JOURNAL

The Advocate

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Injury Wound Blow Damage Impairment Destruction Tumult

TRAUMA

- Ruth on **PTSD**
- Jordon on **Effective Intervention in Cases of Domestic Violence**
- Wentz on **Defending Domestic Violence Cases**
- Alexander on **Traumatically Brain Injured**
- Wayland on **DSM-IV & PTSD**
- Herman's ***Trauma & Recovery***

FROM THE EDITOR:

Psychological Trauma abounds in today's criminal justice system. While it is most usually understood from the viewpoint of the victim, it frequently explains, not excuses, the criminal behavior of criminal defendants.

The works of **Douglas Ruth, M.D., Kathleen Wayland, Ph.D., Carol Jordan, T.J. Wentz, Richard Alexander** and **Judith Herman, M.D.** in this issue reveal many of the dimensions of trauma.

The better we understand this lasting psychological injury, the more effective we will make decisions about Kentucky's accused. What are your thoughts on how to reveal this reality better?

The New Federal Habeas Law has created drastic changes, harsh realities, and stark timelines. Take note of what Tennessee Federal Defender **Paul Bottei** is telling us.

The DPA Mental Health Manual has 195 pages of superb thinking and practical ideas. Send for your reasonably priced copy today.

The 25th Annual Public Defender Conference is June 16-18, 1997 at *The Campbell House Inn* in Lexington, Kentucky. Make your plans to attend now. Our theme for this yearly gathering is: *Celebrating 25 Years of Independent Defense of Indigents: Preparing for the Next 25 Years of Interdependent Advocacy.*

T.J. Wentz of our Richmond trial office has become the associate editor for *The Advocate's* District Court Column. He begins with a timely topic, domestic violence defenses.

Public Advocate's Goals. Ernie Lewis sets out his goals for Kentucky's statewide indigent criminal defense system:

1) full-time delivery of representation;
2) effective death penalty defense;
3) interdependence.

Give us your reactions to these.

Edward C. Monahan,
Editor, *The Advocate*

The Advocate

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure 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.

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Public Advocacy Seeks Nominations

GIDEON AWARD: TRUMPETING COUNSEL FOR KENTUCKY'S POOR

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

Send written nominations to the Deputy Public Advocate by April 15, 1997 indicating:

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

1993 *Gideon* Award Recipient
- **J. Vincent Aprile, II**
  General Counsel of DPA

1994 *Gideon* Award Recipients
- **Daniel T. Goyette** and the **Jefferson District Public Defender's Office**

1995 *Gideon* Award Recipient
- **Larry H. Marshall**
  Assistant Public Advocate
  DPA's Frankfort Office

1996 *Gideon* Award Recipient
- **Jim Cox**
  Assistant Public Advocate
  DPA's Somerset Office

Rosa Parks Award for Advocacy for the Poor

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

Send written nominations to the Deputy Public Advocate by March 24, 1997 indicating:

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

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

1996 *Rosa Parks* Award Recipient
- **Tina Meadows**, Executive Secretary
  for Deputy Public Advocate

An Awards Committee will recommend recipients to the Public Advocate.

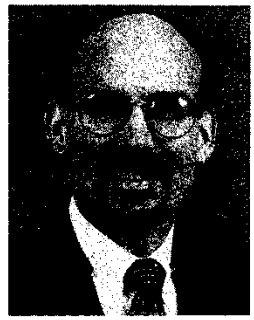
Lifetime Defense Counsel Achievement Award

This Award is established this year by Ernie Lewis, Public Advocate, to honor an attorney for a lifetime of dedicated services and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants throughout a lifetime. The Award is presented at the Annual Public Defender Conference.

Send written nominations to the Deputy Public Advocate by April 15, 1997 indicating:

1) Name of person nominated;
2) Explanation of their lifetime achievement in systematically providing, supporting and leading an increase in the right to counsel for Kentucky indigent criminal defendants; and,
3) A resume or other background information of the person.

Public Advocate's Goals



Ernie Lewis

It is a true honor to be appointed to be the Public Advocate for a four-year term. I view the position as one of stewardship, and hope that I honor this as I serve as Public Advocate.

My Perspective

I hope to use this forum over the next several issues to detail those efforts and initiatives that I hope to make as the Public Advocate. In understanding where I want to take the DPA, it might be helpful to understand the perspective that I bring to the task. I grew up during the Sixties, and like many of you, was greatly influenced by the winds of change during that time. After graduating with a B.A. in English from Baylor University, I served for a year as a VISTA Volunteer in Minnesota. While there, I witnessed my first poor person's lawyer, a VISTA lawyer earning $200 per month. I was awed by the power that lawyer had, and the power he shared with the poor person he was representing. It was there that I decided to be an advocate for the poor. Three years at Vanderbilt Divinity School heightened my commitment to service to the poor. While attending divinity school by day, I worked as a juvenile counselor for an alternative placement for 16-18 year olds adjudicated of a crime. Then I went to law school at St. Louis' Washington University. During my third year, which I spent at U.K. Law School, I tried to find work with Appalachian Research and Defense Fund. However, I also clerked for DPA in the Frankfort Office, and fell in love with public defender work. I started working for DPA full-time in 1977, first as an appellate lawyer and then as a trial services manager. In 1983, my wife and I moved to Richmond, and I began the Richmond Public Defender's Office, where I served as a trial lawyer for almost 14 years. These are the experiences that I will bring to bear as I serve over the next four years.

3 Goals

There are three areas on which I want to focus.

Full-time. First, anyone who has been around me for long knows that I believe in the full-time delivery system of trial services. Private lawyers have long played a vital role in indigent defense. They are going to continue to play a vital role in any system of indigent defense in Kentucky. However, I would like to continue to move DPA toward the full-time delivery method as the primary mode of delivery. At the same time, this full-time delivery method features as a prominent characteristic a partnership with the private bar. More on that to follow.

Death Penalty. A second theme of my four years as Public Advocate will be the full funding of death penalty defense in Kentucky. The people of the Commonwealth have decided that we are to have a death penalty. In the decisions that I make, I want to ensure that the defense is fully funded. I want to make certain that no one is executed as a partial result of their having had an underfunded lawyer. The very integrity of our system is at stake.

Interdependence. Finally, I believe in the interdependency of the criminal justice system. If public defenders are left out of the decision-making at any level, then the resulting decision will be one that is weakened by their absence. The powers that be in the criminal justice system have a responsibility to ask us to the table. At the same time, we have a responsibility to participate with other criminal justice entities, to engage in give-and-take, and to make hard decisions and trade-offs. We deserve to be heard; we also must ensure that we are doing everything we must to be heard.

I hope to go into detail on these and other themes during the next several years. I look forward to serving. Let me know your thoughts.

ERNIE LEWIS
Public Advocate

Post-Traumatic Stress Disorder (PTSD) in the Forensic Setting

Dr. Douglas Ruth

The American Psychiatric Association opened a flood of controversy when it formalized the diagnosis of post-traumatic stress disorder (PTSD) upon the adoption of the third edition of the *Diagnostic and Statistical Manual (DSM-III)*[1] in March 1980. The decision to define this illness came when tort actions were being reshaped by increased awards for exemplary damages, establishment of liability for psychic damages, and expanding the radius of injury[2], setting the stage for vigorous courtroom use of such a diagnosis. Much of the problem in the forensic use of PTSD arises from the fact that, as with other psychiatric disorders, making the diagnosis relies to some degree upon the self-report of the patient, who often stands to gain if he earns the diagnosis. Among several concerns was the fear that copies of the diagnostic criteria would fall into the hand of litigants, claimants, or defendants who would simulate the symptoms.

In October 1980, for example, the Veterans Administration authorized compensation for PTSD, delayed type. Service organizations, outreach groups, and other sources distributed brochures describing the symptoms and provided printed checklists. The VA faced an "unprecedented challenge" created by the growing number of claims received and exaggeration and falsification of data, leading the VA psychiatrists who revised the examination process to comment, "Rarely before have many claimants presented themselves to psychiatric examiners having read printed symptom checklists describing the diagnostic features of the disorder for which they seek compensation."[3] (Lest this should be viewed as critical of veterans, though, it should be recognized that most deserving veterans apparently do not apply for benefits. In 1989 only 4% of the veterans estimated to suffer PTSD had applied for compensation.)[4]

The susceptibility of this disorder to misdiagnosis is illustrated by the aftermath of the sinking of the fish processing vessel *Aleutian Enterprise* in the Bering Sea in 1990. Twenty of the 22 survivors filed personal injury claims, 19 of whom were examined by a total of 15 psychiatrists and psychologists. Each was given the diagnosis of PTSD. Some were evaluated by more than one psychiatrist of psychologist, but in each instance the same diagnosis was given by each examiner. Most of these clinicians did not corroborate the plaintiff's self-report by interviewing collateral witnesses nor reviewing medical records, which contained contradictory data. This figure yielded a conservatively-estimated incidence of PTSD among the 22 survivors of 86%, very much higher than that of most civilian disasters of traumata (this being classified as "chronic" since symptoms persisted beyond 6 months). The percentage of survivors suffering symptoms of PTSD exceeded that of similar maritime disasters that occurred prior to the publication of PTSD diagnostic criteria (although the diagnostic criteria were not published prior to 1980 and were not available to earlier litigants, the percent of survivors suffering specific symptoms should not have varied, though the diagnosis would differ). When these survivors were interviewed after settlement,[5] several admitted to symptom sharing and coaching by attorneys that influenced their behavior as they pursued their claims. This included attorneys describing to them the symptoms of PTSD, advising them not to return to work, and to seek professional help and make frequent appointments in order to bolster their claims. One attorney forwarded his client money for expenses so that he would not feel the need to settle early.

The disease of post-traumatic stress disorder has been referred to as "medicolegal quicksand"[6] and a "forensic minefield."[3] Features of the disorder leave it susceptible to abuse on an unprecedented scale. However, it provides a coherent explanation for the relationship between certain behaviors or symptoms to an antecedent, causative event or injury, often where previously no such relationship could be visualized since the earlier nomenclature did not address the phe-

nomenon that was occurring. Furthermore, unlike most other psychiatric disorders, the diagnostic criteria of PTSD, by characterizing the stress that caused the disease as being of such intensity that "would evoke significant distress in most people," could be viewed as absolving the victim of blame, thus sparing him or her the stig- The diagnostic criteria have changed somewhat in later editions.

Clinical Features

The most recent criteria are abstracted as follows:[7]

DSM-IV Diagnostic Criteria for PTSD

A. (1) An individual experienced, witnessed, or confronted events that involved actual or threatened death or serious injury or threat to physical integrity of self or others, and
(2) His response involved intense helplessness, fear, or horror

B. The event is persistently re-experienced in 1 or more ways:

(1) recurrent intrusive recollections
(2) recurrent distressing dreams
(3) acting or feeling as if the event recurs (including hallucinations, flashbacks, dissociation)
(4) psychological distress upon exposure to cues resembling the event
(5) physiological reactivity on exposure to cues resembling the event

C. Avoidance and numbing in 3 or more ways:

(1) avoiding thoughts, feelings, conversations associated with the trauma
(2) avoiding activities, etc., that arouse recollections of it
(3) partial amnesia for the event
(4) diminished interests
(5) detachment or estrangement from others
(6) restricted affect
(7) sense of foreshortened future

D. Increased arousal in 2 or more ways:

(1) insomnia
(2) irritability
(3) impaired concentration
(4) hypervigilance
(5) exaggerated startle response

E. Duration of B, C, and D is more than 1 month

F. Clinically significant distress or impairment occurs

The symptoms of the disorder are well-described in the diagnostic criteria listed above. The course can vary markedly from one individual to another or from time to time in the same person. One might have few or no symptoms for years or, at the other extreme, become so ill as to require hospitalization. Seemingly benign cues in the environment might trigger symptoms because of their resemblance to elements experienced at the time of the psychological trauma (*i.e.*, the sound of helicopters or the odor of diesel fuel in the Vietnam combat veteran or the odor of burned rubber in an automobile accident victim).

A *delayed* category of PTSD has been recognized in which symptoms might not emerge until long after the stressful event (after 6 months by definition, sometimes after years or decades in practice), creating the potential for unique forensic pitfalls.

The patient may suffer financially when anxiety, impaired concentration, or distraction from flashbacks interfere with job performance. Irritability, restricted affect, detachment, and avoidance might limit employability and hinder personal relationships. Complications such as depression, panic attacks, phobias, and substance abuse add to the burden. Response to flashbacks and behavior during dissociative episodes might result in destructiveness, violence, and criminal behaviors.

Some observations suggest that the victims of trauma might reiterate the very harm they suffered. Abused children often reenact the incidents in play or fantasy or, eventually, by abused their own children. Male sufferers of abuse are known to become violent among their peers, and a high incidence of childhood sex abuse is found among prostitutes.[8]

The Ubiquitous Diagnosis

PTSD has served the legal community tirelessly. In addition to its more popular uses in personal injury, administrative, and criminal law, it has provided a basis for compensation in claims of harassment and discrimination in the workplace, evidence for termination of parental rights, and in immigration law, it has supported the assertions of immigrants that they will be persecuted if they are returned to their native countries.[9] Since the adoption of *DSM-III*, the portion of occupational disease claims classified as stress-related rose 800% from 1979-80, and the number of such claims in California climbed 700% from 1981-91. One state judge was awarded compensation for a stroke he alleged arose from being overworked by his excessive case load of workers' compensation claims.[10]

Prevalence

Estimates of the rate of occurrence of PTSD are subject to sampling bias, changes in the definition over time, and other sources of inaccuracy. Everyone who suffers a trauma as defined above does not suffer PTSD. It is estimated that from 39%[11] to 3/4[12] of the general population in the United States has been exposed to a traumatic event that met the stressor criterion for PTSD. The estimated lifetime prevalence for PTSD in the general population is 9%.[11] The lifetime prevalence for PTSD following certain civilian trauma are as follows: rape, 80%; life threat, seeing others killed, physical assault, 25%; accident, 12%.[13] The lifetime prevalence for former WW II prisoners of war has been estimated at 66.4%.[14] Other data provide a *current* prevalence of PTSD in WW II ex-POW's of 55.7%.[15] Perhaps the actual lifetime prevalence is actually higher than 66.4%, or perhaps this very high current prevalence is a reflection of the low rate of recovery for POW's.

PTSD in the Criminal Courtroom

PTSD has not seen in criminal courtrooms the popularity it enjoyed in the civil arena. In an impressive study of nearly 1,000,000 indictments in 8 states, Callahan and associates[16] found that an insanity plea had been entered in 8979, thus estimating a frequency of insanity pleas of less than 1% of indictments. Studying 8163 of those further (excluding those indicted prior to 1980), Applebaum and others[9] found that PTSD was diagnosed in only 28.

Those defendants with PTSD diagnoses, compared to those with other diagnoses, were less likely to have been arrested as juveniles, were less likely to be incompetent to stand trial, were less likely to be detained after trial, and were more likely to be released on probation or other status.

The utility of the diagnosis in criminal defense was illustrated in *State v. Heads*.[17] Mr. Heads broke into his sister-in-law's home in search of his estranged wife and fired a number of shots from two weapons, one of which struck and killed his sister-in-law's husband. He was convicted of murder in 1978. Following a series of appeals unrelated to PTSD and after adoption of the term by the APA in 1980, his diagnosis was realized by psychiatric experts who previously had not been able to understand nor explain his behavior. He was found not guilty by reason of insanity on retrial in October 1981.

Four types of PTSD phenomena have been identified as playing a role in criminal behavior:[18]

1. dissociative states, or fugue states, or altered states of consciousness such as those driven by flashbacks, including states triggered by stimuli related to the crime scene which resemble those associated to the original traumatic event. Examples would include survivors of combat (*e.g., State v. Heads*) or of prior physical abuse (*e.g., State v. Fields*[19]). These defendants might appear to relive a prior violent episode, might have overreacted violently to minimal provocation, and might be described as exhibiting "explosive" behavior. This same category would include defendants who, misperceiving a current situation as posing a great threat since it resembled an earlier threatening traumatic experience, used excessive force in presumed self-defense, or those who reflexively enacted previously-learned defensive violence.

2. "compulsive" behaviors during which the defendant seems driven to seek dangerous or stimulating and quasi-military situations. An example is that of *U.S. v. Tindall*.[20] Tindall was a Vietnam veteran helicopter pilot who was denied a civilian pilot's license. He sought risky hobbies, such as skydiving and stunt flying, and established a dangerous drug-smuggling opera-

tion with former combat buddies, reestablishing their wartime relationships.[18]

3. "survivor guilt" reactions whereby a survivor of prior trauma in which others have suffered or died undertakes criminal activity that offers little chance of success or appears to provoke retaliation from others and seemingly might involve an effort to get caught and punished or killed. An example might be that of *State v. Gregory*.[21] A former platoon leader described guilt feelings after surviving an ambush in 1969 in which other soldiers died. After 3 suicide attempts, he held several hostages in a bank (with no attempt at robbery) where he fired numerous rounds at sources of noise such as air vents, but not at the hostages, whom he treated gently. His examining psychiatrist explained that he wanted to have protected his patrol as he had "protected" the hostages, and that in Vietnam he had seldom seen the enemy and could only fire at the sounds they made in the foliage.[18]

4. behavior associated with abuse of alcohol or drugs used in an effort to self-treat PTSD symptoms. Both veterans[12] and civilians[22] with PTSD suffer a higher incidence of substance abuse than those without PTSD.

Assessing the Behavior

Several characteristics of flashback-induced behavior such as indicated in the first scenario of the four listed above have been described:[23]

1. The behavior is unpremeditated and sudden.
2. It is uncharacteristic of the individual.
3. There is a history of prior traumatic events reenacted in the episode.
4. The defendant might suffer amnesia for all or part of the episode.
5. Current motivation is lacking.
6. Stimuli surrounding the behavior in question may be reminiscent of the original traumatic experience(s).
7. The defendant is usually unaware of how his criminal behavior reenacted earlier traumatic experiences.
8. The victim is often fortuitous or accidental.
9. The defendant has or has had other symptoms of PTSD.

It is helpful, when forming an opinion as to the likelihood that certain behavior is "PTSD-driven," to consider whether the criminal activity can be viewed as a logical extension of the traumatic experience (*i.e.*, self-protection or anxiety reduction).[24] Behavior that is unpremeditated and the absence of concealment weigh in favor of PTSD. A history of property crimes, as opposed to assault crimes, weighs against the conclusion. But no single item of evidence is conclusory.

In fact, defenses based upon PTSD have been launched even in the face of several exceptions to these rules of thumb. In *State v. Fields*[19], the defendant's attorney argued a defense of unconsciousness based upon testimony that the defendant suffered PTSD from abuse in childhood and that he was in a dissociative state when he fatally shot another man. The victim was apparently well known to Fields as he dated and physically abused Fields' sister. Thus, Fields not only saw current motivation, but one could question whether the victim was "fortuitous." Evidence was presented that Fields, just before the shooting, made arrangements for a friend to cash his numbers ticket and hold the money for him, should he win, as he expected he might be away for some time, raising some question of premeditation.

The PTSD Defense

Erlinder[18] suggests that the language in *DSM-III* provides the rationale for entering into evidence details of the defendant's past in an effort to demonstrate the effects of his prior traumatic experience upon his behavior, as well as the testimony of others who have suffered similar trauma. He views the defense plan as the corroboration of the facts with as much objective data as possible (*i.e.*, records and collateral witnesses) and helping the factfinder to comprehend the effect of the defendant's traumatic experience.

In some instances, upon recognition of a PTSD diagnosis, charges have been dropped, settlements have been negotiated before trial, or treatment has been recommended in lieu of prosecution. These diversions seem more likely to be attainable when injury has not occurred and when treatment is accessible.[18] The diagnosis of PTSD has been used in the defenses of negated specific intent, diminished capacity, self defense, and automatism.[9] Even after sentencing, the diagnosis has been used to support petitions to reduce or reconsider sentences.[18]

The Insanity Defense Reform Act of 1984 and other changes in insanity defense laws have left the use of PTSD in a NGRI defense more difficult, but the more severely impaired individuals should still qualify for this defense.[25]

Making the Diagnosis

As with other psychiatric illnesses, the diagnosis of PTSD is principally made by clinical interview and therefore depends upon the subjective account of the individual under evaluation. The challenge of evaluating such a claimant demands much skill of the clinician. Forensic experience is invaluable in limiting bias and susceptibility to manipulation. As there is often some value placed upon this diagnosis, an objective means of confirmation would be of use. Some transient, measurable physical changes occur in this disorder such as elevation of pulse and blood pressure when exposed to reminders of the stress; but these changes usually are not of such an extreme as to cause an abnormal physical examination, are not specific to PTSD, and sometimes are under conscious control of the individual. The examiner looks to see if the diagnostic criteria of a psychiatric diagnosis including that of PTSD are met, or discounted, and gathers other information to satisfy the reasons for referral, *i.e.*, in a civil action data necessary to assess causation, damages, and prognosis, and in criminal cases, information necessary to form opinions as to competencies in the various stages of the judicial process and mental status at the time of the alleged crime. Characteristics of PTSD in regard to criminal behavior as noted above are sought in the assessment.

Collateral interviews provide the best source of corroborative information. Informants who can describe the claimant or defendant before and after the traumatic experience, and thus document the changes he or she has undergone as a result, should be sought, as well as those who can describe the experience of the individual during the stressful event in question. In a civil case, the plaintiff might experience relapses of symptoms when he encounters reminders of the traumatic event. Co-workers might observe visible changes in the individual when he attempts to return to the workplace where an accident occurred, for example, or family members might observe signs of stress when an automobile accident victim tries to drive again or travels near the scene of his accident. A bedpartner might confirm the complaint of insomnia or of pathological behaviors during sleep. Friends or family members can document interpersonal distancing and affective changes. Medical records and psychotherapy notes should be studied to see if the history is consistent, but with the understanding that an embarrassed or amnestic patient might not have disclosed much information in a rushed examination, and that sensitive information might be shared only late in the course of therapy after a sense of relative comfort has been achieve, or after events have freed repressed memories, contradicting denials made during earlier sessions. The examiner should not assume that such apparent contradictions are signs of dishonesty.

In the criminal case, police reports, depositions and affidavits should be read, and witnesses who can describe the defendant's behavior and surroundings before, during and after the crime should be interviewed. In addition to searching for signs of premeditation, efforts of concealment, and signs and symptoms of mental illness and emotional decompensation, the examiner should also listen for clues that the behavior is in keeping with the "PTSD-driven" behaviors as noted above and for descriptions of cues that might have triggered PTSD symptoms in the defendant.

A thorough psychosocial history should be taken and searched for events that meet the "stressor" criteria. Extensive childhood maltreatment might contribute to substantial behavioral symptoms without any one isolated event being identified as the causative trauma.[26]

If symptoms suggest a medical or neurological illness, then a physical or neurological examination is done and appropriate diagnostic procedures are scheduled.

Various structured interviews and rating scales have been designed and administered to groups suspected of having the diagnosis in efforts to develop some objectivity and reproducibility (for reviews see Watson[27] and Keane[28]). Several of these instruments yield a high level of agreement with each other when patients with suspected PTSD are tested. Most suffer 2 flaws, though:

1. In the absence of ultimate proof of diagnosis, there is no way to determine if the tests increase diagnostic reliability, and

2. Most of the instruments are obvious and easy to manipulate.

Keane[29] pulled together 49 items of the MMPI (Minnesota Multiphasic Personality Inventory) to create a new scale which he standardized. When given in the context of the MMPI, it shares the advantage of measurements of validity and test-taking attitudes (though Keane has, in fact, tested the utility of the PTSD subscale alone, absent the full MMPI), but this subscale also lacks ultimate proof of reliability, and it appears to have failed to detect malingerers.[30]

Still, these instruments are inexpensive, harmless, an easy to administer. The examiner enjoys some reassurance if their interpretation matches his diagnosis; and, if it differs, he might be warned to explore further.

Psychophysiologic Testing in PTSD

Several physiological changes occur in patients with PTSD. These include insomnia, hypervigilance, and elevated pulse and blood pressure. When patients are startled or confronted with reminders of their prior traumatic experience, transiently but quickly the pulse, blood pressure, muscle tension, and skin conductivity rise. These changes have been measured in the laboratory in combat veterans,[31,32] in civilian trauma victims,[33] and in survivors of automobile accidents.[34] Under laboratory conditions and with monitoring devices attached the subjects were exposed to stimuli that resembled their stressor (*i.e.*, sound track from combat film, verbal scripts describing their accident, mental imagery) or loud tones to trigger a startle response. As a group, the PTSD patients tended to undergo greater physiological changes when confronted with such stimuli and to return to their baseline levels more slowly than control groups or patients with other diagnoses. It was hoped that these changes could find use as more objective means of diagnosing PTSD, as the patient could not easily control them.

However, while *group* differences can be demonstrated, the overlap of measurements between the PTSD and control groups were so great that it is difficult to see how any one individual could be categorized into one group versus another (*i.e.*, standard deviations were very large). Further, when 16 non-PTSD subjects were asked to simulate the responses of a PTSD patient, 25% could do so successfully.[35]

Pitman[35] described the sole instance, as of the writing of his article published 1994, in which admissibility of such testing was questioned. The judge disagreed with defense counsel's motion in limine that the test results should be excluded. But when defense counsel objected to the question of whether the probability of the diagnosis could be estimated from the test data, the judge ruled that more foundation for the testimony was required. The question was not pursued.

Treatment

Since symptoms of PTSD often resolve spontaneously within a few weeks, episodes that are diagnosed soon after onset and in which the symptoms are not intense and are improving might not require treatment. When treatment is indicated, the goals include reduction of symptoms, prevention of complications, helping the patient to resume functioning in as many areas of his life as possible, and helping the patient to incorporate the experience into the context of his life. Since the traumatic experience, or the symptoms in its aftermath, often leave the patient feeling humiliated, guilty, and damaged in his self-esteem, providing an empathetic atmosphere that encourages accepting of the patient's disclosure is therapeutic, as is helping him to understand the "normalcy" of his symptoms, given the impact of the traumatic experience.

Several drugs have been prescribed for PTSD and have been demonstrated to have some positive effect. These have included anti-depressant medications, including imipramine, amitriptyline, Prozac, Zoloft, and others, anti-anxiety drugs including Xanax and Klonopin, anti-convulsant or anti-seizure drugs such as Tegretol and Depakene, and drugs that reduce sympathetic nervous system excesses (such as in the hyperarousal symptoms) including propranolol and clonodine.[11,36,37] In addition to relieving anxiety, panic, depression, and insomnia and other sleep pathology, the anti-depressant drugs can relieve the core intrusive symptoms such as sleep disturbance, re-experiencing, and flashbacks independent of any anti-depressant effect. Their impact might not be seen for up to 8 weeks in chronic PTSD. Anti-anxiety drugs such as Klonopin and Xanax can relieve symptoms of anxiety, panic,

and disturbed sleep. Unlike anti-depressants, they carry the risk of addiction and thus their use requires extra judgment, appropriate warning to the patient, and attempts to taper the dose periodically.

Treatment has to be individualized and timed according to the patient's clinical status and his location along the course of his illness.[38] Earlier, when exposure to the traumatic scene or cues that trigger symptoms is intolerable, the patient must be separated from those stressors. Doing so might require interaction between the clinician and the patient's attorneys, employer, disability insurance carrier or other agency.

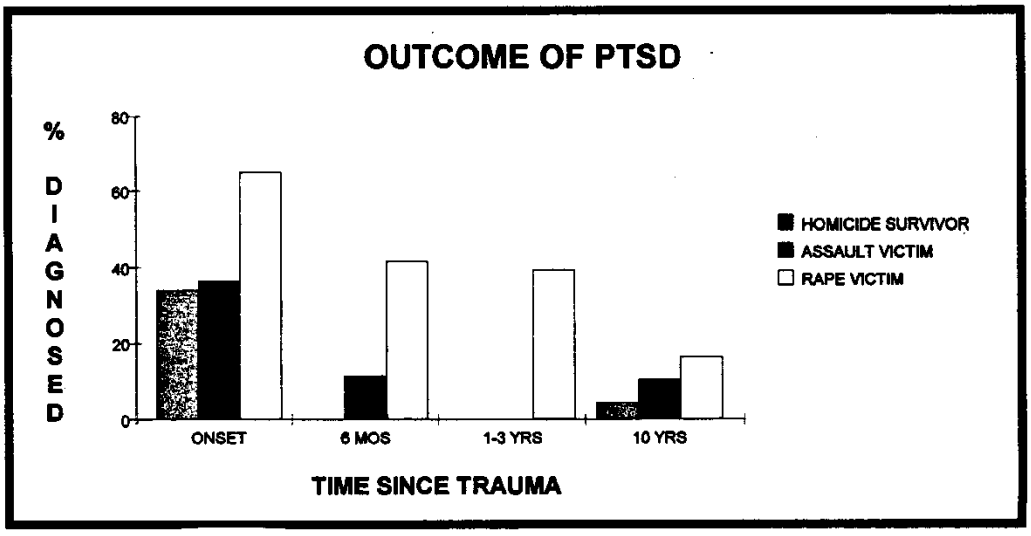
Various non-pharmacological psychotherapies have been offered. These have involved cognitive approaches, relaxation techniques, and behavioral approaches including re-exposure of the patient to his stressors or cues that resemble it, either literally or through imagery. If the patient can tolerate re-exposure, usually after anxiety and hyperarousal symptoms have diminished, and recontact with the noxious stimuli is desirable, he might be re-exposed in a gradual fashion, perhaps by use of a technique of "systematic desensitization." Sometimes a decision is made to re-expose the patient abruptly, either literally ("in vivo"), or figuratively by use of imagery, through processes called "implosive therapy" or "flooding." Complications of such re-exposure might include relapse of symptoms, depression, panic attacks, or substance abuse.[36,37]

Prognosis

To estimate the prognosis of a disease that might not emerge for months or years and whose course might vary depending upon the nature of the causative stressor may seem as futile as trying to predict the final length of a coiled spring when no one knows how tightly it is to be wound. Such information is useful, though, to assess damages in civil cases and in criminal law to demonstrate that a stressor might influence behavior years after its occurrence.

Many victims experience enough symptoms to make the diagnosis of PTSD shortly after trauma but recover within 4 weeks, and the diagnosis is not given by definition. Many others who meet the diagnostic criteria recover within 4 to 6 months.

Since PTSD can persist for years or decades, prospective measurement of the outcome over such a long term is often impractical. Estimates have been made by administering questionnaires to identified groups, *i.e.*, veterans or former POW's, or by re-interviewing victims of past disasters from whom data was collected earlier and is still on record. As does the prevalence, the prognosis appears to vary in relation to the severity of the stressor. Usually the figure reported is the percent of individuals who still meet all the criteria to make the diagnosis. Of a group of ex-WW II POW's, 50% met the diagnostic criteria within one year of release, and 29% still qualified for the diagnosis 40 years later.[39] Of survivors of the Buffalo Creek, West Virginia flood in 1972, 44% suffered PTSD when assessed in 1974. The figure fell to 28% when reexamined in 1986[12]. A graph of the declining rate of diagnosis among some groups for which such information is available is found in Figure 1.[40]



These data, changes in the percent of groups who still meet the diagnostic criteria, do not necessarily reflect changes in the intensity of symptoms. In the Buffalo Creek disaster noted above, a symptom rating scale was administered to survivors with PTSD during the initial assessment in 1974 and again in 1986. Scores fell from an average of 3.9 in 1974 to 2.7 in 1986, representing a 30% decline in the 12 years.

Conclusions

Since the disease of post-traumatic stress disorder is caused by specific traumatic events, some of which are manmade, and it may result in loss or disability and may contribute to criminal behavior it has found its way into various forensic settings - probably more than any other disorder. Publication of the diagnostic criteria and of the disease process have served the legal community well in providing an explanation of the relationship between the stressor and the subsequent suffering or behavior, thus allowing the delivery of justice by clarifying many cases that otherwise would have remained obscure. The attorney for a PTSD sufferer might have a difficult client as irritability, amnesia, lack of awareness of the diagnosis, and unwillingness to discuss the prior traumatic experience might challenge rapport, and detachment, emotional numbing, and affective blunting might preclude sympathy. Though PTSD shares with other psychiatric diagnoses the disadvantage of lacking a truly objective diagnostic test, abuse by malingering can be limited with adequate care in the evaluation.

Considering the very small number of insanity pleas based upon PTSD and the prevalence of this disorder, it is probably underused as a defense. The disease lends itself to a number of defense theories or rationales for mitigation. Since it is treatable, diversion to treatment in lieu of incarceration should offer a gratifying disposition in many cases. The fact that defendants who pled NGRI on the basis of PTSD are probated more often than other defendants indicates that the courts have felt some comfort with dispositions that do not require incarceration.

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America's Nimble New Ambassador of the U.N.

A code of conduct to negotiate by. For his part, [Bill] Richardson [new Ambassador to the U.N.] says his approach to negotiating with foreign leaders is "governed by several informal principles."

- **He always accepts his adversary's turf conditions - the structure of talks.**
- **He always makes it clear whom he represents, something that may not always have been obvious during his semiofficial hostage-rescue missions.**
- **He prepares extensively, finding out as much as he can about the individual he is to meet.**
- **He always lets his host "vent his frustration at the U.S."**

By listening respectfully, Richardson says he learns what message that adversary wants conveyed to the U.S. Then, he uses what he called "connecting skills" to negotiate.

by Faye Bowers, *The Christian Science Monitor* - 2/13/97

An Introduction to Effective Intervention in Cases of Domestic Violence

Carol Jordan

The Incidence of Violence in Families

The past two decades have seen a slow but startling awakening to the existence of widespread abuse within American families. The literature on physical abuse has "discovered" and focused upon populations of victims in a singular fashion. In the 1960's, studies began to reveal the routine victimization of children (*Gil*, 1970); in the 1970's researchers began a focus on spouse as well as child abuse (*Gelles*, 1980); and abuse perpetrated against the elderly received attention for the first time in the 1980's (*Steinmetz*, 1981). Researchers in the area of spouse abuse or domestic violence estimate that 50-60% of American families will experience violence at some point in the context of that relationship, and that the number of women beaten within one year by a spouse reaches approximately two million (*Straus*, 1977-78). More recently, the estimates of wife assault have ranged from 25% (*Straus*, *Gelles*, & *Steinmetz*, 1980) to 50% (*Walker*, 1984). In a 1979 study on the incidence of spousal violence in Kentucky, a Lou Harris study found that 23% of women polled answered affirmatively when asked if they had ever been the victim of this type of crime (*Schulman*, 1979). Reliable statistics related to the incidence of husband assault are not as available, reflecting an unfortunate lack of attention to an apparently smaller population of victims.

Domestic Violence Defined

Domestic violence has traditionally been defined in its narrowest sense, that is, physical violence or assault of a spouse. In reality, however, domestic violence is the summary or aggregate of physically or sexually abusive behaviors directed by one spouse against another. This more inclusive view is important, for generally when one form of abuse exists, it is coupled with differing levels of other forms as well. As if by definition, the infliction of physical assault has as its partners the infliction of fear, sexual assault or exploitation, and attempts to control and dominate the victim's lifestyle. As a result, a model which delineates four separate forms is helpful in providing a comprehensive definition of this crime:

THE CONTINUUM OF DOMESTIC VIOLENCE

Expressive Violence	Instrumental Violence
Escalating Conflict	No Precipitator
Argument	Violence as an Instrument
Predictable	Unpredictable
Reciprocal Violence	Victim and Offender Roles
Low History of Violence	Childhood Abuse History
Remorse	No Remorse/Victim Empathy
Counseling	Court Mandated Counseling
Substance Abuse	Anti-Social or Disordered Offenders
Minimal Psychological Harm	Episodic Substance Dependency
	Severe Psychological Harm

Adapted from Neidig (1984)

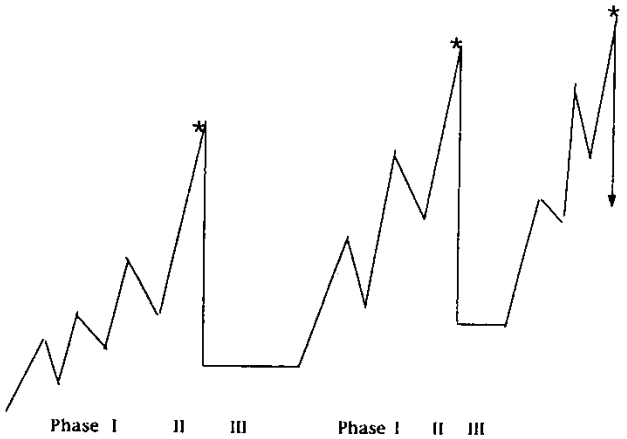
Physical violence or abuse - the non-accidental injury of an adult which is the result of acts of commission by a spouse. Physical abuse involves a wide range of behavior, including pushing or shoving, slapping, hitting, kicking, biting, the use of weapons, or other acts which result in injury or death. It is the most common pattern in cases of domestic violence that the type of injury sustained grows more severe as abuse continues in the relationship. The type of injury sustained may also differ by the motivating factor for the violence, that is, violence which results from an inappropriate expression of emotion occurring during an argument frequently results in facial or other types of visible injury. In those instances where violence is the tool of the perpetrator by which the victim is controlled however, the victim's injury may be inflicted on a part of the body which may be easily hidden from view, and hence hidden for the awareness of persons outside the family.

Sexual violence or abuse - a non-consenting sexual encounter in which the victim is pressured, coerced (expressed or implied), or forced into sexual activity with the spouse. Sexual violence or abuse involves a wide range of behavior, including genital exposure, unwanted touching, fondling, fellatio or cunnilingus, anal or vaginal penetration, and exploitation through photography or prostitution. Until recent years, discussions related to sexual assault have excluded the significant number of battered spouses who are also victimized by this crime. This type of restricted thinking and archaic values which have viewed married women as property have been reflected in state laws which have historically exempted married persons from prosecution under sexual assault statutes. In 1990, the Kentucky General Assembly took steps to recognize the complexity and the reality of the crime of rape in marriage by passing legislation to criminalize sexual assault regardless of the relationship between the victim and the offender. Passage of such legislation was critical as researchers have estimated that rape by a spouse is one of the forms of sexual coercion which a woman is most likely to experience (*Finkelhor & Yllo*, 1985).

Emotional and psychological abuse - emotional abuse can best be defined by describing its result, that being the destruction of an individual's self-esteem. This abuse, whether dealt in a manner of name calling, ridicule, threats, or other forms, is systematic and purposeful, and has the effect of giving power to the abusive partner. This effect is most often the desired result of a perpetrator whose low self-esteem stimulate insecurity and fears of abandonment which are mitigated by the victim's growing dependence and feelings of self-worthlessness.

When threats occur within a relationship in which violence has previously occurred, their ability to induce fear is significantly enhanced. This so-called "psychological battering" is particularly terrorizing, for a victim need not imagine what violence might be like, nor is she able to deny the possibility that violence might actually occur. In the case of psychological battery, the victim's anticipatory anxiety which results from threats can be as debilitating as the violence itself.

THE PATTERN OF DOMESTIC VIOLENCE*



*adapted from Walker (1979) by Jordan (1993)

Environmental abuse - it is characteristic of domestic violence cases that perpetrators exert efforts to control the victim's environment. Such behaviors may include isolating victims from family members, friends, or other contacts outside the family; prohibiting the victim's access to bank accounts; following her or monitoring telephone calls; and other measures. As in the case of emotional abuse, such controls allow the perpetrator to increase the victim's dependence and create a perspective in her that she has no alternatives to the violent relationship. Additionally, when perpetrators destroy the valued property or pets of victims, as unmistakable message regarding the victim's vulnerability is clear.

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Factors Contributing to Traumatic Stress

- → **Degree of life threat**
- → **Likelihood of recurrence**
- → **Suddenness of the event and its predictability**
- → **Presence of social support**
- → **Presence of emotional or family support**
- → **Personal power of the victim**
- → **Victim's role in the traumatic event**

Adapted from Horowitz, 1986

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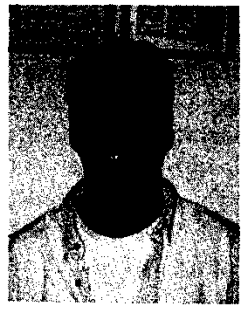
District Court Practice:
Defending Domestic Violence Cases



T.J. Wentz

During Minnesota Vikings quarterback Warren Moon's trial for battering his wife, the prosecution called his wife, Felicia Moon, as their star witness. Not only did Ms. Moon not want to testify against her husband, while on the stand she denied that she was an abused woman and faulted herself as much as her husband for what she termed a "volatile marriage."[1] Although the star football player was acquitted by a jury which believed that "both the Moons were at fault, and that what happened was not that unusual in marriages," trials in which the witnesses have recanted their incriminating statements, claim the police took down erroneous information, or simply do not want to pursue charges are becoming commonplace across the country.

For most of us practicing law in Kentucky, the days of walking into a pre-trial conference and simply saying that this is a "family dispute," "nobody had to go to the hospital," or "they have worked things out between themselves and don't want to come to court" no longer results in a dismissal of the case. In Madison County, they have adopted an informal No-Drop policy on all domestic assault cases. This basically means that once a police officer has filed assault charges against an individual, the County Attorney's Office will pursue the charges to the fullest extent of the law without regard to the victim's level of cooperation or consent. Moreover, changes in Kentucky law over the past five years have allowed police to make arrests for misdemeanors in which they do not observe the criminal behavior, prosecutors to press charges without a signed complaint by the victim, and judges to compel testimony from the victim despite her stated reluctance.[2]

The reasons for such prosecutorial vigilance are clear. When legislators, the media and women's advocates claim that domestic violence is an epidemic, they are correct. In an average year, 572,000 women are assaulted by a husband, former husband or boyfriend, of which 1,400 are killed.[3] Such attacks are not usually isolated. About 20 percent of assaulted women say they have been subjected to three similar attacks within the preceding six months.[4] It is undeniable that prosecutors have a duty to protect domestic violence victims and acknowledge the community's interests in preserving the peace.

However, in such a volatile climate where police, prosecutors and judges worry about bad press and their own individual liability for the actions of accused offenders, it is even more important to make sure clients' rights are not ignored. In a legislative atmosphere where discretionary power is given to police officers to arrest, charge, testify and convict persons, it is imperative that defense attorneys make sure clients are not presumed to be guilty. And finally, when prosecutors adopt across the board policies it is necessary to urge them to retain discretion in distinguishing between criminal conduct and private arguments.

What is domestic violence?

KRS 403.720 defines domestic violence and abuse as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple." This definition covers all blood family members within the second degree which includes parents, grandparents, children, grandchildren, stepchildren, spouses and former spouses. It also covers unmarried couples who have a child together, or couples that live or have lived together. See KRS 403.720(2) and (3).

This definition is especially important in defending criminal assault cases because of the new felony enhancement provisions for assault in the fourth degree. The enhancement applies

only to domestic assaults on persons within the statutory definition of KRS 403.720(2) and (3). Remember that many clients live with extended family members or in a non-traditional family setting. When a client says, "I got into a fight and smacked my brother, Billy," Billy may actually be the client's second cousin who has been living in the family for the last fifteen years and the client simply refers to him as his brother. Or a client may say "yeah, I live with my girlfriend," but in reality has all his possessions in his bedroom at his parent's home and is simply embarrassed that he is 30 years old and still lives with his Mom and Dad. Whether you end up in an assault trial or your client pleads guilty to an assault charge against a person who does not meet the statutory definition of a family member or member of an unmarried couple, make sure that the record reflects this information. This can be litigated by filing a Motion to Declare Case a Non-Domestic Assault, or if the prosecutor does not object simply filing an agreed order with the court. However, failure to take this simple step can come back to haunt your client in future assault cases.

When can a person be arrested for domestic violence?

Lawmakers have always had difficulty trying to balance a person's right to remain free until adjudicated guilty of criminal behavior with the need to protect society from further danger. Generally, police officers have been given discretion to arrest a person once a warrant has been issued, upon witnessing a misdemeanor crime, or if the officer has probable cause to believe that a felony has been committed. See KRS 431.005. Along with the rise in domestic violence has come the concurrent difficulty of protecting domestic abuse victims from what is usually misdemeanor behavior such as terroristic threatening or assault in the fourth degree committed in the privacy of the home.

As of 1992, the laws in fourteen states and the District of Columbia were changed to require arrest of the alleged violator on a report of domestic violence.[5] While taking away police discretion has limited the possible liability if future violence occurs, it has also taken away the ability of the police to peaceably end the violence through alternative means such as letting the person stay with other relatives or friends. Kentucky has not yet taken such a drastic step, but has provided a means for the arrest of alleged violators. Police officers may arrest a person without a warrant if the officer has "probable cause" to believe that the person "intentionally or wantonly caused physical injury" in a domestic violence situation. KRS 431.005(D). In Kentucky, there is no longer any element regarding the possibility of future violence if the alleged violator is allowed to remain in the household.

There are two things to look for in a domestic violence arrest situation. One, is this a case of alleged *domestic violence?* Remember that the victim must meet the definition of "family member" or "member of an unmarried couple" to constitute domestic violence. A police officer still cannot arrest for a misdemeanor assault if the victim is the defendant's girlfriend who lives at home with her mother.

Two, was there a *physical injury?* KRS 500.080(13) defines physical injury as "substantial physical pain or impairment of physical condition." However, Kentucky case law has not provided much protection for criminal defendants. In *Meredith v. Commonwealth*, 628 S.W.2d 887,888 (Ky.App. 1982), the Court said that impairment of physical condition can be any "injury." Courts have found that bruised ribs and a "bruised face [with] a scratch below the eye" constituted physical injury. See *Key v. Commonwealth*, 840 S.W.2d 827, (Ky.App. 1992) and *Covington v. Commonwealth*, 849 S.W.2d 560, 564 (Ky.App. 1992). Moreover, it is well established in Kentucky courts that the victim can testify to any injury sustained as a result of the criminal conduct and no expert medical testimony is necessary. See *Commonwealth v. Hocker*, 865 S.W.2d 323, 325 (Ky. 1993) and *Ewing v. Commonwealth*, Ky., 390 S.W.2d 651, 653 (Ky. 1965)).

Remember that an officer does not have the authority to arrest a person for threats made to a family member or for simply throwing furniture around and destroying property even in a domestic situation unless the officer witnesses the behavior. This often leads to police charging a person with assault in the fourth degree even if the victim says she was not injured or there is no visible sign of injury so they can arrest the angered party. If the criminal citation does not make out a prima facie case of assault and the victim is willing to testify that she was not injured, one defense strategy is to

file a Motion to Dismiss for Lack of Probable Cause as early as possible. While this will rarely result in an outright dismissal of the case, it can convince a judge or the prosecutor that at best this is a case of menacing, terroristic threatening or disorderly conduct. If such an amendment is made and your client is still in jail, the logical argument that follows is that your client could never have been legally arrested for such conduct without a warrant, so his continued detention is illegal. The most recent Kentucky Legislature has provided another tool for police officers to make arrests for misdemeanor criminal behavior in the domestic arena. "If a law enforcement officer has probable cause to believe that a person has violated a condition of release imposed in accordance with section 5 of this Act and verifies that the alleged violator has notice of the conditions, the officer shall, without a warrant, arrest the alleged violator whether the violation was committed in or outside the presence of the officer." Section 5 allows pre-trial release conditions for violations of Chapter 508 (which includes assault) and violations of Emergency Protective Orders. This allows a judge to release a person accused of assault or violation of an EPO on the express condition that no future violence occur, no threats of violence, or even no contact with the victim. A defendant's violation of any of these conditions is a Class A misdemeanor and the police may arrest even if committed outside the officer's presence.

Assault in the Fourth Degree

The most common domestic situation we face is a client charged with striking, pushing, shoving, hitting or scratching their wife or girlfriend resulting in a charge of assault in the fourth degree. To prove an assault occurred the defendant must have (1) intentionally or wantonly caused physical injury to another person, or (2) recklessly caused physical injury to another person by means of a deadly weapon or dangerous instrument.

There must be a "physical injury" to the victim in order to prove an assault. However, as we have already discussed the case law requires very little harm to constitute an injury. Often a victim will be calling my office the day after their husband or boyfriend is jailed with the patented excuses of he didn't hit me, I just fell, or my face was red from crying. If the victim is cooperative, this is the perfect time to ask the victim to come to your office to discuss the case, and if willing, sign a statement requesting that the charges be dropped or that she received no injury from the altercation. These notarized statements can be persuasive in plea bargaining as well as an impeachment tool at trial. While there is nothing unethical about speaking to the victim as long as she understands that you represent the defendant and her cooperation is voluntary, it is important to ask the victim if she is, in fact, telling the truth and willing to testify to this statement in court. If she told the police on the night the defendant was arrested that he struck her in the mouth causing her lip to bleed, and she now wants to sign a statement, which she tells you is not true, that her lip was simply chapped from being in the sun too long which caused the bleeding, she should be informed that giving false information to police officers is a crime for which she could be prosecuted and it would be unethical for you to provide perjured testimony to the court.

This year the General Assembly passed a new law which allows prosecutors to enhance a third assault in the fourth degree charge in a domestic violence situation to a Class D felony.

> If an individual is found guilty or pleads guilty to a third or subsequent offense of assault in the fourth degree pursuant to KRS 508.030 within 5 years, and the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS 403.720, the penalty shall be enhanced by one degree above the penalty otherwise provided for the offense. The victim in the second or subsequent offense is not required to be the same person who was assaulted in the prior offenses in order for the provision to apply. KRS 508.032.

If faced with a felony enhancement be sure to challenge the prior convictions. Under the principles established in *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct 1709 (1969), prior pleas must have been made intelligently, knowingly and voluntarily. Remember that in district court many of the guilty pleas are taken without counsel being present and with-

out a full explanation of each defendant's constitutional rights. Moreover, inherent in any plea taken before June of 1996 when the enhancement law was passed, is the argument that use of prior guilty pleas is an ex post facto law and a violation of constitutional due process. Even if the defendant did have counsel and was afforded a complete reading of his rights, he certainly had no knowledge that his plea would be used against him at a later time for enhancement purposes.

Zealous advocacy principles require challenges to the validity of prior convictions and can also be helpful in negotiating a plea bargain for your client. Since *Boykin* challenges will often result in a need for the actual transcript of the guilty plea in district court, prosecutors may be willing to work out the case as a misdemeanor rather then go to the trouble of requesting court records. And similarly, challenges that the prior assaults were not domestic in nature will often require the prosecutor to not only obtain a copy of citation but actually track down the victim to see if she qualifies as a family member or member of an unmarried couple.

Self-Defense

The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person. See KRS 503.050. Imminent is defined in KRS 503.010(3) as "impending danger, and, in the context of domestic violence and abuse... belief that danger is imminent can be inferred by a past pattern of repeated serious abuse." The burden of raising the issue of self-defense is on the defense, and once raised, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense. KRS 500.070. The initial aggressor may not use physical force unless the force returned from the other person is such that the aggressor believes himself to be in imminent danger of death or serious physical injury. KRS 503.060.

While self-defense will not necessarily be believable in every domestic case, especially when the victim receives a blackened eye and a swollen lip and the defendant has nary a mark, it is a viable defense. Often the victim will admit that she was throwing things at the defendant, was hitting him, or even that she picked up a weapon. If the injury received by the victim was slight, the victim and the defendant are of similar size and strength, and the victim was being violent herself, self-defense can be used effectively.

Extreme Emotional Disturbance

Often the facts of a case will not provide a believable self-defense claim, but may provide the basis for an extreme emotional disturbance to mitigate the punishment. If a person commits assault in the fourth degree while acting under an "extreme emotional disturbance," it reduces the class of the offense to a Class B misdemeanor. KRS 508.040. Kentucky courts have defined extreme emotional disturbance as the following:

> [A] temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be. *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986).

It was designed to replace the "heat of passion" mitigation defense used in pre-penal code times. Extreme emotional disturbance is a mitigating defense to assault and must be provided as a jury instruction if the required elements are available. *Engler v. Commonwealth*, 627 S.W.2d 582 (Ky. 1982). To get an extreme emotional disturbance instruction it is necessary to show evidence of extreme emotional disturbance and a reasonable justification or excuse under the circumstances as the accused believed them to be. *Creamer v. Commonwealth*, 629 S.W.2d 324 (Ky.App. 1981).

Inherent in domestic assault situations are emotional breakdowns between family members. By bringing out the emotional underpinnings of the conflict, it is possible to get the jury to sympathize with your client even if his actions are not excusable. For your client it could mean the difference between 12 months in jail or 90 days, and the conviction cannot be used to enhance punishment in future cases.

The Emergency Protective Order

Any family member or member of an unmarried couple can file a domestic violence petition.[6] The petition is heard by ex parte motion and must present facts and circumstances which constitute the alleged domestic violence and abuse. The Judge will then issue an emergency protective order for a period not to exceed 14 days if there is an "immediate and present danger of domestic violence and abuse." KRS 403.740. The EPO becomes effective at the time of personal service or when the respondent is given notice of the existence and terms of the order by a peace officer or the court, whichever is earlier. KRS 403.735. A full hearing date is then scheduled within the 14 days to allow the respondent to answer. If the Judge finds by a preponderance of the evidence that domestic violence and abuse have occurred and may occur again, then he or she can order the EPO extended for *up to three years*. KRS 403.750.

If your client is charged with violating an EPO be sure to find out exactly what was ordered by the judge. The judge has the power to order no contact, no further violence, vacate residence, prohibit disposal of property, or any combination of the above. Many times a judge will allow contact between spouses and simply order no further violence. If police are then called to the scene of a disturbance and one spouse tells the police there is an EPO in effect, it will often result in an arrest even if no violence is alleged by either party.

Double Jeopardy

Can a person be convicted of violating an EPO which ordered no further violence and for assault on that victim from the same attack? The Kentucky Supreme Court said on August 29, 1996 that the answer is "yes." Despite Kentucky's generally expansive view of the double jeopardy clause the Supreme Court in *Commonwealth v. Burge*, 92-SC-287-DG, 1996 WL 492714 (Ky. 1996), held that the main purpose of the EPO is to provide short term protection to victims of domestic violence against further abuse. "If a violator can only be prosecuted for either the violation or the criminal offense, there is no additional protection." Moreover, the Court held that in compliance with *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed 306, 309 (1932), double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute "requires proof of an additional fact which the other does not." See also KRS 505.020(1) which codifies this case law. Kentucky courts have held that a conviction for violating an EPO requires additional proof that the defendant had knowledge of the EPO and intentionally violated its terms.

Husband-Wife Privilege

One of the reasons that domestic violence cases had been so difficult to prosecute is the fact that usually the only two witnesses to the incident were the defendant and the victim. Since the defendant usually "took the fifth" and the victim usually claimed that she did not want to testify against her husband, the state was left with little to no evidence. The Kentucky Legislature passed KRS 209.060 of the Kentucky Adult Protection Act to alleviate this problem by no longer allowing the privilege to be used to shield the abuser. It provides that "the husband-wife privilege shall [not] be a ground for excluding evidence regarding the abuse, neglect, or exploitation of an adult..."

In *Dawson v. Commonwealth*, 867 S.W.2d 493, (Ky.App. 1993), the Court of Appeals held that the marital communications and spousal privilege were both inapplicable to domestic violence assaults. The "privilege designed to preserve marriages should not apply to cases where violence has replaced marital harmony," and the court could take steps to "compel her [the victim] testimony."

Remember that a person always has the right under the Fifth Amendment of the United States Constitution not to testify if such testimony could be incriminating. The constitutional provision against self-incrimination is a shield and protection, available to all persons summoned as witnesses, whether or

not they have been accused of a crime. "If it appears to the court that a responsive answer to a question propounded would furnish a necessary link in the chain of evidence which might implicate or convict the witness, he may properly claim his constitutional privilege." *Commonwealth v. Rhine*, 303 S.W.2d 301 (Ky. 1957), See also *Young v. Knight*, 329 S.W.2d 195 (Ky. 1959).

A person who is allegedly the victim of domestic abuse may not want to testify because he or she also assaulted the defendant. This tactic can often be used in cases where your client was acting in self-defense. The Fifth Amendment can also be used as a defense in cases where the police have charged all the witnesses with assaulting each other. Each individual has the right not to testify. However, keep in mind that statements made to the police are hearsay, subject to the possible admission as excited utterances or statements against interest.

Conclusion

In a judicial system which has granted broad power to the police to make arrests in domestic situations, to the prosecutor to pursue charges without a victim's cooperation, and to the judge to allow evidence which was once inadmissible, the role of the defense attorney has become even more important. While zealous advocacy has always been the norm in representing clients, the severity of the charge and resulting penalties in domestic violence offenses requires greater energy and creativity in providing our clients with the best available defense.

Footnotes

[1]*Domestic Violence: Should Victims Be Forced to Testify Against Their Will*; Blair, Anita and Raoul Felder, ABA Journal, May, 1996, p. 76.

[2]In this article, I will use the term "her" rather than "him" to refer to the victim of domestic abuse. While some may quote studies which show women are as violent as men, such studies entirely miss the most detrimental aspects of domestic violence: level of fear and seriousness of injuries.

[3]*Id.* at 77.

[4]*Id.*

[5]*Id.*

[6]DPA is not involved at this stage because the action is civil in nature. Only when a person violates an EPO does it become a criminal case. Violation of an EPO is a Class A misdemeanor. KRS 403.763. Remember that testimony taken in an EPO hearing is not admissible in criminal proceedings. KRS 403.780.

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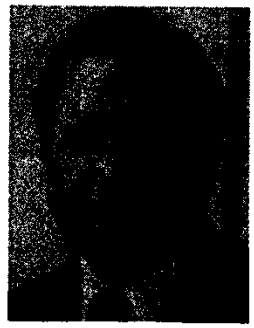
The Traumatically Brain Injured and the Law



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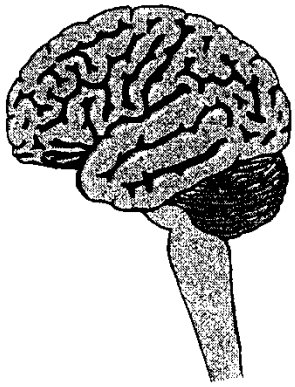

Presented at the Fifteenth Annual Brain Injury Rehabilitation Conference sponsored by the Santa Clara Valley Medical Center. The Rehabilitation Puzzle, What's Ahead? March 26-29, 1992, LeBaron Hotel, San Jose, California. Copyright 1992 by Richard Alexander.

California's civil courts routinely consider, understand and appreciate the significant impact of brain injury, but when it comes to criminal prosecutions our criminal justice system is not designed to provide any special consideration for survivors of traumatic brain injury. Brain injury is considered in sentencing criminal offenders, providing the survivor has a well informed advocate, but that's really not much solace, when many survivors of brain injury should be diverted from the criminal justice system from the outset.

To understand how the system works requires a very basic course in criminal law and practical politics. As a personal injury trial lawyer, I am not the best informed on all the intricacies of criminal law, but from years of representing survivors of major trauma, I unfortunately understand well the public policies issues that drive our legal system and I know the devastating long-term aftermath of a major head injury. So, let's look at how our legal system operates this morning.

California's criminal justice laws are driven by political decisions, which are based on social and moral views concerning crime. In general there is an extremely wide range of opinion about how to best deal with crime, stemming from three different positions.

From the first perspective, American society has been too lenient with those who break the law. Accordingly, the most promising solution is to get tougher will all criminals, to step up enforcement efforts, appoint tougher judges, impose longer jail sentences and build more jails and prison facilities.

The second view believes we can control violent crime by identifying the relatively small group of

criminals who are high-rate offenders and recognize that in important ways they re not deterred by harsher prison sentences. The only realistic way to deal with such chronic criminals is to acknowledge that they are incorrigible. Considering the threat they pose to society, they should be locked up indefinitely.

Lastly, a third view argues that it is essential to recognize the corrosive social and economic forces that lead to criminality, and make a serious effort not just to contain crime, but to prevent it. Proponents of this position recognize that it is no small task to change the social and economic conditions which now provide a breeding ground for crime. As an immediate measure, alternatives to incarceration should be explored, alternatives which promise to help offenders return to productive lives.

Each of these perspectives begins with a claimed explanation of why people commit crime. Because very few people are well informed about criminal justice issues, political decisions about the causes of crime are based upon totally inaccurate information, largely from television and newspapers.

News by definition is the unusual, strange, aberrant, and the exception to the norm, *i.e.* it is newsworthy.

In today's world, on a slow news day criminal violence that occurred somewhere you never heard of is reported locally, not just once, but more than a 1,000 times a day in morning television, drive-time radio, t.v. "live at five" evening news, and the statistical 1.7 newspapers skimmed by your average metropolitan Californian. We are inundated with news concerning crime because it presents visually and it "sells newspapers."

The end result is that day-after-day repetition of the strange, the exotic and the unusual has led many voters to believe the criminal justice system is bizarre. So it is no surprise that nearly every voter will tell you that the criminal does not work, that wholesale numbers go scot free, that the courts are run by lunatics and are supervised by appellate courts which are even worse.

On the other side of the ledger, nobody ever reports, and I doubt few in this room, let alone any newspaper editor, assignment editor or reporter, can tell us, how many people were sentenced to state prison in the Bay Area this month, or the total number of county jail inmates at any one time, because that just isn't news.

So in large part, our criminal justice system has been dictated by the average politician's response to voters who know that the answer is to "lock them up." Like any other field of endeavor, if without special training or experience someone immediately knows the answer to a complex problem and can readily dictate an obvious solution, they clearly have not thought through the question or considered the ramifications of their solution. That is our criminal justice system in a nutshell.

Historically the principal issues in every criminal trial are two fold: did he/she commit a specified act and did he/she intend to do it.

Largely intent is derived from the fact that some complex act was attempted, such as armed robbery of a bank. By the time the robber obtains the gun, walks in, presents the demand note and terrorizes the bank teller, it is pretty clear he/she intended to rob a bank.

Analysis of levels of intent is critical to determine the level of punishment in our system of justice.

For instance, if a person commits murder, but is legally insane, there is no criminal punishment because in large part, they are outside the system of rational adults and are unable to appreciate the nature or quality of their act and do not know the difference between right or wrong.

If there is no cold, cunning, preconceived and premeditated plan to kill, but a momentary rage or blindness to reality driven by an emotional outburst which results in a death, most states recognize this mental state as less culpable than cold-blooded murder, and hold the wrongdoer responsible for second degree murder, with a lesser penalty. If there is no specific intent to kill, but conduct in conscious or reckless disregard of life results in death, we generally find those persons not guilty of murder, but of manslaughter, with a lesser penalty.

The key to understanding these different levels of murder is that the criminal justice system is focusing on the actor's cognitive skills to determine the extent of liability and only in cases

where the actor meets a 100% standard does exculpation occur.

The rules are simplistically designed to be "all or nothing" because they were generated by a political process. Either the killer was insane or not. There is no middle ground or sliding scale. We all know that, except in the rarest of cases, nothing is 100% pure and "all or nothing," rules do not reflect clinical realities.

Similarly in the evaluation of competency to stand trial, we also evaluate cognitive skill on an absolute basis. In order to stand trial one must be presently free of a mental disease, mental defect or mental disorder the nature or severity of which precludes the accused [that also is a 100% standard] from understanding the nature of the proceedings or the ability to cooperate with his/her attorney.

This inflexibility in defining mental status by absolute, "either/or," rules, occurs because our criminal justice system serves many functions. First it is a blend of political, constitutional, moral, and personal judgments forged in a political process controlled by voter expectations. It states the moral values of the community. It is intended to deter the populace generally, although not all activity can be deterrent.

It is intended to specifically deter wrongdoers by taking them out of circulation with the general populace, and it is intended to punish.

There is one thing it is not designed to do and that is, it is no longer designed to treat or rehabilitate, although unquestionably 90% of all convicted criminals at some time will be back on the street. The American public has not figured that out just yet, because the bill has not gotten big enough, although that day appears to be coming soon.

This is not a cynical view, but in a world of limited resources choices have to be made about allocating resources and until such time as the public understands that our prison system is the most pervasive, and unnecessarily expensive, in the world once that fact becomes a reality for the body politic - the next step will be to determine why the politicians have been approaching the issue "unscientifically" or perhaps "with little business or economic sense." Once the case is stated in those terms, as opposed to the current public fear of crime and concern for personal safety, there will be wholesale changes in our criminal law.

As it stands today, the criminal justice system is primarily intended to serve public safety. Criminal law is drafted to reflect widespread public fear and misinformation about the causes and prevention of crime. As a result there no special place for or appreciation for the role or impact of traumatic brain injuries in the current system, because the survivor of traumatic brain injury does not fit into the all or none thinking of our law.

The only arena in which traumatic brain injury is considered is in post-conviction settings, even though a good case can and should be made that politically, morally, and economically many survivors of brain injury should not be involved in the criminal justice system at all, but the traumatically brain injured have not sufficiently impacted the criminal justice system in any one county to merit economic consideration. It is only a matter of time until that occurs since the rate of persons being diagnosed as brain injured has been occurring at a relatively constant rate of approximately 2,000 per year here in Santa Clara County and once seriously injured complete cures are rare. Demographically, three quarters of the victims are males, one half of whom are ages 15 to 34. They are the "go for the gusto," high speed, consumers of alcohol who are going to live forever and who dominate ERs Friday night through Sunday morning and the Monday morning arraignment calendars in the courthouse. From a public health perspective, the top priorities for public education are alcohol abuse, roll bars, air bags, and helmet protection for motorcyclists, bicyclists, skateboarders, and skiers. These annual conferences clearly are making an important contribution to raising the public's knowledge on this issue, but the number of TBI persons is not expected to significantly diminish over the next ten years.

In my practice I have learned that there is widespread misunderstanding concerning traumatic brain injury even in otherwise knowledgeable medical circles. Anecdotal evidence does not replace scientific research, but recently in one of my cases a well regarded Welch Road neurologist concluded that a moderate head injury in a bicycle/truck collision, which resulted in a fractured bicycle helmet, was not responsible for chronic fatigue six months post-injury. Even after presented well documented medical references

describing fatigue as the most common complaint in two-thirds of all minimal to moderate head injury patients, the practitioner still opined that the fatigue was simply secondary to depression, unrelated to the head injury. Such a misinformed view by a treating physician is devastating for the victim and in this case her ability to achieve fair compensation in a strongly contested case of liability.

At the criminal justice level, next to nobody, including public defenders and judges, appreciates that TBI has been closely associated with criminal histories and specifically with violent rages. Current research from the University of Chicago by Dr. Stuart Yudafsky shows that the most common cause of explosive anger is brain injury or neurological disease and that there are now medications available to control violent rage. Beta-blockers can be used to effectively treat not only high blood pressure, but also violent rages. This research is confirmed by the University of Pennsylvania study of 286 psychiatric patients who showed unprovoked rage; in that cohort 94% had some kind of brain damage.

And all this is of dramatic consequence since it correlates with the studies by Dr. Dorothy Lewis of the NYU School of Medicine, and others, of 15 death row inmates in the *American Journal of Psychiatry* [143:7, July, 1986] and a separate study of 31 incarcerated delinquents reported in the *Journal of the American Academy of Child and Adolescent Psychiatry* [1987, 26, 5:744-752]. There is no question that much violent crime can be traced to brain injury, especially in criminals who are repeatedly violent.

While brain damage alone may not be likely to promote intense violence, the most lethal combination is a history of neurological damage and abuse in childhood. When a child has some organic vulnerability, like a brain injury, and is raised in a violent household in which the child has been brutally abused and has witnessed extreme violence, then the end result is a very violent person.

In addition Dr. Lewis's research found that victims of physical abuse were readily distinguished as more aggressive. As Dr. Lewis explains, "children imitate what they see.

Second, the kind of abuse to which such children are subject often results in injury to the central nervous system. This injury, in turn, contributes to the impulsiveness, emotional instability, and cognitive impairment that diminishes their ability to control their behaviors.

Finally, the brutality directed toward these children engenders extraordinary rage and contributes to their paranoid orientation.

(T)his rage is rarely directed toward the abusing parent but rather is displaced onto a host of others in the abused child's environment, teachers, peers and police."

As a consequence, individuals with "this combination of vulnerabilities are especially at risk for committing violent acts when confronted with stressful stimuli, such as interpersonal discord, sexual frustration, and verbal or physical provocation.

Their threshold for aggression is lowered even further by ingestion of alcohol or drugs.

Dr. Lewis terms this condition Limbic Psychotic Aggressive Syndrome, which is an important step forward in forensic psychiatry rather than trying to explain the conduct of repeatedly violent individuals whose disorders do not fit current diagnoses conduct disorders or anti-social personality.

Lewis's work confirms that there is a "constellation of neuropsychiatric and experiential factors that differentiate" violent delinquents from nondelinquents and provides a scientific foundation for the forensic psychiatrist to move the debate from issues of guilt and punishment to treatment and prevention.

Against these exciting developments in understanding of the causes of violent crime, we find ourselves confronting the real world where millions are spent on modern jails that lack funding for adequate operating budgets and where the director of the county's mental health unit resigns after a team of state experts roundly criticized the county jail's program from inadequate staffing, to failing to diagnose and treat, to ignoring mental health patients, to failing to prevent suicides.

At the same time, not surprisingly, a nationwide survey has ranked California 31st among the states in the delivery of mental health services, a further decline from its 25th place two years ago.

The survey by the National Alliance for the Mentally Ill, which was conducted by the Public Citizen Health Research Group, rates Los Angeles as having the worst public mental health services of any major city in the nation. Particularly striking was the report's conclusion that 3,600 severely mentally ill inmates housed in Los Angeles County Jails comprise the "largest de facto mental institution in the nation."

I know from my own practice and working closely with the families of survivors and their health care providers that there is no organized long-term system of care for the traumatically brain injured in our area. TBI patients without families are relegated to the street or incorrectly diagnosed as mentally ill. For those with families, the families do not simply become care providers: they suffer one of the most outrageous burdens that destroys families, causes siblings to leave home prematurely, and mandates that someone give up their life to care for the injured. That's why the research of Dr. Harvey Jacobs on the long term impact of brain injury is so extremely important and why I seek and value his assistance in court to explain that the real impact is continuous, never ending, and always fraught with ongoing disaster.

So it is no surprise that when survivors of traumatic brain injury encounter the courts, it takes substantial litigation muscle to get the system to comprehend the special needs of the brain injured.

So what do I propose?

First, our system of mental health evaluations needs to look at states like Massachusetts which have established fully operating psychiatric clinics in the courthouse. The clinic provides evaluation,therapy, education and consultation, research and supervision. At the Cambridge Massachusetts Court Clinic, operated by Dr. James C. Beck, the major focus of daily activity involves the evaluation and treatment of individuals referred through their contact with the court system as part of the state Department of Mental Health and as an academic division of the Department of Psychiatry at the Cambridge Hospital, Harvard Medical School. Staff psychiatrists are called on daily for in-court emergency consultations. In addition, psychiatrists and other staff members offer on-going therapy.

What has evolved is an on-going partnership venture between mental health professionals and the trial court which provides a wide a variety of clinical services in an effort to serve the generally underserved court-related individual and his/her family, of which perhaps the most valuable is prompt and early diagnosis, evaluation and referral.

But the real benefit of the system is that it provides the court, judges, probation officers, mental health, schools, social services and youth services with immediate access and daily contact with mental health professionals.

Although no empirical data is available, a system such as this is probably more cost effective than those which fail to identify and divert individuals from the expense of the criminal justice system.

Prompt identification is the key.

Because the number of TBI patients present a small problem in any city or county, a stateside system of prompt identification and verification would well serve this population. The State of California's computerized Criminal Information and Identification system, known as C.I. & I., can and should identify victims of TBI. I realize of course the thin line between identification and stigmatization, but when a survivor of bring injury is arrested, anything that can minimize and avoid the abuse of incarceration and result in diversion to a treatment program or special placement should be pursued. The State's computerize system contains substantial controls preventing unauthorized access to the data base, including strong documentation and recording of access. In short, this statewide system has extremely good security and will not stigmatize victims, but will aid in providing realistic options. It is used by every law enforcement agency in the state and is routinely accessed at the time of booking. Identification of persons with brain injury at this stage would greatly assist in intake classification and release on own recognizance decisions. Hopefully at some time in the future it would also serve to aid in diversion as well. And that brings me to my last point. In large part many survivors of brain injury, who are not violent, do not belong in the criminal justice system. But before the public recognizes that fact that a substantial public education effort is needed.

So lastly, I challenge you to make the legal system respond to the advances being made in understanding the role of brain injury by taking the forefront in an educational effort directed to both the bench and bar. A series of local programs for both prosecutors and defenders, followed by presentations to the annual meetings of the California Judges' Association, California District Attorneys' Association, California Public Defenders' Association and California Attorneys for Criminal Justice, will advance the time for better understanding of the long term impact of traumatic brain injury on the victims as well as the community. Once this occurs the next step of changing state law to aid diversion from the criminal justice system will be more easily accomplished.

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CONNELLY RESIGNS

Ernie Lewis, Public Advocate
Department of Public Advocacy

December 2, 1996

After much soul-searching, I have decided to resign my position as an Assistant Public Advocate with the Kentucky Department of Public Advocacy, effective January 10, 1997. As you know, I have accepted a clinical professorship position with the University of kentucky College of Law.

As a person whose entire legal career has been spent in DPA, I truly am a product of Kentucky's public defender system. The Department trained me and then challenged me to reach my potential as an attorney and a person. It fostered in me a standard of excellence in advocacy. More importantly, my years as a public defender proved to me over and over again that each one of us can make a different in this world, and that the law is a powerful tool for insuring fairness and social change, even for the most powerless. That precious knowledge, born from experience, is something I hope to convey to my students.

Likewise, I cannot adequately express my deep respect and affection for the many women and men who are the heart and soul of DPA. I have been extremely blessed to work with and learn from so many committed and dedicated individuals. Not only have they been my co-workers for over thirteen years, they have become my closest friends, confidants, and advisors. I will miss them.

I do not know what the future holds in store for me. We are all tossed on a sea of fate. But I do know, when the cry is the loudest and the defendant needs an attorney, the public defender will be there. When every other person has turned against the accused or convicted, the public defender will be there. When the individual has no one to stand up for her rights, the public defender will be there. I will be there too, for I know from the depths of my heart, I am, and will always be, a public defender.

Allison Connelly

Some of the Nitty Gritty: Examples of Changes in the *DSM-IV*

This article discusses examples of some specific changes in the most recent edition of the Diagnostic & Statistical Manual of Mental Disorders, the DSM-IV, the official mental health diagnostic scheme used in the U.S. and their implications for criminal defense team members and their clients.

Introduction

Published in 1994, the fourth edition of the *DSM* is the American Psychiatric Association's (APA) most current delineation of diagnostic nomenclature and mental health disorders. The *DSM-IV* is the fifth version of the official diagnostic scheme endorsed by the APA and adopted in the U.S. over the past forty years. Its most recent predecessor, the *DSM-III-R*, had been in use since 1987.

Procedural safeguards were instituted by the DSM-IV Task Force and its Work Groups to ensure that proposed changes in the *DSM-IV* have a clear scientific and/or conceptual evidentiary basis. Toward that end, a three-stage empirical process was adopted: (a) comprehensive reviews of the existing empirical and clinical literature on particular disorders; (b) data reanalyses of previously conducted research; and (c) implementation of extensive field trials to address concerns about diagnostic issues in particular disorders.

A secondary but no less important goal of the revision process was to extensively document the empirical and/or conceptual bases of changes. Documentation of the revisions was proposed to minimize concerns about arbitrary and idiosyncratic changes that had plagued earlier versions of the ***DSM***[1] and to maintain historical continuity with the ***DSM-III*** and ***DSM-III-R***.

A major vehicle for documentation of the evidentiary bases for *DSM-IV* text and diagnostic criteria sets is the planned publication of the *DSM-IV Sourcebook*, a five-volume synopsis of the clinical and empirical support for various decisions reached by Work Groups and the Task Force. Volume I has been published and the remaining volumes are expected out over the next few years.

Basic Structure of the *DSM-IV*

Before identifying some of the major types of changes in the *DSM-IV*, it might be helpful to include basic information about the structure of the *DSM*. Since publication of the *DSM-III* in 1980, the *DSM* has described psychiatric illnesses and mental disorders through a five-dimensional descriptive system, labelled, in *DSM* language, the "multiaxial system." The five "axes" listed in the *DSM* involve five different but intimately related ways of describing psychiatric symptoms. The axes identify a complex range of psychiatric and psychosocial phenomena, including delineation of major mental illness, enduring personality traits and maturational delays, and the description of medical, developmental, psychosocial and environmental phenomena that may exacerbate or mitigate the effects of mental disorders. *See, Table 1, Multiaxial System - DSM-III* and *DSM-III-R*.

The *DSM* is composed of sixteen major classes of mental illnesses, within which particular disorders are subsumed. For example, the class of mood disorders includes such disorders as major depression, bipolar I and II, and dysthymia; the class of anxiety disorders includes, among others, post-traumatic stress disorder, obsessive-compulsive disorder, and phobic disorders (*e.g.*, simple phobia, social phobia, and agoraphobia).

Individual disorders are placed in a particular class of mental illness on the basis of shared phenomenological features. That is, two disorders within the same class of mental illness may share a predominant emotion or behavioral symptom, may respond similarly to medication, may be genetically linked, and/or may consistently occur together with other disorders. For example, Post-traumatic Stress Dis-

Multiaxial System - *DSM-III* and *DSM-III-R*

Axis I - Includes the "clinical syndromes," *i.e.*, the major mental disorders. This axis comprises what most people think of as mental illnesses. It is composed of approximately 15 categories of mental disorders, each comprising a distinct group or class of mental illness (*e.g.*, Mood, anxiety, psychotic, or dissociative disorders). Each group or class (*e.g.*, mood disorders/anxiety disorders) contains distinct disorders (*e.g.*, major depressive disorder, bipolar I and II disorders, etc./panic and anxiety disorders, phobias, PTSD) which make up that group.

Axis II - Includes longstanding and enduring personality traits and maturational/developmental deficits and delays. Personality traits are "enduring patterns of perceiving, relating to, and thinking about the environment and oneself, "and are exhibited in a wide range of important social and personal contexts. It is only when personality traits are inflexible, maladaptive and cause either significant functional impairment or subjective distress that they constitute an actual disorder. The essence of maturational/developmental delays is a disturbance in the acquisition of "cognitive, language, motor, or social skills." Such disturbances may be pervasive (as with mental retardation), involve delays or deficits in specific skills (reading, arithmetic, language), or involve qualitative distortions in multiple areas of normal development (autism).

Axis III - Includes physical disorders and medical conditions that may affect psychological functioning.

Axis IV - Includes psychosocial stressors that may influence psychological functioning, they are rated on a five-point scale from "mild" (relationship breakup) to "catastrophic" (death of a child or spouse).

Axis V - Includes the delineation of a longitudinal context (known as the Global Assessment of Functioning [GAF]) within which to appraise psychological functioning. Social, psychological and occupational functioning is rated on a 100-point scale of mental illness which includes 90 (absent or minimal symptoms, "good functioning in all areas"), through 50 (serious symptoms, "suicidal ideation, severe obsessional rituals...serious impairment in some functioning") to 20-10 ("persistent danger of severely hurting self or others...persistent inability to maintain minimal personal hygiene [smears feces]...serious suicidal acts with clear expectation of death).

Table 1

order (PTSD) and Panic Disorder with Agoraphobia (PDWA) are both in the anxiety disorder class of mental illness, and share similar emotional, behavioral, and physiological symptoms. These disorders have in common a predominant emotion (fear); a similar behavioral pattern (phobic avoidance of feared situations, people or events); and similar physiological responses (increased autonomic arousal when confronted with anxiety-provoking or feared stimuli). Additionally, a similar mode of psychotherapy (behaviorally-based "exposure therapy") has been effective for some patients in reducing distress significantly for both disorders. Finally, evidence suggests a possible biomedical and/or psychophysiological link between PTSD and PDWA, as both disorders occur together with depressive disorders and respond similarly and positively to a certain class of drugs.

The purpose of grouping disorders on the basis of shared features is to facilitate the process of "differential diagnosis," the term used to describe the hierarchial decision-making process required to differentiate a particular disorder from other disorders which have one or more similar presenting features. For example, Attention Deficit Hyperactivity Disorder (a disruptive behavior disorder), Major Depression (a mood disorder) and Post-traumatic Stress Disorder (an anxiety disorder) may all share characteristics of concentration difficulty and agitated behavior. To determine whether these characteristics are symptoms of a particular disorder, and, if so, to identify that disorder, a careful evaluation of present symptoms, as well as a careful history are needed.[2]

The description of particular disorders occurs through clearly specified "criteria sets" which outline such factors as the type, number, duration, and severity of symptoms required to warrant a diagnosis. *See Table 2* for criteria sets for PTSD. A wealth of additional information is provided in the text which accompanies criteria set definitions. One area of further information detailed in the text includes factors predisposing individuals to particular disorders, *e.g.*, family history, exposure to extremely stressful environmental events, and in-utero exposure to trauma and/or toxins. Additional information might also address the nature, subtypes and specific course of particular disorders, *e.g.*, age of onset (early vs. late); mode of onset (abrupt

vs. insidious); severity of disorder (mild, moderate or severe); and chronicity and duration of the disorder (episodic vs. continuous, single event vs. recurring episodes, or full vs. partial remission).

Types of Changes in the *DSM-IV*

Changes to the Axes - *DSM-IV* includes a number of conceptually distinct changes. Revisions were made in the content of two axes within the multiaxial system as the learning, communication and motor skills, and pervasive developmental disorders were moved from Axis II to Axis I. Another change involved the designation of Axis III as relating to "general medical" conditions rather than only "physical" conditions, in order to deemphasize the somewhat inaccurate distinction between "organic" (or biological) and "psychological" factors that was implicit in ***DSM-III-R***. Very minor changes were made in Axes IV and V regarding the specification of psychosocial stressors and general psychological functioning.

Changes to the Criteria Sets and Disorders - With respect to major mental illnesses (Axis I) and enduring personality traits (Axis II), modifications included, among other things:

(1) Changes in the names of major diagnostic classes and disorders. For example, there is no longer a class of disorders known as "organic mental syndrome and disorders." The rationale for this change was that this category, as employed in *DSM-III* and *DSM-III-R* suggested a deceptive distinction between disorders caused by psychiatric (mental, emotional or behavioral) versus organic (physical or bodily) factors.

Of additional interest is the fact that the name of a disorder which has received much public and media attention, Multiple Personality Disorder, has been changed to "Dissociative Identity Disorder." This change was based in part on the recognition that distinct personality entities (*e.g.*, the "Three Faces of Eve") are per se less common than the presence of different and dissociated personality states (*e.g.*, passive, aggressive, gregarious, etc.)

(2) Changes in diagnostic criteria for particular disorders. *See*, discussion of PTSD, *infra*.

(3) The creation of several new diagnoses, such as bipolar II, acute stress disorder, and several new childhood disorders; and

(4) The deletion of some diagnoses, including self-defeating personality disorder.

The current version also lists certain syndromes in an appendix with recommendations for further study, such as postconcussional disorder and mixed anxiety-depressive disorder. Additional axes are also proposed for study, and certain disorders are delineated as subsumed by other diagnoses. In addition, developers of the *DSM-IV* placed greater emphasis on the importance of variables such as culture and gender in the development and expression of mental illness (which will be discussed in the next article in this series). Below, a closer look is taken at the types of changes made through a description of the revisions made regarding PTSD.

An Example of the Concerns Guiding Changes in the *DSM-IV*

PTSD was one of twelve disorders targeted for intensive study through field trials prior to publication of the *DSM-IV*. The following is an overview of two issues discussed among PTSD researchers and clinicians involved in the revision process. This example is offered merely to illustrate the kinds of concerns faced by mental health practitioners making diagnoses, and the conceptual underpinnings of the impetus for reconsideration of existing diagnostic definitions. *See, Table 2* for descriptions of the diagnostic criteria for PTSD in *DSM-III-R* and *DSM-IV*.

Says Who? - Defining A Traumatic Event (Criterion A)

As can be seen in Table 2, criterion A for a PTSD diagnosis is the experiencing of a traumatic event. The definition of a traumatic event, called the "gatekeeper" to PTSD, is clearly of considerable importance; if an event does not qualify as traumatic, one cannot, by definition, be diagnosed with PTSD. Thus, the definition of criterion A, a traumatic event, has significant implications for assessment of the prevalence of PTSD in both clinical and community samples. If the description of the trauma is overly inclusive, estimates of PTSD would likely increase; if the description is too

Table 2

DSM-III-R Diagnostic Criteria for Post-traumatic Stress Disorder (309.89)

A. Person has experienced an event that is outside the range of usual human experience and would be markedly distressing to almost anyone, *e.g.*, serious threat to the life or physical integrity of oneself, one's children, spouse, or other close relatives and friends; sudden destruction of one's home or community; or seeing a person who has recently been, or is being, seriously injured or killed as a result of an accident or physical violence.

B. The traumatic event is persistently reexperienced in at least one of the following ways:

(1) recurrent and intrusive distressing recollections of the event (young children may express themes or aspects of the trauma in repetitive play); (2) recurrent distressing dreams of the event; (3) sudden acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative [flashback] episodes); (4) intense psychological distress at exposure to events that symbolize ore resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness, not present before the trauma, indicated by at least three of the following:

(1) efforts to avoid thoughts or feelings associated with the trauma; (2) efforts to avoid activities or situations that arouse recollections of the trauma; (3) inability to recall an important aspect of the trauma; (4) markedly diminished interest in significant activities (in young children, loss of recently acquired developmental skills); (5) feeling of detachment or estrangement; (6) restricted range of affect or feelings; (7) sense of foreshortened future, *e.g.*, does not expect to have a career, marriage, etc.

D. Persistently increased arousal, not present before the trauma, indicated by at least two of the following:

(1) difficulty falling asleep or staying asleep; (2) irritability or outbursts of anger; (3) difficulty concentrating; (4) hypervigilance; (5) exaggerated startle response; (6) physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event (*e.g.*, a woman raped in an elevator breaks out in a sweat when entering any elevator).

E. Duration of the disturbance (symptoms in B, C and D) of at least one month.

Specify delayed onset if the onset of symptoms was at least six months after the trauma.

Notable Changes in Diagnostic Criteria for Post-traumatic Stress Disorder (309.81) in _DSM-IV_

A. Person has been exposed to a traumatic event in which both of the following were present:

(1) person experienced, witnessed, or was confronted with an event or events involving actual or threatened death or serious injury, or a threat to the physical integrity of self or others; (2) response involved intense fear, helplessness, or horror (children may express by disorganized or agitated behavior).

B. the traumatic event is persistently reexperienced in one (or more) of the following ways:

(1)-(4) Only minor changes; (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma *and* numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma; (2) efforts to avoid activities, places, or people that arouse recollections of the trauma; (4) markedly diminished interest or participation in significant activities; (3), (5), (6), (7) same as in *DSM-III-R*.

D. Same as in *DSM-III-R*, but with number six (6) deleted.

E. Duration of the disturbance (symptoms in Criteria B, C and D) is more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if: **Acute**: if duration of symptoms is less than 3 months. **Chronic**: if duration of symptoms is 3 months or more. **With Delayed Onset**: if onset of symptoms is at least 6 months after the stressor.

narrow, estimates of PTSD would likely decrease.

In *DSM-III* and *III-R*, a traumatic stressor was defined as an event "outside the range of usual human experience" that would be "markedly distressing to almost anyone." Several limitations of this definition were noted and investigated, and led to the changes in definition apparent in Table 3. First, epidemiological data about the prevalence of certain traumatic stressors (rape, childhood sexual abuse, assault and batter) consistently indicate that they are a common part of human experience in our society and, thus, cannot be deemed "outside the range of usual human experience." Second, the *DSM-III-R* definition did not recognize the possibility that relatively low magnitude stressors (*e.g.*, a minor car accident), perceived as traumatic by susceptible individuals, could cause the full spectrum of PTSD symptoms.

The *DSM-IV* definition of traumatic event has been both expanded and made more explicit. The definition is more explicit by virtue of the requirement that a stressor involve actual or threatened death or injury, or a threat to physical integrity. The definition is more expansive by virtue of including events that a person has witnessed or "confronted" as qualifying events. Finally, the person's reaction to the event must include "intense fear, helplessness or horror," thus, the traumatic stressor is now in part defined by the subjective emotional response to an event, rather than by the more objective *DSM-III-R* standard of an event that would be "markedly distressing to almost anyone."

A Square or a Rectangle? - Classifying PTSD as a Disorder

The debate over this issue concerns the appropriate disorder classification of PTSD, or its "nosological home." PTSD was categorized as an anxiety disorder in *DSM-III* and *III-R*. In the development of *DSM-IV*, it was considered for possible placement in two other classes of disorders. First, some researchers and clinicians argued that PTSD more appropriately belongs in the class of dissociative disorders because, while it shares features with other anxiety disorder (*e.g.*, fear, avoidance, hypervigilance, poor concentration, etc.), it also shares symptoms with the dissociative disorders (*e.g.*, flashbacks, memory disruption and amnesia). A second proposal was to create a new cause-based class of disorders that share common symptoms arising from exposure to a stress or stressors. Mentioned for possible inclusion in this proposed class, in addition to PTSD, were the adjustment disorders, which by definition involve a maladoptive response to an identifiable psychosocial stressor. Following discussions, it was decided that the most appropriate placement of PTSD in the *DSM-IV* was in the class of anxiety disorders, with which it shares many symptoms.

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Footnotes

[1]It has been argued that earlier versions of the DSM proposed diagnostic criteria sets that were the result of "expert" consensus or "group" opinion, and were therefore necessarily subject to the limitations of group processes.

[2]As noted by Kaplan and Sadock, one of the essential cornerstones of an adequate and reliable mental health evaluation is a thorough review of history and systems. Kaplan, H.I.; Sadock, B.G., *Comprehensive Textbook of Psychiatry*, (Williams and Williams, 5th Ed. 1989). Unfortunately, it is still frequently the case in criminal cases, especially in death penalty litigation that superficial evaluations are conducted based largely on self reports of clients, with no attempt made to obtain and review information about the client and his/her family history.

Trauma & Recovery: A Book Review

"PSYCHOLOGICAL TRAUMA is an affliction of the powerless. At the moment of trauma, the victim is rendered helpless by overwhelming force. When the force is that of nature, we speak of atrocities. Traumatic events overwhelm the ordinary systems of care that give people a sense of control, connections and meaning." This is the opening of Chapter 2 of *Trauma & Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror* (1992) [Basic Books, $14.00 paperback; 276 pages] by Judith Lewis Herman, M.D., associate clinical professor of psychiatry at the Harvard Medical School.

This is a powerful paradigm-shifting book that comprehensively sets out the realities of the traumatized through the following chapters:

Traumatic Disorders

1) A Forgotten History
2) Terror
3) Disconnection
4) Captivity
5) Child Abuse
6) A New Diagnosis

Stages of Recovery

7) A Healing Relationship
8) Safety
9) Remembrance & Mourning
10) Reconnection
11) Commonality

Trauma & Domestic Violence. Herman tells us that in the 1970s it was discovered that the most common post-traumatic disorders were not in combat victim's but in women who were victims of domestic violence. "The late nineteenth-century studies of hysteria foundered on the question of sexual trauma. At the time of these investigations there was no awareness that violence is a routine part of women's sexual and domestic lives. Freud glimpsed this truth and retreated in horror. For the most of the twentieth century, it was the study of combat veterans that led to the development of a body of knowledge about traumatic disorders. not until the women's liberation movement of the 1970s was it recognized that the most common post-traumatic disorders are those not of men in war but of women in civilian life." *Id.* at 28.

Trauma's Effects Linger. She further tells us that trauma can be induced by: being trapped, being taken by surprise, exposed to exhaustion, violated physically, exposed to or witnessing extreme violence. When normal human defenses are overwhelmed, the trauma state persists long after the injury ends.

Trauma breaches the foundational "attachments of family, friendship, love and community." It "shatters the construction of self that is formed in relation to others." *Id.* at 49. "People subjected to prolonged, repeated trauma develop an insidious, progressive form of post-traumatic stress disorder that invades and erodes the personality. While the victim of a single acute trauma may feel after the event that she is 'not herself,' the victim of chronic trauma may feel herself to be changed irrevocably, or she may lose the sense that she has any self at all." *Id.* at 86.

Trauma is especially destructive when it occurs in the form of child abuse. "[R]epeated trauma in childhood forms and deforms the personality." Fragmentation by the abused child occurs after in later decades upon divorce, death of a parent, birth of a child.

The Defense of Trauma. We defenders who face the challenging task of representing clients who kill, injure and harm others should carry this book with us in our every effort to evidence the humanity of our clients. Our client-perpetrators frequently are products of a terrifying developmental history that explains, not excuses, their later criminal conduct. Herman says these persons "literally reenact their childhood experience" in their later life criminal conduct. *Id.* at 113. We defenders know that Herman empowers us to show that.

ED MONAHAN

Dr. Smith's Reply to Dr. Semone & Dr. Norton

Reply to Dr. Semone: Dr. Terry Semone (*The Advocate*, Vol. 18, No. 5 (September 1996) purports to discuss neuropsychological screening versus full neuropsychological evaluation in criminal responsibility cases. It emerges however that what he wants to contrast is some imagined "20 minute" test with a full Reitan battery. This straw man does occasion some remarks.

The basic psychological battery used in criminal responsibility cases includes a mental status exam, a Verbal Wechsler Adult Intelligence Scale-Revised and a Bender Visuo-Motor Gestalt Test. Features of all of these exam methods are sensitive to neurological impairment. Further substantiation of impairment can be obtained through the commonly given Performance Wechsler scales and a Canter Bender. It is all these instruments which I was referring to as a "screening" in the essay to which Dr. Semone took exception.

Further, from an earlier article, Drs. Drogin and Barrett make a point that is relevant here. The psychological examiner has training and experience which make him/her sensitive to indicators of brain dysfunction. Thus the subtleties of the responses to the various test instruments, subtleties which may not be noticed by a psychometrician, are apparent to the psychologist. The professional himself is an important factor in the neuropsychological screening.

Certainly a full Reitan battery administered by a skilled neuropsychologist is sometimes essential to answering the question of criminal responsibility. A skilled neuropsychologist is a full time neuropsychologist, not merely a generalist who can do some neuropsychological tests. For the record, it is also true that neuropsychological testing will pick up abnormalities that are not evident on MRI, CT, EEG and other tools of the neurological evaluation.

Having resisted thus far any urges toward bomb throwing one hates to close this discussion without making at least one incendiary remark. A 1992 study found at least one indicator of potential brain dysfunction in 84% of forensic patients in a maximum security state hospital. A 1977 study found Reitan documented brain abnormalities in 100% of rapists, a 94% of homicide offenders and 87% of assault convicts. These results suggest that if we look hard enough, we can find organic brain dysfunction in every violent criminal. Perhaps then there is no such thing as a willful criminal act. Perhaps every murder, rape and assault are mitigated by factors beyond the perpetrators control. Yes, if we can make a full neuropsychological workup a requirement of every fair trial, we will achieve a condition where, in the words of the Howard Jones song, "No one ever is to blame."

Reply to Dr. Norton: In the recent issue of *The Advocate*, Vol. 18, No. 5 (September 1996), Lee Norton, Ph.D., a doctoral social worker, purports to address the question of the role of the social history in a competency to stand trial or a criminal responsibility exam. A macro examination of her essay reveals that Dr. Norton spends less than half of her time addressing social history issues while she tends predominantly to instruct the reader about the role of the psychologist in a forensic exam. One hopes as one reads the article that the examining psychologist is not incompetent though Dr. Norton assumes him/her to be.

No one can argue with the need for an "adequate social history" in a CR or CST exam. Such a history always includes inquiry into the academic, criminal, drug use and mental health history of the defendant. It is important to assess the history of psychological and neurological trauma. Further questioning about history is informed by the results gathered in this inquiry, in the text data or in the records reviewed.

The extent to which collateral interviews are required, the decision about which records are necessary to a decision, the appreciation of the role of abuse history, racism, lifetime poverty, etc., all are questions which the competent psychologist entertains in conducting the CR and CST exams. Each professional, social worker, neuropsychologist, psychometrician, has his own view of what constitutes a complete exam. At a recent conference, Robert Walker, LCSW, handed out a forensic history outline that included 14 pages of social history inquiries. If one remembers correctly, Marilyn Wagner, Ph.D., in an earlier *Advocate* issue, regarded a complete Halstead-Reitan an essential in a forensic evaluation. Every test result from a psychological instrument yields some extra information to add to the picture.

If you ask any professional to describe the ideal evaluation in his/her own field, he will always have an exhaustive list of procedures. The forensic psychologist is required to select from these lists the features that are or may be relevant in the particular case. Every expert witness makes such a selection. Ultimately the retaining attorney and the jury must rely on the judgment and professionalism of the expert as to the thoroughness of each phase of the evaluation. There is always one more thing that could have been done.

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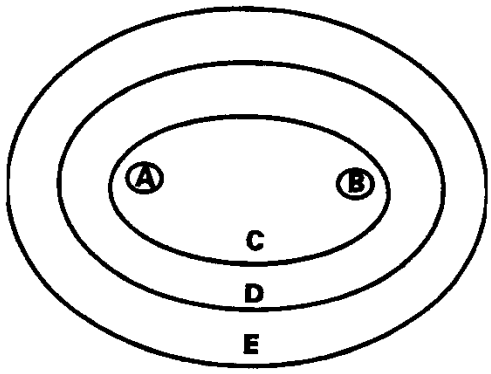
The Use of "Generators" in Brainstorming: An Interactive-Environmental Approach to Case Conceptualization©

This is an exercise designed to generate as many ideas as possible in the initial *brainstorming* approach to case conceptualization. An analogical model with interchangeable *components*, interactive *currents*, and concentric or otherwise related *fields* may add significantly to the creative output of the multidisciplinary team.

There is something counterintuitive to imposing too much *structure* on the free-for-all brainstorming process, and this is not our intent. Rather than viewing the basic graphic tools in this exercise as *templates* or *categories* for group discussion, we will discuss a system of *generators* designed to spark the improvisatory energies of each member of the multidisciplinary team.

Some *generators* will be proposed which can serve as standard models for the conceptualization of any criminal case. Others may be more specialized. A systemic method will be provided for the construction of customized generators that can be designed around the requirements of each individual case.

I. The Basic Generator



A: primary component
B: secondary component
C: primary field
D: secondary field
E: tertiary field

The primary component (A) is that entity which is viewed in this generator as the most important or initial focus of brainstorming.

The secondary component (B) is that entity which is viewed as an addition focus of brainstorming, complementary to (or in opposition to) the primary component.

The primary field (C) is the environmental context of the relationship between the primary and secondary components.

The secondary field (D) is the immediate area or context in which the primary field is located.

The tertiary field (E) is the broader area or context in which the secondary field is located.

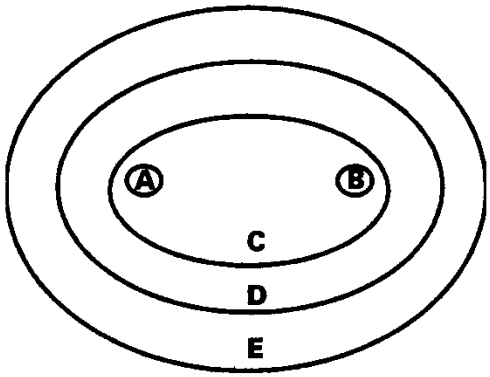
As the first of a series of pragmatic observations on the development and use of generators, it should be noted that the labels applied to various fields and components are not essential to employment of the model, which is designed to be as straightforward and utilitarian as possible. Ongoing use of generators will probably lead to such shorthand labels as *the A character, the B character*, etc., without detriment to the purpose of the exercise.

II. The Initial Generator

Let's construct a sample generator for the following basic case example:

> We are representing a defendant who is a member of a neighborhood gang and who is accused of murdering another gang member. The gang in question is one of several operating in a ten-square-block area.

The components and fields might look something like this:



A: the defendant
B: the alleged victim
C: their gang
D: all gangs in the neighborhood
E: the neighborhood itself

Once an initial generator is constructed, its use can begin. This consists of three basic activities:

1) Brainstorming every question we might want to ask about each individual component and/or field, and

2) Brainstorming every question we might want to ask about the interactions or *currents* between each individual component and/or field.

3) Recasting the questions in (1) and (2) above in terms of the past and future as well as the present.

The first activity would yield a wealth of inquiry concerning the status or functioning of the defendant, the alleged victim, the constellation of gangs in the neighborhood, and the neighborhood itself, all in isolation.

The second activity would involve generating all questions we might have about the relationships between each of the components and each of the fields. on a one-to-one basis, the following relationships can be examined:

A/B	B/C	C/D	D/E
A/C	B/D	C/E	
A/D	B/E		
A/E			

In other words, what was the relationship between the defendant and the alleged victim, their gang, the other gangs in the neighborhood, and the neighborhood itself? What was the relationship between the victim and their gang, the gangs in the neighborhood, and the neighborhood itself? What was the relationship between their gang and the other gangs in the neighborhood, and the neighborhood itself? Finally, what was the relationship between the community of neighborhood gangs as a whole and the neighborhood in which they were located?

The third activity would involve going over all of the questions posed about the individual components and fields, and all of the questions about their various interrelationships, and asking: How would the answers to these questions differ if we looked at these fields and components in the past? What if we were to look at them in the future?

After the changes in answers are discussed, the team can ask itself: What are some of the different questions we would ask about all of the components and fields, if we were thinking in terms of the past or the future?

III. Altering the Initial Generator

Once the three activities outlined above have been performed, the generator can be altered by changing any or all of the components or fields in a systematic fashion, and then recapitulating the three activities in light of different component or field descriptions and interrelated currents.

To use our initial example, we might want to replace our secondary component, the victim, with each known member of the gang. We might want to replace our primary component, the defendant, with other gang members. The primary field of the gang might shift to that of the classroom. The tertiary field of the neighborhood might expand to that of the city.
Of course, the interpolation of some new components or fields may dictate alteration of other components or fields; for example, if we wish to examine the relationship of the defendant and his mother, we would probably want to change the primary, secondary, and tertiary fields to the family home, the brook, and the neighborhood, or to the family, the extended family, and the ethnic community.

This last example also serves to illustrate the point that fields need not be viewed strictly as physical, environmental entities. Indeed, they could function as little more than ideas; for example, they could stand for local ordinances, state laws, and constitutional laws, or friends, acquaintances, and fellow citizens. Similarly, components need not stand for individuals, but could be symbolic of alternate diagnoses, potential suspect genders, or different verdicts.

IV. Constructing New Generators

Once a certain number of alterations have been made to the initial generator, the team may decide to start from scratch with brand new generators that represent a paradigm shift from their predecessors.

To continue with our earlier example, the initial primary component of the defendant might be plucked out of the universe of options in which the crime allegedly took place, and might instead be placed with classes or categories of potential jurors or other courtroom figures within the various levels of our court system, or within the context of each of a series of related charges, or as diagnosed with each of an array of potential diagnoses.

Different potential treating professionals, investigators, or witnesses might be examined as primary or secondary components. How would each of the available judges be expected to view the defendant? What would be the likely environmental effects of different venues?

V. Rewiring, Expanding and Chaining Generators

The initial A/B/C/D/E construction and one-to-one currents of the simple generator are readily adaptable to more elaborate brainstorming opportunities.

Rewiring would involve looking at more complex interactions than just A/H, D/E, etc. Team members could develop issues related to A/B/C, B/C/D/E, and other interactions.

Generators could be *expanded* with addition of multiple components (for example, A, B, C, D, and E) and multiple fields (for example, F through J). Certain components could be combined within some fields while other components could be combined within additional fields;

For example, A through C could be combined in field D while E through I could be combined in field J, all existing within Field K.

These combinations are made easier by the fact that there is no theoretical significance attached to the use of any particular letter or sequence of letters in the construction of generators, and by the use of graphic representation as opposed to complex formulae for expression of individual descriptions and currents.

Chaining of generators could occur in much the same way that other systems combine *genograms* into *ecomaps*. Currents could run from various components of one generator between any number of components or fields from a bank of additional generators, as well as between components of related genograms, ecomaps, and *timelines*.

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PRINCIPLES OF BRAINSTORMING

1) 3 OR MORE PEOPLE
2) CREATIVE STATE OF MIND
3) RELATE FACTS
4) GENERATE EVERY IDEA POSSIBLE
5) LIST OUT ALL IDEAS
6) DO NOT EVALUATE
7) DO NOT PRIORITIZE
8) DO NOT DISPARAGE IDEAS
9) DO NOT DISCARD IDEAS
10) FIND A WAY TO WIN

Update on the New Federal Habeas Corpus Statute of Limitations: Interpretations, Strategies, and an Impending Deadline of April 23, 1997

Paul Bottei

As of April 24, 1996, 28 U.S.C. §2244(d) was amended to impose upon every inmate in state custody a new one-year statute of limitations for filing a federal habeas corpus petition under 28 U.S.C. §2254. The new statute of limitations provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Because there has been little judicial interpretation of the new provisions of §2244(d), this article discusses various possible interpretations of the new statute which one should carefully consider, especially since it is clear that failure to comply with the new one-year limitations will bar a petitioner from obtaining federal habeas relief. This article does not discuss interpretations of §2244(d)(1)(B), (d)(1)(C), or (d)(2)(D), which may provide an inmate additional rights.

The one-year limitation period of §2244(d)(1)(A) apparently has started to run as of April 24, 1996, the day of the enactment of the statute. Under settled legal principles, enactment of a new statute of limitations cannot retroactively cut off a litigant's right to seek judicial relief. Rather, litigants must be given a "reasonable" time after the enactment of a new limitations period to invoke a judicial remedy.

Applying this rationale, the United States Court of Appeals for the Seventh Circuit has held that any state inmate who files a federal habeas corpus petition no later than April 23, 1997 will avoid dismissal because of the statute of limitations. *See Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996)(en banc)("[N]o [federal habeas petition] filed by April 23, 1997, may be dismissed under §2244 (d)."). It is not clear whether the Sixth Circuit will reach the same conclusion, although this appears to be a reasonable one. On the other hand, the Second Circuit has stated in dicta that it sees "no need to accord [habeas petitioner] a full year after the effective date" of the limitations period. *Peterson v. Demskie*, 1997 WL 55841 (2d Cir. Feb. 5, 1997).

Nevertheless, if an inmate completed state post-conviction proceedings on or before April 24, 1996, but the inmate has not yet filed a federal habeas corpus petition, it would appear that any federal habeas corpus petition chal-

lenging a conviction or sentence should be filed as soon as possible, and no later than April 23, 1997. Under virtually every interpretation of the new statute, if an inmate completed state post-conviction proceedings on or before April 24, 1996, but does not file a federal petition before April 23, 1997, the inmate's federal petition will almost certainly be dismissed for failure to comply with the statute.

The federal courts have not yet determined what qualifies as a "properly filed application" for post-conviction relief which tolls an inmate's 365-day limit under §2244(d)(2). At a minimum, it would appear that an RCr 11.42 petition would not be considered "properly filed" if it was not filed within the three-year time limit contained in that rule. Further, it is unclear, for instance, whether an initial RCr 11.42 petition is considered "properly filed" when it is in the trial court, or on appeal in the court of appeals, or in the state supreme court, or on certiorari in the United States Supreme Court.

One might reasonably assume that an initial timely-filed RCr 11.42 petition is considered "properly filed" so long as it is either on appeal in the state court of appeals or state supreme court. One may reach this conclusion, because it would not have made sense for Congress to require a federal petition to be filed while a state petition was on appeal. However, this same reasoning does not necessarily hold while on a petition for certiorari in the United States Supreme Court, because such petitions are rarely granted, and Congress may have wanted an inmate to go expeditiously into federal habeas. However, the courts have not yet spoken on these issues, so be cautious.

If an inmate has had pending a motion under CR 60.02 or KRS Chapter 419 or a successive RCr 11.42 motion, there is a substantial risk that such a motion would not be considered a "properly filed" application for post-conviction relief, given the limited nature of such remedies.

However, if an inmate had a "properly filed" state post-conviction petition which was pending as of April 24, 1996, the statute of limitations arguably is being tolled, and arguably the inmate will have to file a federal habeas petition within one year of the conclusion of the state proceedings. As already noted, because the courts have not yet decided what qualifies as a "properly filed" petition, it is not clear when state proceedings are considered concluded, such that the one-year limitation period would start to run.

On the other hand, an alternative judicial interpretation could require that same inmate to file within a "reasonable" period of time following the denial of relief in the state courts. *Cf. Peterson v. Demskie*, *supra*. Consider this possibility when deciding when to file in federal court.

Given these uncertainties, and given the closing of the federal courthouse doors if an inmate does not comply with the new statute, if one is unclear whether the statute is being tolled, an inmate might wish to file a federal petition as soon as possible, and before April 23, 1997, to avoid dismissal based upon the statute of limitations. One could also move to hold the federal petition in abeyance pending the resolution of pending state proceedings. There is a risk to this procedure, however, as the new federal habeas law allows a federal court to dismiss a petition even if the claims are not fully exhausted in the state courts. Thus, if you go to federal court while there are still ongoing proceedings in the state courts, the federal courts could dismiss the petition on the merits. Carefully consider these possibilities.

If an inmate was not pursuing a direct appeal as of April 24, 1996, but filed a post-conviction petition after April 24, 1996, it appears that the inmate has already used up some of his or her 365 days for filing a federal petition under §2244(d). To determine the final date on which the inmate may file a federal habeas petition, one should take the date on which the inmate filed the post-conviction petition, count the days between April 24, 1996 and that date, and subtract that number from 365. Following any final ruling by the Kentucky courts on the post-conviction petition, the inmate would have that number of days left to file a federal habeas petition.

However, under a more draconian interpretation of the new limitations period, a court could hold that even if a state petition were properly filed after April 24, 1996, the inmate was still required to file a federal petition within a reasonable time after April 24, 1996. If concerned that the courts would

interpret the statute in this manner, an inmate should file a federal petition as soon as possible, even if a state petition is now properly filed and pending. Militating against such a draconian interpretation, however, is the fact that Congress would not have wanted inmates to file simultaneous state and federal petitions, especially if state proceedings would moot the federal proceedings. Nevertheless, keep this possible interpretation in mind.

If an inmate is still on direct appeal, the 1-year limitations period has not even started. 28 U.S.C. §2244(d)(1)(A) states that your one-year statute of limitations starts on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." This section is subject to two different interpretations: (1) direct review is concluded on the date the Kentucky Supreme Court finally decides a case on direct appeal; or (2) direct review is concluded on the date the United States Supreme Court denies certiorari in your case on direct appeal, or, if you have not filed for certiorari, 90 days from the date that the Kentucky Supreme Court ruled on the case.

To ensure that an inmate now on direct appeal will not lose the right to file a federal petition, until the federal courts choose from these two competing interpretations of what is the "conclusion of direct review," under §2244(d)(1)(A), you should assume the worst case scenario, and assume that the one-year federal limitations period starts running from the date the Kentucky Supreme Court rules on the case.

Because the one-year federal limitations period is tolled *only* while the inmate has a "properly filed" state post-conviction petition, the 1-year time limit is *not* being tolled between the time that "direct review" is completed and the time the inmate files a state post-conviction petition. Thus, any time *between* the "conclusion of direct review" and the filing of a state post-conviction petition is subtracted from the inmate's 365 day time limit. Thus, for example, if an inmate files a state post-conviction petition 265 days after direct review is concluded, that inmate will have only 100 days to file a federal petition once proceedings on the post-conviction petition are concluded in the state court.

Every inmate's filing deadline under the federal statute of limitations will thus be different. To determine the last day on which an inmate may file a federal habeas petition, one must properly calculate the number of days which pass between the conclusion of "direct review" and the filing of a state post-conviction petition, subtract that number from 365, and (employing the previously-cited interpretation of what constitutes a "properly filed" petition) count that number of days from the date the Kentucky Supreme Court has denied relief in post-conviction proceedings. This will give you the last possible day on which to file a federal habeas petition. A sample calculation is included at the end of this article, as is a worksheet for calculating an inmate's latest filing date.

Because there is a three-year limitation period for RCr 11.42 petitions, but only a one-year limitation period for federal petitions, it is clear that even if an inmate complies with Kentucky's three-year limitation period, the inmate may still be barred in federal court by the one-year limitation period. For example, if, after direct appeal, the inmate files a RCr 11.42 petition 2 years from the date of the conclusion of the direct appeal, he or she apparently has complied with Kentucky's 3-year limitation period, but will not be able to get into federal court, because the one-year federal limitation period would have passed, and would not have been tolled by a properly filed, pending state post-conviction petition.

Also be aware that, starting April 24, 1996, there is a new 1-year statute of limitations for filing motions to vacate federal convictions and sentences, contained in 28 U.S.C. §2255. This 1-year period starts to run, in most cases, from the date the judgment became final. If an inmate has a federal conviction which became final before April 24, 1996, any motion to vacate sentence would need to be filed as soon as possible, and before April 23, 1997.

The new 1-year limitations periods affect every *state* and *federal* conviction or sentence on an inmate's record, including those convictions which were used to enhance a sentence, *or could be used* to enhance a future sentence. If an inmate has not filed -- or does not file -- a federal petition on any such state or federal conviction or sentence in accordance with the new statutes of limitations, the inmate will lose the right to do so.

As noted earlier, because the federal courts have not interpreted and applied the new statute of limitations, interpretations of the statute presented here -- even if reasonable -- may or may not be adopted and applied by the courts. Keep this in mind when deciding your course of litigation.

Despite the uncertainties surrounding the new statute, one thing is clear: the new one-year limitations period adds yet another layer of complexity to federal habeas corpus practice and poses yet another potential roadblock to habeas relief. However, through careful litigation in light of the new statute, one may ensure that the statute will not close the federal courthouse to those inmates seeking the Great Writ.

Sample Calculation Of Last Date For Filing Petition (Assuming direct review concluded after April 1996):

Event	Date	Number of Days Since Prior Event	Days Counted Toward Federal Statute of Limitations[1]
1. Conviction	April 20, 1999	Not Applicable	A. 0 B. 0
2. Decision by Kentucky Court of Appeals	September 15, 1999	148	A. 0 B. 0
3. Denial of Relief by Kentucky Supreme Court	January 5, 2000	112	A. 0 B. 0 (direct review completed: 1 year now starts to run)
4. Denial of Petition for Writ of Certiorari in United States Supreme Court	May 5, 2000	122	A. 0 (direct review completed: 1 year now starts to run) B. 122
5. Filing of Kentucky RCr 11.42 Motion	July 15, 2000	70	A. 70 B. 192
6. Denial of Relief in Kentucky Court of Appeals	November 15, 2000	123	A. 70 (time tolled: state case pending) B. 192 (time tolled: state case pending)
7. Ruling by Kentucky Supreme Court	March 4, 2001	110	A. 70 (time tolled while state petition pending) B. 192 (time tolled while state petition pending)

*Final date = 365 - 192 (or 70) = 173 (or 295) days after March 4, 2001.

[1]Calculation "A" assumes that "completion of direct review" occurs when the United States Supreme Court denies certiorari following direct review. Calculation "B" assumes that "completion of direct review" occurs when the Kentucky Supreme Court denies discretionary review, or denies relief on direct appeal. Both scenarios assume that a "properly filed" state post-conviction petition is pending until the Kentucky Supreme Court denies discretionary review on post-conviction.

Worksheet for Calculating Last Date for Filing Petition In Your Case:

Event (Column A)	Date (Column B)	Number of Days Since Prior Event (Column C)	Days Counted Toward Federal Statute of Limitations[2] (Column D)
1. Conviction	-----	Not Applicable	A. 0 B. 0
2. Decision by Kentucky Court of Appeals	-----	___ (Count days between Column 1B and 2B)	A. 0 B. 0
3. Denial of Relief by Kentucky Supreme Court	-----	___ (Count days between Column 2B and 3B)	A. 0 B. 0 (direct review completed: 1 year now starts to run)
4. Denial of Petition for Writ of Certiorari in United States Supreme Court	-----	___ (Count days between Column 3B and 4B)	*Add Days from Column 4C to Total from Column 3D* A. 0 (direct review completed: 1 year now starts to run) B. ____
5. Filing of RCr 11.42 Motion	-----	___ (Count days between Column 4B and 5B)	*Add Days from Column 5C to Total from Column 4D* A. ____ B. ____
6. Denial of Relief in Court of Appeals	-----	___ (Count days between Column 5B and 6B)	*Add No Additional Days to Total from Column 5D -- Time is being Tolled* A. ____ B. ____
7. Ruling by Kentucky Supreme Court	-----	___ (Count days between Column 6B and 7B)	*Add No Additional Days to Total from Column 6D -- Time is being Tolled* A. ____ B. ____

FINALLY, subtract your total days in Column 7D from 365 days, and count that number of days from the date in Column 7C, using a calendar. This will give you your last day for filing a federal habeas petition.

365 minus _____ = _____ days (Calculation 8A)
Days in Column 7C

DATE IN COLUMN 7B: _____, 19__ + ___ Days (Days in Calculation 8A (Above)) =

_____, 19__ (Final Day to File Federal Habeas Corpus Petition)

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[2]Calculation "A" assumes that "completion of direct review" occurs when the United States Supreme Court denies certiorari following direct appeal. Calculation "B" assumes that "completion of direct review" occurs when the Kentucky Supreme Court denies discretionary review, or denies relief on direct appeal. Both A & B assume that a "properly filed" state post-conviction petition is pending until the Kentucky Supreme Court denies relief. As noted earlier, this is a reasonable assumption, but may not necessarily be correct, depending on court interpretation of the statute.

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Double Jeopardy As A Bar to Concurrent School Board and Criminal Prosecutions for the Same Conduct

The public perception of increased violence by juveniles has led the state legislature to modify the juvenile code. The upshot of this revision is that harsher penalties for juveniles are now, or will be, permitted. To at least this extent, even though treatment remains the hallmark in our juvenile justice system, the aim of the legislature appears to have turned, to a degree, from the traditional goal of rehabilitation to retribution.

Where a juvenile is alleged to have committed an offense on school grounds, or at a school function, the possibility of retribution against the child is multiplied. Often, the school board exercises its statutory rights to punish the child with penalties ranging up to expulsion. Many times, during or after the time the school board has punished the child, the child is referred to juvenile court where criminal penalties are likely. This result, multiple punishments for the same offense, may be in violation of the double jeopardy clause of both the Kentucky and federal Constitutions.

Double Jeopardy has been characterized as providing "protect[ion] against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969).

For the defendant to invoke the double jeopardy protection, it must be the case that the entities attempting to mete out the punishment are the same sovereign. The double jeopardy clause bars only additional prosecution by the same sovereign. *Heath v. Alabama*, 474 U.S. 82, 106 S.Ct. 438, 88 L.Ed.2d 387 (1985). The doctrine is based on the principle that two different sovereigns derive power from two different sources. Thus, separate sovereigns are allowed to prosecute the same individual for the same conduct where concurrent jurisdiction exists. Each government, in determining what should be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other. *United States v. Louisville Edible Oil Products, Inc.*, 426 F.2d 584 (6th Cir. 1991).

The question of whether a school district and the Commonwealth of Kentucky are separate sovereigns is answered by the Kentucky Revised Statutes. KRS 61.420(5) states:

> "Political subdivision", in addition to counties, municipal corporations, and *school districts*, includes instrumentalities of the Commonwealth, of one (1) or more of its political subdivisions, and any other governmental unit thereof (emphasis added).

The statute specifically includes school districts within the sovereignty of the state. Thus, by statute, school districts are not sovereigns separate and apart from the state.

Additionally, in this state, public education has long been recognized as a function of state government and members of boards of education have been held to be state officers. *Board of Education of Louisville v. Society of Alumni of LMHS, Inc.*, Ky., 239 S.W.2d 931 (1951); *City of Louisville, et al. v. Board of Education of Louisville*, Ky., 195 S.W.2d 291 (1946); *City of Louisville v. Commonwealth*, Ky., 121 S.W. 411 (1909); *Runyon v. Commonwealth*, Ky., 393 S.W.2d 877 (1965).

Furthermore, the United States Supreme Court held that the doctrine of dual sovereignty did not foreclose a double jeopardy claim where violations of a city ordinance resulted in convictions in municipal court and the state subsequently sought to prosecute the defendant for the same conduct in state court. *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 256 L.Ed.2d 435 (1970). In reversing the second conviction the Court reiterated an earlier statement made in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) when it stated, "Political subdivisions of States -- counties, cities, or whatever -- never were and never have been considered as sov-

ereign entities. Rather they have been traditionally regarded as subordinate governmental entities created by the State to assist in the carrying out of state governmental functions." Thus, in addition to KRS 61.420(5), state and federal case law, clearly indicate that the doctrine of dual sovereignty does not stand as a bar to a double jeopardy claim where successive prosecutions are sought by a school district and the Commonwealth for the same conduct.

The prosecution may attempt to avoid a claim of double jeopardy by characterizing a school board action as a civil, as opposed to criminal, action. Unquestionably, school board actions in which students receive punishment are of a civil nature. Nevertheless, the way an action is characterized does not obviate a double jeopardy claim.

In *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989), the United States Supreme Court rejected the government's argument that double jeopardy only applies to punishment imposed in criminal proceedings. The Court determined that a double jeopardy violation "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." The Court noted that "the labels 'criminal' and 'civil' are not of paramount importance."

In *Department of Revenue of Montana v. Kurth Ranch, et al.*, 511 U.S. ___, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994), the United States Supreme Court expanded the *Halper* analysis to taxation. The *Kurth Ranch* Court further recognized that civil penalties are subject to constitutional constraints since they are imposed to deter certain behavior. Whether a civil sanction will be barred or is a bar to further criminal prosecution, depends on the character of the sanction. As the *Halper* Court stated "...a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Thus, it would appear that if a civil sanction is designed to punish, the double jeopardy clause is implicated, but if the sanction is strictly remedial in nature, double jeopardy may not be an issue.

Even if a sanction is fairly characterized as being remedial, it may be so punitive in effect as to bar a subsequent action. In determining whether a supposedly remedial civil sanction is so punitive in nature as to invoke double jeopardy protection, we are guided by the factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). In that case, the Supreme Court held that summary forfeiture of citizenship was a punitive treatment for citizens who evaded the draft by departing or remaining outside the country, and thus required the constitutional procedural safeguards afforded criminal defendants. The Supreme Court stated that it would be inclined to find a sanction punitive when it (1) "involves an affirmative disability or restraint"; (2) "has historically been regarded as punishment"; (3) requires a finding of scienter; (4) promotes the "traditional aims of punishment -- retribution and deterrence"; (5) the activity is a crime; (6) "an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "it appears excessive in relation to the alternative purpose." In reviewing a sanction which is theoretically remedial in light of these factors, the sanction may be so punitive in effect as to invoke double jeopardy protection.

As noted above, the imposition of punitive civil sanctions following a criminal prosecution for the same conduct violates the double jeopardy clause. However, the timing of the proceedings is not determinative. "If in fact a civil sanction may be fairly characterized 'only as a deterrent or retribution,' ...then its exaction before imposition of criminal punishment should have the same double jeopardy effect as exaction afterwards." *United States v. Marcus Schloss & Co.*, 724 F.Supp. 1123 (S.D.N.Y. 1989) (quoting *Halper*, 490 U.S. at 449, 109 S.Ct. at 1902).

Even though juveniles are not endowed with the full assortment of constitutional rights in juvenile court, juveniles are afforded protection against double jeopardy. In *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779 (1975), the juvenile defendant was adjudicated in juvenile court and found guilty of the charge of armed robbery and a disposition hearing was set a few weeks later. During the interim, a determination was made that the defendant was not an appropriate candidate for any of the rehabilitation programs that were available. Based on this information the juvenile court attempted to vacate its finding of delinquency and have the defendant transferred to adult court.

The United States Supreme Court found that such action was in violation of the double jeo-

pardy clause. The *Breed* Court specifically noted that:

> We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.

In restating its view that a person should be held accountable only once for the same offense, the Court noted that proceedings in which one is held accountable for an offense "imposes heavy pressures and burdens --psychological, physical, and financial -- on the person charged."

The *Breed* Court noted that jeopardy had attached when the defendant was put to trial before the finder of facts. The Court appeared to be offended by the notion that an adjudication followed by a criminal trial would give the prosecution an opportunity to review the defendant's defense and even hear the defendant testify. The Court believed that such a procedure would be highly offensive to our basic notions of fair play.

The effect of the *Breed* decision was to prevent successive criminal prosecutions of a juvenile for the same conduct. In a recent New York appellate decision, *In the Matter of the Appointment of Juan C. v. Cortines*, 1996 WL 533934 (N.Y.A.D. 1 Dept.), double jeopardy principles were applied in the context of criminal/civil proceedings. In particular, the *Cortines* Court held that a school board was collaterally estopped from relitigating a Family Court determination that a weapon was illegally seized from a student on school property.

In *Cortines*, the defendant was observed by a security aide walking down the school hallway and suspected that the defendant was carrying a gun. According to the security aide, something that looked like a gun handle was pulling the left side of the defendant's jacket down. The security aide grabbed the defendant and felt the area where he suspected the gun was located. A gun was found and the defendant was charged in both criminal and school board actions.

During a suppression hearing in Family Court, both the security aide and the defendant testified. As part of the defendant's testimony, the defendant gave a demonstration of how he carried the gun in his jacket pocket. On the basis of the defendant's testimony, the court found the security aide's story unconvincing, suppressed the gun, and dismissed the charge.

Later, the school board conducted a suspension hearing. The school board hearing officer ignored the Family Court findings and found that the security aide had reasonable suspicion to believe that the defendant possessed a gun. The defendant was suspended from school for one year. After several unsuccessful appeals, the New York Appellate Division ruled that the school board was bound by the principles of collateral estoppel.

Collateral estoppel is an aspect of double jeopardy. *Ashe v. Swenson*, 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189 (1970). Therefore, in line with *Halper* and its progeny, it would appear that civil/criminal distinctions are no more dispositive with respect to collateral estoppel than they are with the more general double jeopardy claims. However, collateral estoppel only bars the relitigation of a fact previously found in the defendant's favor and does not necessarily bar a second action concerning the same subject matter. Thus, collateral estoppel and double jeopardy are not conceptually the same ideas.

Therefore, the decision in *Cortines* notwithstanding, it is possible that a court could rule that double jeopardy does not apply where a civil sanction has remedial goals. However, the very fact that *Cortines* was decided on double jeopardy principles, does give the trial court the opportunity, since the child has already been punished, to dismiss the case as a double jeopardy violation. Certainly, *Halper*, in which it is stated that a sanction which does not solely serve a remedial purpose is punishment, is strong support for such a result. Furthermore, proper application of the principles of double jeopardy are an essential part of the juvenile's due process rights.

Due process requires that a juvenile charged in Kentucky for conduct which is violative of the code of student conduct be afforded certain procedural protections. For a school board to impose sanctions on a child, a hearing in conformity with KRS 158.150 must be held. Pursuant to the

hearing, as noted in KRS 158.150 (2), the child is endowed with certain rights. First, the child is entitled to an explanation of the evidence if the child denies the charge. Thus, the child is required to either admit or deny the charge. Second, the child is given the opportunity to present his/her version of the facts. Thus, the prosecutor has the ability to hear the defendant's version of the controversy. This is the very essence of the procedures found offensive in *Breed*.

KRS 158.150(1)(a) and (b) also define the conduct which can result in suspension or expulsion. Most of this conduct requires a finding of scienter and it has traditionally been viewed as criminal. These are two of the factors enumerated in the *Mendoza-Martinez* test in determining whether a sanction is punitive or remedial. Thus, whenever this particular statute is invoked, a strong argument can be made that subsequent criminal prosecution for the same conduct should be barred on double jeopardy grounds.

For a school to function efficiently and to provide the best possible learning environment, disruptive or disobedient children should be punished. However, if the school decides to mete out the punishment, criminal action may be foreclosed by double jeopardy considerations. If the school board sanction is merely remedial, double jeopardy will rarely, if ever, be implicated. If the sanction is strictly punitive, principles of double jeopardy are offended by a second proceeding on the same conduct. Where a sanction is mixed, one that has both remedial and punitive aspects, double jeopardy may prevent a subsequent action.

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Tips on Basic Expert Consultation

While obtaining court approved funding still remains a major obstacle to many defense attorneys seeking expert assistance, it should not prevent us from at least consulting with the experts.

This article is not intended to explain how we can obtain court approved funding for experts since there are several well reasoned articles in previous publications of *The Advocate* that address this problem.

This article does address the issues involving expert assistance prior to seeking court approved funding and is intended to assist and encourage all defense attorneys to begin seeking expert assistance in developing their cases. In today's increasingly complex society, we, as defense attorneys, are remiss in the representation of our clients if we do not understand the basics in locating and utilizing experts. Certainly, we should not conclude that every case requires the assistance of an expert; but effective representation mandates that we be able to distinguish and act upon those cases that do.

When Should an Expert Be Consulted

We, defense attorneys, acquire the skill and knowledge to confidently use experts in the same manner as we are continually acquiring and enhancing our other legal talents. We learn the basics and then build upon this knowledge by incorporating it into our legal practice. While no special formula exists that dictates when a case presents issues for which an expert should be consulted, it suffices to state that the uses for experts are as varied as are the fact patterns in our individual cases. One effective way of determining when an expert is needed in our cases is to brainstorm the issues that are presented. We need to use our scant and precious free time, or set aside time, to discuss the issues in our cases with others. It is not necessary to block long periods of time for brainstorming; but we do need to incorporate brainstorming into our practice, if we have not done so already. Brainstorming may be our most powerful defense tool because it uses the concentrated intellect of several people.

In choosing when an expert should be consulted, we must decide whether there are issues in our cases which require the knowledge, skill, experience, training, or education of persons other than the lay witnesses to understand and explain. In deciding if those issues exist, we should focus our brainstorming sessions, in part, on judge and juror empathy. That is, we should decide what testimony or facts would persuade us, if we were a judge ruling on a motion or a juror deciding the verdict or setting the sentence, to decide in favor of our client. In many cases we will conclude that lay witnesses can provide a much stronger impetus for a favorable ruling, simply because of their personal knowledge of the facts. Some cases, however, will inevitably necessitate consulting an expert so that our clients' stories can be told in a knowledgeable, articulate, and persuasive manner. Our decision to consult with experts should increase as we become more knowledgeable in the ways in which they can assist us.

Another invaluable tool for gauging when we should consult our own experts is to interview the prosecution's experts. We can learn who the prosecution is using as experts in a variety of ways. These include: formal and informal requests from the prosecutors or police; preliminary, suppression, or taint hearings; written bill of particulars; and autopsical and serological reports. While some of the prosecution's supposed experts are obviously prosecutorial advocates, my experience, except in cases involving alleged child victimization, has shown that most are extremely helpful and are willing to discuss their findings freely with defense attorneys.

Where to Locate an Expert to Consult

Once we have determined that an expert's assistance may be needed, the next step, and perhaps the most difficult, is locating one with the knowledge and desire to help a criminal defendant. This, even more than funding, is the

hurdle that prevents most defense attorneys from using experts. We are overcome by the immense frustration from not knowing where to locate an expert, as well as from discovering, especially in alleged child victimization cases, that many private experts are so repulsed by the mere allegations that they are unwilling to assist criminal defendants.

Since experts willing to assist criminal defendants are scarce, we need to begin our search for people with specialized knowledge as soon as possible. While talking with others we should ask whether they have used an especially talented expert in the past. We should not limit ourselves to criminal defense lawyers as our only source for locating experts. Our search should be broaden to include our support staff, acquaintances, and friends. These people may be familiar with an obstetrician, gynecologist, psychologist, or someone else with specialized knowledge who has provided valuable assistance to them in the past. We should always remember that some of the most effective advertising for lawyers, doctors, and other professionals has been oral advertisement from their own clients.

Another fertile, but seldom used, source for locating experts is knowledge acquired by civil attorneys. A large percentage of the practice of civil law is devoted to working with experts in a wide variety of disciplines. Not only can civil attorneys help us locate experts, they may also be willing to discuss how they were able to use a particular expert effectively.

While attending seminars and lectures, we should talk with the presenters, who may be experts themselves, or who may have employed experts in their own cases. We should begin compiling our own collection of curricula vitae, outlines, and handouts from these seminars and lectures for future use. While many of the experts that we encounter at these seminars may live long distances from our courts, they are accustomed to traveling those long distances in order to testify at pretrial hearings and trials. With the use of telephone conferences, facsimile machines, and other technologies these long distances should no longer be a block to consulting nationally recognized experts.

After reviewing the reports from the autopsy, serology, handwriting, and other examinations, we need to contact those who prepared the reports. I have discovered that most preparers are willing to openly discuss their findings. Most prosecution experts have allowed me to record my interviews with them and have even supplied me with items not provided by the prosecutors. As with all witnesses, however, we must remember the general caveat that anything we reveal to them may be relayed to the prosecutor. While the expert may or may not contact the prosecutor, the wiser course is to act conservatively in imparting our knowledge of the case to the experts, but yet not so cautiously as to never contact their experts. If any prosecution expert refuses to discuss his findings with us, we should query him as to his reluctance just as we would with a lay witness. The particular reasons why an expert would refused to discuss his findings with defense attorneys can be quite varied and are outside the scope of this article, but almost always those reasons will provide ammunition for impeachment at trial.

The Department of Public Advocacy's (DPA) field offices and its main law library have the Expert Witness List, which should also aid us in beginning our search for experts. While DPA's list is not exhaustive, it does contain several competent experts in over sixty different areas. In addition, the DPA also has the Resource Center, which has numerous articles, transcripts of expert testimony, and curricula vitae of the experts listed in the Expert Witness List.

Experts may also be located by reading books and articles that cover the particular subjects in which questions have arisen. Since the authors of those works have spent their own time and energy writing the articles, they are often willing to continue the dissemination of information by privately consulting with defense attorneys. This is especially true if the articles were written for defense oriented publications.

Another source for locating experts include retired or semi-retired professionals who are good samaritans or who empathize or sympathize with our clients and their situations. While these experts may not want to actually testify,

they can be a fountain of information, providing us with their opinions and literature.

How to Consult an Expert

Before contacting the experts that our search has located, we need to obtain and review all relevant discovery. In addition, we should familiarize ourselves with the basic terminology and literature relating to the issues for which we feel the expert can provide assistance. An expert's time, and especially the time of a talented expert, will be just as limited as our own time. Therefore, having taken these preliminary steps before contacting the expert will make our initial consultation more productive. We should request to meet with the expert, if possible, and have him suggest or supply any additional literature that he may wish us to review. We may not be able to meet with the expert before obtaining funding, but we should at least be able to get the literature. The literature should not only help us in educating ourselves, but it should also enable us to educate the courts as to our need for expert assistance. This literature, if made a part of the record, can also be used to show the appellate courts that expert assistance was needed at the trial level.

Unless we are familiar with a particular expert, we should continue our search until we feel comfortable that the expert we choose can meet the needs of our case. Deciding on a particular expert is not always easy, but we need to employ the same techniques in choosing experts for our cases as we do in choosing experts to assist us in our personal lives. For instance, we need to make some of the same considerations that we would make in choosing a pediatrician for our children, a mechanic for our vehicle, a dentist for our teeth, or others.

While consulting with the experts that we feel may be helpful, we should request them to provide us with the names of other attorneys that have employed them in the past. Some experts may feel uncomfortable with this request, but those experts who are truly professional will not feel threatened but may even suggest it themselves. When we contact the expert's former employers, we should request a critique of the expert's strengths and weaknesses and any particular strategies for which the expert was used.

We should always remember that experts are motivated not only by money and prestige but also by their sense of professionalism. Therefore, we need to energize our experts, whenever possible, by pointing out that by helping our clients they are also preventing the decadence of their own profession. For example, honest and knowledgeable gynecologists are sometimes outraged at the dubious conclusions reached by some medical personnel in sex abuse cases.

Why Consult an Expert

The best reason to consult experts is so our clients' stories can be presented in an intelligent, knowledgeable, and persuasive manner. An expert can provide us with the necessary ammunition to launch our own attack or rebuff an attack by the prosecution. Therefore, even if the expert never appears in court to testify, he can still provide us with the knowledge and assistance to understand technical writings and to properly prepare for cross examinations.

Technological developments in areas such as DNA, blood spatter, and gunshot analyses, have been enormous within recent years. This technology has provided lucrative employment for numerous laboratories and agencies across the country. Many of these laboratories and agencies have either by design or accident placed themselves in self serving environments with no controls or checks having been placed upon them. Much of the new technologies, and especially the methods of using these technologies, have not been examined by critical peer review and have consequently been accepted by courts with only moderate review. People who are knowledgeable in these technologies need to be consulted so that our clients do not fall prey to misleading or false conclusions reached by prosecution experts. Few areas of any discipline are accepted without some professional disagreement, so we need to arm ourselves with these differing opinions so that we can enlighten the judges and juries before whom we practice.

With the increase in the number of people willing to testify as experts comes the likelihood that they will someday testify against defense attorneys. For instance, if a trial attorney does not consult with an expert and a defendant is convicted, then the expert may later testify at

a post-conviction hearing regarding the valuable assistance he could have provided had he been consulted by the trial attorney. Therefore, failing to at least consult with an expert could lead to an RCr. 11.42 motion or lawsuit being filed against the trial attorney. With all of the nuances in criminal law for which defense attorneys are held accountable, we should not feel any reluctance in asking for help in understanding other technological and specialized fields.

Conclusion

While there are a plethora of reasons not to call an expert to actually testify, the only reason not to at least consult with an expert is because the facts presented in the case need no further explanation than that supplied by the lay witnesses. Defense attorneys are presented with this type of case daily, but too often we allow the tone and direction of our cases to be set by the misdiagnosis, incompetence, or charlatanism of the prosecution's experts. Therefore, I encourage all defense attorneys to seize control of their cases by adding to their repertoires the ability to locate and utilize experts in their practice.

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♦ ♦ MEDIA ADVISORY ♦ ♦

Truths, Half-Truths, and Lies: Myths and Realities About Crime and Punishment

The 1996 political campaign season has featured competing "sound bites" about crime and criminal justice policy. Both at a national and local level, candidates are attempting to sound "tough" on crime, often repeating simplistic solutions to a complex problem.

"Truths, Half-Truths, and Lies: Myths and Realities About Crime and Punishment," by Marc Mauer and Malcolm Young, examines ten of the most commonly voiced assumptions about crime policy and finds them to be either misleading or untruthful. Among the myths examined by the report are the following:

- "Prison population increases lead to a drop in crime."
  - Despite a continuous rise in the prison population from 200,000 in 1973 to 1.1 million in 1995, both violent crime and overall crime rates have had periods of rise and fall during this time.
  - Despite harsher punishments for violent offenders and in spite of recent declines in homicide nationally, homicide rates in many major cities are far higher than twenty-five years ago: 71% higher in Los Angeles, 85% in Phoenix, 213% in Milwaukee and 329% in New Orleans.
- "Most offenders are incarcerated for a violent offense."
  - In 1991 (the most recent year for which data are available) 53% of state prison inmates were incarcerated for a nonviolent property or drug offense, an increase from 45% in 1986. In federal prisons, 59% of inmates are incarcerated for drug offenses alone.
  - Approximately about 400,000 state prison inmates -- 38% of the total -- have no current or prior convictions for a violent offense.
- "A coming generation of 'superpredators' will initiate a crime wave unlike any we've seen before."
  - The much-proclaimed 23% rise in the number of young males by the year 2005 will result in fewer young males than were in the population in 1980.
  - Projections that 270,000 of these young males will be "super predators" are based on *all* males under the age of 18, thus including toddlers as well as teenagers. FBI data, though, show that 93% of juvenile arrests are for juveniles over the age of 13.

Other assumptions analyzed in the report include:

- "Higher rates of African American incarceration are due to their increasing crime rates."
- "Prisons today are country clubs and are too soft on offenders."
- "Locking up more offenders saves money by reducing crime."
- "Offenders under supervision in the community on probation or parole are responsible for most violent crime."

The Sentencing Project is a national non-profit organization that conducts research on crime and criminal justice policy. Copies of the report are available for $5 from *The Sentencing Project*, 918 F St., N.W., Suite 501, Washington, D.C. 20004; (202) 628-0871. **Members of the Press:** Marc Mauer and Malcolm Young of *The Sentencing Project* are available for interviews; Tel: (202) 628-0871.

West's Review

Commonwealth v. Gross, Ky.,
95-SC-773-DG, 10/24/96

Savage v. Commonwealth, Ky.,
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Hudson v. Commonwealth, Ky.,
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Commonwealth v. Boris Williams, Ky.,
934 S.W.2d 552 (11/21/96 amended 11/26/96)

West v. Commonwealth, Ky.App.,
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Commonwealth v. Britt, Ky.App.,
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Brock v. Commonwealth, Ky.,
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Julie Namkin

***Commonwealth v. Gross*, Ky.,**
95-SC-773-DG, 10/24/96

The issue in this case is whether a circuit court has jurisdiction to enter a probated sentence after a defendant's conviction has been affirmed on appeal.

Gross was convicted in the Fayette Circuit Court in February, 1992, of first degree rape and second degree burglary. Final judgment, sentencing Gross to thirteen years imprisonment, was entered on March 9, 1992.

Gross was released on bond pending his appeal of his convictions. The Kentucky Court of Appeals affirmed Gross' convictions and this Court denied Gross' motion for discretionary review.

Gross then filed a motion in the trial court seeking modification of his thirteen year sentence and requesting probation or conditional discharge. Gross failed to cite any rule of procedure authorizing such a request. The Commonwealth objected on the ground that under CR 59.05 the trial court lacked jurisdiction to modify Gross' sentence since more than two years had passed since the entry of the final judgment. The trial court believed it retained "continuing jurisdiction, until the time has run to preclude shock probation." It granted Gross' request and placed him on probation for five years on condition that he serve six months in jail and meet other conditions relating to community service and work release. The trial court also noted that at the time of the original sentencing, it had mistakenly believed Gross was not eligible for probation, and it had not considered a suspended sentence as required under KRS 533.010.

The Commonwealth appealed the trial court's order granting Gross probation, and the Court of Appeals affirmed in a two to one decision. The Court of Appeals recognized the trial court lacked jurisdiction to modify Gross' sentence under CR 59.05, but found authority for the modification in CR 60.02 because the original sentencing was made under the mistaken belief that probation was not available. The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review.

The Kentucky Supreme Court reversed the opinion of the Court of Appeals and remanded the case to the Fayette Circuit Court for reinstatement of the original thirteen year sentence. The Supreme Court reasoned as follows.

First, under CR 59.05 a final judgment may be altered, amended or vacated within ten days after its entry. Thus, the trial court lost jurisdiction to amend Gross' sentence to probation. The Court rejected Gross' argument, and the holding of the Court of Appeals, that the trial court had continuing jurisdiction under KRS 439.265 (the shock probation statute) until the time for applying shock probation has expired.

The Court also rejected Gross' argument that the trial court could amend its judgment under the recent case of *Potter v. Eli Lilly and Co.*, Ky., 926 S.W.2d 449 (1996), which applies only in the extraordinary circumstances where a fraud has been perpetrated upon the court.

The Court also rejected the trial court's belief that it could amend Gross' sentence because originally it had not considered a suspended sentence as required under KRS 533.010. The Kentucky Supreme Court stated that "[a] mere error of law does not reinstate jurisdiction which has been lost."

The Court also found that the Court of Appeals' reliance on CR 60.02 was misplaced. First, neither Gross nor the trial court relied on CR 60.02 as a basis for modification of Gross' sentence. Second, the motion to modify was not made within one year of the entry of judgment as required by CR 60.02. Third, the trial court's order modifying Gross' sentence indicated the presentence report had mistakenly stated Gross was not eligible for probation because of his convictions. Gross never challenged this statement at his sentencing hearing or on direct appeal. It was only after Gross lost his direct appeal that he argued to the trial court that his convictions were eligible for probation. Because this claim appeared on the face of the record and could have been challenged at the sentencing hearing or on direct appeal, the Court found this argument was not properly preserved for review and "appears to be barred from any collateral attack whether by CR 60.02 or otherwise." Fourth, the Court stated that even if the issue had been properly preserved for review, an error of law is not sufficient to permit the reopening of the judgment.

Savage v. Commonwealth, Ky., 95-SC-386-MR, 10/24/96

The issue in this case is whether Savage's confession should have been suppressed because after his arrest pursuant to a warrant he was taken to a robbery squad office for interrogation before being brought before a judge as required by RCr 3.02.

In a four to three opinion, the Kentucky Supreme Court upheld the admission of Savage's post-arrest confession. The majority of the Court reasoned as follows.

Savage was arrested pursuant to a warrant which directed the arresting officer to bring him forthwith before a judge. The warrant also contained a yellow post-it note on which was written the instruction to contact any city police robbery detective for interview before booking. After Savage was arrested, the Louisville police officers followed the directions of the post-it note rather than the mandates of RCr 3.02(1) which states that "[a]n officer making an arrest under a warrant issued upon a complaint *shall* take the arrested person without unnecessary delay before a judge as commanded in the warrant."

Upon being taken to the robbery squad office Savage was given his *Miranda* rights which he waived, both in writing and on the tape recorded statement. After spending two hours in the robbery squad office, Savage was taken to the Jefferson County Jail and then taken before a judicial officer as required by RCr 3.02.

Savage argued his confession should have been suppressed because the police did not obey the procedural language of the warrant.

In upholding the admission of Savage's statement, the majority points out that Savage did not show that the delay was unnecessary or that any prejudice resulted to his fundamental rights from the delay. The majority also admits the police failed to comply with "the literal mandates" of RCr 3.02, but since there was neither coercion or duress in obtaining the confession, there was not a flagrant disregard for the rule. The majority cites *Smith v. Commonwealth*, Ky., 920 S.W.2d 514 (1996), for the proposition that unnecessary delay should not invalidate any confession made during the post-arrest period unless coercive tactics were used. The concurring opinion notes that the main issue in *Smith*, *supra*, was not unnecessary delay and said language should only be considered as dicta.

The majority opinion states the *Miranda* warnings and the Rules of Criminal Procedure protect the accused's constitutional rights. Since Savage was twice given his *Miranda* rights prior to his post-arrest and pre-jail interview, and since he was taken before a judge within a couple of hours, the majority found no constitutional violations. The Court states that a delay of a few hours is not presumptively illegal. The Court goes on to state that "[t]o require law enforcement to take an arrestee forthwith before a judge is not consistent with the orderly operation of our courts."

By contrast, the concurring opinion states that unnecessary delay is not the real issue in this case. The real issue is whether the police, after they apprehend a suspect pursuant to an arrest warrant, should have the discretionary power to determine whether to follow the dictates of the warrant or to alter it and take the suspect to their own arena and interrogate him before bringing him before a judge. The opinion states the Court should be wary of issuing opinions which, in effect, give the police the discretionary power to do what they will with a defendant in a warrant case.

The concurring opinion finds a clear violation of RCr 3.02. Although stating Savage's conviction should be affirmed, it points out that future convictions obtained under similar circumstances should be considered to have been obtained in bad faith and should be open to reversal.

A second issue addressed by the Court in this case was whether the entire office of the Commonwealth Attorney should have been disqualified from this prosecution because Savage's appointed counsel left the public defender's office and became an assistant commonwealth's attorney. The Court found the trial court properly held a hearing pursuant to *Whitaker v. Commonwealth*, Ky., 895 S.W.2d 953 (1995), to determine the depth of the attorney/client relationship and properly concluded that appointed counsel's representation of Savage was "perfunctory," and she did not have any communication with the attorney prosecuting Savage. The Court stated the trial court's conclusion was not clearly erroneous and thus would not be disturbed on appeal.

Savage's conviction was affirmed.

***Hudson v. Commonwealth*, Ky., 932 S.W.2d 371 (10/24/96)**

On March 1, 1988, Hudson began serving a fourteen year sentence in an Indiana prison. One year later, Hudson pled guilty to charges pending against him in Hopkins Circuit Court, in Kentucky, in exchange for a twenty year sentence to run concurrently with his Indiana sentence. He was then returned to the Indiana prison. On March 1, 1995, Hudson was paroled.

Upon his release from the Indiana prison, he was delivered to the Kentucky Department of Corrections to begin serving [the remainder of] his Kentucky sentence.

Hudson filed a petition for a writ of habeas corpus based on the case of *Brock v. Sowders*, Ky., 610 S.W.2d 591 (1980). The Lyon Circuit Court denied the writ and the Kentucky Court of Appeals affirmed the denial of the writ. The Kentucky Supreme Court granted discretionary review.

Hudson argued that under the facts of *Brock*, *supra*, he was entitled to immediate release from custody. The Kentucky Supreme Court found *Brock* factually distinguishable.

At the time Hudson filed his petition for a writ of habeas corpus, and at the time the appellate briefs were filed, the facts of Hudson's case fit within the facts in *Brock*. However, after Hudson's motion for discretionary review was granted but before oral argument, the Commonwealth filed documents with the Kentucky Supreme Court indicating that the Indiana Department of Corrections had discharged Hudson from parole on March 1, 1996. The Court found this fact of release dispositive.

The decision in *Brock* was premised on the fact that at the time of Brock's detention in Kentucky, he possibly remained under the jurisdiction of the Indiana authorities.

By contrast, as of March 1, 1996, Hudson's maximum Indiana sentence had expired. Because Hudson's Kentucky sentence is longer than the maximum Indiana term, he is now lawfully under the jurisdiction of the Kentucky prison system. Since Hudson is not being illegally detained in Kentucky, he is not entitled to a writ of habeas corpus.

In a related argument, Hudson asked the Court to grant him an additional one year credit against his Kentucky sentence for the one year he spent on parole in Indiana in addition to the seven years he spent in the Indiana prison. Although such a credit was granted in *Brock*, it was because at that time Indiana gave an inmate "credit-time" when an inmate was on parole. However, since the *Brock* opinion, Indiana has revised its parole statutes so a person now does not earn credit time while on parole or probation. Thus, Hudson is entitled to credit for the seven years he served in the Indiana prison, but no more.

The Court of Appeals opinion was affirmed.

***Adams v. Commonwealth*, Ky.App., 931 S.W.2d 465 (10/4/96)**

After a jury trial, Adams was found guilty of third degree trafficking in a controlled substance, second degree possession of a controlled substance and possession of marijuana. The penalty for each offense was enhanced under KRS 218A.992 because Adams was in possession of a firearm at the time the offenses were committed.

Adams raised the following issues on appeal from his convictions.

First, Adams argued he was entitled to a dismissal of the charges because the Boyd County police officer who arrested him lacked the authority to arrest him because he did not meet the definition of a "peace officer" in KRS 431.005(3). The Court of Appeals disagreed, pointing out the definition of peace officer cited by Adams is limited to arrests in domestic violence situations which was not the fact situation in Adams' case.

Second, Adams argued it was error to enhance his sentences under KRS 218A.992 because the statute is unconstitutionally vague, over broad, and arbitrary. The Court of Appeals held this claim lacked merit because the statute gives clear notice that a person who violates the provisions of Chapter KRS 218A **while in the possession of a firearm** will be subject to an enhanced penalty.

Third, Adams argued his right to be free from multiple punishment for a single act was violated when the trial court used the single act of possession of a firearm to enhance the penalty on each of the three substantive offenses of which he was convicted. The Court of Appeals disagreed. It pointed out that possession of a firearm is not an independent criminal offense. It simply defines a particular status for purposes of punishment. The possession of a firearm is not an element necessary to determine guilt of the substantive drug offenses. Thus, the repeated use of the same fact, that Adams was in possession of a firearm when he committed the substantive drug offenses, to enhance the punishment for the drug offenses did not constitute a double jeopardy violation.

Fourth, Adams argued the warrantless search was illegal and the evidence seized should have been suppressed. The facts were that Adams was seen speeding by a Boyd County police officer. The officer pursued Adams for several blocks. Just before Adams stopped, the officer saw Adams throw something out of his car window into the bed of a pickup truck parked on the street. Adams was arrested for attempting to elude the police. A search of Adams' person, incident to his arrest, produced $1,044.00 in cash and three bottles of prescription medication, one of which was unmarked.

A blue bank bag containing various pills was retrieved from the pickup truck bed. A search of Adams' car turned up a loaded .32 caliber handgun and a box with three grams of marijuana. The Court of Appeals held the warrantless search of the pickup truck bed was not unreasonable because Adams had no expectation of privacy in either the pickup truck (which did not belong to him) or the bank bag (which he had thrown away). The Court of Appeals also held the warrantless search of Adams' vehicle was proper under *U.S. v. Ross*, 102 S.Ct. 2157 (1982).

Adams' convictions and enhanced punishment were affirmed.

***Hedges v. Commonwealth*, Ky., 95-SC-999-DG, 11/21/96**

Hedges was charged with first degree burglary and being a second degree persistent felony offender. After a jury trial, at which the trial court denied his motion for a directed verdict of acquittal as to all degrees of burglary because no weapon was used and no physical injury was sustained by his wife, he was convicted of second degree burglary and being a PFO II.

The facts giving rise to the burglary charge were the following. Hedges was separated from his wife and was under a Domestic Violence Emergency Protective Order (DVO). The terms of the DVO prohibited Hedges from committing acts of violence against his estranged wife **or** to dispose of or damage the couple's property. The DVO did not contain a "no contact" provision.

Hedges went to his estranged wife's apartment one night and asked to enter to use the telephone. He apparently had been drinking. Hedges' wife was hesitant about letting him in because a male friend was visiting at the time. After instructing the male friend to wait in the bedroom and lock the door, Hedges was allowed to enter the apartment. Hearing noise coming from the bedroom, Hedges went to investigate. He forced the bedroom door open and saw the man diving out the window. Incensed over finding a man in his wife's bedroom, Hedges damaged several pieces of the couple's property [in violation of the DVO]. Hedges' wife called the police, after which Hedges grabbed her by the neck but caused her no physical injury according to Hedges' wife's testimony and the police investigation.

On appeal, Hedges second degree burglary conviction was affirmed by the Court of Appeals. The Kentucky Supreme Court granted Hedges' motion for discretionary review and, in a four to three opinion, reversed the decision of the Court of Appeals.

A person commits second degree burglary when with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.

The Kentucky Supreme Court concluded there was no evidence Hedges intended to commit a crime when he lawfully entered his estranged wife's apartment. The Court also concluded Hedges' violation of the DVO, without other evidence sufficient to show his intent to commit an independent crime, could not be used to support a finding of burglary. The Court distinguished *McCarthy v. Commonwealth*, Ky., 867 S.W.2d 469 (1993). The Court further concluded no evidence of an intent to commit a crime existed at the time Hedges' wife revoked her permission allowing him to be in the apartment, if she revoked her permission at all. Thus Hedges did not unlawfully remain in his wife's apartment with the intent to commit a crime.

By contrast, the Court of Appeals found Hedges intended to commit assault when he entered the apartment and, relying on *McCarthy*, *supra*, found a violation of a DVO may be used to show intent to commit a crime.

Addressing the Commonwealth's claim that Hedges' directed verdict motion was not properly preserved for review because he only moved for a directed verdict on the first degree burglary charge and did not object to giving a second degree burglary instruction, the Kentucky Supreme Court, distinguishing *Campbell v. Commonwealth*, Ky., 564 S.W.2d 528, 530 (1978), stated because Hedges' directed verdict motion was based on the claim that there could be no theory under which he could be found guilty of burglary, the directed verdict motion extended to the lesser included offenses and a separate objection to the instructions was not necessary.

The Kentucky Supreme Court made it clear it was **not** holding that if a person lawfully enters another's property, he has carte blanche to engage in criminal conduct. If a lawfully admitted person commits assault, theft or any other crime, he may be prosecuted for those crimes. By contrast, the Court said it was holding that misconduct or criminal conduct does not become burglary solely by reason of said act having been committed on the property of another.

Because, under the facts of this case, it would have been clearly unreasonable for a jury to have found Hedges guilty of burglary, his conviction was reversed.

***Commonwealth v. Anderson*, Ky., 934 S.W.2d 276 (11/21/96)**

Kathy Anderson was indicted for the murder of her live-in boyfriend. Anderson pled guilty to first degree manslaughter in exchange for a fifteen year sentence. As part of the plea agreement, Anderson was given an evidentiary hearing at which she could present evidence to establish she was a victim of domestic violence or abuse. If Anderson prevailed, she would be exempt from the more severe violent offender provision of KRS 439.3401(1) which requires a defendant to serve 50% of her sentence before becoming eligible for parole. The statute does not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse.

At the evidentiary hearing, the only evidence Anderson presented was the testimony of psychologist Dr. Anna Wilson. Dr. Wilson testified Anderson suffered from "battered woman syndrome" and she killed her boyfriend in self-defense. Dr. Wilson's testimony was based solely on information she was told by Anderson and court records.

The trial court was skeptical of Dr. Wilson's testimony because no independent evidence was offered to verify the facts. The court ruled it could not find in Anderson's favor based solely on the unsworn, uncorroborated statements of Anderson to Dr. Wilson.

On appeal, the Court of Appeals held the trial court erred by requiring Anderson to prove she was a victim of domestic violence or abuse by a preponderance of the evidence and vacated the trial court's order. It remanded the case to the trial court to determine whether Anderson had produced "some credible evidence" or "any relevant evidence" to substantiate her claim.

The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review to determine the proper standard of proof necessary to establish a person is a victim of domestic violence and thus exempt from the 50% rule of the violent offender statute.

Relying on the statutes dealing with the standard of proof necessary to obtain an emergency protective order, KRS Chapter 403, the Kentucky Supreme Court held the proper standard is the "preponderance of the evidence" standard set out in KRS 403.740. This standard requires "the evidence believed by the fact-finder be sufficient that the defendant was more likely than not to have been a victim of domestic violence."

Since the trial court was not required to believe Dr. Wilson's testimony, the trial court's finding that Anderson was not a victim of domestic violence or abuse was based on the proper preponderance of the evidence standard and was not clearly erroneous.

The opinion of the Court of Appeals was reversed and the trial court's order was reinstated.

***Commonwealth v. Halsell*, *Arick Williams v. Commonwealth*, & *Commonwealth v. Boris Williams*, Ky., 934 S.W.2d 552 (11/21/96 amended 11/26/96)**

The issue in this appeal is twofold. The first issue is whether the amended version of KRS 635.020(4) is constitutional. The second issue is whether there is an irreconcilable statutory conflict between KRS 635.020(4) and KRS 640.010 necessitating the invalidation of the amendment to KRS 635.020(4).

The amended version of KRS 635.020(4) states, in part, a child over the age of 14 charged with a felony involving the use of a firearm "shall be tried in the circuit court as an adult defendant and shall be subject to the same penalties as an adult defendant...."

The three defendants argued KRS 635.020(4) is an unconstitutional attempt to prescribe circuit court jurisdiction in violation of Sections 112(5) and 113(6) of the Kentucky Constitution.

Once the district court determines there is reasonable cause to believe the accused is a child over the age of 14 and is charged with a felony involving the use of a firearm, KRS 635.020(4) limits the jurisdiction of the district court to act further. Under Section 113(6), district courts are courts of limited jurisdiction which exercise original jurisdiction only as may be provided by the legislature. The Kentucky Supreme Court held that under Section 113(6) of the Kentucky Constitution, it is within the prerogative of the legislature to place limitations on the jurisdiction of district court. Under Section 112(5), circuit courts have original jurisdiction of all justiciable causes not vested in some other court. Thus, once the district court's jurisdiction is properly limited, the circuit court becomes vested with jurisdiction as to that particular class of offenders. Hence, the Kentucky Supreme Court held the amended statute is constitutional.

The second or alternative argument presented by the defendants was that the requirements of KRS 635.020(4) are irreconcilable with KRS 640.010(2). Relying on its duty to try to harmonize the interpretation of the law so as to give effect to both statutes, if possible, the Kentucky Supreme Court found the two statutory provisions could be harmonized. The Court stated:

> Whether it is determined at a preliminary hearing described in KRS 640.010(2) or prior to an adjudicatory hearing as described in KRS 635.020(1), once the district court has reasonable cause to believe that a child before the court has committed a firearm felony as described in subsection (4) of KRS 635.020, jurisdiction vests in the circuit court, the provisions of KRS 640.010 (2)(b) and (c) to the contrary notwithstanding.

The Court also found the defendants' constitutional challenges under Sections 27 and 28 of the Kentucky Constitution lacked merit.

West v. Commonwealth, Ky.App., 935 S.W.2d 315 (12/6/96)

Russell and Ann West, husband and wife, were indicted for second degree manslaughter and complicity to second degree manslaughter, respectively, as a result of the death of Russell's 54 year old disabled sister. The jury found Russell guilty of reckless homicide and Ann guilty of complicity to reckless homicide.

The Wests were alleged to have caused the sister's death by their failure to adequately care for her physical needs and to secure the medical assistance she required. At trial, there was substantial evidence that Russell had assumed the duty of care and was acting in the capacity of "caretaker" as defined in KRS 209.020. The medical testimony was that caretaker neglect ultimately led to the sister's death.

On appeal, the Wests presented two arguments. First, they claimed they did not have a duty to care for Russell's sister or to provide her with medical care so they could not be convicted of an offense based upon the failure to provide such care.

The Court of Appeals disagreed and stated that before the Wests could be found guilty, there had to exist a legal duty owed by them to the victim. "A finding of legal duty is a critical element of the crime charged. As stated in KRS 501.030 and demonstrated by case law, the failure to perform a duty imposed by law may create criminal liability." The Court further stated the duty of care must be found outside the definition of the crime itself (second degree manslaughter or reckless homicide). It may be found in the common law or in another statute. The Court found the legal duty in KRS 209.020 (6) which states:

> 'Caretaker' means an individual...who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily, or by contract, or agreement....

The Wests' second argument was the evidence was insufficient to establish the crime of reckless homicide. The Court of Appeals held it would not have been unreasonable, based on the evidence, for the jury to have believed that

Russell acted recklessly with respect to his duty toward his sister or that Ann acted as a complicitor with regard to the commission of the crime.

The defendants convictions were affirmed.

***Commonwealth v. Britt*, Ky.App., 96-CA-00019-MR, 1/10/97**

This case was decided by the full Court of Appeals sitting en banc.

Seventeen year old Brad Britt robbed a convenience store armed with a gun. The district judge conducted a preliminary hearing, found probable cause to believe Britt committed a robbery with a firearm and that he was over 14 years old, and transferred the case to circuit court. The grand jury indicted Britt for first degree robbery and Britt entered a guilty plea.

The plea agreement noted that the Commonwealth opposed probation because KRS 533.060 (1) prohibits probation for a person convicted of an offense involving the use of a weapon. Britt was sentenced to ten years in prison, but the circuit court ruled he was eligible for probation because he was a "youthful offender" and subject to the Juvenile Code. The Commonwealth appealed.

The issue on appeal was whether Britt was eligible for probation. The Court of Appeals stated the resolution of this issue turned on whether Britt is classified as a "youthful offender" or as an "adult defender."

A majority of six Judges of the Court of Appeals (five Judges dissented and one Judge did not sit) held that by enacting KRS 635.020(4), the Legislature created a new classification under which offenders fourteen to seventeen years of age who commit a felony with a firearm are to be treated as adults for all purposes related to that crime, and not as a juvenile pursuant to KRS Chapter 640.

Thus, since Britt was an adult offender who no longer had the protections of the Juvenile Code, he was not eligible for probation. The trial court's order that Britt was eligible for probation was reversed and the case was remanded for imposition of the ten year sentence.

The dissenters maintained the Legislature did not intend for KRS 635.020(4) to abrogate the youthful offender status for juvenile firearm felonies.

***Commonwealth v. Taber*, Ky., 95-SC-591-DG, 1/30/97**

On February 3, 1992, Taber was indicted for nine offenses arising out of a break-in at a business. Trial was set for April 1992. Taber moved for and was granted a continuance and trial was rescheduled for September, 1992. When the September trial date arrived, the trial court, on its own motion, continued the trial until November 6, 1992. On October 1, 1992, Taber asserted his right to a speedy trial and moved to dismiss the indictment, but the court refused. Shortly before the November trial date, the Commonwealth moved for a continuance due to the unavailability of three witnesses. Taber objected to the Commonwealth's motion as a violation of his right to a speedy trial. The trial court denied the Commonwealth's motion and entered an order dismissing the indictment.

The Commonwealth did not appeal the trial court's order. However, in January, 1993, the Commonwealth reindicted Taber. Taber moved to dismiss the indictment, but the trial court refused. Taber then entered a conditional guilty plea to the charges, reserving his right to appeal "on the indictment/speedy trial issue."

The Kentucky Court of Appeals reversed Taber's convictions because "once there has been a final determination that a defendant has been denied his constitutional right to a speedy trial, he may not be reindicted on the same charges." The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review.

The Kentucky Supreme Court framed the issue before it as being the impact of the trial court's first written order of dismissal, not whether the trial court's order finding a violation of Taber's speedy trial right and granting his motion to dismiss was proper. Because in its written order of dismissal, the trial court did not specify the dismissal of Taber's indictment was "without prejudice" or "with leave to refile," the dismissal effected an adjudication on

the merits and barred subsequent proceedings. The Court relied on CR 41.02 ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule...operates as an adjudication on the merits."), and *Commonwealth v. Hicks*, Ky., 869 S.W.2d 35, 38 (1994), which neither side mentioned in its briefs or oral argument. Under *Hicks*, *supra*, "one who wishes to preserve the viability of a dismissed claim should see that the proper notation is affixed by the trial court or seek appellate relief." Since the Commonwealth did neither, it could not complain about the trial court's actions.

The opinion of the Court of Appeals was affirmed.

***Brock v. Commonwealth*, Ky., 94-SC-1001-MR, 1/30/97**

Brock was convicted of second degree manslaughter and sentenced to twenty years as a result of shooting and killing "Doc" Partin. Brock maintained he shot Partin in self-defense.

Brock raised four issues in his appeal.

The first issue was that Brock was entitled to a directed verdict of acquittal because the evidence presented by the Commonwealth showed a state of facts justifying the shooting. The Kentucky Supreme Court found the evidence did not conclusively support justification because Brock had ample opportunity to avoid the confrontation with Partin. In fact, Brock's wife and children drove away from the scene while Brock remained behind. Also, the testimony of a witness indicated Brock fired the first shot. Thus, the jury could reasonably conclude Brock was the initial aggressor and did not shoot in self-defense and thus was not entitled to a directed verdict of acquittal.

The second issue Brock raised was the trial court's dismissal of a defense witness (the victim's brother) on the first day of trial. The defense was permitted to question the witness in chambers and sought to impeach him with a prior inconsistent statement. It was the content of this prior inconsistent statement that the defense wanted to place before the jury as substantive evidence. However, because the prior statement concerned the victim's state-of-mind **twelve days** before the shooting, the trial court ruled the statement was not relevant to prove the victim's state-of-mind at the time of the shooting and thus was not admissible. Hence, the court dismissed the witness when he complained he was missing work and had no information that would be helpful to the defense.

The Kentucky Supreme Court pointed out the issue was not properly preserved for review and concluded that due to the "marginal relevancy" of the proposed evidence, the trial court's dismissal of the witness and suppression of the evidence did not rise to the level of palpable error.

The third issue raised by Brock concerned the trial court's exclusion of a tape recording of a telephone conversation between Della Partin (the victim's mother) and Shirley Williams. During this telephone conversation Della Partin told Shirley Williams that on the day of the shooting her son was drinking and told her he was going to Brock's home to kill him and ended up getting himself killed.

At trial, the defense called Della Partin. She testified she could not recall her son being at her home on the day of the shooting, and she denied that he had told her that he was going to Brock's house to kill him. When the defense sought to impeach her with her prior inconsistent statement by playing the tape recorded telephone conversation, KRE 613, the trial court sustained the Commonwealth's objection. The trial court stated that since the trial was replete with evidence of "bad blood" between the victim and the accused, the telephone conversation was merely cumulative.

The defense then called Shirley Williams to inquire about the same conversation. Williams remembered the conversation, but could not remember any of its details. Williams admitted that if she heard a recording of the conversation, it might refresh her recollection. When the defense offered to play the tape recording to refresh her recollection, KRE 803(5), the trial court again sustained the Commonwealth's objection.

As to the use of the tape recording to impeach Della Partin, the Kentucky Supreme Court stated that evidence that shortly before the

fatal event, the victim told his mother he was going to Brock's house to kill him was more than just cumulative evidence of "bad Blood," particularly since the issue to be decided by the jury was who was the initial aggressor. The excluded evidence went directly to Brock's defense of self-defense. Thus, the trial court abused its discretion when it excluded the tape recording.

As to the use of the tape recording to refresh Shirley Williams' recollection, the Court held, citing KRE 803(5), that Shirley Williams should have been permitted to hear the tape recording to see if it fully refreshed her recollection. The Court noted the tape should be played to Williams out of the presence of the jury, so if she cannot authenticate it the jury will not have heard the evidence which would then be inadmissible. If Williams is able to authenticate the tape recording, then it may be admitted as a prior inconsistent statement to impeach Della Partin. KRE 801A(a)(1).

In sum, the Kentucky Supreme Court vacated Brock's conviction and remanded his case to the trial court for an in limine hearing to determine whether Brock can authenticate the tape recorded telephone conversation and/or whether listening to the tape recording refreshes the recollection of either Della Partin or Shirley Williams. If the tape recording is authenticated or refreshes either witness' recollection, then a new trial must be held at which the tape recording may be played to the jury to impeach Della Partin. If the tape recording cannot be authenticated or does not refresh either witness' recollection, then Brock's conviction must be reinstated.

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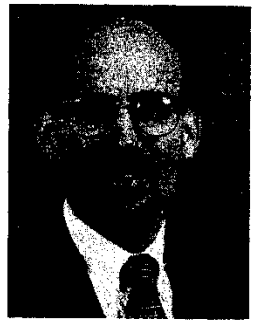
Plain View



Ernie Lewis

***Ohio v. Robinette*,**
117 S.Ct. 417, 136 L.Ed.2d 347 (1996)

***Savage v. Commonwealth*,**
1996 WL 613185 (Ky. 1996)

***Adams v. Commonwealth*,**
931 S.W.2d 465 (1996)

***Cormney v. Commonwealth*,**
1996 WL 730491 (Ky.App. 1996)

***Adcock v. Commonwealth*,**
1996 WL 730492 (Ky.App. 1996)

***Commonwealth v. Bothman*,**
1997 WL 14471 (Ky.App. 1996)

***Stack v. Killian*,**
96 F.3d 159 (6th Cir. 1996)

***U.S. v. Rohrig*,**
98 F.3d 1506 (6th Cir. 1996)

***United States v. Weaver*,**
99 F.3d 1372 (6th Cir. 1996)

***United States v. Palomino*,**
100 F.3d 446 (6th Cir. 1996)

***United States v. McCroy*,**
102 F.3d 239 (6th Cir. 1996)

***United States v. Bradshaw*,**
102 F.3d 204 (6th Cir. 1996)

There have been numerous search and seizure cases over the past four months in the United States Supreme Court, the Kentucky Courts, and the Sixth Circuit Court of Appeals.

***Ohio v. Robinette*,**
117 S.Ct. 417, 136 L.Ed.2d 347 (1996)

The United States Supreme Court issued a significant Fourth Amendment opinion on November 18, 1996. The opinion is written by Justice Rehnquist. Justice Stevens dissented, with Justice Ginsburg concurring separately.

The case involves a routine traffic stop. Here, Robinette was driving too fast on an interstate north of Dayton. After the police had checked his license and found he had no previous violations, they videotaped a warning. The police asked Robinette if he had any contraband in the car, and then asked if they could search it. The search revealed marijuana and other drugs.

The Ohio Supreme Court found the Fourth Amendment had been violated. In their opinion, the police erred by failing to tell Robinette that he was free to go. The Court held that the Federal and Ohio Constitutions required that "citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation."

The United States Supreme Court reversed, finding that the traditional law regarding consent should not be replaced by this bright-line rule. The Court found that they had jurisdiction because the Ohio opinion had relied upon both state and federal law.

The Court relied upon a reasonableness analysis, which in turn was determined by examin-

ing the totality of the circumstances. Based upon these circumstances, it was "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary. The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances."

Justice Ginsburg was more interested in the federalism aspect of the case. In her opinion, the Ohio Supreme Court had every right to author a prophylactic rule regarding consent during traffic stops, but no right to impose a rule on the nation. She urged courts to be clearer in stating whether they were interpreting federal law or state law. "To avoid misunderstanding, the Ohio Supreme Court must itself speak with the clarity it sought to require of its State's police officers."

Justice Stevens dissented. He agreed with the Court's holding that the Fourth Amendment did not "require that a lawfully seized person be advised that he is 'free to go' before his consent to search will be recognized as voluntary." However, he also believed that the Ohio Supreme Court had correctly held that Robinette's consent to search was the product of an unlawful detention. While arrested correctly, "by the time Robinette was asked for consent to search his automobile, the lawful traffic stop had come to an end; Robinette had been given his warning, and the speeding violation provided no further justification for detention...At no time prior to the search of respondent's vehicle did any articulable facts give rise to a reasonable suspicion of some separate illegal activity that would justify further detention... As an objective matter, it inexorably follows that when the officer had completed his task of either arresting or reprimanding the driver of the speeding car, his continued detention of that person constituted an illegal seizure."

***Savage v. Commonwealth*, 1996 WL 613185 (Ky. 1996)**

The Kentucky Supreme Court has issued an opinion with immense ramifications for practice in our trial courts. While not overtly a Fourth Amendment/Section Ten case, it has an impact on liberty and privacy rights of our citizens.

In August of 1994, the police obtained a criminal complaint charging John Savage with first degree robbery. A warrant was issued demanding that Savage be brought to the judge upon his arrest. However, a "yellow post-it note" was attached to the warrant telling the person executing the warrant to contact a city police robbery detective "for interview before booking."

Savage was arrested on August 30, 1994. Rather than being taken to the judge as was stated on the warrant and required by RCr 3.02, Savage was taken to the police station and questioned by detectives. He spent two hours at the jail. Eventually he confessed to committing the robbery. Thereafter, he was taken to jail.

The defendant later challenged his confession due to noncompliance with RCr 3.02. In a 4-3 opinion written by Justice Graves, the Court affirmed. While the Court recognized that RCr 3.02 was violated, the Court also stated that "a prompt appearance before a judicial officer is only one fact in an overall determination whether to suppress the evidence." The Court found that "appellant has not shown that the delay was unnecessary and that any prejudice resulted to his fundamental rights from the delay."

The reasoning of the Court is unclear. While the Court recognizes that a rule violation occurred that led directly to the taking of a confession, the Court does not address precisely why suppression is not the obvious remedy. Rather, the Court implies that a waiver of *Miranda* rights "implicitly and concurrently waives his right to be seasonably taken before a judicial officer." The Court cites *Crayton v. Commonwealth*, Ky., 846 S.W. 2d 684 (1992), the good faith exception case, although *Crayton* is a case involving a warrant, rather than a violation of a criminal rule intended to prohibit holding someone for a period of time without taking him before a magistrate. The Court concludes that there was not a "flagrant disregard for the rule," although the yellow post-it note certainly implies an intent to violate the rule and a practice of violating the rule by ensuring interrogation prior to presenting an accused before a magistrate.

The Court asserts that the rule implicitly allows for "reasonable delays." Further, "there are cogent practical realities for some neces-

sary delay, one being routine police procedure and administration. Unnecessary delay, in and of itself, does not render a confession inadmissible unless the delay bears relation to the accused's making the confession." The Court notes the necessities of "booking" with which they do not interfere. But the Court fails to recognize that this case does not involve booking, it involves the explicit ignoring of the directive to take the accused directly to a magistrate in order to interrogate the accused.

Justice Stephens concurred in the result only, joined by Special Justice James Levin and Justice Stumbo. The concurring justices believed that RCr 3.02(1) was "clearly violated." The dissent warns that "future convictions that are obtained under similar circumstances should be considered by this Court to have been obtained in bad faith...we should be wary of issuing opinions which, in effect, give the police the discretionary power to do what they will with a defendant in a warrant case. If we fail to enforce the clear language of RCr 3.02(1), we risk opening up a Pandora's box by giving the police the right to deviate from the dictates of our criminal rules and run afoul of #2 of the Kentucky Constitution which protects against the governmental exercise of arbitrary and absolute power."

This opinion needs to be considered in conjunction with the absence of a 48-hour rule in this Commonwealth. Taking an accused before a magistrate within 48 hours is a requirement of the Fourth Amendment. *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. ___, 114 L.Ed.2d 49 (1991). There is no rule in Kentucky mandating compliance with *McLaughlin*. Now with this decision, if a confession is obtained without complying with *McLaughlin*, it is questionable whether the Court will enforce the 48-hour rule anymore than they enforced this violation of RCr 3.02.

Adams v. Commonwealth, 931 S.W.2d 465 (1996)

The Court of Appeals has held that a defendant has no reasonable expectation of privacy in an abandoned bank bag. *Adams v. Commonwealth*, (October 4, 1996) The panel was Judges Wilhoit, Emberton, and Gudgel.

In this case, Adams was pulled over while speeding. Immediately prior to stopping, he threw out a blue bank bag. He was arrested and charged with attempting to elude. A search of the bank bag revealed small plastic bags with pills in them. A search of the car resulted in finding a loaded .32 and additional drugs.

The Court had little difficulty dispensing with the search and seizure issues. The defendant did not dispute that probable cause existed for stopping him. He challenged, however, the search of the bank bag and the car itself.

The Court first held that because the defendant threw the bank bag out of the window, he did not have a reasonable expectation of privacy in its contents. "He discarded the bank bag while eluding police, in effect, leaving the bag to examination by any member of the public who might come upon it."

The defendant further asserted that because he was in custody, the police had no right to go into his car and conduct a probable cause search. The Court held that this case was disposed of by *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), which held that a car may be searched without a warrant where probable cause exists to believe that contraband is contained therein.

Cormney v. Commonwealth, 1996 WL 730491 (Ky.App. 1996)

The Court of Appeals has issued an opinion on an interesting question: does a person involved in a wreck have a reasonable expectation of privacy in the wreckage? Surprisingly, the Court of Appeals has held that he/she does not.

Judge Combs wrote the opinion, joined by Judges Gudgel and Knopf. The Court relied primarily upon *U.S. v. Olmstead*, 17 M.J. 247 (CMA 1984), an opinion from the military system virtually on all fours with this case.

Essentially, the Court held that a person involved in a serious wreck does not have an expectation of privacy that society is prepared to recognize as reasonable. "[A]ny subjective expectation of privacy that Appellant had in the wreckage necessarily yielded to the Commonwealth's legitimate public safety interests since the law enforcement officials responding to the accident were charged with the responsibility of determining all of the circumstances

surrounding the fatality and the cause of the collision."

The second question for the Court was whether the warrantless seizure of certain parts of the defendant's clothing while he was in the hospital was legal. The Court held that the seizure of the clothing at the hospital was legal as having occurred pursuant to the exigent circumstances exception to the warrant requirement. The Court agreed with the trial court that the "'clothes were likely to have been misplaced or destroyed by the hospital medical staff, thereby destroying valuable evidence...'"

***Adcock v. Commonwealth*,**
1996 WL 730492 (Ky.App. 1996)

The Court of Appeals has written the first Kentucky "knock and announce" decision that I know of since *Wilson v. Arkansas*, 514 U.S. ___, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995).

The police pretended they were delivering a pizza in order to have the defendant open the door. When she did, they announced, "Police, search warrant," and proceeded to enter the house and set her on a couch. The resulting search revealed pills and paraphernalia.

The Court upheld the search, holding that "when police officers execute a search warrant on a personal residence by conducting a successful ruse that results in the occupant voluntarily opening the door which is followed by the officers announcing their identity and purpose prior to entering the home, these actions are reasonable within the requirements of the Fourth Amendment."

***Commonwealth v. Bothman*,**
1997 WL 14471 (Ky.App. 1996)

The Court of Appeals explored the area of checkpoints in this opinion written by Judge Gardner and joined by Judges Wilhoit and Knopf. Mr. Bothman was stopped at a checkpoint located on a bridge in Mason County and cocaine was found. The checkpoint was established when a KSP trooper radioed a request to establish the checkpoint. The supervisor found the checkpoint was at a pre-established position and approved the checkpoint.

The trial court suppressed the evidence, finding that the checkpoint had been established in violation of an internal KSP general order (OM-E-4).

The Court of Appeals reversed. First, the Court disagreed that OM-E-4 had been violated. More significantly, the Court found that even if a technical rule of the KSP had been violated, that did not answer the larger question of whether the evidence had been seized illegally. The Court used *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) to hold that a checkpoint had to be established in such a manner to "avoid the 'unconstrained discretion' inherent in random stops. The checkpoint must further be calculated to "protect public safety." "Other factors to be considered are whether the checkpoint was conducted pursuant to a systematic plan...and whether only some vehicles were stopped or all vehicles were stopped." These factors led the Court to hold that the stopping of Bothman and the seizure of contraband had been legal.

***Stack v. Killian*,**
96 F.3d 159 (6th Cir. 1996)

The Sixth Circuit has examined the Fourth Amendment ramifications of having a television crew present at the scene of the execution of a search warrant. *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996).

A search warrant was issued to allow a search of an animal shelter, to videotape the shelter, and to seize certain property. In executing the warrant, the defendants in this #1983 action were accompanied by a television crew.

The Court, in a decision written by Judge Siler and joined by Judges Batchelder and Carr, noted that the presence of a television crew has Fourth Amendment implications. "'Officers in "unquestioned command" of a dwelling may... exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises.'" Quoting from *Bills v. Aseltione*, 958 F.2d 697, 704 (6th Cir. 1992). However, because the search warrant explicitly authorized videotaping in this case, "the defendants were justified, under the explicit language of the warrant, in permitting the accompaniment of camera personnel." *Stack*, at 159.

U.S. v. Rohrig, 98 F.3d 1506 (6th Cir. 1996)

Can an officer enter a house without a warrant due to loud music occurring inside? According to an opinion by Judge Rosen and joined by Judge Siler, an officer may do so.

This case began in May of 1994 when officers answered complaints of loud noise coming from Rohrig's house. Repeated knocking failed to roust anyone inside. Eventually the police entered, found Rohrig asleep and found a large marijuana-growing operation. Rohrig was eventually charged with violations of federal laws.

The district judge upheld Rohrig's motion to suppress, holding that "the officers could not lawfully enter Defendant's home in order to turn down the loud music without first securing a warrant."

The Court acknowledged first of all that in the "absence of a warrant authorizing the officers' entry into Defendant's home, the Government must overcome the presumption that this entry was unreasonable." However, while acknowledging that *Payton v. New York*, 445 U.S. 573 (1980) holds that warrantless searches of private dwellings are presumptively unconstitutional, the Court went on to find that an exception to that rule exists in this case. Specifically, the Court found that there were exigent circumstances in this case which excepted it from the general rule.

In short, the Court found that "an ongoing and highly intrusive breach of a neighborhood's peace in the middle of the night constitutes 'exigent circumstances'" allowing for a warrantless entry of Rohrig's house. "[T]he governmental interest in immediately abating an ongoing nuisance by quelling loud an disruptive noise in a residential neighborhood is sufficiently compelling to justify warrantless intrusions under some circumstances."

Judge Daughtrey dissented. His dissent is as passionate as the majority's is scholarly. His "initial problem with the majority's opinion is its insistence that the Fourth Amendment's 'reasonableness' clause dwarfs the warrant requirement." By doing so, the majority "ignores Fourth Amendment jurisprudential principles that have been firmly established for years." "I cannot find 'exigent circumstances' in the neighbors' desire to quell the loud music emanating from the defendant's house. When mere nuisance abatement rises to the level of an 'exigent circumstance,' and the propriety of a search is judged by a post facto determination of the reasonableness of the search, the warrant requirement becomes a virtual nullity and the privacy interest in our homes exists only to the extent that our neighbors do not cry too loudly."

United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996)

In 1986, Weaver was on probation, and as a result he disposed of all of his weapons except for two, which he tried to sell to a friend. The friend, however, could not buy them, and returned them to Weaver's wife, who, without telling Weaver, put them in an outbuilding. Thereafter, the police received a series of tips that Weaver was selling marijuana at his house. The police obtained a search warrant for Weaver's house. During the execution of the warrant, the police found marijuana and the guns in the outbuilding. Weaver was charged in federal court with possession of firearms and ammunition by a convicted felon. After the district court overruled Weaver's motion to suppress, an appeal to the Sixth Circuit was filed.

Judge Nathaniel Jones wrote the opinion for the unanimous panel, joined by Judges Batchelder and Moore, reversing the decision of the district judge. The Court first found the affidavit supporting the warrant lacking in probable cause. The Court considered the critical factors of:"an 'explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitled [the informant's tip] to greater weight than might otherwise be the case'; and, (2) corroboration of the tip through the officer's independent investigative work is significant." The affidavit itself "provide few, if any, particularized facts of an incriminating nature and little more than conclusory statements of affiant's belief that probable cause existed regarding criminal activity." Nothing in the affidavit indicated that the informant had provided reliable information in the past. Further, the police made no effort to corroborate the informant's tip. Thus, the Court found that the "bare bones" affidavit "failed to provide sufficient factual information for a finding of probable cause."

The Court further held that the good faith exception to the exclusionary rule would not apply. The Court found that the third exception in *U.S. v. Leon*, 468 U.S. 897 (1984), that is whether the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" was applicable in this case. "With little firsthand information and no personal observations, McCullough should have realized that he needed to do more independent investigative work to show a fair probability that this suspect was either possessing, distributing, or growing marijuana....We believe a reasonably prudent officer would have sought greater corroboration to show probable cause and therefore do not apply the Leon good faith exception on the facts of this case."

***United States v. Palomino*,**
100 F.3d 446 (6th Cir. 1996)

This is one of many cases that would have been different had *Whren* and *Robinette* been decided differently. Here, the police saw Palomino driving below the minimum speed limit by 3 mph, in the left lane of an interstate highway, go across two lanes without signaling, and weaving. Palomino was pulled over for an investigation of whether he was intoxicated. Upon rolling the window down, the officer smelled what he identified as ether-based cocaine. Palomino was placed in the back of the police car, while the officer found that his car registration was in order and that he had a prior drug conviction. While issuing a warning citation, he asked Palomino if he was carrying any contraband and asked for a consent to search. The resulting search revealed 11 kilos of cocaine.

The Sixth Circuit affirmed the denial of the motion to suppress by the district judge. In a unanimous opinion written by Judge Siler and joined by Judges Ryan and Batchelder, the Court relied heavily upon the findings of the district judge. First, the Court held, in relying upon *Whren v. United States*, 135 L.Ed.2d 89 (1996) and *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993) (en banc), *cert. den.*, 130 L.Ed.2d 47 (1994), that "'so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment.'" Because the officer had probable cause to believe that the accused was committing numerous traffic violations, the initial stopping was ruled to be legal.

The Court then held that the detention and questioning of Palomino was legal. The Court placed great reliance upon the fact that Palomino was questioned regarding contraband, and asked regarding the consent to search, while he was being issued the warning citation. "[We] conclude that Palomino was not detained any longer than the time necessary for the original purpose of the stop when Kellerhall asked him about the contraband and requested a consent to search. Therefore the brief questioning and request for consent to search were constitutionally permissible."

Finally, the Court simply gave deference to the district judge's finding that Palomino's consent to search had been voluntarily made.

***United States v. McCroy*,**
102 F.3d 239 (6th Cir. 1996)

McCroy was shoplifting when he was arrested. A search incident to the arrest uncovered a wallet revealing his identification. A check of the identification revealed a prior felony conviction. Taken to the station, McCroy's possessions were then inventoried, and a pawn shop ticket for a rifle was found. This led to the discovery of the rifle, and eventually a conviction for a federal firearms charge.

The Sixth Circuit affirmed the lower court's decision overruling McCroy's motion to suppress. The Court, in an opinion written by Judge Norris and joined by Judges Boggs and Lively, held that the search incident to the lawful arrest for shoplifting was legal under *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."

The Court then went on to hold that the inventory search at the jail was legal under *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). The Court rejected the argument that because McCroy was given a citation and released, that the inventory exception to the warrant requirement should not apply. "The rationale of *Lafayette* focuses upon protec-

tion of both the arrestee and police during the period a suspect is detained at the station house. At the time of the search, defendant had been placed in a holding facility until it could be determined whether any outstanding warrants had been issued against him. Thus, at the time of the inventory search it was by no means certain that defendant would be released with a citation." Thus, the inventory search was viewed as reasonable.

***United States v. Bradshaw*, 102 F.3d 204 (6th Cir. 1996)**

Officer Kula of the Memphis Police Department pulled up behind Bradshaw and observed what appeared to be an alteration of a temporary tag. After stopping Bradshaw, the alteration became clearer to the officer. Bradshaw got out of the car, was nervous, jittery, and began to sweat. Kula asked Bradshaw to sit in the back of the police car. While radio checks and issuing a citation were occurring, which lasted some 20 minutes, Officer Cooper happened upon the scene. He looked into Bradshaw's car and saw a small plastic bag "which appeared to contain marijuana." When Cooper reached for the bag, he noticed a .357 in the driver's seat. Bradshaw was then searched, at which point he fled, throwing away two pill bottles containing crack cocaine. Bradshaw's motion to suppress was denied by the district court, and an appeal was taken.

The Sixth Circuit affirmed the lower court in an opinion written by District Judge Rosen and joined by Judges Milburn and Suhrheinrich. The Court first held that the initial traffic stop was legal. Next, the Court held that placing the accused into a police car was not an arrest because the detention did not exceed the purpose and objective of the stop. Thus, the plain view discovery of the items in the car by Officer Cooper was not the fruit of an illegal arrest. "In sum, because Appellant's detention in Officer Kula's police car was a legitimate exercise of valid routine police procedure, and because he was not detained for a period of time exceeding the purposes of the initial stop, all evidence in plain view within Appellant's car was lawfully seized."

The Court then approved the search incident to the arrest, which uncovered the seizure of the rock cocaine.

The Short View

1. ***State v. Rogers***, 924 P.2d 1207 (Ariz. Sup. Ct. 9/17/96). Under *California v. Hodari D.*, 499 U.S. 621 (1991), a suspect is not seized for Fourth Amendment purposes until he has submitted to a show of authority or he is subdued by the authorities. The Arizona Supreme Court has held that where an accused halts even momentarily prior to fleeing, he has submitted to the show of authority, and a Fourth Amendment seizure has occurred.

2. ***Maryland v. Wilson***, 664 A.2d 1 (1996). The Supreme Court has granted *cert* on this case from the Maryland Court of Special Appeals. The question the Court is considering is whether a police officer may order a passenger to get out of a lawfully stopped vehicle.

3. ***U.S. v. Foster***, 100 F.2d 846 (10th Cir. 1996). Where the police exhibit "flagrant disregard" for the terms of a warrant, all evidence seized executing the warrant should be suppressed. Here, the officers admitted during the suppression hearing that they had looked at anything in the house with a serial number, they had watched videotapes, and had searched anything of value during a search for marijuana and guns. Relying upon *U.S. v. Medlin*, 842 F.2d 1194 (10th Cir. 1988), the Court stated that "it is abundantly clear that the officers' disregard for the terms of the warrant was a deliberate and flagrant action taken in an effort to uncover evidence of additional wrongdoing. Because the officers here flagrantly disregarded the terms of the warrant in seizing property, 'the particularity requirement is undermined and [the otherwise] valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant.'"

4. ***State v. Palenkas***, 1996 WL 635883 (Ariz. App. Div. 1, 11/5/96). A prosecutor cannot comment on the defendant's refusal to consent to search his home following a hit-and-run. The Court analogized this to *Doyle v. Ohio*, 426 U.S. 610 (1976), which prohibits the prosecutor from arguing that a defendant had failed to talk after arrest and after being given his *Miranda* rights.

5. ***Maxwell v. New York***, 102 F.3d 664 (2nd Cir. 1996). You won't believe this case. The Second Circuit held, in the context of a civil rights action, that the police can cordon off a high crime neighborhood, stop all persons trying to enter the neighborhood, and turn away those with no legitimate purpose. The constitutionality of this Orwellian plan was analyzed, and upheld, under *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).

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First National Survey of "Three Strikes" Laws Finds Federal and State Laws Rarely Used; California Major Exception

- **Despite Political Rhetoric, Only 9 Federal Convictions to Date;**
- **California Law Costly and Unproven in Crime Reduction; 85% are Nonviolent Offenders**

Washington, D.C.: The first national survey of "Three Strikes and You're Out" laws reveals that with the exception of California, these laws are rarely used by the 22 states and the federal government that have enacted them since 1993. The survey was released by the Campaign for an Effective Crime Policy, a national coalition of criminal justice officials.

Despite the widespread political promotion of "three strikes" during passage of the 1994 crime bill, the law has only resulted in 9 federal convictions to date, with an additional 24 cases pending. In several states which have passed such laws, including Tennessee, New Mexico, North Carolina, and Colorado, not a single conviction has yet been obtained. The report attributes this limited use to the fact that the laws in these states apply to only the most serious offenders and that prosecutors and judges already use existing statutes to secure lengthy prison terms for serious violent offenders.

In dramatic contrast, the California law includes any of the state's 500 felonies as a third strike and, along with its second strike provisions, has resulted in the incarceration of more than 15,000 offenders, creating a need for $4.5 billion in prison construction over the next five years. The Campaign report finds that despite ongoing claims, the crime reducing impact of the law is unproven and that 85% of the second and third strike convictions have been for non-violent offenses.

Walter Dickey, University of Wisconsin law professor and author of the report, stated that, "Before policymakers jump on the three strikes bandwagon, they should consider whether these policies are being adopted because they represent good crime control or good politics."

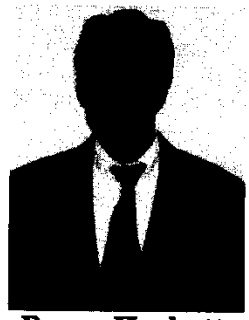
The report also found that the California law is having a significant impact on court backlogs for both civil and criminal cases, since many three strikes defendants choose to go to trial. In Los Angeles, the three strikes cases account for 3% of the criminal court filings but 24% of jury trials. Because three strikes defendants are often unable to post bail, the law has also been found to crowd local jails as well as state prisons. The California law has been applied unevenly across the state as well, depending on prosecutorial discretion, and three strikes defendants are disproportionately African American, raising concerns of racial bias.

The report calls on policymakers to carefully assess the potential effects of three strikes laws before enacting them and to consider more cost-effective means of having an impact on crime.

The *Campaign for an Effective Crime Policy* is a coalition of 1,100 criminal justice and elected officials in all fifty states that was formed in 1992. Campaign sponsors have issued a "Call for a Rational Debate on Crime and Punishment," and work to develop criminal justice policy based on research and effectiveness.

Copies of the report, "*The Impact of Three Strikes and You're Out Laws: What Have We Learned*," are available for $5.00 from the *Campaign for an Effective Crime Policy*, 918 F Street, N.W., Suite 505, Washington, D.C. 20004; Tel: (202) 628-1903. MEMBERS OF THE MEDIA who would like a copy of the report may obtain one from the *Campaign for an Effective Crime Policy* at (202) 628-1903. Interviews also available.

6th Circuit Highlights:
Review of 1996-97



Bruce Hackett

This column is a quick review of significant Sixth Circuit cases decided in March, 1996 through January 1997. The cases are arranged by topic. Citations are to *West's Federal Reporter* (Vol. 77-100) or the *Sixth Circuit Review* (25 SCR 24 - 26 SCR 2).

Appeal

Extension of Time to File Notice of Appeal - "Excusable neglect" must be shown, which means that some jurisdictional act was left undone or unattended to. It includes both faultless omissions and omissions caused by carelessness. *U.S. v. Thompson*, 82 F.3d 700 (6th Cir. 1996).

Guilty Plea - Where the defendant enters into a guilty plea agreement in which he waives his right to appeal as part of the bargain, there is no error when the court fails to advise the defendant of his right to appeal. *Everard v. U.S.*, 25 SCR 24, p. 8.

Carjacking

Statute Constitutional - The carjacking statute, 18 U.S.C. §2119, does not violate the Commerce Clause. *U.S. V. McHenry*, 97 F.3d 125 (6th Cir. 1996).

Closing Argument

Preservation of Error - Where no objection is made to prosecutor's closing argument and no curative instructions is requested at the close of argument, prosecutor's comments are reviewed on appeal for plain error, which mandates reversal only in exceptional circumstances. *U.S. v. Collins*, 78 F.3d 1021 (6th Cir. 1996).

Competency

Court-ordered Psychiatric Examination - The defendant could file an interlocutory appeal from a commitment order requiring the defendant to surrender for a custodial psychia-

tric examination. The order was reversed because the court had no authority to order an in-custody examination. The court's power to order a non-custodial examination was upheld. *U.S. v. Davis*, 93 F.3d 1286 (6th Cir. 1996).

Counsel

Attorney-Client Privilege - Attorney may be compelled to testify to grand jury about legal advice given to client because the client has waived the privilege by talking to investigators about attorney's advice. *In Re Grand Jury Proceedings, October 12, 1995*, 78 F.3d 251 (6th Cir. 1996).

Conflict of Interest - To establish ineffective assistance based on conflict of interest of counsel, defendant must show that actual conflict affected lawyer's performance and result of trial would have been different. A waiver hearing on the issue is not required unless an actual or potential conflict is demonstrated. *U.S. v. Mays*, 77 F.3d 906 (6th Cir. 1996).

Substitution of Counsel - Good cause for substitution of counsel not shown where defendant asked for new counsel the day before trial and defendant did not show that conflict was so great that it resulted in total lack of communication that prevented adequate defense. *U.S. v. Jennings*, 83 F.3d 145 (6th Cir. 1996).

Double Jeopardy

Civil Forfeiture and Criminal Prosecution - Where a defendant's money and property is forfeited by a state court, a criminal drug prosecution in federal court is not barred by the 5th amendment, especially where the defendant did not assert ownership of the seized property. *U.S. v. Keeton*, 101 F.3d 48 (6th Cir. 1996).

Civil Forfeiture and Criminal Prosecution - Where the defendant did not contest the civil forfeiture proceeding, he never became a party to the proceeding, which meant that jeopardy did not attach; therefore, he could be criminally prosecuted. *U.S. v. Branham*, 97 F.3d 835 (6th Cir. 1996).

Civil Penalty - Imposition of civil penalty against the defendant for marketing excess tobacco was not barred by defendant's prior fraud and conspiracy convictions which involved marketing excess tobacco. *U.S. v. Martin*, 95 F.3d 406 (6th Cir. 1996).

Civil Tax Penalty and Criminal Prosecution - Assessment of civil penalties on taxpayer and subsequent criminal prosecution did not violate double jeopardy principles where civil penalties were imposed to compensate government for costs of investigation and recovery of losses. *U.S. v. Alt.*, 83 F.3d 781 (6th Cir. 1996).

Defense Counsel's Consent to Mistrial - Where defense counsel consents to a mistrial as a matter of trial strategy, that consent binds the defendant and there is no bar to a retrial. *Watkins v. Kassulke*, 90 F.3d 138 (6th Cir. 1996).

Motion for Acquittal - Where the defendant's motion for acquittal is based on legal grounds and factual grounds and the court grants the motion based on the legal grounds, a retrial of the defendant is not barred. *U.S. v. Neal*, 93 F.3d 219 (6th Cir. 1996).

Drug Offenses

Amount of Drug - Where the defendant is guilty of growing marijuana, the amount of drugs involved may be calculated based on the number of plants even though the plants have already been harvested; distinguished *U.S. v. Stevens*, 25 F.3d 318 (6th Cir. 1994). *Oliver v. U.S.*, 90 F.3d 177 (6th Cir. 1996).

Evidence of Other Crimes - It was reversible error for the trial court to admit under FRE 404(b) evidence of taped conversations relating to a separate conspiracy. *U.S. v. Merriweather*, 78 F.3d 1070 (6th Cir. 1996).

Money Laundering - Mere transportation of cash is not "financial transaction" for purposes of money laundering statute (18 U.S.C §1956), but delivering funds to courier is. *U.S. v. Reed*, 77 F.3d 139 (6th Cir. 1996).

"Use" or "Carry" Firearm - Evidence was sufficient that the defendant was carrying a firearm where the defendant had cocaine in his pocket, cocaine was in an open purse on back seat of car and a loaded pistol was found under the front passenger seat below where the defendant was sitting. *U.S. v. Taylor*, 25 SCR 24, p. 14.

"Use" or "Carry" Firearm - Mere presence in room where guns were found does not support conviction for using firearm during drug offense, but visibly carrying handgun during cocaine purchase supported conviction for use during drug offense. *U.S. v. Welch*, 97 F.3d 146 (6th Cir. 1996).

"Use" or "Carry" Firearm - There is no offense of *attempting* to use or carry a firearm in relation to a drug offense under 18 U.S.C. §924(c). *U.S. v. Anderson*, 89 F.3d 1306 (6th Cir. 1996).

"Use" or "Carry" Firearm - Where firearms were found under seat of car, evidence not sufficient to prove "using," but sufficient to prove "carrying." *U.S. v. Myers*, 25 SCR 24, p. 10.

Evidence

Adoptive Admission - A government witness was permitted to testify as to a statement made to the defendant by a witness who was deceased at the time of trial because the defendant affirmatively responded to the statement, thus adopting it as his own. FRE 801(d)(2)(B). *U.S. v. Jinadu*, 98 F.3d 239 (6th Cir. 1996).

Other Crimes or Wrongs - Evidence of other drug dealings was properly admitted where the defendant claimed he was merely giving others a ride and had no intent to engage in a drug deal. *U.S. v. Myers*, 25 SCR 24, p. 10.

Other Crimes or Wrongs - Trial judge must make explicit findings on probative value versus prejudicial effect, but where defense failed to request findings, conviction will not be reversed on appeal absent plain error; improper admission of other crimes or wrongs subject to harmless error analysis. *U.S. v. Cowart*, 90 F.3d 154 (6th Cir. 1996).

Other Crimes or Wrongs - Where defendant's knowledge of firearm's presence in car was issue at trial, prior robbery in which similar gun was used was admissible in trial for being felon in possession of a firearm. *U.S. v. Chesney*, 86 F.3d 564 (6th Cir. 1996).

Other Crimes or Wrongs - While defendant's gang membership may have been admissible to prove opportunity (FRE 404(b)), where trial court did not engage in FRE 403 balancing of probative value/prejudicial effect, and then did not instruct the jury on the limited use of the evidence, the conviction must be reversed. *U.S. v. Jobson*, 25 SCR 24, p. 8.

Extradition

Refusal of Governor to Extradite - A governor cannot refuse to extradite an escaped felon upon receipt of a proper request from another state. *State of Alabama v. Engler*, 85 F.3d 1205 (6th Cir. 1996).

Fifth Amendment Privilege

Refusal to Produce Records Sought by IRS - A taxpayer may have a 5th amendment right to withhold records from the IRS, but that right may be waived by refusal to attend court proceedings. When the taxpayer asserts the privilege, the court should review the subject records *in camera* to evaluate the claim of privilege. *U.S. v. Grable*, 98 F.3d 251 (6th Cir. 1996).

Firearms

Drug Offense - Use or Carry Gun - There is no offense of *attempting* to use or carry a firearm in relation to a drug offense under 18 U.S.C. §924(c). *U.S. v. Anderson*, 89 F.3d 1306 (6th Cir. 1996).

Inconsistent Verdicts - conviction of armed bank robbery stands despite acquittal of use/carrying of firearm in commission of crime of violence and sentence enhancement for firearm involvement also upheld. *U.S. v. McCall*, 85 F.3d 1193 (6th Cir. 1996).

Possession by Convicted Felon - Statute prohibiting possession of firearm by felony (18 U.S.C. §922) does not violate the Commerce Clause under the standard of *U.S. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). *U.S. v. Turner*, 77 F.3d 887 (1996).

Possession of a Machinegun - 18 U.S.C. §922(o)(1), which prohibits possession of machineguns, is constitutional and does not violate the Commerce Clause. *U.S. v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996).

Gambling

Constitutionality of Statute - 18 U.S.C. §1955 is constitutional and does not violate the Commerce Clause. *U.S. v. Wall*, 92 F.2d 1444 (6th Cir. 1996).

Guilty Plea

Plea Bargain - Sentencing Guidelines - collateral attack on guilty plea not permitted where sentencing guidelines differ from sentence contemplated in plea bargain agreement, but the court cautions that guidelines issues should be discussed with the court prior to sentencing. *Nagi v. U.S.*, 90 F.3d 130 (6th Cir. 1996).

Habeas Corpus

Burden of Proof - Due Process is not violated by a state statute which requires the defense to prove, in a homicide case, sudden heat of passion by a preponderance of the evidence. *Rhodes v. Brigano*, 91 F.3d 803 (6th Cir. 1996).

Procedural Default - The failure of the defendant to make a motion for directed verdict in the trial court bars consideration in federal habeas of the failure of Kentucky to prove that the defendant was over the age of 18 when he committed the offense upon which a PFO charge is based. *Simpson v. Sparkman*, 94 F.3d 199 (6th Cir. 1996).

***Teague v. Lane* Rule** - This case includes a comprehensible explanation of the *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) "New Rule" rule. *Daniels v. Burke*, 83 F.3d 760 (6th Cir. 1996).

Use of Defendant's Silence - The cross-examination of the defendant by state prosecutor about his refusal to speak to detectives, decision to not testify at preliminary hearing or probation revocation hearing and the comments in closing argument about the defendant's pretrial silence warranted granting the writ. *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996).

Ineffective Assistance of Counsel

Counsel not Properly Licensed to Practice Law in Jurisdiction - Where the defendant's trial attorney was not properly licensed to practice law in state court, that fact does not amount to ineffective assistance of counsel per se. *Blanton v. U.S.*, 94 F.3d 227 (6th Cir. 1996).

Jury Instructions

Elements of Crime - In Medicaid fraud case, failure of trial court to instruct on materiality element was not plain error requiring reversal where the jury was required to make factual findings underlying materiality. *U.S. v. McGhee*, 87 F.3d 184 (6th Cir. 1996).

Alibi Instruction - Where defense did not request an alibi instruction in an alibi case, failure to give such instruction sua sponte was not plain error. *U.S. v. McCall*, 85 F.3d 1193 (6th Cir. 1996).

Jury Trial

***Batson v. Kentucky* Issue** - The court upheld the prosecutor's race-neutral explanations for striking 2 Latino jurors where the defense failed to dispute the explanations. The court noted that the reasons given, namely "unintelligent" or "disinterested" could have been shown to be mere pretexts if the defense had demonstrated that the government failed to challenge equally unintelligent or disinterested jurors of other races. *U.S. v. Tucker*, 90 F.3d 1135 (6th Cir. 1996).

Substitution of Jurors - Despite the explicit terms of FRCP 24(c), jurors may be replaced after submission of the case to the jury and the defense may waive the application of FRCP 24(c). *U.S. v. Cencer*, 90 F.3d 1103 (6th Cir. 1996).

Money Laundering

18 U.S.C. §1956 - The money laundering statute is not void for vagueness for failure to define "proceeds" and the statute's application is not limited to only offenses involving narcotics. *U.S. v. Haun*, 90 F.3d 1096 (6th Cir. 1996).

Motion for Acquittal

Motion After Government's Opening Statement - A motion for acquittal is properly denied when the government merely fails to mention facts relating to a particular charge in opening statement. The court, citing other Circuits, leaves open the possibility that a motion for acquittal is properly granted if the opening statement sets out facts which are totally inconsistent with the charged offense. *U.S. v. Welch*, 97 F.3d 142 (6th Cir. 1996).

Probation and Parole

Restitution - Where restitution is a separate component of a judgment, the court may continue the restitution requirement after revocation of probation. *U.S. v. Gifford*, 90 F.3d 160 (6th Cir. 1996).

Revocation - No abuse of discretion or due process violation where court held revocation hearing 2 years after probation violation warrant was issued even where court sentenced violator to a sentence consecutive to state court sentence. *U.S. v. Throneburg*, 87 F.3d 851 (6th Cir. 1996).

Sentencing

Consideration of Uncharged and Acquitted Conduct - The court cannot base restitution on uncharged misconduct and on conduct of which the defendant was acquitted. *U.S. v. Comer*, 93 F.2d 1271 (6th Cir. 1996).

Resentencing on Remand - On remand, District Court may reconsider sentencing issues on a *de novo* basis to the extent that they do not conflict with the appellate decision. *U.S. v. Crouse*, 78 F.3d 1097 (6th Cir. 1996).

Vacation and Remand - U.S. Courts of Appeal may vacate entire sentencing package and remand for resentencing even where one of sentences remains unchallenged on appeal. *U.S. v. Clements*, 86 F.3d 599 (6th Cir. 1996).

Speedy Trial

Indictment within 30 days of Arrest - Where one indictment was filed within 30 days of arrest, a second, superseding indictment would not be dismissed because it was filed more than 30 days after arrest (18 U.S.C. §1361). *U.S. v. Berry*, 90 F.3d 148 (6th Cir. 1996).

Prima Facie Case and Exclusion of Time Periods - Prima facie case may be demonstrated with a calendar which shows that more than 70 days have elapsed. The burden then shifts to the government to show excludable time. Where the court continues the case without finding that postponement was necessary "in the interests of justice" period of delay cannot be excludable as being necessary. *U.S. v. Jenkins*, 92 F.3d 430 (6th Cir. 1996).

Right to Speedy Appeal - Sixth Amendment speedy trial guarantee applies only to trial court, but due process guarantees a right to a prompt appeal. *Barker v. Wingo* analysis applies to the consideration of appellate delay. *U.S. v. Smith*, 94 F.3d 204 (6th Cir. 1996).

Sufficiency of Evidence

Conspiracy - *Hobbs* Act - Extortion by fear of economic loss, and not merely bribery, was proven. Private citizen can be convicted of *Hobbs* Act (18 U.S.C. §1951) violation. *U.S. V. Collins*, 78 F.3d 1021 (6th Cir. 1996).

U.S. Sentencing Guidelines Cases

U.S. v. Adu, 82 F.3d 119 (6th Cir. 1996). Drug case - court's refusal to apply "safety value" upheld.

U.S. v. Alexander, 88 F.3d 427 (6th Cir. 1996). Bank robber, who gives clerk a note saying that he had a gun and a bomb was not subject to mandatory enhancement for "express threat of death" under guidelines.

U.S. v. Barton, 100 F.3d 43 (6th Cir. 1996). For purposes of sentencing a defendant for being a felon in possession of a firearm, a felony committed after the firearm offense is not a "prior felony conviction" even if the defendant had been convicted of the felony prior to being sentenced on the felon in possession offense.

U.S. v. Bazel, 80 F.3d 1140 (6th Cir. 1996). To apply safety valve statute, allowing disregard of minimum sentence under guidelines, court must find both that defendant was not leader/organizer/manager and that defendant was not engaged in continuing criminal enterprise.

U.S. v. Bingham, 81 F.3d 617 (6th Cir. 1996). Drug offenses - use/possession of firearms, quantity of cocaine, manager status, suborning perjury as sentencing factors.

U.S. v. Branham, 97 F.3d 835 (6th Cir. 1996). Guidelines amendment which precludes consideration of statutory enhancements for those categorized as career offenders was beyond sentencing commission's authority because it conflicted with legislative intent to punish repeat drug or violent offenders at or near the maximum term of imprisonment. (Issue presently before the U.S. Supreme Court. *U.S. v. LaBonte*, NO. 95-1726; 60 CRL 3159 (January 29, 1997)).

U.S. v. Childers, 86 F.3d 562 (6th Cir. 1996). In assessing acceptance of responsibility by defendant, the court can consider offenses committed after his confession but before his arrest.

U.S. v. Dobish, 26 SCR 1, p. 17. Enhancement for both vulnerable victims and for abuse of a position of trust did not constitute double counting because the former factor focused on the selection of victims while the latter focused on post-selection conduct.

U.S. v. Hamilton, 81 F.3d 652 (6th Cir. 1996). Drug case - determination of quantity of drugs in methcathinone case. Drug quantity estimates - court must err on side of caution.

U.S. v. Hebeka, 89 F.3d 279 (6th Cir. 1996). Where the dates that the offense was committed straddled the effective date of the Sentencing Guidelines, the guidelines apply to the case.

U.S. v. Hill, 79 F.3d 1477 (6th Cir. 1996). Drug case - relevant conduct, criminal history, possession of firearm, obstruction of justice, weight of cocaine base as sentencing factors.

U.S. v. Jennings, 83 F.3d 145 (6th Cir. 1996). Where quantity of drugs cannot be precisely measured, sentencing court must approximate the amount and this determination will not be overturned unless clearly erroneous.

U.S. v. Jones, 26 SCR 1, p. 18. Court declines to decide whether "sentencing entrapment" is a ground for downward departure.

U.S. v. Lucas, 99 F.3d 1290 (6th Cir. 1996). This case contains an in-depth analysis of the meaning of the "amount of loss" caused by the defendant's criminal behavior in a bank fraud scheme.

U.S. v. Murphy, 96 F.3d 846 (6th Cir. 1996). Where a defendant is sentenced for being a felon in possession of a firearm, the sentence is properly enhanced because a stolen firearm is involved despite no showing that the defendant knew that the firearm was stolen.

U.S. v. Parrish, 84 F.3d 817 (6th Cir. 1996). In kickback scheme, amount of money received by the defendant is amount of "loss" for sentencing purposes even though loss by victim cannot be accurately calculated.

U.S. v. Perkins, 89 F.3d 303 (6th Cir. 1996). Separate enhancements for use of firearm, for hitting one victim with firearm and for restraining victims did not amount to improper double counting where separate acts were the basis for the enhancements.

U.S. v. Roxborough, 99 F.3d 212 (6th Cir. 1996). Where the defendant was convicted of dealing in firearms away from a licensed premises, his sentence was not properly enhanced based on possession of a firearm with an obliterated serial number without some indication that the obliteration was connected to the charged offense. Strict liability does not apply.

U.S. v. Sanders, 97 F.2d 856 (6th Cir. 1996). Normally, a trial court's refusal to depart downward is not reviewable on appeal, but where the court is unaware that it has the discretion to do so, the issue may be reviewed.

U.S. v. Surratt, 87 F.3d 814 (6th Cir. 1996). In child pornography case, evidence of the defendant's history of sexually abusing minors is not necessarily relevant to charge of receiving child pornography in the mail and the court was not required to hear the evidence as it related to the question of whether "pattern" of activities mandated enhanced sentence.

U.S. v. Valentine, 100 F.3d 1209 (6th Cir. 1996). Seven bank robberies were not "significantly more" than five within the meaning of the sentencing guidelines to justify increase in maximum offense level.

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A Manual on Defending With the Help of Mental Health Experts

Lawyers who are successful at representing criminals excel at evidencing the humanity of their clients to jurors, judges, prosecutors and the public. With increasing frequency, those lawyers effectively evidence their clients humanity with the help of a mental health professional.

The Department of Public Advocacy has collected significant articles, most previously published in DPA's *The Advocate*, in the *Mental Health and Experts Manual* (2d ed. 1997).

In the Manual, **John Blume** of Columbia, South Carolina sets out in detail the 5 steps of a competent forensic mental health assessment process as the national standard of care:

5 Step Forensic
Mental Health Assessment Process

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

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

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

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

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

Perhaps the most significant deficiency in mental health evaluations is the failure to have a thorough social history. In the Manual, **Robert Walker, MSW, LCSW** of Lexington, Kentucky comprehensively describes the dimensions of a biopsychosocial evaluation. Criminal defense attorneys learning how to be effective in these times understand that social histories are essential for reliable opinions which are capable of persuading those making the decisions about our clients.

Jim Clark, Ph.D., a professor of social work at the University of Kentucky, collaborates in the Manual with others to discuss the use of a consulting, not testifying, expert, and also to detail an 8-step process of attorney/expert collaboration:

Step 1:
Assess Mental Health or
Other Expertise Needs of the Case

Step 2:
Finding and Evaluating Experts

Step 3:
Retaining the Expert

Step 4:
Preparing the Expert for Evaluating

Step 5:
The Direct Examination
of the Expert: Telling the Story Well

Step 6:
Preparing the Expert for
Cross-Examination & Improving
Cross-Examination Answers

Step 7:
Revise Direct Examination

Step 8:
Develop Demonstrative Evidence

Lee Norton, Ph.D., MSW, of Tallahassee, Florida helps us learn how to implement the several goals of mitigation interviews which are: informational, diagnostic, therapeutic. Dr. Norton tells us that "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."

Marilyn Wagner, Ph.D., describes the significant specialty of neuropsychology, and what traditional psychology misses.

The Manual also has extensive examples of sample testimony from a social worker, psychologist and psychiatrist with an example of a timeline.

A copy of the 195 page Manual, including postage and handling can be obtained for $29.00.

Please make check payable to *Kentucky State Treasurer* and send order to:

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Manipulators Rebuked

Reason prevails--belatedly. Slowly but effectively, American institutions are repudiating the follies of a period in which echoes of both the Salem witchcraft trials and McCarthyism were heard in the land.

Last week, two headline cases where irrationality ran roughshod over justice and fact -- one in court, one in the United States Congress -- were finally redressed.

The first was the freeing of George Franklin, a San Francisco-area fireman. Franklin had been imprisoned for seven years after a murder conviction based on a suspect "therapy" technique alleged to recreate "repressed memories." His 1990 conviction was overturned in federal court. Then a threatened retrial was called off after the central evidence in the case was discredited on two counts:

1) The "repressed memory" of Franklin's daughter wrongly placed him at the site of one murder when 20-year-old minutes of his fireman's union showed him to be elsewhere.

2) A sister testified that the daughter had lied when she denied that she had been hypnotized in the process of discovering this "memory."

The second case was the exoneration of Dr. David Baltimore and his research associate, Dr. Thereza Imanishi-Kari, victims of a McCarthyist inquisition at the hands of an arrogant congressional committee chairman and his staffers.

One by one cases involving the use of manipulative mental techniques that influence children to "recall" bizarre satanic ritual abuse, or adults to "recover" memories of abuse allegedly repressed since childhood, have been over-turned or have ended in acquittal. Higher courts have rightly found suggestive techniques involving hypnosis, "visualization," and "imagining" early life incidents to be unreliable and inadmissible as evidence on which to convict.

In the quite-different matter of accusations that Dr. Imanishi-Kali (backed by Dr. Baltimore) fabricated lab results, it was not a higher court but careful scientific review that exonerated the Nobel biologist and his associate. A three-member panel of scientists appointed by the Health and Human Services Department exonerated Dr. Imanishi-Kari's work, confirming earlier reviews by Tufts, MIT, and the National Institutes of Health.

A common thread links these disparate cases. Both prosecutors and congressional staffers, in their zeal, relied on highly dubious pseudo-scientific techniques and suspect personal emotions in pursuit of conviction--the first in court, the second in the court of public opinion. That was the same hubris that characterized the earlier sensationalized cases known as the McMartin pre-school and Fells Acres Day School child abuse cases.

The 1983-90 McMartin pre-school case in California was built on strange tales of child abuse apparently induced in children's thinking by

ambitious and poorly trained investigators-- tales as bizarre as those thrown at the women of Salem. That longest and then most-costly trial in California history ended in jury acquittal. Next came the similar Fells Acre case in Massachusetts. The mother and daughter who ran that day-care center were freed after eight years in prison when a superior court judge declared their conviction null and void, but their son/brother remains in jail.

It's easy to look back on the McCarthy and Salem witchcraft eras as quaint periods of hysteria in the nation's past. But now, as then, there are two pernicious aspects of such aberrations that must be corrected. First, individual suffering. Reputations and lives are gravely injured. Second, public gullibility. Too many Americans have been willing to accept pseudopsychological techniques or to cheer on zealous but scientifically illiterate politicians attacking scientists to grab headlines.

We shake our heads that the citizens of Salem and Judge Sewall could believe in witchery. But here in our midst are earnest therapists incredibly asserting that "visualization" can confirm the most outrageously improbable atro-cities. As a review in Scientific American magazine noted: "Many therapists have reported on patients who have clearly recalled savage acts carried out by satanic cults: rapes, murders, cannibalization...and related atrocities.... Investigations by the Federal Bureau of Investigation of more than 300 cases have failed to turn up any proof."

Americans are emerging from this new period of manipulation. We continue to congratulate ourselves on living in an advanced period of the Age of Reason. Surely instant communications, the spread of higher education, and the built-in safeguard of appeals bodies will increasingly prevent miscarriages of justice such as these?

But hold the complacency. While the McMartin case was grinding on, the nation's first lady was consulting an astrologer. As the Dr. Baltimore matter stewed, the well-educated current first lady consulted a "visualizer." Talk shows push the occult and pop psychology.

Americans are sensible. And good sense has prevailed in these highly visible cases. The moral now, as in the past. is simple: Remain vigilant. Don't be swayed by emotional manipulators.

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1997 ANNUAL DPA CONFERENCE - MEMORABILIA SOUGHT

1997 marks the 25th Anniversary of the establishing of the Department of Public Advocacy. We will be celebrating these past 25 years of work in representing indigent clients accused of committing a crime and convicted of a crime by seeking people who have memorabilia - pictures, etc. - that they would like to either donate or loan to the Department to use for this Anniversary celebration at our 25th Annual Public Defender Training Conference in June of 1997.

If you have anything you would like to donate or loan, please send or contact:

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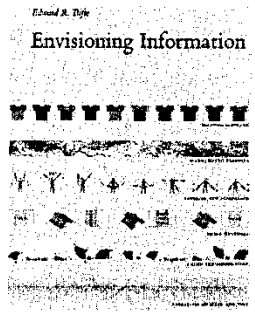
Envisioning Information: Book Review



by Edward R. Tufte
126 pages, fully illustrated
$48 Postpaid
Graphics Press, P.O. Box 430, Chesire, CT 06410

Why review a book on "visual thinking" in a lawyers' journal? Because *ennui*, and more specifically, jurors' *ennui*, is an attorney's greatest enemy. Complex data must be presented in valid, compelling, and vivid ways to communicate effectively to decision-makers.

Still unconvinced? Let's look at a case that demonstrates the power of demonstrative evidence, namely *U.S. v. Powell* (1958). The attorney, Edward Bennett Williams, is defending Congressman Adam Clayton Powell against IRS charges that Powell had committed tax evasion. Williams' biographer describes a particularly amusing and effective day at trial:

> Williams had been leading [IRS agent] Emmanuel through a series of numbers, writing each on a blackboard before the jury... When he finished he drew a line underneath and appeared to add up the figures. With a look of totally feigned surprise, he wrote down the answer. His questions had forced Emmanuel to concede that Powell had failed to claim legal deductions worth over $7,000--more than wiping out his $6700 deficiency. As the jury watched, Williams had just proved that Powell had in fact *overpaid* his taxes. At the counsel's table, Powell turned to look at columnist Murray Kempton, who was sitting in the row behind him. Powell had a look of "utter amazement" on his face, Kempton recalled. "He was shocked to find he was innocent." Thomas, E. (1991), *The Man to See*, N.Y.: Simon and Schuster, p. 142-143.

Advocates *must* use every means available to earn the audience's attention. The fact that the advocate is interested in the case is no guarantee the jurors are interested--even if it is a capital trial. This is even more problematic if the theory of the case relies on complicated data or plot twists. The attention-span of the average American probably equals the period of a thirty-second T.V. commercial, so the mission is daunting.

Envisioning Information calls this quest "escaping flatland." Since "all the interesting worlds" we seek to understand are "multivariate," so must the number of information dimensions and their densities be increased and enhanced. Tufte uses the following examples of excellent design: A Japanese travel guide, the periodic table of chemical elements, three dimensional, scatter plots, sunspot diagrams and a timetable of a Java railroad line to mention only a few. Additional chapters examine the relationship between color and information and developing displays of space and time. Tufte is determined to lift information into three dimensions by using graphic layouts notable for compelling the eye and engaging the cerebral cortex.

Tufte presents one criminal justice example, namely, a stark display presented by the defense team in *U.S. v. Gotti, et al.*, 1987. Bruce Cutler and Susan Kellerman developed a chart of the "Criminal Activity of Government Informants," which detailed the criminal activity of the major prosecution witnesses. The *New York Times* article on the facing page notes that this chart was specifically requested by the jurors for review during its deliberations. Like Williams' relatively simple chalk-talk, this chart summarized multivariate data into a readily-comprehensible format. Tufte concludes:

> Courtroom graphics can overcome the linear, nonreversible, one dimensional sequencing of talk talk talk, allowing members of a jury to reason about an array of data at their own pace and in their own manner. Visual display of in-

> formation encourage a diversity of individual viewer styles and rates of editing, personalizing, reasoning, and understanding. Unlike speech, visual displays are simultaneously a wideband and a perceiver-controllable channel (p.31).

This argument, by the way, is consistent with the contemporary research on jury information processing.

The author, a trial consultant, as well as professor of statistics, graphic design, and political economy at Yale University, leads the reader through a *tour de force* of informational design. Professor Tufte continues the central argument advanced in his earlier book, *The Visual Display of Quantitative Information*. He confounds the conventional wisdom that people are sleepy, silly, and too stupid to grasp complexity. His invectives are directed at the Madison Avenue purveyors of *talk talk talk* and "chart junk." Those persons are not only guilty of downright deception, but also patronize the general public. These criminals rob us of the insight that grasping complexity is an evolutionary cognitive miracle granted the human race.

> We thrive in information-thick worlds because of our marvelous and everyday capacities to select, edit, single out, structure, highlight, group, pair, merge, harmonize, synthesize, focus, organize condense, reduce, boil down, choose, categorize, catalog, classify, list, abstract, scan, look into, idealize, isolate, discriminate, distinguish, screen, pigeonhole, pick over, sort, integrate, blend, inspect, filter, lump, skip, smooth, chunk, average, approximate, cluster, aggregate, outline, summarize, itemize, review, dip into, flip through, browse, glance into, leaf through, skim, refine, enumerate, glean, synopsize, winnow the wheat from the chaff, and separate the sheep from the goats (p.50).

Such *accumulatio* (Professor Tufte's active voice is equally deft with hard science and the parables of Jesus) concertizes with the irresistible, rich, and exciting illustrations and photographs. He publishes what he preaches.

Even if after the above arguments the reader discerns no practical use for this book, it is wonderful fun to keep close at hand, to dip into, to scan and if so inclined, to read analytically. *Envisioning Information* is a physically beautiful book--more than sufficient justification for purchase and study.

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CRIMINAL ACTIVITY OF GOVERNMENT INFORMANTS

CRIME	CARDINALE	LOFARO	MALONEY	POLISI	SENATORE	FORONJY	CURRO
MURDER	X	X					
ATTEMPTED MURDER		X	X				
HEROIN POSSESSION AND SALE	X	X		X			X
COCAINE POSSESSION AND SALE	X		X	X			
MARIJUANA POSSESSION AND SALE							X
GAMBLING BUSINESS		X		X		X	
ARMED ROBBERIES	X		X	X	X		X
LOANSHARKING		X		X			
KIDNAPPING			X	X			
EXTORTION			X	X			
ASSAULT	X		X	X			X
POSSESSION OF DANGEROUS WEAPONS	X	X	X	X	X		X
PERJURY		X				X	
COUNTERFEITING					X	X	
BANK ROBBERY			X	X			
ARMED HIJACKING				X	X		
STOLEN FINANCIAL DOCUMENTS			X	X	X		
TAX EVASION				X		X	
BURGLARIES	X	X		X	X		
BRIBERY		X		X			
THEFT: AUTO, MONEY, OTHER			X	X	X	X	X
BAIL JUMPING AND ESCAPE			X	X			
INSURANCE FRAUDS					X	X	
FORGERIES				X	X		
PISTOL WHIPPING A PRIEST	X						
SEXUAL ASSAULT ON MINOR							X
RECKLESS ENDANGERMENT							X

Appalachians as a Cultural Group: Part IV

Cris Brown

An indicator of the stability of a person is the nature and duration of personal relationships. That is one reason to look at serious attachments in the person's life. Another reason to identify and interview persons the client has married or dated for any length of time is that loved ones are treated to the best and shown the worst of a client's personality.

Early marriages by the client and siblings can be an indication of problems within the home that led the person to leave home by marrying early. Early sexual experience or promiscuity can be an indicator of sexual abuse or a troubled home. It has been said that boys are more likely to turn to crime whereas girls turn to promiscuity if there is a troubled home.

I have come across a woman who married at 12 years of age. The earlier the marriage, the earlier children are born, and it can affect the child's health, nutrition, ability to take care and meet the child's needs and the parenting skills of the mother, and father.

Persons who dated in the past in Eastern Kentucky, due to limited means of travel and traditions may spend the night in the home. Bundling was the accepted way for a courting couple to spend the night together. That involved the couple sleeping in the same bed, but with a board running between them. Somewhat this was done due to limited sleeping places in the home.

Now it is common for boyfriend and girlfriends to "shack up," in the parent's home with their blessing with an eye toward eventual marriage, generally when a baby is on the way. If a relationship does not work out, a line of people may spend the night until the person marries. Bear in mind that this is a serious commitment, and not merely one-night stands being brought home with the parent's blessing.

The couple might live with the family for the beginning of their marriage, or come back to the home if they have financial trouble on their own.

Persons may or may have that "talk" with their father or mother about the facts of life. Schools commonly do that for the parents now. It may have been more true in the past that women started marriage ignorant about the facts of life. Boys working with livestock, were fairly well versed on the subject.

Grandparents, particularly grandmothers, play a major role in rearing the children and providing for a sense of family.

Bear in mind that Eastern Kentuckians may be very insulted by attempts to pry into what is a very personal and embarrassing matter for them.

Finally, do not assume that a couple who have children are married- always inquire, and look for the marriage certificate; That a child belongs to a certain man- always look for birth certificates and compare to marriage certificates; does the child look like the father and other children?; Or that a parent legally divorced the person from an earlier marriage, and the second marriage is legitimate and not bigotry.

Dating/Relationships/Sex:

Find out about times when they "played doctor," [make sure the person knows you're talking about sexual play] at what age they had sex, if it was a person that was of their own age or an older person, how long he'd dated; the names of people that they dated, if it was a long term relationship, why he broke up with the people, how he got along; If they're having any sexual problems; family religious attitudes

towards masturbation; parental practices regarding nudity; sleeping arrangements.

Defendant's Marital History:

How many times married; why each marriage terminated; spouse name, address, phone; (maiden name as well); when married; how long dated before marriage; age at time of marriage; live with either person's parent's; spouse's acceptance by family; did the spouse work, at what? problems within marriage, how they got along; degree defendant assumed marital/parental responsibility; history of extramarital companions; any spouse abuse, child abuse; How did the spouse and client get along, pattern of the relationship - who was in control? Marital pattern for dealing with stress, resolving problems, handling anger and length and intensity of problems, how did they handle financial concerns.

Find out about children they might have, names, ages, when born, if they have pictures see if we can get copies of those, how often he saw the child if he didn't live in the home with the child, if he contributed to support, if he provided clothes or care for the child, if any of his family had significant contact with the child, if the child is recognized to be his child for welfare purposes; Who took care of the children; what types of activities did the family engage in, where are the children now, any contact?

Is there anything about your life that made you try to raise your child differently?

Drug/Alcohol Abuse:

DRUG CHART

DRUG NAME ---- AGE OF FIRST USE ---- INJECTED? ---- HABIT ---- STOPPED
Pot
Acid
Speed
Coke
Heroin
Valium
Xanax
Dilaudid
PCP
Crank
Crack
Mushrooms
Quaaludes
Hashish
Tylox
Opium
Halcyons
Demerol
Elavils
Sinequan
Mellaril
Percodan/Cet
Codeine
Other:_____

FAVORITE OR PREFERRED DRUG: _____

INHALANTS CHART:

TYPE ---- AGE AT USE ---- # OF TIMES ---- STOPPED?

Gasoline
Airplane Glue
Freon
Pam
Paint
Whiteout
Other: _____

Screen for rabbit tobacco, jimpson weed, or any other plant or substance that the client used to attempt to get high.

ALCOHOL USE CHART:

AGE ---- FREQUENCY ---- DRUNK ---- # TIMES DRUNK

0-5:
5-8:
8-10:
10-12:
12-14:
14-16:
16-18:
18-20:
20-25:
25- ?
30- ?
Other?

It is important to screen for non-alcohol matters that the client has ingested such as cooking vanilla, rubbing lotion or liniment, shaving lotion, rubbing alcohol. Anything that he used for a buzz.

Has he ever been in a drug/alcohol rehabilitation program? when, where, why, how long did he stay?

[Note: This is an indepth questionnaire and should be undertaken in subsequent visits when the client has or had a severe alcohol or drug dependency problem.]

Talk to the client about drug and alcohol abuse, get specifics on when he started using drugs or alcohol, find out if he's ever inhaled gasoline or any intoxicants; how did the drug make him feel, drug of choice and why; where first exposed to alcohol, was any used by parents or relatives. How old were you when you first had any wine, beer, or other alcohol at least once a month (for 6 months or more)? What is the largest number of drinks that you've ever had in one day? Has there ever been a period of two weeks when every day you were drinking at least 7 drinks - that you could include beers, glasses of wine, or drinks of any kind? Has there ever been a couple of months or more when *at least one day a week you drank 7 or more drinks* or bottles of beer or glasses of wine? Have you ever gone on binges or benders where you kept drinking for a couple of days or more without sobering up? Did you neglect some of you usual responsibilities then? Did you do that several times or go on a binge that lasted a month or more? Did you ever get tolerant to alcohol, that is, you *needed to drink* a lot *more* in order *to get an effect,* or found that you could no longer get high on the amount you used to drink? Some months or years after you started drinking did you begin to be *able to drink a lot more before you would get drunk* (that is, your speech get thick or you

would get unsteady on your feet)? Did your ability to drink more without feeling the effects last for a month or more? Have there been many days when you *drank much more than you expected to* when you began, or have you often continued drinking for more days in a row than you intended? Have you more than once wanted to quit or cut down on your drinking? Have you ever tried to quit or cut down on your drinking? Did you find that you couldn't quit or cut down? Were you unable to quit or cut down more than once?

Some people *try to control* their *drinking by making rules*, like not drinking before 5 o'clock or never drinking alone. Have you ever made rules like that for yourself? Did you make these rules because you were having trouble limiting the amount you were drinking? Did you try to follow those rules for a month or longer or make rules for yourself several times? Has there ever been a period when you *spent so much time drinking alcohol* or getting over its effects that you had little time for anything else? Did the period when you spent a lot of time drinking last a month or longer? Have you ever *given up or greatly reduced important activities in order to drink* - like sports, work, associating with friends or relatives? Did you give up or cut down on activities for a month or more, or several times in order to drink? Has your *drinking* or being hung over *kept you from working* or taking care children? Have you often worked or taken care of children at a time when you had drunk enough alcohol to make your speech thick or to make you unsteady on your feet? Were there ever *objections* about your drinking from your *family*? Your *friends*, your *doctor,* or your *clergyman*? Your boss or *people at work or school*? Did you ever get into *fights while drinking*? Have the police *stopped or arrested you* or taken you to a treatment center because of drinking? When was the (first/last) time you had this happen because of drinking? You mentioned the police. Did you drink (more than once) *after* having any of these problems? Have you ever had *trouble driving because of drinking* - like having an accident or being arrested for drunk driving? Have you several times had trouble driving because of drinking? Have you ever *accidentally injured yourself* when you had been drinking, for example, had a bad fall or cut yourself badly? Did that happen several times? Have you several times been high from drinking in a situation where it increased your chances of getting hurt - for instance, when driving a car or boat, using knives, machinery, or guns, crossing against traffic, climbing or swimming?

Have you ever had *blackouts* while drinking, that is, where you drank enough so that you couldn't remember the next day what you had said or did? People who cut down or stop drinking after drinking for a considerable time often have *withdrawal symptoms*. Common ones are the shakes (hands tremble), being unable to sleep, feeling anxious or depressed, sweating, heart beating fast, or the DT's or seeing or hearing things that aren't really there. Have you had any problems like that when you stopped or cut down on your drinking? Have you had withdrawal symptoms several times? Have you ever had fits or *seizures after stopping* or cutting down on *drinking*? Did you ever *need a drink just after you woke up* (that is, before breakfast)? Did you ever *take a drink* right *after you woke up to keep from having a hangover or the shakes*? Have you ever *taken a drink to keep from having* a hangover, the shakes, or any *withdrawal symptoms* or taken a drink to make them go away? Have you several times taken a drink to keep from having withdrawal symptoms? Have you ever talked to a doctor about a problem you had with drinking?

There are several health problems that can result from drinking. Did drinking ever cause you to have liver disease, or yellow jaundice, give you stomach disease, or make you vomit blood, cause your feet to tingle or feel numb, give you memory problems even when you weren't drinking, or give you pancreatitis? When did you first find out drinking has given you health problems? Did you continue to drink (more than once) knowing that drinking caused you to have a health problem/injury? Have you continued to drink when you knew you had any (other) serious physical illness that might be made worse by drinking? When was the (first/last) time you drank in spite of an illness that could be made worse by drinking?

Has there ever been a period in your life when you needed alcohol to help you function - that is, you could not do your work well unless you had had something to drink? When was the

(first/last) time you needed a drink in order to do your work well?

Has alcohol ever caused you *emotional or psychological problems*, such as feeling uninterested in things, depressed, suspicious of other or paranoid, or caused you to have strange ideas? Did you continue to drink (more than once) after you knew that drinking caused you psychological or emotional problems? When did you last have any wine, beer or other alcohol?

Now I'd like to ask you about your experience with drugs and other substances. Have you ever used at least one drug on this list to get high, or for other mental effects or more than was prescribed, or for longer than the doctor wanted you to? Have you taken any other drugs on your own either to get high or for other mental effects? How old were you when you first tried one of these drugs (if it wasn't prescribed)? Were you younger or older than 15? Had you tried any of these drugs more than once before you were 15? Which ones? Have you ever taken one of these drugs more than five times in your life (to feel good, to get high, for other mental effects, or longer than was prescribed)? Which ones have you used more than five times (on your own)? How old were you when you first tried (DRUG)? There are various ways that people can take drugs. What are all the ways that you have used (DRUG), such as by mouth (pills), smoking or freebasing, snorting or sniffing, vein or I.V., under the skin or muscle, or some other way? Has a doctor ever prescribed a tranquilizer, sedative, pain pill, antidepressant, or headache medicine for you? Have you ever used them every day for two weeks or more? Which did you use every day for 2 weeks? Have you ever *used any of these drugs almost every day for two weeks or more*? What was the longest period that you used (DRUG) every day for at least two weeks?

How old were you when you first used (DRUG) every day for at least two weeks? When was the last time? Have you ever *stayed high* on any of these drugs for a *whole day* or more? How old were you the first time you used (DRUG) to stay high for a whole day? When was the last time? Has there ever been a period when *you spent a great deal of your time using drugs, getting drugs*, or *getting over their effects*? How old were you the first time (DRUG) took up a lot of your time? When was the last time? Was there ever a whole month when (DRUG) took up a lot of your time? Have you often *used* much *larger amounts* of a drug *than you intended to* , or for more days in a row than you intended to? Have you often used (DRUG) more days or in larger amounts than you intended to? How old were you the first time (you noticed that you were using more (DRUG) than you intended to)? When was the last time? Have you ever *felt dependent* on any of these drugs or found you were unable to keep from using them? Have you ever felt dependent on (DRUG) or been unable to keep from using it How old were you the first time (you felt dependent on [DRUG])? Was there a month or more when you felt that way about (DRUG)? Have you *tried to cut down on* any of these *drugs but found you couldn't*? Have you tried to cut down on (DRUG), but couldn't? How old were you the first time (you tried to cut down on (DRUG) and found you couldn't)? When was the last time? Did you try to cut down on (DRUG) several times? Did you ever get *tolerant to* any of these drugs or need larger amounts of them to get any effect? Did you ever get tolerant to (DRUG) or need larger amounts of it to get an effect? How old were you the first time (you became tolerant to, or needed larger amounts of (DRUG) to get an effect)? Has stopping or cutting down on any of these drugs made you sick or given you *withdrawal symptoms*? Have you *used any of these drugs to keep from having withdrawal symptoms*? Did stopping or cutting down on (DRUG) make you sick? Did you get sick several times from cutting down on (DRUG) (or did your withdrawal symptoms ever last at least a month)? Have you used (DRUG) several times (to make withdrawal symptoms go away/or keep from having them)? How old were you the first time you (got sick from cutting down on (DRUG)/or used (DRUG) to keep from having withdrawal)? When was the last time? Did you have any *health problems* like an accidental overdose, a persistent cough, a seizure (fit), an injection, a cut, sprain, burn, or other injury *as a result of taking* any of these *drugs*? Did (DRUG) cause you any health problems? How old were you the first time (DRUG) caused a health problem? When was the last time? Did you use (DRUG) on more than one occasion after you knew it caused these health problems? Did any of these *drugs cause you considerable problems with your family, friends, on the job,*

at school, or with the police? Did (DRUG) cause you considerable problems with your family, friends, on the job, at school, or with the police? How old were you the first time (you had a problem with job or school, with the police, or with family or friends because of using [DRUG])? When was the last time? Did you use (DRUG) on more than one occasion after you realized it was causing these problems? Have you often *been high on drugs* or suffering their after-effects *while working or taking care of children*? Have you often been high or suffering the after-effects of (DRUG) while working or taking care of children?

How old were you the first time (you were high or suffering the after-effects of (DRUG) while working or taking care of children? When was the last time?

Did drug use start in military?

[See ***Brain Damage, Diagnosis, and Substance Abuse Among Violent Offenders,*** Langeuin, Ron *et. al.* 5 #1 *Behavioral Sciences & The Law*, p. 77 (1987).]

[See also, ***The Pathogenesis of Alcoholism***, Editors, Benjamin Kissin and Henri Begleiter; ***Ethnicity and Nationality in Alcoholism***, McCready, Williams, *et. al.*, Plennum Press, New York, 1983.]

Defendant:

a. Ask the client in his own words what his best qualities and worst qualities are;

b. Any talents, accomplishments, hobbies, interests, clubs;

c. Reputation for honesty, reputation in the community;

d. Examples of kindness or sharing of a good deed done;

e. Ever physically or sexually abused [If you have not asked previously];

f. Military history, years in service, division, awards, actual war experience, pension, injuries, any hospitalizations? Any medical attention, any counseling; discharge papers; service-connected illnesses (Vietnam Vet defendant's case); Did client's father or grandfather serve in the military?

g. Are you a violent person; Should someone be afraid of the defendant;

h. Does anyone ever visit him (frequency), write letters, contribute to his canteen fund? Who, address, telephone, how he knows them.

i. Current status; How does the client spend the day? Who does the client have contact with and why? What does the client think about; especially re: current situation and possible execution. Any physical complaints, headaches, seizures, blackouts?

CRIS BROWN
Brown Investigations, Etc.
1107 Grand Avenue
Frankfort, Kentucky 40601
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"If the only **tool** you have in your bag is a **hammer** -
all **problems** will look like **nails.**"

- Mark Twain

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

ADVERTISING RATES

Black & White

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

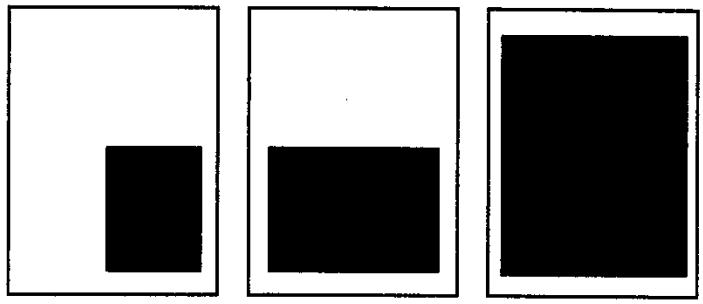
NOTE: *Stapling inside the newsletter up to a 4-sided insert would be double the cost for a full page ad.*

CLOSING DATES

*Published bi-monthly

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

AD SIZES



1/4 Page
3-1/8" x 4-5/8"

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7-13/16" x 4-1/2"

Full Page
7" x 9-1/2"

When preparing art work for full page ad, allow 3/4" on all sides.

All live matter must be contained within 7" x 9-1/2"

MECHANICAL REQUIREMENTS

✓ Negatives, positives, engraving or camera-ready art accepted.
✓ Offset printing
✓ Black & White
✓ Trim size: 8-1/2" x 11" - 2 columns/page
✓ Halftone screen 133

CIRCULATION

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

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

For further information contact:

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

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Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

25th Annual Public Defender Training Conference
June 16-18, 1997
Campbell House Inn
Lexington, Kentucky

DPA Post-Conviction Institute
September 8-10, 1997
Holiday Inn, Newtown Pike
Lexington, Kentucky

8th Death Penalty Persuasion Institute
Kentucky Leadership Center
October 12-17, 1997

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

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**** KACDL ****

For more information regarding KACDL programs call or write: Linda DeBord, 3300 Maple Leaf Drive, LaGrange, Kentucky 40031 or (502) 243-1418 or Rebecca DiLoreto at (502) 564-8006.

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**** NLADA ****

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

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**** NCDC ****

NCDC Trial Practice Institute
Mercer Law School, Macon, GA
June 15, 1997 - June 28, 1997
July 13, 1997 - July 26, 1997

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

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"We cannot solve the problems we have created with the same thinking that created them."

- Albert Einstein

DEPARTMENT OF PUBLIC ADVOCACY
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