the court regarding that to which the client is legally entitled. In other instances, some mental health professionals, used to working on forensic cases without adequate resources, fail to follow the above five steps. However, in this section of the article, I will focus in on the elements of an evaluation which are generally most deficient and result in the most unreliable results. My experiences since I first published this article in 1990 have only confirmed the basic weaknesses in many forensic evaluations detailed below.

A. Client's History

Many forensic evaluations are unreliable because the history upon which they are based is erroneous, inadequate or incomplete. All too often, the medical and social history relied upon by mental health professionals is cursory at best and comes exclusively from the client or possibly from the client and discussions with one or two family members.

This can result in a fundamentally skewed view of the relevant history because often the client, and even their family members, are very poor historians and may fail to relate significant events which are critical to a proper determination of an individual's mental state at the time of the offense.

For example individuals who are physically, emotionally and/or sexually abused often minimize the severity and extent of the abuse. Their view of what is "normal" and thus what should be related to a clinician is frequently impaired. Similarly, individuals with mental retardation or other organic brain impairments generally are unable to recall significant events regarding their medical history which may be critical to a reliable diagnosis. It is also well established that many mental illnesses, *e.g.*, bipolar mood disorder and schizophrenia, run in families and thus it is important to know the family as well as the client's medical and psychiatric history.

It is for this reason that it is essential that a mental health professional obtain as much information as possible regarding a client's social and medical history to reliably determine what genetic, organic, environmental, and other factors may have played a role in the client's mental state at the time of the offense. Thus all available records for both the client and significant members of his family should be obtained. These records include, but are not limited to:

- Client's and sibling's birth records
- Client's medical records and family medical records
- Any social services records relevant to client or his family
- Client's and siblings' school and educational records
- All jail and/or department of corrections records, including medical records
- All records relevant to any prior psychiatric treatment or psychological evaluation for client or family members including grandparents, siblings, etc., including the evaluating professional's raw data (do *not* be content with obtaining the discharge summary or final report)
- Death records for any immediate family members
- Any military records, including medical records
- All police or law enforcement records regarding the arrest, offense, and any prior offenses
- All records relevant to any co-defendants
- Family court records for parents and client
- Attorney files, transcripts, and court files for any prior offenses by the client or his family members

Reviewing these records will often lead to additional records documents and materials which should be obtained.[9] You must ensure that this time consuming process is meticulously followed because it is impossible, before an investigation is complete, to determine what will be the fruitful sources of information thus creating the risk of an additional skewed evaluation.

However, you cannot prepare the history solely from talking with your client and obtaining records. Other family members, friends and persons with knowledge about your client must be interviewed. These people, especially family members should not be talked to in a group, but individually. It is important to bear in mind, for example, that any family member or caretaker you interview may have abused your client. This information will rarely come out in a family gathering, and will even more rarely come out the first time you talk with the individual. In addition to family members, your client's friends, prior counsel, teachers, social workers, probation and parole officers, acquaintances, neighbors, employers, spouses (current or former), and any witnesses preceding, during and after the offense should be interviewed. Any or all of these persons may have critical information relevant to your client's mental state.

An excellent discussion of the needed investigation can be found in Lee Norton's article "Mitigation Investigations," *The Champion*, Vol. 16, No. 4 (May 1992) at 43.

B. Inadequate Testing for Neurological Dysfunction

While not all of our clients have organic brain damage, many do. Due to poverty, abuse and neglect which characterizes so many of our client's lives, a substantial percentage of our clients have mothers who abused alcohol and drugs during their pregnancies and who received poor or no prenatal care. Inadequate medical attention to head injuries and other illnesses is also common, as is exposure to various neurotoxins (*e.g.*, lead based paint and pesticides). Long histories of substance abuse, including the use of organic solvents, is also not unusual. These, and other factors, predispose our clients to varying degrees of neurological impairment. Organic brain damage can and does affect behavior. It can impair judgment and rob an individual of the ability to make decisions in crises rationally and responsibly. It can destroy or diminish a person's ability to learn, to carry out a plan of action, to understand long term consequences of actions, to appreciate cause and effect, and to mediate impulse-driven behavior. However, despite its obvious relevance in mental health evaluations in criminal cases, neurological impairment is often not diagnosed.[10]

Another very common deficiency in state forensic evaluations is the inattention to the possibility of organic damage, other neurological dysfunction, or a physiological basis for psychiatric symptoms. Based on my experience, many of our clients are at risk for organic brain damage. They have a history of serious head injuries from chronic childhood physical abuse, car accidents, and falls. Their developmental years are plagued with chronic illness and fevers, frequently untreated, and malnutrition. Poor or nonexistent prenatal care and/or birth trauma are routinely found in their histories. Many clients had mothers who drank large amounts of alcohol or used drugs during their pregnancies, now well recognized as a cause of permanent and sometimes devastating mental disabilities in the developing fetus. Most of our clients are chemically dependent, and their early and prolonged use of drugs and alcohol, including organic solvents, can cause permanent brain damage.

However, as a result of inadequate histories, or for other reasons, inadequate attention is frequently given to the possibility of neurological impairment. For example, very few of my clients have ever been examined by a neurologist, despite indications in their histories that warrant neurological consultation. Occasionally, the extent of the neurological evaluation may be an EEG, which was likely conducted without any specific leads or without having the client sleep during the test thus making it an inadequate study. It is also a rare case in which any meaningful neuropsychological testing has been conducted, even though neuropsychological testing is one of the best ways to determine the presence of more subtle brain damage prevalent in our clients. The extent of the testing, if any testing at all is done, may be a few neuropsychological screening tests such as the Bender-Gestalt or the trailmaking test. This, however, is often inadequate and will yield unreliable results. A complete neuropsychological battery is often the only way to rule out the possibility of neurological damage. Unfortunately, I have been involved in numerous cases where it was only discovered after the trial that the defendant had a serious organic deficit. For example, in one case, we only discovered during the federal habeas corpus proceedings that our client had a brain tumor exerting pressure on critical brain structures, which was present at the time of the offense. While this is a dramatic example, in countless other cases we have discovered that our clients have serious neurological impairments that went undiagnosed in earlier evaluations.

This can have tragic consequences. It can deny your client a concrete way to reduce his blameworthiness. It is a fact of death penalty life that juries, and judges, are often less impressed with psychosocial explanations for violent behavior than they are with organic explanations. While this is changing somewhat due to our better understanding of the long term effects of various types of trauma, *see, e.g.,* Judith Herman, *Trauma and Recovery*, it is still true. Organic deficits, however, frequently have their

origin in events and situations over which the defendant had no control, such as Fetal Alcohol Syndrome, temporal lobe epilepsy, measles, encephalitis, or prolonged exposure to neurotoxins such as those found in lead-based paint. These factors can be presented in an empathy-provoking manner, as part of a constellation of factors that affected your client's behavior. While we may appreciate psycho-social diagnoses such as post-traumatic stress disorder, in some cases it is not compelling enough unless it is accompanied by a physical explanation. For example, if you can show that part of your client's brain is literally missing, most jurors and judges can understand that such an impairment might affect an individual's behavior. The same presentation can be made with less dramatic or "softer" neurological impairment, *e.g.*, diffuse brain damage. The important thing is to insure that the evaluation your client received at trial, or receives in connection with post-conviction litigation, fully takes into account the possibility of neurological impairment.

This cannot be done without a reliable history and appropriate testing and examination. A competent neurologist, psychiatrist, or neuropsychologist will recommend a complete neurological examination when indicated by physical symptoms such as one sided paralysis or weakness, facial asymmetry, seizures, headaches, dizziness, blurred vision, or imbalance. Laboratory tests, including blood and endocrine workups, may also be necessary to determine the presence of diseases that affect behavior. Magnetic Resonance Imaging (MRI), Electroencephalogram (EEG), and CT scans can also be useful in this regard. However, it is important to note that a negative (or normal) result on a CT scan, EEG, or MRI does not rule out the possibility of neurological impairment. While a positive finding establishes organicity, a negative finding does not rule brain damage out.[11] Organicity may still be discerned through more sensitive neuropsychological testing and/or a neurological evaluation.

V. Choosing Experts

There are a number of different types of experts you may need in any particular case. However, you will not know exactly what type of experts you will need until the social-medical history is completed. As I have stressed throughout this article, this must **always** be the first step. I cannot stress this point enough as it is virtually always the basic flaw in forensic mental health evaluations. You must resist the temptation to hire a psychologist or psychiatrist immediately upon being appointed or retained.[12] Without first conducting the necessary life history investigation, your expert may well overlook significant factors and come to premature or erroneous conclusions.

Furthermore, it is critical that you obtain the assistance of a social worker, or someone with similar skills, to assist in compiling and understanding the social and medical history. Social workers are specially trained not only in gathering the type of information you need-both from documents and individuals-but also in organizing and interpreting the data in coherent themes. *See* Arlene Andrews, *Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings*, 1991 Social Work 36. While you or someone in your office can collect most documents and interview the witnesses, you may not be attuned to significant facts in the records, or be less able to obtain information from the client, the client's family and friends, and other persons with relevant knowledge about your client than someone with special expertise in this area. Thus, you should always attempt to obtain funds for the assistance of an individual with a social work background in the investigation, compilation and assimilation of the social and medical history.

If the court resists funds for this type of assistance, educate the judge, via affidavit or testimony, as to the critical nature of this aspect of the mental health evaluation.[13] For example, a psychiatrist or psychologist with whom you have a collegial working relationship may be willing to provide you with an affidavit laying out specific factors in the "known" social history warranting further exploration by a person with specialized training and discussing the need for full and reliable background information. Furthermore, many of the sources discussed in this article will also be of use in establishing the need for the assistance. It is also important to be adamant about the need for specialized social history assistance in cases where the client's ethnic or cultural background impairs your ability to obtain accurate and complete information.

Depending on the results of the social history, it is then time to obtain your own experts. In doing so, you should search for professionals with expertise in the themes that have developed in the social history, *e.g.*, abuse (physical, emotional and sexual trauma); alcoholism and/or substance abuse; familial or genetic predisposition to certain mental illnesses; head injuries or other indicators of organicity, mental retardation or all of the above. It is important to keep in mind that one mental health professional can very rarely help you with all of these things. *See* Clark, Veltkamp & Monahan, *The Fiend Unmasked: The Mental Health Dimensions of the Defense*, 8 ABA Criminal Justice 22 (Summer 1993).

Thus it is almost always necessary to put together a multidisciplinary team of professionals, including a social worker, to determine the client's mental state reliably. For example, if the social history indicates a history of chronic child maltreatment and abuse, it may be best to begin with a full psychological battery including neuropsychological testing. This testing may confirm or deny the presence of posttraumatic stress disorder, organic impairment or other diagnoses resulting from the abuse. Similarly, in many cases involving child abuse, the individual will often have a long history of substance abuse. Thus, it may be necessary to retain a pharmacologist to explain the nature of the substances abused, their effects on an individual's judgement, impulse control, cognitive functioning etc., and to explain the long-term effects of these drugs on a person's brain. Furthermore, depending on the results of the neuropsychological examination, a neurological consultation will often be in order.

Other types of experts may also be necessary. We have enlisted the assistance of audiologists, mental retardation experts, special education teachers, toxicologists and a variety of other types of experts, in addition to social workers, psychologists, neurologists, neuropsychologists, pharmacologists, and psychiatrists.

The important thing, however, is to assemble the necessary mental health professionals *on the basis of the history as you uncover it.* Furthermore, it is frequently necessary to have one professional, generally a forensic psychiatrist, who can "bring it all together." In other words, many of your experts may be testifying as to only one piece of the mental health picture, for example, your client's history of substance abuse. It is useful to have one person who, in consultation with all the other members of the team, is prepared to discuss all the history, testing, and diagnosis and give the fact-finder and sentencer a comprehensive picture of the individual's mental state at the time of the offense, and, if relevant, at trial.

VI Meaningfully Presenting Expert Testimony

Regardless of which phase of the trial expert testimony is presented, and even regardless of what type of criminal case it is, persuasive expert testimony must have one element: *it must enable the jury to see the world from your client's perspective, i.e., to appreciate his subjective experience.* Most people have no idea, for example, what it is like to suffer from schizophrenia or other major mental illnesses, or what it means to be psychotic or to have auditory, visual or tactile hallucinations. It is often not enough for your expert to tell the jury or judge that your client is schizophrenic and was out of touch with reality at the time of the offense. Rather, she must attempt to explain, in common sense, persuasive, concrete terms, what schizophrenia means, and what the world looks like to a person with this mental illness. Similarly, it is not enough to have the expert testify that your client is plagued by auditory command hallucinations. Without an adequate explanation a juror may react as follows: "Big deal, I don't care, if someone told me to kill somebody I wouldn't do it."

You and your expert(s) must look for ways to convey what it is truly like to be mentally ill, mentally retarded or brain damaged, and how confusing and frightening the world is to your client as a result of his impairments. In other words, you have to give the fact-finder a view of the crime from the defendant's perspective. If you don't, you run the risk of making your client seem "otherly," frightening and thus expendable. What you are striving for is to enable the fact-finder to look through your client's eyes and to walk, at least for a few minutes, in his shoes. If you can accomplish this through your expert testimony, you can facilitate understanding rather than fear.

It takes time and energy, but the key is to avoid jargon and words that ordinary people don't understand. It may be useful to have someone not connected with the case, preferably not a lawyer, sit in on a meeting with your expert witness and see if they understand their explanation of your client's mental state as well as its relevance to the facts of your case.

VII Attacking Anti-Social Personality Disorder

Many of our clients are diagnosed by mental health professionals, employed by either the state or the defense, as having an anti-social personality disorder. This diagnosis is not only very harmful but, unfortunately for many of our clients, it is often arrived at erroneously. In my opinion, anti-social personality disorder is the lazy mental health professional's diagnosis. The criteria for the disorder are essentially a description of people's behavior. It may describe what the client has done, but never why. For example, one of the characteristics is that the individual engaged in sexual activity at a young age, or began using substances at an early age.

Besides the fact that many of these characteristics are economically and racially biased, the diagnosis is often erroneously arrived at because of an inadequate history and lack of other adequate testing and evaluations. DSM-IV specifically states that "the diagnosis may at times be misapplied to individuals in settings in which seemingly antisocial behavior may be part of a protective survival strategy."[14] In other words, the clinician is obligated "to consider the social and economic context in which the behaviors occur." *Id.* at 647. This is another area where a thorough and reliable social history can have a significant impact. For example, to qualify for the diagnosis of Anti-Social Personality Disorder, the client must have met the criteria, prior to age fifteen, for a DSM-IV diagnosis of Conduct Disorder. Conduct Disorder has a number of criteria including a history of running away from home, truancy, etc. Thus, it is critical, to an accurate diagnosis, to know why your client ran away from home. If he ran away because he was being physically, sexually or emotionally abused, then the diagnostic criteria would not be satisfied. Similarly, if the child was truant because his caretakers would not allow him to go school, or if he broke into people's houses because his father was a thief and forced him to do so to further the family enterprise, the diagnosis of Conduct Disorder, and correspondingly Anti-Social Personality Disorder, would be inappropriate. Thus once the dysfunctional nature of most of our client's environments is exposed, the diagnosis can be defeated.

Similarly, if there is an organic or other cause such as mental retardation for some of the behaviors, then the diagnosis should, in many cases, not be given. In this regard, it is useful to look at and study the decision trees published in the *American Psychiatric Association's Diagnostic and Statistical Manual-III.* These "trees" indicate a number of other diagnoses that preempt the diagnosis of anti-social personality disorder. However, because all many psychologists do is talk to the client, and look at his or her criminal record and other behaviors, the diagnosis is often arrived at despite other factors which would either prevent the diagnosis or move it sufficiently far down on an axis as to make it irrelevant to the other more significant diagnoses in explaining the individual's behavior.

Finally, it is important to note that the diagnosis can not be given unless your client is at least eighteen years old, and if there is clear evidence that a diagnosis of Conduct Disorder was warranted before your client was fifteen years old. In other words, if the alleged "anti-social" behaviors began after your client was fifteen, the Anti-Social Personality Disorder would not be an appropriate diagnosis. Thus, if some neurological impairment or other contributing condition occurring after age fifteen explains your clients actions, the diagnosis is not correct. In the same vein, DSM-IV states that if the antisocial behavior occurs during the course of schizophrenia or manic episodes, the diagnosis is not appropriate. *Id.* at 650.

The point of this discussion is that you should never accept at face value any professional's, including your own, determination that your client has anti-social personality disorder. It is always critical, for diagnostic purposes, to know why the seemingly anti-social behavior occurred. While in some cases the diagnosis may be unavoidable, in many it is not. If the steps outlined previously in this article are followed, you dramatically increase your chances of avoiding a diagnosis that establishes aggravating factors, and obtaining one instead that offers a compelling basis for mental health related claims.

VIII Considering Prior Diagnoses

In many cases, you will be confronted with a client who has been previously evaluated, in some cases on many occasions. If this is true, it is also likely that different professionals have arrived at different diagnostic conclusions. In examining the prior evaluations, it is important to know when the prior conclusions were reached, and, more specifically, what version of the Diagnostic and Statistical Manual of Mental Disorders was in effect at the time any prior diagnosis was rendered. *See* K. Wayland, "The DSM: Review of the History of Psychiatric Diagnosis in the U.S.," *Capital Report* #40 (Nov/Dec 1994). For example, it was not until the late 1970's and early 1980's that depression emerged as a diagnosis to be seriously considered in children and ado-

lescents. Thus, prior to that time, a child with a history of suicide attempts and other depressive symptoms would almost certainly not have been diagnosed as suffering from depression. Similarly, Posttraumatic Stress Disorder (PTSD) was not officially recognized as a diagnosis until the publication of DSM-III in 1980. Thus, while there may be clear support for PTSD in descriptions of your client's behavior in a pre-1980 evaluation, the diagnosis of PTSD would likely not have been given.

This indicates--again--the critical need for a detailed history and review of all information regarding your client's life. For it may be that the mental health records contain descriptions of your client's behavior which warrant a different (and more favorable) diagnosis today than was available using previous diagnostic criteria.

IX Don't be Fooled by the Client

Many times when I consult with lawyers, I hear them say, when we are discussing the possibility that their client is mentally ill or mentally retarded, that "Well, I've talked to him and he seems pretty sharp to me." Or they say "Well, he seems normal to me." Sometimes they describe their client as manipulative, evasive, hostile, or street smart. It is crucial to remember that as lawyers we are not trained to recognize signs and symptoms of mental disabilities. It is equally important to keep in mind that many mentally retarded, mentally ill or brain damaged individuals are quite adept at masking their disabilities. For example, one skill that mentally retarded people typically master is some degree of hiding their disability. One client of mine sat in his cell for hours at time pretending he could read because he thought, if people thought he could read, they wouldn't believe he was mentally retarded. Other clients with severe mental illnesses are often good at masking their illness for short periods of time. This is especially true when they are in a structured setting, such as prison or jail, which may minimize many of the symptoms of their impairments.

Unfortunately the quality of many attorney-client conversations does not allow probing into the client's mind to determine delusional or aberrational thought processes. However, this does not mean that they are not there. Many ill people, for example, know that other people don't think like they do, and may need to get to know you before they share their thoughts. Similarly, many people with brain damage may not appear dysfunctional when engaged in casual conversation. The important thing is that neither you nor any mental health professional should prejudge a client's mental state based upon casual contact. It is only through the assistance of competent mental health professionals who recognize the importance of a documented social history, and who are trained in appropriate testing, that you can reliably and adequately determine your client's mental state.

X. Essential References

Because of the pivotal role of mental health issues in criminal and capital litigation, counsel must gain a working knowledge of behavioral sciences. Whether an attorney has only one criminal or capital case or several, it is essential to become familiar with the diagnosis and treatment of psychiatric disorders. Two publications need to be on the shelves of attorneys in criminal litigation and studied: *Comprehensive Textbook of Psychiatry, Fifth Edition*, edited by Harold L. Kaplan, M D., and Benjamin J. Sadock, M.D. (Williams & Wilkins, 1989) and *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-IV*), published by the American Psychiatric Association in 1994. These references offer a guide through the labyrinth of mental health information and allow counsel to participate fully in developing appropriate mental healths claims.

XI Conclusion

Defense counsel in criminal, especially capital, litigation can and should insure that their clients receive complete, competent and reliable mental health evaluations. In order for a mental health evaluation to meet the nationally recognized standard of care in the psychiatric profession it must involve a multi-step process that requires far more than a clinical interview. A thorough and documented social history, physical examination and appropriate testing are necessary components of any psychiatric diagnosis. Mental health professionals must consider whether there is an organic cause for behavior before reaching any psychiatric diagnosis. Counsel has a responsibility to ensure that mental health evaluations reflect this multi-step process.

JOHN BLUME
Post-Conviction Defender Organization
of South Carolina
P.O. Box 11311
Columbia, South Carolina 29211
Tel: (803) 765-0650
Fax: (803) 765-0705

JOHN BLUME is Director of the Post-Conviction Defender Organization of South Carolina and is also an adjunct professor at Cornell Law School. He served as counsel for the petitioner in Burden v. Zant, 114 S.Ct. 654 (1994); Mu'Min v. Virginia, 500 U.S. 415 (1991), Burden v. Zant, 498 U.S. 433 (1991) (per curiam), Butler v. McKellar, 494 U.S. 407 (1990), and as co-counsel for the petitioner in Yates v. Evatt, 500 U.S. 391 (1991), Burger v. Kemp, 483 U.S. 776 (1987), and Yates v. Aiken, 484 U.S. 211 (1988). He has published a number of articles regarding various aspects of capital litigation, including several regarding mental health issues, and he has also served as a faculty member at numerous capital defense training seminars discussing mental health issues and other aspects of death penalty litigation.

Footnotes

[1]See also *Youngberg v. Romeo*, 457 U.S. 307 (1982) (recognizing that psychiatrist's performance must be measured against a standard of care when due process demands adequate performance.)

[2]Other cases involving similar claims associated the effect of the actions by the state court, the prosecution and psychiatric witness with the issue of effectiveness of counsel. Courts have recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974).

[3]Although the *Blake* court analyzed the impairment of the psychiatrist's ability to conduct a professionally adequate evaluation in terms of its impact on the right to effective assistance of counsel, it recognized that its analysis was "fully supported" by *Ake*. In support of this conclusion, the court gave emphasis to *Ake's* requirement that "the state must at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and in presentation of the defense." 758 F.2d at 530-31 (quoting *Ake*, 470 U.S. at 83). Thus, *Blake* recognized that if an appointed psychiatrist's ability to "conduct an appropriate examination" is impaired, due process is violated.

[4]*See generally*, Note, *A Question of Competence: The Indigent Criminal Defendant's Right to Adequate and Competent Psychiatric Assistance After Ake v. Oklahoma*, 14 Vt.L.Rev. 121 (1989).

[5]A national standard of care is important to insure that your client receives a complete, competent mental health evaluation. If a local standard of care applied, for example, your client could conceivably be deprived of available diagnostic studies, *e.g.*, a MRI scan on the ground that such a study is not readily available in the local community. The same may be true of neuropsychological testing if there are no trained neuropsychologists. However, your client's right to a trial conducted in conformity with the Sixth Amendment and

the Due Process Clause demands a national standard as opposed to a local standard of care.

[6]Thus, if your primary mental health professional is a psychologist, it is critical that you obtain the services of a physician to complete a physical examination. If your client is indigent and the court has only approved funds for a psychologist, it is important to bring to the court's attention (and to litigate if necessary) the need for a complete physical examination.

[7]Neuropsychological test batteries were developed as a method for assessing cognitive deficits and involve an assessment of specific cognitive functions, such as memory, attention, and fluency of thinking. The two most widely used neuropsychological batteries are the Halstead-Reitan and the Luria Nebraska. A clinician assessing patients neuropsychologically will often use tests from both batteries as well as other neuropsychological instruments to tailor the assessment to the types of problems that the specific patient is having and to try to identify whether a specific area of deficit is present. When a grouping of neuropsychological tests such as those described above is administered to an individual, the clinician obtains some sense of the person's overall patterns of abilities and deficits.

[8]The determination of whether a defendant is competent--whether he has a rational and factual understanding of the charges and is able to assist counsel--is a limited inquiry which a mental health professional may, under some circumstances, be able to make without following all of the steps outlined in this article. Even in the competency context, however, the failure to obtain a complete and reliable history may skew the results. Unfortunately, in many cases, a mental health professional who only evaluated the defendant for competency purposes, and often conducted a limited examination, proceeds, at the request of either the prosecution or even sometimes the defense, to testify regarding a wide array of forensic issues such as criminal responsibility and mitigation. While a detailed discussion of the various types of mental health evaluations is beyond the scope of this article, any time a mental health professional fails to follow the steps outlined in this article, there is a corresponding risk that the conclusions reached will be erroneous.

[9]There are many excellent, more detailed life history records' checklists which can be obtained from various post-conviction defender organizations and public defender agencies including the Kentucky Post-Conviction Defender Organization.

[10]The reasons organicity so often goes undiagnosed are varied. One reason has to do with the complexity of so many of our clients' histories. For example, when confronted with a substantial history of abuse and polysubstance abuse, a mental health professional may too quickly conclude that the interaction of the trauma and the intoxicants caused the behavior, failing to adequately pursue any existing neurological impairment. Another reason has to do with the circumstances of the evaluation; many people with organic brain damage respond very well to a structured environment such as prison. Thus, when confined and removed from the complexities and temptations of life on the outside, the symptoms of their impairment are significantly less pronounced and may be overlooked. In some cases, the damage is missed because the particular mental health professional retained by counsel has inadequate training in the diagnosis of brain damage, *e.g.*, a psychologist without any experience in neuropsychological testing.

[11]Furthermore, if the CT scan or MRI film has not been reviewed by an expert you have confidence in or was conducted at the request of the state or state psychiatric hospital, I would recommend that you have a neurologist or neuroradiologist retained by the defense review the actual film. I have been involved in a number of cases in which the initial hospital report indicated for example that the MRI was "normal" when it was not. Erroneous CT scan and MRI readings occur for a variety of reasons, a discussion of which is beyond the scope of this article, but counsel should obtain the film and have it reviewed by your own expert.

[12]Many times counsel do so, reasoning that it is important to have the defendant seen as soon by a mental health professional as possible after the offense. There may be some limited circumstances where this is true, *i.e.*, if you are appointed or retained within a few hours of the offense and upon consulting with the client, you determine he is floridly psychotic. Such situations are, however, few and far between, and the temptation to conclude that your case falls in this category must be resisted.

[13]A detailed discussion of how to secure funds for investigative and expert services is beyond the scope of this article. As a general matter, I would advise you to review Ed Monahan's articles: *Funds for Resources: Persuading and Preserving*, The Advocate, Vol. 16 No. 6 at 82 (January 1995); and *Confidential Request for Funds for Experts and Resources*, The Advocate, Vol. 17, No. 1 (February 1995) at 31. As an initial matter, you should always vigorously assert your client's right to an *ex parte* hearing. Most jurisdictions provide for such a hearing, and it is important to assert your client's right to confidentiality in connection with funds requests. Furthermore, in developing the argument for funds it is important to be as specific as possible and to build the case for funds "from the ground up." For example, a detailed showing of factors in your client's life suggesting neurological impairment is much more likely, than a general assertion, to result in the approval of funding. This is especially true if you can convince a neurologist to submit an affidavit, based on the facts in the history which you have developed, detailing the need for a neurological evaluation. It is also helpful to submit a similar affidavit from a forensic psychiatrist or psychologist, and possibly even a social worker, expressing the need for a neurological consultation. A similar process should be followed in attempting to obtain funds for other types of expert assistance. The affidavits from other professionals is useful in convincing the court that you are not on a fishing expedition.

[14]This was also true of DSM-IIIR.

DPA Library Resources on Mental Health

[This is a reprint of a "pathfinder" which is also available in handout form. The purpose is to familiarize library users with the full range of resources we have collected in this area. For a copy of the handout, or to use listed materials, contact DPA librarian Brian Throckmorton.]

The library's general resources relating to mental health cover areas such as law, diagnosis and treatment. The Division of Protection and Advocacy has acquired resources relating to more specialized issues in the lives of mental health patients, such as employment, communication, and education.

BROWSING AREAS: Our library uses the Dewey decimal system of classification. Most books relating to mental health are filed in the range 340 to 365 and in 610 to 620. The Division of Protection and Advocacy has created its own classification system for its library; the most relevant browsing area there is M4.

SELECTED BOOK LIST:

Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) (Washington, D.C.: American Psychiatric Association) 1994. The encyclopedic standard for descriptions of mental health conditions. **616.89 D536am** [Also available in searchable computer diskette format on the Westlaw terminal in the library.]

Mental Disability Law: Civil and Criminal by Michael L. Perlin (Charlottesville, Va.: Michie) 1989. Exhaustive 3-volume set, with extensive citation of relevant cases. Updated annually. **344.73 P45**

ABA Criminal Justice Mental Health Standards (Washington, D.C.: American Bar Association) 1989. Sections relate to pre-trial, competence, sentencing, and prison issues. **344.044 A116**

Attorney's Medical Deskbook 3d by Dan J. Tennenhouse (Deerfield, Ill.: Clark Boardman Callaghan) 1993. Includes mental health in its coverage of the intersection of law and medicine. Three volumes, updated annually. **610.28 T297**

American Psychiatric Glossary edited by Evelyn M. Stone (Washington, D.C.: American Psychiatric Press, Inc.) 1988. Includes tables of legal terms, common abbreviations, psychologic tests. **616.89003 S877**

Physician's Desk Reference, 49th edition (Montvale, N.J.: Medical Economics Data Production Co.) 1995. Drug information. **Reference area**

Comprehensive Textbook of Psychiatry, 5th edition, edited by Harold I. Kaplan and Benjamin J. Sadock (Baltimore: Williams and Wilkins) 1989. Good for general background of specific topics. Two volumes. **616.89 C737** [In the Fall, the library will purchase the 6th edition, probably in CD-ROM format.]

Treatments of Psychiatric Disorders (Washington, D.C.: American Psychiatric Association) 1989. Provides details of possible treatments of full range of mental problems. Three volumes. **616.891 A512**

Resource Manual on the Rights of the Mentally Disabled by Janet Loper Coye, Janet R. Nagy, and Annette K. Schreiber (West Bloomfield, Mich.: CNS Associates) 1985. Background information on rights, with a workbook in which you can collect and develop additional documentation. **346.730138 C881**

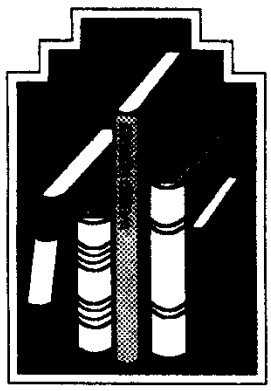
The Mentally Retarded Citizen and the Law, edited by Michael Kindred (New York: The Free Press) 1976. Includes three chapters on "The Mentally Retarded Citizen and the Criminal and Correctional Process." **346.73 M549**

Psychiatry in the Everyday Practice of Law, 3rd edition, by Martin Blinder (Deerfield, Ill.: Clark Boardman Callaghan) 1992, updated annually. Discusses mental health issues and trial techniques. **614.1 B648**

The Mentally Disabled and the Law by Samuel Jan Brakel, John Parry, and Barbara A. Weiner (Chicago: American Bar Foundation) 1985. Includes 100 pages on "Mental Disability and the Criminal Law," with charts for state-by-state comparisons of mental disability-related laws. **346.730138 B814**

Coping with Psychiatric and Psychological Testimony, 4th edition, by Jay Ziskin and David Faust (Marina del Rey, Calif.: Law and Psychology Press) 1988. Our set updated through 1990. Three volumes on challenges, cross-examination, depositions. **347.7366 Z81**

Kentucky Alcohol, Drugs, and Mental Health Directory (Frankfort, Ky.: Cabinet for Human Resources). City-by-city listing of local and regional mental health centers, state psychiatric hospitals. **Kept in librarian's office.**



PERIODICALS: Most of these are kept on the periodicals shelf. Some are housed in offices of staff of the Division of Protection and Advocacy.

Current subscriptions:

Disability Rag
Health Affairs
Issues in Law and Medicine
Mental and Physical Disability Law Reporter
Mental Health Law Reporter
Mental Retardation

Titles for which we have some back issues only:

American Journal on Mental Retardation
Harvard Mental Health Letter
Psychiatry and Law
Psychiatry Letter

DPA TRAINING VIDEOS: Videos may be borrowed by contacting the librarian.

"Representing the Mentally Retarded Criminal Defendant" by A. Moschella (1980) Tape V-6.

"The Mentally Retarded Offender in the Criminal Justice System" by D. Norley (1981) Tape V-50.

"Guilty But Mentally Ill" by W. Radigan and V. Aprile (1982) Tape V-72.

"Mental Health Issues and the Advocate" by M. Perlin (1982) Tape V-73.

"The Role of the Attorney at Commitment Hearings" by W. Radigan (1982) Tape V-91.

"Cross-Examination of an Expert Witness" by D. Dantzler; "Closing Argument Lecture and Demonstration" by E. Lewis (1983) Tape V-106. This tape relates to "guilty but mentally ill" verdict.

"The Brain" by KET (1985) Tapes V-196 through V-198.

"Involuntary Commitments" by B. Lotz and M. Hammons; "District Court Motion Practice" by H. Hellings; "Bench Trials. Jury Trials, Plea Bargaining" by W. Zevely (1985) Tapes V-144 and V-145.

"Controlling State Forensic Expert Witnesses on Cross-Examination" by R. Dodd; "Pharmacology" by E. Nelson; "Blood and Semen" by B. Wraxall and K. McNally (1986) Tape V-226.

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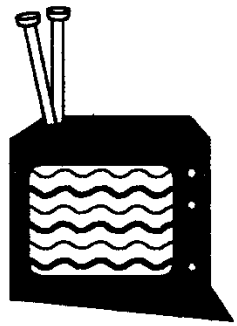

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BRIAN THROCKMORTON
Librarian
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100 Fair Oaks Lane, Suite 302
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Fax: (502) 564-7890
E-mail: bthrock@dpa.state.ky.us

Thoughts on the Police Interrogation of Individuals with Mental Retardation

Robert Perske

Why is it usually so easy for police to get confessions from individuals with mental retardation?

Aurora, Missouri. After 4 hours of police interrogation, Johnny Lee Wilson, age 20, confessed to murdering 79-year-old Pauline Martz. He confessed even though he was seen with his mother at a supermarket when the crime was being committed (Perske, 1994). He is currently serving a life sentence without parole.

Munnsville, New York. New York State police interrogated Delbert Ward, 59, for 4 hours-until he confessed to putting his hand over the mouth and nose of his 67-year-old brother William and killing him. Trial evidence showed that William died in his sleep (Perske, 1991).

Arlington, Virginia. Two detectives met David Vasquez, 37, while he was cleaning tables at a McDonald's restaurant and took him to the police station. After 6 hours in an interrogation room, Vasquez confessed to raping a woman and strangling her with cord from a Venetian blind. Five years to the day after being picked up at McDonald's, Vasquez received a governor's pardon. The reason: The same pattern of crimes continued after his conviction and were connected to another person (Priest, 1989).

Wilson, Ward, and Vasquez are individuals with mental retardation who confessed to crimes they did not commit. Similar cases are surfacing in every state and province in North America.

Confessions for heinous crimes continue to be seen in many legal circles as "the queen of the case." Some prosecutors feel that if they have a confession, there is less need for physical evidence to back up the suspect's admissions. There have been many cases in which individuals with mental retardation did indeed commit the crimes to which they confessed; but even then their confessions usually came quicker and easier than those taken from the average suspect.

These situations give rise to a question that cries out for an answer: Why is it usually so easy for police to get confessions from individuals with mental retardation? After following numerous cases involving suspects who have mental retardation, I have observed that many of these individuals gave responses during police interrogations that some officers misunderstood, but that most workers in the field of retardation would have understood immediately. They live with such responses every day in their work. The following are some explanations for the types of responses made by individuals with mental retardation.

1. **Relying on Authority Figures for Solutions to Everyday Problems.** For most people, satisfaction comes from solving their own everyday problems. Some of us, however, may not be very successful at figuring out what to say and do in certain situations. So we try to get close to authority figures who seem to have the answers. That is why many individuals with mental retardation respect police officers and seek them out as friends.

2. **The Desire to Please People in Authority.** This urge stems from both respect and fear. One needs to stay on the good side of those who help us survive in the community. In many confessions one can sense this desire in statements such as, "If the detective said I did it, then I guess I did it - even though I can't remember doing it."

3. **The Inability to Abstract From Concrete Thought.** When someone reads certain individuals their *Miranda* Rights, they may only grasp rights in concrete terms. They may think of things such as "waving at the right." After all, nobody should wave at the wrong in a police station. They may think about their right hands and consider raising them. They may be unable to grasp the abstract thought that *Miranda* Rights are based on a person's Constitutional rights as a citizen.

4. **Watching for Clues From the Interrogator.** Some people look closely at faces and listen for emphases placed on certain words-trying to sense what an officer wants to hear. The person may even copy moods in order to come up with answers the officer wants.

5. **Longing for Friends.** Some individuals hunger for friends who will not shy

away from them because of their disability. Many would love to have a police officer as a good friend.

6. **Relating Best With Children or Older Persons.** When people their own age do not befriend them, they often work at relating to those who are younger or older.

7. **Plea Bargainings of Accomplices.** Often this hunger for friends can result in associating with the wrong person. Then, when both get apprehended for a crime, the so-called "normal" suspect plea bargains for a lesser sentence by testifying against the person with the disability - who then gets the book thrown at him or her.

8. **Bluffing Greater Competence Than One Possesses.** Individuals with disabilities sometimes do everything they can to appear more knowledgeable than they really are. An untrained officer can easily reinforce this "cloak of competence" and use it against them.

9. **An All-Too-Pleasant Facade.** Smiling at people is a way of getting approval from others. An officer might see this overuse of grinning as a lack of remorse.

10. **Abhorrence for the Term Mental Retardation.** This term has wounded some people so deeply that they will do almost anything to disconnect themselves from it. If a prosecutor is trying to argue that a person does not have mental retardation, that defendant might seal his or her own doom by agreeing with that argument.

11. **Real Memory Gaps.** Some people with disabilities have real memory lapses - not the "selective memories" crafty people exhibit on the witness stand. Some will hide these lapses of memory by claiming to remember what others told them about the crime.

12. **A Quickness to Take Blame.** Even if the tragedy is an "act of God" or an unforeseeable accident, some individuals will feel that someone must be held responsible. They may even take the blame, thinking the officer will like them more if they do.

13. **Impaired Judgment.** Unlike a shrewd criminal with anti-social tendencies. Some people will do and say things that will make it easy for officers to charge them with crimes.

14. **Inability to Understand Court Proceedings, Assist in One's Own Defense, and Understand the Punishment.** In spite of their cloak of competence, some individuals may be completely unaware of what is going on around them.

15. **Problems With Receptive and Expressive Language.** Although they may not show it, some people will not understand what the officer is asking them. If the officer pushes them too hard, their response system may shut down. The officer may see this silence as sassy defiance.

16. **Short Attention Span.** Although myriad sights and sounds may strike a person's sensing mechanisms, most will be able to concentrate on a few and tune out the rest. Some individuals with disabilities may not be able to focus as well. They may be distracted by many more sights and sounds in the police station - even a noisy fan or the sound of voices in another room.

17. **Uncontrolled Impulses.** An individual may feel many impulses, but he or she will act on a few healthy ones and keep the others in check. People with certain disabilities may not be able to control their impulses like that. They may be prey to many urges they are feeling. One might be the urge to confess to a crime in order to reduce the pressure of the situation.

18. **Unsteady Gait and Struggling Speech.** People with cerebral palsy may be excellent receivers of sights and sounds and ideas, but when they try to respond, the impulses sent to their muscles will appear to have been dispatched by a madman. Arms may flail. Heads may bob, and they will exert tremendous energy trying to shape the words they want to voice.

19. **Seeing People With Disabilities as Less Than Human.** This view can lead to all kinds of prosecutorial mischief. For example, consider a police officer who is under pressure to solve a 2-year-old crime and has two suspects: a local bank president and a person with mental retardation. Which would be the easiest to lean on? Seeing a person as "dumb" or as a "nobody" or as a "fringe person" or less than human can inspire a cruel advantage that has no place in an interrogation room or a court.

20. **Exhaustion and the Surrender of All Defenses.** If interrogating officers keep individuals with certain disabilities under pressure for long periods of time, they can break some down and get them to say almost anything.

Implications for Action

The criminal justice system is one enormous elephant, and dealing with the issue of interrogating individuals with mental retardation is like scratching a tiny speck on its skin. Hundreds of imperatives need to be carried out before the system can ensure fair and just outcomes for people with mental retardation. There are two, however, that could be put into action by anyone who cares about and works with such individuals:

1. **Police Training Should be Seen as Everyone's Responsibility.** People with formal teaching skills who are experienced in working with individuals who have mental retardation can offer to conduct sessions at local meetings at police academies and headquarters. With regard to informal opportunities, there must be hundreds of creative ways to help officers enter into face-to-face relationships with those who have mental retardation and learn from the resulting experiences. For example, I recall how five residents in a New York City group home raised the money to buy one of their local police officers a bullet proof vest. Then they invited him to supper and made a special presentation. Great understanding came from this gesture.

Recently, the Special Olympics organization organized police officers as "torch runners." They carried the torch through their towns and counties en route to the International Games in New Haven, Connecticut. With just a little more planning, could they not also involve officers in additional face-to-face activities with the people for whom they are carrying the torch? Could the activities not be crafted so police officers might sense how these people would react in an interrogation session if that situation should ever arise?

Citizen-advocate coordinators can unabashedly seek to match a local officer with a local person who could use such a friend and advocate. Such a prejudice - killing influence might radiate to many of that officer's colleagues.

I recall a tense situation in Topeka, Kansas, when a young man with Down syndrome was taken to the police station for questioning. Shortly after, one of his workers learned of the arrest. In spite of her personal fears of intimidation by power - exuding policemen, she went to police headquarters and described how this "suspect" would confess to anything

if put under enough pressure. Although it does not always happen, the officers stopped the interrogation and released the young man into her custody.

This list could go on. I hope that interested readers will stop and consider ways to increase understanding of individuals with mental retardation by police officers, who may have previously viewed such people according to the not-so-kind wisdom of an earlier age. Uppermost when formulating recommendations should be the belief that if good police officers understand - really understand the ways individuals with mental retardation respond, they might take these factors into consideration, especially when no motive or physical evidence can be tied to the defendant.

2. **Individuals With Mental Retardation Should be Prepared for Police Interrogations.** In this field we work hard at helping the people we care about to "make it" in community living. We teach them street signs. We teach them to handle their finances. We teach them to use public transportation. We teach them to cook meals. We help them to be good workers. We reinforce good relationships with their employers, neighbors, shopkeepers. We teach them good manners. But we do not teach them to understand their *Miranda* Rights. We do not prepare them for a time when an officer suddenly invites them to the police station. We do not tell them how to respond when the officer tells them they have the right to remain silent...they have the right to a lawyer...if they do not have funds for a lawyer, one will be appointed...they have the right to stop talking at any time ...anything they say can be used against them in a court of law.

Although many of my close friends are police officers, if an officer - even one of my friends - starts to read me my *Miranda* Rights, I will sit down, shut up, and ask for a lawyer. Many of the people I have followed waived their rights and talked to the officers because they thought it was the right, most honest, and noble thing they could do. If Johnny Lee Wilson, Delbert Ward, and David Vasquez had understood their *Miranda* Rights and responded to them like the rest of us would, they would have saved themselves from a terrible anguish - an anguish too painful and gut-wrenching to be described in so brief an article.

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ROBERT PERSKE
159 Hollow Tree Ridge Road
Darien, Conneticut 06820

Robert Perske is an activist and writer who follows vulnerable people who confess to crimes they did not commit. He works as a court observer, investigator, community organizer, and as a friend of defendants with mental retardation.

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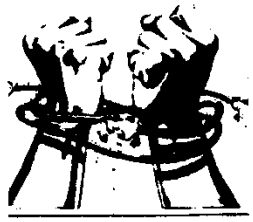

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Plain View

Ernie Lewis

Wilson v. Arkansas

It has been a while since the U.S. Supreme Court said anything positive about our privacy rights under the Fourth Amendment. It has been a while since Justice Thomas wrote anything worthwhile. And it has been a long time since a unanimous opinion of the Court did anything other than hurt the rights of the citizen accused.

In a stunning decision, this changed somewhat on May 22, 1995. In *Wilson v. Arkansas*, 514 U.S. ___, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995) speaking for a unanimous Court, Justice Thomas wrote that there is a knock and announce requirement for serving a warrant as part of the reasonableness clause of the Fourth Amendment.

This case arose in 1992 with allegations that Wilson had drugs at his house. A warrant was issued. While executing the warrant, the police opened an unlocked screen door and entered the house. They seized drugs, and found the defendant flushing marijuana down the toilet. Both the trial court and the Arkansas Supreme Court rejected Wilson's Fourth Amendment argument. Surprisingly, Wilson found a favorable forum in the nation's highest court.

The Court held that the police are required to knock and announce prior to entering a home when executing a search warrant. The Court stated that an "unreasonable search[] and seizure[]" is to be interpreted by looking to common law. Common law reveals that "when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter...But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors..., for the law without a default in the owner abhors the destruction or breaking of any house..." *Id.* at 1916. The Court further found that this common law was followed in the early part of our nation. Given these facts, "we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." *Id.* at 1918.

If you see some equivocation in the language above, then you understand that this will not free a great many of your clients. The Court recognizes that there are numerous exceptions to the knock and announce requirement. Some of these exceptions are that no one is present at the time of the warrant being executed, exigent circumstances, the possibility of escape, danger to the executing officers, and the destruction of evidence.

This is a significant case for Kentucky. I have not been able to find a case establishing a knock and announce requirement under Kentucky Constitution's Section Ten. Thus, this gives a new avenue of relief for our clients under appropriate circumstances.

At the time of the writing of this column, the Court announced that random drug testing of student athletes may take place in our nation's schools consistent with the Fourth Amendment. I will report this decision in more detail in the next issue.

Gunn v. Commonwealth
1995 WL 245471

The Lexington Police executed a search warrant on a suspected crack house on April 1, 1993. During the search, Gunn knocked on the door of the apartment. The police answered, and told Gunn that they were executing a search warrant. Gunn began to act nervously and put his hand into his pants pocket. The police told him to remove his hand from his pocket, which Gunn ignored. The police grabbed him and took him to the floor. Another office then saw a plastic bag protruding from Gunn's pocket. The police seized it and arrested Gunn. No

weapons were found on his person, but the bag produced powder cocaine.

The trial court found that the search was legal. The court relied upon both plain view and plain touch.

The Court of Appeals, with Judge Johnson being joined by Judges Huddleston and McDonald, affirmed the trial court, albeit on a more narrow basis. Specifically, the Court held that the police were where they had a right to be because they were executing a lawful search warrant. Further, when Gunn refused to comply with the order to keep his hands out of his pockets, the officers were justified in seizing his person. Thereafter the evidence came to the attention of the officers in plain view. Its nature of being contraband was readily apparent, and thus the seizure was legal.

This opinion in interesting in two ways. First, the Court uses a standard *Terry* analysis to justify the search. The Court, however, glosses over the fact that this was not a mere stop and frisk. Rather, when Gunn failed to keep his hands out of his pockets, the officer went behind him, put him in a bear hug, and took him to the floor. Only then did the baggie come into plain view. From the reading of the facts, the Court could easily have held that this exercise of force was excessive and went beyond the scope of a legal *Terry* frisk.

Secondly, the Court explicitly rejected the plain touch exception relied upon by the trial court. "Had the bag not protruded from Gunn's pocket when he was seized, the police would have been limited to a 'pat down' search of his outer clothing to determine if he carried a weapon or anything that might be so used... We are not convinced that such a small amount of cocaine powder (68.5 milligrams) in a plastic bag could be detected by sense of touch in the course of a 'pat down,' and even if it could, we are even less convinced that its illicit nature would be immediately apparent from its contour or mass as is required." This buttresses the continued requirement that a *Terry* frisk, including the newly recognized plain touch exception, is confined to an outer clothes frisk, with only matters which are plainly contraband being seizable.

United States v. Hudgins 52 F.2d 115 (6th Cir. 1995)

The Sixth Circuit has explored fully in this case the search incident to a lawful arrest exception as it applies to the search of an automobile.

Hudgins was driving on a suspended license in Knox County, Tennessee, when he was stopped by the police. He was arrested, handcuffed, and placed in the back of the police car. He told the officers that he had a loaded pistol in his briefcase. The police proceeded to find the pistol, $3000 in cash, and 54.3 grams of cocaine.

The district court approved of the search based upon the inventory search doctrine. However, the Court affirmed by analyzing the case under the search incident to a lawful arrest.

Judge Kennedy was joined by Milburn and Wiseman in this unanimous opinion. The Court rejected the district court's rejection of the search incident exception. The district court had been concerned that Hudgins had been handcuffed and placed in the police car at the time of the search. This fact reduced the need for a protective search of the car.

The Court held that because the defendant had been in the car when contact with the police was made, the bright line rule of *New York v. Belton*, 453 U.S. 454 (1981) applied. "Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton* and will be upheld as reasonable ...However, where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-line rule, and a case-by-case analysis of the reasonableness of the search under *Chimel* becomes necessary." *Id.* at 119.

This case was of little use to Hudgins. However, for us it reveals the analysis we need to make where our clients are not in the car at the time of the confrontation with the police. There, *Belton*'s bright-line rule is inapplicable, and a suppression remains a possibility.

Short View

1. ***State v. Wright***, 57 Cr.L. 1099 (3/31/95). The New Mexico Court of Appeals has rejected the apparent authority to consent doctrine under their state constitution. That doctrine looks to the belief of the police in the apparent authority to consent to search a place. Here, the defendant and her boyfriend were allowed by the owner to go into the the bedroom of a trailer. The police were thereafter allowed by a third party to check out the bedroom, despite the closed door. The Court held that even though the occupants had been there for just a few minutes, they had a reasonable expectation of privacy. Having rejected the good faith exception to the exclusionary rule previously, the Court then rejected the apparent authority doctrine as well.

2. ***U.S. v. Hernandez***, 57 Cr.L. 1201 (9th Cir. 5/17/95). The police may not make a pretextual stop for a parking violation when no reasonable police officer would have made such a stop. The pretextual stop spoiled the discovery of a large quantity of drugs.

3. ***State v. Jones***, 57 Cr.L. 1259 (Nev. Sup.Ct. 5/25/95). The seizure of blood from a person suspected of being high on cocaine requires a warrant. The Nevada Supreme Court held in this opinion that in contradistinction to a DUI, suspicion that someone is high on cocaine does not present the same exigent circumstances, and thus a warrantless seizure of blood is unreasonable.

4. ***Anderson v. U.S.***, 57 Cr.L. 1274 (D.C.Ct.App. 5/25/95). The D.C. Circuit has reviewed a typical late night encounter in a high crime area between a citizen and the police involving furtive actions by the police and found that the circumstances did not create an articulable suspicion sufficient for a weapons frisk. "The Fourth Amendment requires that there must be more than a person being seen in an alley late at night, walking away from the police in a high crime area, who upon being questioned puts his hands back in his pockets and acts in a strange manner. While we do not say at all that the officer should have ignored appellant's presence in the area under the circumstances and proceeded to investigate, the facts in this case...do not support the seizure."

ERNIE LEWIS
Assistant Public Advocate
Director, Madison, Clark, Jackson
& Rockcastle DPA Office
201 Water Street
Richmond, Kentucky 40475
Tel: (606) 623-8413
Fax: (606) 623-9463
E-mail: richmond@dpa.state.ky.us

Extradition: Where Do We Go From Here?

What is the Advocate's Role?

Extradition cases are an animal that we have all encountered in our District Court practice. So why does that cold shiver run when the Judge requests our assistance in the extradition proceeding?

Extradition was born out of the desire of our founding fathers that no State become a safe haven for fugitives fleeing the criminal justice system of another state.[1] The desire was so great that extradition was mentioned specifically in the Constitution and the first Extradition Act was passed in 1793. Article IV, section 2 of the Constitution states that upon demand of the requesting State, "A person ...shall...be delivered up...to the State having jurisdiction of the crime." Extradition, however, is by no means the automatic process it may sometimes appear. Your client has rights that must be understood and observed.

Extradition finds its base in Article IV, section 2 of the United States Constitution. Beginning with the Extradition Act of 1793, the Federal government has sought to bring uniformity to the laws governing extradition in the many States. The current form of the Extradition Act places a legal duty on the Executive authority of a State to arrest and deliver a fugitive from justice to the agent of the demanding State[2].

The extradition process that must be followed in Kentucky is found in the Kentucky Revised Statutes between 440.150 and 440.420, the Uniform Criminal Extradition Act. The Uniform Criminal Extradition Act controls three basic situations: 1) when Kentucky, the demanding state, demands the return of a person accused of committing a crime in Kentucky but is found in another state, the asylum state[3]; 2) when the person commits an act in Kentucky or a third state, that has resulted in a crime being committed in the demanding state, and the person is found in Kentucky[4]; and 3) when a crime has been committed within the demanding state and the person is found in Kentucky.[5] The situation you will most likely be appointed to assist a client in is the third, your client is wanted in another State and is present in your jurisdiction.

After your client is arrested by the local authorities, he, or she, must be taken before a judge of a Circuit or District Court before being surrendered to the agent of the demanding State.[6] At this initial appearance before the Judge, the Judge must inform your client of the demand made for his, or her, surrender and the crime with which he, or she, is charged.[7] The Judge must also inform your client of his, or her, rights to demand and procure legal counsel and to test the legality of the detention.[8] Additionally, the Judge should inform your client of his, or her, rights to remain silent and apply to the Court for bond.[9] The initial appearance, however, is far more than simply a recitation of your client's rights by the Judge. It is at the initial appearance that the Judge will be required to decide if your client is in fact the person wanted by the demanding State and if he, or she, is a fugitive from justice.[10]

The United States Supreme Court has stated, "The courts of asylum States may do no more than ascertain whether the requisites of the Extradition Act have been met."[11] The Court has stated the Extradition Act leaves only four issues open for consideration in an extradition proceeding:

> "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding State; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." *Michigan v. Doran*, 439 U.S. 282, at 289 (1978).

In order to chip away at the walls the Supreme Courts rulings have enclosed us in, we must find creative ways to argue the four basic issues open for consideration.

While the arguments concerning identity as the person named in the extradition request and status as a fugitive may be argued in the petition to the Circuit Court for a writ of Habeas Corpus,[12] the first important decision is made on these two facts at the initial appearance.[13] Argue identity to the Court at the initial appearance. If you are to successfully argue the

identity issue at the initial appearance, do not allow your client to answer questions from the Court concerning name, age, date of birth, social security number or residence. Remember no demand for extradition from another State may be recognized unless it is in writing.[14] Make the prosecutor offer proof that the person requested in the written demand for extradition is the same person seated next to you at the counsel table.

Argue your client's status is not that of a fugitive from justice. In interpreting the Federal law, the Court of Appeals of Kentucky stated,

> "To constitute one a fugitive from justice within the meaning of the act of Congress it is only necessary that, having committed a crime, he is absent from the state when he is sought to answer therefor and is found within the jurisdiction of another and his presence in the demanding state at the time a crime is committed is sufficient to justify his return as a fugitive from justice." *Oakley v. Franks*, 159 S.W.2d 415, at 417 (1942).

Additionally, no demand for extradition may be honored unless the required writings allege that the person demanded was in the demanding State at the time of commission of the alleged criminal act.[15] Since an inquiry into your client's guilt or innocence on any underlying charge is prohibited by the United States Supreme Court[16] and by the law of Kentucky,[17] and your client is clearly standing in the jurisdiction, your strongest efforts should be directed at making the prosecutor prove your client's presence in the demanding jurisdiction at the time of commission of the alleged crime. Make sure the written demand for extradition includes an allegation that the person seated beside you at the counsel table was present in the demanding State at the time the alleged offense was committed.

If the Judge determines from the evidence presented that the written demand for extradition, supported by indictment or information substantially charging the person with a crime, is in order,[18] and the Governor's warrant is presented to the Court, the Judge must, if requested, still give your client a reasonable amount of time to petition the Circuit Court for a writ of Habeas Corpus.[19] More likely than not the prosecutor will not be prepared to offer the Governor's warrant at your client's initial appearance. If this is the case, then upon finding the written demand in order and that your client is the person demanded and that he, or she, has fled from justice, the Judge must commit your client to custody for up to 30 days to enable the prosecutor to secure the Governor's warrant.[20] Remember to apply to the Court for bond on your client's behalf.[21] Utilize the 30 days to explore the options available to your client and filing the petition for Habeas corpus. At the conclusion of the 30 day period, the Court should hold a hearing to allow the prosecutor to present the Governor's warrant. Always check the Governor's warrant for accuracy concerning identity. If the prosecutor has not been able to secure the Governor's warrant, the Judge may recommit your client to custody for a period not to exceed 60 days, or may order his, or her, discharge from custody.[22] If your client is recommitted to custody for this 60 day period, argue strongly that he, or she, is entitled to some form of bond relief.

Argue the same considerations in your petition for Habeas corpus that you need to file during this 30 day period that you have argued to the District court:

> "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding State; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." *Michigan v. Doran*, 439 U.S. 282, at 289 (1978).

Your client has the right to petition the Circuit court for a writ of Habeas Corpus,[23] and you have a duty to explore all weaknesses in the prosecution's case in the petition. Utilize the petition for Habeas Corpus to present strengthened arguments covering those considerations argued to the District Court.

Your client's arguments may have been limited by the United States Supreme Court and the General Assembly, but there are still challenges to be made. Challenge the Judges and prosecutors to do their work as diligently as you will do yours. Extradition does not have to be an automatic process.

FOOTNOTES

[1] *California v. Superior Court of California*, 482 U.S. 400, at 406 (1987)
[2] 18 U.S.C. §3182
[3] Kentucky Revised Statute Annotated §440.200, hereinafter KRS
[4] KRS 440.210
[5] KRS 440.170
[6] KRS 440.250
[7] *Id.*
[8] *Id.*
[9] Kentucky District Judges Benchbook, §1.65, *Extradition*
[10] KRS 440.290
[11] *Superior Court*, 482 U.S. at 408
[12] Kentucky Constitution, §16, also KRS 419.020
[13] KRS 440.250
[14] KRS 440.180
[15] *Id.*
[16] *Drew v. Thaw*, 235 U.S. 432, at 440 (1914)
[17] KRS 440.340
[18] KRS 440.180
[19] KRS 440.250
[20] KRS 440.290
[21] KRS 440.300
[22] KRS 440.310
[23] Kentucky Constitution, §16, also KRS 419.020

STUART W. READ
Assistant Public Advocate
P.O. Box 1038
Morehead, Kentucky 40351
Tel: (606) 784-6418
Fax: (606) 784-3364

Stuart Read is a graduate of Morehead State University and the University of Louisville School of Law. He is employed in the Morehead Field Office of the Department of Public Advocacy working in both the Trial Services section before the Rowan District and Circuit courts, and in the Post-Conviction section working in the Eastern Kentucky Correctional Complex.

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.

- Justice Anthony Kennedy, U.S. Supreme Court
Supreme Court Budget Hearing, March 8, 1995
House Appropriations Subcommittee

New Drunk Driving Defense Works in Hundreds of Cases

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41 West Street
Boston, MA 02111
1-800-756-3475

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Where a drunk driver had his license suspended after failing a breath test, he could avoid a criminal trial because this would be "Double Jeopardy," say courts in Idaho and Washington which have dismissed hundreds of drunk driving cases based on his new theory.

In Seattle, a single judge dismissed 17 cases in one hearing.

The dismissals come on the heels of similar rulings in Arizona, Florida, and Ohio which were reported in previous issues of this newspaper.

It is impossible to determine what is happening at the trial level in every state in the country, but in one state, Idaho, hundreds of cases are being dismissed.

Most of the judges in Idaho agree that the new defense is valid, *Lawyers Weekly USA* is told by Judge Charles Brumbach of Twin Falls, Idaho. He says he hasn't even bothered to write an opinion in the several dozen cases he has dismissed, because, "The issue was so clear it didn't merit one."

To stop cases from being discussed, police throughout Idaho have been instructed to stop taking away driver's licenses, according to Michael Henderson, a deputy attorney general in Boise.

The double jeopardy defense was originally suggested in an article in *Lawyers Weekly USA*, 94 LWUSA 929.

The defense is based on recent U.S. Supreme Court cases suggesting that a criminal trial violates double jeopardy if the defendant has previously received a civil penalty for the same offense.

It can be raised in the 37 states that have "administrative license suspensions," in which a drunk driver's license is taken away prior to a criminal trial.

These statutes are also known as "administrative license revocation" or "administrative per se" statutes, or simply "stop and snatch" laws. They typically allow a license to be suspended for 90 or 120 days, although the time period varies from state to state and may depend on whether the driver is a repeat offender.

Avalanche of Cases

William Hollifield of Twin Falls, Idaho has won six cases using the theory. He says he got the idea from reading about the defense in this newspaper.

After his first success, he received dozens of calls from other attorneys who wanted a copy of his motion. "The fax machine was going nuts," he says.

The defense has now worked in "hundreds" of cases throughout Idaho, according to Brumbach.

Judge Larry Duff of Rupert, Idaho, tells *Lawyers Weekly USA* that there have been 50 to 100 defense victories just in his area of the state.

However, the defense has not been successful in every case. In fact, both Hollifield and Henderson say more judges throughout the state have denied it than allowed it.

Many judges don't want to allow it until it has been upheld on appeal, some lawyers say.

Nevertheless, attorneys are bringing motions based on the theory "all over," says Clayne Zollinger, a prosecutor in Rupert.

You can obtain a copy of the Seattle decision and of two Idaho decisions from *Lawyers Weekly USA* at our regular copying charge rate. The decisions are listed below.

Seattle Municipal Court, City of Seattle v. Savaria, No. 215563, February 9, 1995. *Lawyers Weekly USA*, No. 9905091 (15 pages). *To order a copy of the opinion, call 800-933-5594.*

Minidoka County (Idaho) District Court. State v. Bendele, No. CR-94-01200-M. January 23, 1995. *Lawyers Weekly USA*, No. 9905092 (9 pages). *To order a copy of the opinion, call 800-933-5594.*

Minidoka County (Idaho) District Court. State v. Bumgardner, No. CR-94-00936. January 4, 1995. *Lawyers Weekly USA*, No. 9905093 (4 pages). *To order a copy of the opinion, call 800-933-5594.*

Double Jeopardy Defense: Arguments For and Against

What are the best arguments that a lawyer can use when making - or opposing - a motion to dismiss drunk driving charges based on the new Double Jeopardy defense?

Lawyers Weekly USA posed this question to leading criminal defense experts and constitutional scholars across the country, and we report there what they told us.

This article is highly technical and is *not* intended for fast reading. However, it may be very valuable to any lawyer who is preparing a brief on this issue.

The basic defense argument is that if a driver's license is suspended, a subsequent criminal trial would be a second jeopardy. This is because both actions are:

- Punishment;
- Based on the same offense; and
- Imposed in a separate proceeding.

There are a variety of ways that prosecutors can try to undercut this defense. This article examines the best ones, along with the most promising rebuttals for defense counsel.

Many of these arguments rely on three leading U.S. Supreme Court cases:

- *U.S. v. Halper*. A civil fine for Medicare fraud was double jeopardy. (490 U.S. 435 (1989)).

- *Austin v. U.S.* A civil forfeiture could be unconstitutional if it were "excessive." (113 S.Ct. 2801; 93 LWUSA 233).

- *Department of Revenue of Montana v. Kurth Ranch*. A state "marijuana tax" was double jeopardy. (114 S.Ct. 1937, 94 LWUSA 537).

The argument are:

1. **The license suspension isn't 'punishment'; it's intended to protect the public, not to punish the driver.**

To determine whether a civil sanction is "punishment," the U.S. Supreme Court has looked to the goal of the sanction. Prosecutors should argue that the goal of suspending a drunk driver's license is not to punish him but to keep him off the road and protect other drivers.

"This is their best argument," says Rutgers law professor George Thomas, who is writing a book on double jeopardy.

In many states, there is legislative history or language in the statute itself which supports this argument. For example, the Colorado statute says that its purpose is "to provide safety by quickly revoking the driver's license of any person who has shown himself to be a safety hazard by driving with an excessive amount of alcohol in his body."

DEFENDANTS' RESPONSE: There is also legislative history or statutory language in many states that suggests that the goal is punishment.

"I doubt there's a state in the country without evidence of punitive intent in the legislative history," says Lawrence Taylor of Long Beach, California, the author of a book on drunk driving defense.

In Florida, for example, the legislature said the suspension law "seeks to prevent, punish and discourage criminal behavior."

In California, the statute itself says it is intended to "discourage" drunk driving, according to Taylor. (This is good enough, he explains, because the Supreme Court cases say that "deterrence" counts as punitive intent.)

Murray Blum, a defense attorney in Baltimore, says he convinced a judge that Maryland's suspension law was punitive by pointing out that it was included in the section on "penalties" in the state's motor vehicle handbook.

In some states, there may be evidence that license suspension was adopted in order to obtain additional federal funds, says Edward Duwatch of Willits, California, who has written a book on California drunk driving law. This is important because documents from the National Highway Traffic Safety Administration show that deterrence was the federal government's purpose in tying the funds to the states' adoption of the law.

In one case where a driver's license was suspended because the driver refused to even take a breath test, the U.S. Supreme Court stated, "The summary sanction of the statute serves as a deterrent to drunk driving." (*Mackey v. Montrym*, 443 U.S. 1 (1979).) Arguably, this would also apply to a suspension for failing a breath test.

Defendants can also argue that some features of the suspension statute itself show that its goal is punishment, not public safety. For instance:

♦ A statute looks like punishment where a suspension doesn't even if the driver is acquitted in the criminal trial. (In this way a license suspension may be different from other "safety" measures like taking temporary custody of an allegedly abused child or removing allegedly dangerous products from the marketplace.)

However, prosecutors can argue that the reason the suspension doesn't end upon acquittal is that the suspension is based on the preponderance of the evidence, whereas the standard in the criminal trial is one of reasonable doubt.

♦ A statute looks like punishment if the suspension varies in length depending on whether the defendant pleads guilty to the criminal charges. For instance, it might be 30 days if the defendant pleads guilty and 90 if he doesn't.

If the purpose of the law is just to keep potentially dangerous drivers off the road, such a scheme makes no sense, says Donald Nichols of Minneapolis, who edits the *Drinking/Driving Law Letter*, "Is someone who believes he's guilty less dangerous than someone who believes he's innocent?"

The scheme "does make the law look punitive," says Professor Ann Poulin of Villanova University.

However, prosecutors can argue that a person who pleads guilty may in fact be less dangerous because he is more likely to reform himself, says Nancy King, a law professor at Vanderbilt University.

♦ A statute looks like punishment where the suspension hinges on the commission of a crime, and in many states, on an arrest for the crime. This makes it similar to *Kurth Ranch*, in which the Supreme Court held that a marijuana tax was "punishment" based largely on the fact that it was imposed only on someone who had committed a crime and been arrested for it.

However, prosecutors can claim that this argument is more important with regard to a tax than with regard to a license

suspension. the fact that the marijuana tax was imposed only on an illegal activity persuaded the Supreme Court that the real goal wasn't revenue raising, since that goal could be just as easily met by increasing the fine upon conviction. The goal of quickly removing a dangerous driver from the road, on the other hand, arguably can't be met by waiting to impose a suspension only upon conviction.

♦ A statute looks like punishment when the hearing focuses on the same issues as the criminal prosecution - probable cause and whether the driver failed the breath test.

To argue that this shows a punitive purpose, defense attorneys can cite *Austin*, where the Court held that the civil forfeiture of a drug dealer's home was punishment and a basis for this holding was the forfeiture law's focus on "culpability."

However, prosecutors can argue that focusing on probable cause and the breath test are consistent with the goal of removing dangerous drivers from the road because they not only show that a driver is culpable, they show that he is dangerous.

♦ A statute looks like punishment in that suspensions are a type of penalty that typically is also imposed in a criminal prosecution for drunk driving.

This makes the suspension look more punitive, says Thomas.

However, the hearing's similarities to a criminal prosecution are not as important as the legislative history, says Lewis Katz, a professor at Case Wester Reserve Law School.

2. The license suspension isn't 'punishment' even if it is party punitive, since it has other purposes.

The U.S. Supreme Court cases are unclear where a civil sanction has mixed goals, both punitive and non-punitive.

However, prosecutors can find language in the cases suggesting that for a sanction to be punishment, punishment must be the *only* goal.

In particular, in *Halper*, the Court said that a civil sanction will be considered punishment only in "the rare case" where "it may not fairly be characterized as remedial, but *only* as a deterrent or retribution." (Emphasis added.)

The Court said that the sanction in that case was punishment because it bore "no rational relation" to a non-punitive goal. The sanction consisted of a civil fine for Medicare fraud, and its purported non-punitive goal was reimbursement for the government. The Court held that the sanction bore no rational relation to that goal because it was so "overwhelmingly disproportionate" (it was a $130,000 penalty, for a $585 fraud).

Halper places the burden on the defendant, contends Thomas. The defendant must show that the sanction is not "rationally related" to a non-punitive goal, he says.

It's a burden of showing that the sanction "can't be explained" by non-punitive goals, says King.

And "it will be hard burden to carry in the license suspension cases," Thomas says.

Another case which is helpful to prosecutors is *Kurth Ranch*. There, the Supreme Court distinguished a marijuana tax from what it called "mixed motive taxes that governments impose both to deter a disfavored activity and to raise money." The Court didn't hold that the marijuana tax was punishment until after it had found that there was no other purpose to justify it.

As a fallback, prosecutors can argue that a civil sanction is not punishment unless punishment is the *primary* goal.

This is supported by language in *Kurth Ranch* suggesting that whether a sanction is punishment is a line-drawing problem. "At some point, an exaction labeled as a tax approaches punishment, and our task is to determine whether Montana's drug tax crosses that line."

Also supporting this argument is the Court's use of the phrase "fairly characterized." Arguably, a sanction can be fairly characterized as punishment only if punishment is its *primary* goal.

And prosecutors can raise a "parade of horribles" by arguing that if a sanction is to be counted as punishment if it is the least bit punitive, then a multitude of sanctions imposed routinely would raise double jeopardy problems. For instance, a lawyer who commits fraud couldn't be disbarred and also prosecuted, nor could a doctor who sexually assaults a patient have his medical license suspended and also be prosecuted.

DEFENDANTS' RESPONSE: There is also language in the Supreme Court cases suggesting that a sanction is punishment if punishment is just one of its purposes.

For instance, in *Halper* the Court said, "A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."

Defense attorneys can also argue that although the language in *Halper* seems to help the prosecutor and says a civil sanction is punishment only in the "rare case" where it has "no rational relation" to a non-punitive goal, this applies only to sanctions that, like the one in that case, are ostensibly an attempt to recoup the government's losses.

This argument is supported by David Rudstein, a professor at Chicago-Kent College of Law and the co-author of a treatise on criminal and constitutional law. According to Rudstein, where a statute imposes a fine ostensibly to recoup the government's losses, it *is* rare that the fine will constitute punishment. But that analysis doesn't necessarily apply in other contexts, he says.

Defense attorneys can also argue that the "rare case" and "rational relation" language applies only where, as in *Halper*, the statute authorizing the sanction seems to have no punitive aspect to it.

As to another statement in *Halper* that a civil sanction is punishment "tot he extent that it may not fairly be characterized as remedial, but only as a deterrent or retribution," defense attorneys can argue that a sanction may indeed be fairly characterized as punishment if punishment is *one* of its goals.

This interpretation of *Halper* is strongly supported by *Austin*, where the Court said that a sanction is punishment if, "[I]t can only be explained as serving in part to punish." The Court held that a civil forfeiture was punishment because it did not serve "solely a remedial purpose."

The general test "is whether the sanction is punitive in any respect," contends Rudstein. "If it is, then it has to be considered punishment."

Prosecutors might argue that *Austin* is irrelevant because it was based on the Excessive Fines Clause, not the Double Jeopardy Clause. But the Court implied throughout the case that the analysis was the same for both clauses.

Prosecutors might also point out that *Austin* was decided before *Kurth Ranch*. But defense attorneys can argue that *Kurth Ranch* is consistent with *Austin* since the marijuana tax in *Kurth Ranch* did in fact serve the non-punitive goal of raising revenue but was still held to be punishment.

A good case for defense attorneys is *U.S. v. $405,089.23 in U.S. Currency*, 33 F.3d 1210; 94 LWUSA 929. In deciding that a civil forfeiture was punishment for double jeopardy purposes, the Ninth Circuit in that case quoted much of *Austin's* language about a sanction being punishment even if it serves only partly to punish.

However, prosecutors can argue that the case, which was decided shortly after *Kurth Ranch*, apparently didn't take *Kurth Ranch* into account, since it never mentions that decision.

As a fallback, defense attorneys might argue that a sanction is punishment if punishment is its primary goal. This could be a good argument in a state where the legislative history shows that punishment is the primary goal of the license suspension law.

As to the "parade of horribles," defense attorneys can argue that there is a double jeopardy problem only where the sanction actually has a punitive aspect. Where an attorney is disbarred for fraud or a doctor has his license suspended for sexually assaulting a patient, arguably the only goal - or at least the primary goal - is to protect the public.

The legislative history of disbarments and medical license suspensions probably indicates more of a public safety concern than does the legislative history of driver's license suspensions, says David B. Smith of Alexandria, Virginia, who has written a treatise on forfeiture law.

3. The license suspension isn't punishment because it isn't 'excessive.'

The Supreme Court held that the fine in *Halper* was punishment because it was excessive. So a prosecutor might argue that a license revocation is not excessive and therefore isn't punishment.

Some courts have been swayed by this argument. For instance, in deciding that Vermont's suspension law was not punishment, the Vermont Supreme Court said, "The minimum suspension period is not excessive in relation to the remedial purpose." (*State v. Strong*, 605 A.2d 510 (1992).)

And in deciding that Louisiana's law was not punishment, the Louisiana Supreme Court said, "Unlike *Halper's* disproportionate fine, [the defendant's] license suspension is temporary (90 days), in the last 60 days of which he will be able to obtain a restricted license." (*Butler v. Department of Public Safety*, 609 So.2d 790 (1992).)

DEFENDANT'S RESPONSE: *Halper* involved a fine that was imposed ostensibly to recoup government losses. Defense attorneys can argue that it doesn't matter whether a sanction is excessive unless the ostensible goal is to recoup government losses.

Supporting this argument is *Austin*, where the Court declined to compare the value of the property the defendant forfeited with the amount of the government's costs in the case, because collecting such costs wasn't the civil forfeiture's ostensible purpose.

And in *Kurth Ranch*, the Court declined to compare the amount of the marijuana tax with the government's costs, saying, "Tax statutes serve a purpose quite different from civil penalties, and *Halper's* method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute."

Defense attorneys can also argue that "excessiveness" is relevant only where the sanction has no punitive aspect to it. This is also supported by *Austin* and *Kurth Ranch*, where the Court appeared to view the sanction as entirely punitive and it declined to analyze whether it was excessive.

In any event, the U.S. Supreme Court made clear in both *Halper* and *Kurth Ranch* that whether a sanction constitute punishment is not determined from the perspective of the defendant. It noted that, "for the defendant even remedial sanctions carry the sting of punishment."

So any argument that a license suspension isn't punishment because it isn't all that "hard" on the defendant is irrelevant. The issue would be whether the suspension is consistent with its purported non-punitive goals.

Finally, some defense attorneys may want to try arguing that a license suspension really is excessive.

4. Suspending a driver's license isn't punishment because driving is a privilege, not a right.

Prosecutors might argue that a license suspension isn't punishment; it's merely the revocation of a privilege.

DEFENDANTS' RESPONSE: The correct reply is that taking away a privilege can be punishment just as much as taking away a right can be, says Thomas.

In addition, there are numerous state court cases holding that driving is something more than a privilege, says Taylor. Some refer to it as a "property interest," others as a "liberty interest," he says.

The U.S. Supreme Court has held that a driver's license can't be taken away without due process. (*Bell v. Burson*, 402 U.S. 535 (1971).)

5. The license suspension isn't for the 'same offense' as the criminal trial.

Under *U.S. v. Dixon*, 113 S.Ct. 2849 (1993), double jeopardy applies only to two prosecutions or punishments for the "same" offense. Offenses are the "same' if they have the same elements, and they are different if each has an element the other doesn't.

In the drunk driving context, most states allow a driver to be charged with both (1) "driving under the influence," and (2) a "per se" crime of driving with a blood-alcohol-content above the legal limit, usually .10% or .08%.

It would be almost impossible to argue that the license suspension and the per se crime are not the same offense, experts say, since both are based on excessive alcohol in the person's blood or breath.

However, prosecutors have a good argument that the "driving under the influence" offense and the suspension offense are different.

This is "an excellent argument," says William McAninch, a law professor at the University of South Carolina.

It's harder for the defense to argue double jeopardy as to the "under the influence" count, concedes John Henry Hingson, former president of the National Association of Criminal Defense Lawyers.

DEFENDANTS' RESPONSE: Defense lawyers can argue that the "per se" and "under the influence" offenses are not

really two offenses, but simply two ways of proving a broader, "either-or" drunk driving offense. They can further argue that this broader offense is the "same" as the suspension offense under *Dixon*, since a defendant can't be guilty of the suspension offense without also being guilty of the drunk driving offense.

This is a good argument, says Thomas.

However, it may not be as strong in states where the "per se" and "under the influence" offenses are listed in separate statutes.

Another argument for defense lawyers is that even if the license suspension and the under the influence count are not the "same offense," they are based on the "same conduct."

The "same conduct" test was used by the Supreme Court in a case that was overruled by *Dixon - Grady v. Corbin*, 495 U.S. 508 (1990). However, it's not clear that *Dixon* completely abolished *Grady*. Dissenting in *Dixon*, Chief Justice Rehnquist said the majority's double jeopardy analysis "bears a striking resemblance to that found in *Grady* - not what one would expect in an opinion that overrules *Grady*."

"*Dixon* is all over the board," says Poulin. "The same-offense area is such a mess."

It's "incredibly murky," says McAninch. "The precise test is up in the air."

Defense lawyers can also argue that *Dixon* doesn't apply where one offense is criminal and the other is civil. Supporting this argument is the fact that *Halper* uses the "same conduct" language even though there was no dispute that the offenses were the same.

Halper preceded both *Dixon* and *Grady*, so its choice of the phrase may be significant, says Smith.

However, the Supreme Court used the "same offense" language later in *Kurth Ranch*.

Prosecutors can also note that not applying *Dixon* to the civil-criminal situation would give defendants greater protection there than where both offenses are criminal - which would be "insane," says Thomas.

In some states, defense attorneys can rely on a "same conduct" provision in the state constitution or a state statute.

As a fallback, if a court dismisses only the "per se" charge, a defense attorney might argue that the evidence pertaining to blood alcohol content should be excluded at trial. However, this probably won't work, according to Rudstein.

6. The license suspension hearing isn't a 'separate proceeding.'

Prosecutors might argue that a license suspension is similar to a preliminary injunction freezing a defendant's assets and is really part of the criminal proceeding.

Recently, the Second and Eleventh Circuits held that a criminal prosecution and a parallel civil forfeiture action weren't separate proceedings for double jeopardy purposes. They noted that the forfeiture action and the criminal prosecution took place at approximately the same time, involved the same criminal violations, and were part of a "single, coordinated prosecution." (*U.S. V. Millan*, 2 F.3d 17 (3d Cir. 1993); *U.S. v. One Single Family Residence*, 13 F.3d 1493 (11th Cir. 1994).

This is a good argument, says Smith, especially in states where the license suspension hearing is held before a court rather than a licensing agency.

DEFENDANTS' RESPONSE: The Ninth Circuit rejected the reasoning of the Second and Eleventh Circuits in *U.S. V. $405,089.23 in U.S. Currency*.

Defense lawyers can point out the ways in which license suspension proceedings are separate from criminal proceedings, including:

- In most cases they are held before the criminal proceedings have begun;

- They are usually heard by an employee of the state's licensing agency rather than a judge; and

- In most states the suspension is enforced regardless of whether the criminal charges result in a conviction.

The last of these factors is the most significant, says Smith, since it makes the license suspension more like a civil forfeiture than a temporary seizure of assets.

Even if the suspension hearing is presided over by the same judge who will hear the criminal trial, there could still be two "proceedings," argues Katz.

Probably the only way in which the license suspension proceeding could be merged with the criminal proceeding would be for the criminal court to make the license suspension a condition of bail, says King.

At a minimum, the suspension must end upon acquittal, says Smith.

7. There's no double jeopardy if the civil proceeding comes first.

In both *Halper* and *Kurth Ranch*, the two cases in which the Supreme Court has applied double jeopardy to a civil proceeding, the civil proceeding occurred after the criminal proceeding. Arguably, the decisions don't apply when the order is reversed.

"Some courts have said it's not a two-way street," says Mary Cheh, a law professor at George Washington University.

This is "an unanswered question," says Rudstein.

DEFENDANTS' RESPONSE: Dissenting in *Kurth Ranch*, Justice Scalia said that the decision would also apply where the civil proceeding occurred first. "If there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference," he said.

A U.S. District court in Seattle recently agreed and held that a drug dealer who had been forced to forfeit his proceeds couldn't then be tried criminally. (*U.S. v. McCaslin*, 863 F.Supp. 1299 (W.D. Wash. 1994); 94 LWUSA 929.

"Logically, the order of the proceedings doesn't matter," says Cheh.

Civil-followed-by-criminal can be analogized to misdemeanor-followed-by-felony, says Thomas. The order shouldn't matter in either context, he says.

8. The suspension proceeding doesn't count for double jeopardy purposes because it's merely 'administrative.'

Some courts have said that double jeopardy doesn't apply to proceedings that are "administrative," rather than judicial, says Rudstein.

DEFENDANTS' RESPONSE: In *Halper*, the Supreme Court said that a penalty could be punishment for double jeopardy purposes regardless of whether it's called criminal or civil. The implication is that labels don't matter, says Thomas.

Defense attorneys should likewise argue that it doesn't matter whether a proceeding is called "administrative." The issue is whether the sanction is punitive.

It's true that most administrative penalties are remedial, not punitive, but that doesn't mean they all are, says Smith.

9. There's no double jeopardy if the suspension wasn't actually imposed.

What if the defendant won in the license suspension hearing?

Both *Halper* and *Kurth Ranch* are based on a prohibition of two *punishments* in successive proceedings, not a prohibition of two proceedings. So a prosecutor could argue that if the defendant won as to the license suspension, he's not being subjected to a second punishment in the criminal trial.

DEFENDANT'S RESPONSE: Defense attorneys can argue that double jeopardy also ought to apply to an *attempt* to impose a civil punishment.

Kurth Ranch provides some support for this. Although the Court talked mostly about multiple punishments, it ended its opinion by saying that the civil proceeding in the case "as the functional equivalent of a successive criminal prosecution." Arguably, this was because it was an attempt by the government to impose punishment, not because it succeeded.

10. There's no double jeopardy if the defendant didn't contest the suspension.

Prosecutors may argue that a defendant wasn't "in jeopardy" in the license suspension hearing if he didn't contest the punishment.

They could rely on a recent Seventh Circuit ruling that a defendant who didn't contest a civil forfeiture couldn't raise the double jeopardy argument in a subsequent criminal case. (*U.S. V. Torres*, 28 F.3d. 1463 (1994).)

DEFENDANTS' RESPONSE: The Seventh Circuit ruling appears to apply only to civil forfeiture.

There, the defendant and his partner were arrested after they paid $60,000 to federal agents posing as cocaine dealers. The money was forfeited. Because the defendant didn't make a claim in the forfeiture action, he was not a party to it. Whether the money even belonged to him or to his partner or to somebody else, was never determined.

By contrast, even if a drunk driving defendant doesn't contest his suspension, he certainly is a "party" to the suspension proceeding, and there could be no question that the license that was suspended was his.

The experts generally agree that there is no requirement that the defendant contest the punishment.

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NOTE: If anyone is interested in writing an article for *The Advocate's* **District Court Column** please contact Steve Guerin at (606) 784-6418.

From the Recruiting Corner: EMPLOYMENT OPPORTUNITY

The following positions are available with the Kentucky State Public Defender's Office

Staff Attorneys: London and Paducah Field Offices - The Kentucky Department of Public Advocacy is seeking staff attorneys, both entry level and experienced, for two DPA field offices in London and Paducah.

Salary for all positions will be commensurate with experience. All letters or application must be accompanied by a writing sample and resume and should be submitted to Rebecca Ballard DiLoreto, Recruiter, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601. Inquiries are welcome at the same address, by calling (502) 564-8006 or by E-mail at recruit@dpa.state.ky.us.

The Kentucky Department of Public Advocacy is an Equal Opportunity Employer.

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Juvenile Mediation: A Different Approach

Benefits of Mediation to Offenders:

A better understanding of the meaning and implications of the offense to the victim, the opportunity to experience feelings of forgiveness and of "making things right," an alternative to the damaging effects of court and detention, less alienation and rejection from society, the ability to have a role in decisions concerning them, and a sense of ownership in, and commitment to fulfilling, any agreement reached.

Since early 1994, the Mediation Center of Kentucky has been mediating juvenile criminal and status complaints. While still a relatively small portion of the total cases handled by the Center, this program has proven to be highly successful in terms of settlement rates and participant satisfaction.

The juvenile mediation program grew from both the Center's desire to serve a larger portion of the Lexington community, and the specific needs of a particular case. In the fall of 1993, the Mediation Center was contacted by a man whose home had been damaged by teenagers from a nearby party. Knowing many of the youth from his neighborhood and not wanting to give them criminal records, he still felt they should somehow make amends and be held accountable. He sought to mediate the matter. After two separate, multi-party mediation sessions, each teenager apologized for his or her involvement and agreed to pay a portion of the damages. With the success of this case, Center staff were encouraged to continue discussions with local juvenile justice officials.

Key to the development of the program and its continued success were Tom Clark, Fayette District Court Judge, David Bell, Director of Youth Services, and Del Felty, Administrator of Court Designated Workers. These individuals, along with Center personnel, established what types of cases would be suitable for mediation, and how and from where they would be referred. With the process in place, the Mediation Center received, and mediated to resolution, its second juvenile case in February 1994.

Since that time, 79 cases involving juveniles have been referred. While only 33 (41%) of those have actually been mediated, the settlement rate is 94% (31 of 33). The most prevalent charges in all of these cases are harassment and assault IV. Others include terroristic threatening, disorderly conduct, criminal mischief, theft by extortion, and harassing communications. Many of the charges are first offenses for the juvenile, and no felonies are mediated.

By far, the majority of cases have been received from the CDW's at the Division of Youth Services. When a juvenile is placed on diversion and mediation is considered appropriate for the case, it becomes part of the diversion agreement. If the complainant is willing to participate, the charged juvenile must attend a mediation session with at least one parent or guardian. If necessary, a social worker or other social service representative may attend with the juvenile. In the case of a cross complaint, both juveniles involved may be placed on diversion and required to attend mediation. Parties are in no way bound to resolve the conflict once in mediation.

In the mediation session, each party is allowed to express his or her views, perceptions and thoughts about the conflict. Two trained mediators direct conversation and keep the process focused toward a mutually acceptable resolution. It is not the mediators' responsibility to determine the guilt or innocence of any party. A typical agreement involves some type of behavioral adjustment for the parties, especially where they may have a continued relationship (*e.g.* neighbors or classmates), and may include a formal, written apology, a goal of personal improvement, or restitution. Agreements are signed by the parties and each receives a copy. They are never sent to Juvenile Services or Juvenile Court. The referral source receives a report from the Center as to whether or not the case was mediated and whether or not it was settled.

Many juvenile mediation programs nationwide handle cases in the post conviction stage, where a victim and offender have been established by the justice system. While the Mediation Center receives cases prior to trial, the victim-offender concept of restorative justice still plays an important role. This model views a crime as a violation against another individual rather than an offense against the state. A restorative approach to justice attempts to identify needs and obligations so that things can be made right between the individuals in conflict.

Benefits to complainants/victims in mediation include:

a) the opportunity to participate in a restitution settlement,

b) being able to express their feelings to the defendant/offender,

c) being able to ask questions of the defendant/offender,

d) the ability to play an active role in the legal process, and

e) an increased understanding of defendants/offenders and the nature and causes of crime.

Benefits to defendants/offenders in mediation include:

a) a better understanding of the meaning and implications of the offense to the victim,

b) the opportunity to experience feelings of forgiveness and of "making things right,"

c) an alternative to the damaging effects of court and detention,

d) less alienation and rejection from society,

e) the ability to have a role in decisions concerning them, and

f) a sense of ownership in, and commitment to fulfilling, any agreement reached.

Many of these benefits in cases at the Center have surfaced in evaluation forms, personal discussions, and follow-up conversations.

As the juvenile mediation program at the Mediation Center of Kentucky continues to grow, its past successes are encouraging, and funding and resources are being sought to expand it. While visibility and public awareness of the program have been a struggle, a recent article and editorial in the Lexington *Herald-Leader* increased both. The newspaper was highly supportive in stating "the work of the center...proves that there's more to stemming juvenile crime than more police, harsher laws and more beds in detention centers." The Center hopes more people will realize the advantages of mediation in juvenile cases and utilize its services in the years to come.

AMANDA MAIN FERGUSON
Mediation Center of Kentucky, Inc.
Juvenile Coordinator
271 West Short Street, Suite 200
Lexington, Kentucky 40507-1211
Tel: (606) 255-6056
Fax: (606) 254-9155

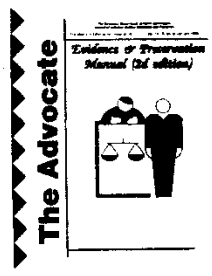
I do know one thing though, and that is that part of the difficulty that all of the judicial system has, state and federal, in administering the death penalty in the United States stems from the difficulty in getting people who are competent to try cases and to take the appeals. Certainly, the object of the Death Penalty Resource Centers, by whatever name they go by, is to provide a group of individuals who are experts in that kind of litigation, and the value of those people to the judicial system as a whole and to the United States as a whole is not merely that they are less likely to result in provable cases of incompetent counsel after the trial is over, but that both at the trial level and at the appellate level - because they know what they are doing - they can assess what they are doing, they can assess what is important and what is not important. They are far less likely to waste judicial time in small stuff and far more likely to go to what is important and do it competently.... It is certainly in the interest of the United States as a government and of the federal courts as a judicial system to encourage the development of experiness in the trial of these cases.

- Justice David Souter, U.S. Supreme Court
Supreme Court Budget Hearing, March 8, 1995
House Appropriations Subcommittee

Evidence & Preservation Manual (2d Ed. 1995)

The Kentucky Department of Public Advocacy, 1995 *Evidence & Preservation Manual (2d Ed.)* is available for $30.00, including postage & handling. This 96 page work includes the entire text of the Kentucky Rules of Evidence, Commentary to each rule written by Jefferson District Assistant Defender, David Niehaus, an extensive article on preservation by Marie Allison, Julie Namkin & Bruce Hackett, a table of cases which have cited to the KRE, a KRE Users Guide, and other evidence and preservation articles. Send check made payable to *Kentucky State Treasurer* to:

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



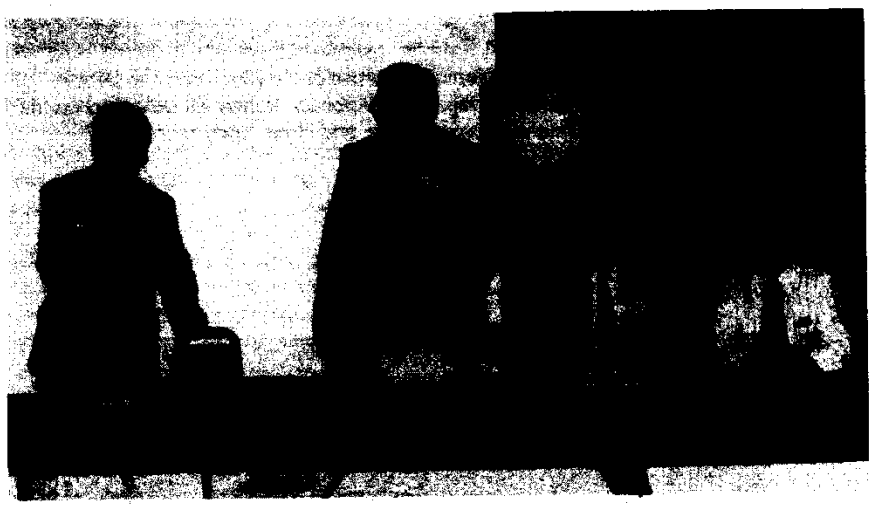
DPA's Professional Support Staff Training

June 15-16, 1995 - Kentucky Dam Village State Park

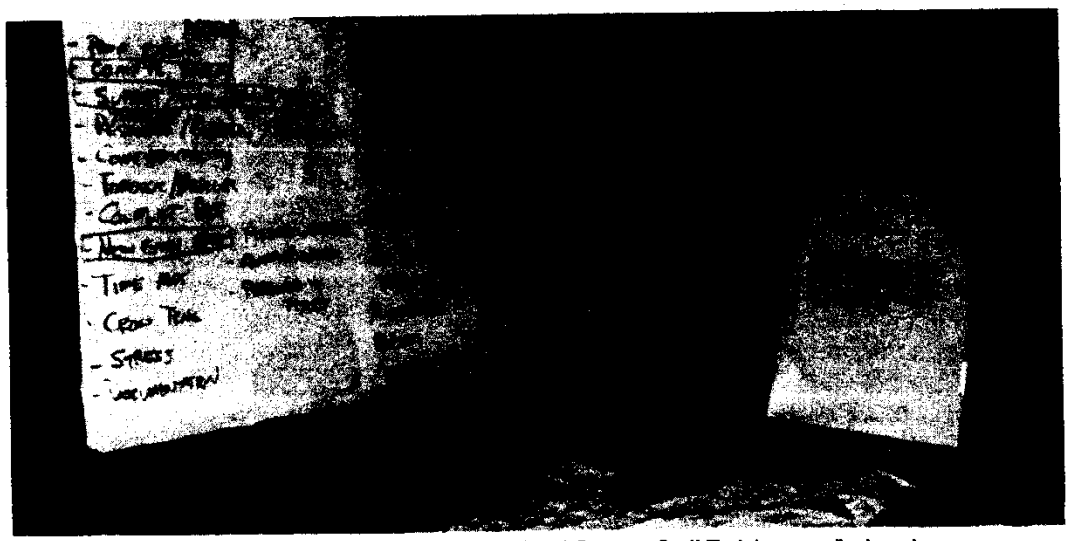
Jane Goldstein, a professor at University of Louisville's College of Business & Public Administration is presented a Kentucky Bill of Rights poster by Allison Connelly at DPA's June 1995 Professional Support Staff Training where Jane spoke on Professional Organizational Skills and inspired us with Moms Mabley's wisdom, *"If I always do what I always did, I will always get what I always got."*

Lee Cowherd of Governmental Services Center facilitates the day's work at the 1995 DPA Professional Support Staff Training at Kentucky Dam Village State Resort Park.

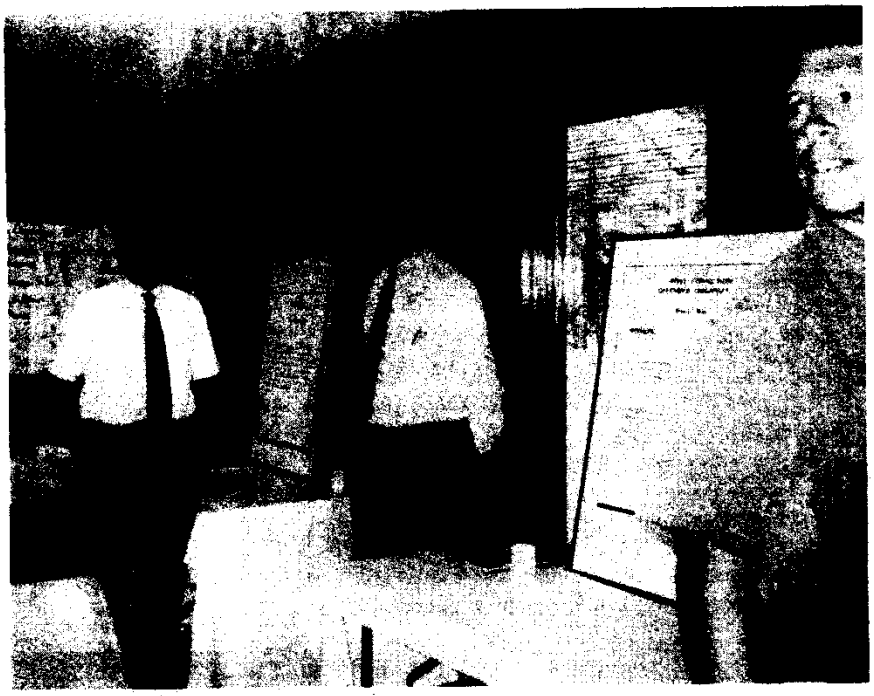
Gayla Peach, head of DPA's Protection & Advocacy Division meets with DPA Professional Support Staff to explain the mission of her Division.



Ed Dance of the Kentucky State Police Central Crime Lab, David Jones of the State Medical Examiner's Office, Jim Hager, AFIS Section of the Kentucky State Police and James T. Osborne, Fingerprint Technician of KSP educated us on the KSP Lab, Medicolegal Death Investigations, KSP AFIS, & KSP Records - Criminal History Statutes at the Professional Support Staff Training in June.



The worksheets of the Planning Team for the Professional Support Staff Training are displayed.



DPA staff was available to explain the internal resources of the Department to DPA's statewide staff. Here **Oleh Tustaniwsky** represents Appeals; **Randy Wheeler** represents the Kentucky Post-Conviction Defender Organization, and **Hank Eddy** represents Post-Conviction.

DPA's Wonderful Professional Support Staff

Dismissal of Juvenile Court Actions Filed by Special Education Teachers

Juvenile courts have no jurisdiction over complaints filed by school personnel against special education students for behavior related to the students' disabilities. The filing of such complaints amounts to an admission against interest regarding the schools obligation to develop an individual educational program (IEP) for success. As public defenders, we must challenge the jurisdiction of the juvenile court in these cases.

The Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 *et seq.* was designed to insure that all special education students are provided a free appropriate public education. Previous to the IDEA, children whose disabilities challenged the status quo were all too often provided with a second rate education if they were served at all. Behaviorally disabled students were more likely than most to be completely excluded from the educational system since the symptoms of their disability left them susceptible to suspensions, expulsions and other exclusionary disciplinary measures which removed them from the classroom.

Intake interviews at the Division of Protection and Advocacy for these students reveal an extremely high correlation of physical and sexual abuse against the students who later develop behavioral disorders. A somewhat lower correlation (but nevertheless significant one) involves organic disorders, with or without the history of abuse.

All behavior serves a purpose. Inflammatory rhetoric concerning behaviorally disabled students further dehumanizes children who are reacting to painful and abusive situations in the raw, unsophisticated manner in which children tell adults that something is wrong.

Disabled children are not immune from disciplinary measures. The IDEA allows both a short term solution via a ten day suspension, and a long term solution via injunctive relief to remove a child who is dangerous to himself or others. It does not, however, permit a unilateral exclusion by school personnel. Furthermore, the disciplinary action must be fashioned to maximize educational and therapeutic benefit.

Special education teachers, frustrated by the failure of their school districts to provide adequate resources and support for emotionally disabled children, have taken things into their own hands. In doing so, the teachers have turned on their special education students, filing complaints for attempted assault, harassment, criminal mischief, and in one outrageous instance, criminal syndication.

Resort to juvenile court by school personnel is a blatant attempt to accomplish what IDEA prohibits. Disabled children may not be excluded from educational opportunities. Repeated suspensions totalling more than ten days in a school year are prohibited. Expulsions for disability related behaviors are prohibited. The aim of juvenile court referral is to set in motion a machine which can, eventually, remove the child from his family and community and, in so doing, remove the troublesome child from the school.

The Individuals with Disabilities Act 20 U.S.C. 1400 *et seq.*

Under 20 U.S.C. 1401 *et seq.*, the Individuals with Disabilities Education Act, (IDEA), requires, *inter alia*, the following from states and schools receiving federal funds under the Act:

a) a free, appropriate public education available for each handicapped child including appropriate evaluations and due process procedures;

b) placement of each handicapped child in the least restrictive or most normal educational setting possible;

c) specifically designed instruction and related services for each handicapped child to meet his unique needs at no cost to his family; and

d) placement of each disabled child pursuant to an Individualized Education Program (IEP) developed for his unique needs. The applicable federal regulations promulgated pursuant to IDEA are found at 34 C.F.R. 300 *et seq.*

The primary vehicle utilized by the parent and local school for determining a child's educational needs is the Admissions and Release Committee (ARC). The ARC will typically include the child's teacher, principal, special education director, and parent. The ARC may also include others

whom the parent or school wish to invite who are informed about the child's educational needs such as therapists, social workers, and so on. Certainly the ARC may include the child. 707 KAR 1:180 Section 9(2).

If either the parent or school district are unhappy with the outcome of the ARC, a request may be made for an administrative due process hearing. 707 KAR 1:180. Disagreement with the decision of the hearing officer may be appealed to the Exceptional Children Appeal Board. 707 KAR 1:180 Section 12. Except in extraordinary circumstances, the administrative remedies must be exhausted prior to appeal to a court of competent jurisdiction.

Factors Triggering a Jurisdictional Challenge

Complaints in juvenile court, filed by school personnel against special education students for behavior related to their disabilities should be dismissed for lack of jurisdiction. Set out below are determinate factors which should trigger a jurisdictional challenge and case support for such a challenge.

Any of the following events should alert the defense attorney to the possibility of a dismissal of an action in juvenile court:

1. **The defendant has been identified as emotionally or behaviorally disabled.**

Once identified as emotionally or behaviorally disabled, the school district must serve the student appropriately. 707 KAR 1:180 *et seq*. This includes obtaining the necessary evaluations and developing an individual educational program (IEP). Unfortunately, special education teachers complain that their training failed to prepare them for the behavioral management techniques necessary to the emotionally disabled student's success. For many behaviorally disabled students, this may require the district to hire a behavioral management expert to develop a behavioral management plan. The goal of the plan is to assist the student in gaining control over his behavior and becoming a responsible citizen. Data maintained with the plan reveals which aspects of the behavioral management plan are working. Where the plan is not working, the appropriate action by the school is to modify the behavioral plan, not referral to juvenile court.

One important point to remember is that even if a child has been expelled from school (for example because of a handgun charge), the shcool must provide the special education student with an alternative educational plan. Defense counsel can work with the school system, family and juvenile court to insure that a suitable, least restrictive alternative is in place.

2. **The defendant has an extensive school record of fighting, challenges to authority, suspensions, expulsions, inappropriate behavior and *should have been evaluated* to determine whether the student is behaviorally disabled.**

Some children are behaviorally disabled but have *never been* tested. Where a clear history of behavioral or emotional problems may be documented, defense counsel should argue for dismissal of the complaint and advise the student and his parents of their right to appropriate evaluations at the school district's expense. The school district's complete failure to initiate the ARC process does not defeat the jurisdictional challenge. A complete evaluation would include review of the following documents:

1) academic record;

2) disciplinary record;

3) any evaluations or medical/psychological reports in the school's possession; and

4) all notes and memoranda kept by school personnel regarding the student.

(In many instances, the notes, disciplinary records and attendance data are scattered, some being maintained at the district's central office, some in the local school office and others simply maintained informally by teachers or others working with the student.)

Once behavioral problems begin to surface in the school setting, the school has a duty to contact the parent in order to set up an ARC and begin the evaluation process. With the parent's permission, the school must assume responsibility for obtaining input from psychologists, physicians and therapists to diagnose the problem and advise the ARC on the structure of the student's educational program. 707 KAR 1:170; 707 KAR 1:200 Section 7. The behavior's impingement should be considered against all aspects of education - academic, physical, social, behavioral, communication, recreational, cognitive, vocational and so forth. *Id.*

In *Chris D. and Cory M. v. Montgomery County Board of Education*, 753 F.Supp. 922 (M.D. Ala. 1990) a student suffered more than six years of academic failure and disruptive behavior. The IEP which was finally developed for him was silent as to behavioral objectives although the child was frequently restrained and eventually told not to come to school. *Chris D.* at 926. The Court held that the school district had failed to provide the student with a free appropriate public education. *Chris D.*, *Honig* and *Clevenger, infra*, all affirm the duty of the school district to address behavior problems arising in an educational context.

3. **The complaint is filed by school personnel, often a teacher or principal.**

A relatively new development in some school districts' search to rid themselves of emotionally disturbed students is to have teachers or staff file public offense complaints against disabled students without specifying the fact that they are acting as agents of the school district. Certainly an argument may be made that complaints filed by school personnel against special education students for events occurring during school hours, on school property or at a school sponsored event, and dealt with by school staff within the regular course of their employment is clearly one filed by an agent of the school district. *See Employers' Liability Assurance Corp. v. The Home Indemnity Company*, 452 S.W.2d 620 (Ky. 1970); *Russell v. U.S.*, 465 F.2d 1261 (6th Cir. 1972).

4. **The juvenile court orders the student to attend a particular school or class.**

"Placement" of a student may be accomplished only through the IEP. 707 KAR 1:220 Section 1 (6). Under 707 KAR 1:210, the IEP may be written only by the group of people who know the student best, the ARC. The make-up of the ARC may be found at 707 KAR 1:180 Section 4. A juvenile court judge is typically *not* an appropriate member of the ARC process.

5. **The juvenile court orders the parent to provide certain related services.**

The term "related services" includes counseling services as well as transportation, supportive services such as speech pathology, audiology, psychological services, physical and occupational therapy and recreation. It may also include medical services which are diag-

nostic and evaluative. 20 U.S.C. 1401 (a) (17). If a related service is required to assist a student with a disability to benefit from special education, then the school, not the parent, is required to provide the services.

6. The juvenile court orders the student to attend counseling.

The core purpose of IDEA is to provide a "free appropriate public education" for all children with disabilities. 20 U.S.C. 1400. "Free appropriate public education means special education and related services ...have been provided at public expense, under public supervision and direction, and *without charge*..." 20 U.S.C. 1401 (a) (18)(emphasis added).

7. The juvenile court orders the student or student's family to adhere to certain behaviors.

This may include the admonition "not to get in any more trouble." Such orders violate the procedural protections of IDEA in so far as they replace the functions of the ARC and the IEP and in so doing release the school district from its duty to design an educational plan to aid the student in reaching realistic goals.

From time to time parents of special education students in Kentucky are ordered to come to school to pick up their child when their behavior becomes difficult. Some parents find holding a job a challenge when the school calls daily. Inappropriate orders from a juvenile court for the parents of a behaviorally disabled child to go to the school deny the parent the right to free transportation and deny the student the right to appropriate educational intervention.

Arguably in every circumstance set out above, the juvenile judge exceeds his authority to hear the case, provided the behavior complained of is related to a disability which meets the criteria set forth in 707 KAR 200 and provided the complaint is filed by school personnel. Once a challenge to the juvenile court's jurisdiction is raised by defense counsel, the school's only alternative is to begin the administrative review process by requesting a due process hearing or to file for injunctive relief in either state circuit or federal district court for reasons set out more fully below.

Jurisdictional Barriers to Juvenile Court

IDEA and its progeny draw the road map for school district. Should the school believe that conditions are so dangerous that they must abandon the administrative process and proceed directly into court, they may do so. However, the district may only access a federal district court or a state court of competent jurisdiction. 20 U.S.C. 1415 (e)(2). Further, IDEA's progeny points out that the appropriate school board action would be a request for injunctive relief, not juvenile court action.

The *Honig* Injunction

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1401 *et seq.*, jurisdiction for behavioral problems arising in an educational setting for emotionally disturbed students are to be dealt with in a proscribed manner, beginning with an administrative process set out in 707 KAR 1:180. The IDEA makes no allowance for replacing a free appropriate public education with punitive actions initiated in juvenile court. In most circumstances, the issues may be taken up in court only after the administrative process has been exhausted. 20 U.S.C. 1415(e)(2).

In exceptional circumstances, the case may proceed directly to court provided the school is able to show the necessary proof for a preliminary injunction as set out in *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). In *Honig*, a severely emotionally disabled child exhibited extreme behavior including an attempt to strangle another student. The school's response was expulsion. The Supreme Court held that student's with serious or violent behavioral problems are not to be summarily and unilaterally excluded from the educational system. Rather, a school may proceed directly to the federal district or state circuit court for injunctive relief where "the current placement is substantially likely to result in injury either to himself or herself, or to others." *Honig* at 710. Otherwise, administrative remedies must be exhausted while the school continues to serve the child. Even when injunctive relief is granted, the school must continue to serve and educate the child. That duty is never removed.

Under *Honig*, a court of competent jurisdiction will have authority to grant injunctive relief to remove the child from the school setting. In Kentucky, juvenile courts lack the authority to grant injunctive relief. A juvenile court action brought by school personnel against an emotionally or behaviorally disabled student, *for disability related behavior*, can be and should be dismissed for lack of subject matter jurisdiction.

The "Stay-Put" Provision

Without a *Honig* injunction, with any disagreement regarding a special education student's placement, the student must be allowed to remain in the same educational placement pending a final outcome to the dispute. 20 U.S.C. 1415(e)(3). This is known popularly as the "stay-put" provision. Practically speaking, it prohibits the school from unilaterally changing a special education student's placement when disputes arise. Where successive appeals are filed, the stay-put provision could be invoked for several years. *Honig* anticipates that some situations will call for immediate action for everyone's safety and permits the civil action to be filed. The hitch, of course, is that the burden is on the school to establish that proof regarding irreparable harm, balance of the equities, likelihood of success on the merits and public policy justify the remedy. Specifically, the school district must prove that "maintaining the student in the current placement is substantially likely to result in injury either to himself or herself or to others." *Honig* at 328. The resort to juvenile court, particularly in cases where the judge is not notified of the *Honig* requirement, amounts to an end-run around the federal protections offered special education students.

School Has Duty to Help Child Succeed

Prior to the passage of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, children with disturbing behavior were summarily ushered out of public schools through suspensions, expulsions or encouragement to withdraw or drop out. The IDEA no longer permits school districts to label and dismiss children who exhibit disruptive behavior. With the IDEA, it is the duty of the school to help the student succeed. Adults credentialed with educating are deemed responsible for instructing and encouraging the child to develop acceptable means of self-control. The school's obligations include serving children with oppositional-defiant disorders and those with the present inability to cooperate with authority. *Clevenger v. Oak Ridge School Board*, 744 F.2d 514 (6th Cir. 1984). *Clevenger* concerned a student who had suffered head trauma at birth and who exhibited behavioral problems as a result. The school district in *Clevenger* argued it had no duty to take into account the student's oppositional and run-away behaviors. The Sixth Circuit

decided otherwise. The Court held that the duty to serve the child continued, not in spite of the particular behavioral problems but precisely because of the problems.

School districts' resort to juvenile court amounts to an admission against interest regarding the student's failure to make progress. Education law prohibits schools from giving up on any student. The schools are charged with the responsibility to challenge the learning disabled student, the physically challenged student and the student struggling with emotional disorders. The student's failure to succeed simply triggers school's responsibility to modify the IEP.

In Re McCann

Close to home is *In re McCann*. There a public school student in Tennessee found himself the subject of a juvenile court action for "unruly" behavior in 1987. *In re McCann*, 18 EHLR (DEC) 551 (Tenn. C.A. 1990). Tony McCann was diagnosed with mild mental retardation and was found to be emotionally handicapped. The school's solution was to file an "unruly" petition under Tennessee state statute following an incident of threatening behavior to teachers and other students. As a direct result of the petition, he was suspended from the school for ten (10) days. Later, after returning to the school, Tony was involved in a yet another fight. This time, after failing to gain admission to a residential facility, the school notified the child's parents that "the ...school system has scheduled an appointment with the juvenile judge to try to determine the best placement for Tony. You will be notified of the court date through the court system." A second unruly petition was filed alleging physically abusive behavior to other students and verbal threats to staff. No ARC meeting was ever held following the incident.

The county juvenile court held hearings on both unruly petitions and Tony was found to be unruly. He was placed in the temporary legal custody of the Department of Human Services with the court recommending placement in a group home. The child was provided no educational services from January 5, 1988 until March 16, 1988, since the judge had ordered that he not return to school.

Upon a *de novo* hearing, the juvenile court proceedings were affirmed. The parents appealed, in part, on the issue as to whether both petitions should have been dismissed for failure of the school system to follow mandatory procedures required by state and federal laws governing discipline of disabled students. The issue was purely one of law. Therefore, the scope of the federal court of appeals was *de novo* with no presumption of correctness for the trial court's conclusions of law.

The Tennessee Court recognized:

1) that IDEA requires all states to provide a free appropriate education for handicapped children;
2) that compliance with these programs is necessary to assure equal protection to the handicapped children; and
3) that Tony in particular was entitled to such services.

The Court found that the school system:

1) failed to follow the procedures designed to determine the relationship of the child's behavior to his disability; and,
2) failed to explain procedural safeguards to the child's parents.

Citing the *Honig* court's conclusion that IDEA guaranteed the child a substantive and enforceable right to a public education, the Court reversed.

"The [act] provides adequate administrative procedures for the schools to deal with discipline problems of handicapped children..." and the inappropriate use of the juvenile court is limited by federal and state laws governing special education. *McCann* at 553.

Because the IDEA prohibits the school from ever giving up on the seriously emotionally disturbed student, certain districts within Kentucky have attempted to take advantage of the juvenile courts' lack of information regarding IDEA's federal mandates to the schools.

Referral to Juvenile Court is an Impermissible Change in Placement

In *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982) the school district attempted to make an artificial distinction, arguing that while more than a ten day suspension was certainly impermissible, an expulsion was somehow different and not a change in placement. The Sixth Circuit rejected the district's arguments and pointed out that the concept of inclusion of disabled students mandated in IDEA would be eviscerated if school officials could use traditional procedures to exclude the students from the educational setting.

None of this is to say that all students need to be in a regular classroom setting. For some students, particularly those whose emotional and behavioral disabilities are just beginning to be addressed, a more structured setting may be necessary with an eye toward gradually including the child in the activities of regular classrooms.

A case being closely watched within the Sixth Circuit is *Morgan v. Chris L.*, 21 IDELR 783 (E.D. Tenn. 1994) *appeal docketed*, No. 94-6561), (6th Cir. 1995). In *Chris L.* a school district filed a juvenile court petition against a student with attention deficit hyperactivity disorder (ADHD) after the child committed an act of vandalism seeking his adjudication as delinquent. The district court found that "at least beginning with the date a child is referred for an evaluation [for purposes of qualifying as a child protected by IDEA], before a school files a petition against a child in juvenile court, it must follow the same procedures as for expulsion or suspension for more than ten days. The M-Team (the Tennessee version of an ARC) must determine if the behavior was a manifestation of the child's physical or mental characteristics and the appropriateness of the placement." *Chris L.* at 784. The school was subsequently ordered to "take all actions necessary to seek dismissal of the juvenile court petition filed against this student." *Id.*

Going on, the Court in *Chris L.* noted, "what makes the filing of an unruly petition a change in placement for IDEA's purposes, however, is the potential which juvenile court proceedings have for changing a child's educational placement in a significant manner." *Id.* at 785. Educational placements and programs include where the child will be educated and the specific educational programming for his or her individualized educational plan.

The Misbehavior is the Disability

Astute courts have recognized that a *per se* relationship exists between certain disabilities and student misbehavior. *School Board v. Malone*, 762 F2d 1210 (4th Cir. 1985). One should actually *expect* to see behavior problems in such students. Moreover, the increase in behavioral problems should have been a cue to the schools that the student's IEP (IEP) was ineffective and that a modification needed to occur. Schools who resort to the juvenile court process abdi-

cate on their responsibilities and place the fault on the child.

A more professional approach is that offered in *Malone*. In examining whether the misbehavior was attributable to the handicap, the district court stated:

> A direct result of [the student's] learning disability is a loss of self-image, an awareness of lack of peer approval occasioned by ridicule of peers. He is ostracized from their group. He doesn't understand their language. These emotional disturbances make him particularly susceptible to peer pressure. Under these circumstances he leaps at a chance for peer approval. He is a ready 'stooge' to be set up by his peers engaged in drug trafficking.
> *Malone* at 1216.

Cross-Examination of School Personnel

At a hearing to challenge whether the complained of action involves disability-related behavior, school personnel can rarely provide the type of data necessary to accurately report behaviors of emotionally disturbed children. Such data should include the following notes, kept contemporaneously:

1) of time, place and duration of the incident;

2) of actual dialogue with the child;

3) of the situation and context in which the event occurred;

4) of social relationships involved (adult-child, peer, family);

5) full details of child's actions;

6) relevant facts about person and situation.

If the school is doing its job, they will have:

1) a professionally maintained baseline of behavior;

2) data which specifies antecedents to problem behavior;

3) measurement of actual behavior; and,

4) reactions to interventions.

This data rarely exists. Its absence may be used to show the school's failure to serve the child and the school's role in the exacerbation of problem behavior.

Instead what we find are teachers confusing their personal interpretations with the behavioral facts. We find labeling rather than describing. For instance, rather than describing the behavior engaged in, we hear that the student is "spoiled", that he "needs his butt kicked" as a speaker at the Kentucky State Bar Association Convention recently avowed.

Rather than Juvenile Court...

For schools concerned with the behavior of an emotionally disabled child, the proper approach will typically be to schedule a meeting of the student's Admission and Release Committee (ARC) for the purpose of making referrals to professionals appropriate to the child's problems and the eventual design of an individualized education plan (IEP).[1] More often than not, a severely emotionally disabled child will need a behavioral consultant to be hired by the school district to observe the child, charting a baseline of behaviors, designing a behavioral management plan, instructing the school on the application of the plan and modification of the plan. Given the expense and time-consuming nature of this approach, schools are abdicating their federally mandated responsibilities in favor of juvenile petitions and charges aimed at harassing the families and, at times, resulting in the children being committed to the Cabinet for Human Resources.

As public defenders we must realize that all too often disabled students are wrongly excluded from the educational system via the court system. In far too many Kentucky counties, no jurisdictional challenge is made.

FOOTNOTES

[1]Under 707 KAR 1:180, Section 5, (3), (4), the local education authority is charged with ensuring that each special education student's IEP be reviewed and revised as needed and that placement decisions be determined by the ARC. Further, parents are entitled to a full explanation of procedural safeguards. *Id.* In far too many instances, teachers deem themselves to make such judgments that only psychiatrists or psychologists should be making. Frequently, a teacher will determine that a child "knows what is right or wrong" thereby confusing the M'Naughton rule in criminal matters with self-restraint as it applies to behavioral disabilities. *M'Naughton's Case*, 8 Eng. Rep. 718 (1843).

LISA BRIDGES CLARE
Legal Section
Protection & Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-2967
Fax: (502) 564-7890
Toll-Free: 1-800-372-2988

REBECCA B. DILORETO
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890

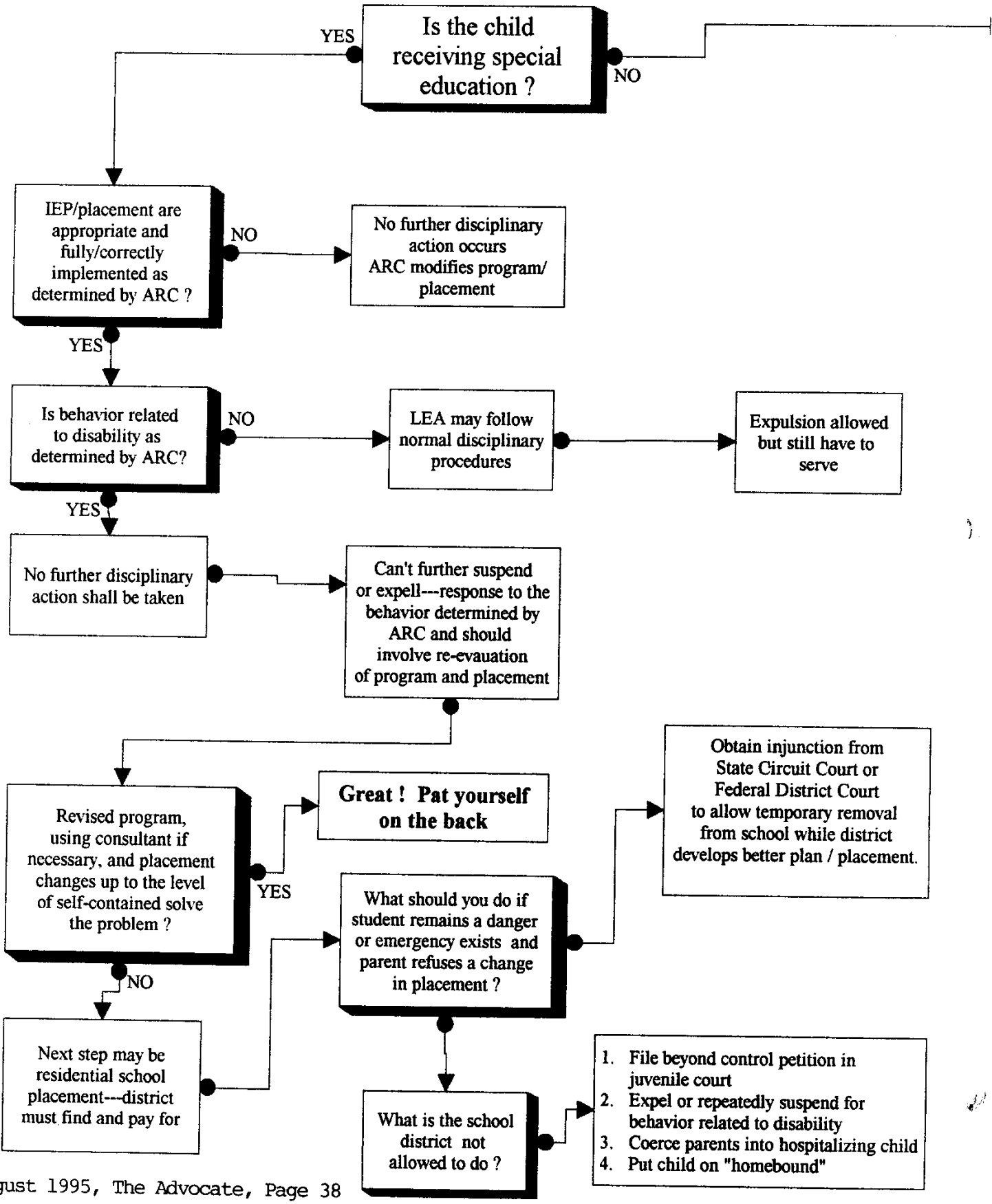
The Historical Relationship Between Mental Health & Law

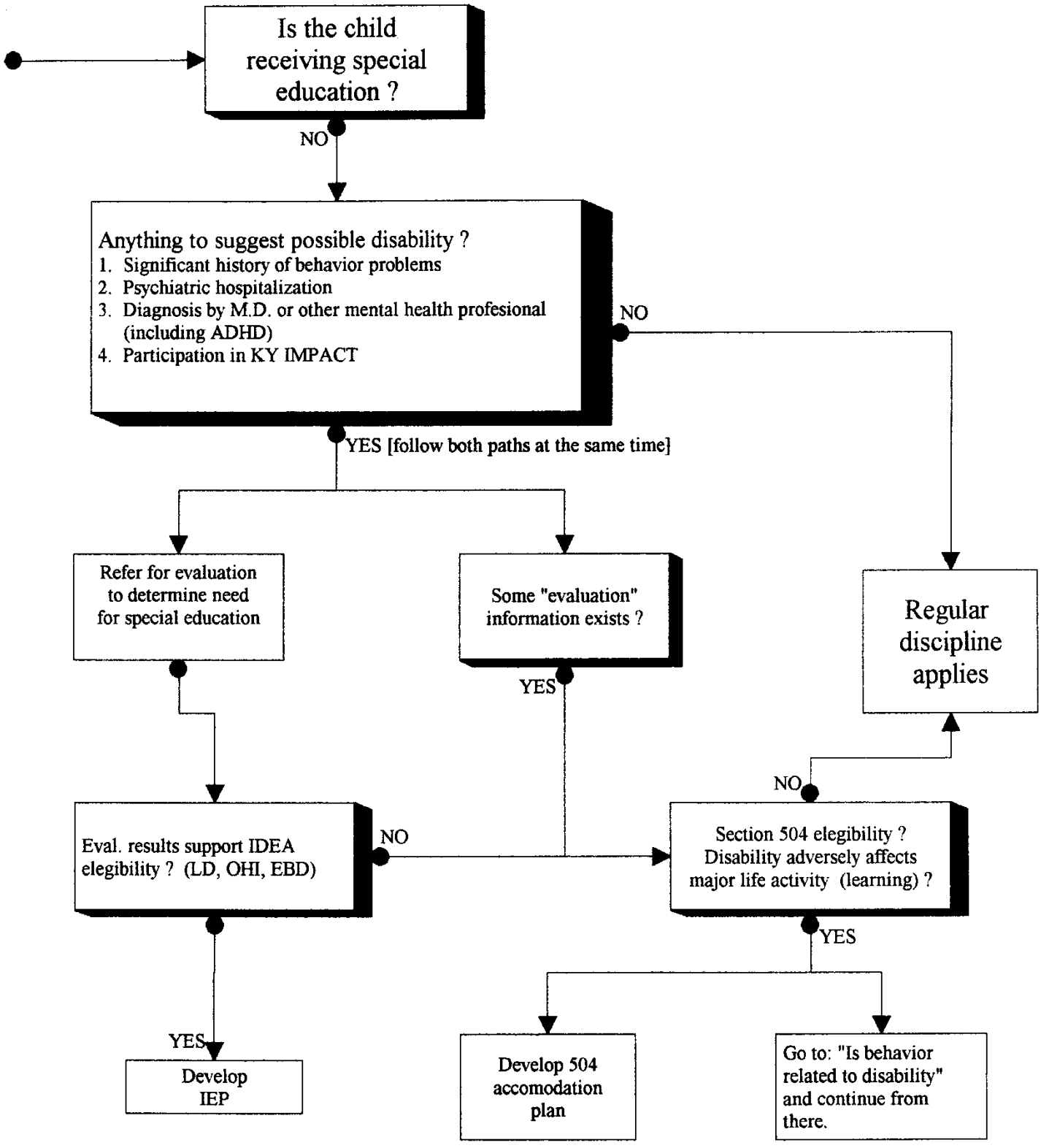
The assumption that the relationship between law and mental health is new and, perhaps, somewhat aberrational is false. Such a relationship was revealed in early Roman law and in Justinian's codes. Similarly, the sources of state responsibility for the mentally disabled arise from "three distinct conceptual sources fundamental to the Anglo-American political system," based in large part on English common-law traditions of the thirteenth century and later codified in Blackstone's *Commentaries*. Thus, whereas the "right to treatment" concept is just over twenty-five years old, questions as to the adequacy of institutional treatment date to the Middle Ages. While the existence and the scope of a "right to refuse treatment" is still hotly debated, the origins of the concept can be found in Blackstone. Although problems of the rights of the homeless continue to plague both urban officials and state mental health agencies, records of analogous problem can be traced to the time of Constantine.

Michael Perlin, *Mental Disability Law: Civil & Criminal* (1989).

Paul Phillips, 1995
Ky. Protection & Advocacy

"Dangerous Behavior"
What can the school do
After 10 day suspension threshhold is reached





Paul Phillips, 1995
Ky. Protection & Advocacy

Appellate Procedure for Trial Attorneys

From Circuit Court Judgment to Certification of the Record

- Procedures at Sentencing
- Notice of Appeal
- Designation of Record and Certificate as to Transcript
- Transfer of Case to Central Office of the Department of Public Advocacy
- Extension of Time to Certify Record

In order to timely process an appeal to the point of having the record certified by the circuit clerk, trial counsel must comply with the applicable rules of procedure. Most of these are found in Rule 12 of the Rules of Criminal Procedure and Rules 73, 75 and 76 of the Rules of Civil Procedure. The following is an outline of the procedures (with cites to the appropriate rules) which trial counsel must follow to insure timely certification of the complete record.

Procedures at Sentencing

An *order* allowing the defendant *to proceed on appeal in forma pauperis and appointing the DPA* to represent defendant on appeal should be obtained immediately after the defendant has been sentenced (Attachment I, A & B). Without such an order the circuit clerk's office may be reluctant to file the Notice of Appeal in the absence of a filing fee. (But see CR 76.42(2)(b)). Also it is needed in order to file a timely Certificate as to Transcript (see below). It is important that the order specifically refer to KRS Chapter 31 or appoint DPA to handle the appeal. Otherwise, the appellate courts and DPA will consider the appellant to be represented on appeal by trial counsel or proceeding *pro se*.

If the circuit court denies the defendant in forma pauperis status, counsel should immediately file in the circuit court Notice of Appeal pursuant to *Gabbard v. Lair*, Ky., 528 S.W.2d 675 (1975) seeking appellate review of that denial (See Attachment II). The notice must be filed within 10 days of the adverse order and it must be served on the trial judge. As soon as the Notice of Appeal is filed, the clerk of the circuit court should prepare and certify a copy of all the pleadings and proceedings had on the motion to appeal in forma pauperis in circuit court. That certified record shall immediately be sent to the Court of Appeals. No briefs need be filed unless requested by the court. All costs will be waived. The filing of the Notice of Appeal tolls the time for taking any further steps in processing the direct appeal.

Since it is local counsel's responsibility for applying to the trial court for bail on appeal for the defendant, trial counsel should make a formal *request for bail pending appeal* at sentencing.

Notice of Appeal

The *Notice of Appeal* must be *filed* within *ten days* after the date of *entry of the judgment* or the order from which the appeal is being taken (RCr 12.04(3), see (Attachment III). This usually means that the Notice of Appeal must be filed within ten days of the entry of the final judgment. However, when defense counsel has filed a timely (within 5 days of the verdict) motion for a new trial under RCr 10.06 or pursuant to RCr 10.24 (motion for judgment notwithstanding verdict), the Notice of Appeal must be filed within ten days after the date of the entry of the order overruling the motion *unless* the final judgment is entered after that. The Notice of Appeal does not have to be served on the opposing party.

All that the Notice of Appeal need include is the names of all the appellants and appellees and a statement that the appellant is appealing from the final judgment (this is true even if the time for filing the Notice of Appeal from the final judgment is triggered by an order overruling a timely filed motion for a new trial). It is not necessary to state the date the final judgment was entered or to specify the Court to which the appeal is being taken. The following is an acceptable format for the body of a Notice of Appeal:

> Notice is hereby given that the above-named Defendant appeals from the Final Judgment entered herein. On appeal the Appellant will be John Doe and the Appellee will be the Commonwealth of Kentucky.

Designation of Record and Certificate as to Transcript

Unless the proceedings were recorded exclusively by video, *within ten days after* the *Notice of Appeal* is filed, the trial attorney *must file a Designation of Record*

and a *Certificate as to Transcript.* (CR 75.01(1)(2)).

The *Designation of Record* must state what portion of the proceedings stenographically or otherwise reported the appellant wishes to have included in the Transcript of Evidence (CR 75.01(1)). Counsel must specifically request that the transcript include voir dire, opening statements and closing arguments or they will not be included. (See CR 75.02 (2)). The Designation of Record must be served on the Commonwealth Attorney. (See Attachment IV).

The designation rule (CR 75.02(2)) provides that "the transcripts of proceedings shall include only those portions of the voir dire or opening statements and closing arguments by counsel which were properly objected to...and which are designated by one of the parties." The rule does allow the circuit court to otherwise direct that the entirety of those proceedings be included in the transcript. It is suggested that counsel have the judge sign an order so directing in every case. Such an order has been incorporated in the sample order allowing the defendant to proceed on appeal in forma pauperis (Attachment I).

A *Certificate as to Transcript* is the document which must be filed *with* the Designation of Record within ten days after the Notice of Appeal is filed (Attachment V). The Certificate as to Transcript must be signed by the designating counsel and the court reporter and it must state the date on which the Transcript of Evidence was requested, the estimated completion date of the transcript, and that satisfactory financial arrangements have been made for transcribing and preparing the requested proceedings (CR 75.01(2), See also Form 23 in the appendix of Official Forms to the rules of Civil Procedure). In a case involving an indigent, satisfactory financial arrangements will simply mean that counsel has obtained an order permitting the defendant to proceed on appeal in forma pauperis.

Transfer of Case to Central Office of the Department of Public Advocacy

If trial counsel wishes the Central Office of the Department of Public Advocacy to handle an indigent client's appeal, that counsel must send a *Notification to the Department of Public Advocacy.* (KRS 31.115(2)). The following must be included in that notification:

a. The defendant's name, address and, if he is out on bond, his telephone number, if known;

b. The name, address and telephone number of the court reporter;

c. A statement indicating the amount of bail and whether or not the defendant has been released on bail pending appeal; and

d. A brief statement of any suspected errors which occurred during the trial.

Certified copies of the Final Judgment, Notice of Appeal, and copies of the Designation of Record with the Certificate as to Transcript attached should be sent with the Notification (KRS 31.115(2)).

Extension of Time to Certify Record

If trial counsel has complied with the four previous steps, DPA's Post-Trial Services Manager will take all necessary steps to ensure that the record is timely certified by the circuit clerk. Otherwise, trial counsel must comply with CR 75.01(3), (4) and (5) and CR 76.33(2), if it is necessary to request an extension of time to certify the record. This request must be made in the appropriate appellate court before the time for certification has expired (See CR 75.01(3) and (4)).

DONNA L. BOYCE
Post-Trial Services Branch Manager
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: dboyce@dpa.state.ky.us

ATTACHMENT I-A (FOR TRANSCRIPT APPEALS)

_____ CIRCUIT COURT
____-CR-____

COMMONWEALTH OF KENTUCKY — PLAINTIFF

vs. — ORDER

_____ — DEFENDANT

* * * * * * *

The Defendant having moved the Court for an order to prosecute the appeal of his criminal conviction in forma pauperis, and it appearing to the court that the Defendant is a pauper within the meaning of KRS 453.190 and KRS 31.110(2)(b), and the court being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant is hereby granted leave to prosecute his appeal without payment of costs and that the Department of Public Advocacy is appointed to represent the Defendant on appeal.

IT IS FURTHER ORDERED that the court reporter is directed to prepare the transcript of evidence of the entire proceedings including the voir dire, the opening statements and the closing arguments by counsel. The court reporter shall be compensated for the preparation of the transcript of evidence by the Administrative Office of the Courts at the prevailing rates.

Under my hand this _____ day of _____, 19____.

_____
JUDGE

ATTACHMENT I-B (FOR VIDEO APPEALS)

_____ CIRCUIT COURT
____-CR-____

COMMONWEALTH OF KENTUCKY
vs.
_____

PLAINTIFF

ORDER

DEFENDANT

* * * * * * *

The Defendant having moved the Court for an order to prosecute the appeal of his criminal conviction in forma pauperis, and it appearing to the court that the Defendant is a pauper within the meaning of KRS 453.190 and KRS 31.110(2)(b), and the court being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant is hereby granted leave to prosecute his appeal without payment of costs and that the Department of Public Advocacy is appointed to represent the Defendant on appeal.

Under my hand this _____ day of _____, 19___.

_____
JUDGE

❧ ❧ ❧ ❧ ❧

ATTACHMENT II

_____ CIRCUIT COURT
NO. ____-CR-____

COMMONWEALTH OF KENTUCKY
vs.
_____

PLAINTIFF

NOTICE OF APPEAL

DEFENDANT

* * * * * * *

Notice is hereby given that the above named Defendant appeals from the order denying him leave to proceed on appeal in forma pauperis. On appeal the Appellant will be _____ and the Appellee will be the Commonwealth of Kentucky. This Notice of Appeal is being filed pursuant to *Gabbard v. Lair*, Ky., 528 S.W.2d 675 (1975).

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served on the trial judge, the Hon. _____, _____ County Courthouse, _____, Kentucky _____ and on the Commonwealth's Attorney, the Hon. _____, _____, _____, Kentucky _____, on this _____ day of _____, 19___.

_____

❧ ❧ ❧ ❧ ❧

ATTACHMENT III

_____ CIRCUIT COURT
NO. ____-CR-____

COMMONWEALTH OF KENTUCKY
vs.
_____

PLAINTIFF

NOTICE OF APPEAL

DEFENDANT

* * * * * * *

Notice is hereby given that the above named Defendant appeals from the Final Judgment entered herein. On appeal the Appellant will be _____ and the Appellee will be the Commonwealth of Kentucky.

_____
COUNSEL FOR DEFENDANT

ATTACHMENT IV

_____ CIRCUIT COURT
NO. ____-CR-____

COMMONWEALTH OF KENTUCKY — PLAINTIFF
vs.
_____
DESIGNATION OF RECORD
DEFENDANT

* * * * * * *

Comes now the defendant and hereby designates as the record on appeal the entire evidence and the entire proceedings stenographically reported in this action including all pretrial hearings, voir dire, the opening and closing statements of all counsel, and all hearings conducted outside the presence of the jury. Appellant also designates the record on appeal to include all proceedings which were mechanically recorded but not stenographically reported including any pretrial video tapes.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Designation of Record was served on the Commonwealth's Attorney, the Hon. _____, _____, _____, Kentucky _____, and to the Court Reporter, Ms. _____, _____, _____, Kentucky _____, on this _____ day of _____, 19___.

_____

❧ ❧ ❧ ❧ ❧

ATTACHMENT V

_____ CIRCUIT COURT
NO. ____-CR-____

COMMONWEALTH OF KENTUCKY — PLAINTIFF
vs.
_____
CERTIFICATE AS TO TRANSCRIPT
DEFENDANT

* * * * * * *

A transcript of the proceedings in the above-captioned action has been requested by _____, _____, counsel for _____, on _____.

The estimated date for completion of the estimated _____ page transcript is _____.

Satisfactory financial arrangements have been made for the transcribing and preparation of requested proceedings stenographically recorded. Attached hereto is a copy of the order allowing the defendant to proceed on appeal in forma pauperis.

_____ _____
DATE — COUNSEL

_____ _____
DATE — COURT REPORTER

❧ ❧ ❧ ❧ ❧

Funds for Experts and Resources for Indigent Defendants Represented by Retained Counsel

- ♣ Client's Desire
- ♣ State Fisc
- ♣ Effective Assistance

This is the seventh 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.

When an indigent is represented by retained counsel and the case demands an expert, investigator or other resource who has the responsibility to pay for those resources if justice is the goal and if fair process is the means to the goal?

Two different approaches are evident: either the state pays under KRS 31.185 or the indigent defendant has to turn the money up. The competing values involved in these two approaches include the client's desires, the state's fisc, and effective assistance of counsel. The two approaches each have substantial rationales to support them.

No Resource Funds. There are those who believe it is essential to discourage the harmful practice of marginal attorneys taking significant cases for small retainers and then providing minimal or inadequate representation. They argue that these unacceptable situations will be deterred by refusing to give the indigent defendant represented by a retained attorney any state funds for experts, investigators or other necessary resources. Those indigent defendants and those marginal attorneys should be left to fend for themselves, the argument goes, and they will soon realize that continuing this practice is problematic. Proponents of this approach believe the long range consequence is that the practice of doing this will stop if no resources are provided. The problem will be cured with the statewide defender system having those cases from the start and with the state funding the attorney and the resources under KRS Chapter 31. The state's interest is met because the indigent receives competent representation from public defenders with adequate resources at the trial, reducing or eliminating the need for protracted post-trial litigation.

Resource Funds. On the other side of this dilemma are those who are convinced that clients have the right to choose to be represented by the attorney they prefer, even if the attorney is objectively marginal or inadequate, if the client can somehow turn up from family or friends the retainer. The argument continues that it is in the state's interest to encourage this retained representation because it saves money since the cost for the attorney representing the indigent is not paid for by the state. The state pays only the cost of experts, investigators and resources, which it would have to do anyway if the client were represented by a public defender. Even though the state pays some money, it saves money overall. The public defender office is less burdened. The client has the attorney of his choice.

Analysis. Both sides have significant advantages and both arguments have negative consequences. An indigent represented by marginal retained counsel of choice who is paid a wholly inadequate amount of money who does not receive state funds for resources will in all probability receive ineffective representation. The public defender system will likely inherit the case on appeal and post-conviction...hardly an overall cost-saving to the public defender system. But many private attorneys will do effective work which will provide indigents with competent representation. The probability of competent representation is likely to substantially increase if those retained counsel could access funds for defense experts, defense investigators and defense resources when representing an indigent.

There is no way to prevent indigent clients from hiring counsel for an inadequate fee so it is in the state's interest to provide resources in order to increase the chance that the representation is competent and will not spawn endly collateral challenge. If the state pays for resources, it will also encourage more defendants who can pay for counsel themselves or find others to pay for counsel, to access retained counsel and free up state resources for defender services.

Would we not want to honor the client's preference of counsel when it will reduce the financial burden on the state?

ABA Standards. The considered American Bar Association *Standards for Criminal Justice Providing Defense Services* (3d ed. 1992) provide that resources should be supplied by the state not only for defender cases but also for indigents represented by retained counsel. *Standard* 5-1.4 states: "*...In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services.*"

Nationally. Courts across the nation which have decided this issue balance the equities and risks with a preference for providing state funding of experts, investigators and other necessary resources to the indigent being represented by retained counsel. A review of cases from 7 jurisdictions over the last decade and a half indicate the national uniformity of thought on this issue.

In ***Arnold v. Higa***, 600 P.2d 1383 (Hawaii 1979) the murder defendant was initially appointed counsel. Subsequently his parents employed counsel for him after the "previous counsel had exhausted the maximum allowable attorney's fee from the state." *Id.* at 1384. The Hawaii Supreme Court held that it was error to preclude the indigent defendant from eligibility for state funds to hire an investigator simply because he was represented by retained counsel. The statute did not limit funds for resources to only cases where counsel was appointed, and an indigent has the right to "effective assistance of counsel and to a fair and impartial trial." *Id.* at 1385.

The Court also held that a challenge to the failure of the trial judge to consider whether funds were necessary was an appropriate issue for a writ of prohibition. An appeal would not be an adequate remedy since the investigator was being sought to contact out of state witnesses. If the defendant is "forced to wait for a reversal on appeal to obtain an investigator, these witnesses will be increasingly difficult to locate and their statements will be considerably less accurate and helpful to a just conclusion of this case." *Id.*

In ***Anderson v. Justice Court***, 100 Cal. Rptr. 274 (Cal.Ct.App. 1979) the indigent capital defendant had retained counsel who was being paid by friends and family. The Court reasoned that the "statute itself does not limit application to cases where counsel has been appointed but to 'the indigent defendant.'" *Id.* at 277. "It follows that the test of indigency for the purpose of funding investigators and experts is financial means to secure these services." *Id.*

In ***English v. Missildine***, 311 N.W.2d 292 (Iowa 1981) the indigent defendant was charged with third degree theft. His mother paid private counsel $800 and her son, the defendant, paid counsel $100. The private counsel sought public money for a handwriting analyst and deposition expenses. The Iowa Rule of Criminal Procedure "does not distinguish between indigents who are represented by court-appointed and private counsel." *Id.* at 293. The Sixth Amendment right to effective assistance of counsel includes the right to "public payment for reasonably necessary investigative services." *Id.* at 293-94. "The Constitution does not limit the right to defendants represented by appointed or assigned counsel. The determinative question is the defendant's indigency." *Id.* at 294. "It would be strange if the Constitution required the government to furnish both counsel and investigative services in cases where the indigent needs and requests public payment for only investigative services." *Id.*

In ***State v. Manning***, 560 A.2d 693 (N.J. Super. 1989) the Court looked to the statute on ancillary resources and found that it "nowhere conditions these services on the defendant first receiving legal services from the public defender." *Id.* at 698. The Court also considered "the increasingly overcrowded docket and insufficient resources, both monetary and personnel, of the office of the public defender limit the number of cases that office can handle effectively." *Id.* at 699. The court held that being represented by private counsel, whether *pro bono* or paid by a third party, does not deny the indigent access to state-funded ancillary resources. "Permitting the cost of legal services to be borne by a charitable attorney or a third party would relieve the State of the legal costs and use of personnel involved in such defenses." *Id.*

In ***Ex Parte Sanders***, 612 So.2d 1199 (Ala. 1993) the defendant, who was charged with robbery and kidnapping, was declared indigent and was appointed counsel. Two weeks later his family retained counsel for him and the appointed counsel withdrew. The trial judge denied the request for state funds to hire a ballistics expert since the defendant was represented by retained counsel. The Alabama Supreme Court held that the indigency of the defendant was the criteria under the statute for the eligibility of state funds for expert help, and money from third parties did not affect a defendant's indigency. "If the assets of friends and relatives who are not legally responsible for the defendant are not included in determining a defendant's indigency, then the fact that a friend or relative pays for an indigent defendant's counsel should not be considered in determining whether the defendant is entitled to funds for expert assistance. The simple fact that the defendant's family, with no legal duty to do so, retained counsel for the defendant, does not bar the defendant from obtaining funds for expert assistance when the defendant shows that the expert assistance is necessary." *Id.* at 1201.

In ***Spain v. District Court of Tulsa Co.***, 882 P.2d 79 (Okla.Crim.App. 1994) the indigent defendant's parents mortgaged their house and retained counsel, paying $15,000 with $10,000-$40,000 additional obligation. The parents were unwilling to pay for funds for resources since they were not sure they would be able to pay all they were due to the attorneys. The defense attorneys ordered a transcript of the preliminary hearing at a cost of $800 and asked for reimbursement from the court since the defendant was indigent. The Court refused since they were retained counsel. The attorneys then sought a writ of mandamus. The appellate court granted the writ determining that the defendant's indigency was the determiner of whether the government was obligated to provide costs and services. The "fact that Spain's parents were willing and able to retain counsel on his behalf has no bearing on Spain's status as an indigent, given his parents' unwillingness to provide any further financial assistance." *Id.* at 81.

In ***State v. Wilkes***, 455 S.E.2d 575 (W. Va. 1995) the indigent murder defendant's family paid for counsel from a bank loan and donations from their church. The trial court denied the request for funds for experts since the defendant was represented by private counsel. The Court concluded that "financial assistance provided by a third party which enables an indigent criminal defendant to have the benefit of private counsel is not relevant to the defendant's right to have expert assistance provided at public expense. A criminal defendant who qualifies as an indigent person is entitled to receive publicly funded expert assistance deemed essential to conducting an effective defense." *Id.* at 578. "The petitioner's family members have no obligation to finance the petitioner's defense, and any funds they provide have no effect on his status or personally indigent." *Id.* at 577.

Kentucky. Kentucky's approach is currently contrary to the predominant national thinking and is ripe for reconsideration.

In ***Morton v. Commonwealth***, 817 S.W.2d 218 (Ky. 1991), the state sought the death penalty for Barrington L. Morton's killing of a drug dealer and her 5 year old son. Mr. Morton "retained" an attorney to represent him against this capital prosecution for $100, and asked the court to declare him indigent under KRS 31.110 so he would be able to obtain funds for expert assistance at the expense of the state. The Kentucky Supreme Court viewed these facts to have three counsel dimensions.

The trial judge determined Mr. Morton was indigent but refused to permit him to keep his chosen counsel if he wanted to access public funds for experts. According to the Kentucky Supreme Court's decision, an indigent defendant who had retained counsel for $100 was not constitutionally entitled to have that attorney continue to represent him *pro bono* since "...the constitutional right to counsel does not embrace a right to be represented by a particular attorney." *Id.* at 220.

Secondly, the Court held that an indigent who had paid counsel $100 was not able to access expert services under KRS Chapter 31 even though that counsel was willing to continue the *pro bono* representation. *Id.*

Thirdly, the Court decided that a judge could order funds for experts under KRS Chapter 31 for an indigent represented by "truly *pro bono*" counsel. *Id.* at 220-21.

These three decisions were propelled by the Court's finding that KRS Chapter 31 required two facts to access either public counsel or public funds for ancillary services: 1) the defendant had to be "without the independent means to obtain counsel" *and* 2) there had to be the "inability to obtain necessary services." *Id.* at 220.

Perhaps the most compelling reason for the decision was that the Court feared that a ruling otherwise would mean that most people would pay their attorneys all their money and then seek funds for non-attorney costs from the state. This would substantially increase the state's financial burden: "to do otherwise would invite defendants to impoverish themselves by payments to attorneys and have the Commonwealth pay all other costs." *Id.* at 221.

While there is no doubt that criminal defendants do in some numbers impoverish themselves to criminal defense attorneys, the much larger reality in Kentucky seems to be that attorneys agree to represent accused persons for less money than is necessary to provide competent representation. In fact, many attorneys donate the rest of the time to provide adequate representation. In other cases the client is provided something less than adequate representation.

As a consequence of *Morton*, there will likely be more cases where the state is responsible for both costs: the cost of the attorney, and the cost of the ancillary services. A different ruling would likely have saved the state substantial public defense attorney fees. Clients are seldom going to risk trial with retained counsel if that means they must forfeit access to funds for experts, investigation and other services despite their real indigence.

In *Morton*, the Court has eliminated one risk to the state financial obligations and increased another larger risk to state financial responsibilities. If *Morton* is primarily motivated by what is cheaper to the state fisc, *Morton* is ripe for modification or even overruling when the costs caused by it become apparent in future litigation.

A disturbing aspect of the Court's rationale is its decision to view $100 as a real retainer for an attorney to represent an indigent charged with capital murder of an adult and child. While the court's recognition of the sanctity of the retained attorney-client relationship is impressive, it is disconcerting to see $100 viewed as a real fee. $100 does not purchase the time necessary for competent representation in a DUI case in this Commonwealth, much less for the most time consuming and complicated litigation known to the Commonwealth's criminal justice system.

Conclusion:
The Client's Desire, the State Fisc, Effective Assistance

Just results through fair process is the goal of our criminal justice system. Quality representation is the criminal defense attorney's duty in this effort to achieve just results. In these times quality is defined by the customer. Prospering enterprises honor the desires of their customers...their clients. Recognition of that value would lead state courts to allow clients to choose retained counsel and have access to state funds for experts, investigators and resources when the defendant cannot afford those costs. This would minimize the chances that such representation will be ineffective without those resources and provide some relief to underfunded defender offices...but there's clearly two sides to this dilemma.

EDWARD C. MONAHAN
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: emonahan@dpa.state.ky.us

KENTUCKY DEATH NOTES

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

DPA Appointments/Resignations

APPOINTMENTS

SUSAN ABBOTT joins DPA's Protection & Advocacy Division as an Advocatorial Specialist. She transferred to DPA from the Cabinet for Human Resources.

JOHN BURRELL returns to DPA's Hazard Office as an Assistant Public Advocate. He is formerly from DPA's Stanton Office.

JULIO COLLADO joins DPA's Pikeville Office as an Assistant Public Advocate. He is a 1993 graduate of Oklahoma College of Law.

TABITHA CRASE joins DPA's Stanton Office as a Secretary Chief. She transfers to DPA from the Natural Resources Cabinet.

JOHN DELANEY formerly of DPA's Pikeville Office rejoined DPA in the Kenton County Office as an Assistant Public Advocate. John is a 1992 graduate of Western New England College of Law.

MICHAEL FOLK joined DPA's Kenton County Office as an Assistant Public Advocate. He is a 1991 graduate of Chase Law School. He is a former staff attorney for the Kentucky Supreme Court.

KRISTI GRAY joined DPA's Pikeville Office as an Assistant Public Advocate. She is a 1994 graduate of Ohio Capital Law School.

KATHLEEN JORDAN joins DPA's Madisonville Office as Director/Assistant Public Advocate. She transfers to DPA from Kentucky Human Rights Commission where she was General Counsel. She graduated from Gonzago Law School in 1980.

JOHN MEIER joins DPA's Kenton County Office as an Assistant Public Advocate. He is 1979 graduate of Chase Law School. He was formerly the Assistant County Attorney in Kenton County.

DOUG MOORE joined DPA's Paducah Office as an Assistant Public Advocate. He is a 1987 graduate of University of Louisville School of Law. He is a former Assistant District Defender from the Jefferson District Public Defender's Office.

BILL MORRISON joins DPA's Protection & Advocacy Division as an Advocatorial Specialist. Bill was formerly the manager of the Foster Care Review Program with AOC in Frankfort.

JENNIFER OSBORNE joins DPA's Morehead Office as a Paralegal. She graduated from Morehead State University with her B.S. in Paralegal Studies.

MARY RAFIZADEH joined DPA's Kenton County Office as an Assistant Public Advocate. She is a 1990 graduate of the University of Houston Law School.

BRIAN RUFF joins DPA's Pikeville Office as an Assistant Public Advocate. He graduated University of Louisville Law School in 1983.

LINDA SMITH joined DPA's LaGrange Post-Conviction Office as an Assistant Public Advocate. She is a 1994 graduate of Chase Law School.

FRANK TRUSTY joined DPA's Kenton County Office as Director/Assistant Public Advocate. He is a 1963 graduate of University of Kentucky School of Law. Frank is a former district and circuit judge in Kenton County.

TERRY VINSON joined DPA's Hazard Office as an Investigator. Terry was a police officer for 10 years in Henderson and 3 years in Princeton.

KARL WISSMANN joined DPA's Kenton County Office as an Investigator. Karl is the former deputy sheriff of Kenton County.

GEORGE ZACHOS joined DPA's London Office as an Assistant Public Advocate. He is a 1993 graduate of University of Oklahoma Law School.

RESIGNATIONS

LES BRADSHAW retired from DPA's Hazard Office due to health reasons.

LARRY CHURCH left DPA's LaGrange Trial Office to join *Wyatt, Tarrant & Combs.*

JOHN CUNNINGHAM left DPA's Paducah Office to join the McCracken Commonwealth's Attorney Office.

JENNIFER J. HALL left DPA's Appeals Division to begin a teaching position at Western Kentucky University.

BARB KIBLER left DPA's Protection & Advocacy Division to transfer to the Department of Education.

JILL LOGAN left DPA's Richmond Office to go into private practice.

JENNIFER WORD left the Kentucky Post-Conviction Defender Organization to work at the Kentucky Bar Association CLE Commission.

Rosa Parks Award Recipient: Cris Brown

These remarks were made by Allison Connelly, Public Advocate, at the 23rd Annual Public Defender Conference at Lake Cumberland in June 1995 during the Awards Banquet:

First of all, I want to initiate the beginning of a new award called the Rosa Parks Award. To me, Rosa Parks is my personal heroine, my hero. She's a woman that made great change for a whole movement, she started the free movement for blacks, she started the Montgomery Boycott. In her honor, I've initiated the Rosa Parks Award that should be given to the non-attorney, who just like Rosa Parks, really galvanized people into action.

I want to tell you a little bit about the person I've selected as the first Rosa Parks winner and what we'll do next year is take nominations. I want this first to set the standard for what will follow and hopefully will be an annual event. The plaque itself reads this - it's from a speech given by Martin Luther King the day after Rosa Parks was convicted for violating the Alabama bus segregation laws and he gave it at the Baptist Church in Montgomery, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong. We are not wrong in what we are doing. If we are wrong - the Supreme Court of this nation is wrong. If we are wrong - God Almighty is wrong!... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream."

The person who has received this first award is someone who can be characterized by these words: dedication, service, sacrifice and commitment. This person has lost numerous, numerous hours of overtime. This person is someone that galvanizes other people into action that makes other people act, is totally dedicated to the clients that she represents, and is totally dedicated to her job even if it means sacrificing her own personal life. So it is with great pleasure and a lot of pride that I present the first Rosa Parks Award to **Cris Brown**. If any of you have any capital clients out there, Cris Brown does absolutely the best mitigation interview of anybody in this state.

Remarks from Rosa Parks Award Recipient:

It was a great honor to be chosen as the first recipient of the Rosa Parks Award among such a worthy field, any one of which were equally deserving. I commend Allison [and any other inventors] for the inception of the Rosa Parks Award for excellence in support staff.

It was a very proud moment for me and one that I will never forget. I thank each one of you that congratulated me and encouraged me.

Had I been able to think and talk I would have said upon my acceptance of the award: I share this award with the excellent people with whom I have worked with in the Eddyville post-conviction office, but especially Hank Eddy, and the tremendous staff in the Frankfort office, especially Ed Monahan, and the numerous CTU staff but especially Kevin McNally and Neal Walker.

I do not feel I would have been eligible for the award but for Mike Williams. Mike has seen and encouraged my potential and has utilized me to the fullest extent.

He has inspired me to press on when I felt I had nothing further to give DPA and the clients by the example of his untiring efforts without reserve or personal concern, on the behalf of capital clients. He inspired me, and has led me to believe that with creativity and hard work, the battle can be won at a time when I felt defeated.

I am thankful for the excellent support of the secretaries that have been mostly responsible for the success I have enjoyed, because without them, I am unable to do my job efficiently and effortlessly. I appreciate their hard work and dedication. We are a team in CTU. Especially, I want to thank my friend, Lisa Fenner, who was the secret to my success for so many years.

Cris Brown receives the 1995 "Rosa Parks Award"
from Allison Connelly, Public Advocate at the 23rd Annual Public Defender Conference

Gideon Award Recipient: Larry H. Marshall

These remarks were made by Allison Connelly, Public Advocate, at the 23rd Annual Public Defender Conference at Lake Cumberland in June, 1995 during the Awards Banquet:

I'm very happy that everyone is really interested, kind of intrigued, as far as who the recipient was of this year's award. Even Dan Goyette tried to get inside information as far as who was this year's winner, so I know it has generated some interest this time.

Let me tell you a little bit about this year's winner. This person was nominated by over 44 separate individuals. He can best be characterized as not only friend to the poor, but friend to all. His dedication and his commitment to the poor, to the public defender system began in 1975 and has continued to this day. In fact, after I pulled his personnel file and in typical fashion there was a writing sample that looks like a law school paper. It was about *Change of Faces Brings a Change of Philosophy; the Supreme Court Trilogy*. Even then, this is the closing paragraph, he was urging Kentucky to 'take the enlightened approach and modernize its procedure whereby the debtor is truly given due process not only in theory but in practice. This means a meaningful hearing before seizure.'

This person has over 56 published opinions in the Courts of the Commonwealth and in federal court today. No other state is so lucky to have its own body of *Marshall law*. The *Gideon* Award goes this year to **Larry H. Marshall**.

Remarks from the 1995 Gideon Award winner:

Of all the awards, honors and recognition that I have ever received, I can truthfully and honestly say that this is the most -- recent.

No, in all sincerity, and to be brief, this award is very appealling. Thanks to all my friends and colleagues from the bottom of my heart.

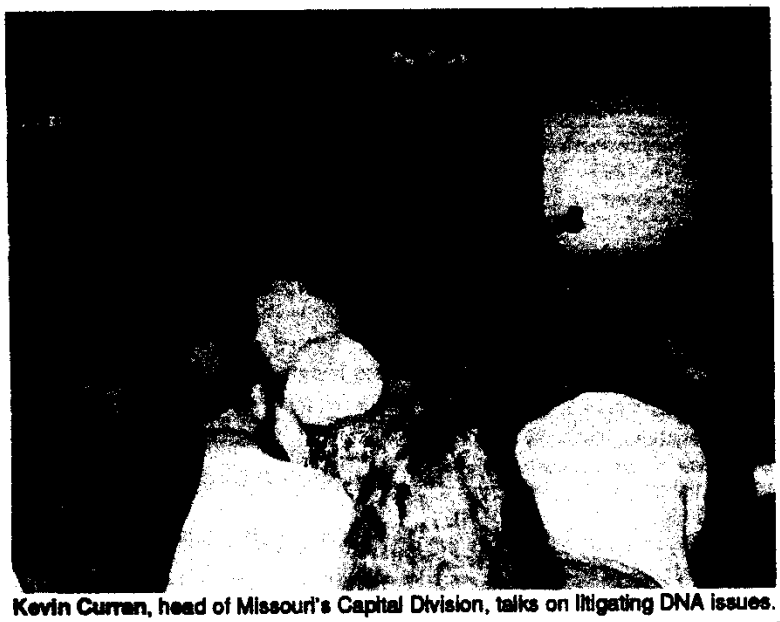
Larry H. Marshall received the 1995 *Gideon* Award from Allison Connelly, Public Advocate

DPA's 23rd Annual Public Defender Training Conference

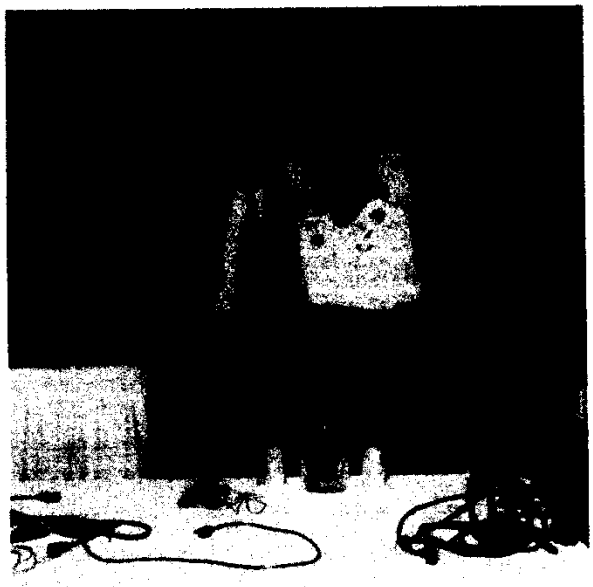
June 4-6, 1995 - Lake Cumberland State Park

Robert Hirschhorn of Galveston, Texas, author of the leading work *Bennett's Guide to Jury Selection*, helped us understand the critical importance of jury questionnaires and effective voir dire.

Lisa Wayne, a Colorado public defender from Denver educated us on *Cross-Examination of the Alleged Sexual Assault Victim.*



Kevin Curran, head of Missouri's Capital Division, talks on litigating DNA issues.



Tony Natale of West Palm Beach, Florida speaks to Tina Meadows, DPA Training, just before he talks on *Cutting Edge Cross-Examination: Images & Models of Cross-Examination*

Paul Bottel of Nashville, Tennessee and **Randy Wheeler**, head of the Kentucky Post-Conviction Defender Organization, educate us on the skills of post-conviction pleadings

Virtues & Values Etched in Stone

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

Upcoming DPA, NCDC, NLADA & KACDL Education

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

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

24th Annual Public Defender Training Conference
June 17-19, 1996
Executive Inn, Owensboro, Kentucky
**Since Sunday, June 17, 1996 is Father's Day, our 1996 program is on Monday, Tuesday & Wednesday.*

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

NCDC Theories & Themes
October 20 - October 22, 1995
Atlanta, Georgia

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

NLADA Defense of Drug Cases
September 7 - September 9, 1995
Baltimore, Maryland

73d NLADA Annual Conference
December 13-16, 1995
New Orleans, Louisiana

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.

KACDL Board Meeting
August, 1995
CLE & Visit to Kentucky State Penitentiary

KACDL Annual Conference
November 10, 1995
Lexington, Kentucky

For more information regarding KACDL programs call Linda DeBord at (502) 244-3770 or Rebecca DiLoreto at (502) 564-8006.

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

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

DEPARTMENT OF PUBLIC ADVOCACY
100 Fair Oaks Lane, Ste. 302
Frankfort, KY 40601

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