THE ADVOCATE

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Left to right): Everett Hoffman, Ann Joseph, Rowly Brucken, Rev. Louis Coleman, Carl Wedekind, Rev. Nancy Jo Kemper, Pat Delahanty, Senator Gerald Neal, Governor Paul Patton, Representative Eleanor Jordan, Representative Jim Wayne, Scott Wegenast, Representative Jesse Crenshaw, Ernie Lewis, Secretary Laura Douglas, Ed Monahan.

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From the Editor

The 1998 Kentucky Legislature's work took effect for the most part on July 15, 1998. Its criminal law changes are the most dramatic in decades from the Kentucky Racial Justice Act to life without parole.

Litigators have a lot to learn and shape through their advocacy. This issue we specially focus on many of the new changes and challenges in the law.

Public Advocate Ernie Lewis provides us an update on the General Assembly's funding of defender services over the next two years with its special funding for juvenile representation. He also reviews the state of indigent defense in Kentucky and nationally.

We are delighted to feature Rebecca Murrell, an 11 year public defender veteran.

Our nationally recognized week-long Litigation Practice Institute is adding two tracks, appellate & post-conviction, to the longstanding trial track. Space is limited. Apply early if you want to attend.

We are happy to announce that *The Advocate* is now available on line starting with the May 1998 issue. The address is: http://dpa.state.ky.us

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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 bi-monthly (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.

THE ADVOCATE FEATURES: REBECCA MURRELL

Attending the University of Kentucky, majoring in history, then Northern Kentucky's Chase School of Law is how Rebecca Murrell, contract public defender in Bullitt County, began her legal career. During law school, Rebecca clerked at a law firm in Cincinnati, Ohio, in the insurance defense field and continued to work there upon graduation.

Rebecca then moved to Louisville to marry her husband, David, who was the Deputy Public Defender at that time, and went into private practice conducting a lot of criminal and appellate work. In 1987, Rebecca took over as the contract public defender in Bullitt County.

Currently, 95% of Rebecca's caseload is public defender work. When she first started in Bullitt County, the caseload was around 320 to 340 closures per year. Now it is at 550 closures per year.

Rebecca finds the juvenile portion of her practice the most challenging yet frustrating. It is challenging in the fact that the laws governing juveniles have become more stringent, the juvenile statutes are poorly written and there are so many situations that juveniles today can find themselves in. Until this past year, Rebecca had never had a juvenile waived as an adult.

The juvenile portion is frustrating in that juvenile court is more drawn out. "The case never dies," states Rebecca. "Cases do not have an end or closure so you need to always be familiar with the case." Rebecca feels that her juvenile work could alone take up all of her time. "All these children need is a little love and attention." Unfortunately, these children often go back into the same environment that caused their problems in the first place and never get this love and attention. Rebecca feels that the system aims at being punitive instead of providing the help that these children really need.

The hardest cases that Rebecca feels that she deals with are the sex abuse cases. She states, "High penalties depend on the credibility of one witness against another. Clients do not understand that a person's word is sufficient evidence if the jury believes it beyond a reasonable doubt."

To put things back into perspective, Rebecca enjoys spending time with her family. She lives in Louisville with her husband David and her two children, ages fifteen and twelve.

Rebecca feels that some attorneys, including herself, have a problem with treating misdemeanors as routine when you have a heavy caseload. "We must remind ourselves that to that person facing the charges it is extremely important."

Steve Mirkin, directing attorney for the Elizabethtown field office, has been closely familiar with the work of Rebecca Murrell for the last four to five years. He states, "Rebecca handles as big a caseload as anyone in the state whether part-time or full-time and has the uniform respect of all court personnel. As a guy who fields the complaints from clients, she has extraordinary high respect from her clients. The Department really appreciates her."

Thanks Rebecca for being a prime example of the quality advocates in the state of Kentucky. Your hard work and dedication to the DPA is greatly appreciated!

Lisa Hayden, DPA Intern

Lisa is a senior at Georgetown College and is planning to attend the University of Kentucky School of Law in the fall. ■

RACIAL JUSTICE ACT BECOMES LAW:
NOT SOFT ON CRIME, BUT STRONG ON JUSTICE

Senate Bill Committee Substitute 171 sponsored **by Senator Gerald Neal** of Louisville passed the Senate 22-12 on Thursday, February 5, 1998 after two hours of vigorous debate. The identical House Bill No. 543 sponsored by **Representative Jesse Crenshaw** of Lexington was introduced February 9, 1998 in the House. After a vigorous hour long debate in the House, SB 171 passed. The Act fixes one of the glaring deficits in Kentucky's capital scheme identified by the American Bar Association's Call for a Moratorium. The new legislation creates a pretrial process to have a judge determine whether race is a part of a capital prosecution.

ABA Calls for Moratorium. The ABA House of Delegates in a February 3, 1997 Resolution (No. 107) called for a moratorium on executions in this country until jurisdictions implement policies to insure that death penalty cases are administered fairly, impartially and in accordance with due process to minimize the risk that innocent persons may be executed. Far from being administered fairly and reliably, the death penalty in this country, according to the ABA, is "instead a haphazard maze of unfair practices with no internal consistency." Kentucky mirrors that national reality. The ABA resolution establishes a legal position on fairness in the application of the law; it is not a policy statement for or against the penalty. The ABA's call for a suspension of executions focuses on: 1) incompetency of counsel; 2) racial bias; 3) mentally retarded persons; 4) persons under 18 years of age; and, 5) preserving state & federal post-conviction review. "The ABA's Moratorium Call," Public Advocate **Lewis** said, "acts as a moral statement condemning the Kentucky death penalty until change is made."

Discrimination Exists in Kentucky Capital Sentencing on the Basis of the Race of Either the Victim or Defendant. There are 7 African-Americans on Kentucky's death row of 33. This represents 21% of the death row population, compared with Kentucky's non-white population of 7.7%. All the victims of these 7 death row inmates were white. A study commissioned by the 1992 Kentucky General Assembly of all homicides between 1976 and 1991, Keil & Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing* (Sept. 1993), demonstrates race is a factor in Kentucky capital sentencing. Defendants were more likely to be sentenced to death if their victims were white, most especially if the defendant was black. The Racial Justice Act provides a method to eliminate race from the death process by allowing a judge to consider the relevant statistical and other evidence of discrimination before trial.

Racism is the opposite of treating each individual as unique, with punishment and treatment particularized to who he/she is or what he/she has done. Rather, racism treats persons with the same color of skin the same regardless of who they are or what they have done. There is evidence that prosecutors/judges/juries have historically discriminated against black defendants who have killed white victims. The Racial Justice Act is a common sense process to eliminate race from the calculus, freeing all of the parties to treatment each defendant in a particular way without the broad taint of generalized racism. During the Senate floor debate, Sen. Gerald Neal of Louisville said SB 171 was simply a method of insuring racism did not play a role in death sentences. He observed that under the Act, defendants bore a high threshold to prove race was a factor. Sen. Charlie Borders of Russell said, "This is a vote on whether we're soft on crime." Sen. Neal championed the bill's intent by stating, ***"I'm not soft on crime. I'm strong on justice."*** Sen. Neal said some senators were using "scare tactics" to attack the bill. "They don't want the status quo disturbed."

In the extended Howe debate on SB 171, Rep. Jesse Crenshaw led the fight for passage. He introduced retired circuit Judge Benjamin Shobe in the House Gallery and read from his 1996 letter (reaffirmed February 1998) to Rep. Mike Bowling, chair of the House Judiciary Committee:

> I address you as an African-American former Circuit Judge, whose legal experience in Kentucky exceeds fifty years. During this time, I presided in cases in which the death penalty was sought and obtained both pre-*Furman* and after *Gregg*.
>
> My concern is SB 132/SCS [now SB 171] which proposes to at least increase the perception of fairness in the death penalty procedures of Kentucky. Because the death penalty is our society's ultimate punishment, citizens realize it application must be supremely fair and, therefore, expect that racial bias play no role in its use. SB 132/SCS [now SB 171] proposes only to insure that the death penalty not be sought on the basis of race. This seems to me to be the least we can do to help erase the perception of minorities that they do not get a fair deal before the courts.
>
> I have received the proposed legislation, with an eye toward considering the objections which have been raised by prosecutors. One of their objections is that this bill will erase the death penalty in Kentucky. This is entirely untrue. If restrictions upon the issuance of capital punishment are to be looked upon as matters of abolition, then we would no longer need present requirements such as consideration of mitigating circumstances, juries that meet the *Batson* standard, and proportionality reviews by the Kentucky Supreme Court. Are we to believe and can we tell our constituents that death penalty procedures in this State are so infected by race bias that no capital case could ever be tried in which the death penalty is sought? Of course, not.
>
> The objection that such procedures required by the bill are onerous and costly has very little merit. After all, judicial decisions are made frequently based upon statistical information, and properly so. It has been my experience that those charged with the responsibility of presenting such information have the greater responsibility. Therefore, the burden to present evidence of racial bias is upon the accused. May we say to them that any information which would tend to show that they were accused and convicted because of race should not be a part of the proceeding? Of course, not.
>
> With the experience this nation underwent as a result of the *Miranda* decision, policemen have become more professional. Should prosecutors object to having their actions scrutinized to determine whether they are free from untoward motivations? Of course, not. As a former prosecutor, I recognize the obligation of this officer to be eminently fair. This legislation requires no more.
>
> I am grateful for your support of the pending measure and assure you that the citizens of Kentucky will be relieved when passage of this bill guarantees greater racial justice and harmony in our Commonwealth.

SB 171 passed the House 70-23 on March 30, 1998 after three amendments were defeated.

Senator Neal said that the vote "is a strong expression by the legislators that they support concepts of racial justice."

The new law follows:

AN ACT relating to the fair and reliable imposition of capital sentences.
Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS: (1) No person shall be subject to or given a sentence of death that was sought on the basis of race.

(2) A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.

(3) Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently:

(a) Upon persons of one race than upon persons of another race; or

(b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

(4) The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case. The claim shall be raised by the defendant at the pre-trial conference. The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties. If the court finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought.

(5) The defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek the death penalty. The Commonwealth may offer evidence in rebuttal of the claims or evidence of the defendant.

SECTION 2. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS: *Section 1 of this Act shall not apply to sentences imposed prior to the effective date of this Act.*

SECTION 3. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS: *Sections 1 to 3 of this Act shall be cited as the Kentucky Racial Justice Act.*

THE STATE OF INDIGENT DEFENSE RECEIVES NATIONAL ATTENTION

We have long known that the promise of *Gideon* has been sullied by the reality of inadequate funding. Indeed, one of the themes that I presented to the legislature during this past session was that Kentucky was at approximately $166 per case - the lowest funded public defender system in the country. Kentucky remains with the majority of states with the promise of *Gideon* left unfulfilled.

There have been several developments during the past few months that offer the hope that this problem will receive nationwide attention.

Attorney General Addresses Indigent Defense

The most hopeful sign has come from the top. Attorney General Janet Reno has focused a great deal of attention on the problem with indigent defense during the past year. At the ABA Annual Conference in San Francisco, she stated "for fifteen years as a prosecutor I became convinced that to achieve justice for defendants if we are going to do that we have to have adequate funding, adequate training and adequate resources for indigent defendants. To give people confidence in the justice system we had to have adequate funding, adequate training and adequate resources for indigent defense."

General Reno followed this up with convening leaders from NLADA and other indigent defense professionals. They first met on September 18, 1997 to discuss "what steps we can take to help improve the quality and the availability of indigent legal defense services." Later, on December 19, 1997, she wrote the President of NACDL, Mr. Gerald Lefcourt, to invite him to the table to attend a meeting on January 27, 1998. The purpose of this meeting was to discuss two issues: "the provision of adequate defense for the indigent and joint prosecution defense training."

Many of you saw this spring that General Reno wrote an editorial that was reprinted across the country entitled "Legal Services for Poor Needs Renewed Vigilance." This editorial has recently been reprinted in *Indigent Defense,* one of NLADA's publications. This article celebrates the 35th anniversary of *Gideon v. Wainwright.* She notes in the article that in *Gideon* itself, the court stated that "any person hailed into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him . . . this seems to be an obvious truth." She goes on to say: "what is less obvious is that the right to counsel is critical, not only to the defendants and defense lawyers, but to all of us. The right to an attorney helps guarantee that any outcome, be it guilt or innocence is just and definitive . . . Unfortunately, the promise of *Gideon* is not completely fulfilled. Indigent defendants do not invariably receive effective assistance of counsel. We have all heard the stories no matter how infrequent of a criminal defense attorney not adequately defending his or her client. Sometimes it is caused by lack of resources. Sometimes it stems from the absence of a structure in the state to provide adequately for the indigent but such failings inevitably erode the community sense of justice and the aspiration of our system to equal justice under the law."

Law Review Article

I thought of General Reno's comments and attention paid to this issue when I recently read ***The Crisis in Indigent Criminal Defense,*** by Paul Drecksel, 44 Arkansas Law Review 363 (1991). In this article, Mr. Drecksel concludes, "indigent defense systems are plagued by gross underfunding and a lack of mandatory standards." (363, 364). The effects of this system

are many. The system of underfunding results in inadequate investigation, inexperienced attorneys, attorneys with little training, attorneys with little supervision, staggering and ever-increasing caseloads, late entry into cases, lack of representation of misdemeanants, and a dangerous trend toward the use of contact defense systems.

I particularly was interested in Mr. Drecksel's description of the contract defense system as being caused by the serious lack of funding. I will in another article focus on the NACDL and NLADA's recent attention paid to "low-bid criminal defense contracting." For purposes of this article, however, it is interesting to note that Mr. Drecksel sees the trend toward the use of contracts as part of the problem of gross levels of underfunding. Mr. Drecksel states "virtually everyone agrees however that contract defense systems are also less likely to provide effective assistance of counsel . . . contract defense systems may not adequately monitor and evaluate attorney performance, much less provide for internal training of new attorneys." (381,382). He concludes that contract systems have "fewer suppression hearings, jury trials, and appeals as well as more guilty pleas and client complaints." (382). In Kentucky, the problem is not only one of contract public defender systems. Underfunding reaches into the systems in all 120 counties. While the recent legislature funded the conversion of 20 additional counties to full-time, we will at the end of the biennium still have 48 of 120 counties being covered by contract defense systems. In those systems, we will have inadequate funding, high caseloads, and many of the other problems noted by Mr. Drecksel. The same is true of our full-time systems where we will have low salaries and heavy caseloads.

Other States

In the May 1998 issue of *The Champion*, Laura Lafay wrote an article on *"Indigent Defense in Virginia, Poorest in Nation."* Interestingly, Ms. Lafay, a reporter for the *Virginia Pilot* calls Virginia's defense system the poorest in the nation. *The Spangenberg Group* has consistently reported that Kentucky at $166 per case is the lowest funded cost-per-case in the nation. However, in Virginia, only one third of the counties have public defender offices. The remaining counties pay on a cost-per-case fee basis. At the present time, a complex major felony case has a fee cap of $575. This will be raised to $845 beginning in July. Other felonies will be raised from $305 to $318. Misdemeanors pay $132 per case.

In Kentucky, the only way that we have avoided the problem present in Virginia is the abolition of the assigned counsel system back in the early 80's. Since then, Kentucky has provided services through the full-time and contract method. In FY96, in the contract method, which then involved 73 counties, 24,127 cases were represented at an average cost-per-case of $109.00. In the eighteen full-time offices covering the remaining 47 counties, 72,357 cases were represented at $132 per case. While private lawyers were not representing clients on an individual cost-per-case basis, one can readily see that at $109 per case, Kentucky's lawyers are simply not being compensated enough to guarantee the effective assistance of counsel.

Mississippi has long had one of the poorest public defender systems in the country. They have now converted to a statewide, state funded defender system. There will be district defenders in each of the "circuit districts." This system will be modeled on the district attorney's system. Mississippi has completely scrapped their contract system. Interestingly, the full-time system will only be involved in what would be circuit court in Kentucky. Counties in Mississippi will continue to fund misdemeanor and juvenile public defender systems.

Chief Justice Calls for Investigation

Recently, Kentucky's Chief Justice, Robert Stephens, has in the context of the Wayne Turner case asked the KBA to look into whether and why innocent people are pleading guilty. I have written the KBA offering the resources of the Department of Public Advocacy to help answer this question. I asserted in my letter to KBA President Bobby Elliott that one place to look

for the answer to this question is in resources. Resources effect the plea of an innocent man in several ways. First of all, when a defender has too many cases, one of the unintended consequences of that is that people will be pleading guilty who perhaps might should have been fighting their case through another method. An even more serious problem is that of the unrepresented people in Kentucky. The Children's Law Center's study noted that a significant number of children were going unrepresented in Kentucky's juvenile courts. That same experience is taking place in district courts across the Commonwealth every day. When a person does not have a lawyer, juveniles will often plead delinquent and adults will often plead guilty without having their case examined by a lawyer. It is hoped that an examination into the plea of guilty problem will result in a focus upon Kentucky's resource starvation.

The Spangenberg Group Reports

In December of 1997, *The Spangenberg Group* conducted a review of DPA, its funding needs for the coming biennium and its Plan 1998-2000. Here is an excerpt from its report dated January, 1998:

> When the Kentucky legislature enacted KRS Chapter 31 in 1972, it was heralded across the country as a model approach to structuring a statewide public defender system. In fact, shortly thereafter, several states used the legislation to create their own statewide public defender system. In our professional judgment, the once-heralded public defender system in Kentucky can no longer be called either a model or a coherent statewide system. Over the years, the program's caseload has sky rocketed while its budget appropriations have failed to keep pace. We have serious doubts about whether the statewide program is capable today of assuring that defendants who qualify for court appointed counsel will receive adequate representation throughout the state... The Department of Public Advocacy's Plan for the 1998-2000 period is well thought out, well documented, but falls far short of what is needed to bring the system up to minimum professional standards.

Conclusion

Kentucky's public defender system received a good boost from the 1998 General Assembly. DPA asked for 2.9 million dollars and we received 2.3 million dollars. This will allow 20 additional counties to convert to full-time by the end of 2000. It will result in the cost-per-case moving from $166 (including post-trial cases) to almost $200 per case. It is not enough, however. We will still be representing people for approximately $200 per case, that is if caseloads do not continue to rise. We will still have defenders in Louisville with caseloads of 700+. We will still have many of our other offices with between 400 and 650 cases per attorney. We will still have indigent misdemeanants and juveniles going unrepresented.

We need to stay alert now that the Attorney General of the United States and others are focusing on this problem. Where the solution lies is unknown. It may rest partly in some federal funding of indigent defense. It may rest in an additional role by the KBA. Wherever the solution lies, however, we must continue to assert our clients' rights to have a conflict free attorney who has a caseload that is reasonable enough for him or her to zealously represent their client.

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DEFENDERS:

PUTTING A FACE ON JUSTICE

DPA'S PLAN 2000: MAKING IT HAPPEN FOR CLIENTS

I am excited to report on DPA's Plan 2000, the plan made possible by a successful 1998 General Assembly. DPA asked for $2.9 million and received approximately $2.3 million for each year of the biennium. This is a 26% increase over the next two years. It will raise DPA's funding per case to almost $200 from its present $161 (figure includes Trial and Post-Trial). This will hopefully vault DPA from dead last among public defender agencies nationwide in terms of funding per case to perhaps somewhere in the bottom third. This increase will allow us to create a structure at the trial level that will enable us to manage effectively the delivery of trial level services in all 120 counties. With five additional full-time offices being authorized, DPA will be in a position to ask the 2000 General Assembly for funding to cover 20 additional counties from then existing field offices, taking us to 90+ counties. More resources, better supervision, a better structure—all changes which will result in better representation of the 100,000+ clients we represent each year. Here are the highlights of Plan 2000:

Juvenile Representation Will Be Enhanced

In November, 1996, shortly after I became Public Advocate, the Children's Law Center at Chase Law School issued a report, later converted into a law review article, that was sharply critical of the representation being provided juveniles in Kentucky by public defenders. DPA was criticized for having lawyers untrained in juvenile representation, particularly in contract counties, for placing inexperienced lawyers into juvenile court, and most seriously indirectly for the fact that many juveniles were going unrepresented in juvenile court across the Commonwealth. This became a cornerstone of our efforts before the 1998 General Assembly. I am pleased to report that the funding that was received will enable DPA to take significant steps toward enhancing the level of representation being provided juveniles in this Commonwealth, by, among other things:

- Extending the full-time delivery method to 72 counties by 2000. Opening five new offices, and extending full-time services to an additional 10 counties from existing offices, will allow trained full-time lawyers to represent juveniles in most of the cases in the state.
- 6 new juvenile lawyers in existing offices. These new lawyers will be placed in Paducah, Hazard, Covington, Hop-kinsville, Richmond, and Elizabethtown. Not only will this allow specially trained lawyers to begin practicing in these offices; it will also reduce the caseloads in some of our highest caseload offices, further enhancing the representation in these offices.
- 2 juvenile social workers. These social workers will be MSW's and will be placed in Elizabethtown and Hopkins-ville. Their caseload will be regional. This will allow lawyers to gain access to the expertise of social workers in presenting dispositional alternatives to juvenile courts.
- 1 juvenile trainer. The Assistant Training Director will have as his/her special assignment the training of DPA full-time and contract lawyers in this highly specialized area of the law.
- Every DPA office should have a person whose special expertise is in the area of juvenile law.
- Juvenile Post-Disposition Branch funded. This Branch was created as a result of a consent decree between then CHR/now DJJ and a group of plaintiffs. Funding of the consent decree was passed through to DPA. As a re-

sult of the Governor's budget, money for the JPDB is now directly given to DPA, thereby guaranteeing the continuation of the JPDB. This will give the JPDB added flexibility to deliver services both within the consent decree and contemplated in Chapter 31.

- 2 juvenile appellate lawyers to be placed in the Juvenile Post-Disposition Branch. These lawyers will be handling all youthful offender cases in the Court of Appeals and Supreme Court, as well as cases at the trial level on appeal from juvenile court to circuit court.

Full-Time Delivery Method Will Be Extended to Additional Counties

When I became Public Advocate in October of 1996, one of my primary goals was to increase the full-time method of delivery at the trial level in Kentucky. At that time, 47 counties were covered by full-time offices, while 73 counties utilized the contract method of delivery. Also at that time, full-time Commonwealth's Attorneys were covering 64 counties in Kentucky, with 56 counties using part-time Commonwealth's Attorneys.

Soon I announced my goal of covering 85% of the caseload with the full-time delivery method. It was and is my belief that the primary method of delivery in Kentucky should be the full-time method. "Contracts for defense services...should be no more than a 'component' of the legal representation plan. It is assumed that contracts should not be the primary provider...The role of primary provider...is reserved for the public defender office, which is considered to be the most effective means of protection of the delivery of quality legal representation." *ABA Standards for Criminal Justice: Providing Defense Services*, 3rd Edition (1992) (Commentary to Standard 5-3.1). The role of contract public defender is a significant one: covering 15% of the counties where a full-time office is not feasible, and covering conflicts of interest.

The 1998 General Assembly has made this goal achievable in the next biennium. By July of 2000, 85% of the caseload will be covered by a full-time lawyer. The full-time public defender office will be the primary component of the Kentucky public defender system at the trial level. And contract public defenders will continue to play a significant role in what is intended to be a seamless delivery system. Here are the details:

- The Owensboro Office will open in January of 1999 covering Daviess County.
- The Columbia Office will open in January of 1999 covering Taylor, Green, Adair, Washington, Marion, Clinton, Casey and Cumberland Counties.
- The Paintsville Office will open in January of 1999 covering Johnson, Martin, Lawrence, and Magoffin Counties.
- The Bowling Green Office will open in July of 1999 covering Warren County.
- The Maysville Office will open in January of 1999 covering Bracken, Mason, and Fleming Counties.
- Existing Offices will be expanded in the following ways in the fall of 1999:
    - Henderson will cover Union & Webster Counties;
    - Madisonville will cover Muhlenberg Counties;
    - Elizabethtown will cover Nelson, Hart, and Larue Counties;
    - Frankfort will cover Scott and Anderson Counties;
    - The new office in Bell County, now scheduled to open in July of 1998, will cover Harlan County.

Significant Additional Resources Will Be Provided to Urban Offices

Two of our oldest offices in Kentucky are located in Louisville and Lexington. Together, these offices handle approximately 40% of the caseload. For decades, attorneys in these offices have suffered from low salaries and high caseloads. Recently, the Louisville Office had attorneys carrying over 800 cases per year, while Lexington attorneys carried over 600 cases per year.

That is about to change. DPA asked the General Assembly for $600,000 additional for these two offices for each year of the biennium. The General Assembly responded by increasing the funding levels for the offices by $500,000 for each year of the biennium. This will enable the following to occur:

- $300,000 additional each year of the biennium to the Louisville Office to achieve salaries equal to their state counterparts and to decrease the heavy caseload.
- $200,000 additional each year of the biennium to the Lexington Office to achieve salaries equal to their state counterparts, to hire two additional attorneys thereby lowering their case-loads, to hire an investigator, and to provide computer technology to their attorneys.

Additional Resources for Contract Counties

The contract counties in Kentucky have a per-case funding level of $109. That is about to change. First, 20 of the contract counties, including Warren and Daviess Counties which have heavy caseloads and a very low per-case funding level, will be converted to full-time. Those counties which remain contract counties will receive a 5% increase overall each year of the biennium. The details are as follows:

- 5% increase overall each year of the biennium.
- Substantial per-case funding equity. Existing contracts will be adjusted in order to attempt to achieve equity between contract counties.
- Contractors will be reviewed annually by the contract manager.
- Performance and training standards will be placed in the contracts.

Capital Litigation Will Be Enhanced

Capital litigation in Kentucky continues to be one of the primary sources of funding problems for DPA. A capital case can dominate resources in a full-time office, which are not funded for the occasional capital case. Capital cases in a contract county outstrip the resources provided to the contractor, and can serve to shutdown the contractor's private practice. Capital cases can dominate the time of the Appellate Branch lawyer. And recently capital cases have far outrun the sparse resources devoted to capital post-conviction. Indeed, since July of 1997, the Capital Post-Conviction Branch has had virtually no funding, having lost a Byrne Grant which had funded the majority of staff in that branch. While capital punishment will continue to cause unique and even intractable problems for DPA, significant changes will occur over the next two years that will improve the delivery of capital services, including:

- 2 new regional capital conflict lawyers. The Capital Trial Branch now has 6 lawyers. These 2 new lawyers will not be placed in CTB, but will be placed in the field in order to facilitate the handling of conflict cases. DPA will be devoting 8 attorneys exclusively to the trial of capital cases.
- The Capital Post-Conviction Branch has been funded in the Governor's Budget and affirmed by the General Assembly budget.
- Alternative Sentencing Workers will have their job duties expanded to include 50% of their time working as mitigation specialists.
- The capital cap will be raised from $12,500 to $20,000. When I became Public Advocate, this figure was $5000. At $20,000, which will occur in January of 2000, Kentucky will go a long way to funding the time of private lawyers who serve as pubic defenders defending a capital case.
- The DPA Death Penalty Manual will be a joint project of the Trial and Post-Trial Divisions.

Conflicts of Interest Will Be Addressed

Conflicts of interest have always been a difficult management problem in Kentucky, irrespective of the delivery method. Conflicts have been persistent in the capital post-conviction arena. At the trial level, conflicts of interest are covered by contracts in individual field offices. Contractors

often trade off conflicts of interest with another defender where there are insufficient numbers locally to handle the conflict. During the past year, the willingness of private lawyers to be involved in handling field office conflicts has been reduced, causing serious problems particularly in the field. As a result, 3 full-time conflict lawyers have been hired and placed in Pikeville, Hazard, and Eddyville. This experiment has proven to be a success. As a result, additional attention will be paid to conflicts of interest in the biennium:

- 6 additional conflict lawyers, two to each of the three regions, will be hired.
- A 3% increase in the money made available to conflict contracts in the field offices.
- Conflict contractors will be reviewed annually.
- A Capital Post-Conviction Conflict entity will be created.

Other

DPA has been planning for the biennium over the past year. Many of the details you see above were decided upon during the spring of 1998. Other details of the next year are as follows:

- DPA commits to building a culture of professionalism and excellence throughout the system.
- DPA commits to improving management and supervision of the delivery of services through:
    - A 1999 Defender Leadership Institute;
    - Continued Quarterly Managers meetings which are also attended by DPA's future leaders;
    - Continued training of existing leaders through the GSC leadership track.
    - A commitment to continue to try to move decisions down to the level where the decision should be made. (A good example of this is the way full-time conflict attorneys were created—out of the real need, and out of excellent planning by effected managers.)
- DPA commits to increasing revenue generated by the DUI fee, the administrative fee, and recoupment in order to put ourselves in the black by July 2000. At present, DPA is spending more than $600,000 than it is taking in in revenue. Henderson, CTB, Louisville, Lexington, Madisonville, Covington, Bell County, three appellate attorneys, and 3 trial attorneys are among the programs now being funded by revenue. This revenue increase will be accomplished by:
    - Increasing the rate of imposition by judges;
    - Increasing the collection rate through the civil judgment process;
    - Increasing particularly the rate of imposition in Jefferson County;
    - The increase in the administrative fee from $40-$50 beginning July 15, 1998.
- The creation and utilization of standards throughout the DPA, including trials and post-trials.

Conclusion

It promises to be a very exciting two years for the Kentucky public defender system. There will be a lot of change. Change creates conflict and opportunity. There will be growing pains. However, at the end of the biennium, DPA will be poised to create the public defender system for the 21st Century. Change will not end then, however. DPA continues to face staggering caseloads, the problems associated with capital punishment, low salaries, problems created by insufficient numbers of support personnel. Those problems will be tackled during strategic planning in the spring of 1999. Then we will create a plan to solve those problems. It will be exciting to face the 2000 General Assembly and truly ask for a budget that will enable us meet the obligations and requirements of Chapter 31 and the Sixth Amendment. We should all pledge now to do everything we can to ensure success in the 2000 General Assembly.

Ernie Lewis, Public Advocate ■

HOUSE BILL 337: DPA ADMINISTRATIVE LEGISLATION

On July 15, 1998, **HB337** took effect. This bill amends several provisions of KRS Chapter 31. This was the Department of Public Advocacy's bill sponsored by Rep. Kathy Stein of Fayette County and assisted by Senator Ernesto Scorsone. Defenders as well as judges need to be aware of the different provisions of this important legislation.

What It Does

In the May 1998 issue of *The Advocate*, the provisions of HB337 were detailed. I do so again here as a reminder:

- The primary accomplishment was the raising of the administrative fee from $40 to $50. Also, $2.50 of every administrative fee collected will go to the Clerk in order to compensate the Clerk and facilitate the increased collection of administrative fees.

- The bill also eliminates out-of-date hourly rates and maximum fees previously in the statute. Further, it eliminates the inconsistencies of the maximum fee rates. Does this mean that there will be no occasions when private lawyers will be representing defendants using an hourly rate or using a maximum fee? No, but no longer will the fee be confined to $25 and $35 an hour in and out of court or to either $1,000 or $1,250, depending upon the part of KRS Chapter 31 you are reading. Rather, the Public Advocate will set the prevailing fee rate.

- The third accomplishment is that Jefferson County will be included in the *Superfund.* Now, KRS 31.185 will apply to all 120 counties. Truly, the *Superfund* will now be a comprehensive statewide sharing of the risk for the payment of costs of indigent defense.

- The final accomplishment is that so-called *Lincoln County payments* will be borne by the *Superfund. Lincoln County payments* are expenses being paid primarily in capital post-conviction cases for experts and other costs of defense of incarcerated people.

The Effect of HB337

- The primary effect is that the Department of Public Advocacy's revenue picture will improve. DPA's revenue will be increased both by the raising of the fee from $40 to $50 and by giving an incentive to clerks to recover this fee. The importance of increasing DPA's fee collection should not be underestimated. DPA has projects funded by revenue that cost considerably more than DPA is receiving. It is estimated that this shortfall is approximately $600,000 to $700,000 annually. While DPA has sufficient revenue to stay in the black until July 1, 2000, unless the revenue picture changes through HB337 and through increased and more equitable collection, the programming funded by revenue will be threatened. This includes the Jefferson County Public Defender system, the Fayette County Public Defender system, the Capital Trial Branch, the Capital Post-Conviction Branch, the Henderson, Madisonville, Covington, and Bell County offices, three appellate lawyers, lawyers placed in Somerset, Pikeville, and Richmond, among other programs. It will take a joint effort by defenders as well as the judiciary to ensure that these vital programs are not affected by our failure to reasonably collect revenue.

- Another important part of HB337 is the provision that failure to pay the administrative fee is to be converted to a civil judgment. The hopeful net effect of this will be that individuals will no longer be jailed for failure

to pay their administrative fee. It has always been not only counterintuitive but offensive for individuals to be incarcerated for failing to pay public defender fees. Not only do the judiciary, public defenders, jailers, and counties spend far more than the $40, but it is offensive to many people in the criminal justice system. By converting the failure to pay into a civil judgment, HB337 recognizes the importance of the collection of this revenue while at the same time maintaining the integrity of the public defender system.

- The effect on the *Superfund* is unclear. In the past, Jefferson County public defenders have spent approximately $60,000 a year on expert witnesses. Jefferson County itself will be paying more than $80,000 into the Superfund. However, it is uncertain what inclusion of Jefferson County into the *Superfund* will involve.

- DPA will now have flexibility to pay an appropriate amount depending upon the circumstances of the particular case. No longer will DPA be confined to $25 and $35 an hour. DPA will be able to pay an hourly rate with no fee cap in order to attract the kind of lawyer necessary to defend a particular case. DPA has for some time been paying more than the statutory maximum in capital cases. Now, KRS Chapter 31 will become consistent with the current reality of paying $50 an hour with a maximum fee of $12,500. This will also allow DPA to pay a higher sum when funding is made available without going back to change the statute.

Conclusion

HB337 took effect **July 15, 1998**. I encourage defenders and judges to use the changes in the statute to improve the delivery of services to indigents accused and convicted of crimes.

I encourage all participants in the system to help collect additional revenue so that DPA's vital programming can continue while at the same time protecting our clients from being wrongfully incarcerated for their indigency.

I welcome any suggestions from defenders, judges and anyone else who has any ideas on both how to implement HB337 and how to improve KRS Chapter 31 by amendments in the 2000 Kentucky General Assembly.

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NEW LEGISLATION: THE 1998 GENERAL ASSEMBLY

THE GOVERNOR'S CRIME BILL

HB 455 - SENTENCING

- Probation must be granted unless one of the factors is found.
- New law does not change KRS 533.060 or KRS 532.045 prohibitions on probation.
- If probation is not granted, probation with an alternative sentencing plan must be granted unless the court finds:
    - There is a likelihood the defendant will commit a class c or d felony, or there is a substantial risk he will commit a class a or b felony.
    - The court cannot find that there is a likelihood of the defendant committing a class c or d felony where the defendant has no felony record, or where the defendant's felony is over 10 years old, or where he was released from his previous felony for over 10 years.
- The court can also order probation with alternatives:
    - 12 months at a halfway house;
    - 12 months home incarceration with or without work release;
    - 12 months in jail with or without work release, community service, or other program;
    - Residential substance abuse treatment;
    - Other counseling, rehabilitation, or treatment;
    - The court must set other conditions under each of these alternatives, including work, restitution, and staying away from the victim.
- The court may use a community corrections program under KRS 196.
- The court may sentence alternatively to a community-based, faith-based, charitable, church-sponsored, or nonprofit residential or nonresidential counseling and treatment program.
- The jailer may deny work release to class d felons for violating jail rules.
- The presentence investigation report must identify the counseling, treatment, educational, and rehabilitation needs of the defendant and the programs either available or not to meet the needs.
- KRS 532.210 is amended to allow the sentencing court to place nonviolent felons as well as misdemeanants to home incarceration.

VIOLENT OFFENDER SENTENCING

- Violent offenders under KRS 439.3401 must serve 85% instead of 50% of their sentence before being paroled, irrespective of any good time credit.
- Violent offenders may have a greater minimum parole eligibility date than others with longer sentences, including life.
- Parole eligibility on a violent offender with a life sentence is 20 years.
- Class A felonies are punishable by 20-50 years in prison.
- Maximum stacking of sentences is limited to 70 years.
- Sentencing judge does not have to consider probation, conditional discharge, or probation with an alternative sentencing plan for violent offenders under KRS 439.3401.
- KRS 439.3401 is amended to require the court to designate in its judgement if the

victim suffered death or serious physical injury.
- Violent offenders may not receive good time under KRS 197.045(1) other than educational credit.
- Violent offenders may receive exceptionally meritorious good time.
- This applies to offenses committed after July 15, 1998.

PERSISTENT FELONY OFFENDERS

- First degree persistent felons are eligible for probation, shock probation, or conditional discharge only where all of their offenses are Class D felonies which do not involve violence against a person.
- A first degree persistent felon convicted of a Class A, B, or C felony still must serve 10 years before parole eligibility.
- A violent first degree persistent felon is eligible for parole only as provided under KRS 439.3401.
- Second degree persistent felons are eligible for probation, shock probation, or conditional discharge where all of their offenses are a nonviolent Class D felonies.
- Violent second degree persistent felons are only eligible for parole as provided in KRS 439.3401.

PRETRIAL DIVERSION

- Pretrial diversion programs are to be established by the circuit judge in each judicial circuit.
- Eligible persons are those charged with a Class D felony who are not sex offenders ineligible for probation under 532.045 and who have no felony within 10 years nor have been on probation or parole from a felony conviction within 10 years.
- Diversion is possible only 1 time every 5 years.
- The defendant applies for diversion.
- The defendant must plead guilty.
- The Commonwealth's Attorney makes a recommendation to the court.
- The court has the discretion to approve or deny diversion.
- Diversion lasts for the same period as probation under KRS 533.020.
- The court may place conditions similar to probation, including restitution.
- Revocation occurs on motion of the commonwealth upon notification by probation and parole.
- Revocation hearings are the same as for probation revocation hearings.
- This is felony diversion only.
- Misdemeanor diversion programs may continue as they are at present.

PRERELEASE PROBATION

- Prerelease probation will allow an inmate to petition the sentencing court for release.
- DOC will write eligibility regulations.
- DOC must recommend release.
- The court sets probation conditions, including the possibility of a half-way house.
- The period of probation cannot exceed the maximum expiration date.
- There is no hearing requirement, nor is the appointment of counsel addressed.

GERIATRIC PAROLE

- KRS 439.3405 is amended to allow the parole board to release an inmate with a severe chronic lung disease, end-stage heart disease, severe neuro-muscular disease such as ms, limited mobility due to paralysis as a result of stroke or trauma, or who is dependent on external life support systems.

THE DEATH PENALTY

- Life without parole is an option in a capital case where an aggravating circumstance has been found.
- An additional aggravating circumstance is added to KRS 532.025: offender murdered victim when an EPO or DVO or other similar protective order had been entered.
- The 532.055 rules have been applied to KRS 532.025.

- Victim impact evidence comes in.
- The defendant may put on evidence of mitigation and leniency.
- Includes the nature of the prior offense, juvenile records, parole information.
- This is ripe for a challenge under *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148 (1996).

- Procedures have been established for competency to be executed.

  - A condemned person must have the ability to understand that they are about to be executed and why.
  - If the condemned person is insane, he is to be transferred to KCPC until he is sane enough to be executed. The treating psychiatrist reports once monthly on whether there is a substantial probability that the condemned will become sane.
  - The procedures challenging competency to be executed begin with a motion for a stay filed in the circuit court of the county where the condemned person is incarcerated or was convicted. The motion must be supported by 2 affidavits, apparently by any person.
  - The court appoints 2 licensed mental health professionals to evaluate the condemned and submit a report within 10 days.
  - The court holds a hearing to determine the competency issue.
  - The court uses a preponderance standard.

TRUTH IN SENTENCING

- Victim impact evidence is admissible in the penalty phase of a felony trial.

  - Victim is defined in KRS. 421.500(1).
  - The authorized victim impact evidence includes the description of the nature and extent of any physical, psychological, or financial harm suffered.
  - This opens up requests for discovery of the victim, including potential areas of cross-examination.

- The defendant may put on evidence in mitigation and in support of leniency at the penalty phase of a felony trial.

  - The previous limitation on the meaning of mitigation has been eliminated.
  - Mitigation and leniency should be used in their broadest terms.

- The penalty phase rules for felony trials now applies to capital trials.

CRIMINAL JUSTICE COUNCIL

- Council created to be primary planning body for criminal justice system.
- Placed in justice cabinet for administrative and support.
- Reports to governor and LRC 6 months prior to regular session.
- Required to review and report on:

  - Administration of criminal justice system.
  - Rights of crime victims.
  - Sentencing issues.
  - Capital litigation
  - Comprehensive gang strategy.
  - Penal code
  - Class e felony
  - Involuntary commitment for convicted sexual predators.
  - Hate crimes

- Makes recommendations to justice cabinet on grants.
- Develops model criminal justice programs.
- Disseminates information on the criminal justice system and crime trends.
- Works with communities on gang problems.
- Provides technical assistance to criminal justice agencies.
- Reviews proposed criminal justice legislation.
- KACDL representative and public advocate included.
- Executive director to be appointed by secretary of justice cabinet.

RESTITUTION

- Restitution requirements are made more strict.
- Not subject to suspension or non-imposition.
- Required for pretrial diversion, probation, shock probation, conditional discharge, or alternative sentencing.
- Mandated as a condition of probation and parole.
- Sanctions for nonpayment are to be instituted.
- Defendant not to be released from probation or parole supervision until restitution has been paid.
- Defendant who is on parole and who has failed to pay may be held in contempt.
- The time for probation, parole or a serve out may be extended when nonpayment has occurred.

JUVENILE LAW

- DJJ may form local juvenile delinquency prevention councils.
    - Councils create juvenile justice plan.
    - DPA is involved in the councils.
- DJJ develops statewide detention program.
    - Includes pre and post-adjudication detention facilities.
    - DJJ creates alternatives to pre and post-adjudication detention and follow-up.
- DJJ has access to all educational records of juveniles in facility, program, or informal adjustment.
- Juveniles charged with capital, class a or b felonies held in secure detention facilities.
- Juveniles charged with other offenses, or detained after a detention facility, will undergo security assessment at site of detention and be placed in appropriate facility.
- DJJ must place adjudicated child within 35 days instead of 7. KRS 635.060.
- Status offenders not to be placed in DJJ facilities for public offenders unless CFC, DJJ, and the court agree that the placement is in the best interest of the child.
- No child ten (10) or under to be placed in DJJ public offender facility.
- KRS 635.020 is amended to allow the automatic firearm transfer to apply irrespective of the remainder of Chapter 600.
- Evidence of participation in a gang is added as a factor in the transfer decision.
- Sex offender registration now applies to youthful offenders.
- When a child is charged with or adjudicated guilty of an offense involving a controlled substance, deadly weapon, or physical injury, the juvenile court is required to notify the school principal.
- KRS 530.064 is amended to include illegal controlled substances other than marijuana in the definition of unlawful transaction with a minor in the first degree.
- KRS 530.065 is amended to include illegal controlled substances activity involving marijuana in the definition of unlawful transaction with a minor in the second degree.
- KRS 640.010 is amended to include participation in a gang as an additional factor in the transfer decision.

SEX OFFENDERS

- Sex offenders must complete treatment or have good time denied them.
- Sex offender who does not complete treatment must serve-out sentence.
- 3 year period of conditional discharge is added to sentences of all sex offenders.
    - Conditional discharge is supervised.
    - DOC may require education, treatment, or testing.
    - Violation of conditional discharge can lead to revocation to serve remaining time on the conditional discharge.
- Sex offender registration has been expanded.
    - Sex offender is defined as a person convicted of a sex crime who suffers from a mental or behavioral abnormality or per-

sonality disorder characterized by a pattern of repetitive, compulsive behavior that makes the offender a threat to public safety.

- Applies to youthful offenders.
- A sex offender risk assessment advisory board has been created. This board certifies providers who conduct sexual offender risk assessments or presentence assessments, or assessments related to probation or conditional discharge.
- A high risk sex offender classification is created. These offenders must be registered for life. A high risk sex offender is one who meets the criteria established by the sex offender risk assessment advisory board that have been demonstrated to correlate with a high risk of recommitting a sex crime.
- Notification for high risk sex offenders includes the general public.
- Notification for low and moderate risk sex offenders includes law enforcement, victims, KSP; notification for moderate risk sex offenders includes agencies serving individuals with similar characteristics to the previous victim.
- Low and moderate risk sex offenders must register for 10 years.
- The sentencing court orders a sex offender risk assessment by a certified provider. Communications made during the sexual offender risk assessments are privileged from disclosure in civil or criminal proceedings unless the defendant consents or unless the communication is related to an ongoing criminal investigation.
- The sentencing court holds a hearing to determine the risk assessment.
- The sex offender has a right to counsel.
- The court reviews the recommendations of the provider along with victims' statements.
- The court issues findings of fact and conclusions of law.
- The order designating risk is subject to appeal.
- A high risk sex offender may petition the court for relief from registration 10 years after the date of discharge from probation, parole, or release from incarceration. The court must hold a second hearing. The offender may repetition the court for relief 5 years later.

- New section of KRS 431 creates a cause of action for the victim of a sex crime.

VICTIMS

- KRS 421.500-421.575 named the Kentucky Crime Victim Bill of Rights.
    - Victim may not challenge a charging decision or a conviction.
    - Victim may not obtain a stay of trial or a new trial.
    - Victim definition under KRS 421.500 expanded to include being the victim of stalking, unlawful imprisonment, use of minor in sexual performance, unlawful transaction with minor first, terroristic threatening, menacing, harassing communications, intimidating witness.

- Victim access to juvenile's records clarified and extended.
- Victims to be consulted by the commonwealth on conditions of release.
- A victim or victim's advocate is to be on the 5 member crime victims compensation board.
- Victims may file a claim with the crime victims compensation board within 5 years of the crime.
- Funeral expenses raised to $5000 under crime victims compensation.
- Crime victim fee raised from $10 to $20.
- Attorney General's office is required to develop and administer a program for the protection of crime victims, witnesses, and their families.
    - Includes physical protection, security measures, and short-term relocation.

- Victims of sex crimes have a cause of action under KRS 431.

202A NOTIFICATION

- KRS 202A is amended to require notification by the institution to law enforcement, the prosecutor, and DOC .
- Institution has the responsibility to notify law enforcement, the prosecutor, and DOC when a violent offender escapes from the facility.
- DOC must notify victims who have made a notification request of the discharge or escape of a patient from a facility.

METHAMPHETAMINE

- Methamphetamine is included in KRS 218.1412 - KRS 218.1416 with Schedule I and II narcotic drugs.
- Creates the crime of manufacturing methamphetamine.
- Manufacturing methamphetamine is a Class B felony for the first offense and Class A felony for second and subsequent offenses.
- Trafficking in methamphetamine is a Class C felony for the first offense and Class B felony for second and subsequent offenses.
- Possession of methamphetmine is a Class D felony for the first offense and Class C felony for second and subsequent offenses.

HATE CRIMES

- Sentencing judge may find a person to have committed a hate crime.
    - If person intentionally because of race, color, religion, sexual orientation, or national origin commits one of 27 enumerated crimes including assault, kidnapping, sexual offenses, arson and other property damage, and riot and disorderly conduct.
- Determination is made at sentencing.
- Court must determine that hate crime was primary factor in the defendant's crime.
- The judge may use the finding to deny probation, shock probation, conditional discharge.
- The finding may be used to deny or delay parole.
- Crime of institutional vandalism is created under KRS 525.
    - It is a Class D felony.
    - Occurs when because of designated factors person knowingly vandalizes, defaces, damages, or desecrates objects.

GANGS

- The sentencing court may sentence to an additional 1-3 years where a defendant commits an enumerated felony while in furtherance of criminal gang activity.
    - This additional sentence is discretionary with the judge.
    - This section applies to violent offenses, criminal gang recruitment, and trafficking in destructive devices or booby traps.
- Criminal gang activity means a group of 5 or more people having at least 4 of these characteristics:
    - Self-proclamation
    - Common name
    - Common identifying hand or body signs or signals
    - Common identifying mode, style, or color of dress
    - Identifying tattoo or body marking
    - Organizational structure
    - Claim of territory
    - Initiation ritual
- Criminal gang recruitment is a class a misdemeanor for the first offense, and a class d felony for second and subsequent offenses.
    - Defined as soliciting or enticing another person to join a gang;
    - Also defined as intimidating or threatening another person because the person refuses to join a criminal gang, or has withdrawn from the gang, or has refused to submit to a gang demand.

- It is not a defense that:
    - One or more gang members are not criminally responsible for the offense;
    - One or more gang members have been acquitted or not prosecuted;
    - The defendant has been charged with, acquitted, or convicted of a gang-related offense.
    - The gang members do not know each other;
    - The gang changes membership;
    - The gang is in an arm's length arrangement with each other.

- Evidence of participation in a gang is one of the 9 factors to be considered by the juvenile court in the transfer decision under KRS 640.010.

FILING AN ILLEGAL LIEN

- Crime of filing an illegal lien is created.
- Filing an illegal lien is a Class D felony for the first offense, Class C for second offense, and Class B for the third and subsequent offenses.

BAIL

- KRS 431.520 and 431.525 amended to allow the court to order persons with a history of controlled substance or alcohol abuse to submit to periodic testing as a condition of bail.
- Court may order person to pay for the testing.
- Testing fee for indigents may be waived by the court.
- AOC will establish pilot programs to implement this section.

COSTS

- Crime victim fee raised from $10 to $20.
    - Court costs raised from $55 to $75 to include the crime victim fee.
    - The crime victim fee cannot be probated or suspended.

- 5% fee is to be paid to the circuit clerk to defray the administrative costs of collecting restitution.
- There is a diversion fee based upon the ability of the defendant to pay. The fee is to be set at an amount to defray all or part of the cost of participating in diversion.
- If the defendant completes the diversionary period, the conviction is listed as "dismissed-diverted."
    - It is not a criminal conviction
    - It is not admissible as evidence in any court proceeding.

- The probation and parole supervision fee has been raised to a maximum of $2500 per year on a felony and $500 per year on a misdemeanor.
- Persons in jail on a class d felony must pay work release fees to the jailer.
- Persons granted prerelease probation must pay for the cost of lodging at a half-way house and the costs of probation supervision.
- Sex offenders pay for the sex offender risk assessment based upon their ability to pay.
- Criminal garnishment has been created under KRS 532 for fines, court costs, restitution, and reimbursement.
    - All financial obligations are combined into a single order of garnishment.
    - Payment of restitution takes precedence.
    - Circuit clerk disburses all collected moneys. Circuit clerk collects a $2.50 fee from each account.
    - Failure to comply with the terms of the criminal garnishment order may result in contempt.

- A lien against real property of a convicted person owing fines, court costs, restitution, or reimbursement is created under KRS 532.
- Reimbursement of expenses associated with incarceration, including medical expenses, food, and lodging, may be ordered by the

sentencing court upon conviction of non-status juvenile offense, moving traffic violation, criminal violation, misdemeanor, or class d felony. KRS 532.

- It is unclear under the act whether this is discretionary or mandatory.
- Local government may require co-pay for medical treatment; sentencing court may require reimbursement of medical expenses while incarcerated.

LAW ENFORCEMENT

- KRS 189.393 amended to make attempting to elude a class misdemeanor unless defendant is fleeing the commission of a felony. If the defendant is convicted of the felony, the attempting to elude becomes a class a misdemeanor.
  - KRS 189.393 is amended to be confined to persons disregarding signals from officers who are directing traffic. It includes a wanton mental state.
- A new crime of fleeing or evading police is created in KRS 520.
  - 1st degree is the knowing or wanton disobedience of a direction to stop a motor vehicle when fleeing from domestic violence, while driving DUI or while under DUI suspension, or while creating the substantial risk of serious physical injury or death. Also includes a pedestrian who disobeys an order to stop under similar circumstances. 1st degree is a Class D felony.
  - 2nd degree occurs without the aggravating circumstances of 1st degree. It replaces resisting an order to stop a motor vehicle now contained in KRS 520.100. 2nd degree is a Class A misdemeanor.
- A new crime of disarming a peace officer is created.
  - It is defined as removing a firearm or other deadly weapon from a peace officer, or depriving them of their weapon, while the officer is acting within the scope of their official duties.
  - A defense is that the defendant did not know nor could have reasonably known the person disarmed was a police officer.
  - A defense is the officer was engaged in felonious conduct.
  - Disarming a peace officer is a class d felony.
- A new crime of impersonating a peace officer is created.
  - Defined as pretending to be a peace officer with intent to induce another to submit to the pretended official authority.
  - Impersonating a peace officer is a Class D felony.
- University police officers, urban county officers, and full or part-time sheriffs, including bailiffs, are entitled to receive clef funds.
- KSP, city, county, and urban-county police officers, deputy sheriffs, state or public university safety and security officers, school security officers, airport safety and security officers, ABC field representatives and investigations, insurance fraud investigations all must be certified by the Kentucky law enforcement council.
- Deputy coroners, deputy constables, deputy jailers, certain deputy sheriffs, private security officers among others may upon request of their agency be certified.
- Sheriffs, coroners, constables, and jailers are exempt from certification requirements.

INFORMATION SYSTEMS

- Kentucky unified criminal justice information system established as joint effort of criminal justice agencies other than DPA and courts.

  - System to be designed, implemented, and maintained by criminal justice council committee.
  - Purpose of the system is to facilitate sharing of existing information, and to create a consistent information system in the future.

- Automated fingerprint identification system to be designed, implemented, and maintained by KSP.
  - All detention centers will have fingerprint equipment.
  - All persons arrested or detained, including juveniles, shall be fingerprinted.

- DJJ, CHR, DOC, AOC, KSP responsible for recording data for centralized criminal history record information system.
  - DJJ provides access to law enforcement.

- Law enforcement generally required to share information maintained on juveniles.
- Educational institutions required to provide records on all juveniles convicted by a court subject to confidentiality restrictions.
- Criminal justice council designs an automated warrant system.

MISCELLANEOUS

- Theft by deception charges under $100 will result only in the issuance of a summons; a warrant is authorized only if the defendant fails to appear, or if the judge finds that based upon the defendant's record an arrest warrant is necessary to ensure the defendant's presence.
- DUI with a BA of 0.18 mandates a sentence of 7 days, to serve at least 5 days, for a 1st offense.
- DUI 3rd is a Class D felony where the BA is 0.18 or above.
- Hunting under the influence of alcohol is a crime under KRS 150 to be punished by a fine of $25 to $200 and/or up to 6 months in jail.
- KRS 520.010(3) is amended to include any quantity of alcohol in the definition of dangerous contraband.
- KRS 520.010(5) is amended to remove the knowing mental state from the definition of escape.
- A person found guilty of certain felonies while wearing body armor and armed with a deadly weapon is not eligible for probation, shock probation, parole, conditional discharge, or other form of early release.

HB 27 - LETHAL INJECTION

- Every execution shall be by lethal injection for those people convicted after the effective date of the act.
- People convicted before the effective date of the act may choose between lethal injection and electrocution.
- 3 members of the victim's family may attend an execution.

SB 171 - RACIAL JUSTICE ACT

- No person may be subject to death sentence sought on the basis of race.
- Defendant must state with particularity how evidence supports claim that racial considerations played a significant part in the decision to seek a death sentence.
- The defendant may prove race was the basis of the decision to seek a death sentence by statistical evidence or other evidence.
- Statistical evidence may consist of evidence that death sentences were sought significantly more frequently against persons of one race, or sought more frequently against defendants whose victims were of one race.
- The decision is made by the trial court at a hearing prior to trial.
- The defendant has the burden of proof by clear and convincing evidence.
- The statute does not operate retroactively.

HB 337

- Public defender administrative fee is raised from $40 to $50.

- Clerks receive $2.50 from every fee collected.
- Administrative fee is to be converted to a civil judgment.
- Hourly and maximum rates for assigned counsel are eliminated. Prevailing rates are to be set by the public advocate.
- Defense costs for inmates, so-called Lincoln County cases, are to be paid from the superfund.
- Jefferson County is included in the superfund.

HB 537 - DEPOSITIONS

- Depositions are not to be taken by parties, relatives, employees, persons with a financial interest or their relatives, employees, or attorneys, or attorneys of parties.
- Employees of attorneys may take depositions.
- Depositions taken in violation of this new law are void, and the person taking the deposition is guilty of a class b misdemeanor.

SB 74 - CRIME STOPPERS

- A $1 fee is added to court costs in counties where a crime stoppers organization has entered into a written agreement of affiliation with the county.
- Applies to misdemeanors or violations other than violations of KRS 186, 187, 188, 189, or 189a.

HB 325

- HB 325: coroners are to perform post-mortem examinations on executed prisoners.
- Canteens at private prisons must be used for the benefit of prisoners.
- DOC may impose a fee on prisoners' use of medical and dental facilities, based upon their ability to pay.
- Open Records Act is only available to prisoners for records pertaining to that individual when request is to DOC.
- Approved monitoring devices may be used by probation and parole officers. The probationer or parolee may be required by DOC to pay for the monitoring device.

HB 544 - FAMILY COURTS

- 8 family court pilot projects are established in McCracken, Warren, Pulaski, Rockcastle, and Lincoln, Franklin, Madison, and Clark, Boone and Gallatin, and Floyd and Pike Counties.
- 9 additional circuit court judgeships are established.
- 3 new district judgeships are established.
- Each family court judge establishes a family court council.
- Family court jurisdiction includes but is not limited to domestic or family issues or dissolution of marriage, child custody, visitation, support and equiptable distribution, adoption and termination of parental rights, domestic violence, including EPOS, non-criminal juvenile matters including juvenile mental inquests and self-consent abortions, paternity and URESA, dependency, abuse and neglect, and status offenses.

HB 90 - ASSAULT OF SPORTS OFFICIAL

- A new crime of assault of a sports official is created.
- Defined as intentionally causing physical injury to a sports official performing sports official duties, or to a sports official arriving or leaving an athletic facility where a sports event is occurring.
- Class A misdemeanor for first offense, Class D felony for second and subsequent offenses.
- Class D felony if the defendant assembles with 5 or more persons for the purpose of assaulting a sports official.

HB 81 - ASSAULT OF SERVICE ANIMAL

- The crime of assault on a service animal in the first degree is created.

  - Defined as intentionally and knowingly killing or causing debilitating physical injury to a service animal.
  - Class D felony.

- The crime of assault on a service animal in the second degree is created.

  - Defined as intentionally and knowingly causing physical injury to a service animal.
  - Class B misdemeanor.

- Service animal includes bomb detection dogs, narcotic detection dogs, patrol dogs, tracking dogs, search and rescue dogs, accelerant detection dogs, cadaver dogs, guide dogs, and police horses.
- The offense occurs whether the animal is on duty or not.

HB 115 - THEFT OF DRUGS

- Crime of theft of a legend drug, that is a drug requiring a prescription, is created.

  - Does not include controlled substances.
  - Class d felony if legend drug is worth $300 or less.
  - Class c felony if legend drug is worth more than $300, or if the offense is a second or subsequent offense.

- The crime of theft of a prescription blank is created.

  - Theft of a prescription blank is a Class D felony for first offense, Class C felony for second or subsequent offenses.
  - Criminal possession of a prescription blank is a Class A misdemeanor for the first offense and Class D felony for second or subsequent offenses.
  - Trafficking in prescription blanks is a Class A misdemeanor for the first offense and Class D felony for second or subsequent offenses.

- Forgery of a prescription is a Class D felony for first offense, Class C felony for second and subsequent offenses.
- Criminal possession of a forged prescription is a class misdemeanor for a first offense and Class D felony for second and subsequent offense.
- Possession of a legend drug without being prescribed is a Class B misdemeanor.
- Theft of a controlled substance is a Class D felony if controlled substance is worth $300 or less.
- Theft of a controlled substance is a Class C felony if worth more than $300 or if second or subsequent offense.

HB 689 - JUVENILE JUSTICE

- A child must consult with an attorney prior to waiving separate adjudication and disposition hearings. DJJ also has to consent if the disposition is to be commitment.
- Status offenders may not be converted into public offenders by committing status offenses.
- A child may not be committed as a public offender as a result of contempt.
- A committed child who escapes or is AWOL shall be returned to DJJ.
- A preliminary revocation hearing for a committed child shall be held within 5 days.
- An administrative hearing for a committed child shall be held within 10 days of the preliminary revocation hearing.
- Automatic transfer children may be committed to DOC by the sentencing court on DJJ motion as a result of escape, violent behavior, or other disruptive behavior.
- Other youthful offenders may be sent by the sentencing court to a DOC facility on motion by DJJ after a finding that the youthful offender is mentally ill, dangerous to himself or others, and cannot be adequately treated in the DJJ facility.
- Youthful offenders who have been committed to DOC cannot later be placed in a DJJ facility.
- Youthful offender parole violators shall be incarcerated in a secure juvenile detention

facility until 18; they shall be transferred to DOC at 18.

OTHER

- HB 188: amends KRS 532.045 to include classified school employees and certified school employees in the definition of persons in a "position of authority."
- SB 36: amends KRS 209.990 to provide that the wanton abuse or neglect of an adult by a caretaker is a Class D felony; the reckless abuse or neglect of an adult is a Class A misdemeanor; the knowing exploitation of an adult resulting in more than a $300 loss is a Class C felony; the wanton or reckless exploitation of an adult resulting in a more than a $300 loss is a Class D felony; the knowing, wanton, or reckless exploitation of an adult resulting in a loss of $300 or less is a Class A misdemeanor.
- HB 1: KRS 235.240 is amended to prohibit the boating under the influence of alcohol or controlled substances. The presumption of consent to give a test is created. Penalties are $100-$250 fine for the first offense, $250-$500 for the second offense, $500-$1000 or 30 days in jail for the third or subsequent offenses.
- SB 146: Purchasing tobacco under the age of 18 becomes a status offense.
- SB 83: The identity of informants of child abuse under KRS 620.050 is not to be divulged without a court order finding that the informant knowingly made a false report. The identity may be revealed to law enforcement with a legitimate interest in the case. If the subject of the charge publicly reveals the confidential matter, the confidentiality is waived and the matter may be disclosed if in the best interest of the child or necessary for the administration of the cabinet's duties.

- KRS 304.47-020 is amended to make the engaging in fraudulent insurance acts on a continuing basis a violation of the criminal syndicate statute.
- SB 119 makes the illegal obtaining of wireless communications services the crime of theft of services.
- SB 34 creates the class c felony of tampering or interfering with a horse race, which is defined as intentionally influencing the outcome of a horse race by using a device, material, or substance not approved by the Kentucky Racing Commission.
- SB 76: Sentencing court may require the probationer to make a payment to dare or some other treatment or prevention program.
- HB 736: 2 part-time parole board members are added to the parole board. Victims of class d felonies may submit comments in person or in writing to the parole board.
- HB 490: Committed juveniles are to be transported by the sheriff or jailer.

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HONEST JOHN **by JIM THOMAS**

TRUTH IN SENTENCING:
REAL CHANGES FROM THE CRIME BILL

The legislative session that recently completed its work made significant changes in the law for the criminal defense practitioner. Many of these changes are in the Crime Bill, House Bill 455, including some of the most significant changes made in KRS 532.055, also known as Truth in Sentencing since its passage. All trial attorneys should study the changes closely, and be aware of the enormous impact the changes will have on the defense practice.

Victim Impact Information

The first change that will impact defendants is the addition of a section in the law allowing victim impact information to be presented to the sentencing jury. Note the use of the phrase "may offer" at the beginning of this section. Specifically, the law provides for the jurors to hear "The impact of the crime upon the victim, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim...."

The defense attorney must develop a pretrial motion practice to set the limits for this part of the trial. The definitions in KRS 421.500 indicate specific persons who can be a victim or stand in for a victim. Not everybody can testify. The court must first find the offered witnesses meet the statutory definitions.

Clients must be advised that the jurors that find them guilty will hear victim information. The jurors setting the sentence will now hear information that was previously seen only by the Judge, often after the sentence was determined. The defense attorney in advising the client cannot underestimate the potential impact of this change.

Leniency

The most positive change for the defendant reads: "The defendant may introduce evidence in mitigation or in support of leniency." The old statutory language about negating the prosecution's evidence and limiting defense proof of no significant criminal history is gone. With the language change, the defense attorney must now look to the client as the foundation of proof for the penalty phase.

What is it about this person that calls for leniency in sentencing? Is it job history, jail history (similar to *Skipper v. South Carolina*, 476 U.S. 1 (1986) evidence in capital cases), family issues, health issues, victim of domestic violence, good deeds, lesser culpability, sorrow, potential for rehabilitation? The list goes on. A list limited only by our ability to show that which makes this person qualify for leniency.

Leniency is a word with great possibilities. I found it defined in Webster's II New Revised University Dictionary as the act of being lenient, not harsh, merciful.

There could not have been a richer field to plant in then was laid out in this statute. It is up to the defense attorney to take the next steps to yield a bumper crop of fairer, more reasoned sentences that take into account not only the criminal behavior but also the nature and characterization of the person.

TIS and Capital Penalty Phases

Finally, the Legislature amended section three by combining the non-capital phase with the Penalty phase of capital trials under 532.080. This change in conjunction with the new life

without parole provision will alter death penalty litigation in significant ways. However, for the purposes of this article I have only noted the change.

The New Sentencing Provisions Demand New Approaches

What should the defense practitioner do with these changes? I suggest a vigorous pre-trial motion practice for dealing with the victim impact evidence. A client centered penalty phase, which maximizes the potential for mitigation and leniency is the next step. Preparing death penalty cases with the changes in the penalty phase in mind rounds out the steps the defense practitioner must take.

For the last decade, we on the defense side have not prepared penalty cases for all felony trials. A statute that left little room to focus on our client and his situation stopped us from presenting full and fair information relevant to sentencing. We must change our approach. Let us begin with the people most affected by the outcome of the sentencing part of any trial, our clients.

Statutory Amendments to TIS Provisions

HB 455, Section 111: KRS 532.055 is amended to read as follows:

. . . . .

(a) Evidence may be offered by the Commonwealth relevant to sentencing including:

. . . . .

*7. **The impact of the crime upon the victim, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim;***

(b) The defendant may introduce evidence in mitigation ***or in support of leniency***~~[. For purposes of this section, mitigating evidence means evidence that the accused has no significant history of criminal activity which may qualify him for leniency. This section shall not preclude the introduction of evidence which negates any evidence introduced by the Commonwealth]~~; and

. . . . .

(3) All hearings held pursuant to this section shall be combined with any hearing provided for by KRS 532.080. ~~[This section shall not apply to sentencing hearings provided for in KRS 532.025.]~~

. . . . .

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FACTS ON THE JUVENILE DEATH PENALTY

THE 1997 ABA CALL FOR A MORATORIUM ON EXECUTIONS IS BASED IN PART ON THE FACT THAT THE STATES INCLUDING KENTUCKY CONTINUE TO SENTENCE CHILDREN TO DEATH.

In the 1988 report of the Criminal Justice Section of the ABA, it was stated that "The spectacle of our society seeking legal vengeance through execution of a child should not be countenanced by the ABA."

THE JUVENILE DEATH PENALTY IS RACIST

- 2/3rds of the 288 children executed in the nation's history were black.
- 100% of the 40 children executed in the U.S. for the crimes of rape or attempted rape were black.
- 2/3rds of children now on death row in the United States are black, including the one individual on Kentucky's death row who committed his crime as a juvenile.
- Six of the seven children executed in Kentucky history have been black.

NEW LEGISLATION CONCERNING JUVENILES

There is quite a bit of new legislation affecting juveniles that was enacted by the General Assembly during the 1998 session. This article will focus on changes which affect status and public offenders. House Bill 89 contained an emergency clause and is already in effect; the other significant bills become effective 7/15/98. Anything with an * is already in effect. Changes are organized by topic.

Contempt

KRS 600.020 (40)* has been amended to exclude contempt from the definition of "public offense action". Additionally, KRS 635.055* has been amended to specify that a juvenile found in contempt of court may not be committed as a public offender as a result of that finding. Finally, KRS 630.010* has been amended by the addition of a new section prohibiting the conversion of status offenders into public offenders by virtue of status conduct. Hopefully, these new provisions will drastically reduce the number of juveniles being committed as public offenders because of contempt of court and will end the practice of "boot strapping" status offenders into public offenders through use of the court's contempt power.

Counsel/Separate Disposition

KRS 610.080* has been amended to specify that a juvenile cannot waive separate disposition unless he has consulted with counsel. Moreover, if the disposition is to be commitment, the child's waiver of separate disposition is invalid unless the Department of Juvenile Justice (DJJ) or the Cabinet for Families and Children (CFC) consents. This amendment should eliminate the "rocket docket" where juveniles, often unrepresented by counsel, admit guilt at arraignment, waive separate disposition and are committed within only a few minutes.

Detention

KRS Chapter 441 has been amended to require that all juveniles arrested or detained in a juvenile detention facility be fingerprinted. This includes status offenders. Various amendments to the statutes give DJJ significant authority over juvenile holding facilities and secure detention facilities and substantial power in placing detained juveniles. KRS 600.020 (17)* has been amended to include "an alternative form of detention" under the definition of "detain." KRS 610.265 (2) (b) has been amended to provide that juveniles who are not charged with capital offenses, class A or B felonies, but are ordered detained shall be assessed by DJJ and may be placed in approved detention facility or "program." Additionally, KRS 635.060 (4) and (5) have been amended to allow detention time to be served in a "detention program" authorized by DJJ. These amendments should result in fewer juveniles held in secure detention facilities and more assigned by DJJ to alternative, less secure programs.

Commitment

KRS 635.060 (3) has been amended to allow DJJ 35 days, rather than 7 days, to place a committed child. KRS 610.115, which permitted extended detention (beyond the 7 days then authorized) after commitment, has been repealed.

Records

KRS 610.340 has been amended to include adjudications which took place prior to the effective date of the act within records which may be disclosed to victims.

School Discipline

KRS 158.150 (2) has been amended to require local Boards of Education which expel students to provide educational services in an appropriate

alternative program unless a finding can be made by clear and convincing evidence that a student poses a threat to the safety of other students or the school staff. KRS 158.150 (3) has been amended to permit school personnel to remove immediately threatening or violent students from a classroom or school bus. KRS 158.150 (6) (b) has been amended to provide that, if an Admission and Release Committee finds a special education student's behavior is related to his disability, the juvenile may not be suspended or expelled on the basis of the behavior unless the current placement can result in injury to the child, other children or educational personnel. Finally, KRS 158.150 (7) states that the suspension of primary students is to be considered only in exceptional cases where there are safety issues.

School Notification

KRS 610.345 has been amended so that any school employee with whom a juvenile comes in contact can be informed of information concerning the petition filed against the child and the adjudication for felonies and for misdemeanors involving drugs, deadly weapons or physical injury. The notification is to be made within 5 days.

Sex Offenders

KRS 635.500* has been extensively amended. Previously, judges had discretion about whether to declare any juvenile a juvenile sexual offender. 635.505 (2) was amended to distinguish between felonies under KRS Chapter 510 and 506.010 (attempts) and misdemeanors under Chapter 510. 635.510* requires that a child be declared a sex offender if he is 13 or over and convicted of a 510 felony, felony attempt (506.010), incest (530.020), unlawful transaction with a minor first degree (530.064), or use of a minor in a sexual performance (531.310). If the child is under 13 or convicted of a misdemeanor, he may be declared a juvenile sex offender. KRS 635.510 (2)* is also amended to eliminate language permitting a juvenile to be declared a sex offender prior to adjudication or based on use of force or past history of sex offenses.

NOTE: KRS 635.505 (2) still excludes those who are "actively psychotic" or "mentally retarded" from the definition of "juvenile sexual offender."

Status Offenders

A new status offense-purchase of tobacco by minors- has been created by KRS 438.311. Jurisdiction over this behavior is transferred from the Department of Agriculture to the Juvenile Session of District Court. Status offenders may be placed in DJJ group homes or lesser level facilities if both CFC and DJJ agree and the court consents pursuant to 605.090 (1) (c). As mentioned previously, even status offenders who are lodged in a detention facility will be fingerprinted pursuant to KRS Chapter 441.

Supervised Placement Revocation

KRS 635.100* concerning revocation of supervised placement has been amended to include all juveniles on supervised placement to DJJ rather than only those on supervised placement from residential treatment facilities. The amendments also permit juveniles taken into custody after an alleged violation of terms of supervised placement to be held in a DJJ "facility, program or contract facility" rather than solely a treatment facility. A preliminary hearing is to be conducted within five days rather than 48 hours, and the final hearing is to be conducted within 10 working days of the preliminary hearing. Furthermore, the hearing is to be conducted by a hearing officer rather than a three member board, and the hearing is exempt from the requirements of the Administrative Procedures Act.

All of us who represent juveniles in status and public offense cases should share our ideas and experiences with this new legislation.

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JUVENILE SUCCESS STORIES:
HOW THE RIGHT TO TREATMENT CAN WORK

To those of us playing the role of juvenile public defender at the trial or post-trial stage, the words "juvenile" and "success" or "successful treatment" may not seem to belong in the same sentence. However dim the headlines of late have been regarding juveniles, there are many juvenile success stories that happen every day but do not receive the attention they deserve. Some of these are found in this article.

Juveniles who come into contact with the court system in Kentucky are entitled to treatment, not punishment. KRS 600.010. Treatment remains the goal of the Kentucky Unified Juvenile Code after the 1998 Kentucky Legislative session. Both public offenders, who remain in juvenile (district) court, and youthful offenders, who have been transferred to circuit court, have a "**right to treatment** reasonably calculated to bring about an improvement in [their] condition(s)." KRS 600.010(d) (emphasis added).
The right to treatment applies to all juveniles, regardless of the crime, the age at the time of the offense, or whether the juvenile is transferred to adult court.

In the past year, there have been several instances of juvenile clients, convicted as youthful offenders, who have successfully completed a treatment program and were then released on probation at their eighteen year old hearings. Some clients were represented by the Juvenile Post-Dispositional Branch and some were represented by their trial attorneys. In some cases, formal Alternative Sentencing Plans were prepared and proposed to the court, while in others, terms of probation were suggested in court and were ordered. Charges as serious as Rape, first, were probated. Sentences spanned from three to twenty years.

In one instance, a client, M.D., was granted one year probation with an alternative sentencing plan at his eighteen year old hearing in Warren Circuit court. Though M.D. was only fifteen when convicted of Wanton Endangerment in the first degree for shooting at the tires of a police vehicle, he made many changes during the time he was committed to a treatment center. He was transferred from the most secure juvenile treatment facility in the state to a minimum security facility because of his low security rating and progress in the facility. He ambitiously finished his high school diploma, passed his GED, took the ACT, and was awarded a full Pell grant to Western Kentucky University. He will attend school there this fall. Because the court date was delayed for one month, the director and counselor at the minimum security facility arranged for M.D. to be transported to a job one hour away, every day for one month, in order to gain job experience. These two men attended the hearing, eager to inform the judge of the progress made at the treatment center.

Another youthful offender , J.J., was charged with Robbery in the first degree after robbing a cashier at a local "steak and egg" with an unloaded pistol when he was sixteen years old. He was sentenced to ten years. In the two years before this robbery, J.J. had been heading down the wrong path. He went to school sporadically, signed himself out of special education classes. At the treatment center, he was re-enrolled in special education classes and did not have one disciplinary violation. His mother, who is deaf-mute, came to visit every weekend. J.J. had a shock probation hearing but probation was denied on the basis that he had committed a very serious crime involving a gun. However, he continued to excel in his treatment program. At the eighteen year old hearing, his mother was the primary witness and through an interpreter explained how she was very dependent on her son for help. She told the court that she moved to a nicer neighborhood and would do anything the court asked if her son could be probated. The social worker submitted an affidavit stating that

she overheard the person whose gun was used in the robbery tell another that the gun was unloaded. After hearing the terms of probation that J.J. agreed to abide by, the judge granted probation.

At the age of 14 years and 42 days, H..Z. committed an impulsive act in an effort to obtain money for a cab ride home and approval from an older friend. H.Z. and two other children stole two toy guns from Hills Department Store. These harmless plastic toys were then used in three successive robberies. H.Z. is a child who has been diagnosed with numerous disabilities over the years: Tourette's, learning disabilities, Attention Deficit Hyperactivity Disorder, and emotional and behavioral disorders. Due to the then newly enacted automatic transfer statute, H.Z's case was transferred to circuit court. KRS 635.020(4). After being told by his attorney than he would probably get sixty years if he went to trial, H.Z. pled guilty to one count of Robbery in the first degree, and was sentenced to twenty years. After a rough transition from detention to a treatment center and a transfer to another treatment center, H.Z. met a counselor, a principal, and a volunteer art teacher who gave H.Z. the opportunity to succeed. H.Z. became a role model for other residents, excelled at school and developed his enormous talent as an artist.

Working with his attorney, H.Z. and other individuals prepared a probation plan. H.Z.'s principal traveled over 75 miles to meet this a special education coordinator to develop an IEP, the counselor helped H.Z. prepare letters and testified on H.Z.'s behalf, the art teacher made calls to arrange for continued training and offered to continue his training by opening his home to monthly weekend visits. Despite the unclear status of probation eligibility of juvenile's transferred under the "firearm" provision at the time of his hearing, the court granted the untimely motion for shock probation, showing court room personnel H.Z's artwork and remarking that he had never seen a juvenile have such support from so many people.

N.S., at the age of sixteen, was convicted in circuit court of Robbery in the first degree, and sentenced to eight years. On the same day N.S. was to appear before the court for his hearing after turning eighteen, the Court of Appeals held that youthful offenders transferred under KRS 635.020(4) are not eligible for probation. *See Commonwealth v. Britt*, Ky. Ct. App., No. 95-CR-002556 (1997). N.S. was then immediately transferred to corrections and sent to the Roederer Correctional Complex. Six weeks later, the judge intervened on N.S.'s behalf and ordered him placed back in a youth development center for six months. At this point N.S. was extremely depressed after his experience at the Roederer Complex. However, with the help of his treatment team, he was able to attain a G.E.D. and complete the treatment program. When he appeared before the court, he was able to present numerous letters of recommendation from teachers, counselors, and staff. The judge ordered him finally discharged.

Juveniles adjudicated as sexual offenders are placed in a sexual offender treatment program which requires a minimum of two years treatment time. KRS 635.515. A juvenile can be required to remain in SOTP until the program is completed, a maximum of three years. A client, C.K., was charged with Rape in the first degree, for an offense committed against his adopted sister at age fourteen. The judge sentenced him to fifteen years and said it was unlikely C.K. would be probated at his eighteen year old hearing. C.K. lingered in a detention center for a long time before being committed to a treatment center. He remained in SOTP for over two years and did well in the program. While there, his counselor helped him enroll at Murray State University and helped him find an apartment. When C.K. returned to court at age eighteen, even the prosecutor did not want him sent to prison. The judge granted probation.

Public offenders make up the majority of juveniles in treatment centers throughout the state. The length of their stay in a residential facility depends on how well they progress through the center's individual treatment plan. When a client has made great progress through a program and is no longer in need of treatment, a Motion to Terminate Commitment can be used to release him back into the community. Such a motion was filed in the case of G.A. in Grayson county. G.A. was adjudicated of three counts of Criminal Possession of a Forged Instrument in the

second degree. During his stay at the treatment facility, he completed a welding program, worked with the counselor to be prescription drug-free successfully, obtained his GED, and attained the third level out of four in the treatment plan. The judge agreed that he was ready to be released and granted the motion. G.A. was over eighteen at the time the motion was granted and is enrolled in vocational school.

These are only some examples of how treatment within the DJJ facilities really can work. Though we as public defenders oftentimes find ourselves as adversaries to DJJ staff, by working together it is possible for us to have more successful outcomes in the courtroom. Equally importantly, it is possible to make a tremendous difference in the lives of our troubled juvenile clients who are ready to make a change for the better.

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The Kentucky Department of Public Advocacy on the Web

DPA Home Page: At http://dpa.state.ky.us/ contains a history of defenders in Kentucky; DPA's mission and information about defender caseloads; the Public Advocacy Commission; the agency's 4 divisions: Trial, Post-Trial, Protection & Advocacy, Law Operations; Kentucky defender funding relative to national defender funding; maps of counties covered by full-time defenders and prosecutors; the agency's core values; and links to defender employment opportunities; the National Legal Aid and Defender Association's home page and other links. Thanks to Randy Wheeler for placing this information on our page!

Criminal Law Links: In July 1995 the Department of Public Advocacy established a presence on the World Wide Web by beginning *Criminal Law Links*. What started out as a simple listing of links to criminal law resources on the web soon blossomed. Now the site provides links to news, opinions, reference materials, medical information, search engines and other resources that are useful to the criminal law practitioner. The site also posts selected articles from *The Advocate* and other sources in its "Focus" section. Recently the department began a site devoted to Education and Development. This site includes links to CLE resources on the web and announcements of upcoming DPA education and other educational events related to criminal law. *Criminal Law Links* can be reached at http://dpa.state.ky.us/~rwheeler.

DPA Education: The DPA Education and Development site is located at http://dpa.state.ky.us/~rwheeler/train.htm, or can be reached through a link from the *Criminal Law Links* home page. It lists future defender education.

We hope that you find this service useful. If you have any suggestions or comments, please send them to DPA Webmaster, 100 Fair Oaks Lane, Frankfort, 40601.

DPA Employment Opportunities: Available defender jobs are posted at: http://dpa.state.ky.us/career.htm

The Advocate: *The Advocate* newsletter is now available at http://dpa.state.ky.us starting with the May 1998 issue.

WEST'S REVIEW

Brutley v. Commonwealth, Ky., ___ S.W.2d ___ (4/16/98)
Jefferson Circuit Court

Two issues are presented in this case. The first is whether a district judge (who is not a successor judge) may employ contempt power to punish violation of another judge's order entered in a different division of the court and in a different case. The Kentucky Supreme Court answered this question in the negative. In the case at bar, under SCR 1.040(4)(c), the contempt action, arising from non-payment of the public defender's fee, should have been heard by the same district judge who presided over the initial charge which resulted in the imposition of the fee, or if that judge were not available a proper successor judge.

The second issue is whether a district judge is bound to obey an administrative order of the Chief District Judge which requires a grant of continuances in "instant appointment cases." The Kentucky Supreme Court answered this question in the negative. The Court held the Chief District Judge exceeded his authority when he entered an order providing that, in cases of instant appointments, judges are to grant continuances upon request of counsel for "more time to prepare the case." The Court stated that "any local rules placed into effect by the Chief Judge must be in accordance with SCR 1.040 and consistent with the Rules of Civil Procedure, Rules of Criminal Procedure, and Rules of the Supreme Court. RCr 9.04 clearly states that the authority to grant a continuance is within the discretion and power of each judge. Therefore any 'rule' interfering with that discretion exceeds its scope."

Johnson v. Commonwealth, Ky., ___ S.W.2d ___ (4/16/98),
Warren Circuit Court

When Johnson was fourteen years old he entered a guilty plea to facilitation to murder and other offenses related to said murder. He was sentenced to a total of twenty years for all of the offenses and was committed to the Cabinet for Human Resources. After reaching age eighteen, Johnson was returned to the circuit court for a sentencing hearing pursuant to KRS 640.030(2). At this hearing, the trial judge refused to grant Johnson probation because to do so would "unduly depreciate the seriousness of the offenses." The trial court ordered Johnson to serve the remainder of his twenty year sentence in a correctional facility. Johnson appealed the trial court's order denying his request for probation.

On appeal Johnson argued the trial court erred when it applied the requirements of KRS 533.010 to determine whether he qualified for probation under KRS 640.030(2)(a). Johnson suggested that in light of the purpose of the Unified Juvenile Code, youthful offender hearings under KRS 640.030(2) call for a different, more lenient standard for determining whether to grant probation than that found in KRS 533.010. The Kentucky Supreme Court disagreed. The Court noted there is more than one purpose behind the provisions of KRS 640.030. Although the Juvenile Code is designed to ensure youthful offenders receive counseling and treatment in an effort to rehabilitate them, the statute is also designed to protect juveniles from incarcerated adults, at least until they reach the age of majority. Once a youthful offender attains the age of eighteen, there is no guarantee of probation or parole, regardless of the progress he may have

made along the road to rehabilitation. Instead, the decision to probate or parole a youthful offender may only be made after careful consideration of the factors set out in KRS 533.010.

The Court pointed out that in the case at bar "the trial court thoughtfully evaluated both [Johnson's] character and condition and the nature and circumstances of the crime he committed. Based on this evaluation, the court clearly felt that despite the apparently successful rehabilitation of [Johnson], granting him probation would clearly endanger the public. This danger presents itself not in the form of [Johnson], personally, but rather in the message his probation would send to the world. [Johnson's] crime was indeed serious in nature, but the circumstances surrounding the crime indicate that it was also particularly cruel, committed in a callous way, and was apparently motivated not by passion or desperation, but rather merely by boredom and a desire to be entertained. To probate [Johnson] after only four years of detention, merely because he ha[d] cleaned up his act and apologized, would send a message to other children that they can get away with such reprehensible behavior and suffer only minor consequences. The trial court, in its discretion, obviously felt that to send such a message would endanger the public."

The Kentucky Supreme Court agreed with the trial court and finding no abuse of discretion affirmed the trial court's decision not to probate Johnson.

Adcock v. Commonwealth, Ky.,
___ S.W.2d ____ (4/16/98),
Jefferson Circuit Court

This case reached the Kentucky Supreme Court by way of Adcock's motion for discretionary review from the opinion of the Court of Appeals. The case concerns the constitutional implications of police officers using a ruse to gain entry into Adcock's residence for the purpose of executing a search warrant.

The issues before the Court were whether a ruse may be used in the absence of exigent circumstances, and whether the ruse employed by the police in the case at bar, and the announcement and entry that followed, was unreasonable under the Fourth Amendment because it frustrated the purposes of the knock and announce rule.

In the case at bar the police officer was disguised as a pizza delivery man. This ruse was successful because it enticed Adcock to voluntarily open the door. At that point, the necessity for the ruse evaporated. The officers gained peaceful entry through the open door without having to use any force. Thus, no breaking or forceful entry occurred. The ruse accomplished its intended purpose, to prevent Adcock from disposing of the drugs prior to the police gaining entry into her residence.

The Kentucky Supreme Court held the use of police deception to gain entry into a residence for the purpose of executing a valid search warrant does not violate the knock and announce rule so long as it is accomplished without the use of force.

Thurman v. Commonwealth, Ky.,
___ S.W.2d ___ (5/21/98),
Franklin Circuit Court

Carlos Thurman and two others were jointly indicted for the murder, kidnapping and robbery of Peggy King. At a separate trial Thurman was convicted of murder, first degree unlawful imprisonment and felony theft by unlawful taking. He was sentenced to 109 years imprisonment.

The Kentucky Supreme Court addressed the following issues in its opinion.

1. **Hearsay.** The Commonwealth called Loretta Smith who testified Thurman came to her apartment at about 10:30 p.m. on February 4, 1992, which was the last night Peggy King was seen alive. Loretta testified Carlos left a black backpack at her house, but she denied seeing Carlos with a gun and denied that Carlos asked her if he could leave a gun at her house. Loretta also denied giving Carlos any clothes to wear that night, denied telling anyone that Carlos had a gun, that his clothes were bloody when he arrived, that he said he had killed someone and disposed of the body, or that he returned to her

apartment later and told her he had thrown the gun in the river. Loretta also testified that Carlos stayed at her apartment one or two hours and when he left he said he needed a place to stay for the night and asked Loretta's boyfriend to go with him to Monika Clay's apartment.

Loretta was specifically asked about and denied making any statements to Patricia King or April Clark regarding the above-mentioned facts.

The Commonwealth then called Patricia King and April Clark as witnesses. Both testified they had been in the Woodford County Jail with Loretta Smith when a news story came on the television about the unsolved murder of Peggy King and that Loretta had said she knew who killed Peggy King.

The Commonwealth elicited from Patricia King that Loretta Smith said the man who killed Peggy King was dating a girl who was living with a woman who did not like him and who had sent the girl away; that the man told her about putting the body in a van, then taking Peggy King's car downtown and leaving it; that he came to Loretta's house wearing bloody clothes and asked her to get rid of his gun or hide it for him, but that Loretta's boyfriend did not want her to get involved.

The Commonwealth elicited from April Clark that she had asked Loretta if the man was named "Carlos" and Loretta said that he was; that Loretta said "Carlos" had come to her apartment with blood on his shirt; that he had a gun and said he had just killed somebody; and that he asked her to dispose of the gun and his bloody clothing. Clark also testified that Loretta said she had given the man some of her boyfriend's clothes, and that when he left her apartment, he took the gun with him. Lastly, Clark testified Loretta said Carlos told her on another occasion he had disposed of the body and had walked down some railroad tracks and thrown the gun in the river.

Carlos Thurman argued on appeal the Commonwealth's real purpose in calling Loretta Smith was to get before the jury her prior unsworn, out-of-court statements, that were inconsistent with her trial testimony, and that Patricia King's and April Clark's testimony was inadmissible double hearsay.

The Kentucky Supreme Court held that only King's and Clark's statements as to what Carlos said to Loretta were double hearsay. Their testimony as to what Loretta told them she observed (the gun and the bloody shirt) and what she did (gave him clean clothes) was not double hearsay, but was evidence of prior inconsistent statements of Loretta that were admissible under KRE 801A(a)(1).

As to the double hearsay, the Court stated such evidence is admissible if each hearsay statement is admissible under an exception to the hearsay rule. KRE 805. The Court held that Carlos' statements to Loretta were admissible as admissions of a party. KRE 801A(b)(1). Loretta could have testified to those statements since she was the person to whom the admissions were made. Loretta's statements to King and Clark were admissible as prior inconsistent statements of a witness. KRE 801A(a)(1); *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). The proper foundation was laid by asking Loretta if she had made the statements. KRE 613(a).

2. **Jailhouse Informant.** Prior to trial Thurman moved to suppress the testimony of jailhouse informant Charles Cavins. Thurman argued Cavins was an agent of the Commonwealth who questioned him after he asserted his Sixth Amendment right to counsel. The trial court found Cavins was not an agent of the Commonwealth at the time of his first conversation with Thurman, during which Carlos admitted he and two others had killed Peggy King, when the two men were housed together at the Franklin County Correctional Complex. The trial court further found that Cavins did not elicit any information from Carlos, but merely listened while Carlos talked to him and then reported what Carlos said to the director of classification at FCCC.

The Kentucky Supreme Court found there was no evidence in the record that Carlos ever invoked his right to counsel. Even if Carlos had invoked his right to counsel, at the time of Car-

los' statements to Cavins, Carlos was being held on another charge; he had not yet been charged with Peggy King's murder. Since the Sixth Amendment is offense specific, it would not apply. The Supreme Court also found that the trial court's finding, that Cavins did not interrogate Carlos but merely listened to what he said, was conclusive of the issue, relying on *Kuhlman v. Wilson*, 106 S.Ct. 2616 (1986). Thus, there was no error in allowing Cavins to testify at trial.

At trial, Carlos tendered an instruction on the weight the jury should give Cavins' testimony. The trial court refused to give this instruction.

The Kentucky Supreme Court held this failure was not error because it "adhere[s] to the view that jury instructions should not comment upon the weight and probative value to be given to the testimony of a particular witness.

3. **Spousal privilege.** The alleged incident occurred on the evening of February 4, 1992 or the early morning hours of February 5, 1992. On May 15, 1992, Carlos married Vicki McDonald. McDonald was not called as a witness by either the Commonwealth or the defense. During trial, Thurman objected to the introduction of the following evidence based on the spousal privilege.

First, Det. Givens' testified he interviewed McDonald in March 1992. The Kentucky Supreme Court found no error in the admission of this testimony because it occurred before Carlos married McDonald. KRE 504 does not prevent a spouse from testifying to events occurring or information obtained prior to the marriage.

Second, telephone records were introduced showing a telephone call was made to McDonald's home from West Virginia. The content of the conversation was not introduced. The purpose of these records was to corroborate the testimony of the jailhouse informant Cavins, who testified that Carlos told him he went to West Virginia to look for his girlfriend Katherine Stosberg and called McDonald while he was there. The Kentucky Supreme Court held the introduction of these records did not violate the spousal privilege regardless of whether the phone call was made before or after the marriage.

Third, Officer Thomas testified Carlos told him he married McDonald to keep her from testifying against him. The Kentucky Supreme Court held this testimony did not violate the spousal privilege and was relevant as evidence inconsistent with Carlos' innocence or evidence tending to show his guilt.

Fourth, Cavins' testified Carlos told him McDonald possessed evidence which would incriminate him in the murder. The Kentucky Supreme Court held this testimony was not an improper comment upon a claim of spousal privilege, but was admissible as an admission by Carlos tending to prove his guilt of the crime charged. KRE 801A(b)(1).

4. **Weapons Evidence.** Prior to trial the defense moved to suppress the introduction of evidence of weapons not related to this case. The trial court granted the motion. The evidence at trial showed that the bullet retrieved from Peggy King's body was a .22 long rifle caliber bullet capable of being fired from numerous makes and models of firearms, both revolvers and rifles. During trial Thurman withdrew his objection to the weapons evidence. Thus, the Kentucky Supreme Court held Thurman had waived the issue and was precluded from raising it on appeal.

Notwithstanding this waiver, the Court held the introduction of evidence, through numerous witnesses, that Thurman was in possession of a medium-sized revolver before, during and after the evening of February 4-5, 1992 was relevant evidence and its introduction was not more prejudicial than probative.

5. **Inmate Correspondence.** While he was incarcerated Thurman wrote a letter to co-indictee Demond Bush who was incarcerated in a different correctional facility than Thurman. The letter was intercepted by personnel at the Franklin County Correctional Complex and subsequently delivered to prosecuting authorities. A portion of the letter was read to the jury.

The Kentucky Supreme Court held that Thurman's constitutional rights were not violated by the interception, seizure and subsequent use at trial of the letter to his co-indictee since inmates have no absolute right to send letters to other prisoners.

6. **Change of Venue.** Thurman filed a motion for a change of venue supported by a venue survey. The trial court denied the motion because it had been almost two years since the majority of the publicity about the case had appeared.

The Kentucky Supreme Court framed the issue as being "whether the jurors were prejudiced by their exposure to [the publicity] to the extent that it was unlikely that [Carlos] could receive a fair trial. KRS 452.210."

The Court held "[t]he ease with which an impartial jury was selected in this case is convincing that the trial judge's perception that [Carlos] could receive a fair trial in Franklin County was correct." Thus there was no error in denying the change of venue motion.

The Court affirmed Carlos' convictions.

Collins v. Commonwealth, Ky.,
___ S.W.2d ___ (5/21/98),
Henry Circuit Court

Collins was tried and found guilty of intentional murder and first-degree criminal abuse. The trial court then offered Collins sentences in the minimum range for both offenses if Collins would agree to waive her right to jury sentencing. The Commonwealth objected, but the trial court overruled its' objection. Collins accepted the trial court's offer and was sentenced to twenty-one years and seven years, respectively, to run concurrently.

The Commonwealth appealed the trial court's ruling and the Kentucky Supreme Court held that under *Commonwealth v. Johnson*, Ky., 910 S.W.2d 229, 231 (1995), the Commonwealth was entitled to have a jury determine Collins' punishment and remanded for resentencing.

Upon remand, Collins objected to the resentencing hearing on double jeopardy grounds, and the trial court overruled the objection. A jury fixed Collins punishment at life and ten years, respectively.

Collins appealed to the Kentucky Supreme Court. The Court held the Commonwealth had the authority to seek appellate review of her original sentence fixed by the trial court. Thus, Collins' resentencing was not barred by double jeopardy principles.

Baker v. Commonwealth, Ky.,
___ S.W.2d ___ (5/21/98),
Jefferson Circuit Court

Baker was tried for kidnapping and sexual abuse and being a first degree persistent felony offender. The jury found him guilty of the lesser offense of first degree unlawful imprisonment and being a first degree persistent felony offender and fixed his enhanced punishment at twenty years.

On appeal, Baker argued the evidence was insufficient to sustain the conviction of first degree unlawful imprisonment. The Kentucky Supreme Court held the issue was not properly preserved for review because although Baker moved for a directed verdict of acquittal at the close of the Commonwealth's case, he did not renew his motion at the close of all the evidence and he did not object to any of the instructions.

The Court "expressly reject[ed] the proposition that a directed verdict motion not renewed at the close of all of the evidence is sufficient to preserve insufficiency of the evidence issues for appellate review." The Court "overrule[d] that portion of *Dyer [v. Commonwealth*, Ky., 816 S.W.2d 647 (1991)] which is in conflict with the ruling laid down in *Kimbrough [v. Commonwealth*, Ky., 550 S.W.2d 525, 529 (1977)]. A defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence, in order to be preserved for our review."

Baker also argued that two statements by the prosecutor in his closing argument constituted

reversible error. Baker objected to each of the alleged misstatements by the prosecutor. The first objection was sustained by the trial court and the prosecutor was required to rephrase his argument. The second objection was overruled as the wording was said to be a fair comment on the evidence. Baker requested no other relief. The Kentucky Supreme Court held "[i]n the absence of a request for further relief, it must be assumed that [Baker] was satisfied with the relief granted, and he cannot now be heard to complain."

Young v. Commonwealth, Ky.,
___ S.W.2d ___ (5/21/98),
Jefferson Circuit Court.

Young was convicted of three counts of criminal attempt to commit unlawful transaction with a minor in the first degree. Each count had a different male victim and each was under twelve years old. Young was also convicted of being a first degree persistent felony offender. Young was sentenced to twenty years for each enhanced offense to be served consecutively for sixty years.

The facts of the case were that Young asked one child if he would "have sex with me," and asked the two other children if they would have sex with another child. Each child refused.

On appeal, Young challenged the sufficiency of the evidence to convict him of criminal attempt to commit unlawful transaction with a minor in the first degree. Young argued that mere words are insufficient to support a conviction for criminal attempt to commit an offense. KRS 506.010.

The Kentucky Supreme Court stated that since none of the offenses were completed, the issue was whether Young's solicitation of the children to engage in illegal sexual activity, either with him or with each other, constituted criminal attempts to commit the offense of first-degree unlawful transaction with a minor. The Court stated the only additional steps necessary to complete the offenses were acquiescence by the victims and performance of the solicited acts. The Court held the evidence was sufficient to support Young's convictions of all three counts of criminal attempt to commit unlawful transaction with a minor in the first degree.

During the penalty phase of Young's trial, the Commonwealth introduced judgments of the State of Colorado reflecting several prior convictions. Young did not challenge the authenticity of these judgments, but did argue it was error to permit the Commonwealth to introduce a record of the Colorado Department of Corrections containing Young's description, mug shot and fingerprint card. This record contained a notarized certificate of an employee of "Offender Records" that it is "a full, true and correct copy of the original in my custody." Young argued the certification was insufficient to permit self-authentication under KRE 902(2), (4) or (11). The Kentucky Supreme Court pointed out that a notarized document needs no further authentication, KRE 902(8); KRE 422.100, and because Young admitted being the subject of the Colorado convictions, there was no prejudice.

Because the longest possible sentence Young could receive was twenty years under KRS 532.110(1)(c), the Court remanded the case to the Jefferson Circuit Court for resentencing with the maximum sentence being twenty years.

Caudill v. Judicial Ethics Committee, Ky.,
___ S.W.2d ___ (5/21/98)

This case involved a review of an opinion of the Judicial Ethics Committee pursuant to Supreme Court Rule 4.310(4). The issue to be decided was whether Canon 3B(4) of the Judicial Code of Conduct prohibits a judge from hiring a relative. The Kentucky Supreme Court held that employment of a relative by a circuit or district court judge is neither nepotism nor prohibited by Canon 3B(4) of the Judicial Code of Conduct.

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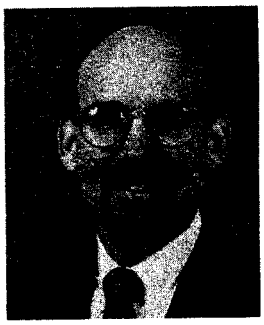
PLAIN VIEW



United States v. Ramirez
118 S.Ct. 992, 140 L.Ed.2d 191 (1998)

The United States Supreme Court has revisited the knock and announce rule again. Here, the Court of Appeals for the Ninth Circuit had held that in situations where property is destroyed in the attempt to execute a warrant, that more than a "mild" exigency is required to avoid the knock and announce rule. This ruling occurred under the circumstances of the execution of a no-knock warrant, which resulted in the breaking of a window followed by the exchange of shots.

The Court delivered a unanimous opinion written by the Chief Justice. The Court rejected the view of the 9th Circuit, saying that under *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), the element of the destruction of property was not significant. "Whether such a 'reasonable suspicion' exists depends in no way on whether police must destroy property in order to enter." Thus, there is no higher standard for a no-knock entry under circumstances of the destruction of property. The *Richards* standard continues to apply, that is that no knock entries are justified when officers have a "'reasonable suspicion' that knocking and announcing their presence before entering would 'be dangerous or futile, or...inhibit the effective investigation of the crime.'"

The Court was cautious to say, however, that their previous jurisprudence mandating reasonableness in the execution of warrants was not effected by their holding. "Excessive or unnecessary destruction of property in the course of a search may violate the fourth amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression."

Talbott v. Commonwealth
1998 WL 124517 (Ky.)
(March 19, 1998, not yet final)

In 1995, Debra Talbott filed a missing person report on her daughter; two months later, the Hart County Rescue Squad discovered her daughter's body in Green River. Talbott's husband Gerald was questioned in the Meade County jail, and he told KSP Detective Harlow that he had last seen their daughter the night before she was reported missing. However, two weeks later, Gerald told Det. Harlow, in front of his lawyer, that his wife had killed their daughter, and that his only involvement was to help dispose of the body. Det. Harlow then obtained a warrant for Debra Talbott's arrest. The affidavit for the warrant read: "The affiant, Stan Harlow, Kentucky State Police, says that on January 17, 1995, in Hart County, Kentucky the above-named defendant unlawfully with the intent to cause the death of another person, she caused the death of such person by killing Christiana Marie Poper on Tuesday, January 17, 1995."

Det. Harlow then went to Debra's house with the warrant and told her she was under arrest. She gave a written consent to search, and the search revealed evidence corroborative of Gerald's statement. After being placed in jail, Debra then told Det. Harlow that Gerald had killed Christina because he feared Christina would file criminal charges of child sexual abuse against him. Later, she

contacted Det. Harlow again and told him she wanted to tell the whole story. The later statement revealed that she and her husband had together killed their daughter and disposed of the body. Gerald later killed himself prior to trial.

Debra Talbott moved to suppress her two statements and the evidence found from her home based upon the alleged illegality of the arrest. Talbott asserted that the affidavit upon which the search warrant was based was an "ultimate fact" affidavit, and did not contain facts upon which the probable cause determination could be based. The Supreme Court agreed, in an opinion written by Justice Cooper. The Court held that because the affidavit was insufficient "to support a finding of probable cause, the warrant was invalid" and thus "provided no basis for Appellant's arrest."

This holding provided no relief, however, because the Court also found that Det. Harlow had probable cause himself to make a warrantless arrest irrespective of Debra Talbott's confession or the evidence found at the search of Debra's house. "[I]nformation constituting probable cause to effect a warrantless arrest can be premised upon information furnished to the arresting officer by another." That probable cause was Gerald Talbott's confession implicating Debra.

The illegality of the arrest warrant would have been a significant issue had the officer needed to enter Debra's house to arrest Debra. However, she was standing in her doorway at the time of the arrest, and thus could be arrested without a warrant. Thus, because Det. Harlow had probable cause to arrest Debra based upon Gerald's confession, and because Debra was standing in the doorway at the time of the arrest, the illegal arrest warrant did not require suppression of the evidence found during the search of Debra's house.

The Court also looked at the issue of the validity of the search. Debra asserted that her consent was involuntary because it was given after she had been arrested. The Court gave deference to the findings of the trial court, which had found under the totality of the circumstances that the consent to search was voluntary.

Adcock v. Commonwealth
967 S.W.2d 6 (Ky. 1998)

This is an important "knock and announce" case from the Kentucky Supreme Court. It began when the police obtained a warrant for Adcock's house, car, and person to search for controlled substances. The officers feared that Adcock would dispose of the dilaudid at the time of the execution of the warrant, and thus devised a ruse posing as pizza delivery workers in order to have the door opened. The ruse worked, allowing the police to enter the house without incident.

There was disagreement between the police and Adcock regarding what happened at the time the police entered. The police asserted that they had identified themselves prior to the entry. Adcock asserted that when she refused entry, the police grabbed her and threw her onto the sofa. The trial court found that Adcock had refused entry after opening the door, that the police identified themselves and then entered. The trial court denied Adcock's motion to suppress, holding that the police had waited long enough after identifying themselves to "fall within the parameters of the 'knock and announce rule.'" Adcock entered a conditional plea, and appealed the trial court's ruling.

The Court of Appeals affirmed the trial court. The Court held that "when police officers execute a search warrant on a personal residence by conducting a successful ruse that results in the occupant voluntarily opening the door which is followed by the officers announcing their identity and purpose prior to entering the home," there is no violation of the Fourth Amendment. The Kentucky Supreme Court granted Adcock's motion for discretionary review.

Justice Graves wrote the majority opinion affirming the Court of Appeals. The Court noted that the knock and announce requirements of *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995) had a threefold purpose: "(1) to protect law enforcement officers and household occupants from potential violence; (2) to prevent the unnecessary destruction of private property; and (3) to protect people from unnecessary intrusion into their private activities." The Court further noted that *Wilson* established that there were to be exceptions to the knock and announce rule, which were to be explored by the lower courts. The Court also recognized that one of the primary exceptions was that of the existence of exigent circumstances. *Richards v. Wisconsin*, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997).

The Court observed that a ruse is "constitutionally distinguishable from a no-knock entry." This is because an entry which occurs as a result of a ruse is "not a 'breaking' requiring officers to first announce their authority and purpose." Once the officers in this case successfully entered into appellant's home, the need for the ruse evaporated. Accordingly, the police may use a ruse as "long as it is accomplished without the use of force, promotes the underlying purposes of the knock and announce rule and is constitutional and reasonable under the Fourth Amendment."

Justice Stumbo wrote a dissent joined by Justice Stephens. It was short and to the point. "This opinion will send the message that officers seeking to execute a search warrant no longer must evaluate the circumstances surrounding execution for exigent circumstances." The dissenters point out that this case is neither a knock-and-announce case, nor an exigent circumstance case. "This case falls within none of the exceptions set forth in those opinions and simply serves to demonstrate that the Court's reverence for the sanctity of the individual's home is no longer of paramount importance in the Commonwealth. I cannot agree with the majority and dread the day when fruits of this opinion arrive for this Court's review."

Mays v. City of Dayton, 134 F.3d 809 (6th Cir. 1998)

This case arose following several searches of a Dayton doctor's office pursuant to warrants issued during an investigation of Medicare fraud and drug trafficking. The doctor, his wife, and another filed suit under U.S.C. 1981, 1983, 1986, and 1988, claiming Fourth, Fifth, and Fourteenth Amendment violations. The district court denied summary judgment motions of the Detectives and the City of Dayton, and they appealed.

The Sixth Circuit reversed the district court in an opinion written by Judge Wiseman. The district court had found that the affidavit did not demonstrate adequate links between the crimes, the evidence sought, and the doctor. The Court stated that the "specificity required by the Fourth Amendment is not as to the person against whom the evidence is to be used but rather as to the place to be searched and the thing to be seized...courts must bear in mind that search warrants are directed, not at persons, but at property where there is probable cause to believe that instrumentalities or evidence of crime will be found...The affidavit in support of the warrant need not present information that would justify the arrest of the individual in possession of or in control of the property." Because the warrant was based upon probable cause, the district court had erred in denying the summary judgment motion.

The Court also examined another search and seizure issue in the case. The district court had viewed as significant the fact that the affidavit did not state that the officer had unsuccessfully attempted to get the doctor to write a prescription for him. This was viewed as a violation of *Franks v. Delaware*, 438 U.S. 154 (1978). The district court also used *Brady v. Maryland*, 373 U.S.

83 (1963), in reaching its decision. The Sixth Circuit rejected the district court's attempt to link the two, saying "a duty to disclose potentially exculpatory information appropriate in the setting of a trial to protect the due process rights of the accused is less compelling in the context of an application for a warrant...To interweave the *Brady* due process rationale into warrant application proceedings and to require that all potentially exculpatory evidence be included in an affidavit, places an extraordinary burden on law enforcement officers, compelling them to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded." *Id.*, at 816.

The Court did leave a window open in its interpretation of *Franks*' application to omitted facts from warrant applications. "[W]e reiterate that except in the *very* rare case where the defendant makes a strong preliminary showing that the affiant *with an intention to mislead* excluded critical information from the affidavit, and the omission is critical to the finding of probable cause, *Franks* is inapplicable to the omission of disputed facts." *Id.*

SHORT VIEW

1. ***Knowles v. Iowa***, 118 S.Ct. 1298, 140 L.Ed.2d 465 (1998). The Supreme Court has granted cert. from the Iowa Supreme Court looking at the question of whether a state can pass a statute which allows for a full search of vehicles after issuing traffic or equipment citations.

2. ***People v. Baltazar***, 691 N.E.2d 1186 (Ill. App. 3d Dist. 3/11/98). Allowing an officer to look into the back of a rental truck in order to confirm that the driver was moving did not amount to a general consent, according to the Illinois Court of Appeals. The officer, who told the defendant he wanted to "take a look," failed to communicate to the defendant that he intended to conduct a general search, and thus the "consent" was not adequate to cover the entire search.

3. ***United States v. Kyllo***, 140 F.3d 1249 (9th Cir. 1998). The Ninth Circuit has ruled that the use of a thermal imaging device without a warrant is a violation of the Fourth Amendment. "We therefore conclude that the use of a thermal imager to observe heat emitted from various objects within the home infringes upon an expectation of privacy that society clearly deems reasonable." "The Court noted that the imager "strips the sanctuary of the home of one vital dimension of its security: 'the right to be let alone' from the arbitrary and discretionary monitoring of our actions by government officials."

4. ***State v. Hardy***, 577 N.W.2d 212 (Minn. 4/9/98). The act of asking a suspect to open his mouth is a search within the meaning of the Fourth Amendment requiring probable cause. Here, the police with at most an articulable suspicion began to question the defendant in a high crime area. The accused refused to open his mouth, gesturing at first, and then fleeing. When he was caught he was struck with a flashlight and ultimately spit out crack cocaine that had been in his mouth. Under these facts, the Court held that this constituted an illegal search.

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Protection & Advocacy as of 4/1/98

Mavis McCowan, Advocatorial Spec.
Protection & Advocacy as of 4/16/98

TRANSFERS

Alla Welch, Legal Secretary, CTB
2/6/98 transferred to the Labor Cabinet

RESIGNATIONS

Tina Hostetler, Legal Secretary
Richmond Trial Office - 1/31/98

Dale Helton, Advocatorial Specialist
Protection & Advocacy; 2/2/98 - private sector

Jeff Lovely, Asst. Public Advocate
Juvenile Post-Dispositional Unit
2/2/98 - private practice in Maysville

Sean West, Secretary Chief
Protection & Advocacy - 2/3/98

Brenda Popplewell, Asst. Pub Advocate
Appeals; 2/98 - private practice in Somerset

Ed Adair, Asst. Public Advocate
Hazard Trial Office
3/31/98 - private practice in Hazard

Regina Seabolt, Legal Secretary
Stanton Trial Office
3/31/98 - retired from state government;
worked at DPA for more than 15 years

Stefanie McArdle, Asst. Pub. Advocate
Capital Post-Conviction Branch
4/15/98 - Tennessee Post-Conviction
Defender Organization ■

PUTTING A FACE ON JUSTICE

Employment Opportunities

Are you interested in **Putting A Face On Justice?** If so, the Kentucky Department of Public Advocacy may be the place for you. This is a very exciting time for the Department. We are expanding many of our current offices and will be adding five new offices by the year 2000.

Current Opportunities. DPA is currently seeking attorneys for the following trial offices: Henderson County, Perry County, Christian County, Bell County, Pike County, Hardin County, Franklin County, Kenton County, McCracken County, and Madison County. We are also hiring an investigator for the Henderson County office. DPA is also hiring two juvenile appellate attorneys to work in the Frankfort office. We have an attorney opening in the Eddyville Post-Conviction office.

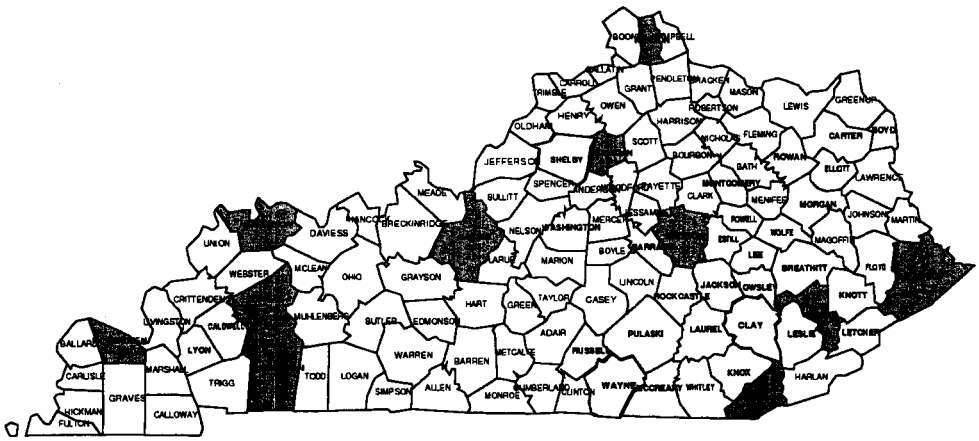
Opportunities in the Next 2 Years. Our expansion will continue into the next two years. In 1999, we will be opening offices in Daviess County, Warren County, Adair County and Johnson County. In 2000, we will open an office in Mason County. We are seeking both entry level and experienced attorneys for these vacancies, including office directing attorneys. We will also be hiring investigators for each of those offices.

Contact the DPA Recruiter. If you would like to **Put A Face On Justice**, contact **Sarah Davis Madden**, Recruiter, at the Department of Public Advocacy, Division of Law Operations, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, phone: 502-564-8006, extension 136, fax: 502-564-7890, email: smadden@mail.pa.state.ky.us.

Louisville & Lexington. For defender employment information in Louisville, contact Daniel T. Goyette, Jefferson District Public Defender, 200 Civic Plaza, Louisville, Kentucky 40202; Tel: (502) 574-3720; Fax: (502) 574-4052. In Lexington, contact Joseph Barbieri, Fayette County Legal Aid, 111 Church Street, Lexington, Kentucky 40507; Tel: (606) 253-0593; Fax: (606) 259-9805.

Access our Web Page. To remain updated on our job listings or to learn more about the Department check out our web page at http://dpa.state.ky.us. ■

COUNTIES WITH DEFENDER EMPLOYMENT OPPORTUNITIES



PROSECUTORS VIOLATE BRIBERY STATUTE WHEN THEY OFFER LENIENCY TO A WITNESS IN RETURN FOR TESTIMONY AGAINST A DEFENDANT

The giving, offering or promising anything of value to a witness for or because of his testimony is prohibited by 18 U.S.C. 201(c)(2). Kansas Professional Rule 3.4(b) provides, "A lawyer shall not...offer an inducement to a witness that is prohibited by law."

In ***U.S. v. Singleton***, (7/1/98, 10th Cir.) (http://lawlib.wuacc.edu/ca10/cases/1998/07/97-3178.htm) the principle witness against the defendant was offered 3 things by the government in return for his testimony against the defendant: 1) the promise not to be prosecuted for certain offenses; 2) the promise to inform state authorities of his cooperation, and 3) the promise to inform his sentencing judge of his cooperation.

The 10th Circuit held that the prosecutor's offers to the witness in exchange for his testimony against the defendant violated both the federal bribery statute and the state ethical rule.

The Court noted that the prosecution's ability to prosecute defendants would not be impaired by this ruling. "The government may still make deals with accomplices for their assistance other than testimony, and it may still put accomplices on the stand; it simply may not attach any promise, offer, or gift to their testimony."

What does this implicate for Kentucky practice?

KRS 524.020 makes bribing a witness a Class D felony and requires pecuniary benefit, defined in KRS 524.010(3) as "money, property, commercial interests or anything else the primary significance of which is economic gain." KRS 524.040 makes intimidating a witness by using physical force or threat to attempt to influence a witness' testimony a Class D felony.

Kentucky's Rule of Professional Conduct 3.4(b) reads the same as Kansas' in this regard. ■

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Defendants are mostly executed because their attorneys were untrained, uninterested or denied the resources to make a real defense.

\- Anthony Lewis
(syndicated columnist)

PRACTICAL JURY SELECTION TOOLS:
ARM YOURSELF FOR JURY SELECTION

The public's attitude toward crime is becoming more harsh. Arrests, convictions, and long sentences are more likely today for acts that would not have had such devastating results several decades ago. To avoid the permanent stigmatization of conviction and the very-increasing possibility of capital punishment, new jury selection approaches need to be implemented for a wider range of cases and by a larger number of criminal defense attorneys. Criminal defense attorneys and their clients can benefit from implementation of some of the following methods. The costs of these methods vary. Defense teams should always seek the resources necessary to implement the method or methods which will most enhance jury selection, and should preserve the issue of a court's refusal to provide those resources. After having done so, the team might consider a less expensive, and possibly less effective, method.

Mock Juries. Mock juries can be conducted at reasonable prices in many regions of the country. Using several sets of mock jurors selected by a scientific method is preferable, but a single mock jury may be better than none if the jurors are asked the proper questions and the elite mock jury design is used. With this technique, powerful and perceptive jurors hear a summary or parts of the trial. The mock jurors are not a cross-section of the population but are selected based on the issues of the case and the characteristics of the lawyer(s). For example, young and educated women with a perception of empowerment are used to evaluate crimes against women and children. Don't use friends or employees to act as mock jurors because of their biases and lack of ability to be objective in most situations. Articulate strangers with backbone make for good mock jurors. Some lawyers report that they find this method humbling. It is always surprising and enlightening to hear what the mock jurors have to say about you and your client and what questions they have about the case.

Surveys. The survey method has been used extensively by lawyers in death penalty cases. It involves measuring the attitudes of a cross section of the population about the issues in a specific case. Most surveys are conducted by telephone. If funding is too limited for a broad, complete survey of the geographic area, a pilot study, which surveys a more limited sample, may be done. The approach is very useful, although the results are exploratory rather than definitive. In a pilot study of the death penalty, one woman was asked at what age the death penalty should be imposed. She answered, "eight!" Another person was asked why he believed in the death penalty. He said that it was because he believed in God. According to his way of thinking, if he imposed the death penalty on someone who was "guilty" then "the criminal would get what he deserved." If the defendant was not guilty, he would just die and God would take him to heaven. Better insight of the thought process can sometimes be gained by this method than in individual sequestered voir dire. This method is useful for lawyers and trial consultants doing cases in geographic areas they are not familiar with. It helps accustom the attorney to the manners and tone of voice of jurors in unfamiliar jurisdictions to better understand the meaning of their statements. The pilot study method is often used by researchers to develop intuitiveness and gain new insights which can be useful for the trial. Telephone surveys are less expensive than face-to-face interviews. I urge lawyers to conduct several of the interviews themselves to see how valuable this method is.

The Questionnaire. Another effective approach to jury selection is the use of the questionnaire. Model your questionnaires after high-quality questionnaires developed by lawyers and jury consultants who have had the resources to develop those instruments. These existing questionnaires are borne out of compromises made between the defense attorneys and prosecutors, so don't just start with a questionnaire borne out of compromise. Some of the more valid and reli-

able questions are often still protested, especially in locations where questionnaires have not been used extensively. Modifications need to be made for use in different regions of the country. If questionnaires have been used extensively, it is important to continuously improve the quality as prosecutors gain familiarity with them and become more sophisticated in dealing with and utilizing them.

The best questionnaires include questions which were developed from national studies in the social sciences for revealing attitudes toward race, the death penalty, rape, child sexual abuse, police brutality, the battered woman syndrome and white collar offenses. If a relevant national survey were conducted, the questions would be suitable for all parts of the country, although certain attitudes of the jurors may vary by proportion considerably. Novel and more powerful questions will give you an advantage because the prosecutors will not have developed countertactics to them. Judges are less likely to ask the lawyers to move along if the lawyers do not repeat the same questions. The judges are more likely to grant a challenge for cause when a juror commits a bold prejudicial response in writing.

Review of Prior Studies. Many studies have been conducted on a very wide range of topics. These studies do not fit all of the issues of your case, but are invaluable if sufficient funds for original research are not available. Reading the research in these areas helps lawyers avoid the errors that result from relying on intuition alone. Just as critical to your cases as reading the law is reading the studies for jury selection. Since the law tries to find solutions to social problems, often others have studied attitudes toward these problems and have implemented solutions to those problems which courts may consider in voir dire, evidence, jury instructions, objections to testimony, and sentencing.

In particular, many social scientists have conducted studies regarding racial issues. Because of the devastating impact on minority clients, racial attitudes are critical. During and after World War II, many social scientists had extreme concerns about the nature of racism and the personality characteristics of those willing to impose punishment without thought or remorse, particularly on those of another race or those in a lower social stratum. Methods to better measure the changing and pernicious nature of racism are continuously being developed, especially since the public is more and more reluctant to overtly express prejudice. Learning the causes and correlates of the authoritarian personality lends insight into which jurors are predisposed to prejudicial biases and attitudes. Finding ways to persuading someone with prejudices against your client is necessary when all bias cannot be eliminated from the panel.

Video Reviews. Video reviews can be used to improve an attorney's jury selection skills. See Neiders, Inese, *Marketing the Truth*, (ATLA paper, Tuscaloosa, AL 1993). Prior to trial, lawyers practice parts of the trial, like jury selection, record them on videotape, and obtain feedback. Trial consultants can help improve the presentations by suggesting and coaching ways of making them more clear and powerful. If trial consultants are not available, feedback can be obtained from "mock jury pools" or colleagues, or the lawyer can do a self assessment.

Trial Observation. Trial lawyers and consultants suggest that lawyers observe trials in their vicinity, the surrounding areas, and at the national level when possible. It is imperative that criminal defense lawyers observe the top national attorneys. It is always helpful to see your opponent and evaluate his or her work. Most criminal defense attorneys are near the court. This affords the defense attorney the opportunity to observe their potential opponents. If you ever need co-counsel on a case, you may want to observe that person in court first. While observing trial attorneys, you can see if other attorneys are getting more rights for their clients. If they are getting more extensive jury selection, then you need to ask for more, particularly if your client is accused of a felony with a longer or mandatory sentence or faces the death penalty. If others are getting supplementary questionnaires or individual sequestered voir dire, there is no justifiable reason for you to be permitted any less in your case.

Conclusion. Whenever possible, obtain the higher-cost, higher-quality jury selection work. With a tight budget, these suggestions can make your work the highest quality possible. Just as lawyers have a policy to provide good services to a wider range of clients, trial consultants have reasonably prices and quality methods for jury selection. Telephone consultation can help defray cost. Ample time is needed to consider the problem carefully.

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I would like to thank attorney Dale M. Musilli and Rolands Dartaus for editing this article.

Dr. Inese A. Neiders is a jury and trial consultant from Columbus, Ohio. She has been successful in defending death penalty, white collar, drug conspiracy, child sex, policy brutality, and a wide range of civil cases. She obtained her Ph.D. from Ohio State University and her J.D. from Case Western reserve University. ■

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McQueen Video

From his prison cell on death row, Harold McQueen, Jr. stares calmly into the camera and begs children 1 last time to stay away from alcohol and drugs. "You don't have no future with drugs. I mean you don't have anything. You don't care about your mother, your brother, whoever. You know you just gotta get that high. And if you don't get it, you'll get it the best way you can. If you don't have money, you'll steal, rob."

3 days after the videotape was made, the convicted murderer was put to death in the Kentucky electric chair for killing a store clerk while high on drugs and alcohol.

The videotape, made under the supervision of the Catholic Conference of Kentucky, is being distributed to churches, youth organizations and other groups in hopes that McQueen's anti-drug message will resonate with teenagers.

The 19-minute video, titled ***It Could Happen To You***, was made public a few weeks ago, but the response already has been overwhelming. A circuit judge plans to show the tape to alcohol abusers who appear in his courtroom. Parents have asked for copies to show to their children.

On the tape, McQueen mentions that he regrets things he's done wrong. And he talks at length about the anguish and the hopelessness of life on death row, where he spent 16 years. And he makes it clear that anybody on drugs could end up like him. "All you gotta do is just, uh, load your blood system up with drugs, alcohol, and you don't know what you're doing. You could easily be talked into doing anything...." He urges teens to find a substitute for drugs and alcohol. "If you're not into church, find something else," he said. "There's a better high out there than drugs and alcohol. Life is a high. And when you come in here, you've lost that."

Organizations or individuals interested in ordering the video, ***It Could Happen To You***, may call the Catholic Conference of Kentucky in Frankfort, Kentucky at (502) 875-4345. The price is $15.00, which includes shipping and handling.

Rick Halperin, AL - Texas

UPCOMING DPA, NCDC, NLADA & KACDL EDUCATION

**** DPA ****

- **12th Litigation Practice Institute; *Kentucky Leadership Center*, Faubush, KY; October 4-9, 1998**
  with 3 litigation tracks: trial, appeal, and post-conviction
- **27th Annual Public Defender Conference; *location to be determined,* Louisville, KY; June 14-16, 1999**

NOTE: DPA Education is open only to criminal defense advocates.
For more information: http://dpa.state.ky.us/~rwheeler/rain/htm

**** KACDL ****

- **KACDL Annual Conference, November 13, 1998; Louisville, KY**

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 Appellate Defender Training, November 19-22, 1998, Hampton Inn Downtown, New Orleans, LA**
- **NLADA 76th Annual Conference, December 9-12, 1998, San Antonio, Texas**

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; Web: http://www.nlada.org

**** NCDC ****

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.

HONEST JOHN **by JIM THOMAS**

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