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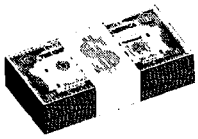

DPA Funding Plan Endorsed

Adequate Public Defender Funding Endorsed By Criminal Justice Leaders

At its November meeting, the **KBA Board of Governors** endorsed DPA's plan for increased funding for indigent criminal defense representation across Kentucky. KBA's legislative committee recommended endorsement of the plan that requests $2.6 million additional funds from the 1998 General Assembly.

The **Governor's Criminal Justice Response Team** was called upon by Governor Patton to recommend ideas to reform the criminal justice system. Despite the preponderance of law enforcement officials and prosecutors, the Response Team endorsed increased funding for indigent defense particularly to improve representation in juvenile court.

The new **Department of Juvenile Justice** has a statutorily created Advisory Board which is comprised of various parts of the criminal justice system. This Advisory Board endorsed the DPA plan for increased funding to improve DPA's representation of juveniles.

The **Children's Law Center**, located at Chase Law School, studied DPA's provision of services in juvenile court. In a law review article in November of 1996, DPA was criticized for having inexperienced and untrained lawyers representing juveniles, in addition to failing to ensure that eligible juveniles are provided counsel. The DPA funding plan has been endorsed by Kim Brooks, the Director of the Law Center and co-author of the critical report.

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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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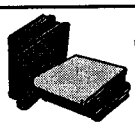

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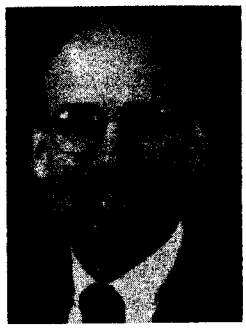
DPA Must Receive A Higher Level of Funding



Ernie Lewis

DPA was Established in Response to *Gideon* and *Bradshaw*

The Department of Public Advocacy was created in 1972 after years of controversy surrounding compliance with *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Gideon* established the right to counsel for poor people charged with felony crimes. In *Bradshaw v. Ball*, 487 S.W. 2d 294 (Ky. 1972), the Court held that an attorney in Kentucky could not be required to represent an indigent absent compensation. Together, these two cases represented a sea change in the manner in which indigents charged with crimes would be provided counsel. Gone would be the pro bono method, whereby new attorneys to the bar would put in their time representing indigents. In its place was a state agency charged with the constitutional obligation of providing counsel to indigents. How to turn the requirements of *Gideon* and *Bradshaw* into reality has been the mission of the Department of Public Advocacy over the years.

One of the Nation's Lowest Funded Public Defender Agencies

In FY 97, DPA handled over 101,849 cases at the trial and post-trial levels. This was accomplished for $163 per case, one of the lowest rates of any public defender agency in the nation. This represented a 10%+ increase over FY 96.

DPA does not receive a significant share of the criminal justice dollar. In FY 98, DPA is receiving only 2.79% of the total criminal justice budget. This is slightly down from the 2.9% received in FY 97. In contrast, Kentucky's prosecutors receive 8.82%, over three times DPA's budget. DPA's clients paid $2,695,096 of the $17,000,000+ budget in FY 97.

DPA's general fund budget has been static for three years. Each of the last three years, DPA has received a continuation budget of 3+%. The only growth in services during the last three years has occurred as a result of revenue being received from our revenue sources, recoupment, the administrative fee, and the DUI service fee. As predicted, the advent of revenue appears to have resulted in a stagnation of increases in state support through the general fund.

The impact of this level of resources is dramatic. Most of DPA's full-time attorneys have caseloads of 50%-100% above of national standards. Louisville's defenders' caseloads were 820 cases in FY 97. Lexington's defenders had a caseload of 632 per lawyer. Most of the attorneys in DPA's rural offices had caseloads from 400-650. These heavy caseloads cause dramatic turnover and create an insurmountable burden for the conscientious defender attempting to represent his/her clients in a reasonable fashion.

This is particularly acute in juvenile court. In 1996, the Children's Law Center criticized DPA in a law review article for the quality of representation being rendered in Kentucky's juvenile courts. DPA was criticized for having contract lawyers untrained in juvenile law, placing inexperienced lawyers in juvenile court, and most significantly doing little to solve the problem of having too many juveniles going unrepresented in juvenile court.

DPA'S 1998-2000 Budget Request

DPA is trying to solve these significant problems with a request of $5.4 million additional general fund dollars during the biennium. This is a modest 15% budget increase which would raise the cost-per-case to approximately $190. It would allow for defenders to reduce their unconscionable caseloads. It would also accomplish the following:

1. DPA would open 5 additional full-time offices, as well as expanding several existing offices into surrounding counties. This would enable DPA to cover 85% of the caseload by the full-time method. Presently, full-time prosecutors serve in 64 counties, compared to 50 counties featuring full-time defenders. Under this plan, the full-time method would be extended to approximately 70 counties. Private lawyers serving as part-time public defenders would continue to

serve in the 50 counties with 15% of the cases, as well as serving as conflict lawyers.

Further, this plan would create a structure whereby most geographical areas in Kentucky would have a full-time office nearby. Finally, the plan would ensure accountability for the increase in tax dollars.

2. DPA would enhance its representation in juvenile court. This budget request would enable DPA to lower caseloads in many areas, thereby allowing for better representation by overworked public defenders in juvenile court. The budget request would create a position for a juvenile trainer, thereby allowing DPA to concentrate on training in this complex area. Further, extending the full-time method into additional counties, with increased training and accountability, is expected to increase significantly the quality of representation in juvenile court.

3. DPA would be able to lower the high caseloads of defenders in Jefferson and Fayette Counties as well as in some of the rural offices.

4. The DPA lost funding for the Capital Post-Conviction Branch in July of 1997. This occurred when the Justice Cabinet ended a Byrne Grant which had previously been given to DPA to continue the funding for the Kentucky Resource Center, renamed the Capital Post-Conviction Branch. While the funding has been lost, the responsibility for representing the 31 men on Kentucky's death row continues. In order to avoid the shameful lack of representation in post-conviction of persons on the southern death row as is now the case in states like Texas and Georgia, DPA is seeking to fund a modest Capital Post-Conviction Branch.

Conclusion

It is my desire to have a reasonably funded, professional, high-quality public defender system in Kentucky. DPA plays a crucial role in our criminal justice system by ensuring fairness and the reliability of verdicts. We have been underfunded for too long. I encourage the readers of *The Advocate* to do everything they can to support this budget request as the General Assembly is meeting.

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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

Prosecutors Receive $2 Million

In 1996 House Bill 160 provided $2,091,300 to Kentucky prosecutors to convert 22 part-time Commonwealth Attorneys from part-time to full-time, providing improved effectiveness and efficiency. Full-time prosecutors cover 64 counties compared to 50 counties covered by full-time defenders.

Endorsements

DPA's need for additional money has also been endorsed by the Northern Kentucky Children's Law Center, the Kentucky Bar Association, the Juvenile Justice Advisory Board and the Governor's Criminal Justice Response Team.

Ewald Receives NLADA Award

Bob Ewald

(St. Louis, Missouri; December 12, 1997) - Louisville Attorney, **Robert C. Ewald**, a litigation partner with *Wyatt, Tarrant & Combs* since 1972, received the prestigious *Arthur von Briesen* Award at the 75th Annual National Legal Aid and Defender (NLADA) Annual Conference in St. Louis, Missouri for his leadership on behalf of Kentucky's poor in need of legal assistance in civil and criminal cases.

The Award honors an attorney not employed by a legal services or defender program who has made substantial volunteer contributions to the legal assistance movement. It commemorates the first president of NLADA.

Ewald's work in the area of legal assistance for the poor began in the early 1970's when he was appointed a member of the Board of the Legal Aide Society of Louisville where he continues to serve today. He was Chair and Treasurer of the Board in 1991 and 1992.

In 1970, there were no public defender services provided in Louisville. He joined with other attorneys and organized the Louisville-Jefferson County Public Defender Corporation.

Ewald authored the first state-wide public defender statute, which became the basis for the establishment of the statewide indigent public defender program, the Department of Public Advocacy. He was the first president of the Louisville-Jefferson County Public Defender Corporation. Throughout his career, he has provided these enormous services to the cause of indigent criminal defense on a completely volunteer basis.

Mr. Ewald was appointed on October 2, 1990 by then Governor Wallace Wilkinson to membership on the statewide Public Advocacy Commission. He has served on that Commission since that time and has been Chair of the Commission since 1993. In his term as Public Advocacy Commission member and chair, he has faced a number of challenging issues involving public defender leadership in the state of Kentucky. Each time he has advanced the cause of the independent public defender efforts in Kentucky within the pragmatic realities of the current attitude towards crime.

He stands out as a person who has provided leadership on behalf of Kentucky's poor when they face the accusation of having committed a crime. He stands out as a person who has made a substantial contributions in upgrading the delivery of indigent services throughout the state of Kentucky. He stands out as one who has persevered in leading Kentucky to better legal services for the poor for the last 27 years.

Dan Goyette, Jefferson District Public Defender, presented Ewald with the NLADA Award in St. Louis, saying, "Without his dedicated hard work and leadership, the quality of justice in this Commonwealth would not be what it is today."

Public Advocate **Ernie Lewis** observed, "Bob Ewald is highly deserving of this recognition. The KBA, the DPA, and the poor of Kentucky are all the better for his commitment to high quality justice for the indigent accused."

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The Public Advocacy Commission

The 12 person Commission consists of a representative from each of the law schools, and members appointed by the Kentucky Supreme Court and the Governor. The Commission assists the Department in insuring its independence through public education about the purposes of the public advocacy system, and has budgetary and certain supervision responsibilities. The Commission Chair is **Robert C. Ewald** of *Wyatt, Tarrant & Combs*. Previous Commission chairs have been **William R. Jones**, Professor of Chase Law School and formerly its Dean; **Anthony M. Wilhoit**, former Kentucky Court of Appeals Chief Judge; **Max Smith**, Frankfort criminal defense attorney; and **Paula M. Raines**, Lexington criminal defense attorney.

Commission Members

Mary Bennett	Robert W. Carran
Susan Stokley-Clary	Robert C. Ewald
Margo Grubbs	Currie Milliken
Roberta M. Harding	Barbara B. Lewis
Donald Keith Kazee	Paul E. Porter
John R. Leathers	John Rosenberg

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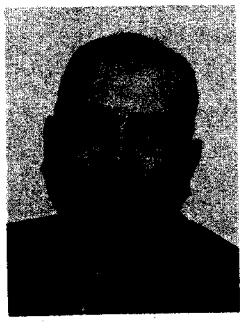
Aunt Sophie's Story



Jed Stone

I said to you that I didn't like the idea of "killer cross." I said that I didn't think that a killer cross, especially in a death penalty case, was a very effective way to do it. And I said that you should look for gentler, more persuasive ways to cross-examine. These cases are unlike any other. Death penalty cases are not like multiple defendant conspiracies or prosecutions. Cross in a death case is unlike cross exam of snitches or narcotics cops. The karma of courtroom, the feeling of the trial, the drama is intensely different. The jurors' attitudes with expectations, the weight of their task is different. And we must learn to respond differently.

Last evening we were standing around talking about how this world of criminal defense, especially death penalty defense, eats us up as lawyers; how it tears us apart; how it makes us angry; how it causes us to be furious with judges who just don't seem to care; how it makes us outraged at prosecutors who cheat, who put on perjured testimony and who hide *Brady* materials; how we're angry with cops that lie in their reports and testimony; how we're disappointed by jurors who just don't seem to care; how we're confounded with newspaper and television reporters who just don't really get it. I suggested that the story of my Aunt Sophie could help us deal with some of that anger.

When I was a little boy, not older than 4 or 5, we were having Shabbos dinner in my grandfather's apartment (Friday night dinner, Sabbath dinner). It wasn't unusual for Aunt Sophie to be there because she was there whenever I was there. She was a gnarled, mean, old woman whose hands were twisted, whose face always looked like she'd just had a bad martini. She was always doing that (gestures a backhand motion). I said to my father, in 4 year old innocence, "I really hate Aunt Sophie."

My father who was a gentle man, I think the only time in his life that he did this, grabbed my arm with such force that I probably have marks on it to this day and pulled me into his father's bedroom and closed the door. He opened up a chest that was at the foot of the bed, rifled through it and came up with a newspaper article from a Berlin, Germany newspaper from the mid-1920's. In that article was a picture of Sophie Hersch, who was a young, beautiful, mid-20s, concert pianist with gorgeous hands and the most beautiful young face. And my father explained to me that this woman, a survivor of the death camps, was twisted and turned and miswrought by hatred because of her experiences in life and that I should never hate her, say that I hate her and he would never tolerate such a thing.

That lesson, as a very young child, has stayed with me all of my life. It is why I hate the death penalty; it is why I do not like prisons; it is why I urge you that kind of hate, that kind of churning inside, can turn all of us into things we are trying to fight.

I 'm not suggesting, for a moment, that when a prosecutor hides *Brady* materials that we have to love him with kindness. I'm not suggesting that when a police officer perjures himself, that we turn the other cheek. I'm not saying that when a judge is unfair or racist, that we should let that unfairness or racism go without challenge. I am suggesting that there are ways to combat these evils that do not involve hate; that do not involve a wrenching and rotting of our spirit, which is really a spirit of life, a spirit of redemption, a spirit of hope that ought to inform the whole anti-death penalty movement.

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Understanding Severe Traumatization

Emotional, physical or psychological traumatic experiences, particularly chronic and/or severe, early traumas, often leave long lasting psychological consequences in their wake. This traumatic legacy takes many forms: Trauma survivors can react dramatically to undetectable or slight provocation, or respond to recollected images of horror in their heads that others can't see, rather than their external environment. Some survivors of trauma may appear emotionally callous, detached, and distrustful of others, or express rage and apparently undue aggression, but show little or no remorse. People who have been traumatized may also display extreme, fluctuating emotions, and may alternate between extreme dependency and marked disconnection in their relationships with others. They may display little regard for their own or others' safety and well-being. When these behaviors are not interpreted in the context of the person's past trauma, they appear disagreeable or odd at best, and reprehensible at worst. The shame and secrecy surrounding traumatic experience compounds this predicament, with individuals rarely disclosing the histories which would provide meaning and context for their actions. A traumatic experience may so profoundly alter an individual's feelings, thoughts and reactions, forming and shaping the person's personality and way of relating to the world, that even a distant past event can dramatically influence present day experience and behavior.

Traumatic experiences, particularly when they are prolonged, severe and happen during childhood, disrupt basic human emotional, cognitive, and physiological processes, resulting in pervasive, far-reaching consequences. However, in spite of the broad reach of traumatic injury, it is often difficult to identify and understand the traumatic origins of the problems many victims have. In this article, we aim to provide a context in which to understand those individuals for whom the wake of trauma has led to destructive, debilitating actions and reactions. We first provide an overview of the definition of a potentially traumatizing event and its effects, then we discuss the particular risks of chronic childhood trauma which are pertinent to this discussion. The bulk of the paper is devoted to describing how traumatic experience can disrupt the optimal functioning of our cognitive, physiological and emotional systems. We conclude with a brief overview of some of the potential long-term effects of traumatic experiences most relevant to our understanding of destructive behavior, focusing particularly on hypersensitivity and reactivity, and conscious and unconscious efforts to avoid traumatic memories and feelings. Placing a client in the context outlined here may help seemingly inexplicable actions become understandable.

What is a traumatic experience?

According to the Diagnostic and Statistical Manual for Psychiatric Disorders criteria for Post-Traumatic Stress Disorder, a potentially traumatizing event is one in which an "individual experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others" (see DSM-IV, APA, 1994). The DSM criteria also specify a subjective response that is characterized by fear, helplessness, and/or horror. Research and clinical observation indicate that the range of events falling under this classification (*e.g.*, physical or sexual assault/abuse; witnessing violence to others; sudden, unexpected death of a loved one; severe physical and emotional neglect) evoke several characteristic responses from the individual: a) the experience of extreme, overwhelming emotions (*e.g.*, terror, helplessness, horror, rage, shame); b) heightened, sustained physiological arousal; and c) the shattering and/or distortion of basic beliefs and assumptions that are necessary for us to function optimally in the world (*e.g.*, that there is some safety and predictability in the world, that the self has some power and worth, that some people are good and trustworthy).

To be traumatized is, by definition, to have the untenable happen; a victim is left with the almost insurmountable task of making sense of and coping with something that is overwhelming, beyond comprehension, inherently unacceptable. For example, a boy who watched his mother being beaten and raped experiences debilitating fear, along with incapacitating shame and guilt at not having rescued her (even in the

case where any effort on his part would have been futile). He may be left with a profound sense of danger and lack of meaning in the world, along with a malignant sense of self, that may preclude his ability to form mutually satisfying relationships, find meaningful work. The potentially devastating impact of trauma cannot be overemphasized.

The nature and course of post-trauma response is of course varied and complex, shaped by a host of factors (*e.g.*, severity and frequency of traumatic exposure, age of victimization, level and nature of pre-trauma functioning, and characteristics of the recovery environment [Green, Wilson, & Lindy, 1985). Certainly many victims are fortunate enough to have the internal and external resources (*e.g.*, emotional support, effective coping skills, a history of positive relationships) necessary to cope with horrible events in such a way that their adjustment is relatively smooth, resulting in few, if any, long-term negative effects. Others, however, are not so lucky due to characteristics of the events themselves, their developmental history, or the environment in which they struggle to cope with these experiences. Often traumatic histories are compounded by additional stressors (*e.g.*, poverty, oppression) and the occurrence of additional traumatizing events, significantly reducing the possibility of successful recovery.

We will focus here on the kinds of lingering, debilitating difficulties some victims experience in order to provide a context for understanding and empathizing with people whose traumatic histories have shaped and altered their lives in destructive ways. (see Herman, 1997; van der Kolk, McFarlane, & Weisaeth, 1996, for more extensive discussions of the range of post-traumatic sequelae and factors of risk and resiliency). Although we include in our discussion those characteristics which fall under the diagnostic category of post-traumatic stress disorder (PTSD), we describe here a broader array of damage and dysfunction that is often associated with severe traumatization and is not adequately described by the diagnostic category of PTSD.

When the victim is a child.

Although detailed discussion of the range of factors that impact traumatic recovery is beyond the scope of this paper, we highlight one of particular relevance: the age at which victimization occurs. Trauma that occurs during adulthood burdens an already formed personality. However, trauma that occurs during childhood often alters the very course of personality development (Herman, 1997). During childhood, we are just beginning to develop the capacities that help us function and thrive in the world: we are learning how to understand, manage, and regulate our emotional experience; we are developing our views of the world and ourselves; we are forming attachments and blueprints of relationships that will be the basis for all our future interpersonal relationships and the neural pathways and biochemical patterns of our brains are being established. Prolonged victimization and/or recurrent exposure to horrible, overwhelming events shape these emerging abilities in ways that profoundly impact the course of our future development. Such experiences may preclude the development of healthy ways of coping with our emotions, or functional views of the world, ourselves, and relationships, all deficits which will significantly affect every subsequent reaction and interaction we have. Researchers have even demonstrated that our brains will not adequately acquire capabilities we take for granted (*e.g.*, being able to talk about our feelings, think before we act, regulate our impulses) if we do not receive the appropriate stimulation (warmth, attention, control over our environments) at certain critical periods of development (Perry, 1997).

Children are also more vulnerable to the negative effects of trauma because they have less power than adults and they are less able to find means of escaping, or even comprehending, a traumatic situation, leaving them more susceptible to feelings of helplessness, arguably the core traumatic emotion. Children who are abused within the family are placed in a particularly untenable position: the adults they must rely on to meet their basic physical and emotional needs have betrayed them. They are faced with dramatically conflicting imperatives: the powerful human drive to attach to a caregiver, to rely on someone, to bond, and the need to protect oneself from abuse and make sense of a situation which defies comprehension. How can this person I rely on, trust and love do such horrible things? How can someone who is supposed to love me treat me this way? The absence of satisfactory answers to these questions and/or their probable answers in the direction of self-

blame profoundly shapes a child's sense of the world, relationships, and, perhaps most tragically, his/her own self-worth.

A naive observer might expect childhood events to be more easily forgotten, "put in the past," so the victim can "move on." However, there is evidence that, for many individuals, traumatic memories do not fade with the passage of time. For some they will become "integrated" and modified by subsequent experience and learning, thereby lessening their emotional intensity and functional impact. But, in the absence of these reparative and transformative processes, they will remain as emotionally vivid as the day they were experienced. Thus, managing a traumatic event involves coping not only with the event itself, but also with the endurance of that event inside oneself -- the intense feelings, graphic images, and life-altering thoughts that persist long after the event itself has passed. Because we are accustomed to the way non-traumatic memories gradually decrease in intensity and salience, we might minimize or underestimate the impact of a horror that does not dissipate over time. To understand the experience of a trauma survivor, we must imagine what it would feel like to continue to relive an unbearable event, with all of its concomitant horror, fear, and helplessness without our volition even years after the event is past.

The impact of traumatic experience on the individual.

Researchers and clinicians recognize that the psychological consequences of trauma affect multiple domains of functioning: emotional, cognitive, physiological. In each area, traumatic experience disrupts and dysregulates the delicate balance that allows each system to respond optimally to incoming information. These disruptions in intrapersonal processes reciprocally interact with the interpersonal ruptures that accompany traumatic experience (*e.g.*, loss of trust in significant others, shame-induced isolation from others) with each deficit potentially exacerbating the others in an escalating cycle. Within this traumagenic internal and interpersonal context, some victims come to behave in ways that are self-destructive and/or destructive to others. We describe below how traumatic experience alters our thoughts and perceptions, our physiology, and our emotionality. We then discuss some of the long-term consequences of these experiences which helps explain the men and women whose lives have been negatively effected by traumatic experience.

Effects on Thoughts and Schemas

How we construct and organize our experience.

What each of us perceives as "real" in the world is actually a composite that is a product of our selective attention to information and our subjective interpretation of that information. In other words, we construct our reality - through the development of "schemas." Schemas are the enduring mental structures - mental maps - that help us make sense of the immense amount of information that continually confronts us. We develop these schemas at both conscious and unconscious, micro and macro, levels. Schemas guide us in areas that range from trivial and concrete tasks to the most meaningful questions about our sense of self and the world. For instance, when we encounter a new baby, our actions are guided by our schemas: If we have had extensive prior experience with babies who enjoy being tickled, we are likely to tickle this new baby; if the babies we know prefer gentler play, we may rock this baby and sing to it. Our reaction is more heavily based on our prior experience than on new information about this particular baby. Ideally, however, if this baby responds counter to our expectations, we will search out alternative strategies, and alter our schema. In this way, our expectations and knowledge base (our schemas) are molded by our experience, and our behavior is in turn guided by these schemas. These schemas guide our interpretation of (and reaction to) events in our environment, reducing the mental work involved in making assessments and decisions. However, this expediency brings with it the risk of misperception or distortion: if we expect the baby to like being tickled, we are considerably more likely to notice indications that s/he is enjoying this activity than we are to note any contradictory information, and we might never try out her favorite games if they are not represented in our schema. Our method of cognitive processing contains a danger within it: The most efficient, definitive way to process information is through rigid adherence to schemas. However, rigid, extreme schemas lead to rigid (and often maladaptive) ways of behaving. Rigid schemas are often

inaccurate, distorted, or negative, all of which lead to problematic actions. For instance, a caretaker's schema that babies don't need to be played with at all would have profoundly detrimental consequences for the baby of that caretaker. On the other hand, overly flexible schemas wouldn't provide sufficiently clear and automatic guidelines for functioning.

In addition to these types of specific schemas regarding various situations and events, we develop more central schemas which encompass our perceptions and expectations of ourselves, the world, and other people. It is generally accepted that certain basic schemas allow us to function optimally in the world (Epstein, 1994; Janoff-Bullman, 1985; McCann & Pearlmann, 1990). In general, people need to have some sense of safety in the world and to feel they can rely on themselves and others to ensure that safety. Also, people need to have a sense of self-worth and to feel valued by those people they trust. Further, people need to believe in some type of order, meaning and fairness in the world, that things happen for a reason, that life is not totally capricious. These basic assumptions are what enable us to interact proactively, planfully, and positively in the world, develop relationships, care for ourselves and others, explore new places, and treat others fairly. For instance, because we believe that we can trust some people, we act in trusting ways with them, which increases the chances they will be deserving of this trust. In this way schemas are self-fulfilling prophecies.

How we process information that is inconsistent with our schemas.

We are often confronted with information that is inconsistent with our existing schemas, both our central, basic, schemas and our more specific, concrete schemas. When this occurs, one of two things must happen. Either we must alter the incoming information so it remains consistent with the schema, in which case our schema remains unchanged (referred to as assimilation), or we must modify our schema so that it encompasses the information at hand (accommodation). Referring back to our prior example of the baby: assimilation would be occurring if we interpret the babies' cries as squeals of glee so this event is consistent with our "babies like to be tickled" schema. Or, we might (more appropriately) accommodate the information that this baby is different by altering our schema to "some babies like to be tickled and this one does not." Our psychological equilibrium is in part maintained by our ability to balance these two processes of assimilation and accommodation so that our schemas grow and positively reflect reality but we also maintain a relatively consistent view of the world. In other words, we do best when we are able to establish and maintain flexible, positive schemas.

Clearly, our process of maintaining cognitive homeostasis is quite complex and multifaceted. We need to make meaning of our world, to understand it, to develop expectations and beliefs that will guide us and help us efficiently organize incoming information. However, if our beliefs are too rigid, definitive, negative, absolute, they will lead to distortions. We must interpret information in light of our schemas, yet at times we need to reassess our schemas in light of our experience. And we must generally maintain some faith in ourselves, the world, and others. However, if this faith is extreme, or overstated, it may lead to dangerous behaviors, or may be easily shattered. Traumatic experiences rupture this homeostasis at nearly every level.

How traumatic experience disrupts our cognitive equilibrium.

Our need to understand, comprehend, and make sense of experiences is dramatically heightened when events are emotional, overwhelming, unpredictable, and challenge our central, basic schemas. A trauma victim is confronted with experiences that cry out for comprehension, for schemas which will structure and order them, for some sense of meaning and purpose. Yet the overwhelmingly negative nature of traumatic events make them difficult to reconcile with positive, coherent, agentive views of self and others. Often, profound contradictions exist even within the event itself: a father is affectionate and loving, yet violates a child claiming it is her fault, then apologizes profusely and says how much he loves her. There is no simple construction of this event that can maintain positive core assumptions and adequately explain the entirety of the victim's experience.

Nonetheless, human beings need to maintain a coherent understanding of reality. The lack of

clear positive answers in a traumatic situation drives the victim to develop or alter his/her schema to explain what is happening. It is important to note that this process is happening instantaneously, outside of awareness, while the victim is in a state of hyperarousal that interferes with any form of reasoned, analytic thought (as described below). In this state, the victim is vulnerable to embracing definitive, extreme, negative schemas which are consistent with what is happening (*e.g.*, they are helpless, they are to blame, the world is unfair). Often a victim will embrace one negative belief, which will serve to protect several other positive beliefs. For instance, blaming yourself for what your father has done to you preserves your trust and faith in him. Once these beliefs have been adopted in a state of extreme emotion, they exert a powerful influence on subsequent behavior and adaptation. The rigid, extreme nature of these negative schemas interferes with the incorporation of new information, contributing to their maintenance.

In cases of chronic developmental trauma, more positive fundamental schemas (*e.g.*, the world is safe, has meaning, people can be trusted) never even have the chance to develop. Instead the child, based on her/his experiences, may form primary beliefs that the world is unsafe, that people cannot be trusted, that fairness should not be expected, and that there is something fundamentally wrong with her/him, and that s/he has no future. How can this child form a meaningful, positive connection with another person when this is what s/he expects to find? How will s/he learn to follow the rules of society, when these rules apparently contain no justice or even predictability for her/him and when s/he can not imagine a future? These negative assumptions will color every future interaction, both in terms of what the survivor perceives (*e.g.*, misconstruing helpful behavior as malevolently motivated), and how the survivor acts (*e.g.*, hurting others before they can hurt him/her).

However, human needs are remarkably robust, and the basic human need to relate to others, to venture out into the world, even to value oneself, does not completely deteriorate in the context of these negative schemas. Unfortunately, this may only lead to further difficulties for a trauma survivor. The survivor is motivated to act in ways that are inconsistent with her/his negative schemas, and is therefore acting without the guidance of adaptive schemas. S/he is at risk then of forming a relationship with someone who is untrustworthy, because s/he hasn't formed a series of guidelines for determining whether someone should be trusted. Without this type of schema, signals of danger may easily be overlooked, increasing the risk of revictimization, further confirming negative schemas. Similarly, a survivor might find him/herself in a dangerous situation because his/her extreme view that every situation is fraught with danger precludes the ability to adequately assess and ensure relative levels of safety and self-protection. The survivor often oscillates between extremes in relation to his/her environment - at times acting like a daredevil, at other times being cautious and overly careful; at times indiscriminately seeking connection, at other times being isolative. The rigidity with which these schemas have developed, coupled with the physiological and emotional constraints discussed below, greatly interferes with the survivor's ability to find any middle ground in his/her cognitive construction of the world - each extreme drives the opposing extreme in an endless, self-perpetuating cycle. (*e.g.*, the inevitable negative outcome when a survivor acts without consideration of safety confirms beliefs that the world is unsafe, further restricting subsequent behavior, increasing the need to finally break out of that constraint, etc.)

Effects on the Brain

How we maintain biological equilibrium.

Our brains involve multiple, intricate, interconnected systems designed to detect internal and external stimuli, identify and interpret them, integrate complex information coming from multiple sources, and motivate appropriate action. Contrary to common belief, the human brain is not a fixed, unchanging organ but rather develops and is shaped in an ongoing fashion by the environment. Each environmentally triggered physiological reaction causes a chain of events in the brain (*e.g.*, release of neurotransmitters) as information is passed from one system to another (stimulating the release of other neurotransmitters). Elaborate checks and balances regulate these events in an effort to maintain homeostasis in the brain's chemistry; in this way the brain remains prepared to detect future new

information and process it accordingly. For instance, upon detection of threatening information, catecholemines are immediately released, preparing the organism for quick unreflective responses of fighting or fleeing. Simultaneously, other regulatory neurotransmitters are released, in order to return the organism to baseline where it is prepared to carefully assess further incoming information. Higher cortical activity (thinking and reasoning) further helps to modulate and regulate the more primal fight or flight response. In this way we are able to quickly jump out of the way of a moving bus without first deliberating, yet shortly afterward are able to carefully look both ways, calculate the relative speed of oncoming traffic and therefore safely venture across the street. Once on the other side, we are able to reflect on this experience, learn from it, and therefore potentially avoid future dangers. The initial fight or flight response enables us to establish immediate safety; deliberation at that point would be fatal. However, the subsequent regulatory mechanisms are what enable us to continue functioning in the world, and to learn from our experience.

How traumatic experience disrupts our biological equilibrium.

Just as trauma overwhelms our natural cognitive regulatory systems, it can also short-circuit our biological regulation. Traumatic experience produces such a strong and overwhelming fight or flight response, that it compromises our brain's regulatory functions, with negative long-term consequences. Evolutionarily, it has been essential that the brain's responses to threats of harm are immediate and extreme. If a saber-tooth tiger approaches you, unless you immediately perceive the danger and are activated to run or fight, you will die. Dangerous events thus evoke powerful responses from our brain, sending massive amounts of neurotransmitters coursing through the structures of our brain, resulting in a cascade of hormones and resultant bodily sensations (rapid heart beat, sweating, increased blood pressure), attentional consequences (narrowing of attention, heightened awareness of threat cues, lack of attention to unrelated cues), and motoric responses (*e.g.*, heightened ability to run or fight). For discrete dangers, this is quite functional, the individual is able to attend to the necessary information at hand, enact the appropriate behaviors to ensure survival and then return to baseline functioning.

However, chronic danger produces chronic activation of what was likely intended as a rapid response systems and the long-term consequences of these reactions can be damaging. Research has shown that chronic exposure to traumatic stress - to the hormones and neurochemicals that are released within us in reaction to it - impacts the brain's chemistry and physiology. Individuals with a history of chronic traumatic experiences exhibit increased levels of baseline arousal, heightened physiological reactivity to both trauma-relevant and neutral information, increased levels of catecholomines (*e.g.*, adrenaline), dysregulation of regulatory neurotransmitters, and increased levels of neurochemicals (endogenous opioids) which may be associated with emotional numbing. These effects may even have a structural impact on the organs of the brain. For example, stress hormones may cause actual cell death in the hippocampus, an area of the brain that plays an important role in evaluation and consolidation of new information to be stored in memory (see van der Kolk, 1996, for a review of the biological effects of trauma).

So, after chronic exposure to overwhelming, terrifying experiences, an individual's physiology may be altered so that they remain in a state of readiness to perceive threat and act immediately. These alterations may interfere with the brain's ability to process information completely by short-circuiting the balanced relationship between primal immediate responding and higher cortical reasoning and analyzing. Usually, information travels through an intricate network of brain cells (neurons) that begins by registering sensory information in the most "primitive" parts of the brain. It then continues through other parts of the brain -- such as the amygdala -- that assign an emotional tone to the information, and then threads its way into the most evolutionarily advanced part of the brain, the neocortex, where the information can be integrated with the brain's most complex forms of functioning such as the ability to reason and the ability to transform experience into language. In a state of arousal, this system is short-circuited in order to facilitate rapid response. Thus, in a crisis, sensory stimuli (such as hearing an angry tone of voice or seeing a hostile facial expression) immediately signal bodily responses that prepare

for action, with little or no cortical mediation. This may compromise an individual's ability to control their reactions; it is through cortical activity that we reason, weigh options, and deliberate. When we remain in a constant physiological state of readiness, we are always ready to jump out of the way of the bus (even when it wasn't really going to hit us), but far less able to assess relative danger and determine a safe opportunity to make our way across the street. This over-reaction to threat can be easily triggered by reminders of a previous traumatic experience.

This reduction in cortical mediation yields pervasive psychological consequences. As described above, being confronted with a traumatic event provides an immense challenge to our meaning-making structures, our schemas. However, the depletion of cortical involvement significantly impedes our ability to negotiate such a challenge. Not surprising, then, that a trauma survivor has difficulty developing or maintaining the type of complex schematic structures that might provide meaning for the experience while still maintaining necessary positive assumptions. Lack of cortical mediation similarly interferes with the survivor's ability to regulate his/her emotional experience, as described below.

Effects on our Emotions

The function of emotions and emotional regulation.

Our emotional responses provide us with essential information about our environment that motivates our actions and helps us to function effectively in the world. Each emotion brings with it specific information and physiological reactions which guide our actions. Just as cognitive and physiological balance and flexibility is important for our well-being, so is emotional regulation. We need to be able to recognize our emotional responses, understand them, and modulate them. We want to be aware of our feelings, but not be compelled to action solely based on these feelings. The balance between amygdala responses and higher cortical reasoning described above is one of the ways that we achieve this regulation. Ideally, we experience our emotions, but analyze and interpret them before acting.

Traumatic experiences typically evoke powerful, overwhelming feelings of fear, rage, helplessness, grief, guilt, shame and alienation (which can cause uncontrollable behavior). Moderate levels of these emotions occur in everyday life, and individuals are usually able to cope with them through a variety of processes which involve some combination of experiencing (enduring) them, expressing and/or sharing them, and understanding them until they gradually lessen and abate. The key here is balance. Denial and suppression of emotion is no more healthy than is complete abandonment to one's emotional state. In general, most people are able to maintain a state of emotional equilibrium in which they are responsive to events, but not overcome by them.

How traumatic experience disrupts our emotional regulation.

During a traumatic experience, emotions are so unbearably intense, intolerable, and overwhelming that they either deactivate or defy our normal coping strategies. For example, horror, fear, helplessness, shame, and despair that accompanies being raped by your favorite uncle outstrips normal regulatory responses. However, human beings don't just cease trying to respond effectively to their environment. Dramatic forms of emotional experiences instead invoke equally dramatic forms of emotional regulation, often outside of awareness. Rather than the typical vacillation between some degree of emotionality and some degree of regulation, resulting in an optimal balance between the two; traumatic affects usually result in extreme, absolute regulation and constriction, prompting an extreme vacillation between all-consuming emotionality, and disrupted, apparently absent emotion. Under ideal circumstances (*i.e.*, normal bereavement) social mechanisms and support provide a way to move back and forth between these extremes, gradually processing the feelings and meanings of the event until they lessen in intensity and equilibrium is re-established. Trauma, however, is more extreme than a normal stressor and we have no established social processes to deal with it. Hence, more extreme strategies are often used and, more importantly, in the absence of meaningful social assistance, often maintained. The most serious consequences of traumatic experience come from the endurance of what are "intended" to be brief responses. Dissociation provides an excellent example of this.

Dissociation and emotional numbing.

During traumatic experiences, victims often report experiencing themselves as separate from their bodies, sometimes watching from above or from the corner of the room. In these descriptions, the victim becomes and observer and is no longer experiencing the emotions of the person who is in the process of being victimized. S/he can see everything that is happening, and may even know how the victim is feeling, but the act of dissociation protects him/her from actually experiencing the overwhelming emotion. This is a highly effective form of responding to unbearable feeling in the moment as it greatly reduces the intensity of emotion. However, recent studies indicate that these responses may have detrimental long-term psychological consequences and are an important predictor of subsequent post-traumatic symptomatology (see van der Kolk, van der Hart, & Marmar, 1996, for a review).

Another extreme emotional adaptation used by trauma victims is emotional "numbing." Victims commonly report feeling shocked or "numb" during victimization, particularly when it is chronic and prolonged. Some researchers have suggested that secretion of endogenous opioids may be associated with this response (van der Kolk, 1996). It is unclear whether reports of numbing indicate actual deficits in emotionality or if they instead indicate an overwhelming, undifferentiated response that the victim cannot identify or acknowledge, and so construes as numbing. Again, this numbing is an effective means of managing the initial traumatic impact since it lessens (although doesn't eliminate) emotional intensity. However, again numbing does not seem to lead to long-lasting relief and it can lead to long-term impairment.

Both numbing and dissociation may first emerge during a traumatic experience, but they often remain as common emotional regulation strategies in the wake of trauma, interfering with survivors' recovery. Although both strategies originate in response to extreme emotions, they become habitual and are then elicited by a range of emotional experiences. A rape survivor may find that during a stressful conversation with his mother, he has "checked out" and is experiencing himself as across the room, not following much of the conversation. These responses leave the survivor unaware of his surroundings, unable to respond optimally to his environment (regulate his reactions), and ironically even more vulnerable to threat. Dissociation has been implicated in the prevalence of revictimization among rape survivors (Cloitre, Scarvalone, & Difede, 1997). Ironically, one lives through a horrible event in part by separating oneself from it, and, as a result, comes to easily dissociate from reality, increasing risk for more pain and suffering. These ways of responding also exacerbate one's sense of confusion and inability to make sense of events.

Habitual numbing and emotional constriction bring with them their own unique disruptions of recovery and adaptation. Particularly for male survivors, who are socialized to control and constrict virtually all emotional experiences except anger (Lisak, Hopper, & Song, 1996), overwhelming, dysregulated affect elicits repeated, constant efforts at constriction and concealment. Through a variety of processes that we are just beginning to explore (*e.g.*, opioid mediation, chronic overarousal resulting in the depletion of emotional resources, detachment, isolation and alienation from others motivated by shame and fear [see Litz, 1992, for an extensive discussion]), trauma survivors often appear numb, remote, distant, or emotionally callous. While at a funeral of someone they know they loved, survivors will describe feeling empty, vacant, "knowing" they should feel sad but having no experience of that emotion. This disruption in natural emotional reactions alienates the survivor from his/her own feelings as well as from other people. Often other people will interpret these reactions as indicative of disinterest and callousness. A lifetime of trying to quell overwhelming emotions and maintain safety in a world perceived as dangerous may evoke an external presentation of callousness, but, underneath this exterior, a cauldron of intense, unmodulated, overwhelming feelings resides. This may explain why some defendants display no emotional response when they hear a jury sentence them to death; they have spent years practicing this form of emotional protection and can not help using it at this moment of profound stress and despair.

Disruptions in describing an emotional event.

One of our most effective ways of regulating an emotional experience is through language. As we describe an event, recall the emotions we felt at the time, and discuss the thoughts we were having, we are integrating this experience more fully, making meaning of it. We are also engaging those structures in the brain associated with regulation of emotion and behavior, enhancing the connections between the emotional memory and higher cortical processes. As we verbally examine our emotions, the feelings are simultaneously accorded a place in our conscious mental structure and tempered by the words we assign them. Describing our feelings also allows others to understand and validate our emotional experience, reducing the isolation that otherwise may exacerbate our emotional distress.

Unfortunately, traumatic events are not easily described for a variety of reasons. Description of these experiences is likely to evoke intolerably painful emotions and memories that the survivor has been trying desperately (both consciously and unconsciously) to avoid. Also, traumatic events often engender shame, due to the degradation and utter helplessness the individual was subject to during victimization as well as the social stigma of victimization. Shame interferes with interpersonal communication. Also, as discussed below, often the survivor will literally not have access to many elements of the experience, due to dissociation, biological factors (*e.g.*, decreased cortical involvement, hippocampal cell death), and other trauma-related phenomena that interfere with the integration of memory. For men, whose gender socialization demands masculine virtues like emotional stoicism, power, and control, disclosures of traumatic experiences (and the inevitably associated emotionality) threaten their very gender identity, greatly reducing the likelihood of disclosure. Finally, trauma victims often accurately perceive that others do not want to hear about the horrible things they have lived through. They fear rejection, incredulity, and invalidation.

Disruptions in our storage of emotional experience.

The intense emotions of traumatic experience also influence the storage of traumatic memories. When we experience an emotional event, we store a variety of information about this event in our minds. The sights, sounds, smells, tastes, feelings, sensations, meanings and interpretations of the event are all associated with each other and we are able to access each component when we are reminded of an event. However, traumatic experience overwhelms this process, disrupting attentional and organizational abilities, so that components are not efficiently integrated and stored in memory. Parts of the memory may be fragmented or separated so that the emotions are separate from the thoughts, the pictures separate from the words, parts of the event separate from each other, and the meaning of the event may be distorted or nonexistent. This process of fragmentation may serve to reduce the overwhelming nature of the event at the moment of storage. However, it interferes with our ability to make sense of and understand the event later, further interfering with the development of flexible, adaptive schemas. When something in the environment reminds the survivor of the experience (*e.g.*, a smell, a voice), only a fragment of the experience may be recalled (*e.g.*, the image of a face, a feeling of dread). The connections which would help understand these responses may be absent, leaving the survivor bewildered, frightened or angry, motivated by impulses s/he cannot understand. For example, a victim hears a male voice and experiences an overwhelming desire to strike out, with little awareness that this impulse is not being motivated by current experience, but is instead activated by unintegrated memories of the past. For instance, the voice might sound like his older brother's, who anally raped him repeatedly during childhood. However, his conscious experience might consist only of this impulse to harm, out of fear or self-protection. In the absence of the modulating effect of understanding the context of this impulse, *i.e.* accessing more elements of the memory in order to help identify the impulse as historical rather than current, he may act on his impulses (particularly given that his inhibitory abilities may not be fully developed due to development trauma) without any externally adequate cause.

The long-term impact of traumatic experiences.

Traumatic experiences disrupt the basic human processes of emotion, cognition and physiology. When these disruptions are not counteracted by equally powerful positive experiences (*e.g.*,

exceptionally loving and supportive long-term relationships), the consequences are often extensive, and devastating. Reactive, extreme, dysregulated functioning interferes with the establishment of mutually satisfying relationships. Conversely, our ability to regulate our feelings and maintain adaptive schemas is predicated on a minimal level of positive interpersonal relationships. Interpersonal violence (particularly when it originates from primary attachment figures) disrupts both intrapersonal and interpersonal functioning, creating a debilitating cycle of biological, emotional, cognitive and relational effects. Our interpersonal relationships are the foundation for our membership in society. We comply with the guidelines of society because we can, and because of our sense of connection to the whole, our identity within the group. The disruption of basic regulatory abilities and the psychological foundations for this sense of belonging pose a two-pronged threat to our ability to conform to society's rules.

The traumatic legacy of pervasive dysregulation, alienation, despair, terror, rage, and self-hatred results in a host of devastating sequelae. Traumatic sequelae are far from static: efforts to minimize one set of difficulties elicit a host of new problems resulting in a constantly changing picture, reflecting the struggle to adapt. Trauma survivors commonly alternate between phases of over- and under-control, sometimes cycling within an hour, sometimes over a decade or a lifetime, reflecting the different demands of trauma (to avoid versus to make sense) Many aspects of survivors' actions are contradictory, further compounding their difficulty understanding themselves, and our difficulty understanding them. We highlight below two components of possible long-term reactions to trauma that may particularly account for participation in apparently inexplicable, destructive actions. They represent the two poles of the dialectic of the traumatic legacy: intrusive recollections and extreme, reactive emotionality versus endless, futile efforts to avoid and banish chronic, intolerable distress.

Reactivity and hypersensitivity to danger.

A survivor of severe trauma whose recovery has been thwarted lives in a state of constant readiness. High levels of arousal and hypervigilance, and schemas regarding the lack of safety in the world, combine to create a style of processing information that is exquisitely sensitive to the slightest indication of threat and often overlooks evidence of safety. Individuals may respond to benign cues with hostility, preparing to fight and protect themselves, and thus elicit hostile responses from others, exacerbating the situation. Heightened reactivity to trauma-related cues compounds the risks associated with this style of responding. A trauma survivor may be triggered and find him/herself in a state of alarm and readiness without understanding why, and may react impulsively, uncontrollably, at times violently and aggressively, because his/her reasoning ability is temporarily diminished and short-circuited. Violent actions are particularly likely, both because they are a natural response to feeling threatened, and because survivors are often raised in extremely violent environments, learning that such actions are appropriate ways of responding to conflict or danger. Traumatized men may be particularly at risk for violent, aggressive actions because anger is one of the few emotional outlets permitted by their gender socialization. Violent actions are also self-perpetuating, both because they elicit violent responses from others, confirming the perception of danger and need for self-protection, and because they temporarily alleviate the sense of helplessness and powerlessness that is so devastating for trauma survivors. The factors that typically inhibit violent behavior (ability to reason and weigh options, compassion for self and others, belief in a sense of justice and meaning in the world) are often disrupted among these survivors, so that a pattern of violence can easily be established and maintained.

Avoidance efforts which may mask traumatic symptoms.

One of the challenges to recognizing trauma-related difficulties is the fluctuating nature of symptoms and responses, and the range of behaviors that serve to mask the traumatic etiology of distress. The overwhelming, intense, horrible nature of trauma-related thoughts, feelings, and images motivates elaborate, complex efforts of avoidance (usually without conscious awareness of this goal). These effects are ultimately ineffective, except in masking the initial source of suffering. Even when survivors display what we have come to accept as the classic post-traumatic response -- being bombarded with intrusive recollections, avoiding any situation reminiscent of

the trauma, chronically hyperaroused and irritable, detached and numb -- they experience periods of numbing and avoidance in which the traumatic source may not be evident and the survivor may appear to be depressed without any obvious cause.

Concealment of a traumatic history.

The most obvious example of efforts to quell the pain of the trauma is the avoidance or denial of a traumatic history. Discussing abusive experiences tends to activate the associated emotions, often at the same level of intensity with which they were first experienced. (Symptoms and distress commonly intensify initially upon disclosure, extensive resources are needed to facilitate this process [see Herman, 1997; Roth & Batson, 1997, for thorough discussion of the process of disclosure]). Often then, survivors don't disclose events and even deny them when asked directly. Sometimes this lack of disclosure is deliberate, mediated by shame and lack of trust. At other times, the survivor may not have sufficient conscious access to their trauma history to disclose, even if they might want to.

Alcohol and substance abuse.

Other efforts to modulate distress are less straightforward. Drugs or alcohol are often used as a form of self-medication in order to block post-traumatic symptoms. Even survivors who have maintained sobriety for decades now will confirm that the most effective, immediate way of diminishing traumatic feelings is through substance use. Given that dissociation and numbing are not completely effective, survivors often turn to these more efficient means of regulating their emotions and distracting themselves from their memories. Unfortunately, the benefits are temporary, and chronic substance use brings with it a host of other complicating difficulties, including decreased attention to safety and increases in risk-taking behavior, again increasing the chances of further victimization. Social isolation, particularly from non-substance using family and friends, compounds feelings of alienation and self-loathing. The financial strain of drug use, coupled with inability to work (due to the entire post-traumatic constellation of responses) increases the likelihood of criminal behaviors.

Social isolation and disruptions in interpersonal relationships.

Many of the effects and long-term sequelae of traumatic experience we have discussed here disrupt the survivor's interpersonal relationships. Just as substance use initially diminishes distress but has a host of subsequent complications, isolation and interpersonal distance can be momentarily comforting for a trauma survivor. Victims have experienced horrendous degradation and pain at the hands of another person, they are strongly motivated to avoid interpersonal vulnerability and doing so somewhat enhances their sense of safety and protection. Feeling love or a sense of connection to someone else often serves as a traumatic reminder, evoking a host of conflicting, intolerable emotions. Isolation and/or rage protects them from this agony. However, the isolation and alienation further erodes their sense of self-worth, and they cannot banish the natural human need for connection and compassion. These conflicting needs and desires result in inconsistency in their relationships. Survivors may fluctuate between extreme, defiant independence, and equally profound dependence and reliance on others. Or they may insist that they have no need for anyone and consistently act in hostile ways that ensure others will keep their distance, yet unconsciously hope that someone will remain, withstand their constant testing, and show that they are in fact worthy of love. Working with survivors of extreme trauma requires immense patience and endurance. We need to accept that they cannot trust us and believe we are on their side, to do so would be to ignore the extensive experience predicting otherwise, and would make them intolerably vulnerable. However, tentative trust can be developed overtime, as long as we are consistent and forthright and show ourselves to be deserving of that trust.

Self-destructive, suicidal and homicidal impulses.

The most dramatic efforts to expel, diminish or expunge traumatic memories and feelings come in the form of self-destructive actions like burning or cutting oneself, and, even more dramatically, serious suicidal attempts. Acts of self-harm are often clinically understood as attempts to distract from psychological suffering, or to reconnect, through pain, with one's body after chronic, pervasive dissociation. The depth of suf-

fering and dearth of self-regard necessary for self-inflicted pain to be experienced as a relief is monumental, and hard to understand for those fortunate enough never to have experienced it. Often this despair takes the form of an overwhelming desire to end the pain, and simply cease to exist. Sometimes, the rage toward those who have victimized becomes intertwined with profound self-loathing, so that homicidal and suicidal impulses become entangled, with the survivor feeling driven to do anything to stop the pain and suffering they experience, to quell their endless rage. Even homicide can sometimes be in part a self-destructive act. Often there is little regard for one's own well-being or concern that incarceration may follow. Also, sometimes homicidal impulses are motivated by a desire to kill what the survivor perceives as a part of him/herself represented in another person. Also, injuring or killing a loved one ultimately causes the survivor pain as well.

Conclusion

Clearly, we can only provide a snapshot here of how a devastating, severe traumatic history might effect an individual and lead them to behave in destructive, dangerous, criminal ways. Because traumatic events push us to the extremes, leading to profound contradictions in our views of ourselves and others, the legacy of trauma is a fluctuating, often inconsistent, extreme way of responding to the world. Fortunately, many survivors find people and inner strengths along the way that help them develop more positive forms of adaptation, never losing or gradually regaining the ability to regulate their responses, flexibly process information, and adaptively respond to their environments. For those who do not, the patterns described here can be self-perpetuating, with each iteration further diminishing the likelihood that alternative perspectives will be adopted, that more effective forms of regulating emotions will be established, that (perhaps most crucially) positive relationships will be established. The apparent incomprehensibility of many trauma survivors' reactions, coupled with the ways their reactions mask the source of their distress, interferes with our ability (along with their own) to understand their reactions and respond compassionately. By viewing their seemingly inexplicable actions in the context of post-traumatic adaptation, responses become understandable and meaningful, profoundly altering our perceptions of these individuals.

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Kentucky's Prisoners Rising

Existing prison beds	10,774
Total in the system in November 1992	10,449
Total in the system last week	14,509
Projected in the system in 2004*	21,140
Average cost to house one prisoner for one year in prison	$14,433
Cost per bed to build a medium security prison	$50,000-$60,000

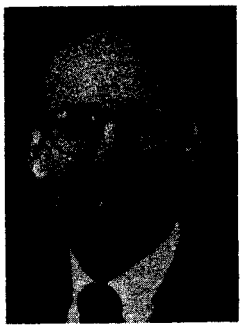
*Projection does not include impact of any proposed tougher sentencing guidelines.

Breakdown of those in the system:

Prison	10,692
In jails awaiting prison beds	1,184
Community service programs (halfway houses, etc.)	516
Class D felony program (in jails)	2,068
Kentucky Correction Psychiatric Center	49
Total	**14,509**

SOURCE: Kentucky Department of Corrections

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 (6th Cir. 9/3/97)

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. ***Quarles v. State***, 696 A.2d 1334 (*cert. denied*) *Quarles v. State*, 118 S.Ct. 349 (10/20/97). 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."

2. ***United States v. Garzon***, 119 F.2d 1446 (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 officers subsequent search of the backpacks was illegal.

3. ***State v. Carter***, 569 N.W.2d 169 (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.

4. ***McGee v. Commonwealth***, 487 S.E.2d 259 (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.

5. ***Titus v. State***, 696 So.2d 1257, *review granted, State v. Titus*, 700 So.2d 687 (Fla. 10/17/97). 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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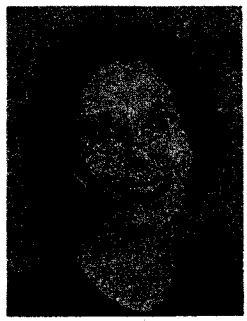
Kentucky Notifies Victims

Kentucky crime victims will receive a phone call when their attackers are out of jail. A new, automatic statewide system notifies registered victims by telephone when inmates escape or are released or transferred to another facility.

The state system grew out of a Jefferson County system. The new system covers all 83 Kentucky jails and 15 state prisons. The system calls registered victims every 30 minutes for 24 hours or until the victim responds. For more information, contact Alicia J. Sells at (502) 574-5223.



Julie Namkin

Blades v. Commonwealth, 95-SC-979-DG, ___ S.W.2d ___ (Ky. 10/30/97)

The defendant, Lesley Blades, was convicted in the Warren District Court of driving under the influence, second offense. His conviction was affirmed on appeal by the Warren Circuit Court. The Kentucky Court of Appeals denied Blades' motion for discretionary review. The Kentucky Supreme Court then granted Blades' motion for discretionary review and, in a four to three opinion, affirmed his conviction.

The DUI charge arose out of the following facts. Blades and his stepdaughter had spent the day at the Dueling Grounds Racetrack. Blades became intoxicated while there so he asked his stepdaughter to drive him home. Blades' truck developed a problem on the way home. Blades left his truck, with the motor running and the flashers on, in the middle of the road and began walking in search of assistance. Two Kentucky State Troopers found Blades staggering down the road. Blades smelled strongly of alcohol and failed several field sobriety tests. He was arrested for public intoxication. The troopers then found Blades' truck about one mile down the road. Blades admitted he had driven the truck to its present location. Blades was charged with DUI, second offense.

At trial, Blades testified he was not telling the truth when he told the troopers he had been driving the truck. He said he had lied to protect his stepdaughter who was married. Blades' stepdaughter testified she had driven the truck home from the racetrack. Both Blades and his stepdaughter testified that after the truck began to malfunction she caught a ride with a passing car in an effort to get help. Another witness testified he had helped a woman start a truck in the race track parking lot because she was not familiar with diesel trucks, and that Blades was a passenger in the truck.

On appeal, Blades raised the following four issues.

First, Blades argued he was entitled to an instruction on public intoxication. Since trial counsel had never asked the trial court to instruct the jury on public intoxication, the Kentucky Supreme Court held this issue was not preserved for review and it failed to address the merits of this allegation of error.

Second, Blades argued that the circuit court should have reversed his conviction because the Commonwealth failed to file a brief or respond to Blades' appeal. The Kentucky Supreme Court held there is no rule requiring automatic reversal where the appellee fails to file an appellate brief, thus Blades' argument was without merit.

Third, Blades argued he was entitled to a directed verdict of acquittal since there was no evidence he was driving the truck other than his out of court uncorroborated confession to the troopers. Blades relied on *Pence v. Commonwealth*, 825 S.W.2d 282 (Ky.App. 1991) to support his argument.

The Kentucky Supreme Court distinguished *Pence* on its facts. It then overruled *Pence* because it "require[d] a greater degree of certainty in DUI cases than is required in other areas of the law." RCr 9.60 provides that a confession, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed. The Court stated that the proof required to corroborate the out of court confession "may be established by considering the confession as well as the corroborating evidence." The Court concluded that the circumstantial evidence in the case sufficed to corroborate Blades' confession; and the circumstantial evidence and the confession taken together were sufficient to overcome the directed verdict motion.

The dissent argued the circumstantial evidence was not sufficient to corroborate the out of court confession. It stated "[t]here must be proof that the crime was committed to corroborate the out of court confession," and there was no proof of a crime without Blades' statement. Thus, Blades' statement should not have been admitted at trial because it was uncorroborated. [It does not ap-

pear from the opinion that the introduction of the out of court confession was ever challenged or objected to. The dissent would have reversed Blades' conviction due to the insufficiency of the evidence.

Fourth, Blades argued he was entitled to a new trial because the trial court did not bifurcate the guilt phase from the penalty phase of his trial. Although this argument was not preserved for review, either at trial or on appeal to the circuit court, the Kentucky Supreme Court pointed out that in 1994, which was when Blades' trial occurred, there was no constitutional or statutory requirement for bifurcation of misdemeanor DUI trials.

Commonwealth v. Conley, 96-SC-954-DG, ___ S.W.2d ___ (Ky. 10/30/97)

Conley was convicted of first degree burglary in the Rowan Circuit Court and sentenced to fifteen years in the penitentiary. The Court of Appeals reversed Conley's conviction because the circuit judge had ordered Conley to wear leg shackles during the trial. The Commonwealth moved for discretionary review which the Supreme Court granted.

The Commonwealth framed the issue as "whether repeated and forceful admonitions to the jury to disregard the shackles, together with overwhelming evidence of guilt, negates any possible prejudice to the defendant." [The dissent pointed out there was not overwhelming evidence of guilt since there were no eyewitnesses and no physical evidence linking Conley to the charged offense. The Commonwealth's case was based on the testimony of admitted drug users who collaborated on their stories before going to the police and who admitted tampering with evidence.]

Conley framed the issue as "whether the trial judge denied him due process and a fair trial by requiring him to be tried in shackles."

The Kentucky Supreme Court framed the issue as "whether the circuit judge abused his discretion in ordering Conley to be shackled throughout the trial."

The facts of the case are as follows. Conley was charged with burglary involving the theft of a firearm. At arraignment, before the ultimate trial judge on that charge, he escaped from the courtroom and fled the courthouse. Prior to trial, the judge, *sua sponte*, ordered Conley be shackled during the trial. The judge admonished the jury several times to the effect that Conley was presumed innocent and the jury was not to take into consideration that Conley was under restraint.

The trial judge determined Conley's escape at arraignment presented a security risk that required drastic action. The judge considered bringing in several state troopers for the trial, but decided, over Conley's objection, that leg irons would be less prejudicial than having Conley surrounded by several police officers. This conclusion is directly contradicted by the U.S. Supreme Court in *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986), which holds the use of extra guards to ensure safety and reduce risk of flight is less prejudicial that shackling.

Although the Kentucky Supreme Court "has long held that the practice of shackling a defendant during trial is to be condemned," it has also recognized that "the use of shackles...has been necessary in cases where the trial court appears to have encountered some good grounds for believing such defendants might attempt to do violence or to escape...." Ultimately, the matter "rests in the 'sound and reasonable discretion' of the trial judge."

The Supreme Court, in a four to three opinion, held the record in the case at bar demonstrates that the trial judge carefully considered all the available alternatives with regard to security in the courtroom. He thoroughly examined and admonished prospective jurors about the presumption of innocence and its relationship to the restraints. The Supreme Court held there was "nothing to indicate that the jury that was ultimately selected was unduly prejudiced." Thus, the trial judge exercised his discretion "within the bounds of legal propriety."

Finding no reversible error, the Supreme Court reversed the opinion of the Court of Appeals and reinstated Conley's conviction.

Commonwealth v. Maddox, 96-SC-679-DG, 97-SC-163-DG, ___ S.W.2d ___ (Ky. 10/30/97)

Maddox was charged with the murder of Terrance Davis, the two year old son of his live in girlfriend. A jury found him guilty of first degree manslaughter and sentenced him to sixteen years imprisonment.

The Court of Appeals reversed Maddox' conviction because it held the trial court erred when it limited Maddox' cross-examination of two prosecution witnesses: Michelle Davis, Terrance's mother, and Michael Stewart, Michelle's brother, who had been present in Michelle's home on the night the fatal incident occurred. The excluded evidence, which was put into the record by avowal, showed that one month prior to Terrance's death Michelle Davis had struck one of her sister's children so hard that a shoe imprint had been left on the child. This information was substantiated by the Cabinet for Human Resources' investigation and Michelle admitted having struck the child. The avowal evidence also showed that Michael Stewart had sexually molested another child in Michelle's care. This information was also substantiated by CHR's investigation.

The Commonwealth moved for discretionary review which was granted by the Supreme Court.

The Kentucky Supreme Court, pointing out that "trial courts retain broad discretion to regulate cross-examination," reversed the opinion of the Court of Appeals.

The Court held that Michelle's prior bad act bore no similarity to those that were inflicted on Terrance on the night of his death and thus it was not a proper subject for cross-examination. The medical evidence at trial showed that Terrance had a massive skull fracture and a ruptured blood vessel in his abdomen and died from these injuries. The Court also held that Michael's sexual abused of another child was not so similar to the crime committed to make it admissible to prove identity or modus operandi under KRE 404(b)(1).

Maddox had also challenged the trial court's admission of all thirteen autopsy photographs. The Court of Appeals held the trial court had not erred in admitting the photographs. Maddox raised this issue on cross-appeal in the Kentucky Supreme Court. The Supreme Court agreed with the Court of Appeals that the autopsy photographs were not so gruesome as to require exclusion.

In a unanimous opinion, the Kentucky Supreme Court reversed the opinion of the Court of Appeals and reinstated Maddox' conviction.

Gaither v. Commonwealth, 96-SC-437 & 438-MR, ___ S.W.2d ___ (10/30/97)

The sole issue in this appeal is whether KRS 532.110(4), which states that a sentence imposed pursuant to a conviction for escape shall run consecutively with any other sentence the defendant must serve, creates an exception to the sentencing cap set forth in KRS 532.110(1)(c). The Kentucky Supreme Court held that it does. The Court stated that KRS 532.110(4) mandates consecutive sentencing for escape offenses and modifies the sentencing maximum set out in KRS 532.110(1)(c).

Weaver v. Commonwealth, 96-SC-170-MR, ___ S.W.2d ___ (Ky. 10/30/97)

Weaver was convicted of first degree trafficking in a controlled substance, cocaine, after selling cocaine to a police informant. Weaver was also convicted of being a PFO II and he was sentenced to twenty years. Weaver raised five issues on his appeal.

Weaver's first argument concerns the sufficiency of the evidence. The Commonwealth's case was based on the testimony of the informant who sold the cocaine to Weaver. On cross-examination, the informant denied he had been involved in any other drug sting operations for the Franklin City Police Department. However, the police detective involved in the case testified the informant had been involved in other police sting operations. Thus, Weaver argued that since the informant committed perjury, his entire trial testimony must be disregarded. Without the informant's testimony, there was no evidence to support a conviction.

The Kentucky Supreme Court disagreed. The Court held the informant's perjured testimony went only to a collateral issue: how many other sting operations he had been involved in. This

testimony affected the informant's credibility but it did not directly affect the facts of the case. Thus, there were no grounds to strike the informant's testimony, and the evidence was sufficient to support Weaver's trafficking conviction.

Weaver's second argument concerns the Commonwealth's violation of the trial court's discovery order. The sale of the cocaine to the informant occurred in Weaver's car. Three other individuals were present in Weaver's car at the time. The informant did not inform the police of this fact in his written statement made immediately after the sale.

Pursuant to the court's discovery order, the Commonwealth was required to provide Weaver with the names and addresses of those persons present during the commission of the charged offense. The Commonwealth made no objection to the court's order and responded that only Weaver and the informant were present.

At trial, the informant testified three other people were in the car. The informant provided the name of one of the three individuals but denied knowing the other two persons. Defense counsel did not ask for a continuance to locate the named individual or make any other motions at that time. However, at the conclusion of the Commonwealth's case, on the second day of trial, counsel moved for a mistrial due to the Commonwealth's violation of the discovery order.

The Kentucky Supreme Court stated that although withholding the identity of an eyewitness would ordinarily prejudice the defendant's ability to prepare his defense, under the facts of the instant case no prejudice occurred because the named individual was available to be interviewed by defense counsel, but he failed to do so. During the discussion on the mistrial motion, defense counsel admitted he had not made any effort to contact the named individual. Weaver and the court both stated the individual was in the local jail, and counsel admitted he had been in the jail the previous evening but had not talked to the individual. Because defense counsel did not avail himself of the opportunity to talk to the individual, the Supreme Court held Weaver could not then claim on appeal that he was prejudiced by the Commonwealth's violation of the discovery order.

Weaver's third argument concerns the limitation of his cross-examination of the police detective as to the informant's participation in other sting operations. As previously stated, the information perjured himself when he denied his involvement in other sting operations. The detective acknowledged the informant's involvement in other sting operations, but could not recall the exact number. As to the total amount the informant had been paid by the police for his involvement, the detective was not sure but believed it was less than $500.00. Defense counsel moved the court to compel the detective to provide the specific information, but the court reused.

The Kentucky Supreme Court held the trial court's ruling was not reversible error because the detective "gave the jury enough information to permit a fair appraisal of [the informant's] bias. The trial judge's ruling was a reasonable limitation on this exploration into [the informant's] motive or bias."

Weaver's fourth argument concerns the so-called "police surveillance privilege." On cross-examination, defense counsel questioned the detective about the type of recording device used to record the drug buy. Counsel wanted to show because of the nature of the recording device, the informant was able to affect the audibility of the recording, which was essential to Weaver's defense tat the transaction never occurred, but was just a way for the informant to get $50.00 "snitch" money from the police. The Commonwealth objected to the question and the trial court sustained the objection on the basis of the so-called "police surveillance privilege" recognized by the Court of Appeals in *Jett v. Commonwealth*, 862 S.W.2d 908, 910 (Ky.App. 1993). Counsel moved the court to compel him to respond, but the court refused.

The Kentucky Supreme Court held that Kentucky does not recognize the "police surveillance privilege" and overruled *Jett, supra*, on this point. The Court held that any error in suppressing testimony about the nature of the recording device was harmless because the detective admitted the informant could have intentionally affected the operation of the recording device so as to prevent it from producing an audible recording of the transaction. Thus, the defense actually received the requested information.

Weaver's fifth argument concerns comments by the prosecutor in his closing argument. The prosecutor told the jury that the Commonwealth's evidence was "uncontroverted" and "undisputed" and there was no evidence presented that Weaver did not sell the cocaine to the informant. After the jury had gone out to deliberate, defense counsel moved for a mistrial based on the prosecutor's repeated references to the "uncontradicted evidence."

The Kentucky Supreme Court held this argument was not properly preserved for review by a *contemporaneous* objection. However, even if the objection had been timely made, the Court held there was no error because the comments went to Weaver's failure to refute the informant's testimony "by any means." They did not address themselves directly to Weaver's silence.

In a six to one opinion, the Kentucky Supreme Court affirmed Weaver's convictions.

Wolbrecht & Feakins v. Commonwealth, 95-SC-229-MR, 95-SC-230-MR, ___ S.W.2d ___ (10/30/97)

Robert Wolbrecht was shot and killed on September 1, 1985. Seven and one half years later, on March 2, 1993, his widow Peggy and Arthur Feakins and Bobby Taylor were indicted for complicity to murder. The indictment alleged that one of the three named indictees was the actual shooter.

Prior to trial, Bobby Taylor's trial was severed from the trial of his coindictees.

Peggy and Arthur's trial began on January 24, 1995. On the fifth day of trial, and during the testimony of its next to last witness, the Commonwealth moved to amend the indictment. Over defense counsels' objection, the trial court granted the Commonwealth's motion and overruled the defendants' motion for a continuance. The amended indictment, rather than alleging that one of the named indictees actually pulled the trigger, simply alleged that the victim was shot and killed without alleging that one of the three named indictees actually pulled the trigger, thus enlarging the basis for the defendants' conviction.

Peggy and Arthur were convicted of complicity to murder and the jury fixed each of their punishment at twenty years imprisonment.

On appeal the Kentucky Supreme Court addressed two issues: whether the trial court erred when it granted the Commonwealth's motion to amend the indictment; and whether it erred when it failed to grant the defense a continuance to meet the new allegation in the expanded indictment.

In a four to three opinion, the Kentucky Supreme Court held the trial court's granting of the Commonwealth's motion to amend the indictment "to include some unknown killer was a substantive change which prejudiced both [defendants'] substantial rights" and constituted reversible error. "When the Commonwealth failed to prove, as charged in the original indictment, that Wolbrecht, Feakins or Taylor actually shot and killed Robert [Wolbrecht], the trial court improperly allowed an amendment to encompass a new charge - that either Feakins or Wolbrecht helped someone, anyone, or everyone to murder Robert. They were unduly and unfairly surprised near the conclusion of the Commonwealth's case with a new charge that they each had engaged in a conspiracy with some anonymous co-conspirator to murder Robert Wol-brecht."

The Supreme Court also held the defendants were further harmed when the trial court failed to grant their motion for a continuance. Once the indictment was amended, "the defense should have been given the opportunity, by way of a continuance, to analyze its case anew and prepare a defense based upon the broadened theory now presented by the Commonwealth. The Commonwealth had more than nine years to get it right, but the appellants had only three days to ascertain further alibis." The Court referred to the appellants as having been "ambushed" at trial.

The Court reversed the appellants' convictions and remanded for a new trial.

Moseley v. Commonwealth, 96-SC-306-MR, ___ S.W.2d ___ (Ky. 11/20/97)

Moseley was convicted of wanton murder and sentenced to twenty eight years imprisonment

based on the death of his live-in girlfriend. Moseley's defense was the shooting was an accident, while the Commonwealth's theory was Moseley had a history of physically abusing his wife.

To prove its theory of the case, the Commonwealth called three witnesses during its case in chief who testified the victim told them that Moseley had stabbed her in the leg on the day before her death as well as physically abused her on dates six months prior to her death. In rebuttal, the Commonwealth called three additional witnesses who testified the victim had told them of incidents when Moseley had beaten her up.

On appeal, Moseley argued the above-mentioned testimony was improperly admitted because it was hearsay and did not fall within any exception to the hearsay rule.

The Commonwealth admitted the statements were hearsay (out of court statements offered to prove the truth of the matter asserted), but maintained they were admissible under the state of mind exception to the hearsay rule in KRE 803(3) to prove Moseley's state of mind.

The Kentucky Supreme Court recognized that KRE 803(3) applies to the declarant's state of mind, *i.e.*, the victim in this case, not the defendant's, as the Commonwealth argued. Since the victim's state of mind at the time of her death was not in issue, the statements were not admissible under the KRE 803(3) exception. Finding no other applicable exception to the hearsay rule that would provide for the admission of the victim's out of court statements, the Court held, in a four to three opinion, the statements were improperly admitted and reversed Moseley's conviction for a new trial.

The Court addressed an additional hearsay problem in the case to prevent its reoccurrence at retrial.

A police detective (Cain) testified Moseley gave four inconsistent statements as to how the shooting occurred. However, these statements were not made to Cain, but to four different members of the fire department. These four inconsistent statements were told to Cain by one of the firemen and a police officer who did not testify.

Moseley argued Cain's testimony was inadmissible "investigative hearsay." The Supreme Court held Moseley's four inconsistent statements were admissible as admissions under KRE 801A(b)(1) and could be introduced through the testimony of the individuals to whom they were made. At the retrial, Det. Cain should not be permitted to repeat the statements during his testimony.

Mullins v. Commonwealth, 96-SC-836-MR, ___ S.W.2d. ___ (Ky. 11/20/97)

Mullins' wife found him engaged in acts of sodomy with a fourteen year old babysitter. She telephoned the police from a neighbor's home and gave testimony against her husband at the grand jury. By the time of trial, Mullins and his wife claimed the husband wife privilege. The trial court ruled the wife waived her privilege by giving statements concerning the incident and that Mullins had waived the privilege by waiting until trial to assert it.

Mullins was convicted of third degree sodomy and sentenced to four years imprisonment.

On appeal, the Court of Appeals affirmed his conviction on the ground that under KRS 620.050 (2) the husband wife privilege is not applicable in a criminal proceeding regarding a dependent, neglected or abused child. Mullins moved for discretionary review which the Kentucky Supreme Court granted.

The Supreme Court affirmed the holding of the Court of Appeals and stated: "It is the holding of this Court that pursuant to KRS 620.050, the husband and wife privilege does not apply to testimony in a criminal trial involving dependent, neglected and abused children."

Mullins also argued on appeal that it was reversible error for the victim's mother to testify the victim was placed in a psychiatric ward of a hospital after the incident, and that it was error to introduce evidence that the victim has been receiving counseling treatment from a psychiatrist and a counselor.

The Kentucky Supreme Court held the complained of testimony was relevant to whether the victim consented to the acts. Thus, there was no error in the admission of the testimony.

Mullins' conviction was affirmed.

Stringer v. Commonwealth, 94-SC-818-MR, ___ S.W.2d ___ (Ky. 11/20/97)

Stringer was convicted of three counts of first degree sodomy and two counts of first degree sexual abuse. The victim of Stringer's actions was a nine year old girl. Multiple issues were raised on appeal.

First, Stringer challenged the sufficiency of the evidence because the victim failed to testify to specific dates and times when the sexual acts occurred. The Kentucky Supreme Court held the Commonwealth's failure to prove the specific dates of the offenses was of no consequence since the dates of the offenses were not a material ingredient of the offenses. The Commonwealth proved the child was less than twelve years of age at the time the offenses occurred and that was the only relevant time element necessary to support the convictions.

Second, Stringer argued it was error to allow the victim to testify from the circuit court library via closed circuit television. Stringer was present in the library with the victim, while the jury was in the courtroom. The Supreme Court held there was no authority to support Stringer's position that a witness and the jury must be in the same room during the witness' testimony.

Stringer also argued it was error to allow the victim to use anatomically correct dolls while describing the acts perpetrated upon her by Stringer. The Supreme Court found nothing improper with this procedure.

Third, Stringer argued it was error to allow the victim's mother to testify that when she told the victim Stringer would bring her home from the day care center the following day, the victim responded, "Please don't make me ride with him." The Court held this statement was not hearsay because it was not offered to prove the truth of the matter asserted. The statement had a legitimate nonhearsay use which was to prove the victim was afraid of Stringer. Thus, the testimony was properly admitted.

Stringer also argued it was error for the prosecutor to ask the victim's mother whether someone had told her the victim had been sexually abused. The mother testified the victim was the one who told her about the abuse. The Supreme Court held there was no error in this line of questioning because it related to why the victim was referred to Mr. House (a certified psychological counselor and cognitive therapist) and was not dependent upon the truthfulness of whether the victim had been abused. The testimony had a legitimate nonhearsay use and was thus admissible.

Fourth, Stringer argued it was error to permit Mr. House to give hearsay testimony by repeating statements made to him by the victim describing the sexual abuse and identifying Stringer as the perpetrator. The Supreme Court held this testimony was properly admitted under KRE 803(4) because the statements were made for the purpose of treatment or diagnosis related to the cause or external source of the child's symptoms.

Stringer also argued it was error for House to express his belief in the truthfulness of the victim's allegations of sexual abuse and that this testimony invaded the province of the jury. House testified that although he was initially concerned the victim might have been "coached," he subsequently found the child's responses "consistent" and supported by "internal logic," and "[he] felt that [he] trusted [the victim] -- or the veracity of the statements and so forth."

Although the Supreme Court pointed out a witness may not vouch for the truthfulness of another witness, it noted there was no contemporaneous objection to any of the statements.

Two separate dissenting opinions found House's opinion testimony as to the victim's credibility to be improper and noted the prosecutor admitted House's testimony was being offered to establish the veracity of the victim's statement.

Stringer also argued it was error for the trial judge to refuse to require House to produce his office records regarding his treatment of the victim. Since the records had not been subpoenaed and House testified from memory, the court did not abuse its discretion in declining to order House to retrieve them from his office and bring them to the courthouse for perusal by the defense.

Fifth, Stringer argued it was error (improper opinion testimony on the ultimate issue) for Dr.

Nunemaker to testify that his findings, which revealed some tearing in the victim's vaginal area as well as some stretching and partial destruction of the hymen, "were compatible with [the victim's] history that she had given [him]" and with "something being inserted in there, and, trying to stretch it."

The Supreme Court held Dr. Nunemaker's testimony was not improperly admitted. Since the doctor's testimony would assist the jury in understanding the evidence and determining a fact in issue, it was admissible under KRE 702. The Court stated that in a criminal case, the ultimate fact in issue is whether the defendant is guilty. "Whether the physical findings testified to by Dr. Nunemaker were consistent with sexual abuse is only a relevant evidentiary fact tending to make the ultimate fact more or less probable. KRE 401."

The Court went on to hold that "[e]xpert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401..., and (4) the opinion with assist the trier of fact per KRE 702." The Court then overruled *Brown v. Commonwealth*, 812 S.W.2d 502 (Ky. 1991) and *Alexander v. Commonwealth*, 862 S.W.2d 856 (Ky. 1993), insofar as they hold otherwise.

The Court concluded that Dr. Nunemaker's opinion concerned a subject peculiarly within the knowledge of a trained physician and was likely to assist the jury in determining whether [the victim] had been sexually abused by [Stringer]."

Once again, both dissenting opinions found the admission of Dr. Nunemaker's testimony to be error. One opinion concluded the error was harmless, while the other would have reversed Stringer's convictions. Both dissenting opinions also pointed out the Kentucky Supreme Court had specifically refused to adopt FRE 704, a rule allowing expert opinion testimony upon the ultimate issue, and believed the majority opinion was improperly amending the Kentucky Rules of Evidence contrary to the express provisions of KRE 1102 and 1103.

Sixth, Stringer argued the trial court improperly suppressed four different pieces of evidence. Stringer had sought to introduce handwritten notes about the victim's behavior contained in records prepared by a previous owner of the daycare center. The Court held the trial court did not err by excluding the notes because evidence of the victim's character for criminal sexual conduct is generally inadmissible under KRE 404(a)(2), and the evidence did not qualify for any of the recognized exceptions.

Stringer also sought to introduce testimony from a clinical psychologist about the suggestibility of children, proper procedures in interviewing children and the appropriate standard of practice in child sexual abuse cases. Since the psychologist had not interviewed the victim in this case and since the victim interviews were not audio or video taped, the Court held this testimony was properly excluded as being speculative and irrelevant.

Stringer also sought to introduce testimony from the mother of another child of Stringer's alleged abuse who would have testified she did not approve of the manner wi which the social workers interviewed her daughter. Since the witness had no background to qualify her to render such an opinion, her testimony was properly excluded.

Lastly, Stringer sought to introduce testimony from the father of another child suspected of having been abused by Stringer that he was of the opinion that the social workers were already convinced of Stringer's guilt. Since no social worker rendered an opinion as to Stringer's guilt, such testimony was properly excluded as irrelevant.

Stringer's convictions were affirmed.

***Yates v. Commonwealth*, 96-SC-425-MR, ___ S.W.2d ___ (Ky. 11/20/97)**

Yates was found guilty of murder and giving a false name to a police officer. He was sentenced to the maximum of life imprisonment for the murder and ninety days for giving a false name.

The sole issue raised on appeal concerns the trial court's failure to suppress statements from a police officer which were not included in his written report.

During the Commonwealth's opening statement, the prosecutor stated a police officer would testify he had seen Yates at a location west of the murder scene prior to Yates' arrest. Up until this time, the only information the defense had received from the Commonwealth was the officer's report stating Yates had been arrested at a location east of the murder scene, and the murder weapon had been found west of the murder scene. Yates' planned defense was the police could not place him in the vicinity of murder weapon. However, trial counsel made no objection to the prosecutor's opening statement.

During the testimony of the Officer Pinnegar, the Commonwealth's fifth witness, defense counsel asked the court to limit the officer's testimony to what he had recorded in his written report. The trial court expressed concern over Yates request and expressed the issue as whether the Commonwealth had any obligation, once it determined that a witness's written statement was incomplete, to reveal the rest of the information to the defense. Despite the trial court's concern, it denied Yates' request to prevent the officer from testifying to the additional information.

The Kentucky Supreme Court stated it was "unable to find any rule or precedent which would require the Commonwealth to" voluntarily reveal the additional information to the defense. The Court further stated "[t]here is no authority that would require a trial judge to confine a witness's testimony to the four corners of his or her written statement. The dissent pointed out that RCr 7.24(9) grants the trial court ample authority to correct the error, and it would have reversed for a new trial.

The Court also questioned the materiality of Yates' argument because trial counsel did not object when the prosecutor first revealed the additional information in opening statement and did not ask for a continuance when he finally did object during the testimony of the Commonwealth's fifth witness. Also, counsel effectively cross-examined Officer Pinnegar about his failure to supplement his written report.

Finding no error in the trial court's ruling, the Supreme Court, in a four to three opinion, affirmed Yates' conviction.

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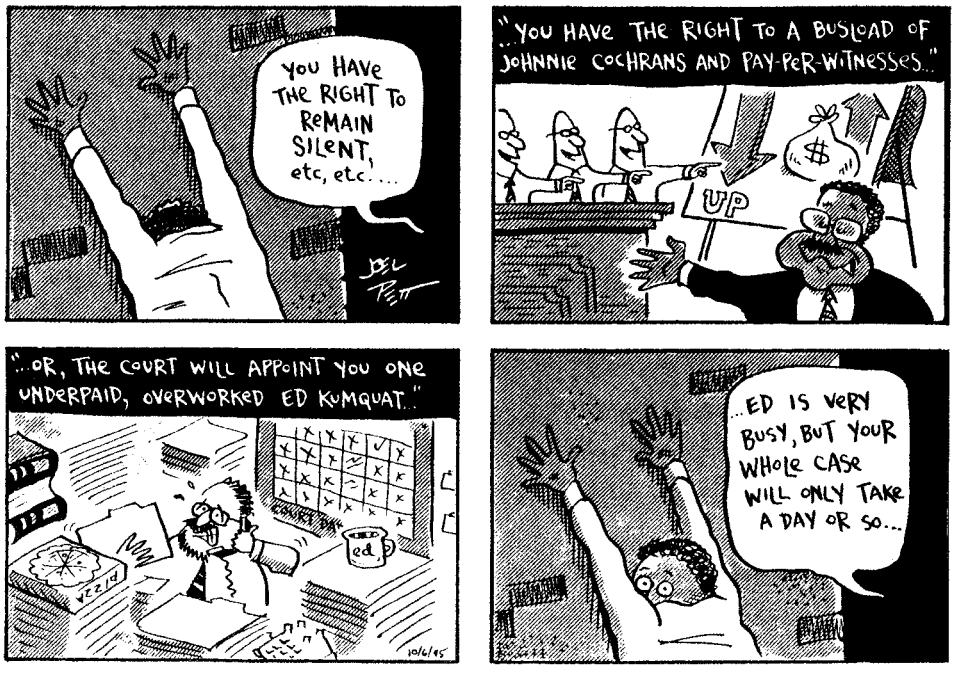

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District Court: I Can't Drive 55 or an Examination of Pretext Stops

This issue, our apologies for the title of the article are extended to Sammy Hagar. Police officers can make a forcible, brief, investigatory stop even without probable cause for an arrest if they can demonstrate an articulable suspicion of criminal activity. *Martin v. Commonwealth*, 592 S.W.2d 134 (Ky. 1979). The problem of course for Dee Fendant and many other clients before the district court is that these investigatory stops often result in criminal charges being filed against your client. In effect, the stop is made on a pretext and from there, the officer proceeds to develop information to use against your client.

Avoid Tunnel Vision

Once sufficient information is gathered from the pretext stop, the officer then has developed enough insight into the situation to meet the probable cause level to effectuate an arrest. Too many defense attorneys look at the file, analyze the charges and ignore the initial reasons for the stop. On closer examination however, there are many cases which should be dismissed because of a lack of probable cause to stop the person in the first place.

Dee Fendant comes to you with a DUI charge after she was stopped for driving 32 miles per hour in a 25 mile per hour speed zone down the main street of town. The breath test shows a .241, she performed miserably on every field sobriety test, the Preliminary Breath Test registered above a .200, she admitted she had consumed "some beers" and because she has been arrested for DUI in the past, she decided to request an independent blood test which shows an alcohol content reading of .240. This is probably not a case most of us are ready to take to a jury and when the prosecutor offers "the standard deal" for a guilty plea, counsel invariably makes a decision to recommend a plea in the case.

Examine the Reason for the Stop

Before making a decision, however, competent counsel needs to examine the reason for the stop. Dee Fendant was initially stopped not for anything related to the DUI but because she was driving at a radar clocked speed of 32 miles per hour in a 25 mph per hour zone. Did the officer have a legal reason to initiate the stop?

In order to stop a citizen, a police officer needs a reasonable and articulable suspicion of criminal activity. *Brown v. Texas*, 443 U.S. 47 (1979). Where no grounds exist for the stop, a citizen is protected from such intrusive behavior by the 4th Amendment. U.S Const. Amend. IV.

When the police gather evidence and such actions are violative of a citizen's constitutional rights, the exclusionary rule is used by the courts to act as a deterrent to such actions. *U.S. v. Leon*, 468 U.S. 897 (1984). The rule is applicable to state actions even though based on a 4th Amendment analysis. *Mapp v. Ohio*, 367 U.S. 643 (1961). Additionally, the integrity of the judicial system requires that the courts not be made "party to lawless invasions of constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Terry v. Ohio*, 392 U.S. 1 (1968).

KRS 189.390 and Local Speed Limit Ordinances

There was no legal basis for the stop of Dee Fendant. KRS 189.390(3)(a) provides that the speed limit is 35 miles per hour in business or residential districts within the Commonwealth. KRS 189.390(5) authorizes municipalities to fix speed limits within their boundaries when conditions so warrant. So where did the 25 mile per hour speed limit originate?

After investigating the origin of the 25 mile per hour speed limit, counsel will no doubt discover that the local municipality has enacted ordinances to regulate the speed limit within the confines of the town or city. If the ordinance is like most such municipal enactments it establishes a blanket speed limit within the boundaries of the town, usually along the lines of: The speed limit on all city streets is 25 miles per hour. Such a wide ranging ordinance that establishes blanket speed limit reductions within the city limits are not contemplated by KRS 189.390.

Murphy v. City of Lake Louisvilla, 303 S.W.2d 307 (Ky. 1957).

In *Murphy*, the Court analyzed a city ordinance that provided:

> Any person who shall operate a motor vehicle upon any street or public way within the City, with the exception of Highway No. 22, at a speed greater than 15 miles per hour shall be fined not to exceed $50.00.

The Court went further and indicated that instead

> of finding that conditions authorizing a lower speed limit than 35 miles per hour, as authorized by the quoted provisions of KRS 189.390, and instead of fixing reasonable and safe limits and giving notice thereof, the City enacted a blanket regulation setting the maximum speed limit at 15 miles per hour on all its streets save Highway 22. It is improbable that a maximum speed limit of 15 miles per hour on every street of a municipality is warranted. Certainly the language of the applicable provisions of KRS 189.390 does not contemplate such an action.
> *Murphy, Id.*

It is clear that the intent of the Court was to halt such speed limits within municipalities by holding the Legislature had no intent to allow such practices.

Check for Section 168 Compliance

Even if the ordinance was carefully drafted so as to escape the condemned blanket coverage there remain avenues which yield the opportunity for fruitful attacks. Does the ordinance establish a fine? In *Murphy*, the established fine of $50 was lower than the fine for speeding established by the legislature. *See*, KRS 189.394. Such fines are improper and a violation of Section 168 of the Constitution of the Commonwealth of Kentucky.

Was the Ordinance Void at Inception

Even if the fine structure is in compliance with the fines established by the legislature, counsel must still determine when the ordinance was adopted. If enacted prior to July 15, 1992, the controlling section of KRS 189.390(4)(a) required "an engineering and traffic investigation" which must show that a reduction "is reasonable and safe under the conditions found to exist at any location within the municipality". I have yet to discover a single municipality that undertook the expense associated with conducting the required studies prior to or even after establishing speed limits below the state mandated 35 miles per hour.

Although it is true that the 1992 Regular Session of the Kentucky General Assembly passed legislation allowing cities or counties to adopt local speed limit ordinances without the expensive traffic studies, local ordinances adopted before the enactment of KRS 189.390(5)(a) in 1992 remain void from inception. *Williams v. City of Hillview*, 831 S.W.2d 181 (Ky. 1992).

Suppress the Stop

The officer that stopped Dee Fendant had no valid legal grounds to do so. When police actions are based upon an incorrect belief, the evidence should be suppressed and the entire stop of Dee Fendant and all of the evidence collected is tainted. The Commonwealth will no doubt argue that the so called "good faith" exception to the exclusionary rule should be applied. That exception was developed by the Burger Court and applied to a good faith belief that officers should be allowed to place a reasonable reliance on a search warrant even if later shown that the warrant was not supported by probable cause. *U.S. v. Leon*, 468 U.S. 897 (1984).

Leon does not apply to your case because the good faith exception applies to warrant searches and arrests. It is precisely the unfettered discretion of the officer which has been called into question. There was no warrant and the exception does not apply.

Even if your Court were inclined to analogize that the officer somehow is entitled to place a reasonable reliance on the posted speed limits, that argument also must fail. The late Justice Brennan's dissent in *Leon* correctly points out that the reason for the rule is "its tendency to promote institutional compliance with Fourth Amendment requirements." Ironically, the Justice

remarked that he was concerned that the exception would not be confined to warrant situations but was concerned that courts, prosecutors and police officers would be tempted to extend the exception into the area of warrantless violations of 4th Amendment rights, just as we see in Dee Fendant's case.

Reliance on a newly created "good faith" exception in municipal bodies is ill founded. The entire stop and all evidence collected should be suppressed. *See, Wong Sun v. United States*, 371 U.S. 471 (1963) (holding all evidence obtained as the results of the fruits of the poisonous tree suppressed.)

Immoral Loitering

A vague suspicion of possible criminal activity is insufficient to meet the probable cause standard. *Brown v. Texas*, 443 U.S. 47 (1979). The officer must have a "reasonable suspicion" based on "objective facts". *Id.* Brown was stopped because he was walking in an area which had a "high incidence of drug traffic"; he "looked suspicious"; and he had not been seen in the area by the officers on previous occasions. *Id.* The Court found these suspicions insufficient and found the stop an unreasonable seizure in violation of the 4th amendment.

Time and time again, counsel will see a case where the initial contact involves the officers belief that the client was loitering for immoral purposes in violation of KRS 525.090 or the companion statute KRS 529.080. Counsel must force the officer to present to the Court the reasons your client was suspected of loitering "for the purpose of" gambling, drug use or prostitution. It becomes almost comical to listen to an officer explain that the person was loitering and this is a known drug/prostitution/gambling area. Does this mean every person in and about this area is there for the immoral purpose? Of course not. The officer must be able to identify specific conduct of your client which caused the officer to believe an illegal act was in progress. It is virtually impossible to specify any action which will set your client apart from anyone else in the area who was there for legal reasons. The stop was a pretext and is improper. "[W]here the question is whether a crime has been committed as opposed to whether a particular individual committed a known crime, more evidence will be required" *In re D.G.*, 581 N.E.2d 648 (Ill. 1991).

Other Suspicious Stops

Race. There are a lot of cases in District Court every day where counsel should pay particular attention to the reason for the stop rather than focusing immediately on defending the actual charges that resulted. Has the officer indicated that the stop was made because your client just did not fit the area? What the officer is really saying in neo-liberal political correct speak is that your clients race did not fit the make up of the local neighborhood. Race alone without other indicia of suspicion is insufficient to initiate a stop. *United States v. Anderson*, 923 F.2d 450 (6th Cir. 1991).

Cracked Windshield/Broken Light. All to frequently we see the pretext for the stop being a cracked windshield on a vehicle in violation of KRS Chapter 189. How did the officer see the cracked windshield before the stop was made? Was the pretext for the stop a broken tail or brake light? KRS 189.055 only requires that a single red light illuminate. As long as one rear brake light is functional, there is nothing illegal about having a burned out brake light.

Conclusion

Dee Fendant may not be able to drive 55 miles per hour down the streets of her town but she may be allowed to complete her journey while driving less than 35 miles per hour without being subjected to a pretext stop. Counsel should always examine the probable cause for the stop to insure that the officer had a legal reason for initiating contact with a citizen.

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The Rules: *Sequel to "Don't Make the Thirteen Worst Mistakes Other Death Penalty Lawyers Make"*

Two major points made in the last article:

1. Go to your social science libraries. Do not be conned by lawyers who use their intuition alone. They are just too lazy to go to the library. Do not stop after you go to the law library. They don't keep much research related to race, drugs, sex or death there. the research social science libraries keep are not quite on point for your case most of the time, but the existing research is clearly better than just relying on your prior experience. This is a way young lawyers surpass those who have practiced for many years.

2. Use a new questionnaire for each death penalty case. You would not wear the same suit (or dress) to court for each and every death penalty case, so update for each case when you can. Battered woman syndrome, drive by shooting, shaken baby, cult murder, serial killer, children killing parents, rape murder, white on black, black on white, bar fights, old victims, young victims, old clients, young clients, poor clients, rich clients -- the list is infinite. You need to change the questions for all of these categories of cases. More than that, you need to update for each case.

Thirteen more recommendations:

14. Use a mock jury. It will take one day of your life versus the rest of the client's life. An abbreviated version is better than none. Ideally we use four mock juries, but this is not feasible for most poverty cases. You may not win every case, but most lawyers feel less depressed with this method. You may be able to counsel the client into considering a plea, if nothing else.

15. Do a small pilot study if you cannot afford a survey. The results are not as reliable, but you will get some direction. Speaking to people randomly can teach you not to get the phone hung up on you. This skill is good training for jury selection as well as other aspects of legal work.

16. Video tape yourself. ATLA[1] and other organizations training civil attorneys do this. It can be more uncomfortable than listening to your voice on a tape recorder, but you will be pleased with subsequent videos of your *voir dire*, opening statement, direct examination, cross-examination, and your closing statement.

17. Get help from civil attorneys. They permit you to use the firm's mock courtroom and other facilities not usually available to criminal defense attorneys. Civil attorneys sometimes do criminal defense work. Their lack of familiarity with criminal laws can more than compensated for by their enthusiasm and their craftsmanship.

18. Call lawyers from other states. This is critical for states like Ohio because they are so far behind many of the other states, even in their region. Ed Monahan from Kentucky and lawyers from Indiana, Texas, Colorado and California have been helpful. Lawyers from other states have different (and sometimes fewer) pressures on them resulting in higher quality product. Some lawyers from the South are excellent despite dismal work environments.

19. Observe civil attorneys. They are often a bit ahead because they do not lack resources. Some of them have tried over 200 cases, some have unusual defense verdicts and other have received very high awards consistently.

20. Conduct post-trial interviews[2]. As the jurors what they liked and what they did not like. Keep a journal on what the jurors say. You want to make sure to extinguish errors and continue to do what does work.

21. Learn from statistical data presented in publications from other states as well as your own. "Who Is Winning the War on Drugs?" by William Curtis[3] writes about the extent of the drug problem. Since drugs are so often involved in criminal activity, you must have *voir dire* questions related to drugs that are effective. It is just as grave a mistake to exclude these questions pertaining to race when they are relevant.

22. Get a coach to help you learn how to ask questions. If possible, get a trained interviewer to

help you. Have the persons watch you in court if you cannot afford a mock jury to practice on. Practice by doing part-time work with a marketing firm for several weeks. Lawyers try to suppress feelings while social workers, psychologists and psychiatrists try to bring them out. Some public defenders provide free services, take advantage of them whenever possible.

23. When working with other attorneys, make sure they return phone calls, treat clients fairly, pay their experts and do what is necessary to represent their clients[4].

24. Learn from Court TV. Some lawyers are good and some are not so good. You can learn by critiquing them.

25. Listen to tapes on keeping a positive attitude, tapes on sales, tapes on the law and tapes on biographies of famous persons. Because of the very negative environment around criminal defense work, it is critical to find some way not to be dysfunctional when dealing with a dysfunctional client, his or her dysfunctional family, criminal defense attorneys who have "quit," and a legal system that could stand improvement.

26. Leave your ego in the dumpster outside the courtroom. The public reacts negatively toward arrogant lawyers. Judges do not like the "*ego uber alles* attitude." Lay your ego aside for the benefit of your client.

Footnotes

[1]Week-long seminars such as those in Tuscaloosa, Alabama and Houston, Texas were invaluable to myself as well as to the participants. Many participants said that they learned in one week more than they learned in six years of practice.

[2]Article with Pete Precario published in four states including Kentucky.

[3]Article published in *The Advocate*.

[4]Jeff Helmick of Toledo, Ohio and Margaret Kirk of Columbus, Ohio are examples of lawyers whose innovative work and kindness benefitted clients.

I would like to thank Dale Musilli for editing this article.

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Recent Departures from DPA

July 1997:	**Brian Throckmorton**, Librarian with Law Operations
	Janet Jewell, Administrative Secretary with Law Operations
August 1997:	**Julia French**, Advocatorial Specialist with Protection & Advocacy
	Sheila Shelton, Assistant Public Advocate with the Capital Trial Unit
	Gwen Pollard, Assistant Public Advocate with the Covington Office
September 1997:	**Martha Campbell**, Advocatorial Specialist with Protection & Advocacy
	Melissa Hall, Assistant Public Advocate & Recruiter
	Kathleen Jordan, Assistant Public Advocate
	Amy Beaton, Assistant Public Advocate, Juvenile Post-Dispositional Unit
	Ellen Benzing, Recruiter
	Kathryn Dutton-Mitchell, Assistant Public Advocate, Protection & Advocacy
October 1997:	**Shirl Cole**, Co-Op Intern, Pikeville Office
	Mary Mirkin, Advocatorial Specialist, Protection & Advocacy
November 1997:	**Amy Kratz**, Assistant Public Advocate, Pikeville Office

KACDL Elects New President

David Steele

David R. Steele Elected to Lead Organization

David R. Steele of Covington, Kentucky took the helm as President of the Kentucky Association of Criminal Defense Lawyers (KACDL) at its annual meeting held in Covington on Friday, November 21, 1997. The reins of the organization were passed to Steele from Jerry Cox of Mount Vernon.

The Kentucky Association of Criminal Defense Lawyers is a state-wide organization. Its purpose is to foster, maintain and encourage a high standard of integrity, independence and expertise among member criminal defense attorneys; to strive for justice, respect and dignity for criminal defense lawyers, defendants and the entire criminal justice system consistent with the constitutional rule of law of Kentucky and the United States. For membership information contact Linda DeBord, Executive Director, 3300 Maple Leaf Drive, LaGrange, Kentucky 40031; Tel: (502) 243-1418.

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As he assumed the reins of the organization Steele outlined his three leading goals: 1) to preserve the individual citizen's participation in our jury system which is now under attack by proposals expected to be before the General Assembly to eliminate sentencing by citizens serving as jurors; 2) Enactment of the racial justice act; and 3) Enactment of a moratorium on the imposition of the death penalty until assurances are in place that this most dreadful of penalties is imposed without bias, prejudice, without arbitrariness and caprice and after the issues addressed in the ABA moratorium on the death penalty are adequately addressed.

Steele also noted the desperate need for fairness, rationality and balance in Kentucky criminal justice policy.

The Attorney General DUI Task Force is an example of an unbalanced approach. Its recommendation comes from a panel which is overwhelmingly made up of prosecutors and police officers while denying the individual citizen or his representative any voice in the declaration of policy. Its recommendation to give an arresting police officer the right to automatically suspend a citizen's driver's license without court intervention smacks of a process presuming guilt. It is more consistent with processes previously attributed to totalitarian societies rather than to an open and democratic society.

The Governor's Criminal Justice Response Team recommendation to add additional aggravators to expand the imposition of the death penalty while failing to recognize additional extenuating circumstances (usually called mitigators) is not rational at a time when the American Bar Association, made up of a cross section of members of the American Bar (only a small percentage of whom practice criminal law), has recommended a moratorium on executions until we fix the problems with how death sentences are imposed. Instead of expanding crimes that can be prosecuted as capital offenses, laws need to be enacted that eliminate race and other biases and prejudices from the capital process and that prohibit the death penalty for children and to make Kentucky law that prohibits execution of mentally retarded individuals retroactive.

The Kentucky Association of Criminal Defense Lawyers must point out that the playing field is dangerously tilted in favor of the state against its people. The bumper sticker that states "I love my country but fear my government" has ominous meaning for criminal defense lawyers.

Kentucky prosecutors receive $53 million each year while Kentucky's defender system receives $17 million. This is a dangerous imbalance in available resources for the defense of the liberty of the common man.

We believe that the people of Kentucky want those who are true criminals to be accountable but the people of Kentucky want those decisions about a person's liberty done in a fair process coupled with integrity where competent and capable advocates are available to both sides in any proceeding. Our association has important work to do if we are to make these goals a reality in our lifetimes.

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Are We Settlers or Pioneers?

This year would be a fitting time to celebrate a leap in Kentucky public defender leadership, an innovation which advanced the systematic assurance of representation at the highest levels, a paradigm shift of how Kentucky defenders work on behalf of clients.

Our harsh Kentucky realities make such change unlikely as a matter of rational probabilities. Clients and the facts of their cases present challenges often beyond our apparent individual capacities. Supported by public opinion, legal precedents which respect individual liberties less and less. Our volume of work is more than a professional can do competently. Most disheartening of all, is the way we defenders treat each other's representation of clients within our various Kentucky defender organizations.

Today, two paradigms are available to Kentucky defenders as we decide to either settle in or to take some risks. The world inexorably moves towards interdependence: cooperation, teams, "we." Indeed, this is the risky future. Yet our defender culture mocks the world's collaborative current with its longstanding procrustean independence, its rigid rationalism imbued by our law school education, and the destructive belief of many defenders that we are the center of the universe.

We have the choice of settling into our current culture or of pioneering a new way of working within our Kentucky defender organizations. Joel Barker in *Future Edge: Discovering the new Paradigms of Success* (1992) tells us that the world's paradigm pioneers are characterized by: 1) knowing the new way is worth doing; 2) having the guts to act on what they believe is needed; and, 3) being in it for the long haul to see it to fruition.

Let's look at what this intuition, courage and commitment would net us if pioneered by defender leaders in this Commonwealth on a daily basis. Public defender managing is too frequently characterized by one of two dysfunctional extremes: 1) criticizing an employee's representation of a client after the fact, or 2) taking a hands off attitude as to the employee's performance.

In the courtroom, public defenders have long excelled at reacting, undermining and attacking the prosecution's case. Disabling, weakening and assailing police, prosecutors, and judges are hallmarks of effective defending within the adversary system. Unfortunately, defender managers too often consciously and unconsciously bring these destructive behaviors to the management of performance of staff attorneys. Other defender managers do little or no managing because they have no time as a result of their many cases, they believe their staff attorneys' licenses insure competence, they are reluctant to confront a colleague, or they believe ethics prohibits it.

A new paradigm of managing is upon us: systematically helping staff attorneys with proactive coaching. An example of this new way of helpful continuous coaching is the case review process.

> *Why is it that intelligent people with good motives do such a poor job at anticipating the future?*
>
> - Joel Barker

What is case review & its purpose? The primary purpose of case review is to assure quality representation to our client *before*, not after, the representation. This is achieved by encouraging common sense, raising awareness, reinforcing a process, offering additional perspectives by looking at the case comprehensively at a point in time when the staff attorney feels ready for the next significant event in the case, and most importantly supporting the attorney's effective representation.

How is case review conducted? At its best, case review is an ongoing process between the attorney representing the client and the attorney's supervisor or one or more other experienced attorneys. Ideally, it is driven by the attorney representing the client. The attorney with the case to be reviewed is the person who engages others for the assistance needed. For attorneys who are not operating at a level of awareness to seek the review on their own, supervisors can invite the review process be taken advantage of or it can be a routine office procedure.

As a matter of policy, we have decided at DPA that a case review will be done on all capital cases. Each attorney without a capital case will have at least one case review done each year. This is reflected in all supervisor and employee performance agreements.

Case review can take different shapes. The medical model of obtaining data, diagnosing and providing a treatment plan with periodic check-ups is a standard approach of providing help. The mental health therapeutic approach is another way to help. The patient reports the problem(s), there is a structured dialogue and then diagnosis and treatment takes place. Often the treatment amounts to arriving at an awareness of the obvious, making a commitment to the known, having an increased ability to employ healthy processes, gaining confidence, or greater perspective. The case review approaches can be highly directive or more supportive, depending on the needs of the attorney. The case reviewer can ask the attorney to articulate needs and then the two can decide which to focus on. The reviewer could systematically go through the components of the trial, appellate, or post-conviction representation questioning and dialoguing as necessary with the attorney.

A leader is a person you will follow to a place you wouldn't go by yourself.
- Joel Barker

It can happen between a supervisor and a staff attorney or among peers. Peer review's "proven way of enhancing performances, its various formats, and its lethargic acceptance by attorneys" is reviewed by Edmund B. Spaeth, Jr., in *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 Temple L.Rev. 1211 (1988).

Context of case review. Where does case review fit into the work on a case? Quality mandates deliberate employment of quality assurance processes. Quality legal processes include thinking expansively and creatively at the beginning of the case representation process (brainstorming with others), coaching throughout case representation (case review or peer review), mock practices with feedback; observation in court; random case-file review; evaluation by the customers (clients); and performance evaluations. The larger quality representation coaching process includes the following steps:

1) performance planning: role identification, goal setting, contracting for coaching style;
2) obtaining relevant case data;
3) organizing case information;
4) brainstorming case solutions and strategies;
5) analyzing;
6) deciding;
7) case review;
8) practicing with feedback;
9) executing in court;
10) observing litigation;
11) co-counselling;
12) case file review;
13) performance surveys;
14) performance evaluations.

Case review is an integral, unifying part of this larger performance process.

The coaching. Through the case review process, the coach has to help the attorney not only competently perform in this particular case but also help the attorney learn how to improve overall. The coaching includes evaluation of how the process of representing this client in this case is being done with the goal of increasing representation knowledge, skills, attitudes and processes for this and future clients by this attorney and other attorneys in the office. It seeks client-centered quality representation, greater self-awareness, better processes, fuller perspective. This is done with coaching the development of the following: helping the person reframe problems, helping the person transfer skills from one context to the problem area, helping the person explore strategic alternatives, and helping the person confront negativity within themself or others they are working with.

Who does case review? Obviously, new or inexperienced attorneys will benefit from case review, as they work to gain awareness, experience, perspective, and knowledge of standard methods of representation. Less obviously, the experienced attorneys will benefit form such

review to confront and account for bad habits, being stuck in the routine, skipping parts of the process out of arrogance, lacking efficiency, confronting personal defenses that may be unknown.

Advantages of case review. The analysis of a case with an attorney *before* the attorney performs the particular work in the case has the huge advantage of helping the attorney improve by assisting future practice which gives the attorney more confidence, more control and more effective experiences. This positive experience of help is likely to encourage the employee to seek additional assistance via case review. Case review will take place frequently for new attorneys and when attorneys transition into new levels of practice, like from misdemeanor court to felony court, or from an intermediate court of appeals to the state's highest appellate court, or when handling a type of case that involves specialized skills, like a sexual abuse case. Because of their complexity, the enormity and their protracted nature, case review will occur for all capital cases and probably more than one time. Senior attorneys who fall into ruts benefit from this outside perspective, boost of confidence, and the raising of the bar.

The comprehensive case review process allows for an integrated process which addresses an ensemble of disciplines necessary for immense learning. In *The Fifth Discipline: The Art and Practice of the Learning Organization* (1990) Peter M. Senge details five essential learning disciplines:

a) **Systems Thinking:** Moving from snapshots and compartmentalization to understanding patterns and the interconnectedness of what we do; the case reviewer helps the attorney see patterns of success and failure;

b) **Personal Mastery:** Becoming a master craftsman, continuously realizing own personal vision, what matters most to us; what matters most to achieving the best for the client;

c) **Mental Models:** Becoming aware of our assumptions, generalizations, and images which comprise our picture of the world; which often is not the picture of the world possessed by those deciding the fate of our client;

d) **Building Shared Vision:** Being a part of creating a picture of the future; especially the vision of persuading the fact-finding on behalf of the client;

e) **Team Learning:** Maximizing how we perform by learning from others through genuine dialogue. We can learn more when we work with others than we can when we operate alone.

These five disciplines are furthered in a highly integrated, efficient way by the case review process. Ultimately, through the coaching by case review employees perform at a level they would not necessarily rise to.

Customer's standard is quality. Quality is the only acceptable standard for service to the customers of today. We always want quality service when we are the customer. We really have little tolerance for anything less whether it be service for our car, our airline flight or our body.

Good anticipation is the result of good strategic exploration.

- Joel Barker

Some American car companies embraced a dangerous attitude in the 1970s that left an indelible mark on their image. They pushed their product out the factory door to sell it and had the attitude that they would fix anything wrong with it later. Enter the quality conscious, continuously improving Japanese who sought to sell their product only if it had no or very few defects. The Japanese knew their long range success was in customers who were satisfied from the beginning of purchase.

The Toyota Camry plant in Georgetown, Kentucky has a clothes line running the length of the assembly line. Every employee bears the responsibility to pull it if they see a defect because Toyota does not want the car to leave the plant with defects which will displease their customer. When the employee pulls the cord, fewer cars

are built that day but the ones which are assembled have fewer defects which likely will insure demand for them into the future. An employee who pulls the cord receives a lot of attention because Toyota wants the defect fixed and the line rolling as soon as possible but the attention is not negative because Toyota wants to encourage the identification of defects.

While the legal representation business is in many ways significantly different from selling a material product, it does not differ greatly from providing medical services. We want our body or the body of our child competently fixed...the first time. We have no tolerance for mistakes or for a failure to use the best techniques known nationally. Defender clients who want quality are demanding innovations like case review from defenders. It's not unusual for customers to cause innovations. Koozes & Posner, *The Leadership Challenge* (1995) at 46.

National legal standard is quality. The ABA Standards for Criminal Justice Providing Defense Services (3d ed. 1992) set out *quality* as the standard for all legal representation: "The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter." Standard 5-1.1. Case review provides a way to continuously improve the methods of working to solve problems for clients before the representation is provided.

If we expect to meet the increasing challenges of criminal defense advocacy, we must seek out and utilize other perspectives.

Conclusion. Proactive coaching which provides disciplined help for defenders is no longer an option for Kentucky defender leaders. The paradigm of defender coaching *has* shifted. Colorado defenders employ a pretrial review process. After a number of years of education, Kentucky defenders are beginning to implement a similar process we identify as case review at the trial, appellate, and post-conviction levels. The National Legal Aid and Defender Association has provided substantial education on these quality assurance processes at many of its Defender Management Conferences since the early 90s. *See also* Vince Aprile, "Appellate Case Review: A Strategy for Success," *NLADA Appellate Brief*, Vol. 4, No. 1 (Oct. 1996) at 1. Civil legal aid programs have long fostered case review systems. Gail Elizabeth Price, "Case Review: A Program of Self-Assessment," *Clearinghouse Review* (April 1984) at 1373.

Kentucky cries out for pioneers of the new paradigm of coaching characterized by proactive help. We know what the new way of coaching has to be. We do not yet have across the board in Kentucky's various defender organizations the pioneers that are implementing this new way with courage and with a deliberate commitment to making it work over the long haul. Our clients demand for high quality representation beckons a decision from us *now*: will we be settlers or pioneers?

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The forms that follow are a product of many DPA staff attorneys, including Vince Aprile, Margaret Case, Rebecca DiLoreto, Larry Marshall, Ernie Lewis, Ed Monahan and others.

Self-awareness propels us to new heights.

DPA Criminal Defense Trial Case Review

Date of this Review: __/__/__

February, 1996

Trial Case Review Learning Objectives: *Coaching and evaluation of how the process of representing this trial client in this case is being done with the goal of increasing representation knowledge, skills, attitudes and processes for this and future clients by this attorney and other attorneys in the office. Seeking client-centered quality representation.*

1. General Information
2. Offense(s)
3. Client Communication, Relationship
4. Investigation
5. Legal Research
6. Motions
7. Consultation
8. Propelling the Client's Story
9. Defense
10. Witnesses
11. Jurors
12. Instructions/Admonitions
13. Directed Verdict Grounds
14. Plea
15. Constitutionalization
16. Sentencing
17. Log
18. Trial Notebook
19. Subpoenas
20. Information
21. Recusal
22. Ethical Issues
23. Evaluation

1. GENERAL INFORMATION

Client: _____

Co-Defendant(s): _____ Date Assigned Case: __/__/__

Attorney being Coached: _____

Coaching Being Done By: _____

Next Action: _____ Date of Next Action: __/__/__ Open Cases: _____

Client: ☐ confined; ☐ on release

2. OFFENSE(S):

a) Charge(s):
1) _____ 2) _____

3) _____ 4) _____

b) Elements:
1) Mental State: _____ 1) Mental State: _____ 1) Mental State: _____

2) _____ 2) _____ 2) _____

3) _____ 3) _____ 3) _____

4) _____ 4) _____ 4) _____

c) Does Client Have Any Other Pending Charges? ☐ Yes ☐ No
Describe: _____

3. CLIENT COMMUNICATION, RELATIONSHIP:
☐ in-person; ☐ phone; ☐ letter; number of contacts: _____

a) Identification and explanation of your role
b) Interviews, communications, contacts, copies of indictment, pleadings
c) Client's experience with previous attorney(s)
d) Trial process, timing, next step
e) Bail
f) Advice to client on:

1. ☐ not talking
2. ☐ elements of offense
3. ☐ lesser included offenses
4. ☐ possible sentences
5. ☐ concurrent, consecutive
6. ☐ truth-in-sentencing process
7. ☐ parole
8. ☐ probation
9. ☐ alterative sentence
10. ☐ future enhancement
11. ☐ legal defenses
12. ☐ consent, waiver
13. ☐ appeal
14. ☐ indigency status
15. ☐ confidentiality

e) Client's decisions, client's desires
f) Client boundaries

4. **INVESTIGATION:**

a) Investigation of prosecution evidence and defense evidence
b) Records
c) Arrest
d) Identifications
e) Statements
f) Mental health history
g) Co-indictee

5. **LEGAL RESEARCH:**

a) Statutes
b) Regulations
c) Caselaw: U.S., Kentucky, 6th Circuit, other
d) State & Federal Constitution
e) Rules: criminal, civil
f) Ethics rules, opinions
g) Legal trends
h) Scientific
i) Social
j) Educational
k) Communication
l) Pending grants of cert

6. **MOTIONS:**

a) Evidentiary Hearings, Trial Memorandum, Suppression Motions & Hearings: offensive & defensive
b) Bail
c) Preliminary Hearing/Grand Jury Testimony

7. **CONSULTATION** with others

8. **PROPELLING THE CLIENT'S STORY:**

a)	3 Most Favorable Facts	How can these be maximized:
	1)	1)
	2)	2)
	3)	3)
b)	3 Most Damaging Facts	Persuasive Way to Communicate Damaging Facts
	1)	1)
	2)	2)
	3)	3)

9. **DEFENSE:** Create then Evaluate

a) Brainstorming: generate with others possible solutions; do not evaluate

b) Possible defenses
1)

2)

3)

c) Evaluate

d) Actual defense theory of the case: _____

e) Themes: _____

f) Images: _____

g) Persuasive Vocabulary: _____

10. WITNESSES

Prosecution Witnesses (lay & expert):

	Name	Type	Defense Objectives with Witness
1.			
2.			
3.			
4.			
5.			

Defense Witnesses (lay & expert) *(in order to be called)* (primacy, recency)

	Name	Type	Defense Objectives with Witness
1.			
2.			
3.			
4.			
5.			

Will client testify: ☐ Yes ☐ No Why? _____

Preparation of witnesses by: ☐ discussion; ☐ practice direct; ☐ practice cross

Evidentiary Issues/Problems: keeping bad out; getting good in

a) Prosecution
b) Defense
c) Court

Exhibits/Demonstrative Evidence

a) Anticipated Prosecution Exhibits
   1. _____
   2. _____
   3. _____
   4. _____
   5. _____

b) Defense Demonstrative Evidence/Exhibits: Emphasizing the theory, themes, images most helpful.
   1. _____
   2. _____
   3. _____
   4. _____
   5. _____

11. JURORS:

a) Background Information
b) Desired & least desired juror profile
c) Voir dire areas for defense
1. _____
2. _____
3. _____

d) Expected prosecution voir dire & response
1. _____ _____
2. _____ _____
3. _____ _____

e) Voir dire enhancement strategies

12. INSTRUCTIONS/ADMONITIONS

a) Anticipated prosecution instructions and defense response
b) Written defense instructions; expected prosecution position
c) Anticipated court instructions and defense response

13. DIRECTED VERDICT GROUNDS

1.

2.

3.

14. PLEA

a) Client's plea
b) Plea Negotiation
c) Plea offers
d) Diversion, alternate sentence

Trial: Why is this case going to trial? _____
_____

15. CONSTITUTIONALIZATION, State and Federal, of Requests/Issues

16. **SENTENCING:** Retribution, deterrence, rehabilitation, incapacitation, costs

a) Prior(s)
b) Factors for lesser sentence/no prison time, alternate sentence
c) Hearing
   1. Defense witnesses: _____
   2. Prosecution witnesses: _____
d) Presentence investigation report: presence at probation & parole interview; defense attachments

17. **LOG** of Attorney's Case Activities

18. **TRIAL NOTEBOOK**

19. **SUBPOENAS**

20. **INFORMATION** about prosecutor, judge, victim, witnesses

21. **RECUSAL:** judge, prosecutor

22. **ETHICAL ISSUES**

a) Attorney's decisions
b) Client's decisions
c) Conflict of interest
d) Competency
e) Communication
f) Supervisor's responsibilities, decisions

23. **EVALUATION:** from self & others

Best aspect of your representation of this client; how does your representation of this client need to improve?

DPA Criminal Defense Appellate Case Review

February, 1996

Date of this Review: __/__/__

Appellate Case Review Learning Objectives: *Coaching and evaluation of how the process of representing this appellate client in this case is being done with the goal of increasing representation knowledge, skills, attitudes and processes for this and future clients by this attorney and other attorneys in the office. Seeking client-centered quality representation, greater self-awareness, better processes, fuller perspective.*

1. General Information
2. Offense(s)/Sentence
3. Major Actions
4. Client Communication, Relationship
5. Essential Data
6. Appellate Motion Practice
7. Propelling the Client's Story
8. Create
9. Research
10. Evaluate
11. Introduction to Brief/Describe Essence of Case Briefly
12. Statement of the Case
13. Assignment of Error
14. Conclusion to Entire Brief
15. Other Briefs
16. Issues you Will Orally Argue in the Order to be Argued
17. Strongest Aspects of Prosecutor's Arguments
18. 3 most Significant Questions Judges Will Ask at Oral Argument
19. Worst Problems with Case
20. Opening of Oral Argument
21. Fundamental Persuasion Points to be Communicated
22. Closing of Oral Argument
23. Planned Rebuttal
24. Vocabulary (Key Words) of Oral Presentation
25. Self-Evaluation
26. List Any Relevant Cases Decided Since Briefs Filed
27. Information on judges Relevant to This Case
28. Information on Opposing Counsel Relevant to This Case
29. Coaching Comments after Mock Oral Argument
30. Editing, Revising, Rewriting, Proofreading, Feedback and Self-Evaluation
31. Ethical Issues
32. Future Review
33. Other Litigation Activity
34. Assessing the Unusual, Significant, Creative
35. Overall Coaching Comments on Appellate Representation

1. GENERAL INFORMATION

Client: _____ Correction's Inmate No.: _____

Co-Defendant(s): _____ Date Assigned Case: __/__/__

Attorney being Coached: _____ Coaching Done By: _____

Next Action: _____ Date of Next Action: __/__/__

Other Open Cases: _____ Date Brief Initially Due: __/__/__ Date Brief Now Due: __/__/__

Appellate Court Case is in: _____ Client is: □ confined; □ on release

Check if this is a: □ retrial; □ with prior appeal

2. OFFENSE(S)/SENTENCE:

a) Conviction(s) Total Sentence: _____
1) _____ 2) _____

3) _____ 4) _____

b) Elements of each conviction:
1) Mental State: _____ 1) Mental State: _____ 1) Mental State: _____

2) _____ 2) _____ 2) _____

3) _____ 3) _____ 3) _____

4) _____ 4) _____ 4) _____

c) Does Client Have Any Other Pending Charges? ☐ Yes ☐ No
Describe: _____

d) Is client serving any other sentence(s): _____

3. MAJOR ACTIONS:

a) Directed Verdict Made? ☐ Yes ☐ No
Grounds: _____
b) New Trial Motion; JNOV Filed? ☐ Yes ☐ No
Grounds: _____
c) Newly Discovered Evidence
d) Instructions tendered and not given
1) _____

2) _____

3) _____

e) 3 major motions defense did not get relief on:
1) _____

2) _____

3) _____

f) Interlocutory, extraordinary actions
g) Recusal: judge, prosecutor; grounds
h) Funds for experts
i) Suppression:
j) Discovery
k) Voir Dire
l) Evidence

4. CLIENT COMMUNICATION, RELATIONSHIP:

□ in-person; □ phone; □ letter; number of contacts: _____

a) Identification and explanation of your role as legal representative for client
b) Client's experience with previous attorney(s)
c) Any prior appeals
d) Appellate process and timing, and difference from trial process and timing
e) Next step in appellate process
f) Advice on consequences of remand or retrial
   1. greater sentence
   2. lesser sentence, lesser included, acquittal
   3. new proceeding (*e.g.*, 11.42; 60.02)
   4. parole eligibility
   5. future enhancement
   6. prison classification
g) Reaffirm client's decision to appeal
h) Appeal bond, shock probation
i) Client's desires on motions, issue selection, issue content: generally & specifically
j) Providing copies of appellate motions, briefs, opinions, orders, record
k) Present indigency status
l) Client confidentiality
m) Decisionmaking: who makes what decisions? client or attorney?

5. ESSENTIAL DATA:

a) the record: testimony, hearings, pleadings, exhibits (written, audio, video)
b) trial attorney's file
c) trial attorney's evaluative thoughts on trial and appellate issues
d) client's mental health records since confined after conviction
e) client's recollection and evaluative thoughts of trial
f) juror investigation
g) co-indictee trial records
h) correctional records
i) any additional investigation

6. APPELLATE MOTION PRACTICE:

a) complete record: testimony, hearings, pleadings, exhibits (written, audio, video)
b) enlarge record
c) additional time to file record, brief, reply brief
d) incompetent appellate client
e) offensive motions (*e.g.*, strike pleading, sanctions, recusal, abeyance)
f) creative motions

7. PROPELLING THE CLIENT'S STORY:

Most Persuasive Facts, Law, Practical Considerations:	How can these be maximized:
1)	1)
2)	2)
3)	3)
Most Damaging Facts, Law, Practical Considerations:	Persuasive Way to Communicate Damaging Facts (confront or avoid)
1)	1)
2)	2)
3)	3)

Theory of the Case on Appeal:

Themes: entire brief:

Error 1 _____

Error 2 _____

Error 3 _____

Error 4 _____

Error 5 _____

Images: Pictures that propel the themes

Persuasive Vocabulary

8. **CREATE.** Identifying Possible Issues, Strategies: creative problem-solving via brainstorming possible solutions

a) assemble appropriate group of people (at least 2 plus yourself)
b) you relate case briefly
c) generate every possible helpful idea
d) immediately write ideas for all to see
e) no evaluation

9. **RESEARCH:** Legal & Other

a) Kentucky caselaw
b) U.S. Supreme Court Caselaw
c) Pending grants of certiorari
d) Sixth Circuit Caselaw
e) Other Jurisdictions Caselaw
f) Statutes
g) Kentucky Rules of Criminal Procedure, Civil Procedure
h) Kentucky Administrative Regulations
i) Kentucky Constitution
j) United States Constitution
k) Ethics Rules, Opinions
l) Legal Trends
m) Scientific
n) Social
o) Educational
p) Communication

10. **EVALUATE.** Selecting the issues to present:

a) integrate theory of appeal
b) consider all possible issues created during brainstorming
c) list possible categories of issues, themes
d) what do the judges want, what have the judges been responding to, significance of issue beyond relief for client
e) think of all strengths of each issue
f) think of all problems with each issue
g) contextual benefits of arguable but unwinable issue
h) exclude inappropriate issues
i) consult with client, others
j) review
k) alter theory as necessary based on issues selected

11. **INTRODUCTION TO BRIEF/DESCRIBE ESSENCE OF CASE BRIEFLY:**

12. STATEMENT OF THE CASE: *(facts determine who wins)*

a) primacy
b) chronological vs. narrative vs. thematic
c) the client's persuasive story with adverse facts
d) vocabulary
e) preview of all issues
f) preservation
g) anticipate, preempt factual & legal problems
h) procedural vs. factual
i) recency

13. ASSIGNMENT OF ERROR. Present the issues persuasively to win:

a. **Theory:** Primarily one theory propelled by consistent themes
b. **Headnote, Headline:** Subject of error, position taken, whose error is it? (judge, prosecutor, defense attorney, the state, other?)
c. **Issue presentation & content**
   i) primacy
   ii) facts - maximize good & turn bad to your client's advantage; case facts & social facts
   iii) law - feature good and bad
   iv) Constitution - state & federal
   v) regulation, secondary authorities
   vi) equity
   vii) policy
   viii) argument: why relief is necessary - for this client
   ix) will not require any other or a lot of cases to be reversed
   x) prejudice, harm
   xi) standard of review
   xii) preservation, or reasons to review despite distinguish lack of complete preservation
   xiii) anticipation of opponent's arguments
   xiv) conclusion, relief needed to correct error: reverse for new trial, remand, reverse & dismiss, other
   xv) recency

d. **Ordering of issues:**
   i) chronological
   ii) strongest to weakest
   iii) contextual relationship to other issues
   iv) thematically
   v) primacy, recency

e. **Appendix**
   i) required materials
   ii) optional materials; are the theory, themes, images enhanced?

f. **Demonstrative Evidence**
   i) chart
   ii) table
   iii) picture

14. CONCLUSION TO ENTIRE BRIEF: Comprehensive Request for Relief

15. OTHER BRIEFS

a) Amicus curiae: soliciting, opposing, timing
b) Supplemental: appellant, appellee, other
c) Certification of Law

16. ISSUES YOU WILL ORALLY ARGUE IN THE ORDER TO BE ARGUED

	Issue	Prejudice	Preserved
1.		1.	1. ☐ Yes ☐ No
2.		2.	2. ☐ Yes ☐ No
3.		3.	3. ☐ Yes ☐ No

17. STRONGEST ASPECTS OF PROSECUTOR'S ARGUMENTS

a.

b.

c.

18. 3 MOST SIGNIFICANT QUESTIONS JUDGES WILL ASK AT ORAL ARGUMENT

a.

b.

c.

19. WORST PROBLEMS WITH CASE (*e.g.*, Procedural, Record, Preservation)

a.

b.

c.

20. OPENING OF ORAL ARGUMENT

21. FUNDAMENTAL PERSUASION POINTS TO BE COMMUNICATED

a.

b.

c.

d.

e.

22. CLOSING OF ORAL ARGUMENT

23. PLANNED REBUTTAL

24. VOCABULARY (KEY WORDS) OF ORAL PRESENTATION

25. SELF-EVALUATION

YOUR BEST ORAL PRESENTATION SKILL

YOUR ORAL PRESENTATION SKILL YOU MOST NEED TO IMPROVE

26. LIST ANY RELEVANT CASES DECIDED SINCE BRIEFS FILED

a.

b.

c.

27. INFORMATION ON JUDGES RELEVANT TO THIS CASE (*e.g.*, prior opinions)

JUDGE	RELEVANT INFORMATION
1.	1.
2.	2.
3.	3.
4.	4.
5.	5.
6.	6.
7.	7.

28. INFORMATION ON OPPOSING COUNSEL RELEVANT TO THIS CASE

NAME OF ATTORNEY(S)	RELEVANT INFORMATION
1.	1.
2.	2.
3.	3.

29. COACHING COMMENTS AFTER MOCK ORAL ARGUMENT

a) MOST PERSUASIVE ASPECTS OF ORAL ARGUMENT

THOSE CAN BE MAXIMIZED BY:

b) MUST WORK ON BETTER ANSWERS FOR FOLLOWING QUESTIONS:

i.

ii.

iii.

vi.

v.

c) LEAST PERSUASIVE ASPECT

ADVICE ON WHAT TO DO CONCERNING THIS ASPECT

	Very Poor	Poor	Avg.	Good	Very Good
1. Communication of commitment to the issue(s)/client	1	2	3	4	5
2. Clarity of communication, preciseness of defining issue(s)	1	2	3	4	5
3. Responses to questions	1	2	3	4	5
4. Communicating unfairness, prejudice, emotion	1	2	3	4	5
5. Knowledge or record and use of facts	1	2	3	4	5
6. Use of state and federal Constitutions	1	2	3	4	5
7. Knowledge and use of caselaw, statutes, and procedural rules	1	2	3	4	5
8. Demeanor and attitude	1	2	3	4	5
9. Appropriateness of any oral admissions made	1	2	3	4	5
10. Rebuttal skills	1	2	3	4	5
11. Persuasiveness; communication of theory, themes	1	2	3	4	5

30. **EDITING, REVISING, REWRITING, PROOFREADING, FEEDBACK AND SELF-EVALUATION:** maximizing the best; confronting & improving weaknesses

a) from others
b) from self
c) passage of time between writing and review, revising, rewriting
d) procedures to insure feedback: in place or to be created
e) how can the ultimate product be better?
f) what are alternative approaches to major case problems?
g) what are the barriers, obstacles to relief; how can they be hurdled?
h) what are the client's desires on the problems?
i) shephardize, check citation accuracy
j) proofread

31. **ETHICAL ISSUES**

a) Attorney's decisions (with client input?)
b) Client's decisions with attorney's advice
c) Supervisor's decisions, responsibilities
d) conflicts

32. FUTURE REVIEW:

a) Petition for Rehearing/Modification of Opinion/Extension of Opinion

b) Discretionary Review

c) Petition for Certiorari

d) State Post-Conviction Review

e) Federal Habeas Review

33. OTHER LITIGATION ACTIVITY

a) Offensive
b) Defensive

34. ASSESSING THE UNUSUAL, SIGNIFICANT, CREATIVE

a. Most unusual aspect of this appeal
b. Most significant aspect of this Appeal
c. Most creative aspect of your work in this case

35. OVERALL COACHING COMMENTS ON APPELLATE REPRESENTATION

The three major areas for further focus to improve the quality of this appeal process including consultation with others:

a)

b)

c)

Date to discuss this appeal process again: __/__/__

Additional thoughts:

Defenders Comment on Case Review

Kim Brooks on Appellate Case Review

I had a case review done on an appellate case. It was a murder case being heard before the Kentucky Supreme Court. In fact, George Sornberger and John Niland tried the case. I thought it was enormously helpful. I work with DPA's of-counsel program doing appeals and I would really encourage people to go through that case review process. The appellate court is a different audience than we usually face. I would much rather have those guys drilling me with questions raising very difficult questions and thinking those through before the Supreme Court Justices asked me those difficult questions. That helped me very much in the process of doing the appellate oral argument.

Tom Glover of Hopkinsville on Capital Case Review

I was in the Marine Corps. I have been a public defender for 13 years. The first 12 of it was like you would of had to hold a gun to my head to get me to come to Frankfort. We wanted nothing to do with those people. And about 1 year ago, I began to see that they were there to help rather than hurt us. So I came up for a case review in July and it was on short notice and they bent over backwards to let me have mine, real fast and do everything they could to help me. I found out two things about headquarters here. Number one: I found out that they have a lot better supply sergeant and supply room than my office. They let me go in there and I hauled out an armload of stuff that we don't have. I was able to scarf a bunch of gear, so first of all there was that advantage. Number two: When I did my case with Vince Aprile and George Sornberger, there wasn't any criticism at all. They did not criticize me, they made suggestions. But more than anything, they saw three tactical problems with me. They solved three tactical problems for me, and it was because of their experience and judgment. But, I could not have solved the problem because I was too close to it. I gave them the problem and all three problems were solved in 30 minutes. And all 3 problems are good practical ways to get this evidence in or to accomplish something and I could not figure out a way to do it. It was invaluable to me. They really did me and my client a real service. They didn't criticize me, maybe they were being kind, I don't know. I would rather look stupid in that room with them than look stupid in front of the judge. They were very helpful to me and I recommend it to anybody. After the Death Penalty TPI where we were educated on case review, I went to Arizona for a 2-week vacation where I visited Canyon De Chelly National Monument and received their newspaper. A paragraph on the front page concisely sets forth the creed being taught at the Department's practice institutes: *Canyon de Chelly is more than a scenic attraction. Land is more than equity. It is us, the people, and our culture that originate from the land. Land is spiritual, its meaning becomes deeper as we learn about the stories that relate to ourselves and our connection to the earth. Every beautiful place has a story...it is up to us to go home and grasp its meaning and share it with the children.*

Keith Virgin of Madisonville on Case Review

I was recently involved with John Niland and Steve Mirkin in Elizabethtown in a case review. We were having a little bit of an evidentiary problem. They gave us some good ideas on that and several other ideas. My co-counsel and I had the opportunity to divide up some work and I thought that was good. It gave us time to work out what we were going to do and we are going to do it again in a month. So, I think it will only help. We have to represent our clients and give them the best we can offer. The more we think about their case, the better. Four lawyers thinking about the case are a whole lot better than two.

1997 Evidence Law Update

David Niehaus

1997 has been something of sabbatical year for me in the *Advocate*. However, during the year since the last edition of the *Advocate Evidence and Preservation Manual*, the appellate courts have turned out 31 opinions that contain important rulings on evidence law. It is therefore time for an update. Because of the volume and because of the format of the *Evidence and Preservation Manual*, this article will organize the holdings by rule number. To conserve space, the full citation of the case will be presented only in an alphabetical table at the end of the article. In the entries I will make a reference to the case name and to the page number on which the evidence point appears in the opinion. This update covers opinions appearing in the *Southwest Reporter* from December 10, 1996 to November 25, 1997, closing with Volume 953, No. 2.

One other interesting and useful development during 1997 has been the recent publication of a Kentucky evidence manual by Professor Richard Underwood of the University of Kentucky. This book, titled *Kentucky Evidence, 1997/98 Courtroom Manual* is published by the Anderson Publishing Company of Cincinnati and is available for about $40, including postage and handling. This manual is rather detailed and is organized by rule number. It has a number of useful features including the revised Study Committee Notes. The manual also contains a helpful listing of pre-rules Kentucky cases, Kentucky cases citing the rules, and useful federal cases. The manual is not limited to criminal practice and therefore contains a good deal of information that is of use to lawyers handling civil cases as well. This manual is well worth the $40 investment. It is a complement to the *Advocate Evidence and Preservation Manual* which will continue to focus on situations and problems faced by attorneys trying criminal cases who want a short and specific resource for their trial notebook.

KRE 103

Commonwealth v. Kina, p. 809 - Because the trial judge is in a unique position to judge witness credibility, an appellate court, when reviewing a decision to admit or exclude evidence, will accept findings of fact unless they are clearly erroneous and will not reverse unless the appellant demonstrates that the ruling was an abuse of discretion.

Brock v. Commonwealth, p. 29 - However, the discretion of the trial judge is not unlimited. This case reversed on the ground that exclusion as cumulative evidence was outside the discretion normally exercised by a trial judge.

KRE 103(a)(1)

Kesler v. Shehan, p. 256 - Where evidence is admissible for one purpose, a general motion to strike does not preserve error for the appellate court. The trial judge must be given a chance to rule on a specific request.

Commonwealth v. Petrey, p. 419 - Defendant failed to make a timely objection to DNA expert's qualifications, testimony, procedures or findings and therefore waived his right to object on appeal.

KRE 103(c)

Brock v. Commonwealth, p. 30 - Any attempts to impeach or refresh with a taped statement must first be conducted in chambers outside the hearing of the jury to avoid prejudice if evidence is ruled inadmissible.

Luttrell v. Commonwealth, p. 218 - All rulings on expert witness status should be out of the hearing of the jury and there should never be a declaration that a witness is an expert.

KRE 103(d)

McKinney v. Venters, p. 242 - In DNA cases, it is appropriate for the judge to rule after the testing has occurred and when the party indicates that it will offer evidence for admission. The objection should come at that point. This case arose from an original action seeking to prohibit testing by the Commonwealth that would destroy the sample.

KRE 103(e)

Commonwealth v. Petrey, p. 419 - The Supreme Court held that the Court of Appeals erred when it considered the defendant's claim about DNA despite his failure to preserve it *in* the trial court.

Brock v. Commonwealth, p. 28 - The Court held that this rule parallels RCr 10.26 and requires a substantial possibility that the result would have been different but for the error. The Court also cited federal cases which hold that this rule requires showing that the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

KRE 104(a)

Parker v. Commonwealth, p. 213-214 - The Court cites *Huddleston v. U.S.* as the standard for determining KRE 404(b) admissibility. The judge must ask whether there is evidence from which the jury reasonably could infer that the defendant had committed the prior acts.

KRE 105

Cormney v. Commonwealth, p. 634 - Court held that erroneous testimony about the DUI presumption in a manslaughter case was not reversible. The problem was satisfactorily cured by an admonition.

KRE 106

Commonwealth v. Collins, p. 813-814 - The Court held that once the subject of a diary was raised, the door was open for admission of other parts of the diary if relevant. The completeness rule exists to prevent a misleading impression. The inquiry is whether the meaning of the admitted part is altered by other portions that should, in fairness, be admitted.

KRE 107

Commonwealth v. King, p. 808 - The parties on appeal raised the issue of conspiracy pursuant to KRE 801A. The Court declined to consider the rule because the prosecution arose before July, 1992 and instead decided the case on common law conspiracy principles.

KRE 401

Wolfenbarger v. Commonwealth, p. 774 - Court of Appeals held that on remand of a domestic assault case trial judge should not allow testimony of a neighbor of defendant's ex-wife about the effect the crime had on ex-wife because it is irrelevant.

Newkirk v. Commonwealth, p. 692 - Child sex abuse accommodation syndrome, even if valid scientific evidence, is irrelevant to the issue of identification of the perpetrator.

Bowling v. Commonwealth, p. 302 - At penalty phase of death-eligible murder case some background information about the deceased is relevant to full understanding of the nature of the crime. However, not every detail about the deceased is relevant .

Foley v. Commonwealth, p. 887 - On cross-examination, any relevant subject may be brought up, including credibility of the of the witness.

Robey v. Commonwealth, p. 618 - Commonwealth tried to justify other acts evidence to show identity, among other grounds. The Court noted that identity was not an issue because the defendant admitted the acts but claimed consent.

Toyota v. Epperson, p. 415 - "After acquired information" could not be relevant as the motive for discharge of an employee.

Brock v. Commonwealth, p. 28 - A witness's observation of the defendant's demeanor on a certain day did not tend to prove defendant's state of mind 12 days later.

Carman v. Dunaway Timber Co., p. 570 - Judge properly allowed evidence of industry custom to show the standard of care required in a tort case.

Collins v. Commonwealth, p. 575 - The defendant opened the door to a social worker's testimony about a child prosecuting witness's explanation for initially denying sexual abuse.

Parker v. Commonwealth, p. 214 - Judge properly found prior acts relevant to show defendant's animus toward a child and to negate accident or mistake. The

defendant testified that he did not know how the child was injured.

Ray v. Stone, p. 224 - A criminal conviction may be used to collaterally estop any contrary claim by estopped party in a later civil case.

KRE 402

Brown v. Commonwealth, p. 248 - A defendant claimed photographs were irrelevant because he had admitted the acts alleged. The Court held that when the defendant pleads not guilty, all elements of the charge are at issue and selected photographs may be probative.

Kesler v. Shehan, p. 256 - Evidence otherwise irrelevant may become relevant to rebut testimony.

Robey v. Commonwealth, p. 618 - Because defendant admitted the act charged, his identity was not issue, and therefore evidence offered for that purpose was irrelevant.

Foley v. Commonwealth, p. 886 - Evidence that defendant threatened or otherwise influenced witnesses in an attempt to suppress testimony is relevant where the threats are made by or on behalf of the defendant.

KRE 403

Robey v. Commonwealth, p. 618 - In KRE 404(b) cases, the probative value of the evidence must substantially outweigh the danger of undue prejudice. In this case, an act 16 years previous was deemed too remote.

Parker v. Commonwealth, p. 212 - Photographs which supplement the testimony of a medical examiner and other expert testimony may be introduced when the judge finds that they are more probative than prejudicial.

KRE 404(b)

Foley v. Commonwealth, p. 886-887 - Evidence that the defendant threatened or otherwise influenced witnesses in an attempt to suppress testimony may be introduced where made by or on behalf of the defendant. The defendant denied attempting to orchestrate testimony and the Commonwealth sought to introduce a letter in which the scheme was shown.

Bowling v. Commonwealth, p. 300-301 - Other instances showing that the defendant robbed the lone operator of a gas station are admissible because identity is an essential element of every prosecution and other acts evidence may be used to prove identity even if they tend to prove commission of another crime. An apparent important factor in this case was the limiting instruction given by the judge.

Robey v. Commonwealth, p. 617-618 - Other acts evidence is admissible only if probative of an issue independent of character or criminal disposition and only if the probative value outweighs unfair prejudice with respect to character.

Tabor v. Commonwealth, p. 572 - A juror's comment amounted to other crimes evidence which is not permitted to prove character.

Parker v. Commonwealth, p. 213 - Uncharged acts may be admitted to show the defendant's motive, intent or absence of mistake. In this case, the defendant claimed that there was no way to link prior injuries of a child to him. The Court held that the link need not be established by direct evidence, but may be made by inference.

KRE 404(c)

Bowling v. Commonwealth, p. 300 - The purpose of the rule is to provide notice adequate for a motion in limine. The defendant had actual notice in this case from discovery, evidenced by his failure to list lack of notice as a ground for exclusion and his filing of a motion in limine.

KRE 411

Wallace v. Leedhanachoke, p. 625 - Party wished to show that doctor's expert in malpractice action was insured by the same company as the doctor to show the bias of the expert. Court held that the judge must bal-

ance probative value against the well established rule prohibiting introduction of evidence about insurance.

KRE 501

Leanhart v. Humana Inc., p. 820 - KRS 311.377(2), the peer review privilege, does not necessarily prohibit discovery in medical negligence cases.

KRE 503

Lovell v. Winchester, J., p. 467 - In a civil suit, persons who had consulted a lawyer about a case exercised this privilege when the lawyer instead represented the adverse party. The key is whether confidential information is disclosed to the attorney with a view to obtaining his professional services based on a reasonable belief that the lawyer is undertaking representation.

KRE 601(a)

Moss v. Commonwealth, p. 582 - The prosecutor at trial is not necessarily an incompetent witness. The decision as to whether he will testify is largely based on RPC 3.7(a)(1). Here he just testified as a link in the chain of custody which was permissible.

KRE 601(b)

Bart v. Commonwealth, p. 579 - Every person is presumed competent to testify, even infants. The Court held that the trial judge is in a unique position to determine if the witness is qualified. Although due process may in some cases require expert testimony on witnesses, in general, the Court will leave the question of competency to the judge.

KRE 609

Tabor v. Commonwealth, p. 572 - Citing *Duvall v. Commonwealth*, 548 S.W.2d 832 (Ky. 1977), the Court held that a party may not impeach with a conviction if the judgment is not final, which includes a case in which the appeal is not final.

KRE 611(a)

Ray v. Stone, p. 224 - A criminal conviction may be used to collaterally estop any contrary claim by the estopped party in a civil case. The Court does not cite a rule for this principle, but KRE 611(a)(1) and (2) deal with this subject matter.

Collins v. Commonwealth, p. 573 - A missing evidence instruction is to be given when evidence is negligently lost. See *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997).

KRE 611(b)

Foley v. Commonwealth, p. 887-888 - Kentucky follows the "wide open" cross-examination rule which allows a party to cross-examine a witness on any subject including credibility.

Wallace v. Leedhanachoke, p. 625 - A party may cross-examine a witness on any issue relevant to the case, subject to the control of the judge.

KRE 612

Brock v. Commonwealth, p. 29-30 - Use of an audiotape to refresh memory is permitted but must be done out of the presence of the jury. If the memory is refreshed, there is no need to admit the tape. If not, the tape should be admitted but the jury may not use it during deliberations.

KRE 614(c)

Commonwealth v. Collins, p. 817 - Failure to require written juror questions was a technical violation of this rule but in the circumstances harmless.

KRE 615

Commonwealth v. Collins, p. 817 - The purpose of this rule is to elicit truth from the witness. When the rule is violated, the judge must conduct a hearing to determine if there is prejudice to a party, what the witness heard, and what the proposed testimony would be. The judge's determination is subject to review for abuse of discretion.

KRE 701

Hubbard v. Commonwealth, p. 383 - The victim of a robbery is competent to testify as to the injury resulting from the crime.

Bowling v. Commonwealth, p. 305 - A lay witness may testify to "collective facts" like a "strange" or "intense" look.

Brock v. Commonwealth, p. 28 - The Court did not reach the question of whether a party had laid the minimum foundation for a witness to describe the defendant's state of mind. This is another collective facts case.

Moss v. Commonwealth, p. 582 - An attorney may not ask a witness if any other witness in the case is lying.

Commonwealth v. Rhodes, p. 623 - A police officer qualified by training and experience may state an opinion as to intoxication.

KRE 702

McKinney v. Venters, p. 241-242 - After the party has caused the DNA test to be made, the judge will determine, still on a case by case basis, the admissibility of the evidence.

Kesler v. Shehan, p. 256 - In an undue influence will contest, the attorney/expert testified about the duties of a drafting attorney which did not invade the province of the jury.

Commonwealth v. Wirth, p. 83 - The breathalyzer test is considered sufficiently reliable to be admitted without a showing of a greater degree of certainty than other expert evidence. The method of "relation back" testimony by an expert was discussed in this case.

Newkirk v. Commonwealth, p. 695 - The change from the Frye to the *Daubert* standard is not sufficient to permit testimony about child sex abuse accommodation syndrome. The Court also observed that more courts permit experts to testify about probabilities, classes, syndromes and traits the more the jury is removed from its historic function of judging the credibility of evidence. The Court stated that it would trust the jury.

Bowling v. Commonwealth, p. 305 - A police officer's testimony about the fit of a gun to a particular holster was objected to on the ground that the jury could observe this for itself. The Court rejected the claim because the rule permits evidence that "aids" the jury, even where there is some reservation as to its helpfulness.

Foley v. Commonwealth, p. 889 - The judge has discretion as to expert witness status. The proposed testimony must be relevant to the *issue* at hand.

Robey v. Commonwealth, p. 620 - DNA evidence is admitted on a case by case basis. It was unnecessary in this case because the defendant admitted intercourse.

Cormney v. Commonwealth, p. 634 - Expert testimony as to who was driving the car in a vehicular homicide case assisted the jury. However, testimony as to the DUI presumption of intoxication was erroneous.

Commonwealth v. Petrey, p. 419 - The Court stated that it was still reluctant to accept DNA as admissible in all cases. It demands a case by case determination.

Commonwealth v. Rhodes, p. 623 - Preliminary breath test results are admissible if the instructions for them have been followed. The Court did not decide the question of whether the HGN test is scientific or not.

Collins v. Commonwealth, p. 574-575 - A physician's testimony about retention of the hymen was helpful to the jury in a child sex abuse case. It was based on a compilation of statistics and observations therefore a qualifying hearing under *Daubert/Mitchell* was not required.

Bart v. Commonwealth, p. 578-579 - Due process may in some cases require examination of a child witness by an independent expert to determine competency to testify. But in general, the Court prefers to leave the matter up to the trial judge.

Luttrell v. Commonwealth, p. 218 - In the context of this case, the judge's statement to the witness that "you may render an expert

opinion" was harmless. But the Court cautions that all rulings on expert status should be out of the hearing of the jury and that there should never be a declaration to the jury that the witness is an expert.

KRE 703

Brown v. Commonwealth, p. 247 - An expert may testify as to what a third person said as long as this type of information is customarily relied on in the particular practice or profession of the witness.

KRE 704

Kesler v. Shehan, p. 256 - In an undue influence will contest, the attorney/expert's testimony did not address any matter that the instructions called for the jury to decide and therefore did not touch on the ultimate issue.

Newkirk v. Commonwealth, p. 694 - The rejection of proposed KRE 704 was an unambiguous act, and, as Lawson concluded, the ultimate fact prohibition is still important in Kentucky.

Cormney v. Commonwealth, p. 633 - The testimony of an accident reconstruction witness that the defendant was the driver was held not addressed to the ultimate issue in the case which the Court identified as whether the driver was acting wantonly. This decision is wrong. Identity is an issue in every criminal case and the witness gave an opinion on who was driving the car, an essential element of second degree manslaughter.

KRE 705

Collins v. Commonwealth, p. 574 - An expert may give an opinion without disclosure of underlying data relied upon. Therefore, the failure of the Commonwealth to provide in pretrial discovery copies of the studies relied upon was not a violation of RCr 7.24(1)(b)

KRE 801A(a)(1)

Brock v. Commonwealth, p. 27 - A party may use qualifying statements both to contradict and as substantive evidence. A prior statement qualifies when the witness denies making it or claims inability to remember it.

Newkirk v. Commonwealth, p. 696 - Child could not recall specific details during trial testimony and therefore the judge did not abuse discretion by allowing a police officer and a physician to testify as to these details.

KRE 801A(a)(3)

Owens v. Commonwealth, p. 839 - The Commonwealth is entitled, after a witness says that he made an eye witness identification, to corroborate the fact that the out of court identification was made.

KRE 801A(b)

McQueen v. Commonwealth, p. 417 - This rule expressly exempts only statements offered against the party from exclusion by KRE 802.

KRE 801A(b)(5)

Commonwealth v. Kina, p. 809 - This case discusses pre-rules conspiracy and holds that the determination of the existence of a conspiracy will not be reversed except upon showing of abuse of discretion. The dissent says that the rule has not yet been construed.

KRE 802

Collins v. Commonwealth, p. 575 - In this case the Court held that the social worker's testimony about a child's explanation for initial denial of sexual abuse was not hearsay. The Court noted that the social worker did not say whether she believed the child's explanation. The Court is wrong on this point. Unless the testimony was expressly limited to corroboration that the explanation was made, in which case the substance was unnecessary, the jury would have used this as evidence of the truthfulness of this explanation.

KRE 803(2)

Robey v. Commonwealth, p. 618-619 - The Court held that the rule was satisfied when the declarant was under the stress of nervous excitement, reacting to recent event with no

opportunity to reflect upon or fabricate a statement and the statement was trustworthy because the stress of the nervous excitement stilled reflective facilities so that the statement was spontaneous and a sincere response to the event.

KRE 803(5)

Brock v. Commonwealth, p. 30 - The recorded recollection exception does not require a written memorandum prepared by the witness particularly when it is used only to refresh recollection. This opinion is confusing. The rule expressly requires the making or adoption of the record "when the matter is fresh". The Court is really talking about refreshment, KRE 612, rather than exemption from the hearsay rule.

KRE 804(a)

Brock v. Commonwealth, p. 31 - In this case the defendant wanted to use a statement of the deceased to his mother which had been recorded on audiotape.

KRE 804(b)(3)

Brock v. Commonwealth, p. 31 - The decedent's statement that he would kill the defendant constituted a statement against the decedent's penal interest when made to his mother before the confrontation which resulted in the defendant shooting the deceased.

KRE 805

Brock v. Commonwealth, p. 31 - This case presents an example of how the rule works. The deceased's statement to his mother was recorded on audiotape and introduced through the person engaged in the phone conversation with the deceased's mother.

KRE 901

Commonwealth v. Wirth, p. 82 - To qualify the breathalyzer, calibration testimony is usually provided by technicians but the statutes and regulations permit use of public or business records to do so.

Brock v. Commonwealth, p. 29-30 - To authenticate audiotape, there must be evidence sufficient to support a finding that the matter in question is what the proponent says it is. The witness may identify the voices and the accuracy of the tape. Without saying so expressly, this case acknowledges that KRE 901 abrogates the former involved foundation for audiotape.

Moss v. Commonwealth, p. 582 - The Assistant Commonwealth's Attorney may appear as a witness to establish the chain of custody.

Parker v. Commonwealth, p. 213 - Photographs may be authenticated by anyone who can say that they actually depict what they are supposed to show.

Bart v. Commonwealth, 951 S.W.2d 576 (Ky. 1997)
Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997)
Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997)
Brown v. Commonwealth, 934 S.W.2d 242 (Ky. 1996)
Carman v. Dunaway Timber, 949 S.W.2d 569 (Ky. 1997)
Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997)
Commonwealth v. Collins, 933 S.W.2d 811 (Ky. 1996)
Commonwealth v. King, 950 S.W.2d 807 (Ky. 1997)
Commonwealth v. Petrey, 945 S.W.2d 417 (Ky. 1997)
Commonwealth v. Rhodes, 949 S.W.2d 621 (Ky.App. 1996)
Commonwealth v. Wirth, 936 S.W.2d 78 (Ky. 1996)
Cormney v. Commonwealth, 943 S.W.2d 629 (Ky.App. 1996)
Foley v. Commonwealth, 942 S.W.2d 876 (Ky. 1996)
Hubbard v. Commonwealth, 932 S.W.2d 381 (Ky.App. 1996)
Kesler v. Shehan, 934 S.W.2d 254 (Ky. 1996)
Leanhart v. Humana, Inc., 933 S.W.2d 820 (Ky. 1996)
Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997)
Luttrell v. Commonwealth, 952 S.W.2d 216 (Ky. 1997)
McKinney v. Venters, 934 S.W.2d 241 (Ky. 1996)
McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997)
Monsanto Co. v. Reed, 950 S.W.2d 811 (Ky. 1997)
Moss v. Commonwealth, 949 S.W.2d 579 (Ky. 1997)
Newkirk v. Commonwealth, 937 S.W.2d 690 (Ky. 1996)
Owens v. Commonwealth, 950 S.W.2d 837 (Ky. 1997)
Parker v. Commonwealth, 952 S.W.2d 209 (Ky. 1997)
Ray v. Stone, 952 S.W.2d 220 (Ky.App. 1997)
Robey v. Commonwealth, 943 S.W.2d 616 (Ky. 1997)
Tabor v. Commonwealth, 948 S.W.2d 569 (Ky.App. 1997)
Toyota Motor Mfg. v. Epperson, 945 S.W.2d 413 (Ky. 1996)
Wallace v. Leedhanachoke, 949 S.W.2d 624 (Ky.App. 1996)
Wolfenbarger v. Commonwealth, 936 S.W.2d 770 (Ky.App. 1996)

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Issues Related to the Juvenile Sex Offender Statute

A. Introduction

Recently I appeared in a juvenile court to represent a child who had been probated on a sex abuse charge. The judge had revoked the child's probation and committed him to the Department of Juvenile Justice (DJJ) when his mother was unable to take him back into her home after he was released from a mental health facility. At the hearing on the motion to terminate commitment, the juvenile judge asked the DJJ community worker whether the child had been receiving sex offender treatment. There was considerable discussion of that subject before the judge denied the motion to terminate. My focus as the child's advocate expanded from whether his probation had been improperly revoked to whether he'd been properly designated a sex offender.

Following the hearing, I reviewed the child's records and learned that he'd never been represented by an attorney. The report ordered by the judge when the child admitted guilt without counsel, advised that his IQ was 56, and there had been no declaration by the judge that the child was a sex offender. The judge's position was that a child is automatically designated a sex offender upon an adjudication of guilt of a sex offense. In spite of the child's low IQ, the judge ordered DJJ to treat him as a sex offender. An appeal to circuit court is pending.

This article contains my observations about the juvenile sexual offender statute. The law is complex, and the consequences of being declared a sex offender are severe. No child should be allowed to proceed without an attorney when charged with a sex offense.

B. The Statute

KRS 635.500, effective 7/15/94, creates a new classification of juveniles - sex offenders. KRS 635.505 defines a "juvenile sexual offender" as a child under 18 who has been convicted of designated offense(s) and is NOT actively psychotic or mentally retarded. The offenses which can result in a juvenile being designated a sex offender are all those contained in KRS Chapter 510, including sexual misconduct and indecent exposure, attempts to commit any 510 offenses, incest (530.020), unlawful transaction with a minor (530.064), and use of a minor in a sexual performance (531.310). KRS 635.510 provides that a child "may be declared" a juvenile sexual offender under certain circumstances and KRS 635.515 states that the juvenile shall be committed to DJJ "if the juvenile court declares the child to be a juvenile sexual offender."

A mental health assessment is mandatory "upon final adjudication by the juvenile court." KRS 635.510(2). The juvenile court judge "shall order" a mental health assessment to be conducted on the child by the DJJ sexual offender program or by a qualified mental health professional (see KRS 600.020(41)) approved by the program. The evaluator "shall recommend the appropriate course of treatment." Thereafter, the juvenile judge or other authority designated by the judge "shall initiate a referral to the program for evaluation and treatment as indicated." KRS 635.510(2).

If a juvenile is declared a juvenile sex offender, he must receive treatment in a Juvenile sexual offender treatment program (SOTP) for a minimum of two years with a maximum treatment time of three years. KRS 635.515 (1). However, the juvenile shall not remain in the care of DJJ after age 21. KRS 635.515 (1). Moreover, DJJ "shall utilize the treatment setting which provides the least restrictive alternative as defined in KRS 600.020." KRS 635.515 (2). Pursuant to KRS 635.545, DJJ shall maintain the names of program participants for a 15 year period.

There are specific requirements regarding the treatment agreement. KRS 635.515 requires the program to develop a written treatment agreement containing the responsibilities of the juvenile sex offender, his family and the program. The contents shall include attendance, participation in education, planning and completion of treatment goals, curfew, home visits, participation in parenting groups and family counseling, continued contact with program, schools and courts and discharge criteria. KRS 635.515 (3). The agreement shall be presented to the court and the court shall include it as part of its order except for good cause. KRS 635.515 (4). The

program must send written reports to the juvenile judge every 60 days. KRS 635.510 (5). [Trial counsel should ask at disposition to be served with a copy of the 60-day report and the individualized treatment plan.]

The reports shall include information about the current treatment program, an assessment of the juvenile's current condition and any recommendation by program staff. KRS 635.510 (5). Moreover, the case may be called for review on recommendation of program staff or the juvenile court judge. KRS 635.510 (6). Finally, a discharge review shall be requested by the program sixty (60) days prior to the recommended release date. KRS 635.510 (7).

C. Issues

The first and most critical question is whether the juvenile is even eligible to be declared a sex offender. Many kids who appear in juvenile court are not functioning at a high intellectual level and/or are mentally disturbed. Since juveniles who are; "mentally retarded" or "actively psychotic" are not eligible for sex offender classification, reliable information on those important questions is essential. If a juvenile's IQ is below 70 he should not be designated a sex offender. See the DSM IVR and KRS 532.130.

The next question is whether the juvenile has been "declared" a sexual offender. The language of the statute clearly indicates that an affirmative act by the juvenile court declaring a child to be a sexual offender—is necessary before the KRS 635.515 treatment requirements apply. Note that KRS 635.510(1)(a) indicates that a juvenile may be declared to be a sex offender before adjudication. If a prosecutor requests such a premature declaration, there are certainly issues concerning violation of the presumption of innocence, due process clause and the prohibition on arbitrariness contrary to the United States and Kentucky Constitutions.

If a child is declared to be a sex offender, the mental health evaluation is required. It should be performed between adjudication and disposition to be meaningful. Sometimes the evaluator will find that the juvenile is not actually a sex offender or that sex offender treatment is inappropriate. The person performing the evaluation must be approved by DJJ's SOTP and must be a qualified mental health professional such as a physician, psychiatrist, psychologist with a doctorate or masters and specified qualifications, nurse or licensed clinical social worker with certain qualifications. The evaluation may not be performed by a CFC or DJJ social worker with a bachelor's degree, and a course of treatment must be recommended.

At disposition the judge "initiates referral" to a treatment program. Residential treatment is not necessarily appropriate. DJJ is required to use the least restrictive treatment alternative. Moreover, the child may participate in more than one treatment program over the two year period.

Note the requirements for the treatment agreement which should be very comprehensive and must include criteria for attaining discharge from the program. If the treatment agreement lacks any of the critical components particularly discharge criteria, an objection may be appropriate.

The sixty day reports should be substantive. If the juvenile is not making progress, he may be in an inappropriate program. Moreover, there may be issues surrounding a juvenile's unwillingness to admit responsibility. While many juveniles have pled guilty to sex offenses, others insisted on a trial and denied guilt. Conditioning treatment on an admission of guilt in the latter situation raises constitutional questions.

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I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

From this day forward I no longer shall tinker with the machinery of death.

- Harry A. Blackmun
U.S. Supreme Court Justice
February 22, 1994

A Juvenile's Right to Counsel

Rebecca DiLoreto

According to a 1996 study by The Children's Law Center, 15% of youth detained in 1995 in detention centers and residential treatment facilities were unrepresented on their most recent charges in juvenile court. According to data collected by the DPA Juvenile Post Dispositional Branch 15% of those youth who have chosen to become clients of the branch, and are detained in the state's twelve residential treatment facilities had no lawyer to assist them before they were committed to the Department of Juvenile Justice. Many of these youth will not be free of the state's custody or control until their eighteenth birthday.

According to recent data from AOC and from DPA's case tracking system, over 40% of youth appearing in juvenile court on status and public offenses are not represented by DPA contract and full-time public defenders. Though we have no data on the involvement of private counsel, surely a quick survey of our Commonwealth's juvenile courts would reveal that the appearance of a privately retained lawyer is few and far between in juvenile court. Thus, a preliminary look at the cross-referencing of DPA case tracking data and AOC data indicates that a large number of youth go unrepresented in our juvenile courts.

KRS 610.060(1)(a) provides that "if the child and his parents, guardian, or person exercising custodial control are unable to obtain counsel, [the court] shall appoint counsel for the child" "As used in statutes, contracts, or the like, this word is generally imperative or mandatory." *Black's Law Dictionary, Fifth Edition, 1979. KRS* 31.110 recognizes that such a child whose parents cannot afford to secure counsel is a "needy" or "indigent" person, entitled to the appointment of counsel. KRS 31.110(d) goes one huge step further. This subsection provides that even if a parent has means but fails to obtain counsel or obtains counsel not consented to by the child, the child qualifies as a needy person and is thus entitled to appointed counsel. With these statutory protections in place, why do so many juveniles go unrepresented? Why do youth end up in DJJ's custody and in juvenile detention centers, never having had the benefit of counsel?

A juvenile, who admits as a public offender, to having committed a felony will never have that charge expunged. The adjudication may be used against him in later circuit proceedings or as a means to transfer him to circuit court on a later charge. Do we really think that persons under the age of eighteen understand the specific, legal distinctions between a felony and a misdemeanor?

Though the law may seem clear, juvenile court judges are not routinely appointing counsel for children appearing before them. The Department of Juvenile Justice Advisory Board will be recommending legislation to the Governor in an attempt to see this right more broadly enforced. The board's proposal will include the mandatory appointment of counsel for initial consultation, with the child, before the court can accept a waiver of the right to counsel. In the meantime, the Juvenile Post Dispositional Branch will continue to litigate this issue on behalf of children who had viable legal defenses which were not raised because counsel was not appointed.

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The problem of our youth is not youth. The problem is the spirit of our age; denial of transcendence, the vapidity of value, emptiness in the heart, the decreased sensitivity to the imponderable quality of the spirit, the collapse of communication between the realm of tradition and the inner world of the individuals. The central problem is that we do not know how to think, how to pray, how to cry, how to resist the deceptions of too many persuaders. There is no community of those who worry about integrity.

- Abraham Joshua Heschel

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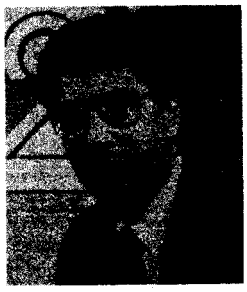
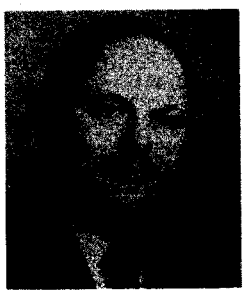
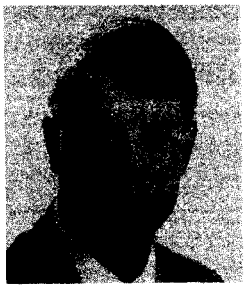


Lawrence Dubin



Jim Neuhard



Rodney J. Uphoff

Professor Lawrence A. Dubin received his B.A. from the University Michigan and his J.D. from the University of Michigan Law School. He is currently a professor at the University of Detroit Mercy School of Law and has been the legal analyst for WJBK-TV (Fox affiliate)in Southfield, Michigan. Professor Dubin has authored numerous articles and books and since 1990 has written a regular ethics column for the *National Law Journal*. He is a member of the State Bar of Michigan, the American Bar Association and the American Arbitration Association. Professor Dubin recently received the President's Award for Teaching Excellence at the University of Detroit, and he has been a pioneer in the production and use of videotapes in law schools across the country as well as law-related education programs on public television.

Ira Mickenberg has been a public defender, appellate defense lawyer, attorney trainer and law professor for twenty-two years. He is chairperson of the Appellate Defender Section of the National Legal Aid and Defender Association, and has designed and taught training programs for appellate defenders in more than a dozen states. When not banging his head against appellate issues, Ira spends as much time as possible at racetracks and ballparks.

James Neuhard of Detroit, Michigan has directed the Michigan State Appellate Defender Office since 1972. Neuhard chaired the ABA's Special Committee on Funding the Justice System which was charged with the highest priority of the ABA to investigate and attack the system wide crisis in funding of the Justice system, past president of the National Legal Aid and Defender Association (1987-89). He served as the ABA Bar Information Program (BIP) chair from 1985-92 and again in 1985. BIP provides technical assistance to local bar associations, courts, legislatures and public defender program seeking ways to improve the funding and delivery of indigent criminal defense representation. Jim was a member of the ABA Special Committee, The Constitution in a Free Society, which published *Criminal Justice in Crisis*. Neuhard is one of the nation's leading public defender/criminal justice system thinkers and leaders, whose leadership spans a quarter of a century.

Rodney J. Uphoff is a Professor and Director of Clinical Legal Education at the University of Oklahoma College of Law. He has a B.A. and J.D. from the University of Wisconsin and a Masters Degree from the London School of Economics. In addition to doing criminal defense work as a public defender and a private practitioner, he served as Chief Staff Attorney for the Milwaukee Office of the Wisconsin State Public Defender. He directed a criminal defense clinic program at the University of Wisconsin Law School and now directs a similar program at Oklahoma. He is vice-chair of the ABA Defense Service Committee and the OBA Public Defender Committee. He was appointed to the Oklahoma Indigent Defense System Board by Oklahoma Governor Frank Keating. He has written and lectured frequently on ethical issues, criminal defense practice and the delivery of indigent defense services. He is the editor of a book published by the ABA entitled *Ethical Problems Facing the Criminal Defense Lawyer* (1995).

Challenging Kentucky's Guilty But Mentally Ill Law

In *Gall v. Commonwealth*, 607 S.W.2d 97, 113 (Ky. 1980), the Kentucky Supreme Court, reviewing conflicting mental state evidence, took the unusual step of "commending" to the General Assembly the enactment of a statute authorizing verdicts of guilty but mentally ill (GBMI). In 1980, only two states--Michigan and Indiana--authorized GBMI verdicts. That situation was to change in 1982, when John Hinkley, Jr., was found insane and acquitted of charges of assaulting then President Ronald Reagan. That year nine additional states, including Kentucky, adopted GBMI laws.

KRS 504.120, *et. seq.*, allowed juries, as urged by the *Gall* Court, to resolve doubts about an insanity defense by returning a GBMI verdict. For the next fifteen years, Kentucky's experiment with GBMI remained free from direct constitutional challenge.

In 1996, the Court signaled a change in its view of GBMI statutes. The defendant in *Brown v. Commonwealth*, 934 S.W.2d 242 (Ky. 1996), asserted that Kentucky's GBMI law denied him his due process right to present an insanity defense and that the GBMI instruction misinformed the jury as to the consequences of its verdict. While finding insufficient evidence in the record to support Brown's arguments, the *Brown* court--in language ironically reminiscent of the *Gall* Court's solicitation of GBMI legislation-suggested that it was ready to give serious consideration to a constitutional challenge to GBMI verdicts. The Court observed that it was "gravely troubled by a method of punishment which appears to be nothing more than a charade, cloaked in a verdict, GBMI, which amounts to nothing more than an oxymoronic term of art." *Id.* at 245. A dissent by Justice Wintersheimer described the majority's opinion as "an engraved invitation... to challenge the validity of the statute." *Id.* at 249.

Following his appeal, the appellant in *Brown* declined to pursue a post-conviction challenge to the GBMI law. Thus, the case that may serve as a vehicle for successfully challenging Kentucky's GBMI law remains to be found. However, after *Brown*, it is clear that the GBMI law is vulnerable. Much of the evidence that would need to be marshalled in support of such a challenge is also clear, and DPA's Post-Conviction branch has begun the process of gathering that evidence for use in an appropriate case.

A successful challenge will likely rest on two key elements: first, that a verdict of GBMI carries no consequences different than those carried by an ordinary guilty verdict, and is therefore nothing more than a guilty verdict with the addition of the phrase "but mentally ill;" and secondly, that the GBMI verdict option results in the conviction of individuals who would otherwise be found not guilty by reason of insanity.

There is No Difference Between A GBMI Verdict and A Guilty Verdict

In establishing the verdict's lack of meaningful difference from a guilty verdict, it should first be understood that a GBMI verdict carries no legal consequences. In particular, the verdict is not a substitute for involuntary commitment proceedings under KRS Chapter 202A.

Ordinarily, if a jury returns a verdict of not guilty by reason of insanity (NGRI), the next logical step is for the Commonwealth to seek to commit the defendant under KRS Chapter 202A. The defendant would then receive around the clock treatment and psychiatric care. DPA's investigation of Corrections' procedures for intake of GBMI inmates, however, shows that Corrections processes the GBMI inmate through general intake in substantially the same way it processes any prisoner entering the prison system. The GBMI inmate is nol automatically classified to the psychiatric hospital at KCPC. There is no automatic 202A hearing. Only when Corrections has itself determined that the inmate requires treatment does it take steps to seek treatment, and if the inmate refuses treatment, he can only be treated following a due process hearing under 202A. Thus, the procedures observed by Corrections for treating GBMI inmates do **not differ** from those for treating any other inmate. Both practically and legally, a GBMI verdict has no legal consequence with regard to the treatment of the GBMI inmate.

As a matter of law, a GBMI verdict is not a substitute for an involuntary commitment pro-

ceeding. If it can be additionally shown that Corrections' treatment of those GBMI inmates *willing* to undergo treatment is, at best, erratic, it then follows that Kentucky courts misinform jurors by instructing them that if they convict a defendant as GBMI, "treatment shall be provided to the defendant...."

That treatment of receptive GBMI inmates is erratic is strongly suggested by Corrections' data on GBMI inmates. The data show that there are currently 68 GBMI inmates in Kentucky prisons. Of those, only seven are held at the Kentucky Correctional Psychiatric Center. The rest are housed at other institutions where continuous medical monitoring and daily therapy are unavailable. Indeed, eight inmates are housed at minimum-security institutions where regular medical staff is limited to a single nurse practitioner.

A lack of automatic treatment procedures for GBMI inmates is also indicated by the experience of the defendant in *Brown*.

In 1985, Brown, a former postal worker and military veteran with an honorable discharge, attacked members of his family with a hatchet. Brown's father and brother died; his mother and sister were seriously injured. Brown had no prior felony or misdemeanor record, nor any history of drug or alcohol abuse. His family had no history of abuse or dysfunction.

Brown was found incompetent to stand trial and was committed to Central State Hospital where he remained until 1992, when he was determined to be competent. During his seven years at Central State, Brown was continuously on medication, was **under medical** observation 24 hours a day, and participated in daily therapy sessions.

At his trial, the jury was instructed that if they found Brown GBMI, he would receive a sentence, but that "treatment shall be provided to the defendant until those providing the treatment determine that such treatment is no longer necessary or until the expiration of his sentence, whichever occurs first."

Once placed in Corrections custody, however, Brown received a less than comprehensive mental evaluation in a non-clinical setting. Because of his GBMI verdict he was housed in a special dorm for inmates with a mental health history, but received no treatment incident to that housing assignment. His medication was continued, but Brown, acting on his own, eventually stopped taking it. When he refused further medication, Corrections took no action, not even offering medical advice. One year after his incarceration, Brown's only "treatment" consisted of purely voluntary, and sporadic, participation in a "violent offender group."

A juror in *Brown*, experiencing post-trial doubt as to the verdict, wrote to t.he presiding judge that, "[a] factor in our sentence deliberations was our belief that...Brown would get special treatment in prison because we had found him 'guilty but >>>>>>>>>>>>>>

But Brown's experience that GBMI inmates do not mentally ill' instead of just 'guilty. and Corrections intake procedures show receive special treatment. Under these circumstances, the GBMI law gives rise to a constitutionally unacceptable risk that jurors will be mislead as to the meaning of a GBMI verdict--that is, that difference between a simple when in fact there is none.

They will believe there is some "guilty" verdict and a GBMI verdict, Juror ignorance of such a lack of any real distinction may "induce compromise verdicts by seducing jurors into settling on a middle ground between guilty and not guilty, when in fact there is no middle ground." *State of New Mexico v. Neely*, 819 P.2d 249, 261 (N.M. 1991) (Montgomery, J., dissenting).

The GBMI Law Promotes Compromise Verdict

Like the lack of any legal or factual consequences, that GBMI laws lead to compromise verdicts may be element in challenging the statute. A number of empirical studies a showing a crucial supporting such a showing were cited in the appellant's brief in *Brown*.

A 1986 study used 145 mock jurors to assess the impact of GBMI instructions on jury verdicts. Savitsky, J. and Lindblom, W., "The Impact of the Guilty but Mentally Ill Verdict on Juror Decisions: an Empirical Analysis," *Journal of Applied Social Psychology*, 686-701 (1986). The study concluded, "when the GBMI verdict was available, there were few NGRI verdicts." *Id.* at 699. The researchers also concluded from their data that, "[t]he availability of the GBMI verdict may well encourage jurors to convict innocent defendants on the basis of irrelevant mental health concerns." *Id.* at 699.

A 1987 study examined "whether individuals are less likely to reach judgments of insanity when given the GBMI option." Roberts, C., Golding, S., and Fincham, F., "Implicit Theories of Criminal Responsibility - Decision Making and the Insanity Defense," *Law and Human Behavior*, Vol. 2, No. 3, 207-232, 211 (1987). One hundred and eighty one mock jurors were asked to choose verdicts in response to two vignettes depicting violent acts by mentally ill defendants. The researchers found that when GBMI was offered as an option, verdicts of NGRI dropped from 60% to 29.5% for one defendant and from 77% to 27% for the second. The study concluded that "[m]ost lay persons would prefer to utilize a GBMI option as a compromise verdict even in the most obvious cases of 'real' insanity." *Id.* at 226.

Similar conclusions were reached by a study in 1990: "We observed that when the GBMI verdict was made available to jurors it resulted in a two-fold effect namely, we observed approximately a two-thirds reduction in both NGRI and straight guilty verdicts." Poulson, R., "Mock Juror Attribution of Criminal Responsibility: Effects of Race and Guilty but Mentally Ill (GBMI) Verdict Option," *Journal of Applied Social Psychology*, 1596-1611 (1990).

A 1991 study further builds the case that the GBMI option leads jurors to reject an NGRI verdict they would otherwise reach.

Roberts, C. and Golding, S., "The Social Construction of Criminal Responsibility and Insanity," *Law and Human Behavior*, Vol. 15, No. 4, 349-375 (1991). The researchers found that rates of NGRI verdicts dropped from 60% to 35%, and "represented a shift from a probable to an improbable NGRI verdict." *Id.* at 368. The researchers concluded that: "These data demonstrate clearly that the GBMI judicial instructions and verdict option significantly reduce rates of lay persons' individual predeliberation NGRI verdicts in vignette cases involving floridly psychotic defendants whose delusions are closely related to the nature of their criminal acts."

Finally, a 1993 study, whose findings were consistent with those of the studies cited above, posed this conundrum:

> Certainly it remains an interesting puzzle as to why a majority of persons are willing to adjudge psychotic persons with minimal reasonability capacities as insane under traditional...instructions, while a substantial majority of persons adjudge the same defendants as 'functionally guilty' under GBMI- supplemented instruction's. *Id.* at 274.

A GBMI verdict may present a very attractive compromise to a jury struggling with a difficult

decision as to a defendant's sanity. Citing the law's promotion of compromise verdicts, the Illinois Court of Appeals this year became the first appellate court in the nation to invalidate a GBMI law. *People v. Robles*, 682 N.E.2d 194 (Ill. App. 1997). Here in Kentucky, the Cabinet for Health Service's Task Force on Law, Violent Crime, and Serious Mental Illness referred to the *Roble* decision in their October 1997 recommendation that Kentucky's GBMI law be repealed.

Conclusion

More evidence needs to be developed to challenge Kentucky's law: evidence as to Corrections intake procedures and treatment (or lack of treatment) of GBMI inmates, expert testimony as to the clinical inappropriateness of utilizing a prison as a "treatment environment," statistics on the impact of GBMI verdicts on the number of acquittals by reason of insanity in Kentucky and nationally. DPA's Post-Conviction branch is working to develop this evidence so that it will be available for use, at trial, by defendants wishing to challenge the law Anyone interested in challenging the GBMI statute, and who believes that his or her client's case is appropriate for presenting such a challenge, should contact DPA's Post-Conviction branch in Frankfort for assistance. It's time that the GBMI law's promise to jurors that by convicting an insane defendant they insure he will be treated is exposed for the falsehood it is.

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Assistant Public Advocate

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100 Fair Oaks Lane, Suite 301
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Below is a sample motion for an evidentiary hearing that was made by Kelly Gleason.

• • • • • • • •

COMMONWEALTH OF KENTUCKY
43RD JUDICIAL CIRCUIT
BARREN CIRCUIT COURT
INDICTMENT NO. 97-CR-000180

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

Motion to Declare Unconstitutional KRS 504.120(4), KRS 504.130, KRS 504.140, and KRS 504.150 (Guilty But Mentally Ill Statutes)

STACY DEAN MEADOWS DEFENDANT

****

Comes the defendant, Stacy Dean Meadows, by and through counsel, and respectfully moves this Court for an order declaring that KRS 504.120(4), KRS 504.130, KRS 504.140, KRS 504.150 (Kentucky's "guilty but mentally ill" statutes) are unconstitutional because the Commonwealth has ruled and will continue to fail to provide treatment for those criminal defendants found guilty but mentally ill and because the guilty but mentally ill (hereinafter "GBMI") statutes are acting solely as a nullifier to the not guilty by reason of insanity (hereinafter "NGRI") verdict which is authorized by law and is firmly established and integral part of Kentucky criminal law.[1] Defendant asserts that application of the GBMI statutes in this case will violate Mr. Meadows' rights to due process, a fair trial, to present a defense, and to freedom from cruel and unusual punishment as protected by Sections 1, 2, 3, 7, 11, 17 and 26 of the Kentucky Constitution and Amendments 5, 6, 8, and 14 of the U.S. Constitution. As grounds for this motion, the defendant asserts the following:

1. Stacy Meadows stands accused of murder, kidnapping, and burglary in the death of Bonita Jo Young. Previous counsel has filed a notice of intent to introduce evidence of mental illness or defect at the trial. Current counsel intend to present an insanity defense at the trial of this matter. Mr. Meadows was evaluated at the Kentucky Correctional Psychiatric Center (KCPC) by Dr. Candace Walker and found to be not criminally responsible for his actions during the time of the alleged offenses due to his mental condition of chronic paranoid schizophrenia with acute exacerbation. Mr. Meadows was also evaluated by Dr. James Hallman from the Green River Comprehensive Care Center who diagnosed him with a psychotic condition which would render him not criminally responsible if malingering was ruled out.[2] Mr. Meadows was under psychiatric care at the time of the crimes charged in the Indictment

and in fact had been to his doctor, Dr. Kinnaman, the day before.

2. Despite the Commonwealth's knowledge of the defendant's mental status, the prosecutor has chosen to seek the death penalty in this case. Thus, the disposition of the charges takes on greater significance because of the heightened sentencing potential and the conduct of this case will receive great scrutiny if a death penalty is imposed upon this ill man.

3. In most cases where insanity of the defendant is raised, the guilty but mentally ill statutes, enacted and effective in July 1982 as a reaction to the Hinkley acquittal, are applied at the request of the Commonwealth or the defendant. Pursuant to KRS 504.130 a defendant may be found guilty but mentally ill if the prosecution proves beyond a reasonable doubt that the defendant is guilty and the defendant proves by a preponderance that he was mentally ill at the time of the offense. Although the statute seems to read that GBMI is a type of affirmative defense which a defendant may choose to raise, in reality, GBMI is most often used by prosecutors to ensure a conviction and a sentence equivalent to one given to a defendant who does not suffer mental illness.

4. The Commonwealth has stated in its "Response to Motion to Exclude Death Penalty as a Sentencing Option for this Mentally Ill Defendant" that the Commonwealth does not believe the defendant to be mentally ill as that term is defined in the statutes." This is ridiculous given the information available to the Commonwealth and the evidence at trial will demonstrate that Mr. Meadows is both mentally ill now and at the time of the charges and was insane at the time. Because of the similarities between the mental illness and criminal responsibility statutes[3] and the nature of Meadows' illness and insanity, the GBMI statutes will be applicable in this case. However, the current operation of the statutes is contrary to due process and to the right of a fair trial because GBMI convicted defendants are not receiving treatment and the statutes are operating solely to serve as a nullifier for the NGRI verdict.

5. The Kentucky Supreme Court has recognized this problem recently. See *Brown v. Commonwealth*, 934 S.W.2d 242, 245 (Ky. 1996):

> We are indeed gravely troubled by a method of punishment which appears to be nothing more than a charade, cloaked in a verdict, GBMI, which amounts to nothing more than an oxymoronic term of art.

Despite being troubled the Supreme Court refused to rule on the merits due to the lack of appropriate evidence:

> Unfortunately, however, this is not the case to determine either the constitutionality of the GBMI statute or the effectiveness of its provisions, as the record in this matter is essentially devoid of any evidence with which to consider such issues. *Id.*

The Court noted that Brown offered newspaper articles alone in support of the allegations regarding GBMI and that he "could have strengthened his case with more relevant and credible references, especially with regard to the issue of treatment." *Id.*

6. The defendant requests a hearing on this motion at which counsel for the defendant will be able to present testimony regarding the current treatment policy within the Kentucky Corrections Cabinet for those people convicted of crimes who have been found guilty but mentally ill. Further, defense counsel wish to present information about the impact of GBMI on the return of NGRI verdicts.

7. Defense counsel would direct the Court's attention to several scholarly works dealing with the GBMI verdict that were cited in the appellant's brief in *Brown v. Commonwealth, supra.* In 1986, two researchers used mock jurors to "provide data for use in determining the constitutionality of the GBMI statute." Savitsky, J., and Lindblom, W., "The Impact of the Guilty but Mentally Ill Verdict on Juror Decisions: An Empirical Analysis," *Journal of Applied Social Psychology*, 686-701, 686 (1986). The study used 145 undergraduates as jurors and concludes that "most criticisms of the GBMI verdict rest on the notion that the availability of this alternative will serve as a *de facto* veto of the insanity plea. Indeed, the current study does indicate that when the GBMI verdict was available there were few NGRI verdicts." *Id.* at 699. The data from the study also demonstrated that, "The availability of tho GBMI verdict may well encourage jurors to convict innocent defendants on the basis of irrelevant mental health concerns." *Id.* at 699.

8. Another study cited in the *Brown* appellate brief was conducted in 1987 for the purpose of examining "whether individuals are less likely to reach judgments of insanity when given the GBMI option." Roberts, C., Golding, S., and Fincham, F., "Implicit Theories of Criminal Responsibility -- Decision Making and the Insanity Defense," *Law and Human Behavior*, Vol. II, No. 3, 207-232, 211 (1987). The study involved 181 undergraduate students responding to vignettes portraying an act by a mentally disordered defendant

> [T]he GBMI option had a twofold effect. First, the GBMI option reduced markedly the proportion of schizophrenic defendants found NGRI [Not Guilty by Reason of Insanity] (Schiz I went from 60% NGRI to 29.5% and Schiz II

went from 77% NGRI to 27%). Thus, even those defendants who had been adjudged almost unanimously (and, we would argue appropriately) to the NGRI were now found GBMI... *Id.* at 222.

The study concluded that "Most lay persons would prefer to utilize a GBMI option as a compromise verdict even in the most obvious cases of 'real' insanity." *Id.* at 226.

9. A study published in 1991 used data from a sample of undergraduates and from a community sample selected from the phone book. Roberts, C. and Golding, S., "The Social Construction of Criminal Responsibility and Insanity," *Law and Human Behavior*, Vol. 15, No. 4, 349-375 (1991) and concluded as follows:

   These data demonstrate clearly that the GBMI judicial instructions and verdict option significantly reduce rates of lay persons' individual predeliberation NGRI verdicts in vignette cases involving floridly psychotic defendants whose delusions are closely related to the nature of their criminal acts. *Id.* at 368.

10. Counsel for the defendant are unaware of whether studies in Kentucky have been done to determine the effect of the GBMI verdict since its effective date of July 15, 1982. Counsel Gleason contacted the Administrative Office of the Courts and spoke with Acting Manager of Research and Statistics Bonnie Embry to determine whether data regarding NGRI dispositions prior to and after 1982 were available. Counsel was told that no disposition code for that result was available to Ms. Embry's knowledge although there is a code for incompetent to stand trial. Ms. Embry stated there was no program available to her knowledge to retrieve the data and that if one existed it probably would not determine NGRI results since there is no disposition code for that result. Thus, "not guilty" dispositions could be obtained but the reason would be unknown.

11. There is anecdotal evidence of the impact of GBMI on NGRI acquittals available. In the five years (1991-1996) that undersigned counsel Gleason was a member of the capital trial unit and monitored capital cases from around the state, there was only one NGRI acquittals in the state in a murder case to Gleason's knowledge. This was the case of Valerie Wallace, a battered woman tried in Jefferson County for the murder of her spouse. The Commonwealth sought the death penalty. After the NGRI acquittal, Ms. Wallace was found to not be a danger to herself or others and was released. In the time period prior to that, there was an NGRI acquittal in Northern Kentucky in the murder case of *Commonwealth v. Jackie Dunn* handled by Robert Carran and Phil Taliaferro.

12. On the other hand, there were several murder cases in which a defendant was tried for murder, presented evidence of insanity, and was found guilty but mentally ill. These cases include *Commonwealth v. Jonathan Port* in Warren County in which Port received life without parole for 25 years; *Commonwealth v. Bobby Chester Brown* in Jefferson County in which Brown received 48 years; and *Commonwealth v. Scott Pennington*, from Carter County originally but tried in another venue, in which Pennington received life without parole for 25 years. This last case was a death penalty case. In the case of *Commonwealth v. Clawvern Jacobs* tried in Warren County in 1996, neither GBMI nor insanity instructions were given despite the defendant's mental illness.

13. Thus, anecdotal evidence suggests that the research performed elsewhere would be applicable to the impact of GBMI in Kentucky. Regardless of the effect of the GBMI verdict on the NGRI verdict, it is clear that the GBMI statutes are unconstitutional if the promise of treatment is not met. It appears that the state of the Correctional system in Kentucky is such that treatment is not being given. Counsel request the opportunity to present evidence.

Footnotes

[1]Although insanity in Kentucky is an "affirmative defense" which must be proven by the defendant, due process requires the state to prove every element of a crime beyond a reasonable doubt in order to support a conviction. KRS 507.020 requires criminal intent to commit murder. The Commonwealth should be required to prove criminal intent in order to justify a conviction, and cannot do so in the case of a person who is insane at the time of the offense. Thus the right to present an insanity defense where applicable rises to the level of a constitutional right under Sections 2, 7, and 11 and Amendments 5, 6 and 14.

[2]Malingering was ruled out after a careful, lengthy evaluation at KCPC. In addition, Mr. Meadows psychiatric history, including an admission at the Medical Center at Bowling Green one year before the alleged crimes, indicates that this mental condition was present and persistent prior to any criminal activity.

[3]See KRS 504.020 providing that a person is not criminally responsible if "at the time of such conduct, as a result of mental illness or retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law"; KRS 504.060 (5) (Insanity defined as stated above); KRS 504.060(6) (Mental illness defined as "substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological or social factors.")

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Recent DPA Appointments (7/1/97 - 12/1/97)

Ed Adair, Assistant Public Advocate, Hazard Office

Kristen Bailey, Assistant Public Advocate, Capital Post-Conviction, Frankfort Office

John Barton, Assistant Public Advocate, Hazard Office

Dana Bias, Assistant Public Advocate, Capital Trial Branch, Frankfort Office

Valerie Bryan, Mitigation Specialist, Capital Post-Conviction

Dennis Burke, Assistant Public Advocate, London Office

Sylvia Coffey, Legal Secretary, Protection & Advocacy

Tom Collins, Assistant Public Advocate, Juvenile Post-Dispositional Unit, Frankfort Office

Shelley Fears, Assistant Public Advocate, Appeals Branch, Frankfort Office

Jim Gibson, Assistant Public Advocate, Capital Trial Branch, Frankfort Office

Michael Greer, Assistant Public Advocate, Pikeville Office

Tammy Havens, Administrative Secretary, Law Operations, Frankfort Office

Will Hilyerd, Librarian, Law Operations, Frankfort Office

Jeff Lovely, Assistant Public Advocate, Juvenile Post-Dispositional Branch, Frankfort Office

Vicki Manley, Receptionist, Law Operations, Frankfort Office

Andy Markelonis, Assistant Public Advocate, Pikeville Office

Glenn McClister, Assistant Public Advocate, Somerset Office

John Palombi, Assistant Public Advocate, Appeals Branch, Frankfort Office

Keith Plank, Investigator, Morehead Office

Brenda Popplewell, Assistant Public Advocate, Appeals Branch, Frankfort Office

Renie Schuble, Mitigation Specialist, Capital Post-Conviction, Frankfort Office

Karen Smith, Assistant Public Advocate, Stanton Office

Hal Spaw, Investigator, Covington Office

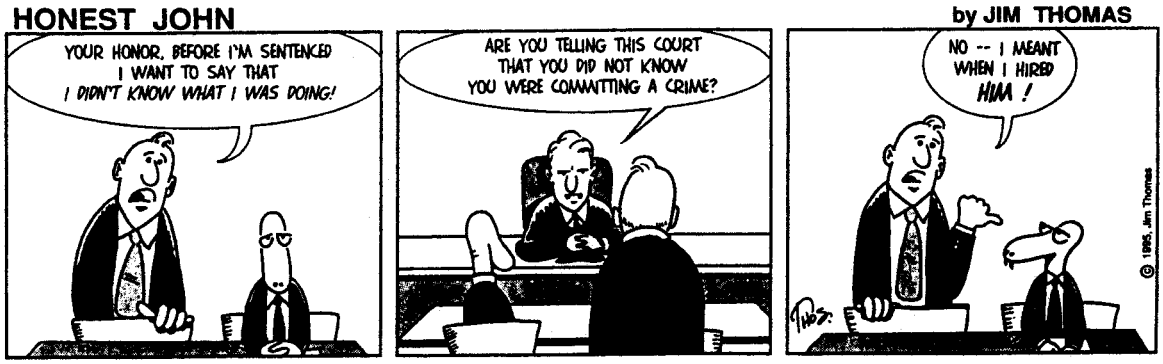
Jim Stevens, Assistant Public Advocate, Paducah Office

David Ward, Assistant Public Advocate, Richmond Office

Jennifer Word, Mitigation Specialist, Capital Trial Branch, Frankfort Office

Rebecca Wright, Assistant Public Advocate, Madisonville Office

David Wrinkle, Assistant Public Advocate, Paducah Office



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
- **Robert W. Carran**, Attorney at Law, Covington, Kentucky

Members of the Awards Search Committee are:

John Niland, DPA Contract Administrator, Elizabethtown, Ky.
Dan Goyette, Director, Jefferson District Public Defender's Office, Louisville, Ky.
Christy Wade, Legal Secretary, Hopkinsville Office, Hopkinsville, Ky.
Tina Scott, Paralegal, Post-Conviction Unit, Frankfort, Ky.
Ed Monahan, Deputy Public Advocate, Frankfort, Ky., Chair of the Awards Committee

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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:

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

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 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.

Funds Allocated for 1997-1998

Kentucky Defenders ..... $17 million
Kentucky Prosecutors ..... $53 million

While prosecutors handle more cases than defenders, this 3-1 disparity disables defenders from effectively playing a significant role in insuring fair and reliable results in criminal justice actions.

DEPARTMENT OF PUBLIC ADVOCACY
100 Fair Oaks Lane, Ste. 302
Frankfort, KY 40601

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