THE ADVOCATE

JOURNAL OF CRIMINAL JUSTICE EDUCATION & RESEARCH
KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY

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MAY, 1999

The Gault Initiative

Representing Kentucky's Kids

The Department of Public Advocacy Seeks Improved Representation of Juveniles

"Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts."

Fare v Michael C.,
442 U.S. 707, 719
(1979)

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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 or webmaster@mail.pa.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. It 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.

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Bruce Hackett – 6th Circuit Review
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Ernie Lewis – Plain View
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Julia Pearson – Capital Case Review
Jeff Sherr - District Court
Julie Namkin - West's Review

FROM THE EDITOR. . .

Gault Initiative
Juvenile representation in Kentucky has been identified as an area that full-time and contract public defenders must improve. This special issue of *The Advocate* focuses on juvenile litigation, defense litigators doing juvenile representation and the history of juveniles and the criminal justice system.

DPA is in the midst of its *Gault Initiative* - a major plan to improve juvenile defense representation across Kentucky. Join us in our resolve to provide better legal representaiton to Kentucky's juveniles. Please give Jeff Sherr your feedback and suggestions on this critical effort.

U.S. Attorney General
Attorney General Janet Reno offered substantial reflections in her Law Day remarks. We carry them this issue and invite your response.

Psychological Evaluation
Mental health issues in criminal cases face us in increasing numbers and complexity. Take a look at what new psychological testing reveals to us as litigators.

Advocate Changes
This is the first *Advocate* under the guidance of Patti Heying, who has replaced Tina Meadows in doing the graphics, design and layout of *The Advocate*. Tina provided us with marvelous *Advocates* over the last 9 years. Patti has a strong background in theatre and several years of training and teaching throughout the states of Minnesota and Kentucky. She is starting us out with a new design and layout for *The Advocate*. Please give her your feedback.

Edward C. Monahan
Editor

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Plain View

Ernie Lewis, Public Advocate

Darden v. Commonwealth
1999 WL 113134
(Ky. Ct. App. 3/5/1999)
Opinion Withdrawn
3/17/1999

United States v. Shutters
163 F.3d 331
(6th Cir. 12/10/1998)

United States v. Allen
168 F.3d 293
(6th Cir. 3/2/1999)

Darden v. Commonwealth
1999 WL 113134
(Ky. Ct. App. 3/5/1999)
Opinion Withdrawn 3/17/1999

A juvenile, Marcus Darden, was driving a 1978 Cadillac toward a football field during a game at Todd Central High School. He was stopped by a police officer who was on security duty. Another officer had received information from the school principal of "the odor of marijuana around a school parking lot area." As a result of the information, another officer, Officer Moberly, went to the parking lot area and saw the Darden's car. Moberly stopped the car based solely on the information from the school principal.

After the car was stopped, Darden consented to a search of the car, which revealed drugs, weapons, and shells. Darden and his passengers were arrested. Darden filed a motion to suppress, arguing that the original stop had been unlawful. The trial court overruled the motion, however, based upon the fact that the school principal had reported the odor of marijuana from the parking lot area and based upon the fact that "no one else was in the area."

The Court of Appeals affirmed the decision of the trial court. In an opinion written by Judge Knox joined by Judges Gudgel and Dyche, the Court held that the officer had a reasonable and articulable suspicion to stop Darden. The Court relied upon *Graham v. Commonwealth*, 667 S.W. 2d 697 (Ky. App., 1983), and the fact that the informant in this case was not an anonymous individual, but in fact was the school principal. Further, the Court also noted that in *Graham*, the Court held that a person could be seized for a violation of a misdemeanor not in the presence of the officer. Accordingly, because the tip came from the school principal and because Darden and his friends were the only people in the area, the stopping was lawful.

What is missing in this opinion is any nexus between the informant's tip and Darden. From the opinion anyway, the tip was that the odor of marijuana was coming from the parking lot of a high school during a football game. Absolutely nothing in the informant's tip related to Darden, his car, or his passenger. It is highly questionable whether anyone in the area, as implied by the opinion, could be legitimately stopped without some sort of nexus between the odor and Darden.

United States v. Shutters
163 F.3d 331 (6th Cir. 12/10/1998)

This is a case involving a scheme to buy cars with forged checks and to sell them across state lines. Shutters was investigated, and eventually evidence was obtained at two residences both pursuant to alleged consent and a warrant. Shutters was convicted in a jury trial and sentenced to 57 months in prison. He appealed to the Sixth Circuit.

Judge Jones wrote the opinion for the Court affirming Shutters' conviction. The Court denied Shutters' challenge to his consent, which resulted in a search of his sister's residence. The Court found that there was a factual dispute regarding the facts, and that the court below had not erred in finding that Shutters had failed to make the requisite showing that the police were lying and that he was telling the truth. The holding of the case was that "the district court's conclusion—that Shutters voluntarily consented to the search of the Georgia Residence—was not clearly erroneous."

Shutters also appealed the search of his Tennessee residence pursuant to a warrant. The Court found that the affidavit in support of the search warrant failed to show a nexus between Shutters and his residence. However, the Court also accepted the Government's contention that the good faith exception should apply to save this search, saying that "only a police officer with extraordinary legal training would have detected any deficiencies" in the warrant. Accordingly, both searches were held to be constitutional.

United States v. Allen
168 F.3d 293 (6th Cir. 3/2/1999)

An informant told Det. Lomenick that "Red Dog" had been in possession of cocaine three days earlier in a particular Chatanooga apartment. Without any investigation, Det. Lomenick prepared an affidavit asking to search the apartment, and it was granted by a local magistrate, actually an attorney acting for the local magistrate. Det. Lomenick then executed the search warrant, during which a gun and 9.3 grams of crack cocaine were found. The defendant entered a conditional guilty plea and appealed to the Sixth Circuit.

In an opinion written by Judge Clay, the Sixth Circuit reversed. *United States v. Allen*, 168 F.3d 293 (6th Cir. 1999). The Court analyzed whether the affidavit, which relied exclusively upon the informant's tip, allowed a finding of probable cause by the magistrate. This was decided by examining two factors: "(1) an explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles the informant's tip to greater weight than might otherwise be the case; and (2) corroboration of the tip through the officer's independent investigative work is significant."

Based upon these factors, the Court found the affidavit legally insufficient. The Court noted that the affidavit only stated that cocaine was at the apartment 3 days prior without indicating the amount of cocaine, the type of cocaine, or the location of the cocaine. Nor did the affidavit indicate how the informant knew about the appearance of cocaine. In addition, the police failed to corroborate any of the information given by the informant. The Court noted that the affidavit was a ""form type affidavit consisting of boilerplate text...boilerplate language in affidavits poses a threat of generalization where particularization is necessary." Under all of these factors, "under the totality of the circumstances, we find that the affidavit at issue was conclusory and 'bare bones' in that it failed to provide sufficient factual information for a finding of probable cause because it

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(Plain View, Continued from page 4)
contained only the affiant's belief that probable cause existed, which lacked particularized facts sufficient to indicate that a search 'would uncover evidence of wrongdoing[,]' and was not corroborated by an independent investigation."

The Court next looked at the question of whether the search could be saved by the good faith exception to the warrant requirement. The Court answered this question in the negative finding that the third exception under *United States v. Leon*, 468 U.S. 897 (1984) was met, namely that "the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or where the warrant application was supported by nothing more than a bare bones affidavit." In this case, the Court believed that "Detective Lomenick should have known that the search was illegal despite the magistrate's authorization...We believe that a reasonably prudent officer would have made some attempt to corroborate the informant's tip in order to establish the requisite probable cause."

Judge Gilman concurred in part and dissented in part. While he agreed that the search warrant was defective, he would have excused the illegality based upon the good faith exception. "I cannot conclude that the affidavit was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable...I believe that reasonable people could disagree as to whether the affidavit was supported by probable cause." Judge Gilman also criticized the majority for its criticism of the use of boilerplate affidavits. "Standard forms are a useful tool to provide officers a skeleton from which to work, and actually serve in many cases to perpetually alert officers to the legal requirements that they must meet." Finally, Judge Gilman invited an en banc review of the case "in order to clarify the law in this circuit regarding the necessary requirements for the issuance of a search warrant based on uncorroborated information from an informant." ■

Short View. . . Ernie Lewis, Public Advocate

1. *State v. Donis*, 723 A.2d 35 (NJ 12/10/98). The challenges of technology when applied to the traditional analysis of the Fourth Amendment are apparent in this case. Here, the police had a mobile data terminal (MDT) which allowed them to enter a license number and gain access not only to status information regarding the car and the driver, but also more personal information. An individual stopped when the MDT revealed personal information, leading to his being stopped, challenged the use of MDT without an articulable suspicion. The New Jersey Supreme Court held that the use of the MDT for status information without an articulable suspicion did not violate the Fourth Amendment, while the use for personal information did. "In the first step, the initial random license plate look-up would display information regarding only the registration status of the vehicle, the license status of the registered owner, and whether the vehicle has been reported stolen. The registered owner's personal information would not be displayed. If the original inquiry disclosed a basis for further police action, then the police officer would proceed to the second step, which would allow access to the 'personal information' of the registered owner, including name, address, social security number, and if available, criminal record."

2. *Hulit v. State*, 982 S.W.2d 431 (Texas Crim. App. 12/16/98). In a fascinating opinion, the Texas Court of Criminal Appeals holds that the federal constitution does not provide a floor of rights for Texas citizens. "Because of the Supremacy Clause of the United States Constitution, a defendant who is entitled to claim the protection of a federal provision may receive a greater protection from that floor than the greatest protection that the ceiling of the Texas Constitution would give him. But that does not mean that the Texas Constitution has no ceilings that are lower than those of the federal constitution." Only in Texas.

3. *U.S. v. Hanson*, 588 N.W.2d885 (S.D. 1/20/99). The South Dakota Supreme Court has approved a very intrusive warrantless search of kids in a car. Here, Hanson was in a car stopped for a violation of the state's law on tinted windows. The police smelled marijuana, and called for a narcotics dog, which alerted. A search of the car revealed a pipe with residue and some marijuana residuals. No one admitted knowledge of the pipe or residue. Hanson was arrested, and required to provide a urine sample, which revealed the presence of THC. The Court held that this seizure was reasonable based upon *Schmerber v. California*, 384 U.S. 757 (1966), which had allowed the involuntary seizure of body samples based upon probable cause and exigent circumstances. The dissent argued that because marijuana can be detected long after its use that there were no exigent circumstances justifying a warrantless seizure of this evidence.

4. *In re Patrick T.*, 723 A.2d 523 (Md. Ct. Spec. App. 1/28/99). The Maryland Court of Special Appeals has approved an extraordinary school search of all lockers based upon a report that drugs and weapons were present in the school. The Court "balanced" the students' acknowledged privacy rights in their lockers with the school's interest in safety.

5. *State v. Kulan C.*, 970 P.2d 821 (Wash. Ct. App., 2/1/99). A person arrived at an apartment to deliver drugs and was arrested. He was required to strip, was searched, and during that search cocaine was found in his shoes. This warrantless search violated the Washington Constitution.

6. *Mazepink v. State*, 987 S.W.2d 648 (Ark. 1/28/99). The Arkansas Supreme Court has held that a person has standing to challenge a violation of the knock and announce rules even when he/she is not at home, as long as someone is home at the time of the search, and that a violation of the knock and announce rules requires suppression of the evidence obtained.

7. *State v. Evans*, 723 A.2d 423 (Md. Ct. App. 12/6/99). The Maryland Court of Appeals has held that officers may legally "tag and release" people against whom there

Short View. . . Ernie Lewis

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is probable cause. This method of arresting, searching, and releasing for drug offenses had been condemned by a lower court. The higher court, however, held that the question is whether there is probable cause, not whether there is an intent to detain, book, and incarcerate. All that is required for the search incident to arrest exception to the warrant requirement is that "a police officer must have probable cause to believe the suspect has committed a felony and must either physically restrain the suspect or otherwise subject the suspect to his or her custody and control."

8. *United States v. Castro*, 166 F.3d 728 (5th Cir. 1/28/99). The fruits of the *Whren* decision are apparent in this case. Here, a state/federal task force was following Castro's car through 3 counties, but could not develop a reason to stop the car. Investigators radioed a sheriff's deputy, told them the car was involved in a narcotics investigation, and told the deputy to "develop his own probable cause" to stop the car. The car was stopped for speeding, and the defendants were arrested for not wearing their seat belts. The defendant refused to allow the car to be searched. Eventually, an inventory was conducted, a dog was brought in, the dog alerted, and narcotics were found. The Fifth Circuit en banc held that under *Whren* it did not matter what the pretext was for the search. If there was probable cause (speeding, seat belt violation), then the officer's real reason for the stop was irrelevant. Further, because the inventory was valid based upon a lawful stopping, the seizure of the drugs was lawful. The dissenters were not pleased: "[T]here must be a point where the combination of pretext and continuing bad faith cannot be tolerated if the fourth amendment protections are to have any meaning whatsoever."

9. *Barttuff v. State*, 706 N.E.2d 225 (Ind. Ct. App. 2/24/99). The Indiana Court of Appeals took the opposite view of the Court in *Castro* above. Here, the Court found quite relevant the pretextual inventory search of a car stopped for a traffic violation (driving 57 in a 55). The officer refused to let the driver take control of his personal property in the car or wait to search until the car was towed to a storage area. The Court relied upon a statement in *Florida v. Wells*, 495 U.S. 1, 110 (1990) that an inventory search must not be used "for general rummaging."

10. *State v. Mendez*, 970 P.2d 722 (Wash. 1/28/99). The Washington Supreme Court has decided that the bright line rule established in *Maryland v. Wilson*, 519 U.S. 408 (1997) allowing for the police to detain a passenger of a lawfully stopped vehicle would not apply in Washington under their state constitution. To detain a passenger, the police must articulate some reason other than the stopping of the car to justify the detention of the passenger.

11. *Lauro v. New York*, 64 Cr. 424, 1999 WL 101245 (S.D.N.Y. 2/25/99). It violates the Fourth Amendment to parade an arrestee in front of the media to provide a photo opportunity, according to a U.S. District Court in New York in the context of a 42 USC #1983 action. "[T]he perp walk conducted with plaintiff was a seizure that intruded on plaintiff's privacy interests and personal rights, and was conducted in a manner designed to cause humiliation to plaintiff with no legitimate law enforcement objective or justification. . . We therefore hold that plaintiff's rights under the Fourth Amendment were violated by defendants as a matter of law by the perp walk conducted by Det. Charles. This outrageous and unnecessarily humiliating procedure is an 'unreasonable seizure' as a matter of law and defendants have violated rights of plaintiff that are secured to him by the Fourth Amendment to the United States Constitution."

12. *United States v. Johnson*, 170 F.3d 708 (7th Cir. 3/12/99). First there was stop and frisk. Then there was knock and announce. Now there is knock and talk. Here, the police received "word" that drug dealing was being done out of a certain apartment. Under the knock and talk theory, the police go to a place they've heard about, listen outside the place, knock, engage in conversation, look into the apartment and enter if they see contraband in plain view, attempt to come in with consent, and generally to see what they can develop. In this case, after they knocked and before they talked, the defendant attempted to run. The police changed knock and talk into knock and tackle, finding weapons and cocaine after Johnson was taken to the floor and searched. The Seventh Circuit thought this somehow violated the Fourth Amendment. There was no reasonable suspicion and a stop and frisk under these circumstances mandated suppression. ■

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Laura Douglas Leaves as Cabinet Secretary

The Department of Public Advocacy, and Kentucky public defenders, has lost a friend. Laura Douglas has left as the Public Protection and Regulation Cabinet Secretary for a job in Louisville as Vice-President and General Counsel for the Louisville Water Company. She will be missed.

Ms. Douglas has been the Secretary of the Cabinet since December 1995. The Public Protection and Regulation Cabinet is the Cabinet in which DPA has been since the early 1980s. The Cabinet is an umbrella Cabinet with oversight authority over Alcoholic Beverage Control, Board of Claims, Crime Victims Compensation Board, Dept. of Financial Institutions, Dept. of Housing, Buildings and Construction, Dept. of Insurance, Dept. of Mines and Minerals, the Office of the Petroleum Storage Tank Environmental Assurance Fund, the Dept. of Public Advocacy, the Public Service Commission, the Kentucky Racing Commission, and the Board of Tax Appeals. Under Ms. Douglas' tenure, this disparate Cabinet was given additional unity and identity.

Ms. Douglas brought strength to the job as Cabinet Secretary. She was an activist Secretary, not in any way content to look the other way when problems became apparent to her. She brought about significant change in ABC and in the organization of the Cabinet itself, among her many achievements. She stressed good management, accountability, and data based decision-making. She served with distinction on the Governor's Criminal Justice Response Team, during which she chaired a Victims' Committee. She demonstrated excellent value based decision-making.

She never forgot poor people during her leadership of the Cabinet. She came from a Legal Services background as a lawyer, and brought that experience to bear in her dealings with DPA. She helped public defenders in many ways. She helped us reorganize into four divisions. More recently, she approved the reorganization of the Trial Division into 5 trial regions, and a reorganization of the Post-Trial Division into two appellate branches, including a Capital Appeals Branch. She approved of our ability to utilize flexible hiring, which has enabled us to fill much needed vacancies despite the limits of our complement. She was a strong supporter of Plan 2000, especially favoring juvenile enhancement and the creation of 5 additional full-time offices during 1998-2000. She helped salvage the Capital Post-Conviction Branch. She was a strong supporter of additional funding for public defenders in the 1998 General Assembly, and has agreed to continue to serve on the Blue Ribbon Group on Improving Indigent Defene in the 21st Century. She helped me secure a place on the Governor's Criminal Justice Response Team. She helped coach me through the process of the 1998 General Assembly.

On a personal level, I will miss Laura Douglas. She is a classy woman who exercised her power gently, wisely, and in a measured way. She has been my friend, a friend of DPA, and a friend of poor people in Kentucky. ■

Ernie Lewis, Public Advocate

Bill Clemons. . .Juvenile Specialist

by Gail Robinson

Bill Clemons, a native of Breathitt County, has been the juvenile specialist at the Hazard Regional DPA Office since October 1, 1998. Bill worked in the mines for many years and then attended Berea College and the University of Kentucky College of Law after the mining position no longer existed. Since his graduation from law school, he has held several different positions, including law clerk for Judge Stephen Hayden in Henderson and staff attorney handling district court at Fayette County Legal Aid. Last fall, he returned home to eastern Kentucky and accepted the juvenile specialist position in Hazard.

Bill has enjoyed each of his attorney positions as well as his work with pre-trial services in Lexington. The transition from clerking for a circuit judge to handling a high volume of district court cases in Fayette County was a challenging one. However, Bill enjoyed the wide variety of cases he was able to handle and liked the juvenile court work after an initial period of being "torn up" about what he experienced there. Bill believes that it is important to let juveniles know that they have rights and that the court system is designed to protect them as much as to punish them. That includes the right to appeal, and Bill has been willing to appeal cases which he believes have merit.

While in Fayette County, Bill urged the juvenile court judge that a sentence for contempt could not exceed the 45 and 90 day limits set out in KRS 635.060(4) and (5). The district judge disagreed with Bill's argument and he appealed to circuit court where Judge Sheila Isaacs upheld his position. Shortly after taking the position at the Hazard Office, Bill appealed a case from juvenile to circuit because a ten year old child with a low IQ had been adjudicated guilty of charges filed by the school system when Bill believed the child, who was a special education student, should have been a dependent, neglected or abused child instead of a public offender. Pending appeal, Bill obtained a stay of the district court's judgment and the juvenile remained at home. Bill

Ronald B. McCloud
Named Secretary
Public Protection and Regulation Cabinet

Gov. Paul Patton appointed Ronald B. McCloud Secretary of the Public Protection and Regulation Cabinet on March 10, 1999. Sec. McCloud succeeds Laura Douglas, who left to take a position within the private sector.

Sec. McCloud is a native of Greenup County and a graduate of Eastern Kentucky University and the Graduate School of Banking, Louisiana State University. He worked for the First American Bank in Ashland, Kentucky for 19 years, serving as Senior Vice President before leaving to become Chairman of the Kentucky Democratic Party.

"Ron has both the administrative abilities and a commitment to public service that will make him a valuable part of our administration," **Gov. Patton** said at the press announcement.

"I'm ready for this opportunity to take on new challenges and to demonstrate my desire to continue in public service in this new role. It's an honor to be part of Governor Patton's administration," said **Secretary McCloud**.

"Secretary McCloud brings to this job an interest in people, extensive administrative ability, and the willingness to work hard. I look forward to working with Secretary McCloud to move the Kentucky Public Defender system forward into the 21st Century," remarked **Ernie Lewis**.

Sec. McCloud became mayor of Worthington, Kentucky in 1982, an office he held for 15 years. He co-founded and chaired the Economic Development Corporation of Boyd and Greenup counties, was president of the Ashland Business Center, and was a member of the FIVCO Area Development District.

His civic and volunteer service includes director of the Salvation Army; past treasurer, First Baptist Church in Worthington, member of the Boyd/Greenup Counties Chamber of Commerce; and adviser to the Boy Scouts of America, Tri-State Council. In 1997 he received the Outstanding Volunteer Cornerstone Award from the Boyd/Greenup counties Chamber of Commerce.

Sec. McCloud is married to Nancy Ovesen McCloud, who works for the Cabinet for Families and Children as a principal assistant in the ombudsman's office. Secretary McCloud has four children, Lucinda, Brian, James and Ronae, and one grandchild. He and Mrs. McCloud live in Frankfort. ■

(Clemons Article Continued from page 7)

states that he has drafted appeals and habeas corpus petitions that he ended up not having to file because the cases were successfully resolved. He believes that the drafting process refreshed his memory concerning the legal claims he would be presenting.

At this point, Bill handles juvenile court in Perry, Knott and Letcher Counties and also handles involuntary commitment hearings at a hospital in Hazard. The pace in the courts where he currently appears is far slower than the pace in Fayette County and the clients are more positive about representation by a public defender. Bill has tried to educate the judges and county attorneys with whom he works about juvenile law and believes that this has been helpful. He is enjoying the work but sometimes feels frustrated that a judge may find a juvenile guilty when he believes a jury would have returned a not guilty verdict for the client.

Bill suspects that the number of juvenile cases has increased in recent years because matters that used to be handled at home or at school are now being brought to court. A problem that is faced by advocates in rural areas is the lack of alternative programs available to juvenile clients. Even a well intentioned judge may choose to sentence a juvenile to detention if he believes there are no other alternatives available.

Bill believes that it is important for all who participate in our juvenile court system to remember that these are children and not little adults and that a ten day detention sentence will seem like a very long sentence to a juvenile. Bill's supervisor, Peyton Reynolds, direction attorney of the Hazard Office, states that he's very proud of Bill's work and his emphasis on clarifying the Juvenile Code and assuring that the rights of juvenile clients are protected. Thanks for your zealous advocacy on behalf of juveniles, Bill. ■

The Gault Initiative:
Saving the World One Child At A Time

by Jeff Sherr

Providing individualized, effective, and caring representation to Kentucky's indigent youth through comprehensive education, systematic support, and innovative use of technology.

Elements of the Plan

Co-Counseling Cases
◊ Asst. Director of Ed. teams with one Contract Attorney per region
◊ Juvenile Specialists also assist
◊ Juvenile Social Workers provide support

Case Reviews
◊ Create regional cells of 8-10 attorneys
◊ Each cell will be led by a juvenile specialist and a JPDU or Juvenile Appellate attorney
◊ Cells will be connected through use of email and video conferencing

Regional Juvenile "Summits"
◊ A one-day summit of juvenile practitioners (including contract attorneys) in each region
◊ Lead by Regional Manager, Juvenile Specialists and Assistant Director of Education

Knowledge Management
◊ On-line Motion Bank
◊ On-line Dispositional Alternative Bank
⇒ Created and Maintained by Juvenile Social Workers
◊ Juvenile Manual
◊ Juvenile Listserv
◊ Computerized QuickReview of Juvenile Code available

Newly Hired Attorney Education
◊ Continue 2 1/2 day program for new attorneys
◊ Follow up with computerized QuickReview

Litigation Persuasion Institute
◊ Juvenile Track added to LPI
◊ Coaches brought in with expertise in juvenile issues
◊ Emphasis given to Transfer and Dispositional Hearings

Annual Conference
◊ Continue emphasis of Juvenile Practice
◊ 1999's Conference will include sessions on
⇒ Motion Practice
⇒ Sex Offenders
⇒ Transfer issues

DPA Performance Standards for Juvenile Trial Litigators
◊ Circulate Proposed Standards for Revision
◊ Develop Checklist based on Standards
◊ Utilize Standards in Education
◊ Utilize Standards in Performance Evaluations

The field of juvenile law is an energized, exciting area of practice which, due to the limited amount of caselaw and the ever-changing juvenile code, allows attorneys to practice creative, problem-solving law. Unfortunately, it has traditionally been viewed as a proving ground for young attorneys, merely a stepping stone toward the practice of "real' criminal law. This view coupled with enormous caseloads has led to today's crisis in providing quality representation in Kentucky's juvenile proceedings.

Recognizing the importance of quality education for juvenile practitioners, the 1998 General Assembly provided funds for the Department of Public Advocacy and a new Assistant Director of Education and Development whose primary responsibility is to increase education in juvenile representation at the trial level. A comprehensive needs assessment including literature review, interviews, focus groups, and surveys has been conducted. This report outlines the results of the needs assessment and the initial approach toward upgrading the quality of representation of Kentucky's youth.

> *"The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice."*
>
> ***Kent v. United States***, 383 U.S. 541, 561 (1966).

The Problem

"Young people charged with delinquency offenses need effective representation to ensure that they are not held unnecessarily in secure detention, improperly transferred to adult criminal court or inappropriately committed to institutional confinement. They need the active assistance of counsel to properly challenge prosecution evidence and to present evidence in their behalf. If the charges against them are sustained, they need effective representation to assure that the disposition order is fair and appropriate to their individual need. If they are incarcerated, they need access to attorneys to help respond to a myriad of post-dispositional legal issues. *A Call for Justice: An Assessment of Access to Counsel and Quality Representation in Delinquency Proceedings*, ABA Juvenile Justice Center, Juvenile Law Center, and Youth Law Center, p. 4, (1995)

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("The Gault Initiative" Continued from page 9)

In 1995, the national report "A Call for Justice: An assessment of Access to Counsel and Quality Representation in Delinquency Proceedings" painted a bleak picture of the quality of juvenile representation in the United States. This comprehensive study made the following recommendation regarding the education of juvenile attorneys:

- Trainers should use innovative and interactive techniques, including:
  - audiotapes,
  - videotapes,
  - mock hearings,
  - or regional meetings with teleconferencing to ensure that educations are flexible, affordable, effective and accessible to attorneys in distant areas.

- The curriculum for the education should be updated regularly and be comprehensive, including, at a minimum:
  - child development,
  - communicating with young clients,
  - multicultural issues knowledge of community resources,
  - diversion,
  - informal case resolution,
  - ethics,
  - transfer/waiver hearings, and
  - related legal issues such as custody, education, mental health, and child welfare. *Id.* at 68.

A Kentucky study, "*Beyond In Re Gault: The Status of Juvenile Defense in Kentucky*", conducted by the Children's Law Center recognized the need to upgrade Department of Public Advocacy's education for full-time and contract attorneys who represent children. The study made the following findings relevant to DPA's education effort:

- DPA should reassess its allocation of resources to ensure that juveniles receive a fair and equitable portion of funding and other available resources as compared with adult offenders.
- Attorneys representing juveniles in public and status offense proceedings should receive comprehensive education on juvenile court practice, treatment issues, criminal law, and other special matters relating to the representation of children.
- All contract attorneys who take juvenile cases should be required to complete juvenile education similar to that of full-time DPA attorneys.
- Courts, bar associations and state agencies such as DPA should adopt minimum standards for representation of juveniles in juvenile court.

The DPA responded to this study by requesting resources necessary to meet these deficits. The General Assembly has provided funding to address the problem. In addition to the creation of the position to increase the quality of education, funding was made available to hire six new trial attorneys in existing full-time offices to focus on juvenile representation, two juvenile appellate lawyers, and two Master level social workers.

Needs Assessment

A needs assessment process focusing on the areas most needing education and the methods of education to be utilized has also been conducted through the use of surveys and focus groups.

DJJ Focus Group

In February of 1999, a focus group consisting of DJJ staff members from Rice Audubon Youth Development Center met to discuss issues related to defender education. Rice Audubon provides treatment for approximately forty public and youthful offenders. This group was chosen because of the member's unique vantage point to review the results of juvenile practitioners performance.

The primary area of concern stressed by the group was the communication between the child and counsel. Group members described frequent occurrences of children returning to court for reviews without their attorney speaking with them or their counselors. This lack of communication often increases the frustration and nervousness of the children leading to behavior problems in the facility. Group members also expressed their surprise that when attorneys did call the facility it was not uncommon for the staff member to have to explain the juvenile code to the attorney.

Survey of District Court Judges

A survey was sent to the Commonwealth's district court judges asking them to rate some thirty areas of juvenile practice to determine the areas in most need of education. The responses of the judges identified DJJ structure and programs, dispositional alternatives, predispositional alternatives, sex offenders and transfer hearings as the areas in most need of additional education for defenders.

Survey of Attorneys

Another survey was sent to juvenile practitioners focusing on the areas education is most needed and which methods of education to utilize. The attorneys identified a list similar to the judges regarding the areas in which education is most needed. Transfer hearings, caselaw and statute updating, sex offenders, DJJ structure and programs, and dispositional alternative lead the list.

Conclusion

The needs assessment identifies three primary areas for focus:

1. Providing the court with dispositional alternatives. In other words, answering the question, "What can we do to help these kids?";
2. Providing attorneys with education on particular difficult areas of juvenile practice, such as sex offenders, transfer hearings, and special education; and

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("The Gault Initiative" Continued from page 10)

3. Teaching attorneys the skills needed to better communicate with their juvenile clients.

The assessment also indicates that the education must be provided using a variety of methods with an emphasis on hands on education with other attorneys on real life cases.
The crisis in Kentucky's juvenile law cannot be solved merely through an increase in education programs. The solution must also address adjusting the attitude of and toward juvenile practitioners, providing the support structure to serve individual clients and creating the time to fully involve clients, their families and their communities in shaping a better future.

Elements of the Plan

Co-Counseling Cases

Attorneys rated working with an experienced attorney as one of the most effective learning methods. With the creation of the new Assistant Director of Education and Development (A.D.) position, the department now has an individual with the time set aside to provide one-on-one assistance to attorneys. The A.D. will be available to co-counsel one case in each of the department's five regions. When the case is closed the A.D. will move to another case in the region. The regional managers will identify the case and attorneys for co-counseling with priority given to contract attorneys. Other attorneys in the region, including juvenile specialists and a juvenile social worker, will participate in comprehensive case reviews of these cases to provide increased opportunities for sharing ideas and resources.

Case Reviews

Case reviews with other juvenile attorneys can dramatically increase the quality of representation in the case reviewed by increasing the wealth of knowledge and experience brought to the case. Case review also provides for a learning opportunity for all of the attorneys involved as they share ideas for strategy, motion practice and disposition.

As part of The *Gault* Initiative, regional cells of 8-10 attorneys led by a juvenile specialist will be created for the purpose of ongoing case review and support. These cells will be also include a member of the Juvenile Post Dispositional Branch and a juvenile social working. The cells will be connected through the use of email discussion groups and video conferencing.

Regional Juvenile "Summits"

An annual "Summit" of juvenile practitioners will be held in each of the five trial division regions. Prior to the Summit a needs assessment will be conducted for that region and seminars will be offered in subjects most requested by members of the region. The Summit will be lead by the Regional Manager and the region's Juvenile Specialists working with the Assistant Director of Education and Development. In addition to offering relevant, needed education, the Summits will provide another forum to discuss common problems and solutions to those problems.

Knowledge Management

Technology will be utilized to provide information, to quickly seek help from others, and to review recent caselaw and changes in the Juvenile Code. Motions will be collected from across the Commonwealth and be accessible to juvenile practitioners through a password protected internet site. The new Master's level social workers will create and maintain an on-line Dispositional Alternative Bank to allow attorneys to quickly search for treatment specific to their client's needs. The comprehensive Juvenile Manual, already in existence, will continue to be updated and will be made available on-line. An email discussion group (with 37 members currently) has been created to facilitate discussion of juvenile issues and sharing of motions and articles. QuickReview, on-line quizes, will provide attorneys a vehicle to test their knowledge of the Juvenile Code and caselaw.

Newly Hired Attorney Education

The Department will continue two and one half day juvenile program for newly hired attorneys. Participants will be able to review the knowledge acquired at the education through the use of QuickReview.

Litigation Persuasion Institute

A Juvenile Track will be added starting October, 1999 to the Department's annual Litigation Persuasion Institute in Faubush, Kentucky. This intensive week long institute provides participants repeated opportunities to get on their feet to try out persuasion techniques with feed back from peers and experienced coaches. The Juvenile Track will give emphasis to persuasive advocacy at transfer and dispositional hearings.

Annual Conference

The Department's annual conference will continue its emphasis of Juvenile Practice with this year's conference containing beginning and advanced sessions in transfer hearings and sex offender, a session on the use of themes in juvenile motion practice and a plenary session with a national speaker.

DPA Performance Standards for Juvenile Trial Litigators

A draft of proposed DPA Performance Standards for Juvenile Trial Litigators has been prepared by Rebecca DiLoreto and is currently being discussed on the juvenile practitioners email discussion group. After this initial discussion, suggestions will be solicited from regional trial managers and juvenile specialist throughout the state. Once the standards are finalized they will be used to develop practitioner checklists, guide education curriculum, and assist in evaluating attorney's performance.

Conclusion

Surveys will be sent to judges early in the implementation of plan to set a baseline for levels of performance in areas such as knowledge of caselaw, level of motion practice, and number and feasibility of dispositional alternative presented. After a year, these surveys will be resent to track changes. As the plan is implemented, it will continue to be assessed and will change to meet the needs of litigator. Attorneys and their supervisors will be asked to provide feedback and suggestions throughout the process.■

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Executive Summary

A Celebration or a Wake? The Juvenile Court After 100 Years

1998 Annual Report to the President, Congress and the Administrator of the Office of Juvenile Justice and Delinquency Prevention by the Coalition for Juvenile Justice[1]

In 1999 the juvenile court will mark its 100th anniversary as a separate legal institution, and there is much public and academic ambivalence about both its effectiveness and future. At least part of the impetus for the creation of the court initially was dissatisfaction about the criminal law's ability to deal in a humane and efficient manner with children who violated the law. Although separate institutions for children were growing in acceptance during the 19th century, their appropriateness and the effectiveness of their program designs were widely questioned. Consequently, the juvenile court as a separate entity was established in Cook County, Illinois, in 1899, to get children out of adult institutions, to focus more on rehabilitative treatment rather than punishment, and to provide for greater informality and confidentiality in court proceedings.

Over the years since 1899 concerns developed in a number of quarters about the absence of due process in these informal juvenile courts, and the United States Supreme Court responded with a series of rulings in the late 1960s and early 1970s that narrowed considerably the procedural gulf between juvenile and criminal courts. These decisions, beginning with *Kent v. United States* in 1966 and *In re Gault* in 1967, demanded greater procedural regularity in the juvenile court to ensure due process for juvenile offenders. The federal Justice and Delinquency Prevention Act of 1974 contributed to the juvenile justice reform movement with its core requirements focused on the separation of juveniles and adults in institutions, deinstitutionalization of status offenders, removal of youth from adult jails, and, later, the disproportionate confinement of minority juveniles. The past decade, however, has witnessed a growing criminalization of the juvenile justice process through a greater use of transfer or certification to adult court, an opening up of the court and its records, the establishment of longer juvenile dispositions, and more emphasis on accountability sanctions premised on punishment than on traditional rehabilitative treatment.

The impending approach of the second century of the juvenile court has focused considerable attention on the future of the juvenile justice system in America. The Coalition for Juvenile Justice believes the juvenile court of the next century should not be fundamentally different from the court throughout most of the current century, but we hope that it will receive significantly more of society's attention and resources. We do not believe the juvenile justice system is fatally flawed. Like many institutions and programs for children and youth, we believe that it only requires some fine tuning and greater support to carry out its high purpose.

The Coalition proposes that the court of the future should be a unified family court, designed to bring all family-focused legal issues into a single setting with one judge dealing with the problems presented by those issues holistically. Judges and other juvenile justice system personnel should be selected for their interest in children and youth, and they should be given the specialized training to enable them to perform their tasks in a caring and effective fashion.

The court must also be provided with the needed staff and resources to enable it to do its assigned job in dealing with children and families in need of great attention.

We also urge that there must be a far greater emphasis on delinquency prevention and on the creation of effective early intervention programs to reduce the incidence of youth crime. The court and the community also need to work together to develop more alternative dispute resolution services to divert cases away from the formal legal system where court intervention is unnecessary.

We strongly recommend that juveniles charged with criminal offenses be detained only in separate juvenile facilities, and only when such incarceration is absolutely necessary to protect society or to assure their presence in court. Children also should have an unwaivable right to zealous and competent counsel at all critical stages of the proceedings against them, and trained and experienced prosecutors committed to the juvenile justice system must be available to the court.

Transfer of juveniles to adult criminal court should take place only after an individualized hearing before a juvenile or family court judge, with the decision based on specific and carefully delineated criteria. If youths are transferred to the adult court for trial, they should not be placed in any adult facility unless and until they have been convicted and sentenced as adults. Delinquency hearings in juvenile or family court largely should be held in open court, and court records should be accessible to those with a demonstrated need to know. The court must also be provided with the needed staff and resources to enable it do its assigned job in dealing with children and families in need of great attention. Victims should be given greater access to and participation in court proceedings.

The court of the 21st Century must have available to it a continuum of graduated sanctions and priority must be given in court handling to early intervention for potentially serious, violent, or chronic offenders. Culturally, racially, and gender sensitive services should be available to the court and the community, and for use in diversion from the formal court

(Continued on page 13)

("Executive Summary" Continued from page 12)
process. Greater access to meaningful diagnostic and treatment services must be provided the court for use with youths suffering from mental health and substance abuse problems. Carefully designed restorative justice programs, such as community service, restitution, offender-victim mediation, and family group conferencing, should be available to the court for use with appropriate juveniles. Status offenders should not be placed in secure correctional institutions with delinquent youths.

We oppose the death penalty for crimes committed by persons under the age of eighteen, and we urge the United States Senate to join the world community by ratifying the United Nations Convention on the Rights of the Child.

The juvenile or family court should address delinquency by balancing competing, yet complementary, goals. Since youths are developmentally different, we believe their antisocial behavior should be corrected through services expressly designed to address their deficits and behavior in an individualized fashion. Because of their developmental and social differences, they are more likely to be rehabilitated by carefully designed treatment programs than by pure punishment. Young people who break the law also must be held accountable for the results of their illegal behavior, because this accountability is an integral part of rehabilitation. Juveniles need to know that criminal conduct has consequences. Thus, illegal behavior by juveniles should be addressed by a legal system that balances protection of the community, developmentally appropriate correction of juvenile lawbreakers, and protection of the rights of victims.

The Coalition for Juvenile Justice is hopeful that America has learned the lessons of the past and will adhere to its commitment to a separate juvenile justice system predicated on the principles that children are developmentally different from adults, that they continue to need to be separated from adults in institutional and procedural settings, and that individualized justice can best rehabilitate juveniles and protect society. We hope that the Congress and the states will decline to turn back the clock to the harsher days of a prior century when most juveniles were tried in criminal courts and largely incarcerated in adult institutions. ■

This was reprinted with permission of the Coalition for Juvenile Justice.

[1] The Coalition for Juvenile Justice is comprised of members of Advisory Groups appointed by Governors or Chief executive officers in states, territories and the District of Columbia.

[2] If anyone would like a copy of the entire report, contact the Coalition at 1211 Connecticut Avenue NW, Suite 414, Washington DC 20036; phone (202) 467-0864; fax (202) 887-0738.

Juvenile Court Turns 100, But is the Party Over?

This is the city where a 10- and 11-year old boy dropped five-year old Eric Moses from a Chicago, 14th floor window because he wouldn't steal candy for them.

It is the city where 11-year old Robert Sandfer show 14-year old Sharon Dean to death as a gang initiation – and was himself slain by fellow gang members to stop him from squealing to cops.

It is the city where a juvenile Court judge returned three-year-old Joseph Wallace to the care of his schizophrenic mother, who then hanged him to death.

Perhaps it is fitting that Chicago – where juvenile crime and courts make worldwide headlines – is hosting the centennial of the nation's first Juvenile Court, but is at the center of a debate over whether Juvenile Court should be overhauled or even eliminated.

The sometimes sensational nature of a few juvenile crimes – like the Chicago murders related above, or the series of school shootings around the country over the past 18 months – has driven public officials to nearly reverse the 100-year-old principles behind Juvenile Court. Thanks partly to a decade of heavy media attention to juvenile crime and the ensuing public fear, increasing numbers of children are now being sent to the adult prison system – where, studies show, they are more likely to be abused by adults. According to the U.S. Bureau of Justice Statistics, nearly 5,000 juveniles served sentences in adult prisons in 1997.

"It's tragic. It shows just how far we have fallen in the way we view children", said Steven Drizin, a supervising attorney at Northwestern University's Children and Family Justice Center.

"At the turn of the century, the Juvenile Court here in Chicago was developed in large part because of the horrible experiences children were being subjected to in adult jails," Drizin said, "And as we approach another turn of the century, we are moving in the direction of placing more and more children – and younger children – in adult prisons".

Others are optimistic about the future of juvenile justice, saying a re-examination of Juvenile Court is healthy. "You need to refine any system, adult or juvenile, to make sure it's responsive to any change in circumstance or change in our society – to make sure it has the flexibility it needs to be effective, then make sure you invest it", said Shay Bilchik, administrator of the U.S. Office of Juvenile Justice and Delinquency Prevention. "In a way, this scrutiny the Juvenile Court has been under is long overdue".

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Birth of a Nation

The need for Juvenile Court – where abused children are protected and misbehaving children are corrected – arose from cases like that of 12-year-old James Guild, a black child from Hopewell, NJ, who was convicted of murdering a white grandmother in 1828. The verdict carried an automatic sentence of death.

In a recent report, "A Celebration of a Wake? The Juvenile Court After 100 Years," University of Richmond law professor Robert Shepherd tells how the boy awaited his fate in an adult jail by playing with mice in his cell. He conducted a mock trial with rodents as jurors and defendant, then executed the "bad" mouse. The boy was hanged while a crowd gawked.

Shepherd, who wrote his report for the Washington-based Coalition for Juvenile Justice, which advised the president and Congress, says that during the 19th century at least 10 juveniles who were under 14 at the time of their offenses were executed in the United States. Two of them were just 10 years old.

Youth crime and a "get tough" atmosphere stir debate over whether system should be overhauled or simply dumped.

Although many states had Juvenile Reform Houses beginning in the 1820s, the Juvenile Court movement began in the 1880s with social reformers like Jane Addams and Julia Lathrop of Chicago's Hull House, a settlement house and sanctuary for abused women and children.

Outraged at the abuses inflicted on children locked up in adult prisons, the reformers called for a separate system of justice for abused, neglected or delinquent children.

Police and prosecutors joined the call, frustrated by increasing numbers of "jury nullifications" in which juveniles obviously guilty of serious crimes were acquitted by juries who did not want to see them going to adult prison, Shepherd said.

The first true Juvenile Court was born in 1899 here in Cook County. The movement held such promise that it spread quickly; by 1915, 46 states, three territories and the District of Columbia had established Juvenile Courts.

In Colorado, a parallel movement led by Denver Judge Ben B. Lindsey used the jurisdiction under Colorado's compulsory school attendance law to protect and reform children. When Lindsey lost re-election in 1927 to a candidate backed by the Ku Klux Klan, he took the matter of confidentiality for children seriously by burning all his court's juvenile records. His motive: protect the families from KKK reprisals or harassment. Juvenile Courts adopted the legal principle of *parens patriae*, allowing the court, on behalf of the state, to become "parent" to a child whose biological parents were unwilling or unable to raise him or her. A Juvenile Court judge, acting much like a firm yet caring parent, looked for individualized ways to correct a child's misbehavior, disregarding a one-size-fits-all approach to justice.

Juvenile Court hearings were informal and confidential; juveniles were not represented by attorneys. Many judges did not wear robes, creating a more home-like atmosphere to proceedings.

Abuses Spur Reforms

But paternalism inevitably led to abuses; children were often jailed with little concern for basic fairness. In a notable 1967 case from Arizona (*In Re Gault*), wherein a judge had incarcerated a 15-year-old boy indefinitely for making an obscene phone call, U.S. Supreme Court Justice Abe Fortas likened the youth's Juvenile Court trial to a "kangaroo court". The Gault case led to massive reforms in juvenile justice nationwide.

Gault and other Supreme Court decisions forced juvenile courts to become more like adult courts, protecting the rights of accused youths to have attorneys present during all phases and to not be incarcerated for minor matters like status offenses.

Some of the changes, however, brought new problems. "The concept of juvenile court was that it was not punitive and, therefore, you could treat the person like a child", said James Lincoln, juvenile Court Judge in Wayne County, Michigan, from 1960 to 1977. "A father says to the child: 'What did you do? Tell me". And the child would come clean.

"Nowadays, the child has an attorney who says, 'Don't tell'. This is kind of a psychological change, because you say to the child, 'You can beat the rap, even though you're guilty'," said Lincoln, now 82.

Some conservatives say Juvenile Court is too lenient with young criminals; some liberals believe the court tramples on children's rights. Still others say Juvenile Court destroys families by removing children and throwing them into a temporary and often poorly managed foster care system, now home to more than 500,000 kids.

"The idea of Juvenile Court is that we can combine social welfare and criminal social control in one institution," said Barry Feld, a law professor at the University of Minnesota who promotes abolishing the court. "When we try to do both missions, we do them both badly".

Kids who commit crimes don't fully understand their rights to remain silent or have an attorney present during police questioning. Feld and others say. "The reality of the current juve-

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nile court is that it functions primarily as a scaled-down, second-class criminal court for young offenders".

Feld would abolish juvenile court and try children in adult courts. They could get a "youth discount" at sentencing, he says, and be kept separate from adult offenders in prison.

A U-Turn on Kids?

Over the past six years, 40 states – driven by public fears over violent juvenile crime – have passed laws excluding more young people from the juvenile justice system because of the nature of their crimes, and making it easier to put children in adult prison. Critics say that trend reverses a century-long tradition of treating young offenders differently than adult criminals.

"Part of the argument to abolish the court is that rehabilitation doesn't work", said Shepherd, former legislative chair for the Coalition on Juvenile Justice. "But I've seen programs that do work and we do have a much better idea now of things that are successful with kids".

The trend to give children "adult time for adult crime" has drawn criticism from human rights groups like Amnesty International, which recently used a picture of an accused juvenile killer from Michigan, 12-year-old Nathaniel Abraham, for the cover of a report on abuses of children in the U.S. criminal justice system (Youth Today, December/January 1999).

Shepherd said legislators make a mistake by taking away from judges the decision on whether a youth should be tried as an adult, and giving that decision to prosecutors.

"They're saying basically that judges can't be trusted to make decisions about transferring kids to (adult court), so they're going to do it legislatively", Shepherd said. "That is clearly an attack on the traditional model of the juvenile court, where cases are dealt with on an individualized basis and (which) still focuses on rehabilitation and treatment, rather than punishment".

On the Ropes

But the juvenile crime rate increases since the mid-1980s are driving the call for more punishment. Since 1994, actually, juvenile crime rates have dropped dramatically nationwide, but are still above the pre-1980 levels.

Juvenile court "is on the ropes for a number of reasons", said Ira Schwartz, dean of the school of social work at the University of Pennsylvania. "One is that it's failed to live up to the rehabilitative ideal of being able to provide prescriptive diagnostic, and treatment services for kids because of the limitations of the social sciences.

"Another is the long history of not providing basic due process and procedural rights for young people, which took a series of Supreme Court decisions" to correct.

One-time anti-war activist, Bernadine Dohrn, director of the Children and Family Justice Center at Northwestern, contends that juvenile court has been subjected to intense scrutiny over the past 20 years, exposing every flaw. "It's not hard to imagine that adult criminal court, if it had this kind of light shown on it, would look pretty bad", she says. "Is the adult system really willing to take 30,000 cases of juveniles into it? Not to mention status offenses and truancy issues".

No one says adult prisons are better at rehabilitating people. Indeed, recent studies from Florida – where most serious juvenile offenders are automatically tried as adults – show that youths sent to adult prison are far more likely to commit new crimes than are youths in juvenile treatment facilities.

[Florida's automatic waiver policies were championed in the early 1990s by Dade County prosecutor Jane Reno, now U.S. Attorney General, and by Bilchik, who was then her deputy].

The Coalition for Juvenile Justice believes it's not too late to save juvenile court. It says Congress should reauthorize the Juvenile Justice and Delinquency Act (which it has failed to do since 1996), direct more federal funds to juvenile crime prevention efforts, stop the wholesale transfer of children to adult court, and make the court more family-focused.

But Congress may soon pass legislation pressuring states to put more juvenile offenders in the adult system. One bill, known as S.10, failed to pass last year; this year Sen. Jeff Sessions (R-Ala.) and Sen. Orrin Hatch (R-Utah) have co-sponsored a new version, S-254.

Celebration Anyway

In Chicago, officials have scheduled a series of lectures to discuss juvenile justice and child welfare. The Juvenile court here is sponsoring an essay contest for students, and the National Council of Juvenile and Family Court Judges will hold its conference here in July – almost exactly 100 years after the first juvenile court case was called by Judge Richard Tuthill on July 3, 1899.

But any celebration is under a cloud. "I think it's an alarming and dangerous prospect to think that, as a society, we have so little hope in our abilities to correct and resolve problems that young people have", says Cook County Juvenile Court Judge Nancy Sidote Salyers, who presides over the court's child protection division. "We're in essence giving up on ourselves if we give up on our children".

Salyers is leading the year long effort to highlight the juvenile court's birth, growth – and what she hopes will be its future. ■

. . . From Ornery Kid to Convicted Felon

by Lisa Clare, Juvenile Post Disposition Branch

The Problem: Status offenders in Kentucky who leave home after being placed on "home detention" have found themselves felons, charged with escape, second degree.

The Solution: Enactment of KRS 630.010 (4) which provides that "status offenders shall not be converted into public offenders by virtue of status conduct" and KRS 635.055 which specifies that a child found in contempt of court may not be committed as a public offender as a result of that finding nor detained in a facility other than a secure juvenile detention or juvenile holding facility.

The New Problem: In parts of Kentucky, status offenders continue to be confined to "home detention" and adjudicated public offenders for felony escape when they leave home without a parent's permission.

Lisa Clare, Juvenile Post Dispositional

THE NATURE OF STATUS OFFENDERS

Various terms have been used by courts for children who do not do what their parents ask of them. Tennessee calls them "unruly". Tenn. Code Ann. Section 37-1-102(b)(21). Rhode Island refers to such children as "wayward." R.I. Gen. Laws Section 14-1-3 (Supp. 1991). In Maryland, such a juvenile would be called a "child in need of supervision:. Maryland Cts. & Jud. Proc. Code Ann. Section 3-801 (1989). Alaska terms these juveniles as "children in need of protection." Alaska Ct. Rules, Child in Need of Aid Rules, 12, Right to Counsel (Supp. 1992).

In Kentucky, a status offender is a child who has been an habitual runaway, has not subjected himself to the reasonable control of his parent, guardian or school personnel or has been an habitual truant from school. KRS 630.020. Now, under KRS 438.311, jurisdiction over purchase of tobacco products by minors is moved from the Department of Agriculture to the Juvenile Session of District Court as a status offense. Now, juveniles who smoke may be adjudicated status offenders. [1]

What is clear in all jurisdictions is that a status offender is a child who is adjudicated for a behavior which is permissible for an adult. The particular behavior of concern for purposes of this article is that of leaving home without parental permission or permission of the court after having been placed on "home detention."

The public policy for avoiding incarceration of status offenders wherever possible makes good sense when one considers "the youngster whose only offense against society was that he could not get along with his parents, [finds] himself cheek by jowl with the underage rapist, robber or heroin peddler." Cal. Welf. & Inst. Code Section 601 (West 1984). Consider also, that a disproportionate number of children accused of running away are foster children who have experienced so many changes in placement that their emotional resources for trusting adults is severely limited. Catholic University Law Review, Vol. 42, No. 271, "Stemming the Tide of Foster Care Runaways: A Due Process Perspective," Kevin M. Ryan, 1993 , p. 271.

If the goal is to remedy the runaway and the truant problem, that is, to rehabilitate the children, one must also ask whether rehabilitation is ever possible in a jail setting. Surprisingly, research has shown "that status offenders were more likely to be detained, to be placed in secure confinement, and to spend longer periods of time in correctional institutions than juveniles who had violated criminal statutes." *Child Welfare*, Vol. LXXII, Number 1, January – February 1993 "Status Offenders: Attitudes of Child Welfare Practitioners toward Practice and Policy Issues," Robin Russel and Ursula Sedlak.

"CUSTODY" MEANS A LOT OF DIFFERENT THINGS

Unfortunately for the children of Kentucky, the concept of custody has become elastic with its multiple uses. Stretched out of place, the word's use has become ineffective and confusing. Through the years, custody has been a concept of domestic relations and family law. Separated or divorced parents were awarded custody.

From time to time, circumstances in family life go awry and the Cabinet for Families and Children may become involved. Children may be committed to the custody of the Cabinet for Families and Children via dependency, neglect and abuse proceedings. Emergency custody provisions are provided for. KRS 610.050. Here, the goal of "custody" is to provide protection to a child in danger.

To make matters even more confusing, where custody is given to the Cabinet for Families and Children, it does not necessarily follow that the Cabinet will have physical custody of the child. Rather, the Cabinet will have control over the child and the physical custody may be in the hands of the parents, foster parents, private child care or other institutions. Custody, then, for dependency, neglect, abuse, for status offenders and even for public and youthful offenders, does not necessarily mean

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physical custody. 610.125. Commitment to the custody of the Cabinet more accurately means that the Cabinet has control of placement and services to be provided to the child.

To "take custody" or place a child "in custody" has shadings of a different meaning which are none too encouraging for the child who is providing the subject matter jurisdiction for the proceedings. KRS 610.200 (1),(2),(3). Here, physical control over the child is implied without a lot of verbiage regarding "services."

Police officers may hold a child "in custody" at a police station, secure juvenile detention facility, juvenile holding facility, intermittent holding facility, with the court designated worker or a hospital or clinic for up to two hours for essentially administrative purposes. KRS 610.220. Kentucky statutes even permit a court designated worker to make the decision to release a status offender from custody. KRS 610.250.

In theory at least, stringent standards must be established at a hearing for a status offender to continue to be kept in custody and held in detention. Even for children accused of public offenses, a hearing must be held justifying their detention pretrial. Otherwise, children "in custody" must be "released to the custody" of their parents "or person exercising custodial control or supervision...." KRS 610.290. Here we have the concept of "custody" being used in two different manners even within the same sentence and statute. "In custody" connotes a deprivation of freedom in a significant way. Such protections as Miranda warnings attach. *Hammill v. U.S.* 498 A.2d 551, 558 (D.C. Ct. App. 1985).

The right to a writ of habeas corpus attaches where one is wrongfully detained or incarcerated. *Preiser v. Rodriguez*, 411 U.S. 475, 499, 36 L.Ed.2d 439, 93 S.Ct. 1827 (1973) However, the United States Supreme Court has held that a child in foster care and in the custody of a state child welfare agency has no right to obtain a writ of habeas corpus. *Lehman v. Lycoming County Children's Service Agency*, 458 U.S. 502; 73 L.Ed.2d 928 102 S.Ct. 3231 (1982). The lower court in *Lehman* recognized the many definitions of "custody", saying, that the type of custody maintained by that agency over the child was "not the type of custody to which the federal habeas corpus remedy may be addressed." "*Lehman* at 3234, 3235 (citing *Lehman v. Lycoming County Children's Services Agency*, Civ. No. 79-65 (MD Pa. 1979)). The lower court went on to say "disputes of the nature addressed here and which essentially involve no more than the question of who shall raise a child to maturity, do not implicate the federal habeas interest in personal liberty sufficiently to warrant the extension of federal habeas corpus." " *Id.* at 3235.

So it is with status offenders. Statutory directions provide that the child be kept in community-based placements except under exceptional circumstances related to safety, not criminal behavior. If a child in foster care has no right to federal habeas relief, surely a child in his own home has no such right either.

The *Lehman* court went on to state very specifically that the distinction between child custody of a child welfare agency and custody subject to federal habeas corpus relief is this: whether the child's custody is determined by a state criminal justice system. Kentucky's Unified Juvenile Code states unequivocally that children who commit status offenses are not to be committed to the Department of Juvenile Justice but are committed to the Cabinet for Families and Children, the placements should be community-based and the courts "shall utilize a separate and distinct set of guidelines for status offenders which reflect their individual needs." KRS 630.010, KRS 630.120.

A home placement for a child, then, is not custody which entails deprivation of liberty and hence, is not detention for children committed to state agencies, at least for children committed to the Cabinet for Families and Children for status offenses or due to dependency, neglect or abuse. Intervention by a child welfare agency such that a child is placed in a home, whether the parents' home or a foster home, is intended to unloose a fountain of services for children in need of protection. A custodial placement by a court for a child committed to the Department of Juvenile Justice is, in contrast, a valid deprivation of liberty.

COURTS ARE BOOTSTRAPPING STATUS OFFENDERS TO FELONIES THROUGH MISUSE OF "HOME DETENTION".

In other jurisdictions the phenomenon of bootstrapping a status offender into a public offender via an "escape" charge has been described as a "vicious practice". *In re Ronald S.*, 138 Cal. Rptr. 387, 391 (App. 3rd 1977). Quite simply, a status offender may never be confined to any type of detention absent the few exemptions set out at KRS 630.070 and 630.080. Where no real interventions have been attempted, any type of detention is unwarranted. The statutory standard is not met. Nowhere does Kentucky's Unified Juvenile Code envision such criminalization of such innocent conduct. Nowhere does the Code envision simple disobedience becoming felonious.

Despite recent statutory changes intended to protect status offenders from unnecessary contact with public offenders, some state courts continue to order status offenders to "home detention". KRS 630.010, KRS 635.055. A trip to the corner store without permission, then, converts a status offender into a public offender and a felon.

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For a status offender who is made a felon for violating "home detention", life is forever changed. Dispositional options from which status offenders are protected are suddenly on the table. The child may now be sent away to a non-community-based treatment center. KRS 635.060. "Home incarceration" is now clearly listed as a dispositional option. KRS 635.060 (2). As a felon, the juvenile faces the possibility that the conviction may be used to impeach testimony he might give in a future proceeding. *Evitts v. Lucey*, 469 U.S. 387, 391 (1985).

Should the person ever face a court on another charge, the felony escape may be used at a Truth-in Sentencing hearing. Should he ever face another charge, the felony escape charge will certainly affect his security rating and thus the degree of freedom he may exercise in the future. *Carafas v. LaVallee*, 391 U.S. 234 20 L.Ed.2d 554 88 S.Ct. 1556 (1969).

THE PLAIN MEANING OF THE STATUTE

Kentucky's legislature went to great pains to insure that status offenders (smokers, runners, children who don't go to school as they should nor follow their parents' directions) be housed in different facilities and receive markedly different treatment by the court than children who commit public offenses. KRS 630.020. Under the Unified Juvenile Code, status offenders may not be incarcerated at all in juvenile treatment facilities KRS 630.120(5); KRS 630.120(1)(a). Alleged or adjudicated status offenders can be held in detention centers only upon a determination by the court that

1. the child has waived his rights under KRS 630.070 which prohibits the use of secure detention as a means of punishment except where the child has been found in contempt; AND

2. the court has determined that the child's waiver and agreement to detention is in the child's best interest. KRS 630.090; KRS 630.100. Even with the child's essential agreement to detention, such detention may not continue in excess of ten days. *Id.*

Unless a child has been found to be in contempt of a court's order or where multiple interventions and alternatives have been attempted, no status offender in Kentucky may be incarcerated. KRS 630.070; KRS 630.080. Even if one or both of these factors exist, the court must provide an evidentiary probable cause hearing to establish which alternatives have been attempted or that the child has run or failed to appear at past court hearings. KRS 630.080. Additional factors which may be considered at the probable cause hearing include the initiation of an interstate compact, the agreement of a parent or guardian to pick up the child within forty-eight hours or the fact that the child is a danger to himself or others. KRS 630.080.

Under the plain meaning of the statute, then, a first time status offender absent a *prior* contempt order may never be placed in detention, at least not with reliance on KRS 630.070.

Under the plain meaning of the statute, where no prior alternatives have been attempted and failed, the KRS 630.080(1) exception to secure detention cannot apply.

Under the plain meaning of the statute, where a child has had no prior brushes with the juvenile court system and has never failed to appear, the KRS 630.080(2) exception to secure detention cannot apply.

Under the plain meaning of the statute, where a child has never been charged or accused of running away, the exception to secure detention at KRS 630.080(3) and (4) cannot apply. Unless the court finds in an evidentiary hearing that the child meets at least one of these criteria justifying secure detention found at KRS 630.080, the order for the juvenile to remain in home detention upon threat of an escape charge is void *ab initio*. To be sure, some of the home detention orders surfacing around the state have imposed a "home detention" that is so secure that the child was to leave home only in the company of his parents. Even school attendance would not be possible under some orders. Such an order, though, is far in excess of the community-based model envisioned by the Juvenile Code.

The definition for felony escape, second degree reads:

> A person is guilty of escape in the second degree when he escapes from a detention facility, or being charged with or convicted of a felony, he escapes from custody. KRS 520.030.

Where a juvenile has never been charged with or convicted of a felony at the point that the order of secure home detention is made, the juvenile can only be found guilty of escape if he was validly detained.

If a status offender could not be placed in a recognized secure detention facility, escape from which would have drawn the escape charge, neither may the court place him in such secure home detention as to criminalize normal teenage behavior. Such arbitrary action offends Section 2 of the Kentucky Constitution as well as all sense of due process. While courts are certainly free to order the juveniles to follow their parents' rules, the remedy there would be contempt, not the imposition of a felony offense.

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Kentucky's Unified Juvenile Code's Treatment of Status Offenders

The reasons for the distinction in treatment for status offenders and public offenders lies in underlying problems leading up to the court's involvement. For status offenders, the problems are more in the nature of family squabbles.

In contrast, public offenders are juveniles who have shown a flagrant disregard for authority, for laws governing society and for the safety and well-being of the public.

The distinction in treatment between status offenders and public offenders could not be more clear. The legislative purpose of the section of the Unified Juvenile Code addressing the treatment of status offenders expressly states:

> Detention of status offenders in secure juvenile detention facilities or Juvenile holding facilities should only be used for very specific purposes, when *all other less restrictive alternatives to detention* have been attempted and are not feasible.KRS 630.010(3) (emphasis added).

Status offenders may only be detained for a maximum of ten days provided an evidentiary hearing has been held to establish that less restrictive community based alternatives have been attempted and have failed. KRS 630.080; 630.090; 630.100.

The legislature anticipated that initial interventions by the court for a status offender may be insufficient and went to extreme measures to spell out that treatment programs for status offenders "shall be community-based and non-secure." KRS 630.120.

Where all appropriate resources have been reviewed and considered insufficient to adequately address the needs of the child and his family, the court may commit the child to the cabinet for such services as may be necessary. ..KRS 630.120(5). Even then, however, the court is directed to insure that the "treatment programs for status offenders shall be...community-based and non-secure." KRS 630.120(5)(a). The language is mandatory, not permissive.

Status offenders may be committed to the Cabinet for Families and Children, an agency which assists families in dealing with various non-criminal issues. It is an agency which deals in food stamps, family service workers, foster parents and assists children with various disabilities.

In contrast, public offenders may be committed to long -term residential placements and are governed by the Justice Cabinet. KRS 630.060. Public offenders are governed by the same cabinet which oversees adult corrections. The approaches and philosophies of the two cabinets are not the same. The intent of the legislature was to prevent mixing disobedient children with dangerous public offenders, to prevent the bootstrapping of family problems into incarcerated felons, and to insure the community-based treatment of status offenders.

CONCLUSION

Status offenders are children with troubled family and school relations. They are often foster children. Truant status offenders are frequently children who have been unsuccessful in school due to unrecognized learning and educational disabilities. The statutory mandate for providing status offenders with different placements and treatment than public offenders is wise and should be followed at every turn. ■

[1] Prior to adjudicating any child accused of a status offense as an offender, it might make more sense to ask the child "What are you running away from?" Or to inquire as to why a child does not feel successful in school. Or to question the emotional health and parenting skills of custodial parents who claim a child is beyond control. Schools who file beyond control petitions are rarely held accountable for where they have failed the child.

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"A hundred times every day I remind myself that my inner and outer life depend on the labors of other men, living and dead, and that I must exert myself in order to give in the same measure as I have received and am still receiving."

- Albert Einstein

SPECIAL EDUCATION ADVOCACY:
AN IDEA WHOSE TIME HAS COME

by Carol Camp, Assistant Public Advocate

INTRODUCTION

Juvenile clients often face a myriad of educational challenges. Utilizing state and federal special education laws, juvenile litigators can effectively challenge the subject matter jurisdiction of juvenile courts to adjudicate status and public offense petitions filed against unidentified and identified special education students. Advocates can also use these laws to litigate other issues that frequently arise in juvenile cases, including competency, detention decisions and the validity of a juvenile's *Miranda* waiver. The purpose of this article is to provide advocates with a brief overview of applicable state and federal laws and to provide examples of how special education advocacy serves as a powerful tool in a juvenile litigator's arsenal.

PIKE COUNTY FAMILY COURT IDEA SEMINAR

On March 2, 1999, the Pike County Family Court sponsored a seminar entitled "The School District's Responsibility Under the Individuals with Disabilities Education Act." Seventy-five school principals, special education teachers, guidance counselors, judges, attorneys and parents from Pike and Floyd counties attended the two hour presentation. Bill Morrison, Supervisor of Education and Technology, and Tim Shull, formerly a Staff Attorney, of the Division of Protection and Advocacy, facilitated a lively discussion concerning the interplay between special education law and the filing of status and public offense petitions in juvenile court against unidentified and identified special education students. As a result of this seminar, the number of petitions filed against unidentified and identified special education students in Pike and Floyd counties has decreased significantly. Additionally, parents who attended the session became more aware of their children's due process rights and have become effective advocates for them.

A BRIEF OVERVIEW OF IDEA

The Individuals with Disabilities Education Act [hereinafter referred to as "IDEA], 20 U.S.C.A. 1400 et seq., is the primary federal statute defining the rights of unidentified and identified special education students. IDEA's due process protections appear at 20 U.S.C.A. section 1415. Congress enacted several significant amendments to IDEA in June 1997. Newly promulgated federal regulations interpreting the 1997 IDEA amendments become effective May 11, 1999 and will be published at 34 C.F.R. Section 300 et seq.

The due process protections outlined in IDEA apply to both identified and unidentified special education students. 20 U.S.C.A. 1415(k)(8)(A) allows a previously unidentified special education student who has allegedly violated a school rule or conduct code to assert the due process protections found in section 1415 "if the local education agency had knowledge...that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." [20 U.S.C.A. 1415(k)(8)(A)]. Even if local education agency personnel do not actually know that a child has a disability, 20 U.S.C.A. 1415(k)(8)(B) deems that they have such knowledge if one of the following prerequisites is met: the child's parent has expressed concern in writing (unless the parent is illiterate or has a disability that precludes compliance with this provision) to school personnel that the child needs special education and related services [20 U.S.C.A. 1415(k)(8)(B)(i)]; the child's behavior or performance demonstrate that the child needs special education and related services [20 U.S.C.A.1415(k)(8)(B)(ii)]; the child's parent requests an evaluation in accordance with section 1414 of IDEA [20 U.S.C.A. 1415(k)(8)(B)(iii)]; or, the child's teacher or other school officials express concern about the child's behavior or performance to the school district's special education director or to other school district personnel. [20 U.S.C.A. 1415(k)(8)(B)(iv)]. Note that the newly promulgated federal regulations allow parents who do not know how to write or who have a disability that prevents them from making a written statement to express concern orally. *See* 34 C.F.R Sec. 300.527(b)(1).

The new regulations further provide that school personnel are deemed to have knowledge that the child is a child with a disability if a child's teacher or other educational personnel have expressed concern to the special education director or to other appropriate personnel in accordance with the school district's

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child find or special education referral system. *See* 34 C.F.R. Sec. 300.527(b)(4). School personnel, however, are not deemed to have knowledge that a child is a child with a disability if the child has been evaluated and the evaluation results indicated that the child did not have a disability and the child's parents received notification of the evaluation results. *See* 34 C.F.R. Sec. 300.527(c).

Both unidentified and identified special education students are entitled to certain due process protections when they are disciplined in a manner that constitutes a change in their educational placements as outlined in 20 U.S.C.A. 1415 and KRS 158.150. Two of the most significant due process protections are the functional behavior assessment and the manifestation determination review.

Before determining whether or not a functional behavioral assessment and a manifestation determination review need to be performed, a juvenile litigator must first determine whether or not a change in an unidentified or identified disabled child's educational placement has occurred. Unfortunately, the new federal regulations have created considerable confusion as to what events are serious enough to trigger a change in a disabled child's educational placement. This issue is likely to be a fruitful source of future litigation.

Prior to the implementation of the 1997 IDEA amendments, federal case law defined a change in educational placement in one of two ways: exclusion of a special education student for more than 10 days in a school year [*Honig v. Doe*, 484 U.S. 305 (1988)]; or, as will be discussed *infra*, the filing of a juvenile court petition [*Morgan v. Chris L.*, 927 F.Supp. 267 (E.D. Tenn. 1994), *aff'd* 106 F.3d 401 (6th Cir.), *cert. denied*, 117 S.Ct. 2448 (1997)].

The 1997 IDEA amendments embraced and expanded upon the 10 day rule set forth in *Honig*. IDEA 1997 characterized each of the following events as a change in a disabled child's educational placement: removal of a disabled child to an interim alternative educational setting, another setting, or suspension for not more than 10 school days [20 U.S.C.A.1415(k)(1)(A)(i)]; and removal to an interim alternative educational setting for up to 45 days for a disabled child who commits any of the following offenses:

- carrying a weapon to school or to a school function [20 U.S.C.A.1415(k)(1)(A)(ii)(I)]; knowingly
- possessing or using illegal drugs or selling or soliciting the sale of a controlled substance at school or
- a school function [20 U.S.C.A.1415(k)(1)(A)(ii)(II)];

A hearing officer may also order the removal of a special education student to an interim alternative setting for up to 45 days if school personnel are able to prove by substantial evidence that the child's current placement is substantially likely to result in injury to the child or others. [20 U.S.C.A.1415(k)(2)].

The new federal regulations concur with IDEA 1997 to the extent that they contain identical provisions concerning changes of educational placement for a disabled child who carries a weapon or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school or at a school function. *See* 34 C.F.R. Sec. 300.520(a)(2). A hearing officer, in an expedited due process hearing, may still remove to an interim alternative educational setting for up to 45 days, a disabled child who has allegedly violated a school rule or code of conduct upon a showing based on substantial evidence that maintaining the child's current educational placement is substantially likely to result in injury to the child or to others. *See* 34 C.F.R. Sec. 300.521.

Advocates . . .need to be aware of two important changes to the definition of change in educational placement.

The new regulations also appear to preserve the *Honig* 10 day rule: a change of placement occurs if a disabled child is removed for more than 10 consecutive school days. *See* 34 C.F.R. Sec. 300.519(a).

Advocates, however, need to be aware of two important changes to the definition of change in educational placement. First, the new regulations mention nothing about placement in an interim alternative educational setting, another setting or suspension for up to 10 days as constituting a change in educational placement. The regulations also create a new situation in which a change in educational placement may occur. A disabled child can now be subjected to more than one removal during a school year. The removals will constitute a pattern (and thus a change in the child's educational placement) if they total more than 10 days during the school year and also if certain factors, including the length of each removal, the total amount of time that the child is removed from school, and the proximity of the removals to one another, suggest the existence of a pattern.. *See* 34 C.F.R. Sec. 300.519(b).

As previously stated, a change in a disabled child's educational placement is an important triggering event because once it has occurred, a functional behavioral assessment and a manifestation determination determination review must be performed.

To develop an appropriate behavior plan that can be used as a basis for conducting a manifestation determination review, school personnel must first perform a comprehensive functional behavioral assessment. A comprehensive functional behavioral assessment addresses such issues as why the student is acting in certain ways and also provides effective methods for dealing with and preventing future incidents of

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inappropriate behavior. This information, in turn, can then be incorporated into a student's IEP ["Individual Education Plan"]in the form of a behavior plan. 20 U.S.C.A. 1415(k)(1)(B) refers to functional behavioral assessments and behavioral intervention plans. School personnel are required to conduct functional behavioral assessments (if they have not previously done so) within 10 days of taking disciplinary action against special education students who are removed to an interim alternative educational setting, another setting or suspended for not more than 10 days [20 U.S.C.A. 1415(k)(1)(A)(i) and (B)}, as well as for those special education students who are placed in interim alternative educational settings for up to 45 days for allegedly engage in any of the following activities at school or at school functions:

- carrying weapons;
- possessing or using illegal drugs; or selling or soliciting sales of controlled substances. [20 U.S.C.A.1415(k)(1)(A)(ii) and (B)].

If a behavioral intervention plan has already been imple mented, the child's IEP team [or, as it is known in Kentucky, the Admissions and Release Committee, or ARC] must review and, if necessary, modify the child's plan to address her behavior. [20 U.S.C.A.1415(k)(1)(B)(ii)].

Although the new federal regulations appear to eliminate the functional behavioral assessment requirement for special education students placed in alternative educational settings, other settings and suspensions for less than 10 days, they nevertheless further emphasize the importance of conducting functional behavioral assessments and implementing and modifying behavioral assessment plans. 34 C.F.R. Sec. 300.520(b)(1)(i) requires school personnel to conduct a functional behavioral assessment and to implement a behavioral intervention plan for special education students in each of the following instances: those students who are removed for more than 10 consecutive days in a school year; those who experience a pattern of removals during the school year; and those who are placed in interim alternative educational settings for up to 45 days for allegedly committing weapons or drug offenses at school or at school functions.

After developing the student's behavioral intervention plan, the IEP team is required to meet to develop and implement behavioral interventions that address the student's behavior. *See* 34 C.F.R. 300.520(b)(2). Additionally, if a special education student already has an implemented behavioral plan, that student's IEP team must meet to review the plan and its implementation and to modify the plan as necessary to address his behavior. *See* 34 C.F.R. Sec. 300.520(b)(1)(ii). Therefore, the new federal regulations appear to emphasize and encourage earlier identification of behavior problems through the use of functional behavioral assessments and the continuous implementation and modification of interventions to deal with problematic behavior.

Advocates, however, should be aware of one potential exception to the mandatory IEP team meeting requirement. If a special education student has a behavioral intervention plan in place and that student has already been removed for more than 10 days during the school year, the student's IEP team is **not** required to meet (unless one or more team members believes that a meeting is necessary) to review the student's plan if the student is removed again during the same school year and the subsequent removal does not constitute a change in educational placement. *See* 34 C.F.R. Sec. 300.520(c).

The existence of a comprehensive functional behavior assessment and a behavior intervention plan significantly affects school personnel's ability to perform a meaningful manifestation determination review. 20 U.S.C.A. 1415(k)(4) (A)-(C) sets forth the requirements for the manifestation determination review that a local education agency must perform. School personnel must perform a manifestation determination review within 10 school days of the date that they contemplate taking any of the following actions:

1) placing a special education student in an interim alternative setting, another setting, or suspending the student for not more than 10 school days;

2) placing in an interim alternative educational setting for up to 45 days a child who has allegedly committed one of the following offenses while at school or a school function:
- carrying a weapon;
- knowingly possessing or using illegal drugs;
- selling or soliciting the sale of a controlled substance;

3) having a hearing officer place in an interim alternative educational setting for up to 45 days a child who is substantially likely to cause injury to herself or others if allowed to remain in her current educational placement; or,

4) changing for more than 10 days in a school year the current educational placement of a special education student who has allegedly violated a school rule or code of conduct. [20 U.S.C.A. 1415(k)(4)(A)].

This manifestation determination review must assess "the relationship between the child's disability and the behavior subject to the disciplinary action." [20 U.S.A.1415(k)(4)(A)(ii)].

The child's IEP team members and other qualified personnel must perform this review. [20 U.S.C.A.1415(k)(4)(B)]. The child's IEP team can only determine that the child's behavior was not a manifestation of his disability if it adheres to the stringent requirements set forth in 20 U.S.C.A.1415(k)(4)(C). The IEP team members must consider "in terms of the behav-

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ior subject to disciplinary action, all relevant information," including: evaluation and diagnostic results (including any results that the child's parents provide); observations of the child; and the child's IEP and placement. [20 U.S.C.A. 1415(k)(4)(C)(i)(I-III)].

The IEP team must then find, "in relationship to the behavior subject to disciplinary action" each of the following: that the child's IEP and placement were appropriate and that his IEP was properly implemented; that the child's disability did not impair his ability to understand the impact and consequences of his behavior; and that the child's disability did not impair the child's ability to control his behavior. [20 U.S.C.A. 1415(k)(4)(C)(ii)].

The new federal regulations modify and add two additional requirements to 20 U.S.C.A.1415(k)(4)(A)-(C).

It is only if the IEP team members can make each and every one of these findings that they can properly conclude that the child's behavior was **not** a manifestation of the child's disability. If the IEP team concludes that the child's behavior was **not** a manifestation of the child's disability pursuant to 20 U.S.C.A. 1415(k)(4)(C), it can then proceed in accordance with 20 U.S.C.A. 1415(k)(5).

20 U.S.C.A. 1415(k)(5)(A) allows the local education agency to proceed against a child with disabilities in the same manner as it would proceed against a child without disabilities [subject to 20 U.S.C.A. 1412(a)(1)].

The new federal regulations modify and add two additional requirements to 20 U.S.C.A.1415(k)(4)(A)-(C). Manifestation determination reviews are required to be performed on the following types of special education students:

- those who are removed for more than 10 consecutive days in a school year;
- those who are subjected to a series of removals for more than 10 cumulative school days that constitutes a pattern;
- those who are placed in interim alternative educational settings for up to 45 days for allegedly committing weapons and drug offenses at school or at school functions; and
- those whom a hearing officer has removed to an interim alternative educational setting for up to 45 days because they are substantially likely to injure themselves or others if allowed to remain in their current educational placements. *See* 34 C.F.R. Sec. 300.523(a).

Although manifestation determination reviews need not be performed on students who are removed from their current educational placements for less than 10 days, the regulations nevertheless augment IDEA 1997 in two important ways. First, 34 C.F.R. Sec. 300.523(d) states that, "[i]f the IEP team and other qualified personnel determine that any of the standards in paragraph (c)(2) of this section [which contains language identical to that found in 20 U.S.C.A. 1415(k)(4)(C)(ii)] were not met, the behavior must be considered a manifestation of the child's disability." And, second, 34 C.F.R. Sec. 300.523(f) mandates that if the review reveals deficiencies in the child's IEP, the IEP's implementation or the child's educational placement, the local education agency "must take immediate steps to remedy those deficiencies." Once again, advocates should be prepared to argue that IDEA 1997 and the new federal regulations, taken together, emphasize a preventative rather than a litigious approach to resolving the behavioral problems of special educational students.

A BRIEF OVERVIEW OF KRS 158.150

KRS 158.150 is the analogous state statute to IDEA. The regulations interpreting KRS 158.150 appear at 707 KAR 1:15 et seq. [No new regulations similar to 34 C.F.R. Sec. 300 et seq. have been promulgated; the Kentucky regulations deal primarily with the identification and evaluation of special education students, the services they are entitled to receive, requirements for IEPs, and the process by which parents can appeal changes in educational placement that adversely affect their children].

The statutory scheme outlined in KRS 158.150 is not nearly as elaborate as the framework set forth in IDEA. KRS 158.150(6) deals with the suspension and expulsion of Kentucky special education students. KRS 158.150(6)(a) states that an exceptional child (which is the Kentucky term for special education students) who are suspended for more than ten days during a school year has experienced a change in his educational placement. This change of placement is sufficiently significant to mandate the convening of the student's ARC [Admissions and Release Committee] to review the student's placement and to determine whether or not the student can be suspended or expelled in the same manner as a regular education student.

If the ARC members conclude that the student's behavior is related to his disability, that student cannot be suspended or expelled from school unless the student's current educational placement could result in injury to himself, other students or educational personnel. Even if a student's conduct is determined to be sufficiently dangerous to himself or others, that student must still be placed in an alternative educational setting and continue to receive an education. *See* KRS 158.150(6)(b); 707 KAR 1:180 Sec. 14. Additionally, even if the ARC members decide that the student's behavior is not related to his disability, and the student is suspended or expelled pursuant to school policy, that student must continue to receive educational services during any period of suspension or expulsion. *See Id.* Juvenile litigators should be aware of these provisions and refer to private counsel clients whose

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educational rights have been denied during a period of suspension or expulsion.

USING IDEA AND KRS 158.150 TO CHALLENGE A JUVENILE COURT'S SUBJECT MATTER JURISDICTION

Kentucky juvenile litigators have recently experienced significant success in challenging the subject matter jurisdiction of juvenile courts when status and public offense petitions are filed against both unidentified and identified special education students. A Motion to Dismiss for Lack of Subject Matter Jurisdiction has been developed from an appellate brief that Suzanne Hopf of DPA's Juvenile Post-Disposition Branch wrote. Advocates can obtain copies of this motion and a supporting memorandum of law by emailing the author.

The principal argument set forth in the Motion to Dismiss and the supporting memorandum is based on a Sixth Circuit federal district court case. In *Morgan v. Chris L.*, 927 F.Supp. 267 (E.D. Tenn. 1994), *aff'd* 106 F.3d 401 (6th Cir.), *cert. denied*, 117 S.Ct. 2448 (1997), the federal district court for the Eastern District of Tennessee addressed the issue of whether the filing of a petition in juvenile court constituted a change of educational placement sufficient to trigger the due process protections contained in both IDEA and Tennessee law. The appellee, Chris L., had been diagnosed as suffering from attention deficit hyperactivity disorder in May 1992. Approximately one year later, on May 11, 1993, Chris allegedly kicked and damaged a lavatory water pipe. On May 17, 1993, school officials held an ARC meeting and determined that Chris was eligible for special education because of his ADHD. Without first determining whether or not Chris's alleged misconduct (vandalism) was related to his disability, school officials filed a juvenile court petition.

Chris's parents appealed his case to an administrative law judge. The ALJ held that the filing of the juvenile court petition constituted "a change in educational placement entitling the child to the procedural and substantive protections mandated by the act [IDEA] whenever a change in placement is proposed." *Chris L.*, 927 F.Supp. at 270. The federal district court affirmed the ALJ's findings, stating that the ALJ acted appropriately when he ordered the school district's superintendent to seek a court order dismissing the juvenile petition. *Id.*

On appeal, in an unpublished decision, the Sixth Circuit found that the school system violated its IDEA duty to Chris by failing to identify and evaluate him; by failing to provide him with a free appropriate public education; by trying to get the juvenile court to implement a program for Chris instead of fulfilling its obligation to do so; and by attempting to change Chris's educational placement through the filing of a juvenile court petition rather than by following IDEA's change-in-placement provisions. The Court expressly held that the filing of the juvenile court action constituted a change in Chris's educational placement that entitled him to invoke his IDEA due process protections, including the convening of an IEP team or ARC meeting prior to the proposed change in placement. [The author gratefully acknowledges the assistance of Hon. Eileen Ordover of the Center for Law and education, Louisville, KY, in presenting this argument].

The Chris L. decision makes it clear that when school officials attempt to circumvent their IDEA obligations by filing juvenile court petitions, the juvenile court can, and should, dismiss such cases for lack of subject matter jurisdiction.

The *Chris L.* decision makes it clear that when school officials attempt to circumvent their IDEA obligations by filing juvenile court petitions, the juvenile court can, and should, dismiss such cases for lack of subject matter jurisdiction. *Accord Flint Bd. of Ed. v. Williams*, 276 N.W.2d 499 (Mich. Ct. App. 1979) (holding that probate court could not assume jurisdiction over a juvenile petition filed against a child whose rights were protected under IDEA unless school system first exhausted all administrative remedies). Subsequent decisions, however, have attempted to distinguish the *Chris L.* scenario from situations in which other parties have filed the petition in juvenile court. *See, e.g., In the Interest of Trent N.*, 569 N.W.2d 719 (Wisc. App. 1997) (holding that the juvenile court had subject matter jurisdiction over petition that the District Attorney's office filed and distinguishing case from *Chris L.* by relying on a Wisconsin statute that precluded school officials from filing juvenile court petitions); *Florida v. T.O.*, 720 So.2d 295 (Fla. Dist. Ct. of Appeal 1998)(same, noting that neither IDEA nor Florida law precluded the state from filing a petition in juvenile court).

Another potential area of future litigation concerns the interpretation of 20 U.S.C.A. 1415(k)(9)(A) and (B). 20 U.S.C.A. (k)(9)(A) provides that nothing in 20 U.S.C.A. 1415 prohibits "an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C.A. 1415(k)(9)(B) requires an agency that reports a crime committed by a child with a disability to transmit copies of the child's special education records to the authorities to whom the crime is reported. As the new federal regulations indicate, the disclosure of a student's special education records can only be made "to the extent that the transmission is permitted by the Family Educational and Rights Privacy Act ["FERPA"]. *See* 34 C.F.R. Sec. 300.529(b)(2). Generally, disclosures of educational records pursuant to FERPA can only be made with prior written parental consent or the consent of a student aged 18 or over. Although FERPA contains some exceptions, which can be found at 20 U.S.C.A.

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1232(g)(b), there is no exception for crime reports.

At least one court has interpreted 20 U.S.C.A.1415(k)(9)(A) to allow school board personnel to file a juvenile court petition against a student who had previously been determined not to have a disability. See *State of Connecticut v. David F.*, 29 IDELR 376 (Ct. Superior Ct. 1998). The better (and more legally correct) argument is that before school personnel file a juvenile court petition against an unidentified or identified special education student, they must strictly adhere to the due process procedures outlined in IDEA and KRS.

If these procedures are strictly followed and school officials conduct the manifestation determination review and functional behavioral assessment, ascertain that the child's behavior is not a manifestation of his disability, and make the findings that 20 U.S.C.A.1415(k)(4)(C)(ii) requires, they can then proceed against a special education student as they would against a nondisabled student pursuant to 20 U.S.C.A. 1415(k)(5). Juvenile advocates should review carefully their clients' school and special education records, as well as their court files, to determine the extent to which the above procedure has been followed and be prepared to challenge the juvenile court's subject matter jurisdiction if any missteps have occurred.

OTHER JUVENILE COURT ISSUES THAT CAN BE LITIGATED THROUGH THE USE OF IDEA

Although a thorough assessment of other juvenile court issues that can be litigated through the use of IDEA is beyond the scope of this article, the author wishes to point out an invaluable reference tool that can give juvenile advocates creative uses for IDEA. Examples of alternative applications for IDEA include, but are certainly not limited to, the following: using special education records to challenge a juvenile client's competency; questioning the validity of a special education student's waiver of his *Miranda* rights; fashioning disposition alternatives in situations where a special education student's behavior has been properly determined not to be a manifestation of his disability; and obtaining the release of a special education student from juvenile detention because detention staff members cannot comply with the child's IEP, thus denying his IDEA right to a free appropriate public education. For a more thorough explanation of these and other creative advocacy ideas, the author encourages juvenile advocates to obtain a copy of *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) For Children in the Juvenile Delinquency System*, edited by Joseph B. Tulman and Joyce A. McGee.

Copies can be obtained by sending $15 in a check or money order made payable to the DCSL Foundation, Bldg. 38, Rm. 207, 4200 Connecticut Avenue, N.W., Washington, D.C. 20008.

CONCLUSION

IDEA, KRS 158.150, KAR and the newly promulgated federal regulations provide numerous areas of potential litigation for juvenile attorneys. Advocates should not hesitate to challenge the juvenile court's subject matter jurisdiction when petitions are filed against unidentified and identified special education students, nor should they hesitate to refer potentially eligible clients for evaluation to determine whether or not they qualify to receive special education and related services. IDEA can also be creatively interpreted to litigate other critical issues that juvenile clients confront; the advocate's success in utilizing IDEA as a powerful tool is limited only by his or her imagination. ■

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"To me the worst thing seems to be a school principally to work with methods of fear, force and artificial authority. Such treatment destroys the sound sentiments, the sincerity and the self-confidence of pupils and produces a subservient subject."

- Albert Einstein

Steps That Must Be Followed Before School Official Files Juvenile Court Petition

- ❑ **Identification as Special Education Student**
  - ❑ Already identified [20 U.S.C.A. 1415 et seq.]; ***or***
  - ❑ Deemed Eligible [20 U.S.C.A. 1415(k)(8)(B)(i)-(iv)] if:
    - ❑ Parent expresses concern in writing (unless illiterate or disabled); ***or***
    - ❑ Child's behavior or performance demonstrates need; ***or***
    - ❑ Parent requests an evaluation; ***or***
    - ❑ Child's teacher/other school officials express concern to appropriate school personnel.

If not Identified or Deemed Eligible, school may discipline in same manner as a nondisabled student.

- ❑ **Change of Placement**
  - ❑ Cumulative removal time is more than 10 days [*Honig v. Doe*, 484 U.S. 305 (1988); 34 C.F.R. Sec. 300.519(a); KRS 158.150(6)(b); 707 KAR 1:180 Sec. 14]; ***or***
  - ❑ Child placed in interim alternative educational setting for up to 45 days for
    - ❑ Weapons/drug offenses committed at school or school function [20 U.S.C.A. 1415(k)(1)(A)(ii)(I) and (II); 34 C.F.R. Sec. 300.520(a)(2)]; ***or***
    - ❑ Substantial likelihood of injuring self or others [20 U.S.C.A. 1415(k)(2); 34 C.F.R. Sec. 300.521]; ***or***
    - ❑ Series of removals totals more than 10 days and suggests a pattern [34 C.F.R. Sec. 300.519(b)]; ***or***
    - ❑ Placement in interim setting, alternative setting or suspension for less than 10 school days [20 U.S.C.A. 1415 (k)(1)(A)(i)]; ***or***
    - ❑ Filing of juvenile court petition [*Morgan v. Chris L.*, 927 F.Supp. 267 (E.D. Tenn. 1994), *aff'd* 106 F.3d 401 (6th Cir.), *cert. denied,* 117 S.Ct. 2448 (1997)].

If petition could not lead to change or placement, then this would not be an issue. However, since any petition could lead to commitment these elements must always be satisfied.

- ❑ **Functional Behavioral Assessment**
  - ❑ Must be done within 10 days of change of placement [20 U.S.C.A. 1415(k)(1)(A)(i),(ii) and (B); 34 C.F.R. Sec. 300.520(b)(2)]; ***and***
  - ❑ Must implement behavioral intervention plan or review/modify existing plan [20 U.S.C.A. 1415(k)(1)(B)(ii); 34 C.F.R. Sec. 300.520(b)(1)(ii)]

Steps That Must Be Followed Before School Official Files Juvenile Court Petition

- ❑ **Manifestation Determination**
  - ❑ Must be done within 10 days of change of placement [20 U.S.C.A. 1415(k)(4)(A); 34 C.F.R. Sec. 300.523(a)]; ***and***
  - ❑ Behavior must be determined to **not** be a manifestation of disability [20 U.S.C.A. 1415(k)(4)(C)(ii); 34 C.F.R. Sec. 300.523(c)(2)]; Behavior is **not** a manifestation of diability if:
    - ❑ IEP and placement are appropriate and properly implemented; ***and***
    - ❑ Disability did not impair ability to understand impact and consequences of behavior; ***and***
    - ❑ Disability did not impair ability to control behavior

If behavior IS a manifestation of the child's disability, school officials CANNOT suspend, expel or file a juvenile court petition!!!

- ❑ **School May File Petition***
  - ❑ Schools may report crimes to local law enforcement authorities (but **not** to judiciary) [20 U.S.C.A.(k)(9)(A)]; ***and***
  - ❑ School officials must transmit child's special education records to appropriate authorities in a manner consistent with FERPA (officials must obtain signed release authorizing transmittal from child's parent of from child if child is over 18) [20 U.S.C.A. 1415(k)(9)(B); 34 C.F.R. Sec. 300.529(b)(2); 20 U.S.C.A. 1232(g)(b)]

***It is our position that school officials arguably may file a juvenile court petition against special education eligible students *ONLY AFTER* they have complied with these procedures. IDEA, KRS and the new federal regulations clearly contemplate allowing school officials to call law enforcement authorities when a special education eligible child commits a "crime."**

Note that IDEA uses the word "crime," unlike the Kentucky Juvenile Code, which uses the terms "status offense" and "public offense." It could also be argued that status offenses and public offenses are not technically "crimes" and therefore this part of IDEA would only apply to potential youthful offenders. However, we do not believe that most courts would consider this to be a significant distinction in cases that should be brought to court.

Moreover, we believe that even in a situation in which a school district has contacted law enforcement authorities, the school district must follow the above procedures if it intends to change a special education eligible child's educational placement.

KENTUCKY'S RCR 11.42's

by Susan Jackson Balliet, Assistant Public Advocate

PART I: The Standard for Granting an 11.42 Hearing

We all know the burden is on the prosecution to prove its case in a criminal trial, and the standard is beyond a reasonable doubt. But how many of us know what standard and burden of proof apply in Kentucky's post-conviction RCr 11.42 proceedings? This first in a series of three articles will focus on the standard that trial courts should be using in deciding whether or not our clients will be granted an 11.42 hearing to pursue issues regarding ineffective assistance of counsel.[1] Under RCr 11.42 Part II, to appear in the next issue of *The Advocate*, will address the burden of proof inside an 11.42 hearing. And Part III will offer practical advice on how to raise and argue standard of proof and burden of proof issues in 11.42 cases.

As many of us know all too well, despite lip-service to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), courts in Kentucky are still routinely refusing to grant 11.42 relief unless counsel is so ineffective as to render the proceedings a farce and mockery. And all too often the courts are doing so without adequate consideration of the standard that should apply. Under RCr 11.42 a person in custody (*i.e.*, a prisoner, a probationer, parolee, or person on conditional discharge) may file a motion to vacate, set aside or correct a sentence. The motion must be verified by the movant, and "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." The commonwealth may file an answer to the motion, and the standard for deciding whether or not there will be a hearing is as follows:

> ....If the answer raises a material issue of fact that *cannot* be determined on the face of the record the court shall grant a prompt hearing.... (emphasis added)

In determining what the Kentucky Supreme Court meant by the language in RCr 11.42, it is reasonable to seek guidance from the Court's interpretation of almost identical language which appears in Kentucky's civil summary judgment rule, CR 56.03. A civil litigant can get a complaint thrown out without a trial if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that "there is no genuine issue as to any material fact." The Kentucky Supreme Court has interpreted this language in CR 56.03 to mean that a summary judgment without a factual hearing (i.e., a trial) is improper unless it appears "*impossible* for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991) (emphasis added); *Paintsville Hospital v. Rose*, 683 S.W.2d 255 (Ky. 1985). And based on this interpretation, courts in Kentucky routinely grant trials to civil plaintiffs unless it appears *impossible* for them to come up with any evidence that might prove their case.

Of course Kentucky should not treat civil litigants –who stand only to lose some of their money– better than it treats criminal defendants –who stand to lose liberty or even life. And yet despite the similarity of the two rules, courts in Kentucky, including the Supreme Court itself, routinely grant extended evidentiary hearings (trials) to civil litigants, but deny even rudimentary hearings to 11.42 litigants, thus elevating the right to property above the right to life and liberty. This is true despite the fact that civil litigants have the added advantage of complete discovery to assist them in making and defending against summary judgment motions, and indigent criminal defendants are denied any opportunity for discovery, and are even refused access to the trial record to assist them in the preparation of a motion under 11.42. There is a reason why none of our nation's leaders have ever been quoted as saying "Give me property, or give me death." Life and liberty are clearly higher constitutional values than property. More –not less– due process should be afforded litigants facing criminal charges.

What did the Kentucky Supreme Court originally intend the rule to be?

Since the language is so similar, the Kentucky Supreme Court apparently intended a similar standard should apply under RCr 11.42 as in CR 56.03. And indeed, the Kentucky Supreme Court held in 1967 that in an 11.42 "[o]ur review is confined to whether the motion on its face states grounds that are not *conclusively* refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967) (allegations that counsel refused to defend defendant unless he pled guilty and that he had pled guilty under this duress were sufficient to require a hearing) (emphasis added).

Justice Palmore's opinion in *Lewis* comes very close to the holding in *Steelvest*. Under *Lewis* a "summary judgment" against a criminal defendant without a hearing on an 11.42 is improper if there are grounds "not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis*, 411 S.W.2d at 322. Requiring a court to determine that the facts alleged in the 11.42 motion are *conclusively re-*

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("11.42's" Continued from page 28)

futed by the record is tantamount to requiring the court to determine it would be "*impossible*" for the defendant to produce evidence at an 11.42 hearing warranting a ruling in his favor. Under the *Lewis* standard, a reviewing court should remand any case in which, based on the record, it would not be *impossible* for a defendant to produce evidence at a hearing warranting a favorable 11.42 ruling.

The decline of Kentucky's standard for denying hearings under RCr 11.42

Unfortunately, *Lewis* is an isolated case, and there is a separate, more dominant line of cases that state the 11.42 hearing standard in ever looser terms. Instead of using Justice Palmore's key word –"conclusively"– the earlier cases use the words "fairly," "largely," or "clearly" to describe the manner in which the record must refute the 11.42 allegations in order to deny a hearing. Over time, the Court has simply dropped all descriptive modifiers, resulting in the Court's current rule, which allows 11.42 hearings to be denied as long as the record "refutes" the 11.42 allegations, period. The implication of this stripped-down rule is, of course, that if the record "refutes" the allegations in pretty much any way at all, there will be no 11.42 hearing.

Maggard v. Commonwealth, 394 S.W.2d 893 (Ky. 1965) is perhaps the earliest case where the Court states the 11.42 hearing standard using no modifier, requiring simple "refutation" – not "conclusive" refutation– in order to deny a hearing. Even when the commonwealth does not file an answer to an RCr 11.42 petition, "the movant cannot prevail by default if his allegations are refuted by the record." *Maggard*, at 894. However, this is only one sentence in *Maggard*, and the Court also states it is unnecessary for a court to order a hearing "if the material issues of fact can *fairly* be determined on the face of the record...." –not conclusively, but at least "fairly," whatever that means.

The same year, the Court determined an 11.42 petitioner's factual allegations were "*largely*" untrue, and held that no hearing was necessary because "the material issues of fact can be determined from the face of the record." *Maye v. Commonwealth*, 386 S.W.2d 731, 732 (Ky. 1965) (emphasis added) Again, this decision stopped short of requiring conclusive refutation by the record, but at least noted that the refutation was "largely" complete, whatever that means. And in *Lay v. Commonwealth*, 506 S.W.2d 507, 509 (Ky. 1974) the Court upheld a denial of an 11.42 hearing on the grounds that the record "clearly" refuted the allegations, again, whatever "clearly" means. In any event, after *Maggard*, *Maye*, and *Lay*, it would be safe to characterize the Kentucky Supreme Court's standard for reviewing denials of 11.42 hearings as the "fairly, largely, and/or clearly" standard, a standard extremely easy for the commonwealth to meet.

Through the 1990's, the Kentucky Supreme Court has continued to uphold denials of 11.42 hearings, generally without any clear statement of what standard it is applying. In some cases, the Court applies the "stripped-down" standard, using no modifiers, and upholding denial of a hearing as long as the record "refutes" the 11.42 allegations pretty much in any way. In other cases, one can only conclude that some version of the fairly, largely and/or clearly standard has been applied. In *Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990) the Court gave no clear statement of the standard, and upheld the denial of an 11.42 hearing despite the claim that defense counsel failed to confer with the defendant regarding the penalty phase. The Court based its opinion on what it called "rather" conclusive evidence in the record from a *prior trial*, and refused to remand for an 11.42 hearing on a suppression issue because the record contained "extensive evidence" as to the circumstances of the interrogation, and on the fact that the defendant had not stated this evidence was incorrect or incomplete. Thus the *Skaggs* opinion adds a new pleading requirement to any RCr 11.42 motion involving an issue that is already touched on by the record. Under *Skaggs*, if there is any evidence in the record whatsoever regarding an 11.42 claim, a defendant is now well advised to state in the 11.42 motion that the evidence in the record is "incorrect" or "incomplete."

In *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993) the Court applied the "stripped-down" standard to uphold denial of an 11.42 hearing despite Stanford's claim of prejudice due to the fact the judge was running for election during the trial, and his claim that trial counsel purposely accepted an erroneous interpretation of a case to benefit other clients in other cases. And most recently, in *Bowling v. Commonwealth*, 1998 WL 741816 (Ky. October 15, 1998),[3] the Kentucky Supreme Court stated the standard for denying an 11.42 hearing in its tersest form, and did not use any descriptive language that might explain or modify the rule. The Court said in *Bowling*, "If the record refutes the claims of error, there is no need for an evidentiary hearing."

Applying this stripped-down, pro-commonwealth standard, the Court refused to remand for an 11.42 hearing in *Bowling* despite the fact that many material issues remained *completely unresolved* on the face of the record. In *Bowling*, the defendant complained his attorney was indicted during the trial, was distracted, had a breakdown, abdicated his responsibilities, and completely failed to investigate the defendant's case. The commonwealth put on not one counter-affidavit, and there was nothing in the record to confirm or refute Bowling's detailed, verified claim of ineffectiveness. Nonetheless, the Court held that since there was no evidence of the defense counsel's breakdown already present in the trial record, it could not conclude there was ineffective assistance, and no hearing would be granted.

Not all that long ago, when there was evidence of attorney

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breakdown actually conspicuous in the trial record, one didn't have to wait for an 11.42 proceeding, and Kentucky's high court would consider ineffectiveness *on direct appeal*. In *Flener v. Commonwealth*, 514 S.W.2d 201, 202 (Ky. 1974) where defense counsel was visibly drunk at trial, the court reached the issue of ineffectiveness on direct appeal, stating that the issue was "fundamental fairness." Under *Bowling*, the Court would now deny 11.42 hearings to criminal defendants unless they can prove ineffective assistance of counsel up front based on evidence already in the record. The Court has strayed very far indeed from the standard in *Lewis*, which required the record to *conclusively refute* the 11.42 allegations.

Bowling included other claims in his 11.42, any one of which, if true, would have sufficed to invalidate his conviction, and none of which were remotely capable of being fairly, largely or clearly, let alone conclusively, refuted on the record, including a claim that the commonwealth had made a clandestine deal with one of the witnesses. Had a single one of Bowling's claims been made in a civil complaint, summary judgment would **not** have been granted. Under *Steelvest* it could not be said it was impossible for Bowling to come up with evidence to support his claims. Similarly, under *Lewis*, it could not be said the record "conclusively" refuted Bowling's claims. It is only by interpreting RCr 11.42 more strictly and harshly than CR 56.03, i.e., by eliminating the concept of conclusiveness, that the Court can justify denying an 11.42 hearing in *Bowling*. If proven, Bowling's claims would have vitiated his conviction. Bowling should have been granted an 11.42 hearing. And so should the rest of our clients, whenever there are material facts raised in an 11.42 which are not conclusively refuted on the face of the record.

Kentucky's denial of 11.42 hearings when attorney ineffectiveness claims cannot be *conclusively* resolved on the record denies criminal defendants their rights under RCr 11.42, under *Lewis*, *supra.* and ultimately denies the right to effective assistance of counsel under the 6th Amendment and Section 11 of the Kentucky Constitution.

Part II of this series of articles will explore other approaches to enforcing the correct standard for granting or denying an 11.42 hearing, and will also examine the standard of proof within the 11.42 hearing itself.

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[1] Issues regarding lack of jurisdiction or violation of a statute rendering the judgment void may also be raised under RCr 11.42. *Tipton v. Commonwealth*, 376 S.W.2d 290 (Ky. 1963). However, this article does not address the standard for granting a hearing when these issues are raised.

[2] Credit for this "line" must go to Joe Myers, Frankfort DPA Post-Conviction Branch, who provided invaluable assistance in the research and writing of this article. Thanks also to Suzanne Hopf, Frankfort DPA Juvenile Appeals, for her insights involving a similar problem with Kentucky's interpretation of its standard for waiving juvenile court jurisdiction.

[3] *Bowling* is not yet final, and is cited only for purposes of discussing the Court's current treatment of 11.42 hearing issues. ■

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Law Day Remarks

by Attorney General Janet Reno

Nearly forty years ago, when President John F. Kennedy first proclaimed Law Day, he urged all Americans to rededicate themselves to the ideals of equality and justice under law. This challenge is just as urgent for us today. As the Attorney General of the United States, I am proud to lead a Department of Justice where thousands of employees work to advance the cause of justice throughout our Nation. In traveling around the country, am repeatedly impressed by the tireless efforts of prosecutors and law enforcement officers -- federal, state, local and tribal -to protect our citizens and promote criminal justice.

On Law Day this year, I ask that you join me in supporting efforts to realize our Nation's pledge of justice for all." Our legal system depends on the confidence of every citizen. Americans strongly support our legal system, but many question whether it dispenses justice evenly. Too many Americans think that our legal system does not treat crime victims fairly. Too many think that it favors the wealthy over the poor. And too many lack effective access to the civil legal system because they cannot afford a lawyer.

Let us commit ourselves to making the law work for every American. We must support the voices of victims and make sure the broader community is heard in the criminal justice process. Even with our great success in reducing crime rates, millions of Americans are victimized by crime each year. Low-income Americans are the most vulnerable and the most likely to become victims of crime,

Law enforcement officers, prosecutors and others who work to vindicate the right of victims deserve our praise and support. It is especially fitting that we acknowledge their efforts as part of Law Day, which this year concludes National Crime Victims' Rights Week.

Through community policing, community prosecution, and community courts, the voices of victims and others are being heard and respected in the criminal justice system. These initiatives make the law work better by including all citizens and responding to community concerns.

Justice in criminal cases also demands that poor people accused of crimes receive legal assistance. Our Constitution guarantees defendants the right to a lawyer in major criminal cases. We preserve this right for indigent defendants through public defenders or appointed counsel. Working as a prosecutor for 15 years, I learned that our criminal justice system cannot function properly unless we have adequate funding, training, and resources for indigent defense.

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If we do not adequately support criminal defense for poor Americans, people will think that you only get justice if you can afford to pay a lawyer. This perception would undermine confidence in our system. Skimping on adequate representation also hurts effective law enforcement by creating delays and leading to the reversal of convictions on appeal.

Finally, we must work to meet the need for civil legal services for low-income Americans. Poor women and children need this help the most. Nearly two-thirds of the clients of legal services programs are women, most of them mothers. Nearly one-sixth of all cases handled by legal services offices involve domestic violence. But each day, thousands of Americans who deserve civil justice cannot afford it. Legal services programs need more resources.

Access to civil justice for poor Americans is also aided by pro bono efforts by thousands of public and private lawyers. I applaud this work and reaffirm the Justice Department's support for pro bono and community service work by its employees. I urge all lawyers to join me in adopting a personal goal of performing at least 50 hours of pro bono or other volunteer service each year.

Justice for all is a noble ideal. On Law Day this year, I hope you will join me in renewing our pledge to make it a reality. Let's make sure the law protects all Americans. ■

About Law Day

Our Nation celebrated Law Day on Saturday, May 1, 1999. When President John F. Kennedy first proclaimed Law Day in 1961, he urged Americans to rededicate themselves to the ideals of equality and justice under law. The above remarks were made by Attorney General Janet Reno on this year's Law Day.

Redefining Criminal Justice to Restore the Community: The Movement Towards Restorative Justice

by Suzanne A. Hopf, M.A.; J.D.
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ABSTRACT

Dissatisfaction with the current adversarial approach to criminal justice has led to suggested changes and reforms. These new ideas promote a different approach to the process and outcome of our system of justice and are being implemented in juvenile justice programs across the country. Both the literature and pilot programs have labeled many of these movements as "restorative justice."

Restorative justice takes a much more comprehensive view of crime recognizing that victims, the community and also offenders are harmed when the law is violated. It focuses on solutions which consider the needs of these three parties, rather than focusing on the government as a primary party to the process of criminal justice. Restorative justice also emphasizes discovering the truth surrounding the incident, identifying the injustices that occurred and agreeing on future actions which must be made to repair those harms. Success is measured by the amount of reparation which is afforded rather than the amount of punishment that has been inflicted. The local community replaces the government as the primary actor in the process.

INTRODUCTION

The current model of retribution in juvenile justice and the rise in punitive sanctioning has done little to alleviate the problem of juvenile delinquency and crime. There is increasing frustration as we recognize that children continue to appear back before our courts for repeated offenses. Restorative justice offers what is considered a balanced approach to solve the problem of juvenile delinquency and also offers the potential of lowering the costs of programs necessary to reduce crime and delinquency.

For the past decade our criminal justice process has focused on the concept of "just deserts" and harsh penalties. This retributive model has emphasized the adversarial role between the state and the offender. The traditional system of retributive justice is concerned with public vengeance, deterrence effects and the provision of appropriate punishment ("just deserts"). In contrast, restorative justice is focused on the damage or harm done to victims and the community. The process used to resolve this conflict is negotiation, mediation, victim empowerment and reparation.[1]

Restorative justice differs from the traditional model of punishment and restitution in a variety of ways. Restorative justice acknowledges and builds on group and community responsibility for crimes as opposed to directing blame at the defendant. Sanctions and treatment for individual offenders are just part of a broader scheme of justice. Retributive punishment is no longer the central focus of corrections, but rather victim offender mediation, restorative community services, victim awareness education and other victim oriented services become key elements within this system.[2] Restoration of all parties is facilitated by focusing on three primary questions at disposition: 1) what is the harm; 2) what needs to

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("Restorative" Continued from page 31)
be done to make it right; and 3) who is responsible?[3] New programs are being developed by local communities and juvenile justice leaders that embrace and promote these new goals and policies. This change in our juvenile justice process appears to be a "paradigm shift" which will allow juvenile justice to move beyond the current debate that has polarized the juvenile justice profession between the opposing camps of treatment/rehabilitation and increased punishment.

GUIDING PRINCIPLES

Restorative justice focuses on the needs of the victim, the community and the offenders. Three principles guide the efforts of restorative justice:

Accountability: Society can sanction crimes best if offenders become responsible for both the crime and the harm that is done to the victim. Offenders must make amends for any loss resulting from their crimes. Communities and victims should take an active role in the sanctioning process.

Competency: Competency must be developed to enhance the offender's ability to function as a productive adult. Measurable gains must be demonstrated in educational, vocational, social, civic and other competencies. Programs should find ways to involve young people in work service, dispute resolution, community problem solving and cognitive development in community projects overseen by adult mentors.

Public Safety: Incapacitation through secured facilities may be a part of the strategy. However, this must be recognized as least cost effective. Viable alternatives to lock-up, such as community supervision that is structured around work, education and service must be implemented when possible. In these instances the adults responsible for supervision must be assigned clear roles in monitoring offenders.[4]

RESTORITIVE JUSTICE PRINCIPLES ARE SUPPORTED BY PUBLIC OPINION

The shift toward this restorative justice model is due in part to a crisis in confidence in our formal legal system of criminal justice. To create a better functioning criminal justice system we need more informal alternatives with an emphasis on

a) increased participation;
b) more access to the law;
c) deprofessionalization, decentralization and delegalization;
d) minimization of stigmatization and coercion.[5]

Public opinion polls have made it evident that the principles of restorative justice, restitution, rehabilitation and sensitivity to victim issues are popular and favored concepts. While the public is willing to spend more tax dollars on prison, it only wants to do so to house violent and dangerous offenders. In dealing with non-violent offenders public consensus has a different objective. In these cases the public wants the social contract reinstated. The public wants the offender to make amends, apologize sincerely and repair the damage he or she has caused.[6]

The public support behind restorative justice is illustrated by a survey conducted by Vermont Department of Corrections. The survey found that the public wants to see the following objectives achieved by the criminal justices system: accountability, reparation of damages, education and treatment, and wants to see more public involvement in the decisions of individual cases. The Vermont DOC discovered that the public did not want a system that merely focused on incapacitation, deterrence, treatment and punishment. At the same time public consensus emphasized that "the most important response to crime should be the response that attends to the damage done – to the victim and to the community."[7]

RESTORATIVE JUSTICE CALLS FOR A CHANGE IN CENTRAL VALUES

The critical change from the punitive model of justice to a restorative model requires not only changes in process but also involves critical changes of central values. Accountability, competency and public safety will guide the roles of victims, offenders, and communities in the criminal justice process. The central theme of restorative justice is empowerment of all actors in formal justice decision making and correctional outcomes.

Changing the process and the way we think about criminal justice requires a shift in our vision of what the criminal justice system should do. Policies and programs must be carefully reviewed and revised to encourage positive outcomes. The following strategic goals are recommended to develop appropriate policies and programs:

1) Give victims and offenders in communities opportunities for reconciliation through encounter programs;

2) Make non-dangerous offenders accountable for reparation as a sentencing priority and give community based sentences rather than prison;

3) Give victims reparation for the primary harms resulting from crime, and offer them participation in the criminal justice process to ensure their harms are addressed;

4) Assure that victims and offenders have access to services to assist them in

5) the process of integration.[8]

The states that have implemented restorative justice values

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("Restorative" Continued from page 32)
and programs to redefine and revise their criminal justice systems have found that they are well adapted to juvenile justice. The restorative justice model can be applied successfully in both the community and detention setting.[9] The Office of Juvenile Justice and Delinquency Prevention promotes the philosophy that the juvenile justice system must begin to establish a system whereby offenders, victims and the community are all active participants in the juvenile justice process through their Balanced and Restorative Justice Project.[10] This model permits a framework for reintegration of young offenders back into the community while also promoting responsibility and accountability of these young people.

[1] Gordon Bazemore and Dennis Maloney, "Rehabilitating Community Service." Federal Probation. March 1994, p. 28.

[2] Gordon Bazemore and Mark Umbreit. "Rethinking the Sanctioning." Crime and Delinquency. July 1995. pp. 297-317.

[3] Howard Zehr. "Restorative Justice: The Concept." Corrections Today. December, 1997.

[4] Gordon Bazemore and Susan Day. "Restoring the Balance." Juvenile Justice. 1996.

[5] Roger Mathews, "Reassessing Informal Justice." Informal Justice. Sage, 1983

[6] John Gorczyk and John Perry. "What The Public Wants" Corrections Today, December 1997.

[7] Id.

[8] Daniel VanNess and Karen Strong. "Restoring Justice." Anderson Publishing. 1997.

[9] Jim Moeser, "Implementing a Balanced and Restorative Justice Approach in Juvenile Detention." Journal for Juvenile Justice and Detention Services, Fall 1997.

[10] Balanced and Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st Century., The Office of Juvenile Justice and Delinquency Prevention, 1997.

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Other states have started a variety of pilot programs to start implementing restorative justice principles and processes

Maryland - In 1997 the Maryland Department of Juvenile Justice introduced legislation that would reflect a balanced, restorative and victim-centered approach to justice. Restorative principles now serve as statewide criteria for evaluating proposed reform measures. Resources have been reallocated to maintain residential treatment programs for serious, chronic and violent juvenile offenders. Delinquency prevention and early intervention services have been expanded. Most importantly, new programs are being created for intermediate range juvenile offenders.

Ohio – Restorative Justice has been implemented in Ohio through the advancement of the following principles:
Victim Services – victims are involved in the justice process, and programs are being established to facilitate victim/offender mediation and offender restitution programs.
Community Service - providing meaningful work and skill-building activities for offenders. Curricula are being developed to develop the psychological aspect of community service to prevent recidivism or further victimization.
Community Partnership – community groups and local individuals participate in various ways, including on advisory groups in the corrections system, such as boards that develop meaningful work activities, sound business practices, and vocational programs.
Education and work opportunities - partnerships with the civic and business communities throughout the state, a Job Linkage program where inmates are offered employment and development of interviewing skills.

South Carolina – Juvenile Arbitration Program that utilizes volunteers which is established to empower the community in the criminal justice process. A process by which the juvenile, the juvenile's parents, the referring police officer, and the victim participate to produce a contract which the juvenile is then required to complete within 90 days under the supervision of the arbitrator. In Seminole county this pilot program cost $ 26,000.00 and was estimated to have diverted one-third of the family court caseload in its first year of operation and after three years reduced the recidivism rate to six percent. In the first eight months of operation in Lexington County this program diverted 129 cases from the family court, approximately 45 percent of the new criminal referrals. Not a single juvenile that went through the program in the first three years committed another offense. ■

West's Review

by Julie Namkin
Assistant Public Advocate

***Cornelison v. Commonwealth*, Ky., ___ S.W.2d ___, 1999 WL 79373 (2/18/99), 97-SC-694-MR, Jefferson Circuit Court. Not Yet Final**

Cornelison was convicted of rape, sodomy, use of a minor in a sexual performance (five counts) and sexual abuse (three counts). He was sentenced to one hundred ten (110) years in the penitentiary. Two issues were raised on appeal.

The first issue concerned the removal of the addresses of prospective jurors from the juror qualification forms. Although the issue was not properly preserved for review, the Kentucky Supreme Court stated the identical issue had been resolved against the defense in *Samples v. Commonwealth*, Ky., 983 S.W.2d 151, 152-153 (1998).

The second issue was whether the trial court erred when it permitted a police officer to testify during the penalty phase to the effect of good time credit on the length of a defendant=s sentence. The Kentucky Supreme Court held the list set out in KRS 532.055(2)(a) is not exhaustive, but rather is illustrative. The Court held that evidence related to potential good time credit, although not specifically enumerated in the statute, affects the actual duration of a sentence of imprisonment. Thus, it is relevant and may be offered by the Commonwealth.

Accordingly, Cornelison's convictions and sentences were affirmed.

***Land v. Commonwealth*, Ky., 986 S.W.2d 440 (2/18/99), Daviess Circuit Court.**

In 1972, Land was convicted of murder, rape (two counts), shooting with intent to kill and armed robbery. He was sentenced to life, life without the possibility of parole, twenty-one years and eighteen years, respectively. Land did not appeal his convictions.

In 1973, Land filed a motion pursuant to RCr 11.42 claiming his sentence of life without the possibility of parole for rape was unconstitutional because it amounted to cruel and unusual punishment. The circuit court denied the RCr 11.42 motion, and the Court of Appeals affirmed.

In 1997, Land filed a motion pursuant to CR 60.02 to amend the judgment or to make him eligible for parole. Land again argued his sentence of life without the possibility of parole for rape was unconstitutional and should be amended to life imprisonment with eligibility for parole. The circuit court denied his motion without an evidentiary hearing and Land appealed.

The Kentucky Supreme Court held that Land's sentence of life without the possibility of parole for rape, which was imposed prior to the enactment of the penal code, is constitutional.

Land also argued the trial court erred when it failed to hold an evidentiary hearing on his CR 60.02 motion. Land conceded he did not request a hearing in the circuit court. The Kentucky Supreme Court held the trial court did not abuse its discretion in failing to hold an evidentiary hearing on Land's motion. The Court also pointed out that *Fryrear v. Parker*, Ky., 920 S.W.2d 519, 522 (1996), cited by Land, should have put Land on notice to specifically ask for an evidentiary hearing on his motion.

The Kentucky Supreme Court reiterated that CR 60.02 is not a separate avenue of appeal to relitigate issues that were or could have been raised in an RCr 11.42 motion.

The trial court's denial of Land's CR 60.02 motion without an evidentiary hearing was affirmed.

***Commonwealth v. Deckard*, Ky.App., 1999 WL 95688 (2/26/99), 97-CA-438-MR, Barren Circuit Court. Opinion Withdrawn 3/17/99.**

On November 7, 1996, fifteen year old Jonathan Deckard allegedly received at school, and thus was in possession of at school, a .38 caliber pistol with knowledge that it was stolen.

On December 18, 1996, Deckard was indicted for unlawful possession of a weapon on school property in violation of KRS 527.070(1), a felony, receiving stolen property in violation of KRS 514.110(3), a felony, and possession of a handgun by a minor in violation of KRS 527.100, a misdemeanor.

The record on appeal does not contain the order from the district court transferring Deckard's case to the circuit court pursuant to KRS 635.020(4), the automatic waiver statute. However, the record reveals that on January 7, 1997, Deckard moved the circuit court to dismiss the indictment on the ground that it lacked jurisdiction over him and the subject matter of the indictment. The circuit court remanded Deckard's case to the district court because of the issue of whether "possession" of a firearm constitutes "use" was one the legislature did not address when drafting the [waiver] statute which has created an ambiguity. Relying on *Haymon*

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v. Commonwealth, Ky., 657 S.W.2d 239 (1983), the circuit court determined the ambiguity in KRS 635.020(4) must be resolved in favor of the defendant. The Commonwealth appealed the circuit court's remand order.

In a two to one opinion, the Court of Appeals held *Haymon, supra*, controls the situation in the case at bar and the circuit court correctly applied the holding in *Haymon*. As the Kentucky Supreme Court stated in *Haymon, supra* at 240, "use" of a [firearm] contemplates that it be employed in some manner in the commission of an offense.

The Court of Appeals further stated:

> The very same ambiguity that the Supreme Court recognized in *Haymon* is also present in this case. Like in *Haymon*, in this case the Commonwealth has not shown or even alleged that Deckard actively "used" the handgun in any manner. Accordingly, it is our opinion that Deckard, like Haymon, is "entitled to the benefit of the ambiguity." Thus, just as Haymon was entitled to have his request for probation decided on the "merits of all other relevant factors," Deckard is also entitled to have the disposition of the charges against him determined by the Barren District Court.

One of the concurring judge's stated Ait is time for the General Assembly to address and clarify its intent with regard to the ambiguity in the juvenile waiver statute (KRS 635.020(4)) as to use versus possession of a firearm.

The remand order of the circuit court was affirmed.

***Darden v. Commonwealth*, Ky.App., 1999 WL 113134 (3/5/99), 97-CA-196-MR, Todd Circuit Court. Opinion Withdrawn 3/17/99.**

Two days after his seventeenth birthday, Darden was allegedly in possession of cocaine, marijuana and a firearm on school property. Darden was initially charged by way of a juvenile petition in district court. Pursuant to a motion by the Commonwealth relying on KRS 635.020(4), the charges were later transferred to circuit court, where Darden was prosecuted as an adult and convicted of the three charges.

The charges resulted from a search of an automobile Darden was driving on school property during a football game.

Prior to trial, Darden moved to suppress the items taken from the automobile because the police officers had no articulable basis to stop the car. The court overruled the motion to suppress. Darden's motion to dismiss the charges because the circuit court lacked jurisdiction was also overruled.

Darden raised three issues on appeal.

First, Darden argued the district court's order transferring the case to circuit court was invalid because it did not contain factual findings as required by KRS 640.010(2). The Court of Appeals disagreed and, citing *Harden v. Commonwealth*, Ky.App., 885 S.W.2d 323 (1994), stated Ait would seem the extensive findings normally required by KRS 640.010(2) for transfer from juvenile court to circuit court are not necessary where KRS 635.020(4) becomes applicable.

However, the Court of Appeals further stated the district court should have made the minimal findings of reasonable cause described by KRS 635.020. The record revealed the district court's docket notation merely stated the transfer was pursuant to KRS 635.020(4) and KRS 527.070. The Court of Appeals stated the district court's written transfer order, standing alone, was not sufficient to vest jurisdiction in the circuit court. However, the Court of Appeals noted the district court held a transfer hearing, and even though the transcript of the hearing is not part of the record on appeal, the Court of Appeals assumed the omitted record supports the district court's ruling.

Second, Darden argued the circuit court lacked jurisdiction to try him as an adult because a violation of KRS 527.070, unlawful possession of a weapon on school property, does not constitute use of a firearm for purposes of KRS 635.020(4).

The Court of Appeals recognized that in *Haymon v. Commonwealth*, Ky., 657 S.W.2d 239 (1983), the Kentucky Supreme Court held that possession of a firearm did not constitute use of a firearm. The Court of Appeals distinguished *Haymon* because it was made in the context of deciding whether one who stole a firearm during the commission of a burglary could be denied probation under KRS 533.060(1). The Court of Appeals stated that Darden Awas charged with a crime involving the element of possession, not use, of a weapon. It was [Darden's] possession of a weapon on school property, in violation of KRS 527.070, which constituted the offense "committed" for purposes of KRS 635.020(4). The Court of Appeals believe[d] the Court in *Haymon* recognized such an interpretation, when it said: "The Commonwealth contends that possession of a weapon involves its use; that the intent of the General Assembly was to deter the involvement or presence of weapons in the commission of crimes. Admittedly, the word 'use' is subject to such a construction."

Applying *Haymon* to the case at bar, the Court of Appeals stated "for purposes of KRS 635.020(4), possession of a firearm is the offense committed [by Darden], and thus no ambiguity exists between the 'use' of the firearm or the 'possession' of it insofar as the commission of the offense proscribed by KRS 527.070 is concerned."

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Third, Darden argued the trial court erred when it overruled his motion to suppress the evidence take from the car he was driving. The opinion reveals that Officer Macklin received information from the high school principal that he had gotten reports of the odor of marijuana around a school parking lot. Macklin told Officer Moberly to investigate the complaint. Upon entering the parking lot, Moberly saw a group of males get into a 1978 Cadillac and drive toward the football field. Moberly stopped the car about 150 yards beyond the exit gate of the parking lot. Darden was driving the car and when he rolled down the window, Moberly detected the odor of marijuana. Darden consented to a search of the car which turned up drugs, drug paraphernalia, weapons and shells.

Darden argued on appeal the police officers had no articulable suspicion that he was doing anything wrong, and he was improperly seized pursuant to an investigation of a misdemeanor which was not committed in the officers' presence.

The Court of Appeals held, relying on *Graham v. Commonwealth*, Ky.App., 667 S.W.2d 697 (1983), that since the police officers received reliable information from a school official that some person or persons were smoking marijuana on school property, and since Darden and his companions were the only people in the area, the stop was justified.

Accordingly, Darden's convictions were affirmed.

***Brown v. Commonwealth*, Ky.App., ___ S.W.2d ___, 1999 WL 95697 (2/26/99), 97-CA-1288-MR, Graves Circuit Court. Not Yet Final**

Brown and his girlfriend, Allison Clark, were charged with first degree criminal abuse of their six week old son. Prior to trial the Commonwealth moved to try Brown and Clark together. Brown made no objection to the Commonwealth's motion. After a joint trial, Brown was convicted and sentenced to seven years in prison.

Brown raised three issues on appeal.

First, Brown argued the trial court erred when it granted the Commonwealth=s motion for a joint trial. Both Brown and Clark denied having abused their son, neither accused the other of the abuse, and both attempted to show that the injuries could have resulted from innocent activity. Thus, the Court of Appeals held there was no error in granting the Commonwealth=s motion for a joint trial. The Court of Appeals did acknowledge, however, that rebuttal testimony, consisting of prior bad acts of Brown, offered to impeach Clark was improperly admitted because it placed Brown in a bad light, but it did not amount to prejudicial error requiring reversal. The Court of Appeals noted the trial court should have limited the rebuttal testimony so it did not infringe upon Brown's right to a fair trial.

Second, Brown argued he was entitled to a directed verdict of acquittal because the evidence against him was circumstantial. The Court of Appeals disagreed and held that even though the evidence of abuse was circumstantial, the seriousness of the child's injuries coupled with testimony from three doctors that the probable cause of the injuries was abuse, and not innocent activity, was sufficient to overcome a motion for a directed verdict of acquittal.

Third, Brown argued it was error to admit testimony from one doctor that the child suffered from "shaken baby syndrome." Although the admission of testimony of "shaken baby syndrome" is one of first impression in Kentucky, other states have held such testimony to be admissible when introduced through a properly qualified expert. No challenge was raised as to the doctor's qualifications as an expert. Thus, the Court of Appeals held there was no error.

Fourth, Brown argued that testimony from three lay witnesses that the child's condition shortly before and shortly after his admission to the hospital suggested he had possibly been abused was improperly admitted because the lay witnesses were not qualified to offer such an opinion. The Court of Appeals held Brown was not prejudiced by the admission of such testimony since three doctors testified the child had almost certainly been abused.

Accordingly, Brown's conviction was affirmed.

***Cardwell v. Commonwealth*, Ky., ___ S.W.2d ___, 1999 WL 163404 (3/25/99), Christian Circuit Court, Judge Edwin White, on review from Court of Appeals. Not Yet Final**

The issue before the appellate courts in this case was "whether a trial court may enter an amended judgment [pursuant to RCr 10.10] more than ten days after the original judgment has become final, to make the written judgment conform with the sentence rendered from the bench, when the effect of the amended judgment results in a substantial increase in a defendant's sentence from that which was recited within the original judgment. The Kentucky Supreme Court held that "[b]ecause of due process considerations of a defendant's interest in the finality of a judgment and sentence . . . a trial court may not enter such an amended judgment."

***Mathews v. Commonwealth*, Ky., ___ S.W.2d ___, 1999 WL 163419 (3/25/99), Warren Circuit Court, Judge Thomas Lewis.**

Mathews was tried and convicted of intentional murder and sentenced to life imprisonment. Mathews raised three issues on appeal.

First, Mathews claimed the trial court erred when it failed to

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suppress his oral statement to the arresting officer, made after signing a waiver of his constitutional rights, because the Commonwealth failed to turn over the statement in response to the court's discovery order. The Commonwealth called the police officer at the close of its case in chief. After the defense objected and claimed lack of notice, the Commonwealth stated the officer was going to testify that Mathews told her he did not shoot the victim; a third person did the shooting. The defense, which had not yet made an opening statement, had planned to present a self-protection defense and the officer's testimony would have contradicted this defense. The trial court ruled that if Mathews took the stand and testified he shot in self-defense, the Commonwealth could call the officer in rebuttal to impeach Mathews with his prior inconsistent statement. As a result, Mathews did not testify.

In a four to three opinion, the Kentucky Supreme Court held that since Mathews did not place his testimony into the record by avowal, it could not determine whether his testimony would have been such that it would have been consistent or inconsistent with his prior statement to the police officer. Thus, Mathews failed to demonstrate that the trial court's ruling precluded him from testifying and there was no error.

Second, Mathews argued the trial court erred when it instructed the jury it could sentence Mathews to life imprisonment without the possibility of probation or parole for twenty-five years because there was no aggravating circumstance in his case. This error was not preserved for appellate review.

The Kentucky Supreme Court held Mathews failed to demonstrate he was prejudiced by the trial court's unauthorized instruction because the jury fixed his punishment at life imprisonment. The Court also stated Mathews had not substantiated his claim of a "compromised verdict."

Third, Mathews claimed the trial court erred when it permitted the prosecutor to "glorify" the victim. This error was not preserved for appellate review by any contemporaneous objection to the prosecutor's comments. The Kentucky Supreme Court found no error.

Mathews conviction and life sentence were affirmed.

***Commonwealth v. Walker*, Ky., ___ S.W.2d ___ 1999 WL 163398 (3/25/99), Fayette Circuit Court, Judge Mary Noble, on review from Court of Appeals. Not Yet Final.**

Walker, a juvenile, was charged with first degree robbery and pled guilty to an amended charge of criminal facilitation to commit first degree robbery. The trial court sentenced Walker to five years imprisonment, but probated his sentence. One of the conditions of his probation was to serve an additional six months in the Fayette County Juvenile Detention Center. Because Walker had already served more than six months in the juvenile detention facility prior to his sentencing, Walker moved that the time served prior to sentencing be credited towards the six months' sentence imposed as a condition of his probation. The trial court denied Walker's motion and Walker appealed.

The Kentucky Supreme Court held that under KRS 532.120(3), the time Walker had already spent in the detention center prior to sentencing was credited to his five year sentence of imprisonment, if he should end up serving such sentence. However, under KRS 533.030(6), the trial court was authorized to impose a six month period of confinement as a condition of probation. Thus, no error occurred.

***Petrey v. Cain*, Ky., 987 S.W.2d 786 (3/25/99), original action from Court of Appeals.**

This case involves a writ of prohibition. As part of a divorce decree, Petry was awarded sole custody of his daughter. More than two years after the entry of the decree, Petry's ex-wife moved to modify the custody decree to allow for joint custody. Her motion was accompanied by her own affidavit. The trial court set the motion for an evidentiary hearing. Petry filed a writ of prohibition in the Court of Appeals to prevent the trial court from taking any further action on his ex-wife's motion. The Court of Appeals denied the writ and Petry appealed to the Kentucky Supreme Court.

The Kentucky Supreme Court held Petry had an adequate remedy at law by way of appeal from any order of the trial court granting or denying a motion to modify the prior custody decree. Thus, a writ of prohibition was not the proper avenue of relief. The order of the Court of Appeals was affirmed.

***Vires v. Commonwealth*, Ky., ___ S.W.2d ___, 1999 WL 163423 (3/25/99), Knott Circuit Court, on review from Court of Appeals. Not Yet Final.**

Vires was tried for murder and convicted of second degree manslaughter arising out of a shooting resulting from a car crash. The victim of the shooting was the husband of Vires' girlfriend (the couple were separated but not divorced). The facts of the accident were in dispute.

Vires testified Caudill, his girlfriend's husband, intentionally rammed the rear of his pickup truck in an attempt to push his car and its occupants off the road and over a mountainside. A passenger in the husband's truck testified Caudill came around a curve on a winding mountain road and Vires' truck was stopped in the middle of the road. Caudill applied his brakes to avoid hitting Vires but without success. Vires then exited his truck with a semi-automatic pistol and fired two shots at Caudill, hitting him in the neck and killing him.

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Vires raised two issues on appeal. First, Vires argued the trial court erred when it allowed a Kentucky State Police Detective to testify as an expert in accident reconstruction when his opinion was not provided to the defense prior to trial. Without objection by the defense, the detective introduced photographs of both vehicles and the surface of the roadway and identified skidmarks which he attributed to the Caudill vehicle resulting from an application of the brakes. The detective also testified, without objection, concerning the angle of the impact between the two vehicles. The defense also did not object when the detective was asked if he held an opinion as to whether the physical evidence, including damage to the vehicles and skidmarks, were consistent with the victim having attempted to avoid rather than initiate impact with Vires' pickup.

The Kentucky Supreme Court held the detective did not express any opinion on the victim's intent prior to or at the time of the impact. Nor did the detective perform an accident reconstruction or a written report. The entire police investigation file was provided to the defense. Since all facts and supporting materials relied on by the detective were provided to the defense, the trial court did not err in allowing the detective to testify as to his opinion based on the results of his investigation.

Vires' second argument was that the trial court erred when it excluded the testimony of a former boyfriend of the victim's wife who gave avowal testimony that the victim stalked him when he was dating the victim's wife.

The Kentucky Supreme Court held the trial court did not err because the former boyfriend's testimony "was at best marginally relevant." The trial court did allow substantial testimony concerning the victim's relationship with his wife, his prior violent and jealous behavior and his prior confrontations with Vires. Thus, Vires was not prejudiced by the exclusion of the testimony.

Vires' conviction was affirmed.

***Russell v. Commonwealth*, Ky.App., ___ S.W.2d ___, 1999 WL 153367 (3/12/99), Franklin Circuit Court, Judge Graham. Not Yet Final.**

In 1986, sixteen year old Bradley Russell entered a guilty plea to murder and rape and was sentenced to twenty years on each offense to run concurrently.

In 1994, Russell filed an RCr 11.42 motion alleging the indictment was defective because the victim was already dead when the rape occurred and a person cannot be convicted of raping a corpse; ineffective assistance of counsel because his counsel advised him to plead guilty to the rape charge and the evidence was undisputed that he had sex with the victim after she was already dead; that his plea was not entered voluntarily; and that the court could not sentence him under KRS 439.3401. After an evidentiary hearing, the trial court denied Russell's motion.

Rejecting Russell's first argument, the Court of Appeals stated "[t]he fact that the evidence in the case may have been contrary to the facts as alleged in the indictment (that [Russell] killed the victim before he sexually assaulted her) does not render the indictment defective."

Rejecting Russell's second argument, the Court of Appeals pointed out that trial counsel's advice to Russell to accept the plea bargain and plead guilty to rape was sound trial strategy under the circumstances. Counsel had tried to have the rape charge dismissed prior to trial, on the same ground that Russell alleged in his RCr 11.42 motion, but the trial court refused to dismiss the charge. Also, there was medical evidence that certain bodily functions continue even after a person is brain dead and it was not guaranteed that the appellate court would reverse the rape conviction. Even if the rape conviction were dismissed, Russell could receive a life sentence on the murder charge, but under the plea bargain he received the minimum sentence of twenty years. Trial counsel's performance was not ineffective under the circumstances.

The Court of Appeals also rejected Russell's argument that his plea was not entered knowingly, intelligently and voluntarily because the record revealed the court engaged in a lengthy colloquy to insure that Russell and his parents were informed of all the constitutional rights he was waiving.

Lastly, as part of the plea agreement, Russell agreed he would not be eligible for parole for a minimum of twelve years, under KRS 439.3401, even though the statute was not yet in effect at the time of his plea. The plea agreement set out that the statute was being applied retroactively. The Court of Appeals saw "nothing wrong with [Russell] being bound by the twelve year minimum...." Also, "the twelve year minimum . . . was not outside the law as it existed at the time of the offense. See KRS 349.340."

The ruling of the trial court was affirmed.

***Welch v. Commonwealth*, Ky.App., ___ S.W.2d ___, 1999 WL 193941 (2/5/99, ordered published 3/26/99), Wayne Circuit Court, Judge Eddie Lovelace.**

Welch pled guilty to the misdemeanor of second degree stalking. Welch was sentenced to eight months. The trial court conditionally released Welch and placed him on probation. As part of his release, Welch was to avoid all contact with his wife except for written correspondence through the U.S. Mail related to the care of their minor child.

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Subsequently the trial court revoked Welch's probation because his wife had received seventeen or eighteen phone calls from Welch's home phone and one phone call from his place of employment. On each occasion, when Mrs. Welch picked up her phone the caller hung up, but Welch's number appeared in the caller identification box attached to her phone.

On appeal, Welch argued he had not violated his probation because "since no actual communication took place during the calls, there was no 'contact' between" him and his wife."

The Court of Appeals disagreed since "the act of repeatedly causing [his wife] the inconvenience of responding to harassing hang-up calls constitutes 'contact' within the meaning and intent of the court's conditional discharge order."

The trial court's ruling was affirmed.

***Ferrell v. Commonwealth*, Ky.App., ___ S.W.2d ___, 1999 WL 153368 (3/19/99), Fayette Circuit Court, Judge Rebecca Overstreet. Not Yet Final**

Ferrell was convicted of second degree escape and being a first degree persistent felony offender.

On appeal, Ferrell argued the trial court erred (1) when it excluded, on hearsay grounds, his testimony concerning threats made to him by other inmates, and (2) when it qualified the "choice of evils" instruction to only allow Ferrell the justification if he was not wanton or reckless in forming his belief in the need to escape or in creating a situation in which he needed to escape.

The Court of Appeals reversed Ferrell's convictions because the trial court erred when it sustained the Commonwealth's objection on hearsay grounds to Ferrell's testimony. The Court of Appeals stated the statements were not hearsay because they were not being offered to prove the truth of the matter asserted, but were offered to show that Ferrell heard certain statements that placed him in fear of his life causing him to escape. The Court of Appeals referred to the out-of-court statements as "verbal acts" or "utterances in issue." The Court also stated the out-of-court statements could have been admitted under the "state of mind" exception to the hearsay rule. KRS 803(3).

The Commonwealth argued on appeal the issue was not preserved for review because Ferrell failed to put the testimony in the record by avowal. However, the Court of Appeals rejected this argument because the substance of the excluded evidence was apparent to the trial court from the context in which the questions were asked, citing *Webb v. Stone*, Ky., 445 S.W.2d 842, 845 (1969) and Lawson, *The Kentucky Evidence Law Handbook*, § 1.10 (3d ed. 1993).

The Court of Appeals also addressed the instruction issue so as to avoid error upon retrial. The Court of Appeals rejected Ferrell's argument that a defendant's subjective belief in the need to escape is sufficient to justify his actions. The Court stated "the law requires that the defendant's belief in the need to escape be objectively reasonable." This requirement "ensures that only those acts which society, not the defendant, deems imminently threatening would justify escape from prison."

Ferrell's convictions were reversed and remanded for a new trial. ■

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Five Year Reminders

Be aware important evidence may disappear after five years.

1) Please remember that many jails destroy their records after **five years.** Any issues relating to client's health, mental health, good behavior, etc. could be lost if not obtained before they're destroyed.

2) For *Brady & Giglio* claims: please know that untranscribed records of district & circuit court proceedings in many KY counties are destroyed after **five years**. (Not the court files, but records of actual ct proceedings.) Oral statements to the court are often the only place you can find evidence of snitch deals.

3) The KY medical licensure board destroys all material susceptible of Open Records requests **after five years**. Good to know if there are any issues relating to medical personnel's competency and credibility.

by Sue Martin

CAPITAL CULPABILITY:

DAUBERT NECESSITATES RE-EVALUATION OF CONDEMNED PERSONS WITH BORDERLINE INTELLIGENCE AS MEASURED BY THE WESCHLER ADULT INTELLIGENCE SCALE - REVISED (WAIS-R)

*(Copyright 1999, Michael A. Taylor, J.D., and Robert S. Spangler, Ed.D.)**

New testing standards for measuring intelligence may warrant testing, or more importantly, retesting of otherwise "death eligible" criminal defendants. And, as we will demonstrate, this applies to current cases as well as post conviction cases.

These "new" testing standards we mentioned are really better described as a "re-anchoring" of the norms for the widely used IQ test, the Wechsler Adult Intelligence Scale - Revised (WAIS-R). The new test, the WAIS-III[1], may give a score of 1.2 to 8.9 lower than the WAIS-R, which might make an otherwise "death eligible" defendant "death ineligible"
under the new test.

THE UPDATED WAIS-III

According to the Psychological Corporation, the owners and developers of the testing instrument, the "WAIS-III provides updated norms that were developed using a large normative sample stratified according to the newest U.S. census data on race/ethnicity, sex, education, age, and region." The age range of the new norms has been extended up to 89
years of age.

The new test is redesigned and according to its creator "has demonstrated strong clinical sensitivity and specificity for assessing mental retardation. . . The WAIS-III is highly correlated to the WAIS-R and WISC-III. According to the validity studies reported in the
Technical Manual, the mean WAIS-III IQ scores are about 1.2 to 4.8 points lower than the WAIS-R IQ scores [and an average, score between 4.8 and 8.0 lower on the WAIS-III] and almost identical to the WISC-III scores. The mean difference between the WAIS–R and the WAIS–III IQ scores is expected due to the changes in norms over time."

The Wechsler testing instruments are based upon population norms which, by necessity, must be updated regularly due to I.Q.-score inflation, which inflate at a rate of about 0.3 points per year. This inflation is attributed to improvements in the education system, improved nutrition, better health conditions, and increased dissemination of information
(i.e. cable television, internet access, etc.) among the population as a whole. In their press releases, the Psychological Corporation maintains that "[r]egardless of the reasons for these changes in test performance, periodic updating of the norms is essential; otherwise, average IQ scores will gradually drift upward and give a progressively deceptive picture of an individual's performance relative to the expected scores in his or her own age group.

SCIENTIFIC EVIDENCE - KRE 702 AND DAUBERT

The adoption of the Kentucky Rules of Evidence and specifically, KRE 702, interpreted through the Daubert[2] standard warrants a fresh look at all criminal cases wherein a psychological or psychiatric examination has been made in conjunction with or in opposition to a psychiatric defense (i.e., insanity or mental retardation). This is true because for the last several years most, if not all, testing was done using the WAIS-R. What is more frightening is that many evaluators are still using the outdated instrument today, presumably because the test forms as well as the WAIS-III test kits are more expensive and the evaluators want to use up the old ones before converting to the WAIS-III. If any of this testing was done after October 1997, it could (and, indeed, it should) be strongly argued that the WAIS-R test results are not statistically valid and reliable and therefore, not admissible.

This re-anchoring of the norms of the most commonly used I.Q. testing instrument is most important to attorneys defending death penalty cases since KRS 532.130 defines "seriously mentally retarded" as significantly subaverage general intellectual functioning" as an I.Q. score of seventy (70) or below.

KRS 532.140 makes a defendant "death ineligible" once the Court makes the determination that a defendant is "seriously mentally retarded."

KRE 702 exactly mirrors Federal Rules of Evidence (FRE) 702 for determining the admissibility of scientific evidence. This rule states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(Continued on page 41)

("Capital Culpability" Continued from page 40)

The U.S. Supreme Court in *Daubert*, took this a step further by abandoning the old Frye[3] standard of admissibility of scientific to that which had "general acceptance" in the field of study involved. *Daubert* tells us that we must go further and answer the question, "is it scientifically reliable?" This is where the change in the testing instruments is critical in death cases.

DEFINING "RELIABILITY AND VALIDITY"

The gist of the *Daubert* decision is that expert witness testimony must be supported by objective evidence that is considered reliable in the scientific community. The term 'reliable' is defined in the scientific community as 'consistency' and does not infer validity. A reliable test will consistently yield the same results within the standard error of measurement. Validity is an entirely different construct and in a general sense means that a test or instrument measures what it is supposed to measure accurately. In a norm-referenced instrument, current and accurate norms are essential aspects of valid test results.

Validity is the essence of the *Daubert* decision, not reliability. In the real world, reliability refers to acceptability or dependability and this concept is synonymous with the scientific community definition of test validity: the test measures what it is supposed to measure accurately and is reliable (Cronback, 1970[4]; Anastasi, 1968[5]; Aiken, 1991[6]).

An invalid test can be either reliable or unreliable in the scientific sense; it consistently yield invalid results within the standard error of measurement or does not. A valid test must be both valid and reliable; this includes the requirement for current accurate norms by which an individuals score can be interpreted. When norms are outdated, I.Q. inflation occurs. I.Q. inflation is a trend upward similar to grade inflation that has been occurring in U.S. schools and universities for approximately thirty years. Put simply, a person evaluated with the WAIS-R will have an I.Q. that is inflated. The WAIS-R has consistently yielded Full Scale I.Q. scores that are 4.8 to 8.0 points higher than the older WISC-R and WISC-III. Since the publication of the WAIS-III in 1997, WAIS-R results have consistently yielded Full Scale, Verbal, and Performance I.Q. scores that are higher than WAIS-III results.

According to Dr. Barry Friedman[7]:

> APA ethical guideline specifically states that psychologists do not use obsolete assessment instruments. The WAIS-III has been readily available since October of 1997. I believe that six months. . . is plenty of time for psychologists to obtain, learn and practice administration of the new device; it is also plenty of time to use up the old protocols for the new device. I spoke on the phone recently with a representative of [the] Psychological Corporation and he informed me that the WAIS-R is still offered because some research studies entail its use. However, he indicated that, because of the newer norms, the WAIS-III is the appropriate device for use in clinical setting and that the WAIS-R is no longer intended for use in such settings.

HOW IT ALL WORKS

The Wechsler testing instruments give three I.Q. scores: verbal, performance, and full scale. Each score has its own validity, and these numbers may differ significantly; for example, a person with cerebral palsy may have an invalid performance I.Q. score because of his or her disability, but a valid verbal I.Q. score. In this case a full scale I.Q. score would also not be valid. Since KRS 532.130 only says "an intelligence quotient (I.Q.) of 70 or below," it is critical to have the complete scores because a given defendant may have one score above 70 and another score below 70.

Because the statute is not specific as to which I.Q. score to rely upon, it could be argued that any of the scores could be used as the benchmark score for determining whether a defendant meets the requirement of KRS 532.130. Additional authority is found by looking to the Social Security Regulations for determining disability based upon mental retardation.

The Social Security Administration only requires a "valid verbal, performance, or full IQ of 60 through 70" (along with another disabling feature) to meet the standard for disability benefits (See, 20 C.F.R. §404, Subpart P, Appendix 1, also known as the "Listings of Impairments," 12.05C). This long-established standard recognizes that mental retardation as a disability exists if any of the scores fall below 70.

Since the mean and average scores will range from 1.2 to 8.0 points lower, the results can be remarkable. And, when we consider these are only "mean" and "average" variations, a given individual might score even lower on the new test due to factors as lack of education, cultural deprivation, or any of a number of mental illnesses.

What does this mean for the defense attorney with a claimant on death row or currently on trial for a capital offense? In the states that set a Full Scale I.Q. of 70 as mentally deficient (mentally retarded or developmentally delayed) the Daubert decision absolutely necessitates that all persons who were evaluated with the WAIS-R, yielding results in the Borderline range (70-80), must be re-evaluated with the WAIS-III or other testing instrument. The probability is high that the prior results are invalid and the client's actual intellectual function-

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("Capital Culpability" Continued from page 41)
ing is in the Mental Retardation range (70 and below).

In addition, inmates and defendants who scored in the low average range (80-90) should be re-evaluated because they are probably functioning in the Borderline range of intelligence. This could possibility be used to argue diminished capacity. There are countless civil ramifications of The Psychological Corporation's replacement of the WAIS-R with the WAIS-III, citing updated norms and other technical improvements in the revised instrument; not the least of which are Social Security Disability claims.

Dr. Barry Friedman agrees with the authors and states:

> "I have been advised by representatives of the Roanoke Disability Determination Service (the State Agency in Social Security claims) that they now require administration of the WAIS-III rather than the WAIS-R and, given that the DDS listings ascribe an unwarranted level of precision to such scores (that is, an I.Q. score is considered categorically different from an I.Q. score of 71), the agency would be vulnerable to a class action suit by all claimants administered the WAIS-R when the WAIS-III was readily available."

A significant percentage, of at least 25%, of all those defendants on death row suffer from a mental illness. It stands to reason that many of them may also have been improperly made "death eligible" by a testing instrument which is no longer statistically -- and therefore no longer scientifically -- valid and reliable.

Review of all cases where there is even the slightest question that an inflated IQ score should direct all death penalty lawyers to revisit the issue of IQ testing under these circumstances. A retesting under the new norms may save your client's life.

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[1]The Psychological Corporation, WAIS-III Technical Manual (EDS), (San Antonio, 1997).

[2]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct.
2786, 125 L.Ed.2d 469 (1993)

[3]Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[4]Aiken, Lewis R., Psychological Testing and Assessments, (Allyn & Bacon, Boston, 7th ed., 1991).

[5]Anastasia, Anne, Psychological Testing, (MacMillen & Co., London, 3rd ed., 1968).

[6]Cronbach, Lee J., Essentials of Psychological Testing, Harper & Row, New York, 3rd ed., 1970).

[7]Dr. Barry Freidman is a licensed clinical psychologist who practices in the Abingdon, Virginia area. He is also licensed in two other states and serves as a medical expert for the Social Security Administration Office of Hearings and Appeals. The excerpts provided are from conversations between Drs. Spangler and Freidman.

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"If we knew what it was we were doing, it would not be called research, would it?"

- Albert Einstein

A Review of:
An Unquiet Mind: A Memoir of Moods and Madness
By Kay Redfield Jamison

review by Valerie Bryan

In *An Unquiet Mind: A Memoir of Moods and Madness* (1995), Dr. Kay Redfield Jamison examines the nature of bipolar disorder with the extraordinary dual perspective of both clinician and client. With brutal honesty and clear clinical insight, Dr. Jamison offers a rare exploration into the true day-to-day experience of bipolar disorder.

Dr. Jamison, professor of psychiatry at Johns Hopkins and renowned author of *Touched with Fire: Manic Depressive Illness and the Artistic Temperament* (1996), *Manic Depressive Illness* (1990, co-authored with Frederick Goodwin) and *An Unquiet Mind* (1995), generously details the struggles of her personal and professional life as she coped with the combined difficulty of being a medical student and person with severe mental illness. Through a chronological series of anecdotes from various events in the author's life, she reveals an increasingly clearer representation of bipolar disorder, or manic-depressive illness as Dr. Jamison prefers in this book, from the inside. It is with this venture through her somewhat charmed, academic, and emotionally charged life that the reader witnesses the both the dangerous lows of depression and the seductive addiction of mania:

> *This pattern of shifting moods and energies had a very seductive side to it, in large part because of fitful reinfusions of the intoxicating moods that I had enjoyed in high school. These were quite extraordinary, filling my brain with a cataract of ideas and more than enough energy to give me at least the illusion of carrying them out.* (pg 42, *An Unquiet Mind*).

The author describes how treatment of her disorder with lithium both restored her mental health and brought her to her worst point with a suicide attempt (pg. 115). She relives the battle between exhilarating highs and ever-worsening depressions, and how their increasingly mixed presentation led her to treatment while a young faculty member at UCLA. Her conflicts with and resistance to lithium treatment are valuable reading for any student of the human sciences. She not only explains how the physical side effects complicated her life, but also confesses to a feeling of loss, revealing a unique insight into mania:

> *(But if) you have had stars at your feet and the rings of planets through your hands, are used to sleeping only four or five hours a night and now sleep eight, are used to staying up all night for days and weeks in a row and now cannot, it is a very real adjustment to blend into a three-piece schedule, which, while comfortable to many, is new, restrictive, seemingly less productive, and maddeningly less intoxicating* (pp. 91-92).

Dr. Jamison's struggle for stability in a life that she could continue to value and treasure led her to eventually reaching out to others for support, and learning to tolerate and accept lithium. Her ability to persevere, adapt, and succeed in such fashion is a testament to both the human spirit and mental health treatment and research. Dr. Jamison's ability to convey this particular, unique experience with such clarity is a valuable and engaging vehicle toward increased understanding of bipolar disorder.

Dr. Jamison's descriptions of her illness allow the reader an enlightened view of the manic side of bipolar disorder in particular, and some answers regarding why medication compliance is often an issue with mood-disordered clients. There is a definite message sent by the author that manic episodes, although often dangerous and lacking in judgment, are many times experienced by the client as pleasurable and exciting:

> *When you're high it's tremendous. The ideas and feelings are fast and frequent like shooting stars, and you follow them until you find better and brighter ones. Shyness goes, the right words and gestures are suddenly there, the power to captivate others a felt certainty. There are interests found in uninteresting people. Sensuality is pervasive and the desire to seduce and be seduced irresistible* (pg. 67).

Dr. Jamison then describes how mania can become entirely out of bounds, turn frighteningly unpleasant, and create extremely uncomfortable consequences:

> *But, somewhere, this changes. The fast ideas are far too fast, and there are far too many; overwhelming confusion replaces clarity. Memory goes. Humor and absorption on friends' faces are replaced by fear and concern. Everything previously moving with the grain is now against- you are irritable, angry, frightened, uncontrollable, and enmeshed totally in the blackest caves of the mind... Then, too, are the bitter reminders- medicine to take, resent, forget, take, resent, and forget, but always to take. Credit cards revoked, bounced checks to cover, explanations due at work, apologies to make, intermittent memories (what did I do?), friendships gone or drained, a ruined marriage* (pg. 68).

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The author's mixed emotions regarding her illness pervade the theme of this work. Dr. Jamison recalls the worst period in her life as one caused by a psychotically manic episode. It was during this episode when she was first confronted with her need to take lithium. Yet, it is evident through examination of Dr. Jamison's continuing sense of loss a loss of creativity, of energy, of heightened awareness, of "specialness," that the decision to treat her disorder has caused some regret.

This particular insight is a rare vision into the disorder not available through standard educational and professional texts covering this subject matter. Dr. Jamison recites her DSM-IV diagnosis as such: "Bipolar I Disorder; recurrent; severe with psychotic features; full interepisode recovery" (pg. 181). A cross-reference to the DSM-IV relates to the reader the following technically correct, yet uninspired description of her illness: "The essential feature of Bipolar I Disorder is a clinical course that is characterized by the occurrence of or more Manic Episodes or Mixed Episodes..." (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition). Kaplan and Sadock's *Synopsis of Psychiatry* (eighth ed.) details the various roles of neurobiology (in which both dopamine and serotonin neurotransmitters are implicated), genetics, and psychosocial factors in bipolar disorder, as well as lists the diagnostic criteria for the mood disorders from DSM-IV (Kaplan & Sadock, 1998). The thorough detail provided within this text is intended for the serious student of mental health, and is essential reading for a sound knowledge foundation in mental illness. It thus serves well its purpose; in comparison with the client-centered perspective of Jamison's work, however, a phenomenological view of the disorder is lacking. It is through this phenomenological experience that the true value of *An Unquiet Mind* is revealed (another of Jamison's works, *Manic Depressive Illness*, co-authored in 1990 with Frederick Goodwin, is also a useful resource for individuals investigating the client's day-to-day experience of this illness).

Dr. Jamison indicates that some of her worst experiences in dealing with the disorder arose from interactions with colleagues and medical professionals. It appears that others' negative reactions to her illness, both personally and professionally, impacted her memory and are a salient factor in her lifetime perception of the illness. In the following passage, Jamison recounts the reaction from one colleague, after being trusted with the disclosure of her illness:

> *He was, he said, 'deeply disappointed.' He had thought I was so wonderful, so strong: How could I have attempted suicide? What had I been thinking? It was such an act of cowardice, so selfish* (pg. 200).

In the next account, Jamison recalls how a medical doctor reacted upon learning that she wanted to have children:

> *At that point, in an icy and imperious voice that I can hear to this day, he stated- as it were God's truth, which he no doubt felt that it was- 'You shouldn't have children. You have manic-depressive illness'* (pg. 191).

She acknowledges that not all individuals in her life reacted in such a way, however. It is key support from family members, colleagues, and trusted friends that injected Jamison with the fortitude to continue treatment and succeed. Professional literature indicates that a healthy psychosocial environment and a reduction in environmental stressors, in addition to pharmacotherapy, are significant factors in long-term management of this disorder (Kaplan & Sadock, 1998).

Dr. Jamison's ability to relate this experience to a clinical audience and laypeople, from a clinician's foundation and a client's perspective, provides the reader with the opportunity to empathically integrate new information about the disorder. *An Unquiet Mind* has enlightened this student and reader to a new level of understanding about the disorder. A focus and clarity in perspective regarding this illness has been experienced that has not been heretofore observed in prior readings of mental health literature. Having realized this, I am prompted to seek out more client-centered mental health literature, searching for both individual phenomenology and commonalities amongst experiences reported.

Jamison's work also reveals that even within the insular, informed, and academic environment she lives, biases, prejudices, and misperceptions abound. The anecdotes which deliver this point powerfully illustrate a message that students of mental health must note: competent practice in working with people with mental illness involves an empathetic understanding of the client's perceptions. This message emphasizes for this reader that one of the foundational aspects of the social work profession, a client-centered perspective, is an essential component of a successful intervention. It also begs the question of whether or not other mental health professions adequately utilize and advocate for such an approach with clients.

An Unquiet Mind delivers a perspective that offers the reader interested in mental illness an unprecedented look both inward to the mind and outward to the perception of the world from the client's viewpoint. This type of literature reveals that the essence of mental illness cannot be captured without a client-centered perspective. Diagnostic categorization cannot begin to provide treatment implications without a phenomenological, day-to-day description from the person in her environment. This work has impressed upon the reviewer the true necessity of client-directed and empathetic practice in successful treatment. An understanding gained from the client in this process may work toward answering the question "why?", one of the most often unanswerable questions regarding client behavior,

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INTERNATIONAL LAW, JUVENILE EXECUTIONS, AND THE UNITED STATES

by Rowly Brucken

The execution of Sean Sellers on 4 February in Oklahoma was condemned by more than the usual chorus of domestic anti-death penalty activists. The American Bar Association, South African Archbishop Desmond Tutu, the Organization of American States, the United Nations High Commissioner for Human Rights, and Defence for Children International added their voices also on behalf of clemency.

Why did these groups protest against this execution when each had done so only rarely prior to the previous 511 American executions since 1977? Unlike an increasing number of other death row inmates, Sean Sellers was guilty of the crime for which he was convicted. Unlike a majority of inmates on American death rows today, Sellers was white. Why the outcry, then? Sean Sellers was only 16 when he committed murder, and his execution plainly violated international human rights norms as they have evolved over the past fifty years. By permitting the execution of Sellers, the United States finds itself almost alone on a list of nations that allow the execution of offenders who were under the age of eighteen at the time of their crimes.

The United States is one of only six nations that has executed children, having done so eight times since 1990. The other five nations, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen, have killed a total of nine, giving the United States the dubious distinction of being the world leader in this category. Beginning in 1642, when the judicial system of the Plymouth Colony approved the hanging of 16-year old Thomas Graunger, colonial, state, and federal governments have carried out over 350 juvenile death sentences.[1] Over seventy inmates who were sentenced to death for crimes committed as juveniles today await execution in twelve states.[2] Kevin Stanford and Larry Osborne are the only juveniles on Death Row in Kentucky. Beginning with *Thompson v. Oklahoma*[3] in 1988 and *Stanford v. Kentucky*[4] one year later, the United States Supreme Court has consistently held that executing those who committed murder as sixteen or seventeen years of age does not violate the Eighth Amendment to the U.S. Constitution.

By so holding, the Supreme Court has deliberately ignored a growing international consensus that views the execution of juveniles as a violation of international human rights law. Two benchmark multilateral treaties prohibit the death penalty for crimes committed by juveniles: the International Convention of Civil and Political Rights (the ICCPR)[5] and the Convention on the Rights of the Child (the CRC).[6] Over one hundred thirty nations have signed the former; every nation in the world except the United States and Somalia (which has no functioning government) has acceded to the latter. The American Convention on Human Rights (ACHR)[7], ratified by most nations in the Western Hemisphere, has a similar prohibition. This evidence clearly suggests that executing juveniles violates customary international law.

The United States has, though, committed itself to upholding international human rights standards. In 1992, the Senate ratified the ICCPR, though only after it attached a specific reservation to Article 6(5), which bans juvenile executions and which will be discussed later. Washington has signed, but not ratified, the CRC and the ACHR. Under the United Nations Convention on the Law of Treaties (also known as the Vienna

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and therefore may have immeasurable impact upon treatment success.

An understanding garnered from works such as Jamison's benefits not only the mental health professional, who must strive to tap into such resources to yield successful treatment options, but also client service providers within criminal defense work (among other professional populations). As we analyze the nature of our client's psychosocial concerns and issues, applying this client-centered perspective of specific mental illnesses may help to explain many behaviors that are disturbing, confusing, dangerous, or violent. This lends truth and credibility to our client's legal claims, and a clearer, honest portrayal of mental illness to those who sit in judgement of our clients. ■

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Convention), nations that have signed a treaty have a responsibility to do nothing to defeat its "object and purpose" pending ratification.[8] Despite this interim period between 1977 and 1992, however, governments in Texas, South Carolina, and Louisiana executed five juvenile offenders.

Even after ratifying the ICCPR, the United States government claimed that its reservation to Article 6(5) permitted state governments to continue the practice of juvenile executions. The proviso, arguably the most sweeping and stark reservation ever made to a multilateral human rights treaty, declares that the United States does not recognize the ban on death sentences for juveniles.[9] United Nations agencies and even American allies have challenged the statement's legality on three grounds. First, the ICCPR itself defines Article 6's prohibitions as non-derogatable, meaning that nations can never justify overriding the article's provisions, even in a time of war or other public emergency.[10] If the ICCPR's drafters specifically forbade nations from executing children in times of national crisis, the prohibition applies even more strongly in peacetime, the American reservation notwithstanding. Second, the expansive wording of the reservation, which permits the imposition of capital punishment "on *any* person (other than a pregnant woman)," calls into question what other internationally-recognized limitations on capital punishment the United States will insist it has the right to ignore, including the universally accepted prohibition on executing the insane (which the Supreme Court currently disallows) and the mentally retarded. Third, under international law, reservations to multilateral treaties are legal only if they do not violate the "object and purpose" of the treaty as a whole and of its drafters.[11] Almost every U.S. ally in Western Europe, including France, Germany, Denmark, Spain, Sweden, Portugal, Belgium, and Italy, immediately filed objections to the reservation before the Human Rights Committee, the body established under the ICCPR to monitor treaty compliance. In March 1995, the committee ruled that the reservation contravened the "object and purpose" of the ICCPR, and it asked Washington to withdraw the reservation. The U.S. Senate has refused to do so. Just last year, the U.N. Special Rapporteur on executions issued a report that agreed with the conclusions of the Human Rights Committee.[12]

In response to such criticism, the Bush and Clinton administrations and state and federal courts have articulated two arguments in support of the American do not recognize its legal necessity or support its implementation. A fundamental principle of international law holds that nation-states, whether led by unitary or federal governments, have an equal responsibility to enforce treaties throughout their territory. Moreover, the U.S. Constitution's Supremacy Clause plainly states that ratified treaties override inconsistent state laws, and numerous Supreme Court decisions have equated treaties with the status of federal law: both are binding on all fifty states. Therefore, the ICCPR's ban on juvenile executions has, *ipso facto*, become a federal responsibility to enforce in the fifty states.[13]

Second, state and federal courts, like the Nevada Supreme Court in 1998, look to only the laws of other states to conclude that juvenile executions do not infringe upon the Constitution's Eighth Amendment. Beginning in 1910, the U.S. Supreme Court has taken an organic approach to interpreting what constitutes a "cruel and inhuman punishment"[14] by examining "evolving standards of decency that mark the progress of a maturing society."[15] Given these principles, federal and state courts-most recently the Nevada Supreme Court last year[16]-look to the laws of other states, *but not to international law*, to conclude, as Justice Antonin Scalia did for the majority in *Stanford*, that "neither a historical nor a modern societal consensus" exists for outlawing capital punishment for juveniles.[17] Yet international law is very clear, as stated by the Vienna Convention: nations cannot invoke their own laws to justify non-compliance with international commitments.[18] A 1996 report by the International Commission of Jurists made this point clear: now that the United States has signed the ICCPR, federal and state courts must consider global standards when forging an interpretation of what constitutes "cruel and inhuman punishment" under the Eighth Amendment.[19]

The Inter-American Commission on Human Rights (IACHR) has also weighed in against the killing of juveniles in the United States in the 1987 cases of James Terry Roach and Jay Pinkerton.[20] Both were seventeen years of age when South Carolina and Texas, respectively, charged them with murder. In a non-binding opinion, the commission ruled the United States, as a member of the Organization of American States, is bound to respect the American Declaration of the Rights and Duties of Man, which proclaims that everyone has the rights to life and equality before the law. By executing both individuals, the IACHR concluded, the U.S. violated both of these provisions. Its reasoning turned the U.S. Supreme Court's reasoning in *Stanford* on its head. Instead of finding, as Justice Scalia did, that state laws proved that juvenile executions were an accepted practice, the IACHR found unacceptable that some states allowed juvenile executions and some did not. This "pattern of legislative arbitrariness throughout the United States...results in the arbitrary deprivation of life and inequality before the law," the body decided, which violated Articles I and II of the American Declaration.[21]

The execution of children in the United States has come under increased scrutiny abroad, as the case of Sean Sellers demonstrates. International human rights organizations, United Nations bodies, the Inter-American Commission, and even American allies have criticized the American practice of permitting juvenile executions. Such finger-pointing would have been unimaginable fifty years ago, when international law did not define human rights issues as transnational concerns. This rapid and dynamic evolution has internationalized the debate over the American death penalty in general, and whether children can be executed in particular. From American history, we

know that domestic legal reformers, who strove to free slaves, end child labor, and grant suffrage to women and racial minorities, used international law and practice for inspiration and justification for their work. Perhaps a similar combination of domestic and international pressure will force the United States to abandon capital punishment altogether. ■

***Rowland Brucken**, who received a Ph.D. in history from Ohio State and who currently teaches at Northern Kentucky University, specializes in the development of international human rights law. He is also Kentucky's Death Penalty Abolition Coordinator for Amnesty International USA.*

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1. Victor Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes over the Last Quarter Century, 1973-1997." Ada, Ohio: Ohio Northern University Pettit College of Law, 1998, 3.

2. Amnesty International, *On the Wrong Side of History: Children and the Death Penalty in the U.S.A.* New York: Amnesty International, 1998, 1.

3. 487 U.S. 815 (1988).

4. 492 U.S. 361 (1989).

5. Article 6(5) of the International Convention on Civil and Political Rights states, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age..."

6. Article 37(a) of the Convention on the Rights of the Child states, "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age..."

7. In Article 4(5), the American Convention on Human Rights proclaims, "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age..."

8. Article 16 of the United Nations Convention on the Law of Treaties (Vienna, 1969)

9. The reservation reads, "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman), duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

10. Article 4(2) of the ICCPR.

11. International Court of Justice, "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide," *International Court of Justice Reports*, 1951, 15-58.

12. *New York Times*, 8 April 1998.

13. Article VI of the U.S. Constitution reads, in part, that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." To list the Supreme Court decisions upholding the invalidation of state laws by federal statutes is too lengthy and even unimportant to list; merely a glance at the Constitution's Article VI proves the point.

14. Weems v. United States, 217 U.S. 349 (1910).

15. Trop v. Dulles, 356 U.S. 86 (1958).

16. Michael Domingues v. The State of Nevada, 31 July 1998.

17. Stanford v. Kentucky, 492 U.S. 380.

18. Article 46, Vienna Convention (1969).

19. International Commission of Jurists, *Administration of the Death Penalty in the United States.*

20. Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 (United States), decided 22 September 1987.

21. Paragraph 62, IACHR Resolution No. 3/87.

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"Nothing that I can do will change the structure of the universe. But maybe, by raising my voice I can help the greatest of all causes -- good-will among men and peace on earth."

- Albert Einstein

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Defender 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 have added five new offices by the year 2000. DPA offers extensive training and immediate courtroom experience through every level of courts across the Commonwealth. Beginning with District court, our attorneys gain valuable skills in front of the bench. In Circuit court, you will immediately be given a caseload that will give you practical experience. Also, if you prefer to research and write briefs, we practice in front of the Court of Appeals as well as the Supreme Court. So if you are looking for some of the best training and courtroom experience, DPA may be just right for you. Also, our attorneys have the opportunity to practice in front of a Federal District Court, Federal Court of Appeals and possibly the United States Supreme Court. So check out the following opportunities.

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Opportunities through the year 2000. Expansion for DPA is ongoing and will continue into the next century. In 1999, we recently opened offices in Daviess, Adair and Johnson Counties. In July 1999, we will open our Warren County office and in January 2000 our current expansion will be complete with the opening of our Mason County Office. Recruitment for these offices has begun and there are both entry level and experienced attorneys positions available. We will also be hiring secretaries and investigators for each of those offices.

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How to contact 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.

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"Ideas come into being not through demonstration but through revelation, through the medium of powerful personalities."

- Albert Einstein

PRACTICE TIPS from DPA's Appellate Division

Collected by Susan Balliet, Assistant Public Advocate

Argue the scintilla is the unit of measure to be used in applying the directed verdict test.

Last month's *Advocate* contained an article suggesting a better way to argue the *Benham* and *Sawhill* standard, and this tip suggests a further refinement. *Sawhill* and *Benham* establish only one test: "On appellate review, the test for a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, ..." *Commonwealth v. Benham,* Ky., 816 S.W.2d 186 (1991) (citing *Commonwealth v. Sawhill*, Ky., 660 S.W.2d 3 (1983). However, in *Sawhill*, the Court established the scintilla standard for evaluating the sufficiency of the evidence under the directed verdict test. In other words, the scintilla is not a test. The scintilla is the standard unit we use to measure evidence to see if it meets the test. The trial court is "authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence. Obviously, there must be evidence of substance." *Id.*

Shelly Fears, Assistant Public Advocate
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Object to offensive use of the Battered Woman Syndrome

In a recent case the prosecution made offensive use of the battered woman's syndrome (BWS) where the alleged victim claimed both a shooting and a knifing were "accidents." The prosecution brought in two "experts" to explain why a victim of BWS might falsely claim injuries were caused by an accident. Most jurisdictions addressing this issue hold that offensive use of BWS is not proper unless the victim's character has been attacked. See 57 ALR 5th 315 (1998). If the prosecution tries this tactic in your case, you should object.

Richard Hoffman, Assistant Public Advocate
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Argue Wanton Endangerment I (a felony) merges into Assault IV (a misdemeanor)

In a pending appeal, D was driving the wrong way on I-65 while drunk and crashed into two cars, injuring the driver of Car 1 seriously and the driver of Car 2 slightly. As to Car 1, the trial court merged Wanton Endangerment I into Assault I, but for Car 2 the court merged Assault IV into Wanton Endangerment I and charged it as a felony. The argument on appeal is that WE is either a lesser included or incomplete "inchoate" offense of assault or homicide and must merge with the greater or more complete offense. See Lawson & Fortune, *Kentucky Criminal Law,* Section 9-4(9)(2) (1998)

Richard Hoffman, Assistant Public Advocate
E-mail: rhoffman@mail.pa.state.ky.us

Object to prior convictions and *move for directed verdict* in PFO proceedings

In a recent unpublished opinion, *Thomas Wade Watkins v. Commonwealth* 1997 - CA - 2986-MR, Kentucky's Court of Appeals remanded for a new PFO proceeding due to ineffective assistance of counsel in failing to object to out-of-state convictions which lacked proper authentication under KRS 422.040 (which requires a seal and certification by the court itself, not just by a court clerk). (See Case Alert #24) Be aware, directed verdict

(Continued on page 50)

("Practice Tips" Continued from page 49)

may also be appropriate when prior convictions are not self authenticating, do not meet the requirements of RCr 9.44, CR 44.01, or KRS 422.040, and no one with any knowledge of the facts testifies as to their authenticity. *Davis v. Commonwealth*, Ky., 899 S.W.2d 487, 489 (1995) PFO proceedings are a separate mini-trial. Object whenever prior convictions lack authentication, and move for directed verdict in the PFO phase after the commonwealth and defense close to preserve objection to lack of evidence as to any element of the PFO charge, i.e., insufficient evidence of probation or parole status, of the defendant's age at the time of the prior offense, or evidence of whether the defendant has completed service of his prior sentences.

Susan Jackson Balliet, Assistant Public Advocate
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Repeat limine objections at trial, object during closing argument

Be sure to object *at trial* when the Commonwealth is attempting to introduce evidence that you think is inadmissible *even if you've already had a pretrial hearing and the judge ruled the evidence admissible.*

And, if you think something that is stated during closing argument is error, do not wait until the end of the argument (especially where the error is repeated several times) to make the objection. Object during the argument at the moment the error occurs.

Karen Maurer, Assistant Public Advocate

"Intellectuals solve problems; geniuses prevent them."

- Albert Einstein

The Pilot Study
— A less Expensive Alternative to Survey Methods

by Inese A. Neiders, Ph.D., J.D.

Trial Lawyers have used the survey method in a wide range of cases. This method involves measuring the attitudes of a cross section of the jurors about the issues in a specific case. If resources are available for a full survey, that method is recommended.

If funding is too limited for a broad, complete survey of the geographic area from which the jurors are drawn, a pilot study of a more limited sample may be done. This method is often used to develop intuitions and gain new insights which can be useful for the trial.

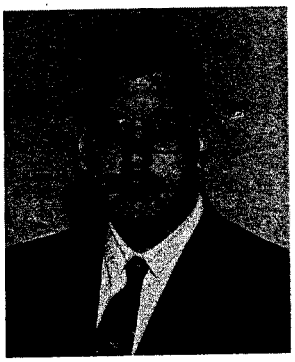
The pilot study is valuable, although the results are exploratory rather than definitive. It is particularly helpful for lawyers and jury consultants trying cases in unfamiliar geographic areas. This approach is also useful if lawyers suspect that key attitudes are changing or would like more precise information about the potential result in the case before trial. The information gained in pilot studies is generally much better than that collected in individual sequestered *voir dire* or group *voir dire* because of the individual measurement of jurors, less lime pressure, limitations placed on the areas of *voir dire* inquiry, and the artificial constraints imposed by courtroom settings. This helps the attorney understand what jurors mean and develop better questions. To see how valuable this method can be, lawyers should consider conducting several of the interviews themselves.

Pilot studies are useful in conjunction with other jury selection methods, in cases in which potential awards are midrange or cases in which modes budgets are available.

Inese A Neiders, Ph.D., J.D. is a jury consultant for civil and criminal cases. She is experienced in constructing questionnaires, organizing mock juries and shadow juries as well as professionally observing the analyzing jurors in court. Ms. Neiders has published in fifteen states and in national publication. She may be reached at (614) 263-7558.

Professionalism and Excellence Profile: Rob Sexton

Rob Sexton worked as a Law Clerk for the Jefferson District Public Defender in Louisville in the spring of 1990. Shortly after taking the bar exam that year, he moved to Somerset, and began working as a Law Clerk in the Somerset Regional Trial Office of the Department of Public Advocacy. When he passed the Bar in October, 1990, he became a staff attorney in the Somerset office. In January 1999, Rob was appointed the Directing Attorney of the new Owensboro Trial Office, which serves Daviess County, the third most populous county in Kentucky.



Rob grew up in Louisville. He received a Bachelor of Arts degree in English from the University of Virginia. He also attended the Southern Baptist Theological Seminary in Louisville, where he graduated with the degree of Master of Divinity. He then attended the University of Louisville, and received the degree of Juris Doctor in 1990. While in law school, Rob clerked for the private firm of Franklin & Hance before going on to clerk in the Louisville Public Defender's office.

Rob misses the many good people he met and worked with during his years in Somerset. He is especially grateful to Jim Cox, his former supervisor for all his help, support and instruction given over many years. Rob also expressed gratitude to Ed Monahan for the education provided at the DPA Quarterly Leadership Education programs. Rob feels this education and development effort has helped him assess the strengths of his staff members and has helped his office make more rapid progress than he would otherwise have hoped. From this education, Rob has implemented what he learned on reframing from the work of Bolman and Deal, *Reframing Organizations: Artistry, Choice, Leadership* (2d Ed. 1999) which describes four frames of reference of persons in organizations; structural, human resource, symbolic and political. Rob evaluated his staff's predominant frame and the strengths that came from that point of view and delegated work to them to take advantage of their way of seeing work responsibilities. The person with the structural strengths was delegated the responsibility for developing a system of file management. She responded by completely reorganizing the office paperflow. The person who excelled at the political frame was asked to foster relations with the Commonwealth Attorney and County Attorney Offices and local legislators, and has arraigned for the assistance of local collage interns.

Tom Glover, the new Western Regional Manager, and Rob's new supervisor noted:

> "I recently spent two days in Owensboro meeting the judges and going to court. Rob received generous praise from all of the judges I met. In just two short months, he has made tremendous strides in integrating our full-status office into the Daviess County judicial system. He is in short indispensable to the Western Region."

George Sornberger, director of the Trial Division, observed: "Rob Sexton showed from his very first days in our Somerset Office his special concern that all our clients be treated fairly. Even amidst the calamity and confusion of a busy court docket, Rob was always able to remain calm and collected, somehow finding the time it took to give each client the individualized attention they deserved. Rob never has to be coached to take the ethical high road, as he seems naturally inclined to do so. It is a privilege to have him in our Trial division in a position of leadership."

In reviewing the opening of this new Owensboro Office in January, 1999, Rob recognized that this public defender representation effort was growing more organized by the day and that it faced challenges of significance but was confident in meeting them with the excellent support of his regional manager and the Trial Division Director. Rob reflected, " The Owensboro Office is turning into a fine place to work. I am honored to be a part of this initiative, and I am very grateful to our staff for all of their dedication and effort. We all join in thanking the Public Advocate for entrusting us with this task."

The Advocate

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