Kentucky Department of Public Advocacy

THE ADVOCATE

Journal of Criminal Justice Education & Research *Volume 18, No. 2, March 1996*

How Many Go Unrepresented?

Book Review: ABA *Ethical Problems Facing the Criminal Defense Lawyer*

Medical Examinations of Sexual Abuse Victims

Funds for Experts in DNA Cases

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 bimonthly (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.

"It took me a while to realize that although you're defying convention, which is what I've always done, you're not progressing."

- Gloria Steinem

FROM THE EDITOR:

The Unrepresented Poor. Do Kentucky's criminal justice system actors consciously or unconsciously fail to insure eligible indigents receive counsel when their liberty is at risk? We examine that acute question with statistical analysis, commentary from practitioners, and the ruling of a circuit court. We'd like to publish your views.

Juvenile Bills. What's on the horizon for Kentucky's juvenile justice system? A stark look at what is being proposed is offered this issue.

Sex Abuse. Kentucky continues to face the difficult, demanding and devastating nature of defending sex abuse cases. We need to understand the limits of medical examinations in these cases? Dr. Lee Coleman provides much insight.

Ethics. If you practice criminal defense, you've faced ethical dilemmas. The ABA has a major work that helps us sort through our duties to our clients, and it is reviewed this issue.

Salaries. We present a defender salary study. Why are Kentucky public defender salaries as much as $5,000 less than the *average* of those in the 7 states that surround us?

Annual Conference & TPPI. Mark your calendars now to take advantage of the most comprehensive and intensive criminal defense training and development offered in the Commonwealth.

This issue we resume features on contract attorneys with ***John Niland*** being held out to us as a model. Let's take note of his example and improve our representation.

Edward C. Monahan, **Editor**

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"Zeal without knowledge is fire without light."
- Thomas Fuller

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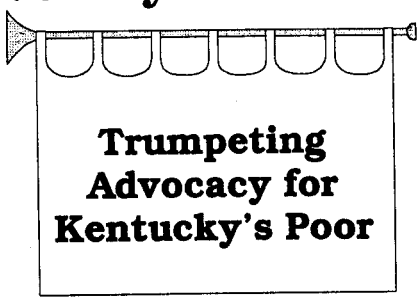
Public Advocacy Seeks Nominations



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

In celebration of the 30th Anniversary of the United States Supreme Court's landmark decision in ***Gideon v. Wainwright***, 372 U.S. 335 (1963), the Kentucky Department of Public Advocacy established the *Gideon* Award in 1993. The prestigious award is presented at the Annual DPA Public Defender Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky.

Written nominations should be sent to the Public Advocate by May 1, 1996 indicating:

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

1993 *Gideon* Award Recipient	**J. Vincent Aprile, II**, General Counsel of DPA
1994 *Gideon* Award Recipients	**Daniel T. Goyette** and the **Jefferson District Public Defender's Office**
1995 *Gideon* Award Recipient	**Larry H. Marshall**, Assistant Public Advocate

Rosa Parks Award for Advocacy for the Poor

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Public Defender Conference and the Annual Professional Support Staff Training Conference to the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong.... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream."

Written nominations should be sent to the Public Advocate by April 1, 1996 indicating:

1) Name of the person nominated;
2) Explanation of how the person has galvanized people to advocate for Kentucky's poor; and,
3) A resume of the person or other background information.

1995 *Rosa Parks* Award Recipient **Cris Brown**, Paralegal, DPA's Capital Trial Unit

The Advocate Features

John Niland

Besides being excellent defense attorneys, what do Rick Kammen, Betty Niemi, Ed Monahan, Ernie Lewis, Steve Rench, Roger Gibbs, Dick Slukich, and Marty Pinales have in common?

These individuals were all presenters or coaches at the 8th Annual Trial Practice Persuasion Institute held in 1992 and **JOHN NILAND**, our Contract Public Defender in Hart County, credits each of these individuals with having an immeasurable impact on his legal career.

John was no stranger to criminal defense attorney training. Since graduating from the University of Texas Law School at Austin in 1971, John had attended many training events designed for the criminal practitioner. However, during the thirteen years he practiced in Texas, the training that was available to him was of the type designed to update the participants on current case law. Nothing had prepared him for the approach to a criminal case that has become the hallmark of Ed Monahan-inspired training.

Three things especially fascinated John:

1. The novel approach to ***Voir Dire*** that emphasized soliciting information and opinions and discussion from the jurors rather than lecturing them on concepts of the law;

2. The approach to a controlled cross-examination with close-ended, **one-fact-per-question** questions;

3. The **attitude** demonstrated by this group of defense attorneys summed up as follows: "You may knock me down but I'm going to get right back up and keep coming at you until I win for my client."

John had tried several criminal cases during the thirteen years he practiced with his father in the firm of *Niland and Niland* in El Paso, Texas, from 1971 until 1984. In fact, John won an acquittal in the first criminal case he tried within six months of graduating from law school. John's client was a PFC who was African American and was accused of the statutory rape of a fifteen year-old white girl. This case represented the kind of difficult challenge that always intrigued John about criminal practice. He was especially fascinated with DUI work because it presented all of the challenges of the criminal law but included technical and scientific aspects. But John's legal education came at a time when the law schools told students when they wanted to learn how to try a criminal case, go to the courthouse and watch other lawyers.

John credits his father Jack with imparting to him and developing in him the skills and techniques that have allowed him to win so often on behalf of his clients in criminal cases. Jack always advised him to "Investigate the case before the trial. Look into every aspect of it. Find the weak point and build from there." John, of course, has, and does work with investigators on his major criminal cases. However, he prefers to do the pre-trial investigation himself whenever possible. John is not always sure what he is looking for, but he knows it when he sees it. His extensive pre-trial investigation leads him to another tenant of his father's practice: "File every pre-trial motion you can in good faith develop. Make them work, and make the prosecutor see the error of their ways." In a very real sense, John feels that his father Jack, who passed away in 1992, is a part of every **NOT GUILTY** verdict he has ever received. His father Jack began the practice of law in 1951 and worked up until just days before his death in 1992. Jack taught John more than just looking for that latent defect in a criminal case and finding a way of getting it dismissed. His father encouraged him to never to turn a client away just because that client did not have money. Because they did so much *pro bono* work in their practice, the firm income was modest. Over the years, about 90 percent of their practice was civil and only about 10 percent criminal. When John joined the firm, the going rate for salary in the El Paso community for newly graduated attorneys was $400 a month before they passed the bar and $600 a month afterwards. Much of their practice was real estate and probate work. One of the many *pro bono* cases that John took while practicing with his father concerned two families who were killed in an automobile accident in Mexico and died intestate

leaving behind several minor children. John had agreed, for no fee, to set up the guardianships and do other necessary legal work to try to protect the rights of the children. The Mexican government was suing the estates, claiming that the deceased driver had caused the accident and damaged the roadway. John's orientation and training led him, almost involuntarily, to look for the defects in the claims made by the Mexican government. After many months of hard work on behalf of the orphan children, John found a basis to sue the tire manufacturer and all of the sudden, his modest practice was highlighted by a significant product's liability case judgement. Good things do sometimes happen to nice people.

John and his wife Sandy, who were married in 1974, came out in the fall of 1977 to visit the state of Kentucky. They had seen pictures in an organic gardening magazine and came to Metcalf county for a visit. That was the first real fall they had ever seen, and the Nilands vowed that, if they ever had the opportunity, they would come back to live in Kentucky. The products liability settlement gave them that opportunity, and in 1984, they moved to the Cub Run area of Hart County were they built their home on 95 acres of land. The children were grown and John and his wife took this sabbatical, allowing them time to do many of the things they had always wanted to do, including John's significant involvement in volunteering his time on noteworthy environmental issues. But alas, John missed the practice of law and became licensed in Kentucky eight years later. That led him to the 1992 TPI and John became involved in sharing the Hart County Public Defender contract with Mike Nichols. John had the Circuit Court part of that contract but soon took over the District Court as well and has remained the Hart County Public Advocate since that time. His practice is now about 70 percent criminal law and 30 percent civil. The first Circuit Court case he tried as Hart County Public Advocate involved the alleged theft of a cow. And once again, John's extensive pre-trial preparation won his client a not-guilty verdict.

What does John miss about Texas? By sharing the practice with his father, John had more time to become involved in BAR matters. He was voted the outstanding young lawyer in El Paso one year, was president of the El Paso Young Lawyers Association and on the Board of Directors of the Texas Young Lawyers Association. The six and seven day a week work schedule that consumes his time now doesn't allow that, but John still finds time to be involved in environmental issues and is the Chairman of the Hart County Solid Waste Management District.

One reason that John has continued to do the Hart County public defender work is because the Judges and prosecutors he works with combine to make as ideal a situation as he can imagine. John recalls that good judicial temperament was a rarity in Texas, and that prosecutors there were not as open and honest and accommodating as those that he works with now. He appreciates the fact that there is little gamesmanship with the prosecutors, and that the judges are polite, knowledgeable, and a pleasure to deal with. John truly enjoys the practice of criminal law, and although he hopes that someday he can cut back on his workload and spend more time in other pursuits, for now, the indigent clients in Hart County are fortunate indeed that we have him on board.

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

Many Indigents Accused of Crimes Go Unrepresented in Kentucky

Section 11 of our Kentucky constitution guarantees each Kentuckian the right to counsel, even those without means. (*Gholson v. Commonwealth*, 212 S.W. 2nd 537 (Ky. 1948)). However, analysis of available case data indicates that vast numbers of poor people accused of crimes in Kentucky do not have counsel appointed to represent them. This is a critical issue for Kentucky because fair process and reliable, valid results in criminal proceedings are unlikely when the constitutional guarantee is not being met.

Difficulties in Counting and Comparing Cases

Determination of the number of criminal cases in Kentucky is a complex and difficult task given the data available and the manner in which it is organized by different criminal justice agencies. This is true for both the Administrative Office of the Courts (AOC) and the Department of Public Advocacy (DPA).

Difficulty results from the fact that each agency's caseload data categories include both criminal and non-criminal cases. For example, AOC's "juvenile" case category includes both criminal and non-criminal juvenile cases. A portion of the DPA non-criminal caseload involves involuntary commitment proceedings.

DPA'S Case Responsibilities

In order for DPA's case statistics to be a significant aid in significant aid in shedding light

TABLE 1
AOC KENTUCKY DISTRICT COURT CRIMINAL CASELOAD FY 89 - FY 94

	FEL	% CHG.	MSD	% CHG.	JUV	% CHG.	MH & DIS	% CHG.	TOT CRIM	% CHG.
FY89	40,065		152,125		32,709		4,761		229,660	
FY90	43,290	8.0	168,401	10.7	37,834	15.7	5,458	14.6	254,983	11.0
FY91	46,129	6.6	179,192	6.4	43,693	15.5	6,285	15.2	275,299	8.0
FY92	51,845	12.4	181,571	1.3	45,120	3.3	7,387	3.3	285,923	3.9
FY93	45,257	-12.7	180,112	-0.8	49,841	10.5	8,168	10.5	283,378	-0.9
FY94	43,704	- 3.4	184,559	2.5	53,449	7.2	8,184	7.2	289,896	2.3

Intractable Problem? It was interesting to read the new statistics demonstrating that the problem of the unrepresented accused in our district courts has continued. What is discouraging is that while there have been numerous significant changes in DPA's funding situation over the past several years, the problem of the unrepresented defendant in district court has not significantly changed. The conveyor belt has been moving for many years and will continue to move in the district courts of this Commonwealth. There is neither the funding nor the political will to provide counsel to each person in district court who is both eligible and who desires to have counsel. There are other big problems with the unrepresented client. We have seen on many occasions defendants who have been forced to have felony preliminary hearings without counsel. After their case is bound over and they end up in circuit court, they are appointed to our office. It is disheartening to see such cases because the opportunity to work the cases out in district court is forever lost. Further, there is very little legally that can be done to remedy such situations after the fact. The only proper remedy is to provide people with counsel in district court when their preliminary hearings and other important procedures are being held. This is indeed a problem that appears to be virtually intractable. While I doubt whether we will ever see full funding for all those accused who desire counsel and are eligible, we need to continue to raise the vision of our Constitution and *Gideon* and continue to press toward that goal.

- Ernie Lewis, Assistant Public Advocate, Richmond

on the magnitude of the problem of the lack of legal counsel for indigents accused of crimes, it is necessary to understand DPA's statutory and constitutional representation responsibilities. The types of cases requiring representation by a public advocate are set forth in the Kentucky Revised Statutes, Chapter 31.

Eligible for representation are needy persons charged with a felony, a misdemeanor, a traffic offense or any offense or penalty which includes the possibility of confinement or a fine of $500 or more. Additionally, the DPA is required by statute to provide representation to needy juveniles charged with felonies, misdemeanors and status offenses, KRS 31.100. Status offenses are not crimes. They are offenses for which persons may be detained by virtue of their age, *e.g.*, truancy, curfew violation, runaway. As the result of a Kentucky Supreme Court Decision in *Lewis v. Lewis*,[1] the DPA is also responsible for providing representation to indigents in civil contempt proceedings.

AOC and DPA District Court Caseload Figures

Table 1 shows District Court AOC summary data for FY 1989 through FY 1994. Small claims, probate, traffic (moving violations) and domestic violence cases are not shown since they are not criminal cases. The first column, felonies includes all persons charged with serious offenses which are punishable by a year or more in prison.

The large majority of felonies, 43,704 are filed and processed through the district courts. Felony cases in which a judge rules that there is probable cause to believe a felony has been committed are bound to the Grand Jury for a hearing. During a Grand Jury hearing prosecutors present evidence. If a Grand Jury rules that there is sufficient evidence to believe that a felony has been committed, a felony indictment is returned. The case then goes to the circuit for filing. (See Table 3.)

Many cases submitted to the Grand Jury are dismissed due to insufficient evidence or amended to misdemeanor. Cases amended to misdemeanors are returned to the district courts for processing and disposiiton. Felony cases are not disposed in district court. The jurisdiction of final processing of felony cases is with the circuit courts.

The AOC District Court data (Table 1) indicate that for the felony category from 1989 through 1994 there were increases for three consecutive years followed by decreases during the past

TABLE 2
DPA DISTRICT COURT CASELOAD FY 89 - FY 95

	FEL	%CHG	MSD	%CHG	MH	%CHG	TOT	%CHG
FY89	21,694		38,216		1,817		61,727	
FY90	23,668	9.1	38,350	0.4	2,051	12.9	64,069	3.8
FY91	26,791	13.2	48,346	26.1	2,500	21.9	77,637	21.2
FY92	31,609	18.0	49,507	2.4	2,184	-12.6	83,300	7.3
FY93	29,135	- 7.8	50,645	2.3	2,679	22.7	82,459	- 1.0
FY94	25,043	-14.0	41,950	-17.2	2,028	-24.3	69,021	-16.3
FY95	27,351	9.2	47,544	13.3	2,515	24.0	77,410	12.2

The Rule Rather Than the Exception. Accused indigent citizens proceeding without counsel in district court remains the rule, rather than the exception. Routinely, these citizens plead guilty to misdemeanors which carry up to a year in jail, often as early as arraignment. Jail time is imposed in many cases. In spite of the right to counsel, I never hear judges ask whether a defendant who appears without an attorney is voluntarily and knowingly waiving the right to counsel. My attempts to set aside convictions/jail sentences for defendants who have pled guilty without counsel via RCr 11.42 have not been successful. The position of the judges has been that the judge at the beginning of the docket informs everyone of the right to counsel and that right is waived unless the defendant exercises it. This issue is ripe for litigation beyond the district court.

- Gail Robinson, Attorney at Law, Frankfort

two years. The DPA District Court data follows a similar trend. (See Table 2 DPA District Court Caseload FY 89 - FY 95) during the same time period. However, during FY 1995 the DPA District Court felony caseload increased by 9.2%. AOC data for FY 1995 for the District Courts is not available.

The AOC District Court misdemeanor column (Table 1) contain all persons charged with the less serious crimes, punishable by a jail sentence of twelve months or less and/or a fine of $500. All misdemeanor offenses are defined by statute. Table 1 indicates that misdemeanor cases in Kentucky increased yearly from 1989 to 1994 with only a slight dip (0.8%) during FY 93. The overall increase from 1989 to 1994, however, was a substantial 21%.

A direct comparison between the DPA misdemeanor cases (Table 2), and the AOC District Court misdemeanor columns cannot be made because DPA includes all of its traffic and juvenile cases in its felony and misdemeanor totals while AOC keeps them in separate categories. Most of the juvenile and traffic cases for which the DPA provides representation are either felonies or misdemeanors.

Nevertheless, over the six year period, the trend of DPA misdemeanors was one of steady increase, except for FY 1994. The 17.2% decrease experienced during FY 1994 is likely the result of the implementation of DPA's new electronic case tracking system which involved establishing standard case definitions and standard counting procedures[2].

The juvenile column for AOC District Court cases (Table 1) includes several types of non-criminal cases. These are dependency, neglect cases, status offenses, and paternity cases. Additionally, this column includes all juveniles charged with criminal offenses. Table 1 shows fairly substantial increases in the numbers of juvenile cases filed in Kentucky's District Courts from FY 1989 to FY 1994. The overall increase in juvenile cases during the five year period was 63.4%. The DPA District Court caseload (Table 2) does not have a juvenile column, because, as previously mentioned, these cases are placed in the appropriate felony or misdemeanor category.

The AOC District Court column labeled Mental Health and Disability (Table 1) includes both involuntary commitment and disability cases. The disability cases mostly involve competency issues. The court appoints attorneys to represent needy persons in disability cases. The DPA has no responsibility for representation in this area. The DPA Mental Health column (Table 2) contains *only* involuntary commitment cases. The data show that during the six year period from FY 1989 to FY 1995, there were four years of substantial increases and two years of substantial decreases. The overall increase for the six year period was 38.4%. This is attributed to 1988 legislation which contained provisions for legal representation during annual review hearings of persons involuntarily committed (KRS 202A.051 and 202A.071).

Moving Cases is Easier Without an Attorney. The problem of unrepresented indigent persons arises most frequently in juvenile and district court when judges want to move cases along without the interference of attorneys when the juvenile and adult defendants are not advised of their right to counsel. Specifically, I have witnessed several instances, and been advised of even more, that at arraignment when a child or adult indicates that they do not wish to enter an admission or plea, that the judge will berate them for this and assure them that they will never again get the opportunity to accept such a generous offer. And all this is done without ever advising the defendant that there is a right to counsel. The prosecutor is then allowed to discuss the matter with the defendant, and generally the defendant will enter a plea or admission, without benefit of counsel. The theory of the prosecution and the court seems to be that if they don't ask for an attorney, their rights haven't been trampled on. What do we as public defenders do when the private bar will do nothing and when asked by us for support in a concentrated effort to stop it, refuse to assist for fear of antagonizing the Court?

- Harolyn Howard, Assistant Public Advocate, Pikeville

District Court Criminal Caseload Increases by One Fourth in Five Years

Given the data available it is possible to tabulate an approximate total district court caseload by adding all of the rows and columns in Table 1. As previously noted, a small number of these cases are not criminal. Since the number of non-criminal cases is small, it is possible to draw some general conclusions about the data. The data indicate that the "total" district caseload has steadily increased each year from FY 1989 to FY 1994, except for a slight drop during FY 1993. For this five year period the overall statewide increase was 26.2%.

The DPA total District Court caseload (Table 2) for FY 1995 (77,410) has increased significantly over the FY 1989 caseload of 61,727. This represents an overall increase of 25.4%. This increase is nearly the same as the five year increase in the number of criminal cases filed in Kentucky's district courts. In other words, the rate of increase in the DPA district court caseload is keeping pace with rate of increase in the numbers of criminal cases filed in Kentucky's district courts.

A Substantial Number of Indigent-Accused in Kentucky District Courts are Without Representation

A comparison of AOC and DPA case statistics, indicates that many indigents are likely without counsel even though the DPA provided legal representation to 69,021 needy persons accused of crimes in 1994 in the District Courts.[3] However, the 69,021 cases represent only 24% (See Graph 1.) of the total number of criminal cases filed in the District Courts.

A crucial question to Kentuckians and those responsible for criminal justice policy which needs to be addressed is who, if anyone, provided representation for the other 76% or 214,357 District Court cases (See Graph 1.)? Did those accused all retain private counsel? It is highly unlikely that these 214,357 criminal defendants retained counsel since it can be conservatively estimated that 75% of the defendants appearing in the criminal courts are indigent.[4] This is a rather important question. It deserves an answer.

Insure Competent Counsel. Like every other aspect of the justice system, there exists a gross disparity among Kentucky's jurisdictions. While some areas struggle with judges who refuse to appoint counsel, we are frustrated by the virtual automatic appointment of DPA. My unverified assignment list for 1995 McCracken Circuit Indictments indicates we have been appointed to about 330 defendants out of 345 total indictments. We represent virtually all juveniles and at least 90% of all misdemeanor cases. Traffic offenders tend to hire private counsel at a higher rate and so we "only" get about 75% of those cases. The only defendants we don't get are A.I. and the few that one judge considers personal squabbles. Even when the judge refuses to appoint, if the defendant returns with no counsel because the price isn't right, we will be appointed and a fee assessed. Private counsels regularly are allowed to withdraw from cases when the money stops (and the work starts). We get these also. The early appointment of counsel is often viewed by judges as an expedient which saves the court's time and facilitates the system. Other judges are truly concerned with right to counsel and take a lenient position on determination of indigency. (For some judges, it is the only liberally construed right.) While this liberal appointment policy is frustrating for us, it is a blessing for our clients and, by far, the lesser of the 2 evils. Realistically, the only way to insure that all indigent clients receive counsel is for the state to accept fully responsibility for providing an equally funded defense system available to all. If this seems Draconian, consider that in my jurisdictions we already have the burden without the necessary funding. Another consideration is whether we have a responsibility to insure *competent* representation. during my prosecutorial dementia I became all too aware that most private counsel were barely competent novices in the criminal defense field. Increasingly, the public defender has become the only real criminal defense lawyer in town. This is especially true in Kentucky where the quality of public defense services is so outstanding. Imagine what could be accomplished if we were equally funded. Since setting up shop some 24 years ago, the Department has been forced to grow as the private bar gradually receded from the criminal field. Private attorneys simply cannot support their practice with only the few "monied" criminal cases available. As they do less, they know less. As society has changed, so our mission must expand. Consider the justice in the position that only the needy defendant gets access to a good lawyer. Let the judges give us everyone. Not just the poor. Not just the huddled masses. Send all the tempest tossed to us. We can handle the 10% who don't "deserve" us if it means no one ever again loses their right to counsel.

- Carolyn Keeley, Assistant Public Advocate, Paducah

TABLE 3
AOC AND DPA CIRCUIT COURT CASELOAD STATISTICS

AOC CIRCUIT COURT CRIMINAL CASELOAD

FY 89 - FY 95

	FELONY	%CHANGE
FY89	15,026	
FY90	15,269	1.6
FY91	16,245	6.4
FY92	18,470	13.7
FY93	19,440	5.3
FY94	17,844	- 8.2
FY95	18,782	5.3

The data in Table 3 lists the number of indictments returned or felony cases filed in Kentucky's Circuit Courts from FY 1989 through FY 1995. In each year except FY 1991, the data reflect increases in the number of indictments. The FY 1995 total (18,782) is 25% higher than the FY 1989 total of 15,026.

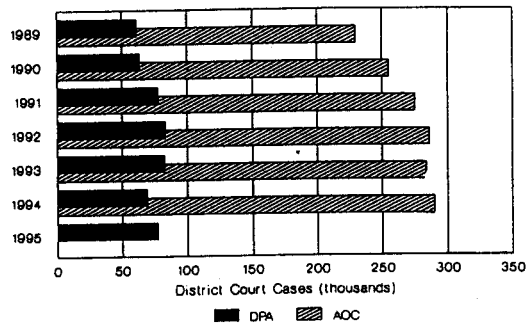
From FY 1989 to FY 1995 Table 4 shows that the DPA Circuit Court caseload has increased significantly each year except FY 1994. The decrease during FY 1994 is attributed to the implementation of the DPA's electronic case counting and case tracking system during that year. The DPA Circuit Court caseload for FY 1995 (11,196) was 62% higher than it was in FY 1989 (6,865).

DPA CIRCUIT COURT CRIMINAL CASELOAD
FY 89 - FY 95
TABLE 4

	FELONY	%CHANGE	%OF IND
FY89	6,865	45.0	
FY90	7,034	2.5	43.3
FY91	8,681	23.4	53.4
FY92	10,487	20.8	56.8
FY93	12,244	16.8	63.0
FY94	10,510	-14.2	58.9
FY95	11,196	6.5	59.6

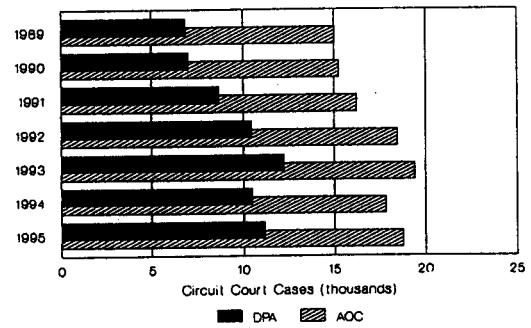
The data in Tables 3, 4 and Graph 2 indicate that the DPA provided representation for nearly 60% of the defendants charged with felonies in Kentucky's Circuit Courts during FY 1995. The significant question is who provided representation to the other 40% or 7,586 cases?

KENTUCKY'S
DISTRICT COURT CRIMINAL CASES



Graph No. 1

KENTUCKY'S
CIRCUIT COURT CRIMINAL CASES



Graph No. 2

Conclusion

The Department of Public Advocacy provides legal representation in one fourth of the criminal cases filed in Kentucky's district courts and in three fifths of the criminal cases filed inthe circuit courts. These findings are remarkably similar to those published in a 1991 *Advocate* article concerning the criminal caseload in Kentucky.[5] It appears that vast numbers of indigents accused of crime in Kentucky are processed through the court system without legal counsel.

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FOOTNOTES

[1]David E. Norat, "Implementation of Kentucky Supreme Court Decision in *Lewis v. Lewis*, Ky., 875 S.W.2d 862 (1993)," *The Advocate*, Vol. 16, No. 5 (October 1994) at 42.

[2]Sheldon S. Mirkin, "Case Definitions and Case Reporting," *The Advocate*, November 1993 at 22.

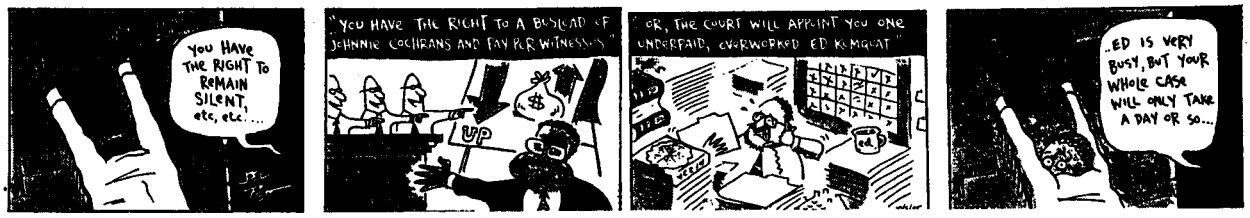
[3]Since Fiscal Year 1995 AOC district court caseload data are not available, comparisons with DPA 1995 district court data cannot be made.

[4]J. Thomas McEwen and Elaine Nugent, "National Assessment Program: Survey Results for Public Defenders," *Institute for Law and Justice*, Alexandria, Va., 1990.

[5]William P. Curtis, "The Criminal Caseload in Kentucky Trial Courts," *The Advocate*, Vol. 13, No. 4 (June 1991) at 10-13.

What Does Denying Counsel Cost? Regardless of one's subjective belief in the correctness of the O.J. Simpson verdict, of one key fact there can be no dispute. Never before has the public been given such an opportunity to openly scrutinize every aspect of a criminal trial. While the outcome has been criticized, and praised, by reference to various factual and societal factors, no commentator can claim that either the state or the defendant was denied a meaningful opportunity to participate. In short, in our society openness equates to fairness and, in that sense, all must agree that O.J. got a fair trial. That the fairness of O.J.'s trial may well have been dependent on his personal wealth raises an issue that should be of much greater concern to us than the outcome of one isolated case. In the vast percentage of criminal cases resolved daily in this country, the defendant is unrepresented by counsel. Where this occurs by choice of the defendant, there is no public harm. But, all too often, a defendant finds him or herself before a Court, requesting appointment of counsel, and finds either a judge indifferent to the right to counsel or one who balances that right with his or her need to move cases. In such cases, where there is no public scrutiny, the largest potential threat to our system exists. While the state cannot be expected to fund O.J. type defense in every case, a defendant denied counsel is denied an opportunity to meaningfully participate. While society has a valid, if not overriding, interest in punishing those guilty of criminal offenses, it has no interest in exacting punishment from those wrongfully convicted. There can be no rehabilitation for such an individual and any public sense of retribution stands, therefore, on questionable footing. In America, we believe that justice is best provided when two adversaries met in the battleground of the courtroom with an impartial trier of fact determining the outcome based on a framework of historical precedent, legislative enactments, and constitutional requirements. Where the defendant is denied counsel, the game is fixed and society should both take little pleasure in the outcome and question the price of admission.

- Rob Riley, Assistant Public Advocate, LaGrange



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Circuit Court Compels Appointment of Counsel

MADISON CIRCUIT COURT - DIVISION ONE

MICHAEL V. SMITH, PETITIONER	)	ORDER COMPELLING
	)	
VS. No. 94-CI-00718	)	APPOINTMENT OF COUNSEL
	)	
WILLIAM CLOUSE, DISTRICT COURT JUDGE RESPONDENT	)	

* * * * * * * * * * * * * * * *

This matter is before the Court upon the action of the petitioner, Michael V. Smith, requesting a writ of mandamus directing District Judge William Clouse to grant the petitioner's motion below for appointment of counsel. The Court will first address the issue of standing of the Department of Public Advocacy, specifically Honorable Jennifer Hall, to file and argue the motion below and the present petition.

I. Standing

The Respondent asserts that since the Department of Public Advocacy has not been formally appointed, their counsel has no standing to assert this issue. This is a rather circular problem who, if not a Public Advocate, is to assert the right of the indigent defendant to have the Department of Public Advocacy appointed to represent him? The Court is of the opinion that the Public Advocate, acting in good faith and without solicitation, has standing.

K.R.S. 31.110 states, in pertinent part:

> (2) A needy person who is entitled to be represented by an attorney under subsection (1) is entitled:
>
> (a) To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney....

The statute clearly encompasses the representation of an indigent defendant prior to formal appointment, so long as he has met the mandate in K.R.S. 31.120(1) which states:

> However, nothing herein shall prevent appointment of counsel at the earliest necessary proceeding at which the person is entitled to counsel, upon declaration by the person that he is needy under the terms of this chapter.

A Public Advocate's authority vests at the earliest point at which a person is entitled to counsel and after a declaration of indigency has been made, *i.e.*, the affidavit of indigency. Mr. Smith has reached this point.

II. Writ of Mandamus

This Court is authorized to dispense relief in the nature of a writ of mandamus by CR 81, which states:

> Relief heretofore available by the remedies of mandamus, prohibition, scire facias, quo warranto, or of an information in the nature of a quo warranto may be obtained by original action in the appropriate court.

In *Tipton v. Commonwealth*, Ky. App., 770 S.W.2d 239 (1989), the Court of Appeals held that while K.R.S. 23A.080 authorizes direct appeal to the Circuit Court of "any final action" of the District Court, the appropriate review of a District Court ruling is had by original action seeking a writ of mandamus or a writ of prohibition in the Circuit Court. The Court states therein:

> In our opinion, review of district court rulings is available through an original proceeding for relief in the nature of mandamus or prohibition in the appellate court,

> herein the circuit court.... This is not an immediate and direct interlocutory appeal to the appellate court but an original action. Procedurally, review is granted, thereby comporting with K.R.S. 23A.080(2) which says, "The circuit court may issue *all* writs necessary in *aid* of its *appellate jurisdiction*...." *Id.* at 241.

In discussing the appropriate standard of review to be used by this Court, they continue:

> However, the standard of review is different [between appeals and original actions]. Under the direct and interlocutory appeal approach, the standard of review is whether the trial court's ruling is supported by findings that are of record, and whether such findings were clearly erroneous or the trial court abused its discretion.
>
> The standard applied in original actions seeking mandamus or prohibition type relief is much different. To obtain relief in the nature of a writ of prohibition, a petitioner must show that: (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no adequate remedy by appeal, or (2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. The issuance of the writ is only under exceptional circumstances in order to prevent a miscarriage of justice. *Id.*

In the instant case, a motion to withdraw was made at the District Court level by Mr. Smith's private attorney based on Mr. Smith's inability to pay her fee. This motion was granted. An oral motion was then made by the Department of Public Advocacy, Honorable Jim Baechtold, that counsel be appointed based upon Mr. Smith's affidavit of indigency, which had been completed the prior day. While this motion and affidavit were not entered into the record, a review of the tape of the September 20, 1994 hearing indicates that the Judge ruled on this motion after the presentment of the motion and the affidavit of indigency. This motion was denied. Petitioner seeks the writ of mandamus to compel Judge Clouse to grant this motion.

The law in Kentucky governing the appointment of counsel for indigent persons is found in RCr 3.05 and K.R.S. Chapter 31. An indigent person is entitled to the appointment of counsel, after he has first met the burden of establishing his indigency. RCr 3.05(2). K.R.S. 31.100(3)(a) defines "needy person" or "indigent person" as:

> A person, eighteen (18) years of age or older...who at the time his need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation.

K.R.S. 31.120(2) goes on to explain that in the determination of whether one is indigent, the Court should take into account "such factors as income, property owned, outstanding obligations, and the number and ages of his dependents." K.R.S. 31.120(3) states:

> It shall be prima facie evidence that a person is not indigent or needy within the meaning of this chapter if he...:
>
> (a) Owns real property in the Commonwealth, or without the Commonwealth;
>
> (b) Is not receiving, or if not receiving is not eligible to receive, public assistance payments at the time the affidavit of indigency is executed;
>
> (c) Has paid money bail (other than the property bond of another), whether deposited by himself or another, to secure his release from confinement on the present charge of which he stands accused or convicted; or
>
> (d) Owns more than one (1) motor vehicle.

Appointment of counsel was denied at the District Court level after review of the affidavit by the District Judge. This appointment was denied based upon the Court's opinion that Mr. Smith had "assets enough" to pay for an attorney. But these facts are mere prima facie evidence that Mr. Smith is not indigent, and can be rebutted by other considerations. Taking into account the other factors of Mr. Smith's "income, property owned, outstanding obligations, and the number and ages of his dependents," this evidence is in fact rebutted. Mr. Smith, while in the ownership of two cars, has placed one in pawn, according to the representation of the Public Advocate; his

income is minimal; his dependents number seven: his wife and six children; and the outstanding obligations owed to him are unfortunately held primarily by bankrupt debtors. These facts were in his affidavit of indigency, with the exception of the car having been placed in pawn. Mr. Smith has met the burden of establishing his indigency for the purpose of appointment of counsel. Again, K.R.S. 31.120 notes:

> ...nothing herein shall prevent appointment of counsel at the earliest necessary proceeding at which the person is entitled to counsel, upon declaration by the person that he is needy under the terms of this chapter. In that event, the person involved shall be required to make reimbursement for the representation involved if he later is determined not a needy person under the terms of this chapter.

Mr. Smith has declared that he is "needy." He is entitled to counsel. For a determination of future representation, and the ability of Mr. Smith to compensate the Office of Public Advocacy, the District Court has the power to review "with respect to each step in the proceedings, whether he is a needy person." K.R.S. 31.120(1). Recoupment under K.R.S. 31.150 can be ordered at a later date if Mr. Smith is indeed found to have resources with which to finance his representation.

In the opinion of the Court, Mr. Smith has met the required standard to obtain relief in the form of a writ of mandamus. It would be a "miscarriage of justice" to allow felony proceedings to continue against a defendant without the benefit of counsel. The preliminary hearing at the District Court level is set for less than two weeks away. Mr. Smith's private counsel was permitted to withdraw based upon his inability to pay her fee. Without the appointment of counsel, there would exist "no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result." *Tipton*, at 241. While Respondent argues that a remedy other than the writ of mandamus is available to Mr. Smith, an accused is not required to repeatedly pursue an avenue in which the door has already been closed to him and the standing of the Advocate challenged.

Therefore, it is hereby ORDERED that the District Court grant the petitioner's motion below for appointment of the Office of Public Advocacy.

This the 14th day of October, 1994.

/s/ Julia S. Adams
Judge, Division One

Integrity of the System. The large discrepancy between the number of criminal prosecutions in the Commonwealth of Kentucky since 1985 as reported by the Administrative Office of the Courts and the number of those prosecutions in which individuals were provided appointed counsel as reported by the Department of Public Advocacy is cause for concern for the entire criminal justice system. The Administrative Office of the Courts and the Department of Public Advocacy should address this issue immediately to assure all of us that the discrepancy is not a result of thousands of individuals being denied counsel in those instances in which they are constitutionally entitled to assistance. Criminal statutes and applicable case law have become increasingly more difficult to interpret and/or to apply to the numerous and variant situations in which the criminally accused find themselves. It is difficult to imagine that any person, let alone the multitudes, as are indicated, would knowingly and/or voluntarily abandon their Sixth Amendment rights. Not only should there be an inquiry into the validity and meaning of the statistics; there should also be a thorough examination into the nature and circumstances of the waiver executed in each case in which an individual did not have the benefit of counsel in any criminal prosecution which occurred in the Commonwealth of Kentucky since 1985. The integrity of our system demands no less.

- Bette J. Niemi, President, Kentucky Association of Criminal Defense Lawyers

Passage of Harsh Juvenile Laws Likely by 1996 General Assembly

An Early Review of the 1996 Legislative Session

Any legislative review should be prefaced with the words of the wag (certainly not this writer) who once said that instead of meeting for 60 days every two years, the Kentucky legislature would do more good and less harm by convening for two days every 60 years. Defense lawyers in particular await each session with trepidation; this year is worse than usual. In general, the actions of the legislature do not benefit our clients insofar as crime and punishment is concerned. New crimes are created; the class of persons who may be prosecuted is enlarged; penalties are increased; and, evidentiary protections are abolished. The rights of alleged and convicted offenders are not a high priority on the working agenda of any elected legislative body.

This legislative review takes into account only those bills which were introduced on or before January 24, 1996. Bear in mind that the last day for introduction of new bills in the House is March 1 and in the Senate is March 5. The last day for the House and Senate to concur in and pass similar bills is March 29. The Governor then has until April 10 to veto legislation. Finally, the General Assembly wraps up on April 11 and 12 by meeting to determine if any gubernatorial vetoes should be overridden.

With that timetable in mind, the following are brief synopses of legislation introduced prior to January 26 which would affect juveniles in some way. At the time of this writing, only two of these bills had passed either chamber. All the rest were still in committee. You are encouraged to call:

1) 1-800-776-9158 to check on the status of any bill;

2) 1-800-633-9650 to obtain information about meetings and agendas; and,

3) 1-800-372-7181 to leave a message for individual legislators.

HB 117 is the most sweeping and controversial bill introduced so far. It was prefiled by Representatives Charles R. Geveden (Wickliffe) and James M. Lovell (Paris), Vice-Chairs of the House Judiciary Committee, and it has picked up five other sponsors. The bill is poorly drafted and unartfully written and is 83 pages long. Among its key provisions: The age at which a child may be transferred to adult court under KRS 640.010 is reduced from 14 to 12 for serious felonies; for less serious felonies to be transferred under KRS 640.010, only one prior felony adjudication is necessary. It is only necessary for two (or more) factors of the seven listed in KRS 640.010(2)(b) to favor transfer for the child to be transferred to Circuit Court. An approved disposition for a child 12 or older (reduced from 16) may be 90 days (increased from 30) in an approved secure detention facility. The juvenile court may retain jurisdiction over persistent juvenile misdemeanants until the age 18, whether in the juvenile or adult session of District Court (whatever that means!). Expungements are no longer allowed for felony offenses. The confidentiality provisions of the Code are gutted. Court costs against the child and parents are encouraged. More actions punishable by contempt are noted. A court designated worker must send all beyond parental control cases to court for prosecution; for other status offenders, only one complaint is allowed prior to court referral. The Department of Youth Services in the Justice Cabinet is created to operate juvenile facilities. The Division of Probation and Parole of the Department of Corrections shall provide all supervision and operate alternatives to detention programs. Informal adjustments are limited. More stringent procedures for appointment of counsel for indigents are established. Juvenile records are more easily admissible in various adult criminal proceedings. Detention is authorized in a juvenile section of a jail. Under certain circumstances, misdemeanors, violations, traffic offenses and status offenses may be transferred to Circuit Court. The court designated worker may only divert one felony and one misdemeanor charge per child in the child's lifetime.

This is a harsh bill, and its provisions are far worse than this brief summary can reveal. If enacted, it would hasten the end of a juvenile justice system already devastated by the firearm-felony offender provisions added to KRS 635.020(4) in 1994.

HB 50 establishes the status of violent felony offender for juveniles and mandates their transfer to adult court and makes their records public. (Sponsor: Allen Maricle, Pioneer Village, and others.)

HB 49 authorizes the sharing of juvenile court records relating to drugs and violence with school officials and makes public most other felony offense juvenile records. It further erodes the cornerstone of confidentiality. (Sponsor: Drew Graham, Winchester, and others.)

HB 76 prohibits the expungement of felony offenses from juvenile records and permits the use of juvenile felony records in circuit court proceedings. (Sponsor: Frank Rasche, Paducah.)

HB 236 allows full attorney access to juvenile records when the attorney is representing children under the Juvenile Code or in adult criminal proceedings. (Sponsor: Gross Lindsay, Henderson.)

SB 27 applies the sex offender registration procedures of KRS 17.510 to juveniles as well as adults. (Sponsor: Barry Metcalf, Richmond.)

SB 28 amends KRS Chapter 31 by establishing a new series of procedures and limitations relating to appointment of counsel for juveniles. (Sponsor: Elizabeth Tori, Radcliff.)

HB 163 amends KRS 620.100 relating to the appointment of guardians ad litem to specify that the guardian ad litem advocate the child's best interest and limits the guardian ad litem's involvement on behalf of the client in other proceedings. (Sponsor: Bob Heleringer, Louisville.)

HB 64 prohibits the Department of Corrections from requiring separate facilities for juveniles, or other requirements other than sight-and-sound separation. (Sponsors: J.R. Gray, Benton, and Kathy Hogancamp, Paducah.)

HB 67 prohibits jail standards or administrative regulations that would permit single-cell bunking of prisoners in adult or juvenile facilities. (Sponsors: Same as HB 64 above.)

HB 256 authorizes municipalities to enact and enforce juvenile curfew ordinances and makes a three-time curfew violator a status offender under the Juvenile Code. (Sponsors: Jim Callahan, Southgate, and Arnold Simpson, Covington.)

HB 310 amends KRS 508.025 relating to third-degree assault to include penalties for assaulting Department for Social Services staff while the worker is performing job-related duties. (Sponsor: Mike Bowling, Chair, House Judiciary Committee, Middlesboro, and others.)

HB 355 creates the crime of child endangerment in KRS Chapter 189A, for having a child under 14 years old in a motor vehicle when the driver is driving drunk. (Sponsor: Jack Coleman, Burgin.)

SB 115 raises the age for obtaining a driver's license from 16 to 17. (Sponsor: Tim Philpot, Lexington.)

HB 300 is a bill containing omnibus amendments relating to paternity and child support. It amends KRS 205.710 to redefine "a dependent child" to include a person under 19 years old if that person is in high school. It repeals the Uniform Reciprocal Enforcement of Support Act (URESA) and adopts the Uniform Interstate Family Support Act. (Sponsor: Tom Burch, Chair, Health and Welfare, Louisville.)

HB 315 establishes new standards, duties, privileges, training and prohibitions for "victim advocates." (Sponsor: Paul Mason, Whitesburg, and others.)

HB 29 requires local school boards to conduct unannounced canine searches for drugs in every school at least once a year. (Sponsor: Jim Maggard, Jackson.)

HB 100, among many other things, amends KRS 159.150 to define habitual truant as a child who has missed three or more days during a school year or been tardy nine times during a school year. (This bill passed the House 90-0.) (Sponsor: Freed Curd, Murray.)

HB 27 permits corporal punishment in school only with parental consent. (Sponsor: Jim Maggard, Jackson.)

SB 44 requires local school districts to adopt a policy that students who bring weapons to school shall be expelled for a period of one year (to conform with the Federal Gun-Free Schools Act of 1994). It also authorizes local school districts to provide alternative educational programs for expelled students. (Sponsor: Elizabeth Tori, Radcliff.)

SB 62 amends KRS Chapter 405 to allow full access to medical and school records for parents, and to permit parents of children in post-secondary education institutions to see enrollment and academic records necessary to determine, establish or continue child support. (Sponsor: Mike Moloney, Lexington.)

HB 12 amends KRS Chapter 605 to establish a new Juvenile Justice Commission and define its membership and duties. (Sponsor: Mike Bowling, Middlesboro.)

HB 120, relating to voluntary commitments to the Cabinet for Human Resources, entitles any parent, guardian or custodian or other person having legal custody who consents to the voluntary commitment to participate in treatment planning for the child. (This bill passed 89-0 and is in Senate committee.) (Sponsor: Tom Burch, Louisville.)

SB 60 allows the establishment of a family court within the Circuit Court. (Sponsor: Mike Moloney, Lexington.)

HB 338 creates a new section of KRS Chapter 454 to specify actions to be taken by a state agency which may enter into a consent decree as a result of a legal action. (Was this bill fostered by the consent decree relating to juvenile facilities agreed to by the Cabinet for Human Resources and the United States Department of Justice??) (Sponsor: Gross Lindsay, Henderson.)

A final note: **House Joint Resolution 20** commissions the Family Resource and Youth Services Center Branch of the Cabinet for Human Resources to provide to legislators pictures for their offices created by children and youth assisted by these centers. Let us hope, if this action comes to pass, that these pictures embody the fairness, equality and justice which is due to Kentucky's children, and that Kentucky's legislators are inspired by them.

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The Value of Counsel Decreases Dramatically Over 23 Years

In 1972 when Kentucky's state-wide public defender system was established the hourly rates were $20 per hour for out-of-court work and $30 per hour for in-court work with a $500 maximum for a misdemeanor case and $1,000 maximum for a felony case. The statutory rates today are $25 in-court and $35 out-of-court. Today's statutory maximums are $500 for a misdemeanor and $1,250 for a felony. The following indicates what the 1972 hourly rates and case maximums would be in 1992, 1994 and 1995 if they had kept pace with inflation. From 1972-1995 the inflation rate was 265%.

1972	1992	1994	1995
$ 20	$ 62.27	$ 71.06	$ 72.96
$ 30	$ 100.90	$ 106.58	$ 109.44
$ 500	$1681.80	$1776.40	$1824.00
$1000	$3363.59	$3552.80	$3648.00

NEW STUDY: ONE IN THREE YOUNG BLACK MEN UNDER CRIMINAL JUSTICE SUPERVISION; GROWING RACIAL DISPARITY PROJECTED TO CONTINUE

- **Drug Policies Led to 510% Increase in Incarcerated Drug Offenders, 1983-93**
- **Incarceration of Black Women for Drug Offenses Increased by 828% from 1986-1991**

Washington, D.C.... Nearly one in three African American males in the age group 20-29, according to a new study, is under criminal justice supervision on any given day - either in prison or jail, or on probation or parole. The study is a five-year follow-up to a 1990 report by The Sentencing Project that found almost one in four young black men in the criminal justice system.

The new study, *Young Black Americans and the Criminal Justice System: Five Years Later*, finds that an estimated 827,440, or 32.2%, of African American males in their twenties are now under criminal justice supervision, at an estimated cost of $6 billion a year. In addition, African American women experienced a 78% increase in their rate of supervision, the highest of any group studied, for the five-year period 1989-94.

Drug policies, and not increases in crime, have been the most critical factor leading to the rise in minority incarcerations, according to the report. African Americans constitute 13% of monthly drug users, but represent 35% of arrests for drug possession, 55% of convictions, and 74% of prison sentences. The number of black women imprisoned for drug offenses increased by a staggering 828% from 1986 to 1991.

"If one in three young white men were under criminal justice supervision, the nation would declare a national emergency," said Marc Mauer, Assistant Director of The Sentencing Project and co-author of the study. "The devastating impact of these policies demands no less a national response because it primarily affects the African American community."

The authors recommend a set of policies to begin to reverse the dramatic trends documented in the study without endangering public safety. These include:

- Revising national drug spending priorities to emphasize prevention and treatment rather than law enforcement.
- Expanding the use of drug treatment within the criminal justice system through drug courts and treatment in prisons.
- Creating a broader array of sentencing options for non-violent drug and property offenders.
- Eliminating mandatory sentencing and other sentencing policies that have had a disproportionate impact on women and minorities.

The report states that since the original 1990 study, factors related to the racial imbalance have only worsened: continuing overall growth of the criminal justice system; continuing disproportionate impact of the "war on drugs"; the new wave of "get tough" sentencing policies; and, the continuing burdensome circumstances of life for many low-income urban residents. The report concludes that current policies will result in increasing racially disparate impacts in the coming years.

The new study, "Young Black Americans and the Criminal Justice System: Five Years Later," by Marc Mauer and Tracy Huling, can be purchased from The Sentencing Project, (202) 628-0871, for $8.00.

KENTUCKY INCARCERATION STATISTICS BY RACE

Total Incarcerated 11,977	100%
Incarcerated - White 7,538	63%
Incarcerated - Non-whites 4,439	36%
Non-whites in Kentucky Population	7.1%

National Data Show Drop in Homicide and Increase in Youth Suicide

DES MOINES, Iowa -- The number of homicides in the United States dropped significantly in 1994, according to provisional data released today at the National Violence Prevention Conference co-sponsored by the Centers for Disease Control and Prevention (CDC) and the University of Iowa Injury Prevention Research Center in Des Moines, Iowa. Although the homicide rates continue to decline, youth suicide rates are increasing.

According to data from CDC there were 23,730 homicides in 1994, down from 25,470 in 1993. With the decline, homicide falls from being the 10th leading cause of death in the U.S. to being the 11th leading cause of death.

"Reducing violence in this country is a top priority, so this is encouraging news," said Vice President Al Gore who delivered the keynote address opening the conference. "But this is only the beginning, because 23,000 homicides a year are still far too many. And homicide is still the second leading killer for young Americans, ages 15-24, and the third for young children, ages 5-14."

The report shows death rates from homicide fell by 8 percent, from 10.5 deaths per 100,000 in 1993 to 9.7 in 1994, continuing the downward trend that started in 1992. From 1987 through 1991, the homicide rate had risen at an average of 5 percent a year. For youth homicides, among young men aged 15-24 years, the news is not as promising. The rates for homicide in this group have not come down, although they have leveled off. The rate of firearm homicide among 15 to 24 year old males is over 3 times that of the overall homicide rate (33 per 100,000 population in contrast to 9.1 per 100,000 population). Firearm homicides among males aged 15-24 years account for nearly 90 per-cent of the total homicides in this age group.

In contrast to homicide, suicide rates in the United States are not declining. The number of suicides in 1994 was 32,410, up from 31,230 in 1993. As with homicide, suicide is a major concern for young men aged 15-24 years. Since the mid-1950's, suicide rates have more than tripled among males in this age group, and this increase shows no sign of slowing up. Suicide rates among young men ages 15-24 years remain twice as high as the overall suicide rate in the United States. Although suicide rates for blacks are lower than for whites, the rate for black males age 15-19 years increased 165 percent from 1980 to 1992.

In commenting on the drop in homicide rates, DHHS Secretary Donna E. Shalala said, "These findings are encouraging signs that violence can be preventable. We have made progress in preventing homicides. Now we need to do the same thing for family and intimate violence, suicide, and violence in the workplace."

Sen. Tom Harkin (D-Iowa), who obtained funding for the Des Moines conference, said: "A stunning simultaneous breakdown of community, family, and work has created a vacuum which has been filled by violence, drugs, and gangs. Prevention is the key and it is fitting that CDC is sponsoring this conference. Violence is very much like a disease -- it can be studied, understood, and prevented."

About 1,000 representatives from public and private organizations across the country have come together in Des Moines to find solutions for violence prevention. Participants at the conference represent health, law enforcement, education, social services, academic institutions, Federal and State governments, and community-based organizations. The conference will begin Monday morning, October 23 and end with an address by Attorney General Janet Reno Wednesday morning, October 25.

"Society has not adequately protected our young people from two violent ends to young lives: homicide and suicide," said Dr. David Satcher, Director of CDC. "While it's encouraging to see the overall homicide rate come down, it's distressing to see so many of our young people dying from violence that is either self-inflicted or inflicted by another. We have got to find more effective ways to prevent this."

For further information regarding the report *Annual Summary of Births, Marriages, Divorces, and Deaths: United States, 1994*, please contact NCHS, Offices of Public Affairs, (301) 436-7551, or via e-mail at paoquery@nch10a.em.cdc.gov.

For further information regarding the report *Suicide in the United States: 1980-1993*, from the National Center for Injury Prevention and Control, please contact Mary Ann Fenley (770) 488-4902.

Juvenile Law From Other Jurisdictions

CERTIFICATION, PROCEDURES

State v. Mohi, 901 P.2d 991 (Utah), 1995)

The juvenile challenged the constitutionality of portions of the Utah Juvenile Courts Act (The Act). The direct file statute under which juvenile was charged provided that when an information was filed in district court or circuit court against a juvenile, the Defendant or his or her guardian or representative could file a "recall motion" with the juvenile court within ten days of the original filing. The court found that § 78-3a-25 of The Act violated Article I, §24 of the Utah constitution, which states: "All laws of a general nature shall have uniform operation." The court found that the statue permits two identically situated juveniles to face radically different penalties and consequences without any statutory guidelines for distinguishing between them and that this amounted to unequal treatment under Article I §24 of the Utah constitution. The court went on to hold that there was no rational connection between the legislature's objective of balancing the needs of the children with public protection. The court felt The Act allowed prosecutors total discretion in deciding which members of a particular class of juvenile offenders to single out for adult treatment.

YOUTHFUL OFFENDER STATUTE, PUNISHMENT & CONSEQUENCES

Hill v. Zakaib, 461 S.E.2d 194 (W.Va., 1995)

Defendant was sentenced under West Virginia's youthful offender statute, which requires a defendant to be at least sixteen years of age at the time of the commission of the crime in order to receive youthful offender treatment. The defendant was fifteen when he committed the crime and therefore technically not eligible for the youthful offender statute. The court held that had the state made a timely objection the sentence of six (6) months to two (2) years at a youth program and then probation after successful completion of the program, would have been void. If void then the defendant would have been made to serve the minimum adult sentence of no less than five (5) years and not more than eighteen (18) years. The State, however, failed to object to the youthful offender sentence at the time of sentencing; failed to timely object to the sentence after it was imposed; and failed to move for a correction of the sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure subsequent to imposition. The sentence, which was voidable when imposed became legal when it was not properly challenged by the State in a timely manner. Any attempt to increase Hill's sentence after a valid sentence has been served is a violation of the double jeopardy clause.

CERTIFICATION, PROCEDURES

T.J.V. v. State, 899 S.W.2d 397 (Tex., 1995)

T.J.V. was charged with murder and attempted capital murder in Juvenile Court under Texas' Family Code. T.J.V. was first hospitalized for mental illness and therefore murder and attempted murder prosecution was stayed. Upon T.J.V.s release from the hospital a second motion for hospitalization was made. Juvenile court found that child was still mentally ill but ordered outpatient treatment. Under Texas Code, child properly found mentally ill but not so ill that court could not proceed with delinquency charges. Juvenile proceedings no longer stayed.

SENTENCING, LIFE IMPRISONMENT

Swinford b. State, 653 So.2d 912 (Miss. 1995)

Swinford, a fourteen year old juvenile was convicted of murder by the DeSoto County Circuit Court. The juvenile appealed, arguing that the trial court erred in not considering alternative sentences under the Mississippi Youth Court Act. The Supreme Court of Mississippi held that it was well within the trial court judge's discretion to sentence Swinford to life imprisonment. The judge stated that he was aware of the sentencing alternatives because of the many cases he handled before dealing with teenagers charged with capital offense. The Supreme Court of Mississippi chastised the trial judge but held that although minimal, the trial judge adequately addressed the reasons for not utilizing the alternatives afforded. They affirmed the decision of the lower court.

SENTENCING, YOUTH REHABILITATION ACT
Veney v. United States,
658 A.2d 625 (D.C. 1995)

Defendant convicted of manslaughter appealed order entered in Superior Court of District of Columbia, sentencing him as an adult rather than under District of Columbia Youth Rehabilitation Act. The Court of Appeals held that an explicit finding that the defendant would not benefit from sentence under Youth Rehabilitation Act was not required.

Peterson v. U.S., 657 A.2d 756 (D.C.App. 1995)

Defendant was convicted of assault with a dangerous weapons, possession of a firearm during crime of violence and possession of prohibited weapons. Defendant appealed, arguing that the trial court failed to make an explicit finding that he would not derive benefit from treatment under the Youth Rehabilitation Act. The District of Columbia Court of Appeals held that the statute did not require the sentencing judge to make an express finding that an age eligible offender will not derive a benefit from Youth Rehabilitation Act treatment, before imposing an adult sentence. The Court of Appeals held that the statute only requires the sentencing judge to make a formal finding when opting *to impose* a YRA sentence. The decision of the lower court was affirmed.

TRANSFER, APPEALS
Hamilton v. State, 896 S.W.2d 877 (Ark. 1995)

Defendant, a juvenile was convicted in circuit court of manslaughter, and he appealed. The Supreme Court held that the juvenile could not challenge the trial court's denial of his motion to transfer on direct appeal from judgment of conviction; appeal from order granting or denying transfer to another court with jurisdiction over juvenile matter must be brought through interlocutory appeal.

TRANSFER, TREATMENT
United States v. T.F.F.,
55 F.3d 1118 (6th Cir. 1995)

Juvenile appealed from order of the United States District Court for the Eastern District of Tennessee, directing his transfer for trial as an adult. The Court of Appeals held that under Federal Juvenile Delinquency Act, trial court had to consider available treatment options when determining whether to transfer juvenile for trial as an adult; however trial court had no obligation to conduct nationwide search for treatment options.

SCHOOLS, RIGHT OF EDUCATION
In re Roger S., 658 A.2d 696 (Md., 1995)

Roger S. suffers from a variety of medical problems including diabetes and autism. Upon receiving his high school diploma from Montgomery County special education program, Roger's foster parents sought additional training for Roger to help him make the transition into the work world. Their request was denied. County department of social services requested emergency hearing concerning provision of post secondary transitional services for child in need of assistance. Following hearing, the District Court, Montgomery County, Juvenile Division, ordered child jointly committed to county department of social services and county board of education and ordered county public schools to provide the requested services, and county board of education appealed to Court of Special Appeals. The Court of Appeals held that Juvenile Causes Act does not authorize juvenile court to order school system to provide educational services to child in need of assistance.

AUTOMATIC TRANSFER, CONSTITUTIONALITY
Novak v. Commonwealth,
457 S.E.2d 402 (Va. Ct. App. 1995)

A sixteen year old boy confessed to the murder of a seven year old boy and nine year old boy. The juvenile was indicted on a capital murder charge. The juvenile was transferred to circuit court from juvenile court to be charged as an adult. The juvenile was convicted on two counts of capital murder, but was *not* sentenced to death. The juvenile appealed his conviction arguing that the proceedings lacked the individualized and particularized consideration mandated by the Eighth Amendment in death penalty cases. The Court of Appeals of Virginia held that the juvenile was not entitled to Eighth Amendment protection because he was not sentenced to death. The juvenile also argued that his transfer from juvenile court was an unconstitutional "automatic certification" to the circuit court. The Court of Appeals held that the legislature's treatment of juveniles who commit one of three specified crimes (armed robbery, rape or murder) to be rational. Therefore the statutory provision allowing the court to dispense

with an amenability determination in certain cases did not violate the defendant's equal protection rights.

CONFESSION, PRESENCE OF PARENTS/ATTORNEY

State v. Sugg, 456 S.E.2d 469 (W.Va., 1995)

A seventeen year old juvenile was apprehended for an alleged robbery of a gas station. The police read him his *Miranda* warnings as he lay face down with his hands cuffed. At the police station the juvenile asked to speak to the police, signed a waiver of his rights form and confessed to the crime. The juvenile court transferred the case to circuit court where the juvenile was tried as an adult. His police station confession was used against him. The juvenile was convicted and appealed, arguing his confession should not have been admitted at trial because he did not knowingly and voluntarily waive his *Miranda* rights because neither his parents nor his attorney were present. The Supreme Court of Appeals of West Virginia affirmed. The court adopted the totality of the circumstances test for determining knowing and voluntary. The court noted several factors weighing against the validity of the waiver, *e.g.* the *Miranda* warnings were first given while the juvenile was face down on the ground, he had only one prior misdemeanor and he read below a third grade level. The court also considered factors weighing in favor of the validity of the waiver, *e.g. Miranda* warnings were read to him at least once and he signed the waiver form. The court admitted that the form might be somewhat confusing and therefore a consideration weighing against a knowing waiver, but the court still held that based on the "totality of the circumstances" the trial court did not err.

MIRANDA WARNING, PERSONS NEEDED

People v. Montanez, 652 N.E.2d 1271 (Ill. 1995)

Police failed to comply with notice requirement when they called mom and told her first that her daughter was witness to murder and on second call that child was suspect and that mom was not to come to police station and should wait for police to call her. Police never called back. At 2:00 a.m. mom went to station and tried to see her daughter. Appellate court reversed conviction because of failure to suppress confession where police psychologically and effectively prevented Mom's visit to her daughter until after all the questioning was completed and confession was taken. "The intended fulfillment of notice...was simply a tragic charade."

RESTITUTION

R.I. v. State,
894 P.2d 683 (Alaska Ct.App. 1995)

After juvenile was adjudicated delinquent and ordered to make restitution, the Superior Court, Fairbanks later revoked probation and entered civil judgment in the amount of unpaid restitution. Appeal was taken. The Court of Appeals held that even though delinquent minor could evade restitution order by waiting until he became "too old" for court to take action against him, the court lacked authority to issue a civil judgment ordering payment of restitution in connection with delinquency matter.

SPEEDY TRIAL RIGHT

P.S. v. State, 658 So.2d 92 (Fla., 1995)

Florida Rules of Juvenile Procedure 8.090 establishes the time limits for speedy trials (90 days after date child was taken into custody or date petition was filed, whichever is earlier). State filed nolle prosequi ninety days after charges brought. State then tried to reindict. Appellate court held that state could not reindict.

CHILD WITNESS, JURY INSTRUCTION

Hicks v. U.S., 658 A.2d 200 (D.C. 1995)

Defendant was convicted of taking indecent liberties with minor child, enticing minor child for purposes of taking indecent liberties and assault with intent to commit sodomy. Defendant appealed, arguing the trial judge should have included the standard cautionary "Redbook" Instruction on the testimony of a child witness in effect at the time of the trial, in his charge to the jury. The Court of Appeals held that the judge had instructed the jury extensively with respect to factors to be considered in evaluating the credibility of a witness and in the absence of some unusual circumstances necessitating a special instruction, general credibility instruction is ordinarily sufficient. The trial judge, therefore was not required to give the jury a cautionary instruction on the reliability of a child witness's testimony.

CHILD WITNESS

State v. Trujillo,
895 P.2d 672 (N.M.Ct.App. 1995)

Defendant was convicted in the District Court of Chaves County of criminal sexual penetration of a minor and criminal sexual contact with a minor. Defendant appealed. The Court of Appeals held that (1) where defendant agreed to having depositions of child victims in exchange for continuance in first trial, use of those depositions was permitted in second trial as well; (2) defendant was not prevented from confronting witness after new charges were made following videotaped deposition of child victims; (3) defendant failed to take advantage of opportunity to cross-examine victims in front of jury on new charges.

DISPOSITION, CREDIT FOR TIME SERVED

In re Reginald D., 533 N.W.2d 181 (Wis. 1995)

Juvenile was arrested and held in detention facility until a formal disposition order was entered nine months later. Juvenile filed a motion requesting credit for time served for the days spent in predisposition in secure custody. His motion was denied and juvenile appealed, arguing his constitutional and statutory rights had been violated. The Supreme Court of Wisconsin affirmed, holding the legislature's failure to provide for time-served credit for juveniles was neither a violation of due process nor equal protection. The court held that the legislature's decision not to allow credit is an appropriate police power function and bears a rational relation to the promotion of the safety and general welfare of juveniles.

REPRESENTATION, RIGHT TO COUNSEL

State v. Jones, 532 N.W.2d 79 (Wis. 1995)

Seventeen year old juvenile was read his *Miranda* rights, signed a waiver and was questioned in a police car about a murder. Juvenile was not under arrest. Juvenile gave an incriminating statement and was transported to county jail. Juvenile met with a juvenile intake officer and in response to intake officer's explanation of his right to an attorney, the juvenile said he already had an attorney in another county. Detention hearing was scheduled and the public defender appointed counsel who immediately told jail personnel no one should interview the juvenile. An officer interviewed the juvenile rationalizing that the juvenile had not requested counsel. Juvenile made more incriminating statements which were admitted at trial. Juvenile was convicted and appealed, arguing violation of right to counsel. The Supreme Court of Wisconsin affirmed, holding that state statute requires a juvenile to be represented during all stages of the proceedings. The Supreme Court of Wisconsin held that proceedings does not include "mere custodial interrogation," it begins with the detention hearing, therefore, juveniles statutory right to counsel had not attached when he gave the incriminating statements.

SEARCH AND SEIZURE, DRUGS

In re Adam M., 629 N.Y.S.2d 770 (N.Y. 1995)

Police officer lacked sufficient basis to search juvenile. Adam M. was arrested because he lacked identification after being charged with violation of riding on outside of subway train. Officer patted down Adam, felt what he believed to be vials of cocaine in right front pocket. Officer not in fear of his safety and Officer did not believe vials were "fruits or instrumentalities" of violation. Held no right to search and vials should have been suppressed.

SEARCH AND SEIZURE, SCHOOLS

In re F.B., 658 A.2d 1378 (Pa.Super. Ct. 1995)

Juvenile was arrested for possessing weapon at school following uniform search conducted as part of school-wide search for weapons. Juvenile's motion to suppress the weapon was denied and he appealed arguing the search violated his fourth amendment right against unreasonable searches and seizures. The juvenile argued that the first part of the two prong test established by the United States Supreme Court had not been met: the search must be justified at its inception. The Superior Court held that the search was justified at its inception because of the high rate of violence in the Philadelphia public schools and because there is no way to know which students are carrying weapons.

TRANSFER, BURDEN OF PROOF/PSYCHOLOGICAL EVALUATION

People in re A.D.G., 895 P.2d 1067 (Colo. Ct.App. 1994)

Juvenile was charged in delinquency petition with manslaughter and prohibited use of a weapon. The juvenile court denied People's motion to transfer the case to district court. People appealed. The Court of Appeals held that due process does not require "clear and convincing evidence" in transfer hearings. The Court went on to point out that transfer decisions are left to the juvenile court's discretion. The People also

argued that the juvenile court should have compelled the juvenile to submit to a psychological evaluation and that it erred in failing to use against him his refusal to submit to such an examination. The Court of Appeals held that the juvenile's fifth amendment privilege prohibited the juvenile court from compelling him to submit to a psychological evaluation for transfer hearing purposes and from using his refusal against him.

DISCOVERY, PROSECUTOR'S RIGHT TO
Clinton K. v. People,
44 Cal.Rptr.2d 140 (Cal 1995)

Held on appeal that prosecutor entitled to reciprocal discovery prior to a "fitness hearing" under Welfare and Institutions Code 707. Prosecutor requested names and addresses of witnesses to be called at hearings, relevant written or recorded statements of witnesses, reports of experts to be called at hearing, results of physical and mental examinations to be used at hearing and any real evidence to be offered. Prosecutor only required to make general showing that such evidence would promote ascertainment of the truth and save court time (2 just causes for granting defendant discovery under Penal Code).

DISPOSITION, RESTITUTION
In re Welfare of D.D.G.,
532 N.W.2d 279 (Minn. Ct. App. 1995)

Juvenile was adjudicated delinquent in district court, after he admitted to one count of interference with the use of public property, stemming from juvenile's phoning in a bomb threat to school. Juvenile appealed. The Court of Appeals held that: statute providing that victim of crime has right to receive restitution, a general provision, prevailed over the earlier enacted special provision stating that court may order child in juvenile delinquency proceeding to pay restitution if child violates law resulting in damage to "person or property." Thus, juvenile could be ordered to pay restitution to school, including amount of reward school offered for information about bomb threats and wages of custodians who were paid for time not actually worked during school evacuation, even though there was no damage to person or property.

People in re J.L.R.,
895 P.2d 11151 (Colo. Ct. App. 1995)

Juvenile was adjudicated delinquent for committing acts that, if committed by adult, would constitute accessory to murder in the first degree. Juvenile's mother was ordered by district court to pay restitution to victim's parents. Mother appealed. The Court of Appeals held that mother could not be ordered to pay restitution for son's delinquent acts, since she was not properly notified or given opportunity to present evidence on issue or challenge amount of restitution sought.

DISPOSITION, COMMITMENT FOR CONTEMPT OF COURT
In re T.L.L., 899 P.2d 44 (Wyo. 1995)

T.L.L. placed in custody of parents but under protective custody of Family Services with restrictions on behavior. T.L.L. then found in violation of court's order and committed to girl's camp. Criminal contempt as defined by statute permits imprisonment for not more than 90 days or fine of not more than $500.00. As no additional delinquency petition was filed, T.L.L. could not be committed to state.

SENTENCING, LIFE SENTENCING
State v. Pilcher,
655 So.2d 636 (La. Ct. App. 1995)

Defendant was convicted of two counts of second-degree murder and appealed. The Court of Appeals held that two consecutive life sentences without benefit of parole, probation or suspension of sentence for fifteen year old juvenile convicted of double murder was not unconstitutional, even though juvenile was prevented from asserting his age as a mitigating factor.

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Medical Examination for Sexual Abuse: Have We Been Misled?

Dr. Lee Coleman

The growing recognition of sexual exploitation of children has brought special problems in determining whether an alleged abuse has in fact taken place. Unlike victims of other crimes, the sexual battery victim may not complain immediately. The victim may be inarticulate or feel intimidated by the perpetrator. There may be no obvious physical evidence of abuse.

Equally difficult, the "victim" may in truth have been led to believe he or she was abused through the use of leading and suggestive questioning. In such cases false accusations are not necessarily lies, because improper questioning may lead a child to sincere but incorrect beliefs. (10)[1]

Faced with such problems, police and child protection workers naturally hope for a way to resolve these special difficulties that may protect the child molester in one case and falsely accuse an innocent person in another.

Not for the first time and undoubtedly not for the last, we have turned to doctors to relieve us of the uncertainty. And so great has been our desire for resolution, for "science" to come to the rescue, that we have been only too happy to accept whatever a small number of the doctors have offered. With few exceptions (44, 47, 48, 69) medical literature has failed adequately to question whether doctors' offerings are legitimate medical evidence or mere speculation.[2]

Some Clarification

A good beginning is a recognition that sexual abuse is not a "diagnosis." It is an *event*. Even a highly suspicious finding, such as the presence of a disease normally transmitted through sexual contact, does not automatically mean that one can assert with confidence that sexual contact (or abuse) has occurred. Medical findings may be important in supporting or negating alleged events, but a finding of sexual molest is a *legal* - not a *medical* - conclusion.

Sexual abuse is not a "diagnosis." It is an event.

The confusion becomes acute when the methods normally used to reach a diagnosis in a non-adversarial, clinical situation are carelessly adopted in a legal investigation. Take for example, the "history." In medicine, statements made by patients or family are generally taken at face value. Allegations of criminal conduct, on the other hand, should be investigated rather than assumed correct. If a doctor hears an allegation and writes it down as "history," he or she has made not a "finding" but has merely repeated an allegation. This might seem obvious, yet it is common for doctors to make a "diagnosis" of sexual abuse, relying heavily on what they call a "history" - as given by an accusing adult or by an investigator. Normal ano/genital examinations are no help in establishing molest. The findings from such an examination are frequently termed "consistent with" sexual abuse, but rarely is such an assertion followed by a statement indicating that a normal examination is equally consistent with no abuse. Take, for example. the case in which the doctor wrote:

> The normal size of her vagina is not an uncommon finding in girls who have been fondled although not deeply penetrated into the vagina. This finding is still consistent with someone attempting to stick their finger into the vagina.

Given that the medical examinations of many actual victims of molestation will be normal, it follows that *every* child's anatomy is "consistent with" molest - because normal anatomy is also consistent with non-traumatic molest.

The confusion deepens when these two "non-findings" - "history of molest" and "physical examination consistent with molest" - are combined. The truth-seeking process is doomed when investigators learn that medical examiners have made a "diagnosis" of sexual abuse based on the

"history" and on a medical examination said to be "consistent with the history." Suspicions confirmed, investigators are hardly likely to continue with a vigorous and unbiased investigation.

Next, it should be remembered that "normality" always means a *range*. Parts of the body vary in detail from person to person. Whether examiners may safely (*i.e.*, reliably) equate physical findings with prior trauma will depend on whether controlled studies have documented the range of "normal" anatomy.

Finally, a note on "experience." Experience, like consensus, is not enough to move from conjecture to science. Feedback, *i.e.* controlled testing of ideas through research, is necessary to be sure that one's experience is not filled with incorrect notions that go unrecognized. Thousands of women, for example, underwent radical mastectomy because highly experienced surgeons, and doctors in general, believed it was the best way to save lives. Only subsequent research demonstrated that simple mastectomy saved as many lives.

The situation is even worse when the doctor's opinion will itself influence the ultimate findings of the justice system. The courts frequently accept Doctor X's expert opinion that a child has been molested. Despite being based on findings which in truth do not prove molestation, this judicial finding then becomes the confirmation which makes the doctor feel he can rely on "experience." Such "confirmation" is, of course, scientifically meaningless.

And then there are the examinations, themselves.

History of Examinations for Sex Abuse

Medical examinations for sexual abuse of children, done long after the alleged fact, are a new phenomenon. All but a handful of the articles on this subject are from the 1980s. An early and highly influential discussion by Woodling & Kossoris (65) was a collaborative effort by a family practitioner and a district attorney. This article listed findings claimed to indicate abuse, including a number of findings that are either extremely non-specific or open to subjective interpretation by the examining physician: perihymenal erythema (redness), tightness (too much or too little) of pubic or anal muscles, tense rectal sphincter, anal fissures, and hymenal irregularities interpreted as either "transections" or evidence of scarring.

In support of these alleged indicators of prior sexual contact, the physician coauthor offered only his "experience," which, he wrote,

> suggests that only forced penile penetration causes actual transection of the hymen or perihymenal injuries. Chronic molestation or repeated coitus will result in multiple hymenal transections which eventually heal and leave multiple rounded remnants present between 3 and 9 o'clock.[3] (65)

When a growing number of physicians and nurses began to take a special interest in forensic ano/genital examinations of suspected child sexual abuse victims, these new specialists eagerly absorbed such ideas, despite the lack of any corroborative research.

Take, for example, the "Training Syllabus" on "Medical Examination of the Sexually Abused Child." (66) To the above list of supposed indicators of molest were added "rounded scars called synechiae," which, "when magnified may show neovascularization" (prominent blood vessels). Another unsupported claim: "The rectal sphincter may manifest laxity or may reflexively relax when stimulated by direct contact with an examining finger, perianal stroking with a cotton bud (perianal wink reflex) or by lateral traction of the buttocks."

As trainees went back to their communities and in turn became the trainers, such uncorroborated claims became the conventional wisdom of the "experts." This second generation wrote more articles - which passed along the same alleged "indicators" of molest. Conspicuous by their absence, however, are any controlled data that showed that these "findings" were limited to molested children. (5,6,7,8,12,13,16,22,24,26,27,28, 30,31,32, 34,35,36,37,40,41,43,46,51,58,62).

Pediatricians and other qualified physicians refused to do such examinations, deferring to those few who claimed to be "specialists." Law enforcement and child protection workers quickly learned which examiners were likely to make findings supportive of an allegation of molest. Most often these examiners were attached to a "sex abuse team."

As of this writing, I have had the opportunity to read the reports and testimony of such examiners in cases involving 158 children suspected to have been molested. The confidence expressed, to the effect that findings like those mentioned above are reliable indicators of molest, is usually very high. Rounded hymenal edges and anal relaxation, to mention just two examples, are confidently asserted to be signs of molest, and only molest.

Behind the scenes, however, doubts were being expressed. Perhaps far fewer doubts than scientific caution dictated, but nonetheless more doubts than law enforcement officials, judges, or juries were hearing. Take, for example, a meeting in April, 1985, during which physicians and nurses came to learn how to examine children who might have been molested.

Dr. Woodling, whose very articles had helped promote these unsubstantiated claims, acknowledged that

> there is a significant variation in hymenal types... [W]e need to realize that hymens are like people's faces, there are lots of variations... [T]here are often times cuts or transections but they're not traumatic, they're just clefts that the child was born with...and can in fact appear to the untrained eye as an old transection. (67)

Yet in countless cases exactly these findings were said to be unequivocal evidence of molest. Another example is vaginal size. A paper by Cantwell (6) is still cited as support for the proposition that a vaginal opening size above four millimeters is supportive of molest. Woodling nonetheless acknowledged that this had "not held true in our experience." (67)

Countless juries have heard expert testimony that anal sphincter relaxation is a definite sign of sodomy, but Woodling admitted, "This is not a hard test, that means in fact that you have sexual abuse." (67)

"Normality" always means a range. "Specialists" have seen a lot of children and opined on which ones were victims of molest, but they have no way of checking on the accuracy of their conclusions.

At the same meeting, the remarks of another specialist, Dr. Astrid Heger, also showed a greater willingness to acknowledge uncertainty: "I think diagnosing sexual abuse on the hymenal diameter alone is a very dangerous thing to do.... [T]he same kid [may have] two different diameters, depending on how you were looking at her." (67)

What emerges from these meetings is the fact that these "specialists" have seen a lot of children and opined on which ones were victims of molest, but that *they have no way of checking on the accuracy of their conclusions*. And even were they to agree on how to interpret a particular finding, this doesn't mean they are correct; only controlled research will allow them to decide whether a particular finding is indicative of molest.

Dr. Robert tenBensel, a physician long involved in the effort to increase awareness of child abuse, has commented on the difference between consensus and true scientific evidence. In response to a 1985 Los Angeles conference at which there was an attempt to reach a consensus of positive findings among doctors doing these examination, tenBensel wrote: "I am not comfortable with the reported 'consensus of positive findings.' This is not the procedure of science; rather, it is simply an agreement among a select group of physicians invited." (61)

It is remarkable, considering the attention paid to sexual abuse of children in recent years, how little the doctors examining the children and giving opinions that may send a person to prison for life have done to validate the claims they so readily make in our courts. The heightened interest in medical detection of sexual abuse of children has produced lots of articles, but little research. Even the "experts" seem to ignore the difference between naked claims and true evidence.

In one of my own cases, a nurse examiner described "a healed V-shaped laceration at the 12 o'clock position in the rectum indicates penetration from the outside." This nurse was faithfully passing on what she had learned in workshops like those mentioned above. No supportive evidence was cited. Asked to evaluate these claims, I commented on the lack of any data to support

such an interpretation. In response, lawyers supporting the allegation called on a pediatrician specializing in such examinations. She backed the nurse's findings by citing several articles that had made the same claims. *None of the articles cited, however, contained reference to any research.* In short, there was no empirical basis for the assertion that an examiner can differentiate the sodomized from the nonsodomized by the shape of a perianal laceration. Once again, unsupported claims were passed off as medical evidence.[4]

Consensus is no substitute for research. We need to go beyond trading opinions and restating unsupported claims into the world of research findings.

In Search of Research

Scarce as they might be, we are not totally without research findings. And what we do have directly contradicts the claims made in recent years by the small number of examiners so regularly consulted by law enforcement and child protection investigators.

One study attempted to compare three groups of girls: (1) abused; (2) non-abused and asymptomatic; and (3) non-abused but with symptoms.[5] (15) Presence or absence of twenty genital findings were recorded on each child. These included hymenal clefts, hymenal bumps, synechiae (tissue bands), labial adhesions, increased vascularity and erythema (redness), scarring, friability (easy bleeding), rounding of hymenal border, abrasions, anal tags, anal fissures, condyloma acuminate (venereal warts)-exactly the kinds of findings being attributed to sexual abuse in courts across the land.

Their findings: "The genital findings in groups 1 and 3 were remarkably similar.... ...There was no difference between groups 1 and 3 in the occurrence of friability, scars, attenuation of the hymen, rounding of the hymen, bumps, clefts, or synechiae to the vagina." Conclusion? These findings are not specific to, and therefore do not indicate, and therefore do not form a basis for any defensible assertion that molestation has or has not occurred.

While the Emans study does report that only the abused group showed hymenal tears and synechiae (bands) in the vagina, doubts about this are raised by the results of the only other research effort done so far. McCann, Voris, and Simon[6] have taken a different approach from Emans' group. They have taken on the very necessary task of trying to establish the range of ano/genital anatomy in normal children. Without such data, the "findings" so regularly attributed to molest are essentially meaningless. That there are as yet no other published data on this is itself highly significant.

McCann and his colleagues examined 300 prepubertal children carefully screened for non-abuse. They concluded that many of the things currently being attributed to molest are present in normal children. In particular:

- Vaginal opening size varies widely in the same child, depending on how much traction is applied and the position of the child while being examined.[7]
- 50 % of the girls had what McCann calls bands around the urethra.[8]
- 50% of the girls had small (less than 2mm) labial adhesions when examined with magnification (colposcope). 25% had larger adhesions visible to the naked eye.
- Only 25% of hymens are smooth in contour. Half are redundant, and a high percentage are irregular.
- What are often called clefts in the hymen, and attributed to molest, were present in 50% of the girls.

Referring to his team's assumptions at the outset of their study. McCann commented.

> We were struck with the fact that we couldn't find a normal. It took us three years before we found a normal or what we had in our own minds as a preconceived normal.... [you see a lot of variation in this area just like any other part of the body.... We need a lot more information about kids.... [w]e found a wide variety.... [I]n the literature, they talk about...intravaginal synechiae and it turns out that...we saw them everywhere.... We couldn't find one that we couldn't find those ridges.... When does normal asymmetry become a cleft? I don't know.[9]

Anal examinations were equally revealing of a good deal more variation among normal children than assumed:

- 35% of children had perianal pigmentation.
- 40% had perianal redness. The younger the age group, the more likely this finding.
- One third of the children showed anal dilation less than 30 seconds after being positioned for the examination.
- Intermittent dilation, said by some to be clear evidence of molest, (30) was found in two thirds of the children.

Recalling that Emans had found that abused (by "history" at least) girls were remarkably similar to non-abused but symptomatic girls (infections, rashes, etc.), hymenal tears and intravaginal synechiae were said to be found *only* in the abused group.

We can now see that McCann's findings contradict both these alleged differences between molested and non-molested children. McCann saw no way to distinguish between a healed hymenal tear and "normal asymmetry." He also routinely saw "intravaginal synechiae" in his population of *normal* girls.

What little research exists, then, shows that a small group of self-appointed "experts" has been given an undeserved credibility by an all-too-eager law enforcement and child protective bureaucracy, who, lacking such expertise of their own, look to the medico-scientific community for impartial and reliable guidance. These doctors have misled the courts, falsely "diagnosed" sexual abuse, and damaged the lives of countless non-abused children and falsely accused adults.[10]

In short, pseudo-science is presently passing as medical evidence.

A Review of 158 Examinations

Current misdiagnosis is fundamentally warping investigations. I have as of this writing reviewed 221 cases of alleged child sexual abuse. Some cases have included dozens of children, so the total number of children is much higher. In these cases, 158 children had been examined by a pediatrician or nurse. In all but a handful, only one examiner was permitted to examine the child, a practice which surely needs revising in light of the current state of the art.

Of the 158 children, 49 were boys and 109 girls. They ranged in age from one year 10 months to 13 years old. The age distribution is given in **Figure 1.** With no scientific way to know which children were in fact abused, we cannot keep score on the percentage of false positive and false negative examinations. We can, however, look to see whether findings described by McCann in the single study of normal children are being attributed to prior sexual abuse.

Figure 2 tabulates those findings said to indicate genital abuse of girls.[11] Comparing these findings with what McCann found, we see that nearly all the findings attributed to molest were in fact found by McCann in substantial portions of the normal children he examined. They are *also* the findings which Emans found in allegedly molested children but also found in girls with no evidence of molest, but who suffered other types of medical problems.

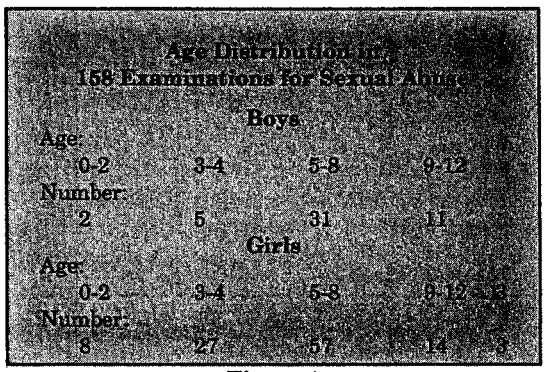

Figure 1

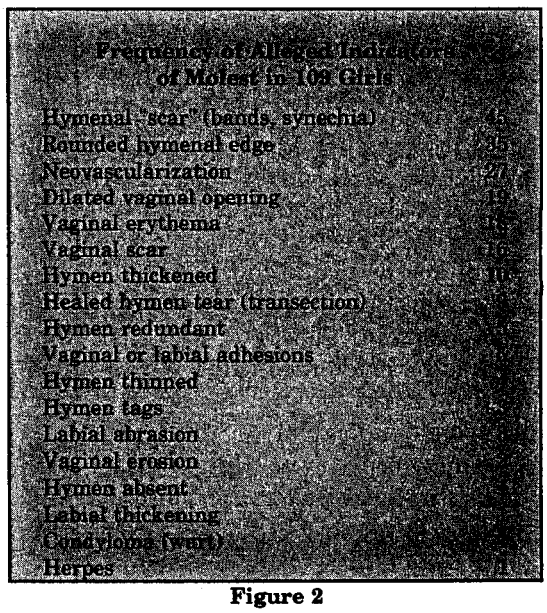

Figure 2

Even the few findings Emans claims distinguishes molested from non-molested (but otherwise symptomatic) girls, such as hymenal tears and intravaginal synechiae, have been found to be unreliable. McCann's team found, as already mentioned, that it was impossible to tell the difference between "normal asymmetry" of the hymen and a hymenal "tear," and that he saw intravaginal synechiae "everywhere" when the normal children were examined.

Figure 3 tabulates those findings said to indicate anal abuse.[12] Once again, we should first make use of the only study of normal children available, McCann's, to evaluate these findings. Both hyperpigmentation and anal relaxation were found in many unmolested children. Venous congestion was very common, as were thickening of anal folds. This leaves "scars" and "fissures" as the major finding said by some examiners to indicate anal abuse.

Frequency of Alleged Indicators of Anal Molestation in 158 Girls and Boys	
Scars	85
Anal Relaxation	23
Fissures	12
Hyperpigmentation	8
Tags	6
Funneling (coving)	6
Prominent veins	3
Loss of rugae	2
Failure to contract on stroking	2
Perianal bruising	1

Figure 3

Several factors raise serious questions about whether these findings are reliable. First, it is not uncommon for the scars described to be so small (one or two millimeters) as to be visible only with the use of the colposcope.[13] Also, we have no data on how frequent these findings will be found if normal children are examined under magnification, particularly if the examiner is not told ahead of time that the child to be examined is brought in for a sexual abuse examination. Specks of one or two millimeters may be easily called "scars," but are hardly reliable indicators of prior trauma. As Paul (48) has written, "[T]here is no evidential value in the finding of these tiny areas of scar tissue, for they are certainly not indicative of any form of sexual abuse. To honor them as being indicative of sexual abuse is to dishonor the administration of justice."[14]

Are "fissures" any more reliable as an indicator of molest? Just as in other parts of the body, (take chapped lips, for example) fissures may occur from many causes. (42) Infection and secondary scratching are certainly a prime example. Thus, fissures are too non-specific to reliably indicate anal abuse.

In those cases I have reviewed where a second examination of the child was allowed, it was common for one examiner to describe fissures and/or scars where the next examiner saw none; and this was particularly true if the second examiner had not had a chance to see the first examiner's findings.

Confusion in Laboratory

Over-interpretation of data is not, unfortunately, confined to the physical examination of the child. Laboratory data are frequently being interpreted in ways which are not medically justified.

Gonorrhea of the throat, for example, is easily confused with other organisms which occur normally. (1,64) Even genital gonorrhea, which obviously should lead to the most searching investigation of possible sexual abuse, may not inevitably be caused by adult sexual contact. (17,18,19, 21,23,38,39,45,49,57).

Condyloma acuminate (so-called "venereal warts") in children do not necessarily prove molest, despite frequent court testimony to the contrary. (4,11,53,54,56,60) Chlamydia false-positives are a risk with antigen screening tests, yet many persons have been accused on this basis. (20,25) Other organisms may infect the genitals of children, but insufficient data exist to automatically assume molest. (2,3,33)

Suggested Reforms

The medical community should first speak out forcefully, alerting the community to the fact that unwarranted conclusions are being drawn by a small group of practitioners.

Research which generates controlled data is long overdue. Studies such as McCann's must be replicated for all age groups, so that standards of normal ano/genital anatomy are established. Examiners should not be limited to those with a "special interest" in sexual abuse, for they have already demonstrated a profound bias.

Beyond such studies to establish the range of normal anatomy, we need studies which compare molested with non-molested children. Those studies which have claimed to do this have in fact simply relied on the judgment of the referring agency as to which children were molest victims. (6,7,15,16,22,24,27,30,35,40,41,43,55,58,62) This ignores, of course, the well established fact that false accusations of molest are a major problem.

Studies which compare molested children with normals must limit themselves to children demonstrated *convincingly* to have been molested. This will be difficult, for court findings are not necessarily accurate. If, however, this difficulty is ignored, and an unknown number of children examined and assumed to be molested have in fact not been molested, the data will continue to be as meaningless as they are now.

Meanwhile, the courts need to modify their current practice. The current assumption that a second medical examination is unnecessary must be re-evaluated. Opinions not accompanied by photographs should be viewed with suspicion.

Both lawyers and judges should recognize that medical interpretations being made by a few doctors are not well accepted in the general medical community. Appeals courts must be taught that convictions based in whole or in part on acceptance of such unscientific claims are suspect.

Physical examiners should not interview the child to get a "history" of possible abuse. This may influence the child and bias the examiner's subsequent findings and interpretations. Examiners should be told only that a careful ano/genital examination is required. When findings are conveyed to family members or law enforcement, over-interpretations must be avoided. All parties should be careful to remember that sexual abuse is rarely determined by physical examination alone. Thorough investigation is required.

Only when the medical community recognizes and speaks out against the current perversion of the true state-of-the-art will the courts and law enforcement respond. No sign of such an outcry from the doctors is on the horizon. Their deep sleep will end, it seems, only when concerned citizens take up the trumpet to awaken them.

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Footnotes

[1]Numbers in parenthesis refer to the numbered references at the close of the article.

[2]As this article went to press, *Child Abuse & Neglect* (Pergamon Press) published an issue (Vol. 13, 1989) devoted to examinations for sexual abuse. The editor's introduction was entitled, "The More We Learn. The Less We Know 'With Reasonable Medical Certainty.'"

[3]The "clock" reference is an arbitrary convention used to describe location. If the orifice is imagined as oriented as per a clock face, 12 o'clock would be at the top of the opening, 6 o'clock would be at the bottom, etc. Whether the child is examined in supine (face up) or prone (face down) position must of course he specified. Woodling was referring to examination in supine position.

[4]Dr. David Paul, one of the most experienced examiners for sexual abuse. has written: "[E]ven the most careful examination of a fissure-healed or fresh-by magnifying glass or colposcope, cannot differentiate between a "natural" fissure caused by constipation and one that was caused by anal penetration." (47).

[5]The study has serious flaws. The examiners were not blind to which category each girl belonged; no information is given on how certain it was that alleged molest victims were true victims; and examiners were not randomly assigned. Instead, the lead author was the exclusive examiner of girls assumed to be molested. Nonetheless, the authors deserve credit for at least addressing what has been ignored by so many others. They concluded from their literature search (just as I have from my own) that "no previous study has reported the incidence of various genital findings in girls."

[6]This study is not yet in print *in toto*; however, a part of the data has recently been published. McCann, Voris & Simon, *Perianal Findings in Pre-Pubertal Children Selected for Non-Abuse: A Descriptive Study*, 13 CHILD ABUSE & NEGLECT 179-183 (1989). This article contains useful comments on the need for caution in interpreting anal examination findings.

[7]Knee-chest position (subject facing table, knees drawn up, and examination done from the rear) leads to different results from the frog position (subject lying face up with legs spread).

[8]He has heard these described as scars indicative of molest. So have I.

[9]Dr. John McCann, Remarks at a meeting sponsored by the Center for Child Protection of the San Diego Children's Hospital, San Diego, Calif., January 21-24, 1988.

[10]To illustrate that such an assessment is not an overstatement, let us briefly review what happened in what I style "The Debacle in Cleveland," an English town in which two pediatricians relied on their certainty that anal relaxation meant "buggery" (sodomy).

Hobbs and Wynne had reported in the British journal Lancet that "Dilatation and/or reflex dilatation of the anal canal" were not seen in normal children, and indicated sodomy. They added that, "In addition to reflex dilatation, we have also seen alternate contraction and relaxation of the anal sphincter or 'twitchiness' without dilatation. In our experience this also indicates abuse." (30)

Despite the fact that Hobbs and Wynne presented no controlled data supporting these notions, their claims were accepted as uncritically in Britain as similar ones here. The catastrophic events were later descnbed in a governmental report (50):

"Dr. Higgs had, in the summer of 1986...suspected sexual abuse and on examination saw for the first time the phenomenon of what has been termed 'reflex relaxation and anal dilatation.' She had recently learned from Dr. Wynne... that this sign is found in children subject to anal abuse..."

Higgs and a colleague (Wyatt) soon were diagnosing children right and left as victims of sodomy. So sure were they of their conclusions that when the finding disappeared and then returned, and the alleged perpetrator had had no contact prior to the reappearance, they presumed a *second* sodomy by a different person! In one case, by the time of the fourth reappearance of the anal relaxation in one child, the grandfather, father, and, finally, the foster parents had all been accused of sodomizing the child.

Before this farce played itself out, Higgs and Wyatt had "diagnosed" sexual abuse in 121 children from 57 families, over a period of 5 months. In the typical case, the child would be removed from the parents and then subjected to regular "disclosure work" interviews.

Eventually, outraged parents were able to arrange second examinations - and British courts gradually came to their senses and returned most of the children. Interestingly, these second examinations by highly experienced doctors often differed from the initial examinations. As Her Majesty's investigators wrote, "The signs recorded by Dr. Higgs and Dr. Wyatt were in the main confirmed by Dr. Wynne in those children she examined, but not by Dr. Irvine, Dr. Paul, Dr. Roberts and others in the children they saw."

[11]As it turned out, all "positive" findings in boys were confined to anal examinations.

Because of inconsistent terminology used by different examiners, I have included alternate terms in parenthesis in the tabular material.

[12]Here, both boys and girls are included.

[13]I am unable to present here a tabulation of the sizes of the scars in the cases reviewed, for most often no pictures are taken and no measurement is taken.

[14]For comments in a similar vein, see references (9,29,52).

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Plain View

Ernie Lewis

United States v. Biggs
70 F.3d 913

This case demonstrates the thin protection provided by the warrant clause of the Fourth Amendment. Here, the police in Hamilton County, Tennessee, received information that Biggs was in a local motel room. A fugitive warrant had been issued on Biggs. Surveillance outside the motel and in the room next door to the motel was established. Nothing happened until Biggs went to his truck which was parked between 20-75 feet away from his open motel room door. The police arrested him at his truck, and then proceeded to conduct a "protective sweep" of his room, finding a gun in an opened suitcase. Biggs was later convicted of being a convicted felon in possession of a firearm. His motion to suppress was denied by the district court.

The Sixth Circuit affirmed in an opinion penned by Judge Merritt and joined by Judge Daughtrey. The Court held that under *Maryland v. Buie*, 494 U.S. 325 (1990), the police had sufficient articulable reasons for conducting the protective search. The officers had testified that they needed to search Biggs' motel room because they had received information that another person was expected to join Biggs, that the motel room door was left opened, and that on two previous occasions when Biggs had been arrested another person had been nearby with a weapon. The Sixth Circuit found these to be reasonable reasons and affirmed the lower court.

Judge Wellford dissented. He found the reasons articulated by the officers to be unpersuasive. "Searching for weapons or accomplices in a home or residence where officers have a reasonable suspicion of danger is one thing--entering and searching a motel room as much as 75 feet away from the scene of arrest of an unarmed suspect is another."

This is an unfortunate decision. Here the majority treated the motel room as no more than a mere vehicle which can be searched without a warrant with a passing articulated "safety" reason. What happened is that a man was arrested 20-75 feet away from his "house" and thereafter the police went into his house, without a warrant, and searched until they found evidence used to convict the defendant. Stretching the "protective sweep" this far -- to the point of being allowed to enter a house when the arrest occurs outside -- operates to obliterate the rule.

United States v. Erwin
71 F.3d 218

A call came in to the Livingston County Sheriff's Office that a drunk driver was on the highway. An officer went to the location and found someone who met the description. However, an investigation revealed that while he was nervous, he gave no indication of being drunk. A pat down search revealed a pager, money and food stamps. During the pat down, the Deputy noticed a cellular phone and drug paraphernalia in the car. The Deputy then asked the defendant if he could search the car, and the defendant agreed. A kilogram of cocaine was found.

After the motion to suppress was denied, a conditional plea was entered and an appeal taken to the Sixth Circuit.

In an opinion written by District Judge Matia and joined by Judge Jones, the Court reversed. The Court held that because Erwin was found not to be intoxicated, he had to have been released. "[T]he scope of activities permitted during an investigative stop is determined by the circumstances that initially justified the stop...Once the officers satisfied themselves that Erwin was not operating his vehicle under the influence of alcohol or narcotics, Erwin should have been released."

Judge Ryan in a strong and lengthy dissent defined the issue in a radically different way, saying the issue was not one of the scope of the investigative detention, but rather whether the consent was voluntarily given. Judge Ryan believed that the information gained by the officers during the initial stop justified the continued

detention of Erwin, or at a minimum allowed the officers to ask Erwin to consent to a search of his car. "The Constitution does not prohibit a law enforcement officer from engaging an individual in conversation; and that is not less so when the conversation includes a request for consent to conduct a search of the individual or his vehicle." Because the consent was voluntary, the search was reasonable and thus constitutional.

The Short View

1. ***People v. Redinger***, 906 P.2d 81 (1995). The police stopped a motorist for failing to have a license plate on his car. Once he stopped him, however, he saw a temporary plate. Rather than letting the motorist go, however, the police officer asked for the driver's license, registration, and proof of insurance. When drugs fell out thereafter, the defendant was arrested. The Colorado Supreme Court held this violated the Fourth Amendment, since the detention of the motorist continued after the reason for the stop ended. "When, as here, the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for continued detention and interrogation of citizens."

2. ***Smith v. State***, 666 A.2d 883 (1995). Where the police pat down an individual they have seen put something in his waistband, and fail to find a weapon, it violates the Fourth Amendment thereafter to pull out the shirt to pursue the search. Thereafter, cocaine, discovered when the shirt was pulled out, was seized in violation of the Fourth Amendment under *Terry v. Ohio*, 392 U.S. 1 (1968).

3. ***State v. Foster***, 905 P.2d 1032 (1995). Where a citizen is arrested outside of his car, the car may not be searched incident to his arrest, even though the arrest was for driving on a suspended license. Analyzing *New York v. Belton*, 453 U.S. 454 (1981), the Court said that the "objective and the virtue of the *Belton* decision was to obviate uncertainty in applying the *Chimel* 'lunge area' rule to automobile searches... [W]e conclude that the *Belton* objectives and Fourth Amendment principles are best served by limiting *Belton*'s application to searches of automobiles that were occupied by the defendant at the time of arrest when the police signalled the driver to stop or when contact between the police and the defendant was otherwise initiated."

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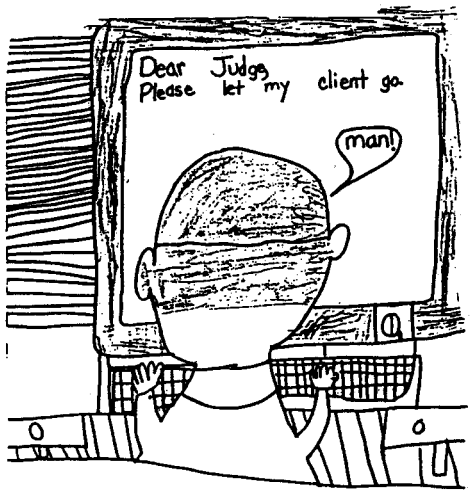

Public defenders just want to help out.

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

Reported KRE Cases
July 1992 - December 31, 1995

This is an update of page 47 of The Advocate's Special Issue on Evidence & Preservation, Vol. 16, No. 6 (Jan. 1995).

RULE	CASE
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"The people who are running things are especially prone to error when they are isolated from the shared ideas and instincts of the larger community... Indeed that is the pragmatic argument for democracy."

- William Greider

Ask Corrections

QUESTION 1:

My client has received a restoration of civil rights issued by the Governor of Kentucky. He is planning to move to another state. Does the Kentucky Restoration of Civil Rights apply to his ability to vote in that state?

ANSWER 1:

Some states do not recognize another state's restoration of civil rights. Your client should contact the Attorney General's Office, or Governor's Office, in that state to see if the restoration of civil rights issued by Kentucky would allow him to vote and hold public office in that state. It may be necessary for your client to apply for a restoration of civil rights with the Governor's Office in the state of residence in order to vote in that state.

QUESTION 2:

My client is seeking a pardon by the Governor. What impact would a pardon have on my client?

ANSWER 2:

A pardon is defined as the excusing of an offense without exacting a penalty; a release from the legal penalties of an offense; or an official warrant of remission of a penalty.

If your client is currently incarcerated and receives a pardon for that offense, he would be released from further service of that sentence. The Department of Correction's records would reflect the issuance of the pardon.

If your client is not currently incarcerated, but has previously completed the service of his sentence, his records with the department would reflect the subsequent issuance of the pardon.

QUESTION 3:

My client is considering requesting a pardon, or clemency by the Governor because of the circumstances involved in his case. He is currently incarcerated serving a sentence for murder. What impact would a pardon, or clemency have on my client?

ANSWER 3:

If he received a pardon of the entire sentence, he would be released from departmental custody.

Clemency is considered an act or instance of leniency. In the case of clemency the Governor would determine the extent of leniency given. Your client's sentence could be commuted in its entirety, or a portion of his sentence may be commuted. The Governor may commute his sentence to a lesser sentence, commute his sentence to for time served.

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"Results are not the only, or even the best criteria for evaluating the fairness of a trial."

- Alan M. Dershowitz, Esq.

Funds for Defense DNA Experts Required

This is the tenth in 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.

A review of the scientific thinking, the law and common sense reveals that funds for defense DNA experts in criminal cases is necessary.

Scientists Recognize Need for Defense DNA Experts

A two year comprehensive study by the National Research Council of the National Academy of Sciences, which by authority of its 1863 charter granted by Congress is required to advise the federal government on scientific developments, was published April 16, 1992 entitled, *DNA Technology in Forensic Science*. (NRC Report). The study was conducted by a group of scholars highly regarded in medicine, science and law. It was undertaken to evaluate the controversies which erupted in the scientific community concerning deoxyribonucleic acid (DNA) methodology. The report acknowledges certain elements of DNA methodology are the subject of continuing scientific debate. This eminent publication was forthright in its judgment that due to the complexities which underlie the methodology of DNA analysis that defense resources are crucial:

> Defense counsel must have access to adequate expert assistance, even when the admissibility of the results of analytical techniques is not in question, because there is still a need to review the quality of the laboratory work and the interpretation of results. When the prosecutor proposes to use DNA typing evidence or when it has been used in the investigation of the case, an expert should be routinely available to the defendant. If necessary, he or she should be able to apply for funds early in the discovery stages to retain experts without a showing of relevance that might reveal trial strategy. Whenever possible, a portion of the DNA sample should be preserved for independent analysis by the defense. NRC Report at 147.

Authorities for Funds for DNA Defense Experts

- ***Cade v. State***, 658 So.2d 550 (Fla.App. 1995)
- ***DuBose v. State***, 662 So.2d 1189 (Ala. 1995)
- ***Husske v. Commonwealth***, 448 S.E.2d 331 (Va.App. 1994)
- ***Polk v. Mississippi***, 612 So.2d 381 (Miss. 1992)

Courts Recognize Need for Defense Experts

Courts in Alabama, Mississippi, Virginia, and Florida agree with the National Academy of Sciences that criminal defendants are entitled to their own independent, defense DNA experts and the funds necessary to employ these expensive serological specialists. Nothing could be more obvious in light of what is at stake in a criminal trial and in view of the mythical persuasive power of DNA results. See Petterson, *Indigent Defense: DNA Experts for Indigents*, **The Champion**, Vol. 18, No. 10 (Dec. 1994) at 29.

Common sense tells us that to insure fair decisionmaking and reliable results the defense has to be given the resources "to develop the shortcomings in the DNA methodology used by the Commonwealth's witnesses, and to explain the current controversy surrounding the reliability of the underlying statistics." *Husske*, *infra*, at 340.

When "zealous experts are not forthcoming about the limitations and shortcomings of DNA evidence, defense attorneys must be prepared to identify and explain the relevant issues in cross-examination and with experts of their own." Koehler, *DNA Matches and Statistics: Important Questions, Surprising Answers*, 76 Judicature 222, 229 (1993).

A look at four cases shows the uniformity of thinking on the necessity of funds for DNA experts.

In ***Polk v. Mississippi***, 612 So.2d 381 (Miss. 1992) the defendant was convicted of two homicides and sentenced to two life sentences. *Polk* analyzed *Ake* and determined that as a matter of due process "It is also imperative that no defendant have [DNA] evidence admitted against him without the benefit of an independent expert witness to evaluate the data on his behalf." *Id.* at 393.

In ***Husske v. Commonwealth***, 448 S.E.2d 331 (Va.App. 1994) the defendant was convicted of sodomy, rape, robbery and breaking and entering. A prosecution DNA expert testified on direct examination at trial that the likelihood of a randomly selected caucasian bearing the same DNA profile as the defendant's was 1 in 700,000. On cross-examination the state's expert amazingly said "there was no controversy in the scientific community about the validity of the FBI [DNA] data base." *Id.* at 333.

The trial judge refused to authorize funds for a defense DNA expert but peculiarly did appoint co-counsel who was represented as being "the most knowledgeable member of the local bar in the area of forensic DNA application." *Id.*

Husske reversed the trial judge and observed that *Ake's* "touchstone inquiry is the extent to which the assistance of an expert in this case would have militated against the risk of error if the expert assistance were not provided." *Id.* at 335. The Virginia Court relied heavily on the NRC Report which found ongoing challenges to DNA methodology in the scientific community. In light of these controversies, the Court noted that "some states recently have held DNA statistical computations evidence inadmissible because the methodologies do not possess 'general acceptance...in the relevant scientific community.'" *Id.* at 338.

Husske held that the defendant was entitled to funds for a defense expert to reduce the risk of error in the trial because a defense expert could:

1) testify to the data base controversy;

2) testify to the random match controversy;

3) assist in cross-examining the state's DNA expert's technical analysis to diminish the weight of that opinion;

4) attack the credibility of the state's expert's disavowal of knowledge of a data base controversy; and

5) allow the defense to raise doubts about the strength of the prosecution's case.

Id. at 339-340.

In ***DuBose v. State***, 662 So.2d 1189 (Ala. 1995) the Supreme Court of Alabama was faced with the question of whether Edward DuBose was improperly convicted of 3 counts of capital murder because of the failure to afford him funds for DNA defense expert help.

First, the Court confronted the timeliness of the request for funds. Three days after DuBose was arrested, the defense knew DNA would be used by the prosecution, and the defense requested discovery of evidence relevant to that testing. The following month, the defense informed the Court that it would not ask for expert funds until the state's results were turned over. The defense

received test results 4 months later, and did not receive autorads and lab notes for another 8 months. Nine months after arrest, the defense asked for funds for DNA experts and the state contended that request was untimely.

DuBose held it was "reasonable for defense counsel to wait for the prosecution's results before seeking expert assistance.... The prosecution's DNA results could have been exculpatory or inconclusive, thereby eliminating the need for a defense expert. Until the autorads, laboratory notes, and other data were available to the defense, there was little, if any, assistance that an expert could have provided." *Id.* at 1194.

Next, the Court found adequate the showing that expert help was necessary. In analyzing the necessity, the Court noted:

- DNA has remained controversial;
- some experts see DNA as an accurate identification method;
- other experts find DNA unreliable;
- there is possibility for error in interpretation and performance of DNA tests;
- the complexity of DNA makes it unlikely that a defense attorney will have the necessary scientific competence;
- defense counsel cannot testify;
- the state's expert is "unlikely to give testimony unfavorable to himself or his processes"; and
- "DNA statistical evidence can create a 'potentially exaggerated impact on the trier of fact.'"

Id. at 1194-1197.

"Given the weight that a jury could place on DNA tests and the statistics drawn from them, coupled with the unlikelihood that defense counsel will have the expertise to challenge that evidence," *DuBose* held that "an indigent defendant against whom DNA evidence will be offered must have access to a DNA expert to assist in his defense." *Id.* at 1197.

DuBose recognized that without a defense DNA expert, the defense could not:

- refute the state's expert;
- independently test the samples;
- question whether there was a "match"; and
- explain the division of scientists on the reliability of DNA analysis.

Id. at 1199.

In ***Cade v. State***, 658 So.2d 550 (Fla.App. 1995) the defendant was convicted of kidnapping, sexual battery, robbery, burglary and theft. The state DNA expert testified that Cade's DNA matched the DNA in the semen found on the victims' clothing. The evidence of guilt was circumstantial. Neither victim could identify the defendant.

The defense attorney promptly asked for a DNA expert, identified a particular expert to the court and provided an estimate of costs. The trial judge denied the request saying it could be renewed if the defense did not find what it needed after taking the deposition of the state expert or searching the library at the university.

Cade held that the trial judge abused its discretion since "there was a substantial risk that the failure to supply the defendant with an expert deprived the defendant of a fair trial." *Id.* at 553. The Court's rationale for finding funds for a defense expert were necessary included:

- "the use of DNA matching to prove identity is especially persuasive";
- DNA is a "highly technical methodology that the literature and caselaw suggest can be vulnerable to attack"; and
- a defendant is entitled to the "basic tools" of an adequate defense.

Id. at 553-555.

Sample Affidavit in Support of DNA Funds

For those interested in the specifics of a threshhold showing, *Dubose v. State*, 662 So.2d 1156 (Ala.Cr.App. 1993) *aff'd Dubose v. State*, 662 So.2d 1189 (Ala. 1995) contained excerpts from a December 4, 1989 affidavit of the New York attorney Peter J. Neufeld on the necessity of funds for defense experts, and expected fees and expenses of $10,000 - $30,000 for qualified assistance. It read in part:

> "...My qualifications in support of this affidavit include the following:
>
> "a. I was co-counsel...on *People v. Castro*, 545 N.Y.S.2d 985 (N.Y.Sup. 1989), the first trial court in the nation to exclude DNA evidence of a match on the grounds that the evidence was not sufficiently reliable.
>
> "b. I served as a member of the New York State Governor's task force on the imple-

mentation of DNA testing from 1988 through 1989.

"c. I am co-chair of the DNA subcommittee of the National Association of Criminal Defense Attorneys. In that capacity I communicate with attorneys throughout the country who are handling DNA cases. Consequently, I am quite familiar with the costs essential to the adequate defense of an action involving DNA evidence proffered by the prosecution.

"3. By way of background, it is useful and appropriate to appreciate that the question of DNA testing's reliability is still an open and hotly contested matter in this nation's courts. It is sometimes suggested by DNA's proponents that the need for often lengthy and costly pre-trial hearings in DNA cases has been all but eroded due to the first three state court appellate decisions, all of which affirmed trial court rulings admitting evidence of a DNA match. A brief review of the DNA litigation to date, however, will surely demonstrate that the need for these hearings and the retention of experts is greater than ever before.

"4. *Andrews v. State of Florida*, 533 So.2d 841 (Fla.App. 1988), [*cert. denied*, 542 So.2d 1332 (Fla. 1989),] stands as the nation's first appellate decision on DNA profiling. Regrettably, the *Andrews* court's affirmance of DNA technology was based on the review of a trial record in which the defense called *no* witnesses in opposition and the cross-examination of the prosecution witnesses was, at best, perfunctory. In the second and third appellate decisions, *Cobey v. [State]*, 80 Md.App. 31, 559 A.2d 391, *cert. denied*, 317 Md. 542, 565 A.2d 670 (1989), and *Spencer v. [Commonwealth*, 238 Va. 275, 384 S.E.2d 775 (1989), *cert. denied*, 493 U.S. 1036, 110 S.Ct. 759, 107 L.Ed.2d 775 (1990); *Spencer v. Commonwealth*, 238 Va. 295, 384 S.E.2d 785 (1990), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990)], once again the defense mounted no challenge to the reliability of the techniques - no defense witnesses were called and defense attorneys conceded on the record that none could be found.

"5. In contrast, in the *Castro* case, decided on August 14, 1989, the defense called six world renown scientists to challenge the admissibility of Lifecodes DNA test results which had declared a match.... The[y] testified...that Lifecodes methods of doing DNA typing were both unreliable and would be generally rejected by the scientific community. The *Castro* court expressly held that Lifecodes methods for declaring a match were not sufficiently reliable to be presented to a jury. I am informed by representatives of Lifecodes that many of their critical methods have changed this fall in response to the *Castro* decision. However, since the testing in your case occurred during late 1988 and early 1989, none of these improvements would have been in place at the time testing was completed for the April 27, 1989, Lifecodes report.

"6. Quite recently, as other lawyers rapidly realized that there was less to DNA profiling than was implied in the private company's hype, more defense challenges succeeded. Earlier this month, in a unanimous decision, the highest appellate court in Minnesota reversed a trial court order admitting DNA evidence and ruled that Cellmark Diagnostics (along with Lifecodes, the second key supplier of forensic DNA testing) had not demonstrated that their methods and results were sufficiently reliable to be presented to a jury in a criminal case. *[State] v. Schwartz*, [447 N.W.2d 422 (Minn. 1989)]. And, although not an appellate decision, the trial court in *[State] v. Pennell*, [No. Crim. A. IN88-12-0051, -0052, and 0053, 1989 WL 167430 (Del.Super. Nov. 6, 1989)], ruled that Cellmark had failed to demonstrate that its methods for calculating probabilities would be reasonably relied upon by the scientific community. The critical distinction between *Schwartz*, *Pennell*, and *Castro* on the one hand, and the first three appellate decisions on the other hand, is that in the three cases where the court heard from knowledgeable defense experts, the proffered evidence was found wanting and at least partially excluded.

"7. Moreover, the role of suitable defense experts cannot be overlooked in their ability to review the tests and at times compel

the testing lab to withdraw the evidence. This in fact occurred recently in cases where Lifecodes had completed the DNA testing, *i.e.*, at first Lifecodes declared a match and subsequently they opined that the evidence was inconclusive.

"8. The retention of suitable experts is a relatively expensive undertaking. In part this is due to the fact that DNA profiling is such a new technology that there are few scientists sufficiently expert not only in the biological sciences but in the forensic applications as well....

"10. Unlike conventional fingerprinting, analysis of the raw data in DNA cases will often consume dozens of hours. Lab notebooks which detail more than a dozen steps in the procedure must be scrutinized; the autorads alone, which are rarely pristine and clear, require hours of analysis to assist in a meaningful interpretation. For instance, in the *Castro* case, prosecution experts after an initial review of the autorads, considered them of good quality, generating reliable results. But after numerous problems were pointed out by the defense experts, the same prosecution experts re-reviewed the autorads and acknowledged the existence of flaws they had not previously noticed. Not only is the assistance of a molecular biologist called for, but a population geneticist is equally indispensable. If the testing lab declares a match, the second question concerns the probability of such a match occurring at random in the population.... In the *Castro* case, the defense experts' combined time spent in out-of-court consultation exceeded 300 hours. Perhaps this is an extreme example, but in many of the cases about which I am personally familiar, where the defense retained experts, the out-of-court time frequently exceeded 100 hours.

"11. There is no question that without allocating several thousand dollars to the defense for challenging the DNA evidence, a pre-trial admissibility hearing can be conducted. But it is equally clear that without the necessary expenditure of funds, the hearing will be a sham and a denial of due process will ensue."
Id. at 1170-1172.

Conclusion

Some things in the law are *no brainers*. DNA test procedures are not perfect. DNA experts make mistakes. The testing process is not foolproof. DNA results can have great effect when heard by factfinders. Cases involving DNA where identity is a contested issue require funds for defense experts who can consult, test and testify to insure the factfinders have both sides of this controversial, complex, confusing scientific process. Fair process and reliable results require no less.

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KENTUCKY HOMICIDES

1994	241
1993	251
1992	233
1991	267
1990	261

DNA POINTS TO PONDER

- **Misleading Labels.** "By capitalizing on the deep-seated public confidence in the uniqueness of fingerprints..., the name DNA fingerprinting may 'create unsubstantiated beliefs and expectations in the minds of judges and jurors.'" William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Va.L.Rev. 45, 53 n.46 (1989) (quoting Dan L. Burk, Abstract, *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 28 Juremetrics J. 455, 468-69 (1988)).

- **Need for Education.** "The complexity of forensic DNA analysis requires that an attorney or judge have more than just a nodding acquaintance with the subject. This Court would hope that future CLE seminars may provide the needed familiarity for any attorney or judge involved in a case where forensic DNA testing is an issue." *Polk v. Mississippi*, 612 So.2d 381, 394 (Miss. 1992).

- **Demonstrative Explanation.** "Finally, this Court notes that any testimony on the subject should be supplemented by drawings, graphs, charts, or other exhibits; as well as detailed explanations in language readily understandable by the general public. Neither a judge nor a jury should rely *solely* on the testimony of expert witnesses in the evaluation of forensic DNA evidence." *Polk v. Mississippi*, 612 So.2d 381, 394 (Miss. 1992).

- **Population Data Bases Used to Calculate Random Match Probability Problematic.** "Interpreting a DNA typing analysis requires a valid scientific method for estimating the probability that a random person might by chance have matched the forensic sample at the sites of DNA variation examined....

  To say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound) of the frequency with which such matches might occur by chance is meaningless.

  Substantial controversy has arisen concerning the methods for estimating the population frequencies of specific DNA typing patterns. Questions have been raised about the adequacy of the population databases on which frequency estimates are based and about the role of racial and ethnic origin in frequency estimation. Some methods based on simple counting produce modest frequencies, whereas some methods based on assumptions about population structure can produce extreme frequencies. The difference can be striking. The discrepancy not only is a question of the weight to accord the evidence...but bears on the scientific validity of the alternative methods used for rendering estimates of the weight."
  NRC Report, pp. 74-75 (footnote omitted).

- **Not Conclusive.** "Evidence of this type [DNA] should not be regarded as conclusive on the issue of guilt, for it is but one piece of evidence among many. There is still a presumption of innocence that must remain with the defendant until the State proves guilt beyond a reasonable doubt. The ultimate determination of whether or not the State has met its burden of proof is the province of the jury, not of experts." *Polk v. Mississippi*, 612 So.2d 381, 394 (Miss. 1992).

- **Premature Acceptance.** "[E]quating the procedure with fingerprinting, a forensic technique considered so reliable that courts take judicial notice of its reliability, has contributed to the premature acceptance of DNA profiling as reliable in criminal prosecutions." Janet C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 Stan.L.Rev. 456, 456 n.3 (1990).

- **Steamrolling.** "Although it usually takes many years for the engines of justice to churn out a personal injury suit or a criminal appeal, in less than two years the combined efforts of commercial laboratories and prosecutors have steamrolled the so-called 'DNA fingerprinting' technique through the courts. The technique has been easy to sell. The current national obsession with crime-fighting and the apparent decrease in concern for individualized justice create a receptive environment for a cutting-edge technology, dazzling in its promise of identifying criminals with 'virtual' or '99 percent certainty.' Courts lost all sense of balance and restraint in the face of this novel scientific evidence, embracing it with little scrutiny of its actual reliability and little concern for its impact on the rights of individuals." Hoeffel, *supra*, at 466 (footnotes omitted).

Winning Voir Dire in Drug Cases

Attitudes toward drug use and sales are increasingly becoming more harsh. This is coupled with the average juror's lack of comprehension of the subculture in which drugs are sold and the occupational subculture of prosecutions.

The use of Vince Aprile's life analogue questions as well as the use of a questionnaire were useful in *U.S. v. William McKenna*.

A library search of questions used for research on attitudes toward drug use was crucial. The questions generally used in national survey research have proven to be reliable and valid for any community in which the trial takes place. Dissertations and public policy research are valuable sources of information. It is critical to let the jurors respond to the questions in private and to be required to put their answers in writing.

When submitting the questionnaire, include some of the questions such as those which were prepared for the main *DeLorean* case. This questionnaire is not as current as it could be, but is quite extensive. The population in California is much less conservative than in the Midwest, so a more moderate questionnaire was used. Let the judge know that you are reasonable in your request by giving him or her a sample of one of the more comprehensive ones.

Three key categories of questioning in this case were: 1) attitudes toward drugs, 2) attitudes toward snitches, and 3) attitudes toward the police.

In this case, attitudes toward drugs resulted in the most challenges for cause. There were seven, which is good for this region. Many jurors did admit that "drugs were the ruination of society." They were concerned about children using drugs. These are valid opinions and jurors should be allowed to express these fully. However, jurors with biased opinions should be dismissed for cause.

Snitches were a critical subject for the jury to understand. One juror was adamant that he wanted the police to get evidence themselves and not rely on snitches.

Attitudes toward the police have been studied extensively. Questions regarding attitudes toward the police are available in the questionnaire that was given out at the 22nd Annual Meeting of the Kentucky Criminal Defense Lawyers Association in 1994 and the Death Penalty Seminar at Blue Ash in Ohio in 1994.

To better enforce the challenges for cause, the lawyer presented legal reasons for challenges for cause, while the jury consultant gave the psychological reasons for challenges for cause. In general, social scientists are much more likely to recognize biased jurors than courts. Courts tend to suppress feelings while jury consultants try to bring them out. Recognizing bias can create conflict, but courts do respond to reasons other than legal ones.

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Letters to the Editor

Mr. Edward C. Monahan, Editor
The Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

Dear Mr. Monahan,

I write to commend you for the interesting article appearing in Vol. 18, No. 1 (Jan., 1996) on *Experimental Studies of the Acute Effects of Marijuana on Human Behavior*. I thought the article to be both enlightening and interesting and commend Dr. Kelly and Dr. Beardsley, the authors. It was helpful to note the number of references reflected in this article.

Yours very sincerely,

HARRY W. WELLFORD
Senior Circuit Judge
United States Court of Appeals
Memphis, Tennessee

Tina Meadows
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

Dear Tina,

Well, I just finished going through your January issue of *The Advocate* and I just had to drop you a line. You know, if you had a put a notice in your November issue asking for suggestions to improve your publication, I probably would not have responded because I liked it just fine the way it was.

But, wow! This newest issue is incredible! I pulled out my August and November issues to compare this one against and I have to admit I really like the larger type and the two-column pages much better. It seems to be more reader-friendly. As usual, the graphics, design and layout are superb.

Congratulations on your new, improved publication. I look forward eagerly to your next issue in the spring.

Sincerely,

Brad Castleberry, Program Administrator
Cabinet for Human Resources
Department for Mental Health and Mental Retardation Services
Frankfort, Kentucky

Everything but the Kitchen Sink: The *Mabe* Mess

In describing KRS 532.055 (Truth-in Sentencing), Justice Leibson foretold of things to come when he wrote his dissent in ***Commonwealth v. Reneer***, 734 S.W. 794 (Ky. 1987). Among the evils he predicted was the use of (or misuse of) prior convictions: "The statute presently under consideration, KRS 532.055, presents problems far more serious than the problem in the *Ramos* case. It involves a piling up and a piling on of evidence of 'half-truths.'... It invites the use of archaic convictions for both felonies and misdemeanors which are not longer relevant if they ever were...." *Id.* at 805.

It took almost seven years for the dire prediction to come home to roost. The case is ***Mabe v. Commonwealth***, 884 S.W.2d 668 (Ky. 1994).

Originally tried as a death penalty case, the defendant was ultimately convicted of murder and theft. He received a sentence of life plus five years (ultimately returned for resentencing). During the penalty phase the Commonwealth was permitted to introduce a large volume of materials. The materials included not only the fact of conviction for driving under the influence, having no operator's license, public intoxication, and the unauthorized use of a motor vehicle, but also the events which led to the convictions and subsequent disposition of those charges. Even the Supreme Court found the evidence "considerable." It also found all of that permissible under the need for a "well-informed jury."

What then is the zealous advocate to do? The statute permits the prosecution to introduce "the nature of prior convictions of the defendants, both felony and misdemeanor." As is noted above, *Mabe* permits everything but the kitchen sink to go to the jury. What to do, what to do?

It is time to roll up the sleeves and go back to basics. If the prosecution is going to go the *Mabe* route then make it a rough road to travel. Start with a ***Commonwealth v. Gadd***, 665 S.W.2d 915 (Ky. 1984) discovery motion. Go back to district court and see if old convictions can be set aside (first offense with marijuana for example). File RCr 11.42 motions on the old convictions and appeal all decisions that go against the client. Remind your prosecutor and judge that if that 11.42 claim is successful somewhere down the line that it will get you at least a new sentencing hearing on this felony and that it just can't be worth the risk of all of that just to have a suspended license conviction before this jury. Finally, move to tell the jury all of the facts and circumstances surrounding this conviction. After all if *Mabe* permits the Commonwealth great latitude in its evidence, then what is good for the goose is good for the gander.

KRS 532.055 does not give much to the defendant, but it does allow "mitigating evidence" which includes "evidence that the accused has no *significant* history of criminal activity...." An argument can certainly be made that much of a defendant's criminal history in district court is not significant. After all is it significant that your client is one of hundreds of people that pass through your district court for having the registration expire on his automobile? If the judge sees the prosecution as doing overkill, threatening the finality of the conviction, or wasting his time on side issues then maybe "significant" can carry the day. *Mabe* leaves little choice but to fight out every little detail.

The defense practitioner must be aware of *Mabe* and try to ameliorate the worst of it. Unfortunately, for the criminal justice system in Kentucky, Justice Leibson has turned out to be a pretty good prophet.

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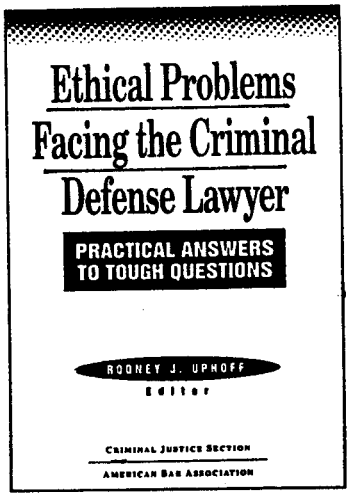
Book Review:

Ethical Problems Facing the Criminal Defense Lawyer,

edited by Rodney J. Uphoff; published by the American Bar Association's Section of Criminal Justice, 1995; Pp. xxvi, 351; paperback, $59.95 ($49.95 for Section members); available through the ABA Service Center at 312/988-5522, product code 5090061.



In this essay, I first review a valuable book on criminal defense ethics, *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions*, and then examine how this book can be used to enhance the teaching of ethics in a criminal defense clinic. *Ethical Problems* is largely the work of clinicians and addresses ethical dilemmas commonly faced by public defenders and court-appointed counsel, dilemmas that students in a criminal defense clinic are likely to encounter. It is also clinical scholarship in another sense, namely that, as Peter Hoffman has urged, it is based in experience, accessible, and understandable to its audience. *Ethical Problems* is all of that.

- Marla L. Mitchell, *Beyond a Book Review: Using Clinical Scholarship In Our Teaching*, 2 Clinical L.Rev. 251 (1995)

Ethical Problems Facing the Criminal Defense Lawyer (1995) would be an excellent addition to any criminal defense lawyer's library. Within its covers is housed the wisdom of over twenty of the country's most knowledgeable, thoughtful, and highly skilled Criminal Defense practitioners. Both the creators of the book, the Defense Services Committee of the ABA Criminal Justice Section, and the writers themselves, a mix of professors and long-time public defenders, have turned their attention to the problems that each criminal defense lawyer faces as he or she tries to do this work. While the book was originally conceived as an ethics manual for public defenders, it serves up enough relevant caselaw and pointed analysis to be useful to private attorneys and judges alike.

The book is divided into four sections: part one focuses on decisionmaking, part two looks at confidentiality and the duty to disclose, part three takes up conflicts of interest, while part four deals with the broader issue of providing defense services. Within those four general sections are chapters dealing with the specific ethical dilemmas that face the criminal defense practitioner.

Each chapter begins by posing an ethical question that the text seeks to answer. The chapter on rasing the insanity plea begins with the question: *Does counsel have an ethical duty to disregard the client's wishes and assert the insanity defense when counsel believes that raising the defense is in the client's best interest?* What follows is an examination of the ethics rules which govern counsel's decision about raising the insanity defense. Next, is a look at the caselaw interpreting the sixth amendment right to counsel. Finally, the author merges the two areas: ethical rules governing the lawyer and the defendant's rights under the United States Constitution, to provide an ethical guideline for the attorney faced with this particular dilemma.

As with ethical questions, there are no easy answers in this book. For each subject, the question is posed, the relevant law is provided, and some anecdotal information is offered. Rarely, do the authors conclude with moral imperatives. Instead, they seem to be offering practitioners a sort of group discussion in print. They have created in book form the sort of ethical discussion in which many public defenders need to engage, but for which they rarely have the time.

The result is a book which looks at a range of problems facing the criminal defense lawyer. From the most common, *Coping with Excessive Workload* to the least common, *Simultaneous Representation of the **Innocent** Client and the Real Culprit*, the authors strive to give the reader a solid grounding in applicable law and a thoughtful illumination of all aspects of the question posed.

Aside from offering ethical guidance, this book would be a fine addition to a research library because each chapter concludes with extensive footnotes and a bibliography of material relevant to each particular subject. As a result, it becomes a nice starting point for research.

Ethical Problems Facing the Criminal Defense Lawyer (1995) offers more than just practical answers to tough questions. It offers sound, well researched, non-judgmental advice to lawyers who are struggling to do good work under difficult conditions. It will be a welcomed addition to your criminal law library.

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As a state and federal prosecutor for almost seven years, the defense lawyers I feared and respected most were public defenders, and the appointed defenders of the indigent. I mean no disrespect to my colleagues in private practice, and hope those readers appreciate the great deal of overlap in many jurisdictions. But the public defender's commitment, without sufficient monetary gain, is undeniably worthy of particular note. They were well-prepared in spite of being overburdened with cases, and short on resources. I looked at rap sheets, they personalized defendants. I surfed along waves of favorable legislation and case law on just about every aspect of crime and punishment, basking in the glow of each year's politically generated war(s) on crime. They swam upstream on every issue, in every case, in every court. Damn it, too, if they weren't also cheerful about it all 80 percent of the time. In hindsight, I think the other 20 percent of the time they were probably grappling with one or more of the recurring ethical headaches generally facing anyone engaged in criminal defense, but public defenders in particular. For those headaches, and to my friends and defender colleagues, I recommend *Ethical Problems Facing the Criminal Defense Lawyer - Practical Answers to Tough Questions*. Like an aspirin tablet, it's not a cure, but it sure helps.

- **John A. Convery**, a partner in *Hasdorff & Convery*, San Antonio, Texas, former at-large council member of the ABA Criminal Justice Section, a former co-chair of the Prosecution Function Committee, and a current member of the White Collar Crime Committee.

Some of the Questions Answered in Ethical Problems Facing the Criminal Defense Lawyer:

- on Defense Counsel's Role and the Allocation of Decision-Making Responsibility

- What should a public defender do if a judge or her supervisor orders her to proceed or to continue representing a defendant when the defender believes she cannot ethically do so?
- Should an individual public defender be permitted to refuse to represent certain categories of clients for moral or ideological reasons?
- Does defense counsel with doubts about a client's competence have an ethical duty to raise the competency issue even though doing so is contrary to the defendant's best interests or wishes?
- Is it ethically proper for defense counsel to call a defense witness to testify when the defendant insists, if counsel knows the witness will testify falsely?
- When, if ever, is it appropriate in a juvenile delinquency proceeding for a lawyer to ignore a judgment or decision made by a child client and substitute her own judgment or that of the child's parent?

- on Confidentiality and Defense Counsel's Duty to Disclose

- When does a criminal defense lawyer know that a defendant or defense witness intends to commit or has committed perjury?
- What must defense counsel ethically do when he learns that his client intends to testify falsely at trial?
- Must defense counsel correct a trial judge who, in sentencing the defendant, indicates he is relying on the prosecutor's statement that the client has no prior record when counsel knows the defendant has a prior record?
- May defense counsel who learns that his client has been charged under a false name continue to represent that client without disclosing the client's true identity?

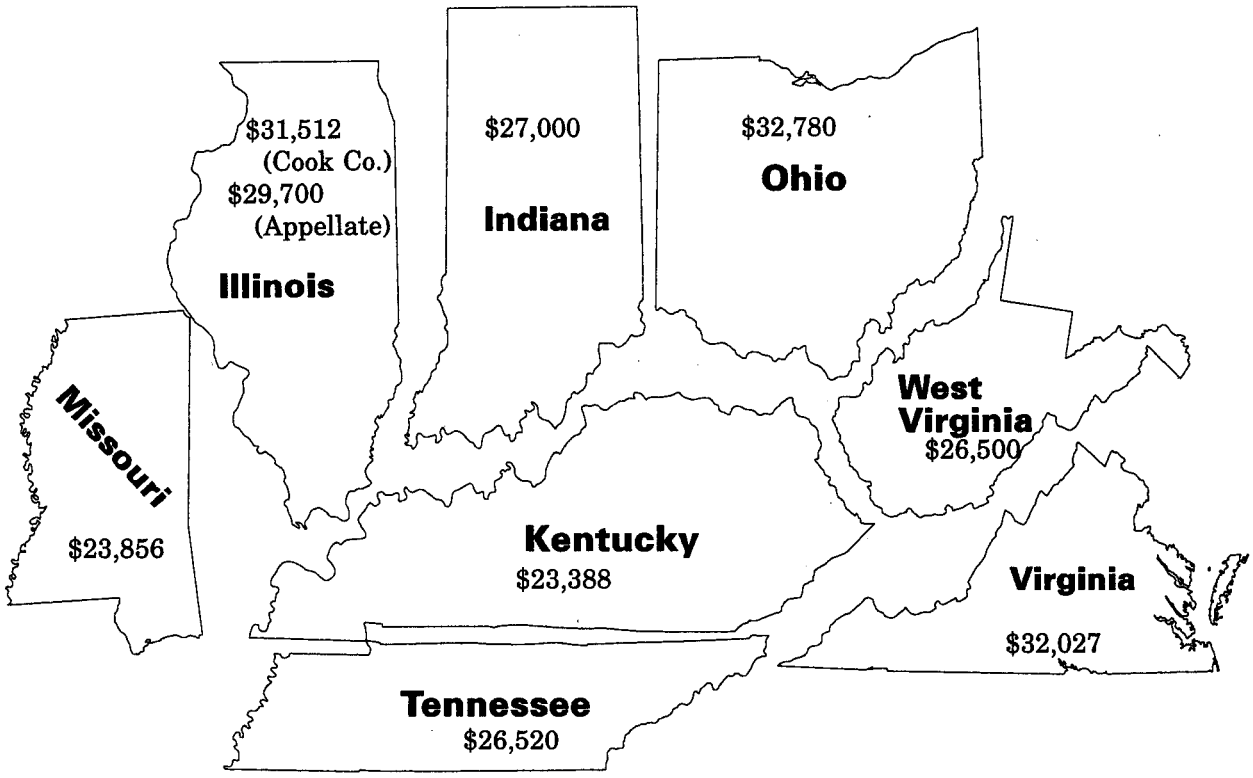
- on Conflicts of Interest

- Should two lawyers from the same public defender office represent co-defendants?
- May a public defender represent an indigent client when her husband is employed by the prosecutor's office?
- What is the proper ethical response for a public defender when a client discloses to that defender that he committed a crime for which another one of the defender's clients has been charged?
- Does criminal defense counsel's ongoing sexual relationship with a police officer, prosecutor, or judge ethically bar counsel from handling cases involving that police officer, prosecutor, or judge?
- Is it ethically proper for an appointed criminal defense lawyer to be sexually involved with a client?

- on Providing Defense Services

- Is it ethically proper for a public defender agency to compensate an expert witness or to retain an expert witness on a contingent basis?
- What must a full-time public defender or appointed counsel do if the defender believes that he cannot competently handle any larger workload if assigned more cases or other work by a supervisor or if appointed to more cases by a judge?

Entry Level & Other Public Defender Salaries Lag Behind 7 Surrounding States



Salaries for Kentucky public defenders continue to lag substantially behind those salaries in the 7 states surrounding Kentucky:

	NEW ATTORNEYS	ATTORNEYS W/ 3 YRS. EXP.	ATTORNEYS W/ 5 YRS. EXP.
1) Ohio	$32,780	$36,130	$41,600
2) Virginia	32,027	38,274	41,841
3) Missouri	23,856	31,620	46,644
4) Indiana	27,000	28,500	36,000
5) Tennessee	26,520	35,700	39,780
6) Illinois (appellate)	29,700	35,700	39,500
Illinois (Cook Co.)	31,512	37,774	41,265
7) West Virginia	26,500	*	*
Kentucky	23,388	34,560	36,984
Group Average Excluding Kentucky	28,736	35,029	41,002
Difference Between Kentucky & Group Average	**5,348**	**469**	**4,018**

For a fuller discussion of these substantial inequities see Roy Collins, *Public Defender Salaries*, *The Advocate*, Vol. 18, No. 1 (Jan. 1996) at 117.

DPA Appointments/Resignations

Appointments

7/1/95 **T.J. Wentz** Richmond Office
Assistant Public Advocate
♦ UCLA Law School 1994

8/16/95 **Sheila Shelton** CTU - Frankfort
Assistant Public Advocate
♦ Former attorney with Jefferson County District Public Defender's Office

9/1/95 **Ellen Peterson** CTU - Frankfort
Mitigation Specialist
♦ BSW in Social Work from EKU 1994

9/1/95 **Andrea Hall** Elizabethtown Office
♦ Legal Secretary

9/16/95 **Krista Reynolds** CTU - Richmond
Legal Secretary
♦ BS in Paralegal Studies from EKU 1994

10/1/95 **Ginger Cohron** Madisonville Office
Assistant Public Advocate
♦ University of Cincinnati Law School 1992

10/16/95 **Jason Nohr** State Post-Conviction- Frankfort
Assistant Public Advocate
♦ University of Georgia Law School 1995

11/1/95 **Gwen Pollard** Covington Office
Assistant Public Advocate
♦ Chase Law School 1994

11/16/95 **Patricia Byrn** Madisonville Office
Assistant Public Advocate
♦ Former DPA attorney in the Paducah office

11/16/95 **Karen Maurer** Appeals - Frankfort
Assistant Public Advocate
♦ Kansas University Law School 1995

12/1/95 **Jerome Baker** London Office
Assistant Public Advocate
♦ Louisville Law School 1981

12/1/95 **Darlene Huff** Madisonville Office
Investigator
♦ Formerly with Owensboro Public Defender Office

Resignations

9/15/95 **John Burrell** Hazard Office
♦ To private practice in Louisville

10/1/95 **Howard Tankersley** Covington Office
♦ To private practice

10/16/95 **Bobby Simpson** Appeals - Frankfort
♦ Private practice *Wyatt, Tarrant & Combs* in Louisville

11/10/95 **Frank Trusty** Covington Office
♦ Appointed District Judge in Kenton County

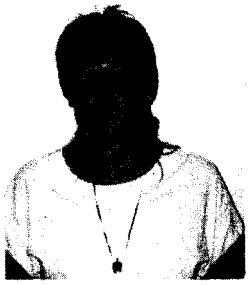
1/26/96 **Karen Potter** CTU - Richmond

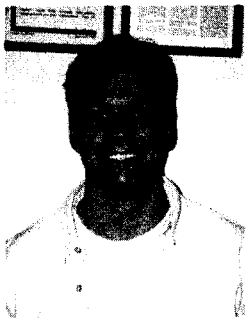
2/14/96 **Brian Ruff** Pikeville Office

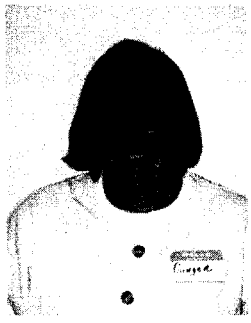
2/16/96 **Steve Maxwell** CTU - Richmond

2/21/96 **Cris Brown** CTU - Frankfort


Andrea Hall


Sheila Shelton

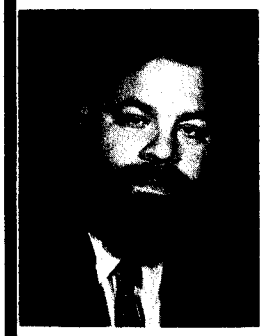

T.J. Wentz


Ginger Cohron

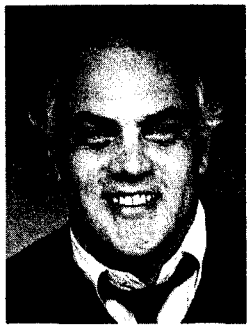

Ellen Peterson

24th Annual Kentucky Public Defender Training Conference
June 17-19, 1996 - Ramada Resort & Conference Center
(*formerly Executive Inn*), Owensboro, Kentucky

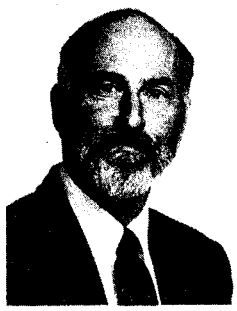
The Essence of Advocacy: Telling Our Client's Story Persuasively



David L. Lewis



Joe Guastaferro



Dr. Lee Coleman

Linda Meza

David L. Lewis practices law in New York City, concentrating on cases involving white collar and murder charges. He has represented alleged members of the Irish Republican Army, former Central Intelligence Agency agent, Edwin P. Wilson, former Head of State Panamanian General Manual Antonio Noriega. Lewis represented Carolyn Warmus in the first "Fatal Attraction" murder trial in Westchester County, which ended in a hung jury. The case is the subject of the book *Lovers of Deceit* by Michael Gallagher published by Doubleday. Shana Alexander also featured Lewis in her book entitled *The Pizza Connection* based on the seventeen month trial of the same name. Lewis has represented alleged members of the Gambino organized crime family as well as corporate officers and public officials. Lewis has been called the "Great White Shark" for his cross-examination skills. His style has been called "wily, in-your-face" and "a predatory courtroom technique." *Gentleman's Quarterly* called Lewis "The Bear from Bensonhurst" and "a Falstaffian Everyman, a Columbo of the Courtroom," "one of the country's leading authorities on national security issues and forensic evidence as well as an aggressive and highly controversial-courtroom performer."

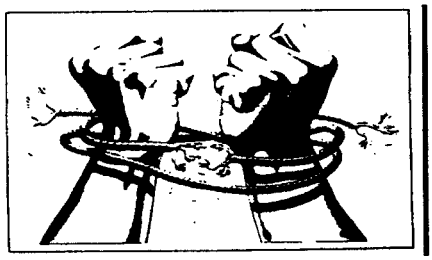
Joe Guastaferro is an actor, director, producer and teacher of jury persuasion technique. From Chicago, he has directed more than 40 plays for theater. He has served as the artistic director of the Travelight Theater in Chicago and was the general manager of the Hawaii Performing Arts Company of which he was also a founding member. His numerous credits include feature films, made for TV movies and TV episodics, as well as commercials and industrial films. His recent credits include *Backdraft, Mario and the Mob, Eye for an Eye, Vice Versa, Running Scared, The Color of Money*, and *The Fugitive*. Joe has served as the Associate Dean of the Goodman School of Drama of DePaul University and is a featured lecturer in trial skills and continuing legal education programs throughout the United States. His practical recommendations on the relationship between attorneys, judges and juries have won the esteem of the legal community. He is committed to the training of Criminal Defense Lawyers and works regularly with the Illinois State Appellate Defender, the Federal Defender Project, the Riverside County, California, Indiana, New York and Kentucky Trial Practice Institutes, NCDC and NITA. He works more and more each year as trial consultant and was a court appointed mitigation specialist in a California capital case. In the civil arena has been on the plaintiff's side of numerous multimillion dollar verdicts and in the criminal courts has assisted in defending various kinds of cases.

Linda Meza is a social and cognitive psychologist. She conducts research on jury decisionmaking and assists attorneys in applying knowledge of *human information processing* and group dynamics to the preparation of their cases. The information processing model she has identified is derived from tests of actual jurors' comprehension, retention and judgment of evidence and instructions, 100's of juror interviews, and training as a cognitive psychologist. *Linda Meza and Associates* applies this model and the principles of social dynamics to the preparation of trial at all phases: Jury Selection; Investigation; Change of Venue; and Case Preparation. Dr. Meza has consulted in 52 capital cases since 1979.

Dr. Lee Coleman, a 1964 graduate of the University of Chicago School of Medicine, practices psychiatry in Berkeley, California. His concern over courtroom reliance on questionable psychiatric and medical opinions has lead to several dozen articles on forensic topics, as well as frequent testimony for both prosecution and defense. He is the author of *The Reign of Error: Psychiatry, Authority and Law* (1994), and *Medical Examination for Sexual Abuse: Have We Been Misled?*, **Child Abuse Accusations**, Vol. 1, No. 3 (1989); *False Allegations of Child Sexual Abuse: Why is it Happening, What Can We Do?*, **Criminal Justice** (American Bar Association), v.5, #3, Fall 1990 (co-authored with Patrick Clancy); *Creating 'Memories' of Sexual Abuse*, **Issues in Child Abuse Accusations**, v.4, #4, Fall, 1992.

Robert Walker, MSW, LCSW, is the Director of the Bluegrass East Comprehensive Care Center which serves Lexington, Winchester, Nicholasville, and Stanton, Kentucky. He holds a Master's degree from U.K. and has 23 years experience as a clinician serving individuals and families. His clinical concentration has been in the areas of addictive disorders and cognitive therapy with mood disorders. He holds clinical faculty positions in the College of Social Work and the Department of Psychiatry in the College of Medicine at U.K.

In October, 1996, a group of criminal defense litigators will spend one intensive week at the Kentucky Department of Public Advocacy's Trial Practice Persuasion Institute. Join them.



If you litigate criminal defense cases, this program is for you!

EVER WISH you had time and a place to consider where you and your criminal defense practice are going? Time to talk to criminal defense attorneys like yourself, to discuss your practice with respected advocates, to fill gaps in your practice, education, and acquire new litigation techniques?

Well, take the time - one week - and come to the **Trial Practice Persuasion Institute** (TPPI) conducted by the Kentucky Department of Public Advocacy. You will join a group of successful men and women who have attended this intensive week of devleopment and who are making their mark with criminal cases they defend.

At the TPPI, you'll exchange real-life litigation experiences with your colleagues, learning from them as they learn from you. At the TPPI, you can build a network of capable, talented people whom you'll confide in and learn from all your life.

Over 20 master criminal defense advocates from across the nation serve as coaches during the week. All are defense veterans: *innovators who have pioneered new persuasion theories, strategies, and tools*. They are teachers, too, and they share their expertise and talk shop with you, in small group practice sessions and afterwards.

For your convenience, and to maximize the program's relevance to your level, the TPPI is separated into three tracks. Throughout the three tracks you will focus on the key issues you face. A broad range of topics will be covered: creative thinking, persuasion, client relationships, voir dire, opening statements, cross-examination, direct examination, closing arguments.

This educational program involves you in the challenges of litigating a case. Your study, discussion and practice of with a case problem or actual cases in extensive small groups is supplemented by lectures and simulations. The results: several years of defense realities are compressed into a week.

The Kentucky Department of Public Advocacy's program is an intensive, comprehensive educational experience for defense persuaders. We invite you to send for information and an application. Applications are due six weeks before the start of the program. Later applications will be reviewed on a space-available basis. Enrollment is limited. We expect a waiting list.

CALL, FAX OR E-MAIL TODAY:
Enrollment is Limited

The next TPPI begins Sunday, October 6, 1996, and ends Friday, October 11, 1996. For brochures and applications, please telephone, fax, or e-mail:

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Kentucky Incarceration Information

8% Increase. The felon population is expected to increase by 8-9% each year; this is an increase over projections issued 2 years ago.

The reasons for the increase are twofold: an increase in admissions and a decrease in releases.

While we are incarcerating more individuals, we are doing so at a lower rate than other states, particularly southern states.

Drug Convictions. Commitments for drug offenses is the fastest growing offense group; increasing by 250% from FY 88 - FY 95.

In terms of inmates in the system, the impact of the "war on drugs" is also evidenced by the fact that drug offenders comprise 18% of all offenders.

Sentences for most offense groups has decreased or remained stable with the exception of drug offenders. The increase may be due to 1996 legislative changes which increased penalties for drug offenses in which a weapon was involved.

Length of Incarceration Increases. Time served has also increased; as it is based on persons released, the increase may reflect that some of the HB 76 violent offenders are starting to be released.

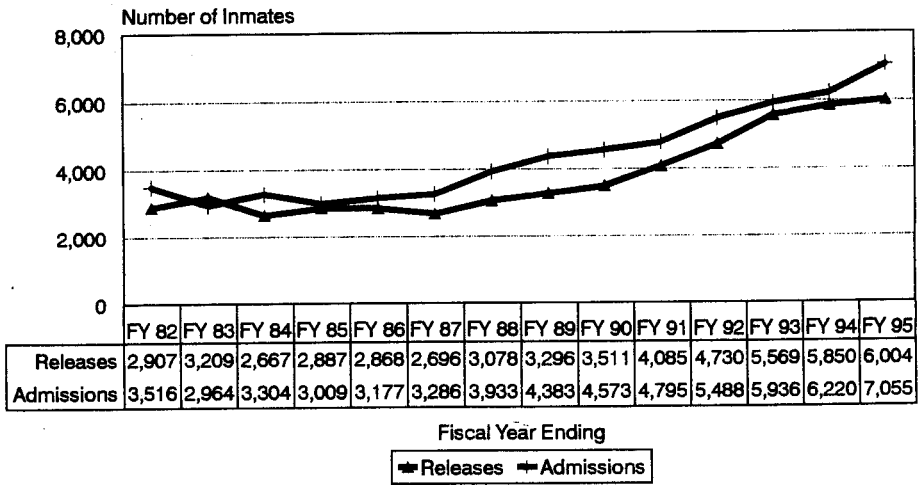
Per Year Cost. It costs an average of $13,613.30 a year to house an inmate in FY 95, a 7% increase over FY 94. Medical costs were a major factor in the increase. The costs for housing an inmate are proportionate to the level of security.

Community Correction's Program. This program was created by the 1992 session to reduce the number of commitments to the prison system. The program involves awarding grants to judicial districts who develop alternative sentencing programs for non-violent offenders. A twelve member Kentucky Correction's Commission is repsonsible for awarding of grants. The budget for this program was $100,000 for FY 95 and $450,000 in FY 96. Grants awarded to date include:

Kentucky Department of Corrections

Admissions & Releases

Fiscal Year 1982-1995



	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Releases	2,907	3,209	2,667	2,887	2,868	2,696	3,078	3,296	3,511	4,085	4,730	5,569	5,850	6,004
Admissions	3,516	2,964	3,304	3,009	3,177	3,286	3,933	4,383	4,573	4,795	5,488	5,936	6,220	7,055

inout Aug 95

excludes escape statistics

1st Judicial Circuit: This project operates in the counties of Ballard, Fulton, Carlisle and Hickman. This project employs one person to oversee the community service work and utilizes a probation and parole office to handle the drug testing and home incarceration component.

12th Judicial Circuit: This project encompasses not only the 12th Circuit of Henry, Oldham and Trimble Counties but also the counties of Shelby, Spencer and Anderson of the 53rd Circuit. Two staff are employed to oversee the program components of home incarceration, drug testing, referrals to treatment programs and community service work.

14th Judicial Circuit: Scott, Woodford and Bourbon Counties make up the 14th Circuit. This grant employs one full-time and two part-time employees. This project provides clients with services related to community service work, drug testing and employment verfications. Staff are currently developing a home incarceration component.

16th Judicial Circuit: This project encompasses three judicial circuits in the Northern Kentucky Area. The Circuits are: 16th, Kenton County; 54th, Boone and Gallatin Counties; and the 17th, Campbell County. It consists of a day treatment program which involves drug treatment, drug testing through a phased approach, as well as, provide employment skills to obtain or maintain jobs.

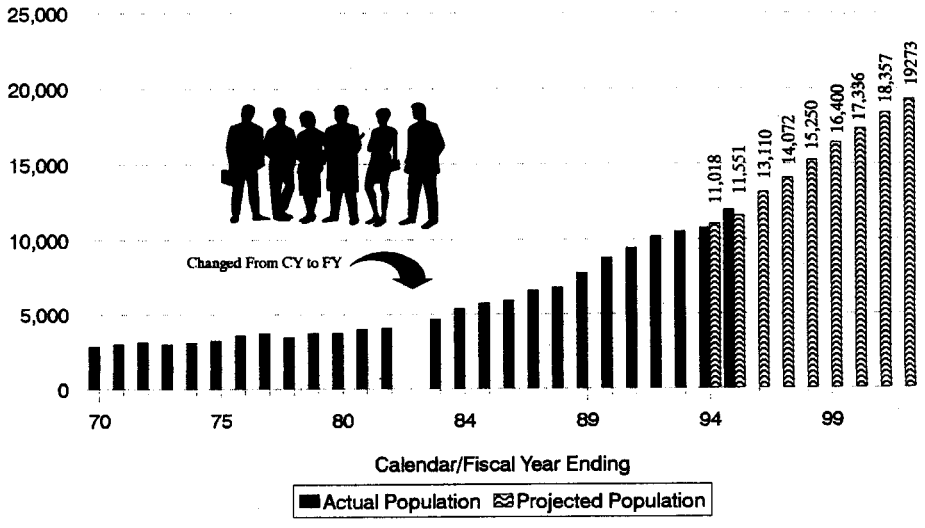
18th Judicial Circuit: This project is comprised of the counties of Harrison, Pendleton, Nicholas and Robertson. A Community Corrections Coordinator oversees the community service work component, referrals to drug treatment, monitors home confinement and monitors restitution payments.

22nd Judicial Circuit: This project serves the 22nd Circuit, Fayette County; the 48th, Franklin County; and the 25th, Clark and Madison Counties. The focus of this project is providing probationers out-patient chemical dependency treatment services in lieu of revocation.

30th Judicial Circuit: This cirucit is comprised of Jefferson County and the project involves 30 slots in the Drug Court program. Clients targeted in this project are those offenders on probation that are identified as substance abusers. Clients are provided with assessments to deter-

Kentucky Department of Corrections

Felon Population Projections



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mine elibility, out-patient services, including meditation and acupunction services along with more traditional services. Clients are also required to make frequent appearances before the Drug Court Judge which provides support and reinforcement to the treatment program.

51st Judicial Circuit: Henderson County makes up the 51st Circuit. The project for this circuit emphasizes community service work, home incarceration and restitution. Staffing is provided through contract with Involvement, Inc. Targeted offenders for this project include persons convicted of forgery, theft, drug, arson and burglary.

56th Judicial Circuit: This circuit is comprised of Livingston, Caldwell, Lyon and Trigg Counties. This project targets non-violent first time offenders. Services offered to these clients include electronic monitoring, drug testing, community service work and restitution. Staff is comprised of community service workers for each county as well as the local probation and parole officers oversight in electronic monitoring and drug testing.

Halfway-Back Program. In 1994, the Department initiated a pilot project in Jefferson and Fayette counties which allows P & P Officers to place parolees who have violated conditions of their parole in halfway houses under contract with the Department. Examples of violations include curfew violations and substance abuse. Normally, Officers would proceed with formal revocation hearings and the parolees would have more than likely been returned to prison.

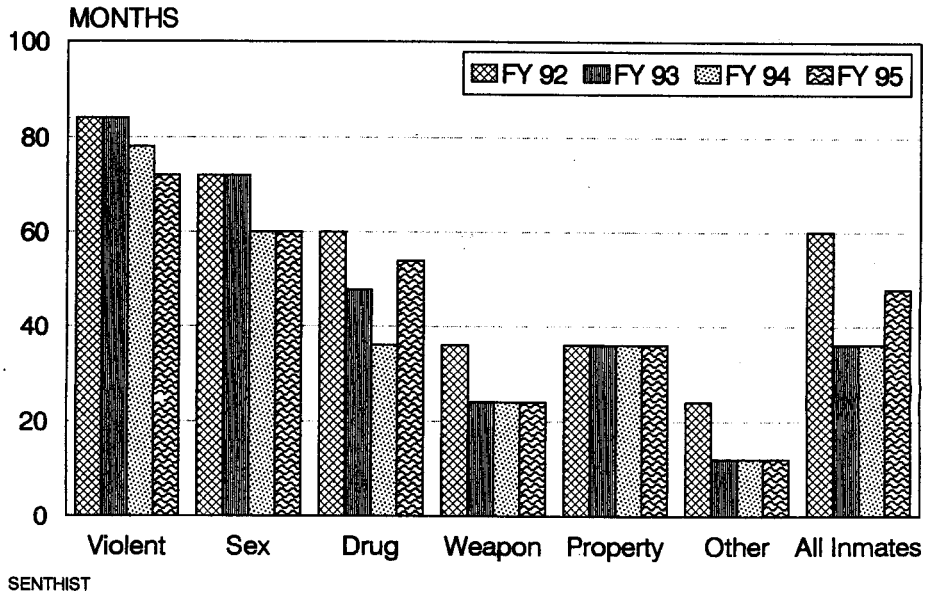
The program was initiated by the Deparatment to reduce the number of returns to prison. In FY 95, returned parole violators represented 21% of all prison admissions. Once returned, the violators spend an average of 16 months in prison.

Parole violators placed in halfway houses stay 30-60 days dependent on their behavior and the recommendations of the Officer. The average length of stay is 45 days.

The cost of placing a violator in a halfway house for 45 days is $1,035 versus $17,000, the cost of incarcerating a returned violator for 16 months. For every 10 inmates, who successfully complete the program, the savings is $160,000.

KENTUCKY DEPARTMENT OF CORRECTIONS

SENTENCE HISTORY
Median Total Sentence



The figures below indicate the number of referrals to the program through June 30 as well as the number of referrals who have returned to prison or who are in the process of being returned to prison.

	Referrals	Number Returned to Institutions	Percent Failures
Jefferson	306	159	51.8%
Fayette	71	28	42.2%

The majority of those who were returned committed technical violations rather than new offenses.

It is important to remember that offenders in this program are considered "high risk" and thus, failure rates can be expected to be higher.

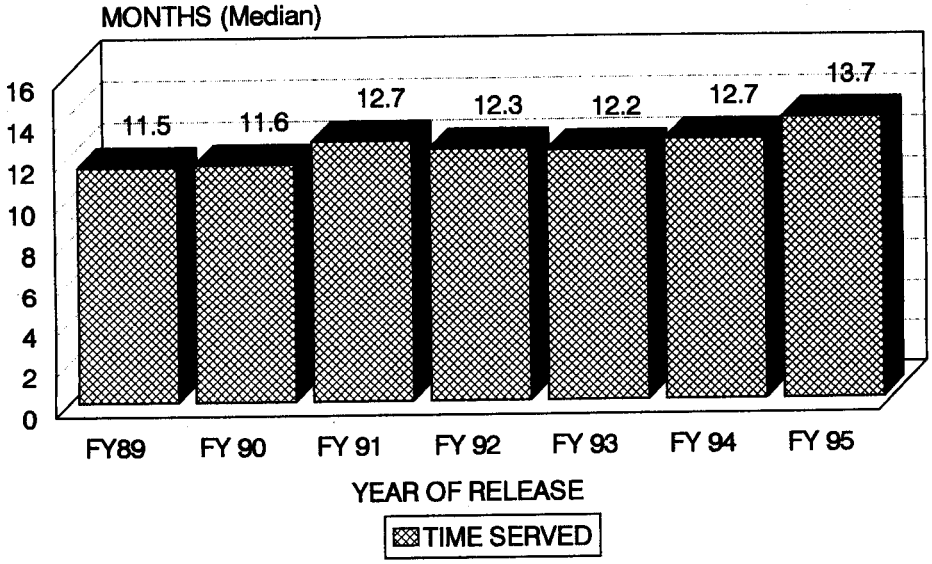
Substance Abuse Program: Due to the fact that 80 percent of the offender population has a substance abuse problem, the Department has developed treatment programs to divert this population from prison.

In three of the largest metropolitan areas of the state, day treatment programs provide cost effective, intensive, structured treatment for offenders. Offenders on probation or parole who have tested positive for drug use are referred to these programs rather than returned to prison. Initially, offenders in these programs are monitored and involved in programs six to eight hours per day for the first month. After that period, they are required to find employment and to continue their involvement in the evenings for several months. The frequency of contact provided by these programs aids the Probation Officer in his/her task of providing serious consequences for inappropriate behavior as well as closely supervising the offender.

All of these programs utilize extensive drug testing to assure compliance with treatment requirements and rules of probation. Throughout the state, offenders whose offense is related directly or indirectly to drugs or alcohol may be referred to out-pateint or other appropriate levels of treatment at local comprehensive care facilities. If the offender is able to comply with this condition of probation or parole, he or she may interrupt the dependency/abuse cycle thus avoiding a revocation. Additionally, referrals to treatment are

KENTUCKY DEPARTMENT OF CORRECTIONS

TIME SERVED



TIMESVD

made in lieu of revocation when the violation involves the illicit use of chemicals.

Boot Camp: The Department operates a 50-bed Boot Camp at Roederer Correctional Complex for both male and female offenders. While incarceration is involved, the program is designed to reduce the length of stay. The Parole Board agreed to grant early hearings to any inmate who successfully completes the 90-day program. Seventy-nine percent of the 192 graduates have been granted early parole at a cost savings of $1.7 million.

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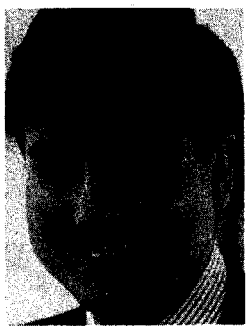
Client-Attorney Relationship Needs Nurturing, Researchers Say



Jim Clark

Ed Monahan

Public opinion ratings of defense attorneys - already less than good - will likely drop in the wake of O.J. Simpson's trial said a University of Kentucky professor who has worked as consultant with attorneys for the past decade.

"The public doesn't have a clear idea of the specific roles defense attorneys play in our adversary system of a trial by jury," said James Clark, assistant professor in the U.K. College of Social Work. "They're ethically bound to do everything within the law and their code of ethics to win the case for their client. But in today's law-and-order climate, if defense attorneys were popular; they wouldn't be doing their jobs."

Ironically, some of the strongest criticism of attorneys comes from clients, particularly the indigents who depend upon public defenders, said Clark. Poor relationships with their clients could be at the root of these criticisms, but the problem goes back to law schools that don't always prepare students for the real world, he believes.

"The public and clients are extremely ambivalent about the professionals from whom they seek services, whether it's from doctors, lawyers or social workers," Clark said. "Ultimately, professional service is best rendered in the context of a humane and therapeutic relationship."

In a paper presented last summer at an international conference on social values in Oxford, England, Clark and his co-author, Edward Monahan of the Kentucky Department of Public Advocacy, presented some interesting findings about novice attorneys. Although many lament their lack of practical training in law school, "They tend to want to pursue other types of technical skills over developing the attorney-client relationship," Clark said.

But law as a discipline emphasizes success, or technical mastery, he pointed out. "Most new attorneys are worried about doing the right thing when they're in a courtroom - knowing where to stand, how to make an objection, what evidence is admissible. There's such a huge range of technical skills to master, they're sometimes resistant to developing relationships with clients."

Good interviewing skills and an understanding of people are important, said Clark. "Clients don't always know what would be the most important dimensions of their case. They may hide things from their attorney as a result... If the attorney doesn't get to know the client, he or she may never detect the kinds of problems that may be helpful in the defense."

As for the competency of public defenders, Clark said some of the most skilled attorneys in the country come from their ranks.

"But the best attorney in the world is handcuffed if he or she doesn't have the resources to conduct an investigation, get expert witnesses to testify or spend the necessary number of hours to try a complicated case."

Clark and Monahan propose that law students have more opportunities for internships in the public advocacy arena and that professional development beyond law school be regarded as lifelong.

"Public defenders are thrown into the most difficult kind of work very early in their careers," Clark said. "Most private sector attorneys would not be in charge of a criminal case until they have been in practice at least several years. But public defenders might be trying a felony case in less than a year of being licensed."

Is It Necessary to Call a Technician in Order to Introduce BAC Readings in DUI Offenses?

Recently there have been several conflicting rulings on the issue of whether a BA technician was necessary in order for the Commonwealth to be able to introduce BAC results of the Intoxilyzer machine currently in use throughout Kentucky.

These decisions conflict because one Northern Kentucky Circuit Judge who has looked at this has recently ruled that the Administrative Regs. (500 KAR 8:020-8:030) require that a ***technician trained or employed by the forensic laboratory*** should be the basis for testimony that the BA machine was operating properly as required by *Owens v. Commonwealth*, 487 S.W. 2d 897 (Ky. 1972). The other Circuit Judge has ruled that *Owens* ***does not*** require the Commonwealth to introduce proof through testimony by a technician, just a certified ***operator***.

Obviously, these two decisions are both unpublished, and may not be cited as authority, but for your information one of these decisions was in fact appealed to the Court of Appeals. The Court of Appeals looked at the issue and ***denied the motion for discretionary review***.

The decision of the Circuit that seems to require use of a certified technician has not of this time been appealed to the Court of Appeals. The other decision was appealed to the Court of Appeals in 1992. The decision of the Court of Appeals likewise is not a "published decision" but it still may be of some use to you.

The court of appeals decision was reported in *Kevin Alexander vs. Commonwealth*, Case No. 92-CA-2583-D, Motion for Discretionary Review, Dec. 14, 1992 (which was an appeal from a decision of Judge Charles Satterwhite of the Grant Circuit Court which affirmed a decision from my division of the Grant District Court.)

At the trial, I allowed introduction of the BAC results without the testimony of a "certified technician" partially on the theory that the machine is self-calibrating and will not provide a result unless it is operating properly. I felt this complied with *Owens*. The resulting conviction was appealed to the Circuit Court, and this ruling was upheld by Judge Charles Satterwhite. A Motion for Discretionary Review was filed with the Court of Appeals, and they denied the Motion for Discretionary Review filed by the defendant.

The Court of Appeals did not state why they denied the appeal, they just peremptorily dismissed it.

Grant County Attorney Jim Purcell had argued in his Response to the Discretionary Review Motion, that a ruling requiring the use of the technician in all cases would "...add an additional element necessary to conviction which the legislature declined to add." He also argued in his Response, that if the defendant felt there was a problem with the BA reading, that it was his responsibility to "...exam...the records of the technician...prior to trial, (and to) ...subpoena...the technician to the trial." Purcell also argued that the issue raised did not provide the requisite "Special Reason" necessary to justify the Discretionary Review stated under CR 76.20 (1). Mr. Purcell's argument was apparently the more persuasive considering the unanimous ruling in his favor by Judges Lester, McDonald and Emberton.

It would of course have been helpful if the Court of Appeals had taken up this appeal and provided us with a functional precedent, or at least had published their decision. Who is to say which Judge is correct at this point?

As for me, I feel that my original ruling was blessed by the Court of Appeals and will continue to allow introduction of the BA test results on the standard testimony of the officer who administers the test, that he was certified to operate the machine, that the machine was operating properly, and that the test ticket shows pre and post self-calibrating operational tests within the parameters allowed in the *King* decision.

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We Need Discovery Reform

- **67% of Counties Have Open File Discovery**
- **In 85% of Counties, the Defense Receives Police Reports and Witness Statements Before Trial**
- **In 85% of Counties, the Defense Receives CHR Reports in Sex Abuse Cases**

A man is killed in Madison County. An accused is charged with a crime and counsel is appointed. The police reports are turned over to counsel prior to or at the preliminary hearing. The preliminary hearing is meaningful since cross-examination is based upon the police reports being available to counsel. At arraignment in circuit court, the grand jury tape, all witness statements, and the remainder of discovery are turned over to the defense. Counsel is able to meet with his client, go over discovery, conduct a reasonable investigation into the facts, and make an informed decision about whether to plead or go to trial.

Another man is killed in Rockcastle County. An accused is charged with a crime and counsel is appointed. This time the chief investigating officer is subpoenaed to the preliminary hearing and a subpoena duces tecum is issued for the officer to bring his police report. The officer does not bring the police report. A motion to quash the subpoena duces tecum is made by the County Attorney. It is sustained by the District Judge. The preliminary hearing consists of the officer stating evidence against the defendant, and during cross-examination stating that he does not know because he does not have his police report with him. The preliminary hearing is essentially a waste of time. At arraignment in circuit court, discovery is not turned over to the defense. Later, the grand jury tape and reports of forensic evaluations are turned over to the defense. Police reports are not turned over until the week prior to trial. Witness statements likewise are turned over a week prior to trial. Investigation prior to trial is done without access to the evidence in the possession of the Commonwealth. The defendant and his attorney are unable to go over discovery and make reasonable decisions regarding whether to go to trial or negotiate for a plea.

Still another man is killed somewhere in Kentucky. His family hires a lawyer to file a wrongful death suit against the shooter. All of the witnesses that have knowledge regarding the offense are deposed by the plaintiff. Discovery is complete, thorough, painstaking. Prior to trial, there is nothing about the case that the plaintiff does not know. Any cross-examination which occurs at trial will be done using a transcribed

statement. Reasonable decisions regarding whether to proceed to trial or negotiate for disposition are made based upon complete and thorough discovery, and complete preparation by counsel.

As these three scenarios indicate, discovery in criminal cases is radically different from discovery in civil cases. More disturbing, discovery among the several counties in Kentucky remains unfortunately widely disparate.

Over the last few years, the Kentucky Association of Criminal Defense Lawyers (KACDL) Rules Committee has conducted several surveys regarding problems with the administration of justice in particular counties. The overwhelming problem that continues to be reflected on the surveys is that of discovery. In the counties where discovery remains a problem, attorneys are deeply concerned that they are not receiving police reports and witness statements sufficiently in time to conduct meaningful preliminary hearings, and more importantly to adequately investigate their case, prepare for trial or make a reasonable decision regarding whether to enter a plea or not.

Several proposals have been made in the past to change RCr 7.24 and 7.26 in response to these stated concerns. On each occasion after the June hearing before the Kentucky Bar Association, the rules proposed by KACDL have not been adopted by the Kentucky Supreme Court.

THE SURVEY

The KACDL Rules Committee during the fall of 1995 sent a survey to all public defender administrators in order to determine the discovery practices in the different counties. 81 responses have been obtained to that survey. Most of the counties that did not respond (Adair, Allen, Barren, Bath, Boone, Bourbon, Boyle, Breckinridge, Caldwell, Carroll, Clinton, Crittendon, Cumberland, Edmondson, Grayson, Hancock, Logan, Lyon, Metcalf, Monroe, Montgomery, etc.) were relatively small counties. Responses were obtained from most of the large counties in Kentucky (Jefferson, Fayette, Campbell, Boyd, Christian, Madison, Warren, Laurel, Henderson, Daviess, McCracken, and Pike). While we would have preferred to have a hundred and twenty responses, we believe that the eighty-one responses can tell us a great deal about the discovery practices in Kentucky at the present time.

THE FINDINGS

The findings are as follows:

1) 55 of the 81 counties (67 percent) responding have an open file discovery system;

2) In 69 of the 81 counties (85 percent) responding, the defense receives police reports and witness statements prior to trial rather than on the morning of trial or immediately before the witness testifies;

3) 69 of the 81 counties (85 perecent) responding regularly obtain CHR reports in child sexual abuse cases.

OBSERVATIONS

These findings suggest the following:

1) Discovery as it is being practiced in the Commonwealth is much broader than the present RCr 7.24 and 7.26 indicate. It is clear that through a variety of different methods, such as open file discovery policies of Commonwealth's Attorneys, standing court orders by judges, and the development of trust between the players in the criminal justice system, discovery is working well in the great majority of counties. Defense lawyers are for the most part receiving access to that which is necessary for them to adequately defense their clients in the majority of the counties;

2) Very few counties have discovery practices that are as strict as RCr 7.24 or 7.26. Indeed, of the 81 counties, only 15 percent utilize a strict form of discovery;

3) The problems raised by opponents of enhanced discovery appear to be hollow and not well taken in practice. Indeed one of the few problems that has ever been expressed is that widespread discovery will result in defendants intimidating witnesses prior to trial. It is clear that if that were a problem, 85 percent of the counties would not have broad discovery policies;

4) There is no reasonable or legitimate interest which militates in favor of continuing the strict rules of discovery that we presently have in Kentucky;

5) The reality is there is discovery disparity between the counties. It can be fairly assumed that injustices are being done, that defense lawyers are being squeezed, and that pleas are being entered without full disclosure and without adequate investigation;

6) This is not to say that the open file discovery system is a panacea. In a number of the surveys, the respondents stressed that other measures such as additional discovery motions, discovery inventories, and vigorous investigation must be used and that a cavalier attitude toward an open-file discovery system is simply not justified.

THE RULES PROPOSED BY KACDL

The Kentucky Association of Criminal Defense Lawyers has attempted one more time to improve the discovery rules in Kentucky. Indeed this year the KACDL Rules Committee proposed to the KACDL Board that only one rule be proposed to the Kentucky Supreme Court on behalf of KACDL. That rule is contained below.

KACDL RULES COMMITTEE 1995 PROPOSALS

RCR 7.24

(2) On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents, or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This provision [does not] authorizes pretrial discovery **and** [or] inspection of reports, memoranda, or other documents made by **police** officers and agents of the Commonwealth in connection with the investigation or prosecution of the case. [,or of statements made to them by witnesses or by prospective witnesses (other than the defendant).]

COMMENTARY

The importance of discovery in criminal cases has recently been reemphasized by the United States Supreme Court in *Kyles v. Whitley*, 514 U.S. ___, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995). Yet, discovery continues to be a major impediment to the fair and reasonable handling of criminal cases in this Commonwealth. The fundamental problem is that the Commonwealth is allowed under existing rules to keep from the defense police reports and witness statements for strategic reasons. While pretrial discovery in civil cases is expansive, present discovery rules in criminal cases allow the Commonwealth to decide when and what to give to the defense. Often, police reports and witness statements are not given to the defense at all in cases which are negotiated pretrial. Such reports often are not provided until the day of trial. Neither practice is reasonable or justifiable. Neither protects a legitimate interest of the Commonwealth. After all, the Commonwealth has a duty to provide justice. Keeping from the defense the nature of the case against one accused of a crime does nothing to foster the provision of justice.

This proposed rule would require the turning over to the defense of police reports during pretrial discovery under RCr 7.24 rather than RCr 7.26.

Police reports are an essential part of the processing of cases in district and circuit courts by the Commonwealth and the defense. It is common practice for both the defense and the Commonwealth to utilize the police reports in negotiating cases, in analyzing cases, investigating cases, and preparing cases for trial.

At the present time, however, some courts read the existing language in RCr 7.24 to prohibit the ordering of pretrial discovery of police reports. Case law mandates that police reports be turned over as part of RCr 7.26. See *LeGrande v. Commonwealth*, Ky., 494 S.W. 2d 726 (1973); *Haynes v. Commonwealth*, Ky., 657 S.W. 2d 948 (Ky. 1983); *Maynard v. Commonwealth*, Ky., 497 S.W. 2d 567 (1973). The problem is that by remaining under RCr 7.26, police reports do not have to be turned over until the witness testifies. And if the prosecution does not call a witness, the defense may never receive the statement made by a witness irrespective of its relevancy to the proceeding. As a result, the trier of fact is precluded from gaining access to information which could

affect their verdict. It is reasonable to mandate the provision of police reports in cases which are not at the trial stage but rather at the pretrial discovery stage.

Providing police reports to the defense prior to trial should result in more efficient court proceedings. Defense lawyers and their clients would as a result understand the case against them, thereby enabling a better evaluation of the case. Cases could more easily be negotiated as a result. Pretrial litigation over discovery would be minimized. A better informed client and defense would result in fewer collateral attacks based upon the failure to investigate and advise pretrial.

Preparing a case for trial should not be a "cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused..." *James v. Commonwealth*, Ky., 482 S.W. 2d 92 (1972). The defense should know well before trial what investigation has been conducted by the police. Defense counsel rarely is present at the scene of the crime, or at the time witnesses are interviewed and can gain access to the investigation conducted by the police only by reviewing the police report. No interest exists for not requiring the turning over of police reports as part of the pretrial discovery process.

RCR 7.26

Demands for production of statement and reports of witnesses

(1) [Before a witness called by the Commonwealth testifies,] **A reasonable time prior to trial,** the attorney for the Commonwealth shall produce **all** [any] statements of **any** [the] witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by him or (b) is or purports to be a substantially verbatim statement made by him. Such statement shall be made available for examination and use by the defendant.

(2) If the Commonwealth claims that a statement to be produced under this Rule 7.26 does not relate to the subject matter of the witness's testimony, the court shall examine the statement privately and, before making it available for examination and use by the defendant, excise the portions that do not so relate. The entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

COMMENTARY

This proposed rule change would require the turning over of witness statements to the defense a reasonable time prior to trial rather than during the trial.

At the present time, there is no time requirement for the Commonwealth to supply statements of witnesses they intend to call at trial. As a result, witness statements may be, and are, turned over to the defense during trial prior to the testimony given by the witness. This has serious ramifications for the fairness of the trial.

Witness statements can sometimes be lengthy, and thus cumbersome to read and analyze during trial. New material in a witness' statement often requires additional investigation. Some witness statements require additional motion practice. Effective impeachment following the reading of a witness' statement may take additional time. Taped statements must be transcribed before effective impeachment can take place. Incorporating information received in the reading of a witness' statement may require changes in opening statement, or cross-examination of other witnesses. Voir dire may be completed without the opportunity to question jurors about a key issue or whether a juror knows or is related to a prosecution witness. As the rule presently stands, receiving discovery during trial is simply too late. Most strategic decisions are made in advance of trial. On the other hand, each of these problems can be addressed by the amendment without prejudicing the Commonwealth. Reversals for failure to supply discovery in a timely fashion can be avoided. See for example *Anderson v. Commonwealth*, Ky., 864 S.W. 2d 909 (1993).

Many jurisdictions across the Commonwealth now employ open file discovery, agreements which have been sanctioned by the Court. See *Mounce v. Commonwealth*, Ky., 795 S.W. 2d 375 (1990). This proposed rule change would give to those lawyers practicing in jurisdictions without

open file discovery a reasonable opportunity to prepare their cases.

The Kentucky Supreme Court has made discretionary the requiring of witness statements to be turned over prior to trial. In *Wright v. Commonwealth*, Ky., 637 S.W. 2d 635 (1982) the Court held that "[t]hough it may be that in a technical sense a witness is not 'called' until a bailiff calls him to the witness stand, we think the commonsense construction of this rule is the one given to it by the trial court in this instance, which is that if the Commonwealth intends to use a witness and the defense seeks access to his recorded statements it is within the trial court's sound discretion whether to allow it prior to trial." *Id.* at 636. That which is now discretionary should be made mandatory.

Criminal defense attorneys are required to render the effective assistance of counsel. The accused has a right to present a defense and to confront his accusers. Pretrial investigation and preparation are absolute necessities to the effective defense of the criminally accused. Concealing witness statements from defense counsel until the morning of trial acts as a serious impediment to providing the effective assistance of counsel to persons accused of crimes.

If no relief is provided in discovery, a new rule needs to be made part of the criminal rules authorizing the giving of more time to the defense during the trial to conduct investigations, plan examinations, engage in motion practice, and to respond further to the witness statements. As it is, when a lawyer obtains a witness statement, he often has no time provided to respond to the statement or to prepare for cross-examination of the witness in light of the statement.

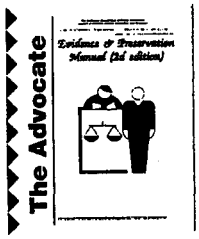
There is no legitimate interest of the Commonwealth that is protected by the existing rule. Nor will a legitimate interest be effected by this amendment.

This rule will be brought for discussion at the Kentucky Bar Association's Rules Committee in June. Be aware of this rule. Feel free to contact the Kentucky Supreme Court regarding your comments about this rule or any other measures which would improve the administration of the criminal justice system.

ERWIN W. LEWIS
KACDL RULES CHAIR

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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SAMPLE MOTIONS & INSTRUCTIONS

DPA MOTION FILE & INSTRUCTIONS MANUAL: The Department of Public Advocacy has collected many motions and instructions filed in actual criminal cases in Kentucky, and has compiled indexes of those motions and instructions. Instructions are categorized by offense and statute number. Many motions include memorandums of law.

CAPITAL CASES: The motion file contains many motions which are applicable to capital cases, and that includes many motions filed in capital cases on non-capital issues. In addition to containing tendered capital instructions, the DPA Instructions Manual contains instructions actually given in many Kentucky capital cases for both the guilt/innocence and penalty phases.

COPIES AVAILABLE: Copies of the instructions and motion file indexes are free to any public defender in Kentucky and any of the actual instructions or motions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Each DPA field office has an entire set of the instructions and motions. Criminal defense advocates can obtain copies of the indexes, instructions, or motions for the cost of copying and postage. To obtain copies contact:

BRIAN THROCKMORTON, Librarian
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006; Fax: (502) 564-7890
E-mail: bthrock@dpa.state.ky.us

The Kentucky Department of Public Advocacy's Advertising Rates for *The Advocate*

ADVERTISING RATES

Black & White

	1 Issue	6 Issues
Full Page	$150	$700
Half Page	$ 80	$350
1/4 Page	$ 50	$200

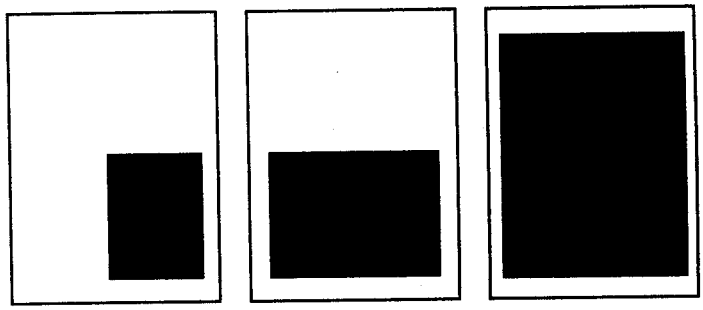
NOTE: *Stapling inside the newsletter up to a 4-sided insert would be double the cost for a full page ad.*

CLOSING DATES

*Published bi-monthly

ISSUE	PUBLICATION	DEADLINE
January	January 15	December 1
March	March 15	February 1
May	May 15	April 1
July	July 15	June 1
September	September 15	August 1
November	November 15	October 1

AD SIZES



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CIRCULATION

Your advertising message is delivered to a highly selective group of readers. *The Advocate* has a circulation of approximately 2,000 which includes all full-time public defenders, many private criminal defense attorneys, members of the criminal justice system and the judiciary in Kentucky, federal district judges and judge os the 6th Circuit Court of Appeals.

The Advocate is the most comprehensive and effective advertising medium to reach Kentucky's growing criminal justice community and defense bar. *The Advocate* is retained permanently by most lawyers as a resource.

For further information contact:

Tina Meadows, *The Advocate*
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Virtues & Values Etched in Stone

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Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

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

11th DPA Trial Practice Persuasion Institute
October 6-11, 1996
Kentucky Leadership Center
Faubush, Kentucky

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

**** KACDL ****

KACDL Annual Conference
November 16, 1996
Paducah, Kentucky

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

**** NLADA ****

NLADA Drug Seminar
April 18 - April 21, 1996
Albuquerque, New Mexico

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

**** NCDC ****

NCDC Trial Practice Institutes
May 19 - June 1, 1996
June 16 - June 29, 1996

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

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

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

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