JOURNAL

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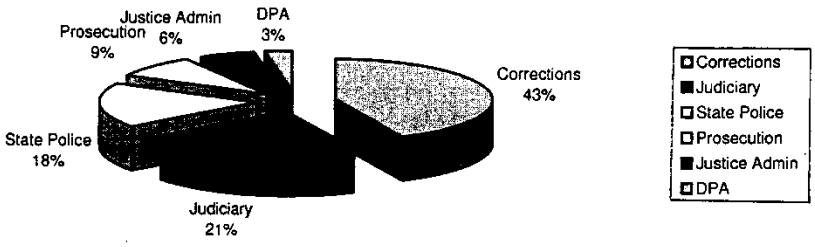
Funds for Kentucky's Justice System: 4.65% DPA at the Bottom



Defenders' Evolving Role - Larry Landis

Revenue for Defender Representation - Ernie Lewis

A Search for the Truth - Robert L. Elliott, President Kentucky Bar Association

FROM THE EDITOR:

Numerous judges expressed to Public Advocate, **Ernie Lewis**, at the October 1997 Judicial Conference in Bowling Green what a fine publication *The Advocate* is. One judge stated that he kept copies of *The Advocate* on the bench and referred to it often. Many judges observed that the only Fourth Amendment law that they ever see comes from *The Advocate*. We need to be reminded on occasion of the educational importance of *The Advocate* for not only defenders but the broader criminal justice community - including judges. Thanks to all who make *The Advocate* a vehicle of education and research!

Independence/Interdependence. An essential core value of DPA is the professional independence of its lawyers to represent clients not just vigorously but zealously. An emerging value of DPA is working interdependently in the criminal justice system to maximize the benefits for our clients. **Larry Landis** challenged us at the 1997 Annual Conference to begin thinking of this new paradigm of helping clients. We carry his remarks in this issue with reflections and reactions from others, Judge James Keller, Ernie Lewis, Bill Johnson, and John Leathers. We'd like to hear your thoughts.

KBA President. We are pleased to share with you the substantial thoughts of KBA President **Bobby Elliott** on the work we do.

Michael Folk joins *The Advocate* as our new associate editor for our district court column. He starts off with a call to learning about jury trials in district court.

In addition to our regular features, this issue looks at meaty issues of funding, working together, truth and much more.

***Edward C. Monahan*, Editor**

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, mission, and 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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Defender Revenue:
$40 Administrative Fee, $50 DUI Fee, Recoupment

Ernie Lewis

An increasingly significant part of the Department of Public Advocacy's (DPA's) funding is the three sources of revenue paid by our indigent clients: recoupment, the DUI fee, and the administrative fee. While many persons have problems with funding DPA through these sources, they are part of our current reality.

Recoupment

Until 1994, the only fund available to DPA was KRS 31.120, which allowed for the Judge to assess recoupment or a partial fee, of persons appointed a public defender. By statute, this recoupment must go back to the counties to provide public defender services. In contract counties, where part-time lawyers deliver services, recoupment monies are sent back to the local public defenders to increase the amount of money given by the state or the county.

DUI Fee/Administrative Fee

In 1994, two additional fees were established to help fund the public defender system. These fees were established as a result of the crisis in public defender funding which had been recognized by the Governor's Task Force and recommended to the General Assembly. As a result of these recommendations, in 1994, KRS 31.051(2) and KRS 189A.050 were passed. The administrative fee (KRS 31.051(2)) mandated the judicial assessment of a $40 fee to all clients who had been appointed a public defender. This fee is mandatory although waivable by the judge. KRS 189A.050 required that 25% of the DUI service fee go to the Department of Public Advocacy.

In 1996/1997, these fees provided almost 16% of the Department of Public Advocacy's budget. As you will see from the attached, in 1997/1997, $903,000.00 was recouped from indigents as a result of KRS 31.120. As a result of KRS 31.051(2), the administrative fee; $666,000.00 was brought in. The DUI service fee brought in $1,040,000.00 for the provision of services. Together, over two and a half million dollars was available to the Department from assessments to indigents accused of crimes.

Where Does It Go?

It is important to understand what the Department does with this funding. First, all recoupment must be returned to the county to provide services locally (KRS 31.051(1)). The remaining monies support many of the services provided by the Department, including: offices in Covington, Henderson, Madisonville, Elizabethtown; significant support to the Fayette and Jefferson County Public Defender Offices; the Capital Post-Conviction Branch; contracts to private lawyers who represent capital clients; three appellate lawyers; trial lawyers in Somerset, London, and Pikeville; conflicts in both contract and field office counties; technology; *The Advocate*, and lastly training. Without the money provided by these three revenue sources, the DPA could not continue to provide its present level of services.

ROLE OF THE COURTS

The heart of the collection of revenue is the decision by district and circuit court judges to assess fees, particularly the administrative fee of KRS 31.051(2). The biggest problem is that the collection rate is much too low. KRS 31.051(2) states that "any person provided counsel under the provisions of this chapter ***shall*** be assessed at the time of appointment a nonrefundable $40 administrative fee." Clearly, this fee is waivable by statute; however, as can be seen by the figures, in 1997, the collection rate for the Department was approximately 14 percent. The Department believes that the assessment and collection rate should be much higher than 14%. If it were, many of the most acute needs of the Department could be alleviated.

An additional problem is the disparity between counties. It can readily be seen that while some counties are collecting the administrative fee on a consistent basis, other counties are not. This

includes some counties who are benefitting a great deal from the provision of revenue.

The final problem is that in some counties recoupment is collected while the administrative fee is not. KRS 31.051(3) states that the administrative fee is in addition to any other contribution or recoupment and *"shall be collected in accordance with that section."*

The Need for Adequate Funding

The Department has numerous acute needs. In short, the Department continues to be revenue - starved. The Department receives only 2.7% of the total criminal justice budget. In 1996/1997 prosecutors in this Commonwealth received approximately 53 million dollars while the Department of Public Advocacy received only 17 million dollars (including the revenue from the two fees and recoupment). DPA received funding at a rate of $163 per case, which is the lowest per case funding in the nation.

Proposal to Legislature

As a result, the Department has been criticized for failing to provide adequate services in juvenile court across the Commonwealth. The Department is proposing to the 1998-2000 Legislature an additional five full-time offices and other trial and appellate staff to enhance the delivery services in juvenile court as well as to other indigents. The Department also is asking for increased financial support for Jefferson and Fayette County Public Defender systems where the highest caseloads prevail, as well as full funding for the capital post-conviction branch, which was recently defunded. The Department is ask-ing these needs to be met through general fund-ing. If this does not occur, revenue must meet the needs of the Department. It is not unreason-able to believe that 50% of indigents accused of crimes can pay the $40 assessment fee (the DPA will be asking for a raise to $50).

I am asking all judges to look at what they can do to assist the Department of Public Advocacy in providing this vital public service. I am not asking any judge to assess an administrative fee of someone who cannot afford it. I am not asking a judge to refuse to waive these fees and I must emphasize that I am not asking any judge to put any indigent in jail for failing to pay the public defender fee or denying counsel to an indigent for failing to pay the public defender fee. What I am asking is for their cooperation and assistance in assessing our clients the modest sum of $40 per case in order to fund the DPA.

For your information, a listing of the two fees and recoupment by county follows.

The fairness and reliability of our public defender system is at stake.

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First Defender Appointed Ethics Director

Anthony Wilhoit

Kentucky's first public defender, **Anthony Wilhoit**, 62, retired from 21 years of Court of Appeals judging and one year as the Court's Chief Judge in November, and is now the second executive director of Kentucky's Legislative Ethics Commission. Wilhoit is a 1955 graduate of Thomas More College, a 1963 graduate of U.K.'s Law School and a 1986 graduate of the University of Virginia's masters in law program. He was a police judge in Versailles in 1964, a city attorney from 1965-67 and Woodford County Attorney from 1967-72. He was Kentucky's first state public defender in 1972 appointed by Governor Wendell Ford. He served as public defender until 1974. His bid for Kentucky Attorney General was unsuccessful. He was Deputy Justice Secretary from 1975-76. The *State Journal's* October 16, 1997 editorial said of Wilhoit's selection from the 76 applicants for the Ethics Commission's Executive Director job, "we cannot imagine anyone with more honor and integrity than Wilhoit brings to the Commission....we have no doubt that Wilhoit will use the law to the fullest in the interest of assuring the people of Kentucky a General Assembly free of the kind of base corruption that led to the enactment of the original ethics code...."

YEAR END RECOUPMENT REPORT FY 97
June 1997

COUNTY	REC'D 7/1 Thru 05/31	RECEIVED THIS MONTH	TOTAL YEAR TO DATE	PERCENTAGE
ADAIR	570.00	$ -	570.00	0.06%
ALLEN	6,165.00	330.00	6,495.00	0.72%
ANDERSON	2,119.00	17.00	2,136.00	0.24%
BALLARD	13,318.33	1,160.00	14,478.33	1.60%
BARREN	15,615.75	1,697.25	17,313.00	1.92%
BATH	805.00	70.00	875.00	0.10%
BELL	9,259.50	915.00	10,174.50	1.13%
BOONE	29,422.95	2,397.00	31,819.95	3.52%
BOURBON	4,735.04	226.00	4,961.04	0.55%
BOYD	21,949.50	1,330.00	23,279.50	2.58%
BOYLE	3,401.00	250.00	3,651.00	0.40%
BRACKEN	1,274.18	200.00	1,474.18	0.16%
BRETHITT	265.00	0.00	265.00	0.03%
BRECKINRIDGE	2,110.00	45.00	2,155.00	0.24%
BULLITT	16,996.00	1,715.00	18,711.00	2.07%
BULTER	5,515.50	750.00	6,265.50	0.69%
CALDWELL	3,266.50	0.00	3,266.50	0.36%
CALLOWAY	12,642.50	1,365.00	14,007.50	1.55%
CAMPBELL	22,180.00	2,295.00	24,475.00	2.71%
CARLISLE	6,015.87	310.00	6,325.87	0.70%
CARROLL	14,476.25	1,248.00	15,724.25	1.74%
CARTER	1,424.96	20.00	1,444.96	0.16%
CASEY	770.00	60.00	830.00	0.09%
CHRISTIAN	29,025.25	2,392.50	31,417.75	3.48%
CLARK	6,436.50	967.50	7,404.00	0.82%
CLAY	1,810.00	10.00	1,820.00	0.20%
CLINTON	0.00	0.00	0.00	0.00%
CRITTENDEN	12,140.85	1,620.00	13,760.85	1.52%
CUMBERLAND	150.00	60.00	210.00	0.02%
DAVIESS	16,314.50	2,175.00	18,489.50	2.05%
EDMONSON	2,920.00	60.00	2,980.00	0.33%
ELLIOTT	710.00	0.00	710.00	0.08%
ESTILL	355.00	0.00	355.00	0.04%
FAYETTE	158,167.00	16,468.00	174,635.00	19.34%
FLEMING	1,007.50	15.00	1,022.50	0.11%
FLOYD	2,047.50	190.00	2,237.50	0.25%
FRANKLIN	2,267.50	170.00	2,437.50	0.27%
FULTON	21,314.55	1,220.00	22,534.55	2.50%
GALLATIN	3,288.00	280.00	3,568.00	0.40%
GARRARD	4,140.00	125.00	4,265.00	0.47%
GRANT	6,554.50	1,297.50	7,852.00	0.87%
GRAVES	17,538.00	2,000.00	19,538.00	2.16%
GRAYSON	605.00	50.00	655.00	0.07%
GREEN	665.00	51.00	716.00	0.08%
GREENUP	6,805.00	490.00	7,295.00	0.81%
HANCOCK	1,008.00	50.00	1,058.00	0.12%
HARDIN	6,798.00	475.00	7,273.00	0.81%
HARLAN	5,054.16	407.50	5,461.66	0.60%
HARRISON	4,058.00	555.00	4,613.00	0.51%
HART	6,256.75	475.00	6,731.75	0.75%
HENDERSON	3,947.00	390.00	4,337.00	0.48%

YEAR END RECOUPMENT REPORT FY 97
June 1997

COUNTY	REC'D 7/1 Thru 05/31	RECEIVED THIS MONTH	TOTAL YEAR TO DATE	PERCENTAGE
HENRY	1,280.00	290.00	1,570.00	0.17%
HICKMAN	12,544.43	689.59	13,234.02	1.47%
HOPKINS	4,143.00	680.00	4,823.00	0.53%
JACKSON	553.00	10.00	563.00	0.06%
JEFFERSON	39,906.50	3,708.00	43,614.50	4.83%
JESSAMINE	15,545.00	2,444.00	17,989.00	1.99%
JOHNSON	2,319.50	180.00	2,499.50	0.28%
KENTON	26,052.18	2,221.50	28,273.68	3.13%
KNOTT	70.00	50.00	120.00	0.01%
KNOX	2,600.00	170.00	2,770.00	0.31%
LARUE	1,610.55	290.00	1,900.55	0.21%
LAUREL	5,787.50	290.00	6,077.50	0.67%
LAWRENCE	3,016.00	250.00	3,266.00	0.36%
LEE	0.00	0.00	0.00	0.00%
LESLIE	645.00	20.00	665.00	0.07%
LETCHER	5,206.00	190.00	5,396.00	0.60%
LEWIS	2,345.00	185.00	2,530.00	0.28%
LINCOLN	6,092.50	540.00	6,632.50	0.73%
LIVINGSTON	2,115.00	110.00	2,225.00	0.25%
LOGAN	2,721.00	200.00	2,921.00	0.32%
LYON	440.00	0.00	440.00	0.05%
MCCRACKEN	19,835.50	1,945.00	21,780.50	2.41%
MCCREARY	3,747.00	255.00	4,002.00	0.44%
MCLEAN	292.50	0.00	292.50	0.03%
MADISON	10,245.00	1,210.00	11,455.00	1.27%
MAGOFFIN	490.00	0.00	490.00	0.05%
MARION	100.00	0.00	100.00	0.01%
MARSHALL	14,154.00	1,972.00	16,126.00	1.79%
MARTIN	2,006.00	85.00	2,091.00	0.23%
MASON	2,835.47	27.50	2,862.97	0.32%
MEADE	695.00	50.00	745.00	0.08%
MENIFEE	435.00	60.00	495.00	0.05%
MERCER	2,730.00	140.00	2,870.00	0.32%
METCALFE	3,595.00	245.00	3,840.00	0.43%
MONROE	720.00	10.00	730.00	0.08%
MONTGOMERY	2,686.00	232.50	2,918.50	0.32%
MORGAN	1,765.00	0.00	1,765.00	0.20%
MUHLENBURG	0.00	160.00	160.00	0.02%
NELSON	9,137.50	245.50	9,383.00	1.04%
NICHOLAS	2,032.50	0.00	2,032.50	0.23%
OHIO	9,967.50	345.00	10,312.50	1.14%
OLDHAM	3,362.50	0.00	3,362.50	0.37%
OWEN	5,096.50	350.00	5,446.50	0.60%
OWSLEY	20.00	0.00	20.00	0.00%
PENDLETON	1,254.00	200.00	1,454.00	0.16%
PERRY	4,486.00	175.00	4,661.00	0.52%
PIKE	1,411.50	135.00	1,546.50	0.17%
POWELL	780.00	100.00	880.00	0.10%
PULASKI	3,740.50	119.50	3,860.00	0.43%
ROBERTSON	768.00	23.00	791.00	0.09%
ROCKCASTLE	1,760.00	0.00	1,760.00	0.19%

YEAR END RECOUPMENT REPORT FY 97
June 1997

COUNTY	REC'D 7/1 Thru 05/31	RECEIVED THIS MONTH	TOTAL YEAR TO DATE	PERCENTAGE
ROWAN	5,522.50	320.00	5,842.50	0.65%
RUSSELL	260.00	0.00	260.00	0.03%
SCOTT	7,144.50	806.00	7,950.50	0.88%
SHELBY	1,420.00	0.00	1,420.00	0.16%
SIMPSON	5,925.00	910.00	6,835.00	0.76%
SPENCER	150.00	0.00	150.00	0.02%
TAYLOR	1,423.50	60.00	1,483.50	0.16%
TODD	2,965.00	394.00	3,359.00	0.37%
TRIGG	1,175.00	0.00	1,175.00	0.13%
TRIMBLE	1,155.00	0.00	1,155.00	0.13%
UNION	16,406.19	1,407.40	17,813.59	1.97%
WARREN	2,819.81	320.00	3,139.81	0.35%
WASHINGTON	300.00	0.00	300.00	0.03%
WAYNE	0.00	0.00	0.00	0.00%
WEBSTER	18,046.00	805.00	18,851.00	2.09%
WHITLEY	750.00	440.00	1,190.00	0.13%
WOLFE	155.00	0.00	155.00	0.02%
WOODFORD	2,242.00	0.00	2,242.00	0.25%
TOTAL:		74,459.74	903,140.76	100.00%

FY97 YEAR END REPORT

DUI FEE REPORT
JUNE 1997

COUNTY	Received 07/01-05/30	Received June	Total Funds Year to Date	Percentage of Total Funds
ADAIR	4,566.25	200.00	4,766.25	0.42%
ALLEN	3,505.63	201.25	3,706.88	0.33%
ANDERSON	4,262.00	460.00	4,722.00	0.42%
BALLARD	4,822.88	629.00	5,451.88	0.48%
BARREN	6,331.06	634.88	6,965.94	0.62%
BATH	2,148.75	175.00	2,323.75	0.21%
BELL	10,752.81	1,655.63	12,408.44	1.10%
BOONE	21,741.83	1,921.88	23,663.71	2.10%
BOURBON	7,567.78	237.00	7,804.78	0.69%
BOYD	11,231.88	825.25	12,057.13	1.07%
BOYLE	5,387.26	660.75	6,048.01	0.54%
BRACKEN	1,623.00	219.25	1,842.25	0.16%
BRETHITT	4,989.38	726.25	5,715.63	0.51%
BRECKINRIDGE	2,592.25	194.25	2,786.50	0.25%
BULLITT	14,892.31	1,740.31	16,632.63	1.48%
BUTLER	2,920.00	503.75	3,423.75	0.30%
CALDWELL	2,766.25	309.38	3,075.63	0.27%
CALLOWAY	8,681.88	543.75	9,225.63	0.82%
CAMPBELL	26,912.11	2,598.50	29,510.61	2.62%
CARLISLE	1,722.94	108.25	1,831.19	0.16%

DUI FEE REPORT
JUNE 1997

COUNTY	Received 07/01-05/30	Received June	Total Funds Year to Date	Percentage of Total Funds
CARROLL	6,409.25	513.13	6,922.38	0.62%
CARTER	5,869.63	531.25	6,400.88	0.57%
CASEY	5,598.25	672.50	6,270.75	0.56%
CHRISTIAN	23,699.00	2,368.75	26,067.75	2.32%
CLARK	11,239.76	916.00	12,155.76	1.08%
CLAY	5,291.38	653.13	5,944.50	0.53%
CLINTON	4,264.50	261.25	4,525.75	0.40%
CRITTENDEN	2,480.25	87.50	2,567.75	0.23%
CUMBERLAND	2,163.75	126.25	2,290.00	0.20%
DAVIESS	18,512.50	1,562.50	20,075.00	1.78%
EDMONSON	1,368.13	187.50	1,555.63	0.14%
ELLIOTT	755.25	63.50	818.75	0.07%
ESTILL	2,358.00	162.50	2,520.50	0.22%
FAYETTE	87,359.38	7,241.13	94,600.51	8.41%
FLEMING	2,522.00	232.75	2,754.75	0.24%
FLOYD	11,381.88	648.75	12,030.63	1.07%
FRANKLIN	11,305.00	1,279.38	12,584.38	1.12%
FULTON	4,760.01	404.25	5,164.26	0.46%
GALLATIN	1,473.75	108.00	1,581.75	0.14%
GARRARD	2,493.75	168.75	2,662.50	0.24%
GRANT	8,677.63	1,002.00	9,679.63	0.86%
GRAVES	11,140.00	750.00	11,890.00	1.06%
GRAYSON	5,927.13	723.75	6,650.88	0.59%
GREEN	430.84	82.91	513.75	0.05%
GREENUP	10,500.00	605.50	11,105.50	0.99%
HANCOCK	1,341.25	275.00	1,616.25	0.14%
HARDIN	21,649.31	2,336.13	23,985.44	2.13%
HARLAN	8,246.38	491.25	8,737.63	0.78%
HARRISON	7,068.38	411.38	7,479.76	0.66%
HART	3,975.88	443.64	4,419.52	0.39%
HENDERSON	17,747.26	1,753.25	19,500.51	1.73%
HENRY	7,488.00	695.50	8,183.50	0.73%
HICKMAN	691.50	125.00	816.50	0.07%
HOPKINS	16,029.81	736.17	16,765.99	1.49%
JACKSON	3,241.25	217.25	3,458.50	0.31%
JEFFERSON	116,907.50	10,792.50	127,700.00	11.35%
JESSAMINE	8,813.75	686.25	9,500.00	0.84%
JOHNSON	5,540.13	615.63	6,155.76	0.55%
KENTON	36,101.44	3,491.75	39,593.19	3.52%
KNOTT	3,421.50	1,515.50	4,937.00	0.44%
KNOX	11,050.63	446.25	11,496.88	1.02%
LARUE	2,096.26	59.88	2,156.13	0.19%
LAUREL	15,438.38	1,562.50	17,000.88	1.51%
LAWRENCE	4,310.51	197.25	4,507.76	0.40%
LEE	332.50	88.00	420.50	0.04%
LESLIE	2,265.38	187.50	2,452.88	0.22%
LETCHER	4,226.77	247.50	4,474.27	0.40%
LEWIS	3,672.75	148.75	3,821.50	0.34%
LINCOLN	4,194.44	323.00	4,517.44	0.40%
LIVINGSTON	5,235.50	281.56	5,517.06	0.49%
LOGAN	4,125.00	350.00	4,475.00	0.40%
LYON	3,981.25	26.25	4,007.50	0.36%
MCCRACKEN	29,116.00	1,737.50	30,853.50	2.74%
MCCREARY	5,049.75	636.25	5,686.00	0.51%

DUI FEE REPORT
JUNE 1997

COUNTY	Received 07/01-05/30	Received June	Total Funds Year to Date	Percentage of Total Funds
MCLEAN	1,597.51	100.00	1,697.51	0.15%
MADISON	30,283.34	4,170.00	34,453.34	3.06%
MAGOFFIN	4,417.38	406.25	4,823.63	0.43%
MARION	3,489.75	351.25	3,841.00	0.34%
MARSHALL	5,209.00	391.25	5,600.25	0.50%
MARTIN	3,714.75	262.50	3,977.25	0.35%
MASON	6,791.75	366.75	7,158.50	0.64%
MEADE	9,525.00	672.50	10,197.50	0.91%
MENIFEE	396.00	16.50	412.50	0.04%
MERCER	5,109.63	337.00	5,446.63	0.48%
METCALFE	1,420.75	247.50	1,668.25	0.15%
MONROE	2,775.00	212.50	2,987.50	0.27%
MONTGOMERY	6,396.88	620.38	7,017.25	0.62%
MORGAN	3,674.75	371.50	4,046.25	0.36%
MUHLENBURG	7,363.00	287.50	7,650.50	0.68%
NELSON	8,010.88	878.00	8,888.88	0.79%
NICHOLAS	1,300.88	316.38	1,617.26	0.14%
OHIO	4,477.88	565.75	5,043.63	0.45%
OLDHAM	5,897.13	371.88	6,269.00	0.56%
OWEN	1,049.75	35.75	1,085.50	0.10%
OWSLEY	708.00	51.25	759.25	0.07%
PENDLETON	3,438.76	194.25	3,633.01	0.32%
PERRY	14,788.51	1,432.38	16,220.88	1.44%
PIKE	12,047.50	1,563.75	13,611.25	1.21%
POWELL	4,515.50	364.00	4,879.50	0.43%
PULASKI	12,876.38	1,374.38	14,250.76	1.27%
ROBERTSON	370.00	30.00	400.00	0.04%
ROCKCASTLE	9,918.13	575.75	10,493.88	0.93%
ROWAN	9,931.76	1,030.38	10,962.13	0.97%
RUSSELL	5,327.38	420.13	5,747.50	0.51%
SCOTT	7,846.13	815.50	8,661.63	0.77%
SHELBY	7,518.13	1,097.50	8,615.63	0.77%
SIMPSON	5,508.25	248.13	5,756.38	0.51%
SPENCER	1,384.88	223.75	1,608.63	0.14%
TAYLOR	4,775.88	312.50	5,088.38	0.45%
TODD	2,456.25	312.50	2,768.75	0.25%
TRIGG	5,809.14	396.88	6,206.01	0.55%
TRIMBLE	821.25	167.38	988.63	0.09%
UNION	5,476.63	684.00	6,160.63	0.55%
WARREN	30,987.63	3,354.75	34,342.38	3.05%
WASHINGTON	1,349.00	146.00	1,495.00	0.13%
WAYNE	1,896.25	112.50	2,008.75	0.18%
WEBSTER	2,034.38	62.50	2,096.88	0.19%
WHITLEY	5,079.75	537.00	5,616.75	0.50%
WOLFE	2,879.13	320.50	3,199.63	0.28%
WOODFORD	7,531.51	626.88	8,158.38	0.73%
		0.00		
TOTAL:	1,030,934.65	94,211.22	1,125,145.87	100.00%

YEAR END USER FEE REPORT FY97
June 1997

COUNTY	Received 07/01 - 05/31	Received June 1997	Total Funds Year to Date	Percentage of Total Funds
ADAIR	510.00	0.00	510.00	0.08%
ALLEN	1,220.00	80.00	1,300.00	0.19%
ANDERSON	1,370.00	120.00	1,490.00	0.22%
BALLARD	4,300.00	480.00	4,780.00	0.72%
BARREN	3,642.00	445.00	4,087.00	0.61%
BATH	3,143.00	120.00	3,263.00	0.49%
BELL	6,670.00	675.00	7,345.00	1.10%
BOONE	12,980.00	1,182.50	14,162.50	2.12%
BOURBON	2,683.50	386.50	3,070.00	0.46%
BOYD	9,978.00	693.50	10,671.50	1.60%
BOYLE	2,471.50	269.50	2,741.00	0.41%
BRACKEN	1,118.00	28.00	1,146.00	0.17%
BRETHITT	1,465.00	160.00	1,625.00	0.24%
BRECKINRIDGE	2,073.00	45.00	2,118.00	0.32%
BULLITT	6,776.50	795.00	7,571.50	1.14%
BUTLER	1,964.50	85.00	2,049.50	0.31%
CALDWELL	2,643.50	45.00	2,688.50	0.40%
CALLOWAY	2,965.00	255.00	3,220.00	0.48%
CAMPBELL	16,074.50	1,550.50	17,625.00	2.64%
CARLISLE	1,650.00	80.00	1,730.00	0.26%
CARROLL	5,084.75	517.50	5,602.25	0.84%
CARTER	5,020.74	370.00	5,390.74	0.81%
CASEY	940.00	40.00	980.00	0.15%
CHRISTIAN	21,861.50	2,215.00	24,076.50	3.61%
CLARK	3,955.00	450.00	4,405.00	0.66%
CLAY	4,340.00	205.00	4,545.00	0.68%
CLINTON	320.00	40.00	360.00	0.05%
CRITTENDEN	2,880.00	419.55	3,299.55	0.49%
CUMBERLAND	640.00	40.00	680.00	0.10%
DAVIESS	12,440.00	1,360.00	13,800.00	2.07%
EDMONSON	925.00	155.00	1,080.00	0.16%
ELLIOTT	840.00	0.00	840.00	0.13%
ESTILL	1,095.00	80.00	1,175.00	0.18%
FAYETTE	95,615.90	9,644.56	105,260.46	15.79%
FLEMING	2,136.00	120.00	2,256.00	0.34%
FLOYD	12,820.00	1,065.00	13,885.00	2.08%
FRANKLIN	1,673.00	235.00	1,908.00	0.29%
FULTON	6,957.32	675.00	7,632.32	1.14%
GALLATIN	835.00	120.00	955.00	0.14%
GARRARD	1,360.00	80.00	1,440.00	0.22%
GRANT	1,310.00	215.45	1,525.45	0.23%
GRAVES	11,490.00	1,650.00	13,140.00	1.97%
GRAYSON	2,325.00	320.00	2,645.00	0.40%
GREEN	725.00	0.00	725.00	0.11%
GREENUP	5,058.00	280.00	5,338.00	0.80%
HANCOCK	920.00	80.00	1,000.00	0.15%
HARDIN	18,724.80	1,910.00	20,634.80	3.09%
HARLAN	540.00	40.00	580.00	0.09%
HARRISON	4,713.50	286.50	5,000.00	0.75%
HART	2,861.40	161.50	3,022.90	0.45%
HENDERSON	8,440.00	1,120.00	9,560.00	1.43%

YEAR END USER FEE REPORT FY97
June 1997

COUNTY	Received 07/01 - 05/31	Received June 1997	Total Funds Year to Date	Percentage of Total Funds
HENRY	1,410.00	280.00	1,690.00	0.25%
HICKMAN	1,685.00	277.50	1,962.50	0.29%
HOPKINS	19,938.00	989.05	20,927.05	3.14%
JACKSON	2,887.00	200.00	3,087.00	0.46%
JEFFERSON	43,311.50	4,729.72	48,041.22	7.20%
JESSAMINE	5,675.00	820.00	6,495.00	0.97%
JOHNSON	2,721.50	132.00	2,853.50	0.43%
KENTON	12,994.50	820.00	13,814.50	2.07%
KNOTT	970.00	0.00	970.00	0.15%
KNOX	2,645.00	85.00	2,730.00	0.41%
LARUE	3,045.50	210.00	3,255.50	0.49%
LAUREL	2,850.00	92.50	2,942.50	0.44%
LAWRENCE	2,354.50	295.00	2,649.50	0.40%
LEE	830.00	0.00	830.00	0.12%
LESLIE	1,765.00	150.00	1,915.00	0.29%
LETCHER	10,057.50	276.50	10,334.00	1.55%
LEWIS	2,265.00	105.00	2,370.00	0.36%
LINCOLN	2,507.51	260.00	2,767.51	0.42%
LIVINGSTON	1,225.00	80.00	1,305.00	0.20%
LOGAN	3,298.00	280.00	3,578.00	0.54%
LYON	960.00	0.00	960.00	0.14%
MCCRACKEN	15,530.00	1,600.00	17,130.00	2.57%
MCCREARY	4,483.00	407.00	4,890.00	0.73%
MCLEAN	1,160.00	80.00	1,240.00	0.19%
MADISON	7,065.00	1,000.00	8,065.00	1.21%
MAGOFFIN	1,380.00	0.00	1,380.00	0.21%
MARION	955.00	120.00	1,075.00	0.16%
MARSHALL	3,743.00	375.00	4,118.00	0.62%
MARTIN	1,667.00	0.00	1,667.00	0.25%
MASON	5,559.50	257.00	5,816.50	0.87%
MEADE	2,600.00	160.00	2,760.00	0.41%
MENIFEE	2,600.00	240.00	2,840.00	0.43%
MERCER	3,200.00	80.00	3,280.00	0.49%
METCALFE	1,115.00	40.00	1,155.00	0.17%
MONROE	1,745.00	165.00	1,910.00	0.29%
MONTGOMERY	9,691.50	745.00	10,436.50	1.57%
MORGAN	3,021.00	165.00	3,186.00	0.48%
MUHLENBURG	1,400.00	260.00	1,660.00	0.25%
NELSON	5,001.50	240.00	5,241.50	0.79%
NICHOLAS	1,874.50	40.00	1,914.50	0.29%
OHIO	4,415.00	545.00	4,960.00	0.74%
OLDHAM	1,720.00	85.00	1,805.00	0.27%
OWEN	1,315.00	170.00	1,485.00	0.22%
OWSLEY	2,400.00	100.00	2,500.00	0.37%
PENDLETON	1,480.00	120.00	1,600.00	0.24%
PERRY	6,928.50	440.00	7,368.50	1.11%
PIKE	1,692.50	40.00	1,732.50	0.26%
POWELL	2,451.50	277.00	2,728.50	0.41%
PULASKI	4,419.00	195.00	4,614.00	0.69%
ROBERTSON	722.00	0.00	722.00	0.11%
ROCKCASTLE	2,188.50	300.00	2,488.50	0.37%

YEAR END USER FEE REPORT FY97
June 1997

COUNTY	Received 07/01 - 05/31	Received June 1997	Total Funds Year to Date	Percentage of Total Funds
ROWAN	10,791.50	910.00	11,701.50	1.75%
RUSSELL	3,052.75	400.00	3,452.75	0.52%
SCOTT	4,217.00	294.00	4,511.00	0.68%
SHELBY	2,005.00	80.00	2,085.00	0.31%
SIMPSON	1,740.00	160.00	1,900.00	0.28%
SPENCER	540.00	0.00	540.00	0.08%
TAYLOR	3,415.00	240.00	3,655.00	0.55%
TODD	1,320.00	0.00	1,320.00	0.20%
TRIGG	1,726.50	80.00	1,806.50	0.27%
TRIMBLE	185.00	0.00	185.00	0.03%
UNION	4,916.00	332.00	5,248.00	0.79%
WARREN	12,111.56	605.00	12,716.56	1.91%
WASHINGTON	635.00	10.00	645.00	0.10%
WAYNE	1,520.00	120.00	1,640.00	0.25%
WEBSTER	4,678.00	180.00	4,858.00	0.73%
WHITLEY	5,064.00	544.00	5,608.00	0.84%
WOLFE	395.00	0.00	395.00	0.06%
WOODFORD	1,360.00	0.00	1,360.00	0.20%
			0.00	
TOTAL:	613,135.73	53,673.83	666,809.56	100.00%

Dr. Norton Receives Public Advocate Award

One person who did more than anyone else during the time of Harold McQueen's execution to prepare us as a Department for the experience that we underwent was **Dr. Lee Norton**. She came to Kentucky on more than one occasion and acted not only as a clinical social worker but also a virtual minister to us. She brought life to us in the midst of death. She brought wisdom and maturity when we did not know where to turn.

She brought healing amidst our strife. As a result, at the DPA Death Penalty Trial Practice Persuasion Institute in Faubush, Kentucky on October 16, 1997, I presented Lee with the ***Public Advocate's Award*** for outstanding service to the Department of Public Advocacy and for outstanding service to the least among us.

ERNIE LEWIS, Public Advocate

Ernie Lewis presents **Dr. Lee Norton** the *Public Advocate's Award*

A Search for the Truth

Our Pledge of Allegiance is an item that periodically is hotly debated in the public domain. Some believe that it in fact should be said at the beginning of each day in our public schools and others condemn the activity as being an infringement upon our guaranteed freedoms. However, I do not hear either side of this debate speaking harshly of the words nor the meaning of the pledge itself. On the other hand, when I hear debates on other hotly contested issues, it causes me to wonder whether anyone is really paying attention to the words and meaning of the Pledge of Allegiance at all. For purposes of this article, let me focus on the words "I pledge allegiance to the flag of the United States of America...with liberty and justice for all." In my opinion, these words speak volumes about what separates our system of justice in America from those of other countries, and is also at the very heart of the purpose of those performing services for the Department of Public Advocacy.

It never ceases to amaze me when I listen to particular political groups or special interest groups espouse the virtues of having our children say the Pledge of Allegiance each morning in our schools and later hear the exact same groups advocating significant decreases in monies to be provided toward our already horrendously under-funded public defender system. Someone please explain to me what they believe the words "liberty and justice for all" mean?

The United States Supreme Court apparently understood the meaning of the words when in 1963 It held that any person facing a loss of his or her liberty was entitled to be represented by counsel appointed by the state even if they could not afford to hire their own. *Gideon v. Wainwright*, 372 U.S. 335 (1963). For many years in the Commonwealth of Kentucky, our courts simply appointed practicing attorneys to represent indigent persons accused of crimes and such court appointed attorneys received no compensation. In the case of *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972), the Kentucky Supreme Court ruled that practicing lawyers could not be required to represent indigents charged with crimes without being compensated due to the fact that it was an unconstitutional taking of the lawyer's property (*i.e.*, fees and income). It was in the face of this holding that the Department of Public Advocacy was created. In the 25 years of its existence, the case load per attorney has greatly increased yet the funding per case has declined. Does anyone truly believe this promotes "liberty and justice for all"?

Each year the President of the Kentucky Bar Association gets to choose a theme for the year. This year's theme is "A Search for the Truth." My hope is that we can engage in an open and honest discussion of the American system of justice and its multitude of strengths as well as areas of weaknesses and shortcomings. It is my impression that young people are no longer graduating from our high schools with an understanding of the three branches of government being separate but equal, and the reasons why. It is my impression that not only do our young people not understand that one of the hallmarks and foundation blocks of our democracy is an independent judiciary and judicial branch of government, but that a number of our elected officials and special interest groups are doing everything within their power to undermine this very independence which makes our system unequaled. Also, I am convinced that one reason the image of lawyers is not what it once was is because various special interest groups have taken what we do in certain instances and attempted to portray us in a very negative light without any effort to explain why it is we do it. I would hope that we could spend some time devoted to explaining to the media, the press and the public who it is we truly are, what it is we truly do and how and why it is we truly do it.

I can think of no finer example of a lack of public understanding for what it is lawyers do, and how and why it is we do it, than the job being performed by the Department of Public Advocacy. Obviously, oftentimes the particular individual being defended and/or the alleged offense committed are horrendous in the eyes of the public and, therefore, they quickly conclude that no lawyer should do his or her best in providing a defense for that individual as to those charges. In the eyes of the public, the job being done by the lawyer is aiding and abetting bad

acts. Somehow, we must do a better job of educating the public to the fact that this is America and under our country's justice system, each individual, whether rich or poor, male or female, minority or not, is entitled to equal justice no matter what they are charged with. That means that individual guarantees, liberties and rights provided for by our Constitution are available to all, not simply those who can afford to assert them on their own behalf. It seems to me that the role of the public defender is to insure that those same guaranteed rights, liberties and rules are applied for those who do not have the income or status to afford their own defense just as they are applied for those who do. In our country and under our system, there is very simply no justice unless there is justice for all.

I realize that I think in very simplistic terms, but it seems to me that if you believe in America and democracy, you must believe in justice for all. If we engage in "A Search for the Truth," wouldn't we find that what public defenders do is provide competent counsel for individuals who cannot afford to provide it for themselves thereby insuring that the same rules, guarantees and rights are applied for all under our system of justice? In answer to the question as to how it is done, would we not determine that it is done in a remarkable way with inadequate staff and inadequate funding? As to why you do it, would we not see that it is because every individual in this country is entitled to equal representation under the law and that is what separates us from systems who do not believe in "liberty and justice for all"?

My understanding is that in fiscal year 1996, the Department of Public Advocacy handled almost 92,000 trial and post-trial level cases with a staff of approximately 160 full-time defenders in 20 offices across the state and another 100 attorneys doing part-time work. The statistics indicate that these cases are being handled for an average of $153 per case which computes to only $3.54 per capita. The trial case loads for public defenders are running between 425 to 760 per attorney. Statistics compiled from throughout the country by an independent group indicate that in fiscal year 1996, Kentucky is at or near the bottom both in the area of per capita funding and cost per case. In our state, the number of indigent persons accused of crime and processed through the court system without the benefit of legal representation has grown 39% in six years. Our Commonwealth has seen fit to provide funding for prosecutors to the extent that 64 of our counties are now served by full-time Commonwealth Attorneys yet we only have 47 counties covered by full-time public defenders. Full-time Commonwealth Attorneys are paid almost $80,000 per year whereas the current average for Department of Public Advocacy directing attorneys covering multiple counties is only $47,000 per year.

Again, if we engage in "A Search for the Truth," do we not find that the reason for providing equal representation for indigent persons is laudable yet our commitment for doing so not only is lacking, but is being undermined? How can each of our citizens be insured equal justice considering the statistics mentioned above? Ob-

viously, any representation should be better than none but the question remains, is it equal? There are those that argue that we simply cannot provide equality for all and that realistically it is impractical to even consider doing so. That simply is not the way that I read our Constitution, nor is it what I believe our founding fathers envisioned for our citizens. In our Pledge of Allegiance, I do not hear the words "liberty and justice" for those who can afford it on their own and a lesser "liberty and justice" for those who cannot. The word "all" leaves no room for interpretation in my opinion.

I know of no group who dedicates their lives on a daily basis more to the very essence of the meaning of "liberty and justice for all" than do you. Even though who you may be defending and for what may seem very unpopular, surely it should be popular that why you do it is to insure that each of our citizens receive the due process and justice to which they are entitled under our Bill of Rights. Our Pledge of Allegiance states it. In "A Search for the Truth," surely we should find out that they are more than just words. What is the purpose in having our children speak the words in the morning if we do not believe in fulfilling their meaning during the day?

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Robert L. "Bobby" Elliott graduated from Centre College in 1971, and then immediately went to the University of Kentucky College of Law, graduating in 1974. Bobby presently serves on the Board of Trustees of Centre College and has since 1989. He and his law partners, Joe Savage and Bill Garmer, have taught a litigation skills course at the U.K. College of Law since 1981. Bobby is on the Boards of the Kentucky Independent College Fund and Health Kentucky.

Bobby has served on the Board of Governors of the Fayette County Bar Association and also served as Secretary, Vice-President, President-Elect and President. He was on the Continuing Legal Education Commission of the Kentucky Bar Association from 1984 through 1990 and represented the 5th Supreme Court District on the Board of Governors of the Kentucky Bar Association from 1990 through 1995. He presently serves as President-Elect. He is a Fellow of the American College of Trial Lawyers.

LETTER TO THE EDITOR:

Dear Editor,

August 25, 1997

I want to commend you for the outstanding job which you do with the publication of *The Advocate*. I always try to read at least portions of it as it is very informative. I also appreciate the outstanding work which the Public Defenders do statewide.

I contend, however, that there was a misstatement on the cover of your July issue regarding the execution of Harold McQueen. Attorneys representing Harold McQueen were not denied access to Mr. McQueen. The order stated that McQueen would have full, unlimited telephone access to his attorneys, and also upon request would be able to meet with them. This order was based on a schedule of events constructed by both McQueen and Warden Parker as to what he - McQueen - wished for his last hours.

Thanks you once again for the very professional publication and the outstanding work which you do.

Bill Cunningham, Lyon Circuit Judge
Eddyville, Kentucky

The Evolving Role of Defenders:
Independent Advocates in an Increasingly Interdependent World

Larry Landis

Defining Defenders. Who are we public defenders? Generally public defenders nationally are characterized by being:

- still somewhat idealistic;
- distrustful of authority, if not anti-authoritarian;
- apolitical, leaning toward anarchism;
- comfortable with chaos;
- iconoclastic;
- loners not joiners.

Defender Skills. What types of skills have we learned from our experience? There are many skills but predominantly we excel at:

- analytical and critical thinking;
- finding the opponent's weakness and exploiting it;
- revealing sloppy and inadequate investigation & preparation by police;
- discovering things not done by law enforcement is fully investigating the case;
- using guerilla warfare tactics to fight the prosecution;
- stealth in investigation;
- deception and misdirection in strategy and tactics;
- commando raid type examination to undermining credibility of witnesses;
- sabotaging and derailing;
- obfuscating of the truth, when necessary.

Reasons for These Skills? Why are these the primary litigation skills we learn as public defenders? Because our role is:

- reactive, not proactive;
- analysis and critical thinking, not synthesis;
- preventing, denying, and rationalizing.

We are not trained in working *with* others. We are not problem solvers.

In the win-lose game of the adversarial model of dispute resolution, we win when the prosecutor does not score. We need the lawyer for the people to fail for us to win. This is a difficult and precarious position because of the public perception that we are obstructionist and are willing to do whatever is necessary to get the client off even if guilty, and sometimes even if the fair administration of the rule of law is undermined.

When crime is high, which it is, and the fear of crime is high, which it is, we are not likely to be viewed by the public as the mythic heros of our culture.

Now more than ever, we need be careful not to confuse the celebrity status of the OJ defense team with our expectations about our status as hero or villain.

Just because our culture seems to be having some difficulty lately distinguishing between the two, is no reason that we should become delusional about how we are commonly perceived or develop unrealistic expectations.

We do not represent people like OJ. We represent falsely accused, innocent, poor people. In addition, we represent:

- the despised, desperate, and dispossessed;
- the dropouts, discards, and degenerates;
- people who lie, steal, and cheat whenever it serves their purpose;
- the losers who cannot successfully compete in a competitive, materialistic society;
- outlaws - people who intentionally violate the law and have chosen to live outside the social contract that defines acceptable conduct.

We have regular and intimate contact with the worst elements of our culture. Does this accumulated interaction have any effect on who we are or who we become?

One of the maxim's used by Stephen Covey and others is: "Sow a thought, reap an action, sow an action, reap a habit, sow a habit, reap a character, sow a character, reap a destiny." There is a connection between attitudes, behavior, and character. That is why our work is dangerous and precarious.

In the criminal justice culture, all we need to do is to look at what happens to some undercover police when they go undercover too long. They have to assimilate and emulate the system, values, and behavior of outlaws in order to be congruent enough to be accepted and trusted. Most undercover police have a fairly value system of right and wrong. They who the good guys and bad guys are.

Yet, as we know, one of the dangers of undercover work is that sometimes undercover police cross-over to the dark side. We are no more immune from the effects of overexposure to unhealthy and dysfunctional people than anyone else.

In fact, we are even more vulnerable than most professionals because, like undercover police, our success is often highly dependent upon our relationship with our clients. We need them to trust us and have confidence in us.

And, some of us, sometimes, even want and need them to like us. If this need becomes tied to self-esteem or self-worth, we are on a steep and slippery slope with little hope of stopping before we bottom out.

How we define success is sometimes defined through the eyes of our clients. This warps our judgment. For example, we recently had an acquittal by a jury of a serial rapist with more than 20 victims. We celebrated this victory and praised the public defender for a job well done. Unspoken, either through practiced repression or social discomfort, was the concern that now free he would do it again.

We have become masters of rationalization and denial. If you don't think so, just listen to how we explain what it is that we do and watch how good we have gotten reframing facts so that we can find a theory of the case that we can believe it enough that we can tell it to the jury with conviction.

What other wonderful models of human behavior are we exposed to daily? We deal with sanctimonious, self-righteous, and vindictive prosecutors who lack empathy for the failed human condition. We are confronted with politically ambitious prosecutors who measure success by the notches in their desk for the people they have killed. We plead our cases to judges, some of who:

- are not knowledgeable about the law or facts;
- are uncaring, unfeeling, and mean spirited;
- are arbitrary and capricious lazy, indifferent, and detached from the world in which our clients live;
- make rulings on constitutional issues with one finger to the wind and one eye focused on the tomorrow's front page news coverage;
- tolerate lying police and prosecutors who abuse their power, and;
- care more about moving the docket than doing justice.

How does all this exposure affect us? Well, sometimes we feel really good about what we do. And, sometimes we feel:

- disliked, despised, and distrusted;
- unappreciated;
- alone and isolated;
- weary and beleaguered;
- frustrated and angry;
- defeated and discouraged;
- demoralized, and depressed.

Sometimes we question whether our participation simply legitimizes an unjust, racist, sexist, and classist criminal justice system. Sometimes we feel like we are pawns in a meaningless game where the outcome is predetermined and we are powerless to change it. Sometimes we feel like we are assembly line workers greasing the wheels of the machinery of justice that grinds up and disposes people who are easy to marginalize, dehumanize, and demonize.

So, considering who we are and what we experience, one might be justified in asking why interdependence should be a goal for criminal defense attorneys and public defenders who relish their independence.

Doesn't working cooperatively in the interest of our client compromise our ethical and legal pur-

pose and the need for us to be fiercely independent? The answer is an unequivocal "no."

We need to practice interdependence for our:

- selves;
- criminal justice system colleagues;
- citizens;
- fellow human beings on this planet;
- and most importantly for our clients.

For the sake of our clients, we need to guard against developing a bunker or siege mentality that isolates, depresses, and impairs our effectiveness as lawyers or people. Clients need us to practice being proactive rather than reactive. Practiceing problem solving in collaboration with others, especially our adversaries, is eseential for competent, effective, quality representation of our clients.

Our clients need us to players in the system and involved in changing it. Clients cannot afford our not being invited to the policy-making table.

Our colleagues need to hear our unique insights and perspectives. We need to help puncture each others self-perpetuated myths in a constructive manner.

Our citizens need a more effective, efficient, and fair criminal justice system that they can have confidence in assuring fair process and reliable results.

In addition, whether we deserve to be or not, we are a model for many developing countries who look to us a model and seek to emulate our justice system.

When we talk about interdependence, it helps to look at this *process* of

dependence → independence → interdependence

in terms of human growth and development.

Being dependent on someone who is not healthy can result in two types imbalances:

- complacent, lacking in motivation, lazy, overindulged, and lacking the ability or desire to achieve independence;

- stifled, held back, resentful, angry, rebellious, revolutionary.

We see the manifestations of this process in human behavior in the defender community. For example, in my state, public defenders are hired and fired by judges before whom they practice. This creates a very unhealthy situation of professional and econimic dependence. While the vast majority of judges are not tyrants that intentionally and consciously abuse their power by telling the lawyers what to do, the employment relationship can produce a chilling effect which impairs zealous advocacy. It can also be more insidious and slowly corrupt and undermine the role that a defense lawyer needs to play.

We all know lawyers who have gotten too comfortable and are afraid to rock the boat. Defense lawyers need to be independent. Anything less is bound to impair their effectiveness just as the failure of an adolescent or young adult to develop independence will impair the growth and development as a happy, healthy and effective adult. But fierce independence is not enough in today's world.

The Future

The adversarial system will change because it is inefficient, and the public will continue to lose confidence in its fairness and reliability.

The criminal justice system will evolve with public defenders doing more problem solving processes that have a win-win potential. Mediation and ADR will have as big or bigger impact on the criminal justice system that it has had on the civil side.

There will be more alternative sentences driven by the increasingly prohibitive costs of widescale incarceration.

Clients, our customers, will demand, more and more, cooperatively arrived at resolutions that are based in the community that are not limited to punishment but advance treatment.

Areas To Work In

- Victim's rights: notification, compensation from state, restitution from offender;
- victim/offender reconciliation programs (VORP);
- jail overcrowding;
- bail reform;
- sentencing alternatives;
- community corrections.

Social Problems:
- high school drop-out rates
- teenage pregnancy rate
- drugs
- guns
- minority employment
- after school activities for children with parents who work

Volunteer:
- Big Brothers/Big Sisters
- Literacy
- Tutoring

The future will come whether defenders change or remain the same. We can be a part of creating a future criminal justice process that recognized the values, needs and interests of our clients. Or, we can stand put as the world advances around us but we risk damage to our clients and perceived or actual irrelevance. Our clients need us to be at the table.

Larry Landis has been the Executive Director of the Indiana Public Defender Council since 1980. He received his J.D. from the Indiana University School of Law in 1973 and his B.S. from Indiana University in 1969. Larry served as Chairman of the ABA Criminal Justice Section, Defense Services Committee (1988-90, 1995-97); Chairman, NLADA's Defender Trainers Section (1979-81, 1983, 1985); Member of NACDL since 1976; member of the Indiana Bar Association; Chairman of the Indianapolis Bar Association Legislation Committee (1994); Distinguished Fellow of the Indianapolis Bar Foundation; Secretary of the Board of Director of the Indiana Association of Criminal Defense Lawyers (1980-87, 1990-97); Board of Directors of the Indianapolis Legal Aid Society (1984-1990); Board of Directors of the Indiana Civil Liberties Union (1976-83). Larry is the 1996 recipient of the NLADA Reginald Heber Smith Award and the recipient of the Indiana State Bar Association, Criminal Justice Section's 1996 Criminal Justice Service Award.

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Reflections on Landis Comments by Kentucky Observers: Judge James Keller, Ernie Lewis, Bill Johnson, John Leathers

We are fortunate in Fayette County that our public defenders and other participants in the criminal justice system have long practiced the interdependence suggested by Mr. Landis. This has not, however, been without criticism from those who incorrectly suggest that public defenders compromise their independency by working cooperatively with the other participants. So, Mr. Landis' remarks were welcomed by those who participate in the Fayette County criminal justice system. We know that cooperation is beneficial for everyone, especially the public defender's clients. This is not to suggest that public defenders should not be "fiercely independence;" to the contrary, our justice system depends upon their independence, but not in all matters at all times.

Public defenders are important players in the criminal justice system and their meaningful participation is necessary as the system evolves. Judge Mary Noble's Drug Court is an excellent example. Joe Barbieri, the Director of Fayette County Legal Aid, was a participant and supporter of Judge Noble's efforts from the beginning. Now, many of Legal Aid's clients not only avoid imprisonment but more important, they are afforded an opportunity through the Fayette County Drug Court Program to rid themselves of the addiction which drove them to commit the crimes that placed them into the system.

The public is now beginning to realize that the "lock-them-up-and-throw-away-the-key" demagoguery is not the simple solution to crime in our society. Many of the criminal justice system's players, who are sincerely interested in prevention of crime, have realized that our criminal justice system must evolve and adjust to the new demands placed upon it. The public defenders are important players in the evolution of the system and their cooperation is necessary; their clients' interests require it.

JUDGE JAMES E. KELLER, Fayette Circuit Court
Lexington, Kentucky 40507

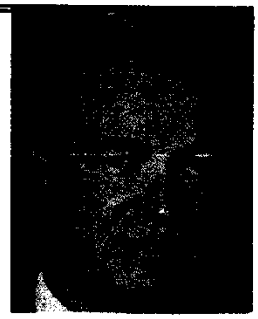
Larry Landis always sees into the future better than the rest of us. He is a visionary who has succeeded over the long haul as a public defender leader in Indiana. He also has an astute awareness of public defender culture. On both of these fronts I believe Larry is accurate in his observations about who we are now and where we have been.

First of all we need to heed Larry's warning that when you do public defender work for a long period of time that it takes a toll on you. We can either ignore the toll with inevitable cynicism and burn out and ultimately a leaving of the work or we can be proactive and deal with the effect on each of us. Dr. Lee Norton has done much teaching on the effect of being a witness to tragedy and sorrow over time. She discusses under the effects of compassion fatigue. What is clear based upon what Dr. Norton teaches and based upon what Larry observes is that we all need to be part of offices, units, support groups where we can decompress, where we can tell our stories, where we can receive support. We public defenders also need to have lives separate from our jobs. While we need to work and work hard for our clients, we also need to have families, we need to exercise, we need to be involved in our communities, we need to be aware of the beauty around us, to be aware of our spiritual sides - we need balance in our lives.

Larry also sees very clearly into the future and he sees that we must have a bipolar future. Defenders certainly must be vigorous representatives of their clients. We must continue to stress excellent representation where we are able to absolute fierce, independent, zealous representatives of the cause of our clients.

However, we cannot be one dimensional. We must be a eclectic. We must be able to be interdependent. We must be players at the table when resources are divided up. We must be present at rule committee hearings at the legislature, at local meetings when jails are designed, when courtrooms are designed, when local procedures are developed. If we are not there, if we are viewed as enemies of reform, if we are viewed as not willing to compromise, as not having anything to say, then ultimately the vigorous representation of our clients will be harmed.

ERNIE LEWIS, Public Advocate



William E. Johnson

There is a great deal of truth in the article by Larry Landis published in the November edition of *The Advocate*. Some of the statements are shocking but true. However, there is a degree of bitterness and hostility expressed in the article. The old saying "You get more accomplished with honey than with vinegar" is frequently true in the courtroom. Mr. Landis looks upon the role of the public defender as a lawyer under siege who must respond in a "no holes barred way."

It has long been my thought that a lawyer, including a criminal defense lawyer, must practice a case in the style best suited to him or her. Because criminal defense cases are most often resolved by juries rather than judges it seems better to approach the case in a manner that will be as pleasing as possible to the jury since that which pleases a jury is more likely to be accepted by them. This does not mean that the criminal defense lawyer should not be aggressive. It means walking the fine line between being aggressive enough to adequately defend the client and at the same time performing the role of advocate in a manner that does not offend the jury.

Mr. Landis is critical of prosecutors and judges. He is correct that some prosecutors are sanctimonious, self-righteous and vindictive. He is correct that some judges lack knowledge about the law or facts, are uncaring, arbitrary, capricious and lazy and give more credence to police and prosecutors than should be given. However, I continue to believe these characterizations are the exceptions of individuals rather than the rule. In my opinion, the criminal defense lawyer should pay less attention to the prosecutors and the judge and focus more on the facts and the law with which he has to work and how they can best be presented during the proceedings.

WILLIAM E. JOHNSON
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I take most issue with Mr. Landis' description of what a public defender *is* and with his proposal as to what a public defender *ought to be* in the future. Perhaps my inexperience in the criminal justice system distorts both my view and my understanding, but I will offer you my thoughts in the two categories.

First, I am disturbed by any notion that public defenders engage in "guerilla warfare tactics," "deception," "commando raid type examination[s]," "sabotaging and derailing," or "obfuscating of the truth." If indeed the role of a public defender is to win an acquittal for a client "even if the fair administration of the rule of law is undermined," then I am both disturbed and frightened. I want to state very clearly that such actions by an attorney engaged in civil practice would clearly violate a multitude of the Rules of Professional Conduct and I absolutely deny that there is any exemption from those Rules for those engaged in the criminal practice, whether public defenders or private counsel.

My own perception of a public defender is that he must play an essential role in the system of justice by ensuring that those with the authority to take away a citizen's liberty do their job within the realm of the law. I understand full well "self-righteous...politically ambitious" prosecutors and judges who cannot or will not play an appropriate role in the system; their counterparts are readily identifiable in the civil system. I believe that only if we provide a competent, aggressive defense for citizens ranging from the innocent to those who "lie, steal, and cheat whenever it serves their purpose" will the liberty of all citizens be safe. in appropriate behavior by police, prosecutors and judges can *only* be curbed if competent representation is available from the bottom of our society to those who can afford the "Dream Team." To me, a public defender both meets that societal goal and his duty to his client if he forces the agents of authority to act appropriately. That accomplishment exists whether his client is convicted or not. Thus, I do not equate a victory by the public defender with acquittal for his client. Public defenders do not necessarily "win" by an acquittal unless that acquittal is secured within the bounds of the law. One will not cause the authoritarian forces to act within the bounds of law by acting outside the law oneself. Thus, a public defender (like every other lawyer) has a duty to act within the rules of conduct placed upon our profession. Those rules do not include the sort of objectionable conduct enumerated above from the Landis article.

Once I arrive at that conclusion as to the appropriate role of a public defender at the current time, it is simple for me to conclude that the Landis proposal for an "interdependent" public defender is inappropriate. I certainly do not think that one must be coopted by the agents of authority in order to be "included at the table." I quite agree that substantial reforms are needed for the criminal justice system including not only new ideas for determination of how to control certain behavior but a comprehensive analysis of what behavior *should* be controlled. It seems to me that the persons who have shown themselves knowledgeable about the defense of criminal cases will be an important part of that dialogue. Perhaps if Mr. Landis would focus more on appropriate lawyering behavior for defenders at the current time, he would not have to worry about being excluded from the table.

John R. Leathers

To the extent that Mr. Landis suggests "interdependence" as meaning cooperating with opposing counsel and the judiciary in a professional manner, I believe that already should exist. Serving the best interests of the client and the social goal of policing abuses of power to not require behavior of a sort which precludes professionalism, courtesy and cooperation. Civil attorneys routinely provide zealous representation of clients in a professional, cooperative fashion and I see no reason why public defenders should not do likewise. To the extent, however, that Mr. Landis suggests "interdependence" as actions in which public defenders act with police, prosecutors and judges to decide what is first blush, that seems to me an invitation for the public defender to step outside the role of zealous advocate and into the role of judge and jury. I suppose that any arrangements proposed would always be subject to client approval, but I am not sure that is a meaningful control given what surely is a low level of sophistication on the part of the client. My inclination is that the public defender must not be coopted into the justice system but must provide services in a professional, cooperative manner.

JOHN R. LEATHERS, Attorney at Law

Mr. Leathers is a shareholder in Buchanan Ingersoll Professional Corporation, in charge of the Lexington office of that Pittsburgh based law firm. His practice is primarily commercial litigation, with experience in mineral-related and environmental matters, professional disciplinary matters, professional liability litigation and insurance ratemaking. Mr. Leathers is a 1968 graduate of the Univ. of Texas at El Paso, a 1971 graduate of the Univ. of N.M. School of Law and a 1973 graduate of Columbia Law School. He has served on the faculties of Columbia Law School, Univ. of Houston College of Law, Univ. of Oklahoma College of Law and U.K. College of Law. Mr. Leathers taught in the areas of Civil Procedure, Conflict of Laws and Federal Jurisdiction. He has published more than 20 articles in various legal journals on those topics and has spoken at more than 50 continuing legal education programs on those topics. Mr. Leathers is recognized in Kentucky as an expert on the application of ethical constraints upon lawyers and is a frequent speaker upon that topic. He is a member of the Kentucky Public Advocacy Commission.

West's Review

Julie Namkin

Bart v. Commonwealth,
Ky., 951 S.W.2d 576 (9/4/97)
(not yet published) 1997 WL 547504

Bart entered a conditional guilty plea to one count of first degree sodomy and one count of use of a minor in a sexual performance. The indictment charged a total of twenty-one offenses, all against the same victim, the fifteen year old daughter of Bart's girlfriend. The offenses were alleged to have occurred over a seven year period.

The issue of the victim's competency to testify as a witness was first raised prior to trial, not by the defendant, but by a licensed clinical social worker from whom the victim was receiving counseling. As a result, Bart moved for a pretrial competency hearing and, in the alternative, an independent mental evaluation, as well as subpoenaing the victim's mental health records. The trial court denied access to the mental health records, but granted the motion for a competency hearing.

At the competency hearing, the victim and the social worker testified. The trial court found the victim competent to testify, and denied Bart's motion for an independent psychological evaluation.

The issue on appeal is whether Bart was entitled to an independent psychological evaluation of the victim to determine her competency to testify as a witness against Bart at his trial.

The Court held the trial court had the opportunity to observe the demeanor of the victim and the social worker, and thus the trial court did not abuse its discretion in finding the victim competent to testify.

The Court distinguished the cases of *Mack v. Commonwealth*, Ky., 860 S.W.2d 275 (1993) and *Turner v. Commonwealth*, Ky., 767 S.W.2d 557 (1988), on the ground that neither case dealt with the competency of the witness (victim) to testify, but rather the elements and substance of the charges against the defendant. The Court also clearly stated CR 35.01 does not expressly provide for an examination of a non-party prosecuting witness.

The Court concluded a defendant is not entitled to an independent evaluation of a non-party witness to enhance his position in a competency hearing. Such determinations are best left to the trial court and there is no compelling reason to disturb that approach since the trial court is in the best position to make such a decision.

Owens v. Commonwealth,
Ky., 950 S.W.2d 837 (9/4/97)

Owens was charged with first degree assault as a result of a stabbing incident. He was also charged with being a second degree PFO. After a trial, Owens was convicted of both offenses.

The only issue raised on appeal was whether the admission of hearsay testimony by two police officers, that bolstered the victim's testimony and invaded the province of the jury, was proper.

Relying on KRE 801A(a)(3), which states the prior statement of a witness is not excluded by the hearsay rule when the statement is one of identification of a person made after perceiving the person, the Court held the introduction of the police officers' testimony was proper. The Court further held the testimony was admissible under *Preston v. Commonwealth*, Ky., 406 S.W.2d 398 (1966) which is a pre-KRE case.

Thus, after the victim testified he had made the out-of court identification of Owens, the two police officers were permitted to testify, as corroboration, that the victim had made such an identification. Although the Court stated the jury must rely on the identifying witness to determine whether the underlying facts are as asserted, one wonders how it can be established the jury relied on the victim's testimony to make that decision and then used the polices officers' testimony only as corroboration.

Owens' convictions were affirmed.

Estep v. Commonwealth,
Ky., ___ S.W.2d ___ (9/4/97),
1997 WL 547523 (Ky.) (not yet final)

Estep was charged with and convicted of wanton murder and first degree assault as a result of a fatal automobile accident on a two lane road in Pike County. The accident occurred in the morning when Estep was on her way to a doctor's appointment. Estep's pickup truck was driving at a high rate of speed when she passed a car in a no passing zone and collided head on with an oncoming car. Estep had five different prescription drugs in her system, all within proper therapeutic levels. She raised four issues on appeal.

The first issue was whether the evidence was sufficient to convict Estep of wanton murder. Estep's main argument was there was no evidence she was aware of and consciously disregarded the risk that taking the various drugs in combination with one another would impair her ability to drive. However, Estep admitted she would not take Elavil when she was by herself because it produced too deep a sleep and she feared someone would break into her house and she wouldn't realize it. She also admitted she wouldn't take Dilantin when she was by herself. In addition, Estep had a handful of Soma and Xanax tablets in her pocket, as well as fifty-eight xanax in her purse. When Estep was taken to the hospital after the accident, she kept passing out and appeared "pretty zonked." The Court held the evidence was sufficient to sustain a conviction for wanton murder.

The second issue was the denial of Estep's request for a continuance. The basis for this claim was that she was not provided the scientific "meat" of the Commonwealth's case prior to Dr. Hunsaker's trial testimony. However, Estep was present at Dr. Hunsaker's pretrial deposition and heard him list the drugs found in her system and describe the effects of the various drugs. Thus, there was no abuse of discretion when the trial court refused Estep's request for a continuance.

The third issue related to the introduction of Dr. Hunsaker's videotaped deposition. However, the record revealed there was an agreed order stating the deposition would be read and used as evidence at the trial.

The fourth issue related to the introduction of a urinalysis report which indicated Estep had marijuana in her system at the time of the accident. The Commonwealth's theory was that Estep constantly took drugs to feel good and the effect of these various drugs impaired her ability to drive which resulted in the fatal accident. Estep admitted she sat around the house and smoked marijuana. Thus, the trial court did not abuse its discretion in admitting the urinalysis report.

Estep's convictions were affirmed.

Butts v. Commonwealth,
Ky., ___ S.W.2d ___ (9/4/97),
1997 WL 547564 (Ky.)(not yet final)

Butts was convicted of first degree burglary, fourth degree assault and first degree PFO. Butts raised five issues on appeal.

The first issue was that Butts' prior conviction for contempt for violating an emergency protective order barred his subsequent prosecution for charges arising from the same incident. This same issue was recently addressed by the Court in *Commonwealth v. Burge*, Ky., 947 S.W.2d 805 (1997), which controls the fact situation in this case. Thus, the Court found no violation of double jeopardy principles.

The second issue was that Butts' convictions for first degree burglary and fourth degree assault violate double jeopardy principles because the physical injury that was used as an element of the first degree burglary charge was the sole element of the assault conviction. The Court expressed concern that this issue was not preserved, but addressed its merits anyway. The facts showed that in the course of committing burglary, Butts committed an assault which resulted in physical injury to the victim. The Court held the assault was used as a necessary element to achieve a first degree burglary conviction and under *Burge, supra*, Butts' conviction must be vacated.

The third issue was the trial court's failure to strike for cause a juror who had been raped at her home three months prior to trial, and the individual had yet to be caught. The Court found no abuse of discretion by the trial court in failing to excuse the prospective juror for cause because of the factual differences between the

prospective juror's situation and the facts of the case at bar.

The fourth issue was the trial court's failure to give Butts' requested reasonable doubt instruction. The Court held the instruction given, which was identical to RCr 9.56, was sufficient. The fifth issue was whether it was proper to charge Butts with being a PFO in a separate indictment from the indictment charging the substantive burglary and assault charges. The Court cited *Price v. Commonwealth*, Ky., 666 S.W.2d 749 (1984) as controlling and found no error.

Butts' fourth degree assault conviction was vacated and his burglary and PFO convictions were affirmed.

Graham v. Commonwealth,
Ky., ___ S.W.2d ___ (9/4/97),
1997 WL 547524 (Ky.)(not yet final)

This case involves the proper method of challenging the validity of prior convictions which are used as the basis for PFO charges. More specifically, the question is whether *Howard v. Commonwealth*, Ky., 777 S.W.2d 888 (1989), should be overturned or modified in light of *McQuire v. Commonwealth*, Ky., 885 S.W.2d 931 (1994) and *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995) which adopt the holding of *Custis v. U.S.*, 114 S.Ct. 1732 (1994).

In 1983 Graham was convicted of trafficking in narcotics and trafficking in a non-narcotic. In 1987 and 1992 Graham entered guilty pleas to PFO II and I, respectively. The 1983 conviction was used as a basis for the PFO charges.

In 1993, Graham moved for relief pursuant to RCr 10.26, RCr 11.42, CR 60.02 and CR 60.03. The trial court denied relief on all grounds because all of the arguments Graham made could have been presented in the direct appeal of the 1983 convictions, and Graham's subsequent guilty pleas to PFO charges precluded any later review of the 1983 convictions on constitutional grounds. The trial court held Graham waived his right to RCr 11.42 relief on the 1983 conviction because he did not challenge the validity of that conviction at the time he entered guilty pleas to PFO II and PFO I in 1987 and 1992 respectively. The Court of Appeals affirmed the trial court's ruling and the Supreme Court granted discretionary review.

The Supreme Court held *Howard* is still viable in light of *McQuire* and *Webb* insofar as it deals with guilty pleas to PFO charges. The Court also held *Howard* applies to the facts in Graham's case. The Court made it clear that when a defendant is charged with being a PFO, the defendant must challenge the validity of the prior conviction within the PFO proceeding. If the defendant fails to do so, the validity of the prior conviction is final and cannot be challenged in a subsequent RCr 11.42 proceeding.

The Court affirmed the opinion of the Court of Appeals.

Parker v. Commonwealth,
Ky., ___ S.W.2d ___ (9/4/97),
1997 WL 547561 (Ky.)(not yet final)

Robert Parker was tried and convicted of the murder of his 22-month-old stepson and sentenced to life in prison.

Parker raised seven issues on appeal, all of which were rejected by the Court.

First, Parker argued the trial court erred when it refused to instruct the jury on the lesser included offenses of second degree manslaughter and reckless homicide. At trial, the Commonwealth's medical evidence supported a finding that the child's injuries were the result of an intentional act to cause the child's death. Parker denied ever hitting his stepson or disciplining or harming him in any way. Parker testified he did not know how the child received his fatal injuries. If the jury believed Parker, he was entitled to a not guilty verdict. If the jury believed the Commonwealth's evidence, the only conclusion to be drawn was the child's death was the result of an intentional act. Thus, the Court held there was no evidence in the record to support Parker's request for instructions on the lesser included offenses of second degree manslaughter and reckless homicide.

Second, Parker argued the trial court's definition of "intentionally" did not follow the statutory definition. The Court found this issue was not properly preserved for review. Even if it had been preserved, Parker's argument has no merit because the definition "substantially follow[ed] the statutory pattern," and was identical to the model instruction set out in Cooper, *Kentucky Instructions to Juries*, §3.01 (Anderson 1993).

Third, Parker argued the trial court erred when it allowed the Commonwealth to introduce photographs of the child from the autopsy and the hospital. The Court held the trial court did not abuse its discretion in allowing the autopsy photographs to be introduced because they were relevant in that they supplemented Dr. Nichols' testimony and their probative value outweighed their prejudicial effect. The hospital photographs were relevant to support Dr. Smock's opinion that the fatal blows were inflicted and not accidental. The Court also found the CHR photograph of the victim was admissible pursuant to KRE 803(6) because the co-defendant, the child's mother, authenticated the photo.

Fourth, Parker argued the trial court erred when it allowed the Commonwealth to introduce evidence of prior injuries to the child because there was no evidence that linked him to being the cause of those prior injuries. The Court stated "the probative link between evidence of prior bad acts and a particular defendant does not have to be established by direct evidence." The Court held there was other evidence from which the jury could infer Parker was the perpetrator of the prior injuries: the injuries did not begin to occur until Parker moved into the home with the child's mother; the injuries stopped for a few months when the child was removed from the home; the child cried excessively when he was in Parker's custody and appeared to be afraid of Parker. Since Parker testified he did not know how the child had been injured, the prior bad acts evidence was relevant to show the injuries were not the result of an accident or mistake.

Fifth, Parker argued a member of the grand jury was improperly removed from the grand jury and transferred to the petit jury prior to the indictment being returned against him. The Court found no merit to this argument because "Parker had no assertible interest in having any particular person serve on the grand jury." Moreover, Parker cannot show prejudice since an indictment may be returned by the grand jury without a unanimous vote and there is no evidence the grand jury would have voted against returning an indictment.

Sixth, Parker argued that since his attorney and the attorney for his co-defendant wife were both assistant public advocates, they were laboring under an actual conflict of interest. The Court disagreed. Early in the trial proceedings, the Commonwealth moved to disqualify either Parker's or his wife's counsel based on a potential conflict of interest because both attorneys were assistant public advocates. Parker opposed the motion and signed a waiver of dual representation. Also, Parker's wife's testimony was favorable to Parker.

Seventh, Parker argued the Commonwealth's cross-examination of him and closing argument improperly shifted the burden of proof to him and violated his presumption of innocence when it repeatedly suggested and argued that Parker was required to offer a satisfactory explanation for the child's injuries. The Court noted the trial court "generally sustained the objections of defense counsel and admonished the jury not to consider the questions and/or remarks of the prosecutor," so there was no error. Moreover, the trial court instructed the jury that the defendant was presumed innocent and the Commonwealth had the burden to prove his guilt beyond a reasonable doubt.

Eighth, Parker argued he was prejudiced by being tried jointly with his wife because certain evidence of uncharged injuries was admitted against him, but not against his wife. The Court held the joint trial was proper because "[t]he charges were intimately related and the proof of each charge necessarily overlapped the other." Moreover, all the evidence, except the evidence of the prior injuries, was admitted against both defendants and the jury was repeatedly admonished how to use the complained of evidence.

Parker's conviction was affirmed.

Estes v. Commonwealth,
Ky., ___ S.W.2d. ___ (10/2/97),
1997 WL 613464 (Ky.)(not yet final)

Estes was cited under KRS 304.99-060 for operating a motor vehicle which was not covered by insurance. Estes was not the owner of the car. Estes entered a conditional guilty plea to the no insurance charge.

Estes appealed to the circuit court which reversed his conviction. The Commonwealth's motion for discretionary review was granted by the Court of Appeals which reversed the circuit court and reinstated Estes' conviction.

The Kentucky Supreme Court granted Estes' motion for discretionary and framed the issue as follows: May a non-owner, operator of a motor vehicle be assessed criminal penalties because the motor vehicle being driven is uninsured? The Court concluded the operator may not.

The substantive section of Subtitle 39, KRS 304.080(5), specifically states the **owner** of a motor vehicle registered or operated in Kentucky by him or with his permission shall be responsible for insuring said motor vehicle. However, the penalty section of Subtitle 39, KRS 304.99-060(1) was amended in July, 1994, to provide that the **owner or operator** of any motor vehicle who fails to have the insurance required by Subtitle 39 shall be fined or sentenced to jail or both.

The Court held the amended penalties in KRS 304.99-060 cannot apply to non-owner operators. The Court concluded the amendment of a penalty provision cannot create a substantive offense when one did not previously exist. The Court noted that while the legislature may have intended to criminalize the conduct of a non-owner operator of a motor vehicle not covered by insurance, it failed to draft the statute clearly enough for the Court to find such an interpretation. The Court further noted that Kentucky's mandatory insurance scheme requires every automobile to be covered by insurance, not every individual who drives an automobile.

The Court reversed the Court of Appeals and reinstated the opinion of the circuit court dismissing Estes' conviction.

Luttrell v. Commonwealth,
Ky., ___ S.W.2d ___ (10/2/97),
1997 WL 613355 (Ky.)(not yet final)

Luttrell was found guilty of murder by a jury and sentenced to twenty years imprisonment. The Kentucky Supreme Court reversed his conviction and remanded for a new trial. Luttrell was again found guilty of murder, but this time the jury fixed his sentence at life imprisonment. Luttrell raised four issues in his appeal.

First, Luttrell claimed he was entitled to a directed verdict of acquittal based on his defense of self-protection or protection of another. The evidence showed that Luttrell and the victim were long-time acquaintances. The shooting occurred in the victim's apartment. Luttrell testified he shot the victim with a pistol after "he heard the victim say something to the effect that he was going to kill both his girlfriend and Luttrell." Luttrell saw the victim pull the bolt on the rifle back and begin to insert a shell into the rifle. It was later determined the rifle was not loaded. Other evidence showed the victim was shot three times and two of the three wounds were contact wounds. The victim was highly intoxicated.

The Court held Luttrell was not entitled to a directed verdict of acquittal on his defense of self-protection or protection of another because the evidence to support Luttrell's defense was not "conclusively demonstrated." The majority also noted that Luttrell's directed verdict motion, which stated the Commonwealth did not prove every element of the offense beyond a reasonable doubt, did not preserve the issue because it did not specifically mention the defenses of justification, self-protection or protection of another and these defenses "are not elements of the offense of murder." The concurring opinion pointed out that although self-protection is not an element of murder, the absence of self-protection was an element of murder under the facts in the case at bar, and the Commonwealth was required to prove that element beyond a reasonable doubt. Thus, the directed verdict motion, on the grounds that the Commonwealth did not prove every element beyond a reasonable doubt, did preserve the issue.

Second, Luttrell argued the trial court erred when it stated within the hearing of the jury that a Kentucky State Police Forensic Firearms examiner could "render an expert opinion." Luttrell argued the trial court's comment unfairly bolstered the witness' credibility. The Court held that if any error occurred, it was not prejudicial and thus not reversible error. The firearms examiner testified the bullets that killed the victim could have been fired by Luttrell's gun, but Luttrell did not challenge said fact. The examiner also testified a spent cartridge had been fired from the victim's rifle, which supported Luttrell's self-defense argument. The Court stated all rulings on whether a witness is qualified to give expert testimony should be made outside the hearing of the jury and there should be no declaration in front of the jury that a witness is an expert.

Third, the Court rejected Luttrell's argument that the prosecutor's reference to the testimony of a witness as a "story" denied Luttrell a fundamentally fair trial. The Court noted the issue was not properly preserved because Luttrell never received a ruling on his motion for an admonition and he never moved for a mistrial.

Finally, Luttrell argued the trial court erred by imposing a more severe sentence following his retrial than that which was imposed at his first trial. The Court rejected this argument. The Court noted that since the prosecutor did not urge the jury to impose a life sentence at Luttrell's retrial, no presumption of vindictiveness should apply. Also, the Court noted that "[t]he double jeopardy clause does not preclude a more severe sentence upon retrial when state law does not require any particular findings of fact to justify the increased sentence."

Luttrell's conviction was affirmed.

Lienhart v. Commonwealth,
Ky., ___ S.W.2d ___ (10/2/97),
1997 WL 613463 (Ky.)(not yet final)

Lienhart was convicted of first degree burglary and second degree persistent felony offender. The sole issue on appeal was the sufficiency of the evidence to support his second degree persistent felony offender conviction.

To prove Lienhart was a PFO II, the Commonwealth introduced three prior felony convictions. On January 13, 1987, Lienhart was convicted of receiving stolen property over $100.00 and burglary II and was sentenced to concurrent five year prison terms. Lienhart was under the age of eighteen when these two offenses occurred. On October 31, 1989, while Lienhart was incarcerated on the receiving stolen property and burglary charges, he was convicted of first degree promoting contraband and sentenced to imprisonment for one year. Lienhart was over eighteen years old when this offense occurred. Lienhart was released from prison on September 15, 1991.

Lienhart argued the Commonwealth failed to prove he met the statutory requirements of KRS 532.00(2) necessary to support a PFO II conviction. Lienhart's receiving stolen property and burglary convictions did not qualify because he was not over eighteen when said offenses occurred. Lienhart's promoting contraband conviction did not qualify because he completed service of the sentence imposed for that offense more than five years prior to the date of the commission of the present first degree burglary charge. [It should be noted the Court's opinion fails to state the date the first degree burglary offense occurred, although it states the indictment was returned in September, 1995.]

To determine whether Lienhart's promoting contraband conviction met the statutory criteria, the Court discussed when Lienhart's sentence for the promoting contraband offense began and when it ended. Since the judgment on the promoting contraband offense was silent as to whether the one year sentence was to run concurrently or consecutively to the five year sentences on the receiving stolen property and burglary II charges, KRS 532.110(2) requires the sentence to run concurrently.

Under *Brock v. Sowders*, Ky., 610 S.W.2d 591, 592 (1980) and KRS 197.035(2), "[i]f the additional sentence is designated to be served concurrently . . . [a confined prisoner] shall be considered as having started to serve said sentence on the day he was committed on the first sentence." Thus, Lienhart must be considered as having started to serve his promoting contraband sentence at the same time he started to serve his receiving stolen property and second degree burglary sentences which was in 1987. The one year sentence would have then expired in 1988, which is outside the five year requirement of KRS 532.080(2)(c)(1).

Accordingly, the Commonwealth failed to prove Lienhart met the criteria for being a PFO II, and the Court reversed his PFO II conviction.

Hourigan v. Commonwealth,
Wylie v. Commonwealth,
and *Commonwealth v. Marcum,*
Ky., ___ S.W.2d ___ (10/2/97),
1997 WL 613369 (Ky.)(not yet final)

The Kentucky Supreme Court granted discretionary review in these consolidated driving under the influence cases to answer the following two questions: first, whether Section Eleven of the Kentucky Constitution requires *Miranda* warnings to be given to a DUI suspect prior to the administration of field sobriety tests requiring verbal statements by the suspect; and

second, whether the pre-arrest suspension of the suspect's driver's license constitutes punishment, thus prohibiting the subsequent imposition of punishment for the conviction of a second offense DUI on double jeopardy grounds.

First, the Court held *Miranda* warnings are not required. The Court relied on the U.S. Supreme Court cases of *Berkemer v. McCarty*, 104 S.Ct 3138 (1984), *Pennsylvania v. Bruder*, 109 S.Ct. 205 (1988) and *Pennsylvania v. Muniz*, 110 S.Ct. 2638 (1990). These cases stand for the proposition that administering field sobriety tests, including recitation of the alphabet following a traffic stop, does not involve custody for purposes of *Miranda*. The Court also relied on the Kentucky case of *Commonwealth v. Cooper*, Ky., 899 S.W.2d 75 (1995), which cited the U.S. Supreme Court cases and pointed out that Section 11 of the Kentucky Constitution is co-extensive with the Fifth Amendment to the U.S. Constitution and provides identical protections against self-incrimination.

Second, the Court held there was no double jeopardy violation because the pre-trial suspension of the defendants' licenses under KRS 189A.200 is not punishment, per se. The Court pointed out that under *Commonwealth v. Steiber*, Ky., 697 S.W.2d 135, 136 (1985), "[l]icense revocation is not a punishment but a cautionary measure to protect the safety of the public." Moreover, the statutory elements of KRS 189A.010(1), which prohibits operating a motor vehicle while under the influence of alcohol or with a blood or breath alcohol concentration of 0.10 or more, are different from the statutory elements of KRS 189A.200, which requires pre-trial suspension of the driver's license of a person charged with a violation of KRS 189A.010 who has been convicted of one or more prior offenses within five years immediately preceding his arrest or who has refused to take an alcohol concentration test. Thus, each offense contains elements not required by the other, and under this Court's recent holding in *Commonwealth v. Burge*, Ky., 947 S.W.2d 805 (1997), the double jeopardy clause does not apply.

Grimes v. McAnulty,
Ky., ___ S.W.2d ___ (10/2/97),
1997 WL 613360 (Ky.)(not yet final)

The issue in this case is whether double jeopardy principles prevent Grimes from being retried for murder after the trial court granted, over Grimes' objection, the Commonwealth's motion for a mistrial.

Grimes was charged with murdering her husband. During voir dire and opening statement defense counsel told the jury Grimes' defense was the shooting was an accident. Grimes testified in her own behalf. During her testimony, Grimes told the jury about the numerous acts of abuse her husband had inflicted upon her and her children over a fifteen to twenty year period. The admission of this testimony was conditionally predicated upon a showing that Grimes had acted in self-defense. At the conclusion of Grimes' direct testimony the Commonwealth moved for a mistrial, and, over Grimes' objection, it was granted.

In a written order, the trial court explained there was a manifest necessity to discharge the jury because Grimes testified the shooting was an accident and thus "the entire offer of proof of specific bad acts of domestic violence" was irrelevant and inflammatory. The trial court found that Grimes' offer of proof in support of a self-defense claim "was a subterfuge to avoid the restriction on character evidence." It found the admission of the evidence was prejudicial to the Commonwealth and no remedy other than a mistrial was adequate.

Relying on principles of double jeopardy, Grimes sought a petition for a writ of prohibition from the Court of Appeals to prevent a retrial. The Court of Appeals denied Grimes' petition. Grimes appealed to the Kentucky Supreme Court which, in a four to three opinion, affirmed the decision of the Court of Appeals.

In its opinion, the Kentucky Supreme Court noted the trial court must have a measure of discretion in declaring a mistrial. The Court also noted a manifest necessity for a mistrial has been found to exist when the defendant introduces improper evidence that prejudices the Commonwealth's right to a fair trial.

In deciding whether a manifest necessity existed for granting a mistrial in the case at bar, the Court framed the issue as being whether the defendant would have been entitled to an instruction on the defense of self-protection. Grimes argued that under *Pace v. Commonwealth*, Ky., 561 S.W.2d 664 (1978), she would have been so en-

titled. However, the Supreme Court disagreed. It stated that since Grimes' testimony did not support a claim that she acted in self-defense, which requires an intentional mental state, Grimes would not have been entitled to such an instruction. Thus, the introduction of the evidence of domestic abuse was irrelevant and highly prejudicial to the Commonwealth. The only way for the trial court to remedy the improper introduction of the evidence was to grant a mistrial. Thus, there was a manifest necessity for the mistrial and principles of double jeopardy do not prevent Grimes from being retried.

Part and parcel of the Court's opinion was its overruling of *Pace, supra*. The Court held "[a] defendant who affirmatively asserts the defense of accident cannot also claim self-protection." "[T]he defenses of self-defense and accident are 'mutually exclusive,' the former contemplating an intentional act leading to death while the latter negatives such intention. A defendant cannot assert accident yet alternatively claim an intentional act done in self-defense, without affirmatively presenting evidence of self-defense."

Accordingly, Grimes may be retried by the Jefferson Circuit Court.

Day v. Commonwealth,
Ky.App., ___ S.W.2d ___ (7/25/97),
1997 WL 413626 (Ky.App.)(not yet final)

Day was indicted for two counts of first degree trafficking in a controlled substance (cocaine) but convicted on only one count. On appeal he argued the trial court erred when it failed to instruct the jury on the defense of entrapment and the lesser included offenses of possession of a controlled substance and criminal facilitation.

The evidence at trial showed that on March 20, 1993, a confidential informant contacted Day in an effort to buy cocaine. Day testified that on the following day he and a friend met the informant in the K-Mart parking lot at which time Day's friend gave him a bag of cocaine which Day then gave to the informant. The informant then gave Day $350.00 which Day gave to his friend. Day also testified that on March 25, 1993, he again met the informant and sold her an additional amount of cocaine for $900.00.

As to the March 21st offense, the trial court instructed the jury on entrapment and the jury found Day not guilty. However, the trial court refused to give an entrapment instruction on the March 25th offense because it reasoned Day was predisposed to commit the crime because he had participated in the same offense just four days previously. The court also refused to instruct the jury on any lesser included offenses.

Relying on *Farris v. Commonwealth*, Ky.App., 836 S.W.2d 451 (1992), the Court of Appeals held Day was entitled to an entrapment instruction because if his actions in the first transaction were the result of entrapment, his conduct from that transaction could not subsequently condemn him as having a predisposition. Also relying on *Farris, supra*, the Court of Appeals held Day was entitled to instructions on the lesser included offenses of possession of a controlled substance and criminal facilitation.

Day's conviction was reversed for a new trial.

Anderson v. Parker,
Ky.App., ___ S.W.2d ___ (9/19/97),
1997 WL 600048 (Ky.App.)

Anderson filed a petition for declaratory judgment pursuant to KRS 418.040 seeking award of "improperly withheld good time" under Corrections Policies and Procedures (CAP) 15.3, which he claimed was unconstitutionally vague and ambiguous and thus violated his equal protection and due process rights. Anderson also sought an evidentiary hearing on his claim.

The Department of Corrections responded that the Commissioner of Corrections had statutory and regulatory discretion in awarding meritorious good time credit and urged dismissal for failure to state a claim.

The circuit court denied Anderson's petition.

Anderson appealed the denial to the Court of Appeals.

CAP 15.3 was adopted pursuant to KRS 197.045(3). It authorizes the award of meritorious good time which is defined as "a good time credit that *may* be awarded for performing duties of outstanding importance in connection with institutional operations and programs." The award of good time credit is clearly up to the discretion of the prison administrators. "No inmate has a *right* to meritorious good time

under CAP 15.3, it is a *privilege* bestowed at the discretion of the Commissioner." The Court of Appeals held inmates "have no protected liberty interest at stake in its' denial." Moreover, Anderson failed to present a single factual allegation of "duties of outstanding importance" which might have qualified him for consideration of the credit. Thus, the circuit court correctly dismissed Anderson's petition.

The Court of Appeals also found Anderson lacked standing to claim CAP 15.3 was vague and ambiguous because he failed to present any facts upon which a reasonable person could argue he was entitled to any good time credit. In addition, the Court of Appeals held the circuit correctly refused Anderson's request for an evidentiary hearing on the claims in his petition.

Jackson v. Commonwealth,
Ky., ___ S.W.2d ___ (9/26/97)
1998 WL 595099 (Ky.App) (not yet final)

A jury found Jackson guilty of fraudulent use of a credit card and being a second degree persistent felony offender.

The evidence showed that Jackson and two friends went to Biggs department store where Jackson attempted to purchase $754.90 worth of merchandise with a credit card that was not his own. When the store clerk ran the credit card through the electronic scanner, a message indicated the card needed to be taken if it was safe to do so. The clerk told Jackson authorization was needed for the card. When the clerk stepped away from the register to call security, Jackson took the credit card and left, but he was detained before he was able to exit the store. Jackson was arrested and taken to jail.

On appeal, Jackson argued the trial court erred when it failed to instruct the jury on the lesser included offense of attempted fraudulent use of a credit card because he took a substantial step toward committing the crime but no property was obtained.

The Court of Appeals agreed and reversed Jackson's conviction and remanded his case for a new trial.

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Plain View

Ernie Lewis

It has been a relatively slow time for developments in the Fourth Amendment and Section Ten areas. A few cases are discussed below.

United States v. Jenkins,
124 F.3d 768 (1997)

The defendants lived in rural Kentucky on a farm, some of which was heavily wooded. Their house sat far from the road and was surrounded by a trimmed yard, small trees, and flower arrangements. Behind the yard was a field where marijuana was spotted from the air by the Governor's Marijuana Strike/Task Force of Kentucky.

Sergeant Ron West approached Linda Jenkins who was standing in her backyard. He asked her how to get to the field with the marijuana. Thereafter, without a warrant and without her consent, he and his team began collecting evidence from the backyard area. After Linda and her husband were arrested and indicted, they filed a motion to suppress, which was denied based upon a finding that the backyard was an open field outside the curtilage. A jury trial resulted in the conviction and the appeal to the Sixth Circuit.

The Sixth Circuit held that the Jenkinses' Fourth Amendment rights had been violated. Contrary to the opinion of the magistrate, the Court ruled that the backyard was within the curtilage, and thus entitled to the protections normally provided the home.

The Court relied upon factors delineated in *U.S. v. Dunn*, 480 U.S. 294 (1987). The Court found that the backyard was within the curtilage because the backyard was in close proximity to the house, because it was enclosed on three sides by a wire fence, because it was used for gardening, planting small trees and flowers, and finally because the defendants had taken steps to protect their backyard from observation.

Accordingly, the police violated the Jenkinses' Fourth Amendment rights when they searched the backyard without a warrant.

Short View

1. ***U.S. v. Redmon***, 117 F.2d 1036 (7th Cir. 6/27/97), *vacated*, 122 F.2d 1081 (7th Cir. 9/18/97). How far can courts go in allowing the seizure of materials from a garbage can without a warrant? Here, searching garbage cans next to a garage and clearly within the curtilage was allowed. However, the Court held that the fact that the cans were located in an area between the defendant's and a neighbor's house where pedestrians walked made the defendant's expectation of privacy one that society was not prepared to recognize as being reasonable.

2. ***Quarles v. State***, 696 A.2d 1334 (De.Sup.Ct. 6/18/97). How far can courts go in allowing for the use of the drug courier profile (where have you heard this before?) In this case, the Court used the drug courier profile and a desire to avoid the police (the right to be left alone?) as sufficient to allow for a *Terry* stop. The analysis? "But this Court should not turn a blind eye to the realities of society's war against drugs and the experience of the police in combating that problem. We are entitled to test the actions of the police by the exacting standards of the Fourth Amendment jurisprudence, but we should be reluctant to substitute an academic analysis for the on the spot judgment of trained law enforcement officers."

3. ***United States v. Garzon***, 119 F.3d 1446 (10th Cir. 7/18/97). Officers do not have the authority to demand that bus passengers take off their luggage. Thus, when the defendant did not take his backpacks off the bus, but did not later disavow ownership of the backpacks, he did not abandon them, and the offi-

cers subsequent search of the backpacks was illegal.

4. ***State v. Carter,*** 569 N.W.2d 169 (unpublished) 1997 WL 561469 (Minn.Sup.Ct. 9/11/97). The Minnesota Supreme Court issued two important holdings in this case. First, the Court found that the police had violated the defendant's right to privacy by leaving the sidewalk, climbing over bushes, and looking through a crack in blinds into an apartment where the defendant was packaging drugs for sale. "[I]t is a search whenever police take extraordinary measures to enable themselves to view the inside of a private structure." The defendant, an out-of-state visitor to an apartment, was also held to have a reasonable expectation of privacy in the apartment, despite his having only been in the apartment for a brief period of time. The Court recognized the fact that the defendant had the leaseholder's permission to be in the apartment, and his presence there for a brief period of time, to establish standing. "Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity." Thus, evidence obtained as a result of the search was ruled to be illegal, as was the warrant which was issued based upon the search.

5. ***McGee v. Commonwealth,*** 487 S.E.2d 259 (Va Ct.App. 7/8/97). Police officers seized the defendant when they came onto his porch and told him that he matched the description of someone who had been reported to be selling drugs. "[W]hen a police officer confronts a person and informs the individual that he or she has been specifically identified as a suspect in a particular crime which the officer is investigating, that fact is significant among the 'totality of the circumstances' to determine whether a reasonable person would feel free to leave." Thus, because the anonymous tip did not did not provide adequate grounds for the seizure, the evidence found as a result of the seizure had to be suppressed.

6. ***Titus v. State,*** 696 So.2d 1257 (Fla.Ct.App. 7/2/97). There is no "rooming house" exception to the Fourth Amendment which would allow the police to enter a common area of a multi-residence building.

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Articles of Interest

"Driving while black" and all other traffic offenses: The Supreme Court and pretextual traffic stops. Harris, David A., 87 J.Crim.L. & Criminology 544-582 (1997).

The appellate role in ensuring justice in Fourth Amendment controversies: .... (*Ornelas v. United States*, 116 S.Ct. 1657 (1996), 7 Grybowski, Jeffrey M. Note. 5 N.C.L.Rev. 1819-1847 (1997).

District Court Practice:
What is This, The Spanish Inquisition or Jury Trial Rights in Domestic Situations?

With apologies to the Monty Python group for our title, some days you just have to wonder about practicing in the District Courts. Time and time again, you see Joe D. Fendant involved in a domestic dispute. A protective order is issued prohibiting him from engaging in certain activities. Inevitably, he is arrested for a violation of the protective order pursuant to KRS 403.763. He is arraigned on the charge of Contempt - Violation of an EPO during the court's misdemeanor docket. A bond is set after the Judge consults the pretrial report which in all likelihood incorporates the Chief Justice's recommendations for bond evaluation in domestic situations. Because of the special circumstances of a domestic situation, the bond is set at a point your client is unable to meet. He sits in jail awaiting the trial call of the case.

Finally the day arrives when you have an opportunity to present his case. Counsel has filed the appropriate jury request. Everything is ready to go and at the call of the case, the County Attorney informs the Court that the Commonwealth is seeking to amend the charge to a charge of civil contempt in violation of KRS 432.280. Joe D. Fendant is momentarily elated once he understands that instead of up to a year in jail and a $500 fine, he is now looking at a maximum of 6 months in jail. Counsel sadly shakes her head while looking at the burgeoning file containing all of the notes for that perfect voir dire and opening statement knowing full well that she will never have a chance to present the case to a jury.

"WHAT? No jury trial? But this is America" cries your client as the bench trial commences. You try to explain that since this is a charge of civil contempt and since the maximum penalty is six months in jail, he does not enjoy a right to a jury trial. Or does he?

Adverse Existing Law

The Commonwealth invariably relies on existing law where the Kentucky Supreme Court held that a Court may sentence a defendant to serve up to six months and impose a fine of $500 for contempt without a jury trial. *Otis v. Meade*, 483 S.W.2d 161 (Ky. 1972). Factual differences, federal case law and state legislative acts show that *Otis* is not dispositive. Some Courts might be inclined to deny the jury trial request based on the discussion of jury trial rights and the affirmation of a conviction absent a jury trial in *Donta v. Commonwealth*, 858 S.W.2d 719 (Ky.App. 1993). It is critical to note that in *Donta*, the defendant "never requested a jury trial." *Donta* at 723. The Court even acknowledged that "had appellant actually availed himself of his statutory right to request a jury trial, the result in this matter might have been different." *Donta* at 725.

Federal Jury Trial History

From the foundations of Anglo-Saxon law, a right to a jury trial has been the hallmark of law and justice. No man shall be taken or imprisoned "except by the lawful judgment of his peers and the law of the land." 17 John (Magna Carta), c. 39 (1215).

Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which has fenced around and interposed barriers on every side against the approaches of arbitrary power.' *Thompson v. Utah*, 170 U.S. 343 (1898), quoting J. Story, Commentaries on the Constitution of the United States § 1779.

The founding fathers of this country saw fit to include this protection and wrote "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;" U.S. Const. Art III, § 2. This fundamental right was deemed important enough to be repeated in the declaration that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." U.S. Const. Amend 6. Even suits at common law where the value in controversy exceeds $20 were found to be of such sig-

nificance that a jury trial right was preserved. U.S. Const. Amend 7.

Constitutional rights to a jury trial were found to apply to the several states by way of the due process clause of the 14th amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). A "fair and enlightened system of justice would be impossible without" a right to jury trial. *Palko v. Connecticut*, 302 U.S. 319 (1937). A defendant's right to a trial by jury "is necessary to an Anglo-American regime of ordered liberty". *Duncan*.

The *Duncan* majority did however limit its holding, finding "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provisions and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States." *Id.* It did not however "settle in this case, the exact location of the line between petty offenses and serious crime." *Id.* That line was first defined by the Court when it held that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin v. New York*, 399 U.S. 66 (1970). The Court did not however indicate that any offense carrying a penalty of six months or less would automatically be considered a 'petty' offense.

The six month threshold of *Baldwin* is not a bright line rule as commonly believed. "[W]e did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a 'petty' offense, and we decline to do so today...." *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989). The Court indicated that a crime punishable by six months or less might be deemed serious enough to invoke the jury trial right because of, among other things, the very nature of the offense itself. *Baldwin*.

The opinion let stand prior case law where it was deemed appropriate to provide a trial by jury for so called 'petty' offenses. *See, District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Schick v. United States*, 195 U.S. 65 (1904); *District of Columbia v. Colts*, 282 U.S. 63 (1930). In spite of their status as petty offenses, courts have honored a jury trial request for crimes where the punishment is less than six months in situations involving conspiracy to deceive immigration officials, DUI, shoplifting and criminal mischief. *See, United States v. Sanchez-Meza*, 547 F.2d 461 (9th Cir. 1976); *United States v. Craner*, 652 F.2d 23 (9th Cir. 1981); *State v. Superior Court*, Az., 589 P.2d 48 (1978); *Reed v. State*, Fla., 470 So.2d 1382 (1985).

Baldwin does not prohibit jury trials for offenses where the sentence is six months or less but rather requires a right to jury trial regardless of the potential penalty if the situation is considered serious. A potential six month sentence for contempt coupled with all of the other potential penalties and restrictions is a serious and not a 'petty' situation.

Equal Protection Requires A Jury Trial

Admittedly, the Sixth Amendment only applies to criminal actions. By couching the charge against the defendant as civil contempt, the Commonwealth attempts to remove him from the protection afforded a criminal defendant. The equal protection clause of the 14th Amendment prevents this type of treatment. The defendant was arrested, was required to post a bond to gain his release from jail and was arraigned on the criminal docket of the District Court. The case was assigned a number which designates a misdemeanor crime within the court docketing system. A County Attorney whose function is the prosecution of criminal matters seeks to have your client incarcerated for a period of up to six months. That determination will be made during the Court's criminal docket.

"What's in a name? That which we call a rose by any other word would smell as sweet;" W. Shakespeare, *Romeo and Juliet*, Act II, s. ii, The Riverside Shakespeare p. 1068 (1974). Everything about your case except its captioning by the Commonwealth indicates the defendant is facing a criminal charge. He is however being denied the most basic protection afforded a citizen facing even the most limited of jail sentences: a jury trial. If a person charged with a DUI 1st offense who is facing a maximum of 30 days in jail is entitled to a trial by jury, equal protection of the law mandates a jury trial for a citizen facing up to six months in jail for contempt. *See,* U.S. Const. Amend 14.

The Commonwealth made the decision to treat Joe D. Fendant as a criminal defendant. It is only because they choose to look upon this matter as a criminal offense that the laws allowed the

police officer to arrest him. He was detained as a criminal defendant. He was arraigned as a criminal defendant. He was entitled to the appointment of a public defender because he was a needy criminal defendant. He was forced to enter a plea to a criminal charge and on his plea of not guilty was allowed to present his case on the criminal docket of the District Court. After all of that, the Commonwealth elects to suddenly decide it was incorrect, in effect saying: This is a civil matter, not a criminal matter so we need not bother with wasteful things like a jury trial. Such tactics from the Commonwealth are improper.

State Jury Trial History

The seminal published Kentucky case concerning civil contempt and jury trial rights is *Otis v. Meade*, 483 S.W.2d 161 (Ky. 1972). It is factually different from domestic cases and relies on federal case law decided prior to the United States Supreme Court's pronouncement in *Baldwin*. The *Otis* Court refused to issue a Writ of Prohibition to prevent enforcement of a contempt order where Otis was served with a subpoena yet failed to appear. He was ordered to serve six months in jail and pay a $500 fine. The Court further found there was no factual dispute in *Otis* to require a jury trial.

Though decided in 1972 when *Duncan* was available to the Court for guidance, instead, the Court choose to rely on an older federal case which mimicked the result in *Baldwin* and held that federal courts cannot impose a sentence exceeding six months absent a jury trial. Even though *Baldwin* defined situations where a jury trial is mandatory and provided situations where even a 'petty' offense could trigger a jury trial right, the Court of Appeals, then, the supreme court of the Commonwealth, choose to summarize the federal decision when it stated "we believe the Supreme Court said, in effect, that incarceration should not exceed six months." *Otis*. It remains clear by reading *Baldwin* that the Supreme Court did not in effect, hold in that manner. The characterization of an offense as petty or serious determines the right to a jury trial, not the potential sentence faced. *Lewis v. United States*, ___ U.S. ___, 116 S.Ct. 2163 (1992) (Where a trial judge's self imposed limitation on sentencing could not be used to deprive a defendant of a jury trial if the act were serious in nature.)

State Legislative Acts

Joe D. Fendant was originally charged with a violation of KRS 403.763, a class A misdemeanor. The Commonwealth then seeks to charge him pursuant to what it terms 'civil contempt', a violation of KRS 432.280. That allows a Court to proceed against and punish a person who resists or disobeys a judicial order. *See, Blakeman v. Schneider*, Ky., 864 S.W.2d 903 (1993) (holding Courts have inherent power to enforce compliance of lawful orders through charge of contempt.)

The Legislature most certainly contemplated jury trials in these situations by the enactment of KRS 432.290 which provides that the truth of the matter may be given in evidence in all trials by jury arising from an alleged violation of KRS 432.280. As early as 1911, it was held that it was error to punish a citizen for more than 2 days and/or $30 for contempt unless a jury trial is available. *Richardson v. Commonwealth*, 133 S.W. 213 (Ky. 1911) (KRS 432.260, the statute limiting punishment without a jury subsequently being found a "material interference with the administration of justice" and held unconstitutional in *Taylor v. Hayes*, 494 S.W.2d 737 (Ky. 1973).)

The allegation is that the defendant has disobeyed a Court order. He has no opportunity to purge himself of this contemptuous conduct. In that situation, jail is deemed punitive in nature and the Court must proceed under the guise of criminal rather than civil contempt. *Blakeman*. Every criminal defendant is entitled to a jury trial. KRS 29A.270.

KRS 402.760(5) specifically states that although either civil or criminal contempt actions are contemplated by the statute, once "either proceeding has been initiated the other shall not be undertaken." Joe D. Fendant was arrested and charged with a criminal violation. That criminal charge was initiated by the Commonwealth yet the prosecutor will now seek to undertake the civil aspects of a contempt charge in direct contravention of the statute.

State Constitutional Issues

The Constitution of the Commonwealth of Kentucky controls and limits any attempt to restrict jury trial rights by the Legislature or the Courts.

> The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution. Ky. Const. § 7.

Section 11 provides a right to a jury trial to all criminal defendants. Having the services of a lawyer is merely important yet the justice system insures that right. *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993). A jury trial is the sacred right of any citizen and should not be denied.

Application of the Law

In order to answer the question of whether Joe D. Fendant is entitled to a jury trial one need only apply the law as written. He does not seek to create new law but instead seeks entitlement to that right from existing law.

Constitutional rights to a jury trial apply to the states via the 14th amendment. *Duncan*. This is limited however if the offense is deemed 'petty.' A petty offense is not defined merely by the maximum amount of penalty. *Blanton*. If the nature of the offense itself is serious, the offense rises to the level requiring a jury trial. *Baldwin*. *Otis* does not control because it is factually distinguished, is out dated by the subsequent federal decisions and indicates that no factual controversy existed for a jury to hear.

In domestic matters there are grave factual differences between the parties. These are indeed serious matters. Besides the threat of a jail term, a person arrested for the violation of a protective order has his personal freedom limited in numerous ways including freedom of travel, freedom to associate and restrictions on the possession of certain property. KRS 431.064

Offenses which carry a Legislative mandate of penalties in addition to a minimum jail period of six months reach the threshold of being classified as serious in nature. *Baldwin*. The alleged violation of a protective order is a serious matter and requires a right to a jury trial. Defined as a serious matter, the charge remains criminal and not civil in nature. *Blakeman*.

Criminal contempt is where a fine or imprisonment is imposed upon the contemnor for the purpose of punishment. Black's law Dictionary 288 (5th ed. 1979) (Citing Fed.R. Crim Proc. 42).

There is no doubt that a person tried and found guilty of a failure to abide by the mandates of a protective order will receive punishment. "Defendant[s] shall have the right to a jury trial in all criminal prosecutions". KRS 29A.270(1). To reject a jury request in a domestic contempt situation is a violation of equal protection. U.S. Const. Amend 14. Both the Constitutions of the United States and The Commonwealth of Kentucky require a right to a jury trial. U.S. Const. Amend 6; Ky. Const. §§7 and 11.

Conclusion

The issues presented in this article are currently under consideration by the Third Division of the District Court of Kenton County, Kentucky. Should the Court grant the defendant's request, the County Attorney will in all likelihood seek certification of the law from the Supreme Court of the Commonwealth of Kentucky. Should the jury trial request be denied, and should a motion for reconsideration be overruled, the next step would be to seek Writs of Mandamus and Prohibition in the Circuit Court. If that fails, an appeal of right would focus on the Court of Appeals. The final step in state relief would be a Motion for Discretionary Review to the Supreme Court of Kentucky.

If all state remedies fail, sufficient federal issues are present to allow the entire process to be repeated starting with a Writ of Mandamus in the Federal District Court. The next time the prosecutor amends a charge of a protective order violation to civil contempt and attempts to deny Joe D. Fendant a jury trial, his lawyer just might have a few more things to say than "Sorry Joe, the law says no jury trials if all you are facing is 6 months." After all of the hearings, motions and appeals, it just might be the prosecutor asking: What is this, the Spanish Inquisition?

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Crime Control and the Death Penalty

The execution of Harold McQueen on July 1, 1997 has revived the debate in Kentucky about the use of capital punishment. Much of that debate centers around issues of morality, ethics, and the appropriateness of vengeance as a matter of state policy. What is often curiously absent from the death penalty debate is any discussion of the enormous volume of social science research on the subject. The death penalty is more than a matter of opinion. There are established, well-documented facts which are beyond refutation, but which are usually ignored in both public discourse and in official decision-making related to capital punishment.

The simple fact is that no issue has been more thoroughly researched and evaluated, in all of criminal justice, than capital punishment. Those of us in criminology and criminal justice are not certain of very many things regarding crime and its control in our society, but we can be absolutely certain, to a level of scientific proof that far exceeds the standard of proof required in the criminal courts, that the death penalty, as presently constructed and administered is very bad policy. This is not a matter of differing opinions or interpretations, it is a matter of clear, irrefutable, undebatable scientific truth established over half a century and involving dozens of studies. It is rare in criminology to find virtually every researcher and every study in agreement, but in this case they are. In studies using entirely different methodologies, at different times, in different places, constructing research questions in different ways, the facts are immutable and unchanging. The scientifically proven facts of the death penalty are clear.

The Death Penalty and General Deterrence

The key argument in support of capital punishment has traditionally been that no offender wants to die, therefore the threat of execution will deter homicide in society at large. On its face this argument seems to be simple common sense. Of course, like many folk myths and much common sense, it is less sensible than it is common. The facts are very simple. No credible study of capital punishment in the United States has ever found a deterrent effect.

In studies of contiguous states, at least one with the death penalty and at least one without, research has shown that there is no deterrent impact from capital punishment. Because these states are selected and matched on the basis of geographical location, and similar social demographic characteristics, we would expect there to be few confounding factors in measuring the impact of capital punishment. If there is a deterrent, death penalty states should have a markedly lower homicide rate. They do not. Homicide rates in states without the death penalty are no higher, and, in many cases, are lower, than in neighboring states with the death penalty (Sellin, 1980).

Similarly in studies of states where the death penalty was adopted or reinstated after having been abolished, research has once again failed to show any deterrent effect. The adoption or reinstatement of the death penalty does nothing to reduce the homicide rate (Sellin, 1980; Zeisel, 1977).

Comparative data also fails to demonstrate any deterrent value to the death penalty. The United States is the only Western democracy that retains the death penalty. The United States also has, far and away, the highest homicide rate in the industrialized world. Far from a deterrent effect, the death penalty would appear to have an aggravating effect on homicide rates (Kappeler, Blumberg, and Potter, 1996: 310).

The scientific conclusion is clear. **The death penalty does not deter homicide**. No study has ever found a deterrent effect, no matter how skewed the research question was in favor the death penalty. It's alleged deterrent value is refuted by everything we know about violent crime. The death penalty, if it is to deter, must be a conscious part of a cost-benefit equation in the perpetrator's mind. There are very few murders that involve that level of rationality or consciousness of the outcomes. Most murders are (1) committed under the influence of drugs or alcohol; (2) committed by people with severe personality disorders; (3) committed during periods of extreme rage and anger; or (4) committed as a result of intense fear. None of these states of

mind lend itself to the calm reflection required for a deterrent effect.

The Death Penalty and Specific Deterrence

Proponents of the death penalty also argue that capital punishment provides a specific deterrent which controls individuals who have already been identified as dangerous criminal actors. According to this argument the presence of death penalty ought to reduce a wide variety of criminal acts. Does it?

Certainly, if the death penalty deters homicide then it should prevent incarcerated people from killing again and reduce the number of homicides among prisoners. The fact of the matter is that over 90% of all prisoner homicides, killings of other prisoners or correctional officers, occur in states with capital punishment (Sellin, 1980).

A major death penalty study by Bailey (1991) also refutes the idea that capital punishment has any impact on other felonies. Despite the fact that Bailey measured the impact of capital punishment in three distinct and different ways he could find no evidence that the death penalty had any effect on index felony crime rates. Bailey concluded that "this pattern holds for the traditional targeted offense of murder, the personal crimes of negligent manslaughter, rape, assault and robbery, as well as the property crimes of burglary, grand larceny, and vehicle theft. In other words, there is no evidence ... that residents of death penalty jurisdictions are afforded an added measure of protection against serious crimes by executions" (Bailey, 1991: 35).

Finally, it has been argued that capital punishment specifically protects law enforcement officers by deterring assaults and killings of police. There have been five major studies addressing the question of whether capital punishment protects police officers. In no case did the death penalty provide any deterrent to killing law enforcement officers, nor did it reduce the rate of assaults on police (Bailey and Peterson, 1987; Bailey. 1982; Sellin, 1980, Cardarelli, 1968; Hunter and Wood, 1994).

Once again the scientific evidence is clear, **the death penalty does not deter other crimes** in any way. It has no deterrent impact on other felonies, it has no deterrent impact on crimes against law enforcement officers, it has no deterrent impact on drug crimes, and it has no deterrent impact on violent crimes. In fact, the death penalty is more likely to endanger the lives of police who investigate crime and pursue fugitives, and endanger the lives of witnesses who may provide evidence necessary for conviction. The reason is obvious, preventing capture and conviction becomes far more pressing a matter in death penalty states.

The Death Penalty and Incapacitation

The frequently advanced argument the that death penalty protects society by incapacitating violent criminals and thereby preventing further offenses is also weak. Obviously, an executed murderer is unlikely to recidivate, but so is a murderer in prison for life without parole. The facts, however, indicate that even if not executed and even if not incarcerated for life, it is unlikely

KMA & Death

The Kentucky Medical Association's house of delegates have voted for a measure that said it is unethical for a physician to participate in an execution, "except to certify cause of death."

The language would mean that a doctor could not have a role in the actual execution, such as by administering a lethal injection. Currently, the method of execution in the state is via the electric chair, but legislation is pending to change the method of lethal injection. Governor Paul Patton has said he would support such a change.

- Rick Halperin, AI - Texas

that a person convicted of homicide will kill again, or even commit an additional serious offense.

A massive study which tracked the post-release behavior of 6,835 male prisoners serving sentences for homicide offenses who were paroled from state institutions, found that only 4.5% of them were subsequently convicted of another crime and only 0.31% committed another homicide (Sellin, 1980). This means that for every 323 executions we **might** prevent one additional murder. Other studies find essentially the same results. For example a study of prisoners whose sentences were commuted as a result of the *Furman* decision (Marquart and Sorenson, 1988), found that 75 percent of these inmates committed no serious infractions of prison rules, and none of these inmates were involved in a prison homicide. Some of the *Furman*-commuted inmates were paroled back into the community. Only 14 percent of them committed a new crime, and only one committed an additional homicide.

Vito, Koester and Wilson (1991) also analyzed the behavior of inmates removed from death row as a result of the *Furman* decision. There study found that of those inmates eventually paroled only 4.5% committed another violent crime and only 1.6 percent committed another homicide. The authors conclude "that societal protection from convicted capital murderers is not greatly enhanced by the death penalty" (Vito *et al.*, 1991: 96).

Even in states with capital punishment the overwhelming majority of people convicted of homicide receive a prison sentence, and many of them will eventually be released on parole. A review of the data on these released murderers clearly reveal that they have the lowest recidivism rates of any felons. In addition, paroled murderers in states without the death penalty had a much lower rate of recidivism than parolees released in states with the death penalty (Bedau, 1982).

The death penalty does not protect society from further crimes of violence by murderers in any significant way. Once again the incapacitation argument is grounded in fundamental ignorance concerning the characteristics of violent crimes in general and murder in particular. But while there is no scientific evidence of societal protection from the death penalty, there is considerable scientific evidence that the death penalty stimulates violence, crime and murder.

The Brutalization Effect of the Death Penalty

So, neither incapacitation nor deterrence theories are supported by the social science research on capital punishment. In most public policy debates the burden of proof is on those advocating a measure. If that were the case here death penalty adherents would fail miserably. But the fact is that lack of deterrence and a failure to protect society are the least of the problems with capital punishment. In fact, the death penalty produces serious crime problems and social problems of its own. Probably most important of these is the fact that death penalty not only doesn't deter murder, it encourages people to kill.

Studies of capital punishment have consistently shown that homicide actually **increases** in the time period surrounding an execution. Social scientists refer to this as the **"brutalization effect."** Execution stimulates homicides in three ways: (1) executions desensitize the public to the immorality of killing, increasing the probability that some people will then decide to kill; (2) the state legitimizes the notion that vengeance for past misdeeds is acceptable; and (3) executions also have an imitation effect, where people actually follow the example set by the state, after all, people feel if the government can kill its enemies, so can they (Bowers and Pierce, 1980; King, 1978, Forst. 1983).

The earliest and most important study demonstrating a brutalization effect was conducted in Philadelphia in 1935, by Robert Dann. Dann looked at five executions of convicted murderers in different years. Dann's research found an average increase of 4.4 homicides for each execution. Dann's research clearly demonstrated that rather than having a deterrent impact, executions markedly increased the incidence of homicide (Dann, 1935).

Another study by William Graves in California also found a brutalization effect. Graves looked at homicide records in Los Angeles, San Francisco, and Alameda counties in order to determine whether there were fewer murders in the days following an execution than in the days leading up to the event. As a comparative measure, he examined the same days of the week for those periods in which an execution did not occur. Graves reported that compared with weeks when no death sentences were carried out, the number of murders actually increased in the days prior to an execution and on the day of the

execution itself. Graves (1957: 137) concluded that persons contemplating homicide are "stimulated by the state's taking of life to act sooner." In addition, a reanalysis of Graves' data (Bowers *et al.*, 1984: 284) concluded that "homicides were higher in the weeks after than in the weeks before executions." Graves' research, therefore, clearly demonstrates a brutalization effect prior to an execution and an even more pronounced one following an execution.

Another study (Bowers and Pierce, 1980) found that executions in California and Pennsylvania encourage crime and homicide. Each execution studied was followed by a two- to threefold increase in the number of homicides the next month. Bowers and Pierce argue there is a small group of people in society who have "reached a state of 'readiness to kill,'" and have an intended victim in mind. The execution itself, or coverage prior to the execution conveys to these people the message that vengeance is justified. Brian Forst found the same effect in his study of the deterrent impact of capital punishment between 1960 and 1970. He found no evidence that executions prevented crime. On the other hand, Forst did find evidence that executions "provoked" homicides (Forst, 1983).

One of the most compelling and recent studies demonstrating the brutalization effect looked at a September 1990 execution in Oklahoma, the first execution in that state in twenty-five years. The researchers monitored the homicide rate for three years following that execution and found "an abrupt and lasting increase in the level of stranger homicides," which on the average rose by one per month (Cochran *et al.* 1994).

While not a direct test of the brutalization effect it is, nonetheless, instructive to note that in post-Furman period marking the reintroduction of capital punishment in 1983, about one-third of all executions in the United States have occurred in Georgia and Louisiana, and in both states the murder rate has increased markedly (UCR, 1983; UCR 1989). In fact, the highest murder rates in the country are in the four states that have carried 70% of the post-Furman executions, all of which have now achieved murder rates much higher than the national average of 8.4 (Georgia, 11.7; Florida, 11.4; Louisiana, 11.6; and Texas, 12.1) (Compare these to states with no executions since Furman: Vermont 2.0; Maine, 3.1; Massachusetts, 3.5; Rhode Island, 4.1; Wisconsin, 3.0; Iowa, 1.7; Minnesota, 2.9; North Dakota, 1.8.) In fact, 36.9% of the states with capital punishment have murder rates in excess of the national average, while 90.9% of the states without a death penalty have murder rates lower than the national average.

Once again the social science research provides compelling evidence against the death penalty as public policy. **The death penalty does, invariably and without exception increase the number of homicides** in jurisdictions where it is applied. This has been proven in Pennsylvania, California, Oklahoma and other jurisdictions. While it is too early to make an absolute assessment, my viewing of news reports since the McQueen death warrant was signed clearly indicates it is having that impact in Kentucky, with an outbreak of killings in Louisville and Lexington, as well as several other homicides across the commonwealth, far in excess of expected averages.

The Administration of the Death Penalty is Arbitrary and Capricious

In its 1972 *Furman v. Georgia* decision, the Supreme Court struck down the death penalty as arbitrary and capricious, with a significant potential for racial discrimination. In the post-*Furman* era states have revised their death penalty statutes in an attempt to reduce arbitrariness by "bifurcating" juries, specifying aggravating and mitigating factors for jury consideration, and specifying more clearly death penalty offenses. Has any of this reduced the arbitrariness of the death penalty?

The research literature answers this question with a resounding, NO! In the post-*Furman* era defendants in capital cases are charged differently and treated differently for no apparent or logical reason (Berk, *et al.*, 1993; Gross and Mauro, 1989; Paternoster, 1991). Sometimes, defendants committing similar crimes with similar criminal histories are charged with capital murder, sometimes they are not. Some get the death penalty after convictions, some do not. Even within the confines of the same state, operating under the same criminal code, varying jurisdictions render varying results. The fact is that even under "reformed" capital punishment statutes, the death penalty is more like a state lottery than a considered act of justice. As one researcher puts it: "... being sentenced to death is the result of a process that may be no more ra-

tional than being struck by lightning" (Paternoster, 1991: 183).

Racism and the Death Penalty

The one aspect of the capital punishment that is sure and certain is that it is blatantly racist. In capital cases the lives of whites are valued far more than the lives of black victims (Baldus *et al.*, 1990; Paternoster, 1991; Radelet, 1981). Prosecutors are far more likely to seek the death penalty when the victim is white than when the victim is black. In addition, juries are far more likely to hand down death sentences when the victim is white.

On the other hand, considerable evidence exists that black defendants are more likely to receive the death penalty than white defendants. Between 1930 and 1966, African-Americans represented 54 percent of all the people executed in the U.S. and 90 percent of all the people executed for rape (Bureau of Justice Statistics, 1992: 684). When the case involves a black defendant and a white victim the prospects of a capital prosecution are almost invariable (Baldus *et al.*, 1990). In fact, post-*Furman* research shows that African-American defendants who kill whites have about a 25 percent probability of receiving the death penalty, while whites who kill African-Americans have a zero percent probability (Bowers and Pierce, 1980; Baldus, *et al.*, 1990).

David Baldus and his associates looked at 594 murder cases in the state of Georgia. They carefully controlled for all legally relevant variables, such as the number of "aggravating factors." They found that prosecutors sought the death penalty in 45 percent of the cases with white victims but only 15 percent of the cases with black victims. Furthermore, they determined that prosecutors sought the death penalty in 58% of the cases with black defendants and white victims, but only 15% of the cases with black defendants and black victims. Juries imposed the penalty of death in 57% of the cases with white victims but only 42 percent of the cases with black victims. The researchers concluded that race had a "potent influence" on both the likelihood that the state would seek the death penalty and the likelihood that a jury would return a death verdict (Baldus, *et al.*, 1990: 185).

In a similar study of 300 capital murders in South Carolina involving aggravating felonies, Raymond Paternoster (1984) found that in cases with white victims prosecutors were two and one-half times more likely to seek death than in cases with black victims. In cases with black offenders and white victims the state sought the death penalty 49.5% of the time. In black offender-black victim cases the state sought the death penalty only 11.3 percent of the time. In addition, in cases with white victims prosecutors tended to seek the death penalty with only one aggravating felony, while in cases with black victims they sought the death penalty only in cases with several aggravating felonies, thereby indicating that homicides against blacks had to far more vicious and brutal in order to justify the death penalty. Paternoster concluded that "victim-based racial discrimination is evident in prosecutors' decisions to seek the death penalty" (Paternoster, 1984: 471).

Adequate Representation and Wrongful Conviction

The fact of the matter is that virtually all defendants in death penalty cases are poor and unable to afford private counsel. As a result they are represented by public defenders or court-appointed counsel, who are often inexperienced and not well trained in litigating a capital case. As a result, major evidentiary and procedural issues don't get raised at trial. It is ironic that in the most complex of criminal cases, defendants are usually represented by counsel least equipped to handle complexities. The criminal justice system as a whole discriminates by a factor of over 4-1 against defendants who must accept the services of public defenders and court-appointed counsel (Blumberg, 1967). The fact of the matter is that the death penalty is awarded to the lowest bidder time and time again. In addition, inadequate funds and resources to gather evidence, interview wit-nesses, and pursue scientific evidence handicap defendants in these cases. Similar problems plague the defendant all the way through the appeals process (Coyle *et al.*, 1990; Smith, 1995).

Lack of adequate legal representation, prosecutorial and police misconduct, judicial and juror prejudice can all combine to result in wrongful convictions, a far more common occurrence that most people have been led to believe. The fact is that a minimum of 1 percent of all felony convictions are mistaken or wrongful convictions (Huff *et al.*, 1986). Research on the death penalty has demonstrated over 350 "miscarriages of justice" since 1900. Including several in the post-*Furman*

period, where defendants were convicted of potentially capital crimes even though they were innocent. Of these defendants, 139 received the death penalty and 23 were in fact executed (Bedau and Radelet, 1987; Radelet *et al.*, 1992).

Conclusion

As a criminal justice scholar, I am constrained to make my judgments on facts, not emotions, not popular ignorance, not superstition and prejudice masquerading as religion. It is my judgment that the death penalty is bad policy and is in fact criminogenic in its social impact. That is also the judgment of almost all my colleagues in Kentucky and in the nation as a whole. The American Society of Criminology, an organization made up of the best researchers and scholars in the country, has by a virtually unanimous vote condemned the death penalty. That judgment is not based upon vague conceptions of morality, it is based on rigorous evaluation of the state's two primary responsibilities: (1) to protect the public health and safety; and (2) to provide equity, fairness and justice to its citizens. The death penalty is anathema to both goals. It is the worst kind of crime-control policy.

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Killing Nationwide Rises

More killers have been executed in U.S. prisons this year than during any year in the past 4 decades, and the pace is expected to quicken as the appeals process is streamlined and some legal aid funds are curtailed. Dwight Dwayne Adanandus became the 57th convicted murderer put to death this year when he was executed by lethal injection Wednesday, October 1, 1997, in Texas. That's the largest number since 1957, when 65 people were nationwide.

This year's total could surpass the 1957 number if executions continue at the current pace. "There are going to be more executions in the future as these cases get speeded up" as a result of the federal and state laws shortening the appeal process, said Richard Dieter of the Death Penalty Information Center, a Washington-based group that is concerned with what it says are inequities in how the death penalty is applied.

There have been 415 executions nationwide since the Supreme Court ended a 4-year moratorium on capital punishment in 1976; 235 have been white, 152 black, 24 Hispanic and 4 others. Critics of the death penalty say the number of blacks executed is way out of proportion to the demographic weight of the African American community, who marked up 13% of the total U.S. population.

Of the 415 executions, 137 have been in Texas, including 30 thus far this year. "There really is overwhelming support for the death penalty in Texas," said Ward Tisdale of the state attorney general's office. "That's not to say we jump for joy when there's an execution. It's a moment for those involved."

There are 3,269 people that are on death row nationwide, and 13 of the 38 states with capital punishment laws have carried out executions this year. Virginia ranks 2nd to Texas, with 6 executions. Executions also were carried out in Florida, Missouri, Louisiana, Alabama, Arkansas, South Carolina, Oklahoma, Arizona, Oregon, Maryland and Kentucky. Kentucky's execution was its 1st in more than 20 years.

- Rick Halperin, AI - Texas

Executions: Understanding the Processes of Dying, Grieving and Healing

NOTE: The author would like to thank Amy Olk for her thoughtful editing and valuable ideas.

Abstract

Executions fall far beyond the realm of usual human experience. Defense team members are called upon to assist the client as he prepares to die, while maintaining their own mental and emotional equilibrium. This chapter offers an understanding of the issues faced by many clients during warrants, as well as insight into the common responses to the death of clients and how defense teams can prevent or alleviate the traumatic effects of working under such dour conditions.

Attorneys generally know when a client is "warrant eligible"; *i.e.,* when appellate issues have been exhausted or nearly exhausted. There is hope; there is always hope. But there is also the knowledge that the client's life is in imminent danger. Individuals who have little connection with the client, have found a belief system within which to intellectually and emotionally resolve the systematic nature of an execution death, or who are otherwise detached from the process, may suffer no ill effects. However, most defense team members find the prospect of an execution to be extremely unsettling, even disorienting, so much so that the reality of a client's impending death may be avoided indefinitely. This reaction is understandable, but may diminish one's professional effectiveness or ability to provide support to the client during the warrant, and result in unresolved grief. For these reasons, it is useful to examine the many factors involved in working on a case under warrant, and to consider the mental, emotional and spiritual effects of executions.

The purpose of this article is to provide a framework for better understanding the experiences of clients as they prepare to die, and of the defense team before and after executions. The article will address the importance of a strong defense team and the roles assumed by different team members; the dynamics of the client's family and how these affect both the client and defense team members; the process of dying as it relates to a client facing execution; the trauma that can result from working with disenfranchised populations and losing a client to execution, and the ways by which to prevent or alleviate this trauma.

Part One: The Importance of Teams During Warrants

The burden of an execution is too much for one person, or even two people, to bear. A team large enough to carry the inhumanity of an execution is required; the team is sacred in this regard. Time and energy should be spent on team development, incorporating a thorough understanding within the team of the needs and skills of each member. It is helpful to define team members' roles as clearly as possible. This increases efficiency, and prevents confusion, duplication of efforts, and short-term burn-out.

Finding the best way to help clients during warrants requires flexibility and the ability to view oneself and the situation objectively. The roles different team members come to play often evolve organically, especially when individuals are observant and accepting of their natural capacity to help. There is almost always a specific niche to fill or unique contribution to make. The nature of one's relationship with the client, in addition to one's professional training or position, may be the best guides. I have found myself in a variety of roles, ranging from mitigation expert, where I reinvestigated the client's life history, to consultant, where I offered an outside perspective and shared my experiences with executions. Those with whom the client has formed a special relationship or in whom he has implicit trust are likely candidates to help him with personal matters. Other important helping roles include assuming work-related responsibilities for colleagues who are working on the warrant, making funeral arrangements, assisting with travel, or making a space for others -- literally -- by simply staying out of the way. In some cases, one has little to offer during a warrant, but can be of great assistance in the aftermath of the execution. Being sensitive to the cadence of

events is a useful way to identify important needs and how these may be met.

Within the rubric of the team are several areas of responsibility, including working with the client and his family; litigation; political and/or media concerns; case management; and support staff. Objective consultants can also contribute to team effectiveness (see Figure 1). Each category of responsibility within the team is complex and could be addressed at length; however, for the purposes of this article, the area that will be given greatest attention is the one involving working with the client and his family and social network.

I. **Client and Family Work.** Whenever possible, the responsibility of working with the client and his family should be shared by two people. This is especially true if the client is emotionally unstable, when the family is large or lacks coping skills, or when the prison is a significant distance from the office handling the case. Variables to consider in selecting the appropriate team members to perform this interpersonal work include the size of the team, who has the longest or closest relationship to the client, who has the mental and emotional fortitude to take on this task at this point in time, who has the greatest proclivity towards "people" versus "strategic" tasks, and who the client thinks would be of greatest comfort. Team members should discuss this matter, allowing the wisdom of the group to prevail.

The demands of working with the client and his family are different than those faced by liti-

Team Components in Capital Cases

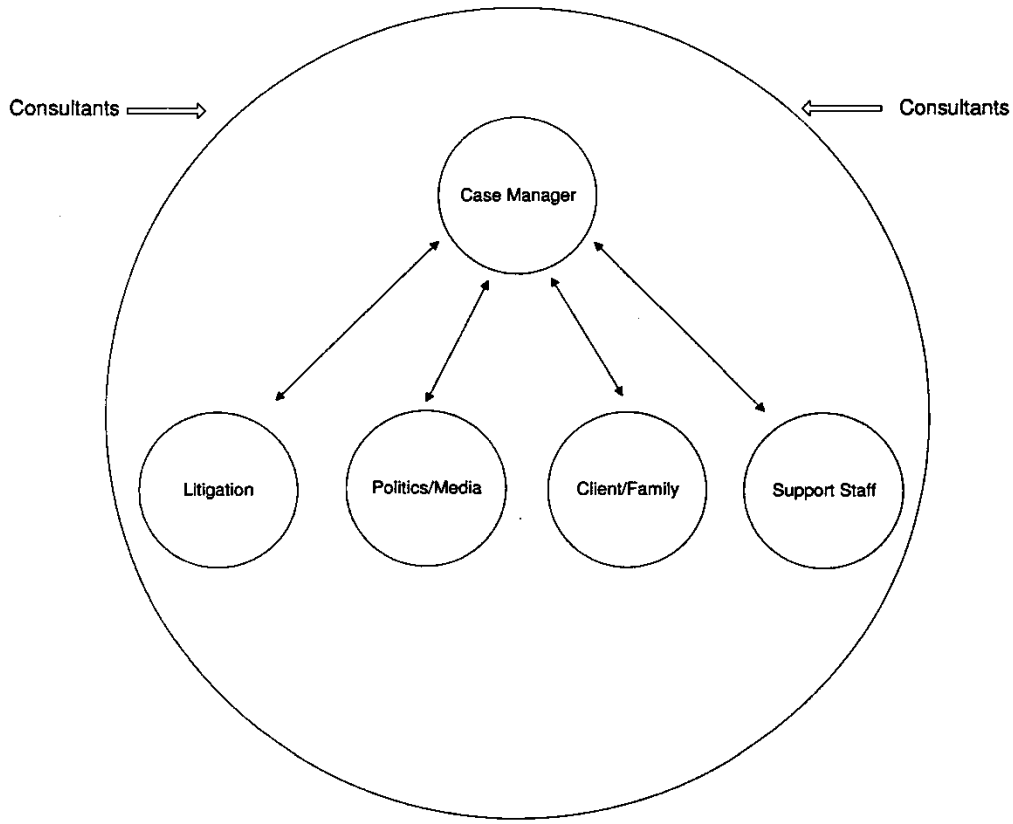

Figure 1

gators. Integral to this role is knowledge of how families and groups operate, and the needs of the dying. It is important to know what the client may experience as he prepares to die, as well as the predictable ways in which families and others react under stress[1]. One must anticipate the various problems that could arise and determine ways of meeting potential crises.

Dying is a dynamic process that, for most, involves both external and internal tasks. In the following sections, both will be considered.

A. The Outer Work of Dying: Institutional Barriers, Relationships, Possessions and Reaching Out to Victims' Families.

Dying individuals usually make peace with the world and then turn their energies inward. For death sentenced clients, the tasks of dying must be completed in conditions over which they have little control. How and where they will die, and the ways in which they can heal wounded relationships or make amends for past deeds, are constrained by the conditions of their incarceration. Often, the best way to assist clients begins with an understanding of the process of dying as it relates to the unique circumstances of executions.

The issues encountered by clients under warrant are in some ways similar to those experienced by patients suffering from terminal illnesses. In both instances, the individual is faced with coming to terms with what his life has meant, deciding how he will spend his remaining days, and determining the legacy he wishes to leave. Both the terminally ill patient and the client under warrant may go through expected phases of transition, including denial and anger (Kubler-Ross, 1969). For both it may be a time of reflection, integration and termination of important relationships.

1. **Institutional Barriers.** A chief difference between the experience of the terminally ill patient and the client under warrant is the environment within which these tasks can be accomplished. The patient generally remains at home or in an institution designed to accommodate his or her physical and emotional needs, and is surrounded by supportive family members and friends. By contrast, the client under warrant has very limited access to those who can comfort him and help him sort through personal matters; fundamentally, he exists in a hostile environment. In this context, the client's relationships with members of the legal team (and counselors with whom the team consults) may become critical. The team serves to preserve for the client a sense of connectedness to others and otherwise assist him as he prepares to die.

Isolation and lack of control are two of the major barriers faced by clients under warrant. The protocol for execution varies, but always involves severing the client from human contact and familiar surroundings. For example, once the warrant is signed, the client may be moved from his usual confinement to a "death watch" cell located near the death chamber. In order to prevent the client from attempting suicide, correctional officers may be required to stand guard 24 hours a day, depriving the client of privacy. Many times the physical representations of the client's identity --valued books, paintings, and pictures of family and friends -- are taken from him.[2] As a result, the client may have to ask a guard for his toothbrush each time he wants to brush his teeth, or for a match to light a cigarette. Even phone calls and bodily functions are monitored by others. Some clients readily accept their powerlessness and direct their energy to spiritual matters and to achieving closure with loved ones. For other clients -- especially those who suffered the abusive use of authority during their childhoods -- learning to relinquish this last semblance of control over their lives becomes central to their preparation for death.

Constraints on visitation make it difficult for the client to reconcile personal relationships. For example, some prisons will limit the number of visitors, allow only close relatives to visit, or prohibit children from entering the institution. Painful choices must be made about who to see, when and for how long. These limitations may be further complicated by family dynamics. Often, the client becomes preoccupied with the needs of his family and loved ones. It is not uncommon for a client to include individuals on a visitation list not because he wants to see them but because they need to see him.

2. **Relationships.** Visiting with family members and friends does not always enable the client to satisfy his need for closure. Not surprisingly, clients often hale from turbulent, dysfunctional families, where roles are unclear and members needy and vulnerable. Ongoing family feuds and deep hurts are common. Stress associated with the warrant may be so onerous, and family

members so unable to cope, that familiar conflicts are recreated as a means of avoiding the more obvious issue of the client's death. Despite having not seen each other for years prior to the warrant, family members may be unable to put aside their differences. In some cases, family "factions" -- incapable of subordinating their needs to those of the client -- cause great tension in the visiting area. The client may find himself acting as arbiter and peacemaker, and tending to wounds that do not directly involve him. This results in wasting precious time needed to attend to the intimate business of dying.

The client and the defense team may have to devote as much time and energy assisting family members as meeting the client's needs. Helplessness and self-defeating behavior are pervasive among clients' families, which are characterized by an interminable stream of crises that leave family members chronically numb and depleted. These traits may become accentuated after a warrant is signed, preventing relatives from focusing their attention on critical matters and assuming responsibility for even simple tasks. Often, attention is diverted to collateral issues, increasing family members' dependence on others. It is not unusual for friends and family members to call a defense team member to ask questions that have been answered previously, or to request assistance with their own legal problems. Problem solving skills among family members may be so poor that they are unable to meet routine demands, such as finding transportation from their homes to the prison. Sometimes family members "forget" visitation times or ask prison officials to change previously scheduled visits. Relatives and friends may use poor judgment, become argumentative with prison officials, or break fundamental rules. When they are subsequently banned from visitation, they may be stunned by the "injustice" and call upon the attorneys to "fix it."

Left unchecked, these dynamics can become pathological. In one case, a client's wife, whom he had met through a magazine ad, arrived for visits dressed provocatively and used sexually explicit language within earshot of guards and other family members. The same woman, who lived less than fifty miles from the prison, asked that her husband's lawyers rent a hotel room for her outside the prison, and then insisted that she be driven to and from her home twice a day so that she could feed her dogs. Any suggestion that she have her neighbors care for her animals was met with hostility and tears. The situation was never resolved, and was an ongoing hindrance to the work of the attorneys.

Isolation, lack of control and family dynamics make more difficult the client's job of preparing to die. As a result, his relationships with members of the defense team may assume greater importance, for team members can offer insight and guidance, and can provide access to counselors if necessary.

3. **Possessions and Wills.**

> "...asking the right question often has more impact on the client...than having the correct answer" (Miller, 1994, p. 93).

Besides contending with institutional barriers and coming to terms with important, if conflicted, relationships, the client's work includes letting go of material possessions. What we own is part of our identity. The death-sentenced client's world becomes condensed into a handful of belongings; only that which can be kept in a small metal compartment. There may be diaries, letters, photos, a few pieces of jewelry, artwork and books. A small amount of money may be left in a prison account. One aspect of outer work involves making decisions about what to do with these belongings. However, to whom these belongings are bequeathed may not be as important as the process of discussing each item. Allowing a client to talk about his possessions may be tremendously supportive. Each belonging may trigger a story or long-forgotten memory, the meaning of which the client can now articulate and put behind him. There may also be items that he wants to be discarded or seen only by one person. He may not, for example, want his mother to see letters with sexual references; or, if he was corresponding with two women, he may not want one to be hurt by knowledge of the other.

A client may feel depressed because he thinks he has so little to leave to others. He may look back on his life as a wasteland of existence. It is often helpful to review the client's life with him, shedding light on the significance of his experiences and how these shaped him. It is important that he not define his life solely by the nature of the acts that brought him to death row. His legacy includes the ways in which he has grown and changed -- the fruit of his efforts to mature and make amends during his confinement. These in-

sights can be consolidated into a "moral will," in which the client bequeaths to loved ones life lessons and acquired strengths. Spiritual beliefs, cognitive and moral skills, and special traits all may be conveyed to others. Putting these thoughts on paper formalizes the client's understanding of the ways in which he may have touched the lives of others, and leaves an artifact that others can keep in memory of him. Constructing a will allows the client to come to terms with and view his life in a more positive light. It enables him to appreciate his own value, and to see that in each life, no matter how desolate it may appear, there is purpose and meaning.

4. **Victims' Families.** Outer work may also include reaching out to the victim's family. In many instances, clients are extremely contrite and deeply ashamed of their actions, but lack the intellectual and verbal abilities to think through and express these sentiments. This is frequently the case when the client was raised in a violent home in which undesirable behavior or other problems were met with impulsive or inconsistent physical punishment. It is often very helpful to the client to be able to verbalize his remorse and assume responsibility for his actions, if only privately. Defense team members, who generally possess superior verbal skills, may be greatly supportive to the client in this regard.

In one case, an attorney provided invaluable assistance to a client who was struggling with the issue of communicating with the victim's family. Interestingly, this issue was not resolved until the client received his last stay of execution, from the U.S. Supreme Court, just hours before his execution. After his initial surprise, the client came to perceive this unlikely turn of events as an opportunity to complete any unfinished tasks. Upon reflection, he realized that while he had thought about the victim's family for years, he had never known how to express his remorse to them. One of the attorneys suggested that he compose a letter to the victim's parents, even if he ultimately chose not to send it. The stay lasted several weeks, during which the client wrote and rewrote his letter, until it conveyed exactly what he needed to say. He and the attorney read the letter aloud and discussed it.

Later, during his last warrant, the client asked that the letter be delivered to the victim's family. The father of the slain man met with us. He read the letter silently and then spoke about his son. He showed us picture albums of his family, including his son at different stages of life. We spoke of the client's life and the person he had become. It was a poignant moment, and we could feel a change in the atmosphere that seemed like a step toward healing.

B. Inner Work: Looking Inward, Releasing the Self and Accepting Death.

> ***"In order to be at peace, it is necessary to feel a sense of history -- that you are both part of what has come before and what is yet to come. Being thus surrounded you are not alone; and the sense of urgency that pervades the present is put in perspective: Do not frivolously use the time that is yours to spend. Cherish it, that each day may bring new growth, insight and awareness."***
> ***-Elisabeth Kubler-Ross (1975, p. 167)***

If the external demands of warrant status -- isolation, loss of control, gaining closure on relationships and the self and other matters -- are not recognized and negotiated effectively, they can leach from the client the energy needed to complete the "inner work" of dying. Inner work refers to the process of fully accepting and then releasing one's personal identity. It involves introspection, rethinking values, and accepting those things that cannot be changed.

1. **Stages of Dying.** Defense team members and care providers can better assist the inner work of clients by understanding the mental and emotional processes of dying. Elisabeth Kubler-Ross, a European doctor of unusual perspicacity, has worked with dying patients for decades, and was one of the first to systematically describe the experience of dying. Her model of the five stages of dying is still considered a valuable conceptual framework for understanding the changes dying patients go through from the time they know death is imminent until death occurs.

The stages of dying -- denial, anger, bargaining, depression and acceptance -- do not necessarily progress in a linear fashion, nor does each last a specific length of time (Kubler-Ross, 1969). More important, each stage is shaped by the individual's personality, needs and perspective on life. The majority of clients go through most of these transitions, some of which occur rapidly, in a matter of days or even hours before death. An

appreciation of these stages is valuable when working with a client under warrant.

Denial: "No, not me" (Kubler-Ross, 1969). Denial is the inability to accept the fact, meaning or irreversibility of a loss (Dorpat, 1973). It is one of the most common reactions to tragedy and is a useful defense to the extent that it provides the psyche time to absorb the shock of a traumatic event. A client sentenced to death may live in a state of denial for years because life on death row is bearable only when there exists the belief that he will *not* die in an electric chair or on a gurney. The client may spend years becoming educated about legal issues, but fail to devote time to making meaning of his life and preparing for his death. Sometimes denial persists until very near the time of execution. For example, one client under warrant showed no interest in talking about his death or the loss of his relationships with his children. He wanted to tell jokes. As the execution date drew near, I became anxious and was on the brink of imposing on him my sense of urgency. I did not reveal this to him. Instead, I spoke with a counselor, who recommended patience. She suggested to me that if I remained calm and receptive, the client likely would be able to accomplish what he needed to. She was right. About five days before the execution, he lapsed into a deep conversation about death, fear, emotional needs and spiritual beliefs. Though I did little more than share my own thoughts, it appeared to be just what he needed, just when he needed it. He reported that he had been uncomfortable talking about religious beliefs because he had always been perceived as a tough guy, and that his experiences had made it difficult to have faith in anything. But now, for the first time, he felt a presence greater than himself. He looked for a ritual to symbolize this turning point and elected to be baptized. The ceremony seemed meaningful to him; it opened a door to an inner sanctum, allowing him access to a previously unknown part of himself.

Anger: "Why me?" Anger arises from years of past confusion, frustration and unresolved pain, or from the surprise and seeming injustice of a having a terminal condition. If it is not acknowledged and released, it can become a toxic emotion that leaves the person bitter and unyielding. However, people must let go of anger in their own time. Sometimes this happens suddenly, like the calm after a storm.

One client resolved tremendous anger in a matter of minutes, after having been extremely agitated throughout most of the warrant. Just hours before the execution, he continued to rail against the system. Though he had accepted responsibility for his role in the offense, he was indignant about the inequities of the process by which individuals come to be executed. However, any efforts to discuss death with him fell on deaf ears. Several team members were present during his last visit, during which he maintained a stoic veneer, recounting stories of his reckless past and extensive drug use. His mother -- an aged Welsh woman of uncommon dignity and strength -- sat before him on the other side of a glass partition listening quietly, but her emotional pain was evident. When the U.S. Supreme Court brought final closure to the appellate process the client exploded, and blamed his impending death on his attorneys' failure to file his *pro se* motion on time. He lashed out at almost everyone in the room and remained in this agitated state until he received a phone call from his 15-year old daughter, who wanted to say goodbye. Immediately upon hearing her voice, he changed. His anger dissipated and his frenetic behavior ceased. His sudden serenity continued throughout his last contact visit, during which he was very comforting to his mother and was able to talk about the pain that had for so long fueled his anger. He accepted his death and encouraged others to go on with their lives. The priest who witnessed the execution said that the client was calm when he left his cell, and that he died a "whole man."

Bargaining: "Yes me, but..." Bargaining involves making deals in exchange for longer time on earth. Initially, bargaining may take the guise of religious convictions: The client secretly promises God that he will live a better life if he is given a reprieve. These overtures may initially be hollow, but many times deepen. Religious convictions of any sort can buoy the client's spirits and provide him a context within which to understand the confusion in his life.

Depression: "Yes, me." Depression entails genuine sadness about the losses that death represents: one's identity, physical body, friends and loved ones, productivity, etc. Symptoms include lethargy, tears and withdrawal. Fully experiencing sadness brings about a catharsis that marks the beginning of the acceptance of death. Helping the client to find meaning in his life and

to have hope for the lives of his children or other loved ones may assist him in moving through this stage.

Acceptance: "My time is very close and it's all right." Acceptance of death may be sporadically observed in an individual from the point at which it is known that death is inevitable, but generally does not become a constant state until just before death (Callanan and Kelley, 1992). It is characterized by a realistic, dispassionate awareness of the outer environment, as well as heightened self-awareness . Acceptance carries with it a gentle detachment, a sensation of being in the world but not of it. It is a state sometimes referred to as "facing the other way," where the person has relinquished all worldly attachments and is ready for death. It comes much more easily to some than others, and is usually the fruit of having worked through a gambit of struggles and emotions.

One client was remarkable for the way he yielded to circumstances he could not control. He was calm and open, grateful for the gifts life had provided him and secure in the knowledge that he had reconciled his transgressions. During his last visit, he was asked if he had any fears he would like to address. He said no, that he could finally die with the knowledge that he was loved unconditionally, for it wasn't until he came to know his post-conviction legal team that he learned what it was like to have a family.

2. **Information.** Team members who work closely with the client may be asked for information about executions and/or death. For example, the client may want to know exactly what to expect the day of the execution, right down to the times and nature of each action. He may want to know what the execution room will look like, who will be there, whether anyone can remain in his cell prior to the execution, what clothes he will wear, who will escort him to the execution room, etc. He may have questions regarding the method of execution, such as electrocution, and whether he will experience pain. He may also ask about death and an afterlife. It is important to provide accurate and reliable information, and to tell clients when the answers are unknown. A frank discussion about the events to come demystifies the experience, which may reduce anxiety and allow the individual to remain more centered and focused.

Most clients seek information from those whom they believe have first-hand knowledge of death and dying or of spiritual matters. However, if it is sensed that these subjects make others feel embarrassed or uncomfortable, the client may curtail his inquiries. It is therefore important to welcome questions, even if the answers are not immediately known, for the willingness to respond to a client's needs is often as significant as providing substantive information.

3. **Last Visits.** Last visits are a time for completion and letting go, not only for the client but for those who care about him. Letting go can be very difficult, but failing to do so may hamper the course of the dying and grieving processes. To the extent possible, these last hours should be devoted to identifying and honoring the client's needs, including giving him "permission" to go. Sometimes it is necessary that others move their "selves" out of the way in order for the client to find his own way of dying. This requires insight, a quiet mind and the capacity for sensitive observation. Suspending one's own needs can be a very creative gesture, for nature abhors a vacuum and will replace emptiness with new meaning.

I learned this from a client whom I grew to respect and for whom I developed a great fondness. I met him just weeks before his scheduled execution (which was stayed twice), when I was asked by his attorneys to work on the mitigation investigation. We talked briefly and had very good rapport. He was a contemplative person, who possessed deep spiritual convictions and a passion for jazz. Legal issues held little interest for him; he was more concerned with better understanding his life and himself.

The mitigation investigation began slowly. I felt disorganized and confused about the purpose of my work; it didn't seem relevant to the status of the client's case. It did not occur to me until I arrived in the client's home town that my efforts ultimately would have less to do with legal issues than with the client's personal needs. He said he hadn't been home in more than thirty years and would like to know about some of the people with whom he had grown up. In the process of uncovering mitigation evidence, I located the retired high school principal, the coach and two close friends, all of whom remembered my client fondly. Their good will propelled my efforts. The ex-principal obtained immediate access to school records and old yearbooks. The coach

guided us through the school, including the gym where my client had played basketball, the shop where he had fashioned lamps from bowling pins, and the classrooms where he studied English and math. We took pictures of the client's childhood home. Each person provided an affidavit that featured different aspects of my client's life; each affidavit reflected a distinct way of knowing my client.

By the time the last stay was lifted, the mitigation work had been completed. I was then free to spend time with the client. Our conversation usually found its way back to spiritual beliefs and to music. As he spoke, it occurred to me that his love for music – the one way he could creatively express himself -- was the beginning of his spiritual journey. When I mentioned this, he immediately agreed and told me the story of how the two were linked. This seemed so important that I wondered if there was a way that he could listen to his favorite musicians one more time. A few inquiries brought surprising responses. Several people, including a disc jockey from a local jazz station, recorded tapes for my client. In addition, the day prior to the execution, I received a cassette tape from the coach and the principal who had assisted me in my investigation. I had learned from the principal that he was a jazz lover, too, who played saxophone (my client's instrument) in a band each Friday night. The attached note indicated that there was special message to my client at the end of the music.

During the last hour of the non-contact visit, I remembered the tapes and asked the client if he would like to listen to them (the attorney had received special permission to have a tape player during the last visit). We listened to the principal's special tape first. At the end of a fairly poor version of Spanish Eyes performed by the principal's band and dedicated to my client, he fought back tears as he heard the kind words of the principal and coach, whom he had not seen in 30 years. He then requested a favorite John Coltrane track, and, with eyes half closed, meditated to the music that had meant so much to him. Everyone remained silent. It seemed clear that our roles were to be witnesses to his final journey. Even the guards, a fairly inhospitable lot, seemed subdued by the significance of this experience.

5. **Witnessing Executions.** Choosing the appropriate person to witness an execution is often one of the most difficult topics the client and defense team members must address. It signifies the belief that the execution likely will occur, and further defines how the client's last moments on earth will be spent. Opinions about who should and should not witness executions vary. In some instances options are limited by prison restrictions. Typically, an attorney must be available to determine whether the client is competent to be executed. At the same time, the client may have a need for someone to whom he is very close to be present, and this may not be the attorney. The client may attempt to protect others -- especially the attorneys who have worked so hard to save his life -- from the pain of witnessing legal homicide and perhaps interpreting the execution as a professional failure. In instances such as these, the client may request that a specific person *not* be present. The client may also wish to have a clergy person or spiritual advisor sit cell-side and serve as witness to the execution. Members of the defense team may be called upon to find such a person and extend to him or her the client's request.

Attending a death – regardless of its nature – is as intimate a process as attending a birth or other significant developmental transition. Natural deaths generally trigger deep emotions, regardless of how much one has prepared for the event or welcomes the end of suffering. However, witnessing an execution -- even for those individuals who have no personal relationship with the client – gives rise to great angst because of the calculated, human design of the death, and the fact that one is helpless to prevent it. This experience may shake the foundation of one's cherished beliefs about human nature or the existence of a benevolent creator. Moreover, the grieving process following the loss of a client to an execution differs greatly from bereavement over a natural death, because there is no solace in the knowledge that death liberated the person from pain. Attending an execution may be seen as a natural extension of one's relationship with the client, or as a professional duty; but for whatever reason one makes this commitment, it should be undertaken only after much serious reflection, and when there are sufficient internal resources and external support to allow one to heal from the experience.

II. **Litigation.** Litigators are needed to identify and frame legal issues. The urgency of warrant status makes this job particularly difficult. These attorneys labor under the stress of attempting to find a legal issue of sufficient

merit to save the client's life. The long hours, intense concentration and analytic nature of this role make it difficult to shift focus to other needs, such as problems that the client's family may be experiencing.

Stress and fatigue are no friends to good decision making. They can limit one's perspective and diminish objectivity, especially in a matter of life and death, when it is difficult to sequester one's emotions. Sometimes the most important question does not concern the value of the goal, but whether the plan to achieve it will produce the intended results. If a strategy is useful, but will have negative consequences for other cases or for the agency, the question arises whether other means can be employed to achieve the same end. For these reasons, it is beneficial to rely on an objective adviser who can help the team evaluate legal strategies.

III. Media and Politics. Executions are political. They are big media events and there are many stakeholders in the process. It is difficult for litigators and client-family workers to effectively perform their roles and at the same time respond to political and media concerns; the demands are too great and too diverse. Public relations issues, including responding to the media, may be best handled by parties one step removed from the legal and emotional concerns of the case, though the decisions made by these individuals should be informed by the legal and client-family workers, as well as other team members. Political functions frequently fall to administrators, whose chief concerns include providing support for the client's cause while at the same time maintaining the stability and viability of the agency or institution, as well as protecting personnel from distracting intrusions.

IV. Case Management. Increasingly, case managers are being used to coordinate team efforts. A primary role of the case manager is to ensure effective team communication. Circumstances change rapidly under warrant conditions, and team members are often located in different cities. Time constraints make it difficult to disseminate information thoroughly and efficiently. Case managers streamline communication by relaying information back and forth among team members and reporting news as it unfolds. Other tasks performed by case managers include monitoring the overall functioning of the team and identifying and obtaining needed resources. Case managers also may organize professional debriefings and preside over team meetings following an execution, where the strengths and weaknesses of the work can be discussed for the benefit of future cases.

V. Support Staff. An integral part of the team is the support staff, who labor tirelessly typing, photocopying, doing collateral research, making phone calls, arranging travel and accommodations, and accomplishing numerous other last-minute tasks. They usually work long hours during a warrant and may not see their families for several days. Yet, these individuals are sometimes taken for granted, and other team members may not be aware of how deeply they can be affected by an execution. For, in making phone calls to the client's friends and family members and interacting with team members, investigators, and outside experts, they come to know the client without ever having met him, and may feel a great sense of loss following his execution.

Following one execution, several secretaries who had done extensive work on the client's case became very despondent. They commented that they had not believed the execution would be carried out because in the past the attorneys had been successful in obtaining stays of execution. They felt certain the attorneys would again find some legal issue that would forestall the execution. When this did not occur, some of their basic assumptions about fairness, safety and the sphere of the attorneys' control were eroded, which complicated their grief about the client's death.

Case managers and other team members can be very helpful to support staff by treating them as valued members of the team, keeping them apprised of the status of the warrant, and acknowledging their efforts. Additionally, support staff should be offered structured debriefings and access to counselors if the need arises.

Part Two: Helping Ourselves

I love my work, but lately I find it contaminating my personal life. I have nightmares about the horrible things I hear about from clients, my sex life has deteriorated, I'm irritable and distractible, I'm afraid for my

kids and tend to overprotect them, and I don't trust anybody anymore. I don't know what is happening to me." (In Courtois, 1993, p. 8)

Death penalty work is uniquely demanding. It places intense litigation against a backdrop of every form of human suffering and indignity. The strain is constant and there is little respite from the effects of such contentious conditions. Anyone who does this work is at risk of becoming a victim of its brutality.

There are many ways in which the stress associated with death penalty work may manifest itself. One of the greatest vulnerabilities is the disruption of professional and personal boundaries. The urgent nature of the work demands great resources of time and energy. It is easy to become consumed when an individual's life is at stake. However, failing to maintain healthy boundaries can distort one's view of the world, self and others. Loose boundaries imply an inability to discern where one person ends and another begins, which makes it impossible to distinguish one's own needs from the needs of others. Losing oneself to the clients served may cause feelings of excessive confusion, helplessness, defensiveness and even paranoia. An inability to define, or "hang on to," the self increases the risk of absorbing and reenacting the problems of the client and his family, colleagues, or the legal system. In extreme cases, it causes an inability to accurately identify one's "adversary." Divisions and fighting among team members are often symptoms of the secondary (or vicarious) trauma that can result from the painful nature of the work.

The extent to which one is diminished is not a good measure of the depth of concern one feels or the importance of the work. Individuals cannot use themselves up, give themselves away, live without boundaries and expect to maintain the quality of their lives and their work. Studies of vicarious traumatization (Yassen, 1996; Stamm, 1995; Figley, 1996) suggest that, in addition to disturbance of boundaries, individuals who work with impaired, abused and disenfranchised populations, absent counterbalancing influences, may suffer a number of other negative effects, including:

- decreased self esteem
- rigidity
- perfectionism
- self-doubt
- anger/rage
- guilt
- anxiety
- depression
- hypersensitivity
- impatience
- regression (use of primal defense mechanisms instead of higher level problemsolving strategies)
- use of negative coping mechanisms (smoking, drinking, drugs, gambling)
- alienation/anomie/inability to "fit in"
- isolation from friends and family; problems with intimacy
- tendency to criticize/mistrust of others
- impaired immune system

These symptoms are among the many potential costs of long-term stress. Most of the individuals who elect to work with capital defendants do so out of a desire to combat injustice, give voice to the oppressed, vindicate the falsely accused, and expose those who would take advantage of the weak. But idealism can take on a life of its own, riding roughshod over the essential personal and spiritual needs of the individual. The peculiar result of this combination of idealism and physical and emotional exhaustion is a distortion of one's frame of reference (Stamm, 1995); *i.e.*, how one perceives oneself in the context of the social environment. Cognitive and coping mechanisms are compromised, causing the afflicted individual to work harder, give more, further abnegate personal needs and see oneself as woefully lacking in commitment and discipline. A vicious cycle of "boom and bust" develops, in which the individual is completely drained, "hits the wall", rallies to fight again, is further depleted, and so on.

The abilities to care for oneself and others are not mutually exclusive. Indeed, an argument can be made that depleting oneself is ultimately detrimental to one's clients; conversely, good emotional and physical health enables one to offer more to others. Stable personal and professional boundaries are an important component of self care. Healthy boundaries are clear, yet adaptable (Whitfield, 1993). They naturally expand and contract in response to internal and external stress, and regulate one's energy supply. Individuals with a good sense of boundaries are aware of their own need for time, space and comfort, and can accept and communicate to others the limits of their personal resources.

Yassen (1996) emphasizes the importance of preventing trauma and burnout. Her ecological framework consists of personal, institutional and societal proaction; *i.e.* planning and implementing self-care strategies. These include:

Adequate sleep. Sleep deprivation and/or abrupt changes in sleep patterns can disturb circadian rhythms, causing reduced mental acuity, changes in metabolism, irritability and emotional volatility. People differ in the amount of sleep they require, but most individuals need consistent sleep patterns in order to function well. That is why companies pay special attention to shift workers and ensure that skilled professionals such as pilots have adequate time to regulate their sleep schedules between flights. It is well known that sleep problems affect productivity.

Diet. The brain runs on oxygen and the metabolites of sugar. Blood sugar irregularities -- especially precipitous drops in blood sugar levels -- can cause symptoms ranging from confusion and forgetfulness to severe headaches and quasi-psychosis. Diets high in processed foods, refined sugar, and fats offer calories but little else. It is difficult to eat well while traveling, but making good food a priority on a day-to-day basis fortifies the immune system and provides a better balance of essential nutrients.

Exercise. Exercise helps maintains muscle tone, improves metabolism, and produces endorphins that alleviate stress and provide a sense of well-being.

Skill development. Proaction involves good problem solving skills and the ability to regulate emotion. One common error is to confuse *thoughts* with *feelings*. We see this in the extreme in clients who cannot conceive of deciding *not* to act on an emotion. For such individuals, the two functions are inextricably entwined[3], precluding choice in responding to a situation. Psychologists have noted that individuals who have the ability to mediate (not deny) their own emotions with cognitive information are interpersonally more effective. These individuals are skilled at reading social cues, including the emotions of others, and can "self soothe" by treating themselves as their caretakers would treat them during a crisis. They are more likely to attribute the harsh actions of another to an external variable, rather than assume that they *caused* or deserved ill treatment (Goleman, 1995).

While genetics determine to some extent the amount of innate "emotional intelligence" (Goleman, 1995) with which we are born, our environment also has a significant influence on how we use what we have. More important, social and cognitive skills can be learned or enhanced, regardless of age. Understanding how to internally reduce stress, identify and improve communication styles, and garner support from family, colleagues and social groups, all help to prevent burnout.

Creative expression. Much of our professional work involves the left cerebral hemisphere or "left brain", which is concerned with linear, verbal, analytic processes. The "right brain" is nonverbal, absorbing but not necessarily making meaning of global experiences. Many artistic endeavors such as creative writing, painting, music, and dance, involve use of the right brain. Engaging in activities that utilize both sides of the brain allows us to expand our self image and self awareness, and prevents us from getting stuck in behavioral ruts. It has also been found that approaching problems from a different perspective generates novel solutions.

Body/Mind Awareness. When we are unable to identify and describe feelings, our body may become the vehicle of translation. Lack of awareness of sensations and feelings can lead to *somaticizing*, or the physical manifestation of emotional pains (Goleman, 1995). Individuals who encounter chronic frustration or emotional stress in their work (such as hearing stories of unparalleled abuse and neglect, or having efforts constantly thwarted by a system designed for failure) often experience vague physical complaints, including nervousness and irritability, headaches, recurring infections, digestive problems, and persistent fatigue. Anxiety and low-grade medical symptoms are often unconsciously self-medicated with alcohol and recreational drugs, which can have the paradoxical effect of increasing rather than relieving distress.

Researches have found that gaining better awareness of and control over physical manifestations of stress improves health. Flannery (1990), Borysenko (1988) Kabat-Zinn (1990), and Benson (1976) each found that medita-

tion, which involves directing one's attention inward, to breathing or to an external reference such as a candle is effective both in calming physiological agitation and in increasing one's control over physical reactions to stress. Other helpful practices include Tai Chi and hatha yoga.

Spiritual Schema. At a recent seminar on psychological trauma, Harvard professors reported that many clients considered their healing complete when they were able to view their trauma through a spiritual lens (March, 1997). In many cases, this did not involve any religious affiliation, but rather a broader context within which to understand human suffering. These clients realized that though they were powerless to prevent their abuse, they could now transcend and transform its devastating effects by increasing their knowledge, devoting time to sensitive self-care, and empowering others to do the same.

Mentors. Another dimension of personal support entails enlisting the assistance of mentors and guides; *i.e.* individuals who have greater experience with and/or more objectivity regarding the issues we face. Mentors can help in a variety of ways, including offering a fresh perspective on challenges that seem insurmountable, enhancing problem solving skills, and providing a means for discharging negative emotions or mediating emotions with a cognitive point of view. Mentors can also serve to identify personal and professional strengths and provide unconditional support.

Agency Support

Among the possible symptoms of secondary trauma are feelings of alienation and being misunderstood (Catherall, 1996). This may affect group dynamics, especially if the group projects onto the affected individuals fears of its own vulnerability to stress and then distances itself from these people. Personal awareness and self care are perhaps the best means of preventing the sense of alienation associated with secondary trauma. However, personal care is most effective when it is complemented by strong institutional support. Figley (1989) outlined agency characteristics that best promote prevention and healing of stress reactions:

- stressors are accepted as valid and serious
- problems are defined not only as personal but as institutional
- stress is viewed as inherent to the nature of the work and no one is considered as immune from its affects
- institutional policy includes an emphasis on prevention and solutions
- institutional culture places high value on support and cohesion
- communication is encouraged and is open and direct; needs are expressed without fear of retribution
- resources in the form of time, energy and money are devoted to preventing and recovering from the effects of work-related stress

Commitment to prevention and wellness can be addressed within the agency in informal ways, such as providing regular opportunities to meet as a group to talk about the stressors associated with working on a death warrant. A more structured means of preventing or mitigating traumatic stress is systematic debriefing. A number of debriefing models exist, one of the most well-known of which is Critical Incident Stress Debriefing (CISD), a technique developed by Jeffery Mitchell (1983) that has been refined over the past fourteen years. CISD is not psychotherapy and is not intended to be used in place of psychological counseling. Rather, it is a time-limited process based on the principles of crisis intervention and education. The process consists of a team of trained mental health professionals leading a discussion in which individuals respond to questions about the nature and impact of a critical incident (a significant turning point or trauma). Participants do not have to respond to specific questions. The process includes seven steps:

1. Introduction
2. Facts (what happened)
3. Thoughts about event (first thoughts)
4. Reactions to event (worst part of event)
5. Symptoms (discussion of any negative effects of stressor, *e.g.* helplessness)
6. Teaching (information about ways to prevent effects of trauma)
7. Re-entry (participants' questions are answered; summary comments made)

CISD is used routinely with many populations, including emergency service, public safety and law enforcement personnel. It also has been used successfully with nonemergency workers, such

as miners, office and factory workers, and teachers and school children. Debriefings and other trauma response interventions are now standard operating procedure in many organizations, including a number of fire departments, hospitals and for most disaster response teams (Mitchell and Eberly, 1993). The assistance of debriefing teams can be obtained from most mental health organizations free of cost or for a nominal fee.

Families

Few people ever know what is it like to work with a person who is perfectly healthy one minute and dead at the hands of the state at the next. This makes "death workers" different; it sets them aside. Families and friends may never be able to empathize fully with or understand the experiences of their loved ones who do death penalty work. Nevertheless, they can be an enormous source of support, *provided they are educated about the ways they can help.* No one is a mind reader. It is incumbent upon each individual to tell others what kind of help is needed. This may be as simple as informing family members that your schedule will be unpredictable for several weeks and that you will likely forget things and be generally unavailable. You may decide to mark off on the calendar those weeks that will be the roughest and then select a time when you will be "Dad" or "Mom" or "wife" again.[4] Be proactive. Learn to enlist the help of others. As a family, discuss the important events you will have to miss and learn who may serve as a surrogate.

Children almost always want to help. Let them. Decide together what they can do to help you out -- it may be washing the car, packing their own lunches, or simply reminding you of an appointment that you must keep. You may also need to talk to children about your work and your role in an execution. Children may suffer great cruelty at school if it is learned that their parent is involved in defending a death sentenced client, especially if the case is highly publicized. Talking with your children about why you do what you do and preparing them for the responses they may receive can help to avoid problems.

Friends want to be included, too. They may not know exactly what you are experiencing, but they can imagine how much pressure you are under. Allow people to use their strengths. Some of your friends are sources of invaluable emotional support; you can tell them anything and, though they may not understand completely, they listen while you try to find words for the images in your head. Other friends can help in more tangible ways, jumping into your home or office and making sense of the chaos, or assisting with child care.

One caveat: An execution is far outside the realm of usual human experience. It can cause distress not only for those who witness or know the client but the friends and relatives of the defense team as well. Finding a way to communicate with and include others in your experience is a learning process. You may find that when you are ready to talk, family and friends will not immediately know what to say and that you are met with an eery silence. However, people usually respond generously and sensitively once they know that talking helps rather then increases your discomfort. But, be careful in how much you tell others and how quickly. You will likely be traumatized to one degree or another if your client is executed, especially if you are a witness. A typical response is to immediately disgorge the horrors in an effort to find validation and relief. Yet, family and friends may not be the best people with whom to debrief. It is often better to rely on trained peer debriefers or professional counselors initially. Gaining perspective and integrating the meaning of an execution enables you to make better judgments about those to whom you should confide the details of your experiences and the best time frame within which to do this.

Summary

Like their clients, team members in the final stages of death penalty litigation have many internal and external tasks to complete. Internally, the team member must find effective ways to cope with emotions of guilt, grief, or loss; the strain and fatigue of working within such a highly charged environment for a prolonged period of time; and the myriad challenges that death penalty work can present to the integrity of one's personal and spiritual values. Externally, the team member must find a way to work effectively with other team members in sorting out legal issues, assisting the client's family members in their time of crisis, and attending to the client as he traverses the painful stages of his preparation for death, all while attempting to preserve a

semblance of normality in the realm of the personal. To undertake to do this without an understanding of the importance of self care, in addition to a knowledge base from which to draw in assisting the client as he prepares to die, poses a serious risk not only to one's personal well-being, but to one's professional efficacy as well.

Footnotes

[1]Because the vast majority of individuals on death row are men, the pronoun "he" will be used throughout this chapter.

[2]These are sometimes referred to as *transitional objects* -- items that provide comfort in the absence of the individuals and relationships they represent.

[3]Goleman, reminds us that the root of the word emotion is *motere*, the Latin verb "to move", suggesting that "the tendency to act is implicit in every emotion" (1995, p. 10). The emotional part of the brain developed first. It wasn't until later that the part of the brain called the neocortex, which allows us to make decisions about whether or not to act on emotions, evolved. Prolonged stress may have an adverse affect on higher cognitive functions, causing us to revert to more primitive responses.

[4]One attorney stated that his family still refers to his worst death penalty case as "the year Dad was crazy."

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Russian Attorneys Attend DPA's Death Penalty Trial Practice Persuasion Institute

Two Russian attorneys travelled to America to attend DPA's week-long intensive Death Penalty Trial Practice Persuasion Institute at Faubush, Kentucky.

Natalia Pereverzeva and Larissa Youzkevitch's translated relfections from their attendance follows:

1) **Why did you come to our Practice Institute?**

   In Russia, having a jury just started 4 years ago. Everything in a criminal trial is new. We came to America to study new ideas, receive American experience and study from this experience.

2) **What have you most learned here?**

   It's most important how to select a jury and how to become persuasive.

3) **What's most different with our criminal justice system compared to Russia's?**

   In Russian system you have stages of guilt. The judge decides punishment. It's not a jury decision. The jury's decision on guilt doesn't have to be unanimous, more than 50% is enough to decide. Client is in a locked cage with guard in the courtroom not at the table with lawyer. No one can talk to client unless jury is out of the room.

4. **What needs to be added to program?**

   We wish to have education on representing co-defendants. It is a big problem in Russia.

■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■

Left to Right: Larissa Youzkevitch and Natalia Pereverzeva

Shifting Paradigms at Faubush:
From the Legal to the Persuasive

The value of Ft. Knox pales in comparison to the value of the 28 coaches and 132 participants who came to the Kentucky Leadership Center October 12-17, 1997 for a week of creative thinking on how to tell the story of our capital client and learning how to make persuasive critical judgments for our capital clients.

There were 72 Kentucky full-time defenders and 11 Kentucky private attorneys, along with 47 attorneys from Arizona, Georgia, Tennessee, Louisiana, New York, Kansas, South Carolina, Indiana and 2 attorneys from Russia.

Of the 132 attorneys present, 44 brought their own, actual case to work on for the week. The others used an Institute case problem. **Steve Bright**, native of Danville and Director of the Southern Center for Human Rights in Atlanta, Georgia called the participants to present persuasive theories and themes for life throughout their capital cases. According to Bright, "an advocate's job is to *always* be persuading to everyone." He identified the most important decisionmaker in the capital process as us, "we can't sell what we don't believe." Teaching how to persuade he said, "resist the temptation to shoot at everything that moves, to challenge everything to the point of making jurors sick of us and rendering us with no credibility."

As he taught voir dire skills, **Bob Carran** of Covington, Kentucky observed that a persuasive "litigator has to have the legal and technical knowledge but in the courtroom, it's common sense and human emotion that win cases."

Steve Rench of Denver, Colorado, told us that we had to think like a juror, not like a lawyer. Everything we think about and do has to be powerful persuasion. Rench observed that winning litigators understand that people make a decision emotionally and then rationalize it. He taught us how to rid ourselves of legalese, abstractions, conclusions and generalities and replace them with sensory language, vivid word pictures that are specific, simple and short. One participant said Rench taught me that I should tell my client's story and **Madonna Magee** in the Communication's Lab showed me how to do that by visualizing images.

Alma Hall, Ph.D., Chair of the Communications Department at Georgetown College, helped the coaches understand that the week-long Institute was one of helping litigators learn how to make critical judgments. Those making high quality judgments look at the complex problems they face through multiple perspectives, such as the perspective of other litigators, the jurors, judge, public.

The helpfulness of the Institute was characterized by one of the participants, "This is the best legal education I have ever received. It should be a requirement for everyone coming out of law school. I found out that I was doing some good things and that made me feel good but I also learned a better way to do lots of the litigation. I wish I had this help 16 years ago."

The attorneys present continued on their journey to be paradigm pioneers, moving from the legal to the persuasive, telling their client's story.

1997 Death Penalty Trial Practice Persuasion Institute Coaches

Prosecutors Demonstrate Serious Lack of Condor and Good Faith

A unanimous opinion of the Kentucky Court of Appeals found that prosecutors knew that the county was liable for expert witness and investigator fees, knew previous caselaw required these payments and were disingenuous in failing to cite controlling precedent. The full unpublished opinion follows:

RENDERED: SEPTEMBER 12, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 93-CA-2314, 2978-MR

POWELL COUNTY FISCAL COURT, APPELLANT
COMMONWEALTH OF KENTUCKY

VS. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
INDICTMENT NO. 93-CR-001

RALPH STEPHEN BAZE, JR.; APPELLEES
DEPARTMENT OF PUBLIC ADVOCACY

OPINION AND ORDER DISMISSING APPEAL

BEFORE: JOHNSON, KNOPF, and MILLER, Judges.

KNOPF, JUDGE: The underlying facts of this action are not in dispute. On March 13, 1992, the Powell County grand jury returned an indictment against Ralph Stephen Baze for two (2) counts of murder, and for being a persistent felony offender in the first degree (PFO I). Baze was represented by two (2) attorneys employed by the Department of Public Advocacy (DPA). The Powell Circuit Court granted Baze's motion for a change of venue due to pre-trial publicity, and the action was transferred to Rowan Circuit Court. Baze's counsel made several motions requesting funding for investigative experts. Following an ex parte hearing, the trial court ordered the Powell County Fiscal Court to deposit the sum of ten thousand, five hundred dollars ($10,500.00) into a DPA account. The trial court further ordered the Powell Fiscal Court to deposit two thousand, eight hundred and forty dollars and twenty-eight cents ($2,840.28) into the DPA account to pay for another expert witness. The Powell Fiscal Court has appealed those orders. During the pendency of the appeal, this court granted leave for the Attorney General of Kentucky to intervene.

The DPA has moved to strike the appellants' brief and dismiss the appeal. In their joint brief filed with this court on January 16, 1996, the appellants fail to cite to *McCracken County Fiscal Court v. Graves*, Ky., 885 S.W.2d 307 (1994). The DPA argues that the appellants failure to cite controlling authority merits sanction pursuant to CR 11, 76.12(8)(a). and 73.02(2) and (4). We agree.

The Supreme Court of Kentucky conclusively rejected the appellants' argument in *Graves*. The Supreme Court held that "whether indigent defendants are represented by local public advocates (under a KRS 31.160 plan) or by state public advocates is irrelevant to a county's liability to pay for those expenses which a trial court considers to be reasonable and necessary. *Id.* at 312. The Supreme Court specifically reaffirmed the holding of *Perry County Fiscal Court v. Commonwealth*, Ky., 674 S.W.2d 954, (1984), providing:

> [T]he trial court may authorize the payment of fees for necessary expert witnesses by the county, not the Department of Public Advocacy, in all counties unless the circumstances are such that K.R.S. 31.200(3) would require otherwise. (Emphasis in original). *Id.* at 957.

We can find no justification for the appellants' failure to cite *Graves* in their joint brief. Our review of the record clearly shows that the appellants were aware of Graves, and its companion case, *Pillersdorf v. Department of Public Advocacy*, Ky., 890 S.W.2d 616, 618 (1994). The appellants cannot simply ignore a controlling precedent merely because it is disfavorable to them.

Therefore, we conclude that the failure of the appellants to cite *Graves* and *Pillersdorf* in their joint brief filed on January 19, 1996, demonstrates a serious lack of candor and good faith by the Powell County Attorney and by the Attorney General's office. This court must be able to expect the highest degree of candor and good faith from these public officers. Consequently, we find that the appellants' failure to cite to *Graves* in their joint brief merits dismissal of their appeal. Furthermore, having considered *Graves* and *Pillersdorf*, as well as the applicable statutes, we find that the issues raised by the appellants are wholly without merit.[1]

Accordingly, this appeal is dismissed.

ALL CONCUR. ENTERED: September 12, 1997
William L. Knopf, JUDGE, COURT OF APPEALS

Footnotes

[1]The Kentucky Supreme Court affirmed Baze's conviction and sentence of death in *Ralph Stevens Baze, Jr. v. Commonwealth of Kentucky*, Nos. 94-SC-127 and 94-SC-627 (Rendered March 27, 1997). The Supreme Court's opinion was designated "To Be Published", but is not yet final. The Supreme Court specifically found that the trial court did not commit reversible error in allowing defense counsel to proceed *ex parte* in requesting funds for experts.

BRIEF FOR APPELLANT: A.B. Chandler III, Attorney General of Kentucky; Sharon Kay Hilborn, Assistant Attorney General, Frankfort, Ky.; Jeffrey Stiles, Powell County Attorney, Stanton, Ky.

BRIEF AND ORAL ARGUMENT FOR APPELLEES: J. Vincent Aprile II, Assistant Public Advocate, Department of Public Advocacy, Frankfort, Ky.

ORAL ARGUMENT FOR APPELLANT: Kent T. Young, Assistant Attorney General, Frankfort, Ky.

Ethical Appellate Advocacy When Controlling Precedent Renders the Issue Meritless

It is incumbent on appellate counsel for any appellant to conduct the preliminary legal research to determine whether the anticipated appeal would be frivolous in view of established controlling law. "The signature of an attorney" on any pleading, motion or other paper, including a brief, "constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is," *inter alia*, "**warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.**" Kentucky Rule of Civil Procedure, hereinafter CR 11; (emphasis added). "CR 11 places a burden upon counsel to make a reasonable inquiry into the basis of an action, both legally and factually, and forbids the filing of an action for an improper purpose like delay or harassment." *Raley v. Raley*, 730 S.W.2d 531 (Ky.App. 1987).

Ethical principles dictate the same result. In Kentucky "[a] lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Ky. Rules of Professional Conduct, Rule 3.1, SCR 3.130. *See Leasor v. Redmon*, 734 S.W.2d 462, 464, 466 (Ky. 1987).

Thus, when counsel for an appellant wishes to raise as error a trial court ruling which was made in conformity with controlling precedent, *stare decisis* is a formidable obstacle to changing the collective mind of the appellate court.

Adherence to precedent is a pillar of this nation's judicial system. "Appellate courts should follow established precedents unless there is a compelling and urgent reason to depart therefrom which destroys or completely overshadows the policy or purpose established by the precedent." *Schilling v. Schoenle*, 782 S.W.2d 630, 633 (Ky. 1990). "Unless the need to change the law is compelling, ... stability of the law is of sufficient importance to require that [the Kentucky Supreme Court] not overturn a precedent which itself is based upon a reasonable premise." *Corbin Motor Lodge v. Combs*, 740 S.W.2d 944, 946 (Ky. 1987). These principles demonstrate the daunting task an appellant faces who challenges a controlling precedent and why it is essential to disclose the controlling adverse authority.

Where an appeal is frivolous under existing law, the only way the appeal will be nonfrivolous is if appellate counsel acknowledges the controlling adverse precedent and makes a good faith argument for reversing, extending or modifying that precedent.

An appellant's counsel may not defend his or her failure to disclose controlling adverse authority by suggesting that the brief was merely making a "good faith" argument to reverse existing law. Such an argument must be explicit, not implicit.

"An attorney must be clear in presenting his argument for what it is - if acceptance of the argument would require the extension, modification, or reversal of existing law, Rule 11 [of the Federal Rules of Civil Procedure] requires disclosure and precludes presentation of the argument as though it rested on existing law." *Pierce v. Commercial Warehouse*, 142 F.R.D. 687, 690 (M.D.Fla. 1992).

"There would be little point to [Federal Rule of Civil Procedure] 11 if it tolerated counsel making an argument for the extension of existing law disguised as one based on existing law." *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 127 (N.D. Cal. 1984). "The certification made by counsel signing the motion is not intended to leave the court guessing as to which argument is being made, let alone to permit counsel to lead the court to believe that an argument is supported by existing law when it is not." *Id.*

Appellate courts rightly expect that a litigator seeking relief on an appellate error would have revealed any adverse authority if it existed. Where no adverse authority is disclosed, appellate courts assume there is no controlling precedent which governs the assigned error.

Ethically, "[a] lawyer shall not knowingly ... make a false statement of ... law to a tribunal." Ky. Rules of Professional Conduct, Rule 3.3(a)(1), SCR 3.130. "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal." *Id.*, Rule 3.3, Comment (3). "A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities." *Id.* "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." *Id.*, Rule 3.3, Comment (2).

In this ethical context an appellate lawyer must disclose clearly adverse controlling legal authority. The omission of such adverse authority will distort the appellate process and require the appellee to spend much of the appellee brief just correcting the omissions and misrepresentations generated by the appellant's unprofessional description of the pertinent law involving the appeal.

"The theory behind the [ethical] rule [of disclosure of adverse legal authority] is that the purpose of litigation is to promote truth and justice. The lawyer is not required to advocate the controlling authority, and may argue it should be distinguished or its application to the present case abandoned, but it still must be acknowledged so that an informed decision can be made." Robert H. Aronson, *An Overview of the Law of Professional Responsibility*, 61 Wash. L. Rev. 823, 864 (1986).

An appellant obviously faces a difficult dilemma when, because of a controlling precedent in the Kentucky Supreme Court, an appeal in the Court of Appeals is clearly frivolous. Knowing this, an appellant must disclose this legal reality to the Court of Appeals and attempt to make a "good faith" argument for reversal of the controlling precedent. By approaching this appeal in the only ethical, professional manner, counsel for the appellant would have to admit that: (1) the trial court's rulings below are correct under existing law; and (2) the Court of Appeals has no jurisdiction to reverse these controlling precedents. Such a "confession" would easily raise the "red flag" that the appeal is on its face frivolous.

Obviously, published decisions of the Kentucky Supreme Court are controlling precedents in the Kentucky Court of Appeals. The Court of Appeals "is compelled to follow precedent established by the decisions of the [Kentucky] Supreme Court." *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). The Court of Appeals "is bound by and shall follow applicable precedents established in the opinions of the [Kentucky] Supreme Court." SCR 1.030(8)(a). The Court of Appeals has "no authority to change or disregard the [Kentucky] Supreme Court's precedent." *Commonwealth v. Basnight*, 770 S.W.2d 231, 238 (Ky.App. 1989).

Where an appeal in the Kentucky Court of Appeals is clearly controlled by precedents of the Kentucky Supreme Court, the Court of Appeals' appellate function is circumscribed. This does not mean, however, that the opinion of the Court of Appeals is unimportant in the advocate's efforts to overturn a controlling precedent of Kentucky's high court.

"[I]t is not [the] function" of the Court of Appeals "to establish new rules of law or enunciate changes in Kentucky jurisprudence." *Tucker v. Tri-State Lawn & Garden, Inc.*, 708 S.W.2d 116, 118 (Ky.App. 1986). The Court of Appeals, "though required to follow precedent established by a

higher court, can set forth the reasons why, in its judgment, the established precedent should be overruled but cannot, on its own, overrule the established precedent set by a higher court." *Special Fund v. Francis, supra* at 642; *Tucker, supra* at 118.

Appellate counsel challenging a Kentucky Supreme Court precedent in an appeal as of right in the Kentucky Court of Appeals should not assume that the only effective strategy is to bypass the intermediate appellate court, by seeking to transfer the appeal to the Kentucky high court. CR 74.02(1). Indeed, a favorable opinion from the Court of Appeals, albeit resignedly affirming the trial court below, may be the most persuasive factor in obtaining discretionary review by the Kentucky Supreme Court. CR 76.20(1).

An appellate litigator should decide carefully whether to challenge a controlling precedent, but, once the decision is made to seek to change the law, the brief should openly and candidly explain both the status of the law and the need for its reformation.

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.02 for Under 21 Rules Unconstitutional

Daviess District Judge Gene Lanham ruled on February 18, 1997 on a motion of criminal defense attorney Henry Hayden that the law that prohibits anyone younger than 21 from driving with a blood alcohol level of .02 or higher unconstitutional. Daviess Circuit Judge Garland Howard upheld that ruling in a July 15, 1997 Opinion. The Circuit Court Opinion follows, as well as a sample motion, supplied by Henry Watson of Cynthiana.

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COMMONWEALTH OF KENTUCKY
DAVIESS COUNTY CIRCUIT COURT
DIVISION NO. I

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. 97-XX-00003

MYRON E. HOWARD DEFENDANT

OPINION AND JUDGMENT

This case is before the court on appeal from the Daviess County District Court, Division No. I. The Appellant, the Commonwealth of Kentucky, seeks this appeal from a ruling by the lower court that KRS 189A.010(1)(e) is unconstitutional. KRS 189A.010(1)(e) states:

> "A person shall not operate or be in physical control of a motor vehicle anywhere in this state...while the al-cohol concentration in his blood or breath is 0.02 or more based on the definition of alcohol concentration in KRS 189A.005 if the person is under the age of twenty-one."

This statute provides a different standard for persons under 21 in which a 0.02 alcohol level is considered evidence of being under the influence and those 21 years and over which require a 0.10 alcohol level before being guilty per se.

The Appellee, Myron E. Howard, 18 at the time, was tested by a state trooper with an intoxilyzer and showed a 0.032% blood alcohol level and was thus charged with a violation of the statute. Mr. Howard challenged the constitutionality of the statute on the basis that it created a suspect class for those adults above 18 of which he was a member, thus violating his right to equal protection under the laws.

The District Judge was convinced that the statute created a suspect class based solely on age without any other rational basis and thus could not uphold the statute even if the interest, zero tolerance for underage drinkers, it sought to protect was noble. The decision was based primarily on the opinions written by the Court of Appeals in *Praete v. Commonwealth* (Ky.App. 1987) 722 S.W.2d 602 and more recently by the Kentucky Supreme Court in *Commonwealth v. Raines* (Ky. 1993) 847 S.W.2d 724.

In *Praete, supra,* the Court examined a statute which provided for harsher penalties for drivers under the age of 18 convicted of driving under the influence than for those over that age. The court decided that this statutory provision did not violate equal protection and was thus considered constitutional.

The Court used the "rational basis test" to determine that the statute was rationally related to a legitimate state interest and adopted Fayette County Circuit Judge Angelucci's opinion in deciding that it was a proper interest. Judge Angelucci and the court took great care in distinguishing minors under the age of 18, who still require close supervision, from individuals who are 18 to 21, who are adults for almost all purposes except purchasing alcohol. The court further stated that,

> "[t]he Legislature may properly decide that members of the general public are entitled to greater protection from those *minors* who have demonstrated a lack of maturity in both the consumption of alcohol and the operation of motor vehicles upon the highways of the state." (emphasis added) *Id.*

The Court of Appeals concluded that a clear distinction existed between the two age groups. The language indicates that the General Assembly can create laws which provide for stricter and harsher standards for *minors* (those under 18). The Court does not, however, apply the same standard to those adults from the age of 18 to 21. The Court had an opportunity to include this class of 18 to 21 year old in *Praete, supra,* but refused. The Court found it easier to sustain the statute since it applied equally to all persons who have not yet reached the age of majority. *Id.* In this case, though, that controversial age group of 18 to 21 year old is included and thus the statute does not apply equally to all persons who have reached the age of maturity. But even if it does not apply equally to all persons who have reached the age of majority, the statute still applies equally to all drivers who have not yet reached the legal age required to purchase alcohol *Commonwealth v. Raines, supra,* however rejects that logic as a means for the classification of a group.

Commonwealth v. Raines, supra, is the other case heavily relied upon in the District Judge's decision. In this case the Supreme Court held a statutory provision which mandated the pretrial suspension of a person's operator's license, when the driver accused of driving under the influence was under the age of 21, *to be a violation of the equal protection clause* and thus in contradiction with the Fourteenth Amendment and Section 59 of the Kentucky Constitution. This case was distinguished from *Praete* because the statutory provision in question did include the age group of 18-21. The court looked at the statute and declared, "Such a classification based on this age is manifestly unreasonable and arbitrary. Therefore it violates both state and federal equal protection clauses." *Id.*, 727.

The portion of the statute that the Court is dealing with in that part of the decision is similar with the challenged section of the new DUI statute. The punishment for violating 189A.010(1)(e) is a suspension of the operator's license and a fine, KRS 189A.010(5), similar to the penalties dealt with in Raines. This is a penalty that other adults, 21 years or older, with the exact same alcohol concentration will not have imposed on them. Other adults with this level are not even considered under the influence. The court in Raines refused to accept the constitutionality of the classification of a group based solely on the age of twenty-one when other adults were not held to this same standard. If this reasoning prevails then the court could rationally declare the subject statute unconstitutional.

There is one line of thought though that the courts and previous decisions do not adequately address. The age of twenty-one, when dealing with alcohol consumption or possession, is not an arbitrary number. This is the legal drinking age within the state of Kentucky and has not been challenged as arbitrary for that purpose. For this statute to declare that anyone under twenty-one who possesses a 0.02 alcohol level, either breath or blood, is in violation of the law is really not new. "Zero tolerance" could be inferred from the laws already on the books that have not been declared unconstitutional. Since it is already illegal for this group to purchase alcohol, KRS 2.015, and it is also illegal for this group to possess alcohol, KRS 244.085(3), it only follows then that it should probably be illegal for a member of this group to register any established alcohol level while driving.

The difference here, though, is that this is not just a rehashing of the old concept of curbing underage drinking. This statute has created a new offense beyond merely punishing minors for purchasing or possessing alcohol. KRS 189A.010(1)(e) creates a violation for operating a motor vehicle with a 0.02 alcohol level if you are under twenty-one. The fact that the Defendant can be found guilty of a per se violation of operating a motor vehicle for a 0.02 alcohol level is not in accordance with the rest of the laws. KRS 189A.0010(2)(a) says:

> "If there was an alcohol concentration of less than 0.05...it shall be presumed that the defendant was not under the influence of alcohol." (emphasis added)

This presumption should apply equally to all. The defendant's alcohol concentration was 0.032%. He is therefore entitled to the presumption that he was not under the influence of alcohol were it not for the questioned statutory provision. The punishment for this per se violation is less than the punishment for

the higher alcohol concentration set out for those over 21, but it still follows that they would not even be guilty of a violation if they were in the class with all other adults.

The general intent of 189A.010 appears to be to protect the public from drunk drivers. Subsection 1(e) and its related sections do not seem rationally related to this goal. Subsection 4(e) even states that a violation of 1(e) shall not be used for the purposes of proof of prior DUI convictions. In other words except for the immediate punishment set forth, the Commonwealth does not consider this offense to be equated with a DUI.

Everyone involved admits that the goal of establishing zero tolerance for underage drinking and driving is a noble goal. There are already laws, though which create the crime and punishment for the possession of alcohol by this underage group, the Commonwealth does not appear to accomplish much more with this new law. They are basically creating a new offense, which imposes penalties in addition to the punishment already received when violating the possession restriction and which are not related to whether the driving of the accused has been impaired. The General Assembly makes an arbitrary classification of a group and then puts what appears to be an even more arbitrary standard on that group. Judge Lanham's District Court opinion is persuasive in that it makes little sense to classify. A drunk driver is a drunk driver regardless of his or her age. Such persons pose the same dangers and risks and thus should be treated the same. If the General Assembly deems it is dangerous for people to drive with a 0.02 alcohol level then that is what it should be for all.

CONCLUSION

The lesson of both *Raines* and *Praete* is that the classification of this age group for these purposes is a "manifestly unreasonable and arbitrary" assignment. Therefore the trend and supported case law is that the statute is not rationally related to its goal of making the roadways safer. It is a very noble goal to try and stop underage drinkers from driving and one which is not without merit. It is still hard to reconcile this goal with the precedent in Raines, which this court feels bound to follow. This results in a finding that the statute creates a suspect class based upon age for those individuals over the age of 18. For the foregoing reasons this court finds KRS 189A.101(1)(e) is in violation of the equal protection clauses of both the United States and Kentucky Constitutions, and therefore the decision of the Daviess District Court is affirmed.

This the 15th day of July, 1997

Garland W. Howard, Judge, Daviess Circuit Court
Division No. I
COPIES TO: Counsel of Record

The following motion of Henry Watson was filed in Harrison County.

• • • • • • • • • • • •

COMMONWEALTH OF KENTUCKY
COURT OF JUSTICE
HARRISON DISTRICT COURT
TRAFFIC DIVISION
96-T-1501

COMMONWEALTH OF KENTUCKY PLAINTIFF

MEMORANDUM FOR DEFENDANT

GINNY L. HUFFMAN DEFENDANT

* * * * *

Comes now Ginny L. Huffman, by counsel, and for her Memorandum In Support of her Motion To Declare Unconstitutional KRS 189A.101(1)(e),(5), and (6), and so much of KRS 89A.120 as applies to persons under the age of twenty-one (21) years, states as follows:

FACTS

Defendant agrees with the statement of facts set forth by the Commonwealth in its Memorandum, with the additional fact of the age of Ginny L. Huffman being nineteen (19) years at her arrest.

ISSUE

This matter is before the Court on the sole issue of whether establishment of a per-se guilty level of blood alcohol in one operating a motor vehicle on a highway of the Commonwealth can be, for those adult drivers between the age of eighteen (18) and twenty-one (21), one-fifth (1/5) the level of those drives twenty-one (21) years of age and older? Additionally, whether penalty provisions established by the General Assembly pursuant to the differential *per se* guilty level set forth above are constitutional?

Defendant respectfully submits that while it is within the scope of constitutional authority for the General Assembly of the Commonwealth to establish different standards for juveniles, *i.e.*, children who have not yet attained the age of majority of eighteen (18) years as set forth in KRS 2.015, it is constitutionally impermissible, under both the United States and Kentucky Constitutions, respectively, to establish a *per se* guilty level of blood alcohol in adults less than twenty-one (21) years of age, especially where there is such disparate degree of blood alcohol level permitted for much younger adults, given the presumption of intoxication provisions of KRS 189A(2)(a) and (b).

ARGUMENT

The Kentucky Supreme Court has recently visited this issue, although under slightly different circumstances, in holding unconstitutional a statute which required a mandatory DUI pre-trial suspension of a driver's license for an adult between the ages of eighteen (18) and twenty-one (21) in the Commonwealth, finding same failed constitutional muster under both the 14th Amendment to the United States Constitution, and Section 59 of the Constitution of the Commonwealth of Kentucky. The case of *Commonwealth v. Raines*, Ky., 847 S.W. 2d 724 (1993), is controlling. The U.S. Supreme Court case which supports this holding is *Matthews v. Eldridge*, 424 U.S. 319, 996 S.Ct. 893, 47 L.Ed.2d 18 (1976).

In the *Raines, supra*, case, in discussing the DUI pre-trial suspension statute, the Court held as follows:

> Initially, review of this statute requires that a heightened attention be directed upon KRS 189A.200 (1)(b). This section mandates a pre-trial suspension of an operator's license when the accused individual is under the age of twenty-one (21). No rational argument is shown to exist for this classification. Such a classification, based on this age, is manifestly unreasonable and arbitrary. Therefore it violates both State and Federal Equal Protection Guarantees. *Withers v. Board of Drainage Commissioner of Webster County*, 270 Ky. 732, 110 S.W. 2d 664 (1937). *Praete v. Commonwealth*, Ky App., 722 S.W, 2d 602 (1987) is clearly distinguished. We hold KRS 189A.200(1)(b) as violative of the Fourteenth Amendment of the United States Constitution and Section 59 of the Kentucky Constitution. This statutory provision is an arbitrary classification based upon this age and is manifestly unreasonable. At page 726.

The Court of Appeals in the case of *Praete v. Commonwealth, supra*, upheld a statute which revoked the driver's license for driving under the influence, and which also provided potentially harsher penalties for drivers under age eighteen (18), as not being violative of equal protection, not being special legislation, and not being violative as cruel and unusual punishment. There has long been a distinction in State and Federal law for treating those who have not yet attained the age of majority, *i.e.*, whether designated as infants, children, or juveniles, differently from those who have attained the age of majority. In upholding this statute the Court of Appeals adopted the opinion of Judge Angelucci of the Fayette Circuit Court, as follows:

> The Opinion of Judge Angelucci of the Fayette Circuit Court points out as well as could we why the statute does not fail the "rational basis test." That Opinion held as follows:
>
> While it is true that individuals between the ages of eighteen (18) and twenty-one (21) cannot legally purchase alcoholic beverages in Kentucky, under KRS 2.015 they are deemed to be adults for all other purposes unless they are handicapped. Those between the ages of sixteen (16) and eighteen (18), on the other hand, are still deemed to be minors and the legislature may reasonably regard them of the class requiring closer supervision than those over the age of eighteen (18). More importantly, the legislature may properly decide that members of the general public are entitled a greater protection from those minors who have demonstrated a lack of maturity in both the consumption of alcohol and the operation of a motor vehicle upon the highways of the state. At page 603.

The statute upheld in *Praete, supra*, applied a different standard to juveniles than adults; the statute struck down in *Raines, supra* attempted to apply a different standard to adults between the age of eighteen (18) and twenty-one (21), and those over twenty-one (21). The distinction was so obvious to the Kentucky Supreme Court in *Raines, supra* that no explanation was even provided in the Opinion.

Given the presumption found in KRS 189A.012 (2)(a) that a Defendant with a blood alcohol level of less than 0.05 is "presumed not under the influence of alcohol", the legislation challenged herein actually makes conduct that would be perfectly lawful for a person age twenty-one (21) years, a per-se guilty crime for a person twenty years and three hundred and sixty four days of age. Such a classification meets the classic test of arbitrariness, and should not be upheld by the Court of Justice.

In brief response to a matter raised by the Commonwealth in its Memorandum, while it may be true that the procedure set forth in the statute in question is not violative of procedural due process, what is constitutionally infirm is the substantive due process aspects of the law. As the statute, on its face, establishes a per se guilty level of blood alcohol one fifth (1/5) of that established for other adults, and totally removes the

presumption provisions of the statute relating to blood alcohol levels of less than 0.10, it is respectfully submitted that the statute does demonstrate proof of hostility and oppressiveness toward a particular class of individuals, adults less than twenty-one (21).

CONCLUSION

Based on the foregoing, it is respectfully submitted that as the statute in question makes an arbitrary differentiation in the *per se* guilty arena, based on age of, albeit, younger adults, who have attained the age of majority as set forth in the general statutes of the Commonwealth, such classification is arbitrary, violative of Section 2 and Section 59 of the Constitution of the Commonwealth of Kentucky, and also lacks equal protection of the law as required by the Fourteenth Amendment of the United States Constitution.

Accordingly, Defendant respectfully urges this Court to declare this statute and, its appurtenant penalty provisions, unconstitutional, to dismiss the charges set forth in this matter relating to driving under the influence, and to allow withdrawal of Defendant's conditional guilty plea thereon.

Respectfully submitted,

Henry Watson, III
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Cynthiana, Ky. 41031
Phone: 606-234-1190
Fax: 606-234-0541

Counsel for Defendant: Ginny L. Huffman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum for Defendant was served upon the Commonwealth by hand delivery of a copy of same to C. William Kuster, Jr., Esq., Assistant Harrison County Attorney, 39 South Main Street, P.O. Box 247, Cynthiana, Kentucky 41031-0247, on this the 13th day of March, 1997.

Ask Corrections:
The VINE® Notification System Saves Lives

On December 6, 1993, her 21st birthday, Mary Byron was shot seven times and killed as she left work in Louisville, Kentucky. Mary's murderer was her former boyfriend, Donavon Harris, the man who had raped her less a month before and whom she believed to be in jail.

At the time of Harris' arrest, police had promised to notify Mary of his release. However, the police did not know that Harris had posted bail on December 1. This breakdown in communications allowed Harris time to purchase a handgun and to plan Mary's murder.

Despite their grief over Mary's death, her parents, John and Patricia Byron, decided to work to change the system. Through their efforts, officials in Louisville and Jefferson County implemented a computerized notification system that contacts victims by telephone when an inmate is about to be released from jail.

After the Jefferson County system was implemented, state officials in Kentucky began examining the notification process for the release of inmates from state prisons. The Kentucky Department of Corrections and the state Parole Board were instrumental in the implementation of the statewide victim notification system with funding from a grant awarded through the Kentucky Justice Cabinet by the U.S. Department of Justice. In February of 1996, the state of Kentucky introduced the first automated statewide victim notification system in the country. The system operated 24 hours a day, seven days a week.

The Kentucky Victim Information and Notification Everyday (VINE®) system is designed to provide notice to a registered party at least 72 hours prior to an inmate's release. A person may register for notification by calling a toll-free number. The Kentucky VINE® system allows each caller to register two telephone numbers. Each caller must leave a four-digit personal identification number (PIN). In the event of escape, parole, changes in release date due to time credits or court-ordered release, the system begins calling as soon as information concerning the immediate release is entered into the computer.

The computer calls a registered person every hour for the first eight hours, every four hours

for the next 24 hours, and every six hours for the following 24 hours or until the individual accepts the release information. The PIN allows the individual to stop the system from continuing to call after notification has been received.

The system not only notifies registered persons of an inmate's release or escape, it also provides information about parole eligibility, status, location and sentence expiration. An individual may access information about an inmate from a touch-tone phone by entering the inmate's institutional number or name using the key pad.

During the first 24 hours after it went on-line, the Kentucky VINE® received 2,870 calls. during the first six months, more than 966 people registered with the system to be notified upon the release of certain inmates, and approximately 100 people were notified. Between February and August, the system received 29,714 calls. The costs for the design and first year of operation of the system total $46,000.

The success of the Jefferson County and Kentucky victim notification systems prompted the Kentucky State Legislature to pass an act requiring the Kentucky Department of Corrections to develop a statewide system that will allow the public to register for notification of an inmate's release from any of the 87 jails in the state of Kentucky. The statewide jail system also provides notification upon the release of certain juvenile felons from county jails. This new system, which is modeled after the Jefferson County and Department of Corrections systems, is scheduled to be fully operational by January 1998. All jails were connected to VINE® on-line on July 18, 1997.

Jefferson County provided $100,000 in seed money for the Jail VINE® system. the cost for the design, implementation and first eight months of operation of the Jail VINE® is $337,000. Monthly operating costs after the first eight months will be $32,000. The state of Kentucky was able to obtain the remaining funds for the project through a U.S. Department of Justice grant. The jail system is being provided as a service to the citizens of the state of Kentucky through a cooperative effort of the Kentucky Department of Corrections, the Kentucky Jailers Association, the Office of the Kentucky Attorney General, the Commonwealth Attorneys of Kentucky, victim advocate groups and various law enforcement agencies.

An individual seeking information on a county jail inmate will be able to access information in the same manner as the state VINE® system. The Jail VINE® will then provide the inmate's location. If the system cannot identify the offender, the caller will then be instructed to call the local law enforcement agency or the arresting agency for additional information.

The Jail VINE® automatically collects information on offenders who are placed in jails with automated booking systems. Jails in Kentucky that do not currently have an automated booking system have been provided with a computer and software that allows them to perform a basic booking operation.

With the implementation of the Jail VINE® system, crime victims in Kentucky can rest easier knowing that, with the use of a telephone, they can track the movement of a perpetrator through the Kentucky penal system, and the state of Kentucky is one step closer to preventing a tragedy, like the murder of Mary Byron, from happening again.

For further information please call Louis Smith at Tel: (502) 564-4360 or Karen DeFew Cronen at Tel: (502) 564-2433.

Karen DeFew Cronen, Offender Records Branch Manager, and Louis Smith, Planning and Evaluation Branch Manager, oversee the VINE® projects for the Department of Corrections.

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Public Advocacy Seeks Nominations

An Awards Search Committee will recommend two recipients to the Public Advocate for each of the following 3 awards for the Public Advocate to make the final selection. Contact Tina Meadows at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006; Fax: (502) 564-7890; E-mail: tmeadows@dpa.state.ky.us for a nomination form. All nominations are required to be submitted on this form by March 1, 1998.

GIDEON AWARD: TRUMPETING COUNSEL FOR KENTUCKY'S POOR

In celebration of the 30th Anniversary of the U.S. Supreme Court's landmark decision in ***Gideon v. Wainwright***, 372 U.S. 335 (1963), DPA 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.

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

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

1995 *Gideon* Award Recipient
- **Larry H. Marshall**, DPA Appeals Branch

1996 *Gideon* Award Recipient
- **Jim Cox**, DPA's Somerset Office Director

1997 *Gideon* Award Recipient
- **Allison Connelly**, U.K. Clinical Professor of Law

Rosa Parks Award for Advocacy for the Poor: Non-Attorney

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Conference and the Annual Professional Support Staff 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."

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

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

1997 *Rosa Parks* Award Recipient
- **Bill Curtis**, Research Analyst, Law Operations

Nelson Mandela Lifetime Defense Counsel Achievement Award: Systemwide Leadership

Established in 1997 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. The attorney should have at least two decades of efforts in this regard. The Award is presented at the Annual Public Defender Conference. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."

1997 *Nelson Mandella Lifetime Achievement* Recipient
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Ed Monahan, Deputy Public Advocate, Frankfort, Ky., Chair of the Awards Committee

Kentucky Defenders Represent Over 100,000 Clients: Reliability of Results Threatened Due to Inadequate Funding

(Frankfort, Ky., October 21, 1997) Ernie Lewis, Public Advocate, has asked the Criminal Justice Response Team to endorse adequate funding for Kentucky's public defender program. Several sub-committees of the Criminal Justice Response Team, which is considering changes in Kentucky's criminal justice system, are evaluating funding concerns including funding of Kentucky's indigent defense system. Lewis' goal is to have 85% of indigent cases to be covered by full-1time defenders. More funds are especially needed to adequately represent juveniles. Preliminary caseload figures released today by DPA indicate a steady increase in numbers and complexity of public defender cases, while the funding per case continues to fall short of what is necessary to get the job done right.

101,849 trial and post-trial level cases for FY 97 (July 1, 1996 - June 30, 1997) present persistent workload pressures on defenders across Kentucky. More and more defenders face demanding, complex and difficult cases involving sex abuse, DUI, and capital allegations. Combined with the volume of cases a defender must handle at the trial level, anywhere from 200-820 clients, this presents many instances where defenders are unable to provide competent representation.

Funding: $163 per case; $4.59 per capita. Kentucky's 101,849 clients in all courts are being represented for an average of $163.25 per case. This funding is $4.59 per capita per year. Average trial caseloads go as high as 498 cases in Paducah, 476 in Somerset and 820 in Louisville. These are more clients than one attorney can effectively handle in a year. The average funding for trial level cases is but $131.

Comparison of Resources: DPA receives only 2.79% of the criminal justice money, down from 2.9% one year ago. Prosecutors receive over 3 times that of public defenders at 8.82%.

Kentucky trial funding lowest in nation. Robert Spangenberg, President of *The Spangenberg Group*, West Newton, Massachusetts, (617) 969-3820, has compiled 50-state national data on the expenditure and caseload for indigent defense since 1982. According to Spangenberg, the most recent data available in FY 97, places Kentucky at or near the bottom in both per capita funding and cost per case. He further states that Kentucky's ranking has continued to fall to a level lower than reported in the first national data published in 1982. At $131 per trial level case, it is now last in this category.

Defendants are paying for part of their representation to the extent their financial limitations allow. In FY 97, defendants paid $2,672,627 through: a $40 administrative fee, a $50 DUI fee, and recoupment, an increase of $120,000 over last year's amount. Clients now fund 16% of Kentucky's indigent criminal defense system.

Workloads Require More Resources if We Want Reliable Results. Reflecting on the state of indigent defense as indicated by defender caseloads in Kentucky, Public Advocate **Ernie Lewis** stated, "As Kentuckians we are not satisfied with being last in providing indigent defense services. We must ensure that verdicts in criminal cases are fair and reliable. This can only be done with a significant increase in funding."

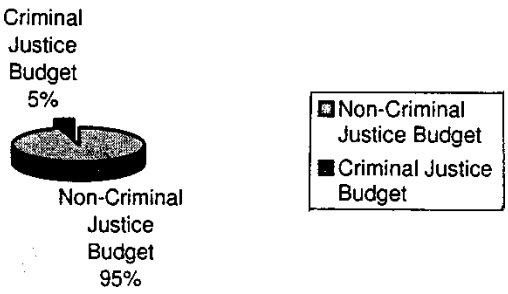
PRELIMINARY TOTAL FIGURES

Population	3,624,606
DPA Dollars	$12,019,041.95
Local Dollars	$ 1,447,249.72
Recoupment Dollars	$ 902,635.76
Other Dollars	$ 2,258,400.00
Total Dollars	$16,627,327.43
Reported Cases	101,849
Average Case Funding	$163.25
Funding per Capita	$4.59

FY 1998 Criminal Justice Budget as a % of Total State Appropriated Budget = 4.65%

Kentucky's criminal justice funding is a modest 4.65% of the total state appropriated dollars:

	Percent	Dollars
Non-Criminal Justice Budget	93.35%	$12,544,290,800
Criminal Justice Budget	4.65%	$ 611,445,300
Total State Budget	100.00%	$13,155,736,100



Funding for Kentucky Prosecutors vs. Kentucky Defenders

Funding Inequity. Within this modest overall criminal justice funding, both prosecutors and defenders are underfunded. However, Kentucky's statewide prosecutorial services are being funded at a substantially higher level than Kentucky's public defender services. Even though prosecutors handle more cases than defenders, the disparity is substantial. Funds allocated for 1997-1998 are:

- Public Advocacy . . . . . $17 million
- Attorney General and Commonwealth Attorneys and County Attorneys . . . . . $53 million

This disparity, which is over 3-1, substantially inhibits the efficiency and effectiveness of public defender services statewide.

Criminal Justice Funding

Not only does DPA pale in comparison to its prosecutorial counterpart, it also is receiving less than its fair share of the criminal justice dollar.

Kentucky invests over 611 million dollars annually in the criminal justice system. At only 2.79% in 1997/1998 of the overall criminal justice funding, DPA is disabled from effectively playing its significant role of ensuring fairness and reliability in the criminal justice process. A review of the figures for Kentucky's criminal justice agencies shows the plight of defenders.

FY 1998 Criminal Justice Budgets, Total Funds, Dollars Figures by Agency are:

Agency	% Total	Total Funds
Corrections	43.12%	$263,656,200
Judiciary	21.48%	131,355,400
State Police	18.00%	110,073,400
Prosecution	8.82%	53,899,000
Justice Admin.	5.79%	35,383,800
DPA	2.79%	17,077,500
Total	100.00%	$611,445,300

Prosecutors Receive $2 Million to Convert to Full-Time

Pursuant to the passage of enabling legislation, 1996 House Bill 160, $1,440,400 in fiscal year 1996-97 and $2,091,300 in fiscal year 1997-98 from the General Fund was appropriated to allow 22 part-time Commonwealth Attorneys to become full-time. Conversion of part-time Commonwealth Attorneys to full-time status improved the efficiency of the prosecution of criminal cases in Kentucky. As a result, full-time prosecutors cover 64 counties while full-time public defenders cover 50 counties.

Capital Voir Dire Review

Capital voir dire involves skills we are not able to frequently practice. Those co-counsel who are heading to a capital trial are encouraged to spend 1/2 day in Frankfort practicing the individual voir dire in their upcoming case with mock jurors on challenges for cause, rehabilitation, reverse *Witt*, mitigation, aggravation, publicity, race, strategy, using a juror rating sheet. A minimum of one week notice is necessary to set up this review. It must be conducted no later than 1 month before the trial so what is learned can be implemented. Before the review, there must be a written voir dire plan, a one page summary of your case and a juror rating form for your case. A binder of voir dire resources can be obtained from the Director of Education and Development. To set up this review, contact:

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Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

26th Annual Public Defender Education Conference
June 15-17, 1998
Holiday Inn, Newtown Pike
Lexington, Kentucky

12th Trial Practice Institute
Kentucky Leadership Center
Faubush, Kentucky
October 4-9, 1998

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

**** 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.

**** NLADA ****

NLADA Annual Conference
St. Louis, Missouri
December 10-13, 1997

NLADA Life in the Balance
Philadelphia, Pennsylvania
March 21-25, 1998

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

**** NCDC ****

NCDC Trial Practice Institutes
June 14-27, 1998
July 12-25, 1998

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.

"If we are to give the leadership the world requires of us, we must rededicate ourselves to the great principles of our Constitution...our nation needs the service of organizations who will remain vigilant in the defense of our principles."

- President John F. Kennedy

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