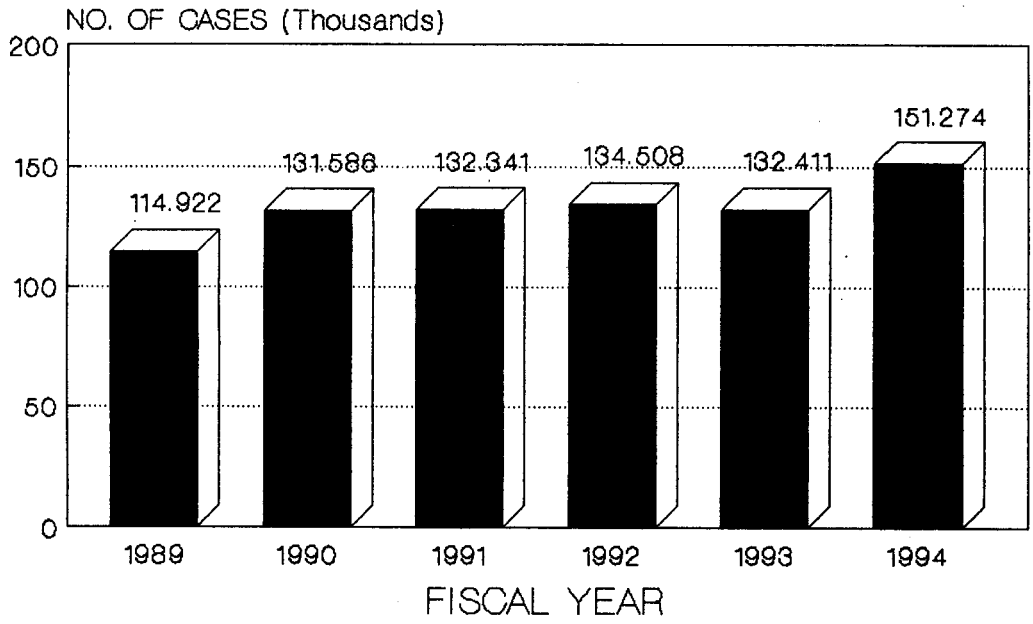
Kentucky Department of Public Advocacy

THE ADVOCATE

Journal of Criminal Justice Education & Research *Volume 18, No. 3, May 1996*

INDIGENTS-ACCUSED UNREPRESENTED IN KENTUCKY



Many Go Unrepresented

Counsel for Juveniles Even More Critical

Sixth Circuit Review, 1995-96

Manipulated Medicine: Understanding Sexual Abuse Examinations

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.

EDITORS:
Edward C. Monahan, Editor: 1984 - Present
Erwin W. Lewis, Editor: 1978-1983
Cris Brown, Managing Editor: 1983-1993
Tina Meadows, Graphics, Design, Layout, & Advertising

Contributing Editors:
Julie Namkin - West's Review
Ernie Lewis - Plain View
Dan Goyette - Ethics
David Niehaus - Evidence
Dave Norat - Ask Corrections
Steve Mirkin - Contract Counties
Steve Geurin - District Court
Bruce Hackett - 6th Circuit Review
Rebecca Diloreto - Juvenile Law
Roy Collins - Recruiting & Personnel
Julia Pearson - Capital Case Review
Bob Hubbard - Retrospection

When we allow fundamental freedoms to be scarificed in the name of real or perceived emergency, we invariably regret it.

- Justice Thurgood Marshall

FROM THE EDITOR:

What do we do about the unrepresented? We know that many indigents go unrepresented. The article by **Bill Curtis** in this issue and his article in the previous issue reveals that reality. *What do we do about it?* Please give us your ideas.

Counsel for Juveniles Essential. As the General Assembly increases the penal consequences for Kentucky kids, it is even more critical for counsel for juveniles at all stages. **Rebecca DiLoreto** helps us understand the need to provide more counsel resources for juveniles.

Mental Health Dialogue. The mental health aspects of criminal cases increase in importance each year. Our dialogue continues with **Dr. Smith** replying to **Mr. Blume's** response. **Greg Taylor** describes KCPC and **Dr. Drogin** and **Dr. Barrett** help us better understand the important psychological evaluation. The specialized area of mitigation interviewing is detailed by **Dr. Norton**, one of the nation's leading capital mitigation specialists. What are your thoughts aobut our forum?

HB 267. The Ask Corrections column discusses an important new law affecting PFO sentences, and it's retroactive.

Sixth Circuit Review. Our 6th Circuit column returns after a long hiatus. It is now authored by Bruce Hackett, an appellate attorney in the Jefferson District Public Defender Office. Bruce starts out with a bang as he reviews 6th Circuit caselaw for 1995 and the first 3 months of 1996.

Edward C. Monahan, **Editor**

❧ ❧ ❧ ❧ ❧

It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis.

-Justice Sandra Day O'Connor

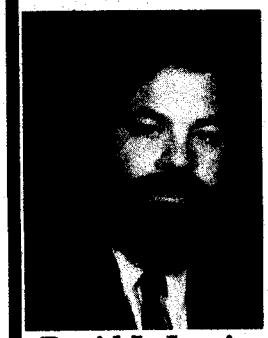
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel: (502) 564-8006; Fax: (502) 564-7890
E-Mail: pub@dpa.state.ky.us

Paid for by State Funds KRS 57.375 & donations.

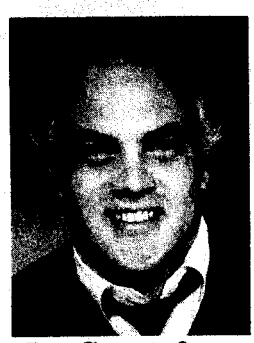
☙ IN THIS ISSUE ❧

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.

FOR A BROCHURE CONTACT: Tina Meadows, DPA Education & Development, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601; Tel: (502) 564-8006; Fax: (502) 564-7890; E-mail: tmeadows@dpa.state.ky.us

Indigents Accused of Crimes without Representation: A Growing Problem in Kentucky

Appearing in the March 1996 issue of *The Advocate* was an article discussing the numbers of Kentucky's indigents-accused in the circuit and district courts without benefit of representation from public advocates.[1] This article will attempt to shed more light on the issue of poor persons without representation in Kentucky by collapsing the previous data (combining the circuit and district court totals) and yielding a "total" criminal caseload for the Administrative Office of the Courts (AOC) and the Department of Public Advocacy (DPA).

Column 2 of Table 1 lists Kentucky's criminal caseload or the total number of criminal cases filed in the trial courts from 1989 through 1994. Since it is estimated that 75% of persons appearing in criminal courts are indigent,[2] this figure was multiplied against the AOC caseloads to derive the total number indigents accused of crimes (Table 1, Column 3) from 1989 through 1994. To derive Column 5 of Table 1, Unrepresented Persons, the DPA caseload (Column 4) was subtracted from the total number of Indigents Accused of Crimes, Column 3. [See Graph 1.]

The data show an upward trend in the number of unrepresented persons starting with 114,922 in 1989, except for a slight drop in 1993, and increasing to 151,274 in 1994. See graph on the cover of this issue. From 1989 to 1994, the number of unrepresented increased by 36,352 persons. This represents an increase of 32% in the number of unrepresented persons over the four year period. During 1994 two thirds or 66% of indigents accused of crimes were processed through Kentucky's court system without benefit of legal representation.

In Kentucky all criminal justice agencies, except DPA, are funded at levels which allow for processing 100% of persons qualifying for agency services. See Graph 2.

For Fiscal Year 1994 the Kentucky Department of Corrections received $191.1 million, the Kentucky judiciary $102.5 million, the Kentucky State Police $72.4 million, and the prosecution $31.8 million in general fund monies. It is understood that the large majority of the judiciary's cases are civil, but it is a reasonable assumption that the courts, corrections, police, and prosecution are adequately funded to process 100% of the criminal cases.

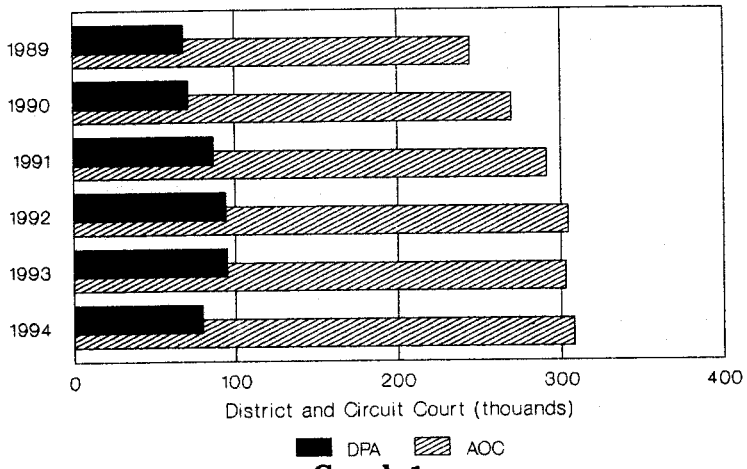
Table one indicates that during FY 1994 that in Kentucky 230,805 indigents were charged with criminal offenses in the trial courts. DPA with its budget of $10.5 million handled one third, 79,531 or 34%, of these cases. As previously noted two thirds, 151,274 or 66%, of the poor people accused of crimes in Kentucky were without benefit of legal representation. In

Table 1

INDIGENTS-ACCUSED UNREPRESENTED IN KENTUCKY 1989 - 1994

	AOC CRIMINAL CASELOAD	INDIGENTS ACCUSED OF CRIMES	DPA CRIMINAL CASELOAD	UNREPRESENTED PERSONS
FY 1989	244,686	183,514	68,592	114,922
FY 1990	270,252	202,689	71,103	131,586
FY 1991	291,544	218,658	86,318	132,340
FY 1992	304,393	228,295	93,787	134,508
FY 1993	302,818	227,114	94,703	132,411
FY 1994	307,740	230,805	79,531	151,274

KENTUCKY'S TOTAL CRIMINAL
CASELOAD IN THE TRIAL COURTS



Graph 1

order to fulfill the guarantee of the right to counsel in the Kentucky constitution it is conservatively estimated that DPA would need a budget comparable to the prosecution or $31.8 million. In other words, we can estimate that a 200% increase in the DPA caseload would require a 200% in its budget.

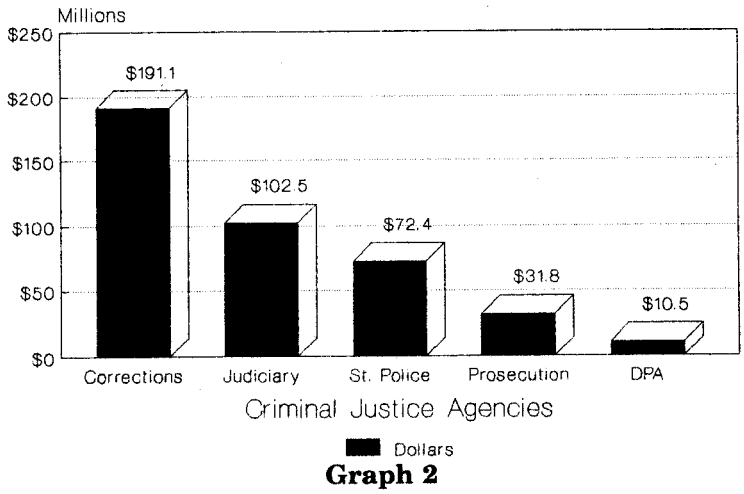
FOOTNOTES

[1]William P. Curtis, "Many Indigents Accused of Crimes Go Unrepresented in Kentucky", *The Advocate*, Vol. 18, No. 2 (March 1996), p. 6.

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

WILLIAM P. CURTIS
Research Analyst
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: bcurtis@dpa.state.ky.us

CRIM. JUSTICE BUDGET FY 94
GENERAL FUND



Graph 2

The Right to Counsel for Juveniles in Kentucky: Change in Code Make Competent Counsel Critical

"Transferring targeted juvenile offenders who commit the most serious and violent crimes to criminal court enables the juvenile justice system to focus its efforts and resources on the much larger group of at-risk youth and less serious and violent offenders who can benefit from a wide range of effective delinquency prevention and intervention strategies. However, in their efforts to ensure that certain juvenile offenders are transferred to the criminal justice system because of the seriousness of their offenses, the Federal Government and the State must be sure that only these youth who truly require this alternative under the laws of their particular jurisdiction are placed in the criminal justice system. **We must also remain vigilant about the juvenile's right to counsel and about the potentially harmful impact of placing juveniles in adult jails, lockups, and correctional facilities, including problems associated with overcrowding, abuse, youth suicide and the risk of transforming treatable juveniles into hardened criminals."**

Combating Violence and Delinquency: The National Juvenile Justice Action Plan, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, p. 72 (March 1996). (A comprehensive strategy and informational guide for focusing state and federal resources to reduce youth violence and prevent delinquency.)

On Monday, April 1, 1996, House Bill No. 117 was enacted. The new legislation contains many features to be explored over the coming months including the creation of a new Department of Juvenile Justice. That Department with its ambitious mission to prevent juvenile crime, identify at risk juveniles, operate or contract for detention, treatment and aftercare facilities and programs, will not have functions assigned to it until July 1, 1997.

The amendments most immediately affecting accused juveniles are those provisions impacting upon transfer. KRS 635.020 has been amended to require only one prior felony adjudication to make a 16 year old eligible for transfer on a Class C or D felony.

This requirement of only one previous felony adjudication may triple the number of cases transferred. It will be coupled with an amendment to KRS 640.010 which will require that the juvenile court find in favor of transfer on only two of the traditional seven factors. Other provisions allow the court to lock up juveniles for up to 90 days for misdemeanor offenses.

A red flag must be raised by those concerned with the rights of children. Juveniles faced with their first felony need to be advised that an adjudication of delinquency on that felony will make them immediately eligible for transfer should they be charged with a subsequent felony. In jurisdictions where county attorneys, police or court designated workers overcharge, it is important to litigate the facutal basis for the charge and seek lesser included misdemeanor offenses as an alternative to the felony.

The express purpose of the code is shifting from treatment and rehabilitation toward a greater emphasis on punishment. In this environment, it becomes even more critical for all accused juveniles to have counsel.

In significant sections of the Commonwealth, juveniles are encouraged to plead guilty without counsel in return for a quick probation. When they violate their probation they are locked up

again and denied counsel. When these children are discovered in detention centers and "treatment" facilities, it is a struggle to convince juvenile court judges that the cases should be reopened.

We are in this situation in Kentucky, even though the United States Supreme Court recognized a juvenile's right to counsel in 1967 in *Application of Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

Several courts across the country have held that a juvenile cannot even waive this right to counsel except upon the advice of counsel.

In *State v. Doe*, 621 P.2d 519 (N.M. 1980) an order revoking juvenile probation was reversed where the minor had been improperly permitted to waive the appointment of counsel at an original hearing on a delinquency petition.

An Arizona appellate court recently addressed the same issue in *In The Matter of the Appeal in Navajo County Juvenile Action No. JV*, 898 P.2d 517 (Ariz. App. Div. 1, 1995). The court agreed to review the issue even though the juvenile had already reached the age of majority because it was clearly an issue "capable of repetition, yet evading review." Pointing to Arizona's own juvenile court statute, the appellate court held that it was reversible error to permit a juvenile to make admissions against his interest without counsel and without important procedural safeguards to insure a valid waiver. Many courts have recognized that because one of the goals of juvenile court as parens patriae is to protect minors, greater caution must be used in determining a minor's competency to waive his/her right to counsel. *In re Shawn F.*, 34 Cal. App. 4th 184, 40 Cal. Rptr. 2d 263 (1995).

This hesitancy to accept a waiver of counsel is rationally based on society's long-held belief that juveniles do not have the capacity to make legally binding decisions. *State ex rel. M. v. Taylor*, 276 S.E.2d 199 (W.Va. 1981) Juveniles cannot sell, lease or mortgage property. Guardian ad litems must be appointed for juveniles in most civil actions. No statutory authority exists for the waiver of a lawyer or counsellor in such circumstances. Yet, when it comes to depriving a child of his/her liberty or urging a child to make decisions today which may affect his liberty and privacy or future employment interests tomorrow, some courts are all to willing to ignore a child's right to counsel.

A social worker is not a substitute for a lawyer. *In re Welfare of D.S.S.*, 506 N.W.2d 650 (Minn. App., 1993). If a child is committed to the state, the social worker or case worker is not in a position to waive the child's right to counsel nor to act on behalf of the child in a delinquency or status adjudication. In a recent case in Western Kentucky, police refused to let a child, undergoing interrogation, consult with a foster parent. The only adult permitted contact with the child was a social worker. The social worker saw no reason to intervene and refused to consult with the child. No one made an effort to secure counsel for the juvenile.

A parent who has no legal training can neither waive a child's rights nor act as his lawyer. *In re Shawn F., supra.* In a recent case, in Central Kentucky, parents urged a child, facing serious felony offenses, to plead guilty without requesting counsel so that they could return quickly to their home county with the case resolved. What apparently went undetected was that the child had a history in juvenile court as abused, neglected and dependent. The parental pressure on the child to forego this critical constitutional right may have been yet another episode of abuse and neglect. Parents may not want a child to obtain counsel either because they desire a speedier resolution or they do not feel that the case merits an attorney. Parents typically do not realize the long term consequences of a plea. Sometimes their interests are adverse to the child's, as in a beyond control petition or an assault charge, when the parent was the alleged victim. When a child faces sex abuse charges, it may be that a parent fears exposure and personal liability.

As with adults, a silent record cannot be equated with a valid waiver. *Re Juvenile Appeal*, 465 A.2d 1107 (Conn. 1983); *K.M. v. State*, 448 So.2d 1124 (Fla. App. D2, 1984); *Re Kriak*, 506 N.E.2d 556 (Medina Co., Ohio 1986). In jurisdictions where waiver is permitted, the juvenile can then only choose to waive his right to counsel with a record that establishes that his decision was the product of an intelligent and understanding choice. *State ex rel. Juvenile Dept. Linn County v. Anzaldira*, 820 P.2d 869 (Oregon, 1991). Such a waiver should not be accepted unless the minor is experienced in the legal system and aware of the dangers and disadvantages of self-representation. The record needs to reveal that the minor

was warned about the case specific dangers of proceeding unrepresented. *Re R.S.B.*, 498 N.W.2d 646 (S.D. 1993). Certainly, where, in Kentucky, the law is growing ever more punitive, the juvenile should be advised of the future consequences of a plea. *See In the Interest of Doe*, 881 P.2d 533 (Hawaii, 1994); *In re Kevin G.*, 709 P.2d 1315 (Cal. 1985); *Re Kriak, supra*; *Re Manuel R.*, 543 A.2d 719 (Conn. 1988); *In Interest of W.M.F.*, (Ga. 1986).

The better practice remains that no juvenile waive the right to counsel, except after consulting with counsel who is knowledgeable in juvenile law. To presume that a child can understand the long term consequences of a juvenile court proceeding is an absurdity. Even educated legal minds cannot be sure of how the juvenile code will be sharpened into a better tool for the prosecution in the future. In a legal system, seeking justice, it is only reasonable to give an accused person who has not yet graduated from high school, an attorney.

REBECCA BALLARD DILORETO
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: rdiloret@dpa.state.ky.us

Doug Sapp Appointed Commissioner of Corrections

Justice Secretary E. Daniel Cherry named **Doug Sapp** as Commission of the Kentucky Department of Corrections effective April 1, 1996.

Sapp, who served as Deputy Commission of Community Services and Local Facilities within the Department of Corrections, has over 20 years of correctional experience.

In making the announcement, Secretary Cherry stressed the importance of naming a person with strong corrections credentials to head the Department of Corrections. The department oversees the operation of all state prisons, 57 probation and parole offices as well as serving as liaison with local jails and halfway houses throughout the state.

"The knowledge and expertise which Doug brings to this position will allow him to successfully undertake one of the most critical jobs in state government," Cherry said. "I have the utmost confidence in his abilities and feel fortunate to be able to name someone with his qualifications to this important position."

Sapp, 48 years old, began his career in 1973 as a Probation and Parole Officer. He advanced through the ranks to assume his current position as Deputy Commissioner. He is a resident of Columbia,

Criminal Justice Mental Health Forum: A Dialogue to Greater Meaning

"Science is rooted in conversations. The cooperation of different people may culminate in scientific results of the utmost importance." *Physics and Beyond: Encounters and Conversations*, Werner Heisenberg. There is a dearth of dialogue in our criminal justice system. The "truth" of science and of the criminal justice process is better approached by interdependent dialogue rather than destructive discussion.

A leading quantum theorist, David Bohm, see *The Special Theory of Relativity* (1965) is developing a theory of *dialogue* when a group of people "becomes open to the flow of a larger intelligence." He has explored the analogy between the collective properties of particles and the way we think together. "As with electrons, we must look on thought as a systematic phenomena arising from how we interact and discourse with one another." He distinguishes *discussion*, an exchange that has winning as its purpose from dialogue. Bohm sees groups using dialogue to access a greater "pool of common meaning" which individuals cannot obtain. "The whole organizes the parts." Three conditions Bohm sees as necessary for dialogue are:

1) participants must "suspend" their assumptions;
2) participants must see each other as colleagues; and
3) a facilitator must "hold the context."

The Advocate invites you to join in the dialogue on what constitutes a competent mental health evaluation for indigent criminals accused of a crime. Columbia, South Carolina attorney **John Blume**; Lexington psychologist, **Harwell Smith, Ph.D.**; Louisville, Kentucky attorney and psychologist, **Eric Drogin, Ph.D.** and **Curtis Barrett, Ph.D.**, Louisville, Kentucky psychologist are currently exchanging ideas. In the August, 1995 *Advocate* John Blume set out what his experience reveals as the components of competent evaluations. In the November issue Dr. Smith took issue with the practicality of Blume's views. In the January, 1996 issue Blume replied and Drogin entered the dialogue. Dr. Smith responds in this issue to Mr. Blume. We also have a description of the Kentucky Correctional Psychiatric Center by its director, **Greg Taylor**. Does anyone seriously think $500 for a competency and criminal responsibility evaluation and any resulting testimony is sufficient across the 400 cases done out-patient in Kentucky? **Lee Norton, Ph.D.**, one of the country's leading mitigation specialists, helps us understand the special skills necessary to reveal information relevant to the life and death decisions factfinders make in capital cases. **Drs. Drogin and Barrett** discuss the critical importance of being an advocate for your opinion, and they explore the components of the psychological evaluation. Already, we see the tragic tension between the *ideal we all know should occur in Kentucky* and the *reality of current Kentucky practice*. We invite your reflection, inquiry and dialogue.

Dialogue vs. Discussion

The discipline of team learning starts with "dialogue," the capacity of members of a team to suspend assumptions and enter into a genuine "thinking together." To the Greeks *dia-logos* meant a free-flowing of meaning through a group, allowing the group to discover insights not attainable individually. Interestingly, the practice of dialogue has been preserved in many "primitive" cultures, such as that of the American Indian, but it has been almost completely lost to modern society. Today, the principles and practices of dialogue are being rediscovered and put into a contemporary context. (Dialogue differs from the more common "discussion," which has its roots with "percussion" and "concussion," literally a heaving of ideas back and forth in a winner-takes-all competition.)

- Peter M. Senge, *The Fifth Discipline: The Art of Practice of the Learning Organization* (1990) at 10.

Further into the Murk:
Reflections on Mr. Blume's Reply

Taking up the gauntlet again from Mr. John Blume, *Mental Health Issues in Criminal Cases: A Reply to Dr. Smith*, *The Advocate*, Vol. 18, No. 1 (January 1996), one must begin with the hope that Mr. Blume caught the topical nature of my use of the word "insane" in my description of his initial remarks and did not take this as my professional evaluation of his thoughts. With regard to what comprises a good forensic psychological evaluation, Mr. Blume draws our attention to the question of when a neuropsychological evaluation is necessary. Blume also makes the case that a complete and accurate medical history (ever seen one?) is essential in establishing mitigation in a capital case. Finally, Mr. Blume takes issue with my remarks regarding the original error in *Ake V. Oklahoma*.

To take the last issue first, I would not presume to argue with Mr. Blume's remarks on the legal opinions surrounding *Ake*. It does appear that the U.S. Supreme Court concluded from the *Ake* circumstances that the indigent defendant is entitled to an expert who works only for him. I would simply say that this is part of the "tortuous, obscure path" traveled from the *Ake* circumstances. I would further remark, in this vein, that Mr. Edward Monahan's observation to me that *Ake* and Binion entitle the defendant to his own team of psychiatric experts, is an idiosyncratic interpretation unsupported by *Ake* and *Binion*.

Mr. Blume feels that "neuropsychological testing is almost always necessary to ensure that a competent and reliable mental health examination is conducted." I would agree with Mr. Blume that most psychologists have not been trained in the Luria or Reitan neuropsychological batteries, as I have. I would agree that these test batteries are time consuming to give. Both these observations miss the essential point with regard to the role of neuropsychological testing in forensic examinations. These examinations are done to answer the questions of the referring party. In almost all cases these questions can be answered with a neuropsychological screening. In most cases neuropsychological testing provides more documentation of a deficit noted upon screening but doesn't provide either better localization of the brain dysfunction or an improved idea about any connection between any dysfunction and the criminal behavior. The appropriately trained and experienced forensic psychological examiner develops an educated opinion on the basis of the screening as to whether there is a likelihood that further neuropsychological testing will affect the answers to the referral questions. If it will, then he makes a referral for the testing. If it won't, then he notes the dysfunction and moves on to whatever conclusions he can make.

This leads us to the issue of the complete and accurate medical history. One always wants such a history. What is a complete history and how long do we wait for it? For example federal prison medical records are virtually unattainable. How long should I wait to issue my report while my request for these and other records winds its way through the system. If the Letcher County school system has lost the record as to whether the defendant's teeth were fluoridated by the school nurse in the third grade, should I withhold my opinion on his culpability in a serious crime where there is no apparent link between his behavior and childhood tooth fluoridation?

Certainly as a defense attorney, I would be looking for any evidence in mitigation of my client's crime. Let me make a philosophical point which will not be new to most readers. One can argue that no one is responsible for his/her actions. Viewing people this way, a person is a product of his/her genes, upbringing, etc. At the same time, to operate as a society, we must treat everyone as if he is responsible for his actions and has made a free will choice to do anything he has done. The insanity defense is an attempt to blend these two points of view. The law, in its wisdom, has awarded me the right to say who society should excuse from the expectations that bind every other member. It has, again wisely, left the ultimate decision to a jury.

The law charges the psychological expert with determining whether the defendant's cognitive functioning was so disordered at the time of the crime that the defendant did not have free will. The issue of mitigation doesn't really enter into the question asked of the expert. Rarely does a murderer come from a healthy upbringing (notable exception: Beaver the Cleaver). There are all kinds of good reasons why a person was so mentally disordered that he killed somebody. These can be ascertained by the attorney's investigator. A good forensic psychological examiner answers the referral question to a reasonable psychological certainty. If he can't do this himself, then he decides if it is likely that anyone could. If more information would make an answer possible, then he seeks more information. If having more information won't make an answer possible, then he says he can't answer to a reasonable psychological certainty. Ultimately the court officers have to trust some expert as to whether a thorough evaluation has been done.

One hopes these remarks have added something to the discussion. Professionals are inclined to argue with considerable ardor for the people or values they represent while at the same time being able to appreciate the soundness of another's point of view. These remarks have attempted to put the issues into the context of the real world while respecting the gravity of the issues for the criminal defendant.

HARWELL F. SMITH, PH.D.
1401 Harrodsburg Road, Suite C-425
Lexington, Kentucky 40504
Tel: (606) 276-1836

Harwell F. Smith, Ph.D. is a board certified clinical psychologist in Lexington, Kentucky. In his psychotherapy based practice, he also does competency, criminal responsibility and personal injury forensic examinations.

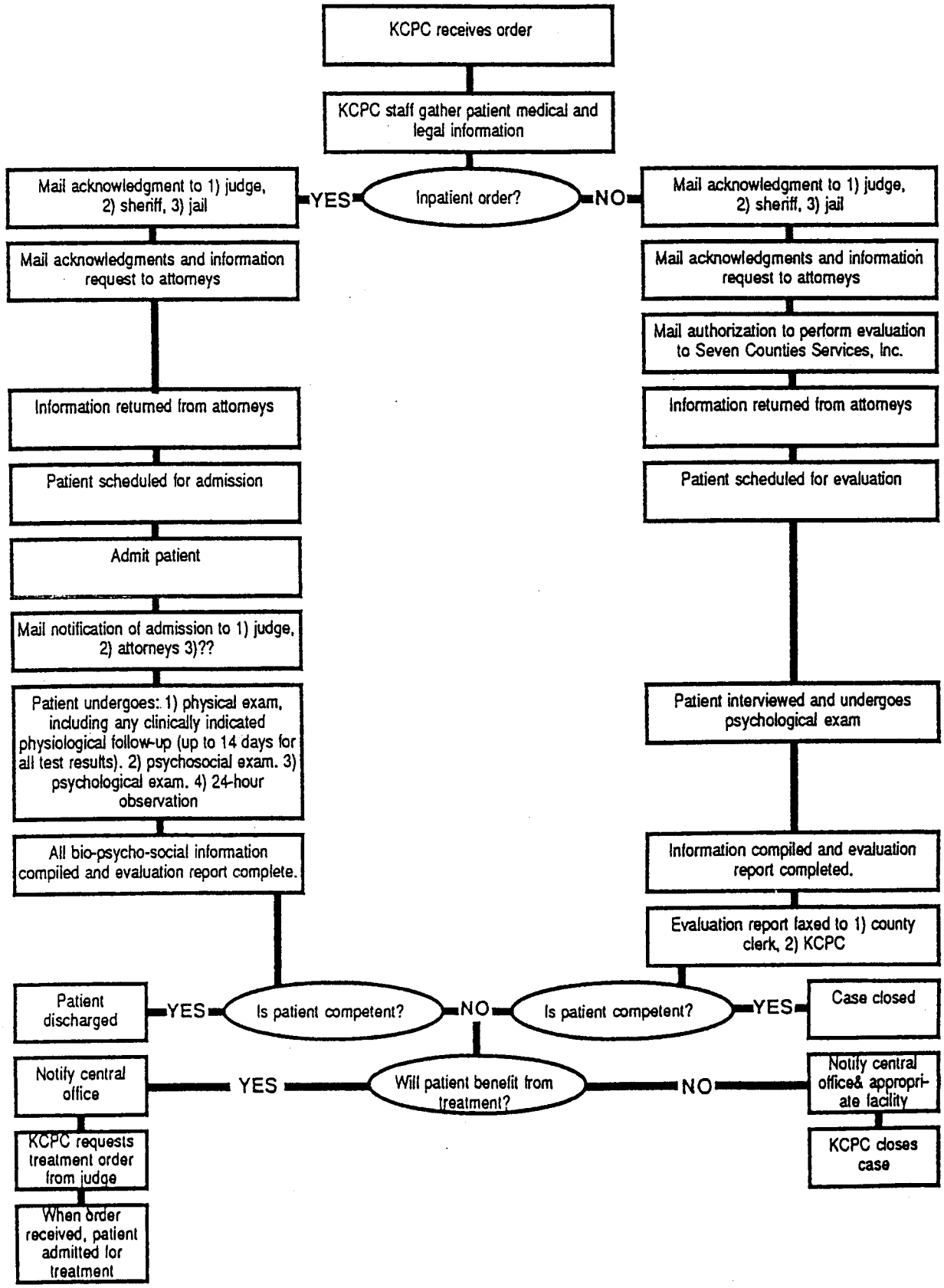
Pre-Trial Evaluation Program
Kentucky Correctional Psychiatric Center

KCPC Purpose. The Kentucky Correctional Psychiatric Center (KCPC) began operations in September, 1981. The purpose of the institution is described in the Mission Statement as follows: "As part of the Mental Health and Criminal Justice Systems of the Commonwealth of Kentucky, the Kentucky Correctional Psychiatric Center is responsible for the provision of professional objective and thorough forensic pre-trial evaluations for the judicial system and quality inpatient psychiatric services of persons charged with or convicted of felony offenses."

114% Increase in 10 Years. The demands of the pretrial aspect of this mission have grown progressively since its inception. In FY 85/86 there were a total of 352 court orders for competency and/or criminal responsibility evaluations. In FY 94/95 the number of orders had climbed to 754. In the past ten years, a 114% increase in the number of orders has occurred. The flow chart attached describes the various steps by which a court order is processed.

$196 per day, In-Patient. It would be impossible to perform this volume of evaluations solely on an inpatient basis. In a farsighted decision in 1986, KCPC and the Department for Mental Health and Mental Retardation Services staff developed a program to conduct evaluations on an outpatient basis. The goals of this approach were to keep patients in their local communities, spread the increasing workload over a larger number of evaluators, decrease the waiting list of patients to be admitted to KCPC, save the expense of a costly inpatient hospitalization ($196.00 per day), and reduce the amount of time required to produce a completed evaluation. An occasional occurrence which may delay the outpatient evaluation process involves patients placed on bond status. These patients sometimes do not keep

COURT ORDERED EVALUATION PROCESS



their appointment for evaluation and requires evaluation to be rescheduled.

$500 for Out-Patient. Currently, the Department for Mental Health and Mental Retardation Services has agreements with eleven community mental health centers to perform these outpatient evaluations. The total amount spent last year on outpatient evaluations was approximately $200,000, or $500 per case. Following is a list of the centers, the individuals performing evaluations, and the counties they serve.

Bluegrass Regional Comprehensive Care Center
Dr. Harwell Smith

Anderson	Fayette	Lincoln	Scott
Bourbon	Franklin	Madison	Woodford
Boyle	Garrard	Mercer	
Clark	Harrison	Nicholas	
Estill	Jessamine	Powell	

Comprehend, Inc. - Dr. Barbara Jefferson

Bracken	Mason	Lewis
Fleming	Robertson	

Cumberland River Comprehensive Care Center

Bell	Knox	Clay	Laurel
Harlan	Rockcastle	Jackson	Whitley

Green River Comprehensive Care Center
Dr. James Hallman

Allen	Hancock	Metcalfe	Warren
Barren	Hart	Monroe	Webster
Butler	Henderson	Ohio	Union
Daviess	Logan	Simpson	McLean
Edmondson			

Northern Kentucky Comprehensive Care Center
Dr. Michael Crane

Boone	Grant	Campbell	Kenton
Carroll	Owen	Gallatin	Pendleton

Pathways, Inc. - Dr. Walter Powers

Bath	Lawrence	Boyd	Menifee
Carter	Rowan	Greenup	Montgomery
Elliott	Morgan		

Pennyroyal Regional Comprehensive Care Center
Dr. Robert Sivley

Ballard	Crittenden	Livingston	Todd
Caldwell	Fulton	Lyon	Trigg
Calloway	Graves	Carlisle	McCracken
Hickman	Marshall	Christian	Hopkins
Muhlenberg			

Seven Counties Services - Dr. J. Robert Noonan

Breckinridge	Jefferson	Oldham	Bullitt
Larue	Shelby	Grayson	Marion
Spencer	Hardin	Meade	Trimble
Henry	Nelson	Washington	

Adanta Group - Dr. Horace Stewart

Adair	McCreary	Casey	Pulaski
Clinton	Russell	Taylor	Cumberland
Green	Wayne		

Mountain Comprehensive Care Ctr. - Dr. Pam Guthrie

Floyd	Martin	Johnson	Pike
Magoffin			

Kentucky River Comprehensive Care Center
Dr. Vincent Dummer

Breathitt	Letcher	Knott	Owsley
Lee	Perry	Leslie	Wolfe

Training & Referrals. In-service training is offered by KCPC to outpatient evaluators on an annual basis. They also have access at any time to hospital staff to consult on a specific patient or address any issue. Patients evaluated as needing longer term observation and/or treatment may be referred as an inpatient to KCPC by the outpatient evaluator. For example, when the evaluator determines that a patient is not currently competent to stand trial but can benefit from treatment, the patient will be admitted.

57% Out-Patient. The number of cases evaluated on an out-patient basis for FY 94/95 was 433. This is out of a total of 754 orders for evaluations.

Increase Expected. This program has proven efficient and effective in addressing the growing volume of court ordered evaluations. It is anticipated that the value of the program will only increase as the demand for such services continues to grow.

GREGORY S. TAYLOR, Facility Director
Kentucky Correctional Psychiatric Center
1612 Dawkins Road
LaGrange, Kentucky 40031
Tel: (502) 222-7161

Gregory S. Taylor has a Bachelor's Degree in Business Administration from Hanover College and a Master's in Hospital Administration from the University of Minnesota. He has been Director of KCPC since 1992.

"But Doctor, Isn't That Just Your Opinion?"
Contributing to the Decision-Making Process of the Forensic Psychologist as Expert Witness

> Do we admit the existence of opinion?
> Undoubtedly.
> Then I suppose that opinion appears to you to be darker than knowledge, but lighter than ignorance?
> Both; and in no small degree.
>
> - Plato
> *The Republic*, c.370 B.C.

Taking Charge...and Giving Charges

In our last article for *The Advocate*[1], we asserted that:

> The difference between the administration of a prescribed series of tests, and the ability to knit results from all sources of data into a responsive, compelling, persuasive, and ultimately convincing whole before the trier of fact, is the difference between the clinical psychologist who performs an *examination* and the forensic psychologist who conducts an *evaluation*.[2]

> The *evaluation*, however, is only the first of two steps in fulfilling the role of the forensic psychologist as expert mental health witness. The witness must first perform an evaluation, without bias, resulting in an *opinion*, and then must be prepared to *advocate* that opinion effectively within the overall context of the attorney's case presentation. As noted expert Dr. David Shapiro points out, "one should not consider oneself an advocate for the patient, for the defense, or for the government. One is an advocate only for one's own opinion."[3]

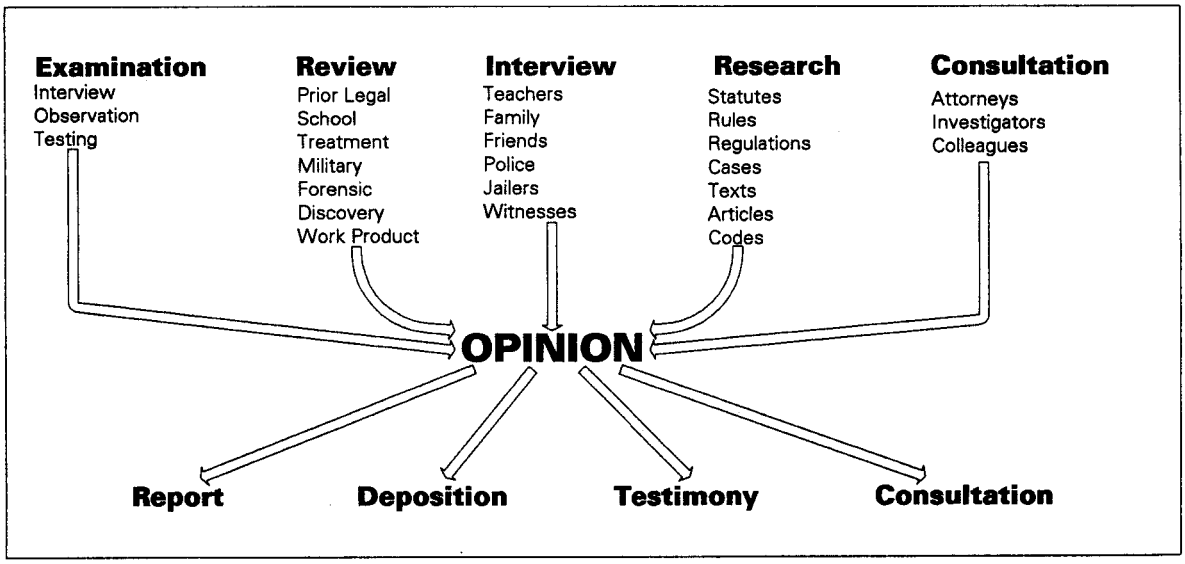
The process that leads to the construction of an expert opinion, and its advocacy in various contexts, can be viewed in the context of a series of "charges." Obviously, the defendant has been presented with "charges," or there would be no defendant. Ultimately, the attorney will be presented an itemized list of "charges" at the conclusion of the case, or quite likely there would be no expert.

What are often ignored are the "charges" with which the expert must be presented by the attorney at the inception of the expert's involvement in the proceedings. All too frequently, experts are merely asked to "perform an evaluation" of a defendant, with little if any

additional guidance. Attorneys may focus exclusively on the contents of the forensic psychological report as a test of the adequacy of the expert's performance prior to testimony, without stopping to consider the need to influence the full scope of the expert's role in the construction and presentation of the attorney's overall theory of the case.

From Evaluation to Opinion to Advocacy

The flow of the expert's transition from forensic evaluation to effective advocacy of an expert opinion can be depicted in the following fashion:



The confluence of data from various sources such as examination, review, interview, research, and consultation (category subheadings provide merely a few examples) informs the scientific basis for an expert opinion. Advised of that opinion, the attorney must then determine if the opinion is sufficiently favorable and/or informative to continue to the advocacy phase, with the expression of that opinion via report, testimony, and/or deposition. Regardless of whether expression of the opinion will be persuasive to the trier of fact, the attorney may benefit from additional consultation by the expert regarding such issues as direct and cross-examination, witness interviewing, *et cetera*.

The scope of the evaluation, and the quality and persuasiveness of the opinion it serves to generate, depend upon the ability of the attorney to provide the expert with the appropriate data in as timely a fashion as possible.

Attorneys often want to know what are the "required" components of the data sources that contribute to the expert opinion. The answer to that question really depends upon the interaction of a variety of factors which may include, among others, the reliability and validity of the data which *have* been obtained, the nature of the forensic issue(s) to be addressed, the current status of the defendant, and the skill, training, and experience of the evaluator.

For example, a recently and severely brain damaged defendant, incapable of coherent speech or any understanding of verbal or written communication on the part of his attorney or anyone else, may be found incompetent to stand trial on the basis of thorough forensic clinical examinations, with a lesser degree of emphasis upon the contributory opinions of friends, family, and former teachers. Similarly, an opinion on the adequacy of an evaluation performed by another professional in the past may not require the testifying expert to perform an examination of that defendant some years later, as long as the conclusions provided are appropriately limited.

The adequacy and utility of the professional opinion is often most helpfully measured, not

in binary terms of "adequate" versus "inadequate," or "competent" versus "incompetent," but rather in incremental terms regarding its potential for persuasiveness, and the degree to which it will withstand the rigors of cross-examination.

Sources of Guidance

While there is no solitary, bottom-line reference which definitively and comprehensively states the necessary components of a competent forensic psychological evaluation and/or report, there are numerous sources of guidance upon which attorneys and forensic psychologists can draw.

Ethics Codes and Guidelines are aspirational statements which seek to guide the behavior of professionals belonging to the associations which promulgate them. Failure to adhere to an ethical code or guideline may lead to expulsion from professional societies, and even to criminal sanctions when compliance is mandated by the psychologist's state licensing statute.

The *Ethical Principles of Psychologists and Code of Conduct*[4] of the American Psychological Association (APA) contains many guidelines related to principles of psychological assessment, and in its most recent incarnation has included standards which pertain specifically to "Forensic Activities":

> **7.01 Professionalism**
> Psychologists who perform forensic functions, such as assessments, interviews, consultations, reports, or expert testimony, must comply with all other provisions of this Ethics Code to the extent that they apply to such activities. In addition, psychologists base their forensic work on appropriate knowledge and competence in the areas underlying such work, including specialized knowledge concerning special populations.
>
> **7.02 Forensic Assessments**
> [a] Psychologists' forensic assessments, recommendations, and reports are based on information and techniques (including personal interviews of the individual, when appropriate) sufficient to provide appropriate substantiation for their findings.
>
> [b] Except as noted in [c] below, psychologists provide written or oral forensic reports or testimony of the psychological characteristics of an individual only after they have conducted an examination of the individual adequate to support their statements or conclusions.
>
> [c] When, despite reasonable efforts, such an examination is not feasible, psychologists clarify the impact of their limited information on the reliability and validity of their reports and testimony, and they appropriately limit the nature and extent of their conclusions or recommendations.
>
> **7.03 Clarification of Role**
> In most circumstances, psychologists avoid performing multiple and potentially conflicting roles in forensic matters. When psychologists may be called on to serve in more than one role in a legal proceeding -- for example, as consultant or expert for one party or for the court and as a fact witness -- they clarify role expectations and the extent of confidentiality in advance to the extent feasible, and thereafter as changes occur, in order to avoid compromising their professional judgment and objectivity and in order to avoid misleading others regarding their role.
>
> **7.04 Truthfulness and Candor**
> [a] In forensic testimony and reports, psychologists testify truthfully, honestly, and candidly and, consistent with applicable legal procedures, describe fairly the bases for their testimony and conclusions.
>
> [b] Whenever necessary to avoid misleading, psychologists acknowledge the limits of their data or conclusions.
>
> **7.05 Prior Relationships**
> A prior professional relationship with a party does not preclude psychologists from testifying as fact witnesses or from testifying to their services to the extent

permitted by applicable law. Psychologists appropriately take into account ways in which the prior relationship might affect their professional objectivity or opinions and disclose the potential conflict to the relevant parties.

7.06 Compliance with Law and Rules
In performing forensic roles, psychologists are reasonably familiar with the rules governing their roles. Psychologists are aware of the occasionally competing demands placed on them by these principles and the requirements of the court system, and attempt to resolve these conflicts by making known their commitment to this Ethics Code and taking steps to resolve the conflict in a responsible manner.

While not adopted by the APA as a whole, the *Specialty Guidelines for Forensic Psychologists*[5] provide additional guidance regarding evaluation and report procedures, including the following:

VI. Methods and Procedures

[B] Forensic psychologists have an obligation to document and be prepared to make available, subject to court order or the rules of evidence, a l l data that form the basis for their evidence or services. The standard to be applied to such documentation or recording *anticipates* that the detail and quality of such documentation will be subject to reasonable judicial scrutiny; this standard is higher than the normative standard for general clinical practice...

[F3] When a forensic psychologist relies upon data or information gathered by others, the origins of those data are clarified in any professional product. In addition, the forensic psychologist bears a special responsibility to ensure that such data, if relied upon, were gathered in a manner standard for the profession...

VII. Public and Professional Communications

[E] Forensic psychologists, by virtue of their competence and rules of discovery, actively disclose all sources of information obtained in the course of their professional services; they actively disclose which information from which source was used in formulating a particular written product or oral testimony.

Learned Treatises, including texts and journal articles, are a fertile source of guidance for various authors' opinions on necessary elements of various forms of forensic psychological evaluation and/or report. For example, in his influential *The Psychologist as Expert Witness*[6], Dr. Theodore Blau outlined components which he felt must be covered in the psychologist's assessment of criminal responsibility (reproduced here in condensed fashion):

1. Events and Observations Concerning the Crime.

2. The Defendant's Recall.

3. Ancillary Sources.

4. Psychological Evaluation.

   a) A History from the Defendant.
   b) A History from the Family of the Defendant.
   c) Intellectual Evaluation.
   d) Neuropsychological Factors.
   e) Competency Evaluation.
   f) Reading Skills.
   g) Personality.
   h) Measures of Faking or Malingering.

5. The Report of Findings and Opinion.

   a) Retention Process.
   b) Facts of the Case and Sources.
   c) Defendants's Recollection of Events.
   d) Observations of Defendant's Behavior.
   e) Family History and Events of Significance.
   f) Tests and Procedures Used.
   g) Clinical Observations.
   h) Test Results.

i) Summary of Current Psychological State.
j) General Concordance of Facts and Results.
k) Statement of Opinion.[7]

The *ABA Criminal Justice and Mental Health Standards*[8] were the product of several multidisiciplinary teams, including psychiatrists, psychologists, attorneys, and others, who worked pursuant to a *MacArthur Foundation* grant to inform the legal process about dealing with the defendants suffering from mental illness or mental retardation. The following is one representative standard, regarding assessment of competency to stand trial:

Standard 7-4.5 Report of the Evaluator

[a] The first matter to be addressed in the report should be the assessment of the defendant's competence to stand trial. If it is determined that the defendant is competent to stand trial, issues relating to treatment or habilitation should not be addressed. If it is determined that the defendant is incompetent to stand trial, or that the defendant is competent to stand trial but that continued competence is dependent upon maintenance of treatment or habilitation, the evaluator should then report on the treatment or habilitation necessary for the defendant to attain or maintain competence.

[b] If it is determined that treatment or habilitation is necessary for the defendant to attain or maintain competence, the report should address the following issues:

1) the condition causing the incompetence;

2) the treatment or habilitation required for the defendant to attain or maintain competence and an explanation of appropriate treatment alternatives in order of choice;

3) the availability of the various types of acceptable treatment or habilitation in the local geographical area. The evaluator should indicate the agencies or settings in which such treatment or habilitation might be obtained. Whenever the treatment or habilitation would be available in an outpatient setting, the evaluating expert should make such fact clear in the report;

4) the likelihood of the defendant's attaining competence under the treatment or habilitation and the probable duration of the treatment or habilitation.

[c] If the evaluating expert determines that the only appropriate treatment or habilitation would require that the defendant be taken into custody or involuntarily committed, then the report should include the following:

1) an analysis of whether the defendant, because of the condition causing mental incompetence, meets the criteria for involuntary civil commitment or placement set forth by law;

2) whether there is a substantial probability that the defendant will attain competence to stand trial within the reasonably foreseeable future;

3) the nature and probable duration of the treatment or habilitation required for the defendant to attain competence;

4) alternatives other than involuntary confinement which were considered by the evaluator and the reasons for the rejection of such alternatives.[9]

These *Standards* also address, in more general fashion, requirements for the overall content of forensic psychological reports:

Standard 7-3.7
Preparation and contents of written reports of mental evaluations

[b] Contents of the written report.

1) The written evaluation should ordinarily:

A) identify the specific matters referred for evaluation;

B) describe the procedures, tests, and techniques used by the evaluator;

C) state the evaluator's clinical findings and opinions on each matter referred for evaluation and indicate specifically those questions, if any, that could not be answered;

D) identify the sources of information and present the factual basis for the evaluator's clinical findings and opinions; and

E) present the reasoning by which the evaluator utilized the information to reach the clinical findings and opinions. The evaluator should express an opinion on a specific legal criterion or standard only if the opinion is within the scope of the evaluator's specialized knowledge.[10]

Statutory Guidelines may be limited in scope, but mandate key requirements that are often ignored by attorneys and not disclosed to expert witnesses. For example, in Kentucky, KRS 504.100 ("*Appointment by court of psychologist or psychiatrist during proceedings*") provides that:

(2) The report of the psychologist or psychiatrist shall state whether or not he finds the defendant incompetent to stand trial. If he finds the defendant is incompetent, the report shall state:

a) Whether there is a substantial probability of his attaining competency in the foreseeable future; and

b) What type treatment and what type treatment facility the examiner recommends.

We frequently review reports which provide a bottom-line opinion regarding competency, but fail to adhere to these additional requirements.

Sometimes, the issue is not *what* comprises the evaluation or report, but *who* is to perform or write them. According to KRS 504.016 ("Definitions for Chapter"), pertaining to competency to stand trial and criminal responsibility evaluations:

(9) "Psychologist" means a person licensed at the doctoral level pursuant to KRS Chapter 319 who has been designated by the Kentucky Board of Examiners of Psychology as competent to perform examinations.

Both KRS 504.100 and KRS 504.070 ("*Evidence by defendant of mental illness or insanity; examination by psychologist or psychiatrist by court appointment; rebuttal by prosecution*") refer to the appointment of a "psychologist" to "examine, treat, and report on the defendant's mental condition." One frequently encounters criminal responsibility and competency to stand trial evaluations where reports are signed by a psychologist at the doctoral level and a psychological associate or certified psychologist at the master's level, and where it transpires that a substantial portion of the evaluation has been performed by the latter professional.

Conclusions

There are many different routes to a professional opinion. The route taken will determine the credibility, persuasiveness, and generalizability of that opinion, in conjunction with the reputation and skill of the expert witness providing it. A wealth of resources including ethical codes and guidelines, learned treatises, and statutes contributes to the constantly shifting parameters of what are acceptable and/or necessary components of the forensic psychological evaluation and report. Attorneys will greatly enhance the quality of the professional opinions of their experts, to the extent that they provide those experts with the fullest possible range of data, and continue to discuss in a collegial fashion the evolving nature of forensic mental health sciences.

ERIC DROGIN, J.D., Ph.D.
P.O. Box 22576
Louisville, Kentucky 40252-0576
Tel: (502) 629-8885
Fax: (502) 629-7788

CURTIS BARRETT, Ph.D., ABPP
Norton Psychiatric Clinic
200 E. Chestnut St.
Louisville, Kentucky 40232-5070
Tel: (502) 629-8885
Fax: (502) 629-7788

ERIC DROGIN is a clinical and forensic psychologist and attorney currently specializing in trial consultation, who has testified in over 150 civil and criminal jury trials. A member of the clinical faculty of the University of Louisville School of Medicine, Dr. Drogin serves as a staff psychologist for the Norton Psychiatric Clinic in Louisville. He has published a number of articles regarding various clinical and legal issues in forensic mental health and professionalism. A member of various national, state, regional, and local legal and psychological associations, Dr. Drogin currently serves as Chair of the Federal Bar Association's Public Health Committee.

CURTIS BARRETT is a clinical and board-certified forensic psychologist with over 25 years of experience in forensic assessment. Dr. Barrett is a Professor in the University of Louisville School of Medicine's Department of Psychiatry and Behavioral Sciences, and is currently Chief Psychologist for the Norton Psychiatric Clinic in Louisville. He has served in the past in such roles as Director of Continuing Education for the American Academy of Forensic Psychology, President of the Psychology of Psychologists in Addictive Behaviors (now Division 50 of the American Psychological Association), President of the Kentucky Psychological Association, and Chair of the Kentucky Board of Examiners of Psychology. Dr. Barrett is the author of numerous articles on clinical and forensic psychology.

Footnotes

[1]E. Drogin & C. Barrett, *Forensic Mental Health Assessment: Moving from Examination to Evaluation*, 18 *The Advocate* 129-133, (1996).

[2]*Id.* at 132.

[3]D. Shapiro, *Psychological Evaluation and Expert Testimony*, 77 (1984).

[4]American Psychological Association, *Ethical Principles of Psychology and Code of Conduct*, 47 Am. Psychologist 1597-1611 (1992).

[5]Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 *Law & Human Behavior* 655-65 (1991).

[6]T. Blau, *The Psychologist as Expert Witness* (1984).

[7]*Id.* at 91-93.

[8]American Bar Association Criminal Justice Standards Committee, *ABA Criminal Justice Mental Health Standards* (1989).

[9]*Id.* at 193-94.

[10]*Id.* at 109.

The Goals of Mitigation Interviews

Lee Norton

Interviews can be viewed as conversations with specific purposes. In social work, the purpose may be *informational* (selective gathering of life history material related to physical, social, emotional, cognitive functioning), *diagnostic* (to assess mental or social status), or *therapeutic* (to bring about a desired change). (Kadushin, 1990).

Informational. Most mitigation interviews fall within the category of gaining information. More specifically, the mitigation interview is intended to obtain information which helps others understand the client's actions in a context which militates the offensiveness of those actions. We are trying to gain information but, more important, we are trying to achieve *understanding*.

Diagnostic. A secondary goal of the mitigation interview is diagnostic. We must know the social and mental status of the person we are interviewing in order to discern whether we

will be able to gain any substantive information and, if so, to what extent. The goals and limits of an interview with a person who suffers from mental retardation or schizophrenia or alcoholism are often quite different from an interview with an individual who is unimpaired and exhibits good insight. In extreme instances, the interview is completely diagnostic; that is, the goal of the interview is purely to gain data about the person's psychopathology with no hope of gaining important life history information. While the diagnostic interview may provide no substantive information, it can be a rich source of insight about the influences which have shaped the individual's perception, judgment and behavior. Diagnostic data may inform us about whether our client is able to assist in his or her own defense, or it may tell us that our client was raised by a person so debilitated by mental illness as to render the person incapable of being a competent caretaker and role model.

Therapeutic. Many times the nature of the information we are seeking necessitates that the interview take on a therapeutic quality. When we hit upon painful or traumatic content, we must slow the pace of the interview and deal with the resulting emotions and reactions. Here we must "hear the suffering" and respond with compassion. (Othmer, *et al*, 1994). In most instances, simply allowing the person to "tell the story" -- perhaps for the first time -- magically relieves the pain. Silence can be the best balm. "Creating a space" for the person to separate themselves from their pain and to see it more objectively is often the most effective therapeutic intervention. Other times, the person needs reassurance and acceptance. Painful memories are usually accompanied by great shame and embarrassment. Conveying to the person that their pain is real and reasonable sometimes enables them to see their experiences from a healthier perspective, with the knowledge that they were not responsible for the harms that came their way. In more acute cases, *cognitive restructuring* is a powerful technique to ameliorate the person's suffering and offer them a tool with which to self-soothe. It consists of providing a new, more positive way to view or interpret an experience or belief. For example, a client or lay witness may recount witnessing his mother's murder, emphasizing what he perceives to have been his failure to save her. This belief likely creates a deep sense of self-hatred and shame, emotions which may be so overwhelming as to prevent him from fully describing the event (details are critical to an adequate psychosocial assessment). Acknowledging the person's feelings of helplessness, terror and confusion is integral to working through the pain which may well have kept them emotionally paralyzed since the time of the atrocity. However, it is sometime useful to go a step further, providing the person a different perspective of the event. For example, pointing out that they were a small child, indeed helpless in the face of such an unimaginable act of violence; explaining the predictable and unavoidable effects of trauma, and highlighting the things the person may have done (sought help, called 911, protected the other children, tended to wounds, etc.) which by any standards, were noble and heroic, may reduce their anxiety and give them a way of understanding their behavior. Acquiring a more positive view often enhances the person's self-image and opens doors to psychic content which may otherwise remain inaccessible.

The Importance of Rapport

The relationship between the interviewer and the witness is the conduit through which information and its meaning is exchanged. (Kadushin, 1990). Positive relationships are more likely to produce honest, detailed responses to inquiries. There are a number of components of positive relationships, perhaps the most important of which is *trust*. The client or lay witness must believe that the interviewer has integrity and that his or her intentions are sincere. Integral to trust is acceptance and suspension of judgment. Generally, individuals will lower their defenses and disclose sensitive information to the extent they feel the interviewer's aim is not to judge or assign blame, but solely to understand. Gently communicating to the person the belief that, most of the time, most of us are doing the very best we can, diminishes anxiety, creates an atmosphere in which the person feels free to reveal otherwise embarrassing information, and increases the probability that events will be recounted more accurately and uncensored.

Positive relationships are also created by *interest*, a genuine desire to get to the bottom of the issue, know the end of the story or simply learn more about the person and what they are discussing. Interest is communicated verbally,

by asking probing and clarifying questions, and nonverbally, by alertness. Maintaining eye contact, sitting slightly forward in one's seat, and responding with gestures intended to promote the conversation (nodding, moving one's hand to suggest "Go on, I'm with you.", etc.) all represent heightened attention. Individuals are much more likely to maintain a flow of conversation if they are speaking to an interested audience.

Most positive relationships are characterized by a degree of *warmth*, or commitment to the needs of the interviewee. (Kedushin, 1990). It involves communicating concern for the needs of those being interviewed, so that they do not feel they are merely a repository of needed information. Warmth is conveyed by the quality and content of speech as well as by nonverbal cues. Engaging in informal conversation about the interviewee's health, children or current goals are all effective means of communicating a caring attitude, as is attending to the person's affect or physical needs. A grimace may indicate the person is recalling something painful, or that they are physically uncomfortable. An inquiry into the person's immediate welfare goes a long way in establishing a caring atmosphere.

Few positive relationships exist absent a strong degree of mutual *respect*. Respect involves behavior which supports self-esteem, (Kadushin, 1990), and dignity. Responding to an individual's innate value and worth -- no matter how abject their current status -- and extending to them the social courtesies afforded associates and friends, has the effect of *calling forth* hidden goodness and competencies. It is remarkable to watch a person transform from a surly, resistant curmudgeon to a helpful and invaluable source of information when treated respectfully and kindly.

For those reasons and more, devoting sustained energy to developing rapport with clients and lay witnesses is one of the most critical aspects of mitigation interviews.

The Physical Environment

Usually, one has little latitude as to where interviews with clients are conducted. The typical setting is a small, poorly ventilated room with equally bad acoustics. Often there are numerous interruptions, and sometimes interviews are abruptly terminated by staff. In some instances a little kvetching goes a long way, and the detention facility will make efforts to improve conditions. More often than not, these circumstances must be accepted and accommodated as best as possible.

Esthetics aside, there are a few non-negotiable requirements for adequate client interviewing. Privacy is paramount and must not be compromised. For obvious reasons, it is unacceptable to interview a client in the presence of a correctional officer or other inmates. Most of the time this issue can be won without litigation, but on occasion it is necessary for the attorney to legally challenge interview policies.

Full access is also necessary. All too often, attorneys and mental health professionals are expected to conduct interviews through a glass or mesh partition, using a telephone. This policy must be challenged on the basis that it prevents observing the client as he moves naturally and unencumbered; communication is stilted and cannot occur spontaneously; and the barrier can be interpreted -- consciously or unconsciously -- by the client as signifying the professional's fear of the client; or, alternately, the partition can *engender* a sense of unease and anxiety.

An associated issue concerns restraints. Whenever possible, the client should be interviewed without restraints of any kind. This may not be possible. Especially in prisons, clients are often required to wear either handcuffs or leg shackles, and, in some instances, both. The use of restraints should be challenged when it compromises the client's comfort to the point he cannot communicate comfortably and undistracted. This is especially true when the client is forced to wear a waist belt to which his hands are tightly fastened. It is impossible to conduct a lengthy interview under such conditions and gives rise to serious ethical considerations.

Issues concerning the physical environment for lay interviews are different from those associated with client interviews. Though it is common to interview at least some family members and friends in jails and prisons, most witnesses are not incarcerated. Lay interviews should be conducted within the home in order to assess the home and gather diagnostic information. *In vivo* interviews allow one to evaluate dimen-

sions such as socioeconomic status, the number of individuals living in the home and the degree of privacy afforded each, the quality (including safety) of the community, and the psychodynamics among individuals residing in the home. One can observe a number of cues which, taken together, vividly narrate the client's story and are rich sources of inquiry: each picture on the wall has a story to tell; holes in the doors may reveal a violent fight the night before; clothes sitting in a tub of cold water means there is no hot water and no funds for the laundry mat; the strong organic stench (associated with lack of hygiene) could imply mental illness, mental retardation or other variables; empty liquor bottles and the stench of gin can be evidence of chronic alcoholism.

An added benefit of home visits is that individuals often feel more relaxed in their own surroundings. A sense of security can compensate for the vulnerability which results from describing painful or embarrassing experiences. Moreover, individuals are more likely to reveal their true personalities in their own homes, rather than present distorted public *personae*. Equally important, home visits allow the interviewer to achieve or enhance rapport. Holding a baby, helping to fill out social services papers or sharing a cup of coffee make the interviewer appear less threatening and more a participant in the process and the group. Indeed, by the third visit, lay witnesses often come to welcome the interviewer and see him or her as a temporary member of the community.

It is not uncommon that family members -- either in an effort to be supportive or out of a sense of "comfort in numbers" -- initially congregate together to be interviewed. This practice is undesirable and should be avoided whenever possible. One of the problems with group interviews is that they leave lay witnesses open to misleading cross-examination. (Isn't it true you all got together and came up with these stories? That you "refreshed" each other's memories about his so-called slowness and mental illness?). Group discussions also give rise to increased defense mechanisms which inhibit candid disclosure of important information. For example, in the interest of "protecting" various family members, individuals who were molested may attempt to insulate others from knowledge about the abuse by tailing to reveal information, downplaying its significance, or flatly denying the abuse occurred. Client families are often so dysfunctional and bound by intricate webs of secrets that they engage in historical revisionism in an effort to maintain an idealized image of the family and preserve the current equilibrium - *even if it means sacrificing the client's welfare.* It is almost impossible to achieve an accurate understanding of events and relationships when family members are together. Only by speaking with them one-on-one and building positive relationships with each can one hope to unearth the truth.

Home visits produce such critical information about the client and his story that failing to include them in the psychosocial history is like trying to describe a country one has never seen.

The Interview Process

Beginning. In many respects, the interview begins before two people meet. (Kadushin, 1990). The interviewer generally has some information about the person who will be interviewed -- from records or other witnesses -- and begins to formulate the goals of the interview and the information needed. If the individual knows about the interview in advance, he or she will likely have ideas -- many of them false -- about its purpose. When the interviewer's biases and/or the witnesses' fears pose inhibiting variables, it is necessary to spend proportionately more time building relational bridges and finding a way to *join* with witnesses. Engaging in social amenities helps reduce suspicion and anxiety. Factual information enables witnesses to feel a greater sense of control. Explaining to witnesses the goals of the interview and how they might be of help also facilitates efficiency by directing their attention to relevant topics. Thus, it is important in any mitigation interview to begin with detailed descriptions of who the interviewer is; who the attorneys are and the relationship of the interviewer to the attorneys; the interviewer's understanding of the legal status of the client and the purpose of the legal efforts; and how the information the witness may have (whether that be the client or lay witnesses) can help achieve the legal goals.

Barriers. The interviewer may experience numerous barriers before gaining any substantive information (which is one reason that in-

terviews can take several hours). This is especially true for lay witnesses. They may fail to appear for an interview, requiring subsequent efforts to reschedule the meeting. They may be late to the interview, leaving the interviewer sitting in unfamiliar surroundings indefinitely. Or, they may be away from home visiting friends or drinking at a bar so that the interviewer must first locate them. Such frustrations are aggravating and may influence the interviewer's attitude and behavior. It is important to regain one's composure before interacting with a witness. If this isn't possible, try again another day.

In the home, the interviewer may be forced to contend with loud conversations, fighting or clattering about in the kitchen; t.v's and radios blaring; or repeated interruptions from the telephone or friends dropping in. The witness may have controlled the seating arrangement so that it is difficult to see or hear (Kadushin, 1990), or continually hop up and down to get drinks, cigarettes, tend to food on the stove or children in the yard. In short, the interview may have to proceed amidst chaos. Don't give up. In most instances, tenacity and a continued attitude of empathy and concern defeat the greatest odds. When witnesses perceive the interviewer's unwavering commitment, they generally align with the goals of the cause and become remarkably cooperative and generous.

Types of Questions. Interviews consist of a balance between open- and closed-ended questions. Open-ended questions (What do you remember about John?) can be likened to a broad net which gathers everything in its path. There are a number of advantages to open-ended questions.

They produce spontaneous responses which reveal witnesses' mind sets and points of reference. They suggest to witnesses that the interviewer is interested in anything they want to discuss; allowing witnesses the discretion to direct the interview often produces fruitful areas of inquiry the interviewer had not considered. Relinquishing partial control of the interview to witnesses communicates respect and engenders positive feelings about and greater participation in the interview.

Open-ended questions allow the interviewer to observe how witnesses prioritize information about a given topic.

Open-ended questions are more likely than closed-ended questions to result in affective content; responses include how an individual *felt* about a certain event or experience. This permits catharsis, which alleviates pain and allows the individual to continue talking unhindered by intrusive thoughts and emotions.

The drawbacks of open-ended questions include that they often produce lengthy, vague responses filled with irrelevant information. (Othmer, 1994). For witnesses with cognitive deficits, open-ended questions are confusing and overwhelming; open-ended questions increase their anxiety and leave them at a loss as to how to respond. Impaired individuals require greater structure and guidance and should be asked more closed- than open-ended questions.

Open-ended questions are time-consuming. Ample time should be allotted to complete open-ended interviews, and the interviewer needs to be well-rested and prepared for the considerable expenditure of energy involved in this lengthy process.

Closed-ended questions are used to get specific, detailed information. They are often used when the interviewer has an understanding of the main idea, but lacks clarity. They narrow the scope of tangential responses, enable the interviewer to regain control of the interview, and provide direction when the interviewer is unsure how to proceed. Closed-ended questions can slow the pace of the interview, reduce emotionality and impose greater focus on important facts. (Kadushin, 1990). Closed-ended questions help stimulate recollection and keep witnesses on the task at hand. They are ideal for obtaining genealogical information and creating time-lines. Closed-ended questions can tell an interviewer whether a witness suffers from memory deficits or attentional problems that may signify more serious conditions.

Closed-ended questions may inhibit spontaneous responses, produce false-positive responses (Orthmer, 1994), and fail to yield a narrative data.

The type of question used depends on the goals of the interview and the nature of information sought. The open-ended question is useful for establishing rapport, seeking diagnostic data, exploring emotions, and seeing a topic from the

perspective of others. Closed-ended questions are more likely to produce specific, linear information and are useful in checking facts and testing competence and veracity. A common interview format is to start with broad, open-ended questions and gradually become more focused and specific.

Ending the Interview. Ideally, interviews wind down naturally. There are more pauses and less new avenues to pursue. When the interview begins to produce redundant information, the witness seems tired, and interest is waning, one has likely reached a point of diminishing returns. This point will vary from witness to witness depending on their situations and deficits. It should be remembered that one can usually conduct follow-up interviews in order to gather additional information. In fact, in most instances a series of interviews is required to work through defenses and reach more sensitive content.

As the interview comes to a close, the interviewer should convey to witnesses the way in which they have assisted the client, and an understanding that this contribution may not have been without psychic cost. Witnesses should be asked whether the interviewer has their permission to contact them again and, if so, when and where. The interviewer should ask about witnesses' schedules and find out whether there are alternate locations or numbers at which they may be reached.

Before leaving, the interviewer should provide witnesses with information concerning how to reach the attorneys and encourage the witnesses to contact the attorneys if they have questions or want additional information. Witnesses should be made aware of any trial or hearing dates and informed of changes as they occur.

Summary

Knowing what to ask and how to ask it is as much an art as a science. Developing good interviewing skills requires practice and feedback. We can use an awareness of the components of successful interviews to guide our practice and increase our skills. There is no meaning outside of context; hence, a chief role of the professional interviewer is to develop a context of trust and commitment to learning the truth about our clients. Conducting mitigation interviews brings us face to face with unfathomable pain, which is absorbed and affects each of us. By telling our clients' stories we bear witness to human devastation and in so doing we create a ripple of healing which begins in each of us.

References

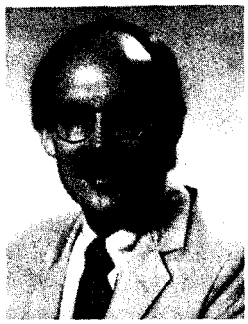
Kadushin, A. (1990) *The Social Work Interview*. New York: Columbia University Press.

Othmer, E. and Othmer, S. (1994). *The Clinical Interview Using DSM-IV*. Washington, D.C.: American Psychiatric Press.

LEE NORTON, Ph.D.
1704 Thomasville Road, Suite 179
Tallahassee, Florida 32303
Tel: (904) 681-9357; Fax: (904) 561-1220

Lee Norton has twelve years experience as a licensed private investigator and has been in private practice as a consultant and mitigation specialist in capital cases since 1988. Nationally known for her work on capital teams, she has worked on numerous state and federal cases, both at the trial and appellate levels. Dr. Norton also has significant experience with military cases, having worked with the Army, Marine Corps, Navy and Air Force. She has lectured and conducted numerous training seminars on investigation and development of capital defense theory. Dr. Norton is principle author of a chapter on mitigation in the Florida Public Defender Association Defending a Capital Case. Dr. Norton received her Ph.D. in Education from Florida State University. She is currently completing a second masters degree in clinical social work.

Plain View



Ernie Lewis

LaFollette v. Commonwealth,
915 S.W.2d 747 (Ky. 1996)

Spear v. Sowders,
71 F.3d 626 (6th Cir. 1995)

United States v. Buchanon,
72 F.3d 1217 (6th Cir. 1995)

United States v. Colbert,
76 F.3d 773 (6th Cir. 1996)

LaFollette v. Commonwealth,
915 S.W.2d 747 (Ky. 1996)

Following a Crimestoppers' tip that LaFollette was growing marijuana in his house, the police flew over his property in a helicopter using a Forward Looking Infrared Radar (FLIR) device. The device obtains information about heat coming from a building, heat which infers that illegal activity is occurring therein. When the police flew over LaFollette's property, FLIR indicated an unusual amount of heat, and a subsequent search resulted in the discovery of a marijuana growing operation.

The Kentucky Supreme Court, on February 22, 1996, in one of Justice Reynolds' last opinions, held, like the Court of Appeals before it, that nothing illegal occurred under these facts.

The Court held that the use of FLIR did not constitute a search. Using *Katz v. United States*, 389 U.S. 347 (1967), the Court held that even though LaFollotte may have exhibited an expectation of privacy in the heat emanating from his home, such an expectation was not one society was prepared to recognize as reasonable.

Disturbingly, the Court in *dictum* noted that an analysis of this issue under Section 10 does not require anything other than looking to the Fourth Amendment. "Examination of Section 10 and the Fourth Amendment reflects a pronounced similarity with little textual difference...Section 10 of the Kentucky Constitution provides no great protection than does the federal Fourth Amendment." Clearly, this particular Court does not intend to recognize the proud tradition of Section 10, nor the privacy rights of Kentucky citizens that section is intended to protect. Nor does this Court appear to be moving in the direction of the high courts of many other states. These courts are utilizing

their state constitutions to preserve the interests of the Fourth Amendment, which has been so seriously eroded by the United States Supreme Court in recent years. By tying the meaning of Section Ten onto the Fourth Amendment as interpreted by the extraordinarily conservative Supreme Court, our Kentucky Supreme Court will preside over the diminution of one of our most precious rights.

Justice Stumbo penned a solitary dissent. She wisely saw that FLIR has as its major purpose a determination of "what activities are taking place inside a private residence." A search of the inside of a residence would require both probable cause and a warrant, neither of which were present here. "To hold otherwise leaves the privacy of the home at the mercy of the government's ability to exploit technological advances."

Spear v. Sowders,
71 F.3d 626 (6th Cir. 1995)

On Christmas Day of 1990, Tina Spear visited Daniel Wade at Northpoint Training Center. Because an inmate had anonymously told officials that Wade was receiving drugs from a female visitor, and because on four previous occasions Wade had been found with drugs in the institution, Warden Sowders authorized a strip search of Spear during the visit. When she objected, she was told that if she did not go along with the strip search, she would be further detained. She was then searched, as was her car. No contraband was found. Spear sued in federal court, and the federal district judge granted summary judgment.

The Sixth Circuit, in an *en banc* opinion written by Judge Boggs, reversed and remanded. The Court held that Spear had a diminished expectation of privacy because she was visiting an inmate in a prison. Warrants are not required for strip searches of visitors at prisons. However, reasonable suspicion is required. Under the factors stated above, the Court held that the Warden had a reasonable suspicion that Spear was bringing drugs to Wade.

The Court further held that the summary judgment was erroneously granted because "there is no authority supporting the proposition that prison officials, relying on their special power to conduct administrative searches, may search a visitor who objects, without giving the visitor the chance to abort the visit and depart."

Finally, the Court approved of the search of the car without a warrant, based upon the warning given in the parking lot that cars are subject to search, and based upon the access inmates had to the parking lot. "We cannot say that the Constitution requires individualized suspicion to search a car on prison grounds, particularly if the visitor has been warned that the car is subject to search."

Judge Jones dissented. In his opinion, there was no reasonable suspicion that Spears was bringing contraband to Wade. Judge Jones particularly disagreed that an anonymous tip by an inmate that an unnamed female would be bringing contraband to Wade was sufficiently particular to constitute reasonable suspicion.

United States v. Buchanon,
72 F.3d 1217 (6th Cir. 1995)

The Sixth Circuit has issued an important decision reviewing the seizure of drugs with the assistance of a narcotics dog. Here, a car and a truck were on the side of the road in southern Ohio. The Ohio State Police pulled over and asked the men if they needed assistance. When one of the men shifted on his feet and looked at the trooper's gun, the trooper called for back-up. Eventually, four cruisers showed up, all with lights flashing. The second vehicle to arrive contained a dog trained to conduct sniff searches of vehicles. The occupants of the vehicles were asked to move, and the dog began to conduct his search, eventually alerting on both vehicles. A warrantless search of the vehicles revealed the presence of drugs. A motion to suppress in federal district court was overruled, with the court finding that no seizure had occurred.

In a unanimous opinion, the Sixth Circuit reversed. In an opinion written by Kentucky's Boyce Martin and joined by Judges Keith and Guy (concurring in result only), the Court held that "a canine narcotics sniff made possible by an unconstitutional Terry seizure violates the Fourth Amendment."

The opinion sets out in detail why this search was illegal. A search had occurred here because a reasonable person would not have felt free to leave. Important in this determination was

that four cruisers appeared with lights flashing, it was nighttime, the men were asked to move away from their vehicles in order to permit the narcotics dog to sniff their car, and it was the "subjective intent" of the officers to conduct a search.

The Court viewed a narcotics sniff search as inherently coercive. "We believe the drug sniff is more coercive than police questioning of a citizen in a place where he or she may easily leave the police presence because a person who wants to end the canine sniff has to either (1) remove their personal property from the presence of the dog, or (2) has to convince the police to stop their actions."

The Court sets out precisely what differentiates a lawful and unlawful dog sniff search. "So long as Trooper Meadows uses Fando on an unattended vehicle or unattended personal property, or so long as the canine sniff is performed on legally seized personal property pursuant to a legal seizure of a person, the canine sniff would not be unconstitutional. The troopers' actions here, however, are unconstitutional and unconscionable. If law enforcement officers are permitted to illegally seize persons in order to attempt to uncover evidence of criminal conduct, then the Fourth Amendment right of persons in this country to go about their business free from baseless interference from the police has been extinguished."

This is an important case. It reaffirms the "reasonable person" test for determining when a seizure has occurred, thereby mandating probable cause or a reasonable suspicion. And more importantly, it establishes that a canine search can be coercive when people are detained, and thus must be preceded with probable cause or a reasonable suspicion.

United States v. Colbert,
76 F.3d 773 (6th Cir. 1996)

The Sixth Circuit, in a decision written by Judge Boyce Martin and joined by Judges Guy and Ryan, considered the parameters of the protective sweep, first authorized in *Maryland v. Buie*, 494 U.S. 325 (1990).

In 1994, the Detroit Police along with federal agents were watching Colbert's home. Colbert was a suspect in a 1989 murder, and the police had an arrest warrant for an escape. After watching for a few hours, the police arrested Colbert when he went to his car. His girlfriend ran outside during the arrest, and she was detained. An officer then went to the door of the apartment, saw a shotgun, and then went inside and engaged in a "protective sweep" of the apartment. After seeing another gun and scales, the officers secured the apartment and obtained a search warrant. During the execution of the search warrant, the officers found cocaine, two guns, ammunition, scales, and other items. The district court ruled that the officers conducted a legal protective sweep, and admitted the evidence. Colbert entered into a conditional guilty plea.

First, the Court rejected Colbert's request to establish a bright-line rule prohibiting all protective sweeps when the arrestee is arrested outside the home. "We believe that, in some circumstances, an arrest taking place just outside a home may pose an equally serious threat to the arresting officers."

The Court did not stop there, however. The Court looked at "those facts giving rise to a suspicion of danger from attack by a third party during the arrest, not the dangerousness of the arrested individual." The Court observed that Colbert was in custody and outside the home at the time of the arrest. Colbert was at his girlfriend's apartment; thus, her running out of the apartment during the arrest should not have alarmed the officers. Further, the Court astutely noted that if the officers were concerned about the girlfriend, at a minimum they would have patted her down for weapons. The Court finally noted that the Government had no evidence that anyone else was inside the apartment. "Lack of information cannot provide an articulable basis upon which to justify a protective sweep." Accordingly, the Court reversed the lower court, and held that the protective sweep in this case was outside the bounds of *Buie* and the Constitution.

Short View

Commonwealth v. White, 669 A.2d 896 (Pa. 12/29/95). The Pennsylvania Supreme Court has decided that in that state, *New York v. Belton*, 453 U.S. 454 (1981) is not the law. Thus, when a person is arrested outside of an automobile, unless there are exigent circumstances, the passenger compartment of the car may not

be searched incident to arrest. The Court did this under their state constitution, saying that while the United States Supreme Court has "deemphasized the privacy interests inherent in the Fourth Amendment," the law in that State has "increasingly emphasized the privacy interests inherent in Article I, Section 8 of the Pennsylvania Constitution."

U.S. v. Brumfield, 910 F.Supp. 1528 (D.C. Colo. 1/3/96). Requiring passengers on an innercity bus to depart the bus and carry their bags in their right hand is a warrantless seizure, and in violation of the Fourth Amendment. "Here, unlike *Florida v. Bostick*, when Agent Hart boarded the bus, announced his purpose, and issued directions he set a confrontational tone for the interdiction operation. The encounter between the officers and passengers was coercive, not consensual. No reasonable person would have felt that he had the choice to act in any manner other than that dictated... Balancing this coercive police intrusion on the individual's right to personal freedom against the public interest served, I conclude that the balance tips in favor of the individual's right to be free from this arbitrary police action."

State v. Johnson, 909 P.2d 293 (Wash. Sup. Ct. 1/18/96). The reasoning of *New York v. Belton*, 453 U.S. 454 (1981), which allows for a search of the passenger compartment of a vehicle incident to a lawful arrest, applies to the search of a sleeping compartment of a tractor trailer rig. "Under the Fourth Amendment, case law supports a conclusion that the sleeper in the cab of the tractor-trailer in this case is part of the 'passenger compartment.' Persons traveling on public highways have lessened privacy interests because of the government's interest in ensuring safe and efficient transportation. Additionally, the operation of over-the-road tractor-trailers on the public highways requires heightened control of drivers of that type of equipment in order to promote increased safety for all users of the highways."

United States v. Lee, 73 F.3d 1034 (10th Cir. 1/11/96). Courts appear to be looking increasingly at law enforcement's attempts to use *Terry* stops to conduct more extensive searches. In this case, the Tenth Circuit held that continued detention of a motorist after the reasons for the stop had been dispelled exceeded that which is allowed in *Terry*, thereby invalidating the resulting search. Here, a lane change had prompted a *Terry* stop. The officer soon discovered the driver was not impaired. Then the officer asked for and received consent to search. Interestingly, the Court found, but ignored, the obviously pretextual nature of the initial seizure because the officer "could" have stopped on the basis of a lane change. The Court unequivocally states that when a driver has produced a license and proof of his right to operate the car, and when there is no proof of impairment, that the driver must be permitted to proceed on his way.

State v. DeWitt, 910 P.2d 9 (Ariz. Sup. Ct. 1/25/96). The police went to the scene of a burglary, where during a sweep of the house they saw what they thought might be parts of a drug laboratory. To confirm their suspicions, they called drug agents, who entered the home without a warrant, inspected the materials, and confirmed that it was a laboratory. A search warrant was obtained, and the materials were seized. This warrantless, confirmatory search to verify the original officer's hunch was a violation of the Fourth Amendment, and thus the evidence had to be suppressed. "With no probable cause and no warrant, and the exigent circumstances justifying McCaslin's and Saylor's warrantless entries have evaporated, the police were without justification to remain for an additional warrantless entry and search."

People v. Dilworth, 661 N.E.2d 310 (Ill. Sup. Ct. 1/18/96). In another step toward the tightly controlled and pri-vacy free school, the Illinois Supreme Court has approved of the search of a student at a school by a police officer. Because the officer was a "liaison police officer" specially assigned to the school, the Court held that *TLO*'s reasonable suspicion standard would suffice for a warrantless search of the student.

State v. Hodson, 907 P.2d 1155 (Utah 1995). The Utah Supreme Court has held that it was violative of the Fourth Amendment to deal with a drug swallowing arrestee by putting a gun to his head demanding that he spit out the drug, followed by a choke hold. The Court utilized *Winston v. Lee*, 470 U.S. 753 (1985) to determine that the "procedures" utilized here were not reasonable.

United States v. Reilly, 76 F.3d 1271 (2nd Cir. 2/12/96). The Second Circuit has held that the curtilage of a house located in a rural area

extended to a cottage, a pond, a patio, a gazebo, and an area planted with trees. Analyzing the case using the factors listed in *United States v. Dunn*, 480 U.S. 294 (1987), the Court noted that an area located 125 feet away from a primary residence could be located in the curtilage; the Court noted that in a rural area a wooden approach to the extent of the reach of the curtilage would not be appropriate.

Carranza v. State, 467 S.E.2d 315 (Ga. Sup. Ct. 2/19/96). Where the police listen by means of an electronic listening device to an informer buying drugs, they must obtain a warrant in order to arrest the defendant. "[W]e hold that where an individual commits an offense in his or her home and that offense is committed 'in [the] presence or within [the] immediate knowledge' of a law enforcement officer, the officer is authorized to arrest the individual in the home without a warrant only where the officer's entry into the home is by consent or where there are exigent circumstances."

Pennsylvania v. Matos, 1996 WL 82381 (Pa. Sup. Ct. 2/26/96). The Pennsylvania Supreme Court has rejected the test for when a seizure occurs established in *California v. Hodari D.*, 499 U.S. 621 (1991). Using their state Constitution, the Court held that a seizure occurs when a reasonable person under the circumstances would have felt free to leave. Police pursuit can constitute a seizure. Thus, individuals who abandon contraband during flight from the police may challenge the propriety of the chase.

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

Editor, *The Advocate*
c/o Dept. of Public Advocacy

Dear Editor:

I just received your most recent publication, Volume 18, #2, March, 1996. As usual, I flipped through the publication looking for items of interest and helpful columns. *The Advocate* has always been such a fine source of this type of information. On page 52 of the March edition, I noticed a comparison of the salaries of Kentucky Public Defenders to the salaries of Public Defenders in the surrounding states. There was a list of comparative salaries, as well as a map diagram of Kentucky and its seven adjoining states.

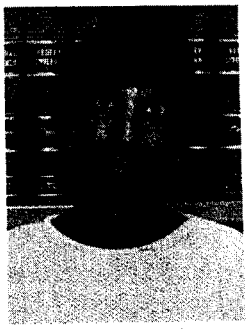
As I looked at the map of Kentucky and the other surrounding states, something caught my eye. At first, I was not sure what it was, but after looking at the diagram more closely, I was able to discern a slight error.

In your diagram, Missouri is listed as the state most western to Kentucky. The listing is correct, but the outline is not the state of Missouri, but rather the state of Mississippi. This is a slight error, as I know, but I felt as though it should be brought to your attention. I enjoy your publication and find it to be a wealth of helpful information, as well as providing the necessary cohesion of our Department. I will continue to enjoy my subscription and will look forward to your next edition.

Thank you for your kind consideration of this matter.

W. Bruce Leasure
Assistant Public Advocate
Paducah, Kentucky

West's Review



Julie Namkin

Keith Allen Allgeier v. Commonwealth, Ky., 915 S.W.2d 745 (2/22/96)

Danny Lafollette v. Commonwealth, Ky., 915 S.W.2d 747 (2/22/96)

Delmar Partin v. Commonwealth, Ky., ___ S.W.2d ___ (3/21/96)

Susanne Baker v. Commonwealth, Ky., ___ S.W.2d ___ (3/21/96)

Bill Belcher v. The Kentucky Parole Board, Ky.App., ___ S.W.2d ___ (3/15/96)

Keith Allen Allgeier v. Commonwealth, Ky., 915 S.W.2d 745 (2/22/96)
Christian Circuit Court
Judge Edward M. White

The defendant was convicted of complicity to murder his ex-wife. The evidence revealed the defendant maintained a life insurance policy on his ex-wife after their divorce. The defendant hired an individual to kill his ex-wife, who was to be paid with funds from the life insurance proceeds. This individual entered into a plea bargain with the Commonwealth and testified against the defendant. Because it was alleged the murder was for profit, this case was tried pursuant to KRS 532.025, Kentucky's death penalty statute. The defendant was sentenced to life imprisonment without the possibility of parole for twenty-five years.

The defendant raised the following three arguments on appeal.

First, the trial court erred by allowing evidence of parol eligibility in this capital case. Although the Kentucky Supreme Court agreed that KRS 532.055(3) prohibits the introduction of evidence of parol eligibility in cases tried pursuant to KRS 532.025, the defendant "waived his right to claim error" **in this particular case** because "the evidence of parole eligibility was introduced by way of a stipulated agreement between the prosecution and the defense." The Court also stated that because the defendant did not receive a death sentence any error was non-prejudicial.

Second, the trial court allowed, over defense objection, improper opinion testimony from a police officer. The record revealed that one police officer testified, without objection by the defendant, that it was his opinion that a slight pry or gouge mark on the back door of the house did **not** indicate the door had been pried

open. The defendant objected to a second police officer's testimony, on the ground that he was not an expert, that it was also his opinion that the gouge mark did not indicate a forced entry. The Kentucky Supreme Court held the trial court did not abuse its discretion in letting the second police officer give his opinion since he was a supervisor, had been an officer for twenty years and was "skilled in the investigation of burglaries and robberies by [his] training and experience." Moreover, since the first officer's opinion testimony had been placed before the jury without objection by the defendant, the second officer's testimony was merely cumulative and thus harmless error.

Third, the introduction of evidence of the victim's phone message to her attorney which was hearsay. The phone message indicated the victim said the defendant had been harassing her about their daughter and visitation, that she feared for her daughter's safety and that she might go by the defendant's home. The Kentucky Supreme Court held that since there was other evidence in the record that the defendant had been harassing the victim and that the victim feared for her daughter's safety, the introduction of the phone message was merely cumulative and any error was harmless. The Court failed to address the question of whether the evidence was admissible under the hearsay exception for business records in KRE 803(6).

The defendant's conviction and sentence were affirmed.

Danny Lafollette v. Commonwealth,
Ky., 915 S.W.2d 747 (2/22/96)
on review from the Court of Appeals

The issue in this case is whether a helicopter fly-over using Forward Looking Infrared Radar (FLIR) to survey heat emissions from the defendant's residence constitutes an illegal search under Section 10 of the Kentucky Constitution and the Fourth Amendment to the federal Constitution. The Kentucky Supreme Court held the use of a FLIR unit is not a search within the meaning of the state and federal constitutions because it does not infringe upon a person's legitimate expectation of privacy.

The defendant was growing marijuana indoors on his property. The defendant was the subject of an informant's Crimestoppers' tip, and his property was the target of a helicopter fly-over using FLIR. Based on the informant's tip and the data collected from the fly-over, a search warrant was issued for the defendant's property. After the trial court denied the defendant's motion to suppress the marijuana seized pursuant to the warrant, the defendant entered a conditional guilty plea to cultivating marijuana.

In addition to arguing the FLIR fly-over constituted an illegal search, the defendant also argued the search warrant was deficient because the informant was anonymous and the police officer failed to state the date the informant made his observations. The Kentucky Supreme Court stated that since the information collected from the FLIR fly-over was sufficient to justify the search warrant, the informant's tip buttressed the finding of probable cause.

The opinion of the Court of Appeals upholding the trial court's denial of the defendant's motion to suppress is affirmed by the Kentucky Supreme Court. The defendant was sentenced to one year in the penitentiary for his conviction for cultivating marijuana.

Delmar Partin v. Commonwealth,
Ky., ___ S.W.2d ___ (3/21/96)
Knox Circuit Court, Judge Roderick Messer

The defendant was charged and convicted of the murder of his estranged paramour. He was sentenced to life imprisonment.

The victim's decapitated body was found in a fifty-five gallon barrel at her place of employment. The defendant was a co-worker. The cause of death was a blunt force injury consistent with being struck by a metal pipe that was found in the barrel. The victim also had bruises on her neck caused by a cord encircling her neck.

The following arguments were raised by the defendant on appeal and addressed by the Kentucky Supreme Court.

1. The trial court erred in overruling the defendant's motion for a directed verdict of acquittal due to insufficient evidence. Without mentioning what evidence supported the trial court's ruling, the opinion holds that "[a] review of the evidence as a whole indicates

that the trial court correctly denied a directed verdict."

2. The trial court erred in allowing testimony concerning the victim's fear of the defendant. The defendant objected to such testimony on the ground that it was hearsay and irrelevant. The trial court ruled Commonwealth's witnesses could testify to their observations of the victim exhibiting fear of the defendant. The Kentucky Supreme Court found the six witnesses' testimony concerning their observations of the victim's fear of the defendant was not hearsay. The Court further found the testimony was relevant and its probative value outweighed its prejudicial effect. The dissent notes the majority opinion fails to state how the victim's fear of the defendant was relevant to any issue in the case or the probative worth of this evidence.

3. The trial court erred when it prohibited the defense from introducing evidence that the victim had had other extra-marital affairs with individuals at her place of employment. During its opening statement the defense stated it was going to show the victim had engaged in other extra-marital affairs at her place of employment. The Commonwealth's objection that such testimony was an improper attack on the victim's character was sustained. On appeal, the Commonwealth argued the issue was not properly preserved for review because the defense never offered the witness testimony by way of avowal as required by RCr 9.52 and KRE 103 (2). Although defense counsel explained, at the time of the Commonwealth's objection, that he was going to call witnesses to show they had a motive and opportunity to kill the victim due to their involvement with the victim, avowal testimony by the witnesses was presented. Relying on *Herbert v. Commonwealth*, Ky.App., 566 S.W.2d 798 (1978), the Kentucky Supreme Court concluded that "counsel's version of the evidence [to be presented] is not enough. A reviewing court must have the words of the witnesses. As a result, we find this issue has not been preserved." As a result of this holding, defense counsel's proffer of what the excluded testimony would be is no longer sufficient to preserve the issue for appellate review. Defense counsel must have the witness give the testimony by avowal. Under such a holding, the trial court would have a corresponding duty to permit defense counsel to present the objected to testimony by avowal.

4. The Commonwealth violated a discovery order when it failed to disclose an oral incriminating statement made by the defendant at the time of his arrest. A detective testified the defendant said, "Oh well," when he was informed the victim's decapitated body had been found. When counsel objected that this statement had never been disclosed despite a year old discovery order, the prosecutor stated he had not been aware of the statement. However, the discovery order directed the Commonwealth to allow the defendant to inspect any oral incriminating statement "known or **by the exercise of due diligence may become known to the attorney for the Commonwealth.**" [Under *Key v. Commonwealth*, Ky., 840 S.W.2d 827 (1992) and *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), the Commonwealth's excuse in unacceptable.] Although the trial court denied counsel's mistrial motion, it did grant counsel's motion to strike and admonished the jury to disregard the statement (thus recognizing a violation of the discovery order had occurred), although it did not tell the jury what statement to disregard. The Kentucky Supreme Court found the violation was harmless because the statement "is subject to many interpretations." However, the Supreme Court went one step further when it stated that under *Berry v. Commonwealth*, Ky., 782 S.W.2d 625 (1990), "RCr 7.24 applies only to written or recorded statements" so no error occurred.

5. The prosecutor's comment in closing argument was improper. Because the prosecutor's comment was not objected, the Kentucky Supreme Court reviewed this error under the palpable error rule of RCr 10.26. Without ever stating the substance of the prosecutor's comment, the Court held there was no indication the comment substantially affected the jury's verdict. However, the actual comment is set out in the dissenting opinion and reveals it referred to the defense's failure to bring in the witnesses who claimed the victim had been involved in affairs with other persons at her workplace. See paragraph 3, *supra*.

The defendant's conviction was affirmed.

Susanne Baker v. Commonwealth,
Ky., ___ S.W.2d ___ (3/21/96)
Knox Circuit Court, Judge Roderick Messer

The defendant was charged with complicity to commit murder, kidnapping and abuse of a

corpse. She was convicted of reckless homicide, kidnapping and abuse of a corpse. She was sentenced to twenty-five years imprisonment.

The charges were the result of the actions of the defendant and her friend (and co-defendant) who was the stepmother of the ten year old victim. The defendant, who was the driver of the car, and the co-defendant drove to the child's school. Under false pretenses and wearing a wig, the defendant convinced the school authorities to allow her to take the child from the school. Back in the car and after driving an unspecified distance, the co-defendant began strangling her stepson resulting in his death. The defendant continued to drive the car during this episode.

Although never raised at trial, on appeal the defendant argued that based on the trial court's instructions her convictions for kidnapping and reckless homicide violated principles of double jeopardy. Since the offense of kidnapping was included in the reckless homicide instruction, the defendant argued a guilty verdict on the reckless homicide charge precluded a separate conviction for kidnapping which was listed as an element in the reckless homicide instruction.

Rejecting the defendant's argument, the Kentucky Supreme Court stated the following.

1. First, the Court questioned the notion that double jeopardy violations may be reviewed on appeal despite failure to raise the claim in the trial court. This case should be taken as a notice to trial attorneys to look for and raise all possible double jeopardy violations at trial since the possibility exists that the Court will not review unpreserved double jeopardy violations in the future. Only two Justices dissented from this portion of the Court's opinion.

2. Relying on *U.S. v. Dixon*, 113 S.Ct. 2849 (1993), the Court concluded that the *Blockberger v. U.S.*, 52 S.Ct. 180 (1932), "same elements" "test is now the U.S. Supreme Court's prevailing interpretation of the double jeopardy clause of the Fifth Amendment" of the U.S. Constitution. However, the Kentucky Supreme Court acknowledged it had held the Kentucky Constitution's double jeopardy to the broader than that of the federal constitution.

3. Contrary to the defendant's argument, the Court concluded the defendant's conduct was not a single act or impulse. The kidnapping was complete once the defendant deceptively took the child from the school and placed him in the car into the hands of the co-defendant.

4. The Court stated that "whether the victim was released alive is not an element of the substantive offense of kidnapping. Such a determination is used only for purposes of determining the range of punishments which may be imposed." Thus, since the death of the victim is **not** an element of the offense of kidnapping, while the death of the victim is an element of the offense of reckless homicide, under the *Blockberger* "same elements" test no double jeopardy violation occurred.

The defendant's convictions were affirmed.

Bill Belcher v.
The Kentucky Parole Board,
Ky.App., ___ S.W.2d ___ (3/15/96)
Lyon Circuit Court
Judge William Cunningham

Mr. Belcher, an inmate at the Kentucky State Penitentiary, filed a complaint in the Lyon Circuit Court against the Kentucky Parole Board alleging that (1) the Parole Board violated KRS 439.340 when it failed to grant him parole; (2) the Parole Board denied him due process of law when it failed to give him any reasons for deferring his parole for nine months; and (3) he was entitled to compensatory damages and injunctive relief from the Board's decision.

The Lyon Circuit Court dismissed Belcher's complaint for failure to state a cause of action. Belcher appealed the dismissal to the Court of Appeals which affirmed the circuit court's ruling.

Belcher's first argument is that KRS 439.430 imposes a mandatory, affirmative duty upon the Parole Board to parole all inmates who comply with the eligibility criteria set forth in the statute.

The Court of Appeals held the statute does not create a protected liberty interest in parole. Rather, "parole is a matter of legislative grace." The statute limits and imposes restrictions

upon the granting of parole. Although the statute and regulations entitle an inmate to review, even if the inmate has met the relevant statutory criteria, the Board is not required to release the inmate prior to the expiration of his or her sentence. "Nothing in the statute or the regulations mandates the granting of parole in the first instance, and nothing [in the statute] diminishes the discretionary nature of the Board's authority in such matters." In fact, "Kentucky's statute *prohibits parole* absent a determination that such would be in the best interest of society."

Belcher's second argument is that the Board failed to provide him with adequate reasons for its denial of parole which violated his due process rights.

The Court of Appeals pointed out that Belcher was given an opportunity to be heard and the record contains a copy of the Board's decision outline the reason for its action. Notwithstanding this record evidence contradicting Belcher's claim, the Court of Appeals went on to state that "due process concepts...do not require the Board to provide a detailed summary or specify the particular evidence on which it rests the discretionary determination that the inmate is not ready for conditional release." Quoting from *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S.Ct. 2100 (1979), the Court of Appeals stated that to so require "would tend to convert the process into an adversary proceeding and equate the Board's parole-release determination with a guilt determination."

Third, Belcher claimed he was entitled to monetary damages because the Board's denial of parole subjected him "to extreme mental anguish that, although confined solely to the mind, is nonetheless severe and cruel."

The Court of Appeals held that since there is no entitlement to parole, Belcher failed to demonstrate he suffered any deprivation of rights secured by the state or federal constitutions. Thus, he was not entitled to monetary damages or injunctive relief.

Lastly, the Court of Appeals held that the Lyon Circuit Court correctly ruled that the Parole Board and its members enjoy immunity from liability in the parole decision making process because it is a quasi-judicial process requiring the exercise of discretion.

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

1997 ANNUAL DPA CONFERENCE - MEMORABILIA SOUGHT

1997 marks the 25th Anniversary of the establishment of the Kentucky Department of Public Advocacy by the 1992 General Assembly at the request of Governor Wendell Ford. We will be celebrating these past 25 years of work in representing indigent clients accused of committing a crime and convicted of a crime at our 1997 Conference.

We seek memorabilia - pictures, etc. - that you would like to either donate or loan to the Department to use for this Anniversary celebration at our 25th Annual Public Defender Education Conference in June of 1997 in Lexington, Kentucky at The Campbell House Inn, the site of the first Annual Conference. If you have anything you would like to donate or loan, please send or contact:

Tina Meadows, DPA Education & Development
Department of Public Advocacy
25th Anniversary Memorabilia
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006; Fax: (502) 564-7890
E-mail: tmeadows@dpa.state.ky.us

Capital Case Review

Lonchar v. Thomas, ___ S.Ct. ___ (1996)
Majority: Breyer (writing), Stevens, O'Connor, Kennedy, Souter, Ginsburg, Rehnquist, Thomas, Scalia
Concurring: Rehnquist (writing), Scalia, Kennedy, Thomas
April 1, 1996

A federal district court may not dismiss a first federal habeas petition for reasons other than those noted in the relevant statutes, the Rules Governing Habeas Corpus, and prior precedent.

PROCEDURAL HISTORY

In 1987, Larry Lonchar was sentenced to death for the murders of three people. Throughout the proceedings, Lonchar maintained his wish to die, to the point of refusing to cooperate with counsel or attend the trial. He also made an unsuccessful attempt to waive his mandatory direct appeal, and his sentence was affirmed. *State v. Lonchar*, 369 S.E.2d 749 (Ga. 1988). He refused to authorize collateral reviews of his conviction and sentence, and a death warrant was issued for the week of March 23, 1990.

Two days before Lonchar's execution, his sister filed a next friend state habeas petition, alleging that her brother was incompetent. Lonchar opposed the proceeding, and eventually, both the state and federal courts found that Lonchar was competent and dismissed the petition. *Kellogg v. Zant*, 390 S.E.2d 839 (Ga. 1990), *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992). Execution was scheduled for the week of February 24, 1993.

After Lonchar was told that his brother was threatening to commit suicide because of the execution, Lonchar authorized a state habeas petition, and the execution was stayed. Lonchar later told the judge that he did not want to proceed. Although his attorneys argued that Lonchar was incompetent to make the decision, the judge dismissed the petition without prejudice, and a third death warrant for the week of June 23, 1995 was issued.

Lonchar's brother filed another next friend petition three days before the execution. Lonchar opposed it, and once again, both the state and federal courts found Lonchar competent and dismissed the petition. *Lonchar v. Thomas*, 58 F.3d 588 (11th Cir. 1995). Immediately afterwards, following discussion with his attorneys, Lonchar himself filed a state habeas petition which contained 22 claims, including one challenging the method of execution. He told the judge that he wished to pursue each of the claims, but was doing so only in the hope that the state would change its method of execution to lethal injection.

The trial court shortly thereafter denied the state habeas, and Lonchar filed his first federal habeas petition, which contained the same 22 claims. Stressing what it called Lonchar's "inequitable conduct" in waiting almost six years and to the last minute to file, the state asked that the petition be dismissed. The district court did not do so, because it felt the state's reasoning did not constitute an independent basis for rejecting the petition. In the court's view, Habeas Rule 9 -- which addresses second and successive petitions -- governed the case. The court granted a stay in order to consider the state's other grounds in its motion to dismiss.

The Eleventh Circuit vacated the stay the next day, pointing out that although the district court based its holding on Habeas Rule 9, equitable doctrines independent of that rule applied. *Lonchar v. Thomas*, 58 F.3d 590, 593 (11th Cir. 1995), citing *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653 (1992).

MAJORITY OPINION

Justice Breyer found no difference in the fact that the Eleventh Circuit had vacated a stay, rather than dismissed Lonchar's habeas. He felt that the *Barefoot v. Estelle*, 463 U.S. 80, 893-894 (1983), standard -- when a certificate of probable cause is issued on first habeas, when necessary to prevent a case from being mooted by the prisoner's execution, a stay of

execution pending disposition of the appeal -- should apply. In other words, if the district court cannot directly dispose of the petition on its face, it abuses discretion by attempting to achieve the same result by denying a stay of execution. *Lonchar v. Thomas*, slip opin. at 3.

The concurrence had argued that *Gomez*, *supra*, displaced *Barefoot*, particularly in the case of last minute applications for stays. Justice Breyer pointed out that *Gomez* involved Robert Alton Harris, who had been through five rounds of federal litigation and was attempting for the first time, just before his execution, a 42 U.S.C. §1983 claim that execution in California's gas chamber was unconstitutional. Furthermore, the concurrence's reading of *Gomez* conflicted with the *Barefoot* treatment of first habeas petitions. *Id.* at 4.

DISMISSAL FOR REASONS NOT WITHIN HABEAS RULE 9

The history of the Great Writ reveals the "gradual evolution of more formal judicial, statutory or rules-based doctrines of law," rather than ad hoc dismissal of petitions. *Id.* citing *McCleskey v. Zant*, 111 S.Ct. 1454 (1991); *Barefoot*, *supra*, at 892; *Kuhlmann v. Wilson*, 477 U.S. 436, 451 (1986) (plurality); *Sanders v. United States*, 373 U.S. 1, 115 (1963); *Townsend v. Sain*, 372 U.S. 293, 313 (1963). All these principles "seek to maintain the courts' freedom to issue the writ, aptly described as the highest safeguard of liberty, while at the same time avoiding serious, improper delay, expense, complexity, and interference with a State's interest in the finality of its own legal processes." *Id.* at 5 (citations omitted).

Secondly, although habeas corpus has been called an equitable remedy, a court is still not authorized to ignore the body of statutes, rules and precedents built around 28 U.S.C. §2254. To do otherwise would "use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot." *Id.* at 6, citing 1 J. Story, *Commentaries on Equity Jurisprudence* 16 (13th ed. 1886).

The court's concern about the importance of noting, as specifically as possible, the standards and directions that should govern district judges in their dispositions of habeas petitions and about abuses of the writ had led to the body of complex and evolving principles now present in habeas corpus jurisprudence standards. *Id.* citing *McCleskey*, *supra*, 499 U.S. at 489, 496.

The need for such rules and arguments against ad hoc departure from them are particularly great when dismissal of a first federal habeas petition is contemplated, for dismissal of that petition entirely denies the protections of the Great Writ to the petitioner. The need is given the court's rules for the dismissal of second and successive petitions. *See McCleskey*.

DISTRICT COURT CONTINUES TO HAVE DISCRETION

The Habeas Rules still give a district court discretion in its handling of habeas petitions in that those petitions which lack substantial merit can be disposed of quickly, efficiently and fairly, while more extensive proceedings are reserved for those petitions which raise serious questions. *Id.* slip opinion at 7.

Habeas Rule 9(a) directly addresses the primary factor -- delay -- the Eleventh Circuit used in its dismissal of the petition. Rule 9(a) specifically requires a finding of prejudice in the states' "ability to respond to the petition." However, the district court was not asked to make this finding. *Id.*

SIXTH CIRCUIT COURT OF APPEALS

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995)
Majority: **Nelson (writing), Guy**
Minority: **Siler (concurring and dissenting)**

In the first death penalty case out of Ohio, the Sixth Circuit followed the lead of several other death circuits in finding *Strickland* prejudice from trial counsel's failure to present evidence of a defendant's mental history and capacity.

In 1981, Robert Glenn was in custody in Mahoning County, Ohio. At some point, he formulated an escape plan involving his brother, John. During the attempt, a part-time deputy

sheriff was shot and killed. Although evidence was presented that he planned the escape, Robert was convicted of Escape and Involuntary Manslaughter. John Glenn, despite his strong assertion of innocence, was convicted of murder and sentenced to death. After proceeding through direct appeal and state post-conviction, Glenn's petition for habeas was denied.

INEFFECTIVE ASSISTANCE OF COUNSEL--PENALTY PHASE

Even though it found Glenn's counsel's performance not objectively reasonable, the Ohio Court of Appeals affirmed the denial of Glenn's motion for state post-conviction relief because it could find no resulting prejudice, under *Strickland v. Washington*, 104 S.ct. 2052, 2064-65 (1984) (in order to obtain relief for ineffective assistance of counsel, a petitioner must show both that his counsel's performance fell below "an objective standard of reasonableness" and prejudice therefrom). The district court followed suit.

Under the Ohio death penalty statute, a jury must weigh the "history, character, and background of the defendant" against the aggravating factor(s) presented. The jury also was instructed to consider whether because of mental disease or defect, Glenn lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

However, in order for a jury to consider those factors, it must have some evidence before it. Glenn's attorney gave the jury "virtually no information on [his] history, character, background and organic brain damage -- at least no information of a sort calculated to raise reasonable doubt as to whether this young man ought to be put to death." *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995). The information was readily available, but counsel "failed to make any significant preparations for the sentencing phase until after the conclusion of the guilt phase." *Id.*

Counsel arranged for the production of a videotape which showed the area in which Glenn grew up and in which narration by Glenn's mother and a trucker for whom Glenn had once worked were heard, but did not seek an advance ruling on whether the video would be admissible. When counsel attempted to show the video to the jury, the trial court ruled it inadmissible hearsay. *Id.*

Although both were available, Glenn's mother and the trucker were never called to testify. The producer-narrator of the video testified about its preparation. Mitigation witnesses were a teacher who had known Glenn when he was small, but knew nothing of the older John Glenn; a minister who did not know Glenn at all, but unsuccessfully tried to present religious arguments against the death penalty; and a lawyer who expressed the opinion that although Glenn had a delinquency adjudication and a record of some arrests and a misdemeanor conviction, he did not have a significant criminal record. *Id.*

Glenn himself did not testify, but told the jury that he was not guilty and did not deserve the death penalty. None of Glenn's relatives testified, although several were willing to do so.

WHAT WAS AVAILABLE BUT NOT PRESENTED

John Glenn's family had always considered him slow; as early as the first grade, he was assigned to a Educable Mentally Retarded classroom; school IQ tests repeatedly produced scores in the 60s; he left school a virtual illiterate; a full scale IQ of 56 done one month before he turned 14 placed Glenn in the "Mental Defective" range; a psychological evaluation near the same time described Glenn as an "ineffectual," "very anxious," "insecure" and "dependent young man." *Id.* at 1208.

Glenn's mother beat him and his siblings regularly; he was a hyperactive child who would constantly butt his head against objects and rock his body back and forth when he went to sleep. Expert testimony indicated that Glenn's hyperactivity was caused by neurological impairment, possibly due to the general anesthesia Glenn's mother received some months before he was born. *Id.*

More readily available evidence showed that Glenn had always been a follower; his probation officer testified at a post-sentence hearing that Glenn could not keep up with his peers on the street, that he was "definitely a follower." The officer once asked Glenn if he would jump off the Mahoning Bridge, which covered a river bed with more rocks than river if his friends

asked him to. Glenn said yes. The probation officer testified that Robert Glenn provided most of the attention John Glenn received. *Id.*

NO SYSTEMATIC EFFORT

The prosecutor was correct in telling the jury that it had "received little by way of mitigation" at the sentencing phase, because little was presented. *Id.* Counsel "made no systematic effort to acquaint themselves with their client's social history"; they never spoke to his siblings; they never examined school, medical (including a record made after his collapsed in court one day) or probation records; they did not speak to his probation officer; although they arranged for competency testing, they waited until nine days before Glenn's sentencing hearing was to start to ask for a medical examination by someone who had not done the prior competency evaluation. *Id.*

At a hearing on a motion pursuant to Ohio Rev. Code Ann. §2929.024, which where reasonably necessary for the representation of someone charged with aggravated murder, provides for provision of a mental health expert at state expense, and allows defense the decision of whether the expert's findings are put before the jury, the prosecutor suggested, and defense counsel agreed, that counsel was asking for a mental health expert under Ohio Rev. Code Ann. §§2929.03(D)(1) and which mandate provision of the report to the jury. Both a psychiatrist and a psychologist were appointed under the later statutes. Although the prosecution fully briefed both men, defense counsel did not communicate at all with either man.

The psychologist's report explained his belief that Glenn was competent, analyzed the mitigation on the basis of how the crime had been portrayed in prosecution-prepared documents, and stated that "the offense was not the product of psychosis, mental retardation, organic brain disease, other mental illness, lack of education, unusual emotional pressure, or inadequate coping skills." *Id.* at 1210. The psychiatrist's report concluded that, "within reasonable medical certainty, I do not see any imtigating (sic) circumstances in this particualr (sic) individual." *Id.* at 1211 (errors in original).

Although Glenn had a statutory right to cross-examine the two, neither the psychologist nor the psychiatrist were called to testify. The majority "[could] only assume that defense counsel, not having done their homework, were not prepared to interrogate [the experts] about the basis for the very damaging conclusions they stated." *Id.*

In view of the nature of the material presented and not presented to the jury, including evidence of mental retardation, the prejudice prong was met because the court "[could not] have much confidence in the jury's weighing of the factors relevant to the issue of whether John Glenn should be sentenced to death." "The failure of John Glenn's counsel to draw the jury's attention to the organic brain problems here, and to the possibility that it helped turn John Glenn into putty in the hands of his admired older brother, was both objectively unreasonable and prejudicial." *Id.*

O'NEAL GRAVE DOUBT TEST

Noting that it would be unusual for judges to be in such doubt, the majority also gave nod to the "grave doubt" standard announced in *O'Neal v. McAninch*, 115 S.Ct. 992 (1995) (if a court has a grave doubt about whether prejudice exists, it must reverse), but said that the prejudice to Glenn was "quite clear." *Glenn, supra*, at 1211.

SILER DISSENT

Although other witnesses and experts who might have helped Glenn could have been found, "in hindsight," "[w]hether they could have helped him any better than the ones that were available is pure speculation." *Id.* at 1212.

The Ohio Supreme Court placed little import on defense counsel's failure to call Glenn's mother and former employer because their testimony would have been cumulative. Furthermore, the jury knew the circumstances of the offense and Glenn's "poor environment and background," "poverty," "little attention from his birth father," truancy, "educational and disciplinary problems as a boy," "extensive contact with the church" as a young boy and his need for "special education classes." *Id.* citing *State v. Glenn*, 504 N.E.2d 707, 711 (Ohio 1987).

Had Glenn's siblings been interviewed or called to testify, and had Glenn's life history records

been examined, that evidence would "only have corroborated the information presented to the jury in the experts' reports and the presentence investigation report. Glenn's mother would "probably not" have testified that she had beaten her children, as Glenn had claimed. *Id.* Lastly, no physician "has yet stated...within reasonable medical certainty" that Glenn's mother's general anesthesia while he was *in utero* caused him any permanent problems. *Id.*

Judge Siler also found it insignificant that defense counsel asked for mental health experts under the discretionary Ohio statute, while the appointments came under the statute which mandated jury knowledge because had counsel gotten the appointments under the former statute, not liked the reports, and decided not to use them, "we would be in the same position here, with Glenn on appeal asserting ineffective assistance of counsel because appointed counsel at trial failed to introduce into evidence" the experts' reports. *Id.*

KENTUCKY SUPREME COURT

***Bowling, Bussell, Sanborn and Wilson v. Commonwealth*, (rendered February 16, 1996)**

Opinion of the Court

On January 3, 1996, Governor Paul Patton signed five death warrants for the execution of Thomas Bowling, Charles Bussell, Parramore Sanborn, Gregory Wilson and David Skaggs before sunrise on February 1. Skaggs, about to enter federal habeas corpus proceedings, filed his habeas petition, and received a stay of execution on January 19, 1996. On January 26, 1996, the Kentucky Supreme Court granted stays to Bowling, Bussell, Sanborn and Wilson. The opinion which follows is the result of that stay litigation. Although it recognized that each person was in a slightly different posture[1], the court noted that "the primary issues are common to all." *Bowling, et al.*, slip opinion at 2.

GOVERNOR'S ANNOUNCED POLICY

Previous gubernatorial policy had been to allow ninety days for commencement of state post-conviction proceedings after a case was finally disposed of on certiorari, at the time the warrants were signed. After the warrants were signed and litigation was commenced, Governor Patton announced a new policy to give up to three days for a written defense response after a request for a death warrant is received. The court saw no conflict with RCr 11.42(3), which allows up to three years for a defendant to begin his state post-conviction litigation. In the Supreme Court's mind, three years is "an outer time limit" which "in no way affects the prerogatives of the Governor with respect to enforcement of criminal judgments." *Id.* slip opinion at 5.

The governor is authorized by statute to set a date of execution. KRS 431.218. As such, his policy concerning those dates "is strictly an executive function." *Id.* Thus, under the separation of powers found in the §§27 and 28 of the Kentucky Constitution, the court does not have the power to interfere with gubernatorial policy concerning death warrants.

JURISDICTION

The second issue was whether filing a notice of intent to file an RCr 11.42 motion (as both Bowling and Bussell had done) could serve as granting the circuit court jurisdiction to stay an execution.

> We do not find the filing of any 'pre-RCr 11.42 motions,' however styled, sufficient to invest the circuit court with the power to grant a stay of execution. In fact, we do not find any evidence of the legal existence of 'pre-RCr 11.42 motions'; certainly not one of sufficient validity to authorize the stay of a criminal judgment. The Rules of Criminal Procedure expressly state that '[a] sentence of death shall be stayed pending review by an appellate court.' RCr 12.76...As such, until an RCr 11.42 motion is filed in the circuit court there is no procedure by which that court can issue a stay of the sentence. *Id.*, at 6.

Although aware that filing a capital 11.42 is fraught with difficulties such as forestalling procedural default, waiver and retroactivity, the court felt only "that an RCr 11.42 motion must be filed in an expeditious manner and is

subject to amendment, if appropriate, with leave of court." *Id.*, at 7.

***Perdue v. Commonwealth*, 916 S.W.2d 148 (Ky. 1995)**
Part I (guilt phase): Stephens, Fuqua, Lambert (writing), Reynolds and Wintersheimer
Part I (penalty phase): Stephens, Lambert (writ-ing), Leibson, Reynolds, Stumbo
Concurrence and dissent: Leibson (writing), Stumbo Wintersheimer (writing), Fuqua

In 1988, Herbert Cannon was murdered when his automobile caught fire near the entrance of Lake Cumberland State Park, in Russellville, Kentucky. The Kentucky State Police had no leads until August 1990, when Cynthia Moore contacted them with information about Cannon's death. She identified Tommie Perdue as a participant in the murder and agreed to wear a tape and attempt to obtain information from him. As a result of that information, Perdue was convicted and sentenced to death for Cannon's murder. His co-conspirators received sentences of less than death for charges ranging from murder to arson to facilitation.

STANDARD OF REVIEW

Before examining the issues raised in Perdue's brief, the court addressed the three-part standard of review to be applied to unpreserved error: 1) whether an error was committed; 2) whether there was a reasonable justification, including trial strategy, for the failure to object; and 3) whether the error was so prejudicial that without it, the defendant may not have been found guilty or might not have been sentenced to death.

The court noted how "profoundly troublesome" it was to discover "an almost complete absence of [defense] objection to the errors at trial. *Perdue v. Commonwealth*, 916 S.W.2d 148, 154 (Ky. 1995).

PROSECUTORIAL MISCONDUCT -- GUILT PHASE

At trial, Sue Melton, Cannon's ex-wife and the instigator of the scheme which led to his death, testified that Perdue threatened to harm her daughter unless she paid him the money she promised for his involvement in the murder. Cynthia Moore, who had worn the tape and gotten the admissions from Perdue, testified that she was voluntarily staying in jail for her own protection from Perdue. Although defense counsel did not object to the testimony or make reference to it in argument, he did cross-examine the witnesses. Thus, in the context of the case, "these minor references" were harmless error. *Id.* at 155.

In the taped conversation, Perdue said several times that Cannon's murder "got done." During closing argument, the prosecutor misquoted Perdue as saying "I got it done." While the court "disapproved" of the misstatement, the error was harmless. *Id.* citing RCr 9.24.

At one point, the prosecutor mentioned that Sue Melton had pled guilty, but that Perdue "has come down here, and he wants a trial, which he is entitled to. He didn't plead guilty. He pled not guilty." This statement "strain[ed] the bounds of propriety, but could not be considered error because it was a valid statement of the facts and was in rebuttal to Perdue's attack on Melton's credibility. *Id.*

"[M]ore troubling" was the prosecution's assertion that Cynthia Moore would testify that Cannon was brought to Russell County "because you could get away with murder in Russell County" and a later rhetorical question about whether Perdue thought a Russell County jury would let him get away with murder. The court felt that the comments were of a similar nature to those in *Taulbee v. Commonwealth*, Ky. 438 S.W.2d 777 (1969), but because there was no defense objection, it could not be said that the jury might have been persuaded to acquit Perdue but for those statements. *Id.*

TAPE RECORDING

Perdue contended that his taped conversation with Cynthia Moore should have been excluded because it was inaudible, irrelevant and inflammatory. However, the only objection was to the tape's audibility.

As part of the process of obtaining Perdue's admissions, Cynthia Moore pretended that she knew about the murder, knew of Perdue's and Frank Eldred's participation in it, and that she wanted her own husband murdered. Several statements in the conversation between she and Perdue were attributed to Eldred. The

statements provided a foundation for her visit to Perdue and were properly admitted at trial. *Id.* at 156, citing *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992). With a proper objection or motion, the tape may have been redacted to eliminate those statements more prejudicial than probative. However, such objections or motions were not made. *Id.*

TELEPHONE BILL

Sue Melton testified that she had asked Arlene Ploettner to get someone "to teach Herbie a lesson", and that Ploettner called Perdue, but she did not speak about the contents of Ploettner's and Perdue's conversation. Defense counsel did not object to the prosecution's introduction of Ploettner's telephone bill as proof. However, in order to find that the telephone bill should have been excluded, the court would "have to conclude as a matter of law that there were no facts or circumstances which would have justified admission of the evidence." Because it could not, the court found no error. *Id.* at 157.

CYNTHIA MOORE'S TESTIMONY

Moore was allowed to repeat statements made by Perdue and Frank Eldred, with whom she had been living, regarding the details of the murder, the means by which the victim was taken to Russell County, and the use of drugs and alcohol.

Defense counsel objected on hearsay grounds. Apparently relying on the adoptive admissions to the hearsay rule, the court allowed the testimony on the basis that as long as Perdue was present, Moore could testify to what he or Eldred had said in her presence. The court found no error in admission of the testimony, but did note that the adoptive admissions exception requires more than mere presence when made; it must also satisfy the KRE 801A (b)(2) manifestation of adoption or belief in the truth of the statement. Furthermore, the hearsay exception for the statements of co-conspirators, which the court believed the more proper exception, does not require exclusion of out-of-court statements made in the presence of the party against whom they are offered. *Id.* at 158.

DOUBLE JEOPARDY CLAIM

Perdue asserted that the burning of Cannon's automobile was incident to the murder, and therefore, any arson was only the means by which the murder was committed. Using its two-pronged double jeopardy analysis: 1) whether the act or transaction constitutes a violation of two distinct statutes; and 2) whether the offenses arose from a single act or impulse with no compound consequences, the court found that two distinct criminal acts were involved. First degree arson was committed when Cannon's automobile was intentionally set on fire. Murder was committed when Herbert Cannon burned to death in the automobile. Thus, there were two distinct acts and impulses involved. *Id.* at 161, citing *Ingram v. Commonwealth*, 801 S.W.2d 3212 (Ky. 1990).

PROSECUTORIAL MISCONDUCT -- PENALTY PHASE

During his penalty phase close, the prosecutor asked when Perdue had gotten into the "murder for hire" business. Defense counsel objected, and the jury was admonished. In light of other penalty phase error, reversal was re-

KENTUCKY DEATH NOTES

Number of people executed since statehood *1795-1963*	470
Number of people executed in the electric chair *1911-1963*	171
Number of people who applied for the position of executioner *1984*	150
Number of people now on death row* *December 1995*	28
Number of people who are Viet Nam veterans on death row *December 1995*	0
Number of people who are women on death row *December 1995*	0
Number of people who were juveniles when the crime was committed *1976-present*	1
Number of people who have committed suicide on death row *1976-1995*	1
Number of people whose trial lawyers have been disbarred or had their license suspended	3
Number of people on death row who can afford private counsel on appeal	1
Number of people sentenced to death for killing a black person *1976-1995*	0
Percentage of death row inmates who are black *1976-1995*	25%
Percentage of Kentucky population that is black	7.7%
Number of black prisoners who were sentenced by all white juries *1976-1995*	3
Number of persons sentenced to death in Kentucky who were later proven innocent	1

quired because the statements were inflammatory, prejudicial, not based on the evidence and served no purpose other than to unfairly prejudice Perdue. *Id.* at 163.

STATEMENTS REGARDING PAROLE ELIGIBILITY

In his penalty phase close, the prosecutor also told the jury that a penalty of less than death meant that Perdue would be eligible for parole and could be "out on the streets." Although defense counsel made no objection, in light of KRS 532.025 (in death cases, parole eligibility may not be introduced), "this error is too great to overlook." *Id.*

The prosecution also turned Perdue's right to a jury trial into an attack on his character for not pleading guilty and taking his punishment, as Sue Melton had. "It is flatly improper to refer to the 'time and trouble' occasioned by a plea of not guilty and the resulting trial." *Id.* at 163-164. *See Norton v. Commonwealth*, 471 S.W.2d 302, 306 (Ky. 1971).

The prosecutor's implication that a death sentence would never be carried out was not objected to. Combined with the misstatements on parole eligibility and other error, "the jury may well have been uncertain as to the legal significance of a sentence of death, of life imprisonment, or of imprisonment for a term of years. [Thus,] [b]ecause of the implication that a sentence of death was something other than a death sentence", the court reversed. *Id.* at 164, citing *Sanborn v. Commonwealth*, 754 S.W.2d 534, 544 (1988); *Ice v. Commonwealth*, 667 S.W.2d 671, 676 (Ky. 1984).

AMENDED CHARGES

The Russell Circuit Clerk testified in the penalty phase that Perdue had been convicted of four counts of murder. In actuality, Perdue had been charged with four counts of murder arising out of a vehicular homicide, but the charges were later amended and Perdue pled guilty to four counts of Manslaughter Second.

The trial court overruled a defense motion for mistrial, but did admonish the jury to consider only Perdue's Manslaughter Second convictions and to make no presumptions as to murder, which in effect, informed the jury that Perdue had been permitted to plea bargain the most severe charge, murder, into something less severe, Manslaughter Second. *Id.* at 165.

While KRS 532.025(1)(b) provides that evidence of a defendant's record of criminal convictions may be presented in the penalty phase, the court had never considered whether the door is opened to consideration of charges subsequently amended, "the plain language of the statute and the possibility of prejudice...compel the conclusion that it does not." *Id.*

A proper admonition would not have been sufficient to cure the error. "That such information was before the jury at the most critical phase of the trial is sufficient to destroy our confidence in the reliability of the jury verdict." *Id.*

"DEATH ELIGIBLE" CLASS

Perdue argued that he was not in a "death-eligible" class because his criminal responsibility was based on complicity and because he did not personally participate in the murder, nor was he at the murder scene. However,

> [e]ven though [Perdue] was not at the scene and even though, in the words of the trial judge, 'he did not light the match', he was nevertheless a moving force behind the murder. It was [Perdue] who arranged the murderous bargain between Melton and Eldred and Ploettner.....[T]he only purpose of the criminal enterprise was murder. We can conceive of no greater crime nor one more deserving of capital punishment than bargaining the death of another human being. As such, there is no constitutional prohibition against the death penalty. *Id.* at 166, citing *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982).

PROPORTIONALITY

The court noted that Perdue's attack on the court's method of proportionality "contemptuously referr[ed] to an appendix to the brief with the comment 'should this Court decide to do a real inquiry into proportionality', but said that "[i]n this case we will not pursue the question of contempt." *Id.* at 167.

USE OF REMOTE FELONIES DURING PENALTY PHASE

The prosecution introduced Perdue's nineteen year old conviction for burglary and his fifteen year old convictions for Manslaughter Second during the penalty phase. The convictions were properly admitted, because "remoteness [goes] only to weight, not to admissibility." *Id.*

VERDICT FORM

There was no reversible error in the trial court's use of a verdict form which forced the jury to fix a sentence of LWOP 25 or death if an aggravating factor was found, but noted that "[v]erdict forms must be carefully drafted to insure that a jury will not feel obligated to fix a specific punishment if an aggravator is found...[T]he verdict form must make it clear that the full range of punishments are available for imposition." *Id.* at 168.

LEIBSON OPINION

Justice Leibson, joined by Justice Stumbo, dissented from the court's affirmance of Perdue's convictions.

Although there was sufficient evidence to place Perdue in the death eligible class because of the arrangements he had made and his demands for payment, there was insufficient evidence to allow the jury to find Perdue guilty of Arson First or to submit Arson as an aggravator.

The guilt phase instructions stated that the jury must find Perdue guilty if it believed beyond a reasonable doubt: 1) that Perdue aided and assisted in the commission of Arson First by destroying Herbert Cannon's automobile; 2) that Perdue procured the services of Frank Eldred in setting the fire; 3) that Perdue facilitated payment for such services by **planning the commission and offense of Arson First**; 4) **that Perdue stood in immediate readiness to come to the aid and assistance of his coconspirators in carrying out the arson**; 5) that one or more of his coconspirators intentionally started the fire; and 6) that it was **Perdue's intent to damage or destroy Herbert Cannon's automobile**. *Id.* at 171.

There was no proof that Perdue arranged ahead of time the method by which the murder would be carried out, or that he participated in any of the planning of the murder, except to arrange Eldred and Melton's meeting. Even more of a "mystery" to Justice Leibson was how Perdue could have been standing in immediate readiness to aid and assist the others, when the Commonwealth had admitted that Perdue was not even present the night of the killing. *Id.* at 171.

WINTERSHEIMER OPINION

Justice Wintersheimer dissented from the majority's reversal of Perdue's death sentence because he felt the prosecutor's actions in the guilt and penalty phases did not deprive Perdue of a fundamentally fair trial.

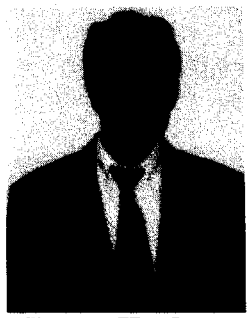
While he agreed with the majority's dispensation of the double jeopardy issue, Justice Wintersheimer also felt that Kentucky should return to the reasoning promulgated in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932), and the standards set out in *Wilson v. Commonwealth*, 695 S.W.2d 854 (Ky. 1985) and *Polk v. Commonwealth*, 679 S.W.2d 231 (Ky. 1984). *Id.* at 172.

FOOTNOTES

[1]Bowling had filed a notice of appearance and notice of intent to file an RCr 11.42 motion and had had a status conference in the Fayette Circuit Court. Bussell had filed a notice of appearance, notice of intent to file an RCr 11.42 motion, a motion to recuse and a motion for status conference, all of which had been dismissed by the Christian Circuit Court for lack of jurisdiction. He was appealing that court's order, and the sixty day briefing period had begun. Sanborn's certiorari proceedings had been finally disposed of by the United States Supreme Court on December 11, 1995. Wilson was pending in the Kentucky Supreme Court on a petition for modification of an opinion handed down on November 22, 1995.

JULIA K. PEARSON
Paralegal, Capital Post-Conviction Unit
Department of Public Advocacy
100 Fair Oaks Lane, Suite 301
Frankfort, Kentucky 40601
Tel: (502) 564-3948; Fax: (502) 564-3949
E-mail: jpearson@dpa.state.ky.us

6th Circuit Highlights
Review of 1995-96



Bruce Hackett

This column is a quick review of Sixth Circuit cases decided in 1995 and January-March of 1996. The cases are arranged by topic. Citations are to *West's Federal Reporter* or the *Sixth Circuit Review*.

♦ ♦ ♦ ♦ ♦ ♦

AIDING AND ABETTING

Illegal Gambling Statute (18 U.S.C. Sec. 1955) - A person may be convicted of aiding and abetting an illegal gambling business, but only if the government proves knowledge of the illegal gambling enterprise and an intent to make the business succeed. *U.S. v. Hill, et al.*, 55 F.3d 1197 (6th Cir. 1995).

ATTORNEY'S FEES

Criminal Justice Act - Fee determination under CJA is not an appealable order. *U.S. v. Stone, et al.*, 53 F.3d 141 (6th Cir. 1995).

CARJACKING

Elements - Carjacker's motive in taking a vehicle is not relevant to the offense and intent to permanently deprive is not an element of the offense. *U.S. v. Moore*, 73 F.3d 666 (6th Cir. 1996).

CLOSING ARGUMENT

Comment on Demeanor of Defendant - It was improper, but not reversible error, for the prosecutor to point out that the defendant had "commented suspiciously" to his counsel after a witness had testified. *U.S. v. Leal*, 75 F.3d 219 (6th Cir. 1996).

Risk of Mistrial - Although the prosecutor's closing argument (reviewed for plain error) did

not warrant reversal of defendant's conviction, the court criticized the prosecutor's rhetoric and suggested that it could have necessitated a mistrial. *U.S. v. Reliford*, 58 F.3d 247 (6th Cir. 1995).

CONFRONTATION

Cross-Examination of Co-Conspirator - The court's denial of the defense request to question government agents about misleading statements made to them by a co-conspirator government witness was not error since alleged deceptions were not relevant to defendant's case. *U.S. v. Hart*, 70 F.3d 854 (6th Cir. 1995).

COUNSEL

Motion to Disqualify Counsel - Normally a hearing is required on a motion to disqualify and the court must balance the constitutional right to representation by counsel of defendant's choosing with interests in the integrity of proceedings and proper administration of justice. *U.S. v. Mays*, 69 F.3d 116 (6th Cir. 1995).

Special Assistant U.S. Attorney - An assistant county prosecutor was properly permitted to serve as a Special United States Attorney and there was no prejudice to the defendant as a result. *U.S. v. Hart*, 70 F.3d 854 (6th Cir. 1995).

CRIMINAL CONTEMPT

Avoiding Service of Subpoena - After a plea of guilty in his case, a defendant is guilty of criminal contempt for trying to avoid service of a subpoena to testify in co-defendant's trial. *U.S. v. Allen*, 73 F.3d 64 (6th Cir. 1995).

DISCOVERY

Violations - Factors for the court to consider in fashioning a remedy for discovery violations include the reason for the delay in production, whether the delay was intentional or in bad faith, the degree of prejudice caused and whether the prejudice can be cured by something less than suppression of evidence. *U.S. v. Maples*, 60 F.244 (6th Cir. 1995).

DOUBLE JEOPARDY

Civil Forfeiture and Criminal Prosecution - The civil forfeiture judgment against the defendant followed by a criminal conviction constituted double jeopardy, mandating that the criminal conviction be reversed. *U.S. v. Ursery*, 59 F.3d 568 (6th Cir. 1995).

Civil Forfeiture and Criminal Prosecution - A prior civil forfeiture of an automobile as being drug proceeds did not constitute punishment for double jeopardy purposes and did not bar the subsequent prosecution of the defendant for drug offenses. *U.S. v. Salinas*, 65 F.3d 551 (6th Cir. 1995).

DRUG OFFENSES

Conspiracy - Conspiracy to distribute drugs and conspiracy to kill a person during a drug offense and conspiracy are separate offenses. *U.S. v. Snow*, 48 F.3d 198 (6th Cir. 1995).

Money Laundering - Transporting drug money for the purpose of purchasing more drugs does not amount to a "financial transaction" for money laundering purposes. *U.S. v. Oleson*, 44 F.3d 381 (6th Cir. 1995).

Police Officer as Expert Witness - It is permissible for a police officer to testify as both a fact witness and an expert witness on the subject of street-level drug dealing. *U.S. v. Thomas*, 74 F.3d 676 (6th Cir. 1996).

"Use" or "Carry" Firearm - A conviction was vacated and remanded where the narrow definition of "use" or "carry" [*Bailey v. U.S.*, ___ U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995)] was not employed at trial. *U.S. v. Moore*, 76 F.3d 111 (6th Cir. 1996).

"Use or "Carry" Firearm - A police officer who was wearing his uniform and pistol while selling drugs "used" a firearm during a drug transaction. *U.S. v. Russell*, 25 SCR 5, p. 27.

"Use" or "Carry" Firearm - Applying *Bailey v. U.S.*, ___ U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) to facts, the court found that a handgun in a car console is immediately available to the driver. *U.S. v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996).

DRUNK DRIVING

Anti-Drunk Driving Activists in Courtroom - Because the defendant did not raise the issue in the trial court of identifiable activists being present during his drunk driving murder trial, on appeal he must show actual prejudice, which he has failed to do. *U.S. v. Sheffey*, 57 F.3d 1419 (6th Cir. 1995).

DUE PROCESS

Sex Offenders - A Tennessee law which designates convicted sex offenders as "mentally ill" does not violate due process of law. *Dean, et al. v. McWherter, et al.*, 70 F.3d 43 (6th Cir. 1995).

EVIDENCE

Hearsay - There was no reversible error where inadmissible hearsay (declarant deceased) was admitted at trial. Cross-examination of the witness was thorough and effective and went far to neutralize prejudice. Also, there was overwhelming evidence of guilt. *U.S. v. Wiedyk*, 71 F.3d 602 (6th Cir. 1995).

Hearsay - No confrontation right violation where under oath videotaped statement of deceased witness was introduced as residual hearsay. *U.S. v. Canan*, 48 F.3d 954 (6th Cir. 1995).

Other Crimes or Wrongs - No need for the government to give advance notice of other crimes or wrongs under FRE 404(b) when the other crimes or wrongs are "intrinsic" to the charged crime. *U.S. v. Barnes*, 49 F.3d 1144 (6th Cir. 1995).

FALSE STATEMENTS TO FBI

"Exculpatory No" Doctrine - The court again refused to decide when, if ever, the "exculpatory no" doctrine may apply, deciding only that it did not apply to the facts in this case. *U.S. v. LeMaster*, 54 F.3d 1224 (6th Cir. 1995).

FEDERAL JURISDICTION

Arson of Private College Dormitory - Educational business of Lee College was an activity affecting interstate commerce; therefore, federal jurisdiction existed for prosecution of arson at dormitory building. *U.S. v. Sherlin, et al.*, 67 F.3d 1208 (6th Cir. 1995).

Drive-By Shooting - A drive-by shooting at a synagogue implicated the right to use and hold property and, therefore, was a federal crime. *U.S. v. Brown*, 49 F.3d 1162 (6th Cir. 1995).

Sexual Harassment and Sexual Assault - A prosecution for sexual harassment and sexual assault under a federal statute criminalizing the willful deprivation of a constitutional right is not proper where the defendant is a state judge and the victims are state judicial employees and litigants. *U.S. v. Lanier*, 73 F.3d 1380 (6th Cir. 1996).

FIREARMS

Licensed Dealers - It is no crime for a licensed firearm dealer to sell a firearm at a location away from the licensed premises. *U.S. v. Caldwell*, 49 F.3d 251 (6th Cir. 1995).

FORFEITURE

Eight Amendment - Excessive Fine - The test for determining an excessive fine question employs both an instrumentality test and a proportionality test. *U.S. v. Certain Real property Located at 11869 Westshore Drive*, 70 F.3d 923 (6th Cir. 1995).

Notice and Hearing - Absent exigent circumstances, pre-seizure notice and hearing for the owner of real property is required. *U.S. v. Certain Real Property Located at 16510 Ashton*, 47 F.3d 1465 (6th Cir. 1995).

Right to Counsel - The Sixth Amendment right to counsel does not apply to civil forfeiture proceedings relating to drug money. *U.S. v. $100,375 in U.S. Currency*, 70 F.3d 438 (6th Cir. 1995).

GUILTY PLEA

***Alford* Plea** - When an *Alford* plea is entered, the government must identify specific evidence which constitutes proof of the offense so that the court is satisfied that a sufficient factual basis supports the plea. *U.S. v. Tunning*, 69 F.3d 107 (6th Cir. 1995).

Right to Withdraw Plea - Failure of the court to inform a defendant of no right to withdraw the plea if the sentencing recommendation is not followed can be harmless error. *U.S. v. Lowery*, 60 F.3d 1199 (6th Cir. 1995).

Waiver of Appeal - By entering into the plea agreement with stipulations and restitution requirement, the defendant waived her right to appeal enhancement and restitution. *U.S. v. Allison*, 59 F.3d 43 (6th Cir. 1995).

HABEAS CORPUS

Competency at Guilty Plea - A nine year delay in holding a competency hearing did not warrant habeas corpus relief. *Cremeans v. Chapleau*, 62 F.3d 167 (6th Cir. 1995).

Costs of Imprisonment and Supervised Release - The imposition of costs cannot be attacked collaterally in a habeas corpus petition. *U.S. v. Watroba*, 56 F.3d 28 (6th Cir. 1995).

Free Transcript for Indigent - An indigent defendant was denied equal protection of the laws when the state refused to provide transcripts of testimony from mistrials and the availability of court reporter's tapes was not an adequate substitute. *Riggins v. Rees*, 74 F.3d 732 (6th Cir. 1996).

Ineffective Assistance of Counsel on Appeal - Failing to file a significant portion of the record on appeal with the appellate court constitutes deficient performance, but the petitioner failed to show prejudice. *Moore v. Carlton*, 74 F.3d 689 (6th Cir. 1996).

Issue Raised in Direct Appeal - The petition was dismissed where the issue raised was identical to an issue raised in the direct appeal and no exceptional circumstances exist. *DuPont v. U.S.*, 76 F.3d 108 (6th Cir. 1996).

Ineffective Assistance - Failure to Request Mistrial - The Kentucky Supreme Court finding that defense counsel was aware of prosecutor's misconduct in closing argument and consciously chose to proceed with trial is entitled to a presumption of correctness. No cause was found for procedural default in not requesting a mistrial. *West v. Seabold*, 73 F.3d 81 (6th Cir. 1996).

Juvenile Court Transfer - By admitting the charged offenses at a juvenile court detention hearing, the accused did not block the later transfer of the case to adult court. *Laswell v. Frey*, 24 SCR 4, p. 10.

Kentucky PFO Law - Double Jeopardy - There is no double jeopardy violation when a defendant is tried for PFO I, convicted of PFO II, has his conviction reversed on appeal and is tried and convicted of PFO I. PFO is a status, not an offense. *Carpenter v. Chapleau*, 72 F.3d 1269 (6th Cir. 1996).

Right to Trial by Jury - No violation of Federal Constitution where state trial court abuses discretion in denying a motion to withdraw waiver of jury trial. *Sinistaj v. Burt*, 66 F.3d 804 (6th Cir. 1995).

INEFFECTIVE ASSISTANCE OF COUNSEL

Conflict of Interest - Where the issue is first raised on appeal, the defendant must demonstrate an actual conflict which adversely affected counsel's performance, but the defendant does not have to additionally show prejudice. *U.S. v. Hopkins*, 43 F.3d 1116 (6th Cir. 1995).

Motion for New Trial - To prevail, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that prejudice resulted, meaning that the defendant here had to show that she would not have been convicted if not for counsel's errors. *U.S. v. Donathan*, 65 F.3d 537 (6th Cir. 1995).

JURY INSTRUCTIONS

***Allen* Charge** - On review of a trial court's decision to give an *Allen* charge, the speed with which the jury returns a verdict is irrelevant. *U.S. v. Tines*, 70 F.3d 891 (6th Cir. 1995).

Armed Career Criminal - There is no need to instruct the jury that if the defendant is convicted as an Armed Career Criminal a 15-year minimum sentence is mandatory. *U.S. v. Johnson*, 62 F.3d 849 (6th Cir. 1995).

Burden of Proof in Conspiracy Case - The conviction was reversed where the instructions did not require the jury to find a knowing illegal structuring of bank transactions to avoid bank reporting requirements for cash transactions [*Ratzlaf v. U.S.*, ___ U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)]. *U.S. v. Palazzolo, et al.*, 71 F.3d 1233 (6th Cir. 1995).

Death During Bank Robbery - To prove guilt of killing during a bank robbery under 18

U.S.C. Sec. 2113(a), the government need not show intent to kill. *U.S. v. Poindexter*, 44 F.3d 406 (6th Cir. 1995).

Elements of Offense - Even where the parties stipulate a fact that proves an element of the offense, the court may not instruct the jury that the element has been proven. This is plain error which results in a reversal of the conviction even in the absence of an objection to the erroneous instruction. *U.S. v. Jones*, 65 F.3d 520 (6th Cir. 1995).

Entrapment - In an entrapment case, instructions which permit the jury to find the defendant was entrapped to commit one drug offense, but not entrapped to commit others, are proper. *U.S. v. Mitchell*, 67 F.3d 1248 (6th Cir. 1995).

Knowledge of Possession of Drugs Through Deliberate Ignorance - Where deliberate ignorance instruction was not supported by the evidence, the jury could not have convicted on that theory; therefore, giving the instruction was harmless error. *U.S. v. Mari*, 47 F.3d 782 (6th Cir. 1995).

Lesser Misdemeanor Offense - Where the felony included an element of intent and the misdemeanor did not, there was no error in the court's refusal to instruct on the misdemeanor because evidence of intent was overwhelming and the evidence was insufficient to support a conviction on the misdemeanor. *U.S. v. Mays, et al.*, 69 F.3d 116 (6th Cir. 1995).

JURY TRIAL

Juror Misconduct - Use of dictionary by jury during deliberations is error, but the defendant must prove prejudice to obtain a new trial. *U.S. v. Gillespie*, 61 F.3d 457 (6th Cir. 1995).

Juror Who Knows Witnesses - There is no error where the trial court declines to conduct a hearing when a juror reveals after opening statements that she may know some of the witnesses. *U.S. v. Rigsby*, 45 F.3d 120 (6th Cir. 1995).

JUVENILE LAW

Evidentiary Standard for Transfer Hearings - The proper standard for transfer hearings under FJDA, 18 U.S.C. Sec. 5032, is preponderance of the evidence and the government has the burden to rebut the presumption of availability of treatment in the juvenile system. *U.S. v. T.F.F.*, 55 F.3d 1118 (6th Cir. 1995).

LARCENY

Conversion - A defendant cannot be convicted of converting money of the United States when the money in question never became property of the United States. *U.S. v. Klingler*, 61 F.3d 1234 (6th Cir. 1995).

Embezzlement - Statute which prohibits taking $5,000 or more from an entity which receives $10,000 or more in federal funds per year requires proof that the theft of $5,000 or more was within a one year period. *U.S. v. Valentine*, 63 F.3d 459 (6th Cir. 1995).

MOTION FOR ACQUITTAL

Timeliness - Court has no jurisdiction to rule on an untimely motion for acquittal or to enter a judgment of acquittal sua sponte after the case is submitted to the jury. *U.S. v. Rupert, et al.*, 48 F.3d 190 (6th Cir. 1995).

OBSCENITY

Cyberspace Community Not Recognized by Courts - To apply *Miller v. Calif.*, 413 U.S. 15 (1973) test of "contemporary community standards" to allegedly obscene computer-generated or transported images, it is not necessary to define "community" based on connections among people in cyberspace rather than on geographic locale of federal judicial district where prosecution occurs. *U.S. v. Thomas, et al.*, 74 F.3d 701 (6th Cir. 1996).

PROBATION AND PAROLE

Delay in Execution of Parole Violator Warrant - Five and one-half year delay in execution of warrant did not deny a speedy trial or deny due process of law. *Bennett v. Bogan*, 24 SCR 20, p. 12.

Revocation - While a person's probation may be revoked for conduct which occurs prior to the actual start of the probationary sentence, a person cannot be revoked for criminal conduct which occurred prior to being sentenced to pro-

bation. *U.S. v. Twitty*, 44 F.3d 410 (6th Cir. 1995).

SENTENCING

Allocution - Error occurs if a sentencing judge does not personally and unambiguously invite the defendant to speak. *U.S. v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996).

Armed Career Criminal Act - Ohio crime of sexual battery has potential for violence and therefore qualifies as a violent felony. *U.S. v. Mack*, 53 F.3d 126 (6th Cir. 1995).

Presentence Report - A trial court is not required to supply to the defense a copy of a presentence report concerning a government witness nor is the court required to review the report in camera for potential Brady material. *U.S. v. Sherlin*, 24 SCR 21, p. 1.

Unrelated Criminal Conduct - A sentence was vacated where unrelated criminal conduct not charged in the indictment was used to increase the sentence. *U.S. v. Russell*, 25 SCR 5, p. 27.

SEPARATE TRIAL

Tax Evasion Charges - Husband and Wife - The court should have granted separate trials where wife presented diminished capacity defense which required introduction of evidence of husband's bad character. *U.S. v. Breinig*, 70 F.3d 850 (6th Cir. 1995).

SUFFICIENCY OF EVIDENCE

Conspiracy - Co-Defendant's Testimony - The court rejected the argument that co-defendant's testimony was entitled to no weight as a matter of law because it was contradictory and uncorroborated. *U.S. v. Cobleigh, et al.*, 75 F.3d 243 (6th Cir. 1996).

Conspiracy - Drugs - A conspiracy conviction was upheld even though indicted co-conspirators were acquitted. The evidence supported a finding that a conspiracy existed with other unknown persons. *U.S. v. Anderson*, 25 SCR 5, p. 13.

U.S. SENTENCING GUIDELINES CASES

Grant v. U.S., 72 F.3d 503 (6th Cir. 1996). (Conspiracy/drugs - collateral attack on sentence disallowed).

Prince v. U.S., 46 F.3d 17 (6th Cir. 1995). (Effective date of Guidelines is November 1, 1987).

U.S. v. Alexander, 59 F.3d 36 (6th Cir. 1995). (Drug case - leader of criminal conspiracy).

U.S. v. Andress, 47 F.3d 839 (6th Cir. 1995). (Weight of LSD).

U.S. v. Berridge, 74 F.3d 113 (6th Cir. 1996). (False statements on loan application).

U.S. v. Bonds, 48 F.3d 184 (6th Cir. 1995). (Collateral attack on prior conviction not allowed at sentencing unless Gideon right to counsel error is alleged).

U.S. v. Bureau, 52 F.3d 584 (6th Cir. 1995). (Government motion for further departure - Rule 35).

U.S. v. Byrd, 53 F.3d 144 (6th Cir. 1995). (Assume court considered downward departure).

U.S. v. Copeland, Jr., 51 F.3d 611 (6th Cir. 1995). (Proof of drug quantity).

U.S. v. Couch, 65 F.3d 542 (6th Cir. 1995). (Assimilative Crimes Act - sentencing guidelines).

U.S. v. Cullens, 67 F.3d 123 (6th Cir. 1995). (Drug quantity can be considered as basis for departure from Guidelines).

U.S. v. Dixon, 66 F.3d 133 (6th Cir. 1995). (Victim of forged endorsement offense must suffer financial loss to justify enhancement).

U.S. v. Ebolum, 72 F.3d 35 (6th Cir. 1995). (Deportable alien status not ground for downward departure).

U.S. v. Ellerbee, 73 F.3d 105 (6th Cir. 1996). (Mail fraud and related crimes).

U.S. v. Epley, et al., 52 F.3d 571 (6th Cir. 1995). (Physical restraint of victim of false arrest relevant for enhancement).

U.S. v. Flowers, 55 F.3d 218 (6th Cir. 1995). (Calculating loss in check-kiting scheme).

U.S. v. Gessa, 57 F.3d 493 (6th Cir. 1995). (Drug offenses - it is the government's burden to prove the quantity of drugs involved).

U.S. v. Graves, 60 F.3d 1183 (6th Cir. 1995). ("Criminal episode" for Armed Career Criminal Act Purposes).

U.S. v. Greene, 71 F.3d 232 (6th Cir. 1995). (Mail Fraud and possession and use of false and forged documents).

U.S. v. Griggs, 24 SCR 6, p. 20. (Counts from separate indictments can be used for multiple counts adjustment).

U.S. v. Hall, 71 F.3d 569 (6th Cir. 1995). (Remand for court to consider coercive effect of spouse abuse on defendant).

U.S. v. Halliburton, et al., 73 F.3d 110 (6th Cir. 1996). (Theft from firearms dealer).

U.S. v. Hancox, 49 F.3d 223 (6th Cir. 1995). (Use of controlled substance means mandatory revocation).

U.S. v. Hayes, 49 F.3d 178 (6th Cir. 1995). (For reckless endangerment enhancement, defendant must know he is fleeing a law enforcement officer).

U.S. v. Horry, 49 F.3d 1178 (6th Cir. 1995). (No enhancement for use of false name unrelated to offense).

U.S. v. Hudson, 53 F.3d 774 (6th Cir. 1995). (Carjacking - brandishing weapon).

U.S. v. Ingram, 67 F.3d 126 (6th Cir. 1995). (Dual rules apply to calculation of weight in LSD cases).

U.S. v. Jackson, 55 F.3d 1219 (6th Cir. 1995). (The preponderance of evidence standard is applicable to a defendant seeking a sentence reduction).

U.S. v. Jackson, 70 F.3d 874 (6th Cir. 1995). (No error in court mandating drug treatment as part of sentence upon revocation of supervised release).

U.S. v. Johnson, 71 F.3d 539 (6th Cir. 1995). ("Special skills" enhancement applies to physician who illegally distributes pharmaceuticals).

U.S. v. Jones, 62 F.3d 851 (6th Cir. 1995). (Enhancement under vulnerable victim provision requires that the defendant knew his victim was particularly vulnerable and chose the victim because of the vulnerability).

U.S. v. Lewis, 68 F.3d 987 (6th Cir. 1995). ("Organizer" or "leader" of criminal activity).

U.S. v. Lindo, 52 F.3d 106 (6th Cir. 1995). (Non-criminal probation violations do not mandate revocation).

U.S. v. Little, 61 F.3d 450 (6th Cir. 1995). (Sufficient evidence in armed career criminal case for upward departure).

U.S. v. Mahaffey, 53 F.3d 128 (6th Cir. 1995). (Drug lab - government proof of production capacity).

U.S. v. McCullough, 53 F.3d 164 (6th Cir. 1995). (Escape from non-secure federal prison work camp).

U.S. McMeen, 49 F.3d 225 (6th Cir. 1995). (Improper enhancement based on mere conclusion in presentence report).

U.S. v. Miller, 56 F.3d 719 (6th Cir. 1995). (Kentucky conditional discharge is a criminal justice sentence).

U.S. v. Organek, 65 F.3d 60 (6th Cir. 1995). (Eighth Amendment analysis; no proportionality analysis unless sentence of death or life without parole is imposed).

U.S. v. Pittman, 55 F.3d 1136 (6th Cir. 1995). (Upward departure may be based on fact that planned crime would have involved multiple victims).

U.S. v. Ragland, 72 F.3d 500 (6th Cir. 1996). (Embezzlement - position of trust).

U.S. v. Reese, 71 F.3d 582 (6th Cir. 1995). (Mandatory sentence for violation of supervised release is not an ex post facto law).

U.S. v. Scott, 74 F.3d 107 (6th Cir. 1996). (Bank fraud).

U.S. v. Smith, 73 F.3d 1414 (6th Cir. 1996). (Drug offense).

U.S. v. Spears, 49 F.3d 1136 (6th Cir. 1995). (Specific findings necessary to support enhancement due to obstruction of justice by perjury).

U.S. v. Thomas, 49 F.3d 253 (1995). (HIV positive defendant - downward departure only if "extraordinary physical impairment").

U.S. v. Ward, 68 F.3d 146 (6th Cir. 1995). (Drug case - "reasonable foreseeability" of drug dealings of co-conspirators).

U.S. v. Williams, 53 F.3d 144 (6th Cir. 1995). (Conspiracy to possess drugs with intent to distribute can result in career offender classification).

U.S. v. Wright, 60 F.3d 240 (6th Cir. 1995). (Bank fraud - calculation of loss).

U.S. v. Wolfe, 71 F.3d 611 (6th Cir. 1995). (Ponzi scheme - calculation of loss).

U.S. v. Zajac, 62 F.3d 145 (6th Cir. 1995). (Enhancement for perjury - preponderance of evidence standard).

BRUCE P. HACKETT
Deputy Appellate Defender
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
Tel: (502) 574-3800
Fax: (502) 574-4052

RECENT DPA HIRES

Teresa Chernosky joined the London Office in January 1996. She received her J.D. from Albany Law School in 1995.

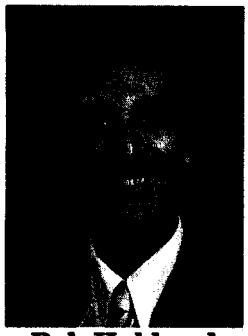
John Helmuth joined the Hazard Office in December 1995. He received his J.D. from the University of Louisville in 1995.

Jeffrey Edwards joined the Protection & Advocacy Division as an Advocatorial Specialist in april 1996. He is formerly the program manager with *Lifeskills, Inc.* in Bowling Green. He received his B.A. in psychology at Kentucky State University in 1989.

Angelia Reid joined the Madisonville Office as a legal secretary in April 1996. She was formerly employed as a legal secretary with the Western Kentucky Legal Services in Madisonville.

In the October 1995 issue of The Advocate we incorrectly omitted the appointment of Robert Laws in the Department's Madisonville Office. We apologize for any inconvenience this omission may have caused.

Robert Laws joined the Madisonville Office as a paralegal in August 1995. He was formerly employed as a paralegal with Western Kentucky Legal Services in Madisonville and worked as a paralegal in the Judge Advocate General's office with the U.S. Marine Corps for 10 years.



Bob Hubbard

Litigating Appellate Counsel's Failure to Raise or Effectively Present Issues on Appeal in Light of *Hicks*

Randy Wheeler

In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the United States Supreme Court, reasoning that appellate counsel must have some discretion in the choice and framing of issues, held that appellate counsel for an indigent is not bound to raise every non-frivolous issue on appeal. This effectively established a double standard, entitling an appellant with means to an attorney who will raise any non-frivolous issues desired, but leaving the poor appellant no such control. See Holdridge, *Whose Appeal is This Anyway?*, *The Advocate*, Vol. 15, No. 3 (June 1993) at 22. Nevertheless, there must be some system of checks and balances which would entitle even the indigent defendant to a forum where colorable issues which were not raised or were improperly raised can be litigated. Recently, the Kentucky courts have had occasion to face this very issue.

Kentucky Opinions on Appellate Ineffectiveness

In an unpublished opinion rendered April 15, 1988, the Kentucky Court of Appeals held that an RCr 11.42 motion filed in the circuit court was not the proper avenue for relief when attacking the effectiveness of an appellate counsel who failed to raise issues preserved at trial. *See Thornhill v. Commonwealth*, 86-CA-2773-MR. Extending that rationale further, in another unpublished opinion rendered September 2, 1988, the Court of Appeals found that in challenging the effectiveness of appellate counsel, the procedure would be the same whether the appeal was dismissed or ran its course to an opinion, *i.e.*, petition the court which had/has jurisdiction to hear the appeal. *See Vunetich v. Commonwealth*, 87-CA-375-MR, citing *Commonwealth v. Wine*, Ky., 694 S.W.2d 689 (1985), *Jones v. Commonwealth*, Ky.App., 714 S.W.2d 490 (1986) and *Ewing v. Commonwealth*, Ky., 734 S.W.2d 475 (1987). Following these opinions, the Supreme Court of Kentucky rendered its initial opinion in *Hicks v. Commonwealth*. See 89-SC-213-TG, September 6, 1990.

Recognizing the constitutional implications raised by the issue of ineffective assistance of appellate counsel, the court, in a well-reasoned opinion, found that although the defendant had a first appeal, the result was the same as if he had no appeal at all because issues of critical importance were not given proper consideration. The Court continued by setting forth the proper standard for judging the claim, stating that in order to prevail on the issue, an appellant must show: "(a) Appellate counsel's performance was so deficient as to prevent proper consideration of issues of critical importance to the success of the appeal, and (b) That more likely than not he would have prevailed upon the appeal except for the ineffectiveness of counsel." *Hicks*, slip op. at page 6.

Departing somewhat from the ineffective assistance standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), reh den 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864, the Court found that a stricter standard of ineffectiveness should be applied: the appellate court must consider what its decision would have been had counsel competently presented the issue(s), *i.e.*, the probability of success. The rationale for this new, stricter standard was that without it, there would never be a final disposition; the last final order would also be subject to challenge. Further, the court required that the petition for relief be filed within a reasonable time (1 year).

Subsequently, in *Vunetich v. Commonwealth*, 88-SC-665-DG, rendered September 27, 1990,

the Court provided additional guidance by establishing an appropriate designation for such a petition *i.e.*, "Petition for Relief from a Judgment which has been Affirmed on Appeal on the Ground of Ineffectiveness of Appellate Counsel," *Id.*, at p. 3 and declaring that a hearing on the motion might not always be required if the reviewing court might discern, from the record, the adequacy of counsel's performance. Unfortunately, this giant leap in Kentucky's appellate jurisprudence was short-lived.

Hicks Revisited

On September 27, 1990, the appellant in *Hicks* filed a Petition for Modification and Extension of the Opinion and Petition for Rehearing. Contrary to the relief sought, however, the Supreme Court of Kentucky completely retreated from its earlier ruling and held "[w]e will not examine anew an appeal reviewed, considered and decided by this Court." *See Hicks v. Commonwealth*, 825 S.W.2d 280, 281 (Ky. 1992).

The Court's conclusion that an appellate court cannot provide a forum on the claim of ineffective assistance of counsel on appeal, was based on a perceived "difference in the situation of a defendant for whom no appeal was ever taken or whose appeal was dismissed solely due to the neglect of counsel and ...[one] whose appeal was completely processed and the judgment affirmed." *Id.* However, to differentiate between defendants who have their appeal dismissed without any consideration and those who had some issues raised and considered on the merits merely begs the question.

In December 1992, the Kentucky Supreme Court similarly backtracked in *Vunetich* after it was also reheard. *Vunetich v. Commonwealth*, 847 S.W.2d 51 (Ky. 1992). Relying on *Hicks*, the Court reached the same conclusions with regard to the effectiveness of counsel during the appeal of an RCr 11.42 motion. The Court denied the need for a remedy because the RCr 11.42 issues had "already been thoroughly reviewed, considered and decided by an appellate court." *Vunetich*, *supra* at p. 52. This decision, to provide a procedure to remedy ineffective assistance of counsel on appeal for only those petitioners whose appellate counsel either failed to take an appeal or acted in a way to cause the dismissal of the appeal, undermines the federal due process right to be heard by the courts of Kentucky in a post-conviction challenge. It also leaves defendants with no state remedy for 6th Amendment violations during the direct appeal.

"The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelley*, 397 U.S. 254, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970), quoting *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). By distinguishing which petitioners can and cannot file a post-conviction motion on the basis of ineffective assistance of appellate counsel, the Supreme Court of Kentucky has drawn an arbitrary and unfair separation, allowing petitioners with specific claims of ineffective assistance of appellate counsel resulting from failure to take an appeal or a dismissal of the appeal to be heard by the courts while, at the same time, disallowing another petitioner the right to be heard in the courts because his ineffective claim is his appellate counsel's failure to raise particular issues.

Further, minimum requirements of federal due process require "the opportunity to be heard in person and to present witnesses and documentary evidence..." *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, *supra*. No less should be required in a post-conviction action challenging the effectiveness of appellate counsel.

Kentucky should provide some forum for a criminal defendant claiming meritorious issues in his case were either not presented, or were presented inadequately by his appellate attorney in order to satisfy the requirements of due process and insure the right to effective assistance of counsel pursuant to the 14th Amendment to the United States Constitution. *See Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1992); *Harris v. Missouri*, 960 F.2d 738 (8th Cir. 1992); *Matire v. Wainwright*, 811 F.2d 1430 (11th Cir. 1987); *State v. Myrnahan*, 584 N.E.2d 1204 (Ohio 1992); *People v. Wolf*, 401 N.W.2d 283 (Mich. App. 1986); *Daniel v. Thigpen*, 742 F.Supp. 1535 (M.D. Ala. 1990).

The denial of a remedy for ineffective assistance of appellate counsel is also a denial of the right to "equal justice" guaranteed by the equal protection clause within the 14th Amendment to the United States Constitution. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). This equal protection guarantee re-

quires that "the indigent be afforded an 'adequate opportunity' to utilize the state process." *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

Actual Practice in Kentucky

Recently, the failure of the state to provide a remedy for ineffective assistance of appellate counsel was raised in federal district court in a capital habeas corpus case. *McQueen v. Scroggy*, No. 87-192 (E.D. Ky.). In that case the district court granted the petitioner an abeyance of his habeas action to return to the state to raise a claim of ineffective assistance on the direct appeal. After the *Hicks* decision, the Kentucky Supreme Court dismissed the ineffective assistance of counsel petition, in effect telling the petitioner there was no remedy for ineffective assistance of counsel on appeal in Kentucky unless he had no appeal in the first place.

Arguing that the denial of a remedial procedure for the constitutional right to effective assistance of counsel on appeal, was in itself a denial of due process, McQueen filed an unsuccessful petition for rehearing and a subsequent petition for a writ of certiorari in the United States Supreme Court which was similarly unsuccessful. Returning to the federal district court, McQueen asserted he was entitled to be heard on the issue of ineffective assistance of appellate counsel in the state courts; relief has thus far been denied but the issue is currently pending before the Sixth Circuit. *McQueen v. Scroggy*, No. 94-6116.

The question of whether the state must provide a remedy for ineffective assistance of counsel for the failure to assert or argue issues adequately on the direct appeal is yet to be resolved by the federal courts and should continue to be asserted until that question is answered. What can be done, when you discover issues which should have been raised on the appeal?

Litigation of the Issue

As a practical matter it is in the best interest of the practitioner to go forward with litigation, at the state court level, asserting the ineffective assistance of appellate counsel claim. In doing so, either your issue(s) will be addressed or at least you have made a record demonstrating the unavailability of relief. In either case you can show that there has been an exhaustion of all issues.

An alternative means of attack would be to raise the ineffective assistance of appellate counsel claim in a federal habeas corpus petition without worrying about asserting it in the state courts. Although normally an issue must be exhausted in the state courts, giving the state the first opportunity to rule on the claim, it may be argued that there is no possibility of that occurring on these claims. The Kentucky Supreme Court has made it clear that it does not intend to provide a remedy in any case where a direct appeal has been heard and considered. In this situation it is futile to even try.

"Futility" provides an exception to the general requirement of exhaustion. *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 993 n.3, 89 L.Ed.2d 123 (1986). A habeas petitioner is only required to attempt remedies that have the potential for relief. If "at the outset...none of the [alternate available post-conviction remedies] is appropriate or effective" to obtain relief, there is no need to pursue those procedures. *Marino v. Ragen*, 332 U.S. 561, 568, 68 S.Ct. 240, 92 L.Ed.2d 170 (1947) (Rutledge, J., concurring). This exception has been held to be satisfied when the highest state court has ruled in another case against the claim the petitioner is pursuing or the courts of the state have withheld a procedure necessary to exhaust. See, *e.g.*, *Brand v. Lewis*, 784 F.2d 1515, 1517 (11th Cir. 1986); *United States ex rel. Cunningham v. DeRobertis*, 719 F.2d 892, 895 (7th Cir. 1983). Under this litigation theory, appellate issues may be raised in federal court even though they were not presented for consideration at the state court level.

Also, although Kentucky's Supreme Court did not come right out and say it, the import of *Hicks* is that the Court considers the entire record thoroughly during its review of the direct appeal including every possible issue. If this is so, there is no need to litigate a claim of ineffective assistance of appellate counsel as the Court would have addressed any conceivable issue during its review. You can then raise the issues which should have been raised on the appeal in a federal habeas corpus petition without worrying about asserting them in the state courts. Then, the denial of a remedy for ineffective assistance on appeal would perhaps

be appropriate and constitutional; there would be no procedural default or waiver of the additional issues which should have been raised during the appeal and thus no lack of exhaustion. The Kentucky Supreme Court's consideration of all possible issues on the merits, even those not raised by counsel, would negate these defenses.

As the United States Supreme Court has stated: "[the] exhaustion doctrine seeks to afford the state courts meaningful opportunity to consider allegations of legal error without interference from the federal judiciary... Under standards established by this Court, a state prisoner may initiate a federal habeas petition '[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated' ...It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); (emphasis added). Under *Hicks*, it appears that the Kentucky Supreme Court's direct and appellate review is of all possible issues. Therefore, such plenary review would satisfy the requirement that the state court be given the first "opportunity" for review.

When the highest state appellate court adjudicates, sua sponte, a claim on the merits or follows a state rule requiring it to review a claim on the merits, exhaustion occurs regardless of whether the petitioner has presented the claim for review. See, *e.g.*, *Sandstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984), cert. den. sub nom. *Butterworth v. Sandstrom*, 469 U.S. 1109, 105 S.Ct. 787, 83 L.Ed.2d 781 (1985); Liebman, *Federal Habeas Corpus Practice and Procedure*, Vol. 1, pg. 49 (1988). In such a situation the court could not have decided petitioner's case without implicitly ruling on the claim now presented by the petitioner in his federal habeas corpus petition. *See Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988); *Lufkins v. Solem*, 716 F.2d 532, 536-37 (8th Cir. 1983). Also, since the Kentucky Supreme Court considers even unraised issues on the merits under its plenary review, there is no "adequate and independent state [procedural] ground" the federal court is required to respect by declining to address the merits of those issues. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594, (1977); *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982).

In some death penalty opinions, the Kentucky Supreme Court has alluded to an "independent" review of the record. See, *e.g.*, *White v. Commonwealth*, 671 S.W.2d 241, 246 (Ky. 1986); *Kordenbrock v. Commonwealth*, 700 S.W.2d 384, 389 (Ky. 1985); *Bevins v. Commonwealth*, 712 S.W.2d 932, 938 (Ky. 1986). Additionally, KRS 532.075 requires the Kentucky Supreme Court to review, automatically, any case in which the death penalty was imposed to "consider the punishment as well as any errors enumerated by way of appeal." The Court must then "render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

This statute can be asserted as additional support for a conclusion that the Kentucky Supreme Court, particularly in death penalty appeals, reviews the entire record for error whether raised or not. After all the statute clearly indicates that a review of at least the punishment will occur regardless of whether an appeal is taken and, therefore, whether any issues are raised at all. Of course, this "independent" review could be of only those factors required by statute and not of all possible punishment issues (although the factors can be construed fairly broadly). Also, the statute could certainly be read to require an independent review of only the sentence and not the guilt phase (although, once again, since the sentence will inevitably depend on most of the guilt phase evidence, a broad interpretation could be asserted).

Vunetich can also be asserted to support the raising of issues from an RCr 11.42 motion appeal in the federal habeas petition even if they were not raised during that appeal. Resting as it does on the *Hicks* decision, the Kentucky Supreme Court has indicated that it considers all possible issues in a post-conviction appeal as well. However, there may be more of a problem, asserting that the defendant was denied his 6th Amendment right to effective assistance during that appeal and that the denial of a remedy constitutes a denial of due process, since the U.S. Supreme Court has held that a post-conviction petitioner is not entitled to the protection of the 6th Amendment. Nevertheless, because Kentucky law requires the appointment of counsel in post-conviction actions,

there may be some argument that the post-conviction petitioner is entitled to effective assistance during his post-conviction and appellate proceedings as a part of due process. See *Coles v. Commonwealth*, Ky., 386 S.W.2d 465 (1965).

Conclusion

It is recommended that counsel continue to pursue ineffective assistance of appellate counsel claims initially in state court proceedings. However, an interpretation of the Kentucky Supreme Court's holdings in *Hicks* and *Vunetich*, and KRS 532.075 in death penalty cases, that all possible issues, even those not raised, were considered on the direct and post-conviction appeals would allow post-conviction counsel to review the record anew for unraised appellate issues and include those in the initial habeas corpus petition. It is certainly reasonable to conclude that *Hicks* means exactly this. If not, it appears that at some point the state will be required to provide a remedy for the failure of counsel to afford the defendant effective assistance on the appeal or the federal court will have to address that issue, at least.

Surely, a state can't be allowed to say that it considers every possible issue on an appeal, even if not raised, to deny a remedy for appellate ineffective assistance of counsel, and, at the same time, maintain that issues were defaulted and not exhausted because they were not raised.

With the federal courts' penchant these days for defaulting claims not properly raised in the state proceedings and their aversion to allowing successive habeas corpus litigation after the issues have been raised later in state court, the significance of *Hicks* cannot be understated.

Of course, this penchant and aversion could eventually lead the federal courts to recognize that appellate default and exhaustion problems will never occur in Kentucky, compelling those courts to conclude that *Hicks* does not mean that all possible issues are reviewed, lest the federal court be required to review numerous "new" issues on the merits. Although the Kentucky Supreme Court is ultimately responsible for determining how Kentucky's law is interpreted, this is why it is still important to raise the denial of appellate ineffective assistance of counsel and a remedy for that issue in federal court as an alternative. Perhaps that resolution will be more palatable by placing the burden back on the state to deal with those issues in the first instance than under the ineffective assistance of counsel umbrella alone.

ROBERT E. HUBBARD
Paralegal Chief
Post-Conviction Services
Department of Public Advocacy
Kentucky State Reformatory
LaGrange, Kentucky 40032
Tel: (502) 222-9441, Ext. 313
Fax: (502) 222-9441, Ext. 356
E-Mail: ksr@dpa.state.ky.us

RANDALL L. WHEELER
Assistant Public Advocate
Capital Post-Conviction
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-3948
Fax: (502) 564-3949
E-Mail: rwheeler@dpa.state.ky.us

Editor, *The Advocate*
Department of Public Advocacy

Dear Mr. Monahan:

I have just read, with pleasure, George Sornberger's articlein the most recent edition of *The Advocate* concerning the Hart County Public Defender, John Niland. As the presiding judge over Hart Circuit Court, I, too, can attest to the fact that Hart County is fortunate to have John as its Public Defender.

Larry D. Raikes, Circuit Judge
10th Circuit Court District
Hodgenville, Kentucky

Public Advocacy Alternative Sentencing Project
Part of the Solution to Jail and Prison Overcrowding

Writing an Alternative Sentencing Plan

The circuit courts of Kentucky now consider a term of community service as an alternative to prison and the availability of a new class of probation "probation with an alternative sentencing plan," under KRS 500 and KRS 533.010. When developing an alternative sentencing plan (hereinafter ASP) keep in mind the 4 goals of an objective alternative sentence:

1. **Retribution** - Remember there are approaches other than prison that can be just as punitive or more punitive to a specific client;

2. **Deterrence** - The threat of imprisonment has little or no deterrent effect to most clients. They or someone they know has been there. But a specific deterrent for a specific client can make a difference;

3. **Rehabilitation** - What factors caused the client to commit the crime in the first place? Then remove or lessen the influence of those factors on an individual basis and;

4. **Incapacitation** - Most of the inmates in prison are serving a sentence range of 1 to 5 years. They serve 20% of their sentences before parole eligibility. A comprehensive and monitorable ASP can incapacitate a client for large amounts of time by keeping track of him.

Areas that should be investigated to meet these goals are the client's: mental health; intelligence; history of substance abuse or use; literacy; educational accomplishments; presence of learning disabilities; physical abilities or disabilities and criminal history. A number of clients coming through the criminal justice system could be classified as Developmentally Disabled (DD), if identified.

A person is considered to have a developmental disability if he/she has a severe and chronic disability which:

(1) is caused by a mental or physical impairment or combination of impairments;

(2) begins before the person becomes 22 years old;

(3) is likely to continue forever; and

(4) requires that the person receive a combination of individually designated services which are needed for a long period of time.[1]

Guidelines that the attorney or the Sentencing Specialist uses to initially determine if the client is DD are:

1. Can the client eat, dress and clean self appropriately?

2. Does the client seem to understand how to change behavior and why the behavior is right or wrong?

3. Is the client able to get around by himself or herself?

4. Is the client able to manage his or her own behavior and protect own self interests?

5. Is the client able to economically provide for self?

6. Is the client able to remember understand and communicate ideas well?

7. Is the client capable of providing for his/her basic needs (food, housing, clothing, etc.) without outside intervention?

If the answer is no to 3 or more of these questions, then your client should be referred to the local comprehensive care for additional review. If your client has a DD diagnosis, she/he is then eligible for a number of services and resources which would become important components of an alternative sentencing plan.

Work on an ASP should begin as soon as client eligibility has been determined. Presently, sentencing specialists do not become involved in an alternative sentencing plan until the defense attorney has determined that the client, based on the evidence as investigated, will be convicted either by plea or jury and that the judge, based upon the findings of guilt, will send the client to prison unless she is provided with an option that will give her a reason to do otherwise.

The first step is an intake interview which usually lasts 24 hours. In this interview, the client's life history, medical and emotional histories, educational history, employment history, family life, military history and other relevent information is obtained. Part of the intake interview is to determine from the client's perspective the client's specific capabilities and problem areas. You also start planning a realistic course of action. Another goal of an initial interview is to gain an understanding of your client. During this initial interview have all needed releases signed. Releases are necessary to gather client information and to verify client information and are required by the agencies having the information you need. You should also use this initial interview to explain to your client what an alternative sentencing plan is, the goals of an alternative sentencing plan, the client's responsibilities under the plan, and that more will be required of him if sentenced to probation with an ASP than if he were to receive a sentence of imprisonment. The client should be kept informed during the plan development process as to the components of the plan and the reasons why. Many times, a client, after becoming aware of the responsibilities he will have under the plan chooses not to have an ASP submitted in his behalf.

Once all the release forms are signed, it is necessary to obtain and document all available records and information on the client. These records, for example, will include educational records or GED certificate, mental health records (include all treatment programs), military records, prior criminal history, relevant Cabinet for Human Resources records, juvenile history and delinquent records, mental retardation documentation, employment records and medical records (specifically head injuries and hospitalizations). This information is not only helpful in documenting what your client has told you but enables you to better understand your client, thus increasing your ability to develop a viable and successful ASP.

The next step is to contact family members and local community members to obtain additional information about the client. This will inform you as to who would be willing to work with your client, give recommendations and to determine the community's attitude towards the client's possible probation. Suggested contacts would be former teachers, pastors, counselors, co-workers, law enforcement officers or any individuals relevant to the client's past or present situation.

Another individual who is contacted but only after consultation with the defense attorney is the victim. Many times, victims, after being informed as to the purpose of the contact and the goals of an alternative sentencing plan have gone along with probation involving an ASP rather than incarceration.

The sentencing specialists after completing the ASP will submit the plan to the defense attorney who then distributes the plan to the judge, the Commonwealth Attorney and the probation officer prior to the sentencing hearing. In most instances the Commonwealth Attorney and the probation officer have had input concerning the plan prior to its completion.

The development and writing of an ASP is a process that averages 2040 hours of work for each client. One's first reaction is the amount of time needed to complete a viable ASP. But an investment of 20-40 hours is small if a successful plan is developed. A small investment when compared to the fact that an individual has been reintegrated into the community as a productive member. When an ASP is accepted by the courts, this allows for the more responsible use of the finite number of prison beds available to the courts. Prison beds cost an average of $55,000-$65,000 each to build and an average of $12,000 a year to maintain.

Remember that an ASP should be creative and tailored to the specific needs of the individual and the concerns in that case. There are no creative boundaries except the boundaries of the law. The purpose of alternative sentencing is to provide viable sentencing options to the court which meet the court's concerns of resti-

tution, retribution, accountability and treatment.

Please refer to the checklist of tasks that must be completed in preparing an ASP.

[1]"*Know Your Rights*," Protection and Advocacy Division, Department of Public Advocacy.

DAVID E. NORAT
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: dnorat@dpa.state.ky.us

KELLY DURHAM
Sentencing Specialist
Department of Public Advocacy
224 Cundiff Square, P.O. Box 672
Somerset, Kentucky 42501
Tel: (606) 677-4129
Fax: (606) 677-4130
E-mail: somerset@dpa.state.ky.us

LYNN ALDRIDGE
Paralegal
Department of Public Advocacy
260 Commerce Street, P.O. Box 50
Eddyville, Kentucky 42038
Tel: (502) 388-9755
Fax: (502) 388-0318
E-mail: eddy@dpa.state.ky.us

ALTERNATIVE PUNISHMENT CHECKLIST

NAME: _____

	Completed:
I. Intake:	
Intake Interview	_____
Release of information forms	_____
II. Documentation analysis:	
Education/GED Certificate	_____
Substance Abuse	_____
Mental Health	_____
Mental Retardation	_____
Medical Records	_____
CHR	_____
Juvenile history	_____
Delinquency Records/priors	_____
Employment	_____
Military Records	_____
Adult prior check (NCIC, Corrections Cabinet, local Court)	_____
III. Social History:	
Family (Spouse & Children)	_____
Family (Parents)	_____
Family (Siblings)	_____
Counselors	_____
Teachers	_____
Ministers	_____
Law Enforcement	_____
Significant Others	_____
IV. Victim:	_____
Comments:	_____
V. Review Alternative Punishment Plan by Client, Attorney, others:	_____
VI. Sentencing Presentation	_____
Comments:	_____
VII. Alternative Punishment Plan Attached Documentation	
Mental Health (MH/MR)	_____
Vocation Education/ Rehabilitation	_____
Substance Abuse (inpatient or outpatient)	_____
Job Placement	_____
Home Placement	_____
Support System	_____
Community Support letters	_____
Family letters	_____
Victim letter or information	_____
Law Enforcement comments	_____
Restitution	_____

Ask Corrections

QUESTION #1:

House Bill 267 passed the General Assembly. This Bill made retroactive a provision to KRS 532.080 relating to persons convicted of persistent felony offender in the first degree based solely on Class D felonies. My client is one such person. When can he expect to have his parole eligibility date recalculated?

ANSWER #1:

House Bill 267 was signed into law by Governor Paul E. Patton in April, 1996, which makes retroactive a provision to KRS 532.080 which exempts persons convicted of persistent felony offender in the first degree basedsolely on Class D felonies from the restrictions set out in Subsection (7). One such restriction was that a person convicted of persistent felony offender in the first degree would not be eligible for parole until having served a minimum term of incarceration of not less than ten (10) years.

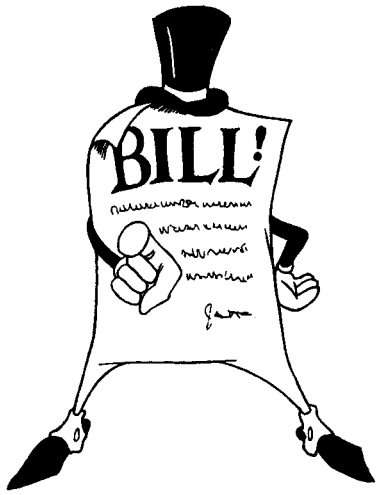
Now that this bill has become law, the departmental staff will proceed calculating eligibility dates for those inmates whose parole eligibility date will be calculated at twenty percent (20%) of the total sentence length.

QUESTION #2:

My client recently lost 4 years non-restorable good time for an assault on a correctional officer. How could he lose that much good time when he has not been in prison long enough to earn that amount of good time? He has a twenty year sentence but has only served two years.

ANSWER #2:

Under 197.045(1) the Department may forfeit any good time previously earned by the prisoner, or deny the prisoner the right to earn good time in any amount, if, during the term of imprisonment, a prisoner commits any offense or violates the rules of the institution.



Upon admission to the prison system, one-fourth (1/4) of a prisoners sentence is deducted in anticipation of good behavior. The allowance will stand as long as clear conduct is maintained. A 20 year sentence allows for five years to be deducted as statutory good time allowance upon initial calculation. He forfeited 4 years of that allowance due to conviction of a rule infraction.

LARRY O'CONNOR
Department Of Corrections
Offender Records Branch, 5th Floor
Frankfort, Kentucky 40601
Tel: (502) 564-2433
Fax: (502) 564-1471

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

Funds for Defense Forensic Pathologists

Sommers v. Commonwealth, 843 S.W.2d 879 (Ky. 1992)

Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987)

Rey v. State, 897 S.W.2d 333 (Tex.Cr.App. 1995)

Harrison v. State, 635 So.2d 894 (Miss. 1994)

Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980)

Terry v. Rees, 985 F.2d 283 (6th Cir. 1993)

> Those who have dissected or inspected many bodies have at least learned to doubt, while those who are ignorant of anatomy and do not take the trouble to attend to it, are in no doubt at all.
>
> - Giovanni Morgagni 1682-1771
> Father of Morbid Anatomy

Forensic pathology is a complex subspecialty of the science of medicine, subject to varying opinions and judgments not subject to mathematical precision, and in many ways a developing science.

Kentucky has 9 state medical examiners. There are two state medical examiners in Frankfort with a third coming July 1, four in Louisville, one in Madisonville and one in Ft. Thomas.

Each year Kentucky has 300 or so homicides. There are medical examinations on all 300 by the Commonwealth's medical examiners. David Jones, director of Kentucky's State Medical Examiner's Office, estimates of these 300 homicides perhaps 25 or 8% are reviewed by a defense-hired forensic pathologist. Mr. Jones believes the reasons for so few is due to the cost involved in securing another pathologist to conduct the review, and the few times there is any real dispute in the findings. Defense experts are obtained, according to Jones, to review toxicology tests, the manner of death and arguments over the time of death.

Another likely explanation for so few reviews by a defense pathologist is the failure of criminal defense attorneys and public defenders to do their job of obtaining expert help to investigate and evaluate the opinions of the state's medical examiner called by the prosecutor. Defense attorneys are also failing to secure the necessary help in cross-examining the state's pathologist and in rebutting the judgments of that expert from the perspective of the defense theory of the case.

The Developmental Limits and Natural Bias of Forensic Pathology

It is vital to appreciate two characteristics of today's field of forensic pathology. First, in most ways pathology in the criminal justice system is in its infancy. "It took man several hundred thousand years to discover that force and its effects can be measured." Luke G. Tedeschi, *The Wound: An Introduction to Related Issues*, Chapter 1 in Forensic Medicine (1977). It was many years before courts were willing to entertain a pathologist's opinion. Pathology

struggled to be recognized as a field relevant to medicine. *See generally* Russell C. Maulitz, *Morbid Appearances: The Anatomy of Pathology in the Early Nineteenth Century* (1987). The science of forensic pathology is far from being fully developed. It was only in 1958 that the American Board of Pathologists recognized the subspecialty of forensic pathology. Curran, McGarry, Petty, *Modern Legal Medicine, Psychiatry and Forensic Science* (1980) at 23. The complex articles in the pathology journals attest to the many remaining mysteries of death. At best, lawyers receive elementary training in this specialty.

Secondly, forensic pathology has been primarily fostered and driven by police needs. "Forensic scientific work has continued to be supported in the United States primarily by law enforcement agencies with the continued stimulation and encouragement of the Federal Bureau of Investigation in the Department of Justice." *Id.* at 17. While this is understandable, primary development of a science through the filter of the law enforcement lens should give pause to those relying on the results of the pathologist called by the prosecutor. The adversary criminal justice system relies heavily on vigorous testing of opinions and testimony by the advocate for the citizen-accused who faces the loss of his liberty.

Complex Subspecialty

The basic questions a forensic pathologist seeks answers for are:

1. Who (?) is the victim (sex, race, age, particular characteristics).

2. When (?) the death and injuries occurred (timing of death and injuries).

3. Where (?) (scene and circumstances of death).

4. What (?) injuries are present (type, distribution, pattern, path and direction of injuries).

5. Which (?) injuries are significant (major vs. minor injuries, true vs. artefactual or postmortem injuries).

6. Why (?) and how (?) injuries were produced (mechanism and manner of death).

Glenn M. Larkin & Cyril H. Wecht, *Use of Forensic Pathology in Defending Criminal Cases* in Forensic Sciences (1995).

We need look no further than the information recommended to be contained in an autopsy report to appreciate the complex nature of this science. Bernard Knight in *Forensic Pathology* (1991) lists the data that must be contained in an autopsy report in the order he views as logical:

"(1) Full person details of the deceased subject, unless unidentified. This includes the name, sex, age, occupation, and address.
(2) The place, date, and time of the autopsy.
(3) The name, qualifications, and status of the pathologist.
(4) Persons present at the examination.
(5) Usually, the authority commissioning the autopsy.
(6) A record of who identified the body.
(7) The name and address of the deceased subject's regular (or last) medical attendant.
(8) The date and time of death, where known.
(9) The history and circumstances of the death. The inclusion of this on the actual autopsy protocol may not be permitted in some jurisdictions as it is hearsay evidence, but unless expressly forbidden it should be included as it remains a record for the pathologist's own files. It also justifies his eventual cause of death in those cases where the morphological findings are scanty or even absent, as his conclusions will be strongly influenced by his pre-knowledge of the mode of death. When the autopsy report is converted to a statement or deposition for legal use, this history may be omitted by those legal authorities responsible for transcribing the document.
(10) External examination.
(11) Internal examination.
(12) A list of specimens and samples retained for further examination. Those handed to other agencies, such as the forensic science laboratory, should be formally identified by means of serial numbers and the name of the person to whom they were handed.

(13) The results of further examinations such as histology, microbiology, toxicology, and serology. When the main report is issued soon after the autopsy, these will not yet be available and a supplementary report will be necessary.

(14) A summary of the lesions displayed by the autopsy (often coded for departmental computer retrieval).

(15) Discussion of the findings, if necessary in the light of the known history.

(16) An opinion as to the definite or most likely sequence of events leading to the death.

(17) A formal cause of death, in the format recommended by the World Health Organization, suitable for the completion of a death certificate.

(18) The signature of the pathologist.

The 'External Examination' should record those details described earlier in the chapter, the major items being:

(a) The height, weight, and apparent state of nutrition.

(b) The presence of natural disease such as oedema, abdominal swelling, cutaneous disease, and senile changes.

(c) Identifying features such as skin colour, tattoos, scars, deformities, dentures, eye colour, and hair colour. When identity is an issue, naturally this section will be greatly expanded.

(d) The presence of rigor, hypostasis, decomposition, and abnormal skin colouration. Body and ambient temperature should be recorded where appropriate, with calculations concerning the estimated range of times since death, though in criminal cases this aspect may well be deferred until the final 'Summary and Conclusions.'

(e) The condition of the eyes, including petechiae, arcus senilis, pupil size, and the condition of iris and lens.

(f) Condition of mouth and lips, including injuries, teeth, and presence of foreign material.

(g) Condition of external genitals and anus.

(h) Listing and description of all external injuries, recent and old.

The internal examination records all abnormalities, usually in a conventional sequence such as:

(a) Cardiovascular system: heart weight, any dilatation, ventricular preponderance, the pericardium, epicardium, endocardium, valves, coronary arteries, myocardium, aorta, other great vessels, and peripheral vessels.

(b) Respiratory system: external nares, glottis, larynx, trachea, bronchi, pleural cavities, pleura, lungs (including weight), and pulmonary arteries.

(c) Gastrointestinal system: mouth, pharynx, oesophagus, peritoneal cavity, omentum, stomach, duo-denum, small and large intestine, liver (weight), pancreas, gallbladder, and rectum.

(d) Endocrine system: pituitary, thyroid, thymus, and adrenals.

(e) Reticulo-endothelial system: spleen (weight), and lymph nodes.

(f) Genitourinary system: kidneys (weight), ureters, bladder, prostate, uterus, ovaries, and testes.

(g) Musculoskeletal system: skull, spine, remaining skeleton, and musculature where necessary.

(h) Central nervous system: scalp, skull, meninges, cerebral vessels, brain (weight), middle ears, venous sinuses, and spinal cord (when examined)."

Id. at 31-32.

Knight also indicates that it is necessary to record the descriptive facts "*at or immediately after completion of the autopsy*. It is vital that no significant interval - certainly no more than few hours - be allowed between the physical performance of the examination and the setting down of the objective findings." *Id.* at 32.

> Once you are open to questioning time-honored rituals and practices you find that one question leads to another.
>
> - Carl Sagan (*Cosmos*)

The Need for Defense Perspective

It is likely that many homicides have no contested issues about the cause of death. However, it defies probability that 92% of the homicides in Kentucky have no need for the expertise of a forensic pathologist in defense of the criminal prosecution, especially considering the developmental limits and the natural bias' of the field.

We need look no further than recent experiences to appreciate the extent of the limitations and the bias' of the field. In *Coroner at Large* (1985), Thomas T. Noguchi, M.D., former Chief Medical Examiner of Los Angeles, County, with Joseph DiMona, explore a series of controversial cases, including Claus von Bülow, Jean Harris, Dr. Jeffrey MacDonald, and Buddy Jacobsen. Noguchi reviewed the forensic evidence in these four cases and found that "chillingly, it was possible that such forensic evidence might not have been correctly understood by juries. If so, innocent men and women had been convicted of crimes they did not commit." *Id.* at 9. "[F]orensic science had provided the evidence that really convicted all of the defendants: an insulin encrusted Hypodermic needle discovered in Claus Von Bülow's 'little black bag'; Jeff Macdonald's pajama top; the bullet wounds in Dr. Tarnower's body; the bullet shell found in a wastebasket in Buddy Jacobsen's apartment." *Id.* As an example, Dr. Noguchi believes islet cell hyperplasia, a natural chemical abnormality in the body, was the cause of the insulin surge that vaulted Sunny into the coma, not insulin injected by Claus. His analysis across many cases is a call to honor the difficulties of forensic evaluation by medical examiners, and to pause before accepting at face value the conclusions of pathologists testifying for the prosecutor.

There are no neutral, unbiased experts who can serve the interests of the adversarial sys-- tem. "Some scientific and technical areas, such as medicine, are not so precise or exact as to permit *one* opinion. If this fact is not made clear to the jury, the opinion of a court-appointed expert may be accorded too much weight. 'Impartial' does not necessarily mean 'right' when looking at a question where experts may differ as to the answer. Finally, it should be remembered that court experts are human beings and are not without their own 'biases' concerning their expert opinions." Oliver C. Schroeder, *Court Appointment of Experts*, Chapter 18 in Forensic Sciences (1995).

Judgment, Opinion and Misconceptions

We should not be surprised that different qualified forensic pathologists can arrive at different, conflicting conclusions. After all, this is a complicated, developing science. The very reason for seeking out an expert is to obtain the professional *judgment* based on experience, specialized education, and the inferences made from those. If the matters in dispute were obvious to all, a highly trained expert would not be needed. Different professionals often have different judgements about the meaning of "facts."

Evaluations done by forensic pathologists has two obvious realities: "first, the quality of the phenomenon observed; second, the character and quality of the observer. The phenomena we are called upon to consider in forensic medicine are often indefinite, shadowy, and illusory. The observer himself is hampered by the uncertain evidence of his more or less imperfect senses, sometimes by his undisciplined intellect, by the perversions of hazy memory, by the limitations of his general knowledge and experience, perhaps by the modifying influence of emotions, and, very rarely, it is true, by a tendency to deliberate deception and misrepresentation of the matters under consideration. We are constantly confronted, in our study and practice of medicine, with the mass of our ignorance of the things yet to be known, and with the defects and limitations of the students of these things." Peterson, Haines, Webster, *Legal Medicine & Toxicology* (1923) at 19.

Medicine is far from an exact science. "From the very nature of the subject, medical opinions cannot be formulated with absolute mathematical certainty. Despite the enormous advances made by medicine in recent years, there remain vast areas, including the sequelae of trauma, which are today undergoing constant study, experiment and thoughtful revision.... [I]n a substantial number of individual cases equally competent and equally honest physicians can and do disagree." Elwood S. Levy, *Impartial Medical Testimony-Revisited*, 34 Temple L.Q. 416, 419-20 (1961).

The adversary system recognizes the limits of science and the difficulty of ascertaining "the truth" so it provides for each side of the dispute to have its expert present the judgment of science through the lens of that side's theory of the case. The factfinder is immensely benefitted.

Qualified professionals who make judgment are at times in error or are operating under misconceptions. Patrick E. Besant-Matthews, *Examination and Interpretation of Gunshot Injuries* in The Pathology of Trauma (2nd ed. 1993) illustrates the dangers of misconceptions:

"There are those who believe that exit wounds are always larger than those of entry; this is untrue and the misconception is a frequent source of serious interpretive errors. There are several reasons why an entry wound may be larger than an exist, including:

- Following a contact discharge, as above, in which the soft tissues at the entry are torn by in-rushing gases.
- When a bullet is yawning as it enters perhaps because of striking something *en route* to the target.
- When an entire bullet enters and breaks up with only a portion of it exiting.
- Tangential entry wounds with focal avulsion of tissue and bone.
- Bullets entering through folded or creased skin but exiting through a less complicated surface.
- Combinations of the above.

> There is a principle which is a bar against all information, which is proof against all arguments and which cannot fail to keep a man in everlasting ignorance - that principle is contempt prior to investigation.
>
> - Herbert Spencer

Size alone should never be used as the determinant of entry or exit: it is no more than one of many features which should be considered. The size of wounds must be recorded carefully but the decision as to whether they are of entry or exit type is to be made on the basis of their total characteristics and the company they keep." *Id.* at 63.

Kentucky Cases

The Kentucky Supreme Court has recognized the need for funds for a defense forensic pathologist. In ***Sommers v. Commonwealth***, 843 S.W.2d 879 (Ky. 1992) the defendant was convicted of two counts of murder and sentenced to 1000 years. The prosecutor's experts were of the opinion that the likely cause of death was suffocation prior to the fire.

In holding that the "defense demonstrated 'reasonable necessity,' and was entitled to the assistance of an independent pathologist and an independent arson expert or the equivalent," *Id.* at 885, the Court noted the following factors:

- "another expert might well find the circumstances consistent with a cause of death other than intentional suffocation, *e.g.*, accidental death resulting from an accidental fire"; *Id.* at 884;
- "the pathologist's report was couched in much technical language, it was argued [by the defense] that an expert was necessary in order to understand the report and to identify any inconsistencies or exculpatory facts." *Id.*;
- the defendant denied committing both killings;
- there were no eyewitnesses;
- at trial, the prosecution called 6 experts, including the chief medical examiner for the Commonwealth and the coroner; and,
- "the state's witnesses had demonstrated an unwillingness to cooperate with the defense." *Id.*

The Court also noted that the defense indicated a need for a forensic pathologist in order to "effectively investigate the circumstances,

choose a course of defense, cross-examine the state's witnesses, or challenge the validity of their opinions." *Id.*

Sommers distinguished ***Smith v. Commonwealth***, 734 S.W.2d 437 (Ky. 1987) where the Court found no error in denying the defendant funds for a pathologist. In *Smith*, the defendant admitted he shot and killed a number of people, and the firearms expert cooperated with the defense. *Sommers*, *supra*, 734 S.W.2d at 883. More importantly, the defense in *Sommers* "were at pains to demonstrate to the trial court the necessity for defense experts." *Sommers*, 843 S.W.2d at 884. The effectiveness of the threshold showing for funds by the defense is likely the real difference between the holding of *Sommers* and *Smith*.

Other Cases

Cases from Texas, Mississippi and the Fourth and Sixth Circuits agree with the Kentucky Supreme Court's holding in *Sommers*.

In ***Rey v. State***, 897 S.W.2d 333 (Tex.Cr.App. 1995) Johnny Rey was convicted of murder during a burglary and was sentenced to death.

At the end of the first day of testimony of the guilt phase of the trial, the defense attorney asked for appointment of an independent forensic pathologist to assist in preparing and presenting the defense. The judge reserved ruling until the state's pathologist testified.

The state argued that there was no need for a defense pathologist since "the opinion of a pathologist is not comparable to the opinion of a psychiatrist" and therefore under *Ake* a pathologist was not as important as a psychiatrist in conveying to the factfinders information about the defendant's behavior and culpability. *Id.* at 337. Because a "pathologist's opinion is based upon 'concrete observations' as compared to the opinion of a psychiatrist which is based upon more uncertain variables," *Ake* is inapplicable according to the state's argument. *Id.* at 338.

Contrary to this contention, the Court found *Ake* applicable to pathologists because "pathology, like psychiatry, is a subspecialty of the science of medicine. Medicine in any of its subspecialties eludes mathematic precision, as evidenced by the need for a 'second opinion' with regard to any important medical question." *Id.* The Court observed that "causation or mechanism of death are examples of important medical questions addressed by pathologists that require more than objective or rote determination." *Id.*

The defense's theory of the case in *Rey* was that the deceased died from a heart attack, not blows to the head. The defendant confessed that he and the co-defendants did not intend to kill the deceased but struggled with him, kicking him in the head, and leaving him alive as they fled. The defense hoped "to establish reasonable doubt on the issue of intent and/or deliberateness by showing that [the defendant] could not have foreseen that his actions would result in the death of the deceased." *Id.* at 341. The state's pathologist found that the previous open heart surgery of the deceased did not aggravate or directly affect the death.

In support of his motion for an expert, the defense attorney attached an affidavit of a co-defendant's pathologist who said he disagreed with the state pathologist's finding that the death was caused by the blows. This pathologist also found that in all likelihood the deceased would have survived the blows but for his diseased heart. He also noted that the state pathologist did not take notes during the autopsy and had erased the audio tape of his observations. Neither the photos nor the report of the state pathologist documented findings about the condition of the heart, skull or brain that would allow a pathologist to rule out the heart as a contributing cause of death. *Id.* at 340-41.

Also, the defense attorney's cross-examination of the state pathologist revealed that the findings of the state pathologist in another case were found to be invalid by another pathologist.

The Court found that the defense "clearly established that the mechanism of death was to be a significant factor at trial." *Id.* at 342.

The State argued that there was no prejudice to the defense since the co-defendant's pathologist testified to as much. *Id.* at 342.

Rey determined that "the appointment of an expert under *Ake* is not only for that expert's testimony" at trial. *Id.* It is also for an expert

who helps identify the weaknesses in the prosecution's case, the strengths of the defense case and one who assists in cross-examining the state's expert. *Id.* at 343. *Rey* was entitled to his own pathologist to provide all these services. Further, the court found this error so significant that it was not subject to harmless error analysis: "the denial of the appointment of an expert, consistent with *Ake*, amounts to structural error which cannot be evaluated for harm." *Id.* at 346.

In ***Harrison v. State***, 635 So.2d 894 (Miss. 1994) the defendant was sentenced to death for killing and raping a 7 year old. A forensic pathologist was a critical witness at the trial. His opinions included:

- stab wounds were caused by something with a long tapering point and sharp edge;
- an injury was consistent with a downward blow from the blood-stained metal canister recovered by the police;
- the vaginal and anal injuries were caused by the forceful penetration of a penis;
- the victim was alive and conscious when injured; and,
- strangulation was the cause of death.

Id. at 897.

Since the defense had access to the state's expert pathologist prior to trial and had the right to cross-examine him, the state argued that the defense was not entitled to funds to hire an expert.

Contrary to this contention, the Court held that the defendant was entitled as a matter of due process and fundamental fairness to an independent pathologist to rebut the state's evidence. *Id.* at 902. The Court reasoned that the state pathologist was "very important to the state's case," and the expert provided the only evidence on rape by stating a penis caused the injuries. *Id.* The Court noted that the expert the defense sought to employ stated in an affidavit "that a pathologist cannot determine to a reasonable medical certainty that a given injury could only have been caused by a human penis." *Id.* n.2.

In ***Williams v. Martin***, 618 F.2d 1021 (4th Cir. 1980) the defendant shot and paralyzed the victim who died 8 months later. The state medical examiner believed that death was caused by a pulmonary embolism resulting from a thrombosis that formed in her leg due to immobilization caused by the paralysis from the gunshot wound.

Defense counsel requested an independent pathologist since medical books said there are numerous causes of a pulmonary embolism, and since 8 months passed from the shooting until the death. These facts raised a complex issue of medical causation in this case where the defense was self-defense.

The South Carolina Supreme Court found no error in denying funds for the defense expert since: 1) the autopsy demonstrated to the highest possible degree of medical certainty that the gunshot wound caused the death; and 2) there was no showing that another pathologist would have aided his defense.

The Fourth Circuit disagreed and held that the defendant was denied equal protection, due process and effective assistance of counsel by the failure to be provided a pathologist for two reasons. There was a substantial question over an issue requiring expert testimony for its resolution, and the defense could not be fully developed without professional assistance.

In ***Terry v. Rees***, 985 F.2d 283 (6th Cir. 1993) the defendant was sentenced to life for the murder of a 14 month old girl. The trial judge refused to give the defense the funds to hire a pathologist to rebut the prosecution's expert's finding that the death was caused by blunt force trauma to the head.

The federal district judge followed the procedure outlined in *Williams v. Martin, supra* and remanded the case to the state court ordering it to appoint an independent pathologist to determine the victim's cause of death. That expert agreed with the state expert's finding and did not support the defense of an accidental fall. The district judge ruled the error harmless and the Sixth Circuit agreed.

Significantly, the Sixth Circuit stated, "Criminal trials are fundamentally unfair if a state proceeds against an indigent defendant without making certain that he has access to the raw

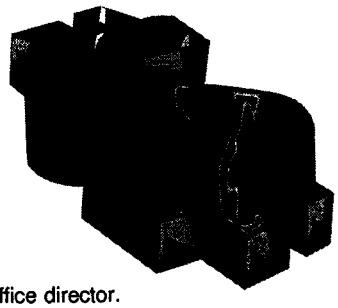
materials integral to building a defense. *Ake v. Oklahoma....*" *Terry, supra*, 985 F.2d at 284.

While it was ultimately found harmless, the Sixth Circuit ruled that "Terry was deprived of the opportunity to present an effective defense when he was denied an independent pathologist in order to challenge the government's position as to the victim's cause of death." *Id.*

Conclusion

Greater awareness by the bench and bar of the realities of forensic pathology will no doubt lead to more funds for defense pathologists being authorized, especially in view of the Kentucky and national caselaw.

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



Kentucky Salaries:
Prosecutors vs. Public Defenders

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

A full-time prosecutor makes over $30,000 more than a full-time public defender multi-county office director.

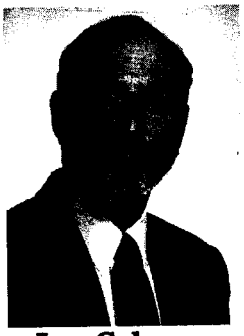
A February 15, 1996 letter from the Department of Local Government relates what the salaries for Kentucky Commonwealth Attorneys and County Attorneys as adjusted for the consumer price index changes pursuant to *Matthews v. Allen*, 360 S.W.2d 135 (Ky. 1962).

Salaries for full-time public defenders are set by the Personnel Department. A DPA directing attorney is in charge of a field office which covers multiple counties and cases in both district and circuit court. Since 1993, the prosecutor's salary has increased $5,832. Since 1993, DPA's directing attorney salary has increased $1,764.

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

Prosecutors & Defenders	1996	1995	1994	1993
1) County Attorney Prosecutorial & Civil Duties	$77,294	$75,361	$73,411	$71,462
2) County Attorney Prosecutorial Only	$46,376	$45,216	$44,047	$42,877
3) Commonwealth Attorney	$77,294	$75,361	$73,411	$71,462
4) *Part-Time* Commonwealth Attorney	$46,376	$45,216	$44,047	$42,877
5) DPA Directing Attorney Full-time Starting	$36,984	35,220	$35,220	$35,220
6) DPA Directing Attorney Full-time, Current Average	$46,376			

Manipulated Medicine:
Understanding Sexual Abuse Examinations



Lee Coleman

Given the difficulties inherent in proving sexual abuse of young children, it is not surprising that when the new sexual abuse prevention movement got underway, police and prosecutors would hope for clear medical indicators of whether or not abuse had occurred. If a child showed medical evidence of sexual trauma, the thorny problem of whether a jury should convict a person based on one person's word over another would largely be eliminated. Just as understandable was the desire of the pediatric community to offer a helping hand in responding to sexual abuse of children.

As early as the mid-1970's, a few doctors were looking more closely than ever at the genitals and anuses of boys and girls whom someone thought had been sexually abused. What happened next will, I believe, qualify as one of the major medical debacles of modern times, for without any evidence a handful of doctors started to claim they had found subtle indicators, never before appreciated, of genital or anal trauma.

By far the most influential of these doctors was Bruce Woodling, a family physician in Ventura, California. He claimed that by looking for certain subtle clues he could determine if trauma had occurred.[1] A hymen that was too "thickened," or had a "rounded" edge, or had an indentation here and a bump there; tiny blood vessels which seemed irregular; or an anus which seemed too relaxed, or had a vein which seemed too large -- these and other variations were said by Woodling to show prior abuse.

Woodling did something else which we believe added to his appeal. He urged his colleagues to heighten their powers of observation by the use of a *colposcope*, a binocular low power (5 to 15x) magnifying instrument which gave an enlarged view of the anal and genital region and also had an attachment for a camera.[2] This expensive instrument, which made everything in view bigger but did nothing to test whether Woodling's claims were correct, gave the new sexual abuse examinations a mystique, but provided no scientific basis whatever.

Many of Woodling's observations, his alleged "microtrauma," were barely visible to the naked eye, but when magnified and photographed they seemed to take on a heightened significance. Tiny variations of just a few millimeters, perhaps one sixteenth of an inch, loomed large indeed. Little bumps became "mounds." Insignificant depressions became "fissures" or "healed tears." Pale areas became "scars." Patterns of blood vessels were said to show "neovascularization," implying that an injury was in the process of healing. Tiny bands of tissue became "synechiae," considered by Woodling to be scars left over from prior injury.

The fact that no one had bothered to take a magnifying glass to the genitals and anuses of *normal*, *healthy*, *nonabused* boys and girls didn't seem to bother Woodling or his eager students. Instead, he became an overnight sensation, eagerly sought out by prosecutors not only to testify in trials, but also to teach more and more doctors and nurses how to see the "microtrauma" which he had discovered.

As support for his claims, Woodling offered only the experience he had gained in examining children brought to him in abuse investigations. This left unanswered, of course, the question of how he knew from his experience if his opinions were correct. How, in other words, could he know when a child he pronounced as traumatized had in truth been injured? Certainly the legal outcome of the case was no guarantee, for Woodling's opinion was itself bound to strongly influence the outcome, there-

by proving nothing about the scientific validity of his claims.

Given the climate at the time, no one raised such questions. Woodling was assumed to have what everyone wanted -- the magic markers for sexual abuse. It was the start of an exciting new subspecialty of pediatrics. Those doctors and nurses who absorbed Woodling's ideas were considered, simply by having attended one of his workshops, authorities on the detection of child sexual abuse.

When these new recruits went back to their communities, they trained others. Woodling's uncorroborated notions became the conventional wisdom among members of newly formed sexual examination "teams," with names such as SART (Sexual Assault Response Team). They became the SWAT teams of the child sexual abuse prevention movement, with the medical firepower to overcome both the denials of child molesters and the tricks of sleazy defense attorneys. Law enforcement and child protection agencies were delighted to accept the central idea behind such teams, that ordinary physicians didn't have the skills to recognize the subtle indicators of sexual abuse.

And with few exceptions, those who should have objected most strenuously to these unscientific developments, the pediatricians, were simply too frightened to say anything.[3] A polite refusal was the usual response on those unusual occasions when a pediatrician *not* associated with a sex abuse team was asked to examine a child. Reminiscent of the McCarthy era, no one wanted to be seen as "soft on child molesters."

Having studied hundreds of examination reports done by Woodling's proteges, I have seen that rarely do the children being examined have fresh injuries. Instead, *interpretations* of tiny variations of anal or genital anatomy are offered, leaving open the question of whether normal, non-abused children show the same variations that Woodling said could only come from abuse.

The leaders of these new medical teams admitted, but only amongst themselves, that Woodling's interpretations were not supported by any research data. At meetings behind closed doors, they acknowledged the fact that no one had gathered data on the range of normal anal and genital anatomy in children of different ages. Without such data, everything Woodling had taught, everything now being disseminated in second and third generation workshops, and most important, everything being claimed in expert medical testimony in thousands of criminal and juvenile court proceedings, was scientifically worthless.

All across the country doctors and nurses offered testimony that their collective *experience* allowed them to pick out abuse victims. The fact that they, just like Woodling, had no *corroboration*, and therefore might be making the same mistaken judgments over and over, rarely made any difference in the outcome of legal cases. It was the rare defense attorney who understood the deception, usually arguing that *someone else* abused the child. Such a defense was hardly likely to impress a judge or jury, which had, of course, no chance whatever to see through the medical manipulations in the case.

It wasn't until the late 1980's, after nearly a decade of misinformation, that even a beginning was made towards exposing what was happening. We are still at the beginning.

Finding the Way Out

The best place to begin sorting out the truth of the physical evidence in a child sexual abuse case is with the use or misuse of words. First, while medical findings may in some cases provide important evidence, only rarely will medical findings alone *establish* that sexual abuse has occurred. The presence of sperm or disease transmitted only through sexual contact, for example, shows that *someone* is guilty of sexual abuse of the child.

With these exceptions, medical findings may be important but they do not add up to a "diagnosis" of sexual abuse. Sexual abuse is something which *happens*, but doctors do not determine if events have happened, only whether there is evidence of pathology. Sexual abuse may be *alleged*, and if proven is a *fact*. Medical findings may help establish the fact, but unless the findings can *only* be the result of sexual abuse, there is no justification for labeling the findings as a "diagnosis." Too numerous to count are the cases I have seen in which a doctor makes a "diagnosis" of "alleged sexual abuse."

Another misuse of medical language is the use of the word "history" instead of "accusation" or "allegation." Typically, medical examiners repeat what they hear from police, social workers, parents, or the child, and record this as the "history." But in medicine, "history" means information given by the patient which is assumed to be true, and this information may influence greatly the doctor's conclusions about what is causing the problem. While it is reasonable, for example, for a doctor to accept at face value a patient's statements of a history of epilepsy, it is obviously *not* appropriate to do the same when someone claims, but others deny, that a crime has taken place.

Statements about abuse are *accusations*, which may or may not be true. Since the doctor who repeats the accusation is clearly *not* making a *medical* finding, it is highly misleading to base any medical conclusions on someone's allegations. Labeling accusations as "history" gives them the look and feel of medical validation, something which is certain to promote injustice.

This, however, is exactly what is happening in many cases. Logic and common sense have, in fact, been so lacking in many child sexual abuse cases that a normal examination becomes evidence for sexual abuse! This linguistic *tour de force* comes about by the use of the words "consistent with."

A normal examination is, of course, "consistent with" sexual abuse because fondling and perhaps even some kinds of penetration will not leave behind any evidence. Even with a child injured by abuse, if the exam is done months later a normal examination may only mean that the injuries have healed without tell-tale signs. Sexual abuse specialists are eager, and appropriately so, not to have such normal findings convey the impression that abuse could not have occurred.

It is true, therefore, that a normal examination *is* consistent with abuse, but in the same sense that red hair is consistent with alcoholism. There is certainly no reason a redhead couldn't be alcoholic, but it is hardly *evidence* for such. Yet unless these things are pointed out to a jury, an innocent person may be convicted of child sexual abuse because a doctor who merely is informed of the accusation and whose examination findings are normal testifies that he or she made the following conclusion: "1. History of sexual abuse, 2. Examination consistent with the history."

When I have testified about such confusion, the claim is sometimes made that of course everyone understands that a normal exam said to be "consistent with" sexual abuse is not *evidence* for sexual abuse. Despite such reassurances, police and child protection investigators usually fail to understand the emptiness of such conclusions, believing instead that the examiner's findings support the allegation of sexual abuse. This is bound to profoundly influence their behavior during the crucial time when a vigorous investigation should be taking place.

And I ask why, except for reasons of bias in favor of prosecution, sexual abuse examiners would use such language when they could simply state, "Normal examination, which *neither confirms nor denies the possibility of sexual abuse.*"

Doctors associated with the new "sex abuse teams" have also caused a lot of confusion by their misuse of the word "normal." In many cases, the impression is left that there is only *one* normal hymen, or *one* normal anus, when in fact these structures, like the rest of the body, are not identical from person to person. Noses and ears are not the only parts of the body which show *variations* within a general pattern.

If, therefore, an expert puts up a single picture of a *normal* child's genitalia and argues that this is different from what was seen with the alleged victim, the truth is that no *one* picture could show all the possibilities of a normal child. The question such testimony evades is whether or not the alleged victim's examination findings have been seen in children who have not been abused.

This is, of course, what was missing from the beginning. Woodling and all those who so readily absorbed and then repeated his interpretations, had no *evidence* for their claims because they had not bothered to compile information on non-abused children. They *presumed*, to give just one example, that the uninjured hymen was always thin, with a smooth rim, but had no good reason for such a presumption.

When all else fails, defenders of such claims often throw another ingredient into the stew, by claiming that their medical colleagues in the sexual abuse prevention movement agree that a particular finding shows abuse. *Consensus*, in other words, is offered as proof.

But science is not democracy. Just as one's *experience* does not guarantee scientific validity, unless the experience has been coupled with corrective feedback, the fact that the new sexual abuse examiners reach agreement proves nothing. As will become clear in a moment, when scientific research finally *was* done, the *consensus* born out of the uncritical acceptance of Woodling's claims,turned out to be wrong.

Research: The First Wave

The first study to look at the range of anal and genital anatomy in non-abused children was done by McCann and his colleagues.[4,5] The results were hardly surprising, showing as they did that hymens and anuses showed a lot of variation. As McCann admitted at a medical meeting, he and his colleagues had confused an *idealized* view of genital anatomy with the variations which they should have expected.

In brief, McCann showed that every one of Woodling's "indicators" of trauma -- from rounded hymenal edges, to hymenal notches, to "neovascularization" or "synecchia," were being overinterpreted. Instead of being signs of healed injuries, they occurred in non-abused children with a frequency that made it impossible to say that only sexual abuse could explain their presence.

Many sex abuse examiners, panicked by these findings, argued that McCann's results were flawed because he couldn't *prove* that all of the children were non-abused. This concern was not justified, since at most the inclusion of some molested children would only mean that, for example, instead of two-thirds of the non-molested children showing intermittent anal dilation, the figure might be one half. This would still show that intermittent anal dilation is not limited to abused children, but occurs just as often in non-abused children.

Another important study was done by Emans and her colleagues.[6] They compared three groups of girls: abused (according to a referring agency); those with neither a history of abuse nor any medical problems; and those with history of genital complaints but no known abuse, Their findings: "The genital findings in groups 1 and 3 [abused vs. nonabused with history of genital complaints] were remarkably similar... There was no difference ...in the occurrence of friability, scars, attenuation of the hymen, rounding of the hymen, bumps, clefts, or synechiae..." Once again, there didn't seem to be specific changes which could separate molested from non-molested children.

Emans claimed, however, that she saw "healed tears" only in the hymens of the sexually abused girls. But the only other group looking at normals (McCann) didn't agree. At a meeting of his colleagues in 1988, he said, "When does normal [hymenal] asymmetry become a cleft? I don't know..." What Emans claimed she could only see in abused girls, McCann saw in nonabused girls.

Emans also claimed that only the abused girls showed scars which ran from the hymen to the vaginal wall. These were the "synechiae" which Woodling had claimed were from prior sexual injury. Once again, however, McCann's findings differed dramatically. Rather than these tissue bands being absent in his non-abused subjects, he told his colleagues, "...in the literature, they talk about...intravaginal syneechiae...we saw them everywhere...We couldn't find one that we couldn't find those ridges..."

Another approach had a simple, direct appeal. An examiner could simply measure the size of the hymenal opening to the vagina. Hendrika Cantwell, a pediatrician in Denver, had claimed in 1983 that by doing this on a number of girls she had learned how to distinguished abused from non-abused girls. She offered the rather remarkable claim that in girls up to thirteen years, an opening larger than four millimeters (slightly larger than 1/8 inch) was strong evidence of prior penetration.[7,8]

Once again, the few examiners attempting to research the issue came up with contradictory findings. Emans' study had shown no such thing, and in an article criticizing reliance on this type of measurement she pointed out that in order to inspect the area, the examiner must apply lateral traction to the tissues in front of vagina. This pulling can enlarge and distort

the appearance of the vaginal opening.[9] McCann in a different study showed the same thing.[10]

In a notorious example from England, the over-interpretations of overzealous examiners came to light only after dozens of children were snatched from their families by local child protection agencies. Hobbs and Wynne in 1986 had written in the British medical journal *Lancet* that any relaxation of the anus during an examination was proof of "buggery" (sodomy).[11] For five months two pediatricians under the sway of such thinking canvassed the pediatric wards, examining the anuses of children who were in the hospital for completely unrelated matters.

These doctors were so convinced of the Hobbs and Wynne claims that when they saw this alleged indicator of sodomy disappear in subsequent examinations, and then recur a few days later, they assumed that the children were being sodomized again. Since the children had been taken away from their suspected abusers, their fathers, the doctors concluded that *someone else* was continuing to bugger the children. In one case, by the time of the fourth disappearance and reappearance of anal relaxation, the grandfather, father, and finally two foster parents had all been accused of sodomy.

Before these physicians were finally stopped, 121 children from 57 families had been removed from their homes and repeatedly subjected to "disclosure interviews." Eventually, this fraud was exposed by an official inquiry but not before dozens of children and families were victims of a brand of governmental child abuse unimaginable a few years ago.[12]

Shrugging It Off

What I find especially disturbing is the difference between what the sex abuse examiners admit at their meetings, and occasionally in their journals, and what they continue to do in legal cases. Take, for example, the fact that the widely read journal *Child Abuse & Neglect* was so concerned about these developments that nearly an entire issue was devoted to the subject of anogenital examinations. Editor and pediatrician Richard Krugman wrote the lead editorial, entitled, "The More We Learn, The Less We Know With Reasonable Medical Certainty?"[13] He admitted that the literature was filled with a "panoply of findings," and concluded that "The medical diagnosis of sexual abuse usually cannot be made on the basis of physical findings alone." When it came to interpreting variations of anal or genital anatomy, Krugman warned, "there are no pathognomonic [definitive] findings of sexual abuse" and also predicted that "The data presented in this issue of the Journal may modify some of these opinions in coming months...We may...be asked to do less with what we know in court."

In the same issue, pediatrician Jan Paradise warned of the dangers of "making a big issue of a little tissue." "As scientists," Paradise wrote, "confronted with poorly defined and sometimes inconsistent information, we should reserve judgment...."[14]

Neither the research data now available, nor the warnings of Krugman, Paradise or others such as England's David Paul, have had much impact on the "sex abuse teams" which law enforcement and child protection agencies have come to rely upon. The research evidence has for the most part simply been *ignored*.

Instead, examiners from sex abuse teams continue to overinterpret minor variations of anatomy. Woodling's discredited signs of abuse, from a rounded hymenal edge, to "synechiae," continue to be labeled as evidence of past trauma. At the same time, a handful of researchers continue to look for markers of sexual abuse, but their studies are plagued with major problems.

Trying Again

Berenson and her colleagues, for example, studied the hymens of nonabused girls, first in newborns and later in prepubertal girls.[15,16] They found that hymenal"clefts" were not seen in the posterior half of the hymen, and therefore concluded that if such clefts were found in girls being investigated for possible sexual abuse, they were "unlikely to [be] a congenital finding but rather a partial transection from trauma...." Kerns reached a similar conclusion by studying children being investigated as "suspected" victims, although his conclusions are suspect because he had no good way to know which children had been abused and which had not.[17]

There is a much neglected factor, however, which in any particular case can help decide whether these "clefts" or "notches" can reasonably be interpreted as healed tears of the hymen. If a hymenal cleft were in fact to be evidence of an old tear, the child would have been seriously injured *at the time* of the assault. Since most injuries to various parts of our bodies heal with no resulting scar, it only makes sense that an injury which *does* leave behind scarring or other altered anatomy (such as a hymenal notch or cleft) would be just that much more serious. The child who months or years later shows what someone claims is residual evidence of injury (scars, notches, decreased tissue) would *at the time* of the assault be bleeding, torn, and suffering from severe pain. While such a child might in some cases be too frightened to reveal her abuse, *caretakers would not fail to notice such an acutely injured child.*

Of the many hundreds of cases I have studied in which the hymen is said to show a "notch" or "cleft," an interpretation usually follows. The hymen is said to have been smooth at one time, only to have been altered by trauma, and the resultant irregularity is a "healed tear." In very few of these cases, however, has an investigation of the child's medical past revealed that at the time of the alleged assault the child was noted to be acutely injured.

This means that investigators who seek the truth should obtain the child's pediatric records. If the records show that a child now said to have a "healed tear" or "scar" of the hymen has no *record* of a prior medical examination and no *history* of bleeding and tearing at the time of the alleged assault, it is almost certain that the "healed tear" or "scar" is simply a normal hymenal variation which is being overinterpreted by the medical examiner.

Also, we now have further research evidence which illustrates in a different way that alleged signs of hymenal injury are usually an *unreliable interpretation* rather than an established medical finding. McCann studied three children who had sustained a genital injury.[18] These were not children seen months later, with examiners engaging in subjective analysis of "microtrauma," but children seen *immediately after* an injury which produced obvious tearing and bleeding.

McCann's main finding was that these injuries healed with little if any scarring. "Although scar tissue has been reported," McCann commented, "as part of the healing process of genital injuries, there was little evidence of that type of tissue repair in these children....even the deep lacerations of the posterior fourchettes left little evidence of the trauma they had suffered."

It follows, then, that if *major* injuries heal with "little evidence," those children said to show scarring, months or years later, would have been so seriously injured *at the time of the alleged assault*, that emergency medical evaluation would have occurred and evidence of acute injury found.

In this study, McCann reported somewhat ambiguously that while scarring did not occur, the hymen was narrowed where healing had occurred. In his conclusion. he writes that these changes were "difficult to detect," and noteworthy because their "subtlety" illustrated "the challenging nature of the medical evaluator of the sexually abused child." To this we would add that if the changes found in children *known* to be abused are this subtle, it takes little imagination to see how easily normal variations of anogenital anatomy in nonabused children could be improperly labeled as evidence of trauma.

In dozens of cases I have studied, and undoubtedly hundreds across the country, a whitish streak sometimes called a "linear avascularity," or simply a "pale area" in the tissue near the opening of the vagina, has been called a scar. Kellogg decided to focus on this, noting that there had been no study to support the frequent claim that a "midline avascular streak," "scar," or "white area" was a sign of past abuse. As she has written, "The causal relationship of these structure(s) to sexual abuse remains obscure."

In Kellogg's own study of newborns, (obviously not molested), 25% of them showed such a white line in the midline posterior area.[19] What many were calling a scar was a normal remnant of the developmental fusion of the two sides of the body, something which occurs before birth, and is seen in other parts of the body. Cary Grant's chin is probably the most famous example of the fact that a midline cleft is hardly evidence of abuse.

Gardner did another study of nonabused girls.[20] She found, "...wide variation among subjects was striking, ranging from vestibules that were featureless to others with multiple irregularities. Similarly unexpected was the high frequency of irregularities, *many of which have previously been reported in studies of sexually abused girls*...." (emphasis added) Gardner emphasized "...the nonspecificity of many small findings of the genital examination" and added that "physicians should not be persuaded to overinterpret physical findings for sociolegal purposes...."

Part of the confusion which prevails in the literature stems from the fact that so many studies are based on the assumption that children referred as abused have in fact been abused. If one reads these studies carefully, noting not just the conclusions but also the *methodology*, it becomes clear that children studied as "abused" are usually children referred by police and caseworkers as "suspected" victims. Even when the allegation is said to be "founded," a careful reading of the articles reveals that there is no reliable way to know *how many* of the "molested" children were actually molested.

Marching Toward Consensus

Faced with such conflicting data, as well as the very real methodological problems in studying abused vs. nonabused populations, the small but tightly knit community of child sexual abuse examiners has once again tried to use consensus as a substitute for evidence. We have already commented on why *agreement* among different evaluators does not necessarily demonstrate validity, especially if the evaluators are embroiled in such a highly sensitive and emotional subject, and when the agreement is not "blind." That is, when the evaluators lobby each other first, and *then* decide what they collectively think.

Adams, nonetheless, has tried to overcome the confusion by taking a poll.[21] "There has not," she wrote in 1992, "been a formal attempt to arrive at a consensus among physicians as to which of these findings should be interpreted as being highly suggestive or conclusive of abuse." While the results of such a survey will tell us *nothing* about what is or is not evidence of prior anal or genital trauma, because the examiners receive insufficient feedback to know when they are right and when they are wrong, the responses should be instructive in another way.

In 1989 I compared the interpretations made on 158 children said to have physical evidence of abuse with what McCann's data showed about nonabused children.[22] I found a pattern in which the normal variations shown by McCann to be unrelated to prior injury were the very ones being labeled in trials throughout the country as evidence of prior injury.

There was a high degree of consensus between examiners in the 158 cases; most of them repeated what they had learned from Woodling. This didn't keep them from being wrong, as McCann's data finally proved.

With Adams' recent survey we can once again compare what the examiners *agree upon* with what the scientific data show. Hymenal variations once again top Adams' list of alleged indicators of trauma. "Laceration," "transection," "remnants," and "attenuation" of the hymen are "suggestive or clear evidence of abuse." Genuine laceration would, of course, be evidence of genital injury, but my own study of cases, as well as the literature, makes it clear that this term is almost always used in the manner described above, to *interpret* a notch or cleft, even when no acute injury is seen. Despite warnings like those of Paradise that examiners should not make "a big issue of a little tissue," they continue to do so.

Adams nonetheless went on to propose a classification based on her survey, despite some rather forthright admissions. "Clear guidelines for examiners as to the significance of anogenital findings with respect to sexual abuse have yet to be developed." (What an admission!) She also noted that "...controversy still exists within the medical community as to the significance of certain anogenital findings...."

While admitting that her proposed classification system "does not represent a consensus of medical experts in the field of sexual abuse evaluation," she nonetheless offered it as a way of "determining the overall likelihood of sexual abuse." She added that it was "a system that we have found helpful." Without a reliable way to know how often her team's conclusions are accurate, her system might be "helpful" in creating a new consensus, and "helpful" in

assisting prosecutors, but hardly helpful in getting at the truth of sexual abuse allegations.

Adams, and all those who confuse consensus with evidence, demonstrate not only a profound misunderstanding of science but also of the recent history of their own specialty. Before any studies had been done, Woodling's claims created a consensus. Then studies were done, and they discredited this consensus. Now some of the very persons who should know better are trying to once again substitute consensus for science. There is no reason to believe that another consensus, pieced together over a committee table, will be any better.

What the small group of doctors who do most of the sexual abuse examinations find so hard to accept is that the available data indicate that unless a child's examination shows acute injury (such as bruising, tearing, abrasion, contusion, or laceration), one that doesn't require a subtle interpretation of alleged "microtrauma," the physical examination is not going to be helpful in determining whether abuse has taken place.

This is repeatedly stated in child abuse literature, yet routinely ignored in actual cases, where examiners continue to label normal or nonspecific variations as "consistent" with sexual abuse.

Laboratory Slips

Even laboratory tests, which ought to bring greater reliability to this highly charged issue, have been misused and overinterpreted in the name of child protection. Perhaps the best known example involves gonorrhea, an infection which is transmitted by sexual contact.

The *Countrywalk* case in Florida, in which Frank Fuster and his teenage wife Ileana were convicted of multiple counts of molesting children in their home included evidence that Fuster's son had gonorrhea of the throat. This was the result of a throat culture taken at Miami's Jackson Memorial Hospital. Despite there being no evidence that Fuster ever had gonorrhea, jurors assumed that he was the source of his son's infection, and commented after the trial that if Fuster would ejaculate into the throat of his own son, he surely must have done the other terrible things of which he was accused.

Only after the trial did Fuster's lawyers learn what students of sexually transmitted diseases were well aware of: the method used to diagnose gonorrhea was not reliable. About a year after testifying in the Fuster trial, about the way the children had been suggestively interviewed, I had done some checking on the throat culture by consulting with specialists at the California State Public Health laboratory near the Berkeley campus.

During the trial, I had told Fuster's attorney that he should consult with the Center for Disease Control (CDC) in Atlanta, but this had never been done. I was again being consulted in the *Countrywalk* case, this time because a civil lawsuit was being filed by the parents. Having studied every document in the case, and sixty hours of videotaped interviews with the children I was convinced then as I am today that no evidence existed for any abuse in the Fuster home.

The Berkeley experts told me that the method used to diagnose Fuster's son, a quick screening method which had never been tested for reliability by anyone other than researchers in the pay of the manufacturer, was unreliable. They told me that in every case where such a screening method was used, culture specimens should be saved and follow-up cultures done using more definitive methods. I knew this had not been done in the Fuster case; the laboratory had simply thrown out the culture material after doing the screening test.

Finally, in 1988, the CDC published data which confirmed what I had learned from local specialists.[23] When specimens from around the country, said to show gonorrhea in children, were sent to the CDC for more definitive, confirmatory testing, more than a third turned out to be normal organisms which can look like gonorrhea on a screening test. Especially unreliable was the use of these quickie methods in *throat* cultures, precisely what had happened in the Fuster case.

Another example of hasty laboratory methods involves *Chlamydia*, which may also be misidentified if screening methods are used instead of more definitive cell culture methods.[24] *Gardnerella*, yet another genital infection, is not particularly difficult to detect in the laboratory, but has been mistakenly said to always mean sexual abuse.[25] *Condyloma acumi-*

nata are sometimes called venereal warts but are not necessarily transmitted through sex.[26,27,28,29,30] They are also sometimes called genital warts, but even this may be misleading because they occur in other sites. If *Herpes* lesions are found on the genitals of a child, an investigation is certainly warranted, but even the most definitive cell culture tests cannot prove sexual transmission.[30]

Inadequate testing or hasty interpretations are not uncommon in sexual abuse investigations. Investigators should obtain *all* laboratory records and consult with someone knowledgeable in the microbiology of sexually transmitted diseases. A conversation with a member of a "sex abuse team" is no substitute for this, as the Fuster example makes clear.

If laboratory findings are overinterpreted, the impact on the investigation is devastating. All concerned are now completely sure that sexual abuse has occurred, and the sky's the limit when it comes to gaining a "disclosure" from the child. Some of the most abusive interviews I have studied were the result of an unjustified medical or laboratory finding which was said to show sexual trauma or sexually transmitted disease. This is because investigators and therapists now "knew" that abuse has taken place and were absolutely determined to help the child acknowledge what was assumed to have taken place.

In the *Countrywalk* case, Fuster's son was badgered endlessly because his interviewer had the "proof" of gonorrhea of the throat. Repeatedly the boy was told that someone (the father) had put their penis in his mouth. Over and over it was stressed that the laboratory findings proved that such a thing had happened. This was the direct result of the failure of Miami's Jackson Memorial Hospital to follow accepted laboratory methods.

Seeking the Truth

No area of child sexual abuse investigations requires more fundamental changes in procedure than the way medical examinations are being interpreted. The discrepancy between what the sex abuse teams are saying, and what medical data actually shows, is so great that police and prosecutors who truly want to find the truth in each case need to reexamine their current trust in, and reliance upon, the sex abuse examination teams which currently dominate the scene.

One solution would be for police and child protection investigators to simply refer the children to pediatricians not associated with such teams. We know, however, that pediatricians in the community for the most part will balk at this; they will simply refuse to get involved.

Here, then, are some other measures which police and child protection agencies can take which would allow the same sex abuse teams to be consulted while guarding against at least some of the problems discussed.

When a child is seen, the examiner should *not* be told exactly what sexual acts have been alleged, only that a careful anogenital examination is needed. There would then be less chance for the examiner's knowledge of what has been alleged to become a contaminating factor in the interpretation of the findings.

What would happen if this were done? In a significant number of cases, examiners would claim to find anal abnormalities while the child was alleging only vaginal contact, and vice versa. I say this because I have already seen it! While in most cases the examiners are told of the allegations before seeing the child, occasionally this does not happen. In the latter situation, it is not unusual that there is no correlation between what is alleged by the child and the supposed abnormalities claimed by the medical examiners.

This doesn't mean that a good medical history should not be taken, only that someone other than the medical examiner should record the allegations and take the medical history. Only *after* the examination results have been recorded should all parties try to understand the meaning of all the medical and historical data.

If examiners didn't know which sexual acts were suspected, some very important research could be conducted at the same time as children were given the benefit of better investigations. I believe that a comparison of what is alleged with what examiners conclude when *not told* ahead of time, would put the final nail in the coffin of credibility currently held by the examiners so favored by law enforcement agencies.

In addition, whenever an examination is done, police or child protection investigators should *insist* that photographs be take. Despite having an instrument (the colposcope) which not only magnifies but also allows for pictures to be taken, sexual abuse examiners often *fail* to take any pictures.

In some communities, medical examiners do not have a colposcope, but any good 35 millimeter camera, equipped with a close-up lens and close-up flash, will produce photographs showing the same information. There is simply no excuse for a medical examiner not having such equipment. If prosecutors were to adopt a policy whereby photographs, just as much as audio tapes of all interviews, were *required* before a case would be considered for prosecution, the medical examiners called upon by investigators would have no choice but to comply.

The insistence on photographs would also enhance another important reform, the need for a second opinion. The immediate protest that another anogenital examination is unfair (even abusive) to the child strikes me as hollow. McCann and others have shown that these examinations, if handled with sensitivity. are not traumatic to the child. Far more detrimental is an investigation which fails to find the truth and subjects a child to repeated interviews and destroys important relationships.

The second medical examiner should, of course, not be told about the results of the first examination. If legitimate indication of abnormality exists, it should be found by the second examiner as well as the first. We ask why second opinions are so highly recommended in other crucial medical evaluations, such as diagnosis of cancer, or a decision about surgery, but so rarely used in this type of examination, one which is so new, so fraught with consequence, and so highly charged.

If for some reason a second medical examination is not done, another option is available if photographs were obtained during the initial examination. A second examiner, kept in the dark about both the allegations and the interpretations of the first examination, can be asked to interpret the photographs. A comparison of interpretations between the first and second opinion would go a long way toward testing the reliability of these examinations.

I have seen that when questioned by knowledgeable persons, these examiners often shift their position quite dramatically. Reports which seem to say that evidence of abuse was found often are admitted later to show no evidence whatever, once it is clarified that the "history of sexual abuse" is nothing more than a repetition of the allegation. Physical findings, likewise, will often be "re-interpreted" as far less conclusive if the investigator or attorney raises the concerns I have discussed above.

After acquiring sufficient knowledge to understand the real meaning of examination findings, you should seek another examination unless the previous one has been interpreted as normal. Be prepared to counter the argument that another examination of the child will be traumatic. Remind the judge that the child has already been put through many interviews as well as a medical examination. with no one apparently objecting, yet one more examination is suddenly, once the defense requests it, "traumatic." Acquaint the judge with the fact that it is not uncommon for opinions to differ in a new field such as sexual abuse examinations.

Especially when photographs have not previously been taken, argue that this amounts to failure to collect and preserve the evidence, and that a second examination with photographs might even lead to a resolution of the case, saving the Court the time and expense of a trial, and the child the need to testify.

If such a request is granted, try to find an examiner who is not part of the sexual abuse community. (By and large the sex abuse teams will refuse anyway, once they learn that the defense has requested a second examination.) Do not indicate exactly what sexual acts are alleged. Be sure the child is examined in both the prone (knee-chest) and supine positions, with photographs taken in both positions. Tell the examiner about the allegations, and the findings from the first examination, only *after* the results of this examination are recorded, and inquire about any discrepancy in the findings between the first and second examinations.

If these recommendations are followed, case after case will show that the way examinations

are now being interpreted is a scandal. Doctors will be disagreeing with each other so regularly that even the most cautious judges will be forced to see that something is wrong. Prosecutors will begin tearing their hair out, realizing that their current medical allies have been exposed. All concerned will realize that neither children nor justice is being served by these unsupported medical interpretations. Without such false medical evidence, investigations and trials will do a better job of finding the truth, which is the one and only thing which is consistent with both justice and the welfare children.

LEE COLEMAN, M.D.
Adult, Child, Family Psychiatrist
1889 Yosemite Road
Berkeley, California 94707
Tel: (510) 527-7512

Dr. Coleman 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, A AUTHORITY AND LAW*** *(1984).*

Footnotes

[1]Woodling, B.A. & Cousins, P.D. (1981). Sexual misuse: Rape, molestation & Incest. *Pediatric Clinics of North America*, 28 (2), 481.

[2]Woodling, B.A. & Heger, A., (1986). The use of the colposcope in the diagnosis of sexual abuse in the pediatric age group. *Child Abuse & Neglect*, 10, 111.

[3]Paul, D. "What really did happen to Baby Jane? Medical Aspects of the investigation of alleged sexual abuse of children; (1986) *Medicine, Science & the Law*, v. 26, #2, pp. 85-102.

[4]McCann, et al., Perianal Findings in Prepubertal Children Selected for Nonabuse: A descriptive study; (1989) *Child Abuse & Neglect*, v. 13, 179-193.

[5]McCann, et al., Genital Findings in Prepubertal Girls Selected for Nonabuse: A descriptive Study; (1990) *Pediatrics*, v. 86, #3, Sept., 428-439.

[6]Emans, et al., Genital findings in sexually abused, symptomatic and asymptomatic girls; (1987) *Pediatrics*, v. 79, 778-785.

[7]Cantwell, H.B.,(1983) Vaginal inspection as it relates to child sexual abuse in girls under thirteen. *Child Abuse & Neglect*, 7, 171.

[8]Cantwell, H.B., (1987) Update on vaginal inspection as it relates to child sexual abuse in girls under thirteen. *Child Abuse & Neglect*, 11, 545.

[9]Heger, A. & Emans, J., (1990) Introital diameter as the criterion for sexual abuse; *Pediatrics*, v.85, #2, Feb.; 222-223.

[10]McCann, J. et al.,(1990) Comparison of genital examination techniques in prepubertal girls, *Pediatrics*, v.85, #2, Feb.

[11]Hobbs, C.J. & Wynne, J.M., (1986) Buggery in childhood, a common syndrome of child abuse, *Lancet*, Oct.4, p. 792.

[12]Butler-Sloss, D.B.E..(1987) Report of the inquiry into child abuse in Cleveland, 1987, *Her Majesty's Stationery Office, London.*

[13]Krugman, R., (1989) The more we learn, the less we know "with reasonable medical certainty?; *Child Abuse & Neglect*, v. 13, pp. 165-66.

[14]Paradise. J. (1989) Predictive Accuracy and the diagnosis of sexual abuse: a big issue about a little tissue, *Child Abuse & Neglect*, 13, 169-177.

[15]Berenson A., et al. (1991) Appearance of the hymen in newborns; *Pediatrics*, 1991, v.87, 458-465.

[16]Berenson A., et al. (1992) Appearance of the hymen in prepubertal girls: *Pediatrics*, v. 89. March 1992, pp 387-394.

[17]Kems, D. et al (1992), Concave hymenal variations in suspected child sexual abuse victims; Pediatrics, v. 90, #2, Aug., pp 265-272.

[18]McCann, J. et al. (1992) Genital injuries resulting from sexual abuse: A longitudinal study; *Pediatrics* v. 89, #2, Feb.; 307-317.

[19]Kellogg, N. (1991), Linea Vestibularis: A Previously undescribed normal genital structure in female neonates; *Pediatrics*, v. 87, #6, June, 926-27.

[20]Gardner, J. (1992) Descriptive study of genital variation in healthy, nonabused pre-menarchal girls; *Journal of Pediatrics*, February, pp. 251-260.

[21]Adams, J. (1992) A proposed system for the classification of anogenital findings in children with suspected sexual abuse; *Adolescent Pediatrics and Gynecology*; v. 5, 73-75.

[22]Coleman, L. (1989), Medical Examination for sexual abuse: Have we been misled?; *Issues in Child Abuse Accusations*; v. 1, pp. 1-9.

[23]Whittington, W.L., et al. (1988) Incorrect identification of Neisseria gonorrhea from infants and children. *Pediatric Infectious Diseases Journal*, 72,(1), 3.

[24]Hammerschlag, et al. (1988) False positive results with the use of chlamydial antigen detection tests in the evaluation of suspected sexual abuse in children. *Pediatric Infectious Diseases Journal*, 7, 11-14.

[25]Bartley, D.L., et al (1987) Gardnerella vaginitis in prepubertal girls. *American Journal of Diseases in Children*, 141, 1014.

[26]Bender, M.E. ,(1986) New Concepts of condyloma acuminata in children. *Archives of Dermatology*, 122, 1121.

[27]DeJong, A.R. (1982) Condyloma acuminata in children, *American Journal of Diseases in Children*, 136, 704.

[28]Seidel, J.S., et al.(1979) Condyloma acuminata as a sign of sexual abuse in children. *The Journal of Pediatrics*, p. 54.

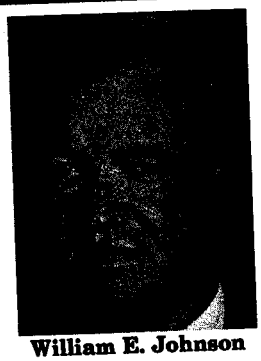
[29]Shelton, T.B. et al.(1986) Condyloma acuminata in the pediatric patient. *Journal of Urology*, 135, 548.

[30]Stringel, G. (1985) Condyloma acuminata in children. *Journal of Pediatric Surgery*, 20, (4) 499.

[31]Kaplan, et al. (1984) Social relevance of genital herpes simplex in children. *American Journal of Diseases in Children*, 138, 872.

Book Review:

Frank Haddad, His Classic Closing Arguments



William E. Johnson

It is difficult to be objective in commenting on a book about a person you knew and loved. Frank Haddad, Jr. was a wonderful human being and lawyer. Burt Milward's book on Frank's classic closing arguments is a splendid dedi-cation to the memory of a the greatest criminal defense lawyer in Kentucky during his time.

The book will be of great value to all lawyers who practice criminal defense law. Its use will not be limited to Kentucky since the arguments can be used as examples in any state and the federal court system. The patterns for acquittal were always present in the arguments by Frank. On page 207 of the book, Burt has listed the 14 elements which always appear in every closing argument by Frank E. Haddad, Jr. This is an excellent outline for the criminal defense lawyer to use in structuring an argument.

Burt points out how Frank always stressed the presumption of innocence. During my reading of the book it brought back to me that which I have always known: that you cannot stress the role of reasonable doubt too much. Burt has even taken the outline on page 207 and showed how Frank used it in the trial of Jim Smith that follows beginning on page 208. This example will be particularly helpful to the young lawyer.

The book demonstrates that Frank was a master as a storyteller. One is fascinated with the case as he reads the argument. You can imagine how much more interesting it would have been to have heard the argument. In the arguments you see how Frank takes the prosecution's testimony and explains it away by either showing a defense interpretation or by reference to defense testimony that is more believable.

Frank's arguments were never condescending, arrogant, abusive, hateful or boring. He spoke the language of the jury. While he would discuss the law in the light of the jury instructions (he was a master at making the instructions sound as if they had been written to acquit the defendant), he was never legalistic in his argument. He spoke like the common man, although he was an uncommon lawyer, and what he said with conviction and from the heart.

Burton Milward, Jr. has put together a splendid book which should be kept close at hand by all lawyers who practice criminal defense law. Frank would be proud of Burt's effort.

WILLIAM E. JOHNSON
JOHNSON, JUDY, TRUE & GUARNIERI
326 West Main Street
Frankfort, Kentucky 40601
Tel: (502) 875-6000
Fax: (502) 875-6008

This book is available for $25.00 from:
Total Victory Press
P.O. Box 5043
Louisville, Kentucky 40255-0043

Governor Paul Patton Announces Creation of the Office of Sexual Abuse & Domestic Violence Services

CAROL E. JORDAN, M.S., Ex. Director
Office of Sexual Abuse and
Domestic Violence Services
Office of the Governor

♦ ♦ ♦ ♦ ♦

"Of all of the challenges faced by this Administration, none may be more compelling than the need which we have to address the issues of child sexual abuse, domestic violence and rape." With this statement on April 5, 1996, Governor Paul Patton announced creation of the Office of Sexual Abuse and Domestic Violence Services within the Governor's Office. In recognition of her role as one of Kentucky's most outspoken victim advocates, Governor Paul Patton named Mrs. Judi Patton to serve as a special advisor to the work of the Office.

The Office of Sexual Abuse and Domestic Violence Services will provide a coordinating function for the varied victim service initiatives being undertaken by the Patton Administration. The Office will provide consultation and training for programs funded by the state which provide services to victims of child sexual abuse, rape or domestic violence. It will be involved in research, in the development of standards of care, in legislative initiatives, and will be charged with providing recommendations directly to Governor and Mrs. Patton and to the Secretaries of the Justice, Families and Children, and Health Services Cabinets on how the state's system of care for victims of violent crime can be improved. The Office will also serve as a liaison between the Executive, Legislative and Judicial Branches of government in efforts related to domestic violence, child sexual abuse and sexual assault.

The Governor's establishment of the Office of Sexual Abuse and Domestic Violence Services follows his creation in January of the Kentucky Council on Domestic Violence. Mrs. Judi Patton will serve as Chair for the Council, with Circuit Judge Julia Adams serving as Vice-Chair. One of the specific charges given by the Governor to his newly created Council is to ensure effective implementation of the legislation passed by the 1996 General Assembly related to domestic violence. This will specifically include the five bills and one resolution successfully proposed by the Legislative Task Force on Domestic Violence which worked over the past year under the co-chairmanship of Senator Jeff Green and then-Representative Leonard Gray.

Through Task Force legislation, a statewide computerized victim notification system will be developed which will ensure that any person who wishes to be notified of the release of an offender from a jail in any county in the state will be provided with that information. This state-of-the-art system will be one which other states will wish to copy as its life saving features become more well known. Task Force legislation also codified into state law the full faith and credit provisions for domestic violence protective orders found within the federal Violence Against Women Act. It provided for penalty enhancement legislation to increase the penalty for third and subsequent domestic violence assaults and will allow the court to establish special bond conditions upon the release of domestic violence and sexual offenders to address the protection needs of victims. Task Force legislation has also set out broad mandatory training requirements for judges, prosecutors, court clerks, law enforcement officers, social workers, spouse abuse center staff, physicians, nurses and mental health professionals; strengthened the role of victim advocates in the court system; and required the implementation of a certification program for mental health professionals who provided court-mandated domestic violence offender treatment.

Virtues & Values Etched in Stone

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

Upcoming DPA, NCDC, NLADA & KACDL Education

**** 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 Defender Management
June 13-16, 1996
Baltimore, Maryland

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.

Battered Women's Defense Conf.
Sponsored by CHR, KDVC, Ky. Psychological Assoc. & DPA
September 9-10, 1996
Frankfort, Kentucky
Contact Sherry Currans for more information at (502) 875-4132.

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.

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

Address Correction Requested

BULK RATE
U.S. POSTAGE PAID
FRANKFORT, KY 40601
PERMIT #1