Kentucky Department of Public Advocacy

THE ADVOCATE

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MARCIA MILBY RIDINGS
Kentucky Bar Association President

Working Together to Right Our Priorities

Restoration of Civil Rights

Review of Books on Sex Abuse Evaluations and Voir Dire

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.

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

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Julia Pearson - Capital Case Review

Responding to a changed environment isn't always easy, but...it is absolutely necessary.

- Bill Gates
askbill@microsoft.com.

FROM THE EDITOR:

Interdependence. As public defenders we must learn how to work collaboratively with the KBA and the other parts of the criminal justice system in Kentucky if the defense voice is to be heard. The right to counsel is too important to all Kentuckians for us to do anything less. Kentucky's Bar Association President, **Marcia Milby Ridings**, speaks to us on working interdependently to right our priorities.

Drug Funding. Federal drug grants seek balanced funding but the recent allocation of money shows defenders are not receiving a balanced amount.

Ethics. Executive Branch Ethics are important for us to understand and follow. They are frequently difficult to understand in their application. We begin a series of articles on what the law requires.

Mental Health. Harwell Smith, Ph.D. responds to John Blume's article on the requirements of evaluation of mentally ill clients. We invite further dialogue on this critical issue for criminal defendants: *competent mental health exams.*

Experts. We explore why the failure of defense attorneys to request funds for experts when the case calls for help from an expert is increasingly being found ineffective.

Publication Months Change. This issue we begin a new publishing schedule. We will now publish this Journal in the months of January, March, May, July, September, November.

Edward C. Monahan, **Editor**

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Beliefs
The man who believes he can do it is probably right, and so is the man who believes that he can't.

- Lawrence J. Peter

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IN THIS ISSUE

Working Together to Right our Priorities

Marcia Milby Ridings

• 96% of the Public Want Equal Justice

• 58% of the Public Would Support Tax Increase to Improve the Quality of Justice

• Nationally, Public Defense is Funded at 1/3 of the Prosecution

I've always been told that one is never to begin talking with a group admitting one's weaknesses. I have to tell you, however, I was a little intimidated to come and speak with you today. My actual criminal experience is not only limited, it's almost nonexistent.

I did start my career clerking for a Federal Judge and had many more criminal cases than civil ones. Through that time I could see on a daily basis the outstanding work the public defenders did. During that 2-1/2 years, I acquired a true admiration for the work of the public defender's office.

After I started private practice 15 years ago, I was totally a civil lawyer. So, I pondered, what am I going to have to say to these people that they don't already know? I struggled and found some assistance from the law library. As part of my research I found a really interesting book titled, *The Public Defender*, subtitled, *The Practice of Law in the Shadow of Repute*, by Lisa J. McIntyre. In the forward Ms. McIntyre sets forth a very interesting definition: "public defenders are anomalies. They are paid by the state to defend those who the state believes are it's enemies, and to question and whenever possible to thwart the prosecution of those whom the state respects as criminals."

That's a very interesting situation. Everytime you get a paycheck it is from the Commonwealth of Kentucky. Everytime you go to court the style of the case is "The Commonwealth of Kentucky vs. Joe Blow" or sometimes even the "United States of America vs. John Doe." In a civil context I would be scurrying through ethics opinions. You've got almost an inherent conflict of interest in that situation. I think it is to your credit that you have not only survived but actually excelled in representing the people against your so-called employer.

The American people also believe that the public defender system is doing an excellent job. My research revealed that the American public definitely believes in the justice system, and it believes that the justice system should be continued.

A poll conducted by the Gallop Organization for the ABA Journal last year revealed that 96% of respondents endorsed the idea that all Americans are entitled to equal justice. I don't know much about polls, but I can't imagine any time when 96% of the people agreed it was Sunday. That says an awfully lot. But before we can feel good about the public perception, that same survey revealed that only 14% of the respondents believed it was very likely that the goal of equal justice could be achieved. Therefore, you are faced with a situation where everyone believes in equal justice but these same people are skeptics. Even more disturbing was a poll that just came out in the June *ABA Journal*. That survey that was conducted by Research USA in March 1995 and questioned 436 adults. These people were asked "How confident are you that if you were charged with a crime you didn't commit, a jury would acquit you and you could have a fair result?" Of the respondents, 21.8% said they were not very confident that they would be acquitted and 7.1% felt they were not confident at all. Almost 30% of these people felt that if they were wrongfully charged with a crime, they were not confident they would be acquitted.

This is a country when the presumption of innocence is absolutely essential to our criminal justice system. Somewhere along the line we seem to have lost that presumption. That's probably something you knew a long time before I did. As the crime rate increases and the economy weakens, and the cost litigation skyrockets, you are going to have to stretch your budget to represent more and more people.

Does anybody want to guess what percentage of Federal, State, and Local budget is spent on criminal and civil justice activities? Someone in the audience guessed 1%. A 1994 Gallop Poll felt that it was 27%. Most of the public thought that more than 1/4 of the Government budget was spent on the court system. I hate to say it, but the person in the audience was closer. The actual number is

just over 3%. 3.3% of the governmental budget is spent on civil and criminal activities. That compares with 20.5% of the overall Government budget, which is spent on Social Insurance programs, 14% of the overall budget is spent for Educational Libraries, 3.5% on Transportation.

The Government of the United States and the Federal, State, and Local levels spend about 74 billion dollars yearly on the justice system. According to 1990 figures of the U.S. Department of Justice, the total Government spending in the justice area was about $299 per capita. That was broken down to $37 per capita for courts, $22 for prosecutors, $7.00 for public defenders. Approximately 1/3 of what is spent for prosecution is given to the public defenders system. Additionally, $128 per capita is spent each year for police and $100 for corrections. When one realizes that in 1990 $956 was spent on each resident to service our debts and $49 per capita for Space research and technology, one has to wonder where the priorities lie in our Government.

96% of American people believe that all Americans have the right to equal justice. But our Government is spending 7 times that for Space Research than it spends to provide adequate defense for the poor. What we have got to do is to look at our priorities, not only in such questions as to why we spend more on Space Research than adequate legal counsel, but I think we have to look at the entire justice system.

Deborah Rhodes who is a Professor at Stanford Law School, recently wrote an article about a Judge in California who worked 10 days trying a commercial litigation case involving about $100,000. Let me first state that I am a civil attorney and I don't find that particularly shocking. I think that is probably par for the course in a commercial case. But during that same 10 day period, a Judge in a domestic relations court in California would be expected to process 1,000 cases involving children. It makes one stop and wonder about priorities.

In 1994 a Gallop poll sponsored by the ABA showed that 58% of the people who responded said they would support a tax increase to improve the quality of the justice system. I frankly have a little trouble with that because I have been turning on the news and there is talk of more and more budget cuts. Maybe it is just the politicians and the news media, but it appears to me that trend is to limit rather than expand absolute right to counsel in criminal defense cases, particularly at the appellate level.

Lisa McIntyre's book is divided into sections and the last section was entitled, *Public Defense Lawyers and Their Society*. The very last chapter was entitled, *But How Can You Sleep At Night?* Trust me, as an insurance defense attorney I have heard that more times than I would want to admit. I have also noted that every time I go to a high school to speak on career day, the students ask "Ms. Ridings, you couldn't represent someone like Jeffrey Dahmer could you?" It never fails that someone wants to know "How could you possibly represent someone like that?" It appears to me that our public is in theory supportive of the concept that everyone is entitled to competent counsel but it is not so sure it wants you to be that competent. I know that it is occasionally troublesome to have your choice of professions questioned by the very people who claim to believe in equal justice. I am sure you are also aware of all the studies that show this very group, the Public Advocates, provide equal, and more often superior, defenses to the clients that you represent. What you are doing is protecting the rights of your client.

I don't think there is any doubt that there is going to be a change in all aspects of the law: civil, private, and criminal. These changes are no doubt going to affect your profession. But I'm confident that as attorneys we'll have no problem adapting to these changes, because we're going to continue to provide our clients with excellent representation.

Judge Max Swinford was a Federal Judge for the Eastern and Western Districts of Kentucky. He wrote a wonderful book called the *Kentucky Lawyer* (1963). This is a funny and uplifting book and it makes one feel really good about being a lawyer. I would recommend it to each of you. I believe it is out of print but many libraries still have it. Judge Swinford described a situation when Senator Alben Barkley, who was then a part of the Kentucky Delegation from Congress called upon President Woodrow Wilson to seek support for a Kentucky Judge who was being considered for a vacancy on the United States Supreme Court. Senator Barkley recalls that the President leaned back and asked, "Gentlemen, does your candidate believe that the law grows?"

Providing the best quality representation to persons facing loss of life or imprisonment should be the highest priority of legislatures, the judiciary, and the bar. However, the reality is that it is not. So long as the substandard representation that is seen today is tolerated in the criminal courts, at the very least, this lack of commitment to equal justice should be acknowledged and the power of courts should be limited. So long as juries and judges are deprived of critical information and the Bill of Rights is ignored in the most emotionally and politically charged cases due to deficient legal representation, the courts should not be authorized to impose the extreme and irrevocable penalty of death. Otherwise, the death penalty will continue to be imposed, not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.

-Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835, 1883 (1994)

Judge Swinford went on to explain as follows, "Mr. Wilson who is probably the most profound scholar of constitutional government and law to ever occupy the office of President, then explained. The Law is not something small but it is something big. It maybe likened to a great oak whose ancient beginning is unknown to all living people. For many decades it has stood in the forest and grown into a gigantic tree, giving beauty and shelter to all its surroundings. So long as it grows it will flourish and be of greater beauty and blessing but if there should be placed an iron casement around it's trunk it would cease to grow and surely die. The same may be said of the law. It must continue to grow and reach out and shelter more and more people. Its blessing and security cannot be limited to the fortunate or the few. It must cast its shadow of certain justice over mankind. It must stand for the dignity of the individual throughout all the earth."

I am confident that whatever the future brings, dedicated people like you will meet the new changes and continue to grow with the law.

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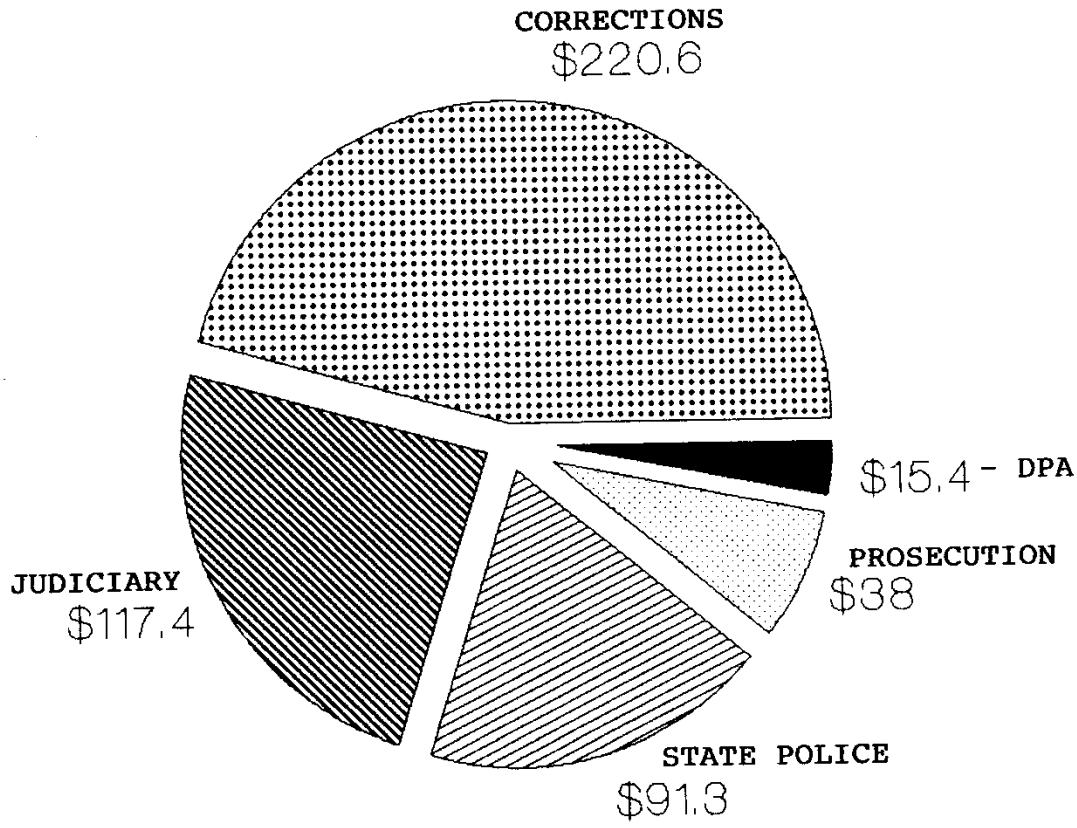
Marcia Milby Ridings is the 62nd President of the Kentucky Bar Association. She is a 1976 graduate of the University of Kentucky College of Law with distinction. There, she was a staff member of the Kentucky Law Journal. Her undergraduate degree was Magna Cum Laude from Georgetown College in 1970 and she has a masters from the University of Kentucky in 1973. From 1976 through 1979 she was clerk for Eugene Siler, Chief Judge of the United States District Court for the Eastern and Western Districts of Kentucky. She served on the Franklin County Board of Education and was a business education teacher at Franklin County High School from 1972-1973. Her many KBA activities include being a member of the Task Force on Gender Fairness, co-chair of the Committee on Jury Instructions, former chair on the Committee on Women in the Profession, member of the Task Force on Minorities. She has been a delegate to the 6th Circuit Judicial Conference on five occasions and has served on the 6th Circuit Rules Advisory Committee since 1993. She is active in many civic organizations including the First Christian Church of London and the Board of Directors of Leadership Kentucky.

Kentucky's Criminal Justice Budget

All Funds, FY 96, In Millions



Mental Health Issues in Criminal Cases, Revisited: Introducing Some Reality Into the Blume Position

Beginning in 1994 and continuing under a new head of steam since the *Binion v. Commonwealth*, Kentucky Supreme Court decision in 1995, an effort has been made in *The Advocate* to lay out the case that the indigent defendant is entitled to his own psychiatrist and full team of professionals in cases where the defendant's mental condition may be an issue. Since the *Binion* decision, a misuse of the circumstances and ruling in the U. S. Supreme Court case of *Ake v. Oklahoma* (1985) has led to increasingly bolder and less solidly based calls in *The Advocate* for services to indigent clients which go well beyond anything a reasonable person could propose. With the publication in the August 1995 *Advocate* of an article by John Blume, following so closely an excellent article on neuropsychological testing by Dr. Marilyn Wagner, it is necessary for someone with a sympathetic but rational view to speak to a few of the more outlandish, not to say insane, remarks of Mr. Blume.

Surely no one can disagree with Blume's call for competent forensic mental health evaluations and it is legitimate to expect that any mental health evaluation meets "existing standards" for such work. Mr. Blume uses selections from a variety of articles to evolve what he has determined is the "proper standard of care." He notes that a regional or local standard of care is not good enough.

Blume insists that adequate care includes history taken from someone other than the patient and a thorough physical exam. He remarks, accurately, that "the standard mental status exam cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment." Blume lists 12 types of patient records including "all available records for both the client and significant members of his family," which the competent clinician must review. He notes that, "other family members, friends and persons with knowledge about your client must be interviewed." Mr. Blume goes on to suggest that nothing short of a complete neuropsychological exam as well as "laboratory tests, including blood and endocrine workups" are part of the national standard of care to which each client is entitled.

While Mr. Blume summarizes well the possible needs of the indigent mentally disturbed client, his views on what constitutes a national standard of care are relevant only in Valhalla. Beyond the pastiche of references in psychiatry manuals, Blume does not substantiate his model for a national standard. Fortunately there are now data, published in October 1995, which speak to the current national standards of care for forensic psychological/psychiatric evaluations.

Randy Borum, Psy.D. and Thomas Grisso, Ph.D., whom readers will recognize as the preeminent figure in the development of forensic assessment instruments, surveyed 53 forensic psychologists and 43 forensic psychiatrists, the vast majority board certified in the forensic area. These professionals were first asked if they wanted to participate in a survey about essential and recommended features of Competency to Stand Trial (CST) and Criminal Responsibility (CR) exams. Those interested, presumably among the more conscientious of the group, then completed questionnaires. The results have been presented at the American Psychological Association and the full report appears in *Professional Psychology: Research and Practice* (1995) Vol. 26 #5 pp. 465-473.

In the Borum and Grisso study clinical data regarded as "essential" for both CST and CR evaluations were:

* psychiatric history
* current mental status
* information from a formal mental status exam
* current use of psychotropic medicine

Elements essential for CR but not CST evaluations were:

* information reviewed in past mental health records
* police information about defendant's behavior at the time of the offense
* information about prior psychiatric diagnoses
* information about presence/absence of substance abuse

Elements seen as essential by both professions for CST evaluations were:

* understanding of charges/penalties
* understanding of possible pleas
* appreciation of consequences of a guilty plea and accepting a plea bargain
* understanding of roles of trial participants
* ability to communicate with legal counsel
* ability to consider advice (collaborate with) of counsel
* ability to make decisions (process information) without distortion due to mental illness

Drs. Borum and Grisso further sampled views on what is important, recommended, and contraindicated in these exams. Interestingly, preliminary reports of the data indicate that only 20% of forensic psychologists and no forensic psychiatrists felt that neuropsychological testing was "almost always" indicated in CR exams and the percentages are even smaller for CST exams (11% and 0%).

Here then is the first research attempt to establish what fully credentialed forensic mental health professionals regard as the national standard for CST and CR exams. We see that standards do not routinely include a physical or neurological exam. They do not include a history taken from someone other than the patient. They do not include evaluation beyond the mental status exam.

The central point here is that Blume is not describing the national standard for forensic mental evaluations but rather is supplying the reader with an attorney's view of an ideal standard. It is worth noting that CR and CST evaluations done under the Bluegrass Regional contract with the Kentucky Correctional Psychiatric Center *always* exceed the national standard delineated by Borum and Grisso. It is also important to remark that part of any CR or CST exam is an adequate screening for potentially significant

factors germane to the ultimate question. Professional diligence requires appropriate referral under these conditions, but it does not require, as Blume seems to say, that every imaginable factor in any patient's CR or CST be exhaustively evaluated based merely on the fact that someone feels the defendant's CR or CST is at issue.

One final remark about *Ake v. Oklahoma*. Recent hoopla has perhaps begun to obscure the central error of the mental health professionals in the case which rendered inadequate the representation of *Ake*. The central error was that the psychiatrists who examined *Ake* **never examined him for criminal responsibility yet they testified to his criminal responsibility at trial.** This was an inexcusable breach of the rights of Mr. *Ake*, but many of the claims about the implications of *Ake* for Kentucky defendants follow a tortuous, obscure path from this origin.

Harwell F. Smith, Ph.D., is one of 10 board certified clinical psychologists in Kentucky but is not among the 3 board certified forensic psychologists. A 1978 graduate of the University of Tennessee, his practice in Lexington is a psychotherapy based practice. Under contract with Bluegrass Regional Mental Health-Mental Retardation Board, Inc., Smith has performed over 300 CR and CST exams since 1988. He also does private forensic evaluations in criminal, guardianship and personal injury cases.

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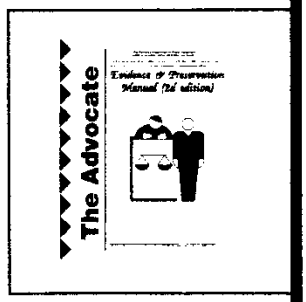
How Much Certainty?

It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with **utmost certainty**. Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction ex-cept upon proof beyond a rea-sonable doubt of every fact necessary to constitute the crime with which he is charged. *In Re Winship*, 397 U.S. 358, 364 (1970).

Evidence & Preservation Manual (2d Ed. 1995)



The Kentucky Department of Public Advocacy, 1995 ***Evidence & Preservation Manual*** *(2d Ed.)* is available for **$39.00**, 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 Public 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:

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♣ *Congratulations on the excellent production of* ***Evidence & Preservation Manual (2d edition)****. It is such an excellent piece of work that I have ordered additional copies for every lawyer in my office. - Frank E. Haddad, Jr., Attorney at Law, Louisville, Kentucky*

Executive Branch Ethics Commission

The citizens of Kentucky have a right to expect honesty from state employees and have confidence in their government. The goal of the Executive Branch Ethics Commission (the "Commission") is to assist public servants in providing the public with the highest ethical standards of public service. This article is designed to acquaint you with the Executive Branch Code of Ethics (the "Ethics Code"), the Commission, and its staff. Following is a general overview:

Inception

The predecessor to the Ethics Code, Executive Order 91-2, was issued by Governor Brereton Jones soon after he took office in December of 1991, and established a limited code of ethics applicable to all officers and employees of the executive branch of state government. During the 1992 session of the General Assembly, the legislation which is now known as the Ethics Code was enacted. The Code became effective on July 14, 1992 and the Governor appointed the first five members of the Commission on August 12, 1992. During the 1993 special session of the General Assembly, legislation was passed pertaining to executive agency lobbying.

Commission Members

The current members of the Commission represent several geographic areas of the state and have specialized in diverse professions. They are:

Lynda Thomas. Ms. Thomas, of Lexington, is an original Commission member appointed on August 12, 1992. She is a Ph.D. candidate in Communications at the University of Kentucky and is employed by the Kentucky Educational Television Foundation.

Martin Huelsmann. Mr. Huelsmann, of Fort Mitchell, is an original Commission member appointed August 12, 1992. He is a law professor at Chase Law School at Northern Kentucky University where he teaches legal ethics; he is also active in state bar matters pertaining to legal ethics.

Ruth Baxter. Ms. Baxter, of Carrollton, was appointed to the Commission on November 4, 1993. She is a practicing attorney and also participates in state bar matters of legal advertising.

Dr. Randall Wells. Dr. Wells, of Morehead, was appointed to the Commission on December 5, 1994. He is a former education professor at Morehead State University and is currently the university's Coordinator of School Relations.

Rt. Rev. Don Adger Wimberly. Bishop Wimberly, of Lexington, was appointed to the Commission on July 19, 1995. He is the bishop of the Lexington Diocese of the Episcopalian Church.

Commissioners are paid a per diem of $100 for each day they meet. Meetings are usually held on a monthly or bi-monthly basis, depending on the amount of work which must be accomplished by staff between meetings. Commissioners also receive reimbursement for actual expenses they incur in executing their responsibilities.

Staff

The Commission employs four staff people who are located in Room 273 of the Capitol Annex in Frankfort:

Jill LeMaster, the Executive Director, oversees the day to day operation of the Commission. Ms. LeMaster is a CPA formerly associated with the State Auditor's Office.

Lori Flanery, the General Counsel, provides legal advice to the Commission and participates in Commission adjudicatory proceedings. Ms. Flanery was previously an attorney with the Public Service Commission and the law firm *Wyatt, Tarrant & Combs* in Lexington.

Jo Ledford, an Executive Secretary, has worked for the Department of Education and came to the Commission staff directly from the Governor's Office.

Jenny May, an Executive Secretary, is new to state government; she was employed previously in the private sector.

Each of the staff members is committed to assisting those who are regulated by the Commission with their filings and other responsibilities under the Ethics Code. Several new publications and forms were issued recently: a guide for executive branch employees; a handbook for executive agency lobbyists and their employers; a compilation and index of all advisory opinions issued to December 31, 1994; and new forms for Statements of Financial Disclosure and lobbying registration and updates. The Commission's first biennial report will be published no later than December of this year and will detail the activities of the Commission during the past two years. The Commission promulgated recently new administrative regulations and is reviewing currently the Ethics Code to propose new or amended legislation for the 1996 session of the General Assembly.

If you are interested in obtaining copies of any of this material, or if you have any questions about the Ethics Code, contact the Commission staff at (502) 564-7954.

Jurisdiction

The Commission is charged with the responsibility of regulating two groups:

1. Employees of executive branch agencies; and
2. Persons and employers who lobby executive branch officers and employees concerning financial decisions.

Employees

Regarding executive branch employees, the Commission regulates:

1. Acceptance of gifts and gratuities;
2. Conflicts of interest;
3. Outside employment; and
4. Post-employment.

The Ethics Code also requires certain management personnel to file with the Commission annual Statements of Financial Disclosure, detailing their financial holdings and transactions, sources of income, and gifts.

Lobbyists

The Ethics Code requires that executive agency lobbyists and their employers register with the Commission within ten

days of the engagement of the lobbyist by the employer, and file updated Statements of Expenditures and Financial Transactions every four months.

Future articles in this series will address specific requirements for executive agency employees, executive agency lobbyists and employers of those lobbyists.

Advisory Opinions

The Ethics Code establishes a mechanism whereby persons affected by the Ethics Code may request an advisory opinion from the Commission in an effort to guide their own conduct. If you have a question about the Ethics Code you should contact the Commission staff to determine whether the Commission has issued relevant advisory opinions to which you may refer. If no such opinions exist, you may request one, in writing, by relating all pertinent facts and setting forth your question in as much detail and as clearly as possible. The Commission staff will research the issue and draft a proposed opinion for the Commission to consider at its next meeting. Requests which are received at least two weeks prior to a Commission meeting will usually be answered at that meeting.

Enforcement and Adjudicatory Procedure

The Commission accepts formal complaints filed against individuals under its jurisdiction. Complainants should indicate the identity of the alleged violator, describe in detail the event which is believed to be a violation, and cite the statute violated, if known.

The Commission must initiate a preliminary investigation into the allegations contained in a complaint, and forward the complaint to the alleged violator within sixty days.

The Commission is also permitted to initiate a preliminary investigation on its own motion. In that situation, the Commission will forward to the alleged violator a notice that the investigation has been initiated, along with a brief explanation of the particular statute(s) which may have been violated.

If, at the conclusion of the investigation, the Commission determines there is not sufficient evidence of a violation, it will notify immediately the alleged violator, and the complainant, if one exists, that the investigation has been concluded.

The existence of the investigation and its resolution remain confidential.

If the Commission determines there is probable cause of a violation it may take one of two actions. It may issue a confidential reprimand to the alleged violator or it may initiate an adjudicatory proceeding. A confidential reprimand could be sent if mitigating factors exist, such as a lack of loss to the state, a lack of benefit to the alleged violator, or the lack of a negative impact on the public's perception of state government. The existence of the investigation and the resolution of the matter is kept confidential if the Commission issues a confidential reprimand.

The investigation and resulting action become public if the Commission initiates an adjudicatory proceeding. This administrative proceeding is conducted pursuant to the Kentucky Rules of Civil Procedure and the Commission is bound by the Rules of Evidence when presiding over adjudicatory hearings.

Penalties

If the Commission determines there is clear and convincing proof of a violation of the Ethics Code, it may:

- issue an order requiring the violator to cease and desist the violation;
- issue an order requiring the violator to file any report, statement or other information;
- in writing, publicly reprimand the violator, and send a copy to his appointing authority;
- in writing, recommend to the violator's appointing authority that he be removed or suspended from office or employment;
- issue an order requiring the violator to pay up to $2,000 in civil penalty for each violation.

Any violation of the Ethics Code which substantially influenced the action taken by an executive branch agency is grounds for voiding, rescinding, or cancelling the action.

Also, violations of KRS 11A.040 are Class D felonies which the Commission refers to the Attorney General for prosecution. Violations of KRS 11A.040(1) to (7) result in forfeiture of the violator's employment or office, and any person who maliciously files a false charge or misconduct shall be fined up to $5,000 and/or imprisoned for up to one year.

The Ethics Code also contains criminal penalties for executive agency lobbyists and their employers for intentionally failing to register or filing a false registration statement with the Commission, and provides that there exists a civil cause of action against lobbyists or employers whose false statements damage a state official or employee.

Finally, the Ethics Code provides civil penalties for failure to make required filings by executive agency lobbyists, their employers, and certain executive agency officers and employees. Final actions by the Commission may be appealed to the Franklin Circuit Court within thirty days.

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Lori has been General Counsel for the Executive Branch Ethics Commission since 1994. Previously she was a staff attorney for the Public Service Commission (April 1992-September 1994) and as associate attorney with Wyatt, Tarrant, & Combs (September 1990-April 1992). She is a 1990 graduate of U.K. Law School where she was a member of the Journal of Mineral Laws & Policy and author of "Inequitable Valuation in Regulatory Taking Cases: Compensation that 'Goes Too Far,'" Journal of Mineral Law & Policy, Vol. 6, No. 1.

The Department of Public Advocacy maintains a complete set of Executive Branch Ethics Commission advisory opinions so they can be readily accessed by members of the Department. If you would like to obtain a copy of any advisory opinion or look at them generally, you can contact Allison Connelly, the Public Advocate, or Vince Aprile, General Counsel, at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006; Fax: (502) 564-7890; E-mail: aconnell@dpa.state.ky.us or vaprile@dpa.state.ky.us.

Procedure for Restoration to Civil Rights

Restoration to civil rights is one of many functions afforded the governor of Kentucky under the Kentucky Constitution. This function is granted at the prerogative of the governor and can be altered and/or deleted at anytime during an administration.

Restoration to civil rights only restores the right to vote and run for and hold public office. Restoration to civil rights does not restore the right to own, possess or transport a firearm or serve on a jury. Since the Federal Bureau of Alcohol, Tobacco and Firearms no longer has the funding to process individual investigations for relief of firearms, the only way to obtain this relief for state convictions, having been convicted of a crime against the state is to request a pardon from the governor. Any person who has already been restored to civil rights may also apply for a pardon if seeking relief of the firearms disability.

A gubernatorial pardon will restore the right to vote, run for and hold public office, the right to serve on a jury and the right to own, possess and transport a firearm. Federal convictions, having been convicted of a crime against the federal government, must request a pardon from the President of the United States.

Most states automatically restore a convicted felon's rights upon completion of the sentence with the exception of Alabama, Florida, Iowa, Mississippi, Nevada, New Mexico, Utah, Virginia, Washington and Wyoming, who like Kentucky require application to the governor for restoration to civil rights. Exactly what rights are lost and what firearms privileges are lost vary from state to state.

Registering or re-registering to vote prior to restoration of civil rights is a violation of the law which provides a maximum penalty of 5 years in prison.

Owning, possessing or transporting a firearm prior to relief of this disability is in violation of both state and federal laws and punishable under current federal and state penalties.

WHO NEEDS TO APPLY

Any person living in the state of Kentucky and having been convicted of a felony in any court in this or any other state loses the right to vote, to run for and hold public office. Misdemeanant convictions do not need to apply since no rights are lost. Juveniles convicted of a felony, as an adult, will need to apply once the conviction has been completed.

POLICIES AND PROCEDURES

Current policy for restoration to civil rights requires the applicant to have completed their sentence either by having received a final discharge from parole, having completed service of the sentence in either a state or federal institution or having the probated sentence expire. The applicant must not be under indictment or having pending charges and should not owe any court-ordered fines or restitutions. If all of these requirements have been met, an application for restoration to civil rights can be completed immediately upon eligibility and submitted to the Division of Probation and Parole for processing.

To request an application the applicant can call or write our office and an application will be sent to them. The secretary of state's office requires a fee of $2.00 (to issue the certificate) and needs to accompany the application for processing.

Since our office only maintains records for convictions received in Kentucky courts anyone applying for restoration who received a felony conviction in any other state or in a federal court must provide a copy of the conviction/judgment of final sentence, a copy of the final release and proof that any court imposed fines and/or restitutions have been satisfied.

THE PROCEDURE OF RESTORATION TO CIVIL RIGHTS

When applications are received in our office they are stamped, logged and separated into 3 groups:

1) probated cases,
2) state cases (where time was served) and
3) federal/out-of-state cases.

The process begins as follows:

1) **Probated cases** are processed immediately by searching our records for the probated information. (Probation information is maintained on index cards). If our office does not have this information the last supervising probation and parole office is contacted to verify the information. Once the information is verified a form letter to the commonwealth attorney in the county of conviction is submitted, to notify their office and the public in general that the applicant has applied for restoration to civil rights and to also request any available information their office may have on possible pending charges or indictments on the applicant. We ask the commonwealth attorney to respond within 15 days of receipt of our request. If after that time we do not receive a response, a form to the governor is completed with the application and $2.00 fee attached and forwarded for consideration. The total time elapsed to complete this process is approximately 3 weeks.

2) **State cases** are processed differently. Several factors play a part in the processing of the state cases, such as, how soon after completing the sentence or receiving a final discharge did the applicant apply? If the answer is immediately, the file will be readily accessible from the office of offender records and the process will be completed the same as the probated cases. If the applicant waits 1 month or longer after the sentence has been satisfied then the file must be retrieved from archives (this adds approximately 2 weeks more to the process to receive the file) before the procedure of sending the form letter to the commonwealth attorney can occur and then forwarding to the governor for consideration. Average time to complete this process is approximately 5 to 7 weeks.

3) **Federal or out-of-state cases** are processed immediately to the governor for consideration provided all required documents of the conviction have been received.

Each application is handled individually and may not be processed exactly as stated due to several factors, such as, if a previous conviction was omitted and another file was needed to be requested from archives, if the conviction is 20 years old or older (our records have been destroyed or information is limited), the applicant has multiple prior convictions (time spent sorting and obtaining file(s)), the applicant is using another name when applying (time spent to find the name convicted under) or information is not given on the application (*i.e.*: crime, sentence, court of conviction) causing a hand search to determine what information we have to process the application. All these delays can add an additional 1 to 2 weeks to the processing time.

Records checks will only occur if additional information is needed and not accessible by our office. In the event our office is informed of any pending charges or indictments the application and $2.00 fee are returned with instructions to resolve the pending charges before further processing can occur.

All applications and information pertaining to each case are maintained and secured in our office until forwarded to the governor for consideration.

Once in the governor's office our office no longer maintains control over the application and can not accurately state how long it will stay in this office. Previous experience shows the application can be in the governor's office anywhere from 3 weeks to 6 months before being returned, however, each application is considered on a case by case basis and time stayed in the governor's office will vary individually.

Once the certificate is issued and returned to our office copies are made and mailed to the appropriate state agencies and to the applicant. (A copy of the certificate is maintained in the circuit clerk's office in the county of conviction and in the probation and parole office supervising the county of conviction and/or where last supervised). A copy of the restoration is maintained in our office as well as in the office of the secretary of state as the official keeper of the records.

Any information pertaining to records for restoration to civil rights should be directed to the office of the secretary of state since that office is the keeper of all records and will be most accurate.

It should be noted that towards the end of an administration, approximately 2 weeks prior to inauguration of a new governor, applications are held until the new administration takes office and the new policies are in place, causing uncontrollable delays in processing. Processing is put on hold beginning December 1 until mid January.

CURRENT ADMINISTRATION'S RESTORATION STATISTICS

In 1992, 131 applications for restoration to civil rights were forwarded to the governor for consideration. 120 applications were restored and 11 were denied.

In 1993, 162 applications were forwarded to the governor for consideration and all 162 were granted restoration.

In 1994, 785 applications were forwarded to the governor for consideration and all 785 were granted restoration. Of those 785, 2 that were previously denied restoration in 1992 were granted restoration in 1994.

In the event the governor should deny the request for restoration to civil rights, the application and $2.00 fee are returned to the applicant simply stating their request was denied and they must wait a period of 1 year before reapplying. No other explanation is given or necessary.

COMMON ERRORS

The biggest mistakes causing delays of processing are failure to attach the $2.00 fee, failure to sign the application and/or have a probation and parole officer or a notary public sign the application, failure to provide documents attesting federal or out-of-state convictions or court orders releasing from probated convictions, failure to answer all questions on the application, submitting the application prior to having completed a probated sentence or having been issued a final discharge from parole and submitting an application while owing outstanding fines and/or restitutions and/or having pending charges and/or indictments.

If any of these mistakes occur, the application is returned to the applicant with instructions of what is necessary to begin processing the request for restoration.

If an application is submitted along with a request for an early final discharge from parole or *prior* to having been issued an early final discharge by the parole board, that application is not processed but kept in our office pending a decision from the parole board. Once the early final discharge is issued the application is processed as previously explained. If the request is denied the application is returned informing the applicant of the parole boards decision to deny the request and to wait 1 year before again requesting the early final discharge and resubmitting the application for restoration to civil rights.

The most frequent question asked: "Am I still a citizen of the United States and can I get a job without having my civil rights restored?"

The answer is "yes," if you were born in the United States or became a citizen through the Department of Naturalization and Immunization you are still a citizen with certain restrictions only restoration to civil rights or a pardon can lift.

Any person having been convicted of a felony and upon completion of the sentence imposed, should be able to obtain employment regardless if they have been restored to civil rights. However, a person may be denied public employment or an occupational or professional license on account of a felony conviction. KRS 335B.010, 335B.020. *E.g.*, insurance (KRS 304.9-440(1)(f)); dentistry (KRS 313.130(1)); nursing, (KRS 314.091(1)(b)); medicine (KRS 311.595(4)).

THE APPLICATION

Review of the application, which follows this article, both front and back shows it is self explanatory and very simple to complete. If read carefully and completely no delays in processing would occur. No additional documents (unless specified) or letters of character reference are necessary to the processing. If the applicant wishes to attach such, those documents and/or letters will be forwarded along with the application and $2.00 fee to the governor for his review and consideration.

MARIAN YOUNG
Administrative Assistant
Department of Corrections
Central Office/
Division of Probation and Parole
514 State Office Building
Frankfort, Kentucky 40601
Tel: (502) 564-4221, ext. 247
Fax: (502) 564-5229

Marian Young has been employed by the Department of Corrections for 6 1/2 years. For the last 4 years she has been specifically working in Corrections' Division of Probation and Parole with the procedure of restoration to civil rights.

P: 406
Rev. 4/95

JUSTICE CABINET

DIVISION OF PROBATION AND PAROLE

APPLICATION FOR RESTORATION TO CIVIL RIGHTS

PLEASE READ INSTRUCTIONS ON REVERSE SIDE PROBATION #_____

1. Name used at Time of Conviction (Please Print) INSTITUTION #_____
   _____ ( )
2. Present Address_____Phone_____Zip_____
   (include city & state)
3. Date of Birth_____SSN #___-___-____Aliases Used_____
4. Most Recent Felony Convicted of:_____
5. Sentence_____ Probated for_____Years
6. Court of Conviction_____Date Convicted_____
   (county & state)
7. Institution First Entered_____
   (address, city & state)
8. Date Entered Institution_____ Conditional Release Date _____
9. Date Paroled _____ Date of Final Discharge_____

   Date Probated _____ Date Probation Expired_____

   Name of Last Supervising Officer & County_____

   FEDERAL SENTENCES: Date Sentence was Terminated _____

10. Are you under Indictment? Yes___ No___ Explain:_____
    _____
11. Do You have Any Outstanding Fines? Yes___ No___ Explain:_____
    _____
12. List Any Previous Felony Convictions: (A) Number, Institution, State; (B) Crime (C) Sentence; (D) Date Convicted; (E) Date & Method of Release; (F) Date of Final Discharge:_____
    _____
    _____

Commonwealth of Kentucky
County of _____

The Affiant,_____, states that the foregoing statements are true and correct.

Signed_____

Subscribed and sworn to before me by _____
this _____ day of _____, 19__.

_____
Notary Public or Probation & Parole Officer

All persons who have been convicted of a felony in any court in this or any other state loses the right to vote and to hold public office. It is the prerogative of the Governor afforded him under the Kentucky Constitution to restore these rights.

To be eligible for restoration of civil rights applicants must have received a Final Discharge from parole or the sentence (either time served or probated) must have expired, whichever is applicable, and must not be under felony indictment, have any pending charges or have and/or owe any outstanding fines and/or restitutions. If these requirements have been met, an application must be completed, signed and witnessed by a notary public or a probation and parole officer. A fee of two dollars is required by the Secretary of State's Office.

For those convicted in a federal or out-of-state court, a copy of the conviction/judgment of final sentence, a letter from the former parole officer attesting to the final discharge and proof of any fines and/or restitutions ordered must be attached to the application.

Restoration of Civil Rights **DOES NOT** give a convicted felon the right to purchase, own or have in possession a firearm or other weapon.

Registering or Re-registering to vote prior to restoration of civil rights is a violation of the law which provides a maximum penalty of five (5) years in prison.

Failure to answer all questions on the application or to provide required documents will result in the delay of processing and the return of your application.

MAIL THIS APPLICATION AND A $2.00 CHECK OR MONEY ORDER, PAYABLE TO THE KENTUCKY STATE TREASURER, TO:

Justice Cabinet
Department of Corrections
Division of Probation and Parole
514 State Office Building
Frankfort, Kentucky 40601

attn: Marian Young

Kentucky Justice Cabinet Awards $6.9 Million

Two DPA Federal Drug Requests

In May, 1995 the Department of Public Advocacy submitted two grant applications to the Kentucky Justice Cabinet for federal drug grant monies: 1) representation for indigents charged in multiple defendant violent crime and drug cases, and 2) pretrial treatment and diversion program for indigent drug and violent offenders.

Prosecutors Awarded Money for Direct Representation; DPA Denied Direct Representation Money

In July, 1995 DPA was awarded $89,643 for a pretrial treatment and diversion program for indigent drug and violent offenders in Kenton County. At the same time, the Kentucky Justice Cabinet denied funding for DPA's request for direct representation of drug defendants in multiple defendant cases.

The Attorney General was awarded $104,850 federal drug grant money for its "Expedite Death Penalty Post-Conviction Litigation" request for direct prosecution of capital defendants. At the same time, the federal government is eliminating funds for DPA's federal post-conviction resource center.

How Was the Money Divided Up?

The Kentucky Justice Cabinet Byrne Formula Grant Program Awards 1995 was awarded to the following parts of the criminal justice system in the following percentages:

	AWARDS	PERCENT
Police	$5,101,265.00	73.2%
Corrections	$1,169,218.00	16.8%
Justice Administration	$ 337,000.00	4.8%
Courts	$ 120,000.00	1.7%
Attorney General	$ 104,850.00	1.5%
Dept. of Public Advocacy	$ 89,643.00	1.3%
Miscellaneous	$ 47,411.00	.7%
TOTAL	**$6,969,387.00**	**100.0%**

POLICE GRANTS

Grant #	Amount Awarded	Program Name	Applicant
5173-N2-3/95	$ 143,665.00	Floyd Co. Fiscal Court	Narcotics Task Force
5174-N2-8/94	$ 136,102.00	Russell	Narcotics Task Force
5175-N1-1/94	$ 2,416.00	Butler Co. Fiscal Court	D.A.R.E
517-N1-1/94	$ 17,250.00	Clark Co. Fiscal Court	Esteem Team
5178-N1-2/94	$ 5,840.00	Barren Co. Fiscal Court	D.A.R.E.
5179-N1-2/94	$ 18,530.00	Mt. Washington	D.A.R.E.
5180-N1-4/94	$ 23,587.00	Ft. Thomas	D.A.R.E
5187-N1-5/94	$ 10,628.00	Warren Co. Fiscal Court	D.A.R.E
5188-N15B-1/94	$ 65,625.00	Fingerprint	Kentucky State Police
5191-N1-1/94	$ 15,240.00	D.A.R.E.	Russellville
5193-N1-1/94	$ 4,224.00	D.A.R.E.	Elkhorn
5194-N18-3/94	$ 57,075.00	D.A.R.E.	Lexington

5195-N2-8/94	$ 219,756.00	Street Sales	Lexington
5196-N4-4/94	$ 25,338.00	Police Act. League	Lexington
5198-N15b-2/95	$1,140,178.00	Information Systems	Kentucky State Police
5199-N2-1/95	$ 156,141.00	Narcotics Task Force	Hardin Co. Fiscal Court
5200-N1-4/94	$ 26,498.00	D.A.R.E	Pike Co. Fiscal Court
5201-N2-3/95	$ 145,827.00	Lake Cumberland Task	Somerset
5202-N2-7/95	$ 303,296.00	Narcotics Task Force	Madisonville
5203-N1-2/94	$ 7,193.00	D.A.R.E.	Meade Co. Fiscal Court
5204-N1-3/94	$ 13,895.00	D.A.R.E.	Bullitt Co. Fiscal Court
5202-N2-7/95	$ 219,819.00	W.A.N.T.	Paducah
5209-N1-3/94	$ 12,140.00	D.A.R.E.	Villa Hills
5210-N15A-1/95	$ 226,028.00	Medical Examiner	State Medical Examiner
5212-N1-3/93	$ 19,955.00	D.A.R.E.	Nicholasville
5214-N2-6/95	$ 142,712.00	Narcotics Task Force	Maysville
5216-N2-1/95	$ 314,879.00	Marijuana Supression	Kentucky State Police
5221-N1-4/95	$ 8,646.00	D.A.R.E.	Murray
5222-N1-2/95	$ 16,030.00	D.A.R.E.	Danville
5223-N4-1/95	$ 29,948.00	D.A.R.E.	Fleming Co. Fiscal Court
5224-N2-1/95	$ 584,000.00	Mid & Up Level Dealers	Kentucky State Police
5225-N1-4/95	$ 12,306.00	D.A.R.E.	Flatwoods
5226-N2-8/95	$ 468,848.00	St. Sales Enforce	Louisville
5228-n2-7/95	$ 159,995.00	Northern Kentucky Drug Strike Force	Kenton Co. Fiscal Court
5237-N1-1/95	$ 52,906.00	D.A.R.E.	Jefferson Co. Fiscal Court
5238-N4-2/95	$ 208,939.00	Lead Officer Program	Jefferson Co. Fiscal Court
5240-N4-1/95	$ 85,810.00	Crime Prevention	Lousiville
TOTAL	**$5,101,265.00**		

CORRECTIONS GRANTS

5217-N15A-1/95	$ 612,405.00	Substance Abuse Program	Corrections
5218-N15a-4/95	$ 353,774.00	Drug Test/Treatment	Corrections
5219-N18-2/95	$ 37,500.00	Domestic Violence Prevention	Corrections
5220-N11-1/92	$ 85,000.00	Violent Offender Conf.	Corrections
5239-N11-1/95	$ 80,539.00	Intensive Sup.	Jefferson Co. Fiscal Court
TOTAL	**$1,169,218.00**		

ATTORNEY GENERAL GRANTS

5170-N26-1/95	$ 104,850.00	Expedite Death Penalty	Attorney General

PUBLIC DEFENDER GRANTS

5206-N15A-1/95	$ 89,643.00	Diversion For Addict	Public Advocacy

JUSTICE CABINET GRANTS

Administration	$ 337,000.00	Administration	Justice Cabinet

COURTS GRANTS

5244-N10-4/93	$ 120,000.00	Drug Court Diversion	Jefferson Co. F. C.

MISCELLANEOUS GRANTS

5241-N4-1/95	$ 40,882.00	Cult. Diversity	Louisville
5243-N18-3/95	$ 6,529.00	Domestic Violence	Louisville
TOTAL	**$ 47,411.00**		

Balance is Called For

Section 109 of the Comprehensive Crime Control Act of 1990 amended 42 U.S.C. 3751(b) enumerated 21 purposes for which grants to states and units of local government may be made by the Bureau of Justice Assistance under the Drug Control and System Improvement Grant Program. This amendment clarifies that the goal of "improving the operational effectiveness of the court process" **requires a balance of support for all components of the court process**, including prosecutorial, public defender, and judicial resources. According to the amendment, this improvement in the effective operation of the court process should be achieved "by expanding prosecutorial, defender and judicial resources, and implementing court delay reduction programs."

The Judiciary Committee Report noted that in the past the Bureau of Justice Assistance had issued guidelines under the Drug Control and system Improvement Formula Grant Program which *erroneously* concluded that services for criminal defense are inappropriate for federal funding due to Congress's omission of any specific mention of criminal defense in the purpose areas specified under 42 U.S.C. Section 3751(b).

That same committee report observed that the Bureau of Justice Assistance's interpretation was "incorrect" under the language of the prior legislation, but concluded that "this amendment is nevertheless needed to ensure that funding for indigent defense programs is recognized as no less significant than the other purpose areas specifically enumerated in Section 3751(b)."

According to the Judiciary Committee Report, "a recent study has found that at least 9 states have relied upon Federal assistance to provide needed indigent defense services, including hiring new assistant public defenders and support personnel to deal with increased drug caseloads, and providing assistance for alternative sentencing programs," as well as other delay reduction programs. The Committee Report stressed that "the amendment" in question "applies both to formula grants and to discretionary grants, which are available for demonstration programs by public agencies and private nonprofit organizations for the purposes specified for formula grants under Section 3751(b)."

Why has Kentucky not implemented the balance called for by the United States Congress?

Training Opportunity for Juvenile Justice Workers

Family Group Conferencing: A Restorative Model for Juvenile Justice

Family Group Conferencing, promoted by **REAL JUSTICE**, helps the community deal with youthful offenses and offenders.

The conferences gather families and close friends of the victims and offenders. The process is borrowed from the Maori, indigenous people of New Zealand. The Maori gather the extended families of victims and offenders together on the sacred grounds of the village. An elder chairs the gathering, seeking a collective response to the crime. This process has travelled from New Zealand to Bucks County, PA.

Conferencing provides a diversionary option for first time offenders. Young offenders gain empathy, learning how their behavior affects others. With the involvement of the extended family there is great opportunity for emotional expression and catharsis.

REAL JUSTICE is offering two training sessions: October 25-27, 1995 in Allentown, Pa. and October 30 - November 1, 1995 in Minneapolis, Mn.

For more information contact:

REAL JUSTICE
P.O. Box 500
Pipersville, PA 18947

Plain View

Ernie Lewis

Veronia School District 47J v. Acton

At the end of the term, the United States Supreme Court issued an extraordinarily important decision. The decision, while perhaps irrelevant to the criminal practitioner, is indicative of what kind of a country is evolving under our Constitution.

The facts of the case are rather simple. It appears that a small Oregon town believed itself to have a drug problem among its youth, and that this drug problem had appeared among its athletes. After several solutions such as classes, meetings, and even drug dogs had failed, the school district proposed drug testing of student athletes. A consent form by parents was required to be signed prior to a student participating in athletics. 10% of athletes were to provide urine samples weekly. If the testing came back positive, a second test was given. If the second test was negative, nothing further happened. If the second test was positive, the student was given the opportunity to participate in a six week assistance program, or was suspended from participation in athletics.

Seventh grader James Acton signed up to play football. His parents refused to sign the consent form, and thus young James was not allowed to play the American game. The law suit ensued, which ultimately led to relief in the Ninth Circuit. The Supreme Court reversed, however, in a 6-3 decision. Writing for the majority, Justice Scalia wrote that the random, suspicionless testing of students in public schools was reasonable and thus constitutional.

The first interesting part of the opinion is the breakdown of the Court. Justice Scalia is joined not only by his soul mates, but also by two of the new "liberal" Justices, Ginsburg and Breyer. Justice O'Connor writes a modest dissenting opinion joined by Souter and Stevens. Gone from the Court are the voices of outrage when privacy rights are shrunk or eliminated.

The majority's reasoning is rather simple. First, the majority asserts that "reasonableness" is the "ultimate measure" of constitutionality under the Fourth Amendment. Second, "reasonableness" is measured by balancing the individual interest in privacy against the particular governmental interest. Joining the recent trend in favor of "special needs" searches, the Court states that special governmental needs, such as in schools, probation schemes, or transportation can supply the reasonableness normally carried by probable cause or individualized suspicion.

The Court relies extensively on the fact that children in a public school are involved in this case. Because children are involved, they "lack some of the most fundamental rights of self-determination." Children are committed to the State as schoolmaster of the children. More importantly, student athletes have even fewer privacy rights than do most students. Their participation is entirely voluntary.

The Court also judges the privacy invasion to be insignificant. A description of minors in bathrooms with backs turned to monitors does not seem minor to this writer and parent of children, but it did in the minds of the Court.

Likewise, the Court believed the nature and immediacy of the governmental concern, that of deterring drug use by the nation's schoolchildren, to be substantial and to outweigh the "minor" inconvenience of drug testing. Accordingly, the Court decided that the result of this balancing resulted in their conclusion that the random drug testing of student athletes was reasonable and thus constitutional.

Justice Ginsburg wrote a brief concurrence joined by no one. She wrote to state her belief that the question of whether random drug testing of all students, as opposed to student athletes under these facts, was constitutional was still an open one.

The dissenters wrote at length, but with relatively little passion. The major point of the dissent is that the Court had long condemned the blanket search, citing the automobile probable cause case of *Carroll v. United States*, 267 U.S. 132 (1925) and the more recent case of *Ybarra v. Illinois*, 444 U.S. 85 (1979). To the dissent, the only time a blanket, suspicionless search is appropriate occurs when there is a strong governmental interest, such as that contained in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989) and *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989). The dissenters do not find such an interest in the testing of student athletes. They would have ruled consistently with *TLO* and required an articulable suspicion prior to the testing of student athletes.

United States v. King

The Sixth Circuit has held that a husband who sends letters to his wife from prison does not have a reasonable expectation of privacy in those letters. Thus, when the wife turned those letters over to the FBI, the defendant lost "standing" to challenge their admission into the case against him.

This opinion was written by Judge Bertelsman, who was joined in the opinion by Judges Norris and Suhrheinrich. The facts were rather simple. During an investigation into bank fraud, Laura King's former husband, Peter Trainor, admitted that she was involved in bank fraud. Thereafter, she asked Trainor to burn some letters from her husband, who was in prison. Trainor obtained the letters, did not burn them, and later turned them over to the FBI. Those letters incriminated David King, Laura's husband, who was in prison at the time. King challenged the admission of the letters.

The Court held that when King mailed the letters to his wife, "his expectation of privacy...terminated upon delivery of the letters." Further, even if King had standing, there was no search to be challenged. Rather, the letters were seized by a private individual, who then acted privately in turning them over to the

government. "Once a private search is conducted, the government's subsequent use of the information obtained in the private search does not implicate the Fourth Amendment as long as the government's use does not exceed the scope of the private search."

United States v. Jackson and Akhibi

The Sixth Circuit has held in an opinion written by Judge Miles and joined by Judges Milburn and Norris that an anticipatory search warrant does not mandate that the package named in the warrant be present at the time of the search. Rather, where the package arrives at the site named in the warrant, thereby triggering the search, the fact that an occupant leaves the residence does not negate the effect of the warrant. "We conclude that once the package was taken inside the Bardwell house, probable cause existed to search the premises not only for the contraband itself, but also for other evidence of drug trafficking."

Short View

1. ***United States v. Ford***, 57 Cr. L. 1293 (D.C. Cir. 6/9/95). During a legal protective sweep pursuant to *Maryland v. Buie*, 494 U.S. 325 (1990), the police may not after seeing a .45 calibre clip look under a mattress and behind shades for the weapon. *Buie* allows for a protective sweep during the arrest of someone in a home under two circumstances: incident to arrest in areas from which an attack could be launched; in an area for which there is an articulable suspicion that a dangerous situation exists. In this case, the Court rejected the government's assertion that seeing a gun clip on the floor triggered the first prong of *Buie*, and held the search to be illegal.

2. ***United States v. Hill***, 57 Cr.L. 1365 (10 Cir. 7/10/95). The exclusionary rule applies to other crimes evidence according to the Tenth Circuit. Thus, if evidence of other crimes is otherwise relevant under FRE 404(b), but was obtained in violation of the Fourth Amendment, the exclusionary rule will operate to prohibit the admission of the evidence. "When police testify in court about illegally obtained evidence pursuant to Fed. R. Evid. 404(b) in order to prove an essential element of the crime, such as knowledge or intent, the evidence is being used as direct evidence to obtain a conviction, and is thus an example of when the rationale for exclusion is, in the Court's view, 'strongest.' In contrast, the list of exclusionary rule 'exceptions' that the government tries unsuccessfully to analogize to Rule 404(b) evidence, all involve contexts in which the evidence is not being affirmatively used to prove an element of an offense and thereby to obtain a conviction."

3. ***State v. White***, 57 Cr.L. 1389 (Fla.Sup.Ct. 7/13/95). Rejecting *Arizona v. Evans*, 56 Cr. L. 2175 (1995), the Florida Supreme Court has held that where the police fail to keep their computer records updated, that a search incident to arrest is illegal. Here, White was stopped on a routine traffic violation. The police arrested him based upon an outstanding warrant showing up on the computer. However, the warrant had been served four days before, but the police had failed to update their computer. As a result, contraband found on the defendant had to be suppressed. The arresting officers were charged with the knowledge of the department as a whole, and thus the good faith exception did not apply.

4. ***Munafo v. State***, 57 Cr.L. 1417 (Md.Ct.Spec.App. 7/3/95). A police officer cannot extend a traffic stop beyond the time necessary for writing a ticket in order to follow-up a hunch that the detainee has drugs in his car.

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U.S. Supreme Court Cases and The Kentucky Rules of Evidence

David Niehaus

One purpose of this article is to consider the U.S. Supreme Court's handling of evidence rules and the persuasiveness of that Court's analysis of rule language. The second purpose is to determine how U.S. Supreme Court cases construing rule language should be handled in jurisdictions like Kentucky having the same or similar language. This is important because when the Court construes rule language its opinion is not binding precedent. The supremacy clause of the federal constitution, Article VI, Clause 2, mandates obedience to U.S. Supreme Court opinions only when they construe the federal constitution. Opinions construing other matters are persuasive only.

Of course, saying that such opinions are merely persuasive does not mean that state courts are likely to ignore them in reaching a decision. The U.S. Supreme Court is the big wind in the world of courts and therefore what it says is likely to be adopted by state courts unless its holding construes language which differs from that of a state rule or is contrary to an important state policy.

For example, a U.S. Supreme Court opinion dealing with the residual hearsay exceptions set out in FRE 803(24) and 804(b)(5) would be rather irrelevant in Kentucky because no such language appears in the Kentucky Rules of Evidence. Additionally, Kentucky's public policy, evinced by its failure to enact analogues to these federal rules, is strictly to control the use of hearsay.

Conversely, an opinion like ***Chambers v. Mississippi***, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), which suggests that the compulsory process clause of the 6th Amendment requires bending of hearsay rules on occasion, is binding on all state courts because of the supremacy clause. When reading evidence opinions of the U.S. Supreme Court, the first important step is figuring out what the justices are talking about. Fortunately, they are pretty straightforward when limiting the opinion only to the court's supervisory authority over the federal system. But it is important to look closely at the opinion to be sure.

The second step in any analysis of a U.S. Supreme Court opinion is to find out what other federal and state courts are doing with the opinion. Usually, you can find references to U.S. Supreme Court opinions either in Shepards or a service like Criminal Law Reporter within one or two months after the rendition of the opinion. If you are lucky enough to subscribe to an on-line service, the lower court opinions probably are available much sooner. Any of these services allows you to take a rapid look at any consensus that may be forming as to the meaning of the opinion.

The importance of doing this is shown by cases construing FRE 801(d)(2)(E), the co-conspirator rule, and FRE 104 since the rendition of ***Bourjailly v. U.S.***, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). In that case the court determined that the judge could consider the proffered statement itself in determining admissibility. Many people, myself included, took *Bourjailly* to mean that co-conspirator statements were admissible without too much of an inquiry as to the existence of the conspiracy in the first place. However, the First and Sixth Circuits have since imposed on the proponent of such a statement a duty to support its admissibility by production of extrinsic evidence, independent of the statement, that a conspiracy actually existed at the time the statement was made. [*U.S. v. Clark*, 18 F.3d 1337 (6th Cir. 1994); *U.S. v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1994)]. *Bourjailly*, read closely, did not establish an exclusive list of considerations governing the admissibility of co-conspirator's statements. Therefore, the inferior federal courts felt free to create this additional requirement. But you would not know about this additional requirement without running the case through Shepards or some other service. Of course, federal appellate opinions are not precedent in any Kentucky court except as law of the case and so they may only be cited as persuasive authority. But there are helpful cases out there.

One such case is ***Tome v. U.S.***, 513 U.S. ___, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). In that federal sex abuse prosecution, the question arose as to whether FRE 801(d)(1)(B) allowed consistent statements of the witness made after the charge of fabrication arose in order to rebut the charge of fabrication. Examination of the rule language shows that the federal rule and KRE 801A(a)(2) are essentially the same and therefore, the ruling that later statements are not admissible can be used without a good deal of difficulty. However, even more useful is the discussion of when and how the exception to the hearsay rule is to be employed. In *Tome*, the court made it clear that the rule permits substantive use of prior consistent statements only to the extent that they "rebut the existence of an improper influence or motive." Mere attacks on memory or credibility do not trigger the exception. This of course, runs directly contrary to the universal practice of Kentucky prosecutors who seem to believe that anything that its witnesses said before or during the trial must be admissible whether the defense cross-examines on the subject or not. *Tome* can be used as extremely persuasive authority, not because it was decided by the U.S. Supreme Court, but because it focuses on the purpose of the prior consistent statement rule, to rebut certain inferences and makes a compelling analysis of the rule.

However, there are problem cases as well. ***U.S. v. Mezzanatto***, 513 U.S. ___, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995), decided shortly after *Tome*, is such a case. The question was whether a federal prosecutor could make a defendant waive FRE 410 as a condition of entering into plea discussions. KRE 410 and FRE 410 are essentially the same language. Some, including Weinstein, say that this language functions as an evidentiary privilege for the maker of statements, subject to certain exceptions. However, in both the federal and Kentucky rules, it is placed in Article IV, which deals with relevancy. The obvious purpose of the rule is to foster plea bargains but the rule also assists police in investigations. [*Roberts v. Commonwealth*, Ky., 896

S.W.2d 4 (1995)]. Rule 410 language excludes every qualifying statement the defendant makes unless the defendant opens the door in some manner. The rule is written in unambiguous language and makes no provision for admissibility of the statements except under the two conditions stated. But the U.S. Supreme Court did not see it that way.

In *Mezzanatto*, the defendant wanted to engage in plea discussions with the federal prosecutor but the prosecutor would agree to do so only if the defendant agreed that any statements made during the discussions could be used to impeach inconsistent testimony given at a trial. The plea discussions did not result in a resolution of the case and at the trial the defendant was impeached by his inconsistent pretrial statements to the prosecutor. On appeal the defendant obtained a reversal by arguing that the agreement was unenforceable in light of the two express exceptions found in Rule 410.

The federal appellate court and two justices of the Supreme Court agreed that as a matter of basic language construction the defendant was right. Souter and Stevens phrased the issue as one of determining clearly expressed congressional intent from rule language which creates only two exceptions neither of which was shown in the case. In the absence of any indication that Congress intended other exceptions, the dissenters argued, the courts should not substitute their notions of public policy. Souter maintained that the information available showed that Congress intended that "[t]he provisions protecting a defendant against use of statements made in his plea bargaining are thus meant to create something more than a personal right shielding an individual from his imprudence." In any event, Souter maintained that the Congress was doing more than creating an evidentiary privilege in favor of criminal defendants by enacting KRE 410.

The majority opinion held that because plea statement rules were enacted against a "background presumption" that legal rights of all kind are subject to waiver by voluntary agreement of the parties, they would not interpret Congress's "silence" as an implicit rejection of waiveability. The majority held that the plea bargain rule was essentially a "privilege of the defendant" and therefore subject to waiver and that the defendant had not shown that the rule as interpreted would lead to overreaching and abuse by prosecutors. Giving a hint at what it would consider cause to invalidate such an agreement, (absence of counsel, unintelligent or involuntary consent), the court held such agreements valid.

Justice Souter noted in the dissent that many federal prosecutors routinely require waiver of KRE 410 before entering into plea discussions. Sooner or later these waiver agreements will be appearing at a Commonwealth Attorney's Office near you and you will have to help your client decide whether to bargain under a condition that statements made could be used to impeach inconsistent trial testimony. Unfortunately, the first cases will present the difficult choice between refusing to bargain at all or bargaining and hoping that a motion in limine later will exclude the statements if the plea does not work out for some reason. Although this is a disagreeable decision to make, there are some important considerations that can guide your choice.

First, it is important to keep in mind that *Mezzanatto* is not binding precedent or even necessarily persuasive precedent in Kentucky. Rather, it is the opinion of seven people who admit in the majority opinion that they are making a public policy choice that they think does not contradict Congressional intent. The first attack on *Mezzanatto* and these types of agreements is that the U.S. Supreme Court opinion is not binding and is unconvincing. You may rely on the dissent which states at least an equally cogent argument for literal application of Rule 410 language. Point out to the judge that in Kentucky courts must, whether dealing with a statute or a court rule, apply the language as written where the language clearly expresses the intent of the drafters. [*Whittaker v. McClure*, Ky., 891 S.W.2d 80, 83 (1995)]. Rely on the fundamental principle that where the drafter states a general rule followed by a limited number of exceptions, only those exceptions may be allowed. [*George v. Commonwealth*, Ky., 885 S.W.2d 938, 940 (1994)]. Educate the judge about the structure of the Kentucky Rules of Evidence. There was nothing to prevent the Evidence Rules Study Committee from putting KRE 410 language into Article V, the privileges article, if it wanted to and if the language was intended to create a personal evidentiary privilege subject to waiver under KRE 509. Instead, the drafters placed it in Article IV, the fourth of six provisions [KRE 407-412] that make certain evidence inadmissible, not privileged. These six rules express public policy and, with the exception of KRE 409, each lists certain circumstances under which evidence may be admitted despite the general rule of exclusion. The drafters who wrote the language, and the General Assembly and Supreme Court which adopted it, obviously believed that the exceptions made in each rule adequately protected the public interest. The U.S. Supreme Court erred in *Mezzanatto* by failing to look at the policy expressed in Rule 410 and its inclusion in a list of rules excluding certain evidence on the ground of public policy. Examination of the exceptions to KRE 410 shows that the public interest is adequately protected without any judicial assistance.

In subsection (4)(A) of KRE 410, the language provides that, if the defendant opens the door by mentioning another statement made in the course of the same plea or plea discussion, the prosecutor has the right to introduce additional statements that "ought in fairness be considered contemporaneously with it." Both KRE 410(4)(A) and KRE 106 allow the Commonwealth to retaliate if the defendant opens the door. More importantly, subsection (4)(B) of KRE 410 indicates what the drafters believe should happen if a defendant testifies inconsistently at trial: he should be prosecuted for perjury or false statement if the out of court statement was made under oath on record and in the presence of counsel. It is fundamental law that where remedies are provided by statute or rule neither prosecutors nor courts can dream up a new or additional remedy. The job of determining remedies and policy are left to the General Assembly and the Supreme Court. Neither adopting body intended for prosecutors to take another step and extract an agreement to ignore the law as written as a condition precedent for plea bargaining. The obvious reason is that such action by the prosecutor would be arbitrary.

Although courts typically say that Sections 27 and 28 of the Constitution prevent them from interfering with the plea bargaining practices of Commonwealth Attorneys, this statement is not entirely accurate. Like all other persons who draw a state paycheck, prosecutors are compelled by Section 2 of the Constitution to refrain from acting arbitrarily in the discharge of their office. Read together, Sections 2 and 3 of the Constitution demand equal treatment of all by the government and its agents. Therefore, while the Court of Justice does not and cannot superintend the out of court activities of the Commonwealth Attorney, it can and must intervene when that government officer acts arbitrarily, that is, acts in a way that exceeds the legitimate needs of his office and of the people. [*Kentucky Milk Marketing Commission v. Kroger*, Ky., 691 S.W.2d 893, 899 (1985)].

The legitimate needs of the people have been expressed in KRE 410 which renders plea bargaining statements inadmissible except under two conditions. It is not up to an executive branch officer to try to sidestep the clearly expressed intent of the General Assembly and the Kentucky Supreme Court by extracting an agreement to waive KRE 410 as a condition precedent to plea discussions. Just as a Commonwealth Attorney may not arbitrarily refuse to bargain with an individual defendant, she may not arbitrarily put additional improper conditions on the practice especially because plea bargaining is now the predominant means by which prosecutors dispose of criminal cases and obtain evidence for use against other persons. The General Assembly, which has the right to govern the Executive Branch [*Brown v. Barkley*, Ky., 628 S.W.2d 616, 623 (1982)], has told prosecutors how plea bargaining is to be conducted. It should not be done in any other fashion.

Whether favorable or unfavorable to criminal defense attorneys, U.S. Supreme Court opinions carry a great deal of weight simply because they are U.S. Supreme Court opinions. Whether these opinions should be entitled to such weight is a question that must be determined in each instance. By keeping in mind the substantial differences between the federal and state systems, particularly the absence of a federal constitutional analogue to Section 2 of the Constitution of Kentucky, it should be possible to make successful arguments to avoid unfortunate decisions made by the U.S. Supreme Court as head of the federal court system.

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From *What is a Public Defender?* written by the classes of Mrs. Ponder, Mrs. Graves, Mrs. Coffey at Brodhead School 1995.

Children's Rights in the Criminal Justice System

Appeals, Fugitive

***In re J.J.*, 56 A.2d 1355 (Pa. 1995)**

Where an appeal was dismissed when the juvenile escaped from the custody, the appellate court had the discretion to reinstate that appeal because he had returned while the appeal was still pending.

Conditions of Confinement, Constitutionality

***Alexander S. v. Boyd*, 876 F.Supp. 773 (D.S.C. 1995)**

The fourteenth amendment mandates that juveniles confined in correctional institutions be provided with programming, staff, services, and physical space to protect their safety and to give them a reasonable opportunity to correct their behavior, while ensuring the safety and community.

E.R. v. McDonnell

A federal civil rights lawsuit challenging conditions of confinement at a Colorado juvenile detention facility was settled May 26, 1995. The suite was brought by the American Civil Liberties Union (ACLU) in December 1994 on behalf of youths detained at the facility. It alleged children who lived at the facility were being detained under cruel, dangerous and unconstitutional conditions. These conditions included excessive overcrowding resulting in inadequate educational services, poor supervision, interference with access to the courts, and unsafe living conditions. Under the settlement, state officials agreed to restrict the number of youths staying at the facility at any one time, ensure safe and sanitary conditions and provide services to meet individual needs.

M.K. v. Wallace

On August 18, 1995, the Kentucky Cabinet for Human Resources settled a civil lawsuit with Kim Brooks of the Children's Law Center before Federal District Court Judge Hon. William O. Bertlesman. The settlement requires that CHR provide counsel for public and youthful offenders committed to facilities operated or supervised by CHR. The statewide system of legal services shall pursue claims arising from or related to the fact, duration or conditions of confinement, or any claims cognizable under 42 U.S.C. § 1983 which involve violations of federal statutory or constitutional rights to the extent that such claims are related to the juvenile's confinement.

Confession, Admissibility

***Stone v. Farley*, 877 F.Supp. 1246 (N.D. Ind. 1995)**

Since a juvenile told the police he was an adult, his confessions were admissible, despite the police's failure to have him confer with an adult family member before waiving his rights. Police made good faith and diligent effort to find out if suspect was a juvenile.

***Burnham v. State*, 53 S.E.2d 449 (Ga. 1995)**

Incriminating statements made by 16 year old 22 hours after illegal arrest was not sufficiently attenuated from illegality of arrest to be admissible at trial.

Confession/Parental Notice

***J.R.N. v. State*, 84 P.2d 175 (Alaska Ct. App. 1994)**

Even though police officer did not formally inform juvenile of his right to immediate parental notice of arrest, juvenile voluntarily waived right to parental notice after responding negatively when police officer asked him if he wanted his parents to be called; juvenile was aware of right to notify parent through prior experience in juvenile system.

Confession/Voluntariness

***In re M.E.P.*, 23 N.W.2d 913 (Minn. Ct. App. 1994)**

Trial court did not clearly err in suppressing initial statements made by juveniles during police investigation, since juveniles were not given *Miranda* warnings; **and**
Statements by juveniles who were subjected to coercive and stress-inducing techniques by police officers during interviews were involuntary and were properly suppressed.

Confidentiality/Privilege, Police Records/Media Access

***Ogden Newspapers, Inc. v. City of Williamstown* 453 S.E.2d 631 (W.Va. 1994)**

Under the First Amendment and pursuant to request made under Freedom of Information Act, law enforcement officials were required to release a juvenile police report to the press, with all identifying information redacted.

Confidentiality/Privilege

***State ex re. Rowland v. O'Toole*, 884 S.W.2d 100 (Mo.Ct.App. 1994)**

Juvenile and parents sued another juvenile and parents for bringing false charges. The juvenile waived his privilege against the use and discovery of his juvenile records by bringing the civil action that placed his juvenile arrest and juvenile court proceedings at issue.

Confrontation

***In re Dixon*, 654 A.2d 1179 (Pa. Super. Ct. 1995)**

Juvenile charged with aggravated assault and reckless endangerment could cross-examine alleged victim about criminal charges pending against victim in order to show bias and motive to testify falsely in hopes of receiving favorable treatment.

Detention, Pretrial

***In re K.H.*, 647 A.2d 61 (D.C. 1994)**

Pretrial detention of juvenile for 213 days, due to alteration in original trial date did not violate due process.

Disposition, Least Restrictive

***In re D.M.Y.*, 892 S.W.2d 792 (Mo.Ct.App. 1995)**

Juvenile's placement in custody of division of youth services was least restrictive placement, since no suitable community based treatment service existed and reasonable efforts to keep juvenile at home had failed.

Disposition/Sentencing, Probation/Youthful Offenders

***United States v. Barial*, 31 F.3d 216 (4th Cir. 1994), reversing *United States v. Barial*, 841 F.Supp. 171 (E.D. Va. 1993), reported at 13;3 ABA Juv. & Ch. Welf.L.Rptr. 40 (May 1994)**

A special probation available to persons convicted of offenses described in the federal Controlled Substance Act (the Act) should have been an option for defendant who was convicted under a National Park Service regulation prohibiting identical conduct as that described in the Act.

Disposition/Sentencing, Family

***Loveless v. State*, 642 N.E.2d 974 (Ind. 1994)**

In sentencing 16-year-old defendant convicted of murder, evidence of defendant's dysfunctional family background as mitigating circumstance was irrelevant to her level of culpability and, therefore, trial court was not required to consider it.

Double Jeopardy

***Laswell v. Frey*, 45 F.3d 1011 (6th Cir. 1995)**

Probable cause hearing to continue juvenile's detention was not transformed into adjudication for double jeopardy purposes after juvenile admitted to charges against her; no inquiry had been made regarding nature and validity of charges and voluntariness of juvenile's admission.

Enhancement of Charge, Prior Adjudication

***In re J.E.M.*, 890 P.2d 364 (Kan.Ct.App. 1995)**

Juvenile's prior adjudications for theft could not be used to enhance subsequent juvenile charge from misdemeanor to felony theft. The Kansas code does not comport criminal acts of the part of any juvenile. Juvenile court has adjudications *not* convictions.

Free Speech

***L.A.T. v. State*, 650 So.2d 214 (Fla.Ct.App. 1995)**

Juvenile's loud and obscene protest of friend's arrest as "police brutality" and "Rodney King style" did not constitute fighting words and was protected under First Amendment; juvenile's protest did not urge crowd to respond, interfere with friend's arrest, or to otherwise breach the peace.

Handgun Statute, Constitutionality

***People v. Juvenile Court*, 893 P.2d 81 (Colo. 1995)**

A minor accused of possessing or committing a crime with a handgun may be presumed dangerous to the community and detained. Minor was accused of pointing a gun at two people. A hearing officer ordered the juvenile detained without bond under a new law that created a presumption that juveniles accused of possessing handguns were dangerous to the community.

IDEA/Special Education

***East Islip Union Free School District v. Anderson* 615 N.Y.S.2d 852 (S.Ct., Suffolk Co. 1994)**

School district sought preliminary injunction for student to be suspended from school and placed on home-bound instruction pending a psychiatric evaluation and review by District Committee on Special Education. Suffolk Co. Supreme Court held that equitable powers of court not limited by IDEA. However, school bears burden of showing that maintaining child in his or her current placement is substantially likely to result in harm to child or others.

Life Sentence, Constitutionality

***People v. Cooks*, 648 N.E.2d 190 (Ill.App.Ct. 1995)**

Statute imposing mandatory life sentence for juvenile convicted of two murders and tried as adult was not unconstitutional on its face or as applied to juvenile.

Media Access, Open Trial Records

***In re M.C.*, 527 N.W.2d 290 (S.D. 1995)**

A newspaper was not entitled to redacted copy of a transcript from a juvenile transfer hearing, or to request opening further juvenile hearings.

Notice, Parental

***In re C.R.H.*, 644 N.E.2d 1153 (Ill. 1994)**

A trial court was without jurisdiction to find minor was a juvenile delinquent where there was a failure to name the parents of the minor as respondents, or provide them with notice of the proceedings.

Placement, Authority of Court

***Arkansas Department of Human Services v. State*, 894 S.W.2d 592 (Ark. 1995)**

Statute governing placement of juvenile delinquents did not give trial court authority to order placement of juvenile in serious offender program.

***In re Lawson*, 648 N.E.2d 889 (Ohio Ct.App. 1994)**

Trial court had authority to order that juvenile delinquent, who was in custody of child welfare agency, be placed in residential treatment facility.

Procedure

***In re Victor B.*, 646 A.2d 1012 (Md. 1994)**

Criminal rules of procedure did not apply in a juvenile proceeding, thus finding that juvenile waived issue by failing to file pretrial motion to suppress was error. Informal nature of juvenile court excused waiver.

Psychiatric Evaluation, Presence of Counsel

***In re Maricopa County*, 893 P.2d 60 (Ariz.Ct.App. 1994)**

Court order barring juvenile's counsel from attending court-ordered psychiatric evaluation did not violate juvenile's right against self-incrimination, since juvenile placed her mental condition in issue by

offering evidence of battered child syndrome as defense to murder.

Right to Counsel

***In re Doe*, 881 P.2d 533 (Hawaii 1994)**

Thirteen-year-old girl did not knowingly and voluntarily waive right to counsel, by receiving all ten petitions against her and stating that she understood each charge. Court failed to read the petition or explain the elements necessary to establish the charge of assault. There must be a "penetrating and comprehensive examination."

Schools/Search and Seizure

***In re S.K.*, 647 A.2d 952 (Pa.Super.Ct. 1994)**

Security officer's pat down of juvenile was reasonable since officer had reasonable suspicion that juvenile was hiding cigarettes; and cocaine found during search was admissible in delinquency proceeding.

Sentence, Life Imprisonment

***Ritchie v. State*, 651 So.2d 167 (Fla.Ct.App. 1995)**

Trial court did not have to comply with sentencing guidelines for imposing adult sanctions when juvenile was charged with offense punishable by death or life imprisonment, but found guilty of lesser included offense punishable by life imprisonment.

Speedy Trial

***United States v. Three Male Juveniles* 49 F.3d 1058 (5th Cir. 1995)**

Federal statute provision for 30 day speedy trial period for alleged delinquents begins with arrest and detention by federal authorities, not state authorities.

Statute/Delinquency, Age of Child

***In re Welfare of S.A.C.* 529 N.W.2d 517 (Minn.Ct.App. 1995)**

A nine-year-old child was not "delinquent" under Juvenile Court Act; legislature specified children under 10 years of age are not delinquent, but are children in need of protection services.

Transfer

***In re J.K.C.*, 891 P.2d 1169 (Mont. 1995)**

Juvenile's transfer to adult court based solely on seriousness of charged offenses was abuse of discretion; there was no evidence that juvenile facility would be inappropriate, and juvenile probation officers testified juvenile facility was secure and adult system lacked sufficient rehabilitation.

***In re R.T.*, 648 N.E.2d 1943 (Ill.App.Ct. 1995)**

Trial judge's denial of motion to transfer juveniles charged with rape and murder to adult court, based on incorrect belief there was insufficient evidence upon which grand jury could indict, was abuse of discretion.

***Ex parte S.B.*, 650 So.2d 953 (Ala. 1994)**

Juvenile's transfer to adult court was improper, since juvenile court failed to determine whether juvenile had delinquency record or had past treatment in juvenile system as required by statute.

***United States v. Juvenile Male #1*, 47 F.3d 68 (2d Cir. 1995)**

A federal trial court did not abuse its discretion in denying the government's motion to prosecute a juvenile charged with cocaine base distribution as an adult. It was within the district court's authority to rely more heavily on the juvenile's social and economic background and the lack of past treatment efforts than on the seriousness of the offense and his juvenile record.

***In re W.T.L.*, 656 A.2d 113 (D.C. 1995)**

Transfer statue does not violate due process despite its presumption that juvenile committed offense with which he was charged.

Transfer, Admissibility of Confession

***Ring v. State*, 894 S.W.2d 944 (Ark. 1995)**

Arkansas statute allows for case involving juvenile to begin in circuit court. At hearing on juvenile's motion to send case to juvenile court prosecutor used juvenile's confession obtained without parental consent. Appellate court held both that use of statement was not error because juvenile tried as adult (Motion to Transfer was denied) and that use of statement was harmless error because prosecution had other proof of serious and violent nature of offense to justify retaining case in circuit court.

Transfer, Age Pending Trial

***Hughes v. State*, 653 A.2d 241 (Del. 1994)**

A statutory amendment's elimination of judicial inquiry into the basis of felony charges against a child who reaches 18 years of age while awaiting trial violates constitutional guarantees of due process and equal protection of laws.

Transfer, Appeal Before Trial

***U.S. v. One Juvenile Male* 40 F.3d 841 (6th Cir. 1994)**

An order transferring a juvenile to be tried as an adult satisfies the *Cooper & Lybrand v. Livesay*, 437 U.S. 463, 468, (1978) test as an immediately appealable collateral order. The district court did not abuse its discretion in granting transfer motion because the district court's decision was based on the "heinous nature of the alleged offenses."

Transfer, Constitutional Rights

***State v. Martin*, 530 N.W.2d 420 (Wis.Ct.App. 1995)**

A juvenile who committed battery in a secured correctional facility did not have a constitutional right to individualized treatment, therefore the "reverse waiver" procedure did not violate his substantive due process rights; the statutory provisions invoking a "reverse waiver" procedure and imposing a minimum sentence did not create arbitrary and irrational classifications in violation of his equal protection rights.

Transfer, Lesser Included Offense

***D.D.A. v. State*, 650 So.2d 571 (Ala.Crim.App. 1994)**

Although petition charged juvenile with capital intentional murder, transfer to adult court on charge of reckless murder was proper since, under particular facts, reckless murder was lesser included offense of capital offense.

Transfer, Mental Health

***M.M. v. State*, 649 So.2d 1345 (Ala.Crim.App. 1994)**

The trial court should have considered the out-of-state mental health records of a juvenile charged with murder before rendering an opinion concerning the juveniles amenability to civil commitment for purposes of deciding whether the juvenile should be tried as an adult.

Transfer/Rehabilitation

***Patton v. Toy*, 867 F.Supp 356 (D.S.C. 1994)**

Transfer of a juvenile violated due process and fundamental fairness where the transfer order did not include specific reasons why the juvenile could not be rehabilitated.

Transfer/Withdrawal of Motion

***State v. Superior Court*, 884 P.2d 270 (Ariz.Ct.App. 1994)**

Prosecutor has the power to withdraw a previously-filed transfer motion and cannot be compelled to proceed by the juvenile court.

Waiver

***S.S. v. Iowa District Court for Black Hawk County* 428 N.W.2d 130 (Iowa 1995)**

District associate judge lacked subject matter jurisdiction over juvenile's appeal from juvenile court order waiving him to adult criminal court.

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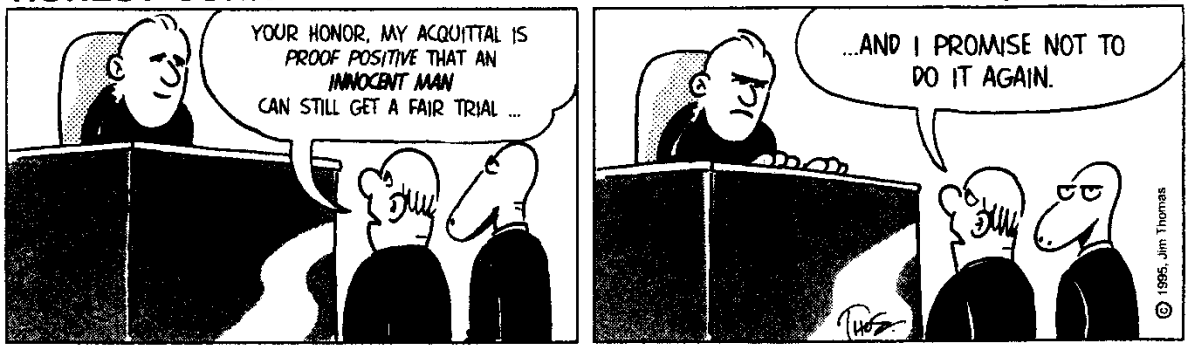
Gun Free Schools Act vs. IDEA

Gun Free Schools Act, 20 U.S.C. Sec. 8921 requires states to mandate one-year expulsion for *any student* who brings a gun to school. The expulsion policy must be in place by October 20, 1995 or the state will lose federal education money.

However, this required expulsion conflicts with the protections accorded students with mental, emotional, physical or learning disabilities under the Individuals with Disabilities Act (IDEA). Under *Honig v. Doe*, 484 U.S. 305 (1988) such students cannot be suspended for more than 10 days without following strict due process procedures.

HONEST JOHN **JIM THOMAS**



Capital Case Review

Following are the cases docketed for United States Supreme Court action during the 1995-1996 term, which begins on October 3, 1995.

CERT GRANTED

Lonchar v. Thomas, 95-5015, June 29, 1995

[Decision below: 58 F.3d 590 (11th Cir. 1995)]

Questions presented:

Was Eleventh Circuit correct in creating, without judicial precedent and without notice to petitioner, novel rule to bar first petition for habeas corpus relief ever filed by petitioner, on basis of amorphous equitable notions that extend well beyond Rule 9 of Rules Governing Section 2254 Petitions when everyone had previously assured petitioner that there would be no bar to his federal petition?

Without proper notice of novel rule and adequate opportunity to develop evidence, were mentally ill petitioner's varying motivations behind filing good faith petition for habeas corpus relief for first time in federal court properly considered as virtually dispositive of court's duty to conscientiously consider issues presented?

Thompson v. Keohane, 94-6615, January 23, 1995

[Decision below: 1994 wl 424489 (9th Cir. 1994) (unpublished)]

Question presented:

What standard of review should appellate court employ when there is conflicting caselaw on standard of review of when suspect has been taken "into custody," triggering requirement that *Miranda* [*v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),] warnings be administered?

DOCKETED CASES

Powell v. Texas, 94-1859, May 11, 1995

[Decision below: 897 S.W.2d 307 (Tex. 1995) (*en banc*)]

Questions presented:

Does state's use of psychiatric testimony ruled by this court to have been unconstitutionally obtained violate this court's mandate and Fifth and Sixth Amendments, and deny due process of law?

Does packing trial court with police officers and other persons wearing badges and pro-prosecution sign, and then referring to this display during summations in effort to influence jury and trial judge, violate due process and Eighth Amendments and require new trial?

South Carolina v. Fossick, 94-1939, May 24, 1995

[Decision below: 453 S.E.2d 899 (S.C. 1995)]

Questions presented:

Did state court hearing judge err in finding that solicitor's closing argument reference to petitioner's lack of remorse constituted violation of petitioner's Fifth Amendment privilege against self-incrimination in view of argument that privilege was waived when petitioner voluntarily confessed to murder and when he testified in his own behalf at trial?

Did court below err in finding that trial counsel's failure to object to solicitor's closing argument reference to petitioner's lack of remorse constituted violation of petitioner's Sixth Amendment right to effective assistance of counsel, in view of argument that reference did not infect trial with unfairness so as to make resulting conviction denial of due process and warranting reversal of conviction?

Wood v. Bartholomew, 94-1419, February 14, 1995

[Decision below: 34 F.3d 870 (9th Cir. 1994)]

Questions presented:

Does Due Process Clause, as applied in *Brady v. Maryland*, 373 U.S. 83 [, 83 S.Ct. 1194, 10 L.Ed.2d 215] (1963), require prosecutors to disclose information that neither is admissible in evidence nor will lead to admissible evidence, if information may affect preparation or presentation of defense?

Loving v. United States, 94-1966, June 2, 1995

[Decision below: *sub nom. United States v. Loving*, 41 M.J. 213 (CMA 1994)]

Questions presented:

Can Congress' legislative responsibility to establish aggravating circumstances to be used in military capital cases be delegated to president consistently with separation of governmental powers required by Article I, Sections 1 and 8, and Eighth Amendment?

Has Congress implicitly delegated to president its legislative authority to establish aggravating circumstances to be used in military capital cases?

If there has been such implicit delegation of authority to president, has Congress established constitutionally adequate standards to guide president's exercise of legislative authority?

Do Fifth and Eighth Amendments permit capital defendant to be convicted of murder and sentenced to death by eight-person jury?

Nebraska v. Rust, 94-1969, June 1, 1995

[Decision below: 528 N.W.2d 320 (Neb. 1995)]

Questions presented:

Does jeopardy attach in capital sentencing proceeding when it can be demonstrated that state has met its only burden of proof under state law?

Is Double Jeopardy Clause implicated in direct appellate review of capital sentencing proceeding?

Mondragon v. Smith, 94-1973, June 5, 1995

[Decision below: *sub nom. Smith v. Kerby*, 50 F.3d 801 (10th Cir. 1995)]

Questions presented:

Is actual prejudice suffered by state--founded on practical inability to retry criminal case some 18 years after state court jury rendered two first-degree murder guilty verdicts--legitimate factor in determining whether to grant equitable relief in federal habeas corpus action?

Is comprehensive and mandatory review by court below of each and every federal habeas corpus appeal, irrespective of denial of certificate of probable cause by district court, directly contrary to language and legislative intent of Section 2253?

Dutton v. Houston, 94-2111, June 26, 1995

[Decision below: *sub nom. Houston v. Dutton*, 50 F.2d 381 (6th Cir. 1995)]

Questions presented:

Does *Brecht v. Abrahamson* [, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)] harmless error standard require reversal of first-degree murder conviction on basis of jury instruction that contained unconstitutional mandatory rebuttable presumption on element of "malice," in case in which (a) instruction at issue did not equate concept of "malice" with "intent to kill," (b) other jury instructions on separate and distinct element of "willfulness" accurately described state's burden of proving beyond reasonable doubt that habeas petitioner intended to kill victim, and (c) there was overwhelming evidence, independent of presumption, that habeas petitioner acted with "malice" toward victim, as that term was defined in court's instructions?

On collateral review of death sentence imposed by jury in "weighing" state whose appellate courts perform harmless error analysis of alleged sentencing errors, must federal habeas court automatically vacate any sentence that is based in part on invalid aggravating circumstance, or is court instead authorized to determine whether use of invalid aggravator was harmless error?

Martinez v. Texas, 95-1, June 30, 1995

[Decision below: 899 S.W.2d 655 (Tex. App. (1994) (*en banc*)]

Questions presented:

Is failure to specifically instruct jury that it may not impose penalty of death based upon co-defendant's responsibility and moral guilt fundamental error that appellate court cannot evaluate for harm?

Does imposition of death sentence violate Eighth Amendment because jury is instructed in manner that allowed it to consider evidence of co-defendant's responsibility and moral guilt?

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Questions/Answers on Disciplining Students with Disabilities

UNITED STATES
DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION
AND REHABILITATIVE SERVICES

OSEP- 95-I6

OSEP MEMORANDUM

TO: Chief State School Officers

FROM: Judith E. Heumann
Assistant Secretary
Office of Special Education and
Rehabilitative Services

Thomas Hehir, Director
Office of Special Education
Programs

SUBJECT: Questions and Answers on
Disciplining Students with
Disabilities

The purpose of this memorandum is to provide guidance about the current legal requirements of the Individuals with Disabilities Education Act (IDEA) for addressing misconduct of students with disabilities and to correct the misunderstanding that students with disabilities are exempt from discipline under current law. This memorandum also includes a discussion of the recent amendments made to IDEA by the Improving America's Schools Act and the recently enacted Gun-Free Schools Act as they apply to students with disabilities who bring firearms to school. If changes-are made to current law in the reauthorization of the IDEA, further guidance will be issued to reflect them.

Two other Federal laws that are enforced by the Department's Office for Civil Rights (OCR)--Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA), Title II--also govern school districts' obligations to provide educational services to disabled students. Unless otherwise noted, compliance with the IDEA requirements as set forth in this memorandum would satisfy the requirements of Section 504 and Title II of the ADA.

Public Law 94-142, the Education for All Handicapped Children's Act of 1975 [now Part B of IDEA] was enacted to address concerns that disabled students, particularly those whose disabilities had behavioral components, were excluded from any public education or were not provided an education appropriate to their unique learning needs. Thus, IDEA recognizes the right of each disabled student to a free appropriate public education (FAPE), which includes an array of rights and procedural protections for eligible students and their parents. One of the central tenets of IDEA is the requirement that each disabled student's program and placement must be individually designed to meet his or her unique learning needs. Today, as school safety takes on increasing importance for all of us, we want to underscore the compatibility of guaranteeing the rights of students with disabilities with the goal of school safety.

Clearly, school safety starts with the commitment of every student to take full responsibility for his or her own safety and the safety of others both in and out of school. This commitment to personal responsibility is essential to ensuring that the goal of safe schools is realized. For any student who misbehaves, a school should decide what action is most likely to correct the misconduct. For a disabled student, this decision may need to take into account the student's disability.

As we travel throughout the country, we have met with parents and school officials, who have underscored the importance of working cooperatively to address concerns when signs of misconduct by students with disabilities first appear before more drastic measures are considered. We also have visited schools that have implemented models for behavior management so effectively that, in many instances, the need for subsequent interventions has been greatly reduced, or even eliminated entirely. The Department encourages and supports the development and dissemination, at the local, State and national levels, of effective classroom and behavior management practices. We also believe that there are a number of positive steps that educators can take to address misconduct as soon as it appears to prevent the need for more drastic measures. For students whose disabilities have behavioral aspects, preventive measures, such as behavior management plans, should be considered and can be facilitated through the individualized education program (IEP) and placement processes required by IDEA. Teacher training initiatives in conflict management and behavior management strategies also should be considered as these strategies are implemented.

If the steps described above are not successful, the appropriate use of measures such as study carrels, time-outs, or other restrictions in privileges could also be considered, so long as they are not inconsistent with a student's IEP. In addition, a disabled student may be suspended from school for up to ten school days. No prior determination of whether the misconduct was a manifestation of the student's disability is required before

any of the above measures can be implemented. If the misconduct is such that more drastic measures would be called for, educators should review the student's current educational program and placement and consider whether a change in placement would be an appropriate measure to address the misconduct.

Where educators believe that more drastic measures are called for, a disabled student may be removed from school for more than ten school days only if the following steps are taken. First, a group of persons knowledgeable about the student must determine whether the student's misconduct was a manifestation of his or her disability. If this group determines that the misconduct was not a manifestation of the student's disability, the student may be expelled or suspended from school for more than ten school days, provided applicable procedural safeguards are followed and educational services continue during the period of disciplinary removal.

However, if the group determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days. Educators still can address the misconduct through appropriate instructional and/or related services, including conflict management and/or behavior management strategies, student and teacher training initiatives, measures such as study carrels, time-outs, or other restrictions in privileges, so long as they are not inconsistent with a student's IEP, and, as a last resort, through change of placement procedures in accordance with IDEA. Moreover, the school district has the option of seeking a court order at any time to remove the student from school or to change the student's placement if it believes that maintaining the student in the current educational placement is substantially likely to cause injury.

In addition, recent amendments to IDEA made by the Improving America's Schools Act permit educators to make immediate interim changes of placement for students with disabilities who bring firearms to school for up to 45 calendar days. If the student's parents request a due process hearing, the student must remain in the interim placement until the completion of all proceedings, unless the parents and school district can agree on another placement.

The questions and answers with this memorandum provide a description of the options outlined above in greater detail.

We hope that this information will be helpful as we all strive to promote safe and effective schools. We urge you and your staff to review this information carefully and to disseminate it to interested individuals and organizations throughout your State. For easy reference a table of contents, setting forth all sixteen questions and their corresponding page numbers, immediately follows.

Further questions can be directed to the Office of Special Education Programs by contacting Ms. Rhonda Weiss at (202) 205-8824 or Dr. JoLeta Reynolds at (202) 205-5507.

Attachment
cc: State Directors of Special Education
RSA Regional Commissioners
Regional Resource Centers
Federal Resource Center
Special Interest Groups
Parent Training Centers
Independent Living Centers
Protection and Advocacy Agencies

♦ ♦ ♦ ♦ ♦ ♦

QUESTIONS AND ANSWERS ON DISCIPLINING STUDENTS WITH DISABILITIES

case-by-case basis mean that the decision regarding whether the student's bringing a firearm to school was a manifestation of the student's disability and placement decisions can be made by the chief administering officer?

16 What immediate steps can school districts take to remove a student with a disability who brings a firearm to school?

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QUESTIONS AND ANSWERS ON DISCIPLINING STUDENTS WITH DISABILITIES

QUESTION 1: Under IDEA, what steps should school districts take to address misconduct when it first appears?

ANSWER: School districts should take prompt steps to address misconduct when it first appears. Such steps could, in many instances, eliminate the need to take more drastic measures. These measures could be facilitated through the individualized education program (IEP) and placement processes required by IDEA. For example, when misconduct appears, determinations could be made as to whether the student's current program is appropriate and whether the student could benefit from the provision of more specialized instructional and/or related services, such as counseling and psychological services or social-work services in schools. In addition, training of the teacher in effective use of conflict management and/or behavior management strategies also could be extremely effective. In-service training for all personnel who work with the student, and when appropriate, other students, also can be essential in ensuring the successful implementation of the above interventions.

QUESTION 2: Are there additional measures that educators may use in addressing misconduct of students with disabilities, and if so, under what circumstances may such measures be used?

ANSWER: The use of measures such as study carrels, time-outs, or other restrictions in privileges is permissible so long as such measures are not inconsistent with a student's IEP. While there is no requirement that such measures be specified in a student's IEP, IEP teams could determine that it would be appropriate to address their use in individual situations. Another possibility is an in-school change in a student's current educational program or placement, or even a removal of a student with a disability from school.

Where these changes are long-term (more than ten school days), they are considered a change in placement. IDEA requires that parents be given written notice before a change in placement can be implemented. (See question 7). However, where in-school discipline or short-term suspension (ten school days or less) is involved, this would not be considered a change in placement, and IDEA's parent-notification provisions would not apply. Also, there is no requirement for a prior determination of whether the student's misconduct was a manifestation of the student's disability. (See question 6).

QUESTION 3: Is a series of short-term suspensions considered a change in placement?

ANSWER: A series of short-term suspensions in the same school year could constitute a change in placement. Factors such as the length of each suspension, the total amount of time that the student is excluded from school, the proximity of the suspensions to each other, should be considered in determining whether the student has been excluded from school to such an extent that there has been a change in placement. This determination must be made on a case-by-case basis.

QUESTION 4: Are there specific actions that a school district is required to take during a suspension of ten school days or less?

ANSWER: There are no specific actions under Federal law that school districts are required to take during this time period. If the school district believes that further action to address the misconduct and prevent future misconduct is warranted, it is advisable to use the period of suspension for preparatory steps. For example, school officials may convene a meeting to initiate review of the student's current IEP to determine whether implementation of a behavior management plan would be appropriate. If long-term disciplinary measures are being considered, this time also could be used to convene an appropriate group to determine whether the misconduct was a manifestation of the student's disability.

If the student's IEP or placement needs to be revised, the school district should propose the modification. If the student's parents request a due process hearing on the proposal to change the student's IEP or placement, the school district may seek to persuade the parents to agree to an interim placement for the student while due process proceedings are pending. If the school district and parents cannot agree on an interim placement for the student while the due process hearing is pending, and the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others, the school district could seek a court order to remove the student from school. (See question 5).

QUESTION 5: Under what circumstances may a school district seek to obtain a court order to remove a student with a disability from school or otherwise change the student's placement?

ANSWER: A school district may seek a court order at any time to remove any student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others.[1] Prior to reaching the point where there is a need to seek a court order, a school district should make every effort to reduce the risk that the student will cause injury. Efforts to minimize the risk of injury should, if appropriate, include the training of teachers and other affected personnel, the use of behavior intervention strategies and the provision of appropriate special education and related services.[2] In a judicial proceeding to secure a court order, the burden is on the school district to demonstrate to the court that such a removal or change in placement should occur to avoid injury.

QUESTION 6: What is the first step that school districts must take before considering whether a student with a disability may be expelled or suspended from school for more than ten school days?

ANSWER: The first step is for the school district to determine whether the student's misconduct was a manifestation of the student's disability. This determination must be made by a group of persons knowledgeable about the student, and may not be made unilaterally by one individual. *See*, 34 CFR §300.533(a)(3) (composition of the placement team); 34 CFR §300.344(a)(1)-(5) (participants on the IEP team). If the group determines that the student's misconduct was not a manifestation of his or her disability, the school district may expel or suspend the student from school for more than ten school days, subject to the conditions described below. If an appropriate group

of persons determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days for the misconduct. However, educators may use other procedures to address the student's misconduct, as described in question 10 below.

QUESTION 7: If an appropriate group determines that a student's misconduct was not a manifestation of his or her disability, what is the next step that school districts must take before expelling or suspending the student from school for more than ten school days?

ANSWER: A long-term suspension or expulsion is a change in placement. Before any change in placement can be implemented, the school district must give the student's parents written notice a reasonable time before the proposed change in placement takes effect.[3] This written notice to parents must include, among other matters, the determination that the student's misconduct was not a manifestation of the student's disability and the basis for that determination, and an explanation of applicable procedural safeguards, including the right of the student's parents to initiate an impartial due process hearing to challenge the manifestation determination and to seek administrative or judicial review of an adverse decision.

If the student's parents initiate an impartial due process hearing in connection with a proposed disciplinary exclusion or other change in placement, and the misconduct does not involve the bringing of a firearm to school (see question 11), the "pendency" provision of IDEA requires that the student must remain in his or her current educational placement until the completion of all proceedings.[4] If the parents and school district can agree on an interim placement, as is frequently the case, the student would be entitled to remain in that placement until the completion of all proceedings. During authorized review proceedings, school districts may use measures, in accordance with question 2 above, to address the misconduct.

QUESTION 8: Under IDEA, where a student is suspended for more than ten school days or expelled for misconduct that was not a manifestation of his or her disability, does the school have any continuing obligations to the student?

ANSWER: Under IDEA, as a condition for receipt of funds, States must ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities in mandated age ranges. Therefore, in order to meet the FAPE requirements of IDEA, educational services must continue for students with disabilities who are excluded for misconduct that was not a manifestation of their disability during periods of disciplinary removal that exceed ten school days. Thus, a State that receives IDEA funds must continue educational services for these students. However, IDEA does not specify the particular setting in which continued educational services must be provided to these students. During the period of disciplinary exclusion from school, each disabled student must continue to be offered a program of appropriate educational services that is individually designed to meet his or her unique learning needs. Such services may be provided in the home, in an alternative school, or in another setting.

QUESTION 9: Under Section 504 and Title II of the ADA, where a student is expelled or suspended for more than ten school days for misconduct that was not a manifestation of his or her disability, does the school have any continuing obligations to the student?

ANSWER: Two related Federal laws, which are enforced by the Department's Office for Civil Rights (OCR), also contain requirements relating to disabled students in public elementary or secondary education programs. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination on the basis of disability by recipients of Federal financial assistance, including IDEA funds. The Section 504 regulation at 34 CFR Part 104, §104.33-104.36, contains free appropriate public education requirements that are similar to the IDEA FAPE requirements. The Americans with Disabilities Act of 1990 (ADA), Title II, extends Section 504's prohibition of discrimination on the basis of disability to all activities of State and local governments, whether or not they receive Federal funds. This includes all public school districts. The Department interprets the requirements of Title II of the ADA as consistent with those of Section 504. Throughout the remainder of this document, references to Section 504 also encompass Title II of the ADA.

As is the case under IDEA, under Section 504, students with identified disabilities may be expelled or suspended from school for more than ten school days only for misconduct that was not a manifestation of the student's disability. However, the Department has interpreted the nondiscrimination provisions of Section 504 to permit school districts to cease educational services during periods of disciplinary exclusion from school that exceed ten school days if nondisabled students in similar circumstances do not continue to receive educational services.

In implementing their student-discipline policies, school districts must comply with the requirements of IDEA and Section 504. Further questions about the application of the requirements of Section 504 and Title II of the ADA should be directed to your OCR regional office.

QUESTION 10: What options are available to school districts in addressing the misconduct of students with disabilities whose misconduct was a manifestation of his or her disability?

ANSWER: If a group of persons knowledgeable about the student determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days. However, it is recommended that school officials review the student's current educational placement to determine whether the student is receiving appropriate instructional and related services in the current placement and whether conflict management and or behavior management strategies should be implemented for the student as well as for teachers and all personnel who work with the student, and for other students if appropriate. A change in placement, if determined appropriate, could be implemented subject to applicable procedural safeguards (see question 7). For example, the school district could propose to place the student in another class in the same school or in an alternative setting, in light of the student's particular learning needs.

The school district also would have the option of suspending the student from school for ten school days or less. The school district also has the option of seeking a court order at any time to remove the student from school or to change the student's placement if it believes that maintaining the student in the current placement is substantially likely to result in injury to the student or to others. (See question 5).

QUESTION 11: Are there any special provisions of IDEA that are applicable to students with disabilities who bring firearms to school?

ANSWER: Recent amendments to IDEA made by the Improving America's Schools Act give school authorities addi-

tional flexibility in protecting the safety of other students when any student with a disability has brought a firearm[5] to a school under a local school district's jurisdiction. These amendments to IDEA took effect as of October 20, 1994.

Even before determining whether the behavior of bringing a firearm to school was a manifestation of the student's disability, the school district may place the student in an interim alternative educational setting, in accordance with State law, for up to 45 calendar days. The interim alternative educational setting must be decided by the participants on the student's IEP team described at 34 CFR §300.344(a)(1)-(a)(5), which include the student's teacher, an agency representative who is qualified to provide or supervise the provision of special education, the student's parents, and the student, if appropriate. However, the student's placement cannot be changed until the IEP team has been convened and determined the interim alternative educational placement that the team believes would be appropriate for the student.[6] If the parents disagree with the alternative educational placement or the placement that the school district proposes to follow the alternative placement and the parents initiate a due process hearing, then the student must remain in the alternative educational setting during authorized review proceedings, unless the parents and the school district can agree on another placement.

QUESTION 12: Under the provision described in question 11 above, how long can a student be placed in an interim alternative educational setting?

ANSWER: A student with a disability who has brought a firearm to a school under a local school district's jurisdiction may be placed in an interim alternative educational setting, in accordance with State law, for up to 45 calendar days. However, if the student's parents initiate a due process hearing and if the parties cannot agree on another placement, the student must remain in that interim placement during authorized review proceedings. In this situation, the student could remain in the interim alternative educational setting for more than 45 calendar days.

QUESTION 13: Does the Gun-Free Schools Act apply to students with disabilities?

ANSWER: The Gun-Free Schools Act applies to students with disabilities. The Act must be implemented consistent with IDEA and Section 504. The Gun-Free Schools Act states, among other requirements, that each State receiving Federal funds under the Elementary and Secondary Education Act shall have in effect a State law requiring local educational agencies to expel from school for not less than one year a student who brings a firearm to school under the jurisdiction of local educational agencies in that State, except that the State law must allow the local educational agency's chief administering officer to modify the expulsion requirement for a student on a case-by-case basis. The Gun-Free Schools Act explicitly states that the Act must be construed in a manner consistent with the IDEA.

QUESTION 14: How can school districts implement policies under the Gun-Free Schools Act in a manner that is consistent with the requirements of IDEA and Section 504?

ANSWER: Compliance with the Gun-Free Schools Act can be achieved consistent with the requirements that apply to students with disabilities as long as discipline of such students is determined on a case-by-case basis in accordance with IDEA and Section 504. Under the provision that permits modification of the expulsion requirement on a case-by-case basis, the requirements of IDEA and Section 504 can be met. IDEA and Section 504 require a determination by a group of persons knowledgeable about the student on whether the bringing of the firearm to school was a manifestation of the student's disability. Under IDEA and Section 504, a student with a disability may be expelled only if this group of persons determines that the bringing of a firearm to school was not a manifestation of the student's disability, and after applicable procedural safeguards have been followed.

For students with disabilities eligible under IDEA who are expelled in accordance with these conditions, educational services must continue during the expulsion period. The Gun-Free Schools Act also states that nothing in that Act shall be construed to prevent a State from allowing a school district that has expelled a student from such a student's regular school setting from providing educational services to that student in an alternative educational setting. For students with disabilities who are not eligible for services under IDEA, but who are covered by Section 504 and are expelled in accordance with the above conditions, educational services may be discontinued during the expulsion period if nondisabled students in similar circumstances do not receive continued educational services.

QUESTION 15: Does the authority of the school district's chief administering officer, under the Gun-Free Schools Act, to modify the expulsion requirement on a case-by-case basis mean that the decision regarding whether the student's bringing a firearm to school was a manifestation of the student's disability and placement decisions can be made by the chief administering officer?

ANSWER: No. As discussed above, all of the procedural safeguards and other protections of IDEA and Section 504 must be followed. Once it is determined by an appropriate group of persons that the student's bringing a firearm to school was not a manifestation of the student's disability, the school district's chief administering officer may exercise his or her decision-making authority under the Gun-Free Schools Act in the same manner as with nondisabled students in similar circumstances. However, for students with disabilities who are eligible under IDEA and who are subject to the expulsion provision of the Gun-Free Schools Act, educational services must continue during the expulsion period. By contrast, if it is determined that the student's behavior of bringing a firearm to school was a manifestation of the student's disability, the chief administering officer must exercise his or her authority under the Gun-Free Schools Act to determine that the student may not be expelled for the behavior. However, there are immediate steps that may be taken, including removal. (See question 16).

QUESTION 16: What immediate steps can school districts take to remove a student with a disability who brings a firearm to school?

ANSWER: A student with a disability who brings a firearm to school may be removed from school for ten school days or less, and placed in an interim alternative educational setting for up to 45 calendar days. (See questions 2 and 11). However, if the parents initiate due process, the student must remain in the interim alternative placement during authorized review proceedings, unless the parents and school district can agree on a different placement. (See questions 11 and 12). In addition, school districts may initiate change in placement procedures for such a student, subject to the parents' right to due process. A school district also could seek a court order if the school district believes that the student's continued presence in the classroom is substantially likely to result in injury to the student or to others. (See question 5).

FOOTNOTES

[1]*Honig v. Doe*, 108 S.Ct. at 606.

[2]See *Light v. Parkway*, C-2 Sch. Dist., 41 F.3d 1223 (8th Cir. 1994), where the Court of Appeals for the Eighth Circuit (Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota, and South Dakota), held that in addition to showing that a student is substantially likely to cause injury, the school district must show that it has made reasonable efforts to accommodate the student's disabilities so as to minimize the likelihood that the student will injure him or herself or others.

[3]34 CFR §300.504(a) and 300.505 (requirements for prior written notice to parents and content of notice).

[4]For a student not previously identified by the school district as a student potentially in need of special education, a parental request for evaluation or a request for a due process hearing or other appeal after a disciplinary suspension or expulsion has commenced does not obligate the school district to reinstitute the student's prior in-school status. This is because in accordance with the "stay-put" provision of IDEA, the student's "then current placement" is the out-of-school placement. After the disciplinary sanction is completed, if the resolution of the due process hearing is still pending, the student must be returned to school as would a nondisabled student in similar circumstances. It should be noted that, pending the resolution of the due process hearing or other appeal, a court could enjoin the suspension or expulsion and direct the school district to reinstate the student if the court determines that the school district knew or reasonably should have known that the student is a student in need of special education.

[5]This amendment to IDEA uses the term "weapon" and states that "weapon" means a firearm as such term is defined in section 921(a)(3) of Title 18, United States Code. The Gun-Free Schools Act also uses the term "weapon."

[6]Under IDEA, a student with a disability who has brought a firearm to school may be removed from school or subjected to in-school discipline that removes the student from the current placement for ten school days or less. Therefore, before the student is placed in the interim alternative educational setting in accordance with the IEP team's decision, the school district has the option of removing the student from school, using other in-school discipline, or placing the student in an alternative setting for ten school days or less. (See questions 2 and 3).

PROVISIONS OF KENTUCKY LAW REGARDING DISCIPLINING STUDENTS WITH DISABILITIES

As a caveat to the preceding OSEP memorandum, Kentucky has a statute and corresponding regulations on the long-term suspension and expulsion from school of students with disabilities. (See KRS 158.150(4) and 707 KAR 1:180, Section 14.) The statute and regulations modify the information and the charts in the memorandum as follows:

1. In Kentucky, a student with a disability has a change in placement when he or she has been suspended for more than 10 *cumulative* days during the school year. This is a higher standard than that imposed by federal law. (See Question 3.)

2. When a long-term suspension or expulsion is being considered for a student with a disability, Kentucky law requires that *first*, the IEP team (the Admissions and Release Committee or ARC) shall determine whether the IEP and placement are appropriate and are being fully and correctly implemented. If the answer is no, appropriate modifications shall occur and no further disciplinary action occurs. (This is different from the answer given in Question 6, under federal law.)

   If the ARC determines that the IEP and placement are appropriate and are being fully and correctly implemented, then the ARC shall consider whether the behavior was a manifestation of the student's disability. The sequence of steps in Question 6 shall then be followed.

3. After a suspension for more than 10 days during a school year has occurred, the ARC shall meet to review placement and determine whether regular suspension/expulsion proceedings apply. In Kentucky, *additional evaluations shall be completed, if necessary.*

NOTE: Section 504 of the Rehabilitation Act also requires that evaluations be conducted prior to any significant change of placement, which would include long-term suspension or expulsion.

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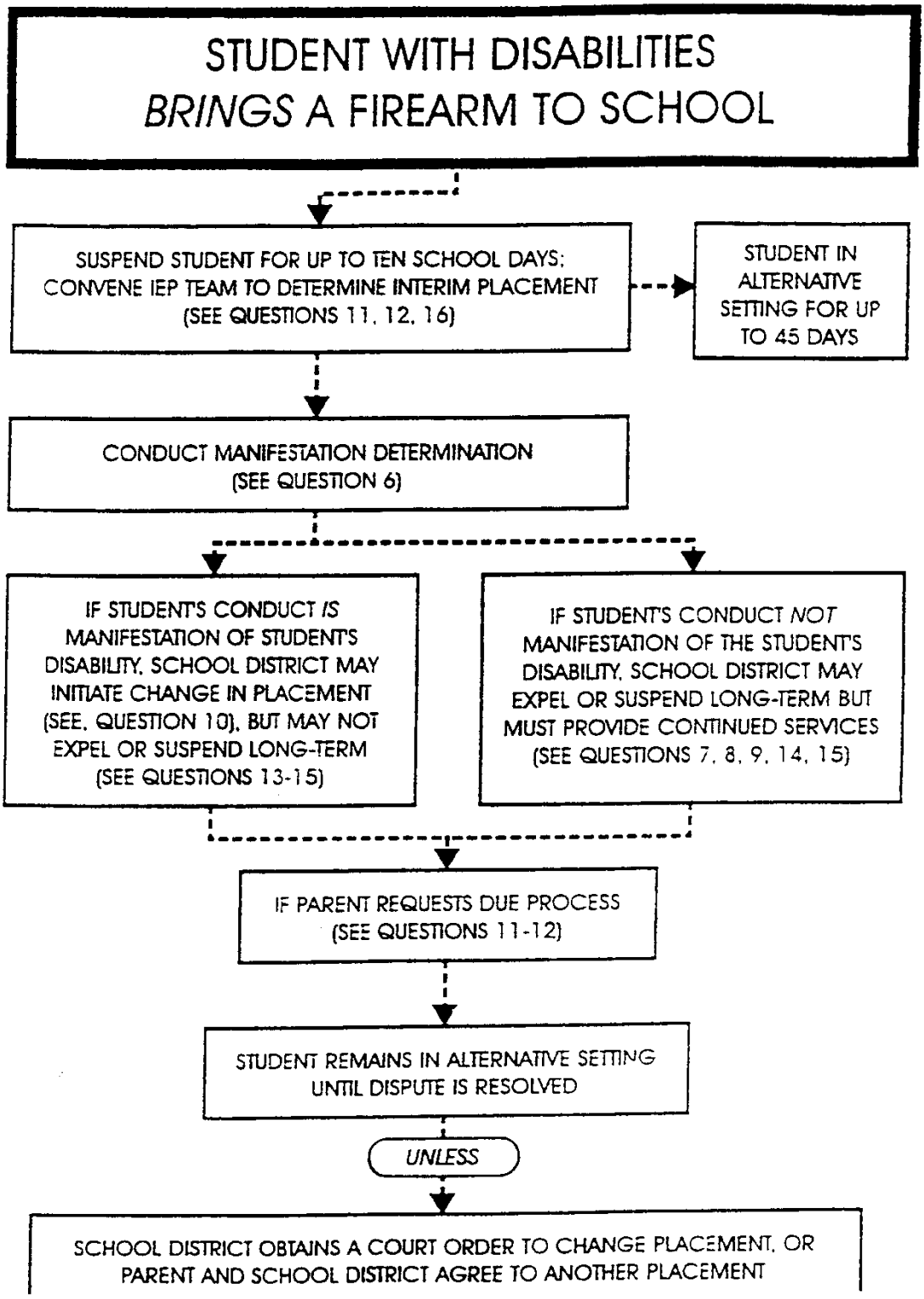
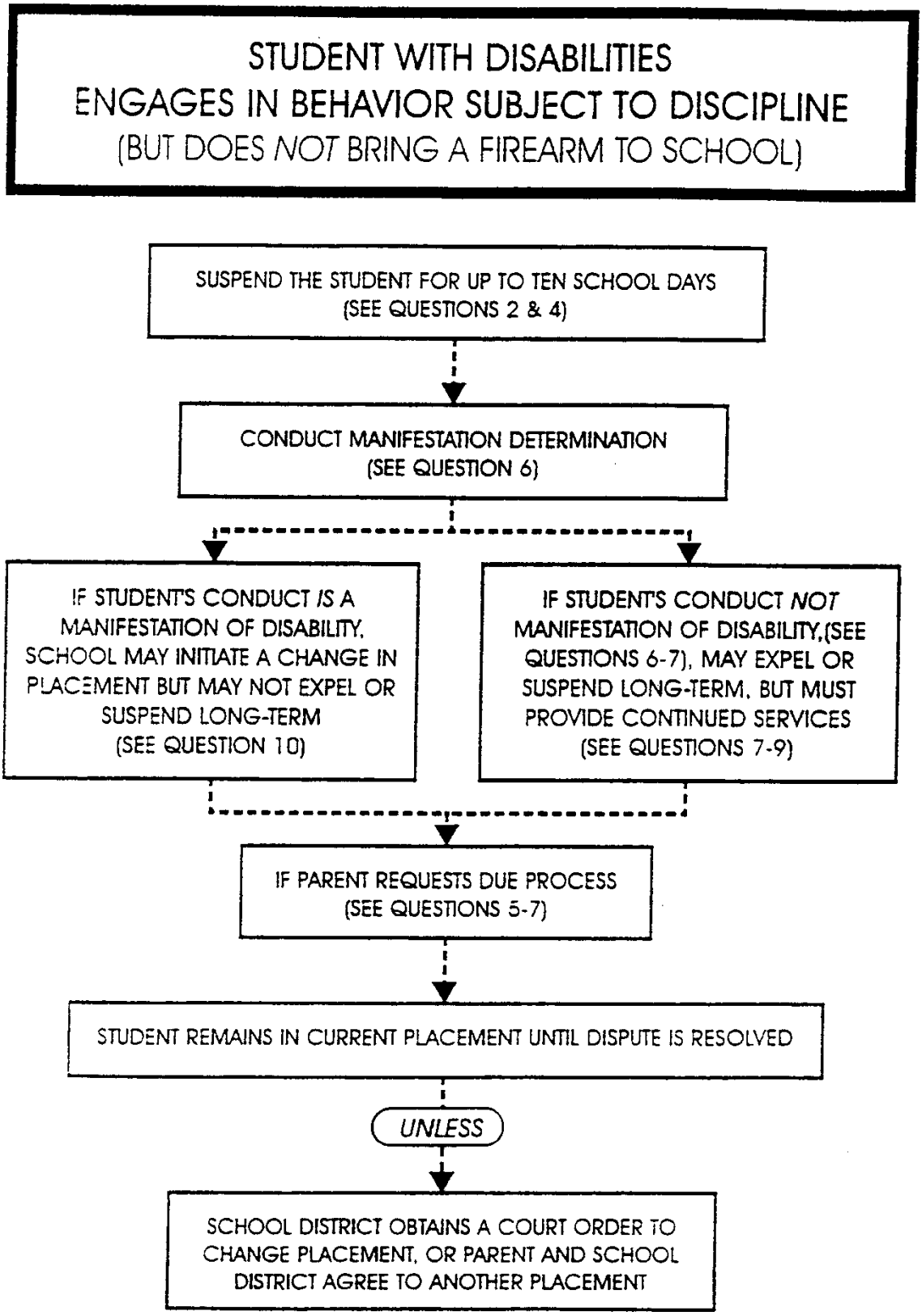

STUDENT WITH DISABILITIES
BRINGS A FIREARM TO SCHOOL
SUSPEND STUDENT FOR UP TO TEN SCHOOL DAYS; CONVENE IEP TEAM TO DETERMINE INTERIM PLACEMENT (SEE QUESTIONS 11, 12, 16)
STUDENT IN ALTERNATIVE SETTING FOR UP TO 45 DAYS
CONDUCT MANIFESTATION DETERMINATION (SEE QUESTION 6)
IF STUDENT'S CONDUCT IS MANIFESTATION OF STUDENT'S DISABILITY, SCHOOL DISTRICT MAY INITIATE CHANGE IN PLACEMENT (SEE, QUESTION 10), BUT MAY NOT EXPEL OR SUSPEND LONG-TERM (SEE QUESTIONS 13-15)
IF STUDENT'S CONDUCT NOT MANIFESTATION OF THE STUDENT'S DISABILITY, SCHOOL DISTRICT MAY EXPEL OR SUSPEND LONG-TERM BUT MUST PROVIDE CONTINUED SERVICES (SEE QUESTIONS 7, 8, 9, 14, 15)
IF PARENT REQUESTS DUE PROCESS (SEE QUESTIONS 11-12)
STUDENT REMAINS IN ALTERNATIVE SETTING UNTIL DISPUTE IS RESOLVED
UNLESS
SCHOOL DISTRICT OBTAINS A COURT ORDER TO CHANGE PLACEMENT, OR PARENT AND SCHOOL DISTRICT AGREE TO ANOTHER PLACEMENT


STUDENT WITH DISABILITIES
ENGAGES IN BEHAVIOR SUBJECT TO DISCIPLINE
(BUT DOES NOT BRING A FIREARM TO SCHOOL)
SUSPEND THE STUDENT FOR UP TO TEN SCHOOL DAYS
(SEE QUESTIONS 2 & 4)
CONDUCT MANIFESTATION DETERMINATION
(SEE QUESTION 6)
IF STUDENT'S CONDUCT IS A MANIFESTATION OF DISABILITY, SCHOOL MAY INITIATE A CHANGE IN PLACEMENT BUT MAY NOT EXPEL OR SUSPEND LONG-TERM
(SEE QUESTION 10)
IF STUDENT'S CONDUCT NOT MANIFESTATION OF DISABILITY,(SEE QUESTIONS 6-7), MAY EXPEL OR SUSPEND LONG-TERM, BUT MUST PROVIDE CONTINUED SERVICES
(SEE QUESTIONS 7-9)
IF PARENT REQUESTS DUE PROCESS
(SEE QUESTIONS 5-7)
STUDENT REMAINS IN CURRENT PLACEMENT UNTIL DISPUTE IS RESOLVED
UNLESS
SCHOOL DISTRICT OBTAINS A COURT ORDER TO CHANGE PLACEMENT, OR PARENT AND SCHOOL DISTRICT AGREE TO ANOTHER PLACEMENT

DUI Implied Consent Warning

CAMPBELL DISTRICT COURT
ACTION NO. 94-T-03111

COMMONWEALTH OF KENTUCKY
PLAINTIFF

VS. ORDER

JAMES R. REBHOLZ DEFENDANT

The defendant herein has moved for a suppression of the results of the BA test administered after his arrest for violation of KRS 189A.010 (DUI). The defendant states that he only took the test because he was improperly mislead by the Implied Consent Warning read to him by the BA operator. That warning says in essence that:

> "...a refusal to submit to such... (BA)...tests shall result in revocation of...(their)...driving privilege...(for six months)."

He argues that this warning as written in KRS 189A.105 (2) falsely informs the defendant of the consequences of a test refusal, since there are a number of ways in which a six month suspension can be avoided. (The court finds that clearly there are a number of statutory procedures that will allow a smaller period of suspension than six months after a refusal, *i.e.* a plea of guilty before a conviction reduces the suspension to only 90 days.)

The defense argument is grounded on the thought that to provide improper information to a defendant in order to obtain evidence that can be used against him is a denial of due process of law. This court agrees with that philosophy, but that does not answer the question raised here.

This court has reviewed every known decision on this issue and is well versed in most of the popular arguments advanced by litigants in the various District Courts in Northern Kentucky, Louisville, and elsewhere regarding the alleged improper wording of KRS 189A.105 (2).

This court has reviewed *Commonwealth v. Tuemler*, 526 S.W.2d 305 (1975) wherein the Kentucky Court upheld a BA implied consent warning that varied from the statutory language. The court in that decision found that the defendant had been "*sufficiently warned.*"

In another case on this issue, the court in Elkin v. Commonwealth, 646 S.W.2d 45 (1982) in ruling on this issue found that a warning was sufficient if it "...sufficiently appraised" the defendant of the consequences of a refusal.

These cases seem to set a standard for the dissemination of information about the consequences of a refusal that are something less than a full explanation of all of the possible consequences resulting from a refusal. The defense argument seems to demand a full and detailed recitation of all possible consequences flowing from a refusal decision. That high degree of education does not appear to be required by the Supreme Court.

While our high court has not required that complete information be provided to the defendant, it has not authorized the police to provide patently incorrect information. KRS 189A.105 (2) does not explain all of the possible avenues of relief from a six month suspension, but we still must examine if it gives false or incorrect information.

The motorist who is offered a BA test, and refuses after the proper reading of the warning in KRS 189A.105 (2), shall according to KRS 189A.107 have their license suspended for *six months* for a first refusal, and longer periods for subsequent refusals.

So the BA implied consent warning does indeed correctly state that a refusal will result in a six month suspension (for the first refusal of a BA test). Further that suspension is automatic pursuant to KRS 189A.105 (1).

After the six month suspension goes into effect, it is possible that the defendant may plead guilty to the DUI and only receive a 90 day suspension, or a number of other things may occur as mentioned by defense counsel, that would reduce the period of actual suspension. *But we must conclude that a refusal does result in a six month suspension, at least initially.*

In no way does the BA implied consent warning of KRS 189A.105(2) incorrectly state the law. The best that can be said of it is that it incompletely states the possible avenues of relief that may be available to the defendant once the six month period of suspension commences.

In neither the *Tuemler* or the *Elkin* cases cited hereinabove, did our high court require a complete explanation of all possible avenues of relief from the penalties resulting from a BA refusal.

In review of this issue we have found a very interesting comment by the Kentucky Court of Appeals that mentions the statutory requirement found in KRS 189A.107 (2) that states that a BA refusal *followed by an acquittal of the underlying DUI charge* will still result in a six month suspension.

In *Commonwealth Transportation Cabinet vs. Ross*, 883 S.W.2d 900, (Ct. App. 1994) the Court of Appeals stated:

> "If the accused refuses to take the test and is later found to be not guilty, then there was no violation of KRS 189A.010(1) or KRS 189.520 (1). This being true, then is the administrative agency within its rights to proceed with a revocation hearing when there was no violation of the DUI statutes which forms the basis for taking the test in the first place? Moreover, is there an infringement by the executive branch of government upon the functions of the judicial? These issues were not raised in this appeal, but we foresee the time when we will have to resolve them."

That statute KRS 189A.107(2) says in the event the defendant is found not guilty of the DUI offense, after a refusal of the BA, "...the court's final judgement shall impose the penalty required by this section." (*i.e.*, the suspension).

In deciding the suppression issues of this case, this dicta in *Ross* by the Court of Appeals is not applicable, since we cannot yet say whether or not the defendant herein will be convicted or acquitted of the DUI charge. While it may yet be raised, it still does not mean that the

implied consent warning is legally incorrect at this time.

In conclusion, this court denies the suppression motion of the defendant, and finds that the implied consent warning herein given to the defendant was in substantial compliance with the wording of KRS 189A.103 (2), and that it substantially appraised him of the consequences of a refusal.

This matter next needs to be set for trial. The Commonwealth and the defendant shall forthwith agree upon a trial date and notify the court of a date during the week of October 9th (except the 13th), and October 23rd (except the 27th). If a jury is requested, the Clerk shall be notified by the defendant.

Done this the 20th day of August, 1995.

Judge Stan Billingsley
Special Judge, Campbell District Court
Carroll County Hall of Justice
802 Clay Street
Carrollton, Kentucky 41008

A Note on Mock Juries in A Child Sex Case

The purpose of a mock jury is to get "feedback" for defense counsel before the trial begins, in order to lower the risk of offending the jury. This information is critical particularly in child sex offenses. Going to trial can be a risky endeavor due to the potential of the long terms of imprisonment involved if the client does not plea bargain.

One way to reduce risk is to hold a "mock jury" or "focus group." In an Ohio case, in order to obtain more critical view of the jurors' thoughts in a sex offense trial, and after they have been presented with the evidence, the jury was divided into two (2) groups -- one (1) group of men and women, and one (1) group of women only. The "women-only" group provided a more critical view of the case. Without men in a mock jury or "focus group," in a sex offense trial, women are more open to discuss their true feelings concerning child sex cases.

Although questionnaires are being increasingly used, some judges will not permit this approach. This is the reason it is imperative to use other methods to evaluate juror response.

I would like to thank Leonard W. Yelsky and Angelo F. Lonardo, of *Yelsky & Lonardo Co., L.P.A.*, Cleveland, Ohio, for experimenting in and utilizing this approach, thus making it possible for its further development.

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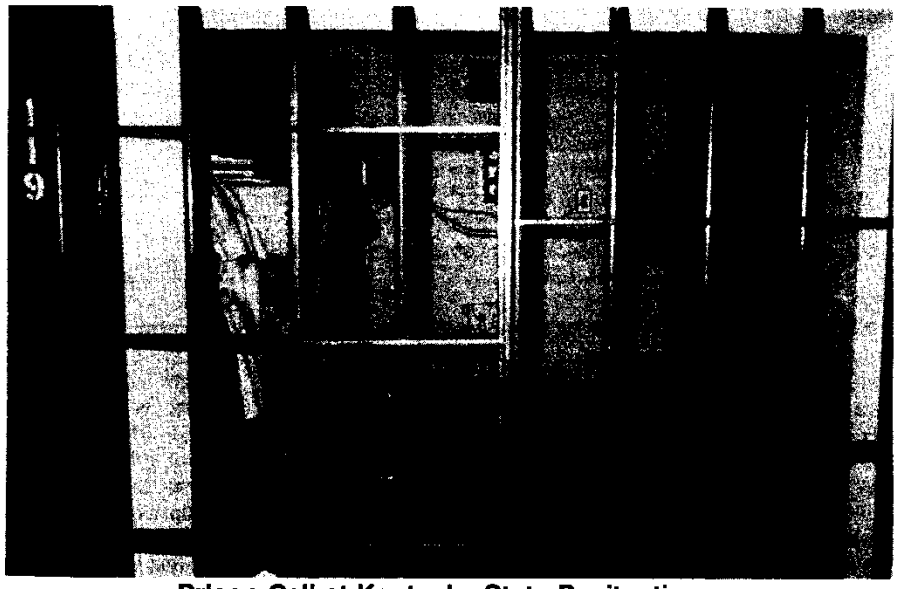

Prison Cell at Kentucky State Penitentiary

Book Reviews

Dr. Richard Gardner

Protocols of the Sex Abuse Evaluation Process

by Richard A. Gardner, M.D.

The Advocate has lately been featuring many of the thoughts of Dr. Richard A. Gardner, M.D. That is as it should be. At a time when the hysteria regarding child sexual abuse continues unabated, Dr. Gardner provides a welcome voice of restraint, moderation and insight.

Dr. Gardner has earned the right to speak on these issues. He is a psychiatrist and clinical professor of child psychiatry at Columbia University. He has been practicing since the mid 1950's. He has authored over 35 books, including the 1987 book *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sexual Abuse*, and the 1992 book, *True and False Accusations of Child Sex Abuse*.

Dr. Gardner is highly critical of the manner in which these cases are presently being handled. He saves his harshest accusations for "validators" and many of the unqualified evaluators now working in this field. He is equally critical of governments and laws which have not established criteria and certifications for "sex abuse evaluators." And finally he is critical of that portion of the criminal defense bar who seek a hired gun rather than someone who will genuinely determine whether an allegation of child sexual abuse is true or not.

It is the truth, after all, that Dr. Gardner seeks. He has little sympathy for the adversary system. His model is to be appointed by all the parties to determine the truth of an accusation. The criteria that he has established to evaluate children, male and female accusers, belated accusers, and persons committing incest, have been developed out of his experience. All are directed at reaching an opinion regarding the truth or falsity of an accusation. This is what makes him so provocative and controversial. Defense lawyers believe in the adversary system, in putting the Commonwealth to its proof. We have as our hallmark the belief that if the Commonwealth cannot prove guilt then our clients should be found not guilty. Dr. Gardner has little time for such. He believes in the thorough evaluation of all parties. He believes in digging until the truth can be determined. And he believes that all parties and the Court should allow an impartial evaluator to determine whether an accusation of child sexual abuse is true or false.

As a result of this, it is questionable whether Dr. Gardner or a similar impartial evaluator would be used by either the defense or the prosecution in a child sexual abuse case in Kentucky. On the other hand, his vast experience, his marvelous insights, and his desire for arriving at the truth make this book **must** reading for anyone interested in a child sexual abuse case.

INTERVIEW OF THE CHILD

Much of this work is devoted to the interview of the child. One interesting phenomenon occurring where I practice now is that the Commonwealth and the police officers working with the Commonwealth have stopped taping children's statements. Often children are not being questioned on tape. Only summaries are included in police reports. Seldom are the children called at the preliminary hearing or at the grand jury. This is the opposite of the search for the truth, and is the device of the true believer and the ideologue. Dr. Gardner would strongly condemn such methods. He is a strong advocate for the video taping of the accusations of children.

Likewise, Dr. Gardner is strongly critical of the leading question. Dr. Gardner recommends what he calls the blank screen principle, where he views the interview as a blank screen following up with the use of non-leading questions in an attempt to have the child tell the story.

Dr. Gardner criticizes asking children below six whether they know the difference between a truth and a lie. That should cause all of us to wonder about the value of many of the competency hearings that now occur. He also suggests that asking when something happens of a child is not useful due to the inability of children to understand time.

Dr. Gardner gives us good advice on how to evaluate whether a child may be telling the truth or not. He suggests that we look at the "credibility of the scenario." Preposterous elements to a child's story are good indicators that the accusation may be false. Likewise, inconsistencies and changes in the story over time are important indicators that a story may not be true. Dr. Gardner suggests that we look at the symptoms being displayed by the child during the period of the abuse, during the period from the abuse to the disclosure, and the period between the disclosure and the trial. He states that clear cut symptoms in *bona fide* child sexual abuse cases will often manifest themselves during the first period. He becomes suspicious when symptomology occurs during the disclosure and after periods.

Dr. Gardner is critical of "statement validity analysis." This is a device used by some mental health professionals looking at all the child's statements to determine whether there has been too much suggestivity and contamination to render the statement valid or not. In his view, such an analysis focuses too closely on the statements and ignores many of the other criteria not related to the statements of the child.

Dr. Gardner places a lot of importance on inconsistencies in the statement of the child. Some leading experts in the defense of child sexual abuse cases have advocated not focusing on those inconsistencies. Dr. Gardner disagrees, at least in terms of determining truth as opposed to trial advocacy. "The greater number of inconsistencies, the greater

the likelihood one is dealing with a false sex abuse accusation." (p. 65).

Many prosecutors use fear of the perpetrator as an important indicator of child sexual abuse. Dr. Gardner disagrees with this as an indicator, saying that fear can arrive from many different sources and can be used as part of the scheme originated by the accusing parent.

Dr. Gardner believes in asking children to draw freely and to tell a story. He does not believe, however, that certain drawings can then be interpreted as supportive of child sexual abuse.

Dr. Gardner does not believe in the use of anatomically correct dolls due to their suggestiveness. "Anatomically correct dolls have the power to ... pull the fantasy in a particular direction... and therefore they have absolutely no place in an evaluation for sex abuse." (p. 158). On the other hand, he does believe in the use of "free doll play" as a method for interviewing children.

One of the most valuable parts of the book is his description of the hallmarks of the false accusation. The most important hallmarks of the false accusation are:

1) The child's belief in the preposterous;

2) Making credible the incredible;

3) Retrospective reinterpretation, which is the "process by which accusing parents, following disclosure, will reinterpret predisclosure behaviors and statements of the child that before disclosure were considered unrelated to sex abuse." (p. 161);

4) Pathologizing the normal; and

5) Cross-fertilization.

Dr. Gardner also gives us good advice regarding how to discover contamination. He suggests that we look at the following:

1) Suggestion;

2) Conditioning, which is positive reinforcement of certain answers;

3) Power;

4) Repetition; and

5) Entrapment.

THE ACCUSED MALE

Dr. Gardner also writes on the evaluation of the accused male. He believes not only in interviewing the child but also the accused male. He looks at twenty-six (26) indicators. Dr. Gardner does not believe there is such as thing as a typical pedophile. He believes that from a regressed to a fixated pedophile is a continuum.

Some of the important indicators in Dr. Gardner's view are the following:

1) History of family influence conducive to development of significant psychopathology;

2) Long-standing history of emotional deprivation. Interestingly as defense lawyers this is exactly what we see. We see "long standing history of emotional deprivation, especially in early family life [our clients] may have been abandoned by one or both parents or grown up in homes where they were rejected, humiliated, or exposed to other privations" (p. 195). One of the saddest things about doing this work is that our clients, far from being the despicable perverts portrayed in the newspapers, are often broken, abandoned, humiliated, small, retarded, weak, and pitiful human beings. Judges, prosecutors, and legislators all refuse to look into the face of the people that we see every day;

3) Intellectual impairment;

4) Childhood history of sex abuse. "Pedophiles are more likely to have been sexually abused in childhood that those that do not exhibit such behavior;"

5) Narcissism;

6) Unconvincing denial;

7) And the use of rationalizations and cognitive distortions that justify pedophilia.

THE ACCUSED FEMALE

An additional chapter is the chapter on the evaluation of an accused female. Dr. Gardner asserts that while we seldom see accused females, the female pedophile is more common than normally thought. He lists only fourteen indicators because of "the paucity of literature on female sex offenders" (p. 258). To Dr. Gardner the three strongest indicators for female sex offenders are:

1) A situation in which the abuser is close to children, such as day care or teaching;

2) History of sex abuse as a child; and

3) The presence of other sexual deviations.

THE BELATED ACCUSATION

Dr. Gardner has a lengthy chapter on the evaluation of the belated abuser or victim. This is the repressed memory situation which has recently come into prominence. Interestingly, Dr. Gardner believes that repressed memory can occur. At the same time, he believes some of the accusations to be false. He uses numerous indicators by which a participant in these cases can evaluate the truth or falseness of the accusation. These categories include:

1) The memory was stimulated by reading *The Courage to Heal*, or a similar book;

2) The recall occurs in the context of therapy;

3) The commitment to questionable therapeutic techniques alleged to facilitate recall of sexual memories including hypnotherapy, sodium amotol, guided imagery, mediation massage and regression;

4) Participation in group therapy with sex abuse survivors;

5) The belief that childhood sexual abuse was at the root of most of the woman's problems;

6) The use of in-vogue jargon like healing, safe place, denial, disassociation, robbed me of childhood;

7) Preposterous and/or impossible elements;

8) Refusal or failure to invite the alleged perpetrator into the therapeutic session;

9) Views alleged victim's mother as facilitator of the sex abuse;

10) Sex abuse occurred before the age of two;

11) Body memories;

12) A law suit as part of the healing process;

13) Absence of guilt;

14) Family civil war;

15) The existence of multiple personality disorder; and

16) Rejection of the accused man's extended family network.

I would recommend this book to anyone interested in this subject matter. It is indeed "the culmination of approximately twelve years of work setting up criteria for differentiating between true and false sex abuse accusations." (p. 391). Dr. Gardner views this as a work in process. He believes that this is "an initial offering." (p. 392). He acknowledges that many people in the child sexual abuse industry including courts and other evaluators have criticized his work. However, he states that "the courts cannot wait the twenty-five years or more that it would take to conduct such studies and provide solid verification (or refutation) in the scientific literature. Neither can people who have been accused of sex abuse wait for these results. Courtrooms need guidelines now and these protocols, I believe, can help serve this need." (p. 392).

I am not asserting that the criteria used by Dr. Gardner can be used similarly to the manner in which prosecutors in other states use the child sexual abuse accommodation syndrome. I do not believe that we will ever get to the point where an expert is asserting that because a certain number of indicators exist that means the abuse is either true or false. I do not foresee the use of these criteria in the trial of a case. I do, however, perceive the use of these criteria in the education of defense lawyers, prosecutors, judges and other evaluators. Indeed the primary use of this book is in the use of the criteria by trained and certified, qualified evaluators in making their own determinations of the truth of child sexual abuse accusations.

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Touchy Feely from the Source ***Bennett's Guide to Jury Selection and Trial Dynamics*** Cathy Bennett and Robert Hirschhorn

Don't plan on grabbing *Bennett's Guide* the night before trial and pulling off a perfect voir dire the next morning. Cathy Bennett's ideas about jury selection, and trial practice in general, don't lend themselves to last minute preparation or to lawyers looking for a new "trick" to put into their trial arsenal. Her ideas, continuing through the work of her husband, Robert Hirschhorn, are distilled here into a method of how to practice law that culminates in better jury selection, better client relations, and hopefully better results.

During her lifetime Cathy Bennett was a nationally known jury consultant and educator on the art of jury selection. Robert Hirschhorn carries on that tradition today and no one who attended his voir dire sessions at this year's annual seminar could doubt his abilities. *Bennett's Guide*, however, goes much deeper. It is, at once, a source of basic how to simple enough in style and content to not intimidate a new lawyer and a source of new ideas sufficient to challenge the practice patterns of a seasonal veteran. It reads, in essence, like a conversation with a colleague - a very wise colleague indeed.

As principle proponents of the "touchy feely" school of trial advocacy, the authors expand their traditional topics into a general, how to do a client centered, humanistic practice. Recognizing that the art of communication in a criminal case does not start with the petite panel on trial day, the authors include a client interview chapter that is or should be a must read for new lawyers.

> The problem is that law school does not train lawyers to listen except as an adversary, ready to pounce for an objection or on cross-examination. In fact, law school drums out of most litigators the capacity for empathy and heart felt warmth towards clients that is necessary in order to hear what may be the key to helping them. *Bennett's Guide* (§2.1)

This is no ordinary law and facts treatise.

While many of us have toyed with the idea of submitting favorable grand jury testimony, Bennett and Hirschhorn have thought about the effect of pretrial publicity on the grand jury, have developed a strategy for litigating the issue, and include sample motions. Likewise, any treatise about jury trials should discuss venue, but the *Bennett Guide* gives practical thought on soliciting venue affidavits from selected group so as to maximize their persuasive power. Using a mock jury to hone the presentation is hardly a revolutionary thought, but, here, the authors give concrete guidance to the actually how to assemble a mock jury, including nits and bolts issues such as how to get mock jurors and what to pay them. Consistently, this reference introduces the reader to important aspects of trial representation and then proceeds to explore the topic to a degree of detail that shows the work is from real, hard fought experience, not mere knowledge.

As expected, the bulk of the work is about petite juries. The topic is covered in a characteristically personnel and professional manner, with attention paid to everyday considerations and details. Much attention is given to improving the odds of a good jury selection, which is, after all, the point. Questionnaires, sur-

veys and jury investigation are given equal space with what questions to ask. The consistent theory, again, is that good jury selection does not occur in a vacuum but is part of a integrated approach. Case citations, sample pleadings, and specific examples as to form suggested questions to ask are included in an easy to follow format that is as useful in answering "why" do it as it is in "what" to do. A separate appendices volume contains over 600 pages of work product ready to be incorporated into the processes taught in the main volume. In short, the *Guide* is a basic course in human dynamics and how that plays out in a successful trial strategy. No case is so strong, no attorney so skilled, that interjecting a more human approach to the process cannot improve the likelihood of a more positive result for the client.

On a specific note, the *Bennett Guide* devotes an entire chapter to the special jury issues that arise in capital litigation. The special requirements of individual sequestered voir dire, both legal and in terms of knowledge and persuasion are discussed along with a rational framework of what works and what to avoid. Having, personally, conducted individual sequestered voir dire, I can honestly say, "I wish I had read this first."

In the early 1980's, when Cathy Bennett was touring the country teaching jury selection, I recall hearing the tired refrain, "You can't do that in my jurisdiction." In June 1995, I heard the same comments about Robert Hirschhorn's lecture/demonstration. It was wrong then, and it is wrong now. This book is a tool for those advocates with the courage to try to dispel the intellectually sterile atmosphere of the courtroom that interferes with the true communication.

The ultimate lesson is to evaluate your ability to relate to others, discover strengths and weaknesses in yourself and to encourage feedback from anyone who is willing to help. Developing skills of relating, educating, and persuading in voir dire and elsewhere is the touchstone of strong advocacy. This book has sought to convey that people educate one another and lawyers are best served listening. *Bennett's Guide*, (§ Conclusion)

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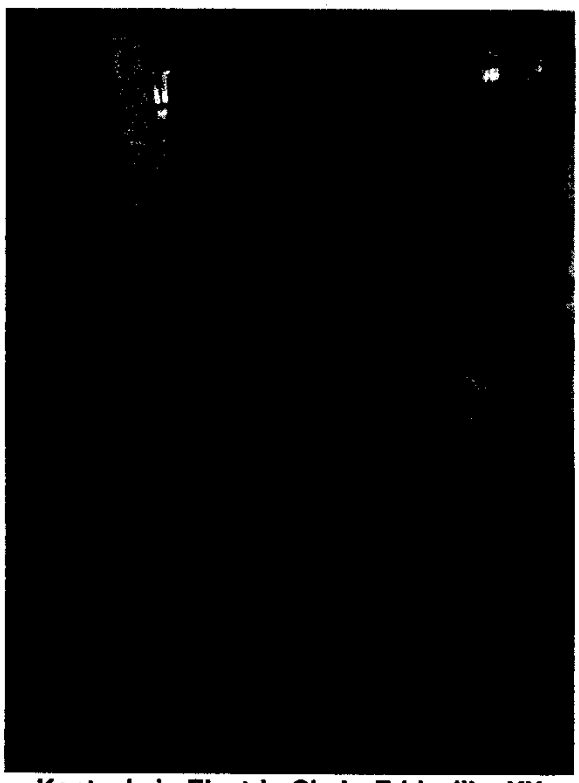
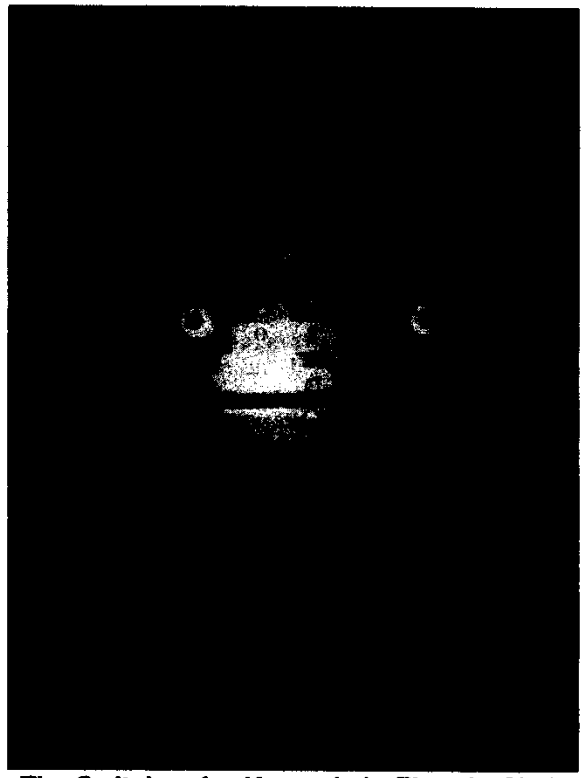


Kentucky's Electric Chair, Eddyville, KY



The Switches for Kentucky's Electric Chair

Failure to Employ or Present Defense Experts: Ineffective Assistance

♣ $377,000 is available statewide for funds for defense experts for indigents under KRS 31.185

This is the eighth 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.

Representation of a huge volume of indigent defendants can lead to poor patterns of practice. The failure to seek funds to employ a defense expert when the case dictates use of an expertise is a bad habit which courts are refusing to tolerate.

Rationalizations. Reasons defense attorneys voice for not asking for funds for a defense expert include "*it really won't make a difference*" or "*I don't have time to do all it takes to effectively obtain and use an expert*" or "*I'll just cross-examine the state's expert.*" Other reasons include the viewpoint that obtaining an expert is not the standard of practice in the city or county or judicial district, or knowledge that the judge has never previously granted a request for funds for experts.

Changes. However, the practice of law is rapidly changing. With good reason, courts are increasingly finding counsel ineffective when they fail to obtain a defense expert to investigate; or they fail to ask for funds to have defense tests or evaluations conducted and instead rely on cross-examining the state's expert. A brief discussion of the federal constitutional standard and a review of cases finding counsel defective for failing to request expert assistance and holding the prejudice required reversal follows.

Standard for Ineffectiveness & Burden of Proof

The standard for ineffective assistance of counsel under the sixth & fourteenth amendments is straightforward: "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To prevail, a defendant has to show both deficient performance and prejudice: 1) the defense attorney's performance was deficient in that it fell below "an objective standard of reasonableness" under prevailing professional norms, and 2) the deficiency prejudiced the defense in that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068. Prevailing professional norms for requesting funds for expert help are set out in several well recognized national standards of practice. See, *What National Benchmarks Require*, The Advocate, Vol. 17, No. 3 (June 1995) at 42.

The *reasonable probability* burden of proof is "a lower burden of proof than the preponderance standard." *Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990).

The focus is on whether the defendant received the process due him, "not to grade counsel's performance." *Id.* at 2069.

When the deficiency is a failure to investigate, *Strickland* informs us that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 2066.

"The prejudice prong of the two-part *Strickland* test continues to be the primary hurdle to be cleared in sixth amendment assistance-of-counsel cases. This obstacle, however, is not insurmountable." *Profitt v. Waldron*, 831 F.2d 1245, 1251 (5th Cir. 1987). The following cases indicate increasing ability to hurdle the obstacles.

Forensic Pathologist

In ***Rogers v. Israel***, 746 F.2d 1280 (7th Cir. 1984) the prosecutor's theory was that the murder defendant's first shot intentionally struck the victim and his second hit the ceiling. The defense theory of the case was that the defendant's first shot lodged in the ceiling and his second was fired during the struggle without criminal intent. "A factual dispute relevant to these two theories was whether Griffin would have been capable of engaging in a struggle after receiving his bullet wound. If the wound would have rendered Griffin incapable of such

activity, the shot that preceded the struggle could not have caused the wound." *Id.* at 1290.

All eyewitnesses but one testified in support of the prosecution's theory. The state called a pathologist who said a person with a bullet wound in the heart and right lung could do strenuous activity for 1/2 hour. The defense attorney did not call on experts to rebut this testimony. Instead he "asked the jurors to use their common sense in concluding that [the victim] could not have engaged in a struggle after being shot through the heart." *Id.* at 1290.

The murder conviction was followed by post-conviction litigation, and presentation of a forensic pathologist who testified "that it would be virtually impossible for victims of such wounds to engage in the physical struggle that was described in the testimony at trial," and that victims with comparable wounds were "immediately incapacitated." *Id.* at 1290. The trial defense counsel testified that he discussed the state pathologist's conclusion with other physicians but not with any pathologists.

The 7th Circuit held the defense attorney was prejudicially ineffective since there was a "reasonable probability" that had the forensic pathologist's testimony presented at the habeas hearing had been presented at trial, "the jury would have had a reasonable doubt respecting guilt on the charge of first degree murder." *Id.* at 1294. Also, defense counsel owed a duty to his client "to ask a qualified expert whether [the victim would have been immediately incapacitated by his wound," and the failure to make such an inquiry was unreasonable and not "sound trial strategy." *Id.* at 1295.

Ballistics Expert

In ***Sims v. Livesay***, 970 F.2d 1575 (6th Cir. 1992) Mr. Sims was convicted of murdering his wife and he was sentenced to life. He told his counsel it was an accidental shooting. As his wife tried to commit suicide by shooting herself, Mr. Sims struggled with her and the fatal shot was fired. Trial defense counsel presented the defenses of accident and self-defense.

A quilt with three bullet holes and butterfly patterns of gunshot residue was examined by the FBI but not by the defense. In the post-conviction action, Sims claimed his counsel was ineffective for failing to obtain "the services of a forensic expert to examine the quilt, its bullet holes, and its powder burns, and the fatal bullet for traces of fabric from the quilt." *Id.* at 1577.

Mr. Sims contended that such an examination would have revealed that "the quilt was between Mrs. Sims and the pistol when the fatal shot was fired. The powder burns on the quilt, he alleged, account for the clean wound on Mrs. Sims' chest, and thus undermine the state's contention that Mrs. Sims must have been shot from a distance." *Id.*

During the federal evidentiary hearing, a forensic firearm examiner and the chief medical examiner for Atlanta offered forensic opinions to support these defense contentions.

The Sixth Circuit found that the defense attorney did not reasonably exercise his professional judgment when he failed to have the quilt examined by a defense expert. The failure to independently investigate key evidence was prejudicially defective assistance.

Mental Health History; Evaluation, or Presentation of Mental & Emotional Evidence

"Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are [the] cornerstones of [the] effective assistance of counsel." *Gaines v. Hopper*, 575 F.2d 1147, 1149-50 (5th Cir. 1978).

In cases involving mental health issues Courts have repeatedly stressed the "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).

The cases which follow demonstrate that defense attorneys are failing to investigate the mental health histories of their clients sufficiently for competent decision-making, and failig to present expert findings. The failure of the attorney to fully investigate almost always necessarily involves the failure of the attorney to ask for and obtain an expert to investigate by evaluating the defendant.

Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986) held that the trial defense counsel's failure to present any evidence from a mental health expert as to the defendant's mitigation was "professionally unreasonable" and "prejudicial." Had "this evidence been presented, the jury would have concluded that death was not warranted." *Id.* at 1103.

The defense attorney presented no mitigation in the penalty phase. At the habeas hearing, a clinical psychologist said the defendant had an I.Q. of less than 41, was emotionally disturbed, and was "severely limited in his capacity to think and did not understand what was happening around him." *Id.* "Defense counsel either neglected or ignored critical matters of mitigation...." *Id.*

Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987) found the Texas defense counsel ineffective for failing to investigate the mental health history of the defendant who counsel knew had escaped from a mental health institution in Idaho. Counsel failed:

1) to "secure records or to pursue inquiries" at the Idaho institution where counsel would have discovered his client was adjudicated insane;

2) in relying on a state psychiatrist's finding that his client was competent and sane;

3) in abandoning his client's only defense...insanity;

4) to seek a continuance to further investigate prior mental health history of this defendant accused of rape;

5) to know that the burden of proof would have shifted to the prosecution to prove the defendant sane had there been proof of insanity by a preponderance of the evidence.

Defense counsel in *Jones v. Thigpen* did what too many public defenders do when he abandoned further investigation of the insanity defense since the court-appointed psychiatrist reported the defendant competent.

The 5th Circuit made clear that obtaining the opinion of a court-appointed psychiatrist does not excuse counsel's duty to further investigate, that counsel could not make strategic or tactical choices on "faulty information" due to "ineffective investigatory steps," and that the lack of knowing about the law on the shift of the burden of proof to the prosecution "undercuts any claim that the decision to forego the insanity defense 'informed.'" *Id.* at 1249.

The mentally ill defendant in ***Bouchillon v. Collins***, 907 F.2d 589 (5th Cir. 1990) was charged with aggravated robbery and aggravated kidnapping. With the

Points to Ponder

- "Assuming that it exists, local bias against a claim of insanity does not justify a failure to investigate that issue." *Bouchillon v. Collins*, 907 F.2d 589, 596 n.24 (5th Cir. 1990).

- "[T]he existence of even a severe psychiatric defect is not always apparent to laymen." *Bruce v. Estelle*, 536 F.2d 1051, 1059 (5th Cir. 1976).

- "[T]he testimony of trial counsel [in a post-conviction challenge to his effectiveness] cannot be treated as coming from a totally disinterested witness." *Bolius v. Wainwright*, 597 F.2d 986, 989 (5th Cir. 1979).

- "One need not be catatonic, raving or frothing, to be [legally incompetent]." *Lokos v. Capps*, 625 F.2d 1258, 1267 (5th Cir. 1980).

- "In any event, the prosecutor should have no influence in the selection [of a psychiatrist assisting an indigent defendant]." *United States v. Bass*, 477 F.2d 723, 726 (9th Cir. 1973).

- "[T]he simple fact that counsel made some effort does not defeat on ineffective claim." *Walker v. Mitchell*, 587 F.Supp. 1432 (E.D.Va. 1984).

- When "a psychiatrist designated by the trial court to conduct a neutral competency examination" goes beyond simply reporting on competence and testifies at the penalty phase, he becomes like "an agent of the State recounting unwarned statements made in a post-arrest custodial setting," and use of his testimony could violate the Fifth Amendment. *Estelle v. Smith*, 451 U.S. 454, 467 (1981).

- "An attorney who does seriously interview an arguably insane client may find him to be one of those many insane persons who placidly insist that they are entirely sane; as the attorney is likely to find that an arguably insane client is not the best or most reliable source of information." *Davis v. Alabama*, 596 F.2d 1214, 1220 (5th Cir. 1979).

dubious help of his appointed counsel, Bouchillon pled guilty to robbery with kidnapping being dropped. He was sentenced to 20 years.

In a post-conviction action Bouchillon alleged he was denied the defense of insanity; he was incompetent to plead guilty, and his attorney was ineffective for failing to investigate his incompetency and insanity. At the post-conviction hearing, the defendant presented medical records; affidavits from his two sisters and a fellow inmate; and experts, including a psychologist who said the defendant was incompetent at the time he pled guilty.

The state presented the trial defense counsel at the post-conviction hearing who said he did no investigation of mental defenses because his client was lucid and able to assist in his own defense. Counsel said that he told Bouchillon that an insanity defense was difficult to prove in Lubbock, Texas when Bouchillon told him he had mental problems, had been institutionalized, and was on medication. The state presented no experts at the post-conviction hearing.

In observing that defense attorneys have a duty to make a reasonable investigation, the 5th Circuit concluded that to "do no investigation at all on an issue that not only implicates the accused's only defense, but also his present competency, is not a tactual decision. Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum.... It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental problem." *Id.* at 597.

Significantly, the Court noted that "Bouchillon's attorney did not ask for a psychiatric evaluation." *Id.* Counsel's lack of investigation including asking for a defense evaluation "fell below reasonable professional standards." *Id.*

In ***Brewer v. Aiken***, 935 F.2d 850 (7th Cir. 1991) defense counsel did not present any evidence of Brewer's mental history at the capital penalty phase. Brewer was the only penalty phase witness, and was sentenced to death.

As part of his presentence investigation, the trial judge ordered a psychological evaluation. That evaluation showed Brewer has an I.Q. of 76, which is in the lowest 7% of the population; had several shock therapy treatments at age 10; did not complete the 9th grade, has "a shallow mind that perceives the superficial aspects of reality," and had brain damage. *Id.* at 852-53, 857.

The Court granted the habeas since defense counsel's failure to investigate the mental history of a defendant with low intelligence demonstrates conclusively that he didn't "make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors." *Id.* at 857 *quoting Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989).

Counsel's representation fell below an objective standard of reasonableness in view of his "failure to make reasonable investigation to discover this readily available evidence regarding Brewer's low I.Q., susceptibility to the influence of friends and disadvantaged background...." *Id.* at 858.

The 7th Circuit held "'there is a reasonable probability that [if the jury had been aware of Brewer's low I.Q. and deprived background, it]...would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069." *Id.* at 858.

Ironically, the trial judge uncovered more mitigation in the standard presentence investigation process than defense counsel did in his investigation.

In ***Blanco v. Singletary***, 943 F.2d 1477 (11th Cir. 1991) trial defense counsel failed to investigate Blanco's mental history, presented no mitigation, and watched their client be sentenced to death. Counsel did not procure a psychiatric evaluation of the defendant; instead, counsel informed the trial judge "after a brief discussion with Blanco that no mental health mitigation evidence existed." *Id.* at 1503.

The 11th Circuit readily found that "given that this discussion constituted the extent of counsels' investigation into the availability of mental health mitigating evidence, that such evidence was available, that absolutely none was presented to the sentencing body, and that no strategic reason has been put forward for this failure, we find that counsels' actions were objectively unreasonable." *Id.*

An assessment of whether prejudice was a product of this deficient assistance of counsel was undertaken by the 11th Circuit. Blanco's brother and acquaintances could have testified to his difficult childhood and adolescence. Blanco was born through serious medical problems,

including an initial lack of oxygen. He suffered seizures. His grandmother had psychosis. Blanco had organic brain damage and epileptic disorders. A psychiatrist at the federal evidentiary hearing testified Blanco's I.Q. was in the borderline range; he suffered from psychotic, paranoid and repressive tendencies, and had extremely poor contact with reality.

In light of this, the 11th Circuit found there was prejudice under the *Strickland* standard since there was a reasonable probability that had the defendant's mental health history been presented the sentencer would have balanced the mitigation and aggravation to a non-death sentence.

In ***Beavers v. Balkcom***, 636 F.2d 114 (5th Cir. 1981) the defense called the state mental hospital when he learned his client was confined twice in the state mental institution. Counsel decided the client's records from the instituton would not be helpful, and that a psychiatric exam would be detrimental to an insanity defense. At trial, the only defense testimony was the client's mother and wife and his own unsworn statement.

"By not following up on the telephone call, to the state mental hospital where Beavers had been previously treated, counsel fell short of the thorough pre-trial investigation to which the appellant was entitled." *Id.* at 116.

In ***Deutscher v. Whitley***, 884 F.2d 1152 (9th Cir. 1989) the court held that counsel's performance was deficient because he failed to present psychiatric testimony about his client's mental impairment in mitigation. Counsel knew his client had a history of mental difficulties but he did not conduct any investigation of them when there was a substantial mental illness history.

In ***Cunningham v. Zant***, 928 F.2d 1006, 1017-18 (11th Cir. 1991) the defense attorney was found ineffective for failing to introduce evidence into the capital penalty phase as to his client's mild mental retardation, his medical records, headaches from a surgically implanted plate in Cunningham's head. While the defense attorney asked a neurosurgeon to review the medical records for an insanity defense, he failed to ask the expert to review them for the purpose of mitigation, and failed to introduce evidence through an expert of his client's I.Q. of 58 and his being mentally retarded.

When the sole defense is "insanity due to alcoholism...minimally effective representation must include an investigation into the defendant's past and present medical condition." ***Mauldin v. Wainwright***, 723 F.2d 799, 800 (11th Cir. 1984). This is so even when defense counsel have no evidence of previous hospitalization for alcoholism.

When insanity is the only defense, the failure of defense counsel "to investigate cannot be excused by saying that it did not seem to be a very strong defense." ***Davis v. Alabama***, 596 F.2d 1214, 1218 (5th Cir. 1979).

Having done no investigation into the mental history of their client, the lawyers asked for a continuance and asked the court to appoint a doctor to examine the defendant but did not allege he was indigent. *Id.* at 1216. The attorneys "did not explain why they had failed to make that request or to find a doctor themselves,

Funds for Neurological Testing

In ***People v. Jones***, 620 N.Y.S.2d 656 (NYAD 4 Dept. 1994) the defendant was convicted of murder, despite his defense that he was justified in killing the person who broke into his home. At trial, two doctors testified for the defense about the defendant's brain damage and limited cognitive abilities. One doctor recommended brain scans be performed based on the defendant's head injury as a child and his 30 year history of alcoholism. The prosecutor opposed the request since "the only evidence of injury was a statement by defendant's sister that she had spoken to defendant's mother in Georgia, who stated the defendant 'had a couple holes in his head, was unconscious for at least a week,' and reportedly was hospitalized." *Id.* at 658. The trial judge refused to authorize funds for that brain testing.

The New York Supreme Court, Appellate Division, held that the trial court "abused its discretion" in denying this brain testing based on the defense's showing of need and the fact that the "testing was crucial to defendant's asserted defense of justification." *Id.* at 657.

The dissent saw no error in refusing to allow money for brain scans since: 1) one defense expert had testified regarding the defendant's results on over 30 cognitive tests, and 2) since it is "the defendant's condition at the time of the crime, not the cause of the condition, that is relevant...." *Id.* at 658.

during the several weeks they were involved with the case." *Id.* The failure to investigate insanity and develop it with an expert was deficient performance. *Id.* at 1220.

In ***Greer v. Beto***, 379 F.2d 923, 925 (5th Cir. 1967) the failure to present any medical evidence relevant to the defendant's insanity was found to be error.

INEFFECTIVE TO RELY ON STATE EXPERT

Relying on state experts without requesting and obtaining defense experts is ineffective assistance of counsel since a defendant does not receive the required defense perspective. See *Indigent's Right to Independent Expert Help*, The Advocate, Vol. 16, No. 5 at 38 (October 1994).

The "ability to subpoena a state examiner and to question that person on the stand does not amount to the expert assistance required by *Ake*." ***Starr v. Lockhart***, 23 F.3d 1280, 1289 (8th Cir. 1994).

In ***Loe v. United States***, 545 F.Supp. 662 (E.D.Va. 1982) reasonable grounds existed to question the mental condition of the defendant. Defense counsel invested substantial efforts in developing the issue and raised the issue at trial.

He did not seek money for a defense psychiatrist. Instead, he relied on the testimony of doctors who examined him for competency, lay witnesses, records of past psychiatric examinations and cross-examination of prosecution doctors. Defense counsel stated that he did not seek a private examination because "he felt it would not produce results helpful to the defendant." *Id.* at 669. He was found to have provided ineffective assistance of counsel since he did not have a mental examination by an expert who could give him a partisan perspective. *Id. at 668. See also, Loe v. United States*, 545 F.Supp. 673 (E.D.Va. 1982).

In ***Loyd v. Whitley***, 977 F.2d 149 (5th Cir. 1990) the defense attorney was found ineffective for failing to seek independent psychiatric assistance to develop an insanity defense and "put Loyd's mental condition in proper focus" where the defendant had been examined by several state hospital doctors. *Id.* at 158. See also *United States v. Fessel*, 531 F.2d 1275 (5th Cir. 1976). The defense called the 3 state doctors at trial but not said his client was insane. The post-conviction hearing saw experts testify as to Loyd's serious mental impairment and their doubts about his sanity.

Appointment of experts to determine a defendant's competency does "not obviate the defendant's right to his own expert" for insanity investigation. ***United States v. Bass***, 477 F.2d 723, 725 (9th Cir. 1973).

CONCLUSION

Defense attorneys who decide not to ask for funds for a defense expert because they think none is available should rethink their decision. Judges who refuse to order funds when requested on the belief that there are not funds available should reconsider.

Unused Money. Money for expert assistance to the defense is readily available. The 1994 General Assembly decided that counties had to contribute 12.5 cents per capita to a statewide indigent defense expert and resources defense fund with amounts above that coming from the state. KRS 31.185(3). In FY 95 (July 1, 1994 - June 30, 1995) the funds collected amounted to $377,000. Of that only $230,533.50 was used in FY 95.

Defense attorneys who do not ask for funds for necessary defense expert investigation, evaluation or testimony, should reevaluate their decision in light of the substantial caselaw indicating the refusal to obtain the help is ineffective assistance.

Binion. The Kentucky Supreme Court has recognized the need for defense experts: "We are persuaded that in an adversarial system of criminal justice, due process requires a level playing field at trial.... [T]here is a need for more than just an examination by a neutral psychiatrist. It also means that there must be an appointment of a psychiatrist to provide assistance to the accused to help evaluate the strength of his defense. To offer his own expert diagnosis at trial, and to identify weaknesses in the prosecution's case by testifying and/or preparing counsel to cross-examine opposing experts." ***Binion v. Commonwealth***, 891 S.W.2d 383, 386 (Ky. 1995).

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